

REGIONAL DEVELOPMENTS

THE JURISPRUDENCE OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLICATIONS FOR AFRICA

*Innocentia Mgijima-Konopi**

1 Introduction

The Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations (UN) and entered into force at the same time as the Convention, is a crucial addition to the international system of human rights protection.¹ The Protocol provides for a mechanism for individual complaints to be submitted to the Committee on the Rights of Persons with Disabilities (CRPD Committee) by or on behalf of individuals or groups of individuals who believe that their rights under the CRPD have been violated by the state party. The Protocol gives persons with disabilities who are victims of such violations a voice and makes states more responsive and accountable to their obligations under the CRPD. The communication procedures of the Protocol are like those of other UN human rights treaty systems.²

Article 1 of the Protocol empowers the treaty-monitoring body of the CRPD, the CRPD Committee, to receive and review communications alleging violations of the Convention by participating state parties. To this end, the Committee confidentially communicates to state parties the communications received and allows the state six months to respond in writing with explanations or clarifying statements. Thereafter the

* LLB (Hons) (Witwatersrand), LLM (National University of Ireland, Galway); Disability Rights and Law Schools Project Co-ordinator, Centre for Human Rights, Faculty of Law, University of Pretoria; Innocentia.Mgijima@up.ac.za

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

2 Eg Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Committee reviews the communication and conveys its decision to the state party concerned and the author of the communication.³ Although the Protocol is a legally-binding instrument, decisions of the CRPD Committee are not legally binding. The Committee, through its decisions under the Protocol, contributes towards the interpretation and application of the CRPD and the development of normative standards. The Protocol allows the Committee to express an expert opinion as to whether the violation of a right has occurred and to recommend appropriate remedies.

The CRPD, along with its Optional Protocol, has been strongly embraced by African states. This is evidenced by the fact that, as of July 2016,⁴² African states have ratified the CRPD and 23 states are party to the Optional Protocol.⁴ This commentary seeks to, first, describe and critically discuss the emerging jurisprudence of the CRPD Committee. The focus will be on the communications where the Committee has to date found violations of the CRPD, namely, *HM v Sweden*, *Szilvia Nyusti and Péter Takács v Hungary*, *Marie-Louise Jungelin v Sweden*, *Liliane Gröninger v Germany*, *SC v Brazil* and *Zsolt Bujdosó & 5 Others v Hungary*.

Akin to their counterparts in other regions, most African countries face significant challenges in formulating, domesticating and implementing disability rights to make the rights guaranteed in the CRPD a reality for persons with disabilities on the continent. The commentary further explores the implications for the African region, where the emerging jurisprudence of the CRPD Committee may offer guidance to state parties in the interpretation and implementation of rights.

2 *HM v Sweden*

HM v Sweden was the first communication brought against a state that was reviewed by the Committee.⁵ HM, a Swedish national suffering from a degenerative chronic connective tissue disorder, was refused permission by her local municipality to install a hydrotherapy pool for rehabilitation purposes on her property. The municipality refused to permit the building of the pool on the basis that the proposed pool would be in contravention of the Planning and Building Act. The pool would to a large extent be built on a zone of land that, per the town's development plan, should not be built on. Even though HM's debilitating condition made it difficult for her to leave her house to obtain treatment or rehabilitation at a hospital without great risk of injury, the municipality maintained that they could not permit an exemption in her case. HM's appeals against the decision to

3 CRPD (n 1 above) arts 3 & 5.

4 For a list of countries that have signed, ratified and acceded to the Optional Protocol, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en (accessed 30 April 2016).

5 Communication 3/2011, *HM v Sweden*, CRPD Committee (19 April 2012), UN Doc CRPD/C/7/D/3 (2011).

several bodies, including the Administrative Court of Appeal, were refused.⁶

In her communication to the CRPD Committee, HM alleged that the state had discriminated against her by failing to take into account her particular circumstances and needs in applying the Planning and Building Act.⁷ Furthermore, the state party's refusal to grant HM permission to build the pool violated her right to enjoy the highest attainable standard of health without discrimination, her right to live independently and to be included in the community, and her right to attain and retain maximum independence and full inclusion and participation in all aspects of life through comprehensive rehabilitation, as provided for in articles 25, 19(b) and 26 of the Convention respectively.

Though *HM v Sweden* is a well-known case and the principles it sets out well established, two aspects of the Committee's findings deserve mention considering their implications for African state parties to the Convention. The Committee in its findings emphasised that the failure to afford reasonable accommodation to persons with disabilities where such accommodation does not impose a disproportionate or an undue burden to the state constitutes discrimination under articles 2 and 5 of the Convention.⁸

The principle of reasonable accommodation as set out in *HM v Sweden* has not yet found resonance on the African continent. The picture emerging from reports submitted by Tunisia, Kenya, Ethiopia, Gabon and Uganda to the CRPD Committee in accordance with state obligations under article 35 is that the concept of reasonable accommodation has not been fully incorporated in the legislations of many state parties to the Convention from the region. In countries such as Tunisia, where the concept is incorporated in national legislation, it is not defined and, consequently, there is a lack of clarity on its application.⁹ In South Africa, according to the Promotion of Equality and Prevention of Unfair Discrimination Act, all persons and entities have an obligation to reasonably accommodate persons with disabilities.¹⁰ However, reasonable accommodation is not explicitly defined in the definition section of the Act.¹¹ In Ethiopia, the concept only relates to employment and not to the other areas covered by the Convention.¹² For the principle of reasonable accommodation to take root, African state parties will first need to address

6 *HM* (n 5 above) paras 2.1-2.7.

7 *HM* (n 5 above) paras 3.1-3.4.

8 *HM* (n 5 above) paras 8.1-10.

9 Concluding Observations of the CRPD to Tunisia, UN Doc CRPD/C/TUN/1 (2011) paras 12-13.

10 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sec 9.

11 PEPUDA (n 10 above) sec 1.

12 Concluding Observations of the CRPD to Ethiopia, UN Doc CRPD/C/ETH/1 (2016) paras 8-9.

the factors impeding the implementation of the principle. This requires them to incorporate the concept of reasonable accommodations defined in article 2 of the Convention in national legislation, explicitly recognising the denial of reasonable accommodation as disability-based discrimination. State parties should raise greater awareness of the concept of reasonable accommodation among the public and private sectors in their countries, in particular civil servants and members of the judiciary. Also, a comprehensive definition of reasonable accommodation that applies to all laws should be adopted nationally.

The CRPD Committee also recognised that a law enacted without any bias, which is applied in a neutral manner, may still have a discriminatory effect on persons with disabilities when their circumstances are not considered. The achievement of substantive equality requires that legislation and the way it is applied should not have either the purpose or effect of impairing or nullifying the recognition and enjoyment or exercise of any rights of persons with disabilities on an equal basis with others. The resounding message for African state parties is that, beyond ensuring equality in terms of outcomes in legislation, laws need to be applied to people with disabilities in a process which considers their individual circumstances.

3 *Szilvia Nyusti and Péter Takács v Hungary*

The case of *Szilvia Nyusti and Peter Takács v Hungary*¹³ provided the CRPD Committee with the opportunity to analyse the scope of the duty of the state under article 9(2)(b) of the CRPD. The article obligates states to ensure that private entities that offer facilities and services to the public consider all aspects of accessibility for persons with disabilities. The case was brought by two Hungarian nationals with severe visual impairments who separately, in their individual capacities, concluded contracts for private current account services which included banking card services with OTP Bank.¹⁴ Despite paying the same annual fees for banking card services as other clients, the complainants were unable without assistance to use the bank's automated teller machines (ATMs) as these were inaccessible, lacking braille fonts, audible instructions and voice assistance. The Committee found that Hungary was in violation of article 9(2)(b) of the Convention by failing to ensure that persons with visual impairments have unimpeded access to the services provided by the bank on an equal basis with other clients.¹⁵

13 Communication 1/2010, *Szilvia Nyusti & Péter Takács v Hungary*, CRPD Committee (16 April 2013), UN Doc CRPD/C/9/D/1 (2010).

14 *Szilvia Nyusti* (n 13 above) paras 2.1-2.17.

15 *Szilvia Nyusti* (n 13 above) paras 9.1-11.

Some research has been done that establishes that financial services and products offered by many private and public banks operating in Africa are not accessible to persons with disabilities.¹⁶ Persons with disabilities in many parts of the continent continue to be denied the opportunity to open and operate bank accounts independently, and they have limited access to financial services, including online banking services and ATMs.¹⁷

The findings of the Committee in *Szilvia Nyusti and Peter Takács v Hungary*, together with the General Comment issued by the Committee on accessibility, help in clarifying the obligations of African state parties to ensure that all goods, products and services open or provided to the public, must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.¹⁸ The Committee made it clear that disability rights have vertical as well as horizontal application in that they are binding on the state as well as on private individuals. States undertake in article 4(1)(e) of the Convention to take the necessary measures, such as legislative and administrative measures, needed to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. If disability rights are conceived as binding only on the state, they will be of limited reach as private individuals will not be placed under an obligation to desist from discrimination and to treat disabled people equally.

The Committee in *Szilvia Nyusti and Peter Takács v Hungary* provided concrete guidelines on how states can make the right to access to banking services a reality for their citizens with disabilities.¹⁹ The Committee recommended, *inter alia*, that states:

- (a) establish minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments;
- (b) create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones;
- (c) have in place effective sanctions for non-compliance with accessibility standards;
- (d) ensure that all newly-procured ATMs and other banking services are fully accessible to persons with disabilities; and

16 O Jared-Omari & O Bosire-Zachary 'Investigating ATM system accessibility for people with visual impairments' (2013) 15 *IOSR Journal of Computer Engineering* 13-18.

17 Eg Lesotho, Zimbabwe, Kenya http://www.informativenews.co.ls/index.php?option=com_content&view=article&id=1547&catid=20&Itemid=389 (accessed 17 September 2016); <https://www.enca.com/africa/nigerias-disabled-get-first-wheelchair-friendly-atm> (accessed 17 September 2016); <http://www.gov.za/social-development-launches-national-disability-rights-awareness-month-3-nov> (accessed 17 September 2016).

18 CRPD Committee, General Comment 2 para 25.

19 *Szilvia Nyusti* (n 13 above) para 10(2).

- (e) provide for appropriate and regular training on the scope of the CRPD and its Optional Protocol to banks, judges and other judicial officials.

Increased financial inclusion of persons with disabilities is central to poverty eradication, sustainable economic growth and the achievement of the Sustainable Development Goals in Africa. By adopting the recommendations set out by the Committee in the above case and in its General Comment, African state parties will be able to pave the way for accessible financial services for persons with disabilities.

4 *Zsolt Bujdosó & 5 Others v Hungary*

In *Zsolt Bujdosó & 5 Others v Hungary*,²⁰ the names of six complainants with intellectual disabilities under guardianship were automatically removed from the electoral register in accordance with article 70(5) of the Hungarian Constitution which was in force at the time. The Hungarian Constitution explicitly stipulated that only persons with full legal capacity could exercise their right to vote.²¹ Persons placed under partial or full guardianship were excluded from voting. Due to this restriction, the complainants could not vote in either the parliamentary or municipal elections held in 2010.

The CRPD Committee examined the state party's obligation to ensure the rights of persons with disabilities to vote in elections on a non-discriminatory basis, guaranteed by article 29 of the CRPD, in a communication brought to it by Zsolt Bujdosó and five others. Broadly stated, article 29 affirms the obligation of state parties to the Convention to ensure that persons with disabilities can effectively and fully participate in the political and public affairs of their countries on an equal basis with others, which includes the right to vote.

In response to the complaint, Hungary argued that this automatic denial of the right to vote of persons under guardianship had been remedied through the passing of legislation which now required courts to individually assess on a case-by-case basis whether a person under guardianship has the capacity to vote. Hungary claimed that the new provision was in line with the landmark judgment of the European Court of Human Rights (European Court) in the case of *Alajos Kiss v Hungary*.²² In this case, the applicant had complained about his automatic disenfranchisement due to his mental health status. In a unanimous decision, the European Court held in paragraph 44 of the judgement that '[a]n indiscriminate removal of voting rights, without an individualised

20 Communication 4/2011, *Zsolt Bujdosó & 5 Others v Hungary*, CRPD Committee (2-13 September 2013), UN Doc CRPD/C/10/D/4 (2011).

21 *Zsolt Bujdosó* (n 20 above) para 2.

22 (2010) ECHR 38832/06.

judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote’.

The Harvard Law School Project on Disability submitted a third-party intervention in support of the complainants.²³ The interveners requested that the Committee in its decision decide on the broader question raised by the communication, namely, whether subjecting persons with disabilities to individualised assessment of their voting capacity is consistent with article 29 of the CRPD. The interveners submitted that article 29 of the CRPD required states to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by adapting their voting procedures to facilitate the exercise of the right to vote by persons with disabilities.

The Committee found Hungary to be in violation of article 29 of the CRPD.²⁴ The Committee concluded that excluding the right to vote based on actual or perceived intellectual or psychosocial disability was discriminatory and inconsistent with article 29. The Committee endorsed the view that article 29 of the CRPD did not envisage any reasonable restriction or exception on the right to vote for any group of persons with disabilities. In addition, the Committee stressed that article 12(2) required state parties to recognise and uphold the legal capacity of all persons with disabilities ‘on an equal basis with others in all aspects of their lives’, which includes their political life and, in this case, the right to vote. State parties are obligated by article 12(3) to take the necessary measures to ensure that persons with disabilities can exercise their legal capacity.

At the regional level, the African Commission on Human and Peoples’ Rights (African Commission) has made important comments on the right of persons with mental disabilities to vote under the African Charter on Human and Peoples’ Rights (African Charter). The Commission, in the case of *Purohit*,²⁵ held that, according to the Charter, the right to political participation was extended to every person, including persons with mental disabilities. In its decision, the Commission found that the exclusion by The Gambia of persons with mental disabilities in a Gambian psychiatric hospital from voting was a violation of their rights under the Charter. The Commission in paragraph 76 of the judgement stated that ‘[i]t is very clear that there are no objective bases within the legal system of the respondent state to exclude mentally-disabled persons from political participation’.

The Gambian and Hungarian cases cited above are examples of the situation in most countries. The constitutions, electoral codes and legal capacity provisions in most African countries continue to permit the

23 *Zsolt Bujdosó* (n 20 above) paras 5.1-5.11.

24 *Zsolt Bujdosó* (n 20 above) paras 9.1-11.

25 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

disenfranchisement of persons with intellectual or psychosocial disabilities based on a perceived lack of capacity to vote arising from their disability status. Section 11(1)(b) of the Tanzanian Elections Act of 1985, for instance, restricts persons with intellectual and mental health problems from registering as voters and participating in political affairs. In Gabon, per article 26 of the Law on common rules for all political elections in the Gabonese Republic of 1996, adults under guardianship and curatorship cannot be registered to vote. Article 83(1)(b) of the Constitution of Kenya prohibits a person declared to be of unsound mind from registering as a voter.

The CRPD Committee's views in *Zsolt Bujdosó* and its Concluding Observations to the African state parties whose reports it has to date reviewed, such as Uganda and Gabon, provide some guidance to African state parties on interpreting and implementing the right to vote of persons with disabilities protected in article 29.²⁶ In order to fulfil their obligations under the Convention, African state parties to the Convention need to repeal discriminatory constitutional provisions, provisions in electoral laws and regulations as well as legal capacity provisions that restrict the right to vote of persons with disabilities on an equal basis with others. State parties need to provide in their laws an unconditional right to vote to all persons with disabilities with no restriction based on real or perceived inability to vote. This means that states should abolish any existing individual assessments of the voting capacity of persons with disabilities. African state parties must, however, be aware that recognising the right to vote of persons with disabilities in their constitutions or legislation will not in itself guarantee the enfranchisement of citizens with disabilities. Ensuring that voters with disabilities can exercise their right to vote requires states to adopt a number of positive measures to overcome the obstacles that may prevent persons with disabilities from voting.

5 *Liliane Gröninger v Germany*

Liliane Gröninger²⁷ brought this case against Germany on behalf of her son on the basis that integration subsidies under the German social legislation were discriminatory and prevented the inclusion of persons with disabilities in the labour market and, thus, violated her son's right to work. The integration subsidy was an affirmative measure put in place by Germany to assist persons with disabilities to integrate into the labour market.²⁸ According to the Social code if an employer who made an offer of employment to a person with a disability whose full working capacity

26 Concluding Observations of the CRPD to Uganda, UN Doc (CRPD/C/UGA/1) (2016) paras 56-59; Concluding Observations of the CRPD to Gabon, UN Doc (CRPD/C/GAB/1) (2015) paras 62-63.

27 Communication 2/2010, *Liliane Gröninger v Germany*, CRPD Committee (4 April 2014) UN Doc CRPD/C/11/D/2 (2010).

28 *Liliane Gröninger* (n 27 above) paras 2.1-2.11.

could be restored in three years' time was eligible to apply to the employment agency for an integration subsidy. The agency would evaluate the application and decide on the duration and amount of the subsidy to be allocated. The complainant submitted that the administration of the scheme was complicated, and that potential employers found it difficult to gain access to the integration subsidy. The process excluded the participation of the person with the disability and, furthermore, the outcome and duration of the process were uncertain. The administration of the scheme deterred employers from employing persons with disabilities, including her son, who, despite being qualified, had never been employed. The scope of the scheme did not support those persons with disabilities whose full work capacity would never be restored.

In the view of the CRPD Committee, the integration subsidy scheme used by Germany to help lower the costs of employing a person with a disability for private sector employers did not effectively promote the employment of persons with disabilities.²⁹ This was evident from the low absorption in the labour market of persons with disabilities. The way in which the scheme was administered was not consistent with the state's obligation under article 27.

The Committee in its findings noted that article 27 of the CRPD required governments to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise', which includes providing for reasonable accommodation measures,³⁰ and to promote policies and programmes, including affirmative action,³¹ that encourage employers to recruit persons with disabilities.³² The article, according to the Committee, implies an obligation on the part of state parties to create an enabling and conducive environment for employment, including in the private sector, for persons with disabilities who have a right to benefit from measures such as placement services and assistance in obtaining employment.³³

What may be understood by African state parties from the comments made by the Committee is that they have an obligation to promote the right to employment of persons with disabilities in the private sector; that measures to include persons with disabilities in the labour market must be effective; that incentives geared at encouraging the private sector to employ persons with disabilities should not be seen as a right of the employer, but that of persons with disabilities; and that the state is under a positive obligation to take a number of measures to ensure the inclusion of

29 *Liliane Gröninger* (n 27 above) para 6.2.

30 Art 27(1)(i).

31 Art 27(1)(h).

32 United Nations *From exclusion to equality: Realising the rights of persons with disabilities: Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 87.

33 *Liliane Gröninger* (n 27 above) para 6.3.

persons with disabilities in the work place. Without such positive measures, the right to employment of persons with disabilities may turn out to be merely token or even regressive. These positive measures are what will make the right transformative. The Committee's findings also highlight the need for states to regularly assess whether policies or measures chosen to increase employment opportunities for persons with disabilities are in practice effective.

It should be noted that Germany's existing social legislation predated the ratification of the CRPD. The case reflects the importance of revising the legislation after ratification to ensure that it complies with international obligations and that programmes guarantee real inclusion and avoid both direct and indirect discrimination.

6 *Marie-Louise Jungelin v Sweden*

The CRPD Committee in 2014 adopted its views on this case brought against Sweden by Marie-Louise Jungelin, a visually-impaired citizen.³⁴ Ms Jungelin had applied to work as an assessor at the Social Insurance Agency, a public entity. Following the interviews, she was told that, although she was an ideal candidate for the work, they could not consider her for the post because their internal computer system could not be adapted to her visual impairment, as adapting the whole information technology system and other computer systems to enable her to carry out her duties would be very expensive and time-consuming.³⁵

Ms Jungelin reported the matter to the Swedish Disability Ombudsman, who took the matter to the Labour Court. The Labour Court ruled that Ms Jungelin's right to reasonable accommodation and, consequently, her right to employment had not been violated as the accommodation she needed would constitute an undue burden on the agency.

In their findings, the CRPD Committee for the first time stated that, when assessing the reasonableness and proportionality of accommodation measures and undue burden, state parties enjoy a certain margin of appreciation.³⁶ The margin of appreciation, a doctrine developed by the European Court in assessing whether a member state has breached the European Convention on Human Rights, means that a member state is

34 Communication 5/2011, *Marie-Louise Jungelin v Sweden*, CRPD Committee (3 October 2014), UN Doc CRPD/C/12/D/5 (2011).

35 *Marie-Louise Jungelin* (n 34 above) paras 2.1-2.9.

36 *Marie-Louise Jungelin* (n 34 above) para 10.5.

afforded a degree of discretion when it takes judicial, administrative and legislative decisions in the area of a right afforded in a convention.³⁷ The reason for this was that state authorities, because of their intimate knowledge of their country, are better placed to interpret what a right means in a certain context when weighing competing public and individual interests. It is important to note that the Committee was not saying that states have unlimited discretion in deciding whether accommodations requested cause an undue burden. Rather, it indicates that, because assessments of reasonable accommodation often involve the weighing of competing interests, the Committee will respect the decision if the domestic courts used an objective criterion in reaching its decision.

Five committee members issued a joint dissenting opinion asserting that the courts did not sufficiently assess the reasonableness of her request.³⁸ In the dissenting opinion, the committee members stated that reasonable accommodation must be analysed on a case-by-case basis, and that the reasonableness and proportionality of the measures of the accommodation proposed must be assessed in view of the context in which they are requested. The committee members were of the opinion that, while reasonable accommodation was in principle an individual measure, the benefit of other employees should also have been considered when assessing reasonableness and proportionality.

7 SC v Brazil

In *SC v Brazil*,³⁹ a Brazilian woman working for a national bank, and who had been demoted in her employment in accordance with company policy after having taken more than three months 'medical leave, lodged a complaint before the CRPD Committee. The prolonged medical leave had been necessitated by a series of motorcycle accidents in which she had been involved, which left her with several injuries and permanent impairment of her knee. She alleged that the bank's internal policy providing for the demotion of staff who take medical leave of more than three months had the effect of discriminating against persons with disabilities.⁴⁰ The state in response to the allegation argued that the complainant did not fall within the definition of a person with a disability as set out in article 1 of the Convention, as she had been diagnosed by professionals of the National Institute of Social Security, an agency charged with certifying disability for purposes of granting monetary benefits to persons with disabilities unable to work or live independently as having a temporary incapacity to work.

37 Open Society Justice Initiative 'An overview of the Strasbourg Court's margin of appreciation doctrine' April 2012 <https://www.opensocietyfoundations.org/sites/.../echr-reform-margin-of-appreciation> (accessed 12 March 2016).

38 *Marie-Louise Jungelin* (n 34 above) Appendix 1.

39 Communication 10/2013, *SC v Brazil*, CRPD Committee (28 October 2014), UN Doc CRPD/C/12/D/10 (2013).

40 *SC* (n 39 above) para 2.2.

Therefore, she did not comply with the aspect of long term as stated in article 1.

Although the Committee found the complaint inadmissible because the complainant had not exhausted domestic remedies and, therefore, did not consider the merits of the case, it nevertheless explored whether the complaint fell within the scope of the Convention. The Committee commented that the author did fall within the ambit of article 1 as her physical impairment, in interaction with various barriers she experienced, did in fact hinder her full and effective participation in society on an equal basis with others.⁴¹ The Committee concluded that the difference between illness and disability was a difference in degree and not a difference of kind, because a health impairment which initially starts out as an illness can develop into an impairment that constitutes a disability as a consequence of its duration and its chronic nature.⁴²

The CRPD, to allow the concept of disability to evolve over time, does not provide a definition of disability. However, the Preamble to the Convention states:

Disability is an evolving concept, and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others.

The CRPD opted to explain who persons with disabilities are rather than define disability. Countries, however, often must define disability, for instance to allocate social security benefits. To protect the rights of persons with disabilities, states often need to first clarify who falls in this category.

The decision of the Committee is a reminder to African state parties that the CRPD adopts a broad categorisation of persons with disabilities and reaffirms that all people with all types of disabilities must enjoy the rights and fundamental freedoms guaranteed by the CRPD. It also confirms that the definition of disability that states adopt must be understood in the context or purpose for which the definition was adopted.

8 Conclusion

It is encouraging to note that a number of African countries, such as Malawi, Kenya, Tanzania, Uganda, Zambia and South Africa, are making an effort to domesticate the provisions of the CRPD through measures which include promulgating disability-specific legislation, revising existing legislative provisions to make them compliant with the CRPD and the

41 SC (n 39 above) para 6.3.

42 As above.

drafting of inclusive policies.⁴³ That being said, in a preponderance of African jurisdictions, conspicuous gaps remain in the formulation, domestication and implementation of disability rights. This negatively impacts on the actual fulfilment of disability rights. The CRPD Committee's jurisprudence under the Optional Protocol reflects the views of the Committee in relation to the CRPD. The views issued by the Committee on communications brought before it consists of the Committee's collective assessment of the communications and recommendations for the enhanced implementation of the rights under the Convention. The value of the Committee's jurisprudence for African countries who are party to the CRPD as they seek to domesticate the CRPD is that, even though the findings of the Committee are not legally binding, they have great interpretative import. They help to clarify the legal obligation of state parties and constitute important guidelines in the practical implementation of rights to ensure conscientious implementation of the CRPD.

The findings of the Committee on communications brought before it to date, discussed in the commentary, provide guidance to African state parties not only on the scope of specific obligations in the Convention, such as the duty to provide reasonable accommodation, but also on how to create an enabling environment for the rights of people with disabilities to flourish. African state parties can refer to the Committee's jurisprudence in revising their legislation to ensure that it complies with the CRPD. The Committee throughout its jurisprudence stresses the importance of affirming the rights of persons with disabilities in the main provisions of law. The Committee, however, cautions states that the mere constitutional and legislative recognition of the rights of persons with disabilities, though imperative, does not automatically guarantee that persons with disabilities will enjoy these rights. There is a need, particularly in the context of historically-marginalised groups such as persons with disabilities, for states to dismantle the underlying systems and structures that continue to perpetuate the unequal enjoyment of rights through positive measures that ensure that persons with disabilities can enjoy their rights.

43 Eg, Malawi repealed its Handicapped Persons Act of 1971 and enacted the Disability Act 8 of 2012. In 2010 Tanzania enacted the Persons with Disabilities Act 9 of 2010. Zambia enacted the Persons with Disabilities Act 6 of 2012. South Africa in 2016 introduced the White Paper on the Rights of Persons with Disabilities 39792. The Persons with Disabilities Act 2003 of Kenya is currently undergoing review. The new Persons with Disabilities Bill 2015 seeks to repeal and replace the Act.