

REGIONAL DEVELOPMENTS

DISABILITY RIGHTS AND EMERGING DISABILITY LEGISLATION IN SELECTED AFRICAN JURISDICTIONS: A DIAGNOSTIC COMMENTARY

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1 Introduction

The Convention on the Rights of Persons with Disabilities (CRPD)¹ expects states parties to take appropriate legislative, administrative and other measures for implementing disability rights.² These measures are expected to incorporate the standards set by the CRPD. A number of Africa states parties to the CRPD have disability specific legislation for implementing disability rights. These countries include Malawi,³ Zambia,⁴ Uganda,⁵ Kenya,⁶ United Republic of Tanzania (Tanzania),⁷ Ghana,⁸ and Zimbabwe.⁹ This commentary analyses the extent of compliance with the CRPD's standards by the disability legislation adopted in selected African jurisdictions. The assessment is done by analysing conformity to four thematic aspects, namely: the human rights based understanding of disability; equality and non-discrimination; existence of a national disability body for coordinating the implementation of disability rights; and the provision for redress mechanism for violation

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1 Adopted on 13 December 2006, entered into force on 3 May 2008.

2 See eg art 4(1)(a).

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

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

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

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

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

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

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

of disability rights. The commentary also looks into whether the disability legislation contains substantive rights, especially education, employment, healthcare, accessibility, equal legal capacity and social protection. These four aspects and the question of guarantees for substantive rights have been selected since many people with disabilities often suffer human rights violations with regard to these contexts.¹⁰ For example, many persons with disabilities do not enjoy rights such as education and employment; and they face various discriminatory practices.¹¹ The aspects relating to the approach of disability; the establishment of national disability bodies; and provision for remedies have been selected due to their peculiar significance, as will be highlighted below.¹²

The discussion focuses on disability statutes in African states parties to the CRPD that were enacted during or after the adoption or entry into force of the CRPD. Accordingly, the commentary looks at the disability statutes of Malawi and Zambia enacted in 2012; disability legislation of Tanzania passed in 2010; and the disability statutes of Ghana and Uganda passed in 2006.¹³ As can be observed, the disability statutes of Malawi, Zambia and Tanzania were enacted after the entry into force of the CRPD and after the three countries had already ratified the CRPD. On their part, the disability statutes of Ghana and Uganda were enacted during the period, and in the year, that the CRPD was (being) adopted but before the two countries had ratified the CRPD. As explained above, the commentary assesses conformity of these statutes to the CRPD's standards. Hence, it is relevant for the commentary to look at the disability laws enacted during this period because they are expected to reflect the CRPD's standards.¹⁴

10 With regard to these substantive rights, the commentary just makes an observation on whether the disability laws recognise the rights.

11 See generally D Filmer 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141; S Mitra et al *Disability and poverty in developing countries: A snapshot from the World Health Survey* (2011) 36; H Kotzé *Status of disability rights in Southern Africa* (2012) 5 & 15; SAD Kamga 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) *African Disability Rights Yearbook* (2013) 46; J Biegon 'The promotion and protection of disability rights in the Africa human rights system' in I Grobbelaar-du Plessis & T Van Reenen (eds) *Aspects of disability law in Africa* (2011) 53-83, 83; I Grobbelaar-du Plessis & T Van Reenen 'Introduction to aspects of disability law in Africa' in Grobbelaar-du Plessis & Van Reenen (eds) (this note above) xv- xxvii, xvi.

12 See 2 below.

13 A discussion of these statutes is contained in 3 below. Kenya's disability legislation was enacted in 2003; whilst that of Zimbabwe was passed in 1992.

14 Disability statutes that were enacted after the concerned states had already ratified the CRPD were expected to have provisions conforming to the CRPD's standards. On their part, disability laws that were enacted before the concerned countries had ratified the CRPD, but during the year that the CRPD was adopted, were expected to be reviewed to be aligned with the CRPD within a reasonable time after the states had ratified the CRPD. Alternatively or in addition, the drafters had to draw inspiration from the negotiations taking place during the CRPD adoption process by having provisions that, to an extent, conformed to the CRPD's standards.

In setting out to achieve its objectives, the commentary first gives the general introduction and background before briefly discussing the CRPD's standards pertaining to the four areas identified above. Thereafter, it briefly describes the disability legislation in the five selected jurisdiction and analyses the extent to which each of the four identified areas is treated by each piece of disability legislation before drawing out the pertinent conclusions.

2 CRPD's standards pertaining to the four thematic aspects

The enactment of disability specific legislation, as the five selected Africa jurisdictions have done, is one of the appropriate legislative measures for implementing disability rights on which this commentary focuses.¹⁵ The taking of such measures is the first level of implementation. The second level requires states parties to realise the rights in practice by carrying out and achieving the obligations set out in the disability statutes on the ground. It is the second level of implementation that could give the right picture of the state of implementation of disability rights in the selected jurisdictions. However, if the disability and other pertinent laws do not conform to the CRPD standards, their 'actual' or 'practical' implementation would not bring about the expected realisation of the rights. Hence, it is also relevant to first assess the extent to which the disability statutes conform to the CRPD.

Accordingly, this commentary only looks into the first level of implementation. In particular, it analyses the extent to which the disability statutes of these selected jurisdictions conform to the CRPD's standards relating to the four selected thematic areas, namely, approach to disability; equality and non-discrimination; national bodies for national implementation and coordination; and provision for redress mechanism and remedies.¹⁶ The CRPD and its monitoring Committee have elaborated on the standards that must be achieved by states parties in these four selected thematic areas. This part briefly outlines and discusses the respective pertinent standards.

15 See generally CRPD Committee *Guidelines on treaty-specific document* (2009) Annex, para A3.2(b).

16 The author acknowledges that it would have been ideal for the commentary to discuss and analyse other rights such as equal legal capacity (guaranteed in CRPD, art 12(2)); and other obligations such as ensuring the independent monitoring of the CRPD and disability rights by national human rights institutions (as set out under CRPD, art 33(2)) in more detail. However, it is not within the scope of this commentary to provide such detailed analysis. Nonetheless, they remain topical areas for future or further research.

2.1 Human rights approach to disability

The adoption of the CRPD marked the confirmation of the shift from the medical model of disability to social and human rights models.¹⁷ The social and human rights models attribute the challenges faced by persons with disabilities to the barriers that exist in the environment which impede their participating in the society on an equal basis with others.¹⁸ The conceptualisation of disability by the CRPD in its preamble mirrors these models.¹⁹ In line with the human rights model, the CRPD further understands 'persons with disabilities' as including 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.²⁰ Accordingly, the CRPD Committee has reiterated the need to define disability, including its related concepts and terms, as is consistent with the CRPD and the human rights model.²¹

2.2 Equality and non-discrimination

The CRPD guarantees the right to equality and non-discrimination in article 5 in four sub-articles that outline the obligations to be discharged by states parties. These obligations are: ensuring equality under the law and equality as a social goal;²² providing legal protection against discrimination in legislation;²³ providing reasonable accommodation to achieve substantive equality;²⁴ and taking of specific measures, including affirmative action, to foster *de facto* equality.²⁵ Accordingly, the disability legislation adopted by states parties must reflect these equality and non-discrimination standards.

17 The CRPD Committee has acknowledged that the CRPD is based on, and also establishes, the human rights model of disability. See generally CRPD Committee, Concluding Observations on China (2012) paras 9 & 16.

18 See generally AS Kanter 'The globalization of disability rights law' (2003) 30 *Syracuse Journal of International Law and Commerce* (2003) 241 246-247; G Quinn & T Degener (eds) *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 14.

19 See CRPD, Preamble, para e.

20 CRPD, art 1. The CRPD does not define a 'person with disability' but only provides its understanding.

21 See eg Concluding Observations on Austria (2013) para 8; Concluding Observations on China (2012) para 9.

22 Art 5(1); M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) 61.

23 Art 5(2). See eg CRPD Committee, Concluding Observations on Australia (2013) para 15.

24 Art 5(3). See eg CRPD Committee, Communication No 3/2011, *HM v Sweden* (2011); R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 9.

25 Art 5(4); Schulze (n 22 above) 63; CRPD Committee, Concluding Observations on El Salvador (2013) paras 15 & 16.

2.3 National coordination committee for disability rights implementation

The CRPD in article 33(1) requires the establishment of an institutional mechanism to be entrusted with matters relating to the implementation of the CRPD and the coordination of the implementation across all sectors. One of the ways of ensuring this is the establishment of national disability bodies that discharge these two functions. The CRPD Committee has endorsed this approach and has commended and urged states parties with regard to establishing and strengthening the capacity of national disability bodies.²⁶ Therefore, disability or other pertinent legislation is expected to make provision for such national disability bodies.

2.4 Provision for remedies for threats or violation of rights as a CRPD standard

The CRPD Committee has explained that states parties to the CRPD must make provision for appropriate judicial remedies and other redress mechanisms in case the rights of persons with disabilities are violated or threatened.²⁷ This is consistent with the justiciability concept of international human rights law.

3 Diagnosis of selected disability specific legislation in Africa

3.1 Malawi: Disability Act 2012

3.1.1 Introductory observations and provisions on substantive rights

The Disability Act was enacted in 2012 as Malawi's contemporary principal disability legislation.²⁸ It has five parts and 33 sections. Part 4 sets out the substantive rights of persons with disabilities.²⁹ The Rights include accessibility; healthcare; education and training; employment; social protection; association and representation; cultural and sporting activities, and recreational services; participation in political and public life; housing; and information and communication technologies (ICT). However, the Act does not mention equal legal capacity for persons with disabilities.

²⁶ See eg CRPD Committee, Concluding observations on Argentina (2012) paras 51 & 52; Concluding observations on Sweden (2014) para 4; Concluding observations on Tunisia (2014) para 41.

²⁷ See CRPD Committee, *Reporting guidelines* (n 15 above) Annex, para A.3.2(f).

²⁸ Act 8 of 2012.

²⁹ This Part runs from sec 6 through sec 26.

3.1.2 Compliance with CRPD's standards relating to the four thematic aspects

Human rights based approach to disability: Definition of disability

The Act defines disability as a

long-term physical, mental, intellectual or sensory impairment, which, in interaction with various barriers, may hinder the full and effective participation in society of a person on equal basis with other persons.³⁰

The definition mirrors the understanding of disability under the CRPD and embodies the social and human rights models. Accordingly, the Act is based on the social and human rights models of disability; and hence, complies with the approach to disability required under the CRPD's standards.

Equality and non-discrimination

The Disability Act does not contain a general anti-discrimination provision but it prohibits discrimination in the enjoyment of certain specified substantive rights only. The general approach taken by the Act in Part 4 is that one section provides for a substantive right; whilst the following section prohibits discrimination in the exercise of the right. This applies to all rights except five: association; access to ICT; benefiting from disability oriented research and ICT; and prohibition of participation in research without consent. This approach is inconsistent with the CRPD standards which require protection from discrimination in the exercise of any right.

In addition, the Act does not recognise the taking of specific or affirmative action measures for fostering *de facto* equality.³¹ Above all, it does not recognise the denial of reasonable accommodation as (constituting) discrimination and it does not impose any obligation to provide reasonable accommodation,³² except pursuant to a court order issued under section 9(3) in the context of facilitating the exercise of the right of accessibility to premises or services. Accordingly, the Act does not comply with the equality and non-discrimination standards under the CRPD.

³⁰ Sec 2.

³¹ The Act mentions affirmative action measures within the provision on the right to employment only.

³² See generally EM Chilemba 'The right to primary education of children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' (2013) 1 *African Disability Rights Yearbook* 3 21-22; EM Chilemba 'Malawi' (2014) 2 *African Disability Rights Yearbook* 207 223 & 226.

National disability body for implementation and coordination

The Act requires the responsible Minister to establish a National Advisory and Coordinating Committee on Disability Issues (NACCODI), which will be the official body on disability affairs.³³ The body will have functions that seek to provide a forum for all key stakeholders on disability issues such as disability mainstreaming; making recommendations to government on best practices regarding disability policies, legislation and programmes; and overseeing the implementation, monitoring and evaluation of disability-related programmes.³⁴ Accordingly, the Act provides for a national disability body to be entrusted with disability rights implementation and coordination.

Provision for remedies and redress mechanism

The Act provides for redress mechanisms.³⁵ The pertinent provision grants standing to 'any aggrieved person' having reason to believe that any person or institution has violated any rights of persons with disabilities to commence legal action against that person or institution in any competent court of law.³⁶ The Court can grant civil remedies, which include monetary damages, the provision of auxiliary aid or services and any equitable relief that the court might consider appropriate in accordance with the gravity of the violation.³⁷

The Act further provides for 'administrative penalties',³⁸ whereby the Minister has the discretion to impose penalties on any person or institution if satisfied on reasonable grounds that such person or institution has contravened the Act or any regulations made under it.³⁹ The penalties could include: directing the person or institution to do a specified act, or refrain from doing a specified act in order to, amongst others, remedy the effects of the contravention or compensate for the loss suffered by the victim.⁴⁰ Accordingly, the Act makes adequate provision for redress mechanisms in a way that complies with the standard under the CRPD.

33 See sec 5(2).

34 Sec 5(2)(a), (b) & (c).

35 Sec 31.

36 Sec 31(1).

37 Sec 31(2)(a), (b) & (c).

38 Sec 32.

39 Sec 32(1).

40 Sec 32(1)(b)(i) & (ii).

3.2 Zambia – Persons with Disabilities Act 2012

3.2.1 Introductory observations and provisions on substantive rights

The Persons with Disabilities Act was enacted in 2012 as Zambia's contemporary disability legislation.⁴¹ It has ten parts and two schedules. Part 2 and Part 5 set out substantive rights. Part 2 provides for rights that include: prohibition of discrimination and use of derogatory terms; family life and social activities; and legal protection and participation in judicial proceedings. The substantive rights listed in Part 5 include:⁴² education; healthcare; employment and social protection; accessibility and mobility; participation in cultural life, recreational, leisure and sport; participation in political and public life; and equal legal capacity.⁴³

3.2.2 Compliance with CRPD's standards relating to the four thematic aspects

Human rights based approach to disability: Definition of disability

The Act defines 'disability' as 'a permanent physical, mental, intellectual or sensory impairment that alone, or in a combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in society on an equal basis with others'.⁴⁴ It also defines a person with disability as

a person with a permanent physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others.⁴⁵

The understanding of disability and a person with a disability is based on the social and human rights models. Accordingly, the Act follows the social and human rights models as required under the CRPD's standards.

Equality and non-discrimination

The Act prohibits disability based discrimination in its general equality clause.⁴⁶ The Act also recognises non-discrimination as one of the general

41 Act 6 of 2012.

42 The Part runs from secs 22 through 51.

43 It is noteworthy that the Act comes only second to the Constitution in terms of hierarchy in so far as disability matters are concerned. See sec 3.

44 Sec 2.

45 Sec 2.

46 Sec 6. See especially sec 6(1).

principles.⁴⁷ It defines discrimination and reasonable accommodation in a manner that is similar to the definitions under the CRPD.⁴⁸ Above all, the definition of discrimination expressly recognises the denial of reasonable accommodation as constituting disability based discrimination,⁴⁹ thereby complying with the equality standard under the CRPD. However, the Act's anti-discrimination provision does not mention the concept of temporary specific or affirmative action measures for fostering *de facto* equality, thereby falling short of the CRPD's standards for equality and non-discrimination.⁵⁰

National disability body for implementation and coordination

The Act makes provision for the continuation of the Zambia Agency for Persons with Disabilities,⁵¹ which was originally established under the now repealed Zambian Persons with Disabilities Act of 1996.⁵² The functions of the Agency include:⁵³ to facilitate and coordinate 'other welfare services for person with disabilities';⁵⁴ to monitor and evaluate service provision and implementation of the Act;⁵⁵ to provide disability related advice to the responsible Minister;⁵⁶ to consult with state bodies and non-state disability organisations (DPOs);⁵⁷ and to keep disability statistical records.⁵⁸ Accordingly, the Act establishes the Agency as the national disability body entrusted with the national implementation and coordination of disability rights as envisaged by the CRPD's standards.

Provision for remedies and redress mechanism

Part IX of the Act provides for offences and penalties comprising fines and a term of imprisonment.⁵⁹ The offences include the negligent causing of a disability;⁶⁰ and any contravention of the provisions of the Act for which no specific penalty is provided.⁶¹ In terms of redress mechanisms, the Act gives powers to the Attorney-General to take legal action if requested by the Agency in situations where a person or group of persons engages in a

47 See sec 4(b).

48 Sec 2.

49 See sec 2.

50 However, the provision on employment (sec 35(3)(h)) recognises the role of affirmative action.

51 See sec 11(1).

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

53 See sec 14.

54 Sec 14(1)(c).

55 Sec 14(1)(n).

56 Sec 14(1)(m).

57 Sec 14(1)(i).

58 Sec 14(2)(d).

59 Secs 61, 62 & 63.

60 Sec 62(1). It is noteworthy that a court may order payment of compensation by the convicted person to the person on whom the disability was negligently caused. See sec 62(2).

61 Sec 65.

practice that is discriminatory under the Act.⁶² This procedure limits standing to the Agency. Individuals do not have direct access to the courts. Of course, the Act gives an opportunity to any person aggrieved by an order of the court that is made in the legal action to apply to the High Court for a review of the order.⁶³ Furthermore, the Act does not set out the remedies, if any, which can be obtained. Accordingly, the redress mechanism does not appear to be consistent with the standards under the CRPD.

3.3 United Republic of Tanzania – Persons with Disabilities Act 2010

3.3.1 Introductory observations and provisions on substantive rights

The Persons with Disabilities Act was passed in 2010 as the modern principal disability legislation of Tanzania.⁶⁴ It contains 12 parts and five schedules. Part 7 sets out the substantive rights of healthcare, education, rehabilitation and employment.⁶⁵ Part 8 provides for the accessibility of buildings, services, information and physical environment.⁶⁶ Part 9 provides for participation in public and political life/affairs, including social protection.⁶⁷ Part 10 provides for ‘accessibility’ measures relating to television and telephone services.⁶⁸ However, the Act does not recognise equal legal capacity for persons with disabilities.

3.3.2 Compliance with CRPD’s standards relating to the four thematic aspects

Human rights based approach to disability: Definition of disability

The Act defines disability in relation to an individual as ‘loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors’.⁶⁹ It defines ‘person with disability’ as ‘a person with a physical, intellectual, sensory or mental impairment and whose functional capacity is limited by encountering attitudinal, environmental and institutional barriers’.⁷⁰ The definition of disability gives a hint that it follows the social model and human rights models. The definition of a person with a disability is based

62 Sec 64(1)(a).

63 Sec 64(1)(c).

64 Act 9 of 2010.

65 Secs 26-34.

66 Secs 35-50.

67 Secs 51-54.

68 Secs 55 & 56.

69 Sec 3.

70 As above.

on the social and human rights models of disability. Accordingly, the Act complies with the standard under the CRPD relating to the conceptualisation of disability and persons with disabilities.

Equality and non-discrimination

The Act contains a general equality and non-discrimination clause,⁷¹ which recognises that persons with disabilities are equal;⁷² prohibits all forms of discrimination on the basis of disability; guarantees equal and effective legal protection against discrimination on all grounds;⁷³ and recognises the obligation to provide reasonable accommodation,⁷⁴ which it refers to as reasonable changes.⁷⁵ It also defines discrimination as including the denial of reasonable accommodation.⁷⁶ This complies with the pertinent CRPD's standards. Furthermore, the Act defines the term '[to] discriminate' as including the 'failure to effect affirmative action'.⁷⁷ It thus recognises that affirmative action must be effected to achieve non-discrimination. Therefore, the Act fully complies with the equality and non-discrimination standards under the CRPD.

National disability body for implementation and coordination

The Act establishes the National Advisory Council for Persons with Disabilities.⁷⁸ The objectives of the Council include promoting the implementation and the equalisation of opportunities for persons with disabilities; and advocating for, and promoting effective service delivery and collaboration between service providers and persons with disabilities.⁷⁹ The functions of the Council include the following:⁸⁰ to act as national advisory body through which the needs, problems, concerns, potentials and abilities of persons with disabilities can be communicated to government and its agencies, for action;⁸¹ to advocate for the promotion and development of disability related programmes and projects;⁸² and to monitor and evaluate the implementation of the Act in relation to the CRPD.⁸³ The Council also has the mandate to advise government on, amongst others: all matters relating to the promotion of the welfare of

71 Sec 6. See also sec 5(1)(d).

72 Sec 6(a).

73 Sec 6(b).

74 Sec 6(c).

75 The Act defines reasonable changes as opposed to reasonable accommodation in sec 3 in the manner that is the same as the definition of reasonable accommodation in art 2 of the CRPD.

76 Sec 3.

77 Sec 3(d).

78 Sec 8(1).

79 Sec 10(a) & (c).

80 They are set out in sec 12.

81 Sec 12(1)(a).

82 Sec 12(1)(c).

83 Sec 12(1)(k).

persons with disabilities,⁸⁴ and co-ordination of policies, programmes and the provision of grants relating to the persons with disabilities.⁸⁵ Thus the Act establishes the Council as the national disability body responsible for the implementation and coordination of disability rights in Tanzania in accordance with the standards under the CRPD.

Provision for remedies and redress mechanism

The Act takes the approach of making provision for offences and penalties comprising a term of imprisonment or a fine. The list of offences includes: any contravention of the provisions of the Act;⁸⁶ discriminating against a person with a disability;⁸⁷ and denying participation of a person with a disability in social, economic and political activities.⁸⁸ However, the Act does not make provision for redress mechanism and the obtaining of civil remedies by individuals with disabilities who suffer rights violations. This procedure is not consistent with the standards relating to redress mechanisms under the CRPD.

3.4 Ghana – Persons with Disabilities Act 2006

3.4.1 Introductory observations and provisions on substantive rights

The Persons with Disabilities Act was enacted in 2006.⁸⁹ It has eight 'parts'. Part 1 sets out the 'general' rights of persons with disabilities relating to, amongst others, family life and social activities; freedom from exploitation and discrimination; and accessibility of public places and services.⁹⁰ Part 2 sets out the rights relating to employment and rehabilitation.⁹¹ Part 3 provides for the rights relating to education and training.⁹² Part 4 sets out the rights pertaining to transportation.⁹³ Part 6 provides for the right of healthcare.⁹⁴ However, the Act does not make provision for social protection and equal legal capacity.

84 Sec 12(2)(b).

85 Sec 12(2)(c).

86 Sec 62(l).

87 Sec 62(b).

88 Sec 62(i).

89 Act 715 of 2006.

90 Secs 1-8.

91 Secs 9-15.

92 Secs 16-22.

93 Secs 23-30.

94 Secs 31-35.

3.4.2 Compliance with CRPD's standards relating to the five thematic aspects

Human rights based approach to disability: Definition of disability

The Act does not provide a definition of disability and hence, it would be difficult to ascertain the model of disability that it takes. Perhaps the Act should have incorporated the definition of disability or persons with disabilities consistent with the CRPD in order to conform to the CRPD's standards relating to the required human rights based approach to disability.

Equality and non-discrimination

The Act contains a general anti-discrimination clause,⁹⁵ which prohibits discrimination against persons with disabilities.⁹⁶ However, the section suggests that discrimination on the basis of certain types of disabilities would be excused in the employment context if such disabilities are 'in respect of the relevant employment'.⁹⁷ Furthermore, the Act does not mention the concepts of reasonable accommodation or specific measures for *de facto* equality such as affirmative action. Hence, the Act does not impose the obligation to provide reasonable accommodation. Consequently, it can be concluded that the Act does not comply with the CRPD standards relating to equality and non-discrimination.

National disability body for implementation and coordination

The Act establishes a national disability body known as the National Council on Persons with Disability.⁹⁸ The object of the Council is to 'propose and evolve policies and strategies to enable persons with disability enter and participate in the mainstream of the national development process'.⁹⁹ The Council's functions include the following: to monitor and evaluate disability policies and programmes;¹⁰⁰ to coordinate disability activities;¹⁰¹ to coordinate activities of DPOs, and organisations that deal with disability;¹⁰² and to advise the Ministry on disability issues.¹⁰³ Thus the Act establishes the Council as the national body for overseeing the coordination and implementation of disability rights as envisaged by the CRPD's standards.

95 Sec 4.

96 Sec 4(1).

97 Sec 4(2). The provision is ambiguous and a court interpretation would be insightful.

98 Sec 41(1).

99 Sec 42(1).

100 Sec 42.2.1.

101 Sec 42.2.3.

102 Sec 42.2.7.

103 Sec 42.2.5.

Provision for remedies and redress mechanism

The Act contains two different sections that make provision for offences and their penalties in the form of fines or terms of imprisonment.¹⁰⁴ Amongst others, it makes it an offence for any person to contravene the provisions setting out rights relating to family life and social activities;¹⁰⁵ and exploitation of and discrimination against a person with a disability.¹⁰⁶ However, the Act only recognises criminal liability for violations of the Act or the specified rights. Hence, it does not make provision for the obtaining of civil remedies by persons with disabilities who suffer rights violations. This procedure, as highlighted in 3.3 above, is not consistent with the standards under the CRPD.

3.5 Uganda – Persons with Disabilities Act 2006

3.5.1 Introductory observations and provisions on substantive rights

The Act was enacted in 2006 as the principal disability legislation in Uganda.¹⁰⁷ It has nine parts and three schedules. Part 2 provides for the rights to ‘quality’ education and health.¹⁰⁸ Part 3 provides for employment.¹⁰⁹ Part 4 provides for accessibility.¹¹⁰ Part 5 addresses non-discrimination in relation to goods, services and facilities.¹¹¹ Part 6 sets out ‘other’ social rights such as privacy, family and participation in public life.¹¹² However, the Act does not recognise the right to social protection and equal legal capacity.

3.5.2 Compliance with CRPD’s standards relating to the five thematic aspects

Human rights based approach to disability: Definition of disability

The Act defines disability as ‘a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation’.¹¹³ It also defines a ‘person with disability’ as ‘a person having physical, intellectual, sensory or mental impairment which substantially limits one or more of the major

104 Secs 8 & 30.

105 Sec 1.

106 Sec 4.

107 Act 20 of 2006.

108 Secs 5-11.

109 Secs 12-18.

110 Secs 19-24.

111 Secs 25-31.

112 Secs 32-38.

113 Sec 2.

life activities of that person'.¹¹⁴ The definition of disability follows the social and human rights models; whilst the definition of persons with disabilities appears to merely describe persons having impairments. On the whole, therefore, the Act demonstrates compliance with the standards under the CRPD relating to the conceptualisation of disability.

Equality and non-discrimination

The Act recognises non-discrimination as one of its objects.¹¹⁵ However, it does not have a general anti-discrimination clause. It takes the approach of providing for particular substantive rights which have follow-up stipulations prohibiting discrimination in the exercise of such rights. For example, it prohibits discrimination in relation to employment;¹¹⁶ and education services.¹¹⁷ It appears to permit discrimination in relation to goods, facilities and services if the person with a disability concerned is regarded to have no 'capacity' to give informed consent or enter into a contract;¹¹⁸ or if the 'limitation of non-discrimination' is aimed at protecting health or safety.¹¹⁹

Furthermore, the Act obliges government to take affirmative action measures for achieving substantive equality for persons with disabilities.¹²⁰ However, the Act does not recognise the obligation to provide reasonable accommodation and it does not make reference to the concept at all. This is contrary to the standards under the CRPD. It can thus be concluded that the Act does not satisfy the equality and non-discrimination standards under the CRPD.

National disability coordination committee

The Act does not establish a disability body but it entrusts the functions performed by such bodies to the National Council for Disability, which is established by a separate statute, namely, the National Council for Disability Act of 2003.¹²¹ The functions of the Council as set out in section 6(1) of the 2003 Act include: to act as body at national level through which disability issues can be communicated to government;¹²² to monitor and

114 Sec 2.

115 Sec 3(d).

116 Sec 12.

117 Sec 6.

118 Sec 25(3)(b).

119 Sec 25(3)(a). The (mis)conception that a person with a disability might not have legal capacity is contrary to art 12 of the CRPD which recognises equal legal capacity for persons with disabilities.

120 Sec 33. The affirmative action under the provision serves the purpose of 'redressing imbalances which exist against' persons with disabilities.

121 Sec 2 of the 2006 Act (which defines the 'Council'). The Council is established under sec 3 of the 2003 Act.

122 Sec 6(1)(a) of the 2003 Act.

evaluate the extent to which government, NGOs and private sector include and meet the needs of persons with disabilities in their planning and service delivery;¹²³ to act as a coordinating body between government departments, other service providers and persons with disabilities;¹²⁴ and to carry out or commission surveys and investigations in matters involving violations of rights of persons with disabilities and non-compliance with laws, policies or programmes on disability.¹²⁵ It can be observed that unlike the disability laws discussed above, the 2003 Act expressly designates the Council as the national disability coordination body. Accordingly, the Act places the Council in a good position to discharge the national implementation coordination mandate under the 2006 Act as envisaged by the CRPD.

Provision for remedies and redress mechanism

The Act makes provision for a redress mechanism in Part VIII.¹²⁶ In terms of the mechanism, a person who alleges that an act prohibited under the provisions of the Act has been committed has the option of lodging a complaint with the National Council for Disability (discussed above).¹²⁷ The Council is expected to make a decision after receiving and investigating the complaint in accordance with its functions under the 2003 Act (discussed above), whereby the Council is expected to take appropriate action relating to the outcome of the investigations or to refer them to relevant authorities.¹²⁸ The Act gives an opportunity to any person who might be aggrieved by a decision of the Council on the complaint to petition the courts of law for a review of the complaint. This mechanism entails that persons with disabilities who suffer rights violations do not have direct access to the courts to seek redress. In addition, the Act does not indicate if and what remedies are available upon a successful court review. This procedure falls short of conforming to the redress mechanism standards under the CRPD.

Furthermore, the Act makes provision for offences and penalties in Part IX.¹²⁹ The Act makes it an offence for any person to contravene, or to aid another person to contravene, any of its provision and a conviction attracts a fine.¹³⁰

123 Sec 6(1)(b) of the 2003 Act.

124 Sec 6(1)(c) of the 2003 Act.

125 Sec 6(1)(f)(i) & (ii) of the 2003 Act.

126 Sec 41.

127 Sec 41(1).

128 Sec 6(1)(f)(i) & (ii) of the National Council for Disability Act of 2003.

129 Sec 43.

130 Sec 43(1) & (2).

4 Conclusion

The diagnostic analysis of the disability statutes in 3 above gives a broad picture of the status of emerging disability legislation at the African regional level. Table 1 below summarises the findings of the assessment of the selected disability laws for compliance with the CRPD standards relating to the four thematic aspects, in addition to the aspect of providing for substantive rights.

Table 1: Assessment of compliance with CRPD standards by selected disability laws

	Malawi – Disability Act	Zambia – Persons with Disabilities Act	Tanzania – Persons with Disabilities Act	Ghana – Persons with Disabilities Act	Uganda – Persons with Disabilities Act
Provision for substantive rights	Compliant (Education, employment, health, accessibility & social protection)	Compliant (Education, employment, health, accessibility; social protection recognised & equal legal capacity)	Compliant (Education, employment, health, accessibility & social protection)	Largely compliant (Education, employment, health, & accessibility)	Largely compliant (Education, employment, health, & accessibility)
Definition of disability and persons with disabilities	Compliant (social and human rights models)	Compliant (social and human rights models)	Compliant (social and human rights models)	Position not certain (No definition of disability or person with disability)	Compliant (social and human rights models in the definition of disability)
Equality and Non-discrimination	Not compliant (No reasonable accommodation; no affirmative action)	'Moderately' not compliant (Reasonable accommodation recognised; but not affirmative action)	Fully compliant (Reasonable accommodation; & affirmative action)	Not compliant (No reasonable accommodation; no affirmative action)	Not compliant (affirmative action; but not reasonable accommodation)
National coordinating body	Compliant (Body to be established under Act)	Compliant (Body continued under Act)	Compliant (Body established under Act)	Compliant (Body established under Act)	Compliant (Body established by separate Act recognised under Act)
Provision for civil remedies; mechanism for redress; & penalties	'Fully' Compliant (Redress mechanism; penalties & civil remedies)	'Moderately' Compliant (Indirect redress mechanism for discrimination only; remedies not listed; but penalties imposed)	'Moderately' compliant (No civil remedies; but penalties imposed)	'Moderately' compliant (No remedies; but penalties imposed for contravention of a few provisions)	'Moderately' compliant (Indirect redress mechanism for prohibited acts; remedies not listed & penalties imposed)

As can be seen from Table 1 above, the following five broad concluding statements can be made in relation to the compliance with the CRPD's standards at the African region. First, almost all disability laws guarantee a number of substantive rights, which include education, employment, health, accessibility and social protection.¹³¹ However, it is only the disability legislation of Zambia that recognises equal legal capacity for persons with disabilities.¹³² Secondly, there is general compliance by the disability legislation with the CRPD's standards in the conceptualisation of disability as most disability laws adhere to the social and human rights models of disability.

Thirdly, the region predominantly still falls short of conforming to the equality and non-discrimination standards under the CRPD as most of the disability statutes do not recognise the obligation to provide reasonable accommodation in ensuring equality and non-discrimination. Fourthly, the domestic statutes establish or recognise a national disability body that is entrusted with the duty to implement and coordinate the implementation of disability rights, thereby conforming to the CRPD's standards. Lastly, the region appears to predominantly take the approach of providing criminal sanctions by way of offences and penalties such as imposing fines, penalties or imprisonment sentences for violations of disability rights or disability laws. This denies persons with disabilities the opportunity to obtain civil remedies when their rights are violated or threatened, contrary to the standards under the CRPD.

Therefore, it can be concluded from the commentary's diagnosis that the African region needs to consider modifying their disability laws for conformity with the CRPD. The modification is especially necessary in the aspects of equality and non-discrimination; and provision for civil remedies in cases of violations of disability rights.

131 It is only the disability laws of Ghana and Uganda that do not recognise the right to social protection.

132 See Persons with Disabilities Act, sec 8(1).