

REGIONAL DEVELOPMENTS

THE RIGHT TO POLITICAL PARTICIPATION FOR PEOPLE WITH DISABILITIES IN AFRICA

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1 Introduction

The UN Convention on the Rights of Persons with Disabilities (CRPD)¹ was adopted in December 2006 and entered into force in May 2008. The convention reaffirms a number of substantive rights for people with disabilities and marks a paradigm shift from an understanding of disability as a medical condition to one that sees disability as the effect of interaction between an individual's impairment and the barriers society creates.² States parties to the convention are obliged to bring their legal frameworks in line with the CRPD's core concepts of self-determination, equality, non-discrimination, participation, inclusion and accessibility.

As of May 2015, the CRPD had been signed by 44 African states out of 54.³ Of the 44 only five haven't ratified the convention.⁴ With the

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

2 AS Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 287.

3 Office of the High Commission for Human Rights 'Ratification Status for CRPD' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed on 24 November 2014).

4 The five countries are Cameroon, Central African Republic, Chad, Libya & Madagascar. Status of the CRPD https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (accessed 14 May 2015).

exception of Egypt and Mauritius African states have ratified the CRPD without reservations.⁵ Essentially African states have shown their willingness to guarantee the rights of person with disabilities. The CRPD guarantees the right to political participation under article 29.⁶ Article 29 guarantees the right of every disabled person to political participation including those of 'unsound mind'. There is neither limitation nor restriction provided for under article 29.⁷ Political participation as it will be seen later involves participation in the electoral process such as voting and holding public administrative posts, participation in policy and administrative posts.

This paper aims to give an analysis on the protection of the right to political participation for person with disabilities in Africa. To this end, I will seek to find out whether African countries have adhered to the standards set forth under the CRPD. Part one will explain the meaning of political participation in relation to persons with disabilities. Here I will also explain the different manifestation of political participation. Part two will give an overview of the African human rights system on the protection of person with disabilities. I will be focusing on whether the current system protects person with disabilities and importantly whether Africa needs a disability rights treaty different from CRPD. Part three will discuss the CRPD and the obligations it provides for states. Article 29 of the CRPD will also be discussed in detail explaining what is required. Part four will be critically reviewing domestic legislation of African countries that have signed and ratified the CRPD. The purpose is to assess whether these African countries have managed to adhere to the standards set forth by CRPD. Finally I will give recommendations on how African countries can effectively realise the right to political participation.

5 As above.

6 Art 29 provides: 'States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake: (a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by: (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; (b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.'

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

2 Understanding the right to political participation for persons with disabilities

Politics and political involvement ranges from family life to that of the local and international arenas where there is a need to make a decision and be part of the decision.⁸ This part focuses on the participation of persons with disabilities in elections, which is one of the commonly known demonstrations of one's political role-playing either as a voter or as a candidate. Hence this part will highlight issues like meaning, scope and manifestation of political participation without rushing into details of the concept. Furthermore, the part will clarify the contents of the rights of persons with disabilities and the values of their involvement as active electoral participants. To this end, the sections are designed to address issues in relation with their right to vote, their right to be elected and their access to party membership. However, this part will not scrutinise each and every aspect of political involvements of person with disabilities.

2.1 The right to political participation

Politics broadly speaking involves the interrelationships between people, between men and women, parents and children, people with and without disabilities and the operation of a power at every level of human interaction.⁹ On the other hand a narrow definition of politics refers to the activities of the government, politicians and political parties.¹⁰ Therefore, political participation includes a range of activities which people express their opinions on the world and how it is governed.¹¹

The Committee to the Convention on Elimination of all forms of Discrimination against Women (CEDAW) defined political participation as:

[A] broad concept referring to the exercising of political power in particular the exercising of legislative, judicial, executive and administrative power. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's

8 J Ballington (ed) 'The implementation of quotas: African experience' Institute for Democracy and Electoral Assistance (IDEA), Quota Report Series, Sweden, 2004, 125.

9 WHO *Empowering persons with disabilities: Community based rehabilitation guidelines* (2010) 29 http://whqlibdoc.who.int/publications/2010/9789241548052_empower_eng.pdf?ua=1 (accessed on 3 May 2015).

10 As above.

11 As above.

organizations, community based organizations and other organizations concerned with public and political life.¹²

The Human Rights Committee (HRC) on the International Covenant on Civil and Political Rights (ICCPR) echoes the same sentiments through General Comment 25. HRC reaffirms the fact that

the conduct of political and public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administration powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, regional and local levels.¹³

Political participation can be manifested in different ways but not limited to: participation in elections as a process of the formal politics through voting or being voted; holding offices at the administrative or executive branch of the government at the local, regional or national levels; joining and forming unions, associations or political parties; participation in policy; and decision making process.¹⁴ For persons with disabilities political participation might involve thinking and developing disability or other social issues at the individual or family level, joining disabled peoples' organisations (DPOs), joining a political party or standing for elections.¹⁵

Despite the fact that the right to political participation is exercised in different ways, it is the view of the author that active involvement in elections is both a 'means' and an 'end' of minimising marginalisation. As a means of realising their different rights, persons with disabilities may choose a party or a candidate with better policies and programmes that accommodate their different needs in their economic, social, cultural and other affairs of their lives. When they participate as candidates, these people may bring disability and its consequences as one agenda in the overall affairs of the country. That is why active involvement of people with disabilities in elections is a means and an effective tool of mainstreaming the fundamental rights in their political life. On the other hand, the right to political and electoral participation in itself is an end right. It is the right of every citizen to enjoy equal and effective participation in the political tournaments of his/her country. Accordingly, as like every citizen, persons with disabilities also should have a room to exercise this right at every level.

12 CEDAW, General Comment No 23 'Political and public life' A/52/38(1997) para 5.

13 HRC, ICCPR, General Comment No 25 'The right to participate in public affairs and the right of equal access in public services' CCPR/C/21/Rev.1/Add.7 (12 July 1996).

14 See art 25 of the ICCPR.

15 WHO (n 9 above).

2.2 Electoral participation of persons with disabilities

As discussed in the previous section, the daily life of mankind has some level of politics. Therefore, participation in the political spectrum is all about the power which enables a person to make informed choices and the freedom to take action.¹⁶ People with disabilities need to be actors in the process of political participation because people with power make decisions.¹⁷

Active involvement in the political game of their country would enable people with disabilities to become actors in every decision-making and policy mainstreaming in the general public affairs and in their specific desires. Consequently the playing field should be leveled and should inspire them to aspire for deeper and enhanced political participation. It must be noted that democracy is about numbers.¹⁸ Therefore people with disabilities who share a considerable number in the country's population must be facilitated to realise their 'political Arsenal'.¹⁹

The right to vote is an essential tool of ensuring accountability of representatives who hold office for the exercise of legislative or executive power.²⁰ Even though every citizen is endowed to enjoy the right to vote, general recognition of the right to vote may not guarantee the enfranchisement of people with disabilities.²¹ For persons with disabilities, special accommodation needs to be facilitated throughout the election season that is, pre-election, during and post elections. The accommodations needed vary from individual to individual. Efforts during pre-election may include repealing any laws or administrative actions that exclude person with disabilities from voting.²² Furthermore, states should not just repeal laws, but enact disability sensitive laws that recognise right to vote for person with disabilities.

People with disabilities also have the right to be elected. However, mere recognition of the right of 'every citizen' does not entail that persons with disabilities are guaranteed on the same level to compete for a seat at the legislature. The right to be elected can be realised when long term and urgent accommodative measure are included to minimise the barriers.²³ To this end, regular and consistent disability sensitisation programmes

16 As above.

17 As above.

18 R Bellamy *Political constitutionalism: A Republican defense of constitutionality of democracy* (2007) 145.

19 As above.

20 General Comment No 25 (n 13 above) para 5.

21 M Schulze 'Understanding the UN Convention on the Rights of Persons with Disabilities' (2009) *A Handbook on the Human Rights of Persons of Disabilities* 14.

22 General Comment 25 (n 13 above) para 7.

23 Focus on Elections and Disability, Extending the Franchise to Citizens with Disabilities, Concept Paper <http://www.electionaccess.org/rs/Discussion> (accessed 10 May 2015).

should be disseminated to the community and its leadership as a first step.²⁴ This effort requires long term commitments through legislative, administrative and policy programmes including advocacy and civic and human rights literacy educational strategies.²⁵

Strong and suitable democracy is dependent on the existence of well-functioning political parties. These organs are crucial actors in bringing together diverse interests, recruiting and presenting candidates and developing competing policy programmes that provide people with choices.²⁶ Political parties are the vehicle through which popular sovereignty is expressed and transformed in to public policy and action.²⁷ Political parties are means through which citizens can participate in governance either directly or through elected representatives of their choice.²⁸ Therefore, ensuring active participation of person with disabilities in political parties is an essential step towards inclusion in political affairs of their country.

2.3 The participation spectrum: Total exclusions, limited or full participation?

According to the European Union Agency for Fundamental Rights (FRA), the participation of person with disabilities in politics can be reflected in three situations: total exclusions, limited participation or full participation.²⁹ Total exclusion entails

to deny the right to political participation to all persons under a protective measure such as a partial and plenary guardianship, regardless of their actual and/or individual level of functional ability.³⁰

In these situations person with disabilities are no more actors in the political field. In most countries this exclusion is linked with the legal

24 As above.

25 PW Masakhwe 'Kenyan with disabilities must now challenge political marginalization' http://www.disabilityworld.org/01_07/kenyanmargins.shtml (accessed 10 May 2015).

26 M Chege 'Political parties in East Africa: Diversity in political party systems' IDEA (2007) 7 http://www.oozebap.org/biblio/pdf/PP_East_Africa_Web.pdf (accessed 10 May 2015).

27 As above.

28 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHRP 2005), Communication 251/2002, para 63.

29 European Agency for Fundamental Rights 'The right to political participation of persons with intellectual disabilities and with mental health problems in the European Union' (2010) 15-21.

30 As above.

capacity of the person with a disability.³¹ However, recent developments in the international human rights law frown upon such kind of laws.

The limited participation spectrum is manifested in different approaches.³² Some limitations are imposed based on the type of disability and most of the time it is to persons with mental and intellectual disabilities who are subject to such restrictions.³³ On the other hand, there are restrictions taking into account the content of the right to political participation.³⁴ This may be reflected in cases where people with disabilities are permitted to vote but not to stand for election or to hold office. Still in other occasions, even though there is no constitutional or legislative restriction, people with disabilities may not have a practical exposure and facilities enabling them to exercise their right. In these occasions, only external barriers and impediments could limit their rights. This happens where there are no affirmative and accommodative legislative and technical measures that enable these people to exercise their right.

Full participation of person with disabilities entails having no legislative or practical constraints against exercising political and electoral rights.³⁵ Here people with disabilities are allowed to participate in all aspects of political spectrum. It is worth mentioning that very few countries mainly Austria, Finland, The Netherlands and Spain are getting closer to this stage.

3 The African human rights system and political participation of persons with disabilities

This section seeks to look at how the African human rights system protects political participation for person with disabilities. Commentators have termed the African human rights system as the least developed compared to other regional bodies.³⁶ This is because African states are notorious human rights violators and they are mostly unable and unwilling to remedy the situation.³⁷ However, for the last 30 years the system has made great improvements by adopting a variety of human rights treaties such as

31 See Senegal's Electoral Code article L.26(7), where adults deprived of their legal capacity cannot be registered on the electoral list, and are thus automatically deprived of the right to vote; Ghana's Constitution which imposes restrictions mainly to persons with intellectual and psychosocial disabilities to vote.

32 European Agency for Fundamental Rights (n 29 above).

33 As above.

34 As above.

35 As above.

36 Steiner et al *International human rights in context: Law, politics, morals* (2007) 1062.

37 M Mutua 'The African human rights system: A critical evaluation' <http://hdr.undp.org/sites/default/files/mutua.pdf> (accessed 1 March 2015)

the African Charter on Human and Peoples' Rights (ACHPR).³⁸ The ACHPR is innovative because it comprises all the generations of rights. The charter also incorporates the concept of people rights and imposes duties on individuals.³⁹ People with disabilities still remain invisible in the African human rights system because the current legal framework does not adequately protect them.⁴⁰

Africa does not have any specific disability related treaty. However, the African Commission has issued a draft protocol on the rights of persons with disabilities for comments. The objective of this section is to review the current treaties and its relation to political participation of person with disabilities. The specific instruments are the ACHPR, African Democracy Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

The ACHPR played a great role of diverting the attention of former OAU⁴¹ from self-governance to human rights situations in the continent. The ACHPR guarantees rights to 'every individual', 'every human being', 'every citizen', and 'all peoples' essentially protecting persons with disabilities.⁴² The values of the Charter in the promotion and effective implementation of the political rights of persons with disabilities is acknowledged from different angles.

First, the Preamble of the Charter espouses freedom, equality, justice and dignity to which these people are highly in need of.⁴³ Secondly, the Charter unequivocally compels the need to root out all forms of discrimination based on non-exhaustive list of grounds like race, colour, sex, language, religion or political opinion. Though disability is not expressly mentioned, on the same grounds already addressed in the previous instruments, the non-discrimination provision of the Charter⁴⁴ could serve as an essential tool to fight discriminations in the political tournaments on the ground of disability. In fact the Commission has stated that disability is one of the grounds provided for under article 2 of the ACHPR.⁴⁵ Furthermore, article 13 of the Charter guarantees the right of every citizen to participate freely in government of his country. From this

38 The African Charter on Human and Peoples' Rights was adopted in 1981 by the 18th assembly of Heads of State and Government of OAU, and came in to force in 1986. The document is also known as the Banjul Charter due to the fact that its final draft was produced in Banjul, the capital city of Gambia.

39 Mutua (n 37 above) 3.

40 The Secretariat of the African Decade of Persons with Disabilities 'The architecture for an African disability rights mechanism' 22.

41 The existing African Union (AU) substituted the OAU after the adoption of the Constitutive Act of the African Union in the year 2000.

42 Secretariat of the African Decade of Persons with Disabilities (n 40 above) 23.

43 ACHPR, Preamble, paras 3, 6, 8 and 10.

44 Art 2 of ACHPR.

45 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) http://www.achpr.org/files/sessions/33rd/communications/241.01/achpr33_241_01_eng.pdf (accessed 9 March 2015) para 49.

provision person with disabilities are protected for as long as they are citizens.⁴⁶ Reading article 13 and 18⁴⁷ of the ACHPR, people with disabilities are guaranteed 'special measures of protection'. This means that people with disabilities in Africa should be protected while exercising franchise. As it will be seen in the next section, the drafters of the CRPD spelt out in detail what these special measures entail.

The ACHPR unfortunately does not mention people with disabilities except under article 18. This limits disability to only 'old age' and the reality is disability may occur at any age.⁴⁸ This curtailed the evolution of disability into a multifaceted issue as it is.⁴⁹ Furthermore, the lack of explicit mention of disability under article 2 is a lack of protection for persons with disabilities especially regarding political participation.

The African Charter on Democracy, Elections and Governance was adopted to maintain peaceful change of governments.⁵⁰ Democracy Charter is relevant to persons with disabilities because it not only guarantees respect for human rights and democratic principles⁵¹ but also provides for the promotion of a representative system of government with effective citizen participation.⁵² Article 8(2) imposes a state to adopt legislation and policies that guarantee the rights of person with disabilities, hence open acceptance that person with disabilities are part of governance structure.

The primary objective of the Maputo Protocol⁵³ is to address women's rights in Africa including those living with disabilities. Women with disabilities in Africa suffer double discrimination, that is, discrimination based on sex and disability. The Maputo Protocol recognises the right to dignity⁵⁴ and non-discrimination⁵⁵ of all women including those with disabilities. Article 9 of the protocol recognises the right to participation and decision-making. Women are entitled to have an equal participation in the political life of their country through affirmative action, enabling national legislations and other measures that could ensure their participation in all elections without any discrimination.

46 MK Mbondenyei 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 183.

47 Art 18 of the ACHPR provides: '[T]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

48 Secretariat of the African Decade of Persons with Disabilities (n 40 above) 23.

49 As above.

50 The Democracy Charter is adopted by the 8th ordinary session of the AU Assembly, held in Addis Ababa, 30 January 2007 (Democracy Charter).

51 Art 3(1) of the Democracy Charter.

52 Art 3(3), (7) & 4 of the Democracy Charter.

53 The protocol was adopted in Maputo, Mozambique, on 11 July 2003.

54 Art 3 of Maputo Protocol.

55 Art 2 of Maputo Protocol.

The African Commission in *Purohit and Moore v The Gambia*⁵⁶ held that the right to political participation is extended to every person under the ACHPR, including persons with psychosocial disability. This case involved the automatic institutionalisation of people with psychosocial disabilities under the Gambian Lunatics Detentions Act. The complainants stated this practice amounts to discrimination under article 2 of the ACHPR, even though disability is not explicitly mentioned. The commission therefore held that all human beings regardless of their mental capabilities should be treated with dignity. The commission stated that the right to political participation can only be limited by reason of legal incapacity which may not necessarily mean mental incapacity.

The *Purohit* case shows there is potential for the Commission to expand the rights under ACHPR to protection of person with disabilities in Africa.⁵⁷ The majority of people with disabilities have never considered the African commission as an avenue to address their issues such as political participation. This is attributed to a lack of knowledge of existence of such a system. Even for those with the knowledge, lack of participation can be attributed to the commission's failure to provide, for instance, sign language making it difficult for people with hearing impairments to participate.⁵⁸ It is also worth mentioning that the lack of cases and engagement of the African commission by people with disabilities is because it is expensive to travel and attend the commission sessions, which occurs twice a year.

3.1 Towards an African disability rights treaty

In November 2007, the African Commission on Human and Peoples' Rights established the Working Group on Older Persons and People with Disabilities to be the focal point on issues of disability rights.⁵⁹ In May 2009, the mandate of the Working Group was extended by resolution 143/45 so that they can advise the commission on the adoption of a Protocol on the Rights of Persons with Disability.⁶⁰ The working group in 2009 held an expert seminar on the rights of older persons and people with disabilities in Africa in Accra, Ghana.⁶¹ Two drafts instruments emerged after the meeting popularly called the 'Accra Draft'. In March 2014, the Working Group released the Draft II Protocol on the Rights of Persons with

56 *Purohit and Moore v The Gambia* (n 45 above).

57 Secretariat of the African Decade of Persons with Disabilities (n 40 above) 31

58 As above.

59 African Commission on Human and Peoples Rights Resolution 118/42 http://www.achpr.org/files/activityreports/23/achpr4243eo4_actrep23_20072008_eng.pdf (accessed 24 November 2014).

60 African Commission on Human and Peoples' Rights 'Working group on older persons and people with disabilities' <http://www.achpr.org/mechanisms/older-disabled/> (accessed 24 November 2014).

61 Secretariat of the African Decade of Persons with Disabilities (n 40 above) 36.

Disabilities in Africa (Draft Protocol II).⁶² Clause 16 of the Draft Protocol II provides for the right to political participation. The Draft Protocol provisions are more similar to the ones under CRPD. This has led to some commentators to ask whether Africa really needs a disability rights treaty.⁶³

Clause 16 mandates African states to ensure that persons with disabilities enjoy political participation on equal basis with others. This will be achieved through legislative and policy reforms. States should also undertake to ensure civic education to encourage participation of person with disabilities.⁶⁴ State parties will be mandated to ensure that there is reasonable accommodation and other support measures for persons with disabilities in political participation.⁶⁵ Importantly the Draft Protocol II mandates state parties to ensure that political participation is through secret ballot.⁶⁶ Unlike the CRPD, article 16 of the Draft Protocol II mandates states to ensure there is at least five per cent of representation in the national and local legislative bodies.⁶⁷ The challenge with the requirement may be on how to implement and the capacity of the African Commission to monitor.⁶⁸

It is important to note that commentators have been asking whether Africa really needs a disability rights treaty.⁶⁹ This is because there was a need to have a feasibility study of whether the CRPD is addressing issues African persons with disabilities face.⁷⁰ The study should have addressed whether there is an African conception of disability distinct from other regions. The research should also have addressed whether Africa is such a homogenous entity that it needs its own disability rights treaty. If the research was in the affirmative then there is a need for an African disability rights treaty. The research should also have addressed whether the CRPD is enough to protect persons with disabilities in Africa considering some African principles such as *Ubuntu* by ensuring humanity, diversity, interdependence and inclusion are included.⁷¹

The drafting of the disability rights protocol has been termed as 're-inventing the wheel'.⁷² The CRPD which more than 40 African countries have signed and ratified provides for a comprehensive rights and

62 African Commission on Human and Peoples Rights (n 60 above).

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

64 Art 16(a) & (e) of Draft Protocol II.

65 Art 16(c) of Draft Protocol II.

66 As above.

67 Art 16(d) of Draft Protocol II.

68 Biegon (n 63 above) 71.

69 Biegon (n 63 above) 72.

70 As above.

71 Art 3(c) & (d) of the CRPD; Biegon (n 63 above) 76.

72 Secretariat of the African Decade of Persons with Disabilities (n 40 above) 39.

obligations for persons with disabilities. The Draft Protocol II clearly duplicates most of the rights that the CRPD already provides. Furthermore, formulating a new treaty such as Draft Protocol II is time consuming. Before a treaty comes into force a certain number of signatures must be deposited. Essentially before persons with disabilities in Africa enjoy the provisions of the protocol might be after a long time if history is anything to go with. This is because the African Charter on the Rights and Welfare of the Child came into force nearly a decade after first signature was deposited.⁷³

4 The CRPD and obligations under article 29 of CRPD

Over forty African countries have signed and ratified the CRPD. Hence African countries are willing to be bound by the provision of the convention. The right to political participation can be read alone and together with other crosscutting provision of the CRPD. These crosscutting provisions include articles 3 and 5. Article 3 of the CRPD provides for the principles that apply in the convention.⁷⁴ Some of the principles applicable to the right to political participation include the respect of inherent dignity. As it will be seen later in the article most legislation in Africa takes away the dignity of persons with intellectual and psychosocial disabilities from voting or being voted. Sometimes the law in some countries calls them 'lunatics'. Article 5 on the other hand provides for equality and non-discrimination. This article is important to political participation because most African countries' laws discriminate either directly or indirectly person with disabilities in voting process. Importantly the article states that failure to provide reasonable accommodation amounts to discrimination. Essentially the right to political participation must be guaranteed through reasonable accommodations.

Article 29 of the CRPD sets out the mechanism of protecting the right to political participation and public life for persons with disabilities. Article 29 encompasses broad notions of participation in public and political life.⁷⁵ This means that there is political participation in terms of the right to vote and be voted as stipulated by article 29(a) of CRPD. The

⁷³ Secretariat of the African Decade of Persons with Disabilities (n 40 above) 40.

⁷⁴ Art 3 provides: 'The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; Equality between men and women; (g) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.'

⁷⁵ Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, Human Rights Council 19th Sess. 21st Dec 2011, A/HRC/19/36.

importance of the right to vote and be voted cannot be underestimated. The right not only ensures equality of opportunity but also allows full participation and inclusion of person with disabilities in society.⁷⁶ Persons with disabilities are able to assert their individual autonomy through this right.⁷⁷ This autonomy is closely related to recognition before the law and freedom to make ones choices.⁷⁸ States are therefore required to guarantee that all eligible persons have the opportunity to exercise voting rights, through adoption of positive measures.⁷⁹ Furthermore, states are required to make the right to vote a 'reality' by making polling stations accessible, facilitating the use of assistive devices to enable person with disabilities to vote independently.⁸⁰

Article 29(b) requires states 'to promote actively an environment in which persons with disabilities can effectively' participate in the public and political affairs of their country on equal basis with others without discrimination.⁸¹ This means that people with disabilities are entitled to participate in all aspects of political and public aspect in their respective countries.⁸² This can be achieved through participation in law and policy reform where people with disabilities are able to make and influence changes in society in areas like education, health and employment.⁸³ Article 29(b) also imposes a positive obligation upon states like encouraging active involvement of persons with disabilities in political parties and organisations dealing with public and political life. Importantly the CRPD as a whole is anchored on participation of persons with disabilities to ensure inclusion.⁸⁴

The Human Rights Committee in its General Comment 25 established that 'psychosocial incapacity might be a ground for denying a person the right to vote or hold office'.⁸⁵ However, since the adoption of the General Comment, there has been a paradigm shift leading to the adoption of the CRPD that proscribes disability discrimination. Article 29 guarantees equal and effective enjoyment of political rights to persons with disabilities. Furthermore, the CRPD does not foresee any kind of

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

77 As above.

78 Thematic study (n 75 above) para 24.

79 Fiala-Butora (n 7 above) 55.

80 See also Art 16(c) of Draft Protocol II.

81 See also Art 16(a) of Draft Protocol II.

82 H Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) 2 *African Disability Rights Yearbook* 75.

83 Thematic study (n 75 above).

84 See art 3(c) of CRPD.

85 General Comment No 25 (n 13 above) para 4.

restriction upon this right.⁸⁶ In *Bujdoso v Hungary*,⁸⁷ the CRPD Committee echoed the same sentiments when they stated that automatic ban on the right to vote on people with psychosocial disabilities is not only unjustified but also breached article 29 read alone and in conjunction with article 12⁸⁸ of the CRPD. Hence any restriction based on real or perceived disability amounts to disability discrimination.

Generally states have a three-pronged obligation to treaties such as the CRPD. This includes the obligation to respect, protect and fulfill. The obligation to respect entails refraining from interfering with the rights under CRPD.⁸⁹ In relation to article 29 states should refrain from discriminatory practices that limit the right to person with disabilities.⁹⁰ The obligation to protect on the other hand mandates states to prevent violation of the rights by third parties.⁹¹ This obligation also entails states adopting legislative and policy reforms to ensure that the right is realised.⁹² States may for example ensure that tactile ballot guides are present as was seen in the 2005 Liberian elections.⁹³ Finally the obligation to fulfill entails enabling the right by adopting policies and assisting person with disabilities. This may include ensuring that there is proper training of the election officials in handling people with disabilities.

5 The legal status of the right of persons with disabilities to political participation in Africa member states

Africa has a total of 54 sovereign states. Of this 42 have both signed and ratified the CRPD. This essentially means that African countries accept the general obligations set out in article 4 of the CRPD, including the obligation to 'modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. Persons with disabilities in Africa still continue to face a challenge in exercising their right to political participation. Persons with psychosocial disabilities face the greatest challenge because laws expressionlessly limit

86 Lord (n 76 above); Combrinck (n 82 above); see also A Lawson 'The United Nations Convention on Persons with Disabilities: New era or false dawn' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 563.

87 Communication No 4/2011, views adopted on 9 September 2013, UN Doc Ref CRPD/C/10/D/4/2011, dated 20 September 2013; see also *Kiss v Hungary* where the court stated that removal of voting rights solely based on mental disability is not compatible with legitimate grounds for restricting the right to vote.

88 Art 12 of CRPD provides for the right to legal capacity.

89 UN Enable 'Chapter two: The Convention in detail' <http://www.un.org/disabilities/default.asp?id=225> (accessed on 21 March 2015).

90 'The right to participation in political and public life' <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/html/CH3.html> (accessed 21 March 2015).

91 Chap2 (n 89 above).

92 n 90 above.

93 As above.

their participation. This part of the article seeks to give a critical look at different African countries laws on the right to political participation for person with disabilities. This part will be answering the question whether African countries that have signed and ratified the CRPD allow persons with disabilities to exercise the right to political participation.

5.1 The Legal status of persons with disabilities right to vote in Africa member countries

The right to vote constitutes one of the cornerstones of modern democracies.⁹⁴ The right to vote is enshrined in different instruments like article 25(b) of the ICCPR which states '[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage'. Persons with disabilities are therefore guaranteed this right not only by the CRPD but also ICCPR. However, it is important to note that most legal restriction on voting that were allowed by the ICCPR, 'are no longer compatible with the prohibition of discrimination in articles 2(1), and 25 or with the present-day understanding of democracy'.⁹⁵ This is the case in situation where voting restriction is based on intellectual or psychosocial disabilities as is the case in most African countries. For instance, the Zambian Constitution provides that any person who under the laws of Zambia is adjudged or otherwise declared to be of 'unsound mind' cannot be registered as a citizen.⁹⁶ The same kind of restrictions is seen in the Constitutions of Zimbabwe,⁹⁷ Malawi,⁹⁸ Gabon,⁹⁹ Kenya¹⁰⁰ and Mali.¹⁰¹ However, persons with disabilities in countries like Ethiopia,¹⁰² Niger,¹⁰³ and Ghana¹⁰⁴ are allowed to vote either independently, by proxy or with an assistant of their choice.

94 Report of the Office of the United Nations High Commissioner for Human Rights 'Factors that impede equal political participation and steps to overcome those challenges' A/HRC/27/29 (2014) para 9.

95 M Nowak *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005) 576.

96 Constitution of Zambia, 1996 art 6(2).

97 Constitution of Zimbabwe, 2007 sch 3, sec 3(2).

98 Arts 51(2)(b), 77(3)(a), 80(7)(a) excludes persons with actual or perceived mental disability from the right to vote.

99 Law on common rules for all political elections in the Gabonese Republic, 1996, which proscribes voters with a mental disability to exercise franchise.

100 Art 83(1)(b) Constitution of Kenya.

101 Art 91 of The Electoral Law (2006) Ethiopia.

102 Arts 21(4), 64(5) & (6) of Electoral Law (2005) <http://aceproject.org/ero-en/regions/africa/ET/Eleclaw.pdf/view> (accessed on 16 May 2015) provides that 'the disabled' and 'the blind' or 'otherwise physically disabled' may vote accompanied by an assistant of their choosing.

103 Art 66 & 74 Electoral Code (1999) provides for voter assistance and voting by proxy respectively for persons with disabilities in Niger.

104 See arts 29 & 37, Ghana Constitution (1992) <http://www.politicsresources.net/docs/ghanaconst.pdf> (accessed 16 May 2015). However, art 29 also contain negative provisions, providing for nonconsensual treatment in respect of his or her residence and 'specialized establishments'. At the same time, it attempts to provide for affirmative action for persons with disabilities to engage in business.

As discussed in the previous section article 29 of the CRPD guarantees the right to vote for persons with disabilities. Importantly is that restrictions such as seen in the constitutions of Kenya, Gabon, Zimbabwe are not compatible with the letter and spirit of the CRPD.¹⁰⁵ Therefore any exclusion of the right to vote on the basis of perceived or actual psychosocial disability constitutes discrimination according to article 2 of the CRPD. There has also been the argument that the restriction on intellectual disability is not based on 'disability' but based on the lack of legal capacity.¹⁰⁶ However, such argument doesn't hold water since article 12(2) of CRPD guarantees legal capacity to all 'on an equal basis with others in all aspects of life'. Importantly this provision does not have any exception.¹⁰⁷

The right to vote for persons with disabilities may also be limited in situation where ballots and polling stations are not accessible. The CRPD Committee in its General Comment 2 stated people with disabilities will be unable to enjoy article 29 if the voting procedures and material are inaccessible.¹⁰⁸ The failure to ensure accessibility amounts to discrimination of persons with disabilities on the rights to vote.¹⁰⁹ These sentiments were also echoed by the Zambian High Court in *Brotherton NO v Electoral Commission of Zambia* where it held that persons with disabilities were discriminated in exercising franchise due to inaccessible polling station and ballot papers.¹¹⁰ In this case the Electoral Commission of Zambia was sued allegedly for failure to initiate legislative reform to ensure equitable participation by persons with disabilities in the electoral process of Zambia. The court also held that failure to provide reasonable accommodations to amounts to denial of the right to vote. Importantly the court held that right to vote for person with disabilities should also be done on secret ballot.¹¹¹

Addressing the issue the Committee on the Rights of Persons with disabilities has stated that limiting the right to vote based on psychosocial or intellectual disability should be the exception rather than the rule as is seen in most African countries.¹¹² In order to remedy this trend amongst

105 Lord et al (n 76 above).

106 Thematic Study (n 75 above) para 30.

107 As above.

108 Committee on the Rights of Persons with Disabilities, General Comment 2 'Article 9: Accessibility' CRPD/C/GC/2,(2014) para 43.

109 As above.

110 *Brotherton NO v Electoral Commission of Zambia* (2011/HP/0818) [2011] ZMHC 32 <http://www.zamlit.org/zm/judgment/high-court/2011/32> (accessed on 10 March 2015).

111 See also *Simon Mvindi v The President of the Republic of Zimbabwe* the Supreme Court ordered the government to ensure accessible ballots for people with disabilities. The applicants petitioned the court because the ballot papers in 2008 general elections were inaccessible to voters with visual impairments. The applicants also argued that section 59 & 60 of the Electoral Act violated the right to secret ballot. The court held these two sections to be inconsistent with the requirements of right to secret ballot.

112 Concluding Observations of the Committee on the Rights of Persons with Disabilities to Tunisia (2011) CRPD/C/TUN/CO/1 para 35.

African countries, revision of such laws must be a priority to ensure inclusivity. Currently no African state has managed to lift all restrictions on the right to political participation for persons with disabilities. Even around the world only Austria, United Kingdom and Canada have managed to lift all restrictions on the right to political participation.¹¹³

5.2 The legal status of right to be elected for persons with disabilities in Africa member countries

The right to be a candidate for persons with disabilities in Africa continues to be a mirage. Like the right to vote, the right to stand election continues to be linked to the legal capacity.¹¹⁴ Essentially people suffering from intellectual and psychosocial disability are denied both the right to vote and stand as a candidate. In most Africa countries person with disabilities are not allowed to stand for elections. For instance in Uganda a person of unsound mind cannot run for elections.¹¹⁵ Article 133 of the Zambian Constitution also provides that a person of unsound mind cannot stand for election for Member of Parliament.¹¹⁶ The legal framework in Central African Republic has similar provision to Uganda and Zambia except the fact that all those who are allowed to stand elections but committed to psychiatric institutions will not be allowed.¹¹⁷ Similar discriminatory provisions are evident in the laws of Namibia¹¹⁸ and Togo.¹¹⁹

These discriminatory and outdated provisions towards persons with disabilities are inconsistent with the obligations that arise from CRPD. Importantly article 29 of the CRPD does not allow any form of limitation toward people with disabilities accessing the right to be elected. Therefore such restrictions not only violate the provision of article 29, but also articles 2 and 12 of CRPD. As of May 2015, no African state has been able to completely lift the restriction for the right to be elected. However, in the United Kingdom there are no restrictions on the right of persons with disabilities to be elected.¹²⁰

113 Thematic Study (n 75 above) para 39.

114 Thematic Study (n 75 above) para 42.

115 Art 80(2) & 102 Uganda Constitution.

116 See also Section 7 of Electoral Act 2006 states that 'no person shall be qualified for registration as a voter if he/she has been adjudged of unsound mind'.

117 Art 79 Electoral Code of the Central African Republic 2004.

118 Sec 47 Constitution of Namibia which bars people with intellectual disability from becoming members of national assembly.

119 Article 62 Constitution of Togo bars people with both physical and mental disability from becoming a president unless three court designated doctors say otherwise.

120 In February 2011, the Government announced its intention to repeal sec 141 of the Mental Health Act 1983 which set the process by which Members of Parliament were required to vacate their seats if they had a mental health condition and were authorised to be detained under mental health legislation for a period of six months or more. Although these provisions had never been used, sec 141 was felt to be symptomatic of an outdated attitude towards mental illness which was out of touch with the modern understanding of mental health.

The CRPD demands that state parties adopt all appropriate measures including the use of assistive devices and new technologies to enable persons with disabilities stand and hold public offices.¹²¹ This right has both negative and positive obligation towards person with disabilities to stand elections. The negative obligation involves ‘abstaining from taking measures which might have a negative impact on the right of persons with disabilities to stand for election’.¹²² Therefore eliminating discrimination is not enough to ensure people with disabilities stand for elections.¹²³ In addition states have positive obligation of ensuring that they undertake that person with disabilities stand for election like all other people. This may include ensuring that there is reasonable accommodation in accordance with article 2 of CRPD.

The CRPD Committee has stated that persons with disabilities will effectively enjoy the right to hold offices in public post when they are given all the support including the personal assistants.¹²⁴ In Uganda, for instance the government pays for sign language interpreters and personal assistants to those elected.¹²⁵ This has led to Uganda having one of the largest active numbers of person with disabilities in local governments.¹²⁶ The use of quota system also allows persons with disabilities to stand and hold public offices. The use of quota is also present in Kenya where the government is to ‘ensure the progressive implementation of the principle that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities’.¹²⁷ In Kenya the government is further required to promote the use of Kenyan sign language, Braille, and other communication formats and technologies accessible to persons with disabilities.¹²⁸ Such affirmative action is important because it ensures that those who have been discriminated for a period of time can access political seats in parliament. This kind of affirmative action is in line with the provision of the CRPD.

6 Conclusion and recommendations

The CRPD marks a new era for the political participation of persons with disabilities in Africa. Article 29 makes it mandatory for state parties to guarantee political rights of persons with disabilities on equal basis with others. Importantly article 29 does not foresee any kind of restriction and

121 Art 29(a)(ii) of CRPD.

122 Thematic Study (n 75 above) para 46.

123 As above.

124 Concluding observations of the Committee on the Rights of Persons with Disabilities to Spain (2011) CRPD/C/ESP/CO/1 para 48.

125 Human Rights Watch ‘“As if we weren’t human”: Discrimination and violence against women with disabilities in Northern Uganda’ 26 August 2010 <http://www.hrw.org/en/node/92610/section/7> (accessed on 16 March 2015).

126 World Bank and World Health Organization ‘World Report on Disability’ (2011) 171.

127 Art 54(2) Constitution of Kenya.

128 Art 7(3) Constitution of Kenya.

exception. Likewise article 12 which guarantees legal capacity of persons with disabilities on an equal basis does not foresee any limitation, restriction or exception. Therefore, any exclusions or restrictions of political rights runs afoul of CRPD and constitutes disability discrimination within the meaning of article 2.

Africa member countries have made progress in integrating the right to political participation of person with disabilities into their national legal and policy framework. All the 44 states that have signed and ratified the CRPD have not made any reservations or objections towards article 29. Essentially there is no excuse from Africa states on non-implementation of article 29. The CRPD Committee will formally assess the progress in implementing the convention which have ratified through concluding observations.

In majority of the African countries, persons with psychosocial and intellectual disabilities continue to be deprived their right to stand elections and vote. This is through constitutional or legal provisions that link political rights and legal capacity. Such restrictions are inconsistent with articles 2, 12, and 29 of CRPD. Therefore, states should as a matter of priority eliminate such provisions in accordance with article 4 of CRPD. To effectively guarantee the right to political participation for persons with psychosocial disabilities, states should adopt all appropriate measures in accordance with article 12(3) and 29(a)(iii) of CRPD. This may include providing all the support that they require, including personal assistants of their choice. The appropriateness of these measures should always be assessed against the obligation of including persons with disabilities in all aspects of society. Furthermore, the measures should also take due regard of the independence, autonomy and dignity. For instance alternative ways of voting should only be used in cases where it is impossible or extremely difficult for person with disabilities to vote in polling stations like everyone else. General reliance in voter assistance as a way of ensuring political participation for persons with disabilities would be inconsistent with the general obligations in article 4 and 29 of CRPD.