

LEGAL CAPACITY OF PARTIES WITH INTELLECTUAL, PSYCHO-SOCIAL AND COMMUNICATION DISABILITIES IN TRADITIONAL COURTS IN KWAZULU-NATAL

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Summary

According to the Committee on the Rights of Persons with Disabilities, article 12 of the Convention on the Rights of Persons with Disabilities specifies that all people everywhere have a right to equal recognition before the law and that there are no circumstances in which this right may be limited. However, General Comment 1 of the CRPD Committee indicates that globally persons with cognitive and psycho-social disabilities are frequently denied legal capacity. This article sets out to explore the current situation and legal imperatives regarding the legal capacity of persons with intellectual, psycho-social or communication disabilities in traditional courts in KwaZulu-Natal. Traditional courts operate in some rural areas of South Africa and are presided over by a chief and a traditional council. These traditional courts are the closest and cheapest dispute resolution forum in rural areas and utilise restorative justice principles. The legal test for mental and legal capacity in formal courts is not applied in traditional courts. This article reports on research conducted by an NGO in KwaZulu-Natal that found evidence of negative attitudes and a lack of knowledge regarding accessibility and reasonable accommodation among traditional leaders. In these courts, persons with disabilities are not accepted as equal before the law. In some proceedings in traditional courts, an adult with a disability (male or female) is treated as a minor and is required to be represented by a parent or a male member of the family without a disability. A short summary of pertinent aspects of the Traditional Courts Bill indicates the scope for improvement in relation to full participation and equality before the law. We submit that South Africa's implementation of the relevant international and regional law obligations

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under the CRPD and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities is found wanting, including a lack of appropriate training of traditional court personnel and a lack of awareness of the equal recognition of legal capacity among families supporting persons with disabilities.

1 Introduction

According to the Committee on the Rights of Persons with Disabilities (CRPD Committee), the Convention on the Rights of Persons with Disabilities (CRPD) specifies that

the right to equal recognition before the law is operative 'everywhere'. In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.¹

The Committee specifically notes that the denial of legal capacity of persons with cognitive (intellectual) and psycho-social disabilities occurs disproportionately worldwide.²

In South Africa, persons with disabilities face multiple and intersecting discrimination – on the basis of their disability, accentuated by their sex or gender and sexual orientation, and economic status.³ Persons with disabilities are furthermore treated differently based on the nature of their disability.⁴ For example, persons with psycho-social disabilities (also referred to as mental illness) can be dehumanised to the point of ostracism due to the stigma attached to the impairment.⁵ This is the case within communities, and also within the legal system.

The vestiges of discrimination against persons with psycho-social, communication and intellectual disabilities, in particular on the basis of race, have continued long after colonialism and apartheid officially ended.⁶ Remote geographic locations and illogical demarcations of traditional areas perpetuate isolation. Discrimination faced by persons with disabilities has been considered a 'social-spatial process that isolates and restricts them to the home, where household-level social relations

1 CRPD Committee General Comment para 5.

2 CRPD Committee (n 1) para 9.

3 I Grobbelaar-Du Plessis 'African women with disabilities: The victims of multi-layered discrimination' (2007) 22 *South African Public Law* 405.

4 MA Sukhai & CE Mohler *Creating a culture of accessibility in science* (2016) 18-20.

5 F Mahomed 'Stigma on the basis of psychosocial disability: A structural human rights violation' (2016) 32 *South African Journal on Human Rights* 496.

6 AR Chapman & LS Rubenstein *Human rights and health: The legacy of apartheid* (1998) 95.

determine [their] access to structurally determined life opportunities'.⁷ This reality plays out in urban-rural divides in South Africa.

Zulu culture historically links disability to ancestral beliefs and 'the lack of sufficient immunity and strength to combat against the harming influence of supernatural powers'.⁸ Also, 'cultural beliefs about disability ... easily translate into pity, overprotection and the exclusion of disabled people from opportunities to realise their individual capabilities'.⁹ Isolation is experienced by persons with disabilities due to exclusion and segregation from community life.¹⁰ This in turn impacts on the ability to actualise opportunities to access not only community services and community life, but also legal dispute resolution mechanisms.

The closest and least costly dispute resolution forum in rural areas are the chief's and headmen's courts (traditional courts).¹¹ What are known as 'traditional courts' today have had many guises under colonialism and apartheid and, similarly, 'traditional authorities' or 'traditional communities' are politically loaded terms devised after decades of flux in the governance of African peoples in South Africa.¹² Traditional courts are comprised of a chief (*inkosi*), headmen or women (*izinduna*) and members of the traditional council.

A traditional council is a council established under the Traditional Leadership Government Framework Act 41 of 2003 (TLGF Act) for a period of five years, with members 'selected' by the senior traditional leader in terms of the community's customs, and other members of the community democratically 'elected' and constituting 40 per cent of the council.¹³ The first group thus refers to the *inkosi* and *izinduna* of the particular community; while the second group includes elected community members. The legislation requires one-third of the members of the council to be women.¹⁴

7 A Gartrell & E Hoban "'Locked in space": Rurality and the politics of location' in S Grech & K Soldatic (eds) *Disability in the global south: The critical handbook* (2016) 348.

8 J Hanass-Hancock 'Invisible: The notion of disability in the context of HIV/AIDS in KwaZulu-Natal, South Africa' unpublished PHD thesis, University of Berlin, 2008 127.

9 E Munsaka & H Charnley "'We do not have chiefs who are disabled": Disability, development and culture in a continuing complex emergency' (2013) 28 *Disability and Society* 767.

10 P Modiba et al 'Profile of community mental health service needs in the Moretele district (North West Province) in South Africa' (2001) 4 *Journal of Mental Health Policy* 189; C Wa Munyi 'Past and present perceptions towards disability: A historical perspective' (2012) 32 *Disability Studies Quarterly* 1.

11 Traditional courts in South Africa are also known as tribal courts and customary courts or indigenous courts.

12 For a historical account of the Zulu nation's traditional leadership from arrival in South Africa, settlements in the 18th century through to 1994, see GF Houston & T Mbele *KwaZulu-Natal History of Traditional Leadership Project: Final Report* (2011) 1.

13 Secs 3(2)(a) & (c) TLGF Act.

14 Sec 3(2)(b) TLGF Act.

A traditional community is recognised as such by the legislation if the community is subject to a system of traditional leadership in terms of the community's customs and observe a system of customary law.¹⁵ The community is tasked with transforming and adapting its customary law and customs to comply with the Bill of Rights principles, especially through the prevention of unfair discrimination, the promotion of equality and progressive advancement of gender representation in the succession to traditional leadership positions.¹⁶ A similar provision for advancing the representation of persons with disabilities has not been made.

Rural community members may prefer traditional courts to formal courts because of their simplicity, as well as language and familiar procedures.¹⁷ The status of these courts, however, are dispute resolution forums not recognised as part of the magistracy or judiciary, yet as 'other courts', as argued by some commentators,¹⁸ or rather 'independent and impartial tribunal[s]' should they not be considered to have the status of 'courts'.¹⁹ Only 'chiefs or headmen'²⁰ duly appointed as such by the government are officially empowered with judicial authority in South African law.²¹ This is because two provisions of the Black Administration Act have not been repealed – those dealing with the civil and criminal jurisdiction of traditional courts.²² Since 2005 the drafting of 'replacement legislation' for the racist Black Administration Act has been on the table.²³ Despite pre-democratic meddling in customary law institutions through legislative intervention, and now post-democratic attempts to regulate traditional courts, the institution remains 'resilient'.²⁴ However, Rautenbach indicates that a gap between law and customary practice remains, indicating a need for empirical research to determine the 'true position' of traditional courts in rural South Africa.

15 Sec 2(a) TLGF Act.

16 Sec 2(3) TLGF Act.

17 SALRC 'The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders' Discussion Paper 82 Project 90 (1999) paras 2.1.1 to 2.1.5.

18 J de Waal, I Currie & G Erasmus *Bill of Rights handbook* (2001) 570 and 576 under sec 166(e) of the Constitution: 'The courts are ... any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.' Compare J Brickhill & A Friedman 'Access to courts' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2011) OS 11097 Ch59-5.

19 TW Bennett *Customary law in South Africa* (2008) 147.

20 Chiefs are known in isiZulu as *amakhosi* (plural) and *inkosi* (singular). Headmen are also known as 'wardheads' and in isiZulu *izinduna* (plural) and *induna* (singular).

21 The TLGF Act 41 of 2003 recognises traditional communities and leadership.

22 Secs 12 & 20 of the Black Administration Act 38 of 1927.

23 E Knoetze 'Value (x 2) + fine = damages? Notes on the imposition of sanctions by the courts of chiefs (senior traditional leaders) and headmen' (2014) *Obiter* 604; C Himonga & R Manjoo 'The challenges of formalisation, regulation, and reform of traditional courts in South Africa' (2009) 3 *Malawi Law Journal* 157. See further, the Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2012.

24 C Rautenbach 'South Africa: Legal recognition of traditional courts: Legal pluralism in action' in TJ Kötter et al (eds) *Non-state justice institutions and the law: Decision-making at the interface* (2015) 144.

A number of constitutional protections against unfair discrimination and the promotion of substantive equality and access to justice means that persons with disabilities have the same rights as non-disabled persons to have their disputes heard in procedurally and substantively fair ways in all courts in South Africa, including traditional courts. According to the Constitution of the Republic of South Africa, 1996, everyone is entitled to 'have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.²⁵

The notion of persons with disabilities, particularly those with intellectual, psycho-social or communication impairments, representing themselves in traditional courts has not been considered in the literature, or by the South African Human Rights Commission (SAHRC),²⁶ nor in recent law reform initiatives, particularly the Traditional Courts Bill of 2016.²⁷ Literature on the challenges in accessing justice faced by persons with disabilities has been sporadic. Therefore, this article sets out to explore the current situation and legal imperatives regarding the legal capacity of persons with intellectual, psycho-social or communication disabilities in traditional courts in KwaZulu-Natal.

The second part outlines the context of dispute resolution under traditional courts, and legal capacity in customary law. The third part highlights the reality of legal capacity and the denial of access to justice for persons with disabilities in traditional communities of KwaZulu-Natal, and compares the approaches to legal capacity in traditional and formal courts. A short summary of pertinent aspects of the Traditional Courts Bill is included. In part four, we argue that the South African state's implementation of the relevant international law obligations are not evident, including a lack of appropriate training of traditional court personnel and a lack of awareness of the equal recognition of legal capacity among families supporting persons with disabilities. Part 5 examines the provisions of the new African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol) relating to traditional justice and equality before the law. Part 6 is the conclusion.

25 Sec 34 of the Constitution of the Republic of South Africa, 1996.

26 Glaringly, the only reference to disability by the SAHRC in its submission on the Traditional Courts Bill of 2012 was that 'disability-friendly' language should be used such as 'persons with disabilities'. South African Human Rights Commission *SAHRC Submission to the National Council of Provinces*, 15 February 2012 (2012) para 76 <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202012.pdf> (accessed 15 November 2017).

27 Traditional Courts Bill (B2016) introduced in the National Assembly with explanatory summary of Bill published in *Government Gazette* 40487 of 9 December 2016.

2 Background

2.1 Traditional courts and dispute resolution

In traditional communities dispute resolution usually starts at family level, and if this fails to be resolved satisfactorily, the headman or woman will attempt to resolve the dispute (at ward level – *isigodi*). Should the parties be dissatisfied with the outcome, the matter is referred to the traditional court (*enkantolo Enkosi*) where the chief will ‘preside’ and come to a decision, in consultation with the headmen and women and councillors of the traditional council.²⁸ Any appeals or reviews of the traditional court’s order is referred to the magistrate’s courts according to its geographical jurisdiction, with appeals being heard *de novo*.²⁹ The rehearing is done simply because ‘no adequate record of proceedings is kept due to lack of resources and the fact that members of chiefs’ courts are not legally trained’.³⁰

When it comes to proceedings in the traditional courts, the customary law applicable in the specific area³¹ applies, as well as the rules of courts of chiefs and headmen in civil matters³² relating to evidence and procedure. Under the Constitution, customary law is placed on parity with the common law, but it has been argued that the reality is an ‘indirect’ entrenchment of the subordinate status of customary law compared to common law.³³

The jurisdiction of the traditional courts generally excludes ‘blood crimes’ such as sexual assault and rape, as well as assault and murder, and land disputes.³⁴ By and large, neighbourly disputes may be heard around nuisances caused by livestock, petty disputes and defamatory conduct by community members and, in some instances, petty crimes. Civil cases require customary law to be applied (common law is excluded) while criminal cases require customary law to be applied, but also includes some common law and statutory offences.³⁵ It should be noted that land disputes are in fact heard by the traditional courts and have been cited as the main types of dispute occurring in KwaZulu-Natal³⁶ despite their

28 Bennett (n <XREF>) 167.

29 SALRC (n <XREF>) 11-12.

30 SALRC (n 17) 12. If a case is not appealed, it is enforceable as the case is then *res judicata* (*Tsautsi v Nene* 1952 NAC (S) 73).

31 Secs 12(1) & 20(1) Black Administration Act.

32 Rules of Court of Chiefs and Headmen R2082 of 1967. Compare Rules 10-13 of the Amakhosi and Iziphakanyiswa Civil Court Rules (KwaZulu) GN 12 of 1992.

33 N Ntlama ‘The application of section 8(3) of the Constitution in the development of customary law values in South Africa’s new constitutional dispensation’ (2012) 15 *Potchefstroom Electronic Law Journal* 38.

34 The latter due to its supposed ‘administrative’ nature. See secs 67 and 68 of the Black Areas Land Regulations Proclamation R188 of 1969; and the Land Regulations (Amendment) Proclamation R23 of 1993.

35 Sec 20 Black Administration Act.

ostensibly 'administrative' nature. The jurisdiction of the traditional courts is highly contentious, and has yet to be aligned with constitutional norms: It is still regulated by the offensive Black Administration Act 38 of 1927 until such time as the law reform process under the Traditional Courts Bill has been completed.

The traditional courts utilise restorative justice principles³⁷ in resolving disputes and are (in theory at least) open to all black (African) community members born of or affiliated with the ward³⁸ of a particular headman or woman and traditional council (of the 'presiding' chief). Restorative justice in the African traditional justice processes shares three key values with modern restorative justice processes, namely, an aim for reconciliation and restoration of peace and harmony between the parties and in the community (social equilibrium); the promotion of a normative system that regards recognition of both rights and duties as vital aspects; and dignity and respect.³⁹ The restoration of relationships, whether within the community or a particular group in an effort to keep the peace and promote harmony, takes precedence over the personal interests of the parties to the dispute.⁴⁰

Nhlapo explains that the modern idea of 'accountability' being linked to justice drives the state (through elected representatives) to maintain order among people who are most likely strangers, whereas smaller societies prioritise the restoration of relationships (people who know each other and are likely kin) over the abstract notion of justice.⁴¹ Broadly, African indigenous justice is considered a victim-centred process, where his or her needs are recognised to include 'information, validation, social support and vindication'.⁴² For persons with disabilities these needs are

36 CREATE *Baseline study: Impendulo Project in eight traditional courts in uThungulu and Umgungundlovu Districts* (2017) (copy with authors).

37 N Ntlama & T Ndima 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) 4 *International Journal of African Renaissance Studies* 6; M Schoeman 'A philosophical view of social transformation through restorative justice teachings: A case study of traditional leaders in Ixopo, South Africa' (2012) 13 *Phronimon* 27; C Rautenbach 'Therapeutic jurisprudence in the customary courts of South Africa (traditional authority courts as therapeutic agents): Notes and comments' (2005) 21 *South African Journal on Human Rights* 323.

38 Ward in isiZulu is *isigodi*.

39 A Skelton 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' unpublished LLD thesis, University of Pretoria, 2005 239-248. Compare A Skelton & M Batley *Charting progress, mapping the future: restorative justice in South Africa* (2006) Restorative Justice Centre 116.

40 JF Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies* 182.

41 T Nhlapo 'Homicide in traditional African societies: Customary law and the question of accountability' (2017) 17 *African Human Rights Law Journal* 34.

42 O Elechi 'Human rights and the African indigenous justice system' (2004) unpublished paper presented at the 18th Conference of the International Society for the Reform of Criminal Law, Montreal, Canada, 8-12 August 2004 cited in A Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' (2007) *Acta Juridica* 232.

self-evidently of great import in showing respect and upholding their dignity and equality.

2.2 Legal capacity in customary law

The idea of what ‘constitutes the self’ correlates with how disability is perceived. Some anthropological studies have shown that in many African contexts, disruption to a person’s physical or mental capacity is attributed to ‘wronged relationships’ with other people, nature, ancestors or God,⁴³ and that ‘competence’ is part of social relations within the community, and not attributed to individuals (as in Western law or understanding).⁴⁴ This means that Western ideas on competence and autonomy are conceived differently by indigenous communities.⁴⁵

How to reconcile these differences in order to promote access to justice is an important consideration, particularly since importing Western models of thinking into African contexts may not be the best fit.⁴⁶ McKenzie, for example, has argued that self-representation is not as relevant in African philosophies of care and community since Western ideals of autonomy and independence of persons with disabilities from their family are not supported. In fact, self-representation (speaking for your own needs) may go against *ubuntu*.⁴⁷ Yet, *ubuntu* also includes aspects such as interdependence and responsibility, not only the notion of solidarity.⁴⁸ A relationship of dependency (for self-care or perhaps support in decision making), in the words of Kittay, need not be seen as a ‘limitation’ but as a ‘resource’.⁴⁹ However, such a positive view also necessitates the concession that dependence can be socially constructed in such a way that it is ‘unnecessary and stultifying’ particularly through oppressive institutions and practices. Interdependence between a person

43 P de Vlioger ‘(In)competence in America in comparative perspective’ in R Jenkins (ed) *Questions of competence: Culture, classification and intellectual disability* (1998) 54.

44 SR Whyte ‘Slow cookers and madmen: Competence of heart and head in rural Uganda’ in R Jenkins (ed) *Questions of competence: Culture, classification and intellectual disability* (1998) 154.

45 J Staples & N Mehrotra ‘Disability studies: Developments in anthropology’ in Grech & Soldatic (n 7) 41.

46 Compare S Grech ‘Recolonising debates or perpetuated coloniality? Decentring the spaces of disability, development and community in the global South’ (2011) 15 *International Journal of Inclusive Education* 87; H Meekosha & K Soldatic ‘Human Rights and the Global South: the case of disability’ (2011) 32 *Third World Quarterly* 1383; K Soldatic & S Grech ‘Transnationalising disability studies: Rights, justice and impairment’ (2014) 32 *Disability Studies Quarterly* 1.

47 J McKenzie ‘Disability activism and participation’ in T Lorenzo (ed) *Disability Catalyst Africa Series 1* (2011) 13.

48 C Himonga ‘The right to health in an African cultural context: The role of *ubuntu* in the realisation of the right to health with special reference to South Africa’ (2013) 57 *Journal of African Law* 176-179. Compare C Himonga, S Taylor & A Pope ‘Reflections on judicial views of *ubuntu*’ (2013) 16 *Potchefstroom Electronic Law Journal* 418; C Himonga ‘Exploring the concept of *ubuntu* in the South African legal system’ in U Kischel & C Kirschner (eds) *Ideologie und Weltanschauung im Recht* (2012) 8-9.

49 EF Kittay ‘The ethics of care, dependence, and disability’ (2011) 24 *Ratio Juris* 49.

with a disability and a family member or caregiver can be positive, but where there are negative ramifications, the *individual* with the disability should be entitled to redress in a traditional court.

Further to notions of ‘competence’ is the historical perspective which remains relevant in South Africa as the insidious effects of colonialism and apartheid⁵⁰ continue to plague traditional communities. For example, Swartz points out the essentialist argument that black persons did not need to have ‘equal access to mental health care’ as their cultural beliefs made it irrelevant.⁵¹ Those in power decided for persons with disabilities what they did or did not ‘believe and want’.⁵² Also, at a particular time in the apartheid history black persons could not be considered ‘mentally retarded’, consequently with no protections granted to black persons with intellectual disabilities.⁵³

In both the formal and informal legal systems, the ‘perceived attributes or consequences that people associate with the disability (which vary across disability type) ... influence acceptance’.⁵⁴ If perceived attributes of a psycho-social disability includes ‘peril’⁵⁵ or dangerousness, for example, then the person will be avoided and their legal capacity questioned, depriving them of personhood. Where formal legal systems and, to a degree, informal legal systems give credence to ‘unsound mind’ stereotypes, persons with psycho-social disabilities continue to be discriminated against.⁵⁶ Similarly, if persons with intellectual disabilities are not believed to be credible, and barriers to effective communication with persons with communication disabilities are encountered by traditional court personnel, then equal recognition of their legal capacity hangs in the balance.

The legal test for mental and legal capacity in formal courts is not applied in traditional courts, nor are any other practices or rules developed to deal with the competency to provide evidence by complainants, defendants, perpetrators or other witnesses with disabilities in the traditional courts. That being said, liability for delicts and criminal conduct

50 L Swartz ‘The reproduction of racism in South African mental health care’ (1991) 21 *South African Journal of Psychology* 240.

51 L Swartz *Culture and mental health: A Southern African view* (1998) 1.

52 D Goodley & L Swartz ‘The place of disability’ in Grech & Soldatic (n 7) 76.

53 S Lea & D Foster (eds) *Perspectives on mental handicap in South Africa* (1990) cited in Goodley & Swartz (n 52) 76.

54 ME McLaughlin, MP Bell Donna & Y Stringer ‘Stigma and acceptance of persons with disabilities: Understudied aspects of workforce diversity’ (2004) 29 *Group and Organisation Management* 308.

55 Peril is one of the dimensions of psycho-social disability considered to evoke feelings of fright and unpredictability. See PW Corrigan et al ‘Three strategies for changing attributions about severe mental illness’ (2001) 27 *Schizophrenia Bulletin* 187; DB Feldman & CS Crandall ‘Dimensions of mental illness stigma: What about mental illness causes social rejection’ (2007) 26 *Journal of Social and Clinical Psychology* 137.

56 P Mwanjisa ‘Of stereotypes and the ‘unsound mind’ clauses’ *AfricLaw: Advancing the rule and role of law in Africa* (2015) <https://africlaw.com/2015/10/02/of-stereotypes-and-the-unsound-mind-clauses/#more-1003> (accessed 20 October 2015).

in customary law, generally speaking, do not only lie with the person who is considered to be 'insane', but is also shared by the head of the family as accessory liability.⁵⁷ What this means is that the head of the family can sue or be sued (defend the action) on behalf of the family (of which the individual is a part) as a proxy so to speak. With regard to contractual liability, 'mental illness' may be considered a ground for legal incapacity in customary law.⁵⁸

The denial of legal capacity can result in restrictions on decision making in the community. This is effectively based on the paternalistic assumption that some persons with disabilities do not have the capacity to exercise their rights responsibly and to make their own choices.⁵⁹ Where persons with disabilities may wish to obtain a resolution to disputes, even on the European continent, 'many did not know about their rights, did not know how or with whom to file complaints or feared that complaints would worsen their situation'.⁶⁰

3 Current situation with regard to legal capacity and access to justice

CREATE, a non-governmental organisation (NGO) in KwaZulu-Natal, has conducted research and training in the province on traditional leaders' attitudes and knowledge of the rights of persons with disabilities, including in the traditional courts, since 2012. Findings reveal that there are pervasive beliefs and stigmatising stereotypes about the ability of persons with disabilities to represent themselves in traditional courts (without a family member).⁶¹ There are erroneous beliefs held by traditional leaders that persons with disabilities do not have disputes that require resolution because their families are 'adequately' caring for their needs,⁶² and these leaders generally lack information about the need for accessibility, reasonable accommodation (procedural) and support measure requirements in court proceedings.⁶³ Findings further indicate that persons with disabilities experience isolation, segregation and stigma in their

57 JMT Labuschagne, JC Bekker & CC Boonzaaier 'Legal capacity of mentally ill persons in African societies' (2003) 36 *Comparative and International Law of Southern Africa* 115.

58 H Whelton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophutatswana* unpublished LLD thesis, University of South Africa, 1991 107 cited in Labuschagne et al (n 57) 116.

59 European Union Agency for Fundamental Rights *Legal capacity of persons with intellectual disabilities and persons with mental health problems* (2013) 18. Compare European Union Agency *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) 42.

60 European Union Agency (2012) (n 59) 42.

61 CREATE *Summary of research on traditional courts and people with disabilities* (2013) Presentation to the House of Traditional Leaders, uThungulu District. (Copy with the authors).

62 CREATE (n 36).

63 As above.

communities; are excluded from participating in community meetings; lack the means to access justice through, for example, transport barriers; are precluded from reporting family disputes due to perceptions of possible repercussions for their relationships of dependency; and by and large do not report relevant disputes to traditional leaders – with a negligible uptake of dispute resolution in the traditional courts.⁶⁴

As traditional dispute resolution begins in the family, it is already at this level that some persons with disabilities experience a lack of access to justice. In research conducted by CREATE in one municipality of KwaZulu-Natal, a municipal official stated in relation to cases for the traditional court that ‘nobody even wanted to take them [people with disabilities] to the *induna*. They were kept indoors.’⁶⁵ It is likely that cases involving persons with disabilities in that municipality did not even reach the traditional courts. Similarly, one woman with a communication impairment explained.⁶⁶

I tried to report a case of my boyfriend who did not want to support the child. The *induna* did not attend to me. They thought I was drunk because of my speech problem.

Thus the *induna* effectively stopped the process of access to justice for this woman.

A key aspect of discrimination against persons with disabilities in the traditional courts investigated by CREATE is the fact that persons with disabilities are not accepted as equal before the law. In some proceedings in traditional courts, an adult with a disability (male or female) is treated as a minor and is required to be represented by a parent or a male member of the family without a disability.⁶⁷

Persons with disabilities in the initial study conducted by CREATE identified negative attitudes of traditional leaders and clerks of the traditional courts as a barrier to their being able to access justice. In addition, several persons with disabilities, especially those with communication impairments, claimed that a lack of patience on the part of the court clerks and the *izinduna* also constituted discrimination and affected their ability to access justice.⁶⁸ Inaccessibility of the court

64 As above.

65 CREATE *Disability inclusion: Possibilities and progress: A case study in uMfolozi Local Municipality, KwaZulu-Natal, South Africa* (2014) 31.

66 V John ‘Traditional leaders ‘scared’ of disabled people’ *Mail & Guardian* 12 November 2015 <https://mg.co.za/article/2015-11-13-traditional-leaders-scared-of-disabled-people#.VkYljr8lp1E.gmail> (accessed 2 November 2017).

67 As above.

68 CREATE (n 65).

buildings, waiting areas and toilets also affects access to justice for persons with disabilities in the traditional courts.⁶⁹

The traditional leaders who participated in CREATE's research on traditional courts in 2012 indicated a particular fear of working with people with communication impairments: 'I am scared of Deaf people because if I do not understand, they will hit me.'⁷⁰ In more recent interviews with other traditional leaders, the language they used to refer to persons with psycho-social impairments was discriminatory, 'a person who is tormented, who is mad'.⁷¹

3.1 Barriers to access to justice

Barriers to accessing justice include pervasive beliefs, stereotypes and stigma faced and resultant discrimination experienced by persons with disabilities, particularly where communication is difficult and/or cognitive capacity is questioned by families and caregivers, community members and traditional council members.⁷² These barriers translate into a situation of low reporting to the traditional courts of disputes by persons with these disabilities⁷³ and, where reporting does occur, the dispute resolution process is marred by a lack of appreciation of the need to recognise the right to self-representation, self-determination, as well as the need for reasonable accommodation measures to ensure equal participation in the dispute resolution process.⁷⁴

Barriers such as inaccessible transport and public buildings and a lack of assistive devices, as well as low employment and unequal access to education and inadequate sanitation restrict the opportunities for persons with disabilities to exercise legal capacity in legal proceedings,⁷⁵ including in traditional courts.

Persons with intellectual disabilities suffer stigma and self-stigma⁷⁶ that in one South African study was found to correlate with ethnicity.⁷⁷

69 CREATE *Baseline evaluation: Khulumani Sekuyisikhathi Collective: Participatory action for socio-economic rights* (2017) (Copy with authors).

70 CREATE presentation Legal Resources Centre cited in John (n 66).

71 CREATE (n 36).

72 Traditional courts' staff are the headmen/women in each village under the chief's area of jurisdiction, as well as the chief; together they comprise the traditional council. This is explained in more detail in part 3.

73 CREATE (n 36).

74 As above.

75 Compare J Lord & M Stein 'Prospects and practices for CRPD implementation in Africa' (2013) 1 *African Disability Rights Yearbook* 110-111.

76 E Kock et al 'Cross-cultural validation of a measure of felt stigma in people with intellectual disabilities' (2012) 25 *Journal of Applied Research in Intellectual Disabilities* 11.

77 A Ali et al 'Ethnicity and self-reported experiences of stigma in adults with intellectual disability in Cape Town, South Africa' (2015) 59 *Journal of Intellectual Disability Research* 530.

Black participants with intellectual disabilities reported higher incidences of physical attacks and 'being stared at' by community members, yet they also were more likely to report their feelings of being 'the same as other people'. Meer and Combrinck found that the stigmatisation of persons with intellectual disabilities includes perceptions that they are 'less valuable' and lack credibility.⁷⁸ This study examined what barriers women with psycho-social and intellectual disabilities who experienced gender-based violence faced when interacting with the criminal justice system. One important factor is the association of intellectual disability with the supernatural – witchcraft, curses, ancestral or demon possession.⁷⁹ A KwaZulu-Natal participant explained that 'in Zulu mythology intellectual disabilities are seen as the result of not having followed customs and being cursed by ancestors, and as portending bad luck'.⁸⁰ The authors recommended *inter alia* that service providers in criminal justice 'dispel stigma and react to the vulnerability of women with intellectual disabilities' to gender based violence.⁸¹ In Traditional courts there is at times a reticence to hear matters where a person with an intellectual disability is a party to a dispute.

Persons with communication disabilities have experienced many barriers in the formal court system, which have been well documented by researchers.⁸² For example, Deaf persons or persons who are hard of hearing (accused or complainants) in the criminal justice system are often unable to provide statements or provide accurate statements because of the absence of a skilled interpreter. Simply having a skilled court interpreter available to translate for a sign language user may not be sufficient. Without the existence of adequate norms and standards of practice to guide court interpreters in formal courts, Lebesse argues, access to justice and linguistic rights are violated.⁸³ CREATE's research findings indicate that bar one instance, the traditional council members did not know how to obtain the services of a sign language interpreter and, furthermore, funding for such services, were they to be obtained, generally was not available.⁸⁴

78 T Meer & H Combrinck 'Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence' (2015) 29 *Agenda* 14.

79 Meer & Combrinck (n 78) 18. Compare C Brooke-Sumner, C Lund & I Petersen 'Perceptions of psychosocial disability amongst psychiatric service users and caregivers in South Africa' (2014) 3 *African Journal on Disability* 146.

80 Meer & Combrinck (n 78) 18.

81 Meer & Combrinck (n 78) 22.

82 H Dalgut & R Morgan 'Barriers to justice: Violations of the rights of deaf and hard of hearing people in the South African justice system' (2003) 18 *South African Journal on Human Rights* 30.

83 S Lebesse 'Do justice to court interpreters in South Africa' (2014) 43 *Stellenbosch Papers in Linguistics Plus* 183.

84 CREATE (n 36).

In another study, White et al⁸⁵ cite recent research revealing that persons with little to no functional speech (LNFS) are particularly vulnerable to being victims of crime, and their rights are infringed during the legal justice system due to restricted communication skills that are aggravated by little understanding of what to do to help a person with LNFS⁸⁶. The controversial legal test for competency to testify (discussed below)⁸⁷ can also violate their rights. White et al recommend that for persons with LNFS, an 'Alternative and Augmentative Communication Resource Tool Kit' should be developed to assist professionals in the justice system to enable full participation by persons with LNFS in providing testimony.⁸⁸

Research around the experiences of persons with psycho-social disabilities in formal courts in South Africa is limited. It abounds on the legal aspects of fitness to stand trial,⁸⁹ insanity defences⁹⁰ and involuntary confinement for criminal accused,⁹¹ but little has been written on the barriers they may experience in accessing the criminal and civil legal system. This cohort has limited access to legal services and they may have a high dependence on others (carers or family members) to assist them to report a crime or bring a civil claim.⁹²

It can therefore be said that persons with disabilities, particularly those with intellectual, psycho-social and communication disabilities, often face insurmountable obstacles to equal participation in the criminal⁹³ and civil justice systems.

- 85 R White, J Bornman & E Johnson 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal* 1.
- 86 DN Bryen & CH Wickman 'Ending the silence of people with little or no functional speech: Testifying in court' (2011) 31 *Disability Studies Quarterly* 1.
- 87 The legal test requires a person to be able to convey his or her testimony in an understandable way. The meaning of 'understandable' differs from person to person where someone has a communication impairment.
- 88 White, Bornman & Johnson (n 85) 10.
- 89 M Swanepoel 'Legal aspects with regard to mentally ill offenders in South Africa' (2015) 18 *Potchefstroom Electronic Law Journal* 3238; T Schutte & U Subramaney "'Single" v "panel" appointed forensic mental observations: Is the referral process ethically justifiable?' (2013) 6 *South African Journal on Bioethics and Law* 64.
- 90 PM Joubert & CW van Zyl 'Behaviour that underpins non-pathological criminal incapacity and automatism: Toward clarity for psychiatric testimony' (2016) *International Journal of Law and Psychiatry* 10.
- 91 N Haysom, M Strous & L Vogelmann 'The mad Mrs Rochester revisited: The involuntary confinement of the mentally ill in South Africa' (1990) 6 *South African Journal on Human Rights* 341; S Ramlall, J Chipps & M Mars 'Impact of the South African Mental Health Care Act No 17 of 2002 on regional and district hospitals designated for mental health care in KwaZulu-Natal' (2010) 100 *South African Medical Journal* 667.
- 92 Compare A Gray, S Forell & S Clarke 'Cognitive impairment, legal need and access to justice' (2009) 10 *Justice Issues* 3.
- 93 W Holness 'Arrested, detained and accused persons' in A Govindjee (ed) *Introduction to human rights law* (2016) 241.

3.2 Legal capacity in formal courts

Legal capacity comprises a capacity to have rights on an equal basis with others (known as passive capacity), and a capacity to act and have one's actions recognised by the law (known as active capacity).⁹⁴ In a common law legal system such as ours, these two aspects are conflated into the notion of 'competency' referring to the capacity to stand before a court of law and to make one's own decisions.⁹⁵ Mental capacity has in practice been considered a precondition to the recognition of 'legal' capacity.

Broadly speaking, legal capacity refers to the ability to represent oneself in a legal dispute; to obtain legal representation; to enter into contracts; to attract liability (delictually and criminally); to be considered fit to stand trial in a criminal matter; and to be competent to provide testimony in civil and criminal courts. The basic understanding is that "the accused must be present both in mind and body" for him or her to participate meaningfully in criminal proceedings'.⁹⁶ Accordingly,

if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79 of the Criminal Procedure Act.⁹⁷

This refers to the trialability of the case.

Criminal capacity (or responsibility or liability) instead deals with the person's 'mental' capacity at the time of the commission of the alleged offence.⁹⁸ This provision entails the following:⁹⁹

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

94 A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

95 J Parry & EY Drogin *Mental disability law, evidence and testimony A comprehensive reference manual for lawyers, judges and mental disability professionals* (2007) 7.

96 F Cassim 'The accused person's competency to stand trial: A comparative perspective' (2004) 45 *Codicillus* 17, relying on the interpretation by the court in *Pachcourie v Additional Magistrate, Ladysmith & Another* 1978 (3) SA 986 (N).

97 Sec 77(1) of the Criminal Procedure Act (as amended by Act 4 of 2017).

98 Sec 78 of the Criminal Procedure Act. J Grant 'Chapter 13: Accused: Capacity to understand proceedings: Mental illness and criminal responsibility (ss 77-79)' in E du Toit et al (eds) *Commentary on the Criminal Procedure Act* (2017) RS 59 13-8.

99 Sec 78(1) of the CPA (as amended by Act 4 of 2017).

Where an allegation of either being unfit to stand trial or not being criminally responsible is made due to ‘mental illness or intellectual disability’, an inquiry procedure is followed.¹⁰⁰ This procedure requires a panel to be appointed, which includes medical professionals such as psychiatrists and clinical psychologists, in varying circumstances.¹⁰¹

As a starting point, ‘[e]very person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities’.¹⁰² It is crucial that an accused person should be provided with legal representation (with legal aid) where the court ‘is of the opinion that substantial injustice would otherwise result’.¹⁰³

In civil proceedings, legal capacity has been linked to the question as to whether or not the person has a ‘consenting mind’. Holness has explained that this means that ‘legal capacity cannot be acquired by a person if, due to that person’s mental condition, he or she does not understand or appreciate the nature and consequences of the juristic act’, which in turn means that

legal transactions entered into by persons with impaired capacity are void *ab initio* (and therefore cannot be ratified whether the other party was aware of the mental incapacity or not).¹⁰⁴

The default position is that everyone has full legal capacity, but ‘insane or mentally disordered persons have limited legal capacity’.¹⁰⁵ Where a declaration of unsoundness of mind is made, a rebuttable presumption of incapacity is created.¹⁰⁶

The common law *curatorship* as well as the legislative process for administratorship under the Mental Health Care Act 17 of 2002 both serve to substitute decision making and self-representation of the person who is declared as ‘lacking’ legal capacity with that of a professional (whether a *curator bonis*, *ad litem*, *personae* or an administrator, depending on the context). Holness has considered the legal reform initiatives on supported decision making, but noted that the *status quo* of curatorship and administratorship is likely to continue even if and when new legislation for ‘supported’ decision making is enacted.¹⁰⁷

100 Secs 77(1) & 78(2) of the CPA (as amended by Act 4 of 2017).

101 Sec 79 of the CPA (as amended by Act 4 of 2017).

102 Sec 78(1A) of the CPA (as amended by Act 4 of 2017).

103 Sec 77(1A) of the CPA (as amended by Act 39 of 2014).

104 W Holness ‘Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality’ (2014) 30 *South African Journal on Human Rights* 332.

105 R Kruger ‘Division F’ in B Clarke (ed) *Family law service* (2016) F11.

106 Rule 57 of the Uniform Court Rules.

107 Holness (n 104) 344.

In formal civil and criminal courts, a witness is competent, qualified and able¹⁰⁸ to provide evidence if he or she can do so lawfully. Some witnesses are excluded as such.¹⁰⁹ Persons with psycho-social disabilities (referred to in legislation as ‘mental illness’ or ‘lunacy or insanity’) or intellectual disabilities (referred to in some legislation as ‘mental illness’ or ‘idiocy’) are generally considered incompetent in our law.¹¹⁰ This legal test in our law is described as follows:¹¹¹

It must appear to the trial court or be proved that the witness suffers from –

- (a) a mental illness; or
- (b) that he or she labours under imbecility of mind due to intoxication or drugs or the like; and
- (c) it must also be established that as a *direct result* of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason.

Evidence of the ‘incompetence’ of the witness is presented to the court, and an investigation follows to determine whether the witness is ‘deprived of the proper use of his or her reason’ as a result of the incompetence.¹¹² Such investigation can also be done on the basis of the court’s own observations of the witness.¹¹³ De Vos further explains that the exclusion here is

directed at a certain degree of mental illness or imbecility of mind, which deprives the witness of the *ability to communicate properly* in regard to the subject matter in question. Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him *to convey his observations in an understandable way to the court*, will be a competent witness.¹¹⁴

108 A Bellangère (ed) *The law of evidence in South Africa: Basic principles* (2013) 102.

109 Sec 8 of the Civil Proceedings Evidence Act 25 of 1965 and secs 192 and 206 of the Criminal Procedure Act 51 of 1977.

110 Sec 9 of the Civil Proceedings Evidence Act, 1965: ‘No person appearing or proved to be afflicted with idiocy, lunacy or insanity, or to be labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.’ Sec 194A of the Criminal Procedure Act, 1977 (as amended by Act 8 of 2017): ‘For purposes of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, the court may, when it deems it necessary in the interests of justice and with due consideration to the circumstances of the witness, and on such terms and conditions as the court may decide, order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.’

111 Bellangère (n 108) 104 (our emphasis).

112 *S v Kato* 2005 (1) SACR 522 (SCA) para 10. (The SCA’s approach is preferred to the one in *S v Mnguni* 2014 (2) SACR 595 (GP).)

113 *S v Zenzile* 1992 (1) SACR 444 (C) 446G. Compare *S v Malcolm* 1999 (1) SACR 49 (SE) 53a.

114 WL de Vos ‘The competence and compellability of witnesses’ in PJ Schwikkard & SE van der Merwe (eds) *Principles of evidence* (2016) 452 (our emphasis).

The ability to effectively communicate with the court, therefore, is a key requirement for the competence of witnesses. Interpreters are utilised for those with communication impairments,¹¹⁵ but in some instances witnesses are found to be incompetent to testify due to speech impairments (for example where the person was paralysed from the neck down due to a stroke and accordingly unable to speak).¹¹⁶ ‘Gesture language’ may be used to present oral evidence by a so-called ‘deaf and speechless’ person.¹¹⁷ Msipa has argued that in criminal proceedings ‘the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony’.¹¹⁸ The implication of this proposal is that courts would have to provide the kinds of accommodation needed: such as qualified interpreters (for instance, speech therapists), develop Augmentative and Alternative Communication guides, and train lawyers and judicial officers on how to effectively communicate with and elicit testimony from a person with an intellectual, communication or psycho-social disability rather than dispose of testimony on the basis of ‘incompetence’.

Often medical professionals, mostly psychiatrists, are called upon to provide expert testimony as to the ‘mental capacity’ of a particular person, whether in civil or criminal proceedings. There are ethical considerations when incapacity or incompetence of a person with psycho-social or intellectual disability in legal proceedings is averred, including the consideration that the expert could be a ‘hired gun’ in terms of promoting the client’s case.¹¹⁹ This is an adversarial approach to dispute resolution.

3.3 Comparison of legal capacity in formal and traditional courts

The common law concept of legal capacity is not extended to customary law, nor its practice in communities. However, CREATE’s research findings indicate that the *de facto* deprivation of legal capacity through pervasive stigma, segregation and, therefore, exclusion from community life and dispute resolution processes, does occur.¹²⁰

Whilst the legislature and formal courts have developed rules to divine the ‘mental’ capacity of a person, traditional courts have no such rules or

115 *R v Ranikolo* 1954 (3) SA 255(O) and *The State v Naidoo* 1962 (2) SA 625 (A).

116 *Master of the High Court v Deedat & Others* 1999 (11) BCLR 1285 (N).

117 Sec 161(2) of the Criminal Procedure Act.

118 D Msipa ‘How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe’ (2015) 3 *African Disability Rights Yearbook* 89.

119 P Stevens ‘Ethical issues pertaining to forensic assessments in mental capacity proceedings: Reflections from South Africa’ (2017) 24 *Psychiatry, Psychology and Law* 628.

120 CREATE (n 36).

procedures. Expert testimony with regard to legal capacity in traditional courts is unheard of.¹²¹ It is more likely that the participants in the traditional court will decide a person's 'capacity' or lack thereof to act in proceedings affecting them, whether the family members at the family level dispute resolution, the *induna* at *isigodi* level, or the *inkosi* at the traditional court level. Indeed, the undeniable role that family and caregivers play in providing informal support can impact on what perception of capacity is created by such a supporter when interacting with traditional leaders 'on behalf of' the person with the disability.

While we are not calling for the participation of expert witnesses in traditional courts, we do question the ability of any person (including informal support provided by family members or caregivers) to determine the capacity of a person with a disability in traditional court proceedings. Further, we question the provision of support that may be needed (as well as promoting safeguards from abuse) without specific training in the recognition of legal capacity and the provision of appropriate support measures. People in rural communities often rely on traditional healers for mental health. One challenge of this practice is that traditional healers rely on the opinions or reports of family members as to the healing process of the person with the psycho-social illness.¹²² This raises red flags with regard to a potentially undue influence when a person with a psycho-social disability is 'supported' by a family member in traditional court proceedings.

The relationship between traditional healers' understanding of psycho-social disability (its causes, treatment and the prevention thereof)¹²³ and their perception of a person's mental capacity and traditional court members' perceptions of legal capacity has not yet been explored in research. However, mental health literacy among traditional healers has been called for.¹²⁴ We would also argue for social context training of traditional healers on disability in line with the emphasis of the CRPD and the African Disability Protocol on equal recognition before the law and legal capacity on an equal basis with others.

121 As above.

122 MJ Sehoana & S Laher 'Pedi psychologists' perceptions of working with mental illness in the Pedi community in Limpopo, South Africa: The need to incorporate indigenous knowledge in diagnosis and treatment' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 236; J Mufamadi & T Sodi 'Notions of mental illness by Vhavenda traditional healers in Limpopo Province, South Africa' (2010) 9 *Indilinga African Journal of Indigenous Knowledge Systems* 262.

123 M Madzhe, TM Mashamba & FJ Takalani 'African traditional healers' perception and diagnosis of mental illness' (2014) 1 *African Journal for Physical, Health Education, Recreation and Dance* 319.

124 KR Sorsdahl et al 'Explanatory models of mental disorders and treatment practices among traditional healers in Mpumalanga, South Africa' (2010) 13 *African Journal of Psychiatry* 290.

Ultimately, without adequate data on experiences by persons with disabilities who do participate in traditional courts, as opposed to current baseline research indicating low reporting and participation,¹²⁵ it will be difficult to develop appropriate guidelines for traditional councils on how to promote equality, legal capacity and access to justice. Further research and monitoring are required, as are meaningful consultation and participation by persons with disabilities in developing such guidelines.

3.4 Traditional courts' law reform

The Traditional Courts Bill (B-2016) was released for comment on 9 December 2016 and is now known as the Traditional Courts Bill (B1-2017).¹²⁶ This most recent incarnation is woefully inadequate when it comes to the prohibition of discrimination and provision of reasonable accommodation measures for persons with disabilities. Below is a brief summary of some pertinent aspects of the Bill and a critique thereof.

3.4.1 Participation

The 2016 Bill appears to take steps towards ensuring that courts will 'facilitate the full, voluntary and meaningful participation of all members in the community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution' in its objectives.¹²⁷ This in part was to placate opposition to the Bill on the basis of the prohibition against opting-out in previous versions of the Bill, which made dispute resolution in the traditional courts compulsory for persons belonging to traditional communities.

Further to this, cognisance of systemic unfair discrimination and inequalities or attitudes preclude 'meaningful and voluntary participation in traditional court proceedings by any person or group of persons, particularly in respect of ... disability' is one of the guiding principles of application of the Bill.¹²⁸ The absence of 'full' participation in this clause is disturbing. Submissions on the Bill included the identification of a lack of systems or procedures to ensure substantive participation of various categories of persons, including persons with disabilities, requiring stronger provisions to give effect to this imperative.¹²⁹ The denial of equal

125 CREATE (note 36).

126 The Traditional Courts Bill of 2016 was introduced in the National Assembly with an explanatory summary of the Bill published in *Government Gazette* 40487 of 9 December 2016.

127 Clause 2(f) TCB.

128 Clause 3(2)(b)) TCB.

129 N Ngamlana 'The Traditional Courts Bill: Examining the gaps' (2012) 14 *Local Government Bulletin* 16 17, referring to the submissions made by the Community Law Centre on the 2012 Bill.

recognition before the law is all too easy if explicit reference to equality before the law is not made in the legislation.

Although the Bill allows for 'opting out' from the traditional court adjudication and to choose rather to utilise adjudication in ordinary courts, just as for women, such a desire to exercise a choice of forum may be prevented by 'overt community pressure or lack of resources'.¹³⁰ According to previous findings by Holness and Rule, the possibility of 'opting out' to use an ordinary court may also be limited for persons with disabilities due to the cultural practice of requiring to receive 'permission' from traditional leaders or, in the case of a married woman with a disability, 'permission' may be required from her in-laws.¹³¹ Such cultural practices should be abolished.

3.4.2 Prohibition of discrimination

It appears that the drafters carefully considered the need to prohibit discrimination against a number of 'vulnerable' groups, including persons with disabilities. However, the terminology utilised is paternalistic and disempowering for parties with disabilities who are to be 'treated in a manner that takes into account their vulnerability'.¹³² While 'vulnerability' truly is a part of being human and in fact is a universal attribute for all of us at some stage of our lives, cloaking someone as 'vulnerable' should not be a mask for paternalism. This is exceedingly possible when the label of 'vulnerability' emphasises what persons with disabilities 'lack' in comparison to able-bodied persons, and the 'dangers' that they face.¹³³ Such paternalism is to be avoided with the human rights approach preferred by the CRPD.¹³⁴ The emphasis on vulnerability does not promote 'equal recognition before the law' regardless of disability or mental capacity.

No mention of reasonable accommodation is made in the Bill as a measure to avoid discrimination, and this is contrary to the requirements of article 13 of the CRPD, as discussed below. While the venue and time of the proceedings are to be 'accessible to members of the community in question',¹³⁵ research conducted by CREATE¹³⁶ reveals that accessibility

130 J Williams & J Klusener 'The Traditional Courts Bill: A woman's perspective' (2013) 29 *South African Journal on Human Rights* 292.

131 W Holness & S Rule 'Barriers to advocacy and litigation in the Equality Courts' (2014) 17 *Potchefstroom Electronic Law Journal* 1913.

132 Clause 7(3)(a)(iii) TCB.

133 J Herring *Vulnerable adults and the law* (2016) 36.

134 United Nations General Assembly 'Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies' (2015) *Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/31/30* 30 November 2013 para 4.

135 Clause 7(1) TCB.

136 CREATE (n 36).

of court buildings at best is uneven. Further, traditional leaders do not know what measures of accommodation to provide bar calling the matter of the person with the disability to be heard first.¹³⁷

We recommend that the Bill, therefore, should delete references to ‘vulnerable’ persons. The Bill should include a reference to the denial of reasonable accommodation as a form of discrimination on the basis of disability.¹³⁸

3.4.3 *Protective and promotional measures*

The Bill requires measures to be put in place

to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity.¹³⁹

The cabinet minister responsible for the administration of justice (the Minister of Justice) is to report annually to Parliament on the measures taken.¹⁴⁰ While this is welcomed, the administration of traditional courts has historically fallen under the Department of Cooperative Governance and Traditional Affairs (COGTA), and this anachronistic situation needs to be resolved. Further, whilst the Commission for Gender Equality, according to this Bill, is to report annually to Parliament on the participation of women and the promotion of gender equality in traditional courts,¹⁴¹ no corresponding requirement is placed on the SAHRC in relation to persons with disabilities. Serious political will is required for provisions under the Traditional Courts Bill ‘to promote and protect vulnerable persons’ to be enacted. The reality is that measures to promote equality are dependent on adequate budgetary allocations.

A schedule to the Bill specifically prohibits conduct that tends to

denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer’s disease;

discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;

discriminate against persons with albinism.¹⁴²

137 As above.

138 Art 2 CRPD.

139 Clause 5(3)(a)(ii) TCB.

140 Clause 5(3)(iii) TCB.

141 Clause 5(3)(b) TCB.

142 Schedule 2 *Prohibited conduct which infringes on the dignity, equality and freedom of persons* (under clause 3(3) of the Bill) (c) to (e).

Such prohibition sends a strong message about such practices. The language used, however, is problematic, in particular the use of terms such as ‘elderly persons who suffer from mental health conditions’ and ‘persons who are mentally or physically infirm or disabled’. These three ‘groups’ identified indeed are likely to face discrimination in court proceedings. Persons with communication disabilities, however, also require specific and explicit protection to recognise their legal capacity on an equal basis with others. It is preferable to distinguish between psycho-social and intellectual impairments in terminology utilised. Unfortunately, these examples of conduct are not specific or broad enough to cover all disabilities. The list of illustrated conduct in particular sectors appended to the Schedule of the Promotion of Equality and Prohibition of Unfair Discrimination Act is instructive,¹⁴³ and a similar relevant list will be helpful for traditional council members, as well as persons with disabilities and the community at large.

The Bill will need strong regulations or guiding principles, including training for traditional councils on how to ensure that they do not perpetuate such conduct, even unintentionally. Further, the Bill must avoid using offensive terms to describe impairments and rather utilise appropriate terminology.

3.4.4 Interpreters

The Bill requires that proceedings and records are in ‘the language most widely spoken in the area’¹⁴⁴ and also makes provision for an interpreter if any party does not understand the language used.¹⁴⁵ These clauses refer to the vernacular language, for example isiZulu. The reference to ‘interpreter’ here appears to be a ‘translator’ from one language to another, for example, isiZulu to Sesotho. There is thus no explicit provision for sign language interpretation or augmentative communication methods. This is a serious flaw that will have to be remedied with explicit provision in the Bill for sign language interpretation or augmentative communication where needed.

3.4.5 Training

Regulations are to be drafted on the training of traditional leaders and persons designated by traditional leaders to convene traditional courts.¹⁴⁶ Such regulations should include equal recognition of persons with

143 Schedule 1 to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

144 Clause 7(9) TCB.

145 Clause 7(10) TCB.

146 Clause 17(1)(j).

disabilities before the law and the attendant consequences for provision of support and reasonable accommodation.

4 International law obligations

While this article has focused on legal capacity and access to justice in customary law specifically in South Africa, these issues need to be seen in the context of South Africa's international law obligations. This section will focus on the CRPD and the country's obligations as a signatory of the Convention.

The Division of Social Policy and Development of the United Nations (UN) has recognised 'informal' justice systems such as traditional courts and stressed that both formal (ordinary) courts and informal (traditional) courts 'must be accessible and inclusive of persons with disabilities in all contexts'.¹⁴⁷ However, the Toolkit, devised to give guidance on how courts on the African continent can transform inaccessible and unaccommodating procedures and remove barriers to equal participation in access to justice, specifically focuses on formal courts. The CRPD, as discussed below, provides some guidelines on how the recognition of legal capacity and procedural accommodation in formal court systems should promote equality and access to justice.

The CRPD contains a basket of rights that promote access to justice for persons with disabilities in traditional courts, including the right to equal recognition before the law; the right to legal capacity recognised on an equal basis with others (and attendant support measures where needed); the need for awareness raising to dispel myths and undo pervasive stigma and discrimination; and the need for the traditional court system to be accessible.

4.1 Legal capacity

The CRPD does not refer to mental capacity, but it is explained by the CRPD Committee in their General Comment on legal capacity as follows:¹⁴⁸

Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.

147 United Nations Division of Social Policy and Development *Toolkit on Disability for Africa: Access to justice for persons with disabilities* (undated) Module 8 <http://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> (accessed 1 September 2017).

148 CRPD Committee (n 1) para 13.

The Committee further explains that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.¹⁴⁹ Legal capacity is explained as referring to legal standing and legal agency of a person.¹⁵⁰

State parties to the CRPD are expected to recognise that persons with disabilities have legal capacity on an equal basis with others in *all* aspects of life,¹⁵¹ but that support may be needed in making certain decisions, and provision of such support should adhere to safeguards¹⁵² because the support is effectively a ‘restriction’ on legal capacity.¹⁵³ Three aspects of the CRPD’s understanding of legal capacity bears mention, namely, (a) possession of legal capacity; (b) the exercise of legal capacity; and (c) equal protection and benefit of the law.¹⁵⁴

As possessor of legal capacity, the person is a bearer of rights and responsibilities. Articles 12(1) and (2) acknowledge this aspect respectively: State parties are to recognise that ‘persons with disabilities have the right to recognition everywhere as persons before the law’, and ‘that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.

The exercise of legal capacity *may* require support from others: Article 12(3) imposes on state parties the duty to ‘take appropriate measures to provide access by persons with disabilities with the support they may require in exercising their legal capacity’. This provision is entirely in line with African notions of communitarianism as it requires that a system of societal support is set up, recognising the interdependence of people requiring that we pursue our lives in ‘conjunction with’ others.¹⁵⁵ To restate this duty: Where a person with a disability needs support to make a decision, this support should be provided, including reasonable accommodation to assist the person in understanding the decision.¹⁵⁶ Such accommodation may allow different ways of providing information about the decision, such as sign language, alternative communication, ‘pacing, repetition and a trusted source for information’.¹⁵⁷ Support may

149 As above.

150 As above.

151 Art 12 CRPD.

152 Art 12(4) CRPD.

153 Holness (n 104) 315.

154 Compare A Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?’ (2007) 34 *Syracuse Journal of Law and Commerce* 597.

155 O Lewis ‘Advancing legal capacity jurisprudence’ (2011) 6 *European Human Rights Law Review* 704.

156 Centre for Disability Law and Policy *Essential principles: Irish legal capacity law* (2012) 4 <https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Legal-Capacity-Essential-Principles.pdf> (accessed 1 September 2014).

157 As above.

be required through the help of an advocate (peer or citizen advocacy, self-advocacy or even state provided advocates).¹⁵⁸

Such support must contain safeguards that protect against harm and abuse.¹⁵⁹

State parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity *respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.* These safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

If support is provided to a person in exercising their legal capacity, whether informally or formally by a relative, friend, paralegal, attorney or any other person, the support is circumscribed by these requirements. This would include instances where a person with a disability exercises their legal capacity with support in a traditional court.

In a traditional justice system based on community participation and where support is usually provided by a relative, often with a vested interest in decisions relating to the daily life of the person with a disability (for example, household reliance on income from the disability grant), undue influence can be a real concern. Yet, a trusted support person, whether a family or community member, who 'values the autonomy and choice of the individual' can provide support with decision making, as long as it is not 'imposed and the person must always be free to reject offers of support or to end the support relationship at any time.'¹⁶⁰

How to imbue the safeguards of article 12 in the decision making of persons with intellectual or psycho-social disabilities will need to be taught to family members and caregivers of persons with disabilities, as well as stakeholders in legal processes (including traditional courts). As Werner explains, ultimately, 'true choice' means that persons who 'support' the persons with the disability should 'focus less on the outcome and more on the process of decision-making' and 'accept that people with [intellectual disabilities] should be allowed to make mistakes as learning opportunities'.¹⁶¹

158 As above.

159 Art 12(4) CRPD (our emphasis).

160 A Arstein-Kerslake & E Flynn 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law' (2016) 20 *The International Journal of Human Rights* 478.

161 S Werner 'Individuals with intellectual disabilities: A review of the literature on decision-making since the Convention on the Rights of People with Disabilities (CRPD)' (2012) 34 *Public Health Reviews* 26.

Provision of support may in some instances require reasonable accommodation in the exercise of legal capacity. However, the CRPD Committee made it clear that the right to receive support if needed is not contingent on undue burden (or unjustifiable hardship, the defence that applies to the provision of reasonable accommodation) and access to support is an immediate obligation resting on state parties.¹⁶² Here, relevant training of the clerks of the court, persons with disabilities and their families, as well as the *izinduna* and *amakhosi* is vital.

4.2 Access to justice

With regard to access to justice, article 13 of the CRPD requires that state parties

shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages

and

shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.¹⁶³

The Committee unequivocally states that '[i]n order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with equal standing in courts and tribunals'.¹⁶⁴ As such, we submit, traditional courts must explicitly recognise rural persons with disabilities subscribing to customary law as having legal standing, equal to non-disabled community members.

With the recognition of legal standing comes the requirement for reasonable accommodation where needed. Article 13 should therefore be read with articles 12(1) and (2) in particular. The recognition of the legal capacity to provide testimony in 'judicial, administrative and other legal proceedings' is guaranteed for persons with disabilities under the CRPD which, if necessary, may require the provision of support to exercise such capacity, whether the person is a complainant, witness or alleged perpetrator.¹⁶⁵ The kinds of accommodation may include the recognition of diverse communication methods; procedural accommodation; the

162 CRPD Committee (n 1) para 34.

163 Arts 13(1) & (2) CRPD.

164 CRPD Committee (n 1) para 38.

165 CRPD Committee para 39.

provision of sign language interpretation; and other assistive methods.¹⁶⁶ While some of these measures (accommodations) are already employed in some formal courts in South Africa, there is no evidence of this being provided in traditional courts. Kayess and Fogarty explain that since article 12 only deals with one aspect of equality before the law, namely, legal capacity, article 13 was specifically drafted to ameliorate disabling 'legal procedures, rules, and practices' requiring states 'to make adjustments to legal procedure and rules of evidence to ensure effective access to justice for persons with disability on an equal basis with others'.¹⁶⁷ Hence, these two articles should be read together when legal capacity is exercised in legal proceedings.

Access to legal representation in proceedings affecting them has historically been denied to persons with disabilities.¹⁶⁸ The CRPD, however, requires access to legal representation on an equal basis with non-disabled persons, especially where interference with legal capacity is concerned.¹⁶⁹ Further, persons with disabilities may not be denied the right to defend their rights in court.¹⁷⁰ The CRPD and the General Comment on article 12 (and with reference to article 13), therefore, cannot be any clearer on this. The Traditional Courts Bill¹⁷¹ prohibits legal representation¹⁷² in traditional courts. Considering the persuasiveness of literature on the need for 'advocates', ombudsmen or support persons to assist persons with disabilities with decision making in matters affecting them,¹⁷³ we would argue that paralegals may be well suited to fulfil this role in traditional court proceedings.

In order to promote recognition of legal capacity on an equal basis with others, the CRPD requires state parties to provide 'appropriate training' for personnel or stakeholders involved in the administration of justice.¹⁷⁴ Within the traditional courts administration of justice would necessarily include by implication *izinduna*, *amakhosi*, *amphoyisa enkosi*

166 Reasonable accommodation is individualised: 'For example, accommodating a person with an intellectual disability may involve recognition and inclusion of support people. In contrast, accommodating an individual with an acquired brain injury may involve allowing more time to process information.' L Kerzner 'Paving the way to full realisation of the CRPD's rights to legal capacity and supported decision-making: A Canadian perspective' *In from the margins: New foundations for personhood and legal capacity in the 21st century* (2011) 68.

167 R Kayess & B Fogarty 'The rights and dignity of persons with disabilities: A United Nations Convention' (2007) 32 *Alternative Law Journal* 22.

168 S Ortoleva 'Inaccessible justice: Persons with disabilities and the legal system' (2016) 17 *International Law Society of America, Journal of International and Comparative Law* 286.

169 CRPD Committee (n 1) para 38.

170 As above.

171 Traditional Courts Bill (B2016) introduced in the National Assembly with explanatory summary of Bill published in *Government Gazette* 40487 of 9 December 2016.

172 Clause 7(4)(b) TCB.

173 CRPD Committee (n 1) para 15. E Flynn 'Making human rights meaningful for people with disabilities: Advocacy, access to justice and equality before the law' (2013) 17 *International Journal of Human Rights* 491; Arstein-Kerslake & Flynn (n 145) 476.

174 Art 13(2) CRPD.

(traditional police acting as sheriff, messenger and enforcer of court orders) and *imibuzo yoMabhalane weNkantolo yeSizwe* (the clerk of the court). The Committee has stressed the need for 'first responders' to legal disputes or complaints to be trained and for awareness raising 'to recognise persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons'.¹⁷⁵ In traditional communities the *induna* is likely to be the first person to whom an incident is reported after the family conciliation has failed.

The Committee explicitly refers to the need for the judiciary to 'be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing'.¹⁷⁶ While *izinduna* and *amakhosi* in their courts respectively may not be 'judicial officers' as such, the role they fulfil in the traditional courts mean that they are the very heart of dispute resolution. Dedicated training and awareness raising for *amakhosi* and *izinduna* is sorely needed on this score, particularly since the training of the justice personnel in traditional and formal courts vary considerably.¹⁷⁷ Recent law reform efforts envisage the establishment of a Legal Services Ombud with wide powers to ensure the integrity of the legal profession and to deal with complaints by the public against legal practitioners¹⁷⁸ (which would not include traditional court personnel). The training of traditional leaders has included a capacity-building programme on leadership and good governance between 2011 and 2015,¹⁷⁹ aiming to include the protection of human rights in traditional communities. The programme content included a curriculum *inter alia* on criminal and civil law and interpretation of policies, human rights, conflict and dispute resolution, and presiding over traditional courts.¹⁸⁰ However, the rights of persons with disabilities are absent from the curricula. One recommendation from an evaluation of this programme is that traditional councillors should also be trained and thus enable *amakhosi* to introduce new practices learnt from the training intervention more easily within the council.¹⁸¹ In its 2009 policy, which paved the way for the law reform process on the Traditional Courts Bill, the Department of Justice advanced that it would provide the capacity and resources necessary for the judicial

175 CRPD Committee (n 1) para 39.

176 As above.

177 To be admitted as an attorney requires the completion of a Bachelor of Laws degree; community service in a law clinic or articles of clerkship in a law firm; practical legal training; the completion of board examinations; and a formal court admission process; Attorneys Act 53 of 1979 (as amended); Legal Practice Act 28 of 2014; Rules for the Attorneys Profession (2016) in GN 2 of 2016 in *Government Gazette* 39740 of 26 February 2016.

178 Ch 5 of the Legal Practice Act 28 of 2014.

179 COGTA *Evaluation of the UKZN Leadership and Good Governance Capacity Building Programme for Amakhosi* (2016) Evaluation Unit 3 <http://www.kzncogta.gov.za/wp-content/uploads/2017/09/Impact-assessment-on-Capacity-Building-of-Amakhosi.pdf> (accessed 15 December 2017).

180 COGTA (n 179) 18.

181 COGTA (n 179) 9.

functions of traditional leaders, towards training and administrative support.¹⁸² This gap remains and needs to be addressed.

As the traditional council as well as community members participate in the dispute resolution process, these community members *also* require conscientising on legal capacity and, therefore, legal agency of persons with disabilities. Indeed, the Division of Social Policy and Development of the UN has recommended

Community level awareness raising on disability and for empowerment of communities to support their members, including persons with disabilities, in obtaining access to justice; this includes for example ensuring that persons with disabilities enjoy equal access to legal aid services and legal literacy programmes, implementation of campaigns against stigma and stereotyping, and provision of human rights training for key service providers.¹⁸³

Such awareness-raising campaigns should, therefore, be provided to all members of the traditional council as well as community members, and should include family members and caregivers of persons with disabilities. The latter is vital because of the possibility of family members acting as 'gatekeepers', stopping persons with disabilities from accessing assistance to resolve a dispute where they may be implicated themselves or have a vested interest. The duty of awareness raising rests on the Department of Justice from the perspective of the requisite knowledge on these key legal and rights aspects. On the other hand, COGTA may also have expertise of the workings of traditional leadership and so contribute to awareness raising, particularly as the provincial and local houses of traditional leadership are administered by it. Importantly, the community members with disabilities should be consulted in the design of such awareness training.

5 Regional law obligations

Here we briefly discuss the African Disability Protocol. The African Charter has one 'exclusive' provision with regard to persons with disabilities, that 'the aged and the disabled shall also have rights to special measures of protection in keeping with their physical or moral needs'.¹⁸⁴ This provision is 'wholly in keeping with the medical model of disability,

182 Department of Justice *Policy Framework on the Traditional Justice System under the Constitution* (2009) para 6.6.

183 United Nations Division of Social Policy and Development *Toolkit on Disability for Africa* (n 132) 28. Similarly, the Committee has argued for awareness raising (art 8 of the CRPD) for authorities and others, to create 'open, enabling and inclusive communities' through the elimination of stereotypes, ableism and misconceptions' that prevent independent living and community inclusion. CRPD Committee General Comment 5: Article 19: Right to independent living (2017) CRPD/C/GC/5 para 78.

184 Art 18(4) African Charter.

rather than as holders of human rights'.¹⁸⁵ Some commentators have argued that the absence of disability as a ground for protection against unfair discrimination is problematic.¹⁸⁶

Kamga argued that a separate African treaty was necessary in part because of the emphasis on individualism in the CRPD, while the African continent is steeped in communalism.¹⁸⁷ Viljoen and Biegon dismissed this argument on the basis that the CRPD does stress community living and supports.¹⁸⁸ While this argument is persuasive, the communitarianism inherent in African customary law and world view can be considered to be at odds with 'autonomy' and recognition of persons with disabilities as self-advocates with the right to represent themselves in disputes affecting them. Balancing the notion of equal recognition before the law for persons with disabilities, whether seen as individual autonomous beings in the 'Western' sense, or members of the community in the 'African' sense, is not necessarily mutually exclusive.

Rather, we would argue, as have authors before us,¹⁸⁹ that recognising the citizenship of persons with disabilities requires valuing their personal autonomy or independence. Such valuation of autonomy and freedom to make their own decisions and choices concerning their lives is not intended to conflict with the communitarian ethos of customary law, but is rather a move away from charitable/social welfare and medical approaches to disability that regard persons with disabilities as objects of dependency¹⁹⁰ and charity in Western and African traditional communities.

Combrinck and Mute explain how the Working Group on Older Persons and People with Disabilities in Africa, who advised the African Commission on adopting a disability protocol, found that issues that 'received no traction in the CRPD despite being of concern in Africa' needed to be clarified to give effect to Africa's 'specificities and

185 F Abbay 'Disability rights in Africa: Towards a citizenship approach' Doctor of Civil Law thesis, McGill University, 2012 138.

186 Abbay (n 185) 139.

187 SA Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 226.

188 F Viljoen & J Biegon 'The feasibility and desirability of an African disability rights treaty: Further norm-elaboration or firmer norm-implementation?' (2014) 30 *South African Journal on Human Rights* 354, referring to art 19 of the CRPD.

189 Abbay (n 185) 56; E Flynn 'Making human rights meaningful for people with disabilities: Advocacy, access to justice and equality before the law' (2013) 17 *The International Journal of Human Rights* 494.

190 Compare World Health Organisation & World Bank *World Report on Disability* (2011) 27, http://www.who.int/disabilities/world_report/2011/report.pdf (accessed 1 December 2017); S Susuman, R Blignaut & S Lougue 'Understanding issues of people living with disabilities in South Africa' (2014) 49 *Journal of Asian and African Studies* 562-563; E van Pletzen, M Booyens & T Lorenzo 'An exploratory analysis of community-based disability workers' potential to alleviate poverty and promote social inclusion of people with disabilities in three Southern African countries' (2014) 29 *Disability and Society* 1535.

realities'.¹⁹¹ This includes the provisions on protection against use of traditional forms of justice to deny persons with disabilities access to appropriate and effective justice, and the support that may be required to enjoy legal capacity requires safeguards and should not amount to substituted decision making. The African Disability Protocol includes a lengthy clause on equal recognition before the law, recognition of legal capacity and safeguards.¹⁹²

Most welcome is the clause that requires state parties to 'ensure that traditional forms of justice shall not be used to deny persons with disabilities their right to access appropriate and effective justice'.¹⁹³ This is an unambiguous statement recognising the vital role of traditional courts that is absent in the generalised statements in the CRPD in article 13, as well as by the CRPD Committee in their General Comment on legal capacity.

The groundwork has therefore been laid on the African continent for tackling the insidious effects of ignorance, lack of understanding and lack of prioritisation of the rights of persons with disabilities to legal capacity being recognised on an equal basis with others. While literature on access to justice in customary courts and under customary law in African countries elaborate on mechanisms to address discrimination,¹⁹⁴ there is a dearth of literature on *persons with disabilities'* utilisation of customary courts,¹⁹⁵ including on the issue of autonomy and legal capacity.¹⁹⁶

191 H Combrinck & LM Mute 'Developments regarding disability rights during 2013: The African Charter and African Commission on Human and Peoples' Rights' (2014) 2 *African Disability Rights Yearbook* 309.

192 Art 8 Draft African Protocol.

193 Art 9 Draft African Protocol.

194 CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 166 (Botswana); C Lwanga-Ntale 'Chronic poverty and disability in Uganda' (2003) Paper presented at the 'Staying Poor: Chronic Poverty and Development Policy' conference, Manchester, cited in NE Groce, J London & MA Stein 'Inheritance, poverty, and disability' (2014) 29 *Disability and Society* 1560 (Uganda); MA Abdurraheem-Mustapha 'Rights of people with disability in Nigeria: Attitude and commitment' (2016) 24 *African Journal in International and Comparative Law* 439 (formal courts in Nigeria); J DeGabriele & J Handmaker 'Justice for the people: Strengthening primary justice in Malawi' (2005) 5 *African Human Rights Law Journal* 148 (Malawi); W Waliuya 'Protecting the rights of persons with disabilities: A perspective from Zambia' in *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia* (2015) 102 (formal courts in Zambia).

195 Notable exceptions are JN Jobodwana 'Courts of chiefs and human rights: Comparative African perspectives' (2000) 15 *South African Public Law* 26; DB Dennison 'The status, rights and treatment of persons with disabilities within customary legal frameworks in Uganda: A study of Mukono District' PhD thesis, University of Cape Town, 2017 (Uganda); AS Steinforth *Troubled minds: On the cultural construction of mental disorder and normality in Southern Malawi* (2008) 65 (Malawi).

196 Notable exceptions are Kenya, L Mute 'Moving from the norm to practice: Towards ensuring legal capacity for persons with disabilities in Kenya' (2012) *Equal Rights Review* 139; 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* 49.

6 Concluding observations

Traditional courts in KwaZulu-Natal have not been used to their full potential.¹⁹⁷ Yet, traditional courts have the potential to be the very sites where the voices of community members with disabilities are heard in relation to dispute resolution and resource allocation. Traditional councils can ensure the equal and effective citizenship of persons with disabilities if they dismantle barriers to equal recognition before the (customary) law and promote full and meaningful access to justice.

Our courts, employing a purposive approach to interpretation of legislation,¹⁹⁸ have acknowledged the need to consider the 'contextual realities and power relations' of persons, including under customary law, 'by asking whether people are able, in practice, to enforce their rights'.¹⁹⁹ CREATE's research has shown that this has not been the case for persons with disabilities in a number of districts of KwaZulu-Natal.²⁰⁰

Traditional courts, as CREATE's research shows, mostly employ the status approach to legal capacity, derived from labelling an individual as disabled and focusing on the impairment or diagnosis without seeing the person as a person before the law, ignoring 'actual decision-making skills'.²⁰¹ New ways of supporting the exercise of legal capacity in the context of traditional courts are needed.

The Traditional Courts Bill law reform process must, therefore, pertinently include all persons' equal recognition before the law, including persons with disabilities. However, the Bill currently falls short in a number of respects.

Persons with psycho-social, intellectual and communication impairments may require support through reasonable accommodation measures in court proceedings that can only be provided if it can be imagined. This imagination will come from the participation by persons with disabilities in the law reform process in the traditional courts who will attest to their lived experiences in trying and failing to access justice.

197 RN Ndlela, JM Green & PS Reddy 'From traditional courts to traditional administration centres: A review of the KwaZulu-Natal experiences' (2006) 25 *Politeia* 235.

198 *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC) paras 21, 25, 28 & 31; *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) paras 22-23.

199 A Claassens 'Contested power and apartheid tribal boundaries: The implications of 'living customary law' for indigenous accountability mechanisms' (2011) *Acta Juridica* 177. Compare *Bangindawo & Others v Head of the Nyanda Regional Authority & Another; Hlantalala v Head of the Western Transvaal Regional Authority & Others* 1998 (3) SA 262 (TK); *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC); and *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC).

200 CREATE (nn 61 & 36).

201 C de Bhailis & E Flynn 'Recognising legal capacity: Commentary and analysis of article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6.