

African Disability Rights Yearbook 2020

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.



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African Disability Rights Yearbook 2020

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EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the eighth volume of the *ADRY*.

Section A of this volume features six articles by; Adetokunbo Johnson on the complex disabled woman in Nigeria's legal and human rights framework; Tafadzwa Rugoho, Pamela Wright, Michael Stein and Jacqueline Broerse on sexual and reproductive health barriers for youth with disabilities in Zimbabwe; Elizabeth Kamundia and Faizah Sidi on the role of national human rights institutions in advancing the right to live independently and be included in the community; Kenneth Muzata on parental participation in the education and general development of children with deafness; Shirley Genga on the link between the right to live independently and to be included in the community for persons with psychosocial disability, and the right to work and employment; and Mwiza Jo Nkhata on access to justice for persons with disabilities in Malawi.

Section B contains four country reports by: Gerard Emmanuel Kamdem Kamga on Niger; Azubike Onuora-Oguna on Liberia; Serge Marcellin Tengho on the Central African Republic; and Soka Armelle Ngoutane Peyou on Togo.

Section C on regional developments contains two commentaries by: Edmore Masendeke on disability, Cyclone Idai and the COVID-19 Pandemic as they apply to the preparedness of African Countries; and the other by Innocentia Mgijima-Konopi and Mary Auma on health emergencies post COVID-19. What guidance can the African Disability Protocol provide?

The 2020 volume ends with a book review of *An African path to disability justice: Community, relationships and obligations* (2020) authored by Oche Onazi. The book is reviewed by Dianah Msipa

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SECTION A: ARTICLES

HUSH WOMAN! THE COMPLEX 'DISABLED' WOMAN IN NIGERIA'S LEGAL AND HUMAN RIGHTS FRAMEWORK: A DECONSTRUCTION

*Adetokunbo Johnson**

Summary

Few studies have paid enough attention to the relationship that exists between law and the oppression that women in Nigeria face, mainly when this oppression manifests as sexism and disability discrimination simultaneously. The interest has mostly been on the oppression that manifests as sexism and disability discrimination as separate issues. Yet, reality shows that many women in Nigeria have sustained injuries as a result of sexist oppression and have become disabled. This situation is testament to the interactions and intersections that exist between identity categories of sex/gender and disability as well as resultant oppression of sexism and disability discrimination. However, these interactions are rarely acknowledged.

Against this backdrop, the objective of this article is to ask the question: Who is a disabled woman in Nigeria? By asking the question, the intention is to expose the Nigerian legal framework's definition of the disabled woman as 'born and essentialist'. Yet, unlike the essentialist approach that law and human rights adopt, I demonstrate, how the identity categories of womanhood and disability that a disabled woman embodies are unstable and fluid. Unfortunately, Nigeria's legal and human rights framework hardly contemplates this fluidity and instability. I posit in the conclusion that particularly where it concerns women, Nigeria's legal and human rights framework can no longer afford to define violations of rights as if disability and sex/gender are entirely separate, stable, monolithic and essentialist identity categories.

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1 Introduction

In this article, I ask the question, who is a 'disabled' woman, particularly in the eyes of the law and specifically the human rights framework in Nigeria? The intent of this question is twofold. First, I expose the Nigerian legal framework's definition of the disabled woman as 'born and essentialist'. Second, I demonstrate that unlike the essentialist approach that law and human rights adopt, there are complexities that result from the intersecting identities that the 'disabled' woman embodies.

My analysis of, who the 'disabled' woman in Nigeria is, proceeds in five sections as follows. The introduction makes up the first section. In the second section, I interrogate who the 'disabled' woman in Nigeria is. I specifically examine how disability is understood and conceptualised in the eyes of the law and the human rights framework in Nigeria. Next, I expose in the third section, the identities that the disabled woman carries and manifests as a 'woman' identity category. In the fourth section, I interrogate the identities that the disabled woman embodies and displays as a 'disabled' identity category. In the final section, I offer conclusions. The conclusion that emerges demonstrates how Nigeria's law and specifically the human rights framework's ability to protect disabled women's encounters is limited because it erroneously views the social realities and identities that she embodies and carries as one-dimensional with essentialist experiences. Thus, the need for Nigeria's legal and human rights architecture to develop and define the 'disabled' woman using an intersectional lens becomes apparent.

1.1 Clarification of the terminology: 'Disabled' woman in Nigeria

Insight from *Mercier*¹ demonstrates how 'disability' does not necessarily have to involve functional limitation(s) at all but could stem purely from harmful societal attitudes, prejudice and stereotypes. This understanding coincides with the historical but relevant meaning of 'disability' that relates to having limited and truncated human rights.² Specifically, this insight is also consistent with an *emergent disability*³ that would not necessarily have

1 For more information on the *Mercier* case and its potentially intersectional insight, see: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* 2000 SCC 27, [2000] 1 SCR 665. In this case, the court found that 'a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.'

2 For more information on the historical but relevant meaning of 'disability' as limited and truncated rights see generally, A Silvers 'Reprising women's disability: Feminist identity strategy and disability rights' (2013) 13 *Berkeley Journal of Gender Law and Justice* 92. PE Kimani 'Blackness as disability' (2018) 106 *Georgetown Law Journal* 296. D Baynton 'Disability and the justification of Inequality in American history' in DC Baynton, PK Longmore & L Umansky *The new disability history* (2001) 33.

happened but for some form of oppression and the result of social oppression in Nigeria. Specifically, I use Nigeria's patriarchal legal discourse as a case study to demonstrate that the *Mercier* definition of 'disability' persists, mainly when the disabled body is female.⁴ This understanding is unlike Nigeria's legal framework's definition of the 'disabled' woman as 'born and essentialist' that arguably can be potentially faulty. The use of a *disabled woman* as opposed to *women with disabilities* and the specific focus on Nigeria's legal framework as a case study thus becomes evident.

The above understanding is consistent with Wasserman's two aspects of disability. The first aspect is the social marker or stigma,⁵ and the second aspect is physical deficiency.⁶ He advocates for the integration of the two elements.⁷ This twofold argument brings to the fore the idea that the 'disabled' woman, whether because of impairment or difference or combination of both, has limited or curtailed legal protections in Nigeria's legal framework today. Yet, the object of legal and human rights framework should be to protect the oppressed and most stigmatised individuals of society, including how 'disabling habits of thoughts and social practices' function.⁸

3 For more information on *emergent disability*, see: B Ribet 'Emergent disability and the limits of equality: A critical reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14 *Yale Human Rights and Development Law Journal* 161.

4 In the *Mercier* case, it is clear from the Court's findings that 'a person may have no limitations in everyday activities other than those created by prejudice and stereotypes' that could be used to rationalise truncated and limited rights. Women's limited rights have been captured in a number of scholarships particularly in the common reference to their *second-class citizenship* in Nigeria. See for example, E Durojaye & Y Owoeye 'Equally unequal or unequally equal: Adopting a substantive equality approach to gender discrimination in Nigeria' (2017) 17 *International Journal of Discrimination and the Law* 70 at 71. E Durojaye 'Substantive equality and maternal mortality in Nigeria' (2012) 65 *Journal of Legal Pluralism* 113. E Durojaye 'Woman but not human: Widowhood practices and human rights violations in Nigeria' (2013) 27 *International Journal of Law, Policy and the Family* 176. GA Makama 'Patriarchy and gender inequality in Nigeria: the way forward' (2013) 9 *European Scientific Journal* 11; EO Ekhaton 'Women and the law in Nigeria: A reappraisal' (2015) 16 *Journal of International Women's Studies* 285. From the above, the use of '*disabled women*' is to show that particularly in Nigeria, the disability experience is not limited to functional capabilities and impairments alone (which the terminology *women with disabilities* sometimes could portray) but importantly includes harmful stereotypes and prejudices that cannot necessarily be separated or fragmented from the woman experience, neither can the woman experience be separated from the disability experience. In other words, 'the disabled woman' as used in this paper demonstrates that the female disability experience is part and parcel of the female experience.

5 D Wasserman 'Philosophical issues in the definition and social response to disability' in EF Emens & MA Stein (eds) *Disability and equality law: The library of essays on equality and anti-discrimination law* (2016) 19.

6 As above.

7 As above.

8 JS Beaudry 'The vanishing body of disability law: Power and the making of the impaired subject' (2018) 31 *Canadian Journal of Family Law* 46.

There is a well-documented reality of women as victims of sexist oppression and its severity in Nigeria.⁹ One in three women in Nigeria, for instance, has reportedly encountered sexist oppression at some point in their lives.¹⁰ These women are often injured, disabled, and, in extreme situations, murdered as a result of the severity of this oppression. One can speculate that the gravity of sexist oppression experienced by women in Nigeria has led to continued debate and the questioning of their humanity.¹¹ These sexist oppressions occur with impunity despite existing legal and human rights framework with commitments ostensibly to ensure the protection and promotion of the rights of (disabled) women in Nigeria. A threefold dysfunctional legal relationship confirms the oppression of the woman in Nigeria. The first aspect is the relationship between law and culture. According to Williams, women are primarily defined by their cultural roles as wives and mothers in Nigeria. Therefore, the problem begins when it becomes challenging to determine where law starts, and culture ends, or vice versa.¹² The second aspect is the relationship between the law and the patriarchal Nigerian society that sees women as inferior.¹³ The third aspect is the pluralistic relationship and nature of the law that reinforces confusion and uncertainty, particularly with regards to women's human rights protection.¹⁴

From the above, a correlation between the forms of oppression that women in Nigeria experience and the dysfunctional legal relationships is clear. A significant question to ask would therefore be whether law and specifically human rights, can adequately respond and speak to disabled women's experiences and lived realities. By asking this question, I draw attention to the idea that few studies have paid enough attention to the relationship that exists between law and the oppression that women face, mainly when this oppression manifests as sexism and disability discrimination simultaneously in Nigeria. Engagements have mostly focused on the oppression that manifests as sexism and disability discrimination as separate issues.

9 See generally eg HI Bazza 'Domestic violence and women's rights in Nigeria' (2009) 4 *Societies Without Borders* 176; S Williams 'Nigeria, its women and international law: Beyond rhetoric' (2004) 4 *Human Rights Law Review* 230; and Durojaye 'Woman but not human.' (n 4) 198.

10 C Onyemelukwe 'Intersections of violence against women and health: Implications for health law and policy in Nigeria' (2016) 22 *William & Mary Journal of Women and the Law* 611.

11 See generally eg Durojaye 'Woman but not human' (n 4); Williams (n 9) 229; and J Dada 'Impediments to human rights protection in Nigeria' (2012) 8 *Annual Survey of International and Comparative Law* 67.

12 Williams (n 9) 229.

13 Makama (n 4) 115.

14 Durojaye 'Woman but not human ...' (n 4) 198.

Yet, reality shows that many women in Nigeria have sustained injuries as a result of sexist oppression and have become disabled.¹⁵ Anecdotal and scholarly reports of, for instance, brutal acids,¹⁶ burning oil¹⁷ attacks on women is proof of how sexist oppression is disabling. This assertion is valid mainly when the sexist oppression manifests as domestic violence, female genital mutilation (FGM), harmful widowhood rites and can potentially end in physical, sexual and psychological disabilities.¹⁸ These examples demonstrate the link between sexist oppression and its disabling implications, although investigations in this regard are rare. Thus, it is possible to link sexist oppression that sometimes manifests as gender and sexual violence to severe physical and mental-health disorders, as well as physical and psychological impairments.¹⁹

Despite the preceding revelation, the lived realities and experiences of the disabled woman have remained largely silenced and ignored because I argue, her lived experiences do not seem to fit neatly into any of the dominant feminist and disability legal and human rights narratives. On the one hand, disability narratives tend to favour men with disabilities. This situation is the result of patriarchal culture and the masculine hegemony, which bestows certain privileges on men in Nigeria in general. On the other hand, given the existence of the socially constructed institutions and cultures that are already prejudicial towards women, the feminist narrative in Nigeria is geared towards focusing on non-disabled women in general, without focusing specifically on or with little regard for the issues facing disabled women.

The law and specifically the liberal human rights framework as literature find establishes neat categories.²⁰ With such categorisation, the law demands that one must choose between being a woman (identity category) and being disabled (identity category). The disabled woman is to claim rights either as a 'woman' or as 'disabled', but not as both simultaneously. Yet, the 'disabled' woman has trouble choosing one of

15 See generally eg Onyemelukwe (n 10) 614.

16 I Eze-Anaba 'Domestic violence and legal reforms in Nigeria: Prospects and challenges' (2007) 11 *Cardozo Journal of Law and Gender* 25.

17 *Mary Sunday v Nigeria 2018 (ECOWAS Community Court of Justice)*. The victim was brutally attacked by her fiancé who is/was a police officer. During a disagreement, the perpetrator had poured hot oil on the victim

18 HI Bazza 'Domestic violence and women's rights in Nigeria' (2009) 4 *Societies Without Borders* 176; AA Abayomi & KT Olabode 'Domestic violence and death: Women as endangered gender in Nigeria' (2013) 3 *American Journal of Sociological Research* 55 at 56. M Owojuyigbe et al 'Female genital mutilation as sexual disability: Perceptions of women and their spouses in Akure, Ondo State, Nigeria' (2017) 25 *Reproductive Health Matters* 80 at 81. A Idowu 'Effects of forced genital cutting on human rights of women and female children: The Nigerian situation' (2008) 12 *Law Democracy and Development* 116.

19 Human Rights Council *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* 30 March 2012 (A/HRC/20/5) para 27.

20 J Ramji-Nogales 'Undocumented migrants and the failures of universal individualism' (2014) 47 *Vanderbilt Journal of Transnational Law* 703.

these established identity categories. This trouble emerges because the 'disabled' woman does not necessarily fall and cannot neatly fit herself into the 'I am a woman' or an 'I am a disabled person' identity categories. Categories that law and specifically the human rights framework has neatly created, without in the process silencing herself completely. Unfortunately, because she does not neatly fit into the human rights categories, she is labelled deviant and denied protection.²¹ Consequently, the 'disabled' woman's actual lived reality and experience of oppression and discrimination remain hushed and silenced in Nigeria's liberal legal and human rights framework that defines violations of rights by treating disability and sex/gender as entirely separate categories.

2 Understanding disability: Who is the disabled woman in Nigeria?

The question we need to ask is: Who is a 'disabled' woman, and how is disability understood in the legal and human rights framework in Nigeria? By asking this question, I draw attention to the Nigerian legal framework's definition of the disabled woman as 'born and essentialist'. I elaborate on the dominant approaches to understanding disability to expose the problem that the Nigerian legal framework's definition of the disabled woman as 'born and essentialist' creates.

When it comes to defining disability as well as determining who qualifies as a disabled person, the concept of disability has been dominated by the controversial medical versus social debate. Underlying this debate is the question of whether it is the body that disables the disabled woman or whether it is the society that disables her. The argument that a woman is 'disabled by her society' is unwelcome in Nigeria,²² mainly because of the apparent disregard of the social dimensions of disability.²³

2.1 The disabled woman understood from the medical-religious perspective in Nigeria's legal framework

The concept of disability as a medical-religious problem is prevalent in Nigeria. On the one hand, as in Western cultures, disability is

21 M Pavan Kumar & SE Anuradha "'Nonconformity incarnate': Women with disabilities, "gendered" law and the problem of recognition' (2009) 44 *Economic and Political Weekly* 38.

22 V Umeasiegbo & D Harley 'Education as a tool for social justice and psychological wellbeing for women with disabilities in a developing country: The challenges and prospects in Nigeria' (2014) 14 *The African Symposium* 121.

23 As above.

predominantly understood from a medical perspective in Nigeria.²⁴ According to this dominant understanding, disability is a product of a medical diagnosis.²⁵ It refers to body variations, impairments, bodily flaws or failures. On the other hand, inspired by the medical understanding, it is still common in Nigeria to view disability in superstitious, cultural and religious terms.²⁶ The explanations given for disability rely on the traditional and religious beliefs of Yoruba folktales and the Bible.²⁷ Swain and French describe the connection between disability and impairment and sin or wrongdoing in biblical injunctions.²⁸ The biblical injunctions related to healings and cure of sick and impaired persons confirm this point;²⁹ reinforcing the medical-religious relationship. Perhaps, it is this relationship that Betcher aptly describes as a lay imitation of the church.³⁰ Nigerians view disability as a fundamental flaw that is a direct consequence of perceived evil, punishment for specific misconduct and misbehaviour.³¹ The religious and traditional explanations ascribed to disability are not surprising considering that religion is an essential part of Nigeria's culture and Nigerians are generally extraordinarily religious and traditional.³² Consequently, underlying this twin understanding is the central premise that disability is an unfortunate consequence of biology and a personal tragic occurrence simultaneously.³³

- 24 AI Ofuani 'The right to economic empowerment of persons with disabilities in Nigeria: How enabled' (2011) 11 *African Human Rights Law Journal* 642. In my opinion, Nigerians have been socialised from birth to think of disability from a medical perspective. I acknowledge other definitions, explanations and understandings given to disability including the economic perspective, the minority group perspective, the universalist perspective, the Nordic relational perspective, the capabilities perspective amongst others. However, I have tried to focus on the understandings common to the Nigerian context and disability scholarships that focus on Nigeria.
- 25 BA Areheart 'Disability trouble' (2011) 29 *Yale Law and Policy Review* 348.
- 26 In my opinion, Nigerians have been socialised from birth to think of disability from a religious point of view. Scholars that have made this same point include: Umeasiegbu & Harley (n 22) 121; and E Etieyibo & O Omiegbe 'Religion, culture and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 3. As I will show, this religious perspective shares a relationship with the medical perspective, also a dominant perspective in Nigeria.
- 27 J Swain & S French 'There but not for fortune' in J Swain & S French (eds) *Disability on equal terms* (2008) 8.
- 28 As above.
- 29 An example in the Bible that is (mis)interpreted to possibly corroborate this point includes: Luke 5; 17-26 among other verses.
- 30 S Betcher 'Monstrosities, miracles and mission: Religion and the politics of disablement' in C Keller et al *Post-colonial theologies: Divinity and Empire* (2004) 82.
- 31 K Olaiya 'Commodifying the sacred beatifying the abnormal: Nollywood and the representation of disability' (2013) 7 *The Global South* 151.
- 32 DU Asue 'Evolving an African Christian feminist ethics: A study of Nigerian women' (2010) 2 *International Journal of African Catholicism*. Asue in this study discuss the linkages of religion to culture, describing Nigerians as extremely religious and traditional.
- 33 Areheart (n 25 above) 349. Areheart makes similar arguments in BA Areheart 'When disability isn't "just right": The entrenchment of the medical model of disability and the Goldilocks dilemma' (2008) 83 *Indiana Law Journal* 185 at 186.

This twin understanding of disability, prevalent in Nigerian society, is reinforced in its law.³⁴ The 1993 Nigerians with Disability Decree (NWDD), for instance, inspired mainly by the medical perspective, restricts the definition of disability to the functional condition and ability of the body.³⁵ A 'disabled person', according to this 1993 Decree, is:

a person who has received a preliminary or permanent certificate of disability to have a condition which is expected to continue permanently or for a considerable length of time which can reasonably be expected to limit the person's functional ability substantially, but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, rising, any related function or any limitation due to weakness or significantly decreased endurance so that **he** cannot perform **his** everyday routine, living and working without significantly increased hardship and vulnerability to everyday obstacles and hazards.³⁶

The essentialist undertones in the NWDD are evident in the foregoing definition. First, this definition exposes the medical reasoning that forms the basis of many social-welfare laws on disabled persons in Nigeria. This reasoning reinforces the archaic idea that disabled persons are the objects of welfare, health and charity, rather than the subjects of legal rights.³⁷ Also, the fact that the Decree invokes the need for medical intervention to be certified 'disabled' is worrying.³⁸ This worry is apparent, because, with such requirement, the medical understanding of disability becomes limiting in its scope, encouraging 'biological determinism'.³⁹ 'Biological determinism' according to Areheart, denotes the idea that genetics determines individual development.⁴⁰ Therefore, biological determinism exposes a significant problem of essentialism.⁴¹ The problem with this kind of essentialist understanding of disability lies in its total reliance on a medical condition, without considering the role that society and culture play in disabling people.⁴²

Apart from the 1993 NWDD, the essentialist undertones can be identified in the fact that disability is missing as a prohibited ground for discrimination in section 42 of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution).⁴³ Literature abounds that

34 Ofuani (n 24) 642.

35 Nigerians with Disability Decree of 1993 (NWDD).

36 Emphasis added, NWDD sec 3.

37 This reasoning is birthed from a medicalised view of disability. See; DFID Scoping studies 'Disability issues in Nigeria' (2008) www.ucl.ac.uk/lcccr/downloads/scoping_studies/dfid_nigeriareport (accessed 16 July 2020).

38 As above secs 3-4.

39 Areheart (n 25) 350; 355.

40 As above.

41 PA Cain 'Lesbian perspective, lesbian experience and the risk of essentialism' (1994) *Virginia Journal of Social Policy and the Law* 47.

42 Areheart (n 25) 358.

43 The Constitution of the Federal Republic of Nigeria of 1999 (the Nigerian Constitution) secs 42(1) and 42(2).

corroborates this oversight.⁴⁴ Arguably, this oversight links to the emphasis on the medical understanding of disability that focuses on biological determinism. This section also depicts a formalistic approach to the prohibited grounds of discrimination that is particularly problematic for the disabled woman. This assertion is evident in *Festus Odafe & Others v Attorney-General of the Federation & Others*.⁴⁵ This case involved the realisation of the rights of persons living with HIV-AIDS (PLWHA). The court had to decide whether, regarding section 42, the applicants had been discriminated against by prison workers and inmates. In reaching its decision, the court applied a narrow and restrictive interpretation. It found that the right to non-discrimination, as enshrined in section 42(1) of the Nigerian Constitution, did not cover discrimination because of illness, virus or disease.⁴⁶ Consequently, the court decided that the applicants did not qualify for freedom from discrimination because health status is not a ground covered in the section.⁴⁷

Notwithstanding, scholars have argued for a purposive interpretation of this section.⁴⁸ In the spirit of purposive interpretation, some scholars have read the phrase '*the circumstances of his birth*' in section 42(2) to include disability.⁴⁹ Using the example of the involuntary sterilisation of adolescent girls with intellectual and developmental disabilities, for instance, Ofuani has argued that the sterilisation of adolescent girls based on their disability is an infringement of section 42(2).⁵⁰ In other words, the author has used section 42(2)'s reference to the '*circumstances of his birth*' to argue that the involuntary sterilisation of adolescent girls with intellectual and developmental disabilities is a discriminatory act. However, there is a different and more common understanding of this phrase. Even Durojaye and Owwoeye note that this phrase is rare in the non-discrimination provisions of most constitutions in Africa.⁵¹ The phrase addresses explicitly discrimination targeted at children because of their parentage or because of conception out of wedlock.⁵²

Even if we read disability into this phrase as suggested, which is not necessarily wrong, it represents an essentialist definition. This essentialist definition limits disability to merely a consequence of the *circumstances of*

44 See generally: N Umeh 'Reading disability into the non-discrimination clause of the Nigerian constitution' (2016) 4 *African Disability Rights Yearbook* 73; Durojaye & Owwoeye (n 4); I Imam & MA Abdulraheen Mustapha 'Rights of people with disability in Nigeria: Attitude and commitment' (2016) 24 *African Journal of International and Comparative Law* 440.

45 *Festus Odafe and others v Attorney General and others* Suit No FHC/PH/CS/680/2003.

46 As above.

47 As above.

48 Durojaye & Owwoeye (n 4) 76.

49 Emphasis added. See generally: Ofuani (n 24) 553.

50 Ofuani (n 24) 553.

51 Durojaye & Owwoeye (n 4) 76.

52 As above.

his birth when it is clear that one cannot limit disability in this way. Besides, the exclusionary male pronoun used in the phrase makes one doubt whether this section covers the disabled female and her intersectional reality.

2.2 The disabled woman understood from the social perspective in Nigeria's legal framework

As a counter response to the medical-religious views would be the social approach. The investigation of the social aspects of disability is necessary for Nigeria, where this perspective is yet to be welcomed or firmly established.⁵³ The argument that disabled women in Nigeria are 'disabled by society' lies at the heart of the social understanding of disability.⁵⁴ Being disabled by society suggests that the oppression faced by disabled women is not merely the consequence of bodily injury, but is an outcome of a social structure that is unable to respond to differences and variations in the human body. Essentially, this social understanding is a critique of the medical-religious view that blames the disabled woman for her disability.

However, despite its wide popularity, the social understanding of disability has been heavily criticised. I discuss two main criticisms here. First, the social model overemphasises the idea that it is the society that disables, without acknowledging the complexities of disabled peoples' lives. Such an understanding of disability fails to recognise the relevance of impairment and pain in the lives of disabled women in Nigeria. It overlooks and disregards the role that impairments play in contributing to disabled women's social disadvantages. In elaborating upon this critique, Shakespeare emphasises such an understanding's deliberate effort to disregard the vital role that impairments play in the lives of disabled women, either as personal experience or as a cause of the disadvantage.⁵⁵ The attempt to ignore impairment by proponents of the social understanding has been deliberate because to admit impairments is to concede that disability is solely about the body's deficiency. According to Shakespeare, the social interpretation of disability deliberately ignores pain because to confirm pain would be to endorse the argument that disability is indeed solely about physical limitations.⁵⁶

Second, the social lens to understanding disability places too much emphasis on the social context, without acknowledging the benefits of medical care and specific impairment-oriented responses. The notion that

53 See generally, Umeasiegbu & Harley (n 22) 121. Ofuani (n 24) 641. Umeh (n 44) 55.

54 T Shakespeare & N Watson 'The social model of disability: An outdated ideology' (2002) 2 *Research in Social Science and Disability* 9 at 12 & 13. Areheart makes similar arguments (n 33) at 189.

55 Shakespeare & Watson (n 54) 5.

56 T Shakespeare 'Critiquing the social model' in EF Emens & MA Stein (eds) *Disability and equality law: The library of essays on equality and anti-discrimination law* (2016) 69.

people with impairments are impaired solely by society, in Shakespeare's opinion, is not necessarily true,⁵⁷ because, even while removing social barriers, the impairment may still be challenging. Shakespeare's point that attempts to eliminate social barriers should not be to the detriment of medical or clinical interventions is valid.⁵⁸ It is right because a disabled woman not only experiences discrimination but is also hugely affected by the limits that are imposed on her by her impairment. Besides, critics have warned that interpretations drawn from the social understanding of disability suggest an attempted denial of the impaired bodies or minds of disabled women in a desperate attempt to seek equality with non-disabled people at all costs. This point underlies Shakespeare's observation that people are not only disabled by society alone but also by their bodies.⁵⁹

Until recently, the only specific legislation that addressed disability rights in Nigeria was the NWDD.⁶⁰ Arguably, one can read the social or right-based understanding of disability in section 57(b) of the recently enacted the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act).⁶¹ Section 57(b) provides a definition for the term 'disability' to include: 'long term, physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others.'⁶² With this definition, there appears to be an acknowledgement of the role that the Nigerian society and culture play in disabling people. However, in a completely contradictory fashion, the Act reverts to defining *persons with disabilities* in line with the medical understanding of disability just like the 1993 NWDD quoted above.⁶³ Like the 1993 NWDD, this 2018 Act requires a medical certificate to be certified 'disabled'.⁶⁴ With such a requirement, biological determinism is emphasised in a manner that invalidates a social and human rights definition of disability.

The drafters' intention for a contradictory twin definition of disability is not clear and explicitly stated in the 2018 Disability Act. However, what is clear, is that the Act's position is dissimilar to the stance of the Convention on the Rights of Persons with Disabilities (CRPD) where its drafters simply acknowledge disability as an evolving term.⁶⁵ Also, the Act's medical definition of *persons with disabilities* is unlike the CRPD's

57 Shakespeare (n 56) 72.

58 Shakespeare (n 56) 72.

59 As above.

60 See the NWDD of 1993. See also Ofuani (n 24) 642 making the same point. There is now a 2018 Disability Rights Act that has been enacted into law to protect the rights of disabled persons in Nigeria

61 Sec 57(b) 2018 Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act) (date accessed 30 September 2020).

62 Section 57(b) 2018 Disability Act.

63 Secs 3 & 4 NWDD

64 Section 57(a) 2018 Disability Act. See generally, AE Arimoro 'Are they not Nigerians? The obligation of the state to end discriminatory practices against persons with disabilities' (2019) 19 *International Journal of Discrimination and the Law* 89 at 91 & 97.

65 The Preamble to the Convention on the Rights of Persons with Disabilities (CRPD).

social and human rights perspective.⁶⁶ Nevertheless, the essentialist undertones in this 2018 Act is evident in its language. Section 1 of the 2018 Disability Act, for instance, provides that ‘a person with disability shall not be discriminated against on the ground of *his* disability by any person or an institution in any manner or circumstance whatsoever’.⁶⁷ At face value, the use of the term ‘a person with a disability’ as it appears in the Act gives the impression of a ‘false universal’ disability experience for all disabled persons. This assumption of a ‘false universal’ disability experience in itself is particularly problematic for the disabled woman. This problem arises because such false universal disability experience assumes that all disabled persons share similar encounters. Yet, this is not necessarily true. A ‘false universal’ disability experience does not necessarily contemplate the complexity and intersecting experiences of a disabled woman who could potentially experience discrimination on more than just her disability or sex as separate grounds but both grounds simultaneously.

Even more disturbing is the Act’s use of the male pronoun *his* for a twofold reason. One, as earlier indicated, just like the 1993 NWDD, the exclusionary male pronoun as used in this legislation makes one question whether the legal protections provided include the disabled woman. Two, the exclusionary male pronoun as used in this legislation, exposes how the male experience usually presented as the ‘universal’ disability experience, ignores the complex and intersectional experiences of the disabled woman in Nigeria.⁶⁸

2.3 The disabled woman understood from an interactive and intersectional perspective in Nigeria’s legal framework

The previous analysis is significant as it proves that understanding disability is a complicated matter, especially in Nigeria. Yet, how societies divide bodies is vital to what it means to be human.⁶⁹ So far, we have shown two characteristics of essentialism evident in the Nigerian legal framework. The first is biological determinism that rests on the medical understanding of disability. The second is a false universal disability experience that rests on both the medical and social perspectives. Although both sides disagree vehemently on how ‘disability’ is to be defined. There still appears to be consensus by proponents on each side of ‘a false universal’ disability experience. As Shakespeare has shown, the medical versus social understanding of disability debate merely shifts the attention

66 Art 1 CRPD.

67 Sec 1 2018 Disability Act. Emphasis added. The use of the pronoun *his* reflects the gender bias already inherent in the document. How such a document intends to protect disabled women given such bias is debateable.

68 I Truscan & J Bourke-Martignon ‘International human rights law and intersectional discrimination’ (2016) 16 *The Equal Rights Review* 105.

69 H Meekosha & R Shuttleworth ‘What is so critical about critical disability studies’ (2009) 15 *Australian Journal of Human Rights* 53.

from one extreme assumption to another equally extreme notion.⁷⁰ For example, on the one hand, disability is equated with dependency, invalidity and tragedy. On the other hand, disability manifests as social oppression, social relations and social barriers. In other words, it moves the perception of disability as caused by biological or natural defects to seeing it as something that has nothing to do with individual bodies or brains.

Therefore, the problem starts where there is a dominant tragic perception of disability in law that singlehandedly attempts to explain disability. This assertion is particularly true in Nigeria where law and specifically human rights would like us to believe that disability is just a medical and religious matter. Be that as it may, the reliance on a single approach to understanding disability has encouraged essentialism.⁷¹ Essentialism, according to Grillot, assumes that there is a disabled person's encounter that can be explained individually from other characteristics that the disabled person carries and embodies.⁷² Her explanation describes how this essentialist understanding presupposes that a disabled person's encounter is a stable one, one with a clear and constant meaning, through time, space, and different historical, social, political, and personal contexts.⁷³ The perceived need to define what the disabled experience is, has prompted the stripping away of identities such as sex, gender, sexuality and race with the presumption that these individual identities can be separated or fragmented

However, using the experiences of African American women, Crenshaw introduced 'intersectionality',⁷⁴ as a way to criticise the essentialist problem of antidiscrimination law including Nigeria's law that refuses to contemplate the disabled woman's intersectional identity. In the next section, drawing from an intersectional lens, I demonstrate, how the identity categories of womanhood and disability that a disabled woman embodies are unstable and fluid unlike the essentialist approach that law and human rights adopt,

70 T Shakespeare *Disability rights and wrongs revisited* (2014) 30.

71 T Shakespeare (n 56) 72.

72 T Grillot 'Anti-essentialism and intersectionality: Tools to dismantle the master's house' (1995) 10 *Berkeley Women's Law Journal* 19.

73 As above.

74 For a detailed discussion on intersectionality, see K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139 at 151.

3 As a woman: Womanhood as a form of oppression in Nigeria

I have established who the disabled woman is and the essentialist understanding of disability that Nigeria's legal and human rights framework upholds. In this section, I continue with the question: Who is a disabled woman in Nigeria? This question demonstrates the complexities that result from the intersecting identities that the disabled woman embodies. Specifically, the disability analysis as used here complicates and expands identity, showing how a woman can represent multiple subject positions and embody several identity categories. To do this, I interrogate the social realities and identities that the disabled woman embodies. I focus on the way society constructs meanings to the identity categories that a disabled woman displays and how they become signifiers of oppression. Thus, using the interrogation of identity categories that the disabled woman represents, I show how individuals have multiple and intersecting identities.

Women have multiple identities. These identities mean that the situations and forms of oppression that women suffer are different and countless.⁷⁵ A woman's identity is crucial to her sense of self as it forms her lived reality. A woman is therefore not just a woman and, if this is so, as Wing rightly illustrates, it will be hypocritical for any woman to attempt to forgo any part of her identity.⁷⁶ She describes the impossibility of subtracting identity parts.⁷⁷ Using Wing's approach, it will be impossible to ask the disabled woman, for instance, to pretend to be only a woman and not disabled, or disabled and not a woman in Nigeria. If this is so, we need to describe the multiple identities that the disabled woman embodies and interrogate how these identities reinforce her lived reality and the oppression that she faces daily in Nigeria.

First, the disabled woman in Nigeria manifests as a woman.⁷⁸ The cogency of this argument is undeniable, despite legitimate concerns about the strength and ability of disability to strip an individual of her gender.⁷⁹ The disabled woman's positioning determined by the identity categories of

75 A Silvers 'Reprising women's disability: Feminist identity strategy and disability rights' (2013) 13 *Berkeley Journal of Gender Law and Justice* 81.

76 AK Wing 'Violence and accountability: Critical race feminism' (2000) 1 *Georgetown Journal of Law and Gender* 98.

77 As above.

78 The analysis of the identities that a disabled woman in Nigeria embodies as done here is not in any way to suggest that these identities can be fragmented but rather to argue otherwise. This argument is made in a way that demonstrates how the identities that the disabled woman carries, and its resultant oppressions are multiple and intersecting in nature in Nigeria.

79 T Shakespeare 'Disability, identity and difference' in C Barnes & G Mercer (eds) *Exploring the divide* (1996) 94. Shakespeare in this article imaginatively describes the susceptibility of disabled women to be de-sexed.

being disabled at the same time as being a woman raises the question of which identity category is the more determining identity. In other words, the problem is which identity category defines the common denominator and which identity category becomes the qualifier.⁸⁰ Legitimate concerns exist about whether a disabled woman is truly a 'woman'. There are doubts about the disabled woman's womanhood and humanity because of her disability.⁸¹ Doubts manifest because of the wrong perception of the disabled woman as less of a human being and a woman. This perception occurs because the disabled woman does not on account of her disability, meet the feminine and traditional ideals and expectations of what it means to be a woman in Nigeria.

I argue that the disabled woman is first and foremost 'woman' and that, as Garland-Thomson has discussed, to be 'woman' in sexist societies such as Nigeria is disabling.⁸² In making this argument, I must first acknowledge a possible objection to this argument, namely to confirm a woman's oppression or claim that 'women are disabled' is to ignore women's agency and ability to negotiate and resist oppression in Nigeria. While this objection has some truth, it does not remove the patriarchal and oppressive tendencies that are closely attached to the definition of a woman that such an argument exposes.⁸³

3.1 Womanhood as a form of oppression: As an inferior identity in Nigeria

From her birth, for instance, a woman has ascribed the identity category 'woman' which is regarded as an inferior and oppressed identity, particularly when compared to the male identity in Nigeria. As confirmation of this argument, Izugbara notes how most Nigerian cultural and religious values are sexist,⁸⁴ a result of the different and inferior values placed on a female body as opposed to one identified as male.⁸⁵ In most Nigerian cultures, the female child is socialised from birth to believe that she is not only different from, but also inferior and subordinate to, the male child.⁸⁶ On the one hand, the female child learns weakness and fragility.⁸⁷ Her fragility is reflected in the mothering and nurturing roles that she then

80 E Kim 'Minority politics in Korea: Disability, interraciality, and gender' in E Graham et al (eds) *Intersectionality and beyond, law, power and the politics of location* (2009) 232.

81 Shakespeare (n 79) 94.

82 R Garland-Thomson 'Integrating disability transforming feminist theory' (2002) 14 *National Women's Studies Association Journal* 1 at 6. This idea was originally from I Young in 'Throwing like a girl and other essays in feminist philosophy and social theory' (1990) 153. Garland-Thomson's quote is actually paraphrased. The original quote reads 'women in sexist societies are physically handicapped'.

83 PA Cain 'Feminism and the limits of equality' (1989) 24 *Georgia Law Review* 808.

84 CO Izugbara 'Patriarchal ideology and discourses of sexuality in Nigeria' (2004) *Africa and Regional Sexuality Resource Centre* at 7, 9 & 23.

85 Izugbara (n 84) 10, 13 & 15.

86 Izugbara (n 84) 10, 15 & 28.

87 Izugbara (n 84) 15 & 28.

acquires from the society. On the other hand, the man learns aggression and strength and to exhibit superiority over the woman.⁸⁸

Besides, scholarship has accurately equated womanhood to disability. A crucial aspect of being female, as far as Morris is concerned, is being weak and dependent, characteristics that are usually synonymous with depictions associated with the disabled.⁸⁹ The differences that women supposedly exhibit are perceived as departures from the male standard and interpreted as types of disabilities.⁹⁰ For example, the oppression that women suffer is usually linked to their supposed and perceived physical, intellectual, and psychological differences and abnormalities, when compared to the male norm.⁹¹ These perceived differences that women embody are usually portrayed in a disabling manner, for instance, as irrationality, hysteria, emotional and physical weakness and are automatically equated with and interpreted as inferiority and inadequacy.

Unfortunately, these kinds of (mis)interpretations reinforce the oppression that women suffer by attributing disability to them. To be labelled female or disabled suggests weakness and passivity, which are characteristics that the disabled woman unfortunately inherits.⁹² Thus, the inferior identity category of 'woman' can easily be equated with and is equivalent to the disability identity, considering that inferiority is a variant of disability and disabling.⁹³

3.2 Womanhood as a form of oppression: As a patriarchal defined identity in Nigeria

Patriarchal notions confirm the origins of the 'woman' identity category as inferior and oppressed.⁹⁴ The forms of oppression that women face are a direct result of the assumptions and meanings that have been ascribed to their bodies by male oppressors.⁹⁵ Harmful colonial, cultural and religious practices, which accord an inferior status to women, theorists agree, worsen inferior meanings ascribed to the woman's body.⁹⁶ One early description of 'woman', for instance, can be traced to biblical times, with

88 As above.

89 J Morris 'Gender and disability' in Swain J et al (eds) in *Disabling barriers – Enabling environments* (1993) 88.

90 Baynton (n 2).

91 As above.

92 M Fine & A Asch 'Disabled women: Sexism without the pedestal' (2014) 8 *The Journal of Sociology and Social Welfare* 237.

93 Garland-Thomson (n 82) 6.

94 G Mkhize 'Problematising rhetorical representations of individuals with disability – Disabled or living with disability?' (2015) 29 *Agenda* 133 at 134.

95 As above.

96 Theorists that have made this argument include: Williams (n 9) 229; AU Iwobi 'No cause for merriment: The position of widows under Nigerian law' (2008) 20 *Canadian Journal of Women and Law* 37; Durojaye 'Woman but not human ...' (n 4) 176 & 191; and Durojaye & Owoye (n 4) 70.

the creation of woman (Eve) as the helpmeet of man (Adam).⁹⁷ The (mis)interpretations that scholarship has often attributed to this biblical passage often justifies the idea that women are the weaker sex and inferior to men. Such (mis)interpretations underlie the view of women as minors or even less than human in Nigeria.⁹⁸ The 'woman' identity category has, therefore been subject to patriarchal definitions, where men define what it is and mean to be a woman. One would therefore be right to speculate that perhaps women in Nigeria have been unable to determine their definitions of what it means to be a woman because the man's foot is frequently on her throat.⁹⁹

Durojaye also confirms how the sexist or patriarchal meaning attributed to the female body reinforces the oppression that women suffer in the Nigerian society.¹⁰⁰ This insight validates the correlation between the inferior female identity and the reality of oppression in Nigeria.¹⁰¹ The flawed identity ascribed to women is what arguably rationalises their unfavourable legal treatment. Evidence demonstrates how the oppressive acts meted out to female bodies, like disabled bodies, are endorsed by cultural stories and the representation of women as inferior and unruly.¹⁰² The prevalence and gravity of oppression, such as the practice of FGM in Nigeria, is a case in point. The FGM practice occurs because of representations of women's bodies as unruly and in need of sexual control. By undergoing FGM, parts that cause sexual pleasure for women are removed and 'controlled' in the name of preventing sexual promiscuity, ensuring docility as well as total submission to the husband.¹⁰³ Unfortunately, this practice's potential to render some women 'asexual' and sexually passive or inactive becomes evident. Such sexual control resulting from FGM can therefore be said to be similar to the asexuality label usually imposed on disabled women.

From the above, one would be right to assert that to be female is a source of oppression to women.¹⁰⁴ This oppression could manifest as

97 Genesis 2 vs 18, 22 King James Version (KJV) of the Bible.

98 Makama (n 4) 115.

99 The phrase *a man's foot in the woman's throat* is indicative of how women are perceived to be subordinate to men, men are regarded and treated as superior to women. See generally EC Dubois et al 'Feminist discourse, moral values, and the law – A conversation' (1985) 34 *Buffalo Law Review* 11 at 74; 75. See also PA Cain 'Feminism jurisprudence: Grounding the theories' (1989) 4 *Berkeley Journal of Gender, Law and Justice* 191 at 193.

100 Durojaye 'Woman but not human...' (n 4) 176.

101 See generally HI Bazza 'Domestic violence and women's rights in Nigeria' (2009) 4 *Societies Without Borders* 175 at 176; Williams (n 9) 230; and Durojaye 'Woman but not human...' (n 4) 176.

102 V McLean 'Why the inflation in legislation on women's bodies' (2012)14 *European Journal of Law Reform* 312 at 321.

103 A Idowu 'Effects of forced genital cutting on human rights of women and female children: The Nigerian situation' (2008) 12 *Law Democracy and Development* 111 at 116.

104 Mkhize (n 94 above) 134. Generally, sex/impairment are perceived as biological traits while gender/disability are socially constructed. However, even this is not clear-cut, there are interactions and intersections.

sexism or disability discrimination and, in most cases, as both at the same time. Gender-based oppression and violence identified globally as the primary causes of death and disability for women between the ages of 16 and 44 validate this point.¹⁰⁵ This observation is undoubtedly correct in Nigeria, where exhaustive documentation reveals the severity of gender-based exploitation that women suffer just because they are women.¹⁰⁶

Underlying the argument that to have a 'woman' identity category in Nigeria is to be oppressed is the notion that one is not necessarily born a woman, but one becomes a woman. This point is similar to DeBeauvoir's remark that one is not born but instead becomes, a woman.¹⁰⁷ She suggests that it is not necessarily physical characteristics that make one male (able-bodied) or female (disabled). In other words, it is societal constructions that ascribe to one an identity of femaleness or maleness, where the former signifies weakness and by extension disability, and the latter represents strength and by extension ability. By implication, although an individual is born with female biological characteristics, becoming a woman is a socially constructed identity category.

Some feminist scholars have invoked the idea that the identity category of woman is problematic.¹⁰⁸ This problem stems from the sexist and patriarchal meaning that the woman identity acquires, already discussed above. However, other feminists argue that it is not necessarily the meaning that society attributes to women's bodily roles that oppress women but the functions themselves.¹⁰⁹ They believe that the biological coalesces into the social, not because society imposes a meaning on a woman's body, but because the woman's body determines her social being. While this is a valid position, women's oppression is a reality, whether it is the meaning that society attributes to women's bodily roles or the roles

105 See generally Global Rights Kano Human Rights Network (KAHRN) & Bauchi Human Rights Network (BAHRN) 'State of human rights in northern Nigeria abridged version' (2011) 15; The United Nations Development Funds for Women on violence against women: 'Facts and figures' available at www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (accessed 20 March 2020).

106 The gender-based oppression and exploitations that women experience have been widely documented in Nigeria. See generally for more discussions: Williams documents the oppressions that women experience in Nigeria Williams (n 9) 229; Durojaye makes the same point in Durojaye 'Woman but not human...' (n 4) 176; 198; and Durojaye & Owioye (n 4) 70. Other authors that underscore the oppressions that women in Nigeria experience include: EO Ekhaton 'Women and the law in Nigeria: A reappraisal' (2015) 16 *Journal of International Women's Studies* 285; NO Odiaka 'The concept of gender justice and women's rights in Nigeria: Addressing the missing link' (2013) 2 *Aje Babalola University: Journal of Sustainable Development Law and Policy* 191. Iwobi makes a similar argument, specifically with a case study of widows in AU Iwobi (n 96)37.

107 Cain (n 83) 807. Cain quotes De Beauvoir and the reasoning posited here points to how 'woman' as an identity category is not necessarily about biological characteristics but a social constructed category.

108 L Alcoff 'Cultural feminism versus post-structuralism: The identity crisis in feminist theory' (1988) 13 *Signs* 405 at 406 &436.

109 S Mann & DJ Huffman 'The decentering of second wave feminism and the rise of the third wave' (2005) *Science and Society* 56 at 57.

themselves in Nigeria. In other words, the argument is that woman's sex or gender does not matter; what counts is the oppression.

Butler sums up the womanhood problem by explaining how the assumption that the concept of womanhood is a representation of a shared identity is troublesome.¹¹⁰ She explains that rather than being a stable concept, to be a woman is a site of trouble and oppression, even for those that the concept purportedly exists to protect.¹¹¹ This oppression and trouble stem from the fact that an individual is not only a woman; her identity is non-exhaustive because gender intersects with other identities. If this is so, it becomes difficult, if not impossible, to separate gender from the political and cultural intersections that invariably shape and sustain gender.¹¹² What the previous analysis and feminists' disagreements show is how, unlike what Nigeria's legal and human rights framework would like us to believe, the identity category of womanhood is complex, unstable and disabling.

4 As disabled: Disability as a form of gendered oppression in Nigeria

The next step in my argument demonstrates that the disabled woman manifests and carries a 'disabled' identity in Nigeria. I argue that to be a woman in Nigeria is to be 'disabled'. In making this argument, I draw on Garland-Thomson's claim that to be a woman in sexist and patriarchal societies such as Nigeria is to be disabled.¹¹³ This insight exposes disability as a form of gendered oppression. I acknowledge possible objections to the 'woman as disabled' argument.¹¹⁴ I will briefly summarise some of the possible objections. First, to state or insinuate that a woman in Nigeria is disabled is to place another oppressive identity (disability) on an identity that is already oppressed (womanhood). Thus, the possibilities of compounding the problem as opposed to proffering resolutions are valid.

110 J Butler *Gender trouble, feminism and the subversion of identity* (1990) 2-4.

111 Butler (n 110) 2.

112 Butler (n 110) 2-3.

113 Garland-Thomson (n 82) 6.

114 Some scholars disagree with the position that I share with Garland-Thomson on the grounds that to claim that women are disabled immediately suggests that I am assuming that disability is inherently negative. This kind of negativity, some might argue, could be viewed as an endorsement of the very dominant narrative that I intend to counter, namely, that disability is something that is inherently wrong with someone. In addition, it could be argued that this inherently negative notion of disability could be seen as countering the struggle of global disability activists who continue to lobby for disability pride. I acknowledge the merits of this objection. However, my argument does not intend in any way to undermine disability pride. My argument that 'women are disabled', in my view, is contextual and a true representation of the reality in Nigeria, which is what I want to highlight. The 'woman as disabled' argument exposes how Nigeria's legal and human rights architecture's treatment of disability and sex/gender as entirely separate identity categories is flawed. The need to recognise the interactions and intersections between the identity categories of sex/gender and disability is the object of the paper.

To claim that ‘women are disabled’ or that disability is a form of oppression on women is a way of invoking one oppressive system to deprecate individuals marked by another system of representation. This objection notwithstanding, this claim is valid considering the well-documented reality of women as victims of sexist and patriarchal oppression and their resulting disabling consequences in Nigeria.

Second, another objection could be that arguing that to be a woman in Nigeria is to be ‘disabled’ will obscure even more the different and specific experiences faced daily by women with impairments. While I agree that there might be some truth in this statement, I am centring the ‘disabled’ woman’s experience by arguing that to be a woman in Nigeria is to be disabled. The intention of the ‘woman as disabled’ argument is to counter the dominant narrative about what the disabled woman’s experience is or should be. This argument opposes the idea of disability as automatically equated with an ‘identity’, an injury or impairment. By making this argument, I, therefore, bring to the fore the lived realities of disabled women that the Nigerian legal framework fails to recognise. I question the dominant assimilationist and essentialist narrative of Nigerian law about the disabled woman.

4.1 Disability as a form of gendered oppression: Its definitions

Having acknowledged these objections, I proceed to reveal disability as a form of gendered oppression in Nigeria; I interrogate three aspects of disability, namely, its definition, its origins and its tendencies. First, the meaning of the term ‘disability’ is contentious. This contention is apparent because even the CRPD does not explicitly define disability.¹¹⁵ The progressive nature of the term is however acknowledged. To state that disability is a form of oppression on women in the first instance is reinforced by Kayess and French’s understanding of disability as oppression by social structures and practices.¹¹⁶ Their insight demonstrates disability as the oppression that works by denying or diminishing the individual’s personhood, citizenship and civic participation.¹¹⁷ This reasoning confirms the diminishing of the personhood of women as a reality in Nigeria. Evidence points to how women’s humanity is questioned, based on the gravity of the oppression meted out to them in Nigeria.¹¹⁸ This questioning of the humanity of women in Nigeria is, in my opinion, equal to what Quinn has identified a

115 Preamble to the CRPD.

116 R Kayess & P French ‘Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1 at 5.

117 As above.

118 Durojaye ‘Woman but not human...’ (n 4) 176; 198.

'civil death'.¹¹⁹ This civil death phrase indicates the denial or loss of an individual's personhood. It is, in my opinion, as applicable to the woman as it is to disabled persons in Nigeria today. The gravity and prevalence of the oppression that women suffer daily in Nigeria is evidence enough.

Additionally, to have a 'disability' means having fewer, truncated and limited rights. This argument is in line with literature describing how historically, the usage of 'disability' justifies discrimination against, and the unequal treatment of groups considered as different.¹²⁰ This usage persists in Nigeria's legal narrative, where women are yet to attain full citizenship. The second-class citizenship commonly ascribed to women in Nigeria clearly illustrates this point.¹²¹ Such denial of women's citizenship validates women's disability in Nigeria, especially if it is true that disability is the direct opposite of citizenship.¹²² Equality and freedom determine the extent of one's autonomy and depend mostly on having a legal personality and citizenship status.¹²³ Therefore, where women lack legal personhood as do the disabled, the liberal vision of equality is untenable. This point is valid because a large part of achieving equality is heavily reliant on legal personhood.¹²⁴ It completely validates the argument that to be a woman is 'disabling' and that disability is a form of gendered oppression.¹²⁵ In making this point, I would use Grillot's disclaimer: saying that forms of gender and disability oppression are related does not necessarily mean that they are the same.¹²⁶

Nevertheless, the above usage and definition of 'disability' run contrary to the common understanding that persists today. Today, disability means having a form of physical, sensory, or cognitive impairment. Silvers describes how individuals in these very different conditions and with varying forms of injury are known and labelled as the 'disabled'.¹²⁷ However, this understanding in itself is insightful in exposing how labelling persons with physical, sensory and cognitive impairments as

119 G Quinn 'Reflections on the value of intersectionality to the development of non-discrimination law' (2016) 16 *The Equal Rights Review* 63 at 66. Quinn in the article traces the origin of the phrase 'civil death' to Blackstone.

120 For discussions on the usage of disability, see PE Kimani 'Blackness as disability' (2018) 106 *Georgetown Law Journal* 293 at 296. see also, Silvers (n 75) 92. Baynton (n 2) 33.

121 The common reference to women's *second-class citizenship* in Nigeria is captured by for example, Durojaye & Owoeye (n 4) 71. E Durojaye 'Substantive equality ...' (n 4). Durojaye 'Woman but not human...' (n 4) 176. Makama (n 13) 115.

122 T Shakespeare et al 'The sexual politics of disability: *Untold desires*' (1996) 200, 201. Baynton makes this point in Baynton (n 2) 33.

123 F Campbell 'Exploring internalized ableism using critical race theory' (2008) 23 *Disability and Society* 151.

124 M Freeman 'Measuring equality: A comparative perspective on women's legal capacity and constitutional rights in five commonwealth countries' (1990) 16 *Berkeley Women's Law Journal* 110 at 111.

125 Garland-Thomson (n 82) 6.

126 Grillot (n 72) 27.

127 Silvers (n 75) 92.

'disabled' introduces the notion that these groups of individuals, just like women are disqualified from protection by the law in Nigeria.¹²⁸

4.2 Disability as a form of gendered oppression: Its origins

Second, offering the claim that disability is a form of gendered oppression in Nigeria stirs up the contentious 'culture versus nature' arguments about the origins of disability. On the one hand, from the 'culture' perspective, disability, especially with regards to women, is viewed as a by-product of societal and cultural oppression. This position is consistent with the arguments of scholars such as Garland-Thomson, Wendell and Begum, who describe disability as merely a product of cultural diagnosis.¹²⁹ Wendell's accurate reminder emphasises disability as a narrative depicting the social and cultural oppression of the female body.¹³⁰ This body, according to Garland-Thomson, is portrayed as sick, flawed, crazy, ugly, abnormal, mad and maimed.¹³¹

In my view, this perspective is applicable in Nigeria, where there is significant evidence of how not conforming to accepted socio-cultural standards devalues and disadvantages the female body in such a way that it is automatically equated with or becomes a disabled body. Evidence shows that failure to conform to harmful cultural practices such as female genital mutilation (FGM) is potentially disabling.¹³² The FGM practice, for instance, involves the partial or complete mutilation of the woman's external genitalia meant for sexual enjoyment. This practice's tendency to reduce or limit women's ability to enjoy sex could result in permanent disability for women primarily because of the use of unsterile instruments amidst unsanitary circumstances.¹³³ Thus, scholarship linking the FGM practice to psychological impairment¹³⁴ as well as sexual disability¹³⁵ in Nigeria is accurate.

Further, authors' analyses and depictions of widows' experiences in Nigeria could be useful here.¹³⁶ In their descriptions of the horrors and oppression that widows encounter, scholars illustrate how most Nigerian

128 As above.

129 See generally Garland-Thomson (n 82) 4; N Begum 'Disabled women and the feminist agenda' (1992) 40 *Feminist Review* 70. Wendell makes similar arguments in S Wendell 'Towards a feminist theory of disability' (1989) 4 *Hypatia* 104; and S Wendell *The rejected body: Feminist philosophical reflections on disability* (1996) 12.

130 S Wendell 'Towards a feminist theory...' (n 129).

131 Garland-Thomson (n 82) 5.

132 M Owojuyigbe et al 'Female genital mutilation as sexual disability: Perceptions of women and their spouses in Akure, Ondo State, Nigeria' (2017) 25 *Reproductive Health Matters* 80 at 80-81.

133 As above.

134 Human Rights Council (n 19) para 27.

135 Owojuyigbe et al (n 132) 80-81.

136 See generally Durojaye 'Woman but not human ...' (n 4) 176; Iwobi (n 96); and U Eweluka 'Post colonialism gender customary injustice: Widows in African societies' (2002) 24 *Human rights Quarterly* 424.

cultural and religious values are sexist and oppressive to women. In making their arguments, these scholars importantly also expose the disabling oppressive nature of most Nigerian cultural and religious values, although hardly investigated as such. Iwobi rightly describes widowhood as a form of 'social death' in Nigeria.¹³⁷ According to him, widowhood strips women of their social status, and they experience severe oppression and stigma.¹³⁸

Following the same logic, if widowhood is a form of social death for women, this validates my argument that widowhood can also be a form of socio-cultural disability. This argument is valid, especially when one considers the dehumanising, oppressive practices and the resultant disabilities that a Nigerian widow suffers upon the death of her spouse. This dehumanisation of widows reinforces the idea and is proof that disability is a form of oppression experienced only by women in Nigeria. As indicated earlier, the woman gains value in most Nigerian cultures when she can perform the functions of a wife and mother. What this means is that upon the death of her husband, the widow is no longer able to fulfil her socially sanctioned wifely functions, she becomes 'disabled'. Her position is even worse if she has no male children. The woman is, therefore ascribed the disability status and stripped off her womanhood because of her inability to perform her social functions.

The loss of womanhood a widow endures is arguably similar to the loss experienced by the disabled woman. The widow's loss is because of the death of a spouse while a disabled woman, because of disability bears a similar loss. If as established above, the general social status accorded to women in Nigeria is one of inferiority and subordination, then it would be accurate to conclude that the public perception in patriarchal Nigeria is that being a woman is disabling. This deduction is correct, especially if we consider the arguments that rightfully regard inferiority and subordination as variations of disability. Disability, especially regarding women, is therefore not merely a question of medical health, genetics and sympathy, but instead a question of politics, power and the lack thereof in Nigeria.

On the other hand, the dominant premise of the 'nature' argument is the view that disability is the result of natural events. This argument suggests that disability is a product of medical diagnosis, and one is disabled because of a specific medical diagnosis. Proponents of the 'nature' argument might, therefore, vehemently disagree with such blunt and bold assertions that women in Nigeria are disabled. These assertions may offend particular feminist sensitivities and may appear to make light of the pain that is associated with a disability.

137 AU Iwobi (n 96) 44.

138 As above.

Interestingly, the dominant disability narrative in Nigeria is the nature argument. Abang, using the example of blindness, identifies five leading causes of this disability in Nigeria:¹³⁹ infections, cataracts, glaucoma, malnutrition and trauma.¹⁴⁰ His line of argument is also consistent with Smith's description of how preventable diseases, congenital malformations, birth-related incidents, physical injury and psychological dysfunction produce disability.¹⁴¹ Undoubtedly, the definition of disability here is, in many respects, a medical one.

Even if I follow the dominant nature approach to disability, at least three of Abang's leading causes of blindness, namely, malnutrition, trauma and infection, could also have their roots in cultural and unequal power explanations. It is, therefore misleading to limit the causes of blindness to genetics and medical factors. One might not necessarily be born malnourished, but malnourishment could be a result of several socio-cultural factors, including poverty and war. Also, domestic violence and rape could result in trauma triggering blindness. What is striking about this argument and supported by the United Nations (UN) and the World Health Organisation (WHO) is the social origins and constructions of disability.¹⁴²

4.3 Disability as a form of gendered oppression: Its tendencies

Third, disability as gendered reflects women's increased susceptibility to diseases and their disabling effects; evident in Nigeria. Smith has alluded to how poor maternal and neonatal care has played a considerable role in increasing the number of disabilities in women and infants in the country.¹⁴³ Child marriages prevalent in Northern Nigeria encourages early childbearing and is a significant cause of poor maternal care that could quickly develop into severe disabilities or death.¹⁴⁴ It is unsurprising that compared to other countries, Nigeria tops the rates of poor maternal care, meaning that according to Onyemelukwe, women are five times more likely to develop disabilities and in extreme cases, die.¹⁴⁵ While there are no available statistics on the actual numbers of women who develop disabilities as a result of poor maternal care in Nigeria, De Silva de Alwist describes how hormonal changes following childbirth coupled with other

139 TB Abang 'Disablement, disability and the Nigerian society' (1988) 3 *Disability, Handicap and Society* 72.

140 As above.

141 N Smith 'The face of disability in Nigeria: A disability survey in Kogi and Niger states' (2011) 22 *Disability, CBR and Inclusive Development* 36.

142 See generally World Health Organisation and the World Bank 'World report on disability' (2011) https://www.who.int/disabilities/world_report/2011/report.pdf?ua=1 (accessed 26 March 2020). Ribet make similar arguments emphasising the social origins of disability in Ribet (n 3) 176.

143 Smith (n 141) 36.

144 Onyemelukwe (n 10) 619.

145 As above.

factors trigger women's risk of depression.¹⁴⁶ This assertion is consistent with anecdotal evidence on the depression crisis in Nigeria.¹⁴⁷ Thus, women's increased risk of acquiring a disability when performing their functions as a wife and mother is evident.¹⁴⁸ Once disabled, the heightened vulnerability of women to increased discrimination and oppression amplifies the risk. Fine and Asch confirm the point by describing the increased exposure of women with disabilities to more significant harm,¹⁴⁹ not only because they are women but also because they are disabled.¹⁵⁰ Significant accounts describing the severe exploitation that disabled women experience as a result of their sex and their disability is enough evidence.¹⁵¹

At this juncture, I ask the question: What precipitates the increased susceptibility of women to disability? Literature is unanimous in linking poor healthcare to disability. Evidence shows how inadequate hygiene and health facilities in Nigeria cause infections that may result in disabilities. It is, therefore, valid to argue that preventing most disabilities could be through measures taken against malnutrition, environmental pollution, poor hygiene, inadequate prenatal and postnatal care, water-borne diseases and accidents of all types.¹⁵² Besides, studies describe how psycho-social conditions such as depression are more noticeable in women than men.¹⁵³ As earlier stated, De Silva de Alwis' description of how hormonal changes following childbirth trigger women's risk of depression is evidence enough.¹⁵⁴

Similarly, poverty links to disability in Nigeria.¹⁵⁵ Smith describes the relationship and interactions that exist between poverty and disability and shows how poor people become disabled simply because of issues such as poor nutrition and a dirty environment.¹⁵⁶ Disabilities may develop simply because poor people cannot afford to treat chronic diseases. In other words, poverty makes a person more susceptible to a disability, which in turn, reinforces and worsens poverty. Thus, the well-documented correlation between disability as both a cause and a consequence of

146 R de Silva de Alwis 'Mining the intersections: Advancing the rights of women and children with disabilities within an interrelated web of human rights' (2009) 18 *Pacific Rim Law and Policy Journal* 296.

147 O Sunday 'Nigeria suffers looming depression crisis' *OZY Nigeria* 22 November 2018 <https://www.ozy.com/around-the-world/nigeria-suffers-looming-depression-crisis/90613/> (accessed 6 November 2020).

148 N Groce 'Women with disabilities in developing world: Areas for policy revision and programmatic change' (1997) 8 *Journal of Disability Policy Studies* 178.

149 Fine & Asch (n 92) 237.

150 As above.

151 Begum (n 129) 70.

152 Smith (n 141) 36.

153 De Silva de Alwis (n 146) 296.

154 As above.

155 MA Haruna 'The problems of living with disability in Nigeria' (2017) 65 *Journal of Law Policy and Globalization* 103.

156 Smith (n 141) 36.

poverty is, therefore, undeniable. This situation worsens because poor people are more likely to endure human rights violations and are less likely to enjoy the guarantee of their rights in Nigeria.¹⁵⁷

If there is at least some truth in this well-established correlation, then the susceptibility of women to disability becomes even more evident. This correlation is valid mainly because poverty is gendered in Africa.¹⁵⁸ Thus, women in Nigeria are more likely to experience poverty which automatically increases their susceptibility to the oppression that quickly manifests as a disability. The ultimate result is that women's exposure to poverty disables and oppresses them, making them undeserving of human rights protection. Today in Nigeria, more than ever, we witness the feminisation of poverty,¹⁵⁹ because of the country's recent unfortunate rise as the poverty (disability) capital of the world.¹⁶⁰ Consequently, if it is possible to speak of the feminisation of poverty, then a feminisation of disability is to be expected in Nigeria. By this, I mean that women in Nigeria are more likely than men to develop disabilities because they are the least likely to have access to food, education and healthcare, the lack of which increases their vulnerability to disability.

Importantly, from a gender-based violence perspective, women are most likely to become disabled because of their vulnerability to sexist and gender-based violence in Nigeria's patriarchal society. Socio-economic oppression, unequal incomes, disproportionate caregiving responsibilities, domestic and sexual violence all increase women's susceptibility to disability and once disabled, amplifies the harm. Although disability in this regard is usually defined using the dominant nature and medical narrative, such linkages expose the social and cultural construction as well as the gendered and emergent nature of the disability.

From the above discussions, we can make a threefold conclusion. One, that given the correlation between poor healthcare, poverty and gender-based violence, on the one hand, and disability, on the other hand, as the literature has correctly established, disability is undeniably a form of oppression of women. Two, the essentialist assumption that there is a 'false universal' disability experience that rests on biological determinism is limiting. Three, the 'woman as disabled' argument counters this

157 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 54 *Journal of African Law* 258 at 263.

158 E Kaka 'Poverty is a woman issue in Africa' (2013) 18 *Journal of Humanities and Social Science* 77.

159 K Boyne 'UN women: Jumping the hurdles to overcoming gender inequality, or falling short of expectations' (2011) 17 *Cardozo Journal of Law and Gender* 683. In this article, Boyne writes how the phrase 'feminization of poverty' originally coined by Pearce is used to depict women's disproportional susceptibility to poverty especially compared to men.

160 'Nigeria overtakes India as world's poverty capital' *Vanguard Newspapers* Nigeria 25 June 2018 <https://www.vanguardngr.com/2018/06/nigeria-overtakes-india-as-worlds-poverty-capital-report/> (accessed 14 March 2018).

essentialist argument pointing instead to an intersectional open-ended idea that disability is not about a woman having functional limitations alone (as crucial as that is). Still, this paper has demonstrated that 'disability' should include restrictions that are a consequence of patriarchal stereotypes, prejudices and attitudes as shown in the Nigerian situation. This assertion is valid considering the potential of harmful patriarchal stereotypes, prejudices and attitudes to turn a typical 'non-disabled' woman today to a potentially 'disabled' woman tomorrow. Viewed in this way, the interactions that exist between sexism and disability (discrimination) becomes significant.

5 Conclusion

In this article, I focused on answering the question: Who is the disabled Nigerian woman? By asking this question, I have drawn attention to the Nigerian legal framework's definition of the disabled woman as 'born and essentialist'. I elaborated on the dominant approaches to understanding disability as a way to expose the problems that the Nigerian legal framework's definition of the disabled woman has created. The above analysis has shown how such a definition of the disabled woman creates a problem of biological determinism and 'false universal' disability experience. Using the interrogation of identity categories that the disabled woman embodies, I have shown how individual identities are multiple and intersecting, unlike a false perception of identity. Law by making us believe that identity categories such as sex/gender and disability are biological realities fails to recognise that the identity categories that the disabled woman embodies, such as gender and disability, are socially constructed and signifiers of oppression.

The 'woman as disabled' argument exposes Nigeria legal and human rights architecture treatment of disability and sex/gender as entirely separate categories as well as law's emphasis and reliance on the rigid and essentialist disabled woman's identity category as faulty. This fault renders her voiceless resulting in increased exploitations and human rights violations. It is clear that to disregard the disabled woman perspective is misleading, considering the fluidity and instability inherent in identity categories of womanhood and disability in Nigeria. It might, therefore, be beneficial to define 'woman' as expansively as possible to include the disabled woman's perspective. In other words, if there is a real interest in protecting the human rights of women, an intersectional lens that considers the female disability experience as part and parcel of the female lived experience and reality in Nigeria is necessary.

Conclusively, I posit that mainly where it concerns women, Nigeria's legal and human rights framework can no longer afford to define violations of rights as if disability and sex/gender are entirely separate, rigid, monolithic and essentialist identity categories. Instead, there is a need to

consciously and proactively treat disability as inextricably and interactively linked to sex/gender and vice versa.

CHAPTER 2

SEXUAL AND REPRODUCTIVE EXPERIENCES OF YOUTH WITH DISABILITIES IN ZIMBABWE

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Summary

Over 120 million youth with disabilities around the world face challenges related to sexual and reproductive health (SRH) services, such as unwanted pregnancy, sexually transmitted infections, and forced abortions and sterilisations. The main causes are cultural, legal, political, and social practices that restrict their rights. Our study explored sexual expectations and experiences of youth with disabilities. We conducted a qualitative study of 20 youth with disabilities using focus group discussions and semi-structured interviews, and then applied a thematic analysis of the data. The findings reveal that youth with disabilities are discriminated against with regard to accessing SRH information. This early exclusion results in discriminatory treatment at other stages of their lives, such as the onset of sexual relationships and marriage. They may also indulge in risky sexual behaviours which expose them to sexually transmitted diseases. Conversely, engaging in relationships, marriage and parenthood brings positive results, especially to women with disabilities. Marrying a non-disabled partner is viewed by disabled men as countering social discrimination. Some of the experiences suggest that parenthood has potential for bringing new status and social capital to persons with disabilities. Our primary recommendations based on this research are that youth-focused SRH schemes need to be redesigned to serve the public health needs of youth with disabilities, a vulnerable population that remains excluded from programming; and girls and women with disabilities should be especially targeted within these redesigned SRH programmes.

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1 Introduction

More than 120 million youth worldwide live with disabilities.¹ The World Health Organisation defines disability as an umbrella term for impairments, activity limitations and participation restrictions. Much like other youth, youth with disabilities face numerous challenges relating to their sexual and reproductive health (SRH). These include sexual health issues, unwanted pregnancy, sexually transmitted infections, and forced abortions and sterilisations. The SRH of youth with disabilities, however, continues to be overlooked and ignored,² mainly because disability is viewed from a medical model that equates disability with illness³ and assumes that persons with disabilities do not have sexual desires⁴ or are hypersexual, and are incapable of participating in sexual acts.⁵ Such stereotypes regarding persons with disabilities create barriers for their equal access to the SRH services to which they are entitled by national constitutions, international laws, and, prominently, the Convention on the Rights of Persons with Disabilities (CRPD).⁶ Women with disabilities are more deeply affected by these negative attitudes, even in comparison to their male counterparts.⁷

Persons with disabilities face these challenges because discrimination against them starts at an early age, originating from their parents and schools. The important role of parents in sex education for their children has been demonstrated by many studies.⁸ However, research has also shown that parents of children with disabilities are particularly uncomfortable teaching them about sexual and reproductive issues because of their anxiety, fear and lack of preparation.⁹ Schools can likewise play a role in teaching SRH issues to learners with disabilities.

- 1 UNICEF 'Children and young people with disabilities fact sheet' (2013) A5 available at [https://www.unicef.org/disabilities/files/Factsheet_A5_Web_REVISIED\(1\).pdf](https://www.unicef.org/disabilities/files/Factsheet_A5_Web_REVISIED(1).pdf) (accessed 8 October 2020).
- 2 R Addlakha, J Price & S Heidari 'Disability and sexuality: Claiming sexual and reproductive rights' (2017) 25 *Reproductive Health Matters* 50.
- 3 C Ngwenya 'Reproductive autonomy of women and girls under the Convention on the Rights of Persons With Disabilities' (2018) 140 *International Journal of Gynecology and Obstetrics* 128.
- 4 JA Haegele & S Hodge 'Disability discourse: Overview and critiques of the medical and social Models' (2016) 68 *Quest* 193.
- 5 T Rugoho & F Maphosa 'Challenges faced by women with disabilities in accessing sexual and reproductive health in Zimbabwe: The case of Chitungwiza town' (2017) 6 *African Journal of Disability* 252.
- 6 C Peta, T Wengraf & J McKenzie 'Facilitating the voice of disabled women: The biographic narrative interpretive method (BNIM) in action' (2019) 4 *Journal of the Academy of Social Sciences* 515.
- 7 A Gartrell, K Baesel & C Becker "'We do not dare to love": Women with disabilities' sexual and reproductive health and rights in rural Cambodia' (2017) 25 *Reproductive Health Matters* 31.
- 8 J Gupta et al 'Disability status, intimate partner violence and perceived social support among married women in three districts of the Terai region of Nepal' (2018) 3 *BMJ Global Health* 3.
- 9 O Robinson 'Moving toward disability justice' (2017) 37 *Disability Studies Quarterly* 1.

Indeed, comprehensive sex education has been recommended for all schools in South Africa, the United States and many other countries.¹⁰ But many teachers are especially uncomfortable discussing sexual issues with their disabled students.¹¹ Even when teachers are willing to make an effort to include learners with disabilities, those youth are often excluded from public schools in low-income countries.¹² In Zimbabwe, for example, it is estimated that approximately 600 000 students with disabilities of school-going age are not attending school.¹³ These youth will be illiterate, miss any provided SRH education, and likely be unable to read the written SRH information that is distributed in their communities.¹⁴ In an effort to promote SRH for persons with disabilities, a human rights approach has been adopted internationally.

1.1 A human rights-based approach to sexual and reproductive health for persons with disabilities

Access to quality and affordable SRH services for persons with disabilities has featured prominently as a human rights issue since the beginning of the 21st century. The CRPD's adoption was a reaction to the exclusion of the rights of persons with disabilities within the broader human rights agenda.¹⁵ Referencing similar provisions in the Universal Declaration of Human Rights and other core human rights treaties,¹⁶ the CRPD explicitly and broadly recognises the equal SRH of persons with disabilities.¹⁷ It does so by challenging cultural, social, political and religious practices that may harm the rights of disabled persons, including those impacting marriage, family, parenthood and relationships.¹⁸ The right of persons with disabilities to the autonomy of their bodies is similarly recognised, including attendant rights to be married and have children.¹⁹

- 10 JA McKenzie 'Disabled people in rural South Africa talk about sexuality' (2013) 15 *Culture, Health & Sexuality* 372.
- 11 J Khubchandani et al 'Providing assistance to the victims of adolescent dating violence: A national assessment of school nurses' Practices' (2013) 83 *Journal of School Health* 127.
- 12 D Schaafsma et al 'People with intellectual disabilities talk about sexuality: implications for the development of sex education' (2017) 35 *Sexuality and Disability* 21.
- 13 H Kuper et al 'The impact of disability on the lives of children: Cross-sectional data including 8,900 children with disabilities and 898,834 children without disabilities across 30 countries' (2014) 9 *PLoS ONE* 9.
- 14 T Rugoho & F Maphosa (n 5) 252.
- 15 M Deluca 'Including children with disabilities in primary school: The case of Mashonaland, Zimbabwe' (2014) *Leonard Cheshire Disability Working Paper* 26 <http://www.ucl.ac.uk/lc-ccr/centrepublishations/workingpapers> (accessed 8 October 2020).
- 16 C Frohmader & S Ortoleva 'The sexual health and reproductive rights of women and girls with disabilities'. Issues paper. ICDP beyond 2014. International Conference on Human Rights
- 17 T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35.
- 18 T Rugoho 'Experiences of disabled commercial sex workers in Zimbabwe in P Chappell & M de Beer *Diverse Voices of Disabled Sexualities in the Global South* (2018) at 151.
- 19 B Connell 'Some parents are more equal than others: Discrimination against people with disabilities under adoption law' (2017) 6 *Laws* 15.

People with disabilities should be free to make such decisions.²⁰ Accordingly, the CRPD mandates governments to promote access to good quality and affordable SRH services to persons with disabilities.²¹ The CRPD also places emphasis on addressing discrimination, inequalities, ensuring participation of persons with disabilities in health planning and decision-making and ensuring accountability. One desired impact of the CRPD is to enable persons with disabilities to claim their rights to information, education and quality of services for SRH.²² Persons with disabilities should be seen as having agency. This has been recognised by United Nations (UN) bodies and many international organisations by mainstreaming SRH for persons with disabilities in their programming. The human rights approach advocates for a substantial shift in how health programming happens, by changing the focus from simply meeting needs to doing so in ways that fulfil human rights.²³

A number of African countries have ratified the CRPD,²⁴ including Zimbabwe, which did so in 2013.²⁵ As might be expected, given the millennia of entrenched stigma that preceded the CRPD, as well as the varying levels of state commitment to its enforcement, progress in implementation differs by location and sector.²⁶ In Zimbabwe, SRH is one area that appears not to be meeting persons with disabilities' expectations. Moreover, there is still a knowledge gap on the extent to which youth with disabilities can achieve their SRH.²⁷

Accordingly, the aim of this study was to explore the sexual expectations and experiences of youth with disabilities in relation to their SRH. Data was collected using a narrative approach which allowed youth with disabilities to recount their own stories. Their responses can inform science and practice. Throughout, this paper employs a rights-based approach in interrogating the barriers faced by youth with disabilities in accessing their SRH.

20 S Hoffman, L Sritharan & A Tejpar 'Is the UN Convention on the Rights of Persons with Disabilities impacting mental health laws and policies in high-income countries? A case study of implementation in Canada' (2016) 16 *BMC International Health & Human Rights* 28.

21 Deluca (n 15).

22 M Ehlers-Flint 'Parenting perceptions and social supports of mothers with cognitive disabilities' (2002) 20 *Sexuality and Disability* 29.

23 B Pinia & ML Conway 'Masculinity and fathering in the lives of rural men with a disability' (2017) 51 *Journal of Rural Studies* 267.

24 J Price 'The seeds of a movement-disabled women and their struggle to organize' 2011 *Women's Rights* available at https://www.awid.org/sites/default/files/atoms/files/changing_their_world_2_-disabled_women_and_their_struggle_to_organize.pdf (accessed 30 March 2020)

25 Rugoho & Maphosa (n 5) 252.

26 M Temmerman, R Khosla & L Say 'Sexual and reproductive health and rights: Global development, health and human rights priority' (2014) 384 *Lancet* 9.

27 T Rugoho & F Maphosa (n 5) 252.

2 Methodology

2.1 Study site

The study was conducted in Chitungwiza, a town located approximately 25 kilometres southeast of Harare, the capital city of Zimbabwe. This town is a densely populated community close to the capital city, but representative of average living conditions in the country. According to the 2012 census, the population of Chitungwiza was around 300 000.²⁸ Due to the collapse of the Zimbabwean economy, many industries in the town have closed, leaving its inhabitants to rely mainly on the informal sector for income.

2.2 Data collection

Data was collected using qualitative methods suitable for generating semi-structured, contextual knowledge on a particular subject.²⁹ We carried out semi-structured interviews with 20 youths with disabilities. Using purposive sampling with the help of a non-governmental organisation that runs outreach programmes for youth with disabilities, 23 people were invited to participate in the research. Of the 20 who agreed, 11 were men and 9 women; their ages ranged from 18 to 33 years. Three (two women and one man) declined to participate; no reasons were sought for their refusal. Although the African Youth Charter defines youth as persons between 15 and 35 years old,³⁰ we selected only those 18 years and older to ensure they were legally regarded as people who could give consent to be interviewed. Three of the participants were visually impaired, two women had a hearing impairment and 15 participants had various physical disabilities. Of the 15 participants with physical disabilities, two used wheelchairs for mobility. Interviewees were asked to narrate their experiences during their upbringing and personal development, especially with regard to their sexuality. Each interview lasted between 45 and 60 minutes. The topics covered in the interviews included: the experience of sexual maturation while living at home and/or attending school; access to information about SRH; finding a sexual partner and developing sexual relationships; getting married; and becoming a parent. All the questions were asked in a very open manner and the respondents described what was relevant and important to them at different times in their lives.

28 MA Stein 'Disability human rights' (2007) 95 *California Law Review* 75.

29 F Mahomed, JE Lord & MA Stein 'Transposing the Convention on the Rights of Persons with Disabilities in Africa: The role of Disabled Peoples' Organisations' (2019) 27 *African Journal of International and Comparative Law* 335.

30 African Union Commission 'The African Youth Charter' (2006) *African Union Commission* Addis Ababa.

To increase validity, a second stage of data collection consisted of two focus group discussions with the same youth with disabilities. For these discussions, we separated men and women into two groups, with the 11 men in one group and the nine women in the other. Each discussion lasted between 70 and 90 minutes. Data collection was carried out by the researchers with the help of a female volunteer research assistant who is well versed in the sign languages used in Zimbabwe. The female assistant researcher, who is 29 years old, collected the data from all female participants during the focus group discussion and interviews. The first author (male) collected data from men. All participants preferred to use Shona, one of the main languages spoken in Zimbabwe; the first researcher is fluent in Shona. In both sessions, participants agreed for the conversations to be recorded using a dictaphone. This was also done to collect the data accurately. Notes were taken to record important points. The same issues were discussed as in the interviews, but now with the interaction and exchange of views in the groups.

2.3 Data analysis

The first author and the research assistant worked together in translating the raw data into English. A colleague who is a professional translator was asked to prepare another translation. The two translations were compared by the first author, research assistant and a professional translator. This improved clarity on the translated data. The next step was familiarisation with data. The first author and research assistant read the data several times. An open coding approach was used to code the data. Data was first put in categories and then emerging themes were listed. The first author and research assistant discussed areas of clarity during the thematic data analysis. The data was further cross-referenced to draw out common and contrasting features and other areas of interest.

2.4 Ethical issues

Great Zimbabwe University provided the ethical approval. The current research adhered to standard ethical research practice³¹ which included obtaining written and verbal informed consent during the planning phase. All participants were told that participation was voluntary (no benefits such as money were to be paid) and that they had the right to exit the research at any point without giving a reason. All the participants agreed with the conditions of the research, and no one opted out. Three participants sought to know how their identities were to be protected. It was explained that anonymity and confidentiality were ensured by giving participants pseudonyms and keeping the data in a secure location.

31 M Deal 'Aversive disablism: Subtle prejudice toward disabled people' (2007) 22 *Disability & Society* 93.

3 Findings

The findings revealed challenges at the different stages of life. The four stages of life identified are: (1) childhood, within the family and at school; (2) becoming sexually active; (3) getting married; and (4) becoming a parent. However, some persons do not necessarily follow the mentioned stages. Results further revealed that discrimination cuts across all stages of life. At the different life stages youth with disabilities used a range of strategies to resist discrimination by choosing to engage in certain behaviours, such as becoming sexually active, getting married and having children. The results are elaborated below.

3.1 Childhood

3.1.1 *Experiences in the family*

Childhood is the stage at which much of the socialisation is done by the family, community and schools. Family, society and schools play a critical role in giving information on SRH. Findings from both focus group discussions and semi-structured interviews with youth with disabilities indicated that they received little information on SRH from home, local society or schools. Participants indicated that the treatment they received from their parents was quite different in comparison to their siblings without disabilities. They highlighted that their non-disabled siblings would get all the necessary information on sexuality and reproductive health from parents, uncles and aunts. A participant with physical disabilities, Chipo, 29 years old, stated:

When my young sister started developing pubic hair and having menstrual cycles she received a lot of information from my mother and aunts ... they started discussing issues of pregnancy and relationships with her. For me, my mother only emphasised issues of hygiene. They treated me as someone without a sexual life. It is hard to seek information from people who discriminate [against] you.

During her semi-structured interview, Edith, 29 years old, who has physical disabilities and is the mother of two children, narrated similar experiences. Persons with disabilities are not seen as sexual persons. She stated:

The only thing I remember my mother teaching me is how to prepare for my menstrual periods. She would evade other questions I would ask her about sexual issues. She warned me that she did not want to hear me talking about sexual issues again. I don't think she thought I would develop sexual desires. Yet she was open to my younger sister.

Participants reported that there was censorship on sexual information for them. While this exists for all children, they noted that when other siblings reach adolescence, they started getting information. By contrast, parents restricted access to information on sexuality for the disabled children – books and magazines were censored before they were allowed to be accessed by youth with disabilities. This experience was shared by a number of participants. During the focus group discussion, Pride, 20 years old with physical disabilities, put it this way:

My parents were against me reading magazines and books on relationships, body parts and sex. They would tell me that this is evil information which would spoil my head, yet other siblings were allowed to read them. Maybe they thought the fact that I am disabled and in a wheel chair meant that I did not have the potential to engage in sexual activities.

The respondents also reported that children with disabilities are discriminated against by their parents who have difficulty accepting their disabilities, thereby making it difficult for them to interact and share information. There is some element of resentment towards children with disabilities by their parents. Edith's parents were always arguing about her disability and accused each other of causing her disability. Neither parent showed affection towards her. Thus, she grew up as a loner, treated as an outcast by both parents. In such an environment it is difficult for children to be open with their parents and ask questions, especially regarding sexual issues.

Anna, 31 years old with multiple disabilities, reported experiences similar to Edith's during her semi-structured interview:

My father hated me. He never allowed me to call him Daddy. He did not acknowledge me as his daughter. In such circumstances, it is difficult to be educated on issues of sexuality and reproductive health. The fact that I was rejected by my parents also made me withdraw from the family and community.

Parents also made it difficult for the community and neighbours to provide their children with information on SRH services. Clara, who is 23 years old with physical disabilities said:

My mother was very [angry] when she heard the girl next door was discussing sexual issues with me. She shouted at her. She further barred her from coming to our house.

Participants further noted that gender could play a role and the treatment experienced by a girl and a boy with disabilities could differ. Thus, some male participants reported that their parents were not that strict on the information that they might access. Calvin, a 24-year old man, and his twin sister were both born with physical disabilities. According to Calvin, their parents monitored his sister more than they did him. He was allowed

to read any book even those on SRH. During a semi-structured interview Calvin said:

My sister was closely monitored. My parents feared that she would become sexually active and become pregnant. Our mother never allowed her to talk about boys. Or read about sexual relationships. But for me, I was treated as a normal boy. They expected me to have girlfriends, marry and have children one day.

Participants agreed that while both boys and girls experienced discrimination in accessing SRH information in comparison to their non-disabled peers, the situation was worse for female adolescents with disabilities. Female participants pointed out that their male counterparts still enjoyed patriarchal benefits. However, other male participants claimed that they also continued to be seen as children because of their disability. Taku, a 24 year old man with cerebral palsy, had this to say during the focus group discussion:

I was treated as an asexual person. Women in my family continued to undress in front of me even when I had become a teenager. No one explained to me about the changes which were happening in my body when I became a teenager. No one even talked to me about sexual issues.

3.1.2 Experiences at school

Children with disabilities were historically educated at special schools, if they attended school at all. These schools did not see SRH education as important. Terrence narrated:

I don't remember any lesson on sexual issues at the school. Actually, it was a subject we were not allowed to utter a word about. The school did not even allow relationships.

The experience was similar for those who went to mainstream schools, when it came to acquiring sexual education. Anna, 31, mentioned:

My teacher in primary school was not comfortable teaching the subject in my presence. Sometime she would ask me to go and sit outside.

3.1.3 Experiences with society and SRH services

Society also makes it difficult for youth with disabilities to access information on SRH services. Participants recalled an outreach programme in which organisations moved around the country teaching people about HIV and AIDS. When they demonstrated condom use, youth with disabilities were forced to leave. Shingi, a 19 year old with both legs amputated, said during his interview:

I vividly remember when the nurses were teaching the community about safe sex methods. One of the elders from the church who was well respected by the community stood up. He argued that it was wrong and sinful to do condom demonstration in my presence. I was asked to leave and my friends remained. The elder said that I was being tortured since I cannot become sexually active. Yet I had made the decision to attend the demonstration on my own.

Edith, 29, added:

The elders in my area did not want to see anyone with a disability during various SRH campaigns. You would be chased away.

Each group indicated that, as a result of this discrimination, they suffered from lack of confidence and low self-esteem when it comes to sexual issues, in large measure because they did not have enough information and had been made to feel it should not concern them by all around them, their family, the schools and the society of the local communities.

However, they made efforts to overcome the discrimination, and to be treated as people with agency to enter into sexual relationships as can be seen in the following sections.

3.2 Becoming sexually active

After childhood, some persons with disabilities wanted to be sexually active. As they looked for sexual partners, their lack of sexual education presented challenges for youth with disabilities. Participants felt that they were not well prepared and lacked capacity to negotiate for sex. Men described that their first experience was filled with uncertainty and anxiety. Paul aged 21, who had both a leg and a hand amputated, asserted during the semi-structured interview:

I was sure that I wanted to do it. But I did not have enough information ... Because I failed the first time, I was embarrassed to try it for the second time. The experience traumatised me because I thought I would not be able to gain an erection again.

The same fear was also by Samson, a 33 year old physically disabled man, who testified during a semi-structured interview:

I started being sexually active at the age of 30. I wanted to have sex as early as 20. Most of my friends started to have sex in their twenties. They would tell me about their sexual escapades. So I would masturbate when I got the opportunity. As a physically disabled person it was difficult to engage in sexual relationships.

Youth reported engaging in sexual activities that exposed them to health risks because they did not have sex education and lacked information on SRH. Jethro, 20 year old, with polio of the left leg, stated that when he

wanted to start having sex he chose a commercial sex worker. The commercial sex worker was open and accommodating to him. However, neither demanded to use a condom, thereby risking infection with a sexually transmitted disease.

For women the experience is not the same. For them, the anxiety was often related to a perceived risk of abuse. They told us they felt that they did not have the power to initiate sexual intercourse in their relationships; they lacked agency in this part of their lives. It was the men who took charge of everything. Rachel felt that she was blackmailed into having sexual intercourse by her first boyfriend who did not have a disability. The boyfriend told her that the only way to show that she loved him was for her to have sex with him. During the semi-structured interview Rachel, aged 21 years, who has a short left arm stated:

I was madly in love with him. I thought he had genuine love for me, yet he wanted to use me. I thought I was fortunate to be loved by someone without a disability. I did not want to sleep with him but he threatened to leave me if I did not. I had to agree to save the relationship. He dumped me a few weeks after sleeping with me.

Again for women in contrast to men, there was anxiety about sharing information on their sexual experiences. Female participants pointed out that when one has not received adequate sexual education, it is also difficult to share sexual experiences, which would otherwise help to maintain wellbeing. The difficulties for persons with disabilities are illustrated by the following stories of Chipo and Samantha. During her interview, Chipo recounted how discrimination and fear of discrimination stopped her sharing:

With the stories of HIV, you would love to share with those close to you so that they can help. My boyfriend and I had intercourse without a condom. I was stressed that I was going to be infected, but there was no one to talk to about that. I remember that one of my childhood friends who is physically disabled shared her story with someone who betrayed her and told the story to others. Her story became known by the entire community. She was labelled and called names. So for me, I was afraid of being shamed.

During her interview, Samantha, 25 years old, with a physical disability, said in a similar vein:

I got my first unwanted pregnancy as a result of the absence of relevant information. When my boyfriend slept with me, we did not use any protection. Of course I was afraid of getting pregnant, but I was afraid to tell my aunt. I could not go to the clinic or pharmacy. I was afraid they would share my story with my aunt. So I kept quiet. My aunt only realised that I was six months pregnant when I felt ill.

Shami, 26 years old, who is hearing impaired, added a comment further illustrating the lonely situation of a disabled person with little knowledge and fear of sharing her experience, during a semi-structured interview:

I developed some pimples around my private area after the first sexual intercourse. The man who had slept with me did not use a condom. I was afraid to share with my mother or sisters. I had to buy the medications in the streets.

Monitoring of sexual activity among younger persons with disabilities was stricter than for other youth. The onset of sexual activity can lead to greater surveillance especially of women. Parents generally did not want their teenage children with disabilities to participate in any sexual relationships. Female participants reported that they were forced to abandon their relationships with their boyfriends due to family interference; they did not want her to have agency in this area of life. As narrated by Edith:

I first had a boyfriend when I was 16 years old. After three months of the relationship my mother found out, after my younger sister told her. My mother was extremely angry. She even told my father and the pastor about my relationship. I was forced to quit the relationship.

In another example of the different treatment of a disabled daughter, Judith said that when her parents discovered that she was sexually active she was interrogated about the men she was sleeping with. Her parents wanted to create a false rape case against her boyfriend. When she refused, confirming that the relationship was consensual, she was forced to go to the rural areas for two years because they thought she would be at less risk of being in a relationship there. Judith, 34 years old with physical disability, reported:

They did not believe that I could enter into consensual sexual relationship. They tried all tricks to stop the relationship.

Women would lose their privacy due to constant policing by family; they also lost the right to consent over their bodies. Women respondents who were sexually active described how their parents forced them to go to the doctor to get medication to prevent pregnancy. They suspected that the medication that was administered to them had long-term effects on their reproduction. Gena, 28 years old, who was diagnosed with a mild form of Down syndrome and cerebral palsy, said:

When my mother realised that I was now sexually active she took me to the doctor. The doctor gave me some medication that could prevent me from being pregnant. All this was done without my consent.

Communities also make it hard for girls with disabilities to become sexually active. Locadia narrated that she entered into a sexual

relationship when she was 21 years old, whilst studying a course in garment making at a vocational college. One of her instructors expressed concern about the relationship. From Locadia's account it was very clear that her instructor treated her as someone who lacked agency, who did not have the right to decide to have a sexual relationship. According to Locadia, a 34 year old woman with spina bifida, the instructor stated:

Why do you need a boyfriend? Are you sure you [were] not forced into that relationship? Do you think they have genuine love for you? Do you think they will marry someone disabled if they impregnate you?

For men the experience was quite different. For them, sharing the information was a positive experience. Engaging in sexual activity is seen as a victory both by them and by their community. Kenneth, a 27 year old with physical disabilities, found acceptance once he told his friends that he was no longer a virgin. He stated:

The experience gave me the masculinity I was lacking. My friends had often portrayed me as a half-man because I had not had sex. They called it the art of taming the opposite sex. So I was excited to let my friends know that I had slept with my girlfriend.

Samson added:

It was a long wait, but I felt as if I were conquering the world. I could boast amongst my peers.

For these men, successfully entering into sexual relationships was a confirmation of their manhood and their adulthood, and an escape from the discrimination they had felt earlier in their youth.

3.3 Getting married

After dating, some persons with disabilities move to marriage. Marriage offers different opportunities. Costs and benefits were compared with regard to selection of a partner. For men it is an opportunity to contest stigma and discrimination. Joe, 27 years old with a physical disability, explained during focus group discussions how he expressed his agency in partner choice:

Dating and marrying able-bodied women reaffirms my manhood and masculinity. For me, a real man should date able-bodied women, even when he is disabled. I had long decided that I was not going to marry a disabled wife like myself.

For Kenneth it took years to reaffirm his masculinity. At first, he would get stressed when his love advances were turned down by able-bodied women. This caused insecurity and anxiety. Kenneth is now married to a teacher

who is not disabled and he feels very comfortable with his wife. He stated during a focus group discussion:

My wife gives me confidence and affirmation. I have been to her work place. She is comfortable with me visiting her work place.

Jonathan, 26 years old, with a physical disability, believes that he married a very beautiful woman and that this status gives him a lot of affirmation. He claimed that because of the beauty of his wife, he had been able to get respect from community members. He believes that the fact that he managed to convince a very beautiful woman to marry him affirms that he is a competent man. He said during a group discussion:

My wife is the most beautiful woman in our suburb. Being married to her gives me a complete sense of self. I do not see myself as a disabled man in a wheelchair but a man like others. She gave me the affirmation I craved.

However, the question of who to marry was met with mixed reactions among the male participants. Others felt that it is prudent to be in a relationship with a fellow disabled woman. They made their decision based on their previous experiences in which non-disabled women abused and cheated on them. Baron said:

They cheat on us these able-bodied women, it is better for me to be married to a disabled woman who equally respects you. I was once cheated by an able-bodied girlfriend. But disabled girlfriends have not cheated me. So I decided to marry a fellow disabled woman.

Baron's sentiments were common also amongst women. Most of the women said they preferred to be married to fellow disabled men. In their opinion, non-disabled men will succumb to negative pressure from their families and community and dump them. These sentiments were shared during a focus group discussion by 26 year old, visually impaired Jessica, who explained:

I feel it's better to be married to disabled men. I have seen many disabled women being dumped by able-bodied men when they finally meet an able-bodied woman.

Jasper, 22 years old, shared the women's view:

Women with disabilities will suffer emotionally if they are married to non-disabled men. Divorce rates are higher among marriages between disabled and able-bodied than in marriages in which both partners are disabled. I have seen it.

Internalised stigma also makes it hard for some people with disabilities to get married to non-disabled partners. Women reported that because of the entrenched discrimination towards them, they feel inferior. The inferiority complex amongst women with disabilities has resulted in their finding it

hard to accept marriage proposals from non-disabled men. Disabled women have a deep-rooted mistrust and suspicion of able-bodied lovers. Olinda, 21 years old, who lost an eye and a hand in an accident, said during her interview:

In a town full of beautiful and nondisabled women like ours, I would take any proposal from men without disabilities with suspicion. When men without disabilities propose to us, the majority of them would want to make fun of us. They do not have any genuine love towards ladies with disabilities. I don't trust able-bodied men.

The participants recognised that they were also victims of internalised stigma, which was common amongst both men and women. They attributed such self-discrimination to their low self-esteem. Shandell, 18 years old, with a physical disability, said during her interview:

Sometimes we are to blame. We create barriers for ourselves. We do not go out there to experiment. We feel self-pity. I have seen most of my friends who think that society hates them, yet it's only their perception.

Arranged relationships and marriages also helped to show that they suffered from internalised stigma. An arranged relationship is when a family or a friend facilitates the person finding a girlfriend or boyfriend; it can result in a marriage. These arrangements may be made by friends or relatives. During a semi-structured interview, Jasper, 22 years old, who has a short hand and a deformed left leg, said:

I had low self-esteem because of my disability and suffered from self-discrimination. My aunt arranged a girl for me. At first, I was tense about the idea but my friends helped me to warm to it. Within a few months, I was happy in the relationship. I am now married to an able-bodied beautiful lady. Looking back, I acknowledge that I was a victim of self-discrimination at that stage in my life.

During her semi-structured interview, Shami, 24 years old with a physical disability, likewise said:

I never thought someone able bodied would love me. I had totally given up on having a sexual life. But after I realised that I was self-discriminating, I started experimenting. My friend pressed me to accept love proposals from one of my colleagues in street vending. After I gave him a chance, he made me happy. He accepted my disability. Even his parents accepted me when he introduced me to them. We are happily married now. I regret all those years of self-discrimination.

3.4 Becoming a parent

Some persons with disabilities will decide to have children either within or outside of marriage. In Zimbabwe, parenthood is an important stage in the lives of youth with disabilities. Parenthood challenges stereotypes, stigma

and discrimination. It enables persons with disabilities to claim the identities of motherhood and fatherhood. They see their children providing them with security in life. Women were proud when those around them began to relate to them as mothers, not as women with disabilities. Shami, 24 years old stated:

I proved the community wrong, they were discriminating me. They regarded me as useless. I have managed to procreate, which is being failed by other able-bodied women. I am now called a mother. I made the decision that I was going to have four or five children to show them that there was nothing wrong with me.

Mellania added:

Having a child gives me the feeling of completeness. I feel that I am a woman just like any other woman. I am now called a mother. Some community members respect me as a mother, as a parent.

Anna, who earlier reported that her parents had resented her for her disability, also reported that after she had three children, the parents changed their attitude towards her. They now treated her as a parent, with the capacity to make decisions.

My parents only started making efforts of getting closer to me after I had children. They now want their grandchildren to visit them. They are now showing me some respect and love.

Similar feelings were shared by men with disabilities. Having children is a demonstration of their fertility. It allows one to get respect from the community. Joe, age 27, said:

My children are a mark of my manhood. How can you claim to be a man without children? Society starts seeing you with a different eye once you are a father.

Jonathan, 26 years old, added:

You gain more status in the community if you have children. I remember that I used to move around with my first son. Just to prove to the community that I was not useless or infertile. I managed to show that my sperm are not disabled also.

Children also bring social capital to the family, as they increase the interaction of their parents with the community. The children have managed to rise above the stigma. Judith said:

My daughter invited me to her school. I interacted with her teachers and other parents. I told them that I sell chickens and peanut butter. I have received several orders. I am now friends with some teachers and parents.

Mellania, 33 years old and a wheelchair user, also felt affirmed by her son's actions. She said:

My son plays soccer for a local junior team. When they are playing with other teams in the district, he invites me to watch him play. He does not care that I am in a wheelchair. I now go out supporting his team frequently. I now have lots of friends. Some offer me transport when my son's team is playing very far; I travel with them in their cars. I am now connected to a number of people. I am now into buying and selling sporting regalia. People support me a lot.

Children also offer emotional support to their parents. They are also seen as potential protectors in future. Anna said:

I receive a lot of emotional support from my children. They comfort me when I complain about the stigma and discrimination that I face from society. They show me much love.

Shami added:

Having children made me happy because they would be able to protect me when they are older. Most people think disabled women do not have the ability to have children, we proved them wrong.

4 Discussion

SRH are now recognised as an integral part of human rights. In recent years, there have been global calls to make SRH information and services accessible to people with disabilities. Using a qualitative methodology, the study explored the sexual expectations and experiences of youth with disabilities. The results showed firstly that from childhood to parenthood, persons with disabilities encounter discrimination. Family, schools and community, which are supposed to be sources of information at the early stages of their lives, continue to discriminate and marginalise them. Similar findings were reported across Africa, for example in South Africa³² where it was also found that parents were not comfortable discussing sexual issues with their children with disabilities. However, this reluctance may also reflect cultural practice and beliefs unrelated to disability. In a study in Kenya on children without disabilities, parents were still not comfortable discussing sexual issues with their children;³³ notably, youth with disabilities may face more general discrimination than other groups.³⁴ This is contrary to article 23 of the CRPD which requires states to implement measures to eliminate discrimination against persons with

32 K Clatos & M Asare 'Sexuality education intervention for parents of children with disabilities: A pilot training program' (2016) 31 *American Journal of Health Studies* 151.

33 J Gupta (n 8) 3.

34 S Ahumuza et al 'Challenges in accessing sexual and reproductive health services by people with physical disabilities in Kampala, Uganda' (2014) 11 *Reproductive Health* 59.

disabilities in all sexual issues such as marriage, family, parenthood and relationships, on an equal basis with others. The study noted, however, that in a family with both boys and girls with disabilities, the boys received better social acceptance when seeking SRH information. Even their participation in sexual relationships was better tolerated. Male youth seem to benefit from the patriarchal system even if they have a disability. The intersection of gender and disability accumulates to further disadvantage the female youth with a disability. Inequities and unfair practices have the potential to affect their self-esteem and well-being in other life stages such as marriage.

An intersection of low education and discrimination affects young women's decisions about seeking medical attention when they perceive an SRH issue. Absence of SRH information could lead to risky sexual behaviour that exposes them to sexually transmitted diseases. Our results also show that many communities are not comfortable with SRH education being offered to youth with disabilities, but they may feel the same about sex education to youth in general; they may believe that teaching youth about sexual issues equates to giving them permission to engage in sex.³⁵ However, when SRH was being discussed at school, youth with disabilities were asked to leave the class. In most societies, elders are not comfortable discussing SRH issues with youths, especially those who have not reached the age to marry.³⁶ The absence of accountability mechanisms in the country makes it hard for youth with disabilities to achieve their SRH rights.

As they mature, youth with disabilities may also enter into sexual relationships just like their peers without disabilities. The onset of sexual activity may bring many experiences to youth regardless of whether they are disabled or not.³⁷ Engaging in sexual activity means different things for men and for women with disabilities. For the men, being sexually active may be part of becoming a man. It shows that they have been able to conquer the negative sentiments that are directed towards them by the community. Male youth with disabilities indulge in sexual activities so that they may fulfil the expectations for a man within the community. Women with disabilities, however, may fear that if they do not agree to sexual activity they will be abandoned by a partner, especially an able-bodied one. Sexual activity may express their desire to please and to demonstrate their love. However, women face more challenges if family and community realise that they have become sexually active. Society will give them negative labels. They may lose control of their autonomy and privacy, as

35 SK Kar, A Choudhury & AP Singh 'Understanding normal development of adolescent sexuality: A bumpy ride' (2015) 8 *Journal of Human Reproductive Sciences* 70.

36 M Boislard, D Van Bongardt & M Blais 'Sexuality (and lack thereof) in adolescence and early adulthood: A review of the literature' (2016) 6 *Behaviour Science* 8.

37 S Offer & B Schneider 'Children's role in generating social capital' (2007) 85 *Social Forces* 1125.

they are monitored constantly on their sexual behaviour. Families are reluctant to let them become sexually active; in extreme cases their fertility is controlled without their input.

At a later stage, persons with disabilities may wish to get married; just as for marriages of non-disabled persons, there is excitement. Results show that it may be used as an opportunity to invalidate myths and stereotypes that are attached to persons with disabilities especially women. Women with disabilities are traditionally seen as incapable of handling the role of a wife.³⁸ Both men and women with disabilities can use marriage to prove to their community that they are able to engage in sexual relationships.³⁹ The choice of a marriage partner is perhaps more critical to persons with disabilities than to other young people. Both men and women gauge the costs and the benefits of different types of partners. The results support the arguments that persons with disabilities have agency and can make sound decisions on getting into a marriage.⁴⁰ Women reported their fear of marrying a non-disabled person, because of perceived risk of abuse, as reported previously.⁴¹ Participants in the current research referred to their past experiences and perceptions to determine who to date and marry. For men, marrying a non-disabled person demonstrates their masculinity. It can be helpful in fighting discrimination and facilitating integration. The choice of a partner can be a result of past discriminations suffered or due to self-discrimination.

Relationships may result in becoming a parent. Parenthood has been seen as a negative experience for persons with disabilities,⁴² but these studies followed the medical model which focuses on the difficulties faced by persons with disabilities as parents.⁴³ Previously, persons with disabilities were also seen as a homogeneous group of people who needed assistance to survive. Persons with disabilities with children were also seen as an economic burden.⁴⁴ However, the women with disabilities in the present study were proud to achieve the identity of mother in their communities, which brought them new respect. Motherhood was important to women with disabilities because it reflects women's female identity.⁴⁵ For the young men, fatherhood can be an opportunity to

38 J Price (n 24).

39 D Anastasiou & JM Kauffman 'A social constructionist approach to disability: Implications for special education' (2011) 77 *Exceptional Children* 367.

40 African Union Commission (n 30).

41 A Daley, S Phipps & NR Branscombe 'The social complexities of disability: Discrimination, belonging and life satisfaction among Canadian youth' (2018) 5 *SSM – Population Health* 55.

42 MA Feldman et al 'Relationships between social support, stress and mother-child interactions in mothers with intellectual disabilities' (2002) 15 *Journal of Applied Research in Intellectual Disabilities* 314.

43 M Parchomiuk 'Social context of disabled parenting' (2014) 32 *Sexuality and Disability* 231.

44 Ehlers-Flint (n 22).

45 Z Lin & L Yang 'Denial of disability discrimination by disabled people in China' (2018) 33 *Disability & Society* 804.

demonstrate their masculinity, as reported earlier.⁴⁶ It boosts the self-esteem of persons with disabilities as it improves their integration into the community through the social networks established through their children. Children help in establishing networks which becomes a source of social capital for their parents as described before.⁴⁷ The current study also showed that children could offer emotional and social support to their parents when they perceive discrimination.

Discrimination against people with disabilities has remained the biggest challenge in all spheres of life.⁴⁸ The study results show that youth with disabilities experienced discrimination at every stage in their life cycle. This discrimination may affect their wellbeing, as has been reported. Women with disabilities were likely to be more affected by discrimination. This could be attributed to the intersectionality of disability, gender, economic status and other factors which promote inequalities against women with disabilities. Women often have a subservient role in many countries, including Zimbabwe, but having a disability exacerbates that situation; women with disabilities are victims of multi-discrimination. It is because of this reason that the UN Committee on the Rights of Persons with Disabilities has emphasised that governments should promote the SRH rights of women with disabilities. Results show that years of suffering discrimination can result in self-stigma, which was also reported by the participants in this research, for example as a limiting factor in finding a partner to date or to marry. However, the results also showed many examples of the persons with disabilities expressing agency in finding information, finding sexual partners, getting married and having a family. Many of them were able to overcome the discrimination and self-stigma to participate in the social life of their community.

The current study was conducted in Chitungwiza which is a dormitory town outside the capital city of Harare. The authors expected better understanding of disability issues because of social amenities such as schools which are found in the area. There are also a number of disabled peoples' organisations and non-governmental organisations working in the areas on disability, so one might have expected better treatment of persons with disabilities as well. Youth with disabilities in other countries in Southern Africa with similar cultures and levels of development may be facing the same types of barriers, and strategies to reduce those barriers may be applicable not only within, but also outside of Zimbabwe.

46 Pinia & Conway (n 23).

47 D Anastasiou & J Kauffman 'Disability as cultural difference: Implications for special education' (2013) 33 *Remedial and Special Education* 139.

48 L Rothstein 'A primer on disability discrimination in higher education' (2018) 7 *Laws* 25.

5 Conclusion

From a rights-based approach, it is clear that communities have not yet created a friendly environment for youth with disabilities to achieve their SRH. Zimbabwe was the first country in Africa to have a disability-related law, however, people with disabilities have not yet enjoyed the rights enshrined in that law. This can also be said with the education where a number of people with disabilities are out of schools. Lacking support, youth with disabilities are becoming sexually active without accurate information and knowledge to protect them from health risks. It is recommended that full operationalisation of the CRPD and the Protocol to The African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa⁴⁹ be implemented, to improve the promotion of sexual and reproductive health of youth with disabilities. The country also needs to establish accountability mechanisms that can be used by persons with disabilities.

49 African Union 'Protocol to The African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2018).

CHAPTER 3

THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN ADVANCING ARTICLE 19 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Elizabeth Kamundia and Faizah Sidi***

Summary

National Human Rights Institutions (NHRIs) established in accordance with the Principles relating to the Status of National Institutions (Paris Principles) have been identified as an essential pillar in the promotion and protection of the rights of persons with disabilities under article 33(2) of the CRPD. This article examines how NHRIs can leverage their respective mandates to address concerns on implementation of article 19 of the CRPD on the right to live independently in the community. Article 19 is especially important in the African context where persons with disabilities lack access to a range of in-home, residential and other state funded community support services as highlighted by the Committee on the Rights of Persons with Disabilities in concluding observations to African states. The article looks into the role played by NHRIs in realising article 19 of the CRPD, with reference to Kenya where the National Human Rights Institution has been designated as the monitoring agency under article 33(2) of the CRPD. The article also explores the potential role of NHRIs in promoting article 19.

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1 Introduction

National Human Rights Institutions (NHRIs) established in accordance with the Principles relating to the Status of National Institutions (Paris Principles) have been identified as a critical pillar in the promotion and protection of the rights of persons with disabilities.¹ Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or Convention) requires state parties to designate one or more independent mechanisms to promote, protect and monitor the implementation of the Convention, taking into account the Paris Principles. Article 33 of the Convention has been recognised as one of the milestones of the CRPD in outlining institutional changes to facilitate implementation and monitoring of the rights of persons with disabilities.² However, the potential and role of NHRIs in advancing the right of persons with disabilities to live independently in the community in view of article 33(2) of the CRPD is rarely canvassed. Knowledge of good practices or initiatives undertaken by NHRIs in order to promote, protect and monitor the right of persons with disabilities to live independently in the community is still very limited.³ The lacuna in information on the role of NHRIs comes at a time when there are 21 African countries with NHRIs accredited as fully compliant with the Paris Principles.⁴ Moreover, discussions at national level on the right of persons with disabilities to live independently in the community are often driven by organisations of persons with intellectual or psychosocial disabilities with little to no investment by the state to fulfil its obligations under article 19 of the CRPD.⁵

- 1 GD Beco 'Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities: Another role for national human rights institutions' (2011) 29 *Netherlands Quarterly of Human Rights* 84 at 93.
- 2 M Birtha 'Nothing about CRPD monitoring without us: A case study on the involvement of the disability movement in policy making in Zambia' (2013) 1 *African Disability Rights Yearbook* 115 at 2.
- 3 To illustrate, general guides on the CRPD and on the role of NHRIs in advancing the rights of persons with disabilities make no reference to the potential role of NHRIs in advancing article 19 of the CRPD eg: Network of African National Human Rights Institutions *Guide for African national human rights institutions on the implementation of the Convention on the Rights of Persons with Disabilities* (2014) at 2; United Nations Office of the High Commissioner for Human Rights *The Convention on the Rights of Persons with Disabilities training guide professional series no 19* (2014) at 2.
- 4 The following African countries have National Human Rights Institutions accredited as fully compliant with the Paris Principles as at 1 March 2020: Cameroon, Democratic Republic of Congo, Egypt, Ghana, Kenya, Liberia, Madagascar, Malawi, Mauritius, Morocco, Namibia, Niger, Rwanda, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia and Zimbabwe. Global Alliance of National Human Rights Institutions 'Chart of the status of national institutions' (27 November 2019) at 3-7 <https://nhri.ohchr.org/EN/AboutUs/GANHRIAaccreditation/Documents/Status%20Accreditation%20-%20Chart%20%28%2027%20November%202019%29.pdf> (accessed 1 March 2020).
- 5 See generally, Inclusion International 'Global report on the right to decide' (2014) at 2.

This article explores how NHRIs can leverage their respective mandates to address concerns on implementation of article 19 of the CRPD on the right to live independently in the community, using the Kenyan NHRI as a case study. Article 19 has been selected as a test case for NHRIs because it blurs the traditional divide in the human rights discourse between the established civil and political rights and economic, social and cultural rights.⁶ Article 19 exemplifies the interrelation, interdependence and indivisibility of all human rights,⁷ and therefore challenges the ability of NHRIs to drive the process of change forward.

The section that follows examines the import of article 19 of the CRPD on the right to live independently in the community. The section lays the foundation for discussion on the role on NHRIs in advancing the rights of persons with disabilities to live independently in the community.

2 The import of the right to live independently in the community

2.1 The UN Convention on the Rights of Persons with Disabilities

Article 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD) provides for the right for all persons with disabilities to live in the community as equal citizens. The right of all persons with disabilities to live in the community is not explicitly provided for in any treaty prior to the CRPD.⁸ However, the right to live in the community is not a new right but rather, a creative interpretation of existing rights that has been specially tailored to apply to the context of persons with disabilities.⁹ In particular, the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities provides that:¹⁰

Persons with disabilities are members of the society and have the right to remain within their local communities. They should receive the support they

6 MA Stein, J Feffer & JE Lord 'Ratify the UN disability treaty' (9 July 2009) https://fpif.org/ratify_the_un_disability_treaty/ (accessed 23 July 2020).

7 CRPD General Comment 5: Article 19: Living independently and being included in the community (2017) UN Doc CRPD/C/GC/5 dated 29 August 2017 para 7.

8 European Coalition for Community Living 'Focus on article 19 of the UN Convention on the Rights of Persons with Disabilities' (Focus Report 2009) <http://community-living.info/wp-content/uploads/2014/02/ECCL-Focus-Report-2009-final-WEB.pdf> (accessed 27 October 2019).

9 E Kamundia 'Choice, support and inclusion: Implementing article 19 of the Convention on the Rights of Persons with Disabilities in Kenya' (2013) 56 *African Yearbook on Disability Rights* 49 at 50.

10 United Nations, Department of Economic and Social Affairs 'Standard rules on the equalization of opportunities for persons with disabilities' <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html> (accessed 27 October 2019).

need within ordinary structures of education, health, employment and social services.

Additionally, General Comment 9 of the Committee on the Rights of the Child (2006) states that young children should never be institutionalised solely on the grounds of disability.¹¹ It is worth noting, however, that General Comment 9 of the Committee on the Rights of the Child does not prohibit institutionalisation absolutely. In this regard, General Comment 9 calls for state parties to ‘use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child’.¹² This underscores the fact that institutions are generally not best suited to provide care for children. It is now necessary to turn to the content of article 19 of the CRPD.

Article 19 of the CRPD calls upon state parties to ensure that:

- Persons with disabilities have the equal opportunity to choose where and with whom to live;
- A range of community-based services is availed to persons with disabilities to support inclusion; and
- Services and facilities available for the general population are available to persons with disabilities and responsive to their needs.

The UN Committee on the Rights of Persons with Disabilities has developed a General Comment on article 19 of the CRPD.¹³ Although General Comments provide expert interpretations to treaty provisions,¹⁴ it is worth noting that they lack binding legal force.¹⁵ Nevertheless, General Comments are useful in clarifying state obligations in relation to the specified treaty provisions.

The General Comment on article 19 of the CRPD¹⁶ identifies eight core elements of the article. The first is the right to exercise legal capacity in determining where and with whom to live.¹⁷ Secondly, is the principle of non-discrimination in accessing accessible housing.¹⁸ Thirdly, is the requirement to expand options for persons with disabilities to live independently in the community, beyond the support provided by family.¹⁹ The fourth core element of article 19 is the requirement to ensure

11 CRC General Comment 9: The rights of children with disabilities (2006) UN Doc CRC/C/GC/9 dated 27 February 2007.

12 General Comment 9 (n 11) para 47.

13 General Comment 5 (n 7).

14 Dag Hammarskjöld ‘What is the purpose of the Human Rights Treaty Bodies general comments?’ 06 January 2020 <https://ask.un.org/friendly.php?slug=faq/135547> (accessed 26 July 2020).

15 A Nollkaemper ‘The legal status of decisions by human rights treaty bodies in national law’ (2011) ACIL Research Paper No 2011-02.

16 General Comment 5 (n 7).

17 General Comment 5 (n 7) para 38(a).

18 General Comment 5 (n 7) para 38(b).

19 General Comment 5 (n 7) para 38(c).

that basic mainstream services are accessible to persons with disabilities in both law and practice.²⁰ Fifth is the requirement to develop a concrete action plan on implementing personalised, rights-based disability-specific support services.²¹ The sixth core element requires that states ensure non-retrogression in achieving the content of article 19 unless in accordance with international law.²² The seventh element requires the collection of quality data on persons with disabilities, regardless of their place of residence.²³ The eighth and final core element calls for the use of any available funding, including regional funding and funding for development cooperation, to develop inclusive and accessible independent living services.²⁴

The core elements identified above underscore the interrelation and interdependence of rights, and of particular interest for present purposes is the relationship between articles 12 and 19 of the CRPD. As is stated in the General Comment on article 19 of the CRPD,²⁵ the right to ‘choose and decide how, where and with whom to live is the central idea of the right to live independently and be included in the community’.²⁶ This clearly entails an exercise of legal capacity. A question that may arise in this regard is whether one can exercise legal capacity to live in an institution. It is the view of the authors that all too often, there is a lack of options to choose from, and therefore, currently, the ‘choice’ to live in an institution is not a real choice as it is driven by a lack of alternatives. Furthermore, as the General Comment elucidates, individual choice includes:²⁷

all aspects of a person’s living arrangements: the daily schedule and routine as well as the way of life and lifestyle of a person, covering the private and public spheres, every day and in the long term.

It is difficult to fathom how the above aspects of individual choice may be achieved in an institutional setting.

At the same time, it is worth acknowledging that the full realisation of article 19 depends on ‘progressive achievement’ of those parts of article 19 that are progressively applicable (economic, social and cultural rights). These are article 19(b) and (c).²⁸ In this regard, state parties have an immediate obligation to design concrete strategies, and resources to develop support services as well as making existing, and new, general services inclusive for persons with disabilities.²⁹

20 General Comment 5 (n 7) para 38(d).

21 General Comment 5 (n 7) para 38(e).

22 General Comment 5 (n 7) para 38(f).

23 General Comment 5 (n 7) para 38(g).

24 General Comment 5 (n 7) para 38(h).

25 General Comment 5 (n 7).

26 General Comment 5 (n 7) para 24.

27 General Comment 5 (n 7) para 24.

28 General Comment 5 (n 7) para 39.

29 General Comment 5 (n 7) para 39.

2.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

In addition to the CRPD, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa provides for the right of persons with disabilities to live in the community under article 14. While the Protocol has not yet come into force,³⁰ it is important to compare article 14 of the Protocol with article 19 of the CRPD in order to clarify similarities and/or differences between the two provisions and resultant state obligations. Notably, the text of the Protocol is largely similar to that of the Convention, except for a few critical elements as discussed in this sub-section.

Unlike the CRPD, the Protocol *explicitly* provides for the right of persons who require intensive support to have access to respite care services/caregivers.³¹ This is critical, in the light of the fact that most African countries lack support for living in the community as will be discussed below under section 3 entitled: 'Issues of concern on implementing the right to live independently in the community in selected African states'.

An additional difference between the Protocol and the CRPD is that the Protocol requires that Community Based Rehabilitation (CBR) should be provided in ways that enhance the inclusion of persons with disabilities in the community³² (in other words, CBR should not be based on a medical model approach of 'fixing' the person). Unlike the CRPD, the Protocol also requires that community living centers organised or established by persons with disabilities be supported to provide training and peer support, among other services to persons with disabilities.³³

As stated in the introduction, article 19 of the CRPD entails civil and political as well as economic, social and cultural rights. In this regard, the principle of progressive realisation of rights as outlined in article 4(2) of the CRPD is critical. Article 4(2) of the CRPD makes a distinction between rights that are to be progressively realised and those that are immediately applicable. It states that in relation to economic, social and cultural rights, each state party shall take measures to the maximum of its available

30 Article 38 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa provides that the protocol shall enter into force 30 days after the deposit of the 15th instrument of ratification. As at 18 December 2019, the Protocol had not been ratified by any county, but had already registered six signatures namely by Burkina Faso, Central African Republic, Gabon, Rwanda, South Africa and Togo.

31 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa Art 14(2)(b).

32 Art 14(2)(e).

33 Art 14(2)(f).

resources, with a view to achieving progressively the full realisation of these rights. The Protocol does not make this distinction expressly. Article 4(a) of the Protocol calls upon states to adopt 'appropriate measures for the full and effective implementation of the rights recognised in the present Protocol'. Under the Protocol, the language of progressive realisation is only expressly utilised in relation to articles 15(2) on accessibility and 16(3)(d) on the right to education.

3 Issues of concern on implementing the right to live independently in the community in selected African states

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has as at 30 March 2020 issued Concluding Observations to 13 African states.³⁴ Of the 13 African states examined so far, only one state (Tunisia) did not receive Concluding Observations on article 19.³⁵ Some common issues of concern have arisen in the Concluding Observations issued by the CRPD Committee on article 19 to African states. These issues present a starting point for understanding the challenges faced by African states on the right to live independently in the community and therefore introducing proposals about the role that National Human Rights Institutions (NHRIs) can play in advancing this right.

34 Concluding Observations on the Initial Report of Kenya, Committee on the Rights of Persons with Disabilities (30 September 2015) UN Doc CRPD/C/KEN/CO/1 (2015); Concluding Observations on the Initial Report of Mauritius, Committee on the Rights of Persons with Disabilities (30 September 2015) UN Doc CRPD/C/MUS/CO/1 (2015); Concluding Observations on the Initial Report of Uganda, Committee on the Rights of Persons with Disabilities (12 May 2016) UN Doc CRPD/C/UGA/CO/1 (2016); Concluding Observations on the Initial Report of Gabon, Committee on the Rights of Persons with Disabilities (2 October 2015) UN Doc CRPD/C/GAB/CO/1 (2015); Concluding Observations on the Initial Report of Tunisia, Committee on the Rights of Persons with Disabilities (13 May 2011) CRPD/C/TUN/CO/1 (2011); Concluding Observations on the Initial Report of Ethiopia, Committee on the Rights of Persons with Disabilities (4 November 2016) UN Doc CRPD/C/ETH/CO/1 (2016); Concluding Observations on the Initial Report of South Africa, Committee on the Rights of Persons with Disabilities (23 October 2018) UN Doc CRPD/C/ZAF/CO/1 (2018); Concluding Observations on the Initial Report of Senegal, Committee on the Rights of Persons with Disabilities (13 May 2019) UN Doc CRPD/C/SEN/CO/1 (2019); Concluding Observations on the Initial Report of Rwanda, Committee on the Rights of Persons with Disabilities (3 May 2019) UN Doc CRPD/C/RWA/CO/1 (2019); Concluding Observations on the Initial Report of Niger, Committee on the Rights of Persons with Disabilities (1 May 2019) UN Doc CRPD/C/NER/CO/1 (2019); Concluding Observations on the Initial Report of Morocco, Committee on the Rights of Persons with Disabilities (25 September 2017) UN Doc CRPD/C/MAR/CO/1 (2017); Concluding Observations on the Initial Report of Algeria, Committee on the Rights of Persons with Disabilities (27 June 2019) UN Doc CRPD/C/DZA/CO/1 (2019); Concluding Observations on the Initial Report of Sudan, Committee on the Rights of Persons with Disabilities (10 April 2018) UN Doc CRPD/C/SDN/CO/1 (2018).

35 Concluding Observations on the Initial Report of Tunisia, Committee on the Rights of Persons with Disabilities (13 May 2011) UN Doc CRPD/C/TUN/CO/1 (2011).

The first and most prevalent issue of concern relates to the prevalence of institutionalisation of persons with disabilities.³⁶ In terms of institutionalisation, the CRPD Committee has expressed concern regarding, in particular, the institutionalisation of children.³⁷ In this regard, the Committee, in its Concluding Observations to Mauritius expressed concern that children are removed from family settings and placed in residential institutions, where they lack care and psychological support and are sometimes subjected to cruel, inhuman and degrading treatment.³⁸ The Committee has also expressed concern about the lack of a well-defined national strategic and legislative framework on deinstitutionalisation.³⁹

The second issue of concern highlighted by the CRPD Committee is the absence of community support services that provide for inclusion of persons with disabilities in society.⁴⁰ The Committee notes that the lack of provision of essential services affects in particular persons with psychosocial and/or intellectual disabilities who are marginalised from everyday life as a result of lack of these services.⁴¹ Furthermore on persons with psychosocial disabilities, in the context of Sudan, the CRPD Committee expressed concern that persons with psychosocial disabilities are still forced to live in reformatories without their consent, ostensibly in the interests of ensuring close supervision and providing access to better healthcare and treatment.⁴² In the context of Ethiopia, the Committee expressed concern at the lack of availability and accessibility of personal assistance services for persons with disabilities.⁴³

The third critical issue of concern is the fact that there are persons with disabilities living in social isolation and segregated from their families and the community.⁴⁴ The CRPD Committee expressed concern about the lack of measures aimed at persons with disabilities who do not have

36 Concluding Observations on the Initial Report of Uganda (n 34) para 38; Concluding Observations on the Initial Report of Kenya (n 34) para 37; Concluding Observations on the Initial Report of Morocco (n 34) para 38(a); Concluding Observations on the Initial Report of Algeria (n 34) para 32.

37 Concluding Observations on the Initial Report of Morocco (n 34) para 38(a); Concluding Observations on the Initial Report of Mauritius (n 34) para 31.

38 Concluding Observations on the Initial Report of Mauritius (n 34) para 31.

39 Concluding Observations on the Initial Report of South Africa (n 34) para 34; Concluding Observations on the Initial Report of Morocco (n 34) para 38(d); Concluding Observations on the Initial Report of Sudan (n 34) para 39.

40 Concluding Observations on the Initial Report of Uganda (n 34) para 38; Concluding Observations on the Initial Report of Kenya (n 34) para 37; Concluding Observations on the Initial Report of Ethiopia (n 34) para 43; Concluding Observations on the Initial Report of Morocco (n 34) para 38(b); Concluding Observations on the Initial Report of Gabon (n 34) para 44.

41 Concluding Observations on the Initial Report of Uganda (n 34) para 38; Concluding Observations on the Initial Report of South Africa (n 34) para 34; Concluding Observations on the Initial Report of Senegal (n 34) para 33; Concluding Observations on the Initial Report of Morocco (n 34) para 38(c).

42 Concluding Observations on the Initial Report of Sudan (n 34) para 39.

43 Concluding Observations on the Initial Report of Ethiopia (n 34) para 43.

44 Concluding Observations on the Initial Report of Rwanda (n 34) para 35.

supportive families for whatever reason. In the specific context of Gabon, the Committee expressed concern about the lack of measures aimed at persons with disabilities who are abandoned by their families, especially in and around the capital in so-called '*cités*'.⁴⁵ In addition and still related to families, the Committee expressed concern that families who are often the sole base of support for persons and children with disabilities (especially those with psychosocial and intellectual disabilities) receive limited assistance from the state.⁴⁶

The fourth issue of concern garnered from the analysis is the inaccessibility of independent living support services in rural areas and for migrants and refugees with disabilities, and the absence of home and community-based care for children with disabilities, especially in rural areas.⁴⁷ The Committee noted that that inaccessible infrastructure and services make it difficult for persons with disabilities to participate in the activities of daily life independently, in particular in rural or remote areas.⁴⁸

The fifth issue of concern raised by the CRPD Committee to some of the African states examined so far relates to the absence of home and community-based care for children with disabilities, especially in rural areas.⁴⁹ In this regard, the Committee expressed concern that private day-care centres where children with disabilities are placed are neither regulated nor monitored by the state. In the specific context of Mauritius, the Committee expressed concern that children with disabilities continue to be placed in '*centres de sauvegarde*' (*abris des enfants en détresse*).⁵⁰

The sixth issue of concern expressed by the CRPD Committee to a number of the African states examined relates to the limited level of awareness among persons with disabilities of available independent living support services, including personal assistance services, and the inaccessibility of those services for persons affected by leprosy, persons with physical disabilities, persons with disabilities in rural areas and migrant workers with disabilities.⁵¹ In addition to the lack of information on the availability of accessible independent living support services in the community, the Committee expressed concern about the lack of awareness about how to claim such assistance.⁵²

45 Concluding Observations on the Initial Report of Gabon (n 34) para 44.

46 Concluding Observations on the Initial Report of Mauritius (n 34) para 31.

47 Concluding Observations on the Initial Report of Niger (n 34) para 31.

48 Concluding Observations on the Initial Report of Rwanda (n 34) para 35.

49 Concluding Observations on the Initial Report of Senegal (n 34) para 33(c).

50 Concluding Observations on the Initial Report of Mauritius (n 34) para 31.

51 Concluding Observations on the Initial Report of Senegal (n 34) para 33(b).

52 Concluding Observations on the Initial Report of Niger (n 34) para 31.

4 The present and potential role of NHRIs in advancing article 19 of the CRPD: The case study of the Kenyan National Human Rights Institution

4.1 Why NHRIs are well suited to advance article 19 of the CRPD

Many of the issues discussed in the foregoing section reveal system deficits that National Human Rights Institutions (NHRIs) are ideally placed to address and help resolve, given their broad mandate to promote and protect human rights under the Paris Principles.⁵³ NHRIs, especially those that are compliant with the Paris Principles, play a critical and unique role in the promotion and protection of human rights at national level,⁵⁴ while treaty and charter-based mechanisms play a critical role at an international level in assessing state compliance with human rights treaties. In essence, human rights protection and promotion cannot be achieved without effective national human rights systems. In this regard, state parties bear the primary responsibility of respecting, protecting and fulfilling rights obligations, and NHRIs created in compliance with Paris Principles form part of the central elements of a strong national human rights system that contribute to the promotion and protection of human rights at national level.⁵⁵

The recognition of the importance of NHRIs in implementation of the CRPD can be found under article 33(2) of the CRPD. Article 33(2) obligates state parties to designate or establish one or more independent mechanisms to promote, protect and monitor the implementation of the Convention taking into account the Paris Principles. Article 33(2) has been noted as one of its kind in monitoring implementation of treaty obligations at national level. As observed by GD Beco:⁵⁶

Human rights treaties define which rights States should respect, protect and fulfil. However, these treaties do not determine through which means they should do this ... In contrast, Article 33(2) of the CRPD provides that States should designate or establish one or more independent mechanisms to promote, protect and monitor the implementation of Convention taking into account the Paris Principles ... the inclusion of obligation to create independent mechanisms is a recent phenomenon.

53 United Nations General Assembly resolution on national institutions for the promotion and protection of human rights (20 December 1993) UN Doc A/RES/48/134 (1993) at 1.

54 United Nations Office of the United Nations High Commissioner for Human Rights 'National human rights institutions: History, principles, roles and responsibilities' (2010) Professional Training Series No 4 13.

55 As above.

56 Beco (n 1) 1.

This means that article 33(2) requires state parties to maintain, strengthen, designate or establish within the state party one or more independent mechanism or mechanisms to promote, protect and monitor implementation of the Convention. The state party may choose to appoint an existing body or bodies and empower them with the mandate to promote, protect and monitor the implementation of rights contained in the Convention.⁵⁷ The body designated to be an independent mechanism or part of bodies that are so designated must be compliant with the Paris Principles.⁵⁸

4.2 The role of NHRIs in advancing article 19 of the CRPD and potential limitations

This section examines the role of NHRIs in advancing article 19 of the CRPD using the case study of the Kenyan NHRI, the Kenya National Commission on Human Rights (hereinafter KNCHR or the Commission).⁵⁹ The Commission is the designated national monitoring agency under article 33(2) of the Convention on the Rights of Persons with Disabilities.

NHRIs can support the enjoyment of article 19 of the CRPD by persons with disabilities in a variety of ways. First, NHRIs can advocate for the development of a well-defined legislative framework on deinstitutionalisation and independent living community support services to encourage the inclusion of persons with disabilities.⁶⁰ NHRIs can make recommendations on this matter during review of bills and policies for compliance with human rights standards. This is in line with the responsibilities envisaged for NHRIs under the Paris Principles. Under the Paris Principles, NHRIs should advise and provide opinions, recommendations, proposals and reports to the government, parliament or other responsible organ on legislative or administrative provisions.⁶¹

Critical bills and policies that might present significant opportunities for deinstitutionalisation (in law) include mental health laws as well as stand-alone ‘persons with disabilities’ laws. This would be in line with General Comment 5 (2017) on living independently and being included in the community, in which state parties are required to adopt a national strategy on living independently and being included in the community and

57 Beco (n 1) 11.

58 Beco (n 1) 12.

59 The Kenya National Commission on Human Rights (KNCHR) is an Independent National Human Rights Institution with ‘A’ Status Accreditation. It is established under the article 59 of the Constitution and operationalised under the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission carries out functions under its founding Act and the Prevention of Torture Act, 2017.

60 Concluding Observations on the Initial Report of Senegal (n 34) para 33(a); Concluding Observations on the Initial Report of Morocco (n 34) para 39(a).

61 UN Doc A/RES/48/134 (1993) (n 53) para 3 (a)(i).

prevent the isolation or segregation of persons with disabilities.⁶² In this regard, KNCHR has been at the forefront of advocating for amendments to Kenya's Mental Health Act, 1989 to render the Act more in line with the UN Convention on the Rights of Persons with Disabilities. Accordingly, the Commission has advised the National Assembly that the mental health law should:⁶³

Avoid institutionalization and medicalization of children to the greatest extent possible. The law should explicitly recognise that institutionalization is detrimental to the development of the child, and contain a general principle to the effect that every effort shall be made to provide support and treatment of children through community health services. The law should ensure that children and adolescents with mental health conditions are provided with early intervention through evidence-based psychosocial and other non-pharmacological interventions based in the community, avoiding institutionalization and medicalization.

While the advisory role is critical to the effectiveness of NHRIs in advancing human rights,⁶⁴ one disadvantage related to this is that states may disregard the recommendations of NHRIs, which are not binding.⁶⁵ Indeed the implementation of recommendations made by NHRIs depends upon the commitment of other state departments to act on findings made by NHRIs and their capacity to do so.⁶⁶ To militate against this, NHRIs should endeavour to develop and maintain good relationships with relevant government agencies to facilitate dialogue where appropriate. This calls for carefully balancing between the adviser and adversarial roles played by NHRIs.⁶⁷ It is also important for NHRIs to foster strong partnerships with business and civil society actors at national level in order to amplify efforts.

The second role of NHRIs in advancing article 19 of the CRPD relates to their mandate in ensuring compliance with obligations under treaties relating to human rights.⁶⁸ The Paris Principles prescribe that NHRIs

62 Concluding Observations on the Initial Report of Rwanda (n 34) para 36; Concluding Observations on the Initial Report of Algeria (n 34) para 33; Concluding Observations on the Initial Report of Sudan (para 34) para 40.

63 Kenya National Commission on Human Rights 'Advisory on the Mental Health (Amendment) Bill 2018' presented to the National Assembly Departmental Committee on Health (31 October 2019).

64 J Mertus 'Evaluating NHRIs: Considering structure, mandate and impact' in R Goodman & T Pogram (eds) *Human rights, state compliance and social change: Assessing national human rights institutions* (2012) at 77.

65 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 17.

66 D Meyer 'National human rights institutions, opportunities and activism' in R Goodman & T Pogram (eds) *Human rights, state compliance and social change: Assessing national human rights institutions* (2012) at 328.

67 The Danish Institute for Human Rights 'Challenges in NHRI effectiveness' <https://www.humanrights.dk/learning-hub/challenges-nhri-effectiveness> (accessed 27 July 2020)

68 United Nations Office of the United Nations High Commissioner for Human Rights (n 54).

should bolster ratification and implementation of international human rights instruments.⁶⁹ NHRIs are also required to contribute to national human rights reports to treaty body mechanisms and where necessary express an independent opinion on matters discussed.⁷⁰ This entails the issuing of parallel reports to treaty body mechanisms in relation to treaties that have been ratified by the specific state. In this regard, NHRIs can make recommendations to advance article 19 of the CRPD in their parallel reports or in their engagements with special UN mechanisms (not limited to the UN Convention on the Rights of Persons with Disabilities). Such recommendations may call upon the treaty body/special mechanism to require the state in question to take any of the following steps:

- a) Provide grants and budgetary allocations to persons with disabilities to promote independent living in the community covering support for assistive devices, guides, sign language interpreters, affordable skin-care protection for persons with albinism,⁷¹ and cash transfer schemes for personal assistance services.⁷² (This recommendation may fall under the parallel report on the International Covenant on Economic, Social and Cultural Rights).
- b) Adopt the necessary measures to prevent isolation or segregation of persons with disabilities from the community by being hidden in the family, or in segregated institutions.⁷³ (This recommendation may fall under the parallel report on the Convention Against Torture).
- c) Systematically provide information to all persons with disabilities, including migrant workers with disabilities and their families, on how to access support services and assistance.⁷⁴ (This recommendation may fall under the parallel report on the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families).
- d) Ensure accessibility to community services and facilities by all persons with disabilities in all areas of life, as well as home and community-based care for children with disabilities, particularly in rural areas.⁷⁵ (This recommendation may fall under the parallel report on the Convention on the Rights of the Child).

69 UN Doc A/RES/48/134 (1993) (n 53) para 3(c).

70 UN Doc A/RES/48/134 (1993) (n 53) para 3(d).

71 Concluding Observations on the Initial Report of Uganda (n 34) para 39; Concluding Observations on the Initial Report of Rwanda (n 34) para 36; Concluding Observations on the Initial Report of Morocco (n 34) para 39(c).

72 Concluding Observations on the Initial Report of Kenya (n 34) para 38(c); Concluding Observations on the Initial Report of Senegal (n 34) para 34(d); Concluding Observations on the Initial Report of South Africa (n 34) para 35(c); Concluding Observations on the Initial Report of Morocco (n 34) para 39(c); Concluding Observations on the Initial Report of Sudan (n 34) para 40.

73 Concluding Observations on the Initial Report of Gabon (n 34) para 45.

74 Concluding Observations on the Initial Report of Senegal (n 34) para 34; Concluding Observations on the Initial Report of Niger (n 34) para 32(a).

75 Concluding Observations on the Initial Report of Niger (n 34) para 32(b); Concluding Observations on the Initial Report of Morocco (n 34) para 39(d).

In relation to the above, the Kenya National Commission on Human Rights' 2019 parallel report on the third cycle of the Universal Periodic Review⁷⁶ noted violations on the right of persons with disabilities to live independently in the community and made the following recommendations:⁷⁷

- (i) Amend Sections 10(3), 14, and 16 of the Mental Health Act which allows for involuntary detention of users of mental health services in consultation with organizations for/of persons with disabilities;
- (ii) Develop action plan to support de-institutionalization and transition to community based mental health service;
- (iii) Provide state funded support services for persons with disabilities at community level, including caregivers, respite services, peer support and personal assistance services.

Parallel reports by NHRIs may influence the Concluding Observations issued by treaty body mechanisms to a specific state. While Concluding Observations are very valuable expert interpretations, they are often not widely disseminated and the public in the given country often remains unaware of them. In many cases, states pay little attention to their implementation.⁷⁸ This illustrates why it is critical for NHRIs to effectively play their role in relation to promoting compliance with obligations under treaties relating to human rights.

The third role that NHRIs may play to advance article 19 of the CRPD relates to monitoring, especially in relation to NHRIs which have already been designated as the monitoring agencies under article 33(2) of the CRPD as discussed in section 4.1 above. In this regard, NHRIs can monitor the extent to which Concluding Observations on article 19 are implemented. They can also monitor non-compliance with progressive national legislation that may advance article 19 of the CRPD.⁷⁹ In addition, NHRIs can, for example, regularly and closely monitor places where children are institutionalised and advocate for the development of family and community-based alternatives for those deprived of a family environment.⁸⁰ Monitoring should also include mental health institutions. In relation to mental health institutions, the World Health Organisation has developed a human rights-based toolkit for monitoring entitled the

76 Kenya National Commission on Human Rights 'Kenya National Commission on Human Rights (KNCHR) Third Cycle UPR report' <https://www.knchr.org/Portals/0/InternationalObligationsReports/KNCHR%203RD%20CYCLE%20UPR%20REPORRT.pdf?ver=2019-07-22-084058-850> (accessed 30 March 2020).

77 As above.

78 J Lhotský 'Human rights treaty body review 2020: Towards an integrated treaty body system' 10 <https://www.geneva-academy.ch/joomlatools-files/docman-files/Jan%20Lhotsky%C3%BD%20-%20Towards%20an%20Integrated%20Treaty%20Body%20System.pdf> (accessed on 26 July 2020).

79 General Comment 5 (n 7) para 38(d).

80 Concluding Observations on the Initial Report of Mauritius (para 34) para 32.

QualityRights Toolkit,⁸¹ which has a specific module on the right of persons with disabilities to live independently in the community. NHRIs should be keen to partner/collaborate with health ministries towards use of the WHO QualityRights Toolkit in monitoring mental health institutions. The Kenya National Commission on Human Rights is already involved in this process.⁸²

NHRIs should ideally monitor the extent to which relevant authorities follow the recommendations set forth in the monitoring reports. This presupposes a good working relationship with government departments,⁸³ as NHRIs may require information from these departments in order to assess progress on implementation of recommendations. The inherent limitation is that governments may take the NHRI's advice on small points, while pressing ahead with actions that breach human rights commitments.⁸⁴ NHRIs can mitigate this by using courts or specialised tribunals as avenues to enforce recommendations in specific instances where their recommendations have been ignored or rejected.⁸⁵ However, the ability of NHRIs to effectively leverage on this mandate must be accompanied by structural baseline commitments such as the ability to intervene in court cases relevant to human rights and the authority to take recommendations to court for enforcement.⁸⁶

The fourth role that NHRIs can play to advance article 19 of the CRPD relates to receiving and investigating complaints about alleged violations of the right of persons with disabilities to live independently and be included in the community. The Paris Principles require that national institutions be vested with specific mandate to protect human rights,⁸⁷ which may entail activities such as receiving, investigating and resolving complaints.⁸⁸ The Paris Principles do not *require* for NHRIs to have the power to receive complaints for alleged human rights violations,⁸⁹ but where an NHRI is provided with this mandate it is expected to handle the complaints fairly and effectively.⁹⁰ Therefore, NHRIs should, on receipt of

81 World Health Organisation 'QualityRights Toolkit' https://www.who.int/mental_health/publications/QualityRights_toolkit/en/ (accessed 27 October 2019).

82 So far, the following mental health facilities have been assessed in the 2019/2020 financial year: Mathari National Teaching and Referral Hospital, Moi Teaching and Referral Hospital, Port Reitz Psychiatric Unit and the Jaramogi Oginga Odinga Teaching and Referral Hospital.

83 United Nations Office of the High Commissioner for Human Rights 'Assessing the effectiveness of National Human Rights Institutions' (2005) 22 <https://www.ohchr.org/Documents/Publications/NHRIen.pdf> (accessed 26 July 2020).

84 As above.

85 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 17; Mertus (n 64) at 81.

86 Mertus (n 64) at 81.

87 UN Doc A/RES/48/134 (1993) (n 53) at 1.

88 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 31.

89 General Observations of the Sub-Committee on Accreditation, Global Alliance of National Human Rights Institutions (21 February 2018) at 50.

90 As above.

individual complaints revealing a violation of article 19 of the CRPD, take steps to secure appropriate redress.

In order to effectively handle complaints, NHRIs should be easily accessible to members of the public.⁹¹ Unfortunately, this is not always the case as some NHRIs are not in a position to establish offices within easy reach of the whole population and digital access may also be limited by various factors. In other cases, NHRIs may be inundated with complaints and lack adequate resources and personnel to handle the complaints effectively.⁹² NHRIs can militate against this by advocating for higher budgetary allocations from government, as well as seeking alternative sources of funding where appropriate.

The fifth role that NHRIs can play to advance article 19 relates to their function in advancing economic, social and cultural rights generally, and in particular the right to housing. Notably, there are ongoing projects to upgrade slums in many African countries, including Kenya, and such projects should be inclusive of persons with disabilities. In this regard, the Kenya National Commission on Human Rights was ordered by the High Court in the case of *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others*⁹³ to oversee the allocation of houses in the Kibera Slum Upgrading Process to ensure that only genuine beneficiaries benefitted from the project.⁹⁴ Where opportunities to advance economic, social and cultural rights are present, NHRIs should ensure that the principle of non-discrimination⁹⁵ is applied in fulfilling these rights so that persons with disabilities are not left behind.

In carrying out the above roles, NHRIs must ensure the active participation of persons with disabilities and their representative organisations⁹⁶ in accordance with articles 4(3) and 33(3) of the CRPD.

4.3 The potential role of NHRIs in advancing article 19 of the CRPD

As was stated in the introduction, the Paris Principles require that national institutions be vested with specific mandate to promote and protect human rights.⁹⁷ The Office of the High Commissioner for Human Rights understands promotion as those functions needed to change attitudes and

91 As above.

92 United Nations Office of the High Commissioner for Human Rights (n 83).

93 Petition Number 304 of 2015 [2016] eKLR.

94 Para 39.

95 Committee on the Rights of Persons with Disabilities General Comment 5 (n 7) para 38(b).

96 Concluding Observations on the Initial Report of Kenya (n 34) para 38; Concluding Observations on the Initial Report of Gabon (n 34) para 45; Concluding Observations on the Initial Report of Algeria (n 34) para 33.

97 UN Doc A/RES/48/134 (1993) (n 53) 1.

behaviour which may include education, outreach, publications, training and capacity building and advising and assisting governments.⁹⁸ NHRIs should therefore take up the mandate to educate and inform state and non-state actors about article 19 of the CRPD. One of the reasons why persons with disabilities fail to fully enjoy the right to live in the community is stigma and negative attitudes that cause families to hide family members who have disabilities.⁹⁹ NHRIs should raise public awareness about the inherent worth of all persons, including those with disabilities, in order to create more inclusive societies.

Many NHRIs have an express or implied mandate to hold public inquiries, either in relation to a single serious incidence or more often in relation to systemic or general human rights issues.¹⁰⁰ The inquiry process enables NHRIs to examine an issue in depth and from a human rights perspective.¹⁰¹ For these purposes, NHRIs have full powers to compel testimony and witnesses.¹⁰² NHRIs may also choose to convene inquiries on issues of interest, but without utilising coercive powers. In this regard, NHRIs may rely on voluntary witnesses and seek the contribution of members of the public and NGOs without the formal powers of a more formal and adversarial process that is based on statute.¹⁰³ Although public inquiries are resource intensive, conducting them can help promote respect for rights and raise public awareness.¹⁰⁴ In relation to article 19 of the CRPD, an inquiry could be held in response to a serious incident, for example, allegations of abuse of institutionalised individuals residing in a mental health facility. This may require an NHRI to compel testimony and witnesses, and is best suited for NHRIs that have investigative powers.¹⁰⁵ NHRIs can also hold a (non-coercive) inquiry to understand the extent to which persons with disabilities are able to access support services, or the extent to which they experience isolation and segregation from the community contrary to article 19(b) of the CRPD.

98 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 31.

99 United Nations Division for Social Policy Development & Department of Economic and Social Affairs 'Toolkit on disability for Africa: Culture, beliefs and disability' 6 <https://www.un.org/esa/socdev/documents/disability/Toolkit/Cultures-Beliefs-Disability.pdf> (accessed 27 July 2020).

100 Asia Pacific Forum & Raoul Wallenberg Institute 'Manual on conducting a national inquiry into systemic patterns of human rights violations' (2012) 4.

101 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 97.

102 As above.

103 United Nations Office of the United Nations High Commissioner for Human Rights (n 54) 98.

104 United Nations Department of Economic and Social Affairs 'Disability' <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-seven-creating-national-institutions-to-implement-and-monitor-the-convention-3.html> (accessed 27 July 2020).

105 As above.

As part of their mandate to protect human rights, many NHRIs can intervene in court proceedings as a 'friend of the court' in cases involving significant human rights issues.¹⁰⁶ Some NHRIs can also initiate cases that are either of broad public interest or that would have a significant impact on advancement of human rights.¹⁰⁷ This includes rights of persons with disabilities, including their right to live independently in the community.

5 Conclusion

The historical development and proliferation of national human rights institutions (NHRIs) as documented in this article demonstrates wide acceptance that NHRIs are a central pillar in the protection and promotion of human rights at national level. The Paris Principles remain central towards assessing the effectiveness of an NHRI and the ability of an NHRI to perform its function of promoting, protecting and monitoring the rights provided under the UN Convention on the Rights of Persons with Disabilities (CRPD).

Globally, it is well documented that persons with disabilities have historically been denied personal and individual choice and control across all areas of their lives.¹⁰⁸ The situation in Africa is no different, as has been demonstrated by the review of Concluding Observations to 13 African countries carried out in section 3 above. To reverse this historical injustice and redress the abandonment, over-dependence on family, institutionalisation, isolation and segregation experienced by persons with disabilities requires concerted efforts from state and non-state actors including NHRIs.

This article has identified critical ways in which NHRIs can advance article 19 of the CRPD. These include advocating for a well-defined legislative framework on deinstitutionalisation and independent living community support services and promoting compliance with obligations under treaties relating to human rights. Other roles that NHRIs can play in this regard include monitoring under article 33(2) of the CRPD, receiving and investigating complaints about alleged violations of article 19 and playing their function in advancing economic, social and cultural rights generally. In addition to these roles, NHRIs should fully utilise their mandate to advance the right of persons with disabilities to live in the community. This may be achieved through educating and informing state and non-state actors about article 19 of the CRPD, holding public inquiries

106 Asia Pacific Forum of National Human Rights Institutions 'Fact sheet 8: Responsibilities and functions of NHRIs: Intervening in court proceedings' <https://www.asiapacificforum.net/support/what-are-nhris/fact-sheet-8-responsibilities-and-functions-nhris-intervening-court-proceedings/> (accessed 27 July 2020).

107 Kenya National Commission on Human Rights 'Legal Services' <https://www.knchr.org/Our-Work/Legal-Services> (accessed 27 July 2020).

108 Committee on the Rights of Persons with Disabilities General Comment 5 (n 7).

on issues related to article 19 and intervening in court proceedings in order to promote this right.

In conclusion, the right of persons with disabilities to live independently in the community should be considered a priority issue, including in resource allocation. Resource allocation should cover all the important elements of this right, including choice of a place of residence on an equal basis with others; the provision of support services to enable inclusion in the community, including for persons who require a high level of support; and responsiveness of community services and communities to the needs of persons with disabilities. Finally, NHRIs that are designated as monitoring agencies under article 33(2) of the CRPD should receive adequate funding to enable them monitor the entire gamut of rights guaranteed under the CRPD.

CHAPTER 4

INTERROGATING PARENTAL PARTICIPATION IN THE EDUCATION AND GENERAL DEVELOPMENT OF THEIR DEAF CHILDREN IN ZAMBIA

*Kenneth Kapalu Muzata**

Summary

Parents have a critical role to play in the education of their children. Their participation is likely to facilitate positive academic achievement and optimal development. In any case, parents' participation is a gateway to realising full inclusion of Deaf children in schools. This study interrogated the participation of parents and guardians in the education and general development of their Deaf children. A survey of 85 parents and guardians was conducted in seven districts of six provinces in Zambia. A mixed-method approach was employed. Closed and open ended questionnaires were used to collect both quantitative and qualitative data. The Statistical Package for Social Sciences (SPSS) version 16 was used to analyse quantitative data. From the quantitative analysis, frequencies, percentages and correlations between variables such as sex and data on the relationship and the desire to learn Sign Language were obtained. A Chi square test of independence helped to establish possible relationships. Verbatim excerpts from qualitative data were used to support quantitative data. The results showed that parents and guardians of Deaf children faced challenges in communicating with their children. Further, parents' participation in the education of Deaf children was limited by difficulties in communication and lack of support from experts. No significant differences were observed between male and female parents and guardians in relation to knowing Sign Language as the main challenge they faced. The study concluded that the realisation of full inclusive education should start from home. Based on the results, it was recommended that the Ministry of General Education and other stakeholders should provide outreach services which include lessons in Sign Language for parents to enhance their participation in the education and general development of Deaf children.

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1 Background

The concept of inclusive education has been embraced by the Zambian government and there is ample evidence of domestication of the laws through the Disability Act of 2012 and education policies that talk about inclusive education in the country.¹ Particularly, the 1996 Educating Our Future policy document on education laid the foundation for the implementation of inclusive education in Zambia. The Zambia 2012 Disability Act categorically prohibits discrimination of persons with disabilities and guides schools and other institutions to be inclusive while considering reasonable accommodations that make inclusion realistic not only in education but also in all institutions in the country.² However, while the Disability Act of 2012 clearly explains how persons with disabilities should be treated in government institutions, the family as an institution appears not to have been directly addressed on how inclusive it should be, yet, it should not be ignored that discrimination may start at family level. Ignoring the family in the inclusive agenda leaves more of the grave causes of disability to be a creation of society. Thus, the social model continues to hold society responsible for causing and worsening disability.³ For instance, children who are Deaf face barriers in communication within their families, barriers that are not created by the children themselves but by the family's failure to learn Sign Language (SL). As such Deaf children may find themselves discriminated against within their own family, yet they have an alienable right to belong to family.

The 1989 Convention on the Rights of the Child (CRC) clearly states the principles of non-discrimination, respect for the child's interests, survival and development and respect for the child's views.⁴ The United Nations Convention on the Rights of Persons with Disabilities (CRPD), which came into force in 2008, has eight principles for inclusion.⁵ These are non-discrimination, equality of opportunity, full and effective participation, respect for differences and acceptance of persons with disabilities as diversity and accessibility, equality between men and women, respect for inherent dignity to make choices and respect for evolving capacities and identities of persons with disabilities.⁶ The main

1 M Chitiyo & FC Muwana 'Positive developments in special education in Zambia and Zimbabwe' (2018) 14 *International Journal of Whole Schooling* 93.

2 The Disability Act 6 of 2012.

3 UNICEF Innocenti Research Centre 'Promoting the rights of children with disabilities' (2007) 13 *Innocenti Digest*.

4 As above.

5 United Nations 'Department of Economic and Social Affairs Disability' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpdc-rpd-10.html> (accessed 21 June 2020).

6 L Wonani & KK Muzata 'Parenting and educating children with autism: Lived experiences of Lusaka parents – Zambia' (2019) 48 *International Journal of Sciences: Basic and Applied Research* 20.

aim of the CRPD is to realise a full development of the potential of all persons with disabilities. How would such principles be realised if the family is left ignorant about the rights of their own child and without the communication abilities to engage with their child who may be Deaf? How would the child who has a hearing impairment express his or her views and interests to parents who do not understand the child's language? These questions appear to be ignored in research, policies and laws. Inclusive education entails that Deaf children participate in the daily activities of their lives in the family and in the community. Participation is not merely placing a person with a disability in the mainstream.⁷ Article 24 of the CRPD says access to the mainstream for persons with profound disabilities can be realised when nations address specific needs of children with severe and complex sensory impairments such as SL, Braille and low-vision aids.⁸ In this paper, I examine the barriers in communication between parents and Deaf children and the nature of difficulties they face. Since there are different categories of hearing impairment (mild, moderate, severe and profound) I have to some extent avoided the use of the term hearing impairment because this study focused only on Deaf children who depend on SL to communicate. However, in some cases, the term 'hearing impairment' has been used to refer to the impairment.

Zambia is a signatory to major world conventions on the rights of persons with disabilities such as the CRPD and is committed to meeting the 2030 sustainable development goal on education that emphasises inclusiveness, equity and lifelong learning.⁹ However, realising the goal requires collaborative effort of government ministries and departments, Non-Governmental Organisations and the Zambian community at large. In particular, parents of Deaf children in Zambia should be part of the inclusive agenda. The progress Zambia has made in the provision of education and policies that are aimed at improving the lives of persons with disabilities cannot be ignored.¹⁰ After independence, the first major Act in education, (The Education Act, 1966) seemed to ignore special education. The Act allowed for the establishment of a National Council of Education at national, regional and local levels.¹¹ Education was offered at primary, secondary and tertiary levels through public, private and grant aided institutions.¹² There was no mention of special education as a subject or as a mode of delivery in the Act. However, the Act provided for the minister to authorise the teaching of any other subject that was not

7 E Johnson & KK Muzata 'Inclusive education: Implementing universal design for learning' in MK Banja (ed) *Selected readings in education* (2019) 1.

8 UNICEF Innocenti Research Centre (n 3).

9 Ministry of National Development Planning *Zambia: Sustainable development goals – Voluntary national review 2020* https://sustainabledevelopment.un.org/content/documents/26305VNR_2020_Zambia_Report.pdf (accessed 9 December 2020).

10 Chitiyo & Muwana (n 1).

11 See Government of the Republic of Zambia: The Education Act: Chapter 134 of the laws of Zambia (1966).

12 As above.

listed.¹³ If this was well interpreted, it would have offered special education a chance for recognition within the 1966 Education Act. However, even if special education were to be recognised, the laws at the time were not flexible enough to support learners with disabilities. For instance, the Act did not allow learners to repeat any other grade apart from grades four or five or grade ten or 12 and no child was allowed to repeat a grade more than once.¹⁴ In turn it did not take cognisance of learners with disabilities who may need to repeat some grades several times and may need more time to learn a subject. Over the years, Zambia, through the Ministry of General Education has scored a number of successes through policy pronouncements on the education of persons with disabilities. The Education Reforms and Recommendations of 1977 made emphasis on the provision of special education to learners with disabilities.¹⁵ For special education reforms emphasised the significance of assessment, design of curricula and teaching materials. Further, the document prescribed suitable building infrastructure for learners with disabilities. The main categories of disabilities considered then were those with physical, intellectual, hearing and visual disabilities.¹⁶ The 1992 Focus on learning policy document advanced that every child should learn through inclusive education.¹⁷ The 1996 Educating our Future policy document pronounced the provision of special education in Zambia premised on equal educational opportunities for children with special education needs, quality education provision, and effective supervision and monitoring of special education.¹⁸

Several strategies were identified on how best to meet equality and the quality of education provision for learners with special education needs. Learners with special education needs in Zambia refer to learners with disabilities including learners with hearing impairment.¹⁹ This includes learners who are Deaf. Among the strategies were decentralisation of services, assessment and placement of children with special educational needs, integration of the learners with special educational needs in the mainstream, cooperating with religious, private, community and philanthropic organisations.²⁰ Of all the strategies, none points directly to working with parents of children with disabilities. However, one statement in the policy that came close was the provision of outreach services to children whose disabilities prevent normal attendance in school.²¹ The outreach services concept if well implemented would ensure that the gap

13 As above.

14 As above.

15 The Ministry of Education Reforms *Proposals and recommendations* (1977).

16 As above.

17 Ministry of Education *Focus on learning: Strategies for the development of school education in Zambia – Report of the team appointed to review Investment Strategies in Education* (1992).

18 Ministry of Education *Educating our future policy: National Policy on Education* (1996).

19 Ministry of General Education *Inclusive education and special education in Zambia: Implementation guidelines* (2016).

20 Ministry of Education (n 15)

21 Ministry of Education (n 18).

at the centre of this study would be covered and inclusion would turn into reality especially for Deaf learners.

Further, the inclusive education and special education guidelines for Zambia highlight parental involvement in terms of participating in the development of the Individualized Education Programmes (IEP), assessment procedures, having access to assessment reports and monitoring the performance of their children with special educational needs.²² The document does not address how parents of Deaf children would get involved when they (parents) have a limitation in SL. The success of the inclusive education policy and the realisation of the rights for Deaf children should also be measured by the participation of parents in the education of their children. SL is crucial for Deaf learners to access the curriculum. SL is the best medium through which the curriculum can be delivered to deaf learners. The participation of parents in the education of their Deaf children is one of the best strategies to achieve curriculum access. The Ministry of General Education in Zambia is making efforts to train teachers to teach learners with hearing impairments and other disabilities in colleges and universities. Although the Ministry of General Education in Zambia recognises the invaluable contribution of parents to children's education by providing knowledge and supportive environment,²³ efforts to support parents of Deaf children have not been documented. Support for parents to provide a strong foundation for their children's education is needed before and during their time in and out of school.

Parents have a critical role to play in not only education, but also the overall development of their children who are Deaf. They play a big role in helping their children do homework and interact with them in daily routines. However, with SL as a barrier, parents cannot afford to help their children in school work and overall daily interaction. Significant degrees of isolation of Deaf children in hearing families by their immediate, extended families and communities have been reported.²⁴ For a child to attain optimum development, interaction with family members is crucial. There are two major categories of Deaf children: those who are born without a sense of hearing (congenitally Deaf) or become Deaf early enough before they acquire language (Pre-lingually Deaf); and those who develop hearing impairment after acquiring language (Post-lingually Deaf). Some children with post lingual hearing impairment are able to communicate using speech although they cannot hear depending on the age at which they lose their sense of hearing. They depend on lip reading

22 Ministry of General Education (n 19).

23 See Ministry of Education booklet written by Mbewe Moffart titled *Principles & practice: Teaching the Deaf in schools – Teachers' guide* (2014).

24 PE Spencer, C Erting & M Marscharck *The Deaf child in the family and at school* (2000).

to get what another person is saying.²⁵ Whatever the case, communication becomes limited when the sense of hearing is inhibited by any form of circumstance. For Deaf children, from birth, their development is likely to be adversely impaired once parents and family members who are the first agents of socialisation fail to engage them in developmental socialisation. According to Bronfenbrenner's ecological systems theory children's development takes place within a context of environmental influences that have direct or indirect effects on them.²⁶ Bronfenbrenner's theory explains that children do not develop in isolation. The immediate family context is crucial in the child's development.²⁷ What brings children closer to their family in addition to the basic needs is language. Language is a vehicle for interaction that facilitates child development within a family context and beyond. Bonding, social, emotional, cognitive and linguistic development of children is dependent on communication with the children. Deaf children like other children without disabilities need to experience the sense of love and belonging from their immediate families and neighborhood.²⁸ They need to interact not only with their parents, but also with the rest of the family members and beyond. However, when a communication barrier is experienced between parents and their children with severe hearing loss, the children are more at risk of the negative impact of communication on their development. Ordinarily, failure by parents to communicate with their children who have severe hearing impairment may be construed by the affected children as a lack of being loved. Language provides a foundation for communication, problem solving, analysis and other higher level cognitive skills.²⁹ Therefore deficits in language can have a profound negative impact on an individual's ability to learn and function competently and confidently in the environment. Learning starts from home. Before a child goes into school, they acquire a substantial amount of concepts from the interaction they have at home. If language becomes an inhibition to communication in a home, children, especially those with severe hearing impairment will get into school with many difficulties.

Though limited studies have been conducted in the area of parenting children with hearing impairment, available literature reveals that most of Deaf children born from hearing parents lag behind in development because parents do not know SL. Lack of skills in SL among hearing parents was a major reason that contributes to the majority of Deaf

25 IRR Ortiz 'Lip-reading in the Pre-lingually Deaf: What makes a skilled speech-reader?' (2008) 11 *The Spanish Journal of Psychology* 488.

26 AL Jung 'Identifying families' supports and other resources' in RA MaWilliam (ed) *Working with families of young children with special needs* (2010).

27 J Linton *Understanding child development 0-8 years* (2015).

28 HA Johnson 'What have we learned from research in deaf ed?' Michigan: Hands and Voices (2014). http://www.handsandvoices.org/articles/research/v12-4_research.htm (accessed 10 July 2018).

29 R Pierangelo & G Giuliani *Teaching in a special education classroom: A step-by-step guide for educators* (2008).

children growing up with limited access to SL as well as spoken language.³⁰ If language is not well developed in childhood, it goes further to affect the academic performance of children when they enter school. Language helps humans to interact, a social factor necessary for child development. Deaf children may face challenges communicating with peers who do not know SL. Social factors may contribute to a child's stress and consequently interfere with learning.³¹ This may eventually lower the available ability children may inherently have and result in academic dysfunction. Clearly, the importance of language and indeed SL cannot be overemphasised. It is language that enables children to play with peers. Language shows whether one's pace of cognitive development is normal or not.

2 Theoretical background

Many theories explain the role of the environment in child development. One influential theory that explains the role of the environment in child development is the Ecological Systems Theory by Urie Bronfenbrenner.³² According to this Theory, there are four main layers through which a child's development can be best explained. These are the microsystem, mesosystem, exosystem and the macrosystem layers.

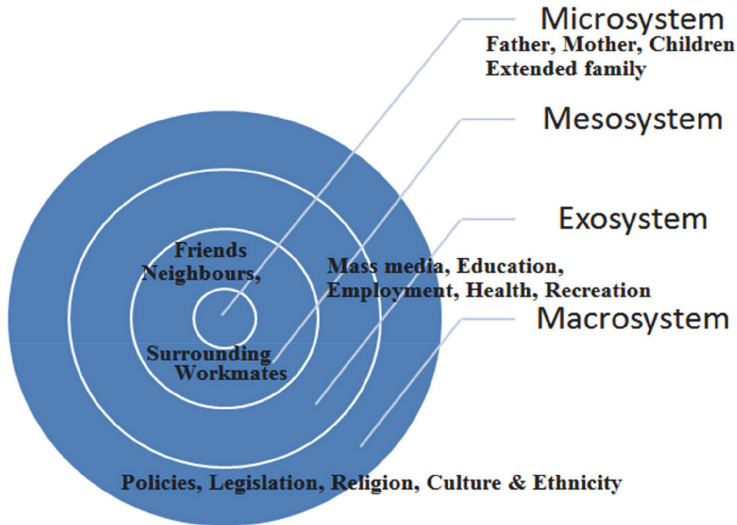


Figure 1: Illustration of the Bronfenbrenner's main layers in child development.

30 Spencer, Erting & Marscharck (n 24).

31 As above.

32 Lindon (n 27).

The family (inner most layer) is the child's first environment. It is the child's microsystem context comprising the father, mother, siblings and in some cultures the extended family members. The development of a Deaf child is dependent on the family's ability to adapt quickly to the disability in the family and help the child develop like other children. Failure to communicate will not only affect the child; it will affect the family as well. For instance, the child would fail to communicate his or her needs to the parents and family members. This may lead to frustrations on the part of the child, who may feel unloved that the needs are not provided without considering the barrier in communication. Reciprocally, parents are equally affected because they feel they do not meet the child's needs adequately and worry about their child's development. Thus, they live a life of worry and anxiety as a result.

Acceptance of the disability is dependent on the environment in which the family is situated. For example, it is dependent on the attitudes in the family's immediate surrounding (mesosystem), and the help anticipated from the exosystem (the school, healthcare and other services). It is also dependent on the extent to which the policies that support the child (macrosystem level) are implemented. For a family with a Deaf child, SL is a basic need. The main concern that relates to this study is policy at the macrosystems level versus the child at the microsystems level. The question is, 'is there national or local school policy' that empowers parents of Deaf children in SL? If there is absence of policy about how parents can participate in the development and education of deaf children, the exosystem level in which education as a social service is found would be defective. Thus, education would not provide the needed outreach services to the child in the home. When parents are not empowered through policy and education or specifically when they are not taught SL or provided with the tools to learn the language, they cannot participate in the education and facilitate optimal child development through interaction. Children's developmental services are better provided to the people in the child's life. The people who are directly involved in the child's life are parents and guardians. One of the most important and early support services to those involved directly in the child's life is language.

For a Deaf child, the provision of SL teaching to parents would overcome possible communication barriers and facilitate smooth interaction between the child and parents. Mitchell suggests that parents of children with disabilities require training in various areas to help them cope with the disabilities their children have.³³ Mitchell further suggests behavioural parent training and parent-child interaction therapy among others as areas parents need support in.³⁴ For parents of Deaf, training in SL would be a key support service professionals can provide. There are

33 D Mitchell *What really works in special and inclusive education: Using evidence based teaching strategies* (2008).

34 As above.

three main forms of support for families, namely emotional support, material and informational support.³⁵ For parents of Deaf children, the anxiety they experience as a result of failing to communicate with their own children needs to be addressed with counseling as an emotional support. Parents may also need material support in the form of hearing aids for children with residual hearing or financial support to allow parents take their children for expert advice. Informational support includes knowledge of the impairment, it causes and how children react so that parents come to understand their children and stop negative labeling.

Several strategies should be employed to help parents of Deaf children learn SL. For instance, Starner and Weaver listed books, DVDs, websites and evening classes as some of the ways to help reach out to parents of Deaf children to teach them SL.³⁶ Starner and Weaver reported the increase in popularity of parents using websites to learn SL. Most websites provide a dictionary; however, some are not browsable without first acquiring a login which may cost money.³⁷ Further, parents did not favour using books to learn SL because books were difficult to understand. DVDs were still more popular among parents than books.³⁸ The use of websites requires an effective fast internet service. Poepplmeyer and Reichert reported educators in Texas' successes in teaching parents of Deaf children SL through videophones, although access to fast internet was a challenge for some parents. The use of iPads, videophones, computers, Skype and ooVoo proved to provide parents access to SL lessons.³⁹ Currently, Skype and many other social media video conferencing facilities provide free service and if parents had access to the facilities and internet, learning of SL would not be a problem. Although not all parents can afford to access internet in the Zambian context, there are families that may have access to such facilities, but lack knowledge about how the facilities can be used as a resource for learning SL. DVDs and VCDs may be affordable by Zambian parents who have access to the SL video download. Parents need support with facilities such as computers, iPads, and video-phones to learn SL. Such facilities have been reported being provided to American parents of Deaf children through higher education institutions, schools for the Deaf, and churches. However, Mutswanga observed that some parents were not in favour of the credits attached to taking the lessons while others reacted favourably to the fun games that were played during lessons.⁴⁰

35 AL Jung 'Identifying families' supports and other resources' in RA McWilliam (ed) *Working with families of young children with special needs* (2010) 9.

36 T Starner & KA Weaver *We need to communicate! Helping hearing parents of Deaf children learn American Sign Language* (2011).

37 As above.

38 As above.

39 D Poepplmeyer & L Reichert *Pioneering program teaches families Sign Language through tele-intervention* (2015).

40 P Mutswanga 'The hands with eyes and nose in the palm: As effective communication alternatives for profoundly Deaf people' (2017) 8 *Zimbabwe Journal of Education and Practice* 103.

A study of effective communication strategies for Deaf learners in Zimbabwe by Mutswanga, found that the majority of persons with profound hearing loss considered visual cues as an effective tool to communication, among other strategies, such as use of sign interpreters. However, the use of interpreters in the case of parents and guardians of Deaf children may not be sustainable. The use of such a strategy means that parents need to continuously depend on interpreters to interact with their child, which may not be sustainable because interpreters may not always be available. Even then, the use of an interpreter puts an artificial barrier in between the bond that should exist between parents and the child in their interaction. The best alternative for parents and guardians of Deaf children is learning SL so that they directly interact with the children.

Another intervention is cochlear implants. In the developed world, hearing impairment may not present serious challenges because cochlear implants have aided Deaf children to be able to learn speech and communicate ordinarily with family members and beyond. For instance, in the United States of America, cochlear implantation, is an effective technology for reducing hearing loss. It is a common technology used in the United States of America, although many Deaf people do not utilise technology because they prefer to promote the use of SL. Other reasons for low utilisation are low awareness of the benefits of cochlear implants among the population and healthcare professionals; the lack of specific referral pathways; some political issues relating to the Deaf Community; and financial constraints.⁴¹ The reasons for low or non-uptake of the cochlear implant service in the underdeveloped world resides in the non-availability of cochlear implant technologies, experts and lack of affordability in terms of finances to access the service,⁴² yet the majority of people with hearing impairment live in the developing world. The higher cost of cochlear implants in the developing world is a major prohibiting factor for access to the service.⁴³

In Nigeria for instance, technology for Cochlear implants is reported to be too expensive for parents of Deaf children to afford.⁴⁴ The situation in Nigeria may not be any different from Zambia especially because Zambia is a third world country. The attainment of inclusive education can

41 DL Sorkin 'Cochlear implantation in the world's largest medical device market: Utilization and awareness of cochlear implants in the United States' (2013) 14 *Cochlear Implants International* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3663290/#s5title> (accessed 23 June 2020).

42 K Krishnamoorthy, RN Samy & N Shoman 'The challenges of starting a cochlear implant programme in a developing country' (2014) 22 *Current Opinion in Otolaryngology and Head and Neck Surgery* 367.

43 AO Suleiman et al 'Paediatric cochlear implantation in north-western Nigeria case report and review of our challenges' (2014) 78 *International Journal of Pediatric Otorhinolaryngology* 363.

44 GB Babudoh 'Family involvement in educating of children with congenital and profound hearing impairment' *Conference proceedings of the International Association of Special Education* (2015).

be made more possible when parents are empowered with skills to help them communicate and interact with their children with disabilities to facilitate development. This study was therefore conducted to establish the experiences families of children who are Deaf face in communicating with Deaf children in Zambia.

3 Purpose of the study

The purpose of this study was to establish factors that affect parents' participation in the education and general development of their Deaf children. By establishing parents and guardians' experiences, the factors that affect their participation in the education and general development of Deaf children can be established. The study was guided by the following objectives:

- a) To examine whether parents and guardians were able to communicate with their Deaf children or not.
- b) To establish the different types of communication styles parents and guardians use to communicate with their Deaf children.
- c) To establish parents and guardians' perceptions about their Deaf children.
- d) To establish parents and guardians understanding of the impact of communication difficulties on the development of Deaf children.

4 Research questions

The following were the research questions used in the study:

- a) Are parents and guardians of Deaf children able to communicate with their children?
- b) What types of communication styles are used by parents and guardians to communicate their Deaf children?
- c) What are the perceptions of parents and guardians of deaf children towards their Deaf children?
- d) Do parents understand the impact of communication barrier on their Deaf children?

5 Research hypotheses

When a researcher chooses to use mixed methods, consideration should be made that there are qualitative questions and quantitative questions or hypothesis.⁴⁵ Since this study adopted the mixed-methods approach, the following assumptions were framed:

- a) Female parents and guardians communicated with deaf children in SL with fewer difficulties than their male counterparts.
- b) Female parents and guardians were more willing to learn SL than their male counterparts.
- c) Parents were more positive about learning SL than guardians.
- d) Parents do not understand the impact of the communication barrier on Deaf children.

The assumptions emanate from both literature and cultural beliefs that females are either more troubled by or more caring than males when a child with a disability is born in a home.⁴⁶ However, Giulio, Philipov and Jaschinski observed that generally couples with a child who has disability are more frequently unstable, more often forego their fertility intentions, more frequently suffer from economic difficulties, show more traditional gender-role arrangements, are more frequently in bad health, and have lower well-being than families without disabilities.⁴⁷

In an investigation of North West Arkansas parents' attitudes and stress levels of parents involved in the hands and voices programme, parents moderately agreed that it was stressful learning a new modality to communicate with their children and language was said to be the barrier.⁴⁸ Other studies report that parents of Deaf children do not report much stress levels as was reported by parents of hearing children.⁴⁹ This study points to the attitudes towards learning SL by parents. There are also notions held against Deaf children that they are generally short tempered or aggressive. However, a study by Hankins on social interaction between Deaf and Hearing people found that the data did not support the hypothesis that the responses of people with hearing ability would reflect negative attitudes

45 JW Creswell *Research n: Qualitative, quantitative and mixed methods approaches* (2014).

46 H Featherstone *A difference in the family: Life with a disabled child* (1980).

47 PD Giulio, D Philipov & I Jaschinski 'Families with disabled children in different European Countries' *Families and Societies, Changing families and sustainable societies: Policy contexts and diversity over the life course and across generations* (2014) 1.

48 EC Davies 'Parenting attitudes and stress levels among parents of children who are deaf' Rehabilitation, human resources and communication disorders Undergraduate Honors Theses, University of Arkansas, Fayetteville, 2015 <http://scholarworks.uark.edu/rhrcuht/40> Rehabilitation, *Human Resources and Communication Disorders Undergraduate Honors* (accessed 10 July 2018).

49 AL Quittner et al 'Parenting stress among parents of deaf and hearing children: Association with language delays and behaviour problems' (2010) 10 *Parenting, Science and Practice* 136.

and beliefs about Deaf people.⁵⁰ Such beliefs can better be dispelled through studies that provide checks through correlations, hence a portion of the assumptions were to detect parents and guardians perceptions towards Deaf children.

6 Methods

6.1 Participants

A total of 85 respondents were targeted in seven districts of six provinces in Zambia. Respondents were purposively sampled through a snowball technique. This technique, also called chain sampling, is used when a researcher uses the first participant to direct him or her to other participants with similar characteristics for a study.⁵¹ This is because it was difficult to locate families that had Deaf children in each area. Therefore, the need to identify the first respondent was cardinal to lead the researchers to other respondents. Purposeful sampling is known for its effectiveness in collecting the desired information from targeted respondents known to possess such information.

6.2 The survey instrument

This study employed the mixed method design. Mixed methods involve the use of quantitative and qualitative methods together to study a research problem.⁵² However, the study was mainly influenced by the quantitative approach while the qualitative acted as a support approach to the quantitative data. Data were collected by the use of closed- and open-ended survey questionnaires. A questionnaire is known for its strength in collecting large amounts of data from a wider population. Questionnaires have enormous advantages including collection of information from large sample and diverse regions.⁵³ This helps in data generalisation and arriving at deductive conclusions. The questionnaire collected demographic data and data for the main research questions. The demographic data provided characteristics of the respondents such as the districts where they were drawn from, their sex, whether they were in formal or informal employment and the grade levels of the Deaf children they were keeping. The first main research question was meant to determine the extent to which parents and guardians were able to communicate with Deaf children. Thus respondents were asked to tick

50 RC Hankins 'Social interaction between Deaf and Hearing people' Unpublished thesis, University of Mississippi, 2015.

51 KK Muzata 'Complexities of sampling in special education: A Zambian contextualised analysis' (2020) 6 *European Journal of Special Education* 96.

52 Creswell (n 45).

53 P Mukherji & D Albon *Research methods in early childhood: An introductory guide* (2015).

'Yes' or 'No' and 'Yes, but not very well'. Respondents who answered "'Yes' to the first question were further asked to tick from options whether they were able to communicate with Deaf children. A scale was provided and respondents were required to tick 'Well', 'Very well' and 'Well, but with difficulties'.

The second research question sought to find out what strategies respondents used to communicate with the Deaf children. Some strategies were outlined for selection, but space was provided for respondents to write other strategies that did not appear on the list. The outlined strategies were pointing, dragging the person, writing on the ground, lip reading, and writing on a piece of paper. The third question was to establish the perceptions of the respondents towards Deaf children. They were asked questions about how the children reacted when there was communication breakdown between them and how they (parents and guardians) reacted in return. The listed reactions were: getting annoyed, smiling and withdrawing. Respondents were required to write any other reactions that were not listed. Respondents were further asked on their general perceptions about the temperament of Deaf children. The question regarding temperament had three options, 'Yes', 'No' and 'Sometimes'.

The survey instrument further collected data on the respondents understanding of the impact of lack of SL on their part as parents and guardians on the Deaf children. This was an open ended question meant to examine their understanding. Open ended questions provide rich information about attitudes, ideas and values that people hold.⁵⁴

The other question on the survey instrument asked about the respondents' willingness to learn SL. The question required 'Yes' and 'No' responses. This was meant to help the researcher verify the genuineness of the responses they were giving to earlier questions and to determine their attitudes towards learning SL. Respondents who were not willing to learn SL were further asked to indicate the reasons. The last question was on suggestions to help them learn SL if they were willing to learn.

While the respondents answered most questions, some questions were not answered. This did not affect validity and reliability of the data because on each questionnaire, either all or more than three quarters of the questions were answered.

6.3 Data Collection

The researcher collected data from Lusaka and Central provinces while research assistants collected from the Southern, Eastern, Copperbelt and Northern Provinces. The research assistants, who were research students

54 Mukherji & Albon (n 53).

in their final undergraduate year of study at the University of Zambia, were trained before they went to administer the questionnaires. Guidance was given to research assistants to help them read questions and write responses for respondents who were not literate. To ensure high return rate of the questionnaires, research assistants were advised to administer and collect the completed questionnaires immediately after respondents answered.

6.4 Data Analysis

Data analysis started with researcher triangulation checkups of the questionnaires that were received. First perceptions indicated similar and natural responses from the various research sites. This was a prior assurance of reliability and validity. Completion rates were satisfactory though not 85-100 per cent, but good enough for quantitative data analysis and drawing conclusions. Missing numbers were too few to affect generalisation. All questionnaires had most questions answered. After data cleaning, categorising and identification of variables, quantitative data were entered in Statistical Package for Social Sciences (SPSS version 16) for analysis. Part of qualitative data were transformed into variables and coded into SPSS as quantitative data to derive frequencies and percentages. This practice is allowed in mixed-methods research.⁵⁵ Other qualitative responses were typed under identified themes within the research objectives and questions. Descriptive statistics, frequencies and cross tabulations were run to make sense of the data. A non-parametric test, the Chi square test of independence was used to run associations between data and to test the assumptions made. For instance, a test was run to determine whether there were significant differences between males and females' ability to use SL and willingness to learn SL. A further test was run to determine whether the type of relationship between the parents and Deaf children was related to their willingness to learn SL. The phi (ϕ) was used to determine the strength of any possible relationship or association. The alpha (α) significance level used was .05.

7 Results

7.1 Demographic data

The study conducted in 2017 collected data from 85 respondents in seven districts of six provinces. Demographic data collected related to districts where the respondents were drawn from, sex, grade level of Deaf children, and whether the parents and guardians were in formal or informal employment. The demographic data helped in data analysis by running

55 P Connolly *Quantitative data analysis in education: A critical introduction using SPSS* (2007).

some relationships in some cases while part of it remained informative. Table 1 shows the demographic frequencies and percentages of the respondents for this study.

Table 1: Demographic Survey Data

Characteristic (Province)	District	Frequency	Percent (%)
Lusaka	Lusaka	8	9.4
Eastern	Petauke	7	8.2
Northern	Kasama	15	17.6
Central	Chisamba	5	5.9
Southern	Monze	11	12.9
Lusaka	Luangwa	27	31.8
Copperbelt	Luanshya	11	12.9
	Missing	1	1.2
	TOTAL	85	100
Grade Level of the deaf children respondents were living with	Grade 1 -7	37	43.5
	Grade 8-9	6	7.1
	Grade 10 -12	20	23.5
	Not in school	13	15.3
	Missing system	9	10.6
	TOTAL	85	100
Relationship with the Child	Son	27	31.8
	Daughter	14	16.5
	Sister	12	14.1
	Brother	9	10.6
	Cousin	12	14.1
	Other	6	7.1
	Missing system	5	5.9
	TOTAL	85	100
Sex of Parents and Guardians	Male	37	43.5
	Female	48	56.5
	TOTAL	85	100

Whether family member works or not	Dependant	12	14.1
	Formal employee	8	9.4
	House wife	25	29.4
	Informal employment	18	21.2
	Missing	22	25.9
	TOTAL	85	100

From Table 1, it is evident that Deaf children are prevalent in the country. The table further shows that some Deaf children were not in school and the relationships of parents and guardians with Deaf children were varied. Only 41-48.3 per cent Deaf children lived with their biological parents.

7.2 Research Question 1: Are parents and guardians able to communicate with the Deaf children?

Respondents were asked to indicate whether they were able to communicate with the Deaf children in their families. The results were cross tabulated and a Chi square test run to determine whether there were significant differences between males and females and their ability to communicate with the Deaf children in their home. Table 2 shows the results:

Table 2: Cross tabulated data of males and females ability to communicate with Deaf children

Characteristic	Category	Yes	%	No	%	Not very well	%	Total	%
Communicating with deaf children (Missing = 2)	Male	31	37	33	40	19	23	83	100
	female								
Parents/Family's ability to communicate with Deaf children ($p = .626 > .05$)	Male	9	47.4	12	36.4	15	46.9	36	42.9
	Female	10	52.6	21	63.6	17	53.1	48	57.1
	Total	19	100	33	100	32	100	84	100

*Significant at .05 alpha level

Generally, the results show that most parents and guardians were not able to communicate with Deaf children due to lack of SL. Most respondents,

33–40 per cent, were not able to communicate; 31–37 per cent were able to communicate, but not very well; while 19–23 per cent were able to communicate. There were no significant differences between male and female respondents and the ability to communicate with Deaf children. Chi-square results showed ($\chi^2 (2, N = 84) = .937, p = .626 > .05$). This means sex was not related to their ability to use SL, thereby dispelling the assumption that, ‘female parents and guardians communicated better with Deaf children in SL than their male counterparts’.

7.3 Research Question 2: What are the types of communication styles used by parents and guardians to communicate with Deaf children?

Respondents were further asked about the strategies respondents were using to communicate with Deaf children in their homes. From the results, parents used pointing, lip reading, looking at the person directly, writing on the ground, dragging the person and writing on a piece of paper. The most common form of communication used by parents and guardians was pointing; 34–45 per cent. From all the forms of communication used by parents, none provides fluent and complete interaction. There are limitations involved when communicating using pointing, lip reading and writing. Thus, fluency in communication is restricted. For instance, pointing to objects as a form of communication may not give full meaning. Lip reading also has its own limitations which includes misinterpretation. One of the parents recounts:

I use pointing to send her to pick what I want, sometimes writing on the ground but you see it’s not easy for the child always to understand what you want fully. This is the problem we face.⁵⁶

Another parent who used lip reading said:

When I use lip reading, this is a problem. You find that the child is just looking at you. You have to repeat and you end up getting frustrated just on simple things.⁵⁷

Lip-reading can best be used when accompanied with cued speech to clarify the ambiguities that lip reading poses.⁵⁸ In any case, lip reading is more suitable for Deaf persons who have previously learnt speech than those who have no previous knowledge to lip read a language they cannot hear.⁵⁹

56 Parent No 6, female, 4 March 2017, Lusaka.

57 Parent No 17, female, 21 March 2017, Lusaka.

58 Ortiz (n 25 above).

59 B Goss ‘Hearing from the Deaf culture’ (2003) XII-2 *Intercultural Communication Studies* 1 <https://web.uri.edu/iaics/files/03-Blaine-Goss.pdf> (accessed 10 July 2018).

7.4 Research Question 3: What are the perceptions of parents and guardians about communication with Deaf children?

The third question required respondents to give their perceptions about Deaf children. To collect data for this question, respondents were asked to state how Deaf children react when there was a breakdown in communication. They were further asked to indicate 'Yes' or 'No' to whether they perceive Deaf children as short tempered or not. The parents and guardians were also asked how they reacted to communication breakdown with Deaf children. Figure 2 shows frequencies and percentages of the different reactions that they demonstrated:

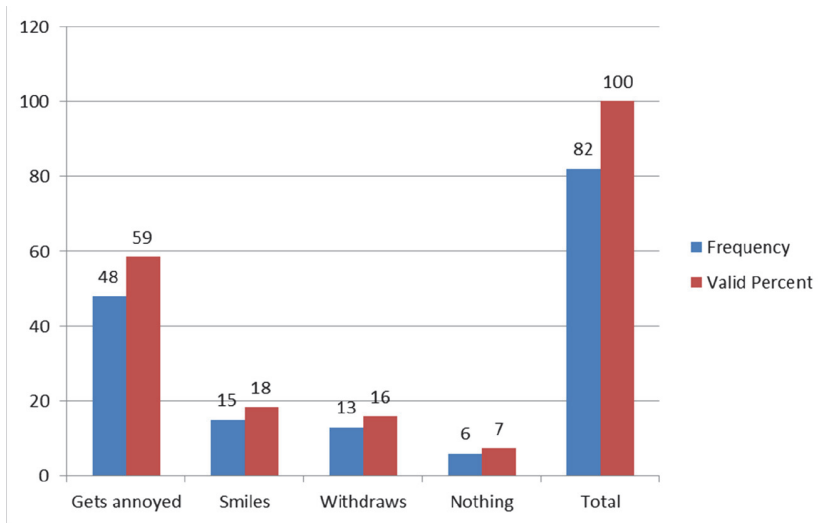


Figure 2: Child reactions when they encounter breakdown in communication with parents

From the results, most parents reported that Deaf children reacted angrily when there was a communication barrier. Other reactions that parents indicated were smiles and withdrawal behaviour. The perception that their children mostly get annoyed leads to negative labels such as 'children who are deaf are short tempered'. Figure 3 shows results to the question on whether parents regarded Deaf children as short tempered or not:

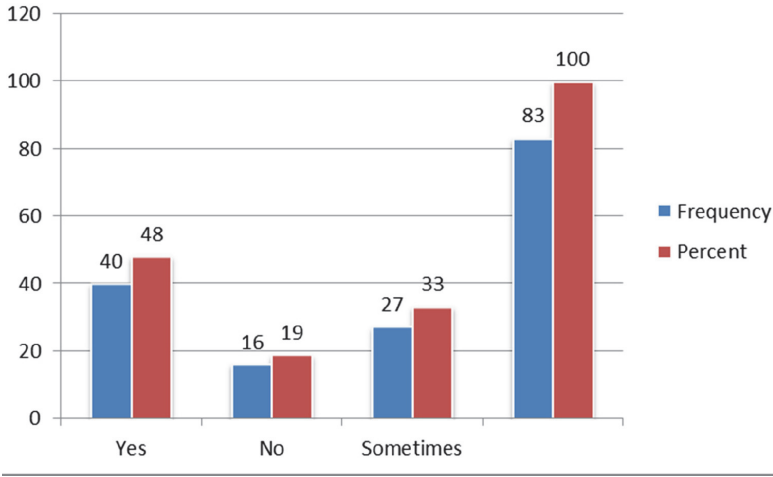


Figure 3: Perceptions of parents on whether Deaf children are short tempered or not

Respondents’ perceptions towards their Deaf children’s temperaments differed. Forty to 48 (40-48 per cent) believe deaf children are short tempered, while 16-19 per cent believe they are not short tempered, and 27-33 per cent believe Deaf children are sometimes short tempered. Based on the results, there seem to be a building perception that Deaf children (40-48 per cent) were generally short tempered.

When parents and guardians were asked about how they reacted to communication breakdown with their Deaf children, various reactions were reported. This is categorised in Figure 4:

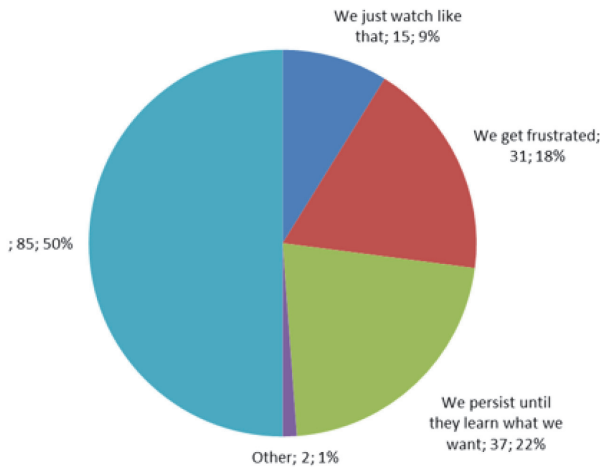


Figure 4: Parents/Guardians reactions when they encounter barriers with Deaf children

Parents mostly reported that they persisted to make Deaf children learn what they wanted them to learn, 37-22 per cent, but they also got frustrated by the failure to have fluent communication with their children, 31-18 per cent. Some parents and guardians gave up when they experienced communication breakdown, thus they just watched, 15 (9 per cent). One parent said, 'I used to get annoyed when the child could not get what I am saying but I am now used, I understand'.⁶⁰

7.5 Research question 4: Do parents and guardians understand the impact of communication barrier on Deaf children's education and development?

When parents and guardians were asked about the impact of communication barrier on the education and general development of Deaf children, results show that parents have some degree of understanding of the impact. Figure 5 shows the frequencies of the responses given by respondents:

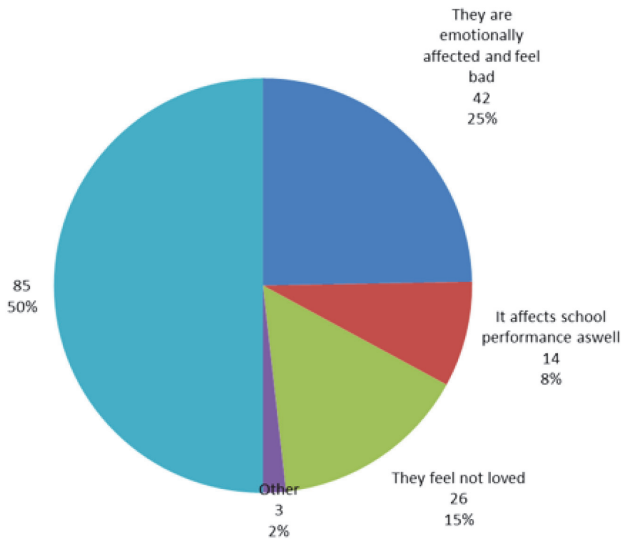


Figure 5: Parent understanding of the impact of communication barriers with Deaf children

From Figure 5, parents and guardians show understanding that Deaf children feel emotionally affected when they encounter communication breakdown, 42-49 per cent. Parents and guardians further understand that the lack of SL also affects school performance of Deaf children and that the

60 Parent No 33, male, 12 March 2017, Central province.

children further felt unloved. The following expressions represent parents' explanations of the impact:

Sometimes I feel guilty, I don't know whether my child thinks I love him or not because sometimes things just remain hanging because of communication barrier, even with school work we can't help properly.⁶¹

Another parent said:

How can they feel loved when you cannot help them with their school work? To me it seems even teachers have problems helping my child because he does not pass most tests and exercises.⁶²

These expressions demonstrate parents' understanding of the impact barrier to communication has on Deaf children. However, it seems they do not have solutions to the problems they face communicating with Deaf children. Thus, they were further asked to state whether they would be willing to learn SL.

7.6 Parents and guardians' willingness to learn SL

Following the question on whether parents and guardians understand the impact of lack of communication on education and general development of Deaf children, they were asked to state and explain whether they would be willing to learn SL. Table 3 shows the results comparing male and female parents and guardians' responses:

Table 3: Parents and Guardians' willingness to learn SL

Characteristic	Category	Yes	%	No	%
Parents willingness to learn SL (P value = .044*)	Male	32	38	5	6
	Female	46	55	1	1
		78	93	6	7

*Significant at .05 alpha level

A significant association was observed in the parents' perceptions towards learning SL. The Chi square results showed ($\chi^2(1, N = 84) = 4.046, p = .044 < .05$). This shows a significant association. Female parents seemed more willing to learn SL when compared to male parents.

61 Parent No 67, female, 15 March 2017, Northern province.

62 Parent No 34, male, 23 March 2017, Southern province.

Another Chi-square test was run to determine whether there was a significant association between the type of relationship parents and guardians had with the Deaf children and the willingness to learn SL.

Table 4: Did relationship matter in choosing to learn SL?

Characteristic	Category	Frequencies of Responses	
		Yes	No
If someone is willing to teach you SL, would you accept	Son	26	1
	Daughter	14	0
	Sister	11	0
	Brother	7	2
	Cousin	9	3
(P value = .050*) Strength at ($\omega = .374$)	Other	6	0

*Significant at .05 alpha level.

The test showed a positive relationship at ($\chi^2(5, N = 79) = 11.054, p = .05 = .050$). The strength of the relationship, however, lies between medium and large at ($\omega = .374$). What the results bring out is that the closer the relationship with the Deaf child, the higher the willingness to learn SL. Thus, parents were more likely to be willing to learn SL than guardians. From the results, there were brothers and cousins that were not willing to learn SL. Respondents that did not want to learn SL gave reasons of being busy at work and that SL was difficult to learn. For instance, one respondent said, 'I am usually busy at work. I rarely have time at home so it's difficult for me I think, unless maybe at weekends'.⁶³ Another respondent said, 'I think SL is just difficult for me to learn'.⁶⁴

However, generally from the results, parents' willingness to learn SL is a positive sign for initiating partnerships and interventions to teach them SL and other skills necessary to facilitate normal development of Deaf children. For instance, one respondent wrote:

I am interested but there is no one to teach so ... there was a time when we started learning SL at our church but that programme just ended, I don't know what happened.⁶⁵

63 Parent No 44, male, 12 February 2017, Lusaka.

64 Parent No 58, male, 14 February 2017, Eastern province.

65 Parent No 28, female, 8 March 2017, Southern province.

Another parent wrote, 'Through having special programmes at work, I can be helped.'⁶⁶

Parents made several suggestions of how best they could learn SL. They suggested having SL clubs, going to school to learn SL, having SL books, television lessons, having evening lessons and attaching a special teacher to homes where there were Deaf children. One of the parents mentioned the use of internet to learn SL.

8 Discussion

The 2010 Census of housing and population in Zambia reports that 9.2 per cent of the population of persons with disabilities are hard of hearing, 2.5 per cent are both deaf and dumb, while another 2.5 per cent are deaf. Overall, 2 per cent of the Zambia's population is disabled.⁶⁷ The 2010 census further reveals that 65.5 per cent of persons with disabilities drop out at primary school level, 24.1 per cent secondary school level, and 8 per cent tertiary level.⁶⁸ The International Labour Organisation reveals that the employment rates for persons with disabilities in Zambia is lower at 45.5 per cent with most them (80 per cent) employed in the agriculture sector.⁶⁹ In this study, demographic data shows that 41-48.3 per cent of Deaf children were kept by their own parents, while 39-45.9 per cent lived with other relations such as sisters, brothers, cousins and others. Of the respondents that answered the question on whether they were in formal or informal employment, only 8-9.4 per cent were in formal employment, 12-14.1 per cent were dependents, 25-29.4 per cent were housewives, and 18-21.2 per cent were in informal employment. In this study, most parents and guardians were not in formal employment. In this study, most Deaf children living with parents and guardians were in grades 1-7 (37-43.5 per cent) while 6-7.1 per cent in 8-9 and 20-23.5 per cent were between grades 10-12. Deaf children out of school accounted for 13-15.3 per cent. Since this study purpose was to investigate factors that inhibit parental participation in the education of the deaf children, most of the demographic data helped to reflect on whether the education system is practically inclusive or not.

The results show that most parents and guardians, regardless of sex were not able to communicate or communicate very well with their Deaf children, namely 33-40 per cent was not able to communicate, while 19-23 per cent said they were not able to communicate very well. Only 31-37 per cent said they were able to communicate well with their Deaf children. By

66 Parent No 66, female, 8 March 2017, Southern province.

67 Central Statistical Office Zambia 2010 Census of population and housing (2012).

68 As above.

69 International Labour Organisation 'Inclusion of People with Disabilities in Zambia: Fact Sheet' (2013).

sex, there were no significant differences between male and female parents and guardians (p value = .626 > .05). The results still show agreement with other studies⁷⁰ reporting that most hearing parents have limited access to SL. Although Featherstone argues that females are more concerned and caring about disability in terms of learning SL, this study found no differences between male and female.⁷¹ Both male and female parents and guardians had difficulties in communicating with Deaf children. However, a positive relationship was established between males and females when they were asked about their willingness to learn SL, with females being more willing than males. Closer relations such as mother, sisters and brothers were more willing to learn SL than distant relations such as cousins and other relations even though the relationship is medium. The challenges of communication in a home have serious repercussions on the overall development of Deaf children. The fact that no differences were observed between male and female may mean that both sexes qualify for outreach services. This study revealed that families of deaf children lack SL communication skills and are therefore limited in communicating with their children who have hearing impairment. Those that were able to communicate still did so, but with difficulties. The strategies parents and guardians used to communicate with their Deaf children such as pointing, writing on the ground and use of a piece of paper were limiting compared to if they learned SL. Early childhood deafness presents unique and long term challenges which include communication to parents.⁷²

The study revealed that parents understand the impact of lack of SL on the general development of their Deaf children. They were able to explain the impact on the emotional development and academic performance. For instance, from the results, parents and guardians felt frustrated when there was a communication barrier with their children. Thus, while Deaf children are affected emotionally by the lack of communication skills of their parents and guardians, the lack of required skills in turn affected the way parents and guardians reacted to the impairment. However, the parents' and guardians' understanding is a positive sign that can help service providers initiate interventions. In this study, parents and guardians seemed to be building up negative perceptions, that Deaf children were generally short tempered. This study revealed that parents reacted with frustration when they encountered communication barriers with their Deaf children. This finding is similar to other studies that report parental frustration when they face communication barriers. For instance, Wood, in a study of the impact of a hearing impairment on family life reports that some parents reported frustration with communication differences and perceived a negative impact of hearing impairment on interaction.⁷³ Family members find it difficult to engage in a conversation

70 Johnson (n 28).

71 Featherstone (n 46).

72 Quittner et al (n 49).

73 C Wood *Impact of deafness on family life* (2004).

with a Deaf child. This failure restricts conversation of issues affecting the family in which a Deaf child is a member.

Frustration resulting from lack of communication also affects the children themselves in that they would struggle to communicate their needs to parents. This study established frustrations on the part of parents who also reported that their children also became frustrated when there was a communication barrier. This is consistent with literature which asserts that children who are not able to communicate their needs or cannot understand instructions from parents are likely to exhibit frustration and parents end up perceiving such children as non-compliant.⁷⁴ Similar to this study, frustrations between children and family compromise a health microsystem in which a child is expected to grow in love and care. It does not help the child developing within a family to be negatively perceived as a trouble maker or a source of trouble because of the impairment the child has. A negative microsystem negatively impacts the child's development. It is not correct to think that all Deaf children are short tempered when they equally have different personality dispositions. In many other cases, the facial expressions deaf children show is likely to be misunderstood as temperamental or as negative reaction to what other family members say. Persons with hearing impairment generally use facial and gestural expressions to drive their point home. If such nature of communication is misunderstood as being temperamental, the children would be deterred from communicating their feelings. This can lead to increased stress and anxiety in Deaf children. The microsystem (family level) should be the first friendly and supportive environment for the child's optimal development.

However, it must be noted that families in the microsystem level also need support from the other levels such as the mesosystem, the exosystem and the macrosystem, levels that Bronfenbrenner propounded as crucial to providing developmental support to the child. For instance, parents need education on the basic needs of Deaf children. This nature of support can be provided by schools and other professionals in the field of audiology. National policies, which are a feature of the macrosystem level, need to be seen to not only exist but to be implemented. Parents need various types of support which include counseling, skills, monetary and expert help trickling from the macro level and helping them to be more positive about nurturing Deaf children. From the focus of this study, the key argument is the need to empower parents with SL skills in order to enable good communication between parents and Deaf children. The lack of SL prohibits fluent engagement in discussions and interaction with other people. Quality of communication is an important contributor to the

74 TM Gallagher *Interrelationships among children's language, behavior, and emotional problems: Topics in Language Disorders* (1999).

child's behavioural problems.⁷⁵ A study of depression and Deaf adolescents by Rostami, Bahmani, Bakhtyari and Movallali reported mild levels of depressive symptoms being more prevalent among Deaf students.⁷⁶ It has further been argued that communication difficulties among the Deaf increase symptoms of depression and this is related to developmental delays associated with early communication deprivation.⁷⁷ Communication barriers and low ability to express demands and needs can lead to giving up interest in activities, which places one at risk of mental health problems such as depression.⁷⁸ Further research shows that children from families with poor communication are likely to show withdrawal behaviours and aggressive or impulsive actions.⁷⁹ On the contrary, a study on social interactions between Deaf and hearing people revealed that Deaf people were less aggressive than hearing people and the study results did not support the hypothesis that hearing people's responses would reflect negative attitudes and beliefs about Deaf people.⁸⁰ Holding negative beliefs that Deaf people are short tempered or highly temperamental is too generalising and as such can lead to negative stereotyping. Negative stereotyping has a detrimental impact on positive self-image.⁸¹

Optimal child development may not be fully achieved in the absence of effective interaction and communication within and outside the family.⁸² Children, whether they have disabilities or not need a sense of belonging, love and care which language and effective communication offers. Where a barrier exists in communication, the child's expectations may not be met and that creates incongruence with emotional development expectations. The inability to use SL by parents does not only hinder emotional and social development, but may also affect academic performance as certain scholars such as Babudoh and the Ministry of General Education in Zambia have alluded to.⁸³ Research by Babudoh has shown that dropout rate among Deaf children is mainly related to parents' lack of SL skills.⁸⁴ Parents are supposed to be active participants in helping children with school work. However, with language limitations, they are at a disadvantage in helping their children in homework and reading

75 PL Runcan, C Constantineanu & BD Popa 'The role of communication in the parent-child interaction' (2012) 46 *Procedia - Social and Behavioral Sciences* 904.

76 M Rostami et al 'Depression and deaf adolescents: A review' (2014) 12 *Iranian Rehabilitation Journal* 43.

77 As above.

78 Spencer, Erting & Marscharck (n 24).

79 As above.

80 Hankins (n 50).

81 KK Muzata 'Terminological abuse versus inclusion: An analysis of selected terms used to describe persons with disabilities in Luvala' (2019) 3 *Journal of Lexicography and Terminology* 1.

82 UNICEF *Communicating with children: Principles and practices to nurture, inspire, excite, educate and heal* (2011) [https://www.unicef.org/cwc/files/CwC_Final_Nov-2011\(1\).pdf](https://www.unicef.org/cwc/files/CwC_Final_Nov-2011(1).pdf) (accessed 24 October 2020).

83 Ministry of Education (n 19).

84 Babudoh (n 44).

programmes, among other academic tasks that require parental help or guidance.

The results of this study further question the realisation of inclusive education in Zambia. The child's rights to belong to the family become so limited that the child may feel he or she is not loved and cared for within the family. In the debate to embrace the concept of inclusive education, full inclusion is only possible when all support systems for child development and education are put in place. As it is now, Deaf children don't seem to benefit much from the practice of inclusive education because they are excluded right from their homes. Overly, if inclusive education is to be realised, families should be involved in programmes that help them to be part of their children's education. Article 7(3) of the CRPD emphasises that parties that are signatories to the Convention should ensure that children with disabilities are accorded their right to freely express themselves in the best interests of the child and ensure equality with other children to be able to express themselves on matters affecting them.⁸⁵ However, as it is, the results of this study show that children who are Deaf find it difficult to exercise their right. Further, their families are also incapacitated in the ability to communicate with their own children. It's not the child's fault that they cannot hear and speak and therefore efforts need to be made to ensure that children are able to communicate their needs and interact with their families, peers and teachers if the right to inclusive education is to be realised.

One of the ways to ensure that the right of children who are Deaf to belong to their family is realised is to empower parents with communication abilities in SL. This study reveals that parents' zeal to effectively communicate with Deaf children was hindered by lack of SL skills. The lack of communication abilities can be a barrier to the realisation of inclusive education and an inclusive society in general. We cannot boast about practicing inclusive education in the absence of empowering parents who are key stakeholders in the education and development of their children. Inclusive education in any case should start from the family, the place where the child develops before he or she goes into the wider community and eventually school. While article 24 of the CRPD guides parties to provide access to inclusive and lifelong learning from primary to tertiary level, it further emphasises that parties should facilitate modes of communication, provide reasonable accommodation and training of professionals to teach persons with disabilities effectively.⁸⁶ The inclusive agenda for persons with disabilities and especially persons with hearing impairment cannot be easily realised when some key

85 United Nations Convention on the Rights of Persons with Disabilities (2006) https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf (accessed 24 October 2020).

86 Arts 7 & 24, CRPD.

stakeholders such as parents are not empowered to participate in the education of their children.

9 Conclusion and recommendations

This study interrogated the participation of parents and guardians in the education and general development of their children who are Deaf. The results showed that parents and guardians did not participate fully in the education and general development of their Deaf children because of limitations in SL. Parents faced challenges in communicating with their Deaf children because they did not know SL. No significant differences were observed between male and female parents and guardians in relation to knowing SL, thereby disapproving the hypothesis that female parents and guardians communicated with Deaf children in SL better than their male counterparts. Further, the results showed that the closer the relationship with the deaf child, the higher the willingness to learn SL, showing that parents and closer siblings were more willing to learn SL than guardians. However, the willingness was inhibited by lack of support from experts to teach them SL so that they communicate well with their children.

There is no doubt that a lack of communication can affect early childhood development and perhaps the rest of a child's life. This study therefore illuminates the need to empower parents of deaf children with SL skills to enable them to participate actively and effectively in the education and development of their children. Although, there is a dearth of studies on the relationship between parents' knowledge of SL and academic performance as well as general development, literature appears to point to this fact. This study however, opens gaps for further research in the area of parenting children who are Deaf in Zambia. Participation in the education of their children can best be facilitated when parents are supported to learn SL. In Zambia, just like it may be in other third world countries, SL seems to have been neglected.⁸⁷

The situation may not have changed much to date since current literature shows that teachers in schools still face challenges in teaching learners with hearing impairment due to limitations in SL.⁸⁸ Although attempts have been made to develop Zambian SL,⁸⁹ teachers in schools still struggle with limited SL vocabulary.⁹⁰ If such challenges exist among

87 VM Chanda 'Lexicography and Sign Language engineering: The Zambian experience' (1997) 7 *Lexikos* 192 <http://lexikos.journals.ac.za> (accessed 10 December 2020).

88 M Mulonda 'A situational analysis on the use of Sign Language in the education of the deaf in Zambia: A case of Magwero and St Joseph schools for the deaf' Unpublished Master's thesis, University of Zambia, 2013.

89 Chanda (n 87).

90 Mulonda (n 88).

teachers that are expected to teach learners who are Deaf, the situation is most likely to be worse with parents because they are not exposed to SL. Parental participation in the education of their children can be inhibited by a language barrier. Based on the results of this study, the Ministry of General Education in Zambia through schools should develop a deliberate policy to provide SL lessons to parents of Deaf children. This is possible through home visit SL lessons at agreed times or by organising evening classes. This kind of initiative means using the already available specialised human resources in schools (specialised teachers). Another strategy would be to identify parents with Deaf children and invite them to attend SL classes at schools. SL videos or CDs should be developed and distributed to parents to be able to learn SL on home television. The use of videos and social platforms to learn SL can also be used in the Zambian context if parents are given support to meet internet costs. Non-Governmental Organisations, the church and other disability interested groups can help to train families of Deaf children in SL. By providing support to parents through SL lessons, the realisation of the inclusion would be achieved. Further, the attainment of the Sustainable Development Goal (SDG) number 4 on inclusiveness and lifelong learning by 2030 may be realised as Deaf children will get more involved in education.

THE LINK BETWEEN THE RIGHT TO LIVE INDEPENDENTLY AND TO BE INCLUDED IN THE COMMUNITY FOR PERSONS WITH PSYCHOSOCIAL DISABILITY, AND THE RIGHT TO WORK AND EMPLOYMENT: A CRITICAL ANALYSIS OF KENYAN LAW

Shirley Genga*

Summary

The right to live independently and to be included in the community is especially important for persons with psychosocial disabilities as they often find themselves isolated from the community. This paper will delve into what the right to live independently in the community means for persons with psychosocial disabilities. Specifically, it will discuss the link between the right to work and employment, and the right to live independently and in the community. In fact, it will make the argument that if the Kenyan legal framework does not adequately protect the right of persons with psychosocial disabilities to work and employment, then it has failed to protect the right of persons with disability to live independently and to be included in the community. In order to make a determination, this paper will engage in a critical analysis of the Kenyan legal framework on the right to work.

1 Introduction

The history of persons with disability across the world has been one of segregation, isolation and exclusion from full participation in society.¹ They have been locked in institutions or in their homes, banned by laws or

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1 M Berghs et al 'Do disabled people need a stronger social model: A social model of human rights?' (2019) 34 *Disability & Society* 1034; CRPD Committee General Comment 5: Article 19: Living independently and being included in the community (2017) UN Doc CRPD/C/GC/5 dated 27 October 2017 para 1.

S Genga 'The link between the right to live independently and to be included in the community for persons with psychosocial disability, and the right to work and employment: A critical analysis of Kenyan law' (2020) 8 *African Disability Rights Yearbook* 101-123
<http://doi.org/10.29053/2413-7138/2020/v8a5>

culture from going out, and routinely denied full citizenship.² Basically, persons with disability are denied from taking part in community life.³

The effects of institutionalisation and exclusion have been devastating, not just on persons with disability, but also to their families and communities.⁴ Persons with disability have not only become increasingly invisible to society,⁵ but social exclusion perpetuates dependency and thus interference with individual freedoms.⁶ This has resulted in persons with disability being denied their personal and individual choice and control across all areas of their lives. In fact, many have been presumed to be unable to live independently in their self-chosen communities.⁷

Worth noting, is that psychosocial disabilities are regarded as one of the most stigmatised of all disabilities,⁸ and thus the segregation and isolation they experience is magnified.⁹ This paper will use the term psychosocial disabilities to refer to both common and severe mental illness.¹⁰ In fact, persons with psychosocial disabilities are amongst the

- 2 L Mladenova 'The right to live independently and be included in the community: Addressing barriers to independent living across the globe' *European Network on Independent Living* (2017) http://enil.eu/wp-content/uploads/2017/06/The-right-to-live-independently_FINAL.pdf (accessed 10 March 2020); E Kamundia 'Choice, support and inclusion: Implementing article 19 of the Convention on the Rights of Persons with Disabilities in Kenya' (2013) 1 *African Disability Rights Yearbook* 54.
- 3 Mladenova (n 2) 8; E Kamundia (n 2) 54.
- 4 P Gooding 'The right to independent living and being included in the community: Lessons from the United Nations' (2018) 24 *International Journal of Mental Health and Capacity* 32; Kamundia (n 2).
- 5 As above.
- 6 CRPD Committee (n 1) para 5.
- 7 CRPD Committee (n 1) para 1.
- 8 DJ Viviers 'Mental health and the world of work: A comparative analysis of the legal frameworks governing categories of mental health conditions' PhD thesis, University of the Free State, 2016 at 22.
- 9 Viviers (n 8); M Swanepoel 'Human rights that influence the mentally ill patient in South African medical law: A discussion of sections 9; 27; 30 and 31 of the Constitution' (2011) 14 *Potchefstroom Electronic Law Journal* 126.
- 10 See W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510, provides that: the CRPD's reference to 'mental' impairment in art 1, includes persons with psychosocial disabilities. The preferred terminology is 'persons with psychosocial disabilities' instead of persons with mental disability. This is in line with the social model of disability and the recognition that disability is an evolving concept (Preamble para (e) of the CRPD). Psychosocial disabilities include mood disorders (such as depression and bipolar disorder), anxiety disorders and psychotic disorders (such as schizophrenia and some forms of bipolar disorder); K Vornholt et al 'Disability and employment – Overview and highlights' (2018) 27 *European Journal of Work and Organizational Psychology* 40 at 41 defines psychosocial disabilities to include both common mental disorders, which include adjustment, mood, and anxiety disorders, and severe mental disorders such as schizophrenia or bipolar disorders; C Harvey et al 'People living with psychosocial disability: Rehabilitation and recovery-informed service provision within the second Australian national survey of psychosis' (2016) 50 *Australian & New Zealand Journal of Psychiatry* 534 at 535 points out that the term psychosocial disability is also preferred over psychiatric disability because it emphasises the social consequences of disability, while psychiatric disability focusses on impairment.

most disadvantaged within the disability movement.¹¹ They experience severe social challenges and continue to be subjected to human rights violations worldwide.¹² Their rights to participate and contribute meaningfully in political, legal, social, clinical and personal decisions which impact their own lives have been violated.¹³

The experiences of discrimination, mistreatment, intolerance and exclusion of persons with psychosocial disability are disturbing.¹⁴ This has been facilitated by prejudicial and misguided beliefs that persons with psychosocial disability, unlike say physical disabilities, lack the capacity to make rational and informed decisions.¹⁵ Further, because people with psychosocial disabilities do not have access to the basic mental healthcare, support and social services that they may require, they eventually become isolated from the community.¹⁶ Accordingly, this isolation and segregation is not just experienced within the community, but even outside and touches every area of the lives of person with psychosocial disabilities, from their right to education, to the right to equal recognition before the law, and even the right to work and employment, just to name a few. For example, persons with psychosocial disabilities experience high rates of unemployment.¹⁷ Persons with psychosocial disabilities continue to experience challenges not just in accessing, but also in maintaining employment.¹⁸ This is particularly alarming because of the high prevalence of psychosocial disabilities worldwide.¹⁹ Yet, the right to work and employment not only reduces poverty, but enables people to become independent, self-sustaining, and to be able to participate equally in society.²⁰ This is the reason that article 19 is so important.²¹ In fact, it was the resistance to this type of harm caused by isolation and segregation which led to the development of the right of all persons with disabilities to

11 K Wheat et al 'Mental illness and the workplace: conceal or reveal?' (2010) 103 *Journal of the Royal Society of medicine* 83.

12 SJ Hoffman, L Sriharan & A Tejpar 'Is the UN Convention on the Rights of Persons with Disabilities impacting mental health laws and policies in high-income countries? A case study of implementation in Canada' (2016) 16 *BMC International Health and Human Rights* 2.

13 S Kleintjes, C Lund & L Swartz 'Barriers to the participation of people with psychosocial disability in mental health policy development in South Africa: A qualitative study of perspectives of policy makers, professionals, religious leaders and academics' (2013) 13 *BMC International Health and Human Rights* 1.

14 Hoffman, Sriharan & Tejpar (n 12).

15 Kleintjes, Lund & Swartz (n 13).

16 As above.

17 DR Becker et al 'Job terminations among persons with severe mental illness participating in supported employment' (1998) 34 *Community Mental Health Journal* 71 at 72.

18 ID Ebuanyi et al 'Employability of persons with mental disability: Understanding lived experiences in Kenya' (2019) 10 *Frontiers in psychiatry* 1 at 10.

19 As above.

20 Judge DL Bazelon (Centre for Mental Health Law) 'Getting to work: Promoting employment of people with mental illness' (September 2014) <http://www.bazelon.org/wp-content/uploads/2017/01/Getting-to-Work.pdf> (accessed 21 March 2020) 3.

21 Mladenova (n 2) 8.

live in the community, with choices equal to others in article 19 of the Convention on the Rights of Persons with Disabilities (CRPD).²²

Currently, there is no accurate data and information on the prevalence of psychosocial disabilities in Kenya.²³ What is available is the 2019 Kenyan Census which adopted the Washington Group short set of questions on disability in order to collect data on the prevalence of disability in Kenya.²⁴ Nonetheless, one limitation of the short set of questions is that they fail to capture psychosocial disabilities as a disability category. As a result, it is difficult to tell the specific numbers of persons with psychosocial disabilities in Kenya from the data collected. The WHO provides some incite, it provides that mental, neurological and substance use disorders are common and affect more than 25 per cent of all people at some point during their lifetime.²⁵ Furthermore, few studies currently exist that explore the employment of persons with psychosocial disabilities in Kenya.²⁶ It is for this reason that this paper will analyse the legal framework in Kenya that protects the right to work and employment²⁷ and investigate its link to the right to living independently and being included in the community. It will firstly discuss the state of persons with psychosocial disabilities in Kenya. Then, it will delve into the meaning of independent living and what constitutes living in the community as provided by the CRPD, and further, look at how it applies to persons with psychosocial disabilities. Additionally, it will investigate how the right to live independently and, in the community, article 19 of the CRPD, and the right to work and employment, article 27 of the CRPD, are connected. Lastly, it will engage in a critical review of Kenyan legislation that regulates the right to work and employment for persons with psychosocial disabilities and identify whether it is in compliance with article 27. This will be done in order to identify whether the Kenyan legal framework is in compliance with article 19. Specifically, the argument the paper makes is that in failing to adequately protect the right to work and employment for persons with psychosocial disabilities, Kenya has failed to enable persons

22 Gooding (n 4) 32.

23 Ebuanyi et al (n 18) 2.

24 Devinit.org 'Status of disability in Kenya: Statistics from the 2019 census' (6 May 2020) <https://devinit.org/resources/status-disability-kenya-statistics-2019-census/#downloads> (accessed 3 October 2020).

25 Fact Sheet: The World Health Report 'Mental and neurological disorders' (2001) https://www.who.int/whr/2001/media_centre/en/whr01_fact_sheet1_en.pdf?ua=1 (accessed 3 October 2020) in The Kenya Mental Health Policy 2015-2030 (August 2015) <http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf> (accessed 3 October 2020).

26 As above.

27 Kenya is a signatory of African Charter on Human and Peoples' Rights and as a result domesticated article 15 on the right to work and employment in the Employment Act which defines the fundamental rights of employees. See African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' <https://www.achpr.org/ratificationtable?id=49> (accessed 3 October 2020)

with psychosocial disabilities to live independently and to be included in the community as provided in article 19.

2 Persons with psychosocial disability and employment in Kenya

Persons with psychosocial disabilities are only often institutionalised against their will,²⁸ but they face the greatest threat of institutionalisation in Kenya²⁹

It is important to note that there are different types of institutions, they vary in size, name and setup the world over.³⁰ The defining elements of institutionalisation include:

[O]bligatory sharing of assistance with others and no or limited influence over by whom one has to accept assistance, isolation and segregation from independent life within the community, lack of control over day-to-day decisions, lack of choice over whom to live with, rigidity of routine irrespective of personal will and preferences, identical activities in the same place for a group of persons under a certain authority, a paternalistic approach in service provision, supervision of living arrangements and usually also a disproportion in the number of persons with disabilities living in the same environment³¹

Institutionalisation is basically a place where people who have been labelled as persons with disabilities are isolated and segregated from life in the community.³² Notably, the institutionalisation and exclusion of persons with disabilities has been shown to cause immense harm to individuals, families and communities.³³ For example, apart from preventing persons with psychosocial disabilities from full participation in society, institutionalisation also increases the risk of exploitation, violence, neglect and abuse.³⁴ In Kenya, Mathare Hospital, the biggest psychiatric

28 Kamundia (n 2) 55.

29 Kenya National Commission on Human Rights 'Silenced minds: The systematic neglect of the mental health system in Kenya: A human rights audit of the mental health system in Kenya' (November 2011) http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf (accessed 20 March 2020) 38; Kamundia (n 2).

30 CRPD Committee (n 1) para 16.

31 As above.

32 Kamundia (n 2) 55.

33 Gooding (n 4) 32.

34 Council of Europe Commissioner for Human Rights 'Issue paper: The right of people with disabilities to live independently and be included in the community' (2011) <https://rm.coe.int/the-right-of-people-with-disabilities-to-live-independently-and-be-inc/16806da8a9> (accessed 10 March 2020) 12; Kamundia (n 2) 55.

hospital, and where persons with psychosocial disabilities are sometimes institutionalised, has often been accused of neglect and abuse.³⁵

Additionally, apart from institutionalisation, the rights of persons with psychosocial disability can also be infringed within the community, and specifically by family members.³⁶ In Kenya this occurs where persons with psychosocial disabilities are isolated by their family members within the family home.³⁷ This is often perpetuated by the prevalence of prejudice and stigma, lack of knowledge or understanding of psychosocial disabilities, and further, the state's failure to provide individualised support services.³⁸ As a result, the majority of persons with psychosocial disabilities, although they may not be institutionalised, continue to live isolated lives within their communities.

As a consequence, the isolation and segregation experienced by persons with psychosocial disabilities within the community is reflected in the rate of employment of persons with psychosocial disabilities. According to an International Labour Organisation report, disabled people in Kenya live in poverty, have limited opportunities for accessing everything from education, to employment opportunities.³⁹ Nonetheless, few studies currently exist that explore the employment of persons with psychosocial disabilities in Kenya.⁴⁰ What is available does not provide an accurate picture. A report by the Kenyan National Human Rights Commission states that only 3 per cent of persons with disabilities were employed by the government instead of the stipulated 5 per cent.⁴¹ Another report by the UN Committee on the Rights of Persons with Disabilities, provides that the employment rate amongst persons with disabilities is about 1 per cent.⁴² Both reports highlight the fact that employment of persons with disability is particularly low in Kenya. Further, that within the general low rate of employment of persons with disability, the rate of employment for persons of psychosocial disabilities

- 35 V Okeyo 'Report reveals huge toll of neglect at Mathari Hospital' *Nairobi News* 12 December 2018; D McKenzie 'Rights groups accuse Kenya of patient abuse' 3 March 2011 <http://edition.cnn.com/2011/WORLD/africa/03/02/kenya.health/index.html> (accessed 5 March 2020), D McKenzie, 'Kenya's mentally ill locked up and forgotten' 25 February 2011 <http://edition.cnn.com/2011/WORLD/africa/02/25/kenya.forgotten.health/index.html> (accessed 5 March 2020).
- 36 Kamundia (n 2) 71; Council of Europe Commissioner for Human Rights (n 34) 39.
- 37 Kamundia (n 2) 71.
- 38 Kamundia (n 20) 71; Council of Europe Commissioner for Human Rights (n 34) 12 and 39.
- 39 ILO 'Inclusion of people with disabilities in Kenya' (2009) https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_115097.pdf (accessed 6 July 2020).
- 40 As above.
- 41 Kenyan National Human Rights Commission 'Compendium on submissions to CRPD' (2016) http://rodra.co.za/images/countries/kenya/concluding_observations/KNCHR%20Compendium%20CRPD%20REPORT%20A4.pdf (accessed 14 October 2020).
- 42 Concluding Observations in relation to the initial report of Kenya, CRPD (4 September 2015) UN Doc CRPD/C/KEN/CO/1 (2015) <https://www.refworld.org/docid/55eed6bc3.html> (accessed 3 October 2020).

is often lower not just in Kenya, but globally.⁴³ This is because employers often prefer employing persons with physical disabilities over persons with psychosocial disabilities when it comes to meeting employment equity targets.⁴⁴ In fact a recent study done in Kenya found that mental illness was the highest self-reported barrier to employment opportunities.⁴⁵

Furthermore, persons with psychosocial disabilities do not only struggle to access employment, but to maintain said employment.⁴⁶ This is driven by misconceptions about the capacity of persons with psychosocial disabilities to make rational and informed decisions,⁴⁷ which has further led to misguided assumptions about the abilities and performance of persons with psychosocial disabilities in work or employment.⁴⁸ So much so, that 'studies suggest a two-way relationship between psychosocial disabilities and poverty and show how they reinforce each other'.⁴⁹ Yet, employment for persons with psychosocial disabilities not only plays a critical role in promoting recovery,⁵⁰ but promotes social acceptance and integration into the community, and gives individuals a sense of purpose, self-esteem, and self-worth.⁵¹ In addition, work also reduces poverty and dependence, enabling people to become independent and self-sustaining, and as a result to have more choices and control over their lives, and to live independently.⁵² Indeed, the Kenyan Labour Court in the case of *Patrick Njuguna Kariuki v Del Monte (K) Limited*,⁵³ held that every moment of time that an employee works inherently generates satisfaction and the employee's self-esteem which is a necessary component to the employee's human dignity beyond mere pay for the employee's work.

43 ID Ebuenyi et al 'Expectations management: Employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42 *Disability and Rehabilitation* 1687; Ebuenyi et al (n 18) 2.

44 Holness (n 10) 511.

45 Ebuenyi (n 18) 10.

46 Becker et al (n 17); ASM Chan, HWH Tsang & SMY Li 'Case report of integrated supported employment for a person with severe mental illness' (2009) 63 *The American Journal of Occupational Therapy* 238.

47 Kleintjes, Lund & Swartz (n 13).

48 Holness (n 10) 510 and 511.

49 Ebuenyi et al (n 45) 10.

50 Judge Bazelon (n 20) 3; R King et al 'Enhancing employment services for people with severe mental illness: The challenge of the Australian service environment' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 471 at 472.

51 As above.

52 As above.

53 [2012] eKLR, Cause 953 of 2011.

2.1 Article 19 of the CRPD

The CRPD was adopted in 2006⁵⁴ and came into force on 3 May 2008.⁵⁵ It was the first UN convention of this millennium⁵⁶ and Kenya ratified the CRPD on 19 May 2008.⁵⁷ By virtue of article 2(6) of the Constitution,⁵⁸ the CRPD forms part of the laws of Kenya.⁵⁹ The Constitution states that: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.⁶⁰ Undoubtedly, the Convention represents a paradigm shift in the way disability is viewed as it adopts the social model of disability.⁶¹ It highlights the role of attitudinal, societal and environmental barriers in hindering disabled persons' full and effective participation in society on an equal basis with others.⁶² Prior to the CRPD the existing UN human rights treaties proved to be insufficient in challenging national laws that excluded the rights of persons with disabilities.⁶³ Nevertheless, the purpose of the CRPD was not to create new rights, but to bring clarity on how the existing human rights law relates specifically to persons with disabilities.⁶⁴

Furthermore, prior to the CRPD, no other human rights instrument contained explicit rights for persons with disability to live independently and in the community as equal citizens.⁶⁵ The CRPD is the first legally binding human rights treaty to recognise the right of persons with disability to live independently and be included in the community as equal citizens in article 19.⁶⁶ However, it is not a new right.⁶⁷ Indeed, the right stems

54 United Nations Department of Economic and Social Affairs Disability 'Convention on the Rights of Persons with Disabilities (CRPD)' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 15 October).

55 As above.

56 United Nations Department of Economic and Social Affairs Disability (n 54).

57 Office of the High Commissioner for Human Rights 'Ratification status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=en (accessed 28 March 2020).

58 Kenyan Constitution, 2010.

59 Mental Disability Advocacy Centre 'The right to legal capacity in Kenya' (March 2014) mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2apr2014.pdf (accessed 20 March 2019) 15.

60 Art 2(6) of the Constitution.

61 Kamundia (n 2 above) 50; Mladenova (n 2 above) 8.

62 As above.

63 C O'Mahony 'Legal capacity and detention: Implications of the UN Disability Convention for the inspection standards of human rights monitoring bodies' (2012) 16 *The International Journal of Human Rights* 883 at 885.

64 O'Mahony (n 63); and T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35.

65 Mladenova (n 2) 7 and 8; I Bulić & C Parker (eds) 'Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities' *The European Coalition for Community Living* (2009) <http://community-living.info/wp-content/uploads/2014/02/ECCL-Focus-Report-2009-final-WEB.pdf> (accessed 10 March 2020) 3.

66 Mladenova (n 2) 7; I Bulić & C Parker (n 65) 3.

67 The European Network on Independent Living (ENIL) 'ENIL's contribution to the consultation on the draft Council of Europe Disability Strategy 2017-2023' (23 May 2016) http://enil.eu/wp-content/uploads/2016/05/ENILSubmissionCoE_230516.pdf (accessed 9 March) 5.

from human rights standards within the United Nations system.⁶⁸ Particularly, the overarching objective of article 19 of the CRPD is full inclusion and participation in society for persons with disability.⁶⁹ Its three key elements are: choice;⁷⁰ support services;⁷¹ and community services.⁷²

It has especially been argued that the purpose of the right is to neutralise the devastating effects of isolation and loss of control over one's life as a result of a society that is not accessible to persons with disability;⁷³ a society that has been rendered inaccessible because of barriers (attitudinal and environmental) to community services, and further no support services designed specifically for persons with disability.⁷⁴ The solution is therefore in removing the barriers in the society, and also providing access to support services to facilitate independence and participation in the community.⁷⁵

Living independently for persons with disabilities is defined as: '[being] provided with all necessary means enabling them to exercise choice and control over their lives and make all decisions concerning their lives ...'⁷⁶ It is all about persons with disability demanding the same choices and control in their every-day lives as non-disabled persons have.⁷⁷ Independent living stresses the importance of personal autonomy and self-determination as fundamental to independent living.⁷⁸ In addition, it does not mean that persons with disability have to be independent in the sense of living a highly individual and self-sufficient life; or that that persons with

68 Council of Europe Commissioner for Human Rights (n 34) 9; art 19 has its roots in civil and political as well as economic, social and cultural rights: The right to liberty of movement and freedom to choose one's residence (art 12 of the International Covenant on Civil and Political Rights); and the right to an adequate standard of living, including adequate clothing, food and housing (art 11 of the International Covenant on Economic, Social and Cultural Rights) and to basic communication rights form the basis for the right to live independently and be included in the community. Liberty of movement, an adequate standard of living as well as the ability to understand and have one's preferences, choices and decisions understood, form indispensable conditions for human dignity and the free development of a person, see CRPD Committee (n 1) para 8.

69 Council of Europe Commissioner for Human Rights (n 34) 5.

70 Art 19(a) CRPD.

71 Art 19(b) CRPD.

72 Art 19(c) CRPD.

73 Council of Europe Commissioner for Human Rights (n 34) 11.

74 As above.

75 As above.

76 CRPD Committee (n 1 above) para 16.

77 R Townsley et al 'The Implementation of Policies Supporting Independent Living for Disabled People in Europe: Synthesis Report' (November 2009, amended January 2010) https://www.academia.edu/24375031/The_Implementation_of_Policies_Supporting_Independent_Living_for_Disabled_People_in_Europe_Synthesis_Report (accessed 2 March 2020) 8. White Paper on the Rights of Persons with Disabilities (Approved by Cabinet on 9 December 2015) https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf(70) (accessed 2 March 2020).

78 CRPD Committee (n 1) para 16(a).

disability should be allowed to live alone or have the ability to carry out daily activities.⁷⁹

In addition, living independently does not mean living at a distance from other people.⁸⁰ In fact, living independently varies depending on individual situation. For some people, it may mean moving away from their family, while for others it means living with their family.⁸¹ What is significant is that the disabled person should have the choice to decide where to stay.⁸² Additionally, living independently does not mean living without support from the state. Indeed, it means that persons with disability should have access to adequate state support to enable inclusion.⁸³ However, choice and control over the support is an essential pre-condition for independent living.⁸⁴ In short, independent living for persons with psychosocial disabilities means having choice and control over their decisions, and having access to support services (including personal assistance) offered by the state.⁸⁵

Then, the right to be included in the community means that persons with disability are able to live in their local communities as equal citizens, with the support that they need to participate in every-day life including everything from cultural life in the community, public meetings, sports events, cultural and religious festivals and any other activity in which the person with disability wishes to participate.⁸⁶ It is basically being fully included and participating in all spheres of social life,⁸⁷ namely where persons with disabilities are not only able to live in the community, but are also given the opportunity to participate and contribute.

A key precondition for the right to live independently and be included in the community is the availability of mainstream services and facilities and support to access these services and facilities.⁸⁸ Significantly, for many persons with psychosocial disabilities it is not enough to provide mainstream services and facilities alone,⁸⁹ access to a range of individualised support services is an important precondition to enable them to live independently and within the community.⁹⁰ In fact, the right

79 CRPD Committee (n 1) para 16(a); Council of Europe Commissioner for Human Rights (n 34) 16.

80 Townsley et al (n 77) 8; Council of Europe Commissioner for Human Rights (n 34)16; Mladenova (n 2) 9.

81 Mladenova (n 2) 9.

82 As above.

83 As above.

84 As above.

85 Townsley et al (n 77) 8.

86 CRPD Committee (n 1) para 16(b).

87 As above.

88 CRPD Committee (n 1) para 19 (b); Mladenova (n 2) 9.

89 Including housing, transport, education, employment and training, recreational activities and all other facilities and services offered to the public, including social media, CRPD Committee (n 1) para 28.

90 CRPD Committee (n 1) para 28.

to live independently and be included in the community may be compromised where support services are not provided.⁹¹ Notably, support services are of two types: community support services⁹² and individualised support systems.⁹³ Furthermore, in the spirit of article 19 even where support services are provided, persons with disability should still retain choice and control.⁹⁴ This is to ensure that persons with disability despite requiring support still maintain the same choice, control and freedom as any other citizen.⁹⁵ Hence, article 19 is violated when the support services required by persons with disability are not provided or if when provided, are done in a manner that takes away control and choice from persons with psychosocial disabilities.⁹⁶ Lastly, It is also important to note that, support services should not only be limited to services inside the home, but should be extended to other areas of a person's life including everything from education to employment.⁹⁷

2.2 The link between the right to work and the right to live independently and be included in the community

Article 19 unlike the other articles found in the CRPD plays a distinct role of being one of the widest ranging and most intersectional articles.⁹⁸ It is in fact a great example of the interdependence and indivisibility of all human rights.⁹⁹ This is because it is interrelated with the enjoyment of other human rights provided for in the CRPD¹⁰⁰ and, as a result, is considered as integral and central for the implementation of the Convention across all articles.¹⁰¹ It is interrelated to both civil and political

91 Council of Europe Commissioner for Human Rights (n 34) 18.

92 C Brennan et al 'How can states ensure access to personal assistance when service delivery is decentralised? A multi-level analysis of Iceland, Norway and Sweden' (2017) 19 *Scandinavian Journal of Disability Research* 334; CRPD Committee (n 1) para 28 and 19(b) provides that: Community support services' are services, based in the community, that support 'living and inclusion in the community' and 'prevent isolation and segregation from the community'. However, this term is commonly used incorrectly to refer to services that are physically located in the community, but are not necessarily inclusive; for example, group homes, sheltered workshops and day-care centres. Often, such services perpetuate segregation and exclusion from the community, because they maintain a parallel system for disabled people, away from the mainstream.

93 CRPD Committee (n 1) para 19(b) states that: 'Individualised support services may vary in name, type or kind according to the cultural, economic and geographic specifics of the State party, all support services must be designed to be supporting living included within the community preventing isolation and segregation from others within the community and must in actuality be suitable to this purpose. It is important that the aim of these support services is the realisation of full inclusion within the community'. See more General Comment No 5 para 28, 29 and 30; and Brennan et al (n 94) 334.

94 CRPD Committee (n 1) para 31.

95 As above.

96 Council of Europe Commissioner for Human Rights (n 34) 5.

97 CRPD Committee (n 1) para 28.

98 CRPD Committee (n 1) para 69; European Coalition for Community Living 'Focus on article 19 of the UN Convention on the Rights of Persons with Disabilities' Focus Report (2009) <http://community-living.info/wp-content/uploads/2014/02/ECCL-Focus-Report-2009-final-WEB.pdf> (accessed 30 March 2020) 7.

99 CRPD Committee (n 1) para 28.

100 As above.

as well as economic, social and cultural rights.¹⁰² These rights include: consultations with and active involvement of persons with disabilities (article 4(3); non-discrimination (article 5); awareness-raising (article 8); accessibility (article 9); equal recognition before the law (article 12); access to justice (article 13); inclusive education (article 24); health (article 25); habilitation and rehabilitation (article 26); adequate standard of living and social protection (article 28); participation in political and public life (article 29); participation in cultural life, recreation, leisure and sport (article 30); statistics and data collection (article 31); international cooperation (article 32); freedom of expression and opinion (article 21); and access to information, and right to work and employment (article 27).¹⁰³ Indeed, the right to live independently and be included in the community can only be realised if all economic, civil, social and cultural rights enshrined in this norm are fulfilled¹⁰⁴. Therefore, article 19 cannot be fully implemented without implementing other rights¹⁰⁵, and vice versa. For example, the right to work and employment is a key right when it comes to implementing article 19. It not only empowers persons with psychosocial disabilities economically, but it enables them to become independent and to participate in the community. The result is that persons with psychosocial disabilities have more choices and control over their lives as is required by article¹⁰⁶ 19. Thus, addressing, to some extent the fulfilment of other rights, in this case the right to work and employment for persons with psychosocial disabilities as provided in article 27 of the CRPD, is not a diversion but in actual fact addressing article¹⁰⁷ 19.

Therefore, in determining whether Kenya has facilitated or failed to enable persons with psychosocial disabilities to live independently and in the community, it is justified to identify whether the state's legal framework has sufficiently protected and facilitated the right of work and employment for persons with psychosocial disabilities.

2.3 The overview of the right to work and employment (article 27 of the CRPD)

Article 27 of the CRPD constitutes one of the most detailed provisions of the Convention, establishing the legal framework for state obligations in relation to work and employment of persons with disabilities.¹⁰⁸ It states that the right for persons with disabilities, in this case persons with

101 CRPD Committee (n 1) para 6.

102 CRPD Committee (n 1) para 7.

103 CRPD Committee (n 1) para 70-97.

104 CRPD Committee (n 1) para 7; Kamundia (n 2) 57.

105 Kamundia (n 2) 68.

106 Kamundia (n 2) 68 Judge Bazelon (n 20).

107 Kamundia (n 2) 68.

108 M Fasciglione 'Article 27 of the CRPD and the right of inclusive employment of people with autism' in VD Fina & R Cera (eds) *Protecting the rights of people with autism in the fields of education and employment* (2015) 146.

psychosocial disabilities, includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.¹⁰⁹ State parties are obligated to safeguard and promote the realisation of the right to work for both those who have a disability when employed, and those who may acquire a disability during the course of employment.¹¹⁰ Admittedly, given the fluctuating, chronic and unpredictable nature of psychosocial disabilities,¹¹¹ this is particularly of relevance to persons with psychosocial disabilities.

Then it sets out a non-exhaustive list of appropriate steps for state parties to take, in order to safeguard and protect the right to work and employment including through legislation, to safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment.¹¹² Importantly, it covers all stages of employment, from recruitment all the way to career advancement and even the creation of safe and healthy working conditions.¹¹³

Further, article 27 places a strong focus on the duty of states parties to prohibit discrimination on the basis of disability¹¹⁴ and also the definition of discrimination¹¹⁵ found within the CRPD makes it an act of discrimination for an employer to refuse to reasonably accommodate an employee with a disability.¹¹⁶ Furthermore, it goes on to widen the scope of the obligation requiring employers to reasonably accommodate persons with disability as more than an anti-discrimination obligation as provided in article 27(1)(a), article 27(1)(i) proceeds to also provide it as a general obligation for employers. Notwithstanding, an employee is only obligated to reasonably accommodate an employee as long as it does not impose a disproportionate or undue burden.¹¹⁷ Additionally, article 27(1)(b) obligates employers to protect the rights of persons with psychosocial disabilities on an equal basis with others, especially as regards 'just and favourable working conditions, including equal opportunities and equal remuneration for work of equal value, safe and healthy working

109 As above.

110 Art 27(1) CRPD

111 L Waddington & M Bell 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' (2016) <https://pdfs.semanticscholar.org/709c/e191dc4236d6dad49894aded969dcf0f50cf.pdf> (accessed 18 March 2020) 7 and 8; M Modini et al 'Supported employment for people with severe mental illness: Systematic review and meta-analysis of the international evidence' (2016) 209 *The British Journal of Psychiatry* 14.

112 Fasciglione (n 108) 146.

113 Art 27(1)(a) CRPD

114 MV Liisberg 'Flexicurity and employment of persons with disability in Europe in a contemporary disability human rights perspective' (2015) 4 *European Yearbook of Disability Law* 145 at 152; art 27(1)(a).

115 Art 2 CRPD.

116 As above.

117 Art 3 CRPD

conditions, including protection from harassment and the redress of grievances'.¹¹⁸

Moreover, in order to help enforce equality and anti-discrimination employees with disability need to be allowed to exercise their labour and trade union rights on an equal basis with others, which is protected under article 27(1)(c). Furthermore, state parties are obligated to promote the work experience of persons with disability in the open labour market.¹¹⁹ Additionally, because the CRPD recognises that employment alone is not the only source of work, it further obligates states in article 27(1)(f) to promote opportunities for self-employment, entrepreneurship and the development of cooperatives and starting one's own business. Furthermore, article 27(1)(g) and (h) obligates states parties to not only employ persons with disabilities in the public sector, but to also 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. Additionally, article 27(2) prohibits slavery, servitude and forced or compulsory labour for persons with disability.¹²⁰

In addition, in order to comply with the requirements in article 27 in a manner that facilitates the compliance with the overarching article 19, state parties are required to do more than just protect the right to work and employment. State parties are required to go a step further and also ensure that they provide employment support services. Persons with psychosocial disabilities need support services in order to access meaningful work, and further to maintain work as they particularly struggle in this area.¹²¹ Studies have consistently found that persons with psychosocial disabilities are capable of working if they are connected with appropriate jobs and receive appropriate support.¹²² In line with this, the CRPD requires states parties take action to ensure that persons with disability, in this case

118 Liisberg (n 114) 150.

119 Art 27(1)(j).

120 Kamundia (n 2) 65.

121 Mental Health Europe 'Toolkit on article 27 of the UN CRPD' (2017) <https://mhe-sme.org/wp-content/uploads/2017/09/Toolkit-on-article-27-of-the-UNCRPD.pdf>9 (accessed 30 March) 3. These work places provided protected environments for people with psychosocial disabilities based on the idea that people could not cope in working environments in the open labour market. These settings were segregated and often provided poor quality and repetitive work.

122 Judge Bazelon (n 20); European Union Agency for Fundamental Rights Choice and Control 'The right to independent living experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States' (2012) <https://fra.europa.eu/en/publication/2012/choice-and-control-right-independent-living>, https://fra.europa.eu/sites/default/files/fra_uploads/2129-FRA-2012-choice-and-control_EN.pdf (accessed 30 March); J Rice & R Traustadottir 'ANED country report on the implementation of policies supporting independent living for disabled people: Iceland' (2009) https://www.researchgate.net/publication/304494770_ANED_country_report_on_the_implementation_of_policies_supporting_independent_living_for_disabled_people_Iceland/link/5771326c08ae0b3a3b7d4eeb/download (accessed 17 March) 6.

psychosocial disabilities, receive the support that they need to participate in society as equal citizens.¹²³ Thus, support services must be available, accessible to all and provided on the basis of equal opportunity, free and informed consent and allowing disabled people flexibility in their daily life.¹²⁴ Apart from article 19(b) of the CRPD, this can be read into 27(1)(d), 27(1)(e) and 27(1)(k). This is where state parties are obligated to provide general, technical and vocational guidance programmes, placement services and vocational and continuing training.¹²⁵ This goes hand in hand with article 27(1)(e), which provides that states parties should ‘promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities’.¹²⁶ Then beyond training and placement services, states parties are obligated to ‘promote ... career advancement for persons with disabilities in the labour market, as well as assistance in ... maintaining and returning to employment’.¹²⁷ Additionally, according to the General Comment 5, the ‘existence of individualised support services, including personal assistance, often is a precondition for effective enjoyment of the right to work and employment’.¹²⁸ Supported employment is a direct service with specialised assistance in choosing, acquiring and maintaining competitive employment.¹²⁹ It includes job placement, training before and on the job counselling services, to a personal job coach, provision of an employment specialist,¹³⁰ rapid job search, integration of rehabilitation and mental health services, job development, benefits counselling, and individualised follow-along supports that are necessary to sustain employment.¹³¹ Case studies done across the world including the UK, USA, Netherlands and most recently in India,¹³² have shown that when it comes to accessing and maintenance of competitive employment, supported employment is most effective for producing positive employment outcomes for persons with psychosocial disabilities.¹³³

As a result, failure to provide employment support services as a precondition, is akin to preventing persons with psychosocial disabilities from accessing and maintaining employment.¹³⁴

123 ENIL (n 67) 5 and 6.

124 ENIL (n 67) 6.

125 Art 27(i)(d) CRPD.

126 Art 27(i)(k) CRPD.

127 Art 27(1)(e) CRPD.

128 CRPD Committee (n 1) para 91.

129 T Marshall et al ‘Supported employment: Assessing the evidence’ (2014) 65 *Psychiatric Services* 16 at 17.

130 Ebuenyi et al (n 18).

131 Marshall (n 129).

132 A Jagannathan et al ‘Supported employment programme for persons with severe mental disorders in India: A feasibility study’ (2020) 66 *International Journal of Social Psychiatry* 607.

133 Modini et al (n 111); Engelbrecht et al ‘Supported employment for people with mental disabilities in South Africa: Cost calculation of service utilisation’ (2017) 47 *South African Journal of Occupational Therapy* 11; Ebuenyi et al (n 18).

134 ENIL (n 67) 6.

In summary, from all the above it is clear that state parties are obligated to do more than simply provide for access to work and employment, they are obligated to ensure that persons with psychosocial disabilities are also able to maintain said work or employment.

3 Obligations of states parties under article 27

Kenya having ratified the CRPD,¹³⁵ is obligated to adopt all appropriate legislative, administrative and other measures for the implementation of the right to work and employment in order to enable persons with psychosocial disabilities to live independently and be included in the community.¹³⁶ Further, to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities with regard to article 27 in conjunction with or under the umbrella of article 19 of the CRPD.¹³⁷ However, because the right to work and employment is an economic, social and cultural right, it requires progressive realisation and not immediate realisation.¹³⁸ Nonetheless, it still demands

immediate obligation to design and decide upon concrete strategies, plan of actions and allocate resources to develop support services as well as making existing as well as new general services inclusive for persons with disabilities.¹³⁹

4 Kenyan national legal framework

4.1 The Constitution (2010)

The right to live independently and be included in the community, article 19 of the CRPD, is not provided for directly under the Kenyan legal framework, but indirectly through the collective provision of other rights.¹⁴⁰ This is first highlighted in the Kenyan Constitution, which does not specifically provide for the right. Nevertheless, article 19 is echoed in a variety of both political and social and economic rights which are found in the Constitution. They include: the right to human dignity;¹⁴¹ freedom and

135 Office of the High Commissioner for Human Rights 'Ratification status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&ang=en (accessed 28 March 2020).

136 Art CRPD 4(1)(a), 27.

137 Art 4(1)(b) CRPD; M. Fasciglione (n 108) 147.

138 As above.

139 CRPD Committee (n 1) para 39.

140 CRPD Committee (n 1) para 70-97; Kamundia (n 20) 64.

141 Art 28.

security of the person;¹⁴² freedom of movement and nationality;¹⁴³ equality and freedom from discrimination;¹⁴⁴ freedom of expression;¹⁴⁵ and education.¹⁴⁶ Nonetheless, this paper will only be focusing on the right to work and employment for persons with psychosocial disabilities.

Firstly, it is important to note that the new Kenyan Constitution defines disability to include persons with psychosocial disabilities and thus its provisions apply to them.¹⁴⁷ The 2010 Constitution furthermore, unlike the previous Constitution,¹⁴⁸ defines disability in art 260 as:

includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.

Notwithstanding, although it can be argued that the wording 'includes' recognises that disability is an evolving concept and further its recognition of perceived disabilities is similar to the CRPD,¹⁴⁹ it still adopts a medical approach when defining disability. This is because its focus is on the negative impact of impairments, and it fails to recognise that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹⁵⁰ This is in contrast to the CRPD.

Then, the Constitution goes on to protect persons with disability from discrimination in both the public and private sphere.¹⁵¹ This is in compliance with article 27 of the CRPD. However, although article 27 of the Constitution prohibits direct and indirect discrimination against person with a disability, it does not include denial of reasonable accommodation and harassment as a form of discrimination in a manner that complies with article 27 of the CRPD. Further, there is no provision that deals with reasonable accommodation as a general obligation or as an anti-discrimination obligation as provided by the CRPD.

Additionally, article 56(c) obligates states parties to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, which includes person with disability,¹⁵² are

142 Art 29.

143 Art 18.

144 Art 27.

145 Art 33.

146 Art 43(1)(f).

147 Art 260.

148 The Kenyan Constitution, 1963.

149 CRPD Committee, General Comment 6: Equality and non-discrimination (2018) UN Doc CRPD/C/GC/5 dated 9 March 2018 para 73(b).

150 Mental Disability Advocacy Centre (n 59) 15.

151 Art 27.

152 Art 260.

provided with special opportunities for access to employment. This is in compliance with article 27 of the CRPD.

Also, in line with article 27, the Constitution protects the labour and trade union rights of persons with psychosocial disabilities in article 41. It provides that every worker's right to fair labour practices includes the right to: fair remuneration; reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike.¹⁵³ Slavery and servitude, and forced labour are also prohibited in article 30. In addition, the Constitution requires the representation of persons with disability in the National Assembly and the Senate. It provides that states should progressively ensure that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities.¹⁵⁴ Additionally, requiring parliament to enact legislation to promote the representation of persons with disability in parliament.¹⁵⁵

4.2 Persons with Disabilities Act

The Persons with Disabilities Act (PWA) was enacted in 2003 before the CRPD came into force. Prior to it, Kenya's legal system made little specific provision for persons with disabilities.¹⁵⁶ The aim of the Act is to provide for the rights and rehabilitation of persons with disability, to achieve equalisation of opportunities for them, and to establish the National Council for Persons with Disabilities.¹⁵⁷

Firstly, similar to the Constitution, the Act's definition of disability includes persons with psychosocial disabilities. Notably though, here again and similar to the Constitution, the definition¹⁵⁸ reflects the medical model of disability which is in contradiction with the social understanding of disability that is adopted by the CRPD.

Here again, the Act does not directly provide for the right to live independently and to be included in the community, nevertheless, the right can be read into the functions of the National Council of Persons with Disabilities (NCPD) formed in section 3 of the Act. The NCPD is charged with formulating and developing measures and policies designed to 'encourage and secure the rehabilitation of persons with disabilities within their own communities and social environment';¹⁵⁹ and to 'co-ordinate services provided in Kenya for the welfare and rehabilitation of persons with disabilities and to implement programmes for vocational guidance

153 Section 41(2).

154 Art 54(2).

155 Art 100(b).

156 As above.

157 Persons with Disabilities Act 14 of 2003 (CAP 133).

158 Sec 2.

159 Sec 7(1)(b)(vi).

and counselling'.¹⁶⁰ Also it is charged with formulating and developing measures and policies designed to 'achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they ... are afforded full access to community and social services'.¹⁶¹ Despite this it is important to note that the use of the words 'to the maximum extent possible' somewhat reduces the strength and possible impact of this the provision.¹⁶²

When it comes to the right to work and employment, the right of persons with psychosocial disabilities is protected from section 12 all the way to 16 of the Act. It provides that persons with disability – this is inclusive of persons with psychosocial disabilities – should not be denied access to opportunities for suitable employment. That a person with disability who is a qualified employee should be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees.¹⁶³ Additionally, the Act provides tax incentives for employers who hire persons with disability.¹⁶⁴ Kenyan employees who hire persons with disabilities are entitled to incentives in form of tax exemption to promote the employment of persons with disabilities in the private sector. This in line with article 27(h).¹⁶⁵ Then section 13 requires the NCPD to endeavour to secure the reservation of five per cent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. Also, section 14 provides for the right to apprenticeship opportunities for persons with disabilities.

Moreover, the Act goes on to prohibit discrimination of persons with psychosocial disabilities in the workplace.¹⁶⁶ It prohibits both public and private employers from discriminating in all areas of employment including: advertisements, recruitment, the creation, classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; and the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment.¹⁶⁷ This is in line with article 27 of the CRPD. Furthermore, the Act prohibits discrimination of persons with disability in the workplace, and takes it a step further to describe the term

160 Sec 7(1)(b)(viii).

161 Sec 7(1)(b)(i).

162 Kamundia (n 2) 65.

163 Sec 12(1) and (2).

164 Sec 12(3) and 16.

165 Sec 12 provides that: '1) No person shall deny a person with a disability access to opportunities for suitable employment. 2) A qualified employee with a disability shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees. (3) An employee with a disability shall be entitled to exemption from tax on all income accruing from his employment.'

166 Sec (15).

167 Sec 15(1).

'discriminate'.¹⁶⁸ Nevertheless, discrimination is only defined in terms of direct discrimination and it does not refer to indirect discrimination either explicitly or within the scope of the definition, which is limiting and contradictory to the CRPD. Further, it does not acknowledge denial of reasonable accommodation and harassment as a form of discrimination as is provided under the CRPD.¹⁶⁹

Further, although the Act does not directly refer to reasonable accommodation or even define it, it is echoed in Act where it provides in section 15(5) that: 'An employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities'.¹⁷⁰ Also, the Act does not define reasonable accommodation as a form of discrimination. Nevertheless, in line with the CRPD, the position taken by the Labour and Employment Court in Kenya, is that denying employees with disability reasonable accommodation amounts to discrimination, and the violation of the right to dignity. This was the position taken in *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁷¹ and *Antony Kipkorir Sang v Attorney General*.¹⁷²

The Act, further, establishes the National Development Fund for Persons with Disabilities, a permanent fund that provide monetary assistance to organisations and persons with disability for the first time in the history of Kenya.¹⁷³ Nonetheless, the Act is a bit silent about support services in general. It is only mentioned as one of the possible uses of the National Development Fund amongst other uses. Furthermore, the decision of whether to use the fund for support services is left at the discretion of the board of trustees. In fact, the section states that 'the board of trustees may contribute part of the funds ... to provide or contribute to the cost of assistive devices and services'.¹⁷⁴ The use of the word 'may' weakens the provision and leaves persons with psychosocial disabilities in a difficult position. This is because for persons with psychosocial disabilities to be able to live independently and be included in the community, support services are key.¹⁷⁵ It is not enough to provide for the various political and economic and social rights under the umbrella of article 19, in this case the right to work and employment, but then fail to provide for employment support services. For persons with psychosocial disability, especially those with severe psychosocial conditions, support services are crucial in order to enable them to not only access, but maintain

168 Sec 2: to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability.

169 Art 2 CRPD.

170 Sec15(5).

171 [2019] eKLR Cause 104 of 2017, para 1, 4, 5, 7(3).

172 [2014] eKLR, Cause 2408 of 2012, para 57.

173 Sec 32.

174 Sec 33(2)(d).

175 Judge Bazelon (n 20) 2; Marshall et al(n 131).

employment.¹⁷⁶ As a result, of lack of clarity on the necessity of support services, in section 32 and 33 above, the amount set aside in the disability fund for persons with disability in Kenya is very little. The amount is about 19 dollars (Ksh 2000) and is only given every two months.¹⁷⁷ Further, the requirement that the fund ‘targets adults and children with severe disabilities, who require full time support of a caregiver’,¹⁷⁸ seems to imply that the fund is only for persons with disability who are not in a position to work. Indeed, there is no funding that specifically provides support services to support employment of persons with disability. In addition, the job placement platform,¹⁷⁹ where persons with disability are required to register, does not provide adequate information or data on the number of persons with disability who have been assisted to access and maintain employment or which specific employment services it provides.¹⁸⁰

Lastly, going through the Act, it seems to focus heavily on person with physical disabilities. Example, section 21 which deals with accessibility and mobility only focuses on needs of persons with physical disabilities. However, the Act is currently under review,¹⁸¹ and clearly it is necessary in order to take into account the provisions of the CRPD.

4.3 The Employment Act

The purpose of the Employment Act, 2007 is to define the fundamental rights of employees and it provides basic conditions of employment for employees. It governs all forms of employment and provides for the protection of persons with disabilities from discrimination within employment.¹⁸² Here again, although disability is defined to include persons with psychosocial disability, the definition provided in section 2 adopts the medical model of disability. Also similar to the Constitution, persons with psychosocial disabilities¹⁸³ are protected from direct and indirect discrimination in employment.¹⁸⁴ It prohibits discrimination in both public and private sectors of employment.¹⁸⁵ Furthermore, discrimination is prohibited in respect of recruitment, training, promotion,

176 As above.

177 National Safety Net Programme – Cash Transfer for Persons with Severe Disabilities (PWSD-CT) <http://www.socialprotection.or.ke/national-safety-net-program/cash-transfer-for-persons-with-severe-disabilities-pwsd-ct> (accessed 20 March 2020).

178 As above.

179 See National Council for Persons with Disabilities <http://placement.ncpwd.go.ke/public/> (accessed 24 March 2020).

180 As above.

181 Kenyan Human Rights Commission ‘Towards equality and anti-discrimination: An overview of international and domestic law on anti-discrimination in Kenya’ (25 January 2015) <http://www.khrc.or.ke/publications/64-an-overview-of-international-and-domestic-law-on-discrimination-in-kenya-1/file.html> (accessed 23 March 2020) 6-8.

182 The Employment Act Cap 226, 11 of 2007.

183 Sec 2.

184 Sec 5(3).

185 Sec 3.

terms and conditions of employment, termination of employment or other matters arising out of the employment, which is in compliance with article 27.¹⁸⁶ Thus, the scope of protection extends to employees and prospective employees.¹⁸⁷ Nonetheless, here again, the Act does not define direct or indirect discrimination, and also fails to acknowledge denial of reasonable accommodation and harassment as a form of discrimination as is provided under the CRPD.¹⁸⁸

Additionally, the Act goes on to provide that employers should pay all their employees equal remuneration for work of equal value.¹⁸⁹ Moreover, the Act makes the dismissal unfair if the termination or discipline of an employee is based on disability.¹⁹⁰ These two provisions are in compliance with article 27 of the CRPD. Nevertheless, here again the Act does not provide for employment support services.

As has already been highlighted, available data suggests that the current rate of employment for persons with disabilities in general, is low.¹⁹¹ Further, as has also been emphasised, support services are a necessary precondition for employee's with psychosocial conditions to access and maintain employment.¹⁹² The review of the law above exposes its failure to adequately provide for employment support services not just for persons with psychosocial conditions specifically, but for persons with disability in general. Therefore, if persons with psychosocial conditions are denied employment support services and as a result are unable to access and maintain employment, their right to work and employment will be infringed, and in turn their right to live independently and in the community.¹⁹³

5 Conclusion

The analysis of the Kenyan legal framework highlights the fact that although Kenyan law still has a long way to go in order to adequately protect the right to work and employment for persons with psychosocial disabilities, it has made great strides. It is important to acknowledge, that the laws have attempted to capture the spirit of article 27 of the CRPD in many instances, for example by including disability as a ground for discrimination in the Constitution for the first time in Kenya and other relevant legislation; providing for labour and trade union rights;

186 Sec 5(3)(b).

187 Kenya Human Rights Commission (n 181) 8-11.

188 CRPD art 2.

189 Sec 5(5).

190 46(g).

191 Kenyan National Human Rights Commission (n 41); UN Committee on the Rights of Persons with Disabilities (n 42).

192 Council of Europe Commissioner for Human Rights (n 34) 18; Jagannathan et al (n 132)1; CRPD Committee (n 1) para 19(b); Mladenova (n 2) 9.

193 Kamundia (n 2) 68; Judge Bazelon (n 20 above)

prohibiting slavery and servitude and forced labour; providing for protection against discrimination in all areas of employment; and providing for positive measures and incentives for employers in order to motivate the employment of persons with disability. Nevertheless, the Constitution and all the laws reviewed above still adopt a medical model when it comes to defining disability which goes against the spirit of the CRPD. Further, a review of the law has highlighted a lacuna in the provision of supported employment, yet as highlighted above support services are a key precondition for persons with psychosocial conditions when it comes to access and maintenance of employment.¹⁹⁴ Therefore, there is a need to amend the law to include provisions of supported employment. Without employment supports services, persons with psychosocial disabilities may still find themselves isolated and excluded from the workplace and further in the community. In conclusion, as the Kenyan legal framework currently stands, it has failed to adequately enable persons with psychosocial disabilities to live independently and in the community.

¹⁹⁴ Council of Europe Commissioner for Human Rights (n 34) 18; Jagannathan et al (n 132) 1; Modini et al (n 111)14; Engelbrecht et al (n 133) 11; Ebuenyi et al (18) 2.

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN MALAWI: EXPLORING CHALLENGES AND POSSIBILITIES IN THE CRIMINAL JUSTICE SYSTEM

Mwiza Jo Nkhata*

Summary

This paper interrogates the right of access to justice for persons with disabilities in Malawi. It begins by noting that, from a normative perspective, significant progress has been made in terms of securing the rights of persons with disabilities. This progress is reflected in Malawi's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) and the adoption of the Disability Act. The paper acknowledges that access to justice is a fundamental right for persons with disabilities since it can facilitate their enjoyment of other rights. After presenting the legal, institutional and policy framework that deals with persons with disabilities, the paper examines selected provisions in Malawi's criminal procedure law and assesses their compatibility with the principles underlying the CRPD and the Disability Act. Amongst other things, the paper establishes that, the language employed by the criminal law is demeaning of persons with disabilities and that the procedures guiding criminal trials do not possess inbuilt avenues for facilitating reasonable accommodation. The paper recommends that an audit of all statutes in the criminal justice system be undertaken in order to inform legislative reforms or initiatives of reasonable accommodation. The paper also advocates for continuous disability-rights training for all actors in the criminal justice system and the domestication of the CRPD together with the ratification of its Optional Protocol.

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1 Background

The predicament of persons with disabilities in Malawi remains dire. According to the Government of Malawi:¹

Persons with disabilities ... face numerous challenges that result in their exclusion from the mainstream of society, making it difficult for them to access their fundamental social, political and economic rights. Many make their way through life impoverished, abandoned, uneducated, malnourished, discriminated against, neglected and vulnerable. For them, life is a daily struggle to survive. Whether they live in urban centres or in rural areas, they share these common problems.

Like in many other countries, there is a close relationship between poverty and disability in Malawi.² Generally, poverty can cause disability and disability exacerbates the effects of poverty. Persons with disabilities and their families, therefore, tend to experience deeper levels of poverty than the population at large.³ In a country like Malawi, where the government has conceded that poverty is deep and severe, this has profound implications for the enjoyment of human rights by persons with disabilities. Deep levels of poverty in turn entail inconsistent progress in the implementation of pro-disability rights interventions.⁴

The above notwithstanding, the legal landscape for persons with disabilities in Malawi has experienced significant changes over the past ten years. Two developments stand out. First, on 27 August 2009 Malawi ratified the Convention on the Rights of Persons with Disabilities (CRPD).⁵ Second, in 2012, Malawi passed the Disability Act after over eight years of procrastination.⁶ These developments remain pivotal in the realisation of the rights of persons with disabilities.⁷ The monumentality of

1 Government of Malawi *National policy on equalisation of opportunities for persons with disabilities* (2006) 8.

2 Government of Malawi (n 1) 13.

3 Open Society Initiative for Southern Africa *Status of disability rights in Southern Africa* (2012) 12; J Nyanda 'Confronting the double marginalisation of girls with disabilities: Practical challenges for the realisation of the right to education for girls with disabilities under the Disability Act of Malawi' (2015) 3 *African Disability Rights Yearbook* 112.

4 R Lang *Disability policy audit in Namibia, Swaziland, Malawi and Mozambique: Final report* (2008) 91.

5 UN Treaty Collection, CRPD https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en (accessed 16 August 2017). Malawi has neither signed nor acceded to the Optional Protocol to the CRPD.

6 E Chilemba 'Promoting disability rights in Malawi' <http://www.osisa.org/law/blog/promoting-disability-rights-malawi> (accessed 16 August 2017).

7 Disability terminology is often highly contested. Some of the commonly used terms are: 'people with disabilities'; 'disabled people'; 'people with impairments'; and more specific terms like 'visually impaired people'; and 'people with intellectual disabilities'. The varying terms, however, are often reflective of the differing perspectives about disability – E Iriarte et al 'Disability and human rights: Global perspectives' in E Iriarte, R McConkey & R Gilligan (eds) *Disability and human rights: Global perspectives* (2016) 8.

these developments, notwithstanding, their practical impact is, largely, yet to be seen.

From an international perspective, the CRPD remains the primary instrument in so far as rights of persons with disabilities are concerned. In articles 12 and 13, the CRPD provides for a mutually reinforcing web of rights that are meant to guarantee equal recognition before the law and access to justice for persons with disabilities. The underlying theme in the two articles is that persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life and also that they should have effective access to justice. In order for persons with disabilities to enjoy the right to effective access to justice, states are required to provide procedural and age-appropriate accommodations that can facilitate their effective participation in the justice system. From a standard setting perspective, it is also important to acknowledge the adoption by the African Union of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities. This Protocol, however, is not in force yet.⁸

In respect of the domestic perspective, Malawian law is not oblivious to persons with disabilities. For example, the Constitution of the Republic of Malawi (the Constitution) expressly lists disability as one of the grounds on which discrimination is prohibited.⁹ Further, in section 13(g), the Constitution enjoins the state to take progressive steps to enhance the dignity and quality of life of persons with disabilities. Additionally, the Disability Act includes wide-ranging protections for persons with disabilities and is, arguably, an avenue through which the protections in the CRPD and the Constitution find detailed legislative expression. Specifically, in relation to the criminal justice system, although some significant reforms have been made to the Criminal Procedure and Evidence Code

a lot of measures still need to be in place to ensure that persons with disabilities have the support they need to ensure they can effectively access justice at all stages of the legal process.¹⁰

8 This Protocol was adopted on 29 January 2018. To date it has garnered six signatures, but zero ratifications – <https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20PERSONS%20WITH%20DISABILITIES%20IN%20AFRICA%20%281%29.pdf> (accessed 10 April 2020).

9 Sec 20(1), Constitution of the Republic of Malawi.

10 Government of the Republic of Malawi 'Combined initial and second report to the Committee on the Rights of Persons with Disabilities' <http://disabilityrightsfund.org/resources/malawi-state-report-crpd/> (accessed 4 March 2020) para 79.

Flynn and Lawson have noted that while access to justice, as a topic of study, has received considerable attention, its disability-related dimensions have attracted little attention.¹¹ Access to justice, however, is a fundamental human right of significant concern to persons with disabilities.¹² Persons with disabilities, whether as victims of crime, accused persons, or even as witnesses are always at risk of having their rights undermined in the justice system.¹³

Perhaps as a manifestation of global trends, there have been very few studies in Malawi that are disability specific, for example, by interrogating the government's implementation of disability policies.¹⁴ Although some studies have been undertaken covering rights of persons with disabilities, no study to date has specifically interrogated access to justice for persons with disabilities in Malawi from the perspective of the criminal justice system.¹⁵ It should also be noted that Malawi's Disability Act does not include a specific guarantee on access to justice for persons with disabilities. This, however, must not be read to imply that persons with disabilities do not have the right to access justice in Malawi. This is because the Constitution guarantees 'every person' the right to access justice and legal remedies.¹⁶ Additionally, the interdependence, indivisibility and interrelatedness of human rights entail that other human rights recognised in the Disability Act can be used to facilitate access to justice for persons with disabilities. Nevertheless, the absence of an explicit provision on access to justice, in a law specifically meant to deal with rights of persons with disabilities, is an odd occurrence.

This paper interrogates the right of access to justice by persons with disabilities within the criminal justice system in Malawi. Specifically, the

- 11 E Flynn & A Lawson 'Disability and access to justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law* 7 at 7-8.
- 12 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities, and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 287.
- 13 Australian Human Rights Commission 'Equal before the law: Towards disability justice strategies' <http://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 24 August 2017).
- 14 Government of Malawi (n 10) para 7. The 2008 national census was the first time in Malawi's history that questions relating to disability were included, see, National Statistical Office '2008 population and housing census' http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=106&Itemid=6 (accessed 23 August 2017). The 2018 national census also included a disability component, see, http://www.nsomalawi.mw/index.php?option=com_content%26view%3Darticle%26id%3D226:2018-malawi-population-and-housing-census%26catid%E2%80%89%3D%E2%80%898:reports%26Itemid%E2%80%89%3D%E2%80%896 (accessed 29 February 2020).
- 15 See, for example, A Munthali *A situation analysis of persons with disabilities in Malawi* (2011) 7. As for a study on access to justice for persons with disabilities, but specific to children with disabilities and in relation to the crime of defilement, see B Malunga, NR Kanyongolo & N Mbano-Mweso 'Access to justice of children with disabilities in defilement cases in Malawi' (2017) 5 *African Disability Rights Yearbook* 25' <http://www.adry.up.ac.za/index.php/section-a-articles-2017/bernadette-malunga-ngeyi-ruth-kanyongolo-ngcimezile-mbano-mweso> (accessed 6 March 2020).
- 16 Sec 41, Constitution of the Republic of Malawi.

paper analyses the procedural and substantive guarantees contained, primarily, but not exclusively, in the Criminal Procedure and Evidence Code (CPEC)¹⁷ and the Penal Code¹⁸ to determine how these contribute to either enhancing or inhibiting the right of access to justice by persons with disabilities. This is achieved by isolating provisions from both the CPEC, the PC, and other applicable laws, and analysing them as against the guarantees in the CRPD, the Disability Act and the Constitution. Subsequent to the analysis, the paper makes recommendations for improving Malawi's criminal justice system in terms of compliance with the rights of persons with disabilities.

The first part of the paper contextualises the discussion by providing a general background to the situation of persons with disabilities in Malawi and some of the applicable legal standards both internationally and domestically. The second part provides an overview of the legal, policy and institutional framework that applies to persons with disabilities in Malawi. The third part explores the right of access to justice in so far as it applies to persons with disabilities and unpacks its key elements. The fourth part explores the right of access to justice for persons with disabilities within the context of Malawi's criminal justice system. The challenges and possible opportunities for persons with disabilities in Malawi's criminal justice system are also discussed in this part of the paper. The penultimate section of the paper makes some proposals for improving access to justice for persons with disabilities in Malawi. The last part of the paper is the conclusion.

2 Persons with disabilities and the legal, policy and institutional framework in Malawi

It is apposite to begin by conceding that disability is part of the human condition.¹⁹ Nevertheless, disability is a complex, dynamic, multi-dimensional and contested concept.²⁰ The identification of the role of social and physical barriers in disability has led to the transition from an individual, medical perspective to a structural, social perspective of disability.²¹ The transition to a social perspective of disability has been described as the shift from a 'medical model' to a 'social model' in which people are viewed as being disabled by society rather than by their bodies.²² Although the medical model and the social model are often

17 Chapter 8:01, Laws of Malawi. Under sec 6(2) of the CPEC all criminal offences under any written law in Malawi must be tried under the procedures established in the CPEC unless there is a law which establishes otherwise.

18 Chapter 7:01, Laws of Malawi.

19 WHO and World Bank *World report on disability* http://www.who.int/disabilities/world_report/2011/report.pdf (accessed 16 August 2017).

20 E Iriarte 'Models of disability' in Iriarte, McConkey & Gilligan (n 7) 11.

21 WHO and World Bank (n 19).

22 As above.

presented as being dichotomous, disability is neither purely medical nor social.²³ Persons with disabilities often experience challenges arising from their health condition as well as their social environment. A balanced approach is, therefore, necessary in order to give appropriate weight to the different aspects of disability.

Article 1 of the CRPD states that

persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.²⁴

This statement is a reminder that ‘persons with disabilities’ is a broad term which covers a wide range of individuals who have different types and degrees of functional impairment as well as different ages, genders, ethnicities, cultures, languages and a full range of other characteristics.²⁵ The description of ‘disability’ in article 1 of the CRPD, which reiterates the exhortation in paragraph (e) of the Preamble to the CRPD, confirms the shift to the social model of disability. Under this model, the direct link between impairment and disability is broken by the introduction of ‘various barriers’, referring to the social, environmental and attitudinal factors which in their interaction with the impairment cause disability.²⁶ Although the adoption of the CRPD confirms that the discourse on disability has moved to the social model, it seems to be the case that in Malawi ‘most people still consider disability as a charity issue’.²⁷ This entails that there is still a lot of effort that must be expended to entrench the social model of disability in Malawi.

It is important to recall that the CRPD does not create new rights.²⁸ It simply articulates how existing human rights are equally applicable to persons with disabilities.²⁹ Further, since Malawi is dualist, in terms of the applicability of treaties, a domestication statute will be required before the CRPD is directly applicable in the country.³⁰ The non-domestication of the CRPD, however, does not mean that the CRPD is irrelevant. Malawi remains bound to uphold the purposes of the CRPD under the principle of

23 As above.

24 Sec 2 of the Disability Act adopts, wholesale, this ‘definition’ of disability for purposes of understanding disability in Malawi.

25 Flynn & Lawson (n 11) 8.

26 Iriarte (n 7) 12 and W Waliuya ‘Protecting the rights of persons with disabilities: A perspective from Zambia’ <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/11.pdf> (accessed 25 August 2017).

27 Government of Malawi (n 10) para 6.1.

28 Open Society Initiative for Southern Africa (n 3) 10.

29 J Lord & M Stein ‘Prospects and practices for CRPD implementation in Africa’ (2013) *African Disability Rights Yearbook* 100.

30 Sec 211, Constitution of the Republic of Malawi. See, T Hansen ‘Implementation of international human rights standards through the national courts in Malawi’ (2002) 46 *Journal of African Law* 31.

pacta sunt servanda – the general principle of international law that requires parties to honour agreements they voluntarily enter into.³¹ In the same spirit, Malawian courts can also have regard to provisions of the CRPD in interpreting constitutional rights.³²

As earlier alluded to, the Constitution is the first repository for rights of persons with disabilities in Malawi. The Constitution remains particularly relevant since it establishes itself as the supreme law of the land and this entails that all laws, policies and acts of government are valid only to the extent of their compatibility with it.³³ The Constitution also expressly proscribes discrimination on the ground of disability and authorises the government to adopt legislation or measures meant to address inequalities in the country.³⁴ The Constitution is particularly relevant for persons with disabilities since it guarantees rights to ‘every person’ or ‘all persons’. The diction used by the Constitution leaves no doubt that the human rights that it guarantees are meant for the benefit of everyone including persons with disabilities.

Further, section 13(g) of the Constitution directs that the state must actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at enhancing the dignity and quality of life of persons with disabilities. This ought to be achieved, amongst other things, by providing adequate and suitable access to public places, fair opportunities in employment and the fullest possible participation in all spheres of Malawian society.³⁵ The adoption of the National Policy on Equalisation of Opportunities for Persons with Disabilities (the Equalisation Policy) in 2006 and the passing of the Disability Act can, therefore, be seen as part fulfilment of the stipulations in section 13(g) of the Constitution.

The Equalisation Policy was developed in order to promote the ‘rights of people with disabilities to enable them to play a full and participatory role in society’.³⁶ The aim of the Equalisation Policy is that people with disabilities must access the same fundamental rights and responsibilities as any other Malawian citizen. The Equalisation Policy identifies several areas in which persons with disabilities face significant challenges and where interventions must be targeted. Amongst the areas identified are the

31 Art 26, Vienna Convention on the Law of Treaties <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (accessed 7 September 2017).

32 Sec 11, Constitution of the Republic of Malawi.

33 See, secs 4 and 5, Constitution of the Republic of Malawi.

34 Sec 20, Constitution of the Republic of Malawi.

35 Although sec 13(g) is part of the principles of national policy, courts in Malawi are enjoined, under sec 14 of the Constitution, to have regard to sec 13 in interpreting and applying any of the provisions of the Constitution.

36 Government of Malawi (n 1) 9. Another relevant policy would be the Special Needs Education Policy which was developed to guide the approach in respect of education for persons with disabilities.

following: health care; HIV/AIDS; employment; concerns pertaining to women and children; and the political process.³⁷ Apart from a general reference to the need to deal with exclusion, marginalisation and vulnerability, the Equalisation Policy never addressed itself to the specific challenges that persons with disabilities face when accessing justice in the country.

The Disability Act (the Act) contains provisions that are specific to the needs of persons with disabilities and its definition of 'disability' mirrors the CRPD. Importantly, the Act moves away from the medical or welfare model of disability that is contained in the Handicapped Persons Act and espouses the social model of disability.³⁸ In section 3 of the Act, the government is mandated to adopt policies and legislation on the equalisation of opportunities for person with disabilities in order to promote and protect the rights of persons with disabilities and also to fully include them in all aspects of life so as to enhance their dignity and well-being. The Act provides for a range of rights including the right to healthcare services,³⁹ the prohibition of discrimination in healthcare and rehabilitation services,⁴⁰ the right to education on the basis of equal opportunity and inclusivity,⁴¹ and the right to work and employment.⁴² As earlier alluded to, the Act does not have any provisions directly focusing on the right of access to justice for persons with disabilities.

A survey of the policy, legal and institutional framework indicates that there have been some positive developments in relation to rights of persons with disabilities. Nevertheless, and in common with many sub-Saharan countries, persons with disabilities in Malawi continue to encounter high levels of exclusion, marginalisation and discrimination.⁴³ It is also striking to note that in all the recent developments in Malawi that affect persons with disabilities, nothing has specifically been targeted at improving their access to justice.

For purposes of the present paper, it is important to acknowledge that different people with varying disabilities will experience different challenges in their access to justice. Additionally, various intersecting factors also condition the manner in which persons with disabilities enjoy their right to access justice and these include age, gender, ethnicity and the form of disability.⁴⁴

37 Government of Malawi (n 1) 14-16.

38 Chapter 33:02, Laws of Malawi. It is ironic that the Handicapped Persons Act was not repealed with the adoption of the Disability Act.

39 Sec 6, Disability Act.

40 Sec 7, Disability Act.

41 Sec 10, Disability Act.

42 Sec 12, Disability Act.

43 Lang (n 4) 75.

44 Flynn & Lawson (n 11) 8.

While this paper will make general conclusions about access to justice and persons with disabilities, this is not in any way to suggest that persons with disabilities in Malawi form a homogenous group.⁴⁵ The paper must simply be understood as suggesting that there are some common challenges that affect persons with disabilities in Malawi in so far as their right to access justice is concerned.⁴⁶ The next section of the paper discusses, at a general level, access to justice for persons with disabilities.

3 Understanding access to justice for persons with disabilities

The expression 'access to justice' marries two intellectually loaded concepts, 'access' and 'justice'. Because of the 'marriage' that the expression creates, a full understanding requires equal focus on both 'access' and 'justice'. Fein suggests that 'access to justice' has come to signify the many efforts made by a range of stakeholders to address the needs of historically disadvantaged populations in relation to the justice system.⁴⁷ The focus on 'historically disadvantaged populations', while perhaps being justifiable, has been criticised for narrowing the full meaning of access to justice.⁴⁸ It is fair, therefore, to understand access to justice as a broad concept 'encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice'.⁴⁹ In the context of the present paper, it is important to bear in mind that access to justice is a fundamental right in itself and also an essential prerequisite for the protection and promotion of other rights.⁵⁰

Bahdi has identified three distinct, but interlinked components of access to justice and these are substantive, procedural and symbolic.⁵¹ While not without its limitations, especially when applied to disability-related access to justice, Bahdi's formulation provides a useful starting

45 This paper is fully aware of the fact that generalisations about disability can be misleading and where appropriate its conclusions will be qualified to limit their applicability to particular disabilities.

46 It is also useful to point out that in spite of the diversity of disabilities, persons with disabilities share a common history of stigma, discrimination and segregation the world over – Lord & Stein (n 29).

47 DE Fein 'Access to justice: A call for progress' (2017) 39 *Western New England Law Review* 211 at 212.

48 Cf R Sandefur 'Introduction: Access to justice: Classical approaches and new directions' in R Sandefur (ed) *Access to justice* (2009) ix.

49 Ortoleva (n 12) 284.

50 OHCHR 'Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' https://www.google.mw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKÉwjxgMHy7YboAhXJyYUKHax3CVkQFjABegQIDBAF&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FDisability%2FA_HRC_37_25.docx&usg=AOvVaw3zYy3xVLP2yE-vHxjq_cN8 (accessed 1 March 2020).

51 R Bahdi 'Background paper on women's access to justice in the MENA region' http://www.uwindsor.ca/law/rbahdi/sites/uwindsor.ca.law.rbahdi/files/womens_access_to_justice_in_mena-bahdi_en.pdf (accessed 17 August 2017).

point for understanding access to justice for persons with disabilities.⁵² First, the substantive component ‘concerns itself with the substance or content of the legal rules and principles which shape decisions made in favour or against those who seek a remedy or a dispute settlement’.⁵³ This component requires the ‘development of laws and policies which promote substantive equality and stresses that this cannot usually be achieved without the involvement of the disadvantaged group’.⁵⁴ Applied to persons with disabilities, this means that attempts to design laws and policies for persons with disabilities are bound to fail unless they deliberately seek to accommodate their participation.

Second, the procedural component of access to justice refers to the:⁵⁵

types of institutions where one might bring a claim, the rules that govern the complaint and conduct of the parties once the complaint is brought within a particular institution, the particular mandate of a given institution and the factors – outside of the substantive law itself – which influence the nature and quality of the encounter

For persons with disabilities, procedural access to justice requires that attention must be given to the removal of the barriers that prevent them from bringing claims and also those that hinder their effective participation in proceedings meant to enforce rights.⁵⁶

Third, the symbolic component of access to justice ‘steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment’.⁵⁷ The symbolic component consists of a society in which, due in part at least to its laws and justice system, disadvantaged individuals are fully included and empowered to participate as equal citizens.⁵⁸ In relation to persons with disabilities, the symbolic component of access to justice involves consideration of what ‘justice’ actually entails for them outside of the narrow confines of the legal system to incorporate the political, social and cultural activities which further their participation and recognition as equal citizens.

In practice, persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems and other bodies that make up the justice system.⁵⁹ Numerous barriers prevent them from accessing justice on the same footing with others.⁶⁰ These include, amongst others, laws denying

52 Flynn & Lawson (n 11) 13.

53 As above.

54 Flynn & Lawson (n 11) 14.

55 Bahdi (n 51).

56 Flynn & Lawson (n 11) 15-16.

57 Bahdi (n 51).

58 Flynn & Lawson (n 11) 16.

59 Ortoleva (n 12) 284.

60 Flynn & Lawson (n 11) 9.

persons with disabilities legal standing, inadequate information or advice, insufficient resources, inaccessible architectural design, inaccessible information or communication methods and inadequate protection from victimisation. Such barriers limit not only the ability of persons with disabilities to use the justice system, but also their ability to contribute to the justice system, specifically, and to society, generally.⁶¹

The above notwithstanding, international human rights law recognises the right of access to justice in several instruments that predate the CRPD.⁶² For example, article 8 of the Universal Declaration of Human Rights (UDHR) provides that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’. The International Covenant on Civil and Political Rights (ICCPR) in article 14 provides that ‘all persons shall be equal before the courts and tribunals’. Article 14(2)(f) of the ICCPR states that, with respect to criminal proceedings, every person has the right ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’.⁶³ Further, in article 16 the ICCPR provides that ‘everyone shall have the right to recognition everywhere as a person before the law’ which entails that legal capacity is an inherent attribute of all human beings.

The CRPD, however, is the first international human-rights instrument that specifically enshrines a right of access to justice for persons with disabilities.⁶⁴ In doing so, the CRPD has expanded the classical notions of access to justice and emphasised the fact that access to justice entails not only removing barriers to ensure access to legal proceedings

to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement and participation of persons with disabilities in the administration of justice’.⁶⁵

The manner in which access to justice has been recognised, in many international instruments, demonstrates that it is a right that must never be understood in isolation. Access to justice must be understood together with other human rights like the right to a fair hearing, the right to equality and the prohibition of discrimination, amongst other rights. Specifically in relation to the CRPD, this means that access to justice for persons with disabilities must always be understood together with the other rights in the

61 Ortoleva (n 12) 284.

62 See also, art 7 of the African Charter on Human and Peoples’ Rights, Malawi ratified this instrument on 17 November 1989 <http://www.achpr.org/instruments/achpr/ratification/> (accessed 7 September 2017).

63 Ortoleva argues that this provision creates a basis for the adoption of reasonable accommodation measures for persons who have hearing impairments or visual impairments to use sign language or braille, respectively, in court proceedings: Ortoleva (n 12) 293.

64 OHCHR (n 50) para 5.

65 OHCHR (n 50) para 12.

CRPD.⁶⁶ This is because access to justice, as conceptualised under the CRPD, is a cross-cutting right that must be interpreted in line with all the principles and obligations underlying the CRPD.⁶⁷

Practically, access to justice for persons with disabilities coalesces around three key components and these are: equality before courts and the right to fair trial; the right to an effective remedy; and participation in the administration of justice.⁶⁸ Each of these three components in turn implicates other demands. First, equality before the courts and fair trial requires that effort be made to ensure that persons with disabilities can physically access institutions critical for the realisation of their rights, but also that they are guaranteed effective access to information and means of communication necessary for them to know and defend their rights. It also requires that provision be made for procedural and age appropriate accommodation within the justice system. Equality before courts and fair trial also demand that persons with disabilities be guaranteed the right to claim justice and stand trial, and to benefit from the presumption of innocence on the same footing as everyone else and be accorded legal aid as appropriate.

Second, the right to an effective remedy for persons with disabilities entails that equal and effective access to justice be guaranteed by, amongst other things, securing the availability and accessibility of complaint mechanisms, investigation bodies and institutions which include judicial bodies that can make authoritative determinations and award reparations. It also encompasses adequate, effective and prompt redress and reparations for harm suffered, and access to relevant information concerning violations and reparations.⁶⁹

Third, participation in the administration of justice requires that persons with disabilities be guaranteed the right to participate directly or indirectly at all stages of proceedings. Direct participation occurs when persons with disabilities are parties to the action while indirect participation is when persons with disabilities take other roles in proceedings, for example, as witnesses, jurors, lawyers or judges. Against this background, it is clear that guaranteeing access to justice for persons with disabilities often requires a serious rethinking of many aspects of the justice system.⁷⁰

The next section of the paper explores Malawi's criminal justice system and highlights some challenges and opportunities in relation to access to justice for persons with disabilities.

66 Flynn & Lawson (n 11) 24.

67 OHCHR (n 50) para 14.

68 OHCHR (n 50) paras 17-61.

69 OHCHR (n 50) para 43.

70 F Gibson 'Article 13 of the Convention on the Rights of Persons with Disabilities – A right to legal aid' (2010) 15 *Australian Journal of Human Rights* 123 at 127.

4 Exploring access to justice challenges and opportunities for persons with disabilities in Malawi's criminal justice system

The criminal justice system refers to the collective of institutions through which a person passes until the allegations against him/her have been processed.⁷¹ The criminal justice system consists of three main components and these are: law enforcement (the police); adjudication (judges, lawyers, prosecutors, magistrates); and correctional facilities (prison officials and probation officers).⁷² A contemporary view of the criminal justice system also includes victims and services available to them as another component.⁷³ The agencies that make up the criminal justice system are independent of each other, but must operate together to ensure the prevalence of the rule of law.

Generally, access to justice for persons with disabilities

raises multidimensional barriers from physical access to courthouses, to ensuring that people with various disabilities are accommodated by materials in alternative formats, making court websites accessible for persons who use assistive technology, and installing listening systems in court houses.⁷⁴

Access to justice for persons with disabilities is both a means as well as an end.⁷⁵ It is a means because it is the vehicle that provides persons with disabilities with an opportunity to realise their rights. It is an end because it can be used to avail individuals with the relevant procedures, institutions and processes that recognise, protect and enforce human rights.

Malawi's criminal justice system, obviously, is quite wide and incorporates many institutions. It is not feasible to conduct an analysis of the entire system within the confines of the present paper. Resultantly, the analysis herein focuses on the roles of the police and the courts. Further, the analysis focuses on the three components of access to justice earlier identified, which are: equality before the courts and the right to fair trial; right to an effective remedy; and participation in the criminal justice system. Each of these will now be addressed individually.

71 USLegal 'Criminal justice system law and legal definition' <https://definitions.uslegal.com/c/criminal-justice-system/> (accessed 17 August 2017).

72 K Daly & R Sarre 'Criminal justice system: Aims and processes' https://www.griffith.edu.au/__data/assets/pdf_file/0011/924878/2017-Daly-and-Sarre-Criminal-Justice-System-FINAL-23-Oct-2016.pdf (accessed 17 August 2017).

73 'What is the criminal justice system' <http://highered.mheducation.com/sites/dl/free/0078026520/953715/Chapter01.pdf>. (accessed 17 August 2017).

74 Lord & Stein (n 29) 110.

75 L Kalaluka 'Towards an effective litigation strategy of disability rights: The Zambia experience' (2013) 1 *African Disability Rights Yearbook* 168.

4.1 Equality before the courts and the right to fair trial

Article 13(1) of the CRPD specifically requires states parties to ‘ensure access to justice for persons with disabilities on an equal basis with others’. This entails that persons with disabilities should be availed all rights and procedural safeguards during pre-trial, trial and post-trial phases of proceedings.⁷⁶ As the examples below demonstrate, persons with disabilities in Malawi face challenges due to lack of accessibility of and access to relevant information and failures to provide procedural accommodation.

For example, once a person has been arrested section 20A of the CPEC requires that the police must promptly inform the person of the fact that he has been arrested and also inform him/her of his/her rights as an arrested person.⁷⁷ If the person arrested is a child, additional safeguards for his/her well-being are provided in section 20D of the CPEC.⁷⁸ In all cases, an arrested person must not be subjected to ‘more restraint than is necessary to prevent’ his/her escape.⁷⁹

One question that immediately emerges with regard to these provisions relates to the mode of communication that must be used in informing an arrested person of the fact of his arrest and his rights. On this point, it is clear that the CPEC has assumed that all arrested persons can be communicated to using the same means of communication. The result is that if the police were faced with a suspect who has both visual and hearing disabilities, they would have no guidance from the CPEC in terms of how to communicate the fact of the arrest and the rights of the arrested person. The provision of sign language, for example, would be dependent on the initiative and goodwill of the arresting officer. While the CRPD and the Disability Act require reasonable accommodation to be extended to any persons with disabilities in the situation just described there is nothing in the CPEC from whence a duty to extend accommodation could be premised. This shortcoming is particularly perilous since the CPEC is the primary statute governing the pre-trial and trial handling of all suspects.

It should also be noted that the police are empowered to search people that they arrest and take over for safekeeping any items in the suspect’s custody other than necessary wearing apparel.⁸⁰ From experience, what this entails is that the police will remove everything from the person of the suspect including belts, shoes, wallets and anything else that they deem could be used to assist escape or could be used in the commission of other

76 OHCHR (n 50) para 18.

77 Sec 42, Constitution of the Republic of Malawi.

78 Further safeguards when arresting a child can be found in sec 90 of the Child Care, Protection and Justice Act 22 of 2010.

79 Sec 23, CPEC.

80 Sec 24, CPEC.

crimes while in custody. In so far as the mode for conducting searches is concerned, a search on a woman must be conducted by a woman and the converse is applicable for men.⁸¹ Searches must, however, be conducted with due regard to decency.

The manner in which the police are empowered to conduct searches, as per the CPEC, offers no guidance in terms of how they must deal with persons with various disabilities. Following the procedure for conducting searches as prescribed by the CPEC, it is possible that persons with disabilities using assistive devices could have the same taken away from them while they are being put under custody. This would leave such persons vulnerable to further violations of their rights.

In so far as equality and fair trial are concerned, it is important to recall that in disability-rights discourse, language and terminology matter significantly. This is because the terms and labels that have been used in connection with persons with disabilities, have in turn tended to colour peoples' perceptions of persons with disabilities and also determining what rights to accord them.⁸² Some of the terms employed in Malawian criminal law, are pejorative, unpleasant and demeaning for persons with disabilities.⁸³ Such language is not in conformity with the CRPD as well as the Disability Act. By way of example, section 139 of the Penal Code provides as follows:

Any person who, knowing a woman or girl to be an **idiot** or **imbecile**, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was **an idiot or imbecile**, shall be guilty of a felony and shall be liable to imprisonment for fourteen years. (emphasis provided)

The Merriam-Webster Online Dictionary defines 'imbecile' as 'a fool' or 'idiot' and 'idiot', as 'a person affected with extreme mental retardation'. These meanings are indicative of the connotations that these words have in normal parlance.

While section 139 of the Penal Code may have been aimed at providing protection from sexual abuse for persons with intellectual disabilities, the language used is inexcusable. The language is demeaning to persons with disabilities and also, in its formulation, it is incapable of accommodating differences and diversity among persons with intellectual disabilities. Such language may also negatively influence the manner in

81 Sec 26, CPEC.

82 L Nyirikindi 'A critical analysis of paradigms and rights in disability discourses' (2006) 12 *East African Journal of Peace and Human Rights* 52.

83 Cf P Manatsa 'Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?' (2015) 4 *International Journal of Humanities and Social Science Invention* 27.

which other actors deal with persons with disabilities. Such language gives a negative perception of the victim while at the same time diminishing the seriousness of the offence.⁸⁴

It should also be noted that under section 11, the Penal Code stipulates that every person is presumed to be of 'sound mind' until the contrary is proved. Section 12 of the Penal Code permits the defence of 'insanity' for persons suffering from diminished responsibility. Further, section 214A of the Penal Code, dealing with diminished responsibility for murder and manslaughter, provides as follows:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such **abnormality of mind**, whether arising from a condition of **arrested or retarded development of mind** or other inherent cause induced by disease or injury, as has substantially impaired his mental responsibility for his acts in doing or being a party to the killing. [emphasis provided]

The observations made in respect of section 139 above are equally applicable to sections 11, 12 and 214A of the Penal Code. Terms such as 'abnormality of mind', 'arrested development of mind' and 'insanity' are not consistent with the social model of disability which Malawi embraced by passing the Disability Act and ratifying the CRPD. These terms are loaded with prejudice about disability and may compromise the perceptions and actions of actors dealing with persons with disabilities in the criminal justice system.⁸⁵

Perhaps the most glaring omission with regard to the provisions regulating the manner in which police officers must deal with persons with disabilities during and subsequent to arrest is the absence of provisions requiring the police to facilitate access to support services for persons with disabilities. Admittedly, the diversity of disability necessitates different support services. However, in all cases involving persons with disabilities it is important that the police facilitate access to support services to enable persons with disabilities to be dealt with in a manner that respects their rights.⁸⁶ It is hard to imagine, by way of example, how the police can conduct a human-rights compliant interview of a person with intellectual or psychosocial disability without extending necessary support services to such a person. The absence of any law on this point entails that persons

84 Malunga, Kanyongolo & Mbanu-Mweso (n 15).

85 Other provisions that highlight the same problem include sec 211 of the CPEC which refers to a witness who is 'unable to speak' as 'a dumb witness' and sec 32(4) which refers to 'mental infirmity' as a condition that police officers must consider before releasing a suspect with a caution.

86 Australian Human Rights Commission (n 13) 18.

with disabilities are not guaranteed access to support services when dealing with the police.⁸⁷

All the above notwithstanding, it must be conceded that the rather bland provisions governing the conduct of searches, for example, are capable of being employed to preserve the rights of persons with disabilities. For example, a creative interpretation of section 23(3) and 23(4) of the CPEC supports the conclusion that any search should proceed only if reasonably required and, under section 26 of the CPEC, any search must be conducted 'with strict regard to decency'. Such an interpretation, coupled with proper training for law enforcement officers, would ensure that the conduct of searches upholds the rights of persons with disabilities. The challenge with the current situation, however, is its unpredictability. Whether rights of persons with disabilities are respected during a search, for example, depends on the conduct of the police officer on the scene and not because of clear prescription of law.

Overall, the interaction between the police, whether as investigators or prosecutors, and persons with disabilities in Malawi is complicated by the fact that the Malawi Police Service (MPS) does not have standardised procedures for dealing with persons with disabilities.⁸⁸ There is no mandatory training in disability rights both during recruitment as well as after recruitment. The treatment of persons with disabilities who come into conflict with the law, therefore, remains largely dependent on the competences and skills of the officer on the ground.

4.2 The right to an effective remedy

Equal and effective access to justice remains critical to persons with disabilities. This includes available and accessible complaint mechanisms, investigative bodies and institutions, including independent judicial bodies capable of determining and awarding reparations; and adequate, effective and prompt redress and reparation for harm suffered. Equal and effective access to justice also covers access to relevant information concerning violations and mechanisms for reparations.

In relation to the right to an effective remedy, it should be recalled that the first engagement that one has with the criminal justice system is often through contact with the police as a victim, suspect or witness. For many people, this is often a novel experience. Aside from the novelty of the first

87 For example, under sec 32A(4)(d), CPEC, a police officer may, upon effecting an arrest, caution the suspect and release him/her. One of the conditions that the police officer may consider in determining whether to release the suspect or not is the 'mental infirmity' of the suspect. While the language of the provision is certainly archaic, it is an example of a provision that can be utilised to accommodate persons by diverting them from the mainstream criminal justice system depending on the allegation against them.

88 Author interview with Deputy Commissioner of the Malawi Police Service Police, M Kaluba, 7 September 2017.

time engagement, persons with disabilities face additional challenges when dealing with the police.⁸⁹ For example, disability is a major risk factor when assessing vulnerability to torture, cruel, inhuman or degrading treatment or other forms of abuse.⁹⁰ Persons with disabilities are thus more exposed to violations of their rights when they come into contact with the police than members of the larger population.

In respect of the above, several points can be noted. First, and as earlier pointed out, an arrest in Malawi must follow section 20 of the CPEC. While section 20 of the CPEC requires an officer to actually touch or confine the person to be arrested, force can only be used if the suspect resists and it must be commensurate to the exigency. If a person is charged with a criminal offence arising out of a lawful arrest in which force was used, a court determining whether the necessary degree of force was used may have regard to the gravity of the offence which was being allegedly committed by the person and the circumstances of the offence. Further, under section 28 of the CPEC a police officer may, without warrant, arrest a person whom he finds loitering in any highway or place during the night who he suspects has committed a felony or is about to commit a felony.⁹¹ The power to arrest without a warrant extends to cover any person considered to be a vagabond or habitual thief or a person who fails to give a satisfactory account of himself/herself.⁹²

At first glance these provisions seem neutral and without any particular implications for persons with disabilities. Close scrutiny, however, reveals some of the challenges that persons with disabilities may encounter when the law is applied to them. By way of example, while a standard arrest requires 'touching and confinement', this may not be very straightforward where the person to be arrested has severe walking disability and is confined to a wheelchair. Further, the provisions on making an arrest offer no guidance on how a police officer must, for example, deal with persons having intellectual and psychosocial disabilities. If, by way of illustration, a person suffering from psychosocial disabilities being arrested is deemed to be resisting arrest, force is likely to be used on him/her. There is nothing in the law that guides the police to factor in disability-related concerns when effecting arrests.

89 Australian Human Rights Commission (n 12) 18.

90 Report of the Office of the High Commissioner for Human Rights 'Expert seminar on freedom from torture and ill-treatment and persons with disabilities' (11 December 2007) <http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorture-reportfinal.doc> (accessed 22 August 2017).

91 Sec 28(f), CPEC. There is also the possibility that this provision may be used to target persons with intellectual disabilities who are not under care and wander in the streets.

92 Sec 29, CPEC. The power to arrest persons considered to be vagabonds, habitual thieves or those that fail to give a satisfactory account of themselves must now be understood in the light of the decision in *Mayeso Gwanda v The State* Constitutional Cause 5 of 2015, where the High Court found sec 184(1)(c) of the CPEC to be unconstitutional.

The absence of explicit guidance on how to handle persons with disabilities during arrest, entails that the arresting officer is left with discretion to improvise in dealing with persons with disabilities. This can bring about contradictory results depending on whether the officer involved is well versed in disability rights or not. On the one hand, this could be an opportunity if the officer is familiar with protocols for dealing with persons with disability. On the other hand, in the case of an officer unfamiliar with disability rights, this poses challenges for persons with disabilities and may lead to violation of rights.

Second, procedures incidental to the commencement of criminal proceedings also deserve mention. For example, under section 85 of the CPEC 'every summons' issued by a court 'shall be in writing, in duplicate, signed and sealed' by an officer of the court. The summons must also contain a statement of the offence with which the person is charged and the particulars thereof. In terms of service of summons, section 87 of the CPEC directs that summons must be served personally by a police officer, an officer of the court or other public servant and a person receiving the summons is required to acknowledge service by signing the duplicate of the summons. Failure to attend court after a summons has been issued exposes the person summoned to a fine. Additionally, in preparing a charge sheet, section 126 of the CPEC directs that every charge must contain a statement of the offences alleged together with particulars of the offence. The detailed rules for framing charges are contained in section 128 of the CPEC and these emphasise the need to use precise language when preparing charges. By way of illustration, section 128(a)(ii) provides that the statement of offence shall be 'short and shall describe the offence in ordinary language' while section 128(a)(iii) provides that 'after the statement of offence, particulars of such offence shall be set out in ordinary language'.

The commencement of criminal proceedings is notable for its emphasis on writing and the use of 'ordinary language'. This emphasis, if applied rigidly, may result in marginalisation of persons with disabilities within the criminal justice system. While the CPEC has not defined what is meant by 'ordinary language', practically, this refers to English. Admittedly, the use of English in Malawian courts affects not only persons with disabilities, but also many Malawians who are not conversant with the language.⁹³ Nevertheless, for persons with disabilities this is a further burden considering the other disadvantages that they have to endure.

The procedure for framing of charges, it is argued, has made no provision for accommodating the various disabilities that accused persons may have. The assumption seems to be that crafting charges in 'ordinary language' is sufficient to ensure effective communication to everyone.

93 The general disadvantage arising from using English is, for the population at large, mitigated by translation of court proceedings into local languages.

There is no statutory requirement directing that charge sheets and summons be prepared in formats that accommodate the needs of persons with disabilities. Additionally, the service of summons is also straight-jacketed and makes no accommodation, for example, for service on persons with visual disabilities or other disabilities that may make reading a challenge. Nevertheless, if a person with disabilities fails to attend court upon being summoned, he/she may be condemned to pay a fine. It is ironic that a sanction can be imposed even when non-compliance with the summons may be for reasons that are structurally embedded in the criminal justice system itself.

4.3 Participation in the criminal justice system

Under the CRPD, for persons with disabilities to have access to justice on an equal basis with others, they must be able to participate directly or indirectly at all stages of proceedings.⁹⁴ Direct participation refers to those instances where a person with disability acts as a claimant or defendant or in any other capacity as a party to the proceedings. Indirect participation refers to other roles that contribute to the administration of justice such as a witness, expert, juror or judge.

There are several provisions relating to the conduct of criminal trials that raise red flags for persons with disabilities. For example, section 138 of the CPEC allows a court to proceed with a trial or committal proceedings even where the accused does not understand the proceedings as long as he/she is not insane. 'Insanity', it seems, is the only condition that would necessitate stopping proceedings and adopting a different procedure.⁹⁵ It defies reason why a court would proceed with a trial even when the accused does not understand proceedings. This provision is also oblivious to the fact that there is a range of disabilities that may challenge a person from following a trial conducted in the traditional manner and not just 'insanity'. Effective participation by persons with disabilities in judicial proceedings requires that a trial should only proceed when the accused can confirm that he/she is following the proceedings.

Further, section 163 of the CPEC provides for the manner in which evidence must be recorded during a trial. According to this section, all evidence must be 'in writing in the language of the court' or in the presence a presiding officer under his direction and superintendence. Under section 164 of the CPEC, if the evidence is given in a language that is not understood by the accused, it must be interpreted into a language that can be understood by him/her. Additionally, section 211 of the CPEC allows a witness who is 'unable to speak' to give his/her evidence in any manner in which he can make it intelligible by writing or signs. Upon the

94 OHCHR (n 50) para 54.

95 As to the procedure for dealing with 'insane' accused persons, see secs 134-136, CPEC.

conclusion of a trial, an accused person is also entitled to a copy of the court's judgment 'in a language he understands'.⁹⁶

From the perspective of participation in the criminal justice system by persons with disabilities, three things can be noted. First, the language of the court in Malawi is English and all court records are prepared in English.⁹⁷ There is no provision to record the evidence or translate a judgment into, for example, braille or any other medium. Second, section 211 of the CPEC, though supposedly directed at 'dumb witnesses', can be utilised to accommodate witnesses who have a speech disability by permitting them to employ, for example, sign language in giving their evidence. Third, the law requires that evidence must be translated into a language that can be understood by an accused person and that a copy of the judgment, upon request, should be given to an accused person in a language that he/she understands. Since the law has not limited the language into which a judgment or evidence must be transcribed, under a broad interpretation of these provisions, courts are at liberty to facilitate translation of a judgment or the court record into braille or other forms of communication accessible to persons with disabilities. However, the failure to have the above suggested measures of accommodation embedded in the law entails that persons with disabilities would be hard pressed to demand such accommodation where the court is not amenable to providing them.

It should also be noted that jury service in Malawi exempts persons with 'mental infirmity'.⁹⁸ The CPEC has not defined 'mental infirmity' but, as earlier pointed out, this type of language is demeaning. It is also language that is very woolly and incapable of accommodating a diversity of intellectual disabilities. It overgeneralises lack of legal capacity for persons with intellectual disabilities. It presumes, rather broadly, that persons with intellectual disabilities are completely incapable of making intelligible decisions.

4.4 A repository of opportunity?

Under section 93 of the CPEC, the Chief Justice is empowered to make rules for the better conduct of all criminal proceedings in Malawi. Further, under section 367 the Chief Justice may, by notice published in the Gazette, prescribe forms that are to be used in criminal proceedings in Malawi. Two points can be noted here. First, the Chief Justice can utilise section 93 to adopt rules that can transform the CPEC into a disability

⁹⁶ Sec 141, CPEC.

⁹⁷ Shorthand notes and electronic records may be made of proceedings at trial, sec 365, CPEC and a copy thereof may be given to any person affected by the judgment, sec 366, CPEC. This mode of capturing proceedings still excludes many persons with disabilities especially those with visual and hearing impairments.

⁹⁸ Sec 296(k), CPEC.

rights-compliant code. Second, all the prescribed forms under the CPEC are in English and there is no obligation to ‘translate’ them into a format that can be accessible to various persons with disabilities. Nevertheless, utilising the power under section 93, the Chief Justice can remedy this shortfall by prescribing forms that accommodate various disabilities. There is, therefore, embedded within the CPEC opportunity for making Malawi’s criminal procedure more aligned with principles in the CRPD and Disability Act.

In so far as the Penal Code is concerned, section 3 can be used to generate disability rights compliant interpretations of the criminal law. Section 3 provides that the Penal Code ‘[s]hall be interpreted in accordance with the principles of legal interpretation that – take full account of the principles and provisions enshrined in the Constitution’. While this provision does not give the court *carte blanche*, it is a provision that can be utilised to deduce disability compliant interpretations of the penal law. Crucially, the Constitution is very emphatic on human rights. By constantly factoring its stipulations into the interpretation of all criminal law, therefore, courts can, even without legislative intervention, ensure that the criminal law is applied in a manner that fully accords with the rights of persons with disabilities. Similarly, from a procedural perspective, section 3 of the CPEC is relevant and can be used to enhance access to justice for persons with disabilities. Section 3 stipulates that the principle that substantive justice should be done without undue regard for technicality shall at all times be adhered to in applying the CPEC. This provision can be used to lessen the hardship that some provisions of the CPEC may impose on persons with disabilities by allowing courts to focus on substantive justice rather than technical procedural aspects.

The penultimate part of this paper presents some recommendations following from the analysis conducted herein.

5 Ensuring access to justice for persons with disabilities in Malawi: Proposals on the way forward

The major challenges in Malawi’s criminal justice system, so far as persons with disabilities are concerned, stem largely from the fact that the key statutes undergirding the system predate the CRPD, the Disability Act and the Constitution. Resultantly, these statutes were not explicitly crafted to accommodate rights of persons with disabilities. In line with article 4(1)(b) of the CRPD, therefore, the obligation on Malawi is to either modify these laws or adopt new laws to make the criminal justice system compliant with the rights of persons with disabilities.

In so far as, for example, the language employed in some of the statutes is not compliant with the principles in the CRPD, the Disability Act and the Constitution, such situations require amendment of the law. In other instances, however, and pending the adoption of the necessary amendments, courts can adopt creative interpretations of existing laws to support the rights of persons with disabilities. Addressing the deficiencies in the criminal justice system by way of interpretation requires a concession that the ratification of the CRPD and the adoption of the Disability Act have created a need to realign all laws in Malawi in line with the rights of persons with disabilities. Crucially, it also presupposes the presence of competent criminal justice sector personnel in all the relevant agencies to undertake this task.

To illustrate the above, section 139 of the CPEC requires a court to pronounce the substance of every judgment in court in the presence of the accused person and upon request to read the entire judgment in court. While this section has not made provision for accommodating persons with hearing disabilities, a court, relying on the CRPD, the Disability Act and the Constitution, can nevertheless proceed to provide sign language interpretation in delivering its judgment. Additionally, under section 99 of the Child Care, Protection and Justice Act, a preliminary inquiry must be held in respect of any child suspected of being responsible for a crime before plea is taken. Even though this section does not refer to disability, it is sufficiently broad to allow a child justice court to accommodate disability related issues in processing a suspected child offender. In the main, therefore, barring the amendment to key statutes in the criminal justice system, courts applying the principle of reasonable accommodation can still make substantial progress in realising the rights of persons with disabilities. Against this background, this section of the paper presents some proposals for improving Malawi's criminal justice system in order to align it with the rights of persons with disabilities.

5.1 The need for a thorough audit of all laws in the criminal justice system

The social model of disability requires a holistic understanding of persons with disabilities and their right to access justice. In Malawi, and specifically in relation to the criminal justice system, a thorough disability rights-focused audit of all laws having a bearing on the criminal justice system is a must. The audit must identify all laws that negatively affect the rights of persons with disabilities. Such an audit would form the basis on which recommendations for either repeal of laws or for further training of criminal justice actors can be conducted. In line with the principle of full and effective participation, such an audit must involve persons with disabilities and their representative organisations so that the ways in which the various laws affect persons with disabilities can be properly articulated and factored into the audit.

5.2 Amendment of non-compliant laws

The examples discussed earlier, from the CPEC and the Penal Code, confirm that the language used by Malawi's criminal law is, in certain aspects, archaic and not consonant with the rights of persons with disabilities. To rectify this situation, there is need to amend all such statutes to make them compliant with the CRPD, the Disability Act and the Constitution. To ensure that rights of persons with disabilities are fully accommodated in this process, however, it is important to precede the amendment of laws by the audit that has earlier been referred to. For the avoidance of doubt, amendment of laws must not simply target the language in the laws, but also the procedures that do not accommodate the rights of persons with disabilities.

5.3 Disability rights training for criminal justice system actors

According to a recent study, the dearth of knowledge about disability rights within the justice sector in Malawi is pervasive and overwhelming.⁹⁹ This emphasises the need for appropriate training of all actors in the justice sector. Police officers, magistrates, lawyers, judges and court clerks all require training on disability rights. In the case of police officers, for example, they must be trained in, amongst other things, how to process persons with various disabilities during investigations and when conducting arrests. Magistrates and judges must be trained on the way in which courtroom procedures can uphold rights of persons with disabilities. Clerical staff working with the courts must also be trained to deal with persons with disabilities in a manner that respects their rights.¹⁰⁰ Lawyers must also be trained on the specific nuances involved in litigating disability rights cases. Overall, therefore, all programmes designed to strengthen the criminal justice system must include a disability component.¹⁰¹

5.4 Domestication of the CRPD

It is commendable that Malawi ratified the CRPD. However, considering the dualist nature of its legal system, it is important that steps be taken to domesticate the CRPD. Domestication would be the clearest indication of Malawi's commitment to uphold the CRPD. Domestication would also provide Malawi with an opportunity to reflect on disability issues that are

99 Malunga, Kanyongolo & Mbanu-Mweso (n 15).

100 Currently, court clerks and interpreters in Malawi are not specifically trained to deal with persons with disabilities. For example, if there is need for sign language translation a decision must be made to find a translator but the judiciary does not have such translators – Author interview with former Registrar of the High Court and Supreme Court of Malawi, Joseph Chigona, 24 August 2017. Translation of records into braille also would require outsourcing.

101 Ortoleva (n 12) 315.

specific to Malawi and hence requiring concerted local effort.¹⁰² To bring full meaning to the domestication, it would also be important for Malawi to ratify the Optional Protocol to the CRPD. Ratification of the Optional Protocol would enhance available avenues for potential litigants in relation to rights under the CRPD by adding the Committee on the Rights of Persons with Disability to the possible fora that one could approach. Further, and in tandem with domestication of the CRPD, it is also important for the government to support programmes designed to generate public awareness about the CRPD. Specifically in relation to access to justice, domestication would enhance clarity about the access to justice for persons with disabilities seeing as the Disability Act does not have an explicit provision on the same.

5.5 Legal education

Members of the legal profession remain key in facilitating access to justice for persons with disabilities, but they may have no understanding or may lack the skills necessary to interact with people who have disabilities.¹⁰³ Generally, lawyers receive no formal training in law school for dealing with persons with disabilities. Institutions training lawyers, therefore, must have dedicated courses dealing with disability rights in order for lawyers to properly fulfil their role in facilitating access to justice for persons with disabilities. In this connection, therefore, the fact that the University of Malawi, which remains the sole local institution for training lawyers, has over the past eight years been teaching disability rights as part of its human rights curriculum is commendable.¹⁰⁴

Systematic training of legal professionals in disability rights can create a cadre of legal professionals capacitated to deal with various disability rights issues. While the training of legal professionals is important, to improve access to justice for persons with disabilities, it is also important to take steps that can increase the enrolment of persons with disabilities in institutions that train legal professionals. On this score, the University of Malawi has, historically, not done very well.¹⁰⁵ It still lacks facilities for ably supporting persons with, for example, visual or hearing disabilities. The result is that it has graduated a negligible number of persons with visual and hearing disabilities. In order to improve this situation, the University of Malawi needs to systematically dismantle the barriers that have traditionally prohibited persons with disabilities from training as

102 Cf Kaluluka (n 75) 182.

103 Gibson (n 70) 128.

104 'Championing disability rights: The law school programme' <https://www.cc.ac.mw/news/championing-disability-rights-the-law-school-program-19-02-2016> (accessed 10 April 2020).

105 E Kamchedzera 'Access and equity for students with disabilities at the University of Malawi: The case of Chancellor College' in T Halvorsen, H Ibsen & VRP M'kumbuzi (eds) *Knowledge for a sustainable world: A southern African-Nordic contribution* (2015) 71-92.

lawyers. This would also require that serious attention be paid to schemes of reasonable accommodation that could assist learners with disabilities when they enrol with the University. The fact here is that law schools are vehicles for potential change with respect to disability rights and it is important that this potential must be harnessed.

6 Conclusion

Although Malawi ratified the CRPD and adopted the Disability Act, this by itself has not led to an amelioration of the rights of persons with disabilities. Clearly, therefore, ratification of international instruments and adoption of policies and statutes will count for nothing unless deliberate effort is expended in implementing the policies and laws.

In terms of the criminal justice system and access to justice for persons with disabilities in Malawi, this paper has demonstrated that there are several areas requiring improvement if the rights of persons with disabilities are to be fully realised. In some instances, all that is required is the implementation of reasonable accommodation measures through creative interpretation of the existing laws while in other instances, amendment of the laws may be necessary. However, to proceed systematically with either the amendments or reasonable accommodation measures, it is important to conduct a full audit of the laws having a bearing on the criminal justice system so that the problematic areas are identified and isolated. Further, it is also important to conduct disability rights training for all actors in the criminal justice system and to include disability rights training as part of the curricula in law schools. Finally, it remains very important for Malawi to domesticate the CRPD and ratify the Optional Protocol. Considering the breadth of the criminal justice sector in Malawi, the analysis in this paper has simply been indicative of the issues and possible solutions.

SECTION B: COUNTRY REPORTS

NIGER

Gerard Emmanuel Kamdem Kamga*

Summary

According to the 2012 census, the Republic of Niger has a population of 17.1 million people made up of 49.7 per cent males and 50.3 per cent females. As of 2020 this population is estimated at 24 096 565 inhabitants. In terms of disability, the percentage of people with disabilities in Niger is 4.2 per cent of the population, that is 715 497 people.

The Republic of Niger signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2007 and ratified it the following year in 2008. At the national level, the Constitution of Niger frames disability. Article 22 prohibits any form of discrimination toward women and people with disability. In the same vein, both articles 26 and 100 provide for the protection of people with disabilities at various levels. In terms of legal framework on disability, the Republic of Niger enacted legislation, decrees and ordinances pertaining to the issue of disability in the country. On the one hand, the government has set up a number of bodies to deal with disabilities issues. These include among others a National Committee in charge of the monitoring and implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) [Comité National chargé du Suivi de la mise en œuvre de la Convention relative aux Droits des Personnes Handicapées (CDPH)] and a National Committee in charge of the promotion of people with disabilities [Comité National pour la Promotion des Personnes Handicapées (CNPPH)]. In addition to this, there exists in Niger a National Commission of Human Rights [Commission Nationale des Droits Humains (CNDH)], an Independent administrative authority provided for by article 44 of the Constitution of 25 November 2010. On the other, at the national level, there are a number of non-governmental organisations and unions that aim at promoting and protecting

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people with disabilities. Chief among these are the Nigerien Federation of People with Disability [Fédération Nigérienne de Personnes Handicapées (FNPH)] and the Nigerien Federation of Paralympic Sports [Fédération Nigérienne de Sport Paralympique (FENISPHA)].

Nonetheless, despite a comprehensive set of initiatives, measures and instruments promoting and protecting their rights, people with disabilities in Niger still face a number of challenges in terms of transport, employment, education, social insertion as well social stigmas and other barriers.

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Niger?

Le Niger a réalisé quatre Recensements Généraux de la Population et de l'Habitat notamment en 1977, 1988, 2001 et 2012. Une population estimée à plus de 17.1 millions d'habitants dont 49,7% d'hommes et 50,3% de femmes, selon les résultats du 4ème Recensement Général de la Population et de l'Habitat effectué en 2012.¹ La population totale du Niger en 2020 est estimée à 24 096 565.

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Niger. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Niger?

Selon les dispositions de l'ordonnance n° 93/012 du 2 mars 1993 déterminant les règles minima relatives à la Protection Sociale des Personnes Handicapées, l'expression – personnes handicapées – désigne des individus qui se trouvent dans l'incapacité d'assurer par eux-mêmes tout ou partie des nécessités d'une vie individuelle ou collective normale, du fait d'une déficience congénitale ou non de ses capacités physiques, sensorielles ou mentales. Entre outre, le Recensement Général de la Population et de l'Habitat 2012 attribue le terme de «handicap», aux personnes présentant une incapacité physique, auditive, visuelle ou mentale dans la vie de tous les jours qui entraîne un ralentissement de l'activité productive de la personne.²

1 Le cinquième recensement général de la population et de l'habitat se prépare au Niger. <https://www.niameyetles2jours.com/la-gestion-publique/social/0603-5161-le-cinquieme-recensement-general-de-la-population-et-de-l-habitat-se-prepare-au-niger> (Consulté le 31 juillet 2020).

2 Recensement Général de la Population et de l'Habitat 2012, rapport sur la situation socio-économique des personnes handicapées http://www.stat-niger.org/statistique/file/RGPH2012/SITUATION_DES_HANDICAPEES.pdf. p.10 (Consulté le 31 juillet 2020).

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République du Niger?

Selon les statistiques recueillis lors du dernier Recensement Général de la Population et de l'Habitat 2012, les personnes en situation de handicap au Niger représentent 4,2% de la population totale résidente, soit 715 497 personnes.³ Les effectifs des personnes en situation de handicap au Niger sont passés de 94246 personnes en 1988 à 80035 personnes en 2001 pour atteindre 715497 personnes en 2012. En gros entre 2001 et 2012, les effectifs des personnes en situation de handicap ont été multipliés par neuf.

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République du Niger?

D'après les statistiques du Recensement Général de la Population 2012, il y a presque autant d'hommes que de femmes en situation de handicap, notamment 4,2% d'hommes et 4,1% de femmes. Pour ce qui est du nombre total, le même Recensement révèle que le rapport de masculinité chez les personnes en situation de handicap est estimé à 102 hommes pour 100 femmes en situation de handicap. Il convient de noter que ce rapport de masculinité est légèrement supérieur à celui de la population résidente totale du pays qui est estimé à 98,8 hommes pour 100 femmes.⁴

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République du Niger?

Selon les données du Recensement Général de la Population 2012, les taux de handicap augmentent avec l'âge et ceci est de 8,9% chez les personnes en situation de handicap âgées de 65 ans et plus, contre 4,4% et 3,7% respectivement pour les tranches d'âges de 15 à 64 ans et de 0 à 14 ans.⁵

1.6 Quelles sont les formes de handicap les plus répandues en République du Niger?

Les statistiques du Recensement Général de la Population 2012 démontrent que les personnes polyhandicapées avec 3,3% de la population résidente totale représentent le taux de handicap le plus élevé dans le pays. Viennent ensuite les personnes malvoyantes avec un taux de 0,3% ensuite encore, les handicapées physiques des membres inférieurs avec 0,2%. Enfin les personnes muettes et celles atteintes de lèpre présentent des taux de handicap presque nuls à cause de leurs sous effectifs dans la population totale résidente.⁶

3 Ceci dénote d'une forte augmentation si l'on tient compte du fait qu'en 2001, le taux de personnes en situation de handicap dans le pays était de 0,7% soit 80 035 personnes.

4 Recensement Général de la Population et de l'Habitat 2012, rapport sur la situation socio-économique des personnes handicapées. http://www.stat-niger.org/statistique/file/RGPH2012/SITUATION_DES_HANDICAPEES.pdf. p.17 (Consulté le 15 juin 2020).

5 Comme ci-dessus p 19.

6 Comme ci-dessus p 12.

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République du Niger? La République du Niger a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). La République du Niger a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

Le gouvernement Nigérien a signé la Convention relative aux Droits des Personnes Handicapées en mars 2007 et l'a ratifiée le 24 juin 2008 en même temps que son protocole facultatif.

2.2 Si la République du Niger 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? La République du Niger a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Conformément à l'Article 35 de la CDPH, la République du Niger était tenue de soumettre son rapport initial dans un délai de deux ans, soit à la date du 24 juin 2010 compte tenu du fait que c'est le 24 juin 2008 que le pays a ratifié la CDPH. Le gouvernement du Niger a soumis son rapport initial au comité des droits des personnes handicapées en 2015. Quant à la branche du gouvernement responsable de la soumission du rapport, il est à noter qu'au Niger, le Ministère de la Population est l'entité étatique ayant la responsabilité de la mise en œuvre et du suivi de la politique du gouvernement en matière de promotion et de protection des groupes sociaux spécifiques. Il exerce cette attribution à travers une Direction chargée des Personnes Handicapées, placée sous la Direction Générale de l'Action Sociale et de la Promotion de la Solidarité.⁷

2.3 Si la République du Niger 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 de la République du Niger. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées du Niger?

En effet, la République du Niger a effectivement soumis son rapport initial en 2015 et le comité en charge des droits des personnes handicapées (le Comité), après examen avait émis des observations finales et des recommandations au sujet de ce rapport. Le Comité a relevé un ensemble d'insuffisances et manquements constatés dans l'ordonnance n° 93-012 du 2 mars 1993 modifiée et complétée par l'ordonnance no 2010-028 du 20 mai 2010, qui constitue la référence en matière de loi de protection et de promotion sociale des personnes en situation de handicap au

7 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 8 mai 2020).

Niger comparativement à la CDPH. Ces manquements vont de l'intitulé de l'ordonnance à l'absence de disposition sur les femmes en situation de handicap en contradiction de l'article 6 de la CDPH ainsi que le manque de précision sur la mobilité des personnes en situation de handicap et autres manquements.⁸

Par ailleurs, Il y a eu des effets internes découlant du processus de rapport liés aux questions des personnes handicapées dans le pays. L'effet le plus remarquable demeure l'adoption en 2018 d'un projet de loi sur l'égalité des chances. C'est dans cette optique qu'une loi « déterminant les principes fondamentaux relatifs à l'insertion des personnes handicapées » a été adoptée le 8 novembre 2019, par le parlement du Niger. C'est une loi qui a pour dessein d'« harmoniser les instruments juridiques nationaux relatifs à la protection et à la promotion des droits des personnes handicapées avec les obligations de la convention internationale relative aux droits des personnes handicapées (CDPH)».

Dans le mois qui suivait l'adoption de la loi susmentionnée, le gouvernement Nigérien adoptait une loi similaire. Ainsi le 18 octobre 2019, le projet de loi déterminant les principes fondamentaux relatifs à l'insertion des Personnes Handicapées a été adopté. Ce texte vise à promouvoir, protéger et assurer la pleine et égale jouissance de tous les droits de l'Homme et de toutes les libertés fondamentales pour les personnes en situation de handicap et promouvoir le respect de leur dignité.

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, la République du Niger 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 la République du Niger? Si oui, quels étaient les effets de ces observations ou recommandations?

La République du Niger a effectivement fait mention spécifique du droit des personnes en situation de handicap dans ses rapports les plus récents. Ainsi on retrouve plusieurs références dans le 15^{ème} rapport périodique de la République du Niger sur la mise en œuvre de la Charte Africaine des Droits de l'Homme et des Peuples couvrant la période 2017-2019, présenté en vertu de l'article 62 de ladite charte.⁹ Dans la section 3 intitulée « droits spécifiques » de la deuxième partie de ce rapport, le paragraphe C, est entièrement dévolue aux « droits des personnes handicapées » dans le pays. Dans le même ordre d'idées, dans son rapport de la Revue Périodique Universelle des Nations Unies, la République du Niger dresse un tableau assez élaboré des personnes en situation de handicap dans le pays.¹⁰

Après l'examen des divers rapports, Il y a eu des observations ou recommandations; lesquelles ont été suivi d'effets. L'adoption en 2018 d'un projet

8 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapée <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 20 juin 2020).

9 https://www.achpr.org/public/Document/file/French/NIGER%2015%20%C3%A8me%20RAPPORT%202017-2019_FRE%20.pdf. (Consulté le 15 mai 2020).

10 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapée <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 20 juin 2020).

de loi sur l'égalité des chances découle de ce processus. En outre et comme précédemment mentionné, une loi « déterminant les principes fondamentaux relatifs à l'insertion des personnes handicapées » a été adoptée le 8 novembre 2019 par le parlement. Il en est de même pour l'adoption le 18 octobre 2019 du projet de loi déterminant les principes fondamentaux relatifs à l'insertion des Personnes en situation de handicap dans le pays.

2.5 Y avait-il un quelconque effet interne sur le système légal de la République du Niger après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

La ratification de la Convention Relative aux Droits des Personnes Handicapées (CRDPH) et du Protocol Facultatif, par le Niger a eu pour effet, la reconnaissance des droits des personnes en situation de handicap. Cet engagement s'est concrètement traduit par la prise de mesures d'égalisation des chances en leur faveur dans le domaine de l'emploi, de l'éducation et de la protection sociale notamment avec l'institution du quota dans les recrutements, de la systématisation de l'octroi de bourse d'études, de la révision de l'âge d'inscription des enfants à l'école et la mise en place du fonds de soutien aux personnes en situation de handicap.¹¹

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous votre système légal ? Si oui y a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

En vertu des dispositions de l'article 171 de la constitution du Niger, les traités ou accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque accord ou traité de son application par l'autre partie. Eu égard à cette disposition constitutionnelle, l'on peut logiquement envisager que les cours et tribunaux du Niger peuvent directement appliquer les dispositions du traité international.

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.

En vertu du fait que les traités ou accords internationaux dûment ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque accord ou traité de son application par l'autre partie comme spécifié par l'article 171 de la constitution du Niger, l'on peut raisonnablement en déduire qu'en ratifiant la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH en mars 2008, le gouvernement du Niger incorporait ladite Convention dans la législation nationale.

11 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 20 juin 2020).

3 Constitution

3.1 La constitution de la République du Niger contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution de la République du Niger contient effectivement un certain nombre de dispositions relative au handicap. Au terme des dispositions de l'article 22, L'Etat veille à l'élimination de toute forme de discrimination à l'égard de la femme, de la jeune fille et des personnes handicapées. Les politiques publiques dans tous les domaines assurent leur plein épanouissement et leur participation au développement national. Dans le même sens, l'article 26 stipule qu'il veille à l'égalité des chances des personnes handicapées en vue de leur promotion et/ou leur réinsertion sociale alors que l'article 100 fait mention de la protection des personnes âgées et de l'insertion des personnes handicapées. Il en découle de ces dispositions constitutionnelles que tout le monde est protégé par la loi et que le fait de discriminer une personne en raison de son handicap serait constitutive d'infraction donnant lieu à des sanctions.

3.2 La constitution de la République du Niger 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 de 2010 proclame dans son préambule son attachement aux principes de la démocratie pluraliste et aux droits humains tels que définis par la Déclaration universelle des droits de l'homme de 1948, le Pacte international relatif aux droits civils et politiques de 1966, le Pacte international relatif aux droits économiques, sociaux et culturels de 1966, la Charte africaine des droits de l'homme et des peuples de 1981. Mention est également faite de l'attachement aux instruments juridiques régionaux et internationaux de protection et de promotion des droits humains tels que signés et ratifiés par le Niger.

4 Législation

4.1 La République du Niger a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

Au Niger, il existe une panoplie de textes concernant directement le handicap:

- La Loi n° 98-14 du 1er juin 1998 portant orientation, organisation et promotion des activités physiques et sportives. Cette loi promeut les activités physiques et sportives pour personnes handicapées (articles 5 et 38).
- L'ordonnance n° 93-012 du 2 mars 1993 modifiée et complétée par l'ordonnance n° 2010-028 du 20 mai 2010, déterminant les règles minima relatives à la protection sociale des personnes handicapées.

- L'ordonnance n° 99-68 du 20 décembre 1999 portant ouverture d'un compte spécial dénommé « Fonds National de Soutien aux Personnes Handicapées ».
- Le décret n° 96-456 /PRN/MSP du 28 novembre 1996 fixant le régime des prestations fournies par les hôpitaux nationaux dont l'article 9 stipule que les personnes handicapées sont exonérées à 100% des frais d'hospitalisation en application de l'Ordonnance n° 93-012 du 02 mars 1993.
- Le décret n°99-540 du 21 décembre 1999 portant modalité de gestion du Fonds National de Soutien aux Personnes Handicapées.
- Le décret n°2010-637 du 26 août 2010, portant application de l'ordonnance 93-012 du 02 mars 1993 modifiée et complétée par l'ordonnance 2010-028 du 20 mai 2010.
- Le décret n°2010-638 du 26 août 2010, portant création, organisation, attribution et fonctionnement du Comité National pour la Promotion des Personnes Handicapées (CNPPH).
- Le 8 novembre 2019 une loi « déterminant les principes fondamentaux relatifs à l'insertion des personnes handicapées » a été adoptée, par le parlement du Niger ; loi visant à « harmoniser les instruments juridiques nationaux relatifs à la protection et à la promotion des droits des personnes handicapées avec les obligations de la convention internationale relative aux droits des personnes handicapées (CDPH) ».
- Le 18 octobre 2019, le projet de loi déterminant les principes fondamentaux relatifs à l'insertion des Personnes Handicapées a été adopté ; une législation visant à promouvoir, protéger et assurer la pleine et égale jouissance de tous les droits de l'Homme et de toutes les libertés fondamentales pour les personnes en situation de handicap et promouvoir le respect de leur dignité.

4.2 La République du Niger a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

On peut dire qu'au Niger, toute législation est guidée par le principe de l'égalité de tous et s'applique à tous les citoyens sans exception y compris les personnes en situation de handicap. Ainsi le Niger réaffirme dans la Constitution du 25 novembre 2010 son attachement aux principes de l'Etat de droit et garantit explicitement les droits des personnes en situation de handicap.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) de la République du Niger 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.

L'article 117 de la constitution du Niger stipule que « la justice est rendue sur le territoire national au nom du peuple et dans le respect strict de la règle de droit, ainsi que des droits et libertés de chaque citoyen ». Pour assurer un meilleur accès à la justice aux justiciables les plus indigents, la loi n° 2011- 42 du 14 décembre 2011, fixant les règles applicables à l'assistance juridique et judiciaire a été adoptée. En plus il est à noter que les magistrats, les avocats, le personnel de justice et les membres des Forces de l'Ordre reçoivent régulièrement des formations sur le

respect des droits de l'homme en général et ceux des personnes handicapées en particulier.¹²

Les archives des tribunaux contiennent un cas notoire de discriminations à l'égard d'une personne en situation de handicap. Il est question d'un diplômé handicapé de l'École Nationale d'Administration et de la Magistrature (ENAM) option Douanes, qui après sa formation, a effectué au sein de la douane un stage d'application de deux ans; stage ayant abouti à son admission au concours d'entrée à la douane. S'étant vue opposer l'accès à la profession par les responsables de cette entité et ayant par la suite saisi les juridictions compétentes, il a perdu son procès pour vice de forme et n'a en conséquence jamais pu intégrer le corps de la douane. Il convient surtout de souligner ici que l'intéressé n'a pas été protégé par le gouvernement contre cette discrimination fondée sur le handicap, qu'il a lui-même reconnu comme tel et notifié dans son rapport initial.¹³

6 Politiques et programmes

6.1 La République du Niger a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

Dans l'optique d'établir l'équilibre entre les hommes et les femmes, il a été élaboré une politique genre qui s'articule autour de quatre axes stratégiques qui sont:

- L'amélioration de l'environnement socioculturel en lien avec la démographie ;
- La paix et la sécurité pour plus d'équité entre les hommes et les femmes ;
- Le renforcement du cadre institutionnel et juridique favorable à l'application effective des droits des femmes et des petites filles ;
- La lutte contre les violences basées sur le genre et à la participation équitable des hommes et des femmes à la gestion du pouvoir.

6.2 Le Niger 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.

L'adoption d'une politique Nationale de Protection Sociale (PNPS) en 2011 offre une vision et des perspectives à long terme pour la création progressive d'un système cohérent et intégré de protection sociale tout en identifiant les objectifs, les priorités et les mécanismes à travers des programmes d'actions concrètes. Il s'agit d'une vision holistique de la protection sociale qui englobe des actions de prévention, de protection, de promotion et de transformation. Il s'articule de ce fait autour de cinq axes stratégiques qui sont:

- Sécurité alimentaire et nutritionnelle;
- Sécurité sociale, travail et emploi;

12 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 10 juin 2020).

13 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 30 juillet 2020).

- Services sociaux et infrastructures sociales de base;
- Actions spécifiques en faveur des groupes vulnérables ; et
- Sécurité du cadre législatif et réglementaire.¹⁴

Il existe au Niger un Plan de Développement Economique et Social (PDES) 2017-2021. Ce programme comprend un ensemble d'actions prioritaires qui englobe tous les secteurs et indirectement celui du handicap. Comme mentionné dans les premières lignes du PDES, Le Plan d'Actions (PA) est un ensemble de programmes ordonnés en hiérarchie ascendante (liens avec les stratégies sectorielles) et descendante (déclinaisons en actions et en activités). Il vise à définir de façon précise la manière dont les choix stratégiques sectoriels opérés vont être réalisés sur le court et le moyen terme.¹⁵

Un autre document important qui aborde indirectement le handicap au Niger est la Politique Nationale de Population (PNP) 2019-2035 élaboré par le Ministère de la Population. Pour atteindre les objectifs et parvenir aux résultats escomptés, cette Politique Nationale de Population décline trois axes stratégiques:

- Axe stratégique 1 : Maîtrise de la croissance démographique
- Axe stratégique 2 : Renforcement de la qualité du capital humain
- Axe stratégique 3 : Amélioration de l'autonomisation des femmes y compris les femmes handicapées.¹⁶

Les principaux fondements sur lesquels s'appuie la Politique Nationale de la Population (PNP) 2019-2035 incluent entre autres le plan international, la Convention relative aux Droits des Personnes Handicapées (CDPH) de 2008.¹⁷

Un autre document de Politique important abordant indirectement le handicap est le Plan de Développement Sanitaire (PDS) 2017-2021 adopté en 2016 par le ministère de la santé. A la page 43 de ce document, il est clairement fait référence aux femmes, enfants, adolescents, adultes, personnes âgées, et personnes handicapées qui constituent les cibles primaires du PDS. Ainsi ces groupes bénéficieront directement et équitablement des retombées de l'amélioration de la couverture sanitaire et de la qualité des services visés à travers la mise en œuvre du PDS 2017-2021.¹⁸

14 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 10 juin 2020).

15 Plan de Développement Economique et Social (PDES) 2017-2021, Plan d'actions prioritaires. Septembre 2019. <https://www.nigerrenaissant.org/sites/default/files/pdf/pdes-pap.pdf>. (Consulté le 10 avril 2020).

16 Ministère de La Population, Politique Nationale de Population (PNP) 2019-2035. https://niger.unfpa.org/sites/default/files/pub-pdf/PNP_25-09-2019_DGP_Version-Definitive.pdf. (Consulté le 10 avril 2020).

17 Comme ci-dessus.

18 Ministère de la santé, Plan de Développement Sanitaire(PDS)2017-2021. 2016. <https://www.prb.org/wp-content/uploads/2020/06/Niger-Plan-de-D%C3%A9veloppement-Sanitaire-2017-2021.pdf>. (Consulté le 10 avril 2020).

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, la République du Niger a-t-elle 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 Niger a mis en place plusieurs organes qui s'intéresse spécifiquement à la violation des droits des personnes handicapées. Il s'agit plus précisément du Comité National chargé du Suivi de la mise en œuvre de la Convention relative aux Droits des Personnes Handicapées (CDPH) et du Comité National pour la Promotion des Personnes Handicapées (CNPPH). L'une des particularités du Niger est que non seulement, ces organes existent au plan national, mais également, ils sont répertoriés à travers le pays. Ces organes sont établis par un ensemble de textes réglementaires. De ce fait, le Comité des Droits des Personnes Handicapées au cours de sa Vingt et unième session tenue du 11 mars au 5 avril 2019, après examen des rapports soumis par les États parties notamment le Niger en application de l'article 35 de la Convention rapporte ce qui suit:

- Ainsi après la ratification de la convention relative aux droits des personnes handicapées, ce dernier a procédé à la mise en place par arrêté n° 00030/MP/RS/DRS du 1er décembre 2008 portant création, attributions, composition et fonctionnement du comité national chargé du suivi de la mise en œuvre de la CDPH;
- Puis d'un comité national de promotion des PH par décret n° 2010-638 du 26 août 2010, portant création, organisation, attributions du Comité National pour la Promotion des Personnes Handicapées (CNPPH);
- Arrêté n° 047/GR/AZ du 27 octobre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région d'Agadez;
- Arrêté n° 103/GR/DA du 27 octobre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de Diffa;
- Arrêté n° 125/GR/DO/ du 24 octobre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de Dosso;
- Arrêté n° 063/GR/MI du 29 septembre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH/MI) dans la région de Maradi;
- Arrêté n° 000054/GR/N du 10 octobre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de Niamey;
- Arrêté n° 098/GR/TI du 24 octobre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de Tillabéry;
- Arrêté n° 079/GRZ/DRP/PF/PE du 30 septembre 2014 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de Zinder;

- Arrêté n° 003/GTA/DRP/PF/PE du 7 janvier 2015 portant Création, Organisation, Attributions, et Fonctionnement du Comité Régional pour la Promotion des Personnes Handicapées (CRPPH) dans la région de TAHOUA.¹⁹

7.2 En dehors des cours ou tribunaux ordinaires, la République du Niger 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.

Il existe au Niger une Commission Nationale des Droits Humains (CNDH) qui est une Autorité Administrative Indépendante prévue par l'article 44 de la Constitution du 25 novembre 2010. La loi n° 2012-44 du 24 août 2012 détermine la composition, l'organisation, les attributions et le fonctionnement de la CNDH. Cette Commission, dotée du statut 'A', fonctionne conformément aux Principes de Paris qui voudraient qu'une Institution Nationale des Droits humains soit indépendante, pluraliste et démocratique. Son siège est fixé à Niamey.²⁰

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

8.1 La République du Niger est-elle dotée 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 la République du Niger n'a jamais abordé des questions relatives aux droits des personnes handicapées.

La République du Niger est en effet dotée d'une Commission Nationale des Droits Humains (CNDH) prévue par l'article 44 de la Constitution du Niger. La loi n°2012-44 du 24 août 2012 détermine la composition, l'organisation, les attributions et le fonctionnement de la CNDH. En termes d'attributions, la commission a une mission de protection et de promotion des droits humains :

- En termes de Protection :
- Recevoir les plaintes et diligenter des enquêtes sur les cas de violation des droits humains;
- Effectuer des visites régulières, notifiées ou inopinées, dans les lieux de détention et formuler des recommandations à l'endroit des autorités compétentes;
- Apporter ou faciliter l'assistance judiciaire aux victimes des violations des droits humains, en particulier les femmes, les enfants, les personnes âgées et les personnes handicapées ainsi que toutes autres personnes vulnérables;
- Lutter contre les pratiques esclavagistes, les pires formes de travail des enfants et les pratiques analogues.²¹

¹⁹ <https://undocs.org/pdf?symbol=fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 10 juin 2020).

²⁰ Commission Nationale des Droits Humains. <https://www.cndh-niger.org/cndh/presentation> (Consulté le 13 mars 2020).

²¹ Comme ci-dessus.

En termes de promotion:

- Assurer sur l'étendue du territoire national la promotion des droits humains en général et en particulier les droits de la femme, de l'enfant, des personnes en situation de handicap, ainsi que toutes autres personnes vulnérables à travers notamment l'information, l'éducation et la communication;
- Effectuer des études et des recherches sur droits humains; fournir au Gouvernement, à l'Assemblée Nationale, soit à la demande des autorités concernées, soit en usant de sa faculté d'auto-saisine, des avis, recommandations et propositions concernant toutes questions relatives à la promotion et à la protection des droits humains en particulier sur les projets et propositions de lois relatifs aux droits humains;
- Encourager les organes compétents de l'Etat à mettre en œuvre les conventions internationales relatives aux droits de l'homme ratifiées par le Niger;
- Veiller à ce que les organes compétents de l'Etat soumettent à temps les rapports que le Niger doit présenter aux organes conventionnels et au comité des Nations Unies, ainsi qu'aux mécanismes régionaux des droits humains dans le respect des obligations conventionnelles et contribuer à l'élaboration des dits rapports dans le respect de l'indépendance de la commission ;
- Entretenir des relations de coopération avec les organisations nationales des droits humains au niveau régional et international, s'intéressant à la promotion des droits humains.²²

Aux vues de ses attributions examinées ci-dessus, il ne fait aucun doute que le mandat de protection et de promotion des droits humains de la Commission s'étend également à la protection et promotion des droits des personnes en situation de handicap. A la question de savoir si la commission a jamais abordé des questions relatives aux droits des personnes en situation de handicap, la réponse n'est pas claire. Mais il faut retenir que cette commission a mis en place un groupe de travail chargé des questions des femmes, des enfants, des personnes handicapées et des personnes âgées.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en République du Niger 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 Niger, les personnes en situation de handicap sont organisées en groupements ou unions de groupements, associations, ONG et réseaux. Au niveau national, il existe deux fédérations de personnes handicapées: Fédération Nigérienne de Personnes Handicapées (FNPH) et Fédération Nigérienne de Sport Paralympique (FENISPHA). La FNPH est membre de la Fédération Ouest Africaine des Associations de Personnes Handicapées (FOAPH), de la Panafricaine des Personnes Handicapées (PANAPH), du Forum Africain des Personnes Handicapées (FAPH) et de l'Organisation Mondiales des Personnes Handicapées (OMPH). La FNPH regroupe vingt et un membres dont six associations catégorielles, représentant les différents types de déficience. Comme mentionnée par le Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées, ces organisations, pour défendre les droits des personnes en situation de handicap mènent des actions de plaidoyer conséquentes et durables auprès des décideurs

22 Comme ci-dessus.

politiques et des partenaires techniques et financiers en vue de promouvoir l'égalité des chances et la pleine participation de tous les citoyens à la vie économique, sociale, politique et culturelle de leur communauté.²³

9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional ?

Au Niger, les Organisations des personnes en situation de handicap se présentent de la façon suivante:

- Au niveau local : Groupements, Coopératives ou Unions ;
- Au niveau national : ONG, Associations et Fédérations.

Il est à noter que la Fédération Nigérienne des Personnes Handicapées (FNPH) coiffe toutes les catégories de personnes handicapées au nombre de six, chacune représentée par une association nationale, auxquelles s'ajoutent plusieurs autres organisations de personnes handicapées. Dans le domaine du sport également, les associations nationales sont regroupées autour de la Fédération Nigérienne de Sports para-olympisme (FENISPHA).²⁴

9.3 Si la République du Niger a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Pour faciliter la consultation des personnes en situation de handicap au Niger, le gouvernement a mis sur pied la Direction de la Protection des Personnes Agées et de la Promotion des Personnes Handicapées au sein du Ministère de la Population, de la Promotion de la Femme et de la Protection de l'Enfant qui a la charge des questions du handicap dans le pays.²⁵ Par ailleurs, il faut également rappeler qu'en 2010 à travers le décret n° 2010-638/PCSRD/MP/PF/PE du 26 août 2010 portant création, organisation, attributions et fonctionnement du Comité National pour la Promotion des Personnes Handicapées, il a été créé un Comité National pour la Promotion des Personnes Handicapées (CNPPH) avec pour mission de coordonner et animer toutes les actions en matière d'insertion et réinsertion sociale des personnes en situation de handicap. Aussi, il a été mis sur pied une division de l'éducation spécialisée au ministère en charge de l'éducation nationale et une autre division chargée de la promotion des personnes handicapées a été créée au sein du ministère de la formation professionnelle et technique. D'un autre côté, la voix des enfants handicapés est portée par des organisations nationales de parrainage des enfants en situation de handicap et de manière générale celles travaillant sur la protection et la promotion des droits des enfants.²⁶

23 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à la Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 12 mai 2020).

24 Fédération Nigérienne des Personnes Handicapées. <https://www.google.com/search?client=firefox-b-e&q=www.fedenph.jimdo.com>. (Consulté le 10 juin 2020).

25 Comme ci-dessus.

26 Comme ci-dessus.

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 Organisations des Personnes Handicapées font partie intégrante de la société civile Nigérienne. Ainsi, il est rapporté qu'au niveau national, la Fédération Nigérienne des Personnes Handicapées (FNPH) bénéficie d'un appui du gouvernement pour son fonctionnement et trois de ses associations membres bénéficient d'une subvention annuelle. Les personnes en situation de handicap participent effectivement à l'élaboration des rapports destinés aux organes des traités et à l'application des mesures législatives ou de politique générale. Bien plus, la Fédération Nigérienne des Personnes Handicapées dispose d'un représentant au sein du Conseil Economique Social et Culturel qui porte la voix des personnes au sein de cette Institution de la République.²⁷ Plus important encore, il convient de mentionner la création auprès du Ministère de la Population, de la Promotion de la Femme et de la Protection de l'Enfant, d'un dispositif national avec des démembrements au niveau de chaque région chargés du suivi de l'application de la Convention. En outre, sur demande de la Fédération Nigérienne des Personnes Handicapées, un Comité ad hoc chargé de faire des propositions pour harmoniser les textes nationaux avec la CDPH a été également mis en place.²⁸

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

De manière générale, les Organisations des Personnes Handicapées au Niger disposent de très peu de ressources pour leur fonctionnement, ce qui ne leur permet pas d'accomplir efficacement leur mission. Cet état de choses s'explique par le fait que le renforcement de capacités des organisations représentatives des personnes handicapées est plus l'œuvre des partenaires tels que CBM, Handicap International, l'Union Européen et bien d'autres œuvrant dans le domaine du handicap.²⁹

9.6 Y a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Information non disponible.

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?

On peut affirmer de façon générale sans risque de se tromper que l'adoption et la promulgation de différents organes, textes et législation clés à l'instar de la récente loi du 8 novembre 2019 « déterminant les principes fondamentaux relatifs à l'insertion des personnes handicapées », du récent projet de loi du 18 octobre 2019 déterminant les principes fondamentaux relatifs à l'insertion des Personnes Handicapées, du projet de loi sur l'égalité des chances de 2018, de l'ordonnance n° 93-012 du 2 mars 1993 modifiée et complétée par l'ordonnance n° 2010-028 du 20

27 Comme ci-dessus.

28 Comme ci-dessus.

29 Comme ci-dessus.

mai 2010 portant promotion et protection des droits des personnes en situation de handicap au Niger est dû en grande partie à l'apport considérable et l'implication des OPH dans le processus de mise en œuvre de la CRDPH.

Dans le projet de loi sur l'égalité des chances, le chapitre 2 est consacré aux dispositions relatives aux enfants et aux femmes handicapés. L'article 6 dispose en effet: « les enfants handicapés, sur la base de l'égalité avec les autres enfants, ont le droit d'exprimer librement leurs opinions sur toutes questions les intéressant, les opinions des enfants étant dûment prises en considération eu égard à leurs âges et à leurs degrés de maturité, et d'obtenir pour l'exercice de ce droit une aide adaptée à leurs handicaps et à leur âge. Dans toutes les décisions qui concernent les enfants handicapés, l'intérêt supérieur de l'enfant doit être une considération primordiale ». En outre, l'article 8 stipule que « les femmes et les filles handicapées jouissent pleinement et dans les mêmes conditions d'égalité que les autres de tous les droits de l'homme et de toutes les libertés fondamentales ».³⁰

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?

Nous croyons qu'il faille mettre une plus grande pression sur le gouvernement et les pouvoirs publics pour une plus grande promotion et protection des droits des personnes en situation de handicap. Il faut également veiller à ce que les divers problèmes rencontrés aussi bien par les personnes en situation de handicap que les OPH soient résolus.

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 au travers de la Fédération Nigérienne des Personnes Handicapées devraient se voir offrir plus de moyens financiers et matériels pour l'accomplissement de leur mission de sensibilisation, représentation, éducation et conscientisation des masses. L'Etat Nigérien devrait tenir compte de leur critiques et observations et devraient leur accorder une marge de manœuvre plus étendue notamment lors de la rédaction et la présentation du rapport conformément à l'Art. 35 de la CDPH.

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?

Bien que cela ne soit pas clairement défini, on estime néanmoins que certaines des organisations mentionnées à la question 9.1 ci-dessus devraient d'une façon ou d'une autre, directe ou indirecte travailler sur les droits des personnes en situation de handicap et de ce fait contribuer à faciliter l'implication des OPH dans le processus, y compris la recherche.

30 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 16 juillet 2020).

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 Niger, le Ministère de la Population, de la Promotion de La Femme et de la Protection des Jeunes Entrepreneurs est l'entité étatique par excellence en charge de la mise en œuvre et du suivi de la politique du gouvernement en matière de promotion et de protection des groupes sociaux spécifiques. Il exerce cette attribution à travers une Direction chargée des Personnes Handicapées, placée sous la Direction Générale de l'Action Sociale et de la Promotion de la Solidarité. En outre, il convient de noter l'existence d'un comité national de suivi de la mise en œuvre de la CDPH mis en place par le gouvernement. Il faut également relever l'existence de plusieurs points de contact comme entre autres, la direction de promotion des personnes handicapées au Ministère de la Population, la division de l'éducation spécialisée au ministère de l'enseignement primaire, la division de la formation professionnelle des personnes handicapées au ministère de la formation professionnelle et la division des personnes handicapées et des personnes âgées au niveau du ministère de la santé publique. On peut également mentionner la Commission Nationale des Droits Humains, autre organe gouvernemental ayant mis en place un groupe de travail chargé des questions des femmes, des enfants, des personnes handicapées et des personnes âgées.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en République du Niger? (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.

Les défis contemporains auxquels sont confrontés les personnes en situation de handicap au Niger sont énormes. Si l'on s'en tenait aux dispositions de l'article 33 de la constitution, cela voudrait dire qu'au Niger, il n'existe pas de discrimination entre les candidats sur le marché du travail, aux transports, au logement, à l'éducation, aux activités récréatives et aux autres équipements et services.

Mais la réalité est différente. A cet effet, on peut noter non seulement la persistance de la discrimination, des inégalités mais aussi et surtout les difficultés pour les personnes en situation de handicap de recourir aux services des juridictions du fait de l'inaccessibilité physique des infrastructures, de l'existence de certaines dispositions discriminatoires dans la législation, de l'insuffisance de soutiens aux personnes en situation de handicap pour exercer ces recours et de la faiblesse des

actions de sensibilisation par l'Etat. Comme exemple, il n'y a aucun interprète professionnel en langue de signes pour l'assistance des personnes sourdes et/ou malentendantes. Il est fait recours aux services d'interprètes formés par l'Etat qui ne garantissent pas la confidentialité des procédures et la transmission fidèle des informations. En outre, malgré sa révision en 2010 l'ordonnance portant sur les règles minima de protection sociale des personnes en situation de handicap, comporte beaucoup de contradictions et d'insuffisances avec la Convention notamment quant à la définition de ces personnes et le vide juridique les concernant.³¹

Par ailleurs, avec les efforts fournis depuis l'adoption de la CDPH, la discrimination recule dans les grandes villes mais reste très perceptible dans les communautés rurales où vivent 80% des personnes en situation de handicap.³² Dans ce contexte déjà très difficile, la situation de ces personnes est aggravée par d'importantes discriminations et inégalités socio-économiques. En outre, il est également à noter l'exploitation d'enfants handicapés à travers la mendicité par leur propre famille ou encore le cas d'autres enfants travaillant comme guide/assistant des personnes en situation de handicap, ce qui à n'en point douter constitue un sérieux frein pour leur avenir.³³

Sur un autre plan, Il y a aussi lieu de constater la persistance des attitudes négatives, des pratiques dangereuses et les coutumes néfastes à l'égard des personnes en situation de handicap. Ainsi, les femmes en situation de handicap mentales sont assez souvent violées du fait d'une croyance unique selon laquelle avoir une relation sexuelle avec ces femmes constitue une source de richesse. Plus grave encore, les guérisseurs traditionnels continuent d'utiliser la chicotte, les fourmilères et bien d'autres pratiques néfastes dans le traitement du handicap psycho-social, aggravant ainsi le choc psychique et engendrant malheureusement parfois d'autres handicaps.³⁴ Il faut aussi relever que beaucoup de personnes en situation de handicap psycho-sociales continuent d'être privées de leurs libertés soit au niveau des cellules familiales et dans des conditions inhumaines et dégradantes (enfermées dans les chambres ou simplement enchaînées) soit à travers des hospitalisations parfois forcées dans des centres de soins qui ne sont toujours pas appropriés. A titre illustratif, une personne handicapée psychosociale est restée pendant 15 ans attachée au bout d'une chaîne sous un arbre sur la route de Diffa. Des images ont été publiées sur les réseaux sociaux après qu'une télévision de la place a diffusé un appel à l'aide de son propre père.³⁵

11.2 Comment la République du Niger répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérées?

• Accès aux bâtiments publics

L'article 37 du projet de loi sur l'égalité des chances prévoit que l'État, les collectivités locales, les organismes publics et privés, adaptent, chacun dans son domaine et selon les critères internationaux d'accessibilité, les édifices, infrastructures sportives et scolaires, routes, trottoirs, espaces extérieurs, moyens de transport et de communication, de manière à permettre aux personnes en situation de handicap d'y accéder, de s'y déplacer, d'utiliser leurs services et de bénéficier de leurs prestations.

31 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 11 mai 2020).

32 Comme ci-dessus.

33 Comme ci-dessus.

34 Comme ci-dessus.

35 Comme ci-dessus.

Cependant, malgré l'existence de normes nationales en matière d'accessibilité depuis 1993, le problème d'accessibilité reste un obstacle majeur pour l'inclusion des personnes en situation de handicap au Niger. Les locaux des établissements publics, parapublics et privés, dans l'écrasante majorité, n'ont subi aucune modification dans leurs structures architecturales pouvant permettre aux personnes en situation de handicap d'y accéder. C'est le cas notamment, des écoles et universités, banques, sociétés commerciales et industrielles, centres récréatifs, grandes salles de meeting, sanitaires des lieux de travail, transports urbains et transports de voyageurs. Même le Ministère en charge des questions du handicap ainsi que ses démembrements au niveau régional restent très peu accessibles.³⁶

• **Accès au transport public**

Des mesures spécifiques destinées à assurer l'accessibilité et la mobilité des personnes en situation de handicap sont contenues dans les textes suivants :

- La loi n° 2017-20/PRN/MDH du 12 avril 2017, fixant les principes fondamentaux de l'urbanisme et de l'aménagement urbain;
- La loi n° 2018-25 du 27 avril 2018 fixant les principes fondamentaux de la construction et de l'habitation;
- Le décret n° 2018-303/PRN/MD/U/L du 30 avril 2018 portant modalités d'application de la loi no 2018-25.

L'article 38 de la loi sur l'égalité des chances prévoit qu'il sera délivré aux personnes en situation de handicap une carte d'égalité des chances cumulativement avec la carte de solidarité nationale, leur donnant l'accès gratuit ou à tarif réduit selon la zone, aux moyens de transport qui sont sous le contrôle de l'État, d'une collectivité locale, d'un établissement public, d'une société nationale d'économie mixte, d'un service public, office et sociétés d'économie mixte. Dans le même ordre d'idées, l'article 41 du même texte prévoit que dans tous les lieux publics, les personnes en situation handicap ont priorité pour les services et les places assises. Cette priorité s'applique aussi, à la circulation des personnes à mobilité réduite telles que les personnes à déficience visuelle se déplaçant à l'aide de la canne blanche, de béquilles, fauteuil ou tout autres appareils/aide de marche, les personnes handicapées mentales et intellectuelles. En plus, il est prévu que les personnes en situation de handicap titulaires de la carte d'égalité des chances bénéficient d'une autorisation de stationnement pour garer leurs véhicules devant leur lieu de travail ou dans un espace aménagé à cet effet.

Cependant, la problématique de la mobilité personnelle de ces personnes reste entière en raison entre autres de l'absence de lois ou règlements protégeant la personne à mobilité réduite dans la circulation routière, les coûts prohibitifs du matériel d'aide à la mobilité et parfois son indisponibilité sur le marché local, le très faible soutien pour l'acquisition des matériels d'aide à la mobilité, l'insuffisance de formation et d'information des personnels travaillant avec les personnes en situation de handicap et le reste de la communauté. De ce fait, l'utilisation des enfants comme guide ou assistant reste encore la seule option pour la majorité des personnes en situation de handicap pour leurs déplacements, avec pour conséquence le manque d'opportunité de scolarisation pour des centaines de milliers d'enfants.³⁷

• **Accès à l'éducation**

L'analyse des mesures législatives et réglementaires en matière d'éducation des personnes en situation de handicap au Niger démontre que l'Etat a pris des mesures pour encourager l'éducation de ces personnes. Ainsi l'inclusion des femmes et des filles handicapées est faite à travers les textes suivants:

36 Comme ci-dessus.

37 Comme ci-dessus.

- Lettre n° 00619/MEN/A/PLN/SG/DGFC/DFIC portant introduction du module sur l'Éducation Inclusive dans les programmes de formation initiale des élèves-maîtres des Ecoles Normales d'Instituteurs ; lettre portant sur l'Éducation Inclusive dans les programmes de formation des élèves-maîtres dans les ENI de Maradi, Dosso et Tillabéry, à partir de l'année 2013-2014.
- Lettre circulaire n° 000311/MEN/DGEB/DEBI, du 7 décembre 2007, portant dérogation d'âge d'inscription des enfants handicapés : demande est faite aux directeurs régionaux de l'éducation de faire une dérogation d'âge d'inscription de ces enfants (jusqu'à l'âge de 12 ans) dans les écoles primaires de leurs régions respectives;
- Lettre circulaire n° 0017/PRN/DIRCAB du 9 janvier 2012 portant mise en œuvre de l'octroi de bourse d'études aux Étudiants et Élèves en situation de handicap par le MP/PF/PE;
- Lettre circulaire n° 0015/PRN/DIRCAB du 9 janvier 2012 portant mise en œuvre de l'octroi de bourse d'études aux étudiants et élèves en situation de handicap par le MEN;
- Lettre circulaire n° 0011/PRN/DIRCAB du 9 janvier 2012 portant mise en œuvre de l'octroi de bourse d'études aux étudiants et élèves en situation de handicap par le MFP/E;
- Lettre circulaire no 0018/PRN/DIRCAB du 9 janvier 2012 portant mise en œuvre de l'octroi de bourse d'études aux Étudiants et Élèves en situation de handicap par le MEMS/RS.³⁸

En plus de ces mesures, le projet de loi sur l'égalité des chances consacre à l'article 21 le droit des personnes en situation de handicap à l'éducation inclusive sur la base de l'égalité des chances avec les autres enfants dans le système d'enseignement général. Nonobstant ces mesures, l'éducation spécialisée reste privilégiée dans la législation Nigérienne, en contradiction avec l'article 24 de la CDPH et les Objectifs du Développement Durable dont le but final est de promouvoir une éducation inclusive de qualité pour tous.

En termes de Politique, un seul document, le Programme Sectoriel de l'Éducation et de la Formation (PSEF 2014-2024) régit le secteur éducatif au Niger. Il concerne tous les niveaux de l'éducation et prend en compte l'éducation des personnes en situation de handicap. Une analyse poussée de ce programme nous renseigne sur le fait que le handicap sensoriel, intellectuel et l'albinisme n'ont pas été suffisamment pris en compte. Ainsi, dans tout le document, on ne trouve aucune référence aux personnes sourdes et malentendantes, aux personnes aveugles, aux personnes handicapées intellectuelles et personnes avec albinisme.³⁹ En outre, il faut noter que les Organisations des Personnes Handicapées n'ont jamais été impliquées dans l'élaboration de ce programme encore moins dans sa mise en œuvre. Tous ces manquements ont un impact négatif sur le taux d'alphabétisation dans le pays non seulement en fonction du sexe mais aussi en fonction du milieu de résidence. Il en découle que, quel que soit le type de handicap, les hommes handicapés sont plus alphabétisés que les femmes.⁴⁰

Cependant, l'on doit reconnaître que des efforts importants ont été déployés tant par l'État que les partenaires au développement pour améliorer l'accès à l'éducation. On constate ainsi, pour tous les ordres d'enseignement, une amélioration de l'accès à l'éducation pour la population générale quoique cet accès

38 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1> (consulté le 31 juillet 2020).

39 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 11 mars 2020).

40 Recensement Général de la Population et de l'Habitat 2012, rapport sur la situation socio-économique des personnes handicapées. http://www.stat-niger.org/statistique/file/RGPH2012/SITUATION_DES_HANDICAPEES.pdf p.28. (Consulté le 15 juin 2020).

reste très faible à tous les niveaux. A titre d'exemple les personnes avec un handicap intellectuel sont exclues du secondaire et les personnes sourdes se voient limitées au second cycle du secondaire faute d'interprètes professionnels en langue de signes.⁴¹

- **Accès à la formation professionnelle**

En ce qui est de l'accès aux Nouvelles Technologies de l'Information et de la Communication (NTIC), il faut noter que quelques personnes en situation de handicap profitent du développement de ces technologies créatrices d'emplois tenant compte de tous les niveaux de compétence et de qualification. Les textes en vigueur ont imparti un délai de deux ans à compter de l'adoption de l'ordonnance n° 2010-028, aux ministres chargés de la protection sociale, de la santé et de l'équipement pour dresser un rapport bilan des résultats obtenus dans la mise en œuvre.⁴²

En attendant, compte tenu du fait que 80% des personnes en situation de handicap au Niger vivent dans des zones rurales, il faut se rendre à l'évidence qu'il y a un défaut crucial d'équipements pédagogiques qui font défaut dans les écoles pilotes. En conséquence, le niveau d'instruction et le taux d'activité de ces personnes demeure faible.

- **Accès à l'emploi**

L'article 6 du décret n° 2017/PRN/MET/PS du 10 août 2017 portant partie réglementaire du Code du travail dispose que « Les chefs d'entreprise doivent prendre en compte, lors des recrutements qu'ils effectuent, les personnes en situation de handicap possédant la qualification requise. Un quota de 5 % est appliqué pour recrutement de vingt (20) travailleurs et plus. Les inspecteurs du travail vérifient, au cours des contrôles en entreprise, les mesures dans lesquelles les employeurs se sont acquittés de l'obligation ci-dessus ». L'article 4 du même texte précise qu'en application de l'article 5 du Code du travail, sont interdites, toutes discriminations en matière d'emploi et de profession. Cette disposition est un écho de l'ordonnance n° 93-012 du 2 mars 1993 modifiée et complétée par l'ordonnance n° 2010-028 du 20 mai 2010. Au terme des dispositions de l'article 21 de cette ordonnance, tout établissement public ou privé employant au moins vingt salariés est tenu de réserver 5% des postes de travail à des personnes en situation de handicap. Lorsque les emplois réservés et profils sont disponibles sur le marché de l'emploi, tout contrevenant sera tenu de verser une pénalité dont le taux mensuel ne peut être inférieur au salaire minimum interprofessionnel garanti (SMIG). Dans le même ordre d'idées, l'article 11 de ce texte dispose qu'aucun établissement professionnel qui forme à des emplois accessibles aux personnes handicapées ne peut leur refuser son accès.

Par ailleurs, la loi n° 2007-26 du 23 juillet 2007 portant statut général de la Fonction Publique de l'État et son décret d'application n° 2008-244/PRN/MFP/T du 31 juillet 2008 prévoient une dérogation de concours pour les personnes handicapées, à qui il est réservé des postes dans la limite des quotas disponibles. De façon similaire, la loi n° 2012-45 du 25 septembre 2012 portant Code du travail de la République du Niger et le décret n° 2017-682/PRN/MET/PS du 10 août 2017 portant partie réglementaire du Code du travail stipulent qu'« aucun employeur ne peut prendre en considération le handicap, pour arrêter ses décisions en ce qui concerne, notamment, l'embauchage, la conduite et la répartition du travail, la

41 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à la Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 11 mars 2020).

42 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1>. (Consulté le 15 juin 2020).

formation professionnelle, l'avancement, la promotion, la rémunération, l'octroi d'avantages sociaux, la discipline ou la rupture du contrat de travail ». Plus loin, l'article 46 du Code du travail dispose que « l'employeur a l'obligation d'assurer aux personnes handicapées ne pouvant être occupées dans les conditions normales de travail, des emplois et des conditions adaptées, ainsi que le droit à une formation spécialisée dans les conditions fixées par voie réglementaire, après avis de la Commission Consultative du Travail et de l'Emploi ».

Par ailleurs, pour inciter les employeurs du secteur privé, afin de promouvoir l'emploi de personnes handicapées la loi en projet sur l'égalité des chances consacre en son article 30 : « Tout établissement public ou entreprise privée employant au moins vingt (20) salariés est tenu de réserver dix pour cent (10 %) des postes d'emploi à des personnes handicapées. Lorsque les emplois réservés et les profils sont disponibles sur le marché de l'emploi, tout contrevenant est tenu de verser des pénalités ». L'article 24 ce texte consacre qu'afin de faciliter l'emploi après la formation des personnes handicapées, des aménagements sont apportés aux règles relatives à l'âge minimum d'admission à l'apprentissage, à la durée et aux modalités de la formation et à l'emploi.

En dépit de toute ces dispositions, l'emploi de ces personnes reste encore un défi dans le secteur privé, en raison entre autres des préjugés et d'absence de mécanismes de suivi du respect de la législation notamment sur le quota.

- **Accès à la détente et au sport**

L'article 38 de la loi n° 98-14 du 1er juin 1998, portant orientation, organisation et promotion des activités physiques et sportives encouragent les activités physiques et sportives pour les personnes en situation de handicap. Les articles 5 et 38 de cette législation stipulent que : « l'État et les collectivités veilleront à faciliter la participation des handicapés aux compétitions nationales et internationales ».

Toutefois en ce qui est précisément de la participation à la vie culturelle et récréative, aux loisirs et aux sports, l'on doit souligner l'inaccessibilité de la plupart des infrastructures sportives et culturelles qui sont source d'accident en particulier pour les personnes handicapées visuelles. S'agissant des espaces récréatifs, à l'image de la plupart des infrastructures publiques, ils restent encore inaccessibles pour l'écrasante majorité des personnes en situation de handicap. A titre illustratif, en 2011, l'on a noté la chute d'une personne aveugle dans un fossé au stade de la ville de Tahoua situé à un peu plus de 500 Km de Niamey.⁴³

Dans le domaine du Sport Paralympique l'on doit mentionner l'insuffisance notoire de matériels adaptés et de ressource financières pour développer ce sport et assurer la participation effective des sportifs handicapés au niveau national et international. Par ailleurs dans le domaine de la culture, les artistes en situation de handicap sont présents sur la scène culturelle du pays. En témoigne les prestations du groupe vocal des jeunes aveugles de l'école SOLI Abdourahmane et Moussa Toukou qui sont utilisés abondamment pour la promotion de la paix et le dialogue entre les communautés, ainsi que les prestations musicales des artistes rappeurs Almamikoye, Jaz ONE etc.⁴⁴

- **Accès aux soins de santé**

L'ordonnance n° 93-012 du 2 mars 1993 modifiée et complétée par l'ordonnance n° 2010-028 du 20 mai 2010, réaffirme les droits des personnes handicapées à la

43 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à La Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf. (Consulté le 15 mars 2020).

44 Comme ci-dessus.

santé, à l'éducation, au travail et à la protection sociale. Dans le même ordre d'idées, le décret n° 96-456 /PRN/MSP du 28 novembre 1996 fixant le régime des prestations fournies par les hôpitaux nationaux dont l'article 9 stipule que les personnes en situation de handicap sont exonérées à 100% des frais d'hospitalisation en application de l'ordonnance n° 93-012 du 02 mars 1993.⁴⁵ Dans le domaine de la santé, Il faut reconnaître que des efforts ont été déployés par l'État pour l'accès des personnes en situation de handicap aux soins de santé, notamment dans la prise en charge total des frais des examens et d'hospitalisation.⁴⁶

Cependant en dépit de toutes ces mesures, force est de constater que seul une minorité de ces personnes habitant les villes de Niamey et Zinder abritant les hôpitaux nationaux bénéficie de ces avantages au détriment de plus de 90% des personnes handicapées se trouvant loin de ces hôpitaux. En tout état de cause, les difficultés d'accès aux soins des personnes en situation de handicap comprennent entre autres:

- L'insuffisance de formation des agents de santé sur les droits des personnes handicapées;
- Le manque d'interprètes professionnels en langue de signe;
- L'inaccessibilité des centres de soins et des équipements sanitaires tels que les tables de consultation et les lits d'accouchement;
- L'inaccessibilité des coûts des produits pharmaceutiques.⁴⁷

11.3 La République du Niger accorde-t-il des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

L'ordonnance n° 99-68 du 20 décembre 1999 portant ouverture d'un compte spécial dénommé « Fonds National de Soutien aux Personnes Handicapées » est d'actualité. Entre autres, pour assurer l'égalité entre tous, le soutien de l'Etat reste encore très faible. A titre d'exemple le fonds de soutien aux personnes handicapées destiné à cet effet, reste à environ 0,044% du budget national.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc) de la République du Niger?

Les articles 42 et 43 du projet de loi sur l'égalité des chances prévoient que les personnes en situation de handicap jouissent de leurs droits politiques et participent à la vie publique sur la base de l'égalité avec les autres, soit directement soit par l'intermédiaire des représentants librement choisis. Ces personnes ont le droit de voter et d'être élues sur la base de l'égalité avec les autres. En outre, l'article 7 de la constitution du Niger stipule que le suffrage est direct ou indirect. Il est universel, libre, égal et secret. Le paragraphe 2 du même article précise que sont électeurs, dans les conditions déterminées par la loi, les Nigériens des deux sexes, âgés de dix-huit ans accomplis au jour du scrutin, ou mineurs émancipés, jouissant de leurs droits civils et politiques. Il est à noter qu'« Au Niger, la loi ne fait aucun obstacle au droit des personnes handicapées de participer à la vie politique et publique »

45 Comme ci-dessus.

46 Nations Unies CRPD/C/NER/Q/1/Add.1 Convention relative aux droits des personnes handicapées <https://undocs.org/fr/CRPD/C/NER/Q/1/ADD.1> (consulté le 15 juin 2020).

47 Rapport Alternatif de La Fédération Nigérienne des Personnes Handicapées se Rapportant à la Convention Relative aux Droits des Personnes Handicapées. https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/NER/INT_CRPD_NGO_NER_31980_F.pdf (Consulté le 15 mars 2020).

même si dans la pratique il persiste des discriminations fondée sur le handicap. Entre autres, il subsiste des problèmes d'accessibilité aux bureaux de vote et de compréhension des matériels électoraux, notamment l'absence de bulletins en braille pour les déficients visuels.⁴⁸

Toutefois, Il faut souligner qu'un aménagement raisonnable pour le vote de certaines catégories de handicap est pris en compte dans le code électoral en son article 69 alinéa 2 qui stipule que « Tout électeur atteint d'infirmité ou de handicap physique le mettant dans l'impossibilité d'introduire son bulletin unique et/ou son bulletin dans l'enveloppe et de glisser celle-ci dans l'urne est autorisé à se faire assister par un électeur de son choix ou par un membre du bureau de vote ». C'est dans cette optique qu'il convient de mentionner qu'en dépit des obstacles persistants, quelques personnes en situation de handicap occupent des postes politiques au niveau central et local.⁴⁹

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapé**

Au Niger, il n'existe aucune disposition sur les femmes en situation de handicap en contradiction de l'article 6 de la CDPH. Dans le pays, il manque une loi sur la torture, les mauvais traitements et les traitements cruels et dégradants en conformité avec la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants. En outre, il n'existe pas des statistiques désagrégées sur le nombre des femmes et des filles en situation de handicap soumises à des mariages forcés. Concernant les cas des mariages d'enfants assistés par les services sociaux de prévention, de promotion et de protection, pour les années 2016 et 2017, il a été dénombré 360 filles ayant subi la menace et/ou été victimes de mariages d'enfant.⁵⁰

- **Enfants handicapés**

L'accès à l'école et aux soins de santé doivent être étendues. En outre, il est question pour le Niger d'adopter une loi interdisant spécifiquement la mendicité forcé compte tenu du fait que certains enfants en situation de handicap sont entraînés dans la pratique de la mendicité au profit de leur famille.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement au Niger au sujet des personnes handicapées?

Pour faciliter la consultation des personnes en situation de handicap au Niger, le gouvernement Nigérien a créé une Direction dénommée Direction de la Protection des Personnes Agées et de la Promotion des Personnes Handicapées au sein du Ministère de la Population qui a la charge des questions du handicap au Niger. Dans le même ordre d'idées, le Décret n° 2010-638/PCSRD/MP/PF/PE du 26 août 2010 portant création, organisation, attributions et fonctionnement du Comité National pour la Promotion des Personnes Handicapées a vu le jour.⁵¹

48 Comme ci-dessus.

49 Comme ci-dessus.

50 Comme ci-dessus.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Niger? Pourquoi?

Le développement de l'enseignement du Droit des Personnes Handicapées dans les grandes écoles et universités du Niger devient une priorité. L'acquisition d'infrastructures, de structures, et de matériels adaptés à leur éducation et insertion social ainsi que la formation d'experts s'avère crucial. La mise en œuvre effective d'une éducation inclusive ainsi que la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH est plus que nécessaire. Il est également important de mettre à jour les textes et autres documents juridiques qui encadrent les personnes en situation de handicap ainsi que leurs organisations en vue d'intégrer les différentes évolutions et contextes contemporains liés à ces personnes. Le dialogue, la conscientisation des masses, la lutte contre les préjugés, pratiques d'un autre âge et autre barrières socio-économiques dont sont régulièrement confrontés les personnes en situation de handicap doivent faire partie des priorités de l'Etat, de la société civile et des autres parties prenantes.

51 Fédération Nigérienne des Personnes Handicapées. <https://www.google.com/search?client=firefox-b-e&q=www.fedenph.jimdo.com>. (Consulté le 31 juillet 2020).

LIBERIA

*Azubike C Onuora-Oguno**

Summary

Using a qualitative methodological approach, the study examined the situation of persons with disabilities in Liberia. In addition, it examined the efforts of the Liberian government in ensuring the protection of their rights within both the African and Global Human Rights frameworks to ascertain the extent of state effort towards protecting, fulfilling, and promoting the rights of persons with disability. The study engages with relevant stakeholders to ascertain the extent of implementation of state obligations and the role of institutions and policies in ensuring that persons with disabilities are not subjected to violations. Conclusively, the study finds that despite the efforts of government and collaboration with Civil Society Organisations and other agencies, there is yet so much need for promotional activities to ensure the realisation of the rights of persons with disabilities in Liberia.

1 Population indicators

1.1 What is the total population of Liberia?

Liberia is estimated to be about 5,033,120.¹

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1 World Meter 'Liberia population' <https://www.worldometers.info/world-population/liberia-population/> (accessed 21 April 2020).

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Liberia. What criteria are used to determine who falls within the class of persons with disabilities in Liberia?

The Disability Data in Liberia is based on the 2008 National Population and Housing Census.² Difficulty in sight, mobility and ability to engage in employment were the major bases used to determine individuals classified as having disability.³

1.3 What is the total number and percentage of people with disabilities in Liberia?

Exact statistics about disability in Liberia *are out of date*, but according to a UNICEF study from 1997, 16 per cent of the population has a disability.⁴ The uncertainty of the data is further presented in an underestimated value of 3,10 per cent of Liberian Population with disability.⁵ Similarly the Liberia Labour Force Report, finds that '4% of the eligible population reported a disability, with very little difference in the rates as between males and females'.⁶

1.4 What is the total number and percentage of women with disabilities in Liberia?

The number of disabled persons reported by the Census was 110 260; females constituted 53 698 (48,7 per cent) and males 56 562 (51,3 per cent).⁷

1.5 What is the total number and percentage of children with disabilities in Liberia?

This statistic is not readily available. It was stated in a Concluding Observation that:

The Committee, taking into account the very high incidence of disability in the State party as a consequence of the armed conflict, is concerned at the lack of statistical data on children with disabilities in the State party, at the inadequate legal and practical protection, at the situation of children with physical and mental disabilities and, in particular, at the limited specialized health care, rehabilitation programmes, education and employment possibilities.⁸

The challenge of collecting data on disability continues to emerge and available data must be treated with some caution as advised by the Labor Force Report of 2010. It was specifically stated in the report that: 'It is generally recognised that it is difficult to collect disability data through national surveys, so these figures should be treated as indicative only'.⁹

2 The Disability Rights Portal <https://www.disabilitydataportal.com/explore-by-country/country/Liberia/> (accessed 21 April 2020).

3 Report on the Labour Force of Liberia (2010) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/presentation/wcms_156366.pdf7 (accessed 13 July 2020).

4 Borgen Project 'What you need to know about people with disability in Liberia' <https://borgenproject.org/disabilities-in-liberia/> (accessed 5 June 2020).

5 Clinton Health Access Initiative 'Final Report: Assistive technology country capacity assessment in seven African countries using WHO Assistive Technology Assessment-Capacity Tool' (April 2020) https://at2030.org/static/at2030_core/outputs/Final_Draft_CCA_in_7_African_Countries_web.pdf (accessed July 16 2020).

6 n 3.

7 https://www.lisgis.net/pg_img/Gender%20Demension%20final%20210512.pdf (n 2).

8 Para 44 <https://www.refworld.org/type,CONCOBSERVATIONS,,LBR,42d28f214,0.html> (accessed 20 May 2020).

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Liberia?

Exact statistics on persons with disabilities is lacking, but available data from a UNICEF study from 1997 show that 16 per cent of the population have a disability. Of these 61 per cent have a mobility disability, 24 per cent are visually impaired, 7 per cent are deaf and 8 per cent have an intellectual or psychosocial disability. The disability prevalence is probably closer to 20 per cent because of the civil war, meaning around 800 000 persons.¹⁰

For a full tabular distribution of disability prevalence in Liberia see the table below:¹¹ of that 16 per cent, 61 per cent struggle with mobility, 24 per cent are visually impaired, seven per cent are deaf, and eight per cent have an intellectual or psychosocial disability. The Swedish International Development Cooperation Agency (SIDA), estimated in 2014 that due to the devastating civil war that ended in 2003 and the Ebola outbreak in 2014, the population of people with disabilities in Liberia is likely closer to 20 per cent.¹² In contrast the Liberia Labour Survey of 2010 finds that people with vision impairment are of high statistics followed by people with mobility challenges.¹³

Type of Disability	Total	Percent	Male	Percent	Female	Percent
Limited use of leg(s)	17858	16.2	9439	16.7	8419	15.7
Loss of leg(s)	3826	3.5	2114	3.7	1712	3.2
Limited use of arm(s)	4193	3.8	2549	4.5	1644	3.1
Loss of arm(s)	1514	1.4	922	1.6	592	1.1
Hearing difficulty	9590	8.7	4753	8.4	4837	9.0
Unable to hear (deaf)	2574	2.3	1302	2.3	1272	2.4
Sight difficulty	33538	30.4	16849	29.8	16689	31.1
Loss of sight (blindness)	3701	3.4	2073	3.7	1628	3.0
Speech impairment	1417	1.3	803	1.4	614	1.1
Unable to speak (mute)	1552	1.4	814	1.4	738	1.4
Mental retardation	1797	1.6	938	1.7	859	1.6
Mental illness	2924	2.7	1466	2.6	1458	2.7
Deaf and Dumb	952	0.9	500	0.9	452	0.8
Other Multiple Disabilities	6480	5.9	3047	5.4	3433	6.4
Others	18344	16.6	8993	15.9	9351	17.4
Liberia	110260	100	56562	100	53698	100

2 Liberia's international obligations

⁹ n 3 at 16.

¹⁰ SIDA 'Disability rights in Liberia' <https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-liberia.pdf> (accessed 21 April 2020).

¹¹ 'Republic of Liberia 2008 Population and Housing Census: Analytical Report on Gender Dimensions' https://www.lisgis.net/pg_img/Gender%20Demension%20final%20210512.pdf (accessed 15 May 2020).

¹² Borgen Project (n 4).

¹³ n 3 at 16.

2.1 What is the status of the United Nation’s Convention on the Rights of People with Disabilities (CRPD) in Liberia? Did Liberia sign and ratify the CRPD? Provide the date(s).

Liberia signed and ratified the CRPD on 30 March 2007 and 26 July 2012, respectively.¹⁴ However, there is need for the CRPD to be domesticated in Liberia so that it can take full effect.

2.2 If Liberia have signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for submission of the report? Did Liberia 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?

Liberia gave its State Report to the committee on 23 July 2019. There is little or no effect domestically from the Report, reason being the need for financial, logistics and technical support by the government of Liberia.¹⁵ The Ministry of Justice in collaboration with the Ministry Of Foreign Affairs of Liberia are responsible for the report.

2.3 While reporting under various other United Nation’s instruments, or under the African Charter on Human and Peoples’ Rights, or African Charter on the Rights and Welfare of the Child, did Liberia 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?

• **International Covenant on Civil and Political Rights**

The State Report of Liberia submitted on 9 December 2016¹⁶ was noted to have been submitted 11 years late, but was eventually considered by the Committee during its 3500th and 3501st meetings held on 23 July 2018. The State Report did not make mention of disability nor how persons with disability could be shielded from discrimination.

In its Concluding Observation, the Committee encouraged Liberia to

adopt comprehensive legislation against discrimination that includes a definition of all forms of discrimination and an expanded list of prohibited grounds of discrimination, including national or ethnic origin, religion, disability, sexual orientation and gender identity.¹⁷

14 ‘United Nations Reporting Status for Liberia’ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=LBR&Lang=EN (accessed 12 May 2020).

15 n 10.

16 ICCPR <https://undocs.org/en/CCPR/C/LBR/1> (accessed 4 June 2020).

17 Concluding Observations on the initial report of Liberia, Human Rights Committee (27 August 2018) UN Doc CCPR/C/LBR/CO/1 (2018) file:///C:/Users/User/Downloads/G1826053.pdf (accessed 09 November 2020) para 17.

The effect of the Concluding Observation is seen in efforts by the government to ensure that policies and institutional supports are put in place to enhance the positive experiences of persons with disabilities.

- **Convention on the Rights of the Child**

Liberia was due to submit its State Report to the CRC in 1995, but only submitted in May of 2005.¹⁸ The report noted the increase in children with disability occasioned by the war situations in the Country.¹⁹ Liberia reported the existence of the Group of 77 which was created to take responsibility for the welfare of disabled children. It, however, notes the limitation of the operations of the group to only physical disability and Monrovia town.²⁰

In the Committee's Observation, concern was raised about the poor state of the welfare of children with disabilities, stating:

the Committee is concerned at the persistence of de facto discrimination in the State party. In particular, the Committee is concerned at the disparities in the enjoyment of rights experienced by children belonging to the most vulnerable groups, among others, girls, children with disabilities ...²¹

The Children Law and the Education Reform Acts can be seen as the offshoot of the Concluding Observations. Both laws are geared towards improving the access to education of children and also that of children with disability.

- **Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)**

The State Report was due in 2013, but was submitted in March 2014.²² Liberia noted that:

A high proportion of the elderly are disabled due to old age and have sight difficulties. Most of these people live in the rural areas with 58% in Bomi, 5% in Gbarpolu and 2% in Grand Gedeh.

The state reiterated the efforts with respect to persons with disability to: 'Improve access to equitable social, political, and economic opportunities and provide full and equal enjoyment of all human rights and fundamental freedoms for persons with disabilities'.²³

In the response by the Committee, it saluted the signing of the CRPD in 2012 by the State of Liberia and also the Education Reform Act of 2011 which was aimed at driving inclusive education for the girl child. In addition, the effect of the Ebola outbreak and other pressing economic challenges were noted by the Committee as factors affecting women generally and encouraged the state to sustain efforts in improving the situation.²⁴

18 Consideration of reports submitted by states parties under article 44 of the Convention: Initial reports of states parties due in 1995: Liberia, CRC (22 September 2003) UN Doc CRC/C/28/Add.21 (2003).

19 CRC/C/28/Add.21 (n 18) para 165.

20 CRC/C/28/Add.21 (n 18) para 164.

21 Concluding Observations: Liberia, CRC (1 July 2004) UN Doc CRC/C/15/Add.236 (2004) para 23 https://www.refworld.org/type,CONCOBSERVATIONS,,LBR,42d_28f214,0.html (accessed 20 May 2020).

22 Consideration of reports submitted by states parties under article 18 of the Convention Seventh and Eighth Periodic Reports of states parties due in 2013: Liberia, CEDAW (10 April 2014) UN Doc CEDAW/C/LBR/7-8 (2014) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fLBR%2f7-8&Lang=en (accessed 09 November 2020).

23 CEDAW/C/LBR/7-8 (n 22) 12.

24 Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Liberia, CEDAW (24 November 2015) UN Doc CEDAW/C/LBR/CO/7-8 (2015).

The inclusion of women in some boards like the Group of 77 could be inferred to be a positive response from the outcome of the Observation. Particularly article iv of the Children Law which specifically seeks a more inclusive for the girl child education is a key development.

- **Convention on Rights of Persons with Disability**

Liberia was due to submit its State Report in 2014, but submitted it in 2019, the Report was published in 2020.²⁵ The Report lauds the effort of the state in implementing laws and policies that would ensure the protection of the rights of persons with disability in Liberia. It takes into account that discrimination against persons with disabilities is still rife in Liberia. The state bemoaned the existence of certain laws that continue to entrench some form of discrimination against the protection of the rights of persons with disability when it notes that:²⁶

Unfortunately, measures by the State to reverse a law that excludes children with disability at the discretion of the principal have not been successful. The national legislature in 2011 passed a law that states that 'a school may exempt a child from free and compulsory education' based on their disabilities (4.6.1.c. IV). Other aspects of the same law assume that when a minister (3.2.4) or a school board member 4.1.1 becomes disabled, this alone is ground for replacement.

The Committee is yet to issue a concluding observation for the report.

- **Regional Reports**

African Commission on Human and Peoples' Rights (ACHPR)

Liberia submitted its Report to the African Commission 20 years later than was scheduled. The Report represented the situation of human rights in Liberia between 1982-2012.²⁷ The Report failed to adhere to several guidelines on state reporting and did not address a number of issues. The efforts to take part in the process was, however, lauded and Liberia was encouraged to ensure strict adherence to laid down policies of reporting and efforts to ensure the protection of human rights standards in Liberia.²⁸

In its Concluding Observation, the Committee noted the lack of action to protect the rights of senior persons with disability.²⁹ Given the high incidences of discrimination against persons with disabilities, especially children,³⁰ Liberia was encouraged to particularly 'take steps to eliminate discrimination of persons with disabilities, and also take measures to provide psychosocial support and health rehabilitation to children with disabilities'.³¹

- **African Committee on the Rights and Welfare of the Child**

Liberia submitted its Report in 2013 as against the initial due date of 2010.³² Liberia noted efforts to include the rights of children with disabilities in the

25 Initial report submitted by Liberia under article 35 of the Convention, due in 2014, CRPD (24 April 2020) UN Doc CRPD/C/LBR/1 (2014).

26 CRPD/C/LBR/1 (n 25) 4.

27 Concluding Observations and Recommendations - Liberia: Initial and Combined Periodic Reports, 1982-2012, ACHPR (19- 28 February 2015) <https://www.achpr.org/sessions/concluding-observation?id=57> (accessed 2 June 2020).

28 'Liberia appears for the first time before the African Commission' *ISHR* 06 June 2014 <https://www.ishr.ch/news/liberia-appears-first-time-african-commission> (accessed 5 June 2020).

29 Concluding Observations (n 27) para 22.

30 Concluding Observations (n 27) para 23.

31 Concluding Observations (n 27) para 49.

32 Government of Liberia's Initial Report to The African Committee of Experts on The Rights and Welfare of The Child <https://acerwc.africa/wp-content/uploads/2018/04/Liberia-Initial-Report.pdf> (accessed 5 June 2020).

Children Law which provides in Section 4, 'special care conducive to full integration and individual development'. In addition, the law also stipulates the duties of the local authorities to seek appropriate support from the central government to assist the families and caregivers of children with disabilities. The right of children with disabilities to enjoy a full and decent life is also protected.³³ Another initiative by the state includes the provision for exclusive education.³⁴

In its Concluding Observation,³⁵ the Committee commends the state party on the following achievements:

- a. The adoption of the Children's Law which domesticates the Charter and Encompasses the General Principles of the Charter
- b. The formulation of the Education Act of 2011
- c. The adoption of the Act to amend the Penal Code of January 2006, called the Rape Law,
- d. The ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2012
- e. National Policy on Girls' Education (2006)
- f. Education Master Plan 2000–2010 and the Education for All Action Plan.³⁶

Financial constraints and insufficient institutional backing for the prosecution of certain offences were, however, identified by the Committee as drawbacks to the efforts of Liberia.³⁷

2.4 Was there any domestic effect on Liberia's legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that had been ratified require Liberia's legislature to incorporate it into the legal system before the instrument can have force in Liberia's domestic law? Have the courts of Liberia ever considered this question? If so, cite the case.

All international treaties signed and ratified by Liberia must be domesticated before they will have effect in Liberia. While the President has the constitutional backing to sign and enter into treaties for the country, the Senate must domesticate such treaty before it will have effect in Liberia.³⁸ Presently, there is no case law available on the applicability or otherwise of the international or regional instrument in 2.3 above. However, the setting up the National Commission on Disability is a laudable development and could be assumed to be an after-effect of the treaties signed and ratified.

2.5 With reference to 2.4 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.

Liberia has domesticated several international treaties. Examples include the Children Rights Convention, Geneva Convention of 1949 and its Optional Protocols. A list of relevant IHL treaties domesticated conventions can be found at

33 Article VII, section 4.1 of the Children's Law.

34 Section 4.3 of the Children's Law.

35 Concluding Recommendations (n 32).

36 As above.

37 As above.

38 Section 34 and 56 of the Liberian Constitution. See also H Kabbah 'Update: Liberian legal system and legal research' available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=98&Lang=ENUN Treatybody (accessed April 2020).

the International Committee of the Red Cross website,³⁹ as well as other treaties identified by Liberia.⁴⁰

- **Case Law**

Presently, there is no case law available on the applicability or otherwise of the international or regional instrument

- **Legislation**

Liberia has set up the National Commission on Disability which is informed by the various concluding observations from the various treaties' bodies.

Generally, Liberia is in the rebuilding phase after the years of war and its after-effect on the state. Specific efforts are put in place to ensure the protection of persons with disabilities, women and children generally. From the setting up of the National Commission on Disabilities to the enactment of Children's Law, it is noted that efforts are being made. On the Policy fronts, the Education Reform Policy is also targeted at ensuring inclusion for both girls and persons with disability. Still outstanding is the Education Sector Policy (ESP).

3 Constitution

3.1 Does the Constitution of Liberia contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

No, the Constitution of Liberia, 1986 does not provide for nor address disability in any way.

3.2 Does the Constitution of Liberia contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

No, the Constitution does not provide for disability. The only mention of the word disability is in article 64 which speaks to the election or otherwise of officers of the country. It is, however, noted that the use of the word disability in this sense does not refer to persons with disabilities but a basis for the President or Vice president to be unable to hold offices. However, the Constitution provides for the right to equality in article 6 and 7 and prohibits discrimination in article 8. This amounts to indirect protection of disability rights.

39 International Committee of the Red Cross 'Treaties, states parties and commentaries: Liberia' https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LR&nv=4 (accessed 09 November 2020).

40 As above.

4 Legislation

4.1 Does Liberia have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- **National Commission on Disabilities (NCD) Act of 2005.** It is, however, noted that the 2005 Act was revised in 2011 and is expected to be passed into law by a 2011 Repeal Act

The Act has helped influence advocacy by Disability Persons' Organisations (DPOs) in the framing of the National Action Plan (NAP) to drive for inclusion of persons with disability.

- **The Educational Reform Act (August 2011)**

This requires a review to establish inclusive education. In addition, according to SIDA reports, The Agenda for Transformation 2012-2017 is providing overall guidance for development efforts and priorities in Liberia. It identifies disability as an important cross cutting issue.⁴¹ The National Action plan adopted by members from 24 DPO's; the Alliance for Disabilities; five government line ministries (Public Works, Education, Gender, Justice and Health); and other institutions concerned with the rights and welfare of persons living with disabilities realises the need for concerted national efforts to promote the welfare of persons with disabilities throughout the length and breadth of Liberia in line with the Liberian Constitution, the United Nations Convention on the Rights of Persons with Disabilities which Liberia signed and ratified in 2012, and the Sustainable Development Goals (SDGs): 'the DPOs stated in the joint resolution seek the Inclusion of Persons with Disabilities to promote the welfare and rights of persons with disabilities throughout Liberia'.⁴²

- **The National Health and Social Welfare Policy and Plan 2011-2021**

This law requires an inclusive approach to cater for the health needs of persons with disability. Under Section 4.3 of the Policy, it is provided that a⁴³

detailed package of services that will be prioritized and made available incrementally, including services for people with physical and mental health disabilities, prevention of disabilities, child and family services, child protection, as well as aged, juvenile, youth development, substance abuse and prison services.

4.2 Does Liberia have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

- **The Liberia National Human Rights Commission Act 1997**

The Commission aspires to improve respect for human rights and protection of same in Liberia.

41 SIDA (n 10).

42 'Liberia: Persons with disability want inclusion' *Reliefweb* 14 July 2018 <https://reliefweb.int/report/liberia/liberia-persons-disabilities-want-inclusion> (accessed 20 May 2020).

43 National Health and Social Welfare Policy https://extranet.who.int/countryplanningcycles/sites/default/files/country_docs/Liberia/ndp_liberia.pdf (accessed 15 July 2020).

In addition, given that Liberia provides for the right to equality, legislation applies to all and as such, indirectly address issues of disability.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Liberia 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.

There are no reported decisions of courts or tribunals.

6 Policies and programmes

6.1 Does Liberia have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **The Education Reform Policy**

This Policy is targeted at ensuring inclusion for both girls and persons with disability.

- **The Education Sector Policy (ESP)**

This Policy is targeted at ensuring inclusive education for children with disability in Liberia.

- **The National Action Plan on Disability 2018-2020**

The policy is targeted at ensuring that persons with disability are included in all sectors of Liberia's national development and shielded from all forms of discrimination. In addition, it ensures the inclusion of persons with disabilities in Liberia's governance process, by requiring that all laws or sections of laws discriminating against persons with disabilities be abolished. The plan also seeks among others, financial assistance through provision of social security and welfare for persons with disabilities; as well as teaching of sign language as a required course in schools in Liberia – from elementary to college levels. The government is also working on offering a tax incentive to businesses that hire someone who has a disability.⁴⁴

6.2 Does Liberia have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

Yes, namely:

44 A Ashenfelter 'Changing Liberian attitudes toward the disabled' (28 March 2013) <https://buildingmarkets.org/blogs/liberia/2013/03/28/changing-liberian-attitudes-toward-the-disabled/> (accessed 7 June 2020).

- **Poverty reduction strategy paper – PRSP (2008)**⁴⁵

This policy seeks poverty eradication in Liberia.

- **National policy and response strategy on climate change**⁴⁶

This policy is to drive adaptation of guidelines that would mitigate the effects of climate change in all spheres of the nation's existence.

- **National disaster management policy 2012**⁴⁷

This policy, among several others, aims to ensure effective institutional frameworks that would drive good governance and ensure sustainable national development.

- **National adaptation programme of action – NAPA (2008)**⁴⁸

This policy provides an avenue to identify areas of urgent development concern.

7 Disability bodies

Other than the ordinary courts or tribunals, does Liberia have any official body that specifically addresses violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.

- **The Independent National Human Rights Commission of Liberia**

The Commission was created in 2005. The Commission's mandate is to support the protection of human rights in Liberia and support various law reforms to ensure a high level of respect for human rights in the country. In addition, the Commission advises the government on measures of ensuring compliance with human rights obligations. They are also saddled with the responsibility of producing reports of the state of human rights to the relevant government arms. The Commission also engages with numerous laws including the CRPD.⁴⁹

45 Liberia: Strategy Reduction Paper (2008) <https://www.preventionweb.net/english/policies/v.php?id=9357&cid=98> (accessed 7 June 2020).

46 As above.

47 As above.

48 As above.

49 Independent National Commission on Human Rights <https://inchrliberia.com/index.php/about-us/what-we-do#:~:text=The%20Independent%20National%20Commission%20on,of%20human%20rights%20in%20Liberia> (accessed 7 June 2020).

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Do you have a Human Rights Commission, Ombudsman or Public Protector in Liberia? 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, Ombudsman or Public Protector of Liberia has ever addressed issues relating to the rights of persons with disabilities.**

Liberia has a Human Rights Commission.⁵⁰ The Commission does not provide for the protection of disability rights specifically, but provides for the general protection of human rights. The Commission is to protect only the rights provided for in the Constitution and engage in human rights education. The Commission is part of the bodies in Liberia engaging in advocacy to advance the protection of human rights and by extension the rights of persons with disability in Liberia.

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Do you have organisations that represent and advocate for the rights and welfare of persons with disabilities in Liberia? If so, list each organisation and describe its activities.**

Several DPOs exist in Liberia,⁵¹ however, the following are identified as DPOs with specific focus on disabilities:

- AIFO-Liberia: AIFO, Liberia is a professional non-profit health and development organisation that enables opportunities for persons affected by leprosy, persons with disabilities, women, children and members of poor and vulnerable groups, through focused healthcare, education and economic empowerment initiatives in Liberia with the aim of providing a better quality of life and creating large-scale positive change.⁵²
- Alliance on Disability: The Alliance consists of six organisations (AIFO, Carter Centre,⁵³ Handicap International,⁵⁴ NCD, NUOD and Sight Savers).⁵⁵ The major focus of the Alliance is to advocate for the implementation of the CRPD.

50 Human Rights Commission Act of 1997.

51 See generally the Diagnostic Study on Disabled Peoples Organisations Italian Agency for Development Cooperation on Start of NGO https://www.academia.edu/37978553/Diagnostic_Study_on_Disabled_Peoples_Organisations_DPOs_in_Liberia (accessed 5 June 2020).

52 <https://aifoliberia.org> (accessed 5 June 2020).

53 The Carter Center 'Liberia' <https://www.cartercenter.org/countries/liberia.html> (accessed 6 June 2020), focused on electoral governance and inclusion of PWD.

54 Hi.org 'Liberia' <https://hi.org/en/country/liberia> (accessed 6 June 2020), focused on inclusive education.

55 Sightsavers 'Liberia' <https://www.sightsavers.org/where-we-work/liberia/> (accessed 6 June 2020), focused on Visual impairment.

- National Union of Organisations of the Disabled (NUOD).⁵⁶ It coordinates the advocacy of issues of the rights of persons with disabilities.
- Group of 77: The largest intergovernmental organisation for developing countries. They are focused on inclusion of persons with disability and other development rights.
- Liberian National Association of the Deaf (LNAD)⁵⁷ sustains advocacy on the rights of the deaf in Liberia.
- Cultivators of Users' Hope (CFUH)⁵⁸ work with mental disability.
- Christian Association of the Blind⁵⁹ provides equal opportunities for persons with disabilities especially with sight impairment.

9.2 In the countries in your region, are DPOs organised/coordinated at a national and/or regional level?

- **National Union of Organisations of the Disabled (NUOD)**

NUOD is the largest coalition of DPO's in Liberia, it is made up of about 17 different bodies with focus on the development of advocacy on issues of persons with disabilities.

- **Italian Association Amici di Raoul Follereau**

Comprises of six groups with focus on different areas of disability advocacy.

9.3 If Liberia has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

DPO's in Liberia are quite organised and have sustained advocacy in this respect. In an email conversation with Mr Samuel Dweh⁶⁰ it was clear that the roles of the DPO's in ratification of the CRPD is quite commendable. He informed that Ms Naomi B Harris is President of the National Union of Organisations of the Disabled (NUOD) which is Liberia's current most vibrant independent advocacy body for the Country's disabled community, and is currently advancing the rights of persons with disability.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

Advocacy and visits to the relevant government agencies which could positively influence the situation of the rights of persons with disabilities.⁶¹ Additionally, DPOs are advocating for the establishment of the National Commission on Disabilities and inclusions of persons with disabilities in national Development and Programs.

56 SIDA (n 10), an independent group on disability rights advocacy https://www.sida.se/globalassets/sida/eng/partners/human_rights-based-approach/disability/rights-of-persons-with-disabilities-liberia.pdf (accessed 6 June 2020).

57 World Federation of the Deaf <https://wfdeaf.org/who-we-are/members/wfd-members/name/liberia-national-association-of-the-deaf-inc/> (accessed 5 June 2020).

58 <https://www.licormh.com/cfuh> (accessed 5 June 2020).

59 <http://www.cabl Liberia.org> (accessed 5 June 2006).

60 Email conversation of 4 May 2020.

61 *Reliefweb* (n 42).

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

Funds remain the greatest challenge to activities of DPOs.

According to Mr Samuel Dweh, monetary⁶² restraints affect the gathering of relevant information from individuals and organisations involved in gathering information on issues of disabilities and consequently affects planning around programmes targeted at persons with disabilities.

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

Yes, according to Mr Williams, the African Youth with Disabilities Network-Liberia (AYWDN-Liberia) played a very vital role in the 2018 Amended Disability Act, creating and strengthening the 2005 Disability Act of the National Commission on Disability of Liberia with funding from the OSIWA. According to Mr Williams, *the AYWDN-Liberia and partners* drafted and submitted a Disability Act of 2018 to a plenary session of the lower House of the Liberia National Legislature which was subsequently passed by same.⁶³

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?

Yes, the consortium of Disabled People Organisations (DPOs), the Alliance for Disabilities, and other institutions concerned with the rights and welfare of persons with disabilities, have adopted and signed a joint resolution for the implementation of the plan.⁶⁴

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?

The areas that require capacity building include, but are not limited to, training to assist DPO’s understanding guidelines for reporting by state parties and the shadow reporting process before the various treaty bodies, and also engaging effective advocacy for implementation of projects. The understanding of this process would enhance the implementation, monitoring and evaluation processes to effectively track government activities. Consequently, there is the urgent need to ensure that capacity of DPOs, NCD and NUOD to carry out their mandates and operational processes for sustained advocacy, fundraising and empowerment is extensively strengthened and they also receive training for technical capacity development.

62 Email conversation of 4 May 2020.

63 Email of 6 May 2020.

64 Liberia Permanent Mission to the UN <http://pmun.gov.lr/index.php/news-and-events/142-government-of-liberia-committed-to-ensuring-inclusive-society-develops-policies-and-programs-for-people-with-disabilities> (accessed 12 May 2020).

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?

Funding, programme management training and exposure. Liberia needs financial and technical support for the development of a national sign-language programme, provision of assistive devices, ICT equipment and establishment of a national registry for persons with disabilities, among others.

9.10 Are there specific research institutes in your region that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

Yes, they are:

- African Youth Disability Network-Lib and the National Union of Organisation of the Disabled (NUOD).
- The Deputy Director for the National Commission on Disabilities Mr Fallah Cymbianoh and the Coordinator for Women with Disabilities at the National Commission on Disabilities, Ms Michal Dennis Zahn formed part of the Liberian delegation to the 12th Session of the Conference of State Parties to the United Nations Convention on the Rights of People with Disabilities (CRPD).⁶⁵
- Open Society Initiative for West Africa (OSIWA) has supported the activities of the African Youth Disability Network-Lib to engage in advocacy. The Humanity for Inclusion Project is also training teachers to equip them with required technical know-how on how to ensure inclusive education.⁶⁶
- Clinton Health Access Initiative and Global Disability Innovation (GDI) Hub: CHAI and GDI conducted an inaugural Liberia country capacity assessment (CCA) in 2019 on access to Assistive Technology for persons with disabilities to provide in-depth understanding on Liberia's capacity to finance, procure and provide quality assistive devices to persons with disabilities and further assessed relevant policy and regulatory environments, qualified human resources and rehabilitation institutions to provide efficient and effective assistive technology and rehabilitation services to persons with disabilities, especially the elderly population who are usually susceptible to functional limitation and disability.⁶⁷

⁶⁵ As above.

⁶⁶ Humanity & Inclusion 'In Liberia, Humanity & Inclusion continues to run programs under the operating name "Handicap International.'" <https://www.hi-us.org/liberia#i> (accessed 12 May 2020).

⁶⁷ Final Report: Assistive Technology Country Capacity Assessment in seven African Countries using WHO Assistive Technology Assessment-Capacity Tool https://at2030.org/static/at2030_core/outputs/Final_Draft_CCA_in_7_African_Countries_web.pdf (accessed 18 July 2020).

10 Government departments

10.1 Do you have a government department/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 National Commission on Disabilities has the mandate to ensure the promotion of the rights of persons with disability. The NCD in collaboration with the Liberia Land Authority conducted a two-day awareness workshop on the National Action Plan for the inclusion of persons with disability and Land Rights Act in Tubmanburg, Bomi County and Grand Bassa County respectively. The event aimed at creating more awareness on a five-year action plan developed by the Commission through the support of UNDP. It also aimed at acknowledging persons with disabilities on their right to land ownership and the legal procedure in acquiring land. The workshop brought together about 200 participants from Gbapolu, G.Cape Mt and Bomi and another 186 participants from Rivercess, Margibi and G. Bassa respectively. The event was supported by UNDP. The NCD is also working with the UNDP to support the event to be extended in other regions of the country.⁶⁸

There is also the Ministry of Gender Children and Social Protection (MGCSPP), the Ministry of Health National Eye Health Division, and Non Communicable Disease Division that supports persons with disabilities with visual impairments.

11 Main human rights concerns of people with disabilities in South Sudan

11.1 Contemporary challenges of persons with disabilities in Liberia (eg in some parts of Africa is ritual killing of certain classes of persons with disabilities such as people with albinism. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

Persons with albinism in Liberia face discrimination and exclusion from gainful employment.⁶⁹ They continue to face verbal and physical attacks. Persons with

68 National Commission on Disabilities Facebook page https://web.facebook.com/pages/category/Legal/National-Commission-on-Disabilities-356657604964339/?_rdc=1&_rdr (accessed 7 June 2020).

69 J Kanubah 'Liberian Albinos fight for rights' *DW.com* 24 July 2013 <https://www.dw.com/en/liberian-albinos-fight-for-rights/a-16971982#:~:text=Liberian%20albinos%20fight%20for%20rights,formed%20their%20own%20advocacy%20group> (accessed 1 June 2020).

mobility impairment are also confronted with the challenges of reasonable accommodation and employment.

11.2 Describe the contemporary challenges of persons with disabilities and the legal responses thereto, and assess the adequacy of these responses to:

- **Access and accommodation:**

Article 19 of the CRPD commits states parties to take all appropriate measures to ensure that the built environment, transportation, information, communications, and other services are accessible and free of obstacle. However, this is very low in Liberia, as the transport system and access to public institutions are still fraught with non-friendly infrastructure. At the moment, there are no legal initiatives in these regards.

- **Access to social security:**

Articles 11 and 13 of the Liberian Constitution guarantee the security of both individuals and citizens of Liberia. However, persons with disability continue to suffer from abuse and violation of the right to security. There is no record of any legal response in this regard. In this sense, it is important to note that both physical and social security remain huge challenges for persons with disabilities in Liberia. This is more so that the National Social Security and Welfare Corporation (NASSCORP) Act makes the scheme nuanced by persons with disabilities.⁷⁰

- **Access to public buildings:**

Articles 5 and 9 of the CRPD advocate for access and elimination of barriers and discrimination of persons with disability from accessing public buildings. However, public buildings in Liberia largely remain inaccessible to persons with disability.⁷¹

- **Access to public transport:**

Article 9 of the CRPD covers this aspect, however, despite consultations since 2013,⁷² projections towards an inclusive transportation system are still unrealistic.⁷³ Additionally, there is poor support in terms of access to Assistive Technology/Devices. Approximately 84 per cent of persons with disability in Liberia do not have access to quality assistive devices to enhance their daily mobility and functionality which often limits their full participation in education, employment and community life and deprives them from leading healthy and productive lives.⁷⁴

- **Access to education:**

The Children Law in article iv provides for access to education of the girl child and persons with disability. It is noted that efforts in this regard are growing. However, there is still much to be desired. The quality of content of education in Liberia remains poor and the various challenges related to quality like infrastructure, availability of academic materials and the like continue to ensure that inclusive education is far from being realised in Liberia.

70 'Harmonisation of the Social Security and Public Sector Schemes' <https://ww1.issa.int/gp/182224> (accessed 10 December 2020).

71 LS Mendin 'Make public buildings accessible again: European Disability Forum calls on Liberian government' *AIFO Liberia* 26 November 2018 <https://aifoliberia.org/2018/11/26/make-public-buildings-accessible-european-disability-forum-calls-on-liberian-government/> (accessed 2 June 2020).

72 'Liberia: Disability inclusive transport sector consultation begins in Monrovia' *AllAfrica* 19 July 2013 <https://allafrica.com/stories/201307191045.html> (accessed 6 June 2020).

73 'Disability and Development Report' <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/07/disability-report-chapter2.pdf> (access 10 December 2020).

74 Clinton Health Access Initiative (n 5).

- **Access to vocational training:**

The Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983 supports the inclusion of persons with disability,⁷⁵ thus in Liberia vocational training is on the increase for persons with disabilities. Organisations like HOPE and some other DPO's⁷⁶ are in the forefront of training persons with disabilities and empowering them with requisite skills to function.

- **Access to employment:**

Access to employment of persons with disabilities in Liberia is provided for by the National Decent Work Act of 2015. Internationally, Liberia has ratified 25 International Labour Conventions. However, the discrimination against persons with disabilities is still prevalent. The involvement of persons with disability on the Board of the National Commission of Persons with Disability is a laudable development.

- **Access to recreation and sport**

Article 30 of the CRPD promotes the right to sports and leisure of persons with disabilities. Liberia has sports programmes for persons with disability. Football is a popular sport that they look forward to.

- **Access to justice**

This is a fundamental right of every individual, article 20 of the Liberian Constitution promotes access to justice and the rule of law. Article 13 of the CRPD protects the right to access justice by the CRPD. However, in Liberia this remains a huge challenge. The poor access to education of persons with disabilities implies the poor awareness and knowledge of the rights of persons with disabilities. The direct implication of this is that they are in several circumstances oblivious to their rights. The state of the court in terms of reasonable accommodation and assistive language facilities are all major indicators as to the poor state of access to justice of persons with disability.

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Liberia?

Article 63 of the Liberian Constitution cites disability as a ground for the removal of the President or Vice President. These provisions negate the spirit of article 29 of the CRPD. It is important to note, however, that considering the economic status of persons with disability, their involvement is very minimal and poor.

11.4 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Liberia?

The state of economic and social rights is very poor. As already discussed above in 11.2, there are still so many grounds to be covered before it can be said that there are sufficient efforts in terms of law, policy and implementation.

75 Liberia Truth and Reconciliation Commission 'Accounting for the "less fortunate" and their psychosocial needs' Vol 3, Title VIII (30 June 2009) <https://www.legal-tools.org/doc/66b519/pdf/> (accessed 3 June 2020).

76 "My job is to make children hopeful": Inside Liberia's deaf school' *The Guardian* <https://www.theguardian.com/global-development/2016/aug/10/liberia-school-deaf-marginalised-my-job-is-to-make-children-hopeful> (accessed 6 June 2020).

11.5 Specific categories experiencing particular issues/vulnerability.

- **Women with disabilities**

Women with disabilities remain part of the most vulnerable group of the disability community. Aside the challenges suffered because of disability, cultural discrimination, and sexual and domestic violence contribute to the very poor experience of this group of persons with disability. Furthermore, it is noted that the effects of civil war had adverse effects on both women and men. More females being affected with various disabilities reflects a more complex situation which calls for multidimensional responses to the disability problem. The government needs to empower women with disabilities who are more affected, in that they will fit in the development process as disability is not inability.

- **Children with disabilities**

Children with disabilities like women suffer what can be best described as a twofold blow. The poor state of education in Liberia means that inclusive education is a huge challenge confronting children with disabilities. Several children with disabilities are hungry and also suffer severe forms of cultural discrimination.⁷⁷

- **Other (eg indigenous peoples)**

There is no record of any recognised indigenous group.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Liberia at the moment?

Yes, especially with the debates on inclusive education and governance debates. Also, the learning of sign language and campaign for accessibility to public buildings. This debate is centred around the Children Law and the Education Reform Act, which is targeted at ensuring that children with disability are not discriminated against in school.

12.2 What legal reforms are being raised? Which legal reforms would you like to see in Liberia? Why?

It is important to have disability specific legislation in the Country. Of equal importance is the need to ensure that the policies are interpreted from a disability-law perspective. The reason for this is it would enhance the inclusive involvement of persons with disability and ensure a targeted and measurable approach towards improving the experiences of persons with disability.

⁷⁷ 'Impact of armed conflict on nutritional situation of children' *FAO.org* <http://www.fao.org/3/w2357e/W2357E02.htm> (accessed 5 June 2020)

LA REPUBLIQUE CENTRAFRICAINE

Tengho Serge Marcellin*

Summary

According to the general Census of Population conducted in December 2003, the Central African Republic population is 3 895 139 million. According to this Census of Population, Persons with disabilities are 50 636, that is 1,3 % of the total population; the most prevalent forms of disabilities include partial paralysis, sensory disabilities such as deaf.

The Central African Republic signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as well as its Optional Protocol on 11 October 2016. The CRPD was ratified on 11 October 2016 by the Central African Republic government. The Constitution of the Central Africa Republic contains no provision dealing directly with disabilities. The term disability does not openly appear in the Constitution. Nevertheless, the Constitution provides for the right to equality for all, including persons with disabilities. The rights to employment, education, etc, for all, are also guaranteed by the Preamble on the Constitution. The Central African Republic has numerous pieces of legislation that directly address disability. The key ones are Law N°00.007of 20 December 2000 on the promotion and the protection of the rights of persons with disabilities, which has not yet been ratified, the decree N°02.205 of 06 August 2002 that instituted application measures of Law N°00.007of 20 December 2000.

The policies that directly address persons with disabilities are: (1) the national policy and its action plan; (2) the national policy of social welfare and its action plan; and (3) the national strategy on the protection of vulnerable children and the national policy on protection of children as well as its action plan including programmes affecting directly people with disabilities.

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Other than ordinary courts or tribunals, the Central African Republic has no official body that specifically addresses the violation of the rights of people with disabilities. However, on 28 June 2017 the government established a national Human Rights Commission which has to be autonomous, neutral and endowed with a legal entity. It also enjoys administrative, technical and financial autonomy and independence of action. While waiting for the effectivity of the Human Rights Commission, its mandate is discharged by the National High-Commission for Human Rights of Central African Republic. The Central African Republic also has a Human Rights Federation which organises actions on the promotion and protection of persons with disabilities. There are numerous organisations that represent and advocate for the rights and welfare of persons with disabilities in the Central African Republic. They include l'Association Ministère d'Évangélisation; Ensemble pour la Promotion et l'Insertion des Personnes Handicapées; and l'Association Nationale la Main des sourds Muets pour le Travail et le Développement de Centrafrique.

In the Central African Republic, the Ministry of National and Higher Education; and the Ministry of Family, Social Work, and National Solidarity are involved in promoting and protecting disability rights. Persons with disabilities in this country face many problems such as the lack of doctors specialised in re-education and rehabilitation. Where access is concerned, persons with disabilities have difficulties in accessing public buildings, public transport, education, vocational training, healthcare, employment justice and other social structures, in practice, very little is done to ensure access for persons with disabilities.

The Central African Republic government should strengthen and speed up the implementation of its national policies and programmes for the implementation of disability rights. It should increase the promotion of disability rights especially in the rural areas.

1 Les indicateurs démographiques

1.1 Quelle est la population totale de la République Centrafricaine?

Située entre le 2^{ème} degré et 11^{ème} degré de latitude Nord et entre le 14^{ème} et le 28^{ème} degré¹ de longitude Est, la République Centrafricaine est un pays enclavé d'Afrique Centrale totalement situé en zone tropicale au nord de l'équateur et au sud du tropique du cancer. La République Centrafricaine est un vaste pays de 623 000 km² qui partage de longues frontières avec le Tchad au Nord, le Soudan au Nord-est le Soudan du Sud à l'Est, le Cameroun à l'Ouest, la République démocratique du Congo au Sud-est et la République du Congo au Sud-ouest. La population était estimée en 1998 à 3 600 000 habitants. Cependant, avec le recensement général de la population et de l'habitat (RGPH) effectué en décembre 2003, cette étude nous donne un nombre de 3 895 139 habitants.² En attendant le prochain recensement général de la population et de l'habitat qui sera le quatrième pour se pays et qui aura

1 Map Centrafrique: Carte. In <https://www.coordonnées-gps.fr>

lieu au courant cette année 2020 tel que le précise Blaise-Bienvenu Ali, directeur général de l'Institut Centrafricain des Etudes Economiques et Sociales (ICASEES), la population actuelle de la Centrafrique aurait atteint 5 745 135 habitants en 2018, pour une densité de 9,22 habitants/km.²

1.2 Méthodologie employées en vue d'obtenir des données statistiques sur la prévalence du handicap en République Centrafricaine. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées en Centrafrique?

Il n'existe aucune statistique globale consolidée du nombre de personnes handicapées en République centrafricaine (statistiques globales et statistiques ventilées selon la nature du handicap et le genre). Les seules données statistiques disponibles datent du recensement de 2003, qui avaient permis de recueillir les informations suivantes : 1,3% de la population Centrafricain soit 50 636 a déclaré un handicap dont 1,5% se retrouve en zone urbaine et 1,1% en zone rurale.³ Il n'y a toujours pas à ce jour d'informations actualisées sur le nombre de personnes handicapées dans le pays, ventilées par genre et par la nature du handicap. Cette étude est loin d'être exhaustive puisqu'elle date de depuis plus d'une décennie et demie. En admettant que la personne handicapée est « toute personne frappée d'une déficience physique ou mentale, congénitale ou acquise, éprouvant des difficultés à accomplir des activités normales par toute personne dite valide de même âge »,⁴ la Loi N°007.007 du 20 décembre 2000 statut, protection et promotion de la personne handicapée ainsi que le rapport du recensement de 2003 distingues plusieurs catégories de personnes handicapées⁵ à savoir les personnes handicapées physiques/moteur, les personnes handicapées auditives; les handicapées mentales; visuelles et les polyhandicapées.⁶

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République centrafricaine?

Les seules données statistiques disponibles datent du recensement de 2003, qui avaient permis de recueillir le chiffre suivant: 50 636 personnes handicapées, soit 1,3% de la population⁷ avaient été identifiées dans le pays. De nos jours, les chiffres sur le nombre exact ou les besoins des personnes handicapées n'existent pas.

NB : Bien qu'aucune statistique jusqu'à ce jour ne porte ni sur le total, ni sur le pourcentage des personnes handicapées en République centrafricaine, il est important de rappeler que le pays a connu plusieurs conflits entre la Séléka et les anti-balaka, des attaques terroristes et bien d'autres événements qui ont eu des répercussions sur la population. Donc l'effectif de personnes handicapées pourrait être à la hausse.

2 Ministère de l'Economie, du Plan et de la Coopération Internationale : La RCA en chiffre : Résultats du Recensement Général de la Population et de l'Habitat de décembre (2003) 4. On le retrouve aussi dans: <https://ireda.org/inventaire/ressources/caf-2003-reco-rca-en-chiffres.pdf> (visité le 9 Décembre 2020).

3 Ministère de l'Economie, du Plan et de la Coopération Internationale : La RCA en chiffre : Résultats du Recensement Général de la Population et de l'Habitat de décembre 2003 (comme ci-dessus) 17.

4 Article 1er de la loi N°00.007 du 20 décembre 2000, portant statut, protection et promotion de la personne handicapée.

5 Ministère de l'Economie, du Plan et de la Coopération Internationale : La RCA en chiffre : Résultats du Recensement Général de la Population et de l'Habitat de décembre 2003 (n 33 ci-dessus) 17.

6 http://ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=88121&p_country=CAF&p_count=89 (visité le 9 Décembre 2020).

7 Ministère de l'Economie, du Plan et de la Coopération Internationale: La RCA en chiffre: Résultats du Recensement Général de la Population et de l'Habitat de décembre 2003 (n 2 ci-dessus) 17.

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République centrafricaine?

Les données statistiques du recensement de 2003, avaient permis de recueillir 1,3% de la population comme personnes handicapées dans le pays (soit 1,3% pour les hommes et 1,2% pour les femmes).⁸ Il n'y a toujours pas à ce jour d'informations actualisées sur le nombre de personnes handicapées dans le pays, ventilées par genre et par la nature du handicap ainsi qu'une évaluation du taux de prévalence.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République centrafricaine?

Il n'existe aucune statistique publiée concernant les enfants handicapés, qu'elle soit ancienne, nouvelle, ou encore moins en cours.

NB: Cependant, dans un document d'OCHA,⁹ il ressort à la page 53 que 127 620 enfants vivent en situation de handicap sans typification de ces handicaps.

1.6 Quelles sont les formes de handicaps les plus répandues en République centrafricaine?

Selon le rapport de Human Rights Watch effectué en 2015 dans, *République Centrafricaine: les personnes handicapées abandonnées*, les personnes présentant un handicap physique ou sensoriel, ainsi que celles sourdes ou présentant un handicap mental ou intellectuel semblent être les plus répandues en Centrafrique. Seulement que cette étude ne fait pas ressortir le pourcentage comme c'est le cas pour le Tchad.¹⁰

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relatives aux Droits des Personnes Handicapées (CDPH) en République centrafricaine? La Centrafrique a-t-elle signé et ratifié la CDPH, Fournir le (s) date (s). La Centrafrique a-t-elle signé le protocole facultatif? Fournir le (s) date (s).

La Mission multidimensionnelle intégrée des Nations Unies pour la stabilisation en République centrafricaine (MINUSCA) se félicite de la ratification/adhésion de la RCA, en date du 11 octobre 2016 à certains principaux traités et protocole facultatifs relatifs aux droits de l'homme. Parmi ceux-ci, on peut citer la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH). Ce jour marque dont le jour où il y a eu confirmation formelle, adhésion et ratification. Cette ratification et adhésion des traités et de leurs protocoles

8 Ministère de l'Economie, du Plan et de la Coopération Internationale: La RCA en chiffre: Résultats du Recensement Général de la Population et de l'Habitat de décembre 2003, (Comme ci-dessus).

9 OCHA est entendu comme Office for the Coordination of the Humanitarian Affairs/Bureau de Coordination des Affaires Humanitaires. In OCHA: Aperçu des besoins humanitaires: République Centrafricaine, Octobre 2019.

10 SM Tengho 'Tchad' (2019) 7 African Disability Rights Yearbook 146.

facultatifs renforce ainsi le devoir de protéger les personnes contre les violations des droits de l'homme.

NB: Ces instruments, adoptés le 11 octobre 2016, n'entreront en vigueur que trois mois plus tard.

Concernant le protocole facultatif de ladite convention, la République Centrafricaine a procédé à sa signature le 11 octobre 2016. Lors de l'adhésion à cette convention, la République Centrafricaine n'a formulé aucune déclaration, encore moins la moindre réserve, ni introduit une quelconque déclaration impérative.

2.2 Si la Centrafrique 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? Votre pays a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Chaque Etat doit présenter au Comité un rapport détaillé sur les mesures qu'il a prises pour s'acquitter de ses obligations en vertu de la présente Convention et sur les progrès accomplis à cet égard, dans un délai de deux ans à compter de l'entrée en vigueur de la Convention pour l'Etat partie intéressé. Le Comité adopte, le cas échéant, des directives relatives à la teneur des rapports.

Au sujet de son rapport, nous n'avons rien eu concernant les données et nous sommes tentés de conclure que, rien n'a encore été dit en matière de soumission de son rapport.

2.3 Si la Centrafrique 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 de la Centrafrique. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées en Centrafrique?

Vu que rien n'a encore été décidé pour la soumission du rapport, il est donc clair qu'il n'y a pas jusqu'ici des observations finales ou des recommandations au sujet du rapport. Quant aux effets internes, les personnes handicapées sont encore en attente.

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 du bien-être de l'Enfant, la Centrafrique 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? Était-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?

La communication d'Amnesty International pour l'Examen Périodique Universel lors de la 31^{ème} session du groupe de travail sur l'EPU tenu en novembre 2018 présente la faiblesse des systèmes de protection des droits de l'homme en République Centrafricaine. Statuant également sur la situation des droits de l'homme en Centrafrique le rapport de l'experte interdépendante sur cette situation agissant pour le compte de l'Assemblée Générale des Nations Unies lors de la 42^{ème} session du conseil des droits de l'homme le 9 août 2019 présente la faiblesse des systèmes de protection en République Centrafricaine et ne mentionne nulle part la situation des personnes handicapées.

Pendant, dans son rapport alternatif présenté au Comité des Droits de l'Homme des Nations Unies en vue de l'Examen du Rapport Périodique de la République Centrafricaine portant sur le respect des dispositions du Pacte International sur les Droits civils et Politiques lors de la 127^{ème} session du Comité des Droits de l'Homme des Nations Unies tenue du 14 octobre au 8 novembre 2019, il est fait mention à maintes reprises de la situation des handicapés.

Certaines observations finales ou recommandations adoptées ont également évoquées le droit de personnes handicapées. En l'espèce, il faut adopter une nouvelle loi sur la protection des personnes handicapées et sur le handicap, qui inclue une définition du handicap qui soit conforme au droit international et qui garantisse les droits civils, politiques, mais aussi économiques, sociaux et culturels nécessaires à la jouissance effective du droit de prendre part à la direction des affaires publiques, de voter et d'être élu. Assurer la diffusion la plus large possible de cette nouvelle loi afin qu'elle soit accessible et comprise selon la nature du handicap. Sur le plan international, ratifier le protocole de Maputo de 2003 qui comporte des obligations juridiques concernant l'inclusion des femmes handicapées dans les processus politiques et électoraux conformément à l'article 23.

Amender le code électoral pour permettre une participation pleine et entière, sans discrimination, des personnes handicapées au processus électoral, sans critère d'éligibilité financière prohibitif ou de diplôme, et en reformulant la référence à la « bonne santé mentale ou physique ».¹¹

11 Les articles 37, 103, 109, 133, 138, 153, 158 et 183 excluent les personnes handicapées mentales et physiques de la compétition électorale, et étant donné qu'il faut une caution pour faire acte de candidature, cela est par conséquent excluant pour ces derniers qui manquent même déjà de quoi manger.

2.5 Y'avait-il un quelconque effet interne sur le système légal de la Centrafrique après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Après ratification des instruments internationaux ou régionaux, ceux-ci ont débouché à un effet direct sur le système législatif centrafricain par la loi N°15-003 portant création, organisation et fonctionnement de la Cour Pénale Spéciale. Elle est une juridiction chargée d'enquêter, instruire et juger les violations graves des droits humains et du droit international humanitaire commis sur le territoire centrafricain.

2.6 Les traités internationaux ratifiés deviennent ils automatiquement loi nationale sous votre système légal? Si oui, y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

L'article 94 de la Constitution Centrafricaine a consacré la primauté des traités ou accords internationaux sur la loi ordinaire en ces termes: « les Accords ou Traités régulièrement ratifiés ou approuvés sont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque Accord ou Traité, de son application par l'autre partie ». Ainsi, dans le système moniste en vigueur dans les pays francophones comme en République Centrafricaine, les traités régulièrement ratifiés font partie intégrante du droit interne. Ces traités peuvent être invoqués auprès des juridictions nationales et les juges sont tenus d'appliquer directement les dispositions et la norme internationale dans la mesure où les traités régulièrement ratifiés sont dès leur publication, une autorité supérieure à la loi.

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 partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

Il n'y a pas eu d'incorporation de la CDPH dans le corpus juridique interne. Il y a certes, une nécessité d'harmoniser la législation interne avec les dispositions du CDPH, même si l'applicabilité directe du traité ratifié est communément admise dans la doctrine juridique interne.

3 Constitution

3.1 La constitution de la Centrafrique contient-elle des dispositions concernant directement le handicap? Si oui, énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La constitution de la République Centrafricaine de mars 2016 ne contient aucune disposition concernant directement le handicap. Cependant certaines dispositions constitutionnelles abordent la question. Le titre XIV portant sur la Haute Autorité chargée de la Gouvernance énonce en son article 148 paragraphe 3 que: « la Haute Autorité chargée de la Gouvernance veille à la protection des droits des minorités, des

peuples autochtones, de personnes handicapées ainsi que du principe de l'égalité entre homme et femmes ».

3.2 La constitution de la Centrafrique 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 Centrafricaine proclame et réaffirme dans son préambule son attachement aux principes des Droits de l'Homme tels que définis par la charte des Nations Unies de 1945, la Déclaration Universelle des Droits de l'Homme de 1948, de la Charte Africaine des Droits de l'Homme et des Peuples (CADHP) de 1981, et à la Charte Africaine de la Démocratie, des Elections et de la Gouvernance du 30 juin 2007 comme faisant partie intégrante de la loi fondamentale. Bien plus, l'article 11 énonce que la République garantit à chaque citoyen le droit au travail, à un environnement sain, au repos et aux loisirs dans les conditions fixées par la loi. Elle lui assure les conditions favorables à son épanouissement par une politique efficiente de l'emploi. Le paragraphe 2 du même article prescrit que tous les citoyens sont égaux devant l'emploi. Nul ne peut être lésé dans son travail ou son emploi en raison de ses origines, de son sexe, de ses opinions ou de ses croyances.

Eu égard à ce qui précède, il y a lieu de souligner que certaines dispositions pertinentes constitutionnelles (Constitution *Stricto sensu*) concernent indirectement le handicap.

4 Législation

4.1 La République Centrafricaine a-t-elle une législation concernant directement le handicap? Si oui, énumérez la législation et expliquez comment la législation aborde le handicap.

En date du 20 décembre 2000, la République Centrafricaine a voté la loi N°00.007 portant statut, protection et promotion de la personne Handicapée. Bien que cette loi contienne notamment des dispositions relatives à la formation professionnelle et à l'emploi des personnes handicapées, elle demeure aujourd'hui extrêmement lacunaire, et n'est pas en mesure, dans sa formulation actuelle, de garantir l'égalité des personnes handicapées devant la loi, la reconnaissance de leur personnalité juridique et la jouissance de toutes les libertés individuelles et collectives. Bien plus, nous avons le décret N°02.205 du 6 août 2002 qui fixe les règles d'application de la loi N°00.007 du 20 décembre 2000 portant statut, protection et promotion de la personne handicapée.

4.2 La République Centrafricaine a-t-elle une législation concernant indirectement le Handicap? Si oui, énumérez la principale législation et expliquez comment elle réfère au handicap.

La République Centrafricaine a une législation concernant indirectement le handicap: la loi N°10.001 du 06 janvier 2010 portant Code Pénal Centrafricain. Cette loi prévoit à travers ses articles suivants:

Article 118: le fait de soumettre une personne à des tortures, traitements cruels, inhumains et dégradants ou à des actes de barbarie est puni des travaux forcés à temps.

Article 119: l'infraction définie à l'article 118 est punie de travaux forcés à perpétuité lorsqu'elle est commise 1: sur un mineur de moins de dix-huit ans; 2: sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse.

Article 120: la torture est punie de la peine de mort lorsqu'elle précède, accompagne ou suit un crime. Lorsqu'il y a mutilation ou infirmité permanente, la peine sera celle des travaux forcés à perpétuité.

Article 312: Sera punie de la peine des travaux forcés à perpétuité, toute personne qui commet un meurtre, un enlèvement suivi de mort contre la personne ou la liberté d'une personne jouissant d'une protection internationale¹² ; sera punie des travaux forcés à temps, toute personne qui en recourant à la violence , contre les locaux officiels , le logement privé ou les moyens de transport d'une personne jouissant d'une protection internationale commet une attaque de nature à mettre sa personne ou sa liberté en danger.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) en République Centrafricaine ont-ils jamais statué sur une question relative au handicap? Si oui, énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décisions (s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Nous n'avons trouvé aucune décision de justice rendue portant sur le handicap.

6 Politiques et programmes

6.1 La République Centrafricaine a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui, énumérez la politique et expliquez comment cette politique aborde le handicap.

Dans son rapport du 28 avril 2018 intitulé République Centrafricaine : les personnes en situation de handicap sont laissées pour compte, Human Rights Watch, fait savoir que les organismes gouvernementaux et les agences d'aide doivent commencer à collecter de manière systématique des données sur les personnes handicapées afin de les inclure dans les décisions politiques et les programmes d'assistance. La question des personnes handicapées doit être portée à l'ordre du jour du Forum de Bangui, un dialogue national qui devrait avoir lieu du 4 au 10 mai 2018. Le gouvernement doit également prendre des mesures pour assurer la pleine participation des personnes handicapées aux élections.

¹² Parmi les personnes bénéficiant d'une protection internationale, on cite les personnes handicapées, les enfants, etc.

6.2 La République Centrafricaine a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui, énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Jusqu'ici nous n'avons pas connaissance en République centrafricaine d'un programme ou d'une politique mise sur pieds qui engloberait ou concernerait indirectement le handicap. Toutefois, étant donné que la République Centrafricaine souscrit aux normes internationales et régionales qui interdisent la discrimination basée sur tout statut y compris le handicap, on peut dire que toutes politiques et programmes englobe indirectement le handicap.

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, la Centrafrique a-t-elle un organisme officiel qui s'intéresse spécifiquement à la violation des droits des personnes handicapées? Si oui, décrire l'organe, ses fonctions et ses pouvoirs.

En dehors des juridictions ordinaires, il n'existe pas à ce jour en République Centrafricaine, un organisme officiel s'intéressant spécifiquement aux violations de personnes handicapées.

7.2 En dehors des cours ou tribunaux ordinaires, la Centrafrique a-t-elle 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.

La République Centrafricaine a un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des personnes handicapées s'y attèle tout de même: le Haut-Commissariat National aux Droits de l'Homme en Centrafrique.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 La République Centrafricaine est-elle dotée d'une Commission des 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 Droit de l'Homme ou l'Ombudsman ou le Protecteur du citoyen de votre pays n'a jamais abordé des questions relatives aux droits des personnes handicapées.

A l'initiative du Ministère de la Justice centrafricaine, du Haut-commissariat National aux Droits de l'Homme et de la MINUSCA, un atelier stratégique a été organisé à Bangui le 28 juin 2017 autour du thème « réflexions et approches stratégiques pour la mise en place de la Commission Nationale des Droits de l'Homme », au cours duquel 35 participants ont eu des échanges interactifs sur le mandat de ladite commission, de ses missions et son mode de fonctionnement.

C'est en effet, dans le but de contribuer efficacement à la lutte contre l'impunité par des moyens non juridictionnels, que le gouvernement avait manifesté sa ferme volonté de doter la République centrafricaine d'une institution de protection des Droits de l'homme en ratifiant divers instruments juridiques internationaux intégrés dans le droit positif interne.

A ce jour la Commission Nationale des Droits de l'Homme semble ne pas encore avoir vu le jour en Centrafrique. Cependant, en attendant son effectivité, celle-ci semble être supplée par le Haut Commissariat National aux Droits de l'Homme en Centrafrique.

9 Organsation des personnes handicapées (OPH) et autres Organisations de la Société Civile

- 9.1 Avez-vous en République Centrafricaine des organisations qui représentent et défendent les droits et le bien être des personnes handicapées? Si oui, énumérez chaque organisation et décrivez ses activités.

En République Centrafricaine, il existe bel et bien des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées, telles que:

- **L'Association Ministère d'Evangelisation:** il s'agit d'une association qui voit le jour sous l'enregistrement N°00112/08/MPECI/DIRCAB/DGPD/DDC. Concernant ses objectifs et missions, elle œuvre dans l'assistance des personnes vulnérables incluant les personnes handicapées et dans la réduction de la pauvreté.

Elle intervient dans l'assistance humanitaire, la lutte contre la pauvreté et le développement.

- **L'Association des Volontaires pour le Développement Socioéconomique en Centrafrique: (AVDSEC)** elle est créée et enregistrée au N°0369/MATD/DIRCAB/DGATD/DAPA/SASE et œuvre dans l'assistance des populations vulnérables incluant les personnes handicapées.
- **Le Cercle de Recherche et d'Éducation par les Arts (CREA):** œuvrant dans la promotion de la liberté et des droits de l'Homme. Elle a vu le jour suite au décret N°393/MICSP/CAB/DGAT/DAPA/SASE.
- **Ensemble pour la Promotion et l'Insertion des Personnes Handicapées (EPIPHA):** elle a pour mission d'insérer les jeunes diplômés et handicapés. Elle voit le jour grâce au N°0099/08/MPECI/DIRCAB/DGPD/DDC.
- **Mission Chrétienne (MC):** cette association forme et assiste les personnes vulnérables. (Euvrant dans la formation, insertion professionnelle et l'assistance aux orphelins et victimes de crise qui incluent les personnes handicapées, elle répond au N°070/MATD/DIRCAB/DGATD/DAPA/SASE.
- **Organisation Nationale des Personnes vivant avec Handicapées:** elle est créée au N°0057/08/MPECI/DIRCAB/DGPD/DDC.
- **Centre de Rééducation des Handicapés Moteurs.**
- **Handicap Action Solidaire de Centrafrique.**
- **L'Association Nationale de Rééducation et d'Appareillage de Centrafrique:** elle a vu le jour en 1999 et a pour but d'aider les personnes en situation de handicap. Elle fournit des traitements de rééducation fonctionnelle, procède la production et à la vente d'appareillages orthopédiques variés.
- **L'Association Nationale la Main des Sourds Muets pour le Travail et le Développement de Centrafrique (ANMSTDC).**
- **Le Centre de Formation des Handicapés Moteurs.**

9.2 En République Centrafricaine et en Afrique Centrale, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Au niveau national, l'Organisation Nationale des Personnes vivant avec un Handicap de Centrafrique (ONAPHA), est un réseau des Organisations des Personnes Handicapées (OPH) centrafricaines toutes catégories confondues; moteurs, sensoriels (malentendants et non-voyants), mentaux et lépreux. Cadre de concertation idéal et d'action, l'ONAPHA est un réseau ouvert au monde extérieur, en vue de mener des actions concrètes pour la consolidation des organisations membres. Il s'agit du rendez-vous de ceux qui croient que les personnes en situation de handicap ont une plus-value qu'elles partagent avec les autres. Ceux qui croient que les personnes handicapées ne vivent pas dans un monde à part, mais qu'elles font partie intégrante de la société, de la communauté.

En effet, il existe au sein des pays de l'Afrique Centrale, un organe régional de coordination des OPH, à savoir la Fédération de Personnes Handicapées de l'Afrique Centrale (FPHAC); Central Africa Eastern Federation of Disabled (CAFOD). Cette organisation sous régionale a été créée pour regrouper les réseaux nationaux des OPH de cette sous-région Afrique Centrale.

9.3 Si la République Centrafricaine a ratifié la CDPH, comment a-t-il assuré l'implication des Organisation des Personnes Handicapées dans le processus de mise en œuvre?

Les OPH sont régulièrement invités pour donner leur point de vue aux conférences et séminaires organisés par le gouvernement ou co-organisés par la Division des droits de l'Homme de la Mission Multidimensionnelle Intégrée des Nations Unies

pour la Stabilisation en République Centrafricaine (MINUSCA). L'ensemble des OPH présentes sont régulièrement conviées à exposer leurs problèmes et recommandations lors de la journée nationale ou internationale des personnes handicapées.

9.4 Quels genres d'actions les OPH ont-elles prise elles même afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Les OPH n'ont ménagé aucun effort pour que le gouvernement Centrafricain procède d'abord à l'adoption de la Loi N°00.007 du 20 décembre 2000 portant statut, protection et promotion de la personne handicapée suivie du Décret N°02.205 du 06 août 2002 fixant les règles d'applications de la Loi N°00.007 du 20 décembre. En date du 3 décembre 2014 marquant la journée internationale des personnes handicapées célébrée en Centrafrique sous le thème: « Droits de l'homme, 365 jours, donnons aux handicapés leurs places », cérémonie co-organisée par la Division des droits de l'homme de la MINUSCA, le réseau des ONG des droits de l'homme de la RCA (RONGDH) et de l'Organisation Nationale des Personnes Handicapées (ONAPHA), cela a été l'occasion pour les personnes handicapées de soumettre une fois de plus aux autorités présentes leurs doléances, au nombre desquelles la non-discrimination, l'accessibilité dans sa globalité et le droit à l'éducation. Ce même jour, le secrétaire général dans son message cette année a recommandé ceci : « ne ménageons pas nos efforts pour veiller à ce que les politiques, les programmes et les directives permettent aux personnes handicapées de profiter des technologies du XXIe siècle et tiennent compte de ce qu'elles vivent et de leurs perspectives. Ensemble, œuvrons pour un avenir meilleur qui n'exclue personne et qui soit équitable et durable pour tous ». C'est sans doute le souci de reconnaissance d'une certaine place aux handicapés que l'Etat Centrafricain a procédé à la ratification de la Convention des Nations Unies relatives aux Droits des Personnes Handicapées le 11 octobre 2016.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

Une évaluation sommaire de la capacité organisationnelle des OPH montre certaines faiblesses. La plupart ne disposent pas d'un siège pour se réunir. Les adhérents sont en majorité de personnes vulnérables sans qualification professionnelle et vivant de la précarité. Elles n'ont pas les capacités techniques pour monter un projet et mobiliser des fonds de la part des partenaires au développement. Depuis une décennie, la visibilité médiatique des OPH se réduit aux interviews données à la presse écrite et audiovisuelles par leurs leaders notamment, lors de la commémoration de la Journée internationale des Personnes Handicapées célébrée chaque année, le 3 décembre ou encore pendant la journée nationale des personnes handicapées. Enfin, à côté de leur alphabétisation pour la majorité, ces OPH n'adoptent pas une approche proactive, laissant aux départements ministériels l'initiative de programmer les consultations sur la question du handicap.

Le manque de moyens financiers et le personnel qualifié, ainsi que la méconnaissance ou la mauvaise interprétation des textes juridiques sont aussi listés parmi les problèmes dont font face les OPH.

9.6 Y'a-t-il des exemples pouvant servir de modèles pour la participation des OPH?

Les OPH collaborent et mutualisent leurs subventions pour mettre en œuvre des projets en faveur des personnes en situation de Handicap.

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?

Les OPH sont engagées dans la promotion de l'intégration socio-économique, professionnelle, la mise en œuvre d'actions de formations, d'appui à la recherche d'emploi, d'appui psychologique et la recherche d'activités génératrice de revenu en faveur des personnes handicapées. Les OPH promeuvent l'autonomisation scolaire, l'apprentissage et la réinsertion sociale par le travail. Elles ont participé à la création d'établissements scolaires et à la réadaptation en milieu urbain et rural.

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?

En premier lieu, il y a une nécessité de conduire une évaluation des structures des OPH dans le but d'analyser leurs forces et faiblesses. Aussi, elles doivent faire appel à une expertise externe en vue de formuler un plan stratégique et un plan d'action. Il est aussi indispensable de solliciter l'assistance technique de partenaires au développement en vue de bénéficier de programmes de renforcements des capacités. Enfin, un aspect qui doit mériter une attention particulière pour les OPH est le grand besoin de capacité financière et de soutien.

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 doivent être représentés dans les organes en charge du suivi et de la mise en œuvre d'instruments de droits de l'homme ratifiés par la République Centrafricaine notamment, dans les ministères en charge de la promotion et de la protection des droits de l'Homme et surtout au niveau de la Commission Nationale des Droits de l'Homme. Bien plus, ils devraient être représentés dans les organes en charge de la mise en œuvre des instruments internationaux ou régionaux et avoir un peu plus la parole.

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?

Centre de Rééducation pour les Handicapés Moteurs (CRHAM): créé en 1994, est aujourd'hui la seule structure du pays à disposer de services de rééducation fonctionnelle et d'appareillage, d'un service social et d'un internat d'une capacité de 20 lits. Depuis de nombreuses années, un chirurgien français spécialiste en orthopédie infantile y effectue des missions chirurgicales de prise en charge des

enfants handicapés, en partenariat avec des équipes locales qui assurent la rééducation post-opératoire.

10 Branches gouvernementales

10.1 Avez-vous de (s) branche (s) gouvernementale (s) spécifiques (s) 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).

L'action publique en faveur des handicapés demande l'implication de plusieurs départements ministériels. Ainsi, le Ministère de la Famille, des Affaires sociales et de la Solidarité nationale; et le Ministère de la Fonction Publique, du Travail, de la Sécurité sociale et de l'insertion Professionnelle des Jeunes sont entre autres les départements ministériels qui dans leurs multiples tâches participent à la promotion et la protection des droits et du bien-être des personnes handicapées.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en République Centrafricaine? 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.

L'accès aux soins des personnes ayant un handicap mental constitue un défi majeur compte tenu du manque de personnel qualifié en psychiatrie. Le défaut d'accès aux soins de santé encouragerait les familles de ces personnes souffrant de déficience mentale de se tourner vers les thérapies traditionnelles.

Le taux de pauvreté extrême affecte spécifiquement les groupes vulnérables comme les personnes handicapées. Ces derniers pour la plupart vivant de la mendicité, dorment dans la rue ou squattent dans les camps des réfugiés. C'est pour cette raison que les associations de personnes font un travail de plaidoyer auprès des pouvoirs publics et des fédérations des employeurs pour le recrutement de personnes handicapées.

La mobilité constitue un autre défi majeur pour ces personnes vulnérables. Plusieurs ont mis en exergue la difficulté de se procurer à titre gracieux de fauteuils roulants, unique moyen de locomotion dans la mesure où les transports en commun refusent de transporter les usagers handicapés. Ils prétextent que leurs bus n'ont pas de rampe d'accès pour les fauteuils roulants ou que les handicapés mettent du temps pour monter ou descendre. Il arrive parfois que le fauteuil roulant d'une personne décédée soit récupéré par un autre handicapé. Et pour certains,

leurs fauteuils, béquilles, ont été consommés ou oubliés pendant les périodes de crise en RCA.

11.2 Comment la République Centrafricaine répond-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

La République centrafricaine répond aux besoins des personnes en situation de handicap sur:

- **Accès aux bâtiments publics:** rare sont les bâtiments publics disposant de rampes d'accès pour les fauteuils roulants ; du coup, l'installation des rampes pour faciliter le déplacement des handicapés dans les bâtiments publics demeure un vœu qui malheureusement n'est toujours pas réalisé.
- **Accès au transport public:** le système de transport public est inexistant. Le système de transport en commun en vigueur se limite aux bus et minibus appartenant à des particuliers travaillant à leur propre compte. Ces derniers choisissent à leur guise leur itinéraire en fonction de sa rentabilité. Certains quartiers de la banlieue de la capitale sont très mal desservis. De plus, les chauffeurs de bus et minibus circulant dans la capitale refusent systématiquement de transporter les personnes handicapées car n'étant pas équipées de rampe d'accès pour les fauteuils roulants.¹³ Cette discrimination en matière de transport pourrait être remédiée en cas de mise en place d'un système de transport public accessible aux personnes handicapées.
- **Accès à l'éducation:** conformément au décret N°02.205 fixant les règles d'application de la loi N°00.007 du 20 décembre 2000 portant statut, protection et promotion de la personne handicapée en République Centrafricaine, l'article 29 stipule que: « l'aide à l'éducation aux élèves et étudiants handicapés comprend: la dispense d'âge; la reprise de classe; l'appui pédagogique; les prises en charge financières et les facilités d'accès aux dortoirs et chambres dans les cités universitaires ». Ce texte législatif ne mentionne pas explicitement la mise en place d'un cursus scolaire adapté aux personnes handicapées ni leur scolarisation dans les structures ordinaires. Toutefois, les parents souhaitant scolariser leurs enfants handicapés dans le cursus ordinaire rencontrent des difficultés pour les inscrire. Certains directeurs d'écoles arguent que les bancs de l'école ne sont pas adaptés pour les enfants handicapés.
- **Accès à la formation professionnelle:** l'article 34 du décret précité dispose que « les enfants et adolescents handicapés bénéficient de l'apprentissage d'un métier adapté à leur condition physique ou mentale, dans les établissements d'enseignement Technique ainsi que dans les écoles professionnelles. Ils bénéficient en cas de nécessité du suivi d'éducateurs spécialisés ». En son article 35, « la prise en charge de cette formation professionnelle se fait dans les mêmes conditions que celles prévues à l'article 21¹⁴ du présent décret ». Jusqu'à ce jour, le gouvernement n'a pas encore mis en place un programme de formation destiné aux personnes handicapées.
- **Accès à l'emploi:** la loi N°00.007 du 20 décembre 2000, portant statut, protection et promotion de la personne handicapée et son décret d'application prévoient en son article 37 alinéa 1^{er} que : « les personnes handicapées justifiant d'une formation professionnelle ou scolaire bénéficient des mêmes conditions de recrutement et de rémunération que les personnes valides aux emplois Publics et Privés lorsque le poste est compatible avec leur condition ». Et en alinéa 2, « en aucun cas, le handicap ne peut constituer un motif de discrimination ou de rejet de leur candidature ». Cependant, les personnes handicapées appartenant à la frange de la population la plus favorisée est touchée par le chômage de masse. Jusqu'ici, l'accès au travail demeure extrêmement discriminatoire pour les personnes handicapées en Centrafrique.

13 La République Centrafricaine : les personnes en situation de handicap sont laissées pour compte., à consulter sur <https://www.hrw.org> disponible depuis le 28 avril 2015.

14 L'article énonce clairement que « les aides aux différentes réductions feront l'objet de décisions internationale ».

- **Accès à la détente et au sport:** la fédération centrafricaine d'Handisport est l'institution qui se charge d'offrir aux personnes handicapées des activités sportives de loisirs ou de compétitions conformément aux articles 44,¹⁵ 45,¹⁶ et 46,¹⁷ du décret de 2002 portant application de la loi N°00.007 du 20 décembre 2000. Cette fédération encourage ses adhérents à participer aux compétitions internationales comme les jeux para-olympiques. Les pouvoirs publics mettent à la disposition des athlètes handicapés les infrastructures sportives publiques.
- **Accès à la justice:** les institutions judiciaires centrafricaines, déjà fragiles avant la crise de 2013, se sont effondrées lors de la crise. Dans leur parcours de justice, les centrafricains en général doivent faire face à de nombreux obstacles. D'une part, le faible déploiement des tribunaux étatiques au-delà de la capitale compromet gravement l'accès matériel au prétoire de justice. D'autre part, les forces de l'ordre s'érigent bien souvent en instance de justice.

Face à la faible présence d'institutions judiciaires étatiques et à leurs dérives, de nombreux Centrafricains saisissent des forums de proximité pour résoudre leurs conflits tels que les chefs de villages, ou même des chefs de quartiers. Tout comme la première voie, si elles ont l'avantage d'être plus accessible, cette forme de justice dite alternative n'est pas exempte de toute critique. D'une part, elle crée des conflits de compétence et des confusions chez les citoyens ; d'autres parts, de nombreux cas de discrimination, de corruption et d'intimidation surtout envers les personnes handicapées persistent.

Le coût élevé des services, le manque criard d'effectif des avocats rendent l'accès à un avocat peu réaliste, surtout pour les handicapés. Etant donné que les personnes handicapées appartiennent à la frange de la population vivant dans la précarité, l'accès effectif de personnes handicapées à la justice mériterait une attention particulière.

- **Accès aux soins de santé:** aucune loi centrafricaine portant orientation de la politique de la santé ou mise en place d'un système d'assurance maladie universelle prévoyant de mesures spécifiques aux personnes handicapées et autres groupes vulnérables n'existe dans ce pays. Ainsi, concernant l'accès aux soins, notons que les personnes handicapées sont laissés pour compte et ne reçoivent que des actions ponctuelles que certaines ONG telles Médecin Sans Frontière, ou Handicap International, etc... leur apporte.

11.3 La République Centrafricaine accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Dans son rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme adressé à l'Assemblée Générale des Nations Unies, lors de sa dix-septième session tenue à Genève en date du 21 octobre au 1^{er} novembre 2013, il est dit que l'Etat centrafricain accorde des subventions aux Organisations des personnes handicapées. Cependant, sur le terrain, nous n'avons pas pu remarquer cet engagement profond du gouvernement. Juste quelques actions ponctuelles de distribution de denrées de première nécessité sont fournies aux personnes handicapées par les ONG.

15 « La personne handicapée a droit aux loisirs, aux jeux et à la participation à des activités culturelles et artistiques ».

16 « L'Etat et les collectivités locales prendront toutes dispositions utiles pour développer les sports et les loisirs pour handicapés, organiser leurs compétitions nationales et assurer leur participation aux compétitions internationales ».

17 « Un programme d'éducation physique et sportive pour jeunes handicapés doit figurer dans les programmes scolaires et universitaires ».

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant) en République Centrafricaine?

Les élections sont perçues par beaucoup de centrafricains comme une opportunité de retour à la paix et de relance du développement économique et social. Effectivement, l'article 30 de la Constitution du 30 mars 2016 revient sur la question de la jouissance des droits électoraux et rappelle que « le vote est un devoir civique ». Le nouveau texte constitutionnel crée en outre l'autorité Nationale des Elections en ses articles 143 à 145 ainsi qu'une Haute Autorité chargée de la bonne gouvernance (articles 146 à 150) en tant qu'institution indépendante qui doit veiller, *inter alia*, à la représentation équitable de toutes les régions de la République Centrafricaine dans les institutions publiques et parapubliques, et à la protection des droits des minorités, des peuples autochtones, des personnes handicapées, ainsi qu'au principe de l'égalité entre hommes et femmes.

L'ensemble des traités ratifiés par la Centrafrique garantissent les droits des personnes y compris les personnes handicapées à participer aux processus électoraux (articles 25 du Pacte International sur les Droits Civils et Politiques et l'article 7 de la Convention sur l'Elimination de toute forme de Discrimination à l'Egard des Femmes).

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilités:

- **Femmes handicapées:** Outre les garanties constitutionnelles et conventionnelles, la Convention sur l'Elimination de toutes les formes de Discrimination à l'égard des Femmes, la convention sur les droits politiques des femmes, le Protocole de Maputo portant sur la protection juridique des femmes en général, qui jusqu'ici n'a pas encore été ratifié, l'Etat partie n'a pas entrepris de mesures spécifiques protégeant les femmes handicapées.
- **Enfants handicapés:** la République Centrafricaine a ratifié les instruments régionaux et Internationaux relatifs aux droits de l'enfant, mais l'Etat partie n'a pas édicté une législation spécifique protégeant le droit des enfants handicapés.
- **Prisonniers souffrant de déficience mentale:** la prison ne dispose pas ne serait-ce que d'un personnel paramédical ou d'un médecin généraliste. Ainsi, ces prisonniers ne disposent pas de soins appropriés en raison du déficit en personnel qualifié en psychiatrie au sein de l'institution carcérale. La construction d'un hôpital de psychiatrie est nécessaire pour prendre en charge ces derniers.
- **Les personnes âgées en situation de handicap:** pas d'informations disponibles.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement en République Centrafricaine au sujet des personnes handicapées?

A propos de la participation politique, des réflexions sont en cours afin de rendre les procédures de vote des personnes en situation de handicapées plus inclusives de manière à garantir la confidentialité du vote; car les personnes handicapées ne jouissent pas d'un droit effectif au vote, à être élu, à faire partir de l'administration électorale à savoir les commissions nationales ou régionales, ou même simplement

en tant qu'observateurs.¹⁸ En attendant que cette situation soit effective, notons que l'élection a été prévue pour cette année 2020.

Effectuer un recensement général sur les personnes handicapées.

Mettre en place un mécanisme multisectoriel de coordination sur le handicap.

Mettre en place une institution ou agence au sein du secrétariat d'Etat chargé spécifiquement de promouvoir le droit des personnes handicapées.

Mettre en œuvre les dispositions relatives à l'accessibilité car, l'inaccessibilité de l'information et de la communication (du fait en particulier du manque d'interprètes en langues des signes ou de documents en braille) prive souvent les personnes handicapées de leur droit à la libre expression.¹⁹

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en République Centrafricaine? Pourquoi?

Le code du travail mérite d'être amendé pour inclure des dispositions pertinentes sur les travailleurs handicapés et qui soient en conformité avec la CDPH.

Eu égard au droit de participation politique des personnes handicapées, l'Etat partie devrait adopter un texte législatif favorisant la participation politique de personnes souffrant de déficience mentale, encore même que ce texte présente des insuffisances ou exclu à quelques endroits les handicapés.

Dans le cadre de la mise en œuvre de la CDPH, l'Etat partie se doit de mettre en place une législation ambitieuse sur la question du handicap.

L'Etat serait bien inspiré de légiférer en matière d'accès à la santé pour les personnes handicapées, en assurant la prise en charge gratuite de l'intégralité de frais médicaux, consultations, examens complémentaires, hospitalisations, appareils orthopédiques, visuelles ou auditifs, etc.

La loi sur l'aide juridique devrait être mise en vigueur afin de garantir explicitement la gratuité totale de tous les frais d'honoraires, d'huissiers ou d'expertises, pour les recours exercés par les personnes handicapées.

Enfin, un texte réglementaire doit être édicté obligeant les promoteurs immobiliers à la considération à l'accessibilité aux personnes handicapées pour tous les ouvrages publics.

Elaborer des projets de lois et décrets en vue de mettre en conformité la législation interne avec les dispositions de la CDPH.

18 Les personnes handicapées en République Centrafricaine, 7 décembre 2019, extrait de Vision-internationale.com

19 Les personnes handicapées en République Centrafricaine, 7 décembre 2019, (comme ci-dessus).

REPUBLIQUE DU TOGO

Soka Armelle Ngoutane Peyou*

Summary

According to the 2010 General Population and Housing Census of Togo, the total population increased from 2 719 567 inhabitants in 1981 to 6 191 155 inhabitants in 2010; that is an average annual growth rate of 2,84 per cent. It is made up mainly of women (51,4 per cent) but also characterised by its extreme youth. Persons with disabilities represent 2,2 per cent.

The State of Togo ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) as well as its Optional Protocol on 1 March 2011. At the national level, the Togolese Constitution of 14 October 1992 directly or indirectly guarantees disability rights set out in the Convention through the provisions of articles 10, 11, 28 and 33. Law 2004-005 of 23 April 2004 on the social protection of persons with disabilities enriches this normative architecture. However, it should be noted that certain provisions of the law do not meet the requirements of the CRPD. To this end, a draft law on the promotion and protection of the rights of persons with disabilities is being prepared.

At the institutional level, the implementation of the rights of people with disabilities is mainly ensured by the government under the aegis of the Ministry of Social Action, the Promotion of Women and Literacy and the Ministry of Human Rights and Relations with Institutions of the Republic in collaboration with the Togolese Federation of Associations of People with Disabilities (FETAPH). This active collaboration has contributed to the gradual improvement in the inclusion of disability concerns in public policies and programmes. This has made it possible to improve the care and inclusion of persons with disabilities through major actions, including the establishment of the Special Fund for persons with disabilities.

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However, despite a favourable context, among the challenges constituting major obstacles to the implementation of the rights of persons with disabilities in Togo, there are many obstacles relating to access to public buildings, insufficient consideration of the needs of workers with disabilities, persistent social stigma and the very low representation of persons with disabilities in elective office and decision-making positions. Making the law consistent with the CRPD should help remove these persistent obstacles.

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Togo?

Sur le plan démographique, le Togo connaît une croissance rapide. La population totale est passée de 2 719 567 habitants en 1981 à 6 191 155 habitants en 2010, soit un taux de croissance annuel moyen de 2,84% (équivalent à un doublement tous les 25 ans). Elle est constituée en majorité de femmes (51,4%) et aussi caractérisée par son extrême jeunesse. Les personnes handicapées représentent 1,6% de cette population.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Togo. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Togo?

En ce qui concerne les données statistiques, avant 2010, l'Institut National de Statistique du Togo ne disposait pas de données sur la situation des personnes handicapées. A la faveur du 4^e Recensement Général de la Population et de l'habitat de 2010 au Togo, une rubrique sur le handicap a été intégrée au questionnaire qui a servi à recenser la population. Cette rubrique a permis de collecter des informations désagrégées sur les personnes handicapées. Par la suite, les questions relatives aux personnes handicapées ont été intégrées dans toutes les opérations de collecte ponctuelle réalisées sur le terrain à l'instar des enquêtes auprès des ménages (MICS et EDST), mais également dans l'enquête Questionnaire Unifié des Indicateurs de Base du Bien-être (QUIBB) réalisée au Togo en 2015. A ce jour, les données démographiques et statistiques relatives aux personnes handicapées et collectées suivant la technique de l'enquête, sont disponibles sur le site web de l'Institut National de la Statistique et des Etudes Economiques et Démographiques, de même qu'au niveau des organisations qui représentent les personnes handicapées.²

1 Recensement Général de la Population et de l'Habitat du Togo de 2010, dont les données ont été consultées sur le site l'Institut National de la Statistique, voir www.inseed.tg (Consulté le 25 Septembre 2020).

2 Pour le site l'Institut National de la Statistique, voir www.inseed.tg; En ce qui concerne les organisations représentatives des personnes handicapées, des données sont disponibles auprès de la Fédération Togolaise des Associations des Personnes Handicapées (FETAPH) dont les personnes ressources peuvent être contactées via le site www.fetaph.tg (Consulté le 25 Septembre 2020).

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République du Togo?

Les résultats de l'enquête QUIBB de 2011 au Togo montrent que 1,5% de la population se trouve dans une situation de handicap.³

Selon une autre étude, environ 900.000 personnes vivent avec un handicap sous une forme ou une autre au Togo, soit près de 15% de la population.⁴

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République du Togo?

Environ 52% d'entre elles sont des femmes. On peut alors estimer le nombre de femmes handicapées au Togo à environ 450.000.⁵

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République du Togo?

Sur cette base, les enfants handicapés sont estimés à 138.000 individus dont 44% de filles.

1.6 Quelles sont les formes de handicap les plus répandues en République du Togo?

Selon les résultats de la même enquête, le proportion des personnes handicapées en milieu urbain (1,7%^o) est à peu près la même que celle des personnes vivant en milieu rural (1,6%).⁶

Parmi les cibles identifiées, les personnes handicapées des membres inférieurs représentent la plus forte proportion (32,6%), suivies des personnes handicapées mentales (19,4%), les personnes handicapées auditives et celles qui présentent des troubles du langage (11,4%), les personnes handicapées visuelles (13,3%) et les personnes handicapées des membres supérieurs (10,1%). Les personnes atteintes de la lèpre (0,7%). Les personnes albinos sont également catégorisées dans ce rapport au rang des personnes en situation de handicap.⁷

L'analyse montre également que quel que soit le milieu de résidence ou la région, la proportion des personnes handicapées des membres inférieurs est très élevée par rapport aux autres handicaps. Les personnes déficientes mentales, les sourds-muets et les non-voyants constituent le deuxième type de personnes

3 Ministère chargé de la Planification, du Développement et de l'Emménagement du Territoire, rapport final du Questionnaire des Indicateurs de Base du bien-être, (Rapport QUIBB), 2011. Même si des chiffres plus récents publiés par le ministère de l'Action Sociale, de la promotion de la femme et de l'Alphabétisation font plutôt état de 1,5% de personnes vivant avec un handicap par rapport au chiffre global de la population togolaise. Cf. www.actionsociale.gouv.tg (consulté le 04 octobre 2020).

4 NKM Dodzi *Etude sur l'accès des personnes handicapées aux technologies de l'information et de la communication au Togo-Quels sont les obstacles à une pleine utilisation? Handicap International FETAPH* (2012) 10.

5 Comme ci-dessus.

6 Comme ci-dessus.

7 Ministère chargé de la Planification, du Développement et de l'Emménagement du Territoire, rapport final du Questionnaire des Indicateurs de Base du bien-être, Rapport QUIBB (n 3 ci-dessus)13.

handicapées respectivement dans les régions Maritime (18,6%) et Lomé (24,5%), dans la région des savanes (22,3%) et dans celle de la Kara (19,5%).⁸

Selon l'enquête Questionnaire Unifié des Indicateurs de Base du Bien-être (QUIBB) Togo 2015 (annexe3.2), les chiffres indiquent une évolution du handicap par sexe avec 2,2% d'hommes et 2,2% de femmes en situation de handicap par rapport au chiffre global de la population.

Le tableau suivant permet d'indiquer la ventilation des données statistiques sur le handicap suivant les résultats de l'enquête QUIBB de 2015.

Tableau 1 : Répartition des personnes handicapées par type de handicap et par âge

Type de handicap	visuel	auditif	Handicap Membre supérieur	Handicap Membre inférieur	Mental	Autre handicap
Tranche d'âge						
0-4 ans	0	0	34,7	20,1	7,8	37,4
5-9 ans	0	0	20,1	39	13,4	27,5
10-14 ans	11,1	3,2	4,5	33,6	14,4	33,2
15-29 ans	1,8	23,3	14,9	21,8	16,2	21,9
30-49 ans	1,7	4,2	10,6	47,5	22,8	13,1
50-64 ans	6,5	0	5	53	10,6	24,9
65 ans et plus	36,5	0	3,7	24,5	2,4	32,8

Source: Ministère de la Protection des Droits de l'Homme, 2020.

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République du Togo? L'Etat du Togo a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). L'Etat du Togo a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

La Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH)⁹ ainsi que son Protocole Facultatif ont été ratifiés par le Togo le 1^{er} mars 2011.

⁸ Comme ci-dessus, 13.

⁹ Ces instruments ont été ratifiés à la faveur de la loi n°2010-016 autorisant la ratification de la Convention relative aux droits des personnes handicapées et son Protocole Facultatif, adoptés le 13 décembre 2006 à New-York. www.ilo.org (Consulté le 02 Octobre 2020).

2.2 Si l'Etat du Togo 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? L'Etat du Togo a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Le rapport initial à présenter en vertu de l'article 35 de la CDPH, attendu en 2013 a été soumis au Comité des droits des personnes handicapées par l'Etat du Togo le 04 aout 2016.¹⁰ La branche du gouvernement en charge de la soumission du rapport est le Ministère des Droits de l'Homme et de la Consolidation de la Démocratie.

Le Togo en tant que partie à la Convention relative aux droits des personnes Handicapées a dû soumettre au Comité des droits des personnes handicapées, un rapport détaillé sur les mesures qu'il a prises pour s'acquitter de ses obligations et sur les progrès accomplis à cet égard. Ce rapport devait être soumis dans un délai de deux ans à compter de la date d'entrée en vigueur de la Convention auprès de l'Etat partie, c'est-à-dire en 2013. Cependant, les difficultés liées à la collecte des données n'ont pas permis au Togo d'honorer son engagement dans les délais impartis.¹¹

Ce rapport sera présenté devant le comité des droits des personnes handicapées probablement en mars-avril 2022 selon le courrier du HCDH adressé à l'Etat du Togo en date du 12 octobre 2020.

2.3 Si la République du Togo 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 de l'Etat du Togo. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées au Togo?

Il n'est pas fait mention des observations finales et des recommandations au sujet du rapport soumis par l'Etat du Togo, ni des effets internes découlant du processus de rapport liés aux questions de handicap au Togo.

Cependant le rapport soumis au titre de l'EPU portant sur l'état de la mise en œuvre des recommandations et des engagements issus du 1^{er} cycle de l'examen périodique Universel du Togo fait état de certaines observations relatives aux personnes handicapées.

C'est le cas de l'observation 101.13 (Canada) qui indique de « prendre toutes les mesures nécessaires pour éliminer la maltraitance des enfants, le travail et l'exploitation sexuelle des enfants ainsi que la violence à leur égard, en accordant une attention particulière au cas des enfants qui sont tués parce qu'ils sont nés avec un handicap ou une malformation, ou sans pigmentation, ou parce que leur mère

10 Nations Unies, Convention relative aux droits des personnes handicapées, Comité des droits des personnes handicapées, Rapport initial soumis par le Togo en application de l'article 35 de la Convention, www.ohchr.org (consulté le 13 Septembre 2020).

11 AGNU, Conseil des droits de l'homme, rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme, Togo, Groupe de travail sur l'EPU, 26e session (2016) 3.

est morte en couches ». ¹² Sur ce point l'état du Togo indique au rang des actions l'Engagement des chefs religieux et traditionnels à lutter contre l'infanticide des enfants qui naissent avec un handicap et le phénomène des enfants dits sorciers à travers la signature de la déclaration de Notsè.

De même, l'observation 100.45 (Slovénie) qui indique de « lutter contre l'exclusion des personnes handicapées dans la famille et dans la communauté par une action éducative et des mesures ciblées et concrètes, en consultation avec les OPH ». ¹³ Sur ce point, l'état du Togo indique l'intégration des personnes handicapées dans la composition des comités villageois de développement.

Enfin l'observation 100.12 (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord) qui recommande de « modifier les textes législatifs portant sur les droits des femmes, des enfants et des personnes handicapées pour les rendre conformes à ses obligations internationales ». ¹⁴

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, l'Etat du Togo 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 l'Etat du Togo? Si oui, quels étaient les effets de ces observations ou recommandations?

Le rapport périodique sur la convention pour l'élimination de toutes les formes de discrimination à l'égard des femmes 2016, en son point 7 relève que « pour ce qui est de l'accès des personnes handicapées aux infrastructures publiques, à l'emploi, aux services de santé et à l'éducation, le pays n'a pas beaucoup évolué. La loi portant protection sociale des personnes handicapées n'est toujours pas adoptée ». ¹⁵

Le même rapport indique en son point 16 une autre faiblesse liée à la réception du système de protection internationale des personnes handicapées au sein de l'Etat du Togo en ce que « la Convention internationale relative aux droits des personnes handicapées et son protocole facultatif ont été ratifiés en 2011 par le Togo. Mais la loi du 23 Avril 2004 portant protection sociale des personnes handicapées n'est pas en conformité avec la Convention ». ¹⁶

Le point 40 indique également qu'« en ce qui concerne les personnes handicapées, on note une discrimination liée à l'indifférence vis-à-vis des personnes (exclusion), à la non prise en compte de leurs besoins dans les discussions, les

12 Etat de la mise en œuvre des recommandations et des engagements issus du 1er cycle de l'Examen Périodique Universel (EPU) du Togo, (2016) 26. www.uprdoc.ohchr.org (Consulté le 11 Octobre 2020).

13 Comme ci-dessus.

14 Comme ci-dessus.

15 EPU Togo, Communication soumise par la plateforme des ONG togolaises contre les discriminations, Groupe de travail chargé de l'examen périodique universel, 26e session (2016) 2.

16 Comme ci-dessus, 14.

projets communautaires, la construction des bâtiments, la non prise en compte des besoins pédagogiques dans les écoles ordinaires (dans les curricula de formation)».¹⁷

Le Rapport de l'UNICEF Togo pour l'évaluation périodique universelle de la mise en œuvre de la Convention relative aux Droits de l'Enfant rend compte des progrès réalisés dans la mise en œuvre des droits de l'enfant au Togo en s'appuyant sur les observations finales et les recommandations faites par le Comité des Droits de l'Enfant (Le Comité) lors de l'examen des 1^{er} et 2^e rapports périodiques du Togo sur la mise en œuvre de la CDE (2005). A ce titre, le rapport indique en ce qui concerne les enfants vivants avec un handicap que le Togo a ratifié un grand nombre de Conventions internationales reprises dans le cadre juridique national à travers le Code de l'Enfant adopté par le Parlement Togolais en 2007.¹⁸ Cependant les recommandations finales du rapport exhortent les parties prenantes à « la mise en œuvre effective des dispositions légales protégeant les enfants vivant avec un handicap ». Le rapport recommande également de « définir une politique nationale d'intégration des personnes handicapées afin de réduire l'exclusion et la discrimination dont elles sont l'objet » malgré le contexte socioéconomique difficile que traverse le pays.¹⁹

En ce qui concerne les mécanismes régionaux il convient de rappeler que la 36^e conférence des chefs d'Etats et de gouvernement de l'union africaine, qui s'est tenue en 2000 à Lomé au Togo a déclaré la période 1999-2009 décennie africaine des personnes handicapées, Décennie qui sera ensuite reconduite pour la période 2009-2019.

Cependant aucune action récente donnant effet aux recommandations des différents rapports précités n'a été relevée.

2.5 Y'avait-il un quelconque effet interne sur le système légal de la République du Togo après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Aucun élément novateur n'a été relevé relativement à l'encadrement juridique des personnes handicapées au Togo depuis 2016 même s'il convient de relever la densité des instruments directs et connexes des Nations Unies ratifiés par l'Etat du Togo relativement à la protection des personnes handicapées.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous le système légal de l'Etat du Togo? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions d'un traité international?

Le cadre juridique de la protection des droits de l'homme est fondé sur le principe de la soumission à la règle de droit. Au Togo, la source du droit se trouve dans la Constitution du 14 octobre 1992, les instruments internationaux dûment ratifiés et la coutume. Tout comme les autres instruments internationaux et régionaux relatifs aux droits de l'homme, la Convention relative aux droits des personnes handicapées est intégrée dans le corpus juridique interne à travers la Constitution du 14 octobre 1992 en ses articles 50 et 140.

17 EPU Togo (n 15 ci-dessus) 7.

18 UNICEF TOGO, Rapport de l'UNICEF Togo pour l'évaluation périodique universelle (2016) 2.

19 Comme ci-dessus, 9-10.

L'article 50 dispose « Les droits et devoirs, énoncés dans la Déclaration Universelle des Droits de l'Homme et dans les instruments internationaux relatifs aux droits de l'homme, ratifiés par le Togo, font partie intégrante de la présente Constitution ».

Quant à l'article 140, Il dit en substance : « Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ».

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 du Togo? Fournir les détails.

Pour protéger et garantir les droits des personnes handicapées, le Togo s'est également doté d'une loi (loi no 2004-005 du 23 avril 2004 relative à la protection sociale des personnes handicapées) qui est en cours de révision.

Le rapport présenté en 2016 en vue de l'Examen Périodique Universelle (EPU) des Nations Unies²⁰ fait mention des droits des personnes handicapées au rang des mesures législatives, politiques et stratégiques adoptées à l'échelle nationale en application de la CDPH, notamment en ce qui concerne:

- le droit au travail et les priorités dans le domaine de l'emploi (Recommandation 100.73) pour lesquels l'Etat du Togo indique, la garantie du « droit au travail décent pour tous, en particulier pour les femmes et les personnes handicapées ». ²¹
- L'éducation. Notamment par la promotion de l'éducation inclusive à travers l'élaboration et la vulgarisation de manuels en braille et en langues de signes.
- En ce qui concerne les droits catégoriels, une étude réalisée en 2013 et 2014 a relevé l'inadéquation des données du document de politique nationale de l'enfance avec la CDE et la CDPH. A ce titre, l'EPU recommande de « modifier les textes législatifs portant sur les droits des femmes, des enfants et des personnes handicapées pour les rendre conformes aux obligations internationales ». ²²
- L'Etat du Togo a fourni des efforts dans ce sens avec l'assistance technique des partenaires au développement²³. Le Point 92 de l'EPU indique que « Le processus d'harmonisation de la législation nationale qui a abouti à l'adoption du nouveau code pénal et du nouveau code des personnes et de la famille a permis de prendre davantage en compte les droits de l'enfant, de la femme et des personnes handicapées ». ²⁴

20 AGNU (n 11 ci-dessus) 18.

21 Comme ci-dessus.

22 Comme-ci-dessus, 26eme session, Recommandation 100.12.

23 Au titre de l'Assistance technique pour harmoniser la législation nationale avec les instruments internationaux relatifs aux droits de l'Homme ratifiés (recommandation 100.13), le nouveau code pénal et l'avant-projet du code procédure pénale ont été harmonisés avec l'assistance technique de l'UE, de la France, du HCDH et du CICR. Cf. EPU, point 101, (2016) 24.

24 AGNU (n 11 ci-dessus) 22.

3 Constitution

3.1 La constitution de la République du Togo contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution togolaise du 14 octobre 1992 contient des dispositions qui garantissent de manière directe ou indirecte aux personnes handicapées les droits énoncés aux articles 3 et 4 de la Convention. Il s'agit notamment des dispositions de l'article 33 de la constitution.

L'article 33 précise que « l'Etat prend ou fait prendre en faveur des personnes handicapées et des personnes âgées des mesures susceptibles de les mettre à l'abri des injustices sociales ».

3.2 La constitution de la République du Togo contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

De manière indirecte:

- L'article 10 affirme que : « tout être humain porte en lui des droits inaliénables et imprescriptibles. La sauvegarde de ces droits est la finalité de la communauté humaine »;
- L'article 11 pour sa part proclame l'égalité de tous les citoyens : « tous les êtres humains sont égaux en dignité et en droits. L'homme et la femme sont égaux devant la loi. Nul ne peut être favorisé ou désavantagé à raison de son origine familiale, ethnique ou régionale, de sa situation économique ou sociale, de ses convictions politiques, religieuses, philosophiques ou autres » ;
- L'article 28 en ce qui le concerne dispose : « Tout citoyen a droit au respect de sa vie privée, de son honneur, de sa dignité et de son image » ;
- Les modalités d'exercice des différents droits proclamés par la Constitution sont déterminées par les séries de lois adoptées par l'Assemblée nationale et des décrets pris par le gouvernement.

4 Législation

4.1 La République du Togo a-t-elle une législation concernant directement le handicap? Si oui citez la législation et expliquez comment la législation aborde le handicap.

La loi N° 2004-005 du 23 avril 2004 relative à la protection sociale des personnes handicapées a été adoptée. Cependant il faut noter la non-conformité de certaines dispositions de la loi sur les personnes handicapées avec la CDPH.²⁵ A cet effet, un avant-projet de loi relatif à la promotion et à la protection des droits des personnes handicapées est en cours d'élaboration.

4.2 L'Etat du Togo a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

De manière indirecte, un certain nombre de lois contribuent à la garantie de droits au bénéfice des personnes handicapées, notamment:

- La loi n°2004-005 du 23 avril 2004 qui précise en son article 23 que la voirie, les locaux d'habitation et d'une manière générale les installations ouvertes au public sont conçus ou aménagés de manière à respecter les normes architecturales en vue de les rendre accessibles aux personnes handicapées.²⁶
- La loi n° 2006-010 du 13 décembre 2006 portant code du travail qui affirme en son article 3 que « toute discrimination directe ou indirecte en matière d'emploi et de profession est interdite. Par discrimination, on entend toute distinction, exclusion ou préférence fondée sur le sexe, la race, la couleur, la religion, l'appartenance ethnique, l'opinion politique ou philosophique, l'origine sociale, le statut juridique, l'ascendance nationale, l'état de santé ou le handicap et qui a pour effet de réduire ou d'altérer l'égalité de chance ou de traitement en matière d'emploi ou de profession ».
- La loi n° 2009-007 du 15 mai 2007 portant code de la santé publique.
- La loi n° 2007-017 du 6 juillet 2007 portant code de l'enfant.
- La loi n° 2011-017 du 16 juin 2011 portant Charte des Activités Physiques et Sportives du Togo.
- La loi n°2013-008 du 22 mars 2013 portant code électoral qui prévoit en son article 95 que tout électeur atteint d'infirmité ou de handicap physique le mettant dans l'impossibilité d'exprimer son vote est autorisé à se faire assister par un électeur de son choix inscrit sur la même liste que lui.²⁷

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) en république du Togo 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.

Aucune décision de justice relative au handicap n'a été relevée.

- 25 A titre illustratif, la loi togolaise de 2004 considère comme personne handicapée « toute personne qui, du fait d'une déficience motrice, sensorielle ou mentale, congénitale ou acquise, est dans l'incapacité d'assurer par elle-même tout ou partie des nécessités d'une vie individuelle ou sociale et se trouve empêchée ou limitée dans ses possibilités de jouir des mêmes droits et de faire face aux mêmes obligations que ses concitoyens de même sexe ou de même âge ». Or l'article 1er de la CDPH indique que « par personne handicapée on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles, ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres ». Cf. AGNU, Conseil des droits de l'homme, rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme, Togo, Groupe de travail sur l'EPU, 26e session, (2016) 7.
- 26 Par exemple équipements de rampes d'accès au niveau de certains édifices publics (écoles, hôpitaux, mairies et préfectures ...) et d'ascenseurs sonores.
- 27 AGNU (n 11) 20.

6 Politiques et programmes

6.1 La République du Togo a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

La mise en œuvre du cadre normatif précité est rendue effective par des politiques publiques qui englobent le handicap de manière directe. Celles-ci sont élaborées par le gouvernement en collaboration avec la Fédération Togolaise des Associations des Personnes handicapées (FETAPH). La stratégie nationale de protection et de promotion des personnes handicapées, adoptée en 2013 est la principale politique publique dédiée à l'inclusion de toutes les personnes vivant avec un handicap.

6.2 La République du Togo a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Les préoccupations relatives à la prise en compte des droits des personnes vivant avec un handicap sont abordées de manière transversale dans le Plan National de Développement (PND), la politique nationale de l'action sociale, le budget-programme de l'action sociale, le Plan Sectoriel de l'Education, la politique nationale de la santé, le plan national de développement sanitaire, la politique de promotion des sports, des loisirs, des arts et de la culture, le programme de la modernisation de la justice, la politique nationale de l'emploi; toutes ces politiques, programmes visent la prise en compte des préoccupations des personnes handicapées.

La démarche collaborative entre l'Etat et la FETAPH a également été prise en compte dans l'adoption d'un certain nombre de politiques et stratégies publiques, notamment:

- La réalisation d'un projet par la FETAPH en collaboration avec le Ministère de l'Action Sociale, de la Promotion de la femme et de l'Alphabétisation. Ce projet réalisé avec l'appui technique et financier du HCDH a permis de revisiter la loi nationale de protection sociale des personnes handicapées en vue de la mettre en conformité avec la Convention. Suite à ce projet, une étude comparative des instruments juridiques adoptés par le Togo a été réalisée afin d'évaluer le seuil de prise en compte des droits des enfants handicapés.²⁸
- La mise en place d'une organisation dénommée Conseil Consultatif National des Enfants. Cette organisation contribue à faire participer particulièrement les garçons et les filles en situation de handicap à la réflexion et la prise de décisions sur les questions relatives à la protection des enfants et la lutte contre les violences faites aux enfants.
- La Stratégie Nationale de protection et de Promotion des personnes handicapées et son plan d'action du 1^{er} mars 2013.

Il faut également citer comme autres politiques publiques inclusives du handicap:

- La politique nationale de réadaptation adoptée en 2005;
- La politique nationale des sports et son plan d'action adoptée en 2012;
- La politique nationale des loisirs et son plan d'action validé en 2013;
- La politique nationale de l'action sociale, validée en mai 2014 et réactualisée en 2019;
- La politique nationale de l'action sociale;
- La stratégie de Croissance Accélérée et de Promotion de l'Emploi (SCAPE); adoptée par le gouvernement en aout 2013 pour la période (2013-2017);
- La révision de la politique sectorielle de l'éducation 2014-2016, avec un accent mis sur l'éducation inclusive;
- La fixation des normes et standards applicables aux structures d'accueil et de protection des enfants vulnérables du Togo par décret n° 2010-100/PR du 04 aout 2010;
- La validation institutionnelle du manuel de formation en éducation inclusive avec un accent particulier sur l'accueil des enfants handicapés en classe ordinaire par arrêté n°048/MEPSA/CAB/SG du 11 mai 2012;
- La prise en compte dans le budget programme 2015-2017 du Ministère de l'Action Sociale, de la Promotion de la Femme, et de l'Alphabétisation des préoccupations des personnes handicapées, notamment en son axe relatif au renforcement de l'accessibilité des personnes vulnérables à un environnement protecteur et valorisant et celui relatif à la prévention de l'indigence et au renforcement de l'accès des populations vulnérables aux services sociaux de base.²⁹

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, la République du Togo a-t-elle 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.

La commission nationale des droits de l'homme (CNDH), cre par la loi n°87-09 du 09 juin 1987 en tant que mécanisme national de promotion, de protection et de vérification des droits de l'homme sur toute l'étendue du territoire national. Ses prérogatives ont connu une garantie constitutionnelle à la faveur de la Constitution du 14 octobre 1992 (Art. 152 et 153) a suite à laquelle la CNDH a restructuré la loi organique n°96-12 du 11 décembre 1996, modifiée et complétée par la loi organique n°2005-004 du 09 février 2005 portant composition, organisation et fonctionnement de la CNDH. La loi n° 2018-006 du 20 juin 2018 vient abroger la loi de 2005 afin d'intégrer aux prérogatives de la CNDH les éléments liés au mécanisme National de Prévention de la torture. Elle est une institution indépendante soumise à la Constitution et à la loi et dotée d'une personnalité morale. Ses membres jouissent d'une immunité pendant l'exercice de leurs fonctions et un an après la cessation de celle-ci. La CNDH est accréditée au statut A du Comité international de coordination des institutions nationales pour la promotion et la protection des droits de l'homme (CIC).³⁰

29 Ministère des droits de l'Homme et de la Consolidation de la démocratie, Réponses au questionnaire de la Résolution 26/20 du Conseil des droits de l'homme relatives aux personnes handicapées (2016) 3; AGNU (n 11 ci-dessus) 8.

30 www.cndh-togo.org (Consulté le 04 octobre 2020).

La mission de la CNDH consiste à :

- Assurer la protection et la défense des droits de l'homme;
- Promouvoir les droits de l'homme par tous les moyens notamment examiner et recommander aux pouvoirs publics toute proposition de textes ayant trait aux droits de l'homme en vue de leur adoption;
- Emettre des avis dans le domaine des droits de l'homme;
- Organiser des séminaires et colloques en matière de droits de l'homme;
- Procéder à la vérification des cas de violation des droits de l'homme. Elle produit des rapports annuels d'activités et fait des recommandations à l'Etat.³¹

Toutefois, l'analyse du rapport d'activités de CNDH pour l'exercice 2019 ne fait pas état des mesures de protection et promotion prises en faveur des personnes handicapées au rang des protections catégorielles.

7.2 En dehors des cours ou tribunaux ordinaires, la République du Togo a-t-elle 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 Ministère de l'Action Sociale, de la Promotion de la Femme et de l'Alphabétisation conformément à ses attributions statutaires, organise la protection des personnes âgées, la protection des personnes handicapées et la prise en charge des réfugiés et des personnes déplacées internes.³²

Spécifiquement aux personnes handicapées, l'organigramme du ministère prévoit en vertu du Décret n°96-107/PR du 08 octobre 1996, la création d'une Direction des Personnes handicapées et du troisième âge. Cette direction a pour mission de concevoir, coordonner, superviser et évaluer l'ensemble des activités de protection et de promotion des personnes handicapées; Définir des stratégies nationales pour la promotion sociale des personnes handicapées; planifier et mettre en œuvre des activités de promotion et de protection des personnes handicapées; veiller à l'application de la législation sur la protection sociale des personnes handicapées et proposer en cas de besoin de nouvelles dispositions.³³

Le Ministère des Droits de l'homme et des Relations avec les Institutions de la République est également concerné par la protection et la promotion des droits des personnes handicapées à titre principal.

31 Comme ci-dessus.

32 République Togolaise, Site officiel du Ministère de l'action sociale, de la Promotion de la femme et de l'Alphabétisation, www.actionsociale.gouv.tg (Consulté le 02 Octobre 2020).

33 Ministère des droits de l'Homme et de la Consolidation de la démocratie, Réponses au questionnaire de la Résolution 26/20 du Conseil des droits de l'homme relatives aux personnes handicapées, (n 29 ci-dessus) 2-3.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 L'Etat du Togo 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 l'Etat du Togo à jamais abordé des questions relatives aux droits des personnes handicapées.

La commission nationale des droits de l'homme (CNDH), créé par la loi n°87-09 du 09 juin 1987 en tant que mécanisme national de promotion, de protection et de vérification des droits de l'homme sur toute l'étendue du territoire national. Ses prérogatives ont connu une garantie constitutionnelle à la faveur de la Constitution du 14 octobre 1992 (Art 152 et 153) a été restructurée par la loi organique n°96-12 du 11 décembre 1996, modifiée et complétée par la loi organique n°2005-004 du 09 février 2005 portant composition, organisation et fonctionnement de la CNDH. La loi n° 2018-006 du 20 juin 2018 vient abroger la loi de 2005 afin d'intégrer aux prérogatives de la CNDH les éléments liés au mécanisme National de Prévention de la torture. Elle est une institution indépendante soumise à la Constitution et à la loi et dotée d'une personnalité morale. Ses membres jouissent d'une immunité pendant l'exercice de leurs fonctions et un an après la cessation de celle-ci. La CNDH est accréditée au statut A du Comité international de coordination des institutions nationales pour la promotion et la protection des droits de l'homme (CIC).³⁴

La mission de la CNDH consiste à:

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- Emettre des avis dans le domaine des droits de l'homme;
- Organiser des séminaires et colloques en matière de droits de l'homme;
- Procéder à la vérification des cas de violation des droits de l'homme. Elle produit des rapports annuels d'activités et fait des recommandations à l'Etat.³⁵

Toutefois, l'analyse du rapport d'activités de CNDH pour l'exercice 2019 ne fait pas état des mesures de protection et promotion prises en faveur des personnes handicapées au rang des protections catégorielles. L'on peut cependant noter les actions menées en faveur des femmes et des enfants notamment.³⁶

34 www.cndh-togo.org (Consulté le 04 octobre 2020).

35 Comme ci-dessus.

36 Commission Nationale des Droits de l'Homme, Rapport d'activités, (2019) 151. Consulté sur www.cndh-togo.org (Consulte le 04 octobre 2020).

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en république du Togo des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées ? Si oui énumérez chaque organisation et décrivez ses activités.

Selon l'annuaire des organisations intervenant dans le domaine du handicap au Togo, le pays comptait en 2012, 66 organisations intervenant sur les questions de handicap enregistrées avec un total de plus de 7.000 membres actifs. Une quarantaine de ces associations étaient comptabilisées comme membres de la fédération Togolaise des Associations des Personnes Handicapées (FETAPH).³⁷

Parmi ces OSC/ONG, les principales identifiées sont au niveau local:

- APER (Association pour la Promotion de l'enfant rural);
- Association des personnes Handicapées Motivées de Tône (APHIMMOTO);
- ATAIDEMES (Association Togolaise d'Aide aux Enfants Malentendants et Sourds);
- CNEPTC (Coalition Nationale de l'Education Pour Tous);
- CVDPH (Communicateurs pour la Vulgarisation des droits des personnes handicapées);
- Forum des Organisations de Défense des Droits des Enfants au Togo (FODDET);
- Réseau des Journalistes et Communicateurs sur le Handicap au Togo.

En ce qui concerne les Organisations Internationales et Associations étrangères intervenant localement au Togo:

- Christoffel-Blindenmission (CBM);
- Croix-Rouge Togo;
- Handicap International;
- Plan International Togo;
- UNICEF Togo.

9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

La FETAPH assure la promotion et la coordination d'activités au sein d'un réseau d'associations togolaises intervenant dans le domaine du handicap. A ce titre, les activités de la FETAPH visent à assurer le renforcement des capacités des membres des associations membres du réseau à travers:

- L'accompagnement des associations dans l'incubation et la maturation des projets soumis aux divers partenaires;
- La contribution à l'identification des besoins en formation et en renforcement des capacités des membres sur des aspects spécifiques à l'instar des techniques de plaidoyer, des techniques d'animation, l'appui à l'élaboration d'outil de gestion administrative et comptable;

- Le portage du plaidoyer des organisations membres auprès du gouvernement et la collaboration à la prise en compte effective des droits des personnes handicapées dans les politiques publiques qui englobent le handicap de manière directe ou indirecte.³⁸

9.3 Si la République du Togo a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Une collaboration manifeste est observée entre la FETAPH et plusieurs départements ministériels dans le cadre de la mise en œuvre des programmes de lutte contre la vulnérabilité et dans le cadre de l'élaboration des politiques sectorielles. L'expérience d'implication de la FETAPH et d'autres organisations de la société civile dans le processus d'élaboration, de mise en œuvre et de suivi de la SCAPE ainsi que dans les autres processus d'élaboration de politiques et de programmes sectoriels est un exemple de bonne pratique portant sur la conception, la mise en œuvre et le suivi de programmes généraux ou spécifiques de protection sociale à l'égard des personnes handicapées. En outre, la réalisation de certains projets a nécessité la mise en place de comités de réadaptation à base communautaire, des clubs de mères et de pères d'enfants handicapés, d'enfants et leaders communautaires. Ces dispositifs communautaires constituent une stratégie efficace de mobilisation pour les campagnes de sensibilisation.³⁹

Il faut également noter que le gouvernement accorde des subventions annuelles à la FETAPH et aux écoles spécialisées d'éducation et de formation des enfants handicapés ; il met à disposition de ces instituts des enseignants pris en charge par le budget de l'Etat et dote périodiquement les centres de vivres et de non-vivres.⁴⁰

9.4 Quels genres d'actions les OPH du Togo ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Face aux discriminations que les personnes handicapées subissent encore dans les faits, la FETAPH a organisé un atelier de formation et de sensibilisation sur la Convention relative aux droits des personnes handicapées et le développement inclusif. Cette rencontre regroupant des magistrats de la région des Plateaux à Atakpamé a permis de familiariser ces praticiens avec les droits de personnes handicapées et de les amener à prendre la mesure de ces droits dans les pratiques judiciaires.⁴¹

La FETAPH collabore également avec un certain nombre d'organisations à la soumission de rapports alternatifs dans le mécanisme EPU.⁴²

38 www.fetaph.tg (consulté le 28 septembre 2020).

39 Ministère des droits de l'Homme et de la Consolidation de la démocratie, Réponses au questionnaire de la Résolution 26/20 du Conseil des droits de l'homme relatives aux personnes handicapées (n 29 ci-dessus) 5.

40 Comme ci-dessus. NB : Les vivres sont des aliments et 'les non-vivres' sont des fournitures tout aussi essentielles, mais qui ne sont ni des médicaments, ni des aliments.

41 AT ADI *L'impact de l'examen périodique universel sur la situation des droits de l'Homme au Togo* Amnesty International (2013) 51.

42 www.fetaph.tg (consulté le 28 septembre 2020).

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH du Togo lors de leur engagement dans la mise en œuvre?

Il faut relever quelques faiblesses dans la collaboration mise en œuvre entre l'Etat et les OPH, notamment celles non affiliées à la FETAPH qui a pour conséquence la non-participation systématique de toutes les OPH aux réflexions sur les politiques publiques, les projets structurants et autres programmes de développement mis en œuvre par l'Etat.

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH au Togo?

Une collaboration manifeste est observée entre les associations des personnes handicapées regroupées sous l'égide de la FETAPH et plusieurs ministères sectoriels dans le cadre de la mise en œuvre des programmes de lutte contre la vulnérabilité et dans le cadre de l'élaboration des politiques sectorielles. A ce titre il faut citer de manière pertinente l'expérience d'implication de la FETAPH et d'autres organisations de la société civile dans le processus d'élaboration, de mise en œuvre et de suivi de la SCAPE,⁴³ de même que dans l'élaboration de certains programmes généraux ou spécifiques de protection sociale à l'égard des personnes handicapées.⁴⁴

Le Projet éducation inclusive est un exemple de bonne pratique collaborative entre les OPH, l'Etat et les partenaires au développement. Sa mise en œuvre a été effectuée par Handicap International en partenariat avec la FETAPH sous la Tutelle du ministère des Enseignements Primaires et Secondaires. Cette collaboration tripartite a permis d'offrir des manuels de formation sur « *la surdit  et la langue des signes* » et « *la d ficiency visuelle et le braille* » dans le but de renforcer la scolarisation des enfants handicap s au Togo.⁴⁵

Par ailleurs, dans le souci de mettre en place un organe efficace de suivi de la mise en œuvre de la Convention au plan national, la FETAPH avec l'appui de ses partenaires a commandit  une  tude en vue de la cr ation ou de la d signation d'un m canisme de suivi de l'application de la Convention.⁴⁶

9.7 Y'a-t-il des r sultats sp cifiques concernant une mise en œuvre prosp re et/ou une reconnaissance appropri e des droits des personnes handicap es r sultant de l'implication des OPH dans le processus de mise en œuvre au Togo?

La principale action efficace de la FETAPH est la collaboration   la mise en œuvre de subventions publiques au profit des  coles et centres sp cialis s des personnes handicap es   travers le Fonds sp cial pour les personnes handicap es. La subvention de plus en plus croissante de la prise en charge de l' ducation, de la scolarisation et de la formation professionnelle des personnes en situation de handicap est pass e entre 2013 et 2015 de 43.877.057 F   125.999.240 F.⁴⁷

43 Strat gie de Croissance Accr l r e et de Promotion de l'Emploi.

44 Minist re des droits de l'Homme (n 29 ci-dessus) 4.

45 LN MVONDO *Cartographie g n rale des organisations de la soci t  civile au Togo* PRO-CEMA, ICE, (2018) 53.

46 Nations Unies 'Convention relative aux droits des personnes handicap es, Rapport initial soumis par le Togo en application de l'article 35 de la Convention' (2019) www.ohchr.org (consult  le 11 Octobre 2020).

47 Comme ci-dessus.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH au Togo afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Le rôle des OPH dans la mise en œuvre de la Convention peut être amélioré à travers le renforcement du cadre de collaboration mis en œuvre entre l'Etat et la FETAPH à travers leur participation systématique aux réflexions sur les politiques publiques, les projets structurants ainsi que leur mise en œuvre afin d'assurer une meilleure prise en charge inclusive 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?

Le rôle des OPH dans la mise en œuvre des instruments internationaux peut être rendu effectif ou amélioré à travers le renforcement du cadre de collaboration mis en œuvre entre l'Etat et la FETAPH à travers leur participation systématique aux réflexions sur les politiques publiques, les projets structurants ainsi que leur mise en œuvre afin d'assurer une meilleure prise en charge inclusive des droits des personnes handicapées.

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?

Bien que cela ne soit pas clairement défini, il semble que certaines organisations mentionnées au 9.1 ci-dessus collaborent de manière directe ou indirecte avec les OPH dans les programmes de recherche incluant des aspects liés au handicap.

10 Branches gouvernementales

10.1 Avez-vous au Togo 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).

En dehors du Ministère de l'Action Sociale, de la Promotion de la Femme et de l'Alphabétisation et du Ministère des Droits de l'homme et des Relations avec les Institutions de la Républiques précités, il faut également noter l'existence d'un Centre National d'Appareillage Orthopédique (CNAO) et des Centres Régionaux d'Appareillage Orthopédique (CRAO).

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en République du Togo? (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).

Au rang des défis constituant des freins majeurs à la mise en œuvre des droits des personnes handicapées au Togo, il faut citer la très faible accessibilité aux bâtiments publics, la non adaptation des postes de travail aux contraintes spécifiques des travailleurs handicapés, la non prise en compte par le code du travail et le statut général de la fonction publique de l'allocation de mobilité pour les travailleurs handicapés, l'insuffisance de sensibilisation du personnel de l'administration sur le handicap et la convention relative aux droits des personnes handicapées.⁴⁸ Malgré de nombreuses dispositions favorables et incitatives, il faut également noter une très faible représentation des personnes handicapées dans les fonctions électives et dans les instances de prise de décisions.

De manière plus spécifique il faut citer comme pratique culturelle endogène pouvant constituer un frein le phénomène des enfants dits-sorciers dont la pratique inclue la stigmatisation sociale de certains enfants en situation de handicap.

Sur ce point l'Etat du Togo indique au rang des actions l'Engagement des chefs religieux et traditionnels à lutter contre l'infanticide des enfants qui naissent avec un handicap et le phénomène des enfants dits sorciers à travers la signature de la déclaration de Notsé.

11.2 Comment l'Etat du Togo répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérées?

Plusieurs actions récentes ont été menées en faveur des personnes handicapées. Parmi lesquelles on peut citer:

- Appui au fonctionnement de la Fédération Togolaise des Associations de Personnes Handicapées (FETAPH) à travers une subvention de l'Etat;
- subvention à 100% de 10 centres spécialisés de prise en charge des enfants déficients intellectuels de l'IMPP l'ENVOL;
- octroi de la subvention à 17 écoles spécialisées de prise en charge des autres enfants handicapés;
- campagne de sensibilisation "Tirer la Sonnette" dont l'objectif est d'interpeller les autorités et la communauté sur le droit à l'éducation de tous les enfants sans exception;

48 Ministère des droits de l'Homme et de la Consolidation de la démocratie (n 29 ci-dessus) 6.

- prise en compte des pathologies handicapantes, les prothèses physiques et la rééducation fonctionnelle par l'Institut Nationale d'Assurance Maladie (INAM);
- prise en charge des personnes handicapées au niveau des centres d'appareillage orthopédique et de rééducation fonctionnelle au plan national;
- réalisation d'une étude sur l'ensemble des textes législatifs togolais en vue de l'intégration des dispositions visant à prendre en compte les droits des personnes handicapées;
- renforcement des capacités des personnes handicapées sur leurs droits et potentialités;
- mise en œuvre du Projet 'Emploi décent pour les personnes handicapées au Togo';
- Mise en œuvre des projets d'éducation inclusive dans les régions des Plateaux, Centrale de la Kara et des Savanes;
- Distribution des kits alimentaires, des équipements de protection et des affiches publicitaires dans le cadre de la riposte contre la COVID 19.

D'une manière générale, des efforts appréciables ont été fournis par l'Etat togolais pour assurer la promotion et la protection des droits des personnes handicapées conformément aux engagements internationaux, au cadre juridique interne et aux politiques publiques inclusives élaborées en faveur des personnes handicapées. Ces efforts concernent notamment les points suivants:

- **Accessibilité aux édifices publics.** Il faut noter la construction de rampes d'accès aux écoles, collèges et formations sanitaires, construction d'infrastructures scolaires accessibles pour tous avec le projet PERI. Par ailleurs, le ministère chargé de la communication a pris des dispositions pour que le nouveau bâtiment de la TVT en construction et qui va abriter tous les médias soit accessible aux personnes handicapées. A cet effet une latrine adaptée aux besoins des personnes vivant avec un handicap est prévue. Un ascenseur et une cantine accessibles aux personnes handicapées sont également envisagés. Cependant, des mesures similaires doivent être envisagées pour faciliter leur accès aux bâtiments du cabinet et de la DAAF. Au Ministère de l'Enseignement Technique et de la Formation professionnelle, 5 projets dont les études sont déjà faites en prévision de la construction des centres de formation technique et professionnelle de la CFTP prennent aussi en compte la construction de rampes d'accès.⁴⁹ Aussi, le processus de modernisation de la justice a permis d'avoir des rampes à la cour d'appel de Lomé et de Kara, aux tribunaux d'Aného et d'Atakpamé et de celui de Sokodé.⁵⁰
- **Accessibilité aux infrastructures sanitaires et sociales de prise en charge.** Il existe encore un écart entre les services existants de prise en charge et les besoins réels des personnes en situation de handicap. En effet, «80% des services sont institutionnels, urbains et payants ; ce qui les rend inaccessibles à la plupart des personnes handicapées issues des milieux ruraux et des quartiers pauvres de la ville». Globalement dans le domaine sanitaire, « 44 infrastructures sanitaires ont été construites munies d'un système d'accès (rampe) dans les 6 régions sanitaires dont 5 dans la région de Lomé commune, 8 dans la région maritime, 7 dans la région des Plateaux, 6 dans la Centrale, 9 dans la Kara et 9 dans les savanes ». ⁵¹ Ce qui reste très insuffisant par rapport au nombre d'infrastructure que compte le système de santé du Togo.
- **Situation de risque et d'urgence sanitaire.** Dans la procédure d'aide humanitaire aux victimes de risques liés aux catastrophes, une attention particulière est portée sur les couches vulnérables dont les personnes handicapées. Lors de la distribution de l'aide en vivres et non vivres, les personnes handicapées tout comme les enfants, les femmes et les vieillards sont les premiers à être prioritairement servis. Pour assurer la mobilité des personnes handicapées, le Ministère de l'action sociale a dans son stock de matériels aux sinistrés des fauteuils roulants sur les sites d'accueil.

49 Il s'agit des CFTP de Gando, Bassar, Pagouda, Bafilo et Tchamba. Cf. Ministère des droits de l'Homme et de la Consolidation de la démocratie, Réponses au questionnaire de la Résolution 26/20 du Conseil des droits de l'homme relatives aux personnes handicapées (n 29 ci-dessus).3 ; AGNU (n 13 ci-dessus) 10.

50 Ministère des droits de l'Homme et de la Consolidation de la démocratie (n 29 ci-dessus) 3 ; AGNU (n 11 ci-dessus) 10.

51 Comme ci-dessus.

L'Etat à travers le Ministère de l'action sociale assure l'hébergement sur les sites avec des logements et sanitaires accessibles aux personnes handicapées en cas de sinistre. Sur le site de Logopé par exemple, les rampes pour l'accessibilité des sinistrés dans les logements et les sanitaires sont en projet de construction.⁵²

- **Accès à la justice.** Pour faciliter l'accès à la justice, le ministère de la justice grâce au programme de modernisation de la justice a créé la direction de l'accès au droit et à la justice qui est chargée de vulgariser tous les textes nationaux et internationaux relatifs aux droits de l'homme. De même, une assistance judiciaire est accordée aux détenus vulnérables y compris les personnes handicapées dans le cadre des projets « recours au volontariat pour un appui juridique en milieu carcéral » et « appui à l'accès au droit et à la justice ».⁵³ Le processus de renforcement des capacités des magistrats sur la thématique du handicap a également été engagé en vue de d'assurer le respect des droits de cette catégorie vulnérable. Enfin, il faut noter l'adoption par le gouvernement de la loi n° 2013-010 du 27 mai 2013 portant aide juridictionnelle qui protège les personnes vulnérables compte tenu du caractère parfois exorbitant des dépenses judiciaires. Malgré ces mesures il faut noter que les démarches judiciaires de la part des personnes handicapées restent très faibles.
- **Protection contre la torture, les peines ou traitements cruels, inhumains ou dégradants, l'exploitation, la violence et la maltraitance.** Il faut citer au rang de mesures fortes sur ce point, la création d'une ligne verte « Allo 1011 » pour faciliter la dénonciation des cas d'exploitation, de violence et de maltraitance, ainsi que la mise en place de centres d'écoute et de prise en charge psychologique des victimes de violences basées sur le genre (VBG). Enfin l'Etude sur les pratiques traditionnelles néfastes suivie de la déclaration de Notsè en 2013.
- **Autonomie et inclusion sociale.** La mise en place du fonds National de la finance Inclusive (FNFI) pour contribuer de manière significative et déterminante, à repousser les frontières de l'exclusion financière, en mettant en œuvre un puissant instrument financier pour faire face aux contraintes liées à l'accès des populations surtout pauvres, aux services financiers de base.⁵⁴
- **Liberté d'opinion, d'expression et accès à l'information.** La liberté d'expression est garantie par la Constitution en son article 26. En pratique, pour favoriser l'épanouissement des personnes handicapées, la TVT a prévu un créneau hebdomadaire d'informations pour les personnes malentendantes ou sourdes. Ce magazine d'informations fait le point des principaux sujets qui ont marqué l'actualité chaque semaine. Par manque de ressources humaines formée dans la communication gestuelle, il est depuis peu provisoirement suspendu.⁵⁵
- **Education et formation professionnelle.** Conformément aux dispositions de la Convention et de la Loi sur les personnes handicapées, des allocations d'étude et de logement peuvent être accordées par l'Etat aux élèves et étudiants handicapés.

Pour l'instant il n'existe pas de structure publique spécialisée pour l'enseignement des personnes handicapées, néanmoins des structures privées confessionnelles existent, d'autres sont créés par les OSC et toutes reçoivent l'appui du gouvernement et des partenaires au développement. Cette subvention est passée de 20 millions de FCFA par an en 2012 à 25 millions à partir de 2017. Et contribue à financer la scolarisation des enfants handicapés, la formation du personnel, l'achat du matériel didactique et des équipements spécialisés, l'élaboration de manuels de langue des signes.

Il a également été mis sur pied un module relatif à l'éducation inclusive qui a été introduit dans les curricula de formation des Professeurs d'Ecole Normale d'Instituteurs et dans les curricula des écoles de formation initiale des enseignants du primaire des mesures spéciales sont également prises pour encadrer les élèves handicapés durant les sessions d'examen officiels. Cependant l'absence de

52 Comme ci-dessus.

53 Projet initié par le Ministère de la Justice avec l'appui du PNUD.

54 Le fonds a bénéficié dès son démarrage d'une dotation financière de près de 10 milliards de Francs CFA dont 5 milliards mobilisés par le gouvernement togolais. Ministère des droits de l'Homme et de la Consolidation (n 29 ci-dessus) 3; AGNU (n 11 ci-dessus) 10.

55 Comme ci-dessus.

formation spécialisée des enseignants des niveaux secondaires et universitaires est une lacune relevée. Ce qui rappelle la nécessité de renforcer l'accompagnement pédagogique spécialisé pour les élèves et les étudiants handicapés.

- **Accès à l'emploi.** Le chapitre 3 de la Loi n° 2004-005 portant protection sociale des personnes handicapées consacre le droit au travail et à l'emploi des personnes handicapées. L'article 12 de la Loi stipule que « *les personnes handicapées jouissent de l'égalité d'accès aux fonctions publiques et aux emplois privés selon leurs capacités et la nature de l'emploi* ». L'article 13 de la même loi indique que l'état encourage le recrutement des personnes handicapées et en définit les conditions.

Dans ce sens et dans le but de favoriser l'entrepreneuriat et l'auto emploi des personnes handicapées, un Fonds d'Appui aux Initiatives économiques des Jeunes (FAIEJ) destiné à servir de garantie auprès des institutions financières en faveur des crédits sollicités par les jeunes pour développer leurs projets ou activités génératrices de revenus a été mis en place. Ce fonds a permis de mobiliser environ 4 milliards de francs CFA en 3 ans a permis l'accompagnement d'environ 500 plans d'affaires dont 10 soumis par les jeunes en situation de handicap formés sur 21 inscrits et 3 financés au final.⁵⁶ Environ 200 personnes handicapées ont été admises au sein de la fonction publique entre 2009 et 2014. En outre, des études ont été menées en octobre 2013 et en juin 2014 : « L'étude prospective d'identification des opportunités d'emploi dans le secteur public et les entreprises privées pour les personnes en situation de handicap » par l'association vision solidaire et l'étude « Diagnostic et élément d'action en faveur des personnes handicapées au marché de l'emploi » par le Ministère du travail, de l'Emploi et de la Sécurité Sociale. Ces importantes études ont eu pour objectifs d'explorer les opportunités et les obstacles relatifs à l'emploi des personnes handicapées et dégager sur la base de la synthèse de l'analyse diagnostic de leur situation professionnelle, des éléments d'action concrète dont la mise en œuvre permettra de faciliter leur insertion socioprofessionnelle.⁵⁷

- **Accès aux TIC.** Une étude laisse transparaître un très faible accès des emprisonnés handicapés aux TIC et conclue à la nécessité de favoriser la promotion de la formation et du financement de l'acquisition des supports de TIC au bénéfice des personnes handicapées afin de favoriser leur épanouissement autant que leur insertion socioprofessionnelle.⁵⁸
- **Participation à la vie culturelle et récréative, aux loisirs et aux sports.** Il faut relever ici l'appui public à la formation des membres et aux activités du championnat paralympique de même que l'organisation nationale des jeux paralympiques.

11.3 La République du Togo accorde-t-elle des subventions pour handicap ou autre moyen de revenus en vue de soutenir les personnes handicapées?

L'Etat du Togo a mis sur pied des politiques publiques d'accompagnement des personnes handicapées à travers des appuis financiers octroyés par le Fonds national de Finance inclusive (FNFI),⁵⁹ le fonds d'Appui à l'Initiative Economique des Jeunes (FAIEJ), l'Agence Nationale pour la Promotion des Garanties et de Financement (ANPGF) pour contribuer de manière significative et déterminante à repousser les frontières de l'exclusion financière grâce à la mise sur pied d'un

56 Comme ci-dessus, 18.

57 Ministère des droits de l'Homme et de la Consolidation de la démocratie (n 29 ci-dessus) 3; AGNU (n 11 ci-dessus) 19.

58 Dodzi (n 4 ci-dessus) 10.

59 Le fonds spécial à bénéficier dès sa création d'une dotation de près de dix milliards (10.000.000.000) F CFA.

instrument permettant aux plus démunis d'avoir accès à des services financiers de base.⁶⁰

Il faut également citer les subventions annuelles accordées par l'Etat à la FETAPH et aux écoles spécialisées d'éducation et de formation des enfants handicapés; ce programme de subventions met à disposition des instituteurs des enseignants payés sur le budget de l'Etat et dote périodiquement les centres spécialisés de vivres et non vivres. L'enveloppe de subventions a été régulièrement croissante sur les 08 dernières années au bénéfice des personnes en situation de handicap.

Il faut également relever les appuis financiers divers, régulièrement octroyés aux artistes en situation de handicap. A titre illustratif, « la coopérative des personnes handicapées de Niamtougou (CODHANI) au Nord du Togo évolue dans la fabrication et la commercialisation des articles artisanaux. La coopérative se livre à des échanges de biens et services culturels entre le Togo et le reste du monde. En 2010, les exportations se sont élevées à 99 601 666 F CFA, les importations à 171 555 463 F CFA, ce qui donne un solde export-import de 71 953 797 F CFA ». ⁶¹

Il faut également relever la mise en place d'un programme de microcrédits aux femmes handicapées et aux mères d'enfants handicapés initiée par l'ONG CBM.

L'Appui du fonds Spécial pour les personnes Handicapées, Fonds de la Croix-Rouge Togolaise qui appuie le centre National d'Appareillage Orthopédique (CNAO) en matériels orthopédiques afin de permettre aux personnes handicapées d'avoir accès à un prix réduit aux services et appareils dont elles ont besoin.⁶²

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc) en République du Togo?

Malgré de nombreuses dispositions favorables et incitatives, il faut noter une très faible représentation des personnes handicapées dans les fonctions électives.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité

Des efforts sont également observables dans les mesures de prise en charge des groupes vulnérables (notamment les femmes, les enfants, les personnes âgées),⁶³ incluant le handicap comme facteur potentiel ou supplémentaire de vulnérabilité. Au rang de ces mesures? il faut noter:

- Elaboration d'une stratégie nationale de protection sociale des groupes vulnérables assortie d'un plan d'action (2013) et l'opérationnalisation du fonds national de finance inclusive permettant aux populations vulnérables d'avoir accès aux financements (2014) ;
- Elaboration et validation de la stratégie nationale de promotion et de protection des personnes handicapées (2013).

60 Nations Unies 'Convention relative aux droits des personnes handicapées, Rapport initial soumis par le Togo en application de l'article 35 de la Convention' (2019) www.ohchr.org (consulte le 11 Octobre 2020).

61 Ministère des droits de l'Homme et de la Consolidation de la démocratie (n 29 ci-dessus) 21.

62 Nations Unies (n 60 ci-dessus).

63 Conformément aux recommandations sur l'état de mise en œuvre de la CDPH par l'Etat du Togo, notamment la recommandation 100.47 (Djibouti) et 100.73 (Vietnam).

Des actions ciblées sont menées sur les groupes suivants:

Personnes âgées vivant avec un handicap

- Poursuite depuis 2012 des sensibilisations sur la protection des personnes âgées et la solidarité intergénérationnelle dans le cadre de la journée internationale des personnes âgées.
- Elaboration et mise en œuvre depuis 2014 du programme de protection et de valorisation du potentiel des personnes âgées (2014-2018) qui a permis la réalisation en 2015 d'une étude sur le bénévolat sénior et la protection d'une base de données sur les personnes âgées.

Enfants handicapés

- Mise en place avec l'assistance des partenaires notamment terre des Hommes, UNICEF, PLAN International-Togo, Agence Nationale de Solidarité ; des ONG nationales et des entreprises privées, d'un système centralisé de détection et de référencement des enfants vulnérables et victimes de maltraitance.

Femmes handicapées

- Renforcement des capacités de 500 acteurs de groupements féminins et mixtes sur le leadership et la gestion des micros entreprises (Savane, maritime, Lomé commune), (2015).

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement au Togo en ce qui concerne sujet les personnes handicapées?

Dans le souci de mettre en place un organe efficace de suivi de la mise en œuvre de la Convention au plan national, la FETAPH avec l'appui de ses partenaires a suggéré la création ou de la désignation d'un mécanisme de suivi de l'application de la Convention. La réflexion sur la mise sur pied de ce mécanisme est en cours.⁶⁴

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Togo? Pourquoi?

Le Togo a accompli d'importants progrès dans la mise en œuvre de la Convention relative aux droits de personnes handicapées. En effet, de nombreux textes législatifs ont été adoptés ou modifiés pour donner effet à la Convention dans l'ordonnancement juridique interne. Ces mesures se traduisent par l'adoption de politiques publiques de plus en plus inclusives des besoins spécifiques des personnes handicapées.

Malgré ces efforts, de nombreux défis restent à relever pour la pleine et effective jouissance des droits des personnes handicapées. Les actions suivantes contribueraient à améliorer la promotion des droits des personnes handicapées.

64 Nations Unies (n 60 ci-dessus).

- Renforcer les politiques publiques nécessaires pour faciliter l'accès des personnes handicapées aux infrastructures, à l'emploi et aux services de santé;
- Renforcer les capacités des centres de formations spécialisés pour les enfants à besoin spécifiques;
- Améliorer l'accès des personnes handicapées à la protection sociale, l'emploi et l'entrepreneuriat;
- Faciliter l'accès aux soins de santé et aux services de réhabilitation au bénéfice des personnes handicapées;
- Rendre le système éducatif plus inclusif en adaptant les curricula de formation, les outils pédagogiques et les infrastructures scolaires adaptés aux besoins des apprenants handicapés;
- Favoriser l'accès des personnes handicapées aux TIC;
- Adopter des mesures de discrimination positive pour favoriser la représentativité des personnes handicapées au sein des instances politiques et administratives de prise de décision;
- Interpréter en langues des signes les journaux télévisés.

SECTION C: REGIONAL DEVELOPMENTS

Disability rights in the African regional human rights system

Section C contains 2 commentaries related to disability, Cyclone Idai and the COVID-19 pandemic and an article related to health emergencies post COVID-19 and the guidance that Africa's Disability Protocol could provide.

REGIONAL DEVELOPMENTS

DISABILITY, CYCLONE IDAI AND THE COVID-19 PANDEMIC: PREPAREDNESS OF AFRICAN COUNTRIES FOR DISABILITY-INCLUSIVE RESPONSES IN EMERGENCY SITUATIONS

*Edmore Masendeke**

1 Introduction

On 11 March 2020, the World Health Organisation (WHO) declared the outbreak of a novel coronavirus disease 2019 (COVID-19), a respiratory disease which started in Wuhan, China, in December 2019, to be a pandemic following a surge in case numbers in Italy, Iran, South Korea and Japan.¹ In that same month, most African countries recorded their first COVID-19 cases.² For Madagascar, Mozambique, Zimbabwe and Malawi, this was barely a year after another humanitarian emergency. In mid-March 2019, the four countries were hit by Cyclone Idai, a tropical storm that was characterised by heavy rains and flooding, which killed around 1 000 people and affected over 2 million people.³ Among those affected were people with disabilities.⁴

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1 WHO 'WHO Director-General's opening remarks at the media briefing on COVID-19' (11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed 22 October 2020).

2 Wikipedia 'COVID-19 pandemic in Africa' (21 October 2020) https://en.wikipedia.org/wiki/COVID-19_pandemic_in_Africa (accessed 22 October 2020).

3 D Phiri, M Simwanda & V Nyirenda 'Mapping the impacts of Cyclone Idai in Mozambique using Sentinel-2 and OBIA approach' (2020) 82 *South African Geographical Journal* 1.

4 Light for the World 'Access to humanitarian aid: Challenges and recommendations for women and men, girls and boys with disabilities' (2019) Unicef http://www.light-for-the-world.org/sites/lfdw_org/files/download_files/policy_paper_lftw_unicef_-_def_di_gital_accessible_0.pdf (accessed 29 September 2020).

Studies show that people with disabilities are generally disproportionately affected by natural disasters and emergency situations⁵ and their needs are often not, or inadequately, addressed in emergency response plans and preparations.⁶ Such vulnerability and inequality often stem from several factors, including a lack of information and knowledge of disability issues among governments and relief organisations;⁷ financial constraints leading to the lack of prioritisation of disability issues and people with disabilities;⁸ as well as stigma and discrimination.⁹ The failure to involve people with disabilities in disaster response planning and preparation also contributes to people with disabilities' needs not being addressed, or being inadequately addressed, in emergency response plans and preparations.¹⁰

For both the COVID-19 pandemic and Cyclone Idai, the four African countries have had to develop and implement emergency response plans and preparations. As emergency response plans and preparations for COVID-19 are still being adjusted and implemented as the disease continues to spread, it may be too early to assess them. However, it is the opportune time to assess the four countries' emergency response plans and preparations for Cyclone Idai and possibly draw some lessons from them, which may be useful to the emergency response plans and preparations for COVID-19.

Therefore, this comment provides an assessment of the extent to which disability issues were addressed in the four countries' emergency response plans and preparations for Cyclone Idai and a discussion of the lessons learnt which may be of relevance to the emergency response plans and preparations for COVID-19. The assessment will be made against relevant provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol), which are discussed in the next section.

5 BH Morrow 'Identifying and mapping community vulnerability' (1999) 23 *Disasters* 11; GA Tobin & JC Ollenburger 'Natural hazards and the elderly' (1992) *FMHI Publications Paper 16*; B Wisner et al (2004) 'At Risk: Natural hazards, people's vulnerability and disasters' 2nd ed (2004).

6 B Wisner 'Business-as-usual disaster relief' (2012) 23 *Capitalism Nature Socialism* 123.

7 F Smith, E Jolley & E Schmidt *Disability and disasters: The importance of an inclusive approach to vulnerability and social capital* (2012); Light for the World (n 4).

8 W Lunga et al 'Disability and disaster risk reduction as an incongruent matrix: Lessons from rural Zimbabwe' (2019) 11 *Jambá* n1.

9 Smith, Jolley & Schmidt (n 7).

10 Smith, Jolley & Schmidt (n 7); HT Sullivan & MT Häkkinen 'Preparedness and warming systems for special needs: Ensuring everyone gets the message (and knows what to do)' (2011) 29 *Geotechnical and Geological Engineering* 225.

2 State obligations to ensure that disability issues are addressed in emergency response plans and preparations

Disability-inclusive emergency response plans and preparations have been promoted through several international and regional laws, policies and guidelines. Here, however, I only focus on the CRPD and the African Disability Protocol as they are the most comprehensive legal frameworks safeguarding the human rights of people with disabilities at the global and regional level. Adopted by the United Nation's General Assembly on 13 December 2006,¹¹ the CRPD is the leading disability-specific articulation of human rights. Internationally, it has been widely acknowledged as such including through wide ratification. At the time of writing this comment, the CRPD has been ratified by 181 countries, including 43 African countries, and the European Union.¹² The African Disability Protocol was adopted by the African Union on 29 January 2018,¹³ but has not yet achieved the 15 ratifications that it requires to become operational. Although it is not yet in operation, the African Disability Protocol stands alongside the CRPD in providing a comprehensive disability specific articulation of human rights in the African context.¹⁴ Thus, many provisions of the African Disability Protocol correspond to the provisions of the CRPD, but they have been contextualised to reflect the situation of people with disabilities.¹⁵ The African Disability Protocol also contains additional provisions on issues which are not emphasised or explicitly mentioned in the CRPD, but are important for the promotion, protection and fulfilment of the rights of people with disabilities in Africa.

Among their similarities, both the CRPD and the African Disability Protocol require state parties to ensure the protection and safety of persons with disabilities in situations of risk. Accordingly, article 11 of the CRPD enjoins state parties to take 'all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including

11 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

12 United Nations Department of Economic and Social Affairs Disability 'Convention on the Rights of Persons with Disabilities (CRPD)' United Nations Department of Economic and Social Affairs Disability <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 11 September 2020).

13 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 14 September 2020). The Protocol was adopted in terms of art 66 of the African Charter on Human and Peoples' Rights (African Charter), which allows for the acceptance of additional protocols to supplement its provisions.

14 J Mureriwa 'Some reflections on the draft African Disability Protocol and socio-economic justice for persons with disabilities' (2011) 12 *ESR Review: Economic and Social Rights in South Africa* 3.

15 Mureriwa (n 14).

situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters'.¹⁶ Similarly, article 12 of the Protocol requires state parties to '[t]ake specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, forced displacements, humanitarian emergencies and natural disasters'.¹⁷

While article 11 of the CRPD and article 12 of the African Disability Protocol are similar in a broad sense, the African Disability Protocol explicitly mentions forced displacement as a situation of risk whereas the CRPD does not do so. This draws attention to the gravity of the problem of forced displacement in Africa and the need to address disability issues in such situations. Although it is a worldwide phenomenon, forced displacement is more pronounced in Africa than any other continent.¹⁸ It is reported that Cyclone Idai caused the displacement of 4.5 million people.¹⁹

Beyond article 11 of the CRPD and article 12 of the African Disability Protocol, other provisions of both instruments are relevant for the development and implementation of emergency response plans and preparations which are disability inclusive. First, the general principles of both instruments provide guidance to the inclusion of disability issues in this context.²⁰ In addition to the seven principles listed in the CRPD, the African Disability Protocol specifies 'reasonable accommodation'²¹ and 'best interest of the child'²² as general principles. Given that these two concepts are not common practice in Africa, they needed to be specifically mentioned to ensure that they are prioritised in the implantation of the Protocol.

Second, the general obligations of both instruments outline the steps which state parties should take in implementing these instruments.²³ While most of these steps are similar in both instruments, the African Disability Protocol requires state parties to take additional steps or pay attention to some things that were not explicitly mentioned in the CRPD, primarily as a way of contextualising the rights of people with disabilities to the African context. For instance, the African Disability Protocol requires states parties to '[put] in place adequate resources, including through budgetary allocations, to ensure the full implementation of this

16 Art 11 CRPD.

17 Art 12(a) African Disability Protocol.

18 Internal Displacement Monitoring Centre 'Africa report on internal displacement' (2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/201912-Africa-report.pdf> (accessed 29 September 2020).

19 Phiri, Simwanda & Nyirenda (n 3).

20 Art 3 CRPD; art 3 African Disability Protocol.

21 Art 3 African Disability Protocol, Principle (g).

22 Art 3 African Disability Protocol, Principle (i).

23 See Art 4 CRPD; art 4 African Disability Protocol.

Protocol',²⁴ whereas the CRPD does not make express mention of such a requirement. As Yvette Basson notes, '[m]any countries in Africa do not prioritise spending on socioeconomic issues, which makes the duty to allocate resources to the implementation of the Protocol particularly significant'.²⁵

Differences also exist in the scope of the guidelines for the involvement of people with disabilities in decision-making processes. The CRPD requires state parties to 'closely consult' and 'actively involve' people with disabilities in 'the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities'.²⁶ The African Disability Protocol, on the other hand, requires state parties to ensure that people with disabilities effectively participate in 'all decision-making processes including the development and implementation of legislation, policies and administrative processes to implement this Protocol'.²⁷

While both instruments require state parties to ensure the involvement of people with disabilities in decision-making processes, there are three differences in the scope of these obligations. First, the CRPD requires state parties to ensure that people with disabilities are also involved in 'other decision-making processes concerning issues relating to persons with disabilities' in addition to issues relating to the implementation of the Convention²⁸ whereas the African Disability Protocol only requires state parties to ensure that people with disabilities are involved in issues relating to the implementation of the Protocol.²⁹ This may be an oversight by the drafters of the Protocol. Consequently, it may pose a limitation on the participation of people with disabilities in decision-making processes which are not explicitly mentioned in the Protocol. Second, the African Disability Protocol mentions that people with disabilities should be involved in the development and implementation of administrative processes,³⁰ while the CRPD does not. Finally, while the CRPD emphasises the participation of children with disabilities,³¹ the African Disability Protocol emphasises the participation of children with disabilities as well as that of women with disabilities.³² Women with disabilities face double discrimination – as people with disabilities and as

24 Art 4 African Disability Protocol, General Obligation (i).

25 Y Basson 'The right to an adequate standard of living in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 258 at 260.

26 Art 4(3) CRPD.

27 Art 4 African Disability Protocol, General Obligation (j).

28 Art 4(3) CRPD.

29 Art 4 African Disability Protocol, General Obligation (j).

30 As above.

31 Art 4(3) CRPD.

32 Art 4 African Disability Protocol, General Obligation (j).

women – and the latter is compounded by patriarchy in Africa,³³ therefore it was important to make the participation of women with disabilities in decision-making processes an explicit requirement in the African Disability Protocol.

Article 31 of the CRPD and article 32 of the African Disability Protocol on statistics and data collection are also relevant to the development and implementation of emergency response plans and preparations which are disability inclusive. These provisions respond to the historic death of disability data, which has been one of the contributing factors to the exclusion of people with disabilities in the development and implementation of legislation and policies, including emergency response plans and preparations.³⁴ While the CRPD encourages the collection of appropriate information, including statistical and research data, to enable the formulation and implementation of policies to give effect to the Convention,³⁵ the African Disability Protocol encourages 'the systematic collection, analysis, storage and dissemination of national statistics and data covering disability to facilitate the protection and promotion of the rights of persons with disabilities'.³⁶ Two differences can be seen in these texts. First, beyond encouraging the collection of information, the African Disability Protocol also encourages analysing, storing and disseminating information.³⁷ Second, while the CRPD encourages collecting information for 'the formulation and implementation of policies to give effect to the Convention',³⁸ the African Disability Protocol encourages collecting information 'to facilitate the protection and promotion of the rights of persons with disabilities'.³⁹ Thus, the latter reimagines not only the use of statistics and information for issues beyond the Protocol, but also for the protection and promotion of the rights of persons with disabilities more broadly.

Finally, article 32 of the CRPD on international cooperation and article 33 of the African Disability Protocol on cooperation are also relevant to the development and implementation of emergency response plans and preparations which are disability inclusive. While the CRPD highlights the need for international cooperation as broadly referring to all forms of possible cooperation among state parties, the African Disability Protocol spells out the forms of cooperation among state parties. This

33 S Majiet & A Africa 'Women with disabilities in leadership: The challenges of patriarchy' (2015) 29 *Agenda* 101.

34 JH Madans, ME Loeb & BM Altman 'Measuring disability and monitoring the UN Convention on the Rights of Persons with Disabilities: The work of the Washington Group on Disability Statistics' (2011) 11 *BMC Public Health* S4. BioMed Central, AH Eide & ME Loeb 'Data and statistics on disability in developing countries' (2005) Disability Knowledge and Research Programme Executive Summary.

35 Art 31 CRPD.

36 Art 32 African Disability Protocol.

37 As above.

38 Art 31 CRPD.

39 Art 32 African Disability Protocol.

includes cooperation at international, continental, sub-regional and bilateral level.⁴⁰ Emergency relief programmes often involve some level of cooperation. Therefore, the requirements of the two instruments are that emergency relief programmes are inclusive of, and accessible to, people with disabilities when some level of cooperation is involved.⁴¹ Thus, the state party and its partners have a responsibility to ensure that their emergency response plans and preparations are disability inclusive.

In summary, both the CRPD and the African Disability Protocol set out the human rights standards which state parties should follow to ensure the protection and safety of people with disabilities during situations of risk. This includes collecting disaggregated data on people with disabilities and involving people with disabilities in decision-making processes. The African Disability Protocol also emphasises the need to allocate financial resources for the implementation of the provisions of the Protocol. As I have already mentioned in the introduction, the failure to do these things are among the main causes of the historic exclusion of people with disabilities and disability issues in emergency response plans and preparations. The next section discusses the extent to which these standards were followed during Cyclone Idai.

3 The extent to which disability issues were addressed in emergency response plans and preparations for Cyclone Idai

Cyclone Idai affected the lives and wellbeing of many people with disabilities. While it is not known how many precisely, Help and Healing International, formally known as CBM, carried out a survey and identified nearly 5 000 people with disabilities in need of humanitarian assistance in Zimbabwe and Malawi.⁴² According to Light for the World, it is estimated that over 100 000 people with disabilities were affected by Cyclone Idai in Mozambique.⁴³ However, there are no statistics for Madagascar. It is important to note that these statistics were provided by international organisations which specifically assist people with disabilities or minorities and that these organisations conducted their surveys after broader government and non-government surveys, which contained very little information about the effects of the Cyclone on people with disabilities.⁴⁴

40 Art 33 African Disability Protocol.

41 MA Stein 'Mainstreaming and accountability: (Really) including persons with disabilities in development aid and humanitarian relief programming' (2013) 31 *Nordic Journal of Human Rights* 292.

42 Hope and Healing International 'Finding and assisting survivors with disabilities: Cyclone Idai emergency rapid assessment by Hope and Healing International and its partners' (2019) <https://blog.hopeandhealing.org/wp-content/uploads/2019/07/HH-Rapid-Assessment-Cyclone-Idai.pdf> (accessed 26 October 2020).

43 Light for the World (n 4).

44 Hope and Healing International (n 42); Light for the World (n 4).

Help and Healing International reports that many of the people with disabilities who they identified in Malawi and Zimbabwe had not been captured in broader government and non-government surveys and records.⁴⁵ They had also failed to access relief aid.⁴⁶ Light for the World reports that only 1 000 people with disabilities had been identified and received assistance in Mozambique.⁴⁷ This was partially due to the government and non-government organisations using different definitions of ‘persons with disabilities’, with some of them having limited or lacking knowledge of ‘impairment types’; using diverse vulnerability criteria, some of which excluded people with disabilities based on their impairment type or its severity; collecting data at various times after the cyclone, but not making follow-ups; and excluding disabled peoples’ organisations (DPOs) in data collection and identification processes.⁴⁸ Similarly, UNICEF Zimbabwe highlighted that the failure to capture disaggregated data of children with disabilities increased the risk of failure to address their unique needs.⁴⁹ In its third situation report on the Cyclone, Unicef reported having identified and assisted 255 children with disabilities in a preliminary disability related assessment in Chimanimani, Zimbabwe.⁵⁰

The failure by governments and mainstream non-government organisations to capture people with disabilities in their surveys and records has also been regarded as an attitude problem.⁵¹ In Mozambique, Unicef was informed that mainstream organisations were not prepared to assist people with disabilities.⁵² Instead of including people with disabilities in their programmes, these organisations passed them on to disability-specific organisations:

Rather than taking up these cases themselves, they (mainstream humanitarian actors) shift responsibility towards other organisations. It seems like there is a general assumption among humanitarian actors that women and men, girls and boys with disabilities require separate services, while in fact they can also be included in their general programmes. This reflects the need to change attitudes about women and men, girls and boys with disabilities and recognise that everyone has the same basic needs with possible additional specific requirements.⁵³

45 Hope and Healing International (n 42).

46 As above.

47 Light for the World (n 4).

48 As above.

49 Unicef ‘Deafening silence on disability Cyclone Idai’ (8 May 2019) <https://www.unicef.org/zimbabwe/stories/deafening-silence-disability-cyclone-idai> (accessed 26 October 2020).

50 As above.

51 Light for the World (n 4); Unicef ‘Aid out of reach’ (2019) <https://www.unicef.org/mozambique/media/2396/file/Aid%20out%20of%20reach.pdf> (accessed 26 October 2020).

52 Unicef (n 51).

53 As above.

Despite the above challenges, however, several organisations, especially those with a disability-specific focus, collected data and information about people with disabilities and used it to address their specific needs. In addition to the above-mentioned organisations, member charities of the Disasters Emergency Committee (DEC), working in Mozambique, Zimbabwe and Malawi, collected disaggregated data at the outset and used it to identify specific groups, such as people with disabilities, and develop emergency response plans that addressed their specific needs.⁵⁴ In addition, these charities actively sought the input of the identified groups when they were designing their intervention programmes.⁵⁵ This enabled these charities to identify and address the specific needs of people with disabilities.

4 Making emergency response plans and preparations for COVID-19 disability inclusive: Drawing lessons from Cyclone Idai

The current COVID-19 pandemic places people with disabilities in a potentially more vulnerable position than the general population.⁵⁶ While they may not be inherently at a greater risk of infection because of their disability status, people with disabilities face greater risk of exclusion in respect to the extent to which emergency response plans and preparations addresses their specific situation.⁵⁷ This notwithstanding, people with disabilities with certain pre-existing medical conditions also fall in the at-risk category.⁵⁸ Therefore, measures need to be taken to ensure that the needs of people with disabilities are addressed in the emergency response plans and preparations for COVID-19. Some of the measures which countries should take are outlined below.

Many persons with disabilities were overlooked in initial relief efforts during Cyclone Idai due to the lack of disaggregated data and statistics on people with disabilities and the effects of the cyclone on their lives. Therefore, national governments should collect disaggregated data on persons with disabilities affected by COVID-19 and its effects on their lives. Furthermore, governments should conduct research into the risk factors which may have contributed to infection, including identifying any possible gaps in existing emergency response strategies and their

54 Disasters Emergency Committee (DEC) '2019 Cyclone Idai Appeal Six-Month Report' (2010) https://www.dec.org.uk/sites/default/files/dec_2019_cyclone_idai_six_mon_th_report.pdf (accessed 29 September 2020).

55 As above.

56 WHO 'Disability Considerations during the COVID-19 outbreak' (26 March 2020) <https://www.who.int/publications/i/item/WHO-2019-nCoV-Disability-2020-1> (accessed 26 October 2020).

57 As above.

58 As above.

implementation. This information can be used as feedback in the further development and implementation of emergency response plans and preparations for COVID-19, which can help make these plans and preparations more disability inclusive.

The exclusion of people with disabilities and their representative organisations during Cyclone Idai also resulted in many needs of people with disabilities going unmet. Therefore, people with disabilities and their representative organisations should be invited to provide technical support in emergency response plans and preparations for COVID-19. This will help make these plans and preparations more disability inclusive.

Finally, disability should be mainstreamed in all emergency response planning and preparation processes. Some organisations side-lined people with disabilities in their emergency relief programmes for Cyclone Idai because they did not have a specific focus on disability issues. Therefore, disability issues should be an integral part of emergency response planning and preparation processes for all state and non-state actors. This will force state and non-state actors, including international collaboration partners, to think about disability issues in the development and implementation of their emergency response plans and preparations for COVID-19.

5 Conclusion

The foregoing discussion shows that while the CRPD and the African Disability Protocol requires state parties to ensure the protection of people with disabilities in situations of risk and humanitarian emergencies, not all the emergency response plans and preparations for Cyclone Idai were disability inclusive. Consequently, many disabled people did not benefit from initial emergency relief aid. These are gaps that should be addressed in the emergency response plans and preparations for COVID-19. These gaps can be addressed by collecting disaggregated data on persons with disabilities, involving people with disabilities in decision-making processes, including through their representative organisations, and mainstreaming disability in all emergency response planning and preparation processes.

REGIONAL DEVELOPMENTS

HEALTH EMERGENCIES POST COVID-19: WHAT GUIDANCE CAN AFRICA'S DISABILITY PROTOCOL PROVIDE?

Innocentia Mgijima-Konopi and Mary Auma***

1 Introduction

Several African countries recorded their first cases of the coronavirus disease (COVID-19) in March 2020, the same month the World Health Organisation (WHO) declared it a global pandemic.¹ Within three months the virus has spread throughout the continent. By 29 December the Africa Centres for Disease Control and Prevention put the total number of COVID-19 cases in Africa at 2.6 million with 63 300 deaths recorded.² Though there are no official statistics on the number of persons with disabilities in Africa who have tested positive for or succumbed to COVID-19, the Working Group on The Rights of Older Persons and People with Disabilities in Africa in its statement on International Day of Persons with Disabilities acknowledged the potential heightened vulnerability of persons with disabilities on the continent to the pandemic reiterating that many persons with disabilities have pre-existing health conditions that may make them more susceptible to contracting the virus and experiencing more severe symptoms, leading to elevated mortality rates.³

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1 World Health Organisation (WHO) 'WHO Director-General's opening remarks at the media briefing on COVID-19' 11 March 2020 <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed 26 November 2020).

2 Coronavirus Disease 2019 (COVID-19) <https://africacdc.org/covid-19/> (accessed 29 December 2020).

3 'Statement of the Working Group on the Rights of Older Persons and People with Disabilities in Africa of the African Commission on Human and Peoples' Rights', At the Occasion of the International Day of Persons with Disabilities, 3rd December 2020.

From the start of the pandemic anecdotal evidence emerged that most government's COVID-19 responses did not fully take into account persons with disabilities. In response, several organisations who work towards combating discrimination against persons with disabilities launched the COVID-19 Disability Rights Monitor (DRM) initiative to collect, analyse and disseminate reliable quantitative and qualitative data on the impact of COVID-19 and related measures adopted by government on persons with disabilities globally.⁴ Data was collected from respondents from 134 countries through a survey conducted between 20 April and 8 August 2020. A report of the findings, Disability rights during the pandemic: A global report on the findings of the COVID-19 Disability Rights Monitor was launched in October 2020.⁵ For Africa, the monitoring report helps identify areas where states are failing to take sufficient measures to protect the rights of persons with disabilities in their response to the pandemic.

The discussion that follows focuses on aspects of the monitoring report related to gaps in the protection of right to health of persons with disabilities in Africa during the pandemic.⁶ The commentary will use the survey results to illustrate how the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol), once in effect, may provide additional guidance to states in responding more effectively to the health needs of persons with disabilities during possible further 'surges' of the COVID-19 pandemic as well as future health care emergencies.⁷ It concludes with a call for African states to expediently ratify the African Disability Protocol so it can come into force.

2 African regional instruments and the right to health of persons with disabilities during the COVID-19 pandemic

The right to health of persons with disabilities in African states, is well established under different African human rights instruments. The African Charter on Human and Peoples' Rights (African Charter) provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.⁸ It further stipulates that 'the aged and the disabled' shall have the right to special measures of protection in keeping

4 'Covid-19 Disability Rights Monitor' <https://covid-drm.org/> (accessed 21 October 2020).

5 'Disability Rights during the pandemic: A global report on the findings of the COVID-19 Disability Rights Monitor' (Disability Rights Monitor Report) (2020).

6 It is important to note that COVID-19 holds implications for a number of additional rights as well, this commentary is however limited to the right to health.

7 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) art 17.

8 The African Charter on Human and Peoples' Rights (ACHPR), art 16.

with their physical or moral needs.⁹ The African Charter on the Rights and Welfare of the Child guarantees every child the right to enjoy the best attainable state of physical, mental and spiritual health.¹⁰ In addition to these two instruments the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women obliges states to ensure that the right to health of women, is respected and promoted.¹¹

Building on these existing regional instruments, the African Disability Protocol makes extensive provision for the protection of the right to health of persons with disabilities. Adopted on 30 January 2018 by the African Union Heads of States,¹² the African Disability Protocol is the culmination to date of the African Union's efforts to create a framework to safeguard the human rights of persons with disabilities on the continent. The potential of the Protocol to contribute to fostering a more inclusive and equitable society in which the human rights of persons with disabilities are respected is yet to be realised. It has not yet attained the 15 ratifications required for it to come into force.¹³

Many of the provisions in the African Disability Protocol mirror the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁴ For instance, using language considerably similar to article 25 of the CRPD, article 17 of the African Disability Protocol guarantees the recognition of the right of every person with a disability to the highest attainable standard of health and requires states parties to take positive steps towards its realisation. There are aspects of article 17 of the Protocol that differ from the CRPD. The African Disability Protocol enjoins states to ensure that 'health care services are provided using accessible formats and that communication between service providers and persons with disabilities is effective'.¹⁵ This obligation is not explicitly set out in the CRPD but rather implied in article 9 on accessibility.¹⁶ Similarly, the obligation on states to guarantee that persons with disabilities are provided with support in making healthcare decisions stated in the Protocol is implied under article 12 of the CRPD which deals with equal recognition before the law.¹⁷ The Protocol by

9 (n 8) art 18.

10 African Charter on the Rights and Welfare of the Child, art 24.

11 Protocol to the African Charter on Human and Peoples' Rights and on the Rights of Women in Africa, art 14.

12 African Disability Protocol (n 7).

13 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 18 December 2020). Nine countries have signed the Protocol at the time of writing, namely Angola, Burkina Faso, Cameroon, Central African Republic, Gabon, Mali, Rwanda, South Africa and Togo.

14 UN Convention on the Rights of Persons with Disabilities (UNCRPD) UN Doc A/RES/61/06 (2006).

15 African Disability Protocol (n 7) art 17 (f).

16 UN Committee on the Rights of Persons with Disabilities, General Comment No 2 (2014), Article 9: Accessibility para 40.

17 CRPD (n 14) art 12(3).

drawing out these obligations puts emphasis on as well as broadens the understanding of these rights.

Article 17 of the African Disability Protocol also contextualizes the right to health to the African context where many people continue to access healthcare services from informal health care providers.¹⁸ It extends the ambit of protection to persons with disabilities accessing informal health services by requiring states to guarantee 'informal health services do not violate the rights of persons with disabilities'.¹⁹ Lastly the Protocol unlike the CRPD speaks to the need for non-stigmatising health campaigns and provision of pain relieving drugs to persons with disabilities which alludes to some of the experiences on the continent.²⁰

3 Identifying gaps in the protection of right to health of persons with disabilities in Africa during the COVID-19 pandemic

3.1 Summary of data collated by the Disability Rights Monitor Research from Africa

The DRM survey received 397 responses from 34 countries in Africa.²¹ In terms of regional disaggregation Eastern Africa had the highest number of responses (185), followed by Western Africa (109).²² Figure 1 below shows responses per country. The highest number of responses came from South Africa (83), Nigeria (63) and Uganda (42).

18 M Sudhinaraset, M Ingram, HK Lofthouse & D Montagu 'What is the role of informal healthcare providers in developing countries? A systematic review.' (2013) 8 (2) PLoS One.

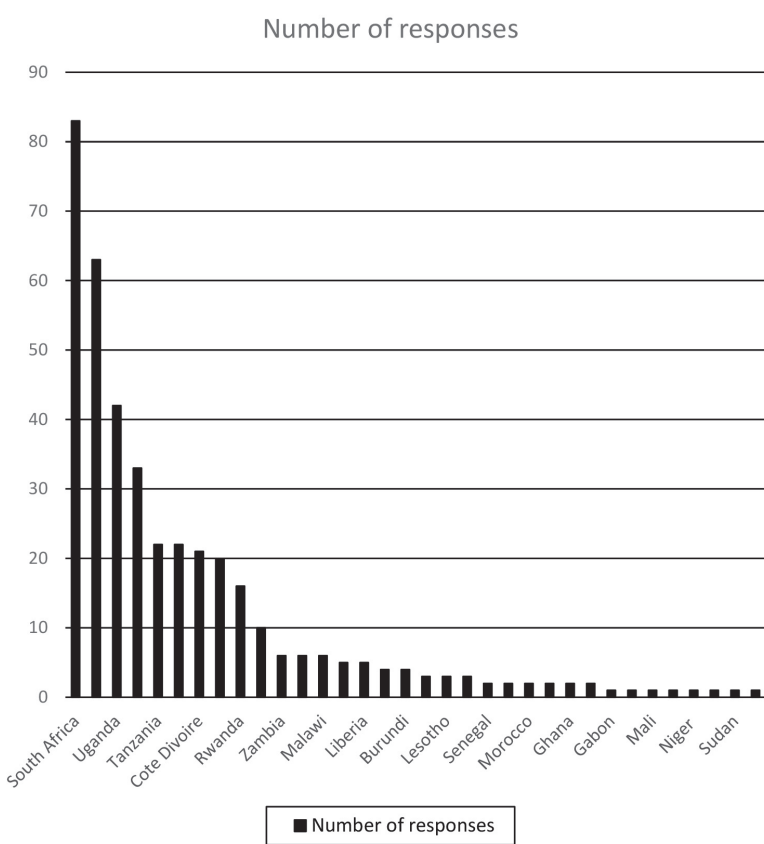
19 African Disability Protocol (n 7) art 17(2)(i).

20 African Disability Protocol (n 7) art, 17(2)(h).

21 Covid-19 Disability Rights Monitor (n 4). A comprehensive discussion of the methodology of the research falls outside the scope of this commentary but can be found on page 16-21 of the report.

22 Disability Rights Monitor Report (n 5) 19.

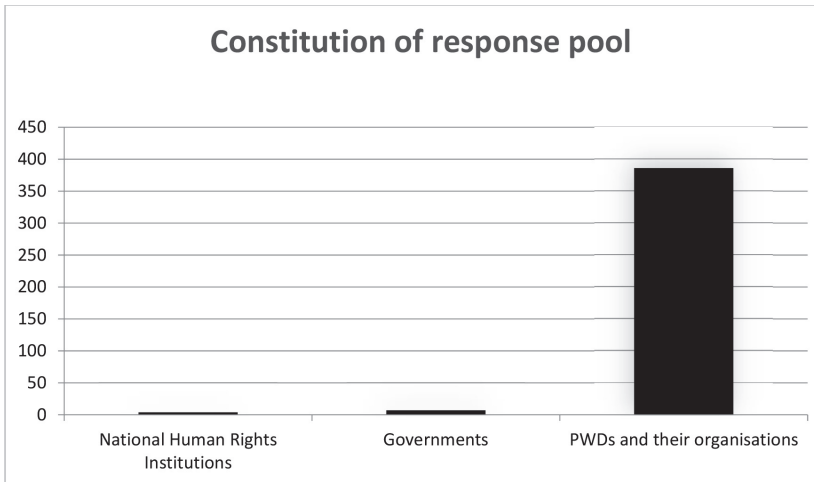
Figure 1: Response per country



3.2 Composition of the response pool

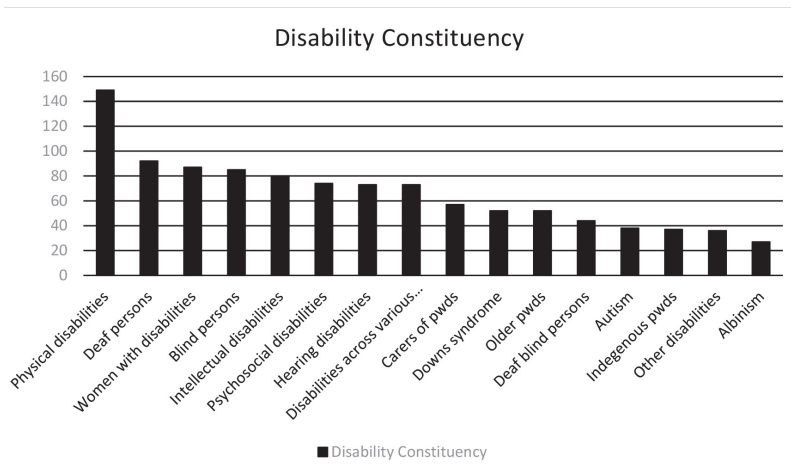
The majority of the responses received as shown in Figure 2 were from persons with disabilities, their families, carers and organisations (386). There were only (7) official responses that came from governments and (4) from national human-rights institutions.

Figure 2: Respondents by identity



The respondents categorised themselves under different disability constituencies. The largest constituency represented was persons with physical disabilities (149), followed by deaf persons (92) as set out in Figure 3 below.

Figure 3: Disability constituency²³



23 The survey allowed for respondents representing organisations to select multiple constituencies where they represented more than one.

4 Access to medication and essential healthcare services by persons with disabilities in Africa during the COVID-19 pandemic: Survey findings

Though the degree and manner differed, several responses indicated that access to medical-care facilities, services and medication had been severely restricted or limited for persons with disabilities during the pandemic in their countries. This was predominantly linked to a suspension of disability-specific health services in many public hospitals at the onset of the pandemic, inflation and the rising cost of living linked to COVID-19; shortages in medication including psychiatric medication; denial of reasonable accommodation in accessing services and pre-existing poor access to good quality affordable health services in many countries.²⁴ The discussion that follows examines certain of these key findings.

4.1 The impact of rising cost of living on medical care

Respondents from Uganda, Nigeria, Sierra Leone, Zimbabwe, Kenya and Nigeria said that the rising cost of living specifically linked to COVID-19 in their countries meant that many persons with disabilities whose livelihoods were already fragile before the onset of the pandemic could not afford medical care.

In a bid to curtail the spread of COVID-19 governments throughout the region adopted far-reaching measures including the restriction of movement of people and goods, the closure of international borders, lockdowns and curfews.²⁵ These measures have had a substantial adverse impact in many countries on both national economic growth and individual livelihoods.²⁶ For persons with disabilities in Africa the impact of this economic downturn was compounded by the fact that many in this group came into the COVID-19 crisis already experiencing barriers that precluded them from effectively participating in the economic activities of their countries.

As echoed by ILO's policy brief issued in June 2020, prior to the onset of this crisis a high number of persons with disabilities compared to those without were less likely to be employed or have decent employment conditions, more likely to be in the informal economy and likely not

24 Disability Rights Monitor Report (n 16) 43.

25 'COVID-19 and the World of Work: Ensuring the inclusion of persons with disabilities at all stages of the response' (2020) ILO policy brief.

26 'Six charts show how COVID-19 is an unprecedented threat to development in Sub-Saharan Africa' *IMF News* 13 April 2020 <https://www.imf.org/en/News/Articles/2020/04/13/na0413202-six-charts-show-how-covid-19-is-an-unprecedented-threat-to> (accessed 15 Nov 2020).

adequately covered by social protection.²⁷ The DRM survey showed that persons with disabilities who earn their livelihoods in the informal sector in particular were badly affected by the disruption in economic activities during the pandemic.²⁸ A respondent from Nigeria pointed out that ‘the increase in the cost of living brought about by COVID-19 has made life very unbearable for persons with disabilities who are self-employed, their families and caregivers’.²⁹

4.2 Access to disability-specific health services during the pandemic

Respondents reported that at the onset of the pandemic disability specific-health services (i.e rehabilitation services and therapies etc.) in a number of their countries’ public hospitals had been suspended to prioritise testing and treatment of COVID-19 patients. One of the respondents from South Africa expressed concern that ‘children with disabilities could not access early intervention programmes as all programmes has been suspended at hospitals and clinics as the government prioritised services to Covid-19 only’. A DPO reported that a number of hospital departments that repair wheelchairs and other assistive devices were closed. While governments prioritised the treatment of COVID-19 patients they failed to ensure that people with disabilities continue to access these crucial services. The impact of this disruption on the health of persons with disabilities affected is yet to be fully understood, but it could lead to mid to-long term worsening of existing conditions and late diagnosis of new impairments.

4.3 Access to medication

The shortages in psychiatric medication in Africa have been well documented, however the advent of the COVID-19 pandemic has made the shortages more acute with medication being out of stock or in short supply in many countries.³⁰ Shortages of medication and related community based mental health services for persons with psychosocial disabilities during the pandemic was a concern for respondents from Uganda, South Africa, Zimbabwe and Kenya. DPO’s from these countries reported that some people with psychosocial disabilities in these countries

27 COVID-19 and the World of Work (n 25).

28 ‘COVID-19 Disability Rights Monitor: Irene from Kenya’ <https://www.youtube.com/watch?v=11J7Y02fFVA> (accessed 17 December 2020); ‘COVID-19 Disability Rights Monitor: Sithembile from Eswatini’ <https://www.youtube.com/watch?v=0CH0xlcTv70> (accessed 17 December 2020).

29 The results from the survey show that the strict and indiscriminate enforcement of lockdown and curfew measures, often accompanied by police brutality, also made persons with disabilities and their families afraid and at times unable to leave their homes to access health services and other essential supplies.

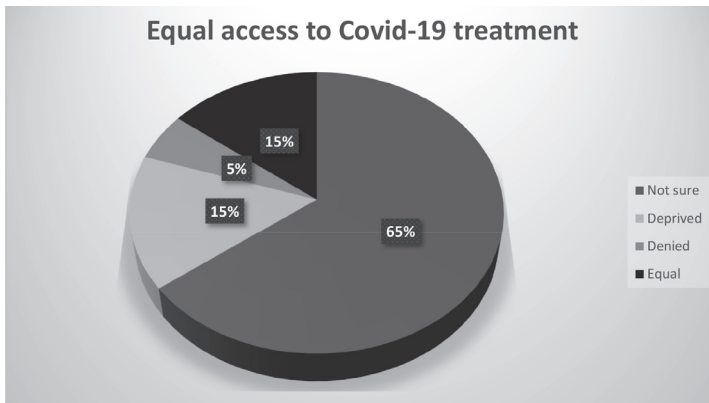
30 C Sunkel & M Viljoen ‘Shortage of psychiatric medications in South Africa’ (2017) 4(1) page 15-16. [https://doi.org/10.1016/S2215-0366\(16\)30422-9](https://doi.org/10.1016/S2215-0366(16)30422-9) (accessed 18 December 2020).

had stopped taking the medication prescribed to them because they were unable to access it. In other instances, they received different medication to the one prescribed as a substitute. DPO's expressed fears that these shortages in psychiatric medication may result in deterioration of the mental health of persons with psychosocial disabilities and possible relapses. In countries like Uganda where mental-health services are primarily accessed in psychiatric institutions and not community based, the closure of these institutions during the lockdown left persons who experienced a mental-health crisis during this period without help. The absence of additional measures to mitigate the psychological stress brought about by the pandemic and accompanying measures such as social isolation on both those with pre-existing mental health conditions and without was also mentioned.

4.4 Access to prevention, testing, treatment of COVID-19

With regards to whether persons with disabilities in Africa were able to obtain information about prevention of COVID-19 in accessible formats, personal protective equipment and treatment of COVID-19 on an equal basis with others, 61 per cent of respondents (273) expressed uncertainty as to whether persons with disabilities in their countries had access to COVID treatment on an equal basis with others. Twenty-three respondents were of the view that persons with disabilities were being deprived of treatment, whilst 61 respondents believed that persons with disabilities had equal access to treatment.

Figure 4: Access to COVID-19 treatment



The data from the survey showed that most countries had made a commendable attempt to ensure that persons with disabilities could access information on COVID-19 as well as the countries' response in accessible formats including sign language and audio formats. A number of respondents however pointed out that information provided was generic

and not disability specific. Concern was raised regarding Hospital triage guidelines. Fears arose that the application of triage protocols result in persons with disabilities being disadvantaged from or not prioritised to receive lifesaving resources, such as ventilators, where there are shortages.³¹

5 How the African Disability Protocol may guide states in protecting the right to health of persons with disabilities in future pandemic

There are a select set of obligations that will arise from the Protocol, once it comes into operation, which could be particularly relevant to the possible further ‘surges’ of the COVID-19 pandemic and future health care emergencies. Firstly, the Protocol recognizes, in the Preamble of article 17 that persons with disabilities have the right to the enjoyment of the highest attainable standard of health. It requires states to ensure persons with disabilities have access to health facilities, goods and services on a non-discriminatory basis.³² Similar to the CRPD discrimination on the basis of disability is defined in article 1 of the Protocol as ‘any *distinction*, exclusion or restriction on the *basis of disability* which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal *basis* with others.’³³ The Protocol in addition also stipulates that the denial of reasonable accommodation itself constitutes discrimination on the basis of disability.³⁴

In interpreting the right to health in the African Charter, the African Commission on Human and Peoples’ Rights (African Commission) has stressed that the minimum core obligations imposed on a state are to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups.³⁵ The African Commission has stated that states are obliged to ensure that national plans prioritise members of vulnerable and disadvantaged groups in access to healthcare and take steps to ensure that individuals, especially those belonging to vulnerable and disadvantaged groups, are not prevented from accessing healthcare services and goods.³⁶ The African Commission has further reiterated that states are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for

31 EL McKinney, V McKinney & L Swartz ‘COVID-19, disability and the context of healthcare triage in South Africa: Notes in a time of pandemic’ (2020) 9 *Africa Journal of Disability* 2.

32 African Disability Protocol (n 7), art 17(1) & 17(2)(a).

33 African Disability Protocol (n 7), art 1 (our emphasis) & CRPD, art 2.

34 African Disability Protocol (n 7), art 1 definition of discrimination on the basis of disability.

35 African Commission ‘Principles and guidelines on the implementation of economic, social and cultural rights in the ACHPR’ para 67a.

36 African Commission (n 35) para 67x.

all persons (including persons with disabilities) to health services.³⁷ The African Children's Committee also echoed a similar opinion as the African Commission in the case of *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*.³⁸

The Protocol therefore once operational reinforces the existing duty of states to prioritise the health needs of persons with disabilities as they constitute a vulnerable group, particularly it could be inferred during health care emergencies where such vulnerability is heightened. Healthcare services including services targeted at addressing those health emergencies ought to be provided on an equal basis without discrimination on the ground of disability. States have a duty of care to provide persons with disabilities with the reasonable accommodation they need in accessing these services. The Protocol places a special emphasis on the importance of providing services using accessible formats.

The Protocol once in force will reinforce the duty of states to provide persons with disabilities with the same range, quality and standard of healthcare as provided to other people. Much like in article 25(a) of the CRPD article 17(2)(a) of the Protocol speaks to states' obligations to ensure that where the state has systems of free and affordable healthcare people with disabilities should be able to *access* these on an equal basis with others without discrimination. States therefore must ensure that persons with disabilities do not receive inferior or substandard healthcare compared to fellow citizens during pandemics. Healthcare personnel are required to provide care of the same quality to persons with disabilities as others. Health care policies and practices developed by states during health emergencies to guide healthcare workers on which patients to prioritise to receive life-saving resources, such as admission to the intensive care unit and a ventilator, in the event of shortages may not exclude or disadvantage persons with disabilities on the basis of their disability.

6 Conclusion

The Protocol as highlighted here has the potential once in force to corroborate some key obligation under the right of health in both the CRPD and African Charter amongst others and assist in guiding states to avoid some of the violations witnessed under the current pandemic. Its potential will remain unrealized until African states ratify it.

37 *Monim Elgak & Others (represented by FIDH & OMCT) v Sudan* Communication 379/09, African Commission on Human and Peoples' Rights, 15th Extra Ordinary Session, 07-14 March 2014 (2014) para 136.

38 Communication 002/09, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011.

BOOK REVIEW

OCHE ONAZI: *AN AFRICAN PATH TO DISABILITY JUSTICE: COMMUNITY, RELATIONSHIPS AND OBLIGATIONS* (2020)

*Dianah Msipa**

Springer Nature Switzerland 1-179; i-xix. ISBN 978-3-030-35850-1

1 Introduction

The exclusion of persons with disabilities is a common phenomenon around the globe and the disability-rights movement has and continues to seek to ensure their inclusion in all aspects of life on an equal basis with others. Human rights are regarded as the most effective way to achieve this goal and the efforts of the disability-rights movement over decades culminated in the adoption of a disability-specific human rights instrument, the Convention on the Rights of Persons with Disabilities (CRPD), which came into force in May 2008.¹ Organisations of persons with disabilities participated in the drafting of the CRPD in order to give context to the particular experience of persons with disabilities across the globe and formulate a human rights instrument that reflects and responds to the lived experience of persons with disabilities.² The majority of African countries, 48 out of 54 countries, have signed and ratified the CRPD, and 49 African countries have signed and ratified the Optional Protocol to the CRPD.³ Ten years after the CRPD came into force, the

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1 GA Res 61/611, adopted on 13 December 2006, entered into force on 3 May 2008.

2 O Onazi *An African path to disability justice: Community, relationships and obligations* (2020) 41.

3 United Nations Treaty Collection 'Convention on the Rights of Persons with Disabilities: Status as at 17 August 2020' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 17 August 2020).

African Union adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) in recognition of the unique rights experience of persons with disabilities in Africa.⁴ In spite of the existence of two disability-specific international human rights instruments, the CRPD and the African Disability Protocol, the treaty obligations they created have not translated into social change in Africa.⁵ The subject of this review – *An African path to disability justice: Community, relationships and obligations* – is a book written by African philosopher, Oche Onazi. The book seeks to explain why these human rights instruments have not brought about social change in Africa.

Onazi opines that the failure to achieve disability justice in Africa is not due to a lack of relevant laws and policies, but is because the existing human rights laws and policies fail to challenge negative cultural and social beliefs about disability.⁶ The author recognises that culture has a powerful influence on how impairments are defined and perceived and on the inclusionary and exclusionary responses to them.⁷ Much of the exclusion experienced by persons with disabilities is due to cultural perceptions of disability.⁸ These cultural perceptions also influence the attitudes of law and policy makers who are primarily responsible for addressing the exclusion of persons with disabilities in society.⁹ However, human rights literature on social change fails to engage with local factors including beliefs and misconceptions that contribute to the exclusion of persons with disabilities.¹⁰ Furthermore, this literature focuses on the normative power of human rights and overlooks the potential for positive African moral and ethical values to enrich human rights discourse and contribute to remedying the systemic exclusion of persons with disabilities.¹¹ Therefore, negative cultural perceptions of disability remain unchallenged from the perspective of positive ethical and moral African standards.¹²

The situation is further exacerbated by the fact that most theories of justice are developed from a Western perspective with Western experiences and cultural reference points in mind.¹³ As a result, these theories fail to account for the diversity of injustices faced by people, including persons with disabilities, in different parts of the globe. In order

4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, adopted by the African Union on 29 January 2018.

5 Onazi (n 2) 40.

6 Onazi (n 2) 10.

7 Onazi (n 2) 11.

8 As above.

9 As above.

10 As above.

11 As above.

12 Onazi (n 2) 12.

13 As above.

to address these injustices, there is a need to develop theories that reflect the diverse intellectual perspectives from around the world.¹⁴

In his book, Onazi seeks to broaden legal and political concepts on disability justice to take into account neglected African intellectual perspectives.¹⁵ Disability justice is understood as the conceptual framework for understanding and analysing the inclusion and exclusion of persons with disabilities in various aspects of life.¹⁶ The author responds to the lack of an adequate African theory on disability justice by developing his own African legal philosophy of disability justice, based on the relational concept of community.¹⁷ The scope of Onazi's book is limited to outlining the structure of an African legal philosophy on disability justice and does not go as far as addressing the practical application of the philosophy in evaluating laws, policies and practices and in creating new ones.¹⁸

2 Overview of the book

The book comprises seven chapters. In Chapter One, titled 'Introduction', Onazi explains two fundamental aspects of African communitarian philosophy, which he relies on and modifies to develop his new African legal philosophy of disability justice. The first aspect is community. Onazi's philosophy is based, like all African communitarian philosophies, on the ideal of community. Though the ideal of community is a central part of African communitarian philosophy, there are two different conceptions of community, the group-based conception of community associated with the work of Menkiti, and the relational conception of community associated with the work of Thadeus Metz.¹⁹ The author prefers and builds on Metz's conception of community, which prioritises relationships between people, regardless of whether or not they belong to a group, over Menkiti's conception of community, which prioritises the group and treats it as superior to individuals.²⁰ For Onazi, a philosophy of community that prioritises relationships between individuals holds greater promise for the inclusion of persons with disabilities compared to a philosophy that gives primacy to the group.

The second aspect is personhood. African communitarian philosophy treats personhood as the 'primary attribute of moral status and moral

14 As above.

15 Onazi (n 2) 13.

16 Onazi (n 2) 9.

17 Onazi (n 2) 4.

18 As above.

19 I Menkiti 'Person and community in African traditional thought' in R Wright (ed) *African philosophy: An introduction* (1984) 171-181. T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321.

20 Onazi (n 2) 2.

consideration'.²¹ A distinction is drawn between persons and human beings and persons are ascribed a moral status that is superior to human beings.²² The basis for the higher moral significance ascribed to persons over human beings is the capacity to participate in mutual reciprocal ethical obligations.²³ Personhood is earned by individuals through discharging a number of ethical obligations to the community or to each other.²⁴ For example, infants begin only as human beings with no moral function and are only transformed into persons through the performance of duties to the community and to others. Conversely, individuals can be deprived of personhood through an inability to discharge their obligations to the community or to one another.²⁵ For Onazi, this conception of personhood, found in both the group-based and relational conceptions of community is problematic for some persons with disabilities, particularly those who lack or have limited capacity to discharge their obligations to others, such as persons with cognitive and severe disabilities.²⁶

In Chapter Two, titled 'Outline of an alternative research agenda on disability justice', Onazi justifies the need to develop an African legal philosophy of disability justice and suggests two main revisions to the relational conception of community to make it inclusive of persons with disabilities. The author notes that African communitarian philosophy, including the group-based conception of community and his preferred relational conception of community, excludes persons with disabilities. This is mainly because of the connection it makes between personhood and the ability to discharge reciprocal obligations, which has the effect, intended or not, of excluding persons with disabilities who either lack or have limited capacity to discharge certain duties.

Onazi suggests two main revisions to the relational conception of community to overcome this conceptual challenge.²⁷ The first revision involves re-defining the concept of personhood.²⁸ In order to do this, the author relies on Geoffrey Tangwa's conception of personhood, which does not distinguish between persons and human beings.²⁹ Tangwa rightly contends that personhood is an attribute of all human beings and is not dependent on the ability to perform obligations to others.³⁰ Furthermore, a human being's moral worth is constant in spite of one's mental, physical or socio economic standing.³¹ The author therefore, suggests a concept of

21 As above.

22 Menkiti (n 19) 176.

23 As above.

24 As above.

25 Menkiti (n 19) 171.

26 Onazi (n 2) 3.

27 Onazi (n 2) 33.

28 Onazi (n 2) 25.

29 G Tangwa 'The traditional African perception of a person: Some implications for bioethics' (2000) 30 (5) Hastings Centre Report 39.

30 As above.

31 Tangwa (n 29) 40.

personhood that neither makes a moral distinction between human beings and persons nor ranks human beings according to features such as age, disability etc.³² For Onazi, this conception of personhood has the potential to lead to the recognition of both the moral status and equal humanity of persons with disabilities.³³

The second revision involves redefining the nature of obligations. Onazi relies on Tangwa's work once again and suggests a departure from symmetrical or mutually reciprocal obligations to asymmetrical obligations that do not require reciprocity.³⁴ Tangwa argues that moral consideration is not dependent on reciprocity, therefore obligations are wider and more inclusive in relation to the people to whom they are owed.³⁵ In contrast with conventional literature, which perceives personhood as constituted by mutually reciprocal obligations, according to Tangwa, the only criterion for receiving the obligations of others is being a human being.³⁶ In other words, obligations are owed, even to people who are not capable of reciprocation.³⁷ Furthermore, Onazi opines that both the group and relational conceptions of community anticipate obligations that are altruistic in nature, such as compassion, care, charity, generosity, benevolence, kindness, help, respect, sacrifice and hospitality amongst others.³⁸ The author proceeds to argue that because altruism involves 'heroic and self-sacrificial acts of helping, which are undertaken without the prospect of direct and indirect reward', then asymmetry is a more compatible concept compared to mutual reciprocity.³⁹ For Onazi, personhood premised on asymmetrical obligations is capable of including persons with disabilities who either lack or have limited capacity for reciprocation.⁴⁰

Chapter Three, titled 'Disability justice in an African context: The human rights approach', as the title suggests, deals with the human rights approach to disability justice with particular emphasis on the African Disability Protocol. Onazi considers the potential of the African Disability Protocol to provide an alternative path to disability justice utilising positive African values to counter negative and harmful social and cultural practices on disability. The author opines that the transformative potential of the African Disability Protocol is diluted by its failure to adequately respond to several key African issues.⁴¹ For instance, though the Protocol

32 Onazi (n 2) 25.

33 As above.

34 Onazi (n 2) 27.

35 Tangwa (n 29) 40.

36 Tangwa (n 29) 39.

37 As above.

38 Onazi (n 2) 27.

39 J Draguns 'Altruism in its personal, social, and cultural contexts: An introduction' in D Vakooh (ed) *Altruism in cross-cultural perspective, international and cultural psychology* (2013) 1 at 2.

40 Onazi (n 2) 4.

41 Onazi (n 2) 59.

is clear about the duties owed by persons with disabilities, it does not address the critical issue of the duties owed to persons with disabilities in order to remedy the exclusions and injustices they face.⁴² Secondly, though the African Disability Protocol begins by making a statement on extreme poverty in Africa, it fails to make specific provisions to address this that go beyond the provisions already in the CRPD on the interaction between poverty, development and disability.⁴³ Furthermore, the issue of albinism is only mentioned in the Preamble and is not present elsewhere in the Protocol.⁴⁴ Finally, the Protocol has no provision on the right of persons with disabilities to choose their residence and nationality, which is surprising given that persons with disabilities are frequently denied citizenship.⁴⁵ The author concludes that the African Disability Protocol is therefore, unlikely to provide an alternative path to disability justice.

In Chapter Four, titled ‘Disability justice in legal and political philosophy: Is the concept of community a missing ideal?’, Onazi analyses Western philosophies on disability justice, paying particular attention to Martha Nussbaum’s capabilities approach, in an effort to evaluate the extent to which it encompasses the concept of community. The author concludes that it is not completely incompatible with the concept of community, because Nussbaum’s list of capabilities is best appreciated through a relational or collective lens. Nevertheless, its underpinning values of individualism are in tension with its relational elements. There is therefore, a need for an alternative approach.

In Chapter Five, titled ‘Disability justice in an African legal philosophical context’, the author begins by evaluating whether an African philosophical foundation for disability justice exists in the African literature on customary justice, pluralist justice and relational justice. He concludes that none of these concepts adequately provide for disability justice. Onazi dedicates the rest of the chapter to developing an African legal philosophy of disability justice comprised of the values of community, relationships and asymmetrical obligations. This philosophy serves as a criterion to evaluate existing legal and political institutions or to create new ones that are responsive to the needs of persons with disabilities. According to the proposed legal philosophy of disability justice, the injustices experienced by persons with disabilities indicate a breakdown of or exclusion from relationships in each community. The philosophy enables the creation of new legal and political institutions that repair severed relational ties between persons with disabilities and the communities that exclude them.

42 African Disability Protocol, art 31.

43 Onazi (n 2) 59.

44 As above.

45 As above.

In Chapter Six, titled 'Disability justice in practice: Instituting a new public culture of obligations', Onazi addresses the nature of obligations arising from the proposed African legal philosophy of disability justice. Specifically, he explores what the asymmetrical obligations would look like in practical terms. As a starting point, and as part of a wider legal and political reform agenda aimed at achieving disability justice,⁴⁶ Onazi posits that civic and citizenship education is required to address negative social and cultural attitudes against persons with disabilities.⁴⁷ The author explains that the sort of civic and citizenship education he envisions is best delivered through disability simulations, which can involve a wide range of methods such as the use of wheelchairs, being immobilised somehow, or being fed by another person⁴⁸ in order to help people to better understand the experience of disability and reduce individual prejudice.⁴⁹ It is important to note that though they can be utilised by adults who are not in formal education, disability simulations remain optional. The more difficult question is how to legally enforce altruistic values such as generosity, benevolence, compassion, care and help?⁵⁰ For Onazi, the answer to this question is in using taxation as a bridge from moral obligations to legal obligations⁵¹ and as a means to channel obligations to persons with disabilities.⁵² Taxation is able to achieve this because it is both a moral and a legal obligation.⁵³ The author favours the use of a hypothecated tax as the most ideal form of taxation to use to discharge obligations to persons with disabilities.⁵⁴ Hypothecation refers to 'directing the revenue from some tax to funding of some relatively narrow set of policies'.⁵⁵ In this context, hypothecated taxation would involve re-directing a revenue from a form of taxation such as income tax, taxes on airlines, taxes on alcohol and cigarettes to fund a national disability service, which will in turn distribute the proceeds of the hypothecated taxation scheme to meet the diverse needs of persons with disabilities.⁵⁶ Onazi acknowledges that there is still a need to carry out further research on the full implications of the application of the theory.

Chapter Seven, titled 'Conclusion', concludes the book by reiterating the main arguments set out in the book which will not be recounted here to avoid repetition.

46 Onazi (n 2) 151.

47 As above.

48 Onazi (n 2) 150.

49 A Silverman et al 'Stumbling in their shoes: Disability simulations reduced judged capabilities of disabled people' *Social Psychological and Personality Science* (2015) 6 (4) 464.

50 Onazi (n 2) 151.

51 Onazi (n 2) 153.

52 Onazi (n 2) 151.

53 E Seligman *Essays in taxation* (1925) 1-18.

54 Onazi (n 2) 159.

55 D Halliday 'Egalitarianism and consumption tax' in H Gaisbauer et al (eds) *Philosophical explorations of justice and taxation* (2015) 119 at 128.

56 Onazi (n 2) 159.

3 Significance of the book

Onazi highlights gaps in existing literature and explains how these gaps result in the continued exclusion of persons with disabilities in Africa from various spheres of life. First, the author notes that various laws and policies on disability rights, including the disability-specific human rights instruments such as the CRPD and the African Disability Protocol, have failed to produce the desired social change in Africa. This is because the literature on human rights is based on Western values and does not acknowledge diverse cultures in different parts of the world, including in Africa, and the influential role culture plays in the exclusion of persons with disabilities. Consequently, the literature fails to take into account the potency of positive African beliefs and values to bring about social change.

Existing literature on theories of justice, most notably Martha Nussbaum's capabilities approach, do not adequately encompass the African values of community and therefore, may not sufficiently address the unique needs of Africans with disabilities.

Significantly, the author also notes that existing literature on African communitarian philosophies exclude persons with disabilities due to its notion of personhood that is inextricably linked to the ability to discharge reciprocal obligations. Persons with disabilities who either lack or have limited capacity to discharge reciprocal obligations are deprived of the moral status of personhood resulting in their exclusion.

These gaps provide the author with a justification to develop a new African legal philosophy of disability justice, which is the most significant contribution the book makes. The proposed philosophy remedies the exclusionary effect of African communitarian philosophies by redefining personhood and reimagining the nature of obligations while maintaining the ideal of community that is central to African communitarian philosophies. In contrast with the literature on human rights, Onazi's proposed philosophy makes use of positive African values to bring about social change and achieve inclusion for Africans with disabilities in different spheres of life.