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African Disability Rights Yearbook

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EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the third volume of the *ADRY*. Whilst maintaining the foundational structure of the inaugural issue, namely, a tripartite division between articles, country reports and commentaries on regional developments, the 2015 *Yearbook* has added, a new feature in the form of a book review section.

Section A of the 2015 volume features six chapters. The majority of chapters in this section emanate from papers which were presented at the conference on the human rights of women with disabilities that was convened by the Centre for Human Rights in November of 2014. The papers were subsequently reworked for publication in the *Yearbook*. The first two chapters focus on the sexual and reproductive health and rights of women. The first chapter is against the backdrop of the persistence of disability-related discrimination that is detrimental to the sexual and reproductive health of women. Lucyline Nkatha Murungi and Ebenezer Durojaye make a case for exploring synergies between the Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol to the African Charter on Human and Peoples' Rights and maximally using the synergies to respect, protect, promote and fulfil the sexual and reproductive health and rights of women. In the second chapter, using the CRPD as a human rights benchmark, Itumeleng Shale puts the sexual and reproductive health and rights spotlight on Lesotho. The author evaluates the extent to which the country's legal and policy framework for protecting women's sexual and reproductive health is consonant with the state obligations arising from the CRPD.

The third chapter by Dianah Msipa highlights that competence to testify and access to justice in respect of witnesses with intellectual disabilities who have experienced sexual assaults and abuse are areas that have historically been at the receiving end of discriminatory laws and practices. Focusing on the criminal justice systems of South Africa and Zimbabwe and drawing from normative standards developed by the CRPD and critical disability theory, the author argues that any assessment of the competence of witnesses with intellectual disabilities to testify should now be for the purposes of determining requisite accommodations rather than findings of incompetence and excluding testimonies. In the fourth chapter, with a spotlight on the African and Latin American regions, Marina Mendez Erreguerena examines the provision of care for persons with disabilities and interrogates the intersection between gender equality and support for the carers. The author observes that, in contrast to the global North, the provision of care in the African and Latin American regions is mainly undertaken by women in family settings and in the form of 'informal care' which is not formally recognised or supported through resource allocation by the state. The author makes a case for reforming law and policy to recognise the contribution and rights of carers.

The fifth chapter by Jim Nyanda highlights that girls with disabilities experience more than a single axis of discrimination. It focuses on access to education in Malawi. Against the backdrop of standards laid down by the CRPD, the chapter assesses the extent to which the Disability Act of Malawi of 2012 is compliant with the international human rights to education. The author argues that the Act falls short of the state obligations imposed by the convention in a number of respects.

The last chapter by Justice Srem-Sai breaks from the focus on women and girls with disabilities to examine the justiciability of socioeconomic rights in the legal system of Ghana. This is with a view to creating an enabling legal environment for the realisation of the rights of persons with disabilities at the domestic level. The chapter's point of departure is that the justiciability of socioeconomic rights is a central assumption in the regime of disability rights inscribed in the CRPD which Ghana has ratified. Against a backdrop of the Constitution of Ghana in which socioeconomic rights are inscribed only as directive principles (rather than justiciable rights) and domestic judicial interpretation which has been equivocal on the justiciability of socioeconomic rights, the author argues that in order to clearly render socioeconomic rights justiciable, it would serve well to amend the Constitution of Ghana and accord socioeconomic rights a clearer status.

Furthermore, it is suggested that Ghana can look at other jurisdictions, including India and South Africa and draw normative guidance on juridical mechanisms for the enforcement of socioeconomic rights.

In Section B of the *ADRY*, a new set of countries are reported on – six in all – thus adding to the stock of countries that were reported on in the 2013 and 2014 volumes. The country reports in this volume are on: **Eritrea** by Futsum Abbay; **Lesotho** by Itumeleng Shale; **Sierra Leone** by Romola Adeola; **Swaziland** by Simangele Daisy Mavundla; **Morocco** by Arlene Kanter assisted by Inviolata Sore and Daniel Van Sant; and **Tunisia** also by Arlene Kanter assisted by assisted by Sore and Daniel Van Sant.

Section C contains two commentaries that address African regional dimensions. The first commentary by Enoch McDonnell Chilemba discusses the emergence of disability-specific legislation in the African region through the prism of a selected range of African countries. The discussion seeks to establish whether domestic legislative initiatives are compliant with the CRPD. Against the backdrop of the right to political participation in article 29 of the CRPD, the second commentary in this section by William Aseka Oluchina, seeks to evaluate the extent to which African regional human rights systems and selected African states are compliant with the convention's standards.

As indicated at the beginning of this editorial, a new feature in this third volume of the Yearbook is a book review section. In this volume, Tsitsi Chataika reviews *The development of disability rights under international law: From charity to human rights* (2014) by Arlene Kanter.

The financial assistance of the Open Society Foundations, in particular the Higher Education Support Project (HESP), Human Rights Initiative (HRI) and Open Society Initiative for Southern Africa (OSISA) is gratefully acknowledged.

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SECTION A: ARTICLES

CHAPTER 1

THE SEXUAL AND REPRODUCTIVE HEALTH RIGHTS OF WOMEN WITH DISABILITIES IN AFRICA: LINKAGES BETWEEN THE CRPD AND THE AFRICAN WOMEN'S PROTOCOL

Lucyline Nkatha Murungi & Ebenezer Durojaye***

Summary

Despite efforts made to address discriminatory practices against women in the last twenty years, women still encounter challenges with regard to their sexual and reproductive health and rights. In many African countries, women's autonomy to exercise sexual and reproductive health choices is often undermined by cultural and religious practices as well as social attitudes and beliefs about the sexuality of women. Women with disabilities experience more barriers as exacerbated by social attitudes and systemic responses to disability which tend to diminish the sexual needs of persons with disabilities. Both the UN Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) have provisions which are relevant to sexual and reproductive health rights. Both instruments also recognise the increased vulnerability of women with disabilities to abuse or denial of their rights as a result of the intersection of disability and gender.

While there are some differences in the approach to sexual and reproductive health and rights, the two instruments underscore the need for non-discrimination and for purposive measures to enable women with disabilities to exercise and benefit from sexual and reproductive health services on a basis of equality with other women in the communities in which they live. The provisions of the CRPD would seem to build upon a bold path charted by the African Women's Protocol in the recognition of the sexual and reproductive health and rights of women. Cumulatively, both instruments, along with other international and regional human rights instruments provide a solid basis for the protection of the sexual and reproductive health rights of women with disabilities.

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1 Introduction

Generally, sexual and reproductive rights are some of the most controversial, underdeveloped, and least understood spheres of rights, especially in Africa. The sexual and reproductive rights of women with disabilities are even more susceptible to abuse fuelled by negative social attitudes and beliefs. Indeed, women with disabilities experience multiple barriers in the exercise of their rights due to the intersection of age, gender, disability, and in some cases other factors of vulnerability such as displacement or social and economic marginalisation. It is therefore significant that the African Women's Protocol lays a foundation for the protection of sexual and reproductive rights of women. The provisions of the Protocol on sexual and reproductive rights of women in Africa are a strong starting point for enhanced protection of such rights. The Protocol specifically led the way in the recognition of sexual and reproductive rights as part of the right to health.

The CRPD builds upon the gains of the African Women's Protocol through a number of provisions that enhance the protection of women's sexual and reproductive rights. In its preamble, the Convention recognises the inherent dignity and worth of every human being as a basis for the rights contained therein. The CRPD establishes a strong basis for the protection of the sexual and reproductive health of women and girls with disabilities in a number of ways. First, it takes special cognisance of the higher risk of abuse that women and girls with disabilities face in access to their rights and therefore calls for special measures to be taken to ensure equality of access to rights. Secondly, the CRPD sets out general principles on the interpretation and implementation of disability rights. These principles have an impact on the kind of measures necessary to ensure sexual and reproductive health rights. The principles are anchored in the social model of thinking about disability which demands a shift in attitudes towards disability in all areas of rights including sexuality and reproduction.¹ In addition, while the CRPD does not specifically address the sexual rights of persons with disabilities, it does call for equal access to 'sexual and reproductive health programmes' for persons with disabilities on a basis of equality with all other people.

This article seeks to establish the extent to which the standards set out in the African Women's Protocol and the CRPD promote and protect the sexual and reproductive rights of women with disabilities in Africa. This is important because the sexual and reproductive needs of people with disabilities, particularly women with disabilities, are often treated lightly. By critically evaluating the standards set out in both instruments as well as the resulting approach to sexual and reproductive health and rights, the

1 See generally C Barnes *Understanding the social model of disability* (2009) for a discussion of the social model of disability.

article identifies the linkages and synergies between the African Women's Protocol and the CRPD in the protection of sexual and reproductive rights of women in Africa.

2 Evolution of sexual and reproductive health as human rights

Sexual and reproductive health and rights as currently recognised developed from the right to the highest attainable standard of mental and physical health guaranteed in numerous human rights instruments. The first recognition of the right to health was contained in the preamble to the Constitution of the World Health Organization in 1946, where it was noted that the enjoyment of the right to health is a fundamental right of all individuals.² Thereafter, attempts have been made to give recognition to this right in other human rights instruments such as the Universal Declaration on Human Rights,³ which despite being a non-binding human rights instrument, is widely accepted as an authoritative human rights instrument worldwide. In fact, the UDHR has almost attained the status of customary international law due to its influence in the drafting of many national constitutions.⁴

However, the most authoritative recognition of the right to health is found in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵ Article 12 of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of mental and physical health. The Committee on Economic, Social and Cultural Rights in its General Comment No 14 has explained that the right to health necessarily includes the right to sexual and reproductive health care services.⁶

Attempts at recognising sexual and reproductive health and rights as human rights gained momentum during the 1990s mainly due to the

2 The Constitution of the WHO was adopted by the International Health Conference, New York, 19-22 June 1945; opened for signature on 22 July 1946 by the representatives of 61 states; 14 UNTS 185.

3 See art 25 of the Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948).

4 JP Humphrey 'The Universal Declaration of Human Rights: Its history, impact and juridical character' in BG Ramcharan (ed) *Human rights: Thirty years after the Universal Declaration* (1979) 21 28.

5 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

6 UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) 'The Right to the Highest Attainable Standard of Health' General Comment No 14, UN Doc E/C/12/2000/4 para 21.

activism of women's and gay rights groups.⁷ In 1993, at the International Conference on Human Rights, the international community affirmed that acts of violence against women constituted a violation of their rights.⁸ More importantly, it was affirmed that women's rights are human rights and that all human rights – civil, political and economic, social and cultural rights – are universal, interrelated, interdependent and indivisible.⁹ Subsequently, during the International Conference on Population and Development Cairo 1994¹⁰ and the Fourth World Conference on Women,¹¹ issues affecting women's health and reproductive well-being were discussed from a human rights perspective. At these meetings the international community recognised that sexual and reproductive health needs of women are human rights imperatives necessary to ensure their well-being and advance their rights. Also, these meetings, addressed key issues affecting the well-being of women and sought to: advance gender equality; equity; women's empowerment; eliminate violence against women; promote reproductive freedom; and assist women to control their own fertility without external coercion.¹²

At Cairo, the international community broadly addressed the health needs of women and girls by declaring that:

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care which includes family planning and sexual health ... All couples and individuals have the right to decide freely and responsibly the number and spacing of their children and to have information, education and means to do so.¹³

In Chapter 7 of the Platform of Action, an attempt was made to define reproductive health and rights. According to the ICDP, reproductive rights:¹⁴

are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and

7 C Ngwenya 'Sexuality rights as human rights in Southern Africa with particular reference to South Africa' (2002) 17 *South African Public Law* 1; see also RG Parker 'Sexual rights: Concepts and action' (1997) 2 *Health and Human Rights* 31.

8 Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 chap III.

9 As above.

10 Programme of Action of the International Conference on Population and Development (ICPD) adopted in Cairo 5-13 September 1994, UN Doc A/CONF 171/13 1994.

11 Beijing Declaration Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF 177/20 (1995) and A/CONF 177/20/Add 1 (1995).

12 See for instance Principle 4 of ICPD (n 10 above).

13 Chap VII.

14 Chap VIII.

childbirth and provide couples with the best chance of having a healthy infant.

It is clear from the above that the right to sexual and reproductive health includes the ability of an individual to make choices about his/her reproduction, to be entitled to information and education about his/her sexuality and to be free from all acts of gender-based violence.¹⁵ It is also clear that the recognition and realisation of sexual and reproductive health and rights is contingent upon the recognition and protection of other rights such as the right to dignity, non-discrimination, or protection from violence. Furthermore, both the ICPD and the FWCW recognised that sexual and reproductive rights are rights already guaranteed in different human rights instruments. In other words, human rights such as rights to life, privacy, dignity and non-discrimination guaranteed in international and regional human rights instruments can be invoked to advance the sexual and reproductive rights of individuals.¹⁶ Thus, human rights recognised in human rights instruments adopted by the United Nations such as the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Right to Child (CRC), the Convention Elimination of Racial Discrimination (CERD), and the Convention on the Rights of People with Disabilities (CRPD), are relevant in advancing sexual and reproductive rights of individuals.

3 Development of sexual and reproductive health and rights in Africa

At the regional level, building on the long established essence and role of the African Charter on Human and Peoples' Rights (the African Charter),¹⁷ the African Women's Protocol¹⁸ was adopted in 2003 and came into force in 2005. The Women's Protocol supplements the African Charter and compliments CEDAW on matters relating to the protection and recognition of women's rights in Africa. Both the African Charter and African Women's Protocol draw inspiration from international human rights law.¹⁹ In article 16, the African Charter recognises the right to the highest attainable state of physical and mental health. However, it was the African Women's Protocol that expounded on the right to health to include sexual and reproductive health.

15 See RJ Cook & M Fathalla 'Advancing reproductive rights beyond Cairo and Beijing' (1996) 22 *International Family Planning Perspective* 115; see also L Freedman & I Stephens 'Human rights and reproductive choice' (1993) 24 *Studies in Family Planning* 18.

16 See P Hunt & JB Mesquita *The rights to sexual and reproductive health* (2006).

17 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

18 Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November 2005.

19 Art 60 of the African Charter.

In recognition of the indivisibility of rights, the African Charter guarantees both civil-political and socio-economic rights of individuals. As highlighted above, the other rights guaranteed in the Charter including the rights to life, dignity, privacy, non-discrimination, information and health are relevant in advancing the sexual and reproductive health and rights of individuals. Indeed, as noted earlier, the right to health guaranteed in the Charter should be interpreted to embrace sexual and reproductive health and rights.²⁰

Article 18(4) of the Charter recognises the rights of person with disabilities to special measures and treatment in accordance with their physical and moral needs. The African Commission is yet to clarify what physical and moral needs refer to (such as through a general comment); but it is arguable that the promotion and protection of the sexual and reproductive health needs of persons with disabilities is crucial to their physical and moral needs.

It is important to emphasise that whereas it is acknowledged that 'women' include girls below the age of 18, and therefore that the general provisions relevant to the rights of women apply to girls as well, child specific considerations need to be taken into account when assessing their access to and exercise of sexual and reproductive health and rights. Accordingly, the provisions of the African Children's Charter are relevant to the protection of the rights of girls and young women below the age of 18. The African Children's Charter recognises a number of civil-political and socio-economic rights of children that are important in advancing the sexual and reproductive health and rights of children. More specifically, article 14 of the Charter recognises the right to health of children, which based on the interpretation of the right to health highlighted above, necessarily includes their sexual and reproductive health and rights. Moreover, in a language similar to the African Charter, article 13 of the African Children's Charter provides that special measures should be adopted to protect children with disabilities in a manner that is consistent with their physical and moral needs, giving due regard to their dignity. In as far as the SRHRs are central to the dignity of an individual, the provision is basis for the protection of the SRHRs of adolescents with disabilities.²¹

3.1 The African Women's Protocol

By far, however, the African Women's Protocol is the most emphatic and forthright instrument dealing with sexual and reproductive health and

20 See V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights (2011) *African Human Rights Law Journal* 368.

21 E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *International Journal of Human Rights* 893.

rights in Africa, particularly the rights of women in this regard.²² The Protocol explicitly guarantees a woman's right to sexual and reproductive health, and contains important provisions such as the rights to non-discrimination and dignity that are useful in addressing discriminatory practices against women and girls, including those with disabilities.

The Protocol has been hailed as a pacesetter in the articulation of women's sexual and reproductive rights.²³ It has further been described as a progressive home grown human rights instrument that captures the lived experiences of African women.²⁴ The Protocol breaks new ground on sexual and reproductive health and rights in a number of ways, not least of which are the recognition of women's vulnerability to HIV as a human rights issue, the explicit recognition of women's sexual and reproductive health as human rights and the provisions allowing for abortion on limited grounds.²⁵ The Protocol affirms women's reproductive choice and autonomy to make sexual and reproductive decisions. Such decisions include the right to abortion when pregnancy results from a sexual attack, incest, rape or when it endangers a woman's life. In addition to recognising the rights of women with disabilities, the Women's Protocol explicitly articulates women's reproductive rights as human rights. It also expressly guarantees a woman's right to control her fertility without being coerced into making any decision that may undermine her sexual and reproductive autonomy.²⁶

The African Women's Protocol addresses the rights of women with disabilities in a specific provision, thereby recognising the dual marginalisation that women with disabilities face.²⁷ The provision specific to women with disabilities however fails to sufficiently address the challenges experienced in exercising sexual and reproductive rights by women with disabilities.²⁸ Instead, the provision only calls for protection of women with disabilities from violence including sexual abuse. This approach is merely protectionist, and fails to embrace the fullness of the sexual and reproductive needs of women with disabilities. The approach fails to recognise the systemic barriers such as routine denial of

22 Durojaye & Murungi (n 21 above) 894.

23 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; see also E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol to the Rights of Women' (2006) 6 *African Human Rights Law Journal* 187.

24 RS Mukasa *The African Women's Protocol: Harnessing a potential force for positive change* (2009) 5.

25 C Ngwena & E Durojaye 'Strengthening the protection of sexual and reproductive health and rights in the African Region through human rights: An introduction' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African Region through human rights* (2014).

26 African Women's Protocol, art 14.

27 As above, art 23.

28 See SA Kamga 'A call for a protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 2 *African Journal of International and Comparative Law* 242.

contraceptive and abortion services that could undermine the exercise of sexual rights by women with disabilities. Implicitly, the provision fails to acknowledge the existence of such sexual and reproductive needs in a similar manner as in article 14.

Nevertheless, the second General Comment of the African Commission on Health and Reproductive Rights (hereafter GC No 2) made some attempts to extend the protections of sexual and reproductive health and rights under article 14 of the Protocol to women with disabilities.²⁹ Along with General Comment No 1, GC No 2 provides interpretive guidance on the overall and specific obligations of state parties for effective domestication and implementation of article 14 of the African Women's Protocol.

GC No 2 specifically highlights the constraints experienced by women with disabilities in access to family planning and contraceptive or safe abortion services.³⁰ The GC calls for action to eliminate barriers that women with disabilities face in access to family planning services³¹ as well as family planning education.³² Arguably however, the GC's failure to dedicatedly consider the challenges that women with disabilities face in the exercise of their sexual and reproductive health and rights, despite recognition of the unique vulnerability, diminishes its potential to address disability specific challenges.

The African Commission is yet to address communications directly related to the sexual and reproductive rights of women in its decisions. However, some of the decisions of the Commission based on other aspects of rights could have implications for the enjoyment of SRHRs. For instance in the *Doebbler* case³³ the African Commission condemned as a violation of the right to dignity the provision of the Sharia penal code in Sudan that permitted caning in public of school girls mingling with their male counter parts. The Commission reasoned that subjecting school girls to caning in public undermines their fundamental rights to dignity and to be free from inhuman and degrading treatment. In the Commission's view, subjecting any individual to physical or mental torture could amount to inhuman and degrading treatment.

In a more recent decision, the Commission has held in the *Egyptian Initiative* case³⁴ that acts of violence and sexual harassment against four

29 ACmHPR, General Comment No 2 on the article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014).

30 ACmHPR, General Comment No 2 (n 29 above) para 53.

31 ACmHPR, General Comment No 2 (n 29 above) para 61.

32 ACmHPR, General Comment No 2 (n 29 above) para 28(d).

33 *Curtis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).

34 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* Communication 323/06 decided during the 10th Extraordinary session of the of African Commission on Human and Peoples' Right held between 12-16 December 2011.

women journalists constituted a violation of the rights to dignity and non-discrimination guaranteed in the African Charter. In arriving at this decision, the Commission drew inspiration from international human rights standards such as the UN Declaration on Violence against Women, the International Conference on Population and Development, and the Beijing Platform for Action.³⁵

Whereas not directly emanating from or based on a violation of sexual and reproductive rights, these decisions significantly highlight the Commission's interpretation of African Charter provisions to cover sexual and reproductive health and rights including protection from sexual and gender based discrimination and abuse. By these decisions, the Commission would seem to be acknowledging the lived experiences of women, who are daily subjected to different forms of discriminatory practices, including acts of violence. Discriminatory practices against women not only violate their rights to equality but more importantly, undermine women's rights to dignity and to exercise choices about their sexuality free from violence and coercion. The reasoning of the Commission further shows willingness to affirm the rights of vulnerable groups, including women, girls and people with disabilities. This is important because it allows the extrapolation of existing provisions to promote and protect the rights of women with disabilities.

The Commission's application of other international standards in this regard also shows the potential of existing provisions of the African Charter and the African Women's Protocol to protect women with disabilities in the context of the exercise of sexual and reproductive health and rights. This is important because women and girls with disabilities are vulnerable to sexual abuse and acts of violence, including involuntary sterilisation all in a bid to 'protect' them. Such practices are a serious abuse of human rights.³⁶ The ability to rely on other instruments such as the CRPD and the interpretation of its provisions by the CRPD Committee has the potential to expand the protection of women and girls with disabilities in Africa in the exercise of their sexual and reproductive health and rights.

The African Commission has also issued important resolutions relevant to advancing sexual and reproductive health and rights in the region. For instance, in 2001 the Commission issued a resolution addressing the human rights issues raised by the HIV/AIDS epidemic in the region. The Resolution urged African governments to adopt a rights-based approach to addressing the HIV epidemic, particularly by protecting

³⁵ Beijing Declaration and Platform for Action (1995).

³⁶ ACmHPR, General Comment 2 (n 29 above) para 47; ACm HPR *Resolution on Involuntary Sterilization and the Protection of Human Rights in Access to HIV Services* adopted on 5 November 2013 at the 54th Ordinary Session of the Commission.

the rights of infected persons from discriminatory practices.³⁷ In another resolution on reproductive rights of women in Africa, the Commission called on African government to strive towards eliminating Female Genital Mutilation/Cutting, reducing the incidence of maternal mortality, and ensuring access to reproductive health care, including abortion, services to women.³⁸ Also in 2008 the Commission adopted two resolutions relating to sexual and reproductive health and rights. The first one deals with maternal mortality in Africa, where the Commission calls for a human rights-based approach to maternal mortality in the region.³⁹ The Commission noted that high maternal mortality in the region should be declared a state of emergency. In addition, the Commission noted that maternal mortality constitutes a gross violation of women's rights to health, life, dignity and non-discrimination. The second resolution in the same year deals with access to medicines as a human right.⁴⁰ Through the resolution, the Commission urges African government to prioritise access to life-saving medicines as a human rights issue by committing resources towards it. The Resolution further enjoins African governments to ensure that any trade agreements entered into do not undermine access to life saving medications to the people.

More recently, the Commission issued a resolution on the human rights issue raised by involuntary sterilisation.⁴¹ The Commission reasoned that involuntary sterilisation constitutes a violation of the rights to autonomy, dignity and non-discrimination of women. It was also noted that forced and involuntary sterilisation could amount to acts of violence against women. The Commission noted that sterilisation must only be done with the informed consent of women given freely devoid of duress or undue influence.

While none of the foregoing resolutions are specifically targeted at persons with disabilities, they can no doubt be invoked to address their sexual and reproductive rights. The issue of forced sterilisation in particular, which has emerged as one of the more recent and pervasive abuses of the sexual and reproductive health and rights, is discussed in greater detail below. It is important to note that despite the various developments in the articulation of sexual and reproductive health and rights, misconception and prejudices remain barriers to their full

37 Resolution on the HIV/AIDS Pandemic –Threat against Human Rights and Humanity adopted at the 29th Ordinary Session of the African Commission held in Tripoli, Libya ACHPR Res 53 (XXIX) 01.

38 Adopted at the 41st Ordinary Session in Accra, Ghana from 16-30 May 2007 reproduced in E Durojaye & G Mirugi-Mukundi *Compendium of documents and cases on the right to health under the African human rights system* (2013) Community Law Centre, Cape Town.

39 ACHPR/Res 135 (XXXXVIII) 08: Resolution on Maternal Mortality in Africa.

40 ACHPR/Res 141 (XXXXVIII) 08: Resolution on Access to Health and Needed Medicines in Africa.

41 The resolution is available on the Commission's website: <http://www.achpr.org/> (accessed 7 September 2014).

realisation.⁴² Indeed this set of rights, especially sexual rights, remains highly contested at national and international levels.⁴³ An examination of the contestations and controversies around the recognition of sexual and reproductive health and rights is beyond the scope of this article. Nevertheless, it is imperative to highlight the fact that the foregoing resolutions and their relevance to sexual and reproductive health and rights re-affirms the argument that existing human rights such as the rights to life, privacy, non-discrimination, health and freedom from torture, inhumane and degrading treatment are all relevant in affirming the sexual and reproductive health and rights of individuals, especially for vulnerable groups such as people with disabilities.

Evidently, a lot of the African Commission's interpretative guidance and calls for action in the context of sexual and reproductive health and rights discussed above are anchored in the African Women's Protocol. Thus, even though the Protocol is a regional and women specific treaty, its potential to advance sexual and reproductive rights of women is highly significant and goes beyond the African continent.

3.2 The draft Protocol on the Rights of Persons with Disabilities in Africa

In 2003, the African Union initiated a process of developing a protocol on the protection of the rights of persons with disabilities and the elderly. Though the process of the development of the Protocol encountered a number of challenges,⁴⁴ the Commission's Working Group on the Rights of Older Persons and Persons with Disabilities presented a draft Protocol for public comment in April 2014.⁴⁵

The draft Protocol contains a number of provisions that are relevant to the sexual and reproductive health and rights of women with disabilities. In particular, the draft Protocol recognises that the right to health includes sexual and reproductive health. The draft Protocol calls for effective implementation of the right to health including 'ensuring that health-care services are provided using accessible formats and that communication between service providers and persons with disabilities is effective'.⁴⁶ The draft Protocol further addresses the rights of women with disabilities

42 African Commission on Human and Peoples' Rights, General Comment on article 14(1)(d) & (e) of the African Women's Protocol reproduced in Durojaye & Mirugi-Mukundi (n 38 above).

43 Durojaye & Murungi (n 21 above) 881.

44 Kamga (n 28 above) 219-220.

45 See 'Comments invited on Draft Protocol on the Rights of Persons with Disabilities in Africa' available at <http://www.achpr.org/news/2014/04/d121> (accessed 28 March 2015). Comments on the draft were considered by the Working Group in a meeting in March 2015. The draft Protocol will be submitted for the consideration of the African Commission at its 56th Ordinary Session in May 2015.

46 Draft Protocol on the Rights of Persons with Disabilities in Africa, art 12.

specifically, and calls upon states parties to ensure that ‘the sexual and reproductive health rights of women with disabilities are guaranteed, and women with disabilities have the right to retain and control their fertility’.⁴⁷

The bold approach of the draft Protocol to sexual and reproductive health and rights is a commendable improvement on the approach of the African Women’s Protocol which despite having a specific provision of women with disabilities does not specifically address the unique challenges of these women in the exercise of sexual and reproductive rights. It is argued that specific reference to the challenges faced by women with disabilities helps to increase visibility of the challenges and hence influences duty bearers to adopt measures to address them.⁴⁸

4 The CRPD and sexual and reproductive health and rights of women with disabilities

Whereas persons with disabilities generally experience discrimination on a range of grounds, the CRPD recognises that certain groups of people, such as women and children find themselves at the intersection of various vulnerabilities and hence are subject to dual or multiple forms of discrimination.⁴⁹ This recognition is significant in the context of sexual and reproductive health because, the recognition of the sexual and reproductive health and rights of women is itself a nascent area of rights, especially in the African context.⁵⁰ Hence, for women with disabilities, access to sexual and reproductive health entails dealing with gender based barriers as well as disability based discrimination. Recognition of the impact of the intersection of multiple vulnerabilities accounts for the CRPD’s specific provisions on women and children.⁵¹

The CRPD’s protection of sexual and reproductive health and rights is twofold, drawn from broad provisions such as those contained in the general principles of the Convention, as well specific articles directed at women with disabilities as a particularly vulnerable group or to areas of rights.

47 As above, art 19.

48 S Arnade & S Haefner ‘Gendering the draft comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities’ (2006) available at www.nw3.de/un-konv/doku/papier-02.rtf (accessed 25 March 2015).

49 C Frohmader & S Ortoleva ‘The sexual and reproductive rights of women and girls with disabilities’ Issue Papers International Conference on Human Rights (2013) 3.

50 Durojaye & Murungi (note 21 above) 881.

51 World Health Organization *World Report on Disability* (2011) 8; CPRD Committee ‘Draft General Comment on Article 6: Women with Disabilities’ CRPD/C/14/R.1 (May 2015) para 2.

4.1 General principles

The CRPD is the first human rights treaty to set out the General principles applicable to the rights contained therein in the text of the Treaty.⁵² Whereas all of the general principles have a critical role in guiding the interpretation and implementation of the rights under discussion, some are of particular relevance to the sexual and reproductive health and rights of women with disabilities. For instance, respect for the inherent dignity, autonomy and choice of persons with disabilities in matters of their sexual and reproductive health is a fundamental aspect of respect for the integrity of their being. The link between the right to dignity and sexual and reproductive rights is discussed further below. Further, the question of the 'individual autonomy including the freedom to make one's own choices' is a solid basis for the protection of women with disabilities from forced sterilisation or abortion which are routinely practiced in some countries both as a matter of policy or in the full purview of complicit family members and public authorities.⁵³ Such practices undermine the dignity and humanity of the women with disabilities.⁵⁴

The principle of reasonable accommodation calls for adjustments to be made to ensure that persons with disabilities enjoy their rights and freedoms on an equal basis with others.⁵⁵ The CRPD Committee has indicated that provision of reasonable accommodation is a necessity for the protection of the inherent dignity of persons with disabilities.⁵⁶ Ensuring reasonable accommodation means that positive action has to be taken, including providing the resources to ensure that women with disabilities not only access but also meaningfully benefit from sexual and reproductive health services. The CRPD Committee has indicated in this regard that reasonable accommodation is a means of ensuring accessibility for persons with disabilities by taking into account the individual access needs of the person in question.⁵⁷

In practice, ensuring access to sexual and reproductive health and rights demands practical measures to guarantee the rights, including ensuring accessibility of premises where sexual and reproductive health services are offered, provision of information on sexual and reproductive

52 CRPD, art 3.

53 In draft General Comment on article 6 (note 51 above) para 3, the CRPD Committee highlights the prevalence of sexual violence against women and girls with disabilities based on information in state party reports as well as various submissions during its Day of General Discussion in 2013. Sexual violence against women and girls with disabilities manifests in various forms including forced sterilisation.

54 African Commission GC 2 (n 29 above) para 24; Frohmader & Ortoleva (n 49 above) 4 highlight the fact that forced sterilisation of persons with disabilities constitutes cruel, inhuman and degrading treatment.

55 CRPD, art 2.

56 CRPD Committee, General Comment on article 9 'Accessibility' CRPD/C/GC/2 (2014) para 24.

57 As above, para 22-23.

health in accessible format and flexibility to enable reasonable adjustments where necessary to ensure that persons with disabilities benefit from the services. Health workers also ought to be able to communicate with women with disabilities, or to avail support services where necessary to enable such communication.⁵⁸ The CRPD Committee notes the importance of taking 'into account the gender dimension of accessibility when providing health care, particularly reproductive healthcare for women and girls with disabilities'.⁵⁹ It is unfortunate the General Comment of the CRPD Committee does not outline in specific or illustrative terms the services necessary to ensure accessibility of the substance of healthcare services alongside accessibility of the premises. The CRPD's definition of discrimination to include denial of reasonable accommodation⁶⁰ means that it is not enough to merely recognise the equal right of women with disabilities to access sexual and reproductive health services. Such recognition has to be coupled with positive measures intended to ensure that the women disabilities with can access services.

4.2 Specific articles

Several specific provisions of the CRPD are relevant to the protection of the rights of women with disabilities. They include provisions specific to the right of women with disabilities, protection of dignity, equal protection of the law, right to family, and the right to health.

4.2.1 Article 6: *The rights of women with disabilities*

The starting point for the protection of the rights of women with disabilities is article 6 of the CRPD which recognises that women experience multiple forms of discrimination and therefore calls upon states parties to ensure that they enjoy the rights and freedoms fully and on a basis of equality with others in the society in which they live.⁶¹ Whereas sexual and reproductive health is relevant to both men and women, women bear the bulk of the reproductive health burden and responsibilities. This is exacerbated by social attitudes that elevate women's reproductive role (almost as the sole subject of women's health) at the expense of other aspects of health, especially non-reproductive sexual expression. The emphasis on the right of women with disabilities to access these rights on the basis of equality with others in their societies is therefore very instrumental to surmounting the dual challenge of gender and disability based discrimination.

58 As above, para 6.

59 As above, para 36.

60 CRPD, art 5(3).

61 CRPD, art 6.

In May 2015, the CRPD Committee published a draft General Comment on article 6 of the CRPD for public comment.⁶² The draft Comment underscores the dual discrimination experienced by women with disabilities and the need for states parties to adopt measures that take into account the intersection of gender and disability discrimination in the implementation of the CRPD.⁶³ The draft Comment further acknowledged ‘restriction of sexual and reproductive rights of women with disabilities, including the right to motherhood and child-rearing responsibilities’ as one of the issues of concern to the CRPD Committee in relation to the rights of women and girls with disabilities based on information received from several countries. Arguably, the draft General Comment pays a great deal of attention to the reproductive dimension of sexual and reproductive health and rights of women and girls, while de-emphasising the non-reproductive sexual expression. Also the draft Comment fails to address the link between article 6 and article 25 of the CRPD, yet the latter explicitly calls for the provision of sexual and reproductive health services without discrimination. Nevertheless, the draft Comment significantly increases the visibility of the plight of women and girls with disabilities in the context of access to sexual and reproductive health and rights.

The CRPD also calls for measures to ensure that children with disabilities benefit from all rights and freedoms on an equal basis with other children, including the right to express their views freely on all matters affecting them, and for such views to be given due weight in accordance with the age and maturity of the children on an equal basis with all other children.⁶⁴ Adolescents’ access to sexual and reproductive health information and services is often controversial. In most cases, parents and caregivers are wary of the capacity of adolescents to consent to reproductive health procedures such as contraceptive and abortion services. The capacity of girls with disabilities, particularly intellectual disabilities, is even more denied. Hence, the call for the recognition of the capacity of children with disabilities on an equal basis with all other children underscores the need for an individualised approach to the assessment of the child’s capacity to consent in the exercise of their sexuality and reproductive rights.

4.2.2 Article 9: Accessibility

The CRPD further calls upon states parties to ensure accessibility of information, facilities, and services open or provided to the public through the elimination of barriers.⁶⁵ This provision is important as access to

62 CRPD Committee Draft General Comment (n 51 above).

63 As above, para 12.

64 CRPD, art 7.

65 CRPD, art 9.

information is central to the full exercise of sexual and reproductive health and rights. The kind of barriers that affect access to health care services include geographic proximity of healthcare facilities, physical accessibility of facilities particularly in respect of women with physical disabilities, economic accessibility, and the skill to communicate with women with disabilities as in the case of the hearing impaired. Also, access to sexual and reproductive health information requires that the information given should be in accessible formats including brail and audio to ensure equal access to women with disabilities. The CRPD Committee has indicated that article 9 calls for access to facilities and equipment for sexual and reproductive health services including access to contraceptive information, adapted equipment such as gynaecological examination beds and mammography equipment, amongst others.⁶⁶

In the view of the Committee on ESCR, accessibility of healthcare entails: non-discrimination in access, especially for the most vulnerable or marginalised sections of the population; physical accessibility meaning that health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalised groups such as persons with disabilities; economic accessibility (affordability); and that healthcare information should be accessible.⁶⁷

Evidently, ensuring equality of access to health care and health services calls for more than just legislation against exclusion from access to such services. It also includes taking positive measures to ensure that persons with disabilities are indeed able to benefit from the services.

4.2.3 Article 12: Equal recognition before the law

The CRPD calls for the recognition of the legal capacity of persons with disabilities to, amongst other things, exercise their will and preferences without undue influence of conflict of interests.⁶⁸ The CRPD Committee has interpreted this provision to include implementation of supported-decision making as opposed to substituted-decision making.⁶⁹ This is especially relevant in relation to forced sterilisation and control of the reproductive health and decision making of women with disabilities, the assumption being that they are incapable of consenting to sex.⁷⁰

66 CRPD Committee Draft General Comment (n 51 above) para 39.

67 ESCR Committee, General Comment No 14 'The right to the highest attainable standard of health (Art 12 of the Covenant)' E/C.12/2000/411 (August 2000) para 12(b).

68 CRPD, art 12(4).

69 CRPD Committee, General Comment on article 12 'Equal recognition before the law' CRPD/C/GC/1 (19 May 2014) para 22.

70 As above, para 31.

4.2.4 Article 23: Family life

Article 23 provides for matters of the family and home, including the rights of persons with disabilities to freely and responsibly decide the number and spacing of their children.⁷¹ The provision calls upon states to provide the means to enable the exercise of these rights. Further, the provision calls upon states to adopt measures to ensure that persons with disabilities retain their fertility on an equal basis with others.⁷² Article 23 largely draws from the Standard Rules on Equalization of Opportunities for Persons with Disabilities which call for 'the full participation of persons with disabilities in family life' and urges states to promote the right to personal integrity for persons with disabilities and to ensure that laws do not discriminate against them with respect to sexual relationships, marriage and parenthood.⁷³

In Rule 9, the Standard Rules further state that:

Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counseling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies. States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society. The media should be encouraged to play an important role in removing such negative attitudes.

The foregoing is, in the most simplistic way, a restatement of the centrality of sexual and reproductive health and rights, to the fulfillment of the right to family life and a testimony to the indivisibility of these rights.

4.2.5 Article 25: Right to health

Article 25 of the CRPD provides that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability, and that states parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive. In addition, the provision requires states parties to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as

71 CRPD, art 23(1)(b).

72 CRPD, art 23(1)(c).

73 Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993), rule 9.

provided to other persons, including in the area of sexual and reproductive health.⁷⁴

Notably, the initial draft of article 25 contained no references to reproductive rights. Instead, reproductive rights were discussed under the provision on privacy, home and family along with a right to sexuality and to form intimate relationships.⁷⁵ In fact, as shown above, some aspects of reproductive rights are still contained in article 23, such as the rights to determine the number and spacing of children and to retain one's fertility. It is reported that the inclusion of sexual and reproductive health and rights of persons with disabilities in article 25 was highly contested.⁷⁶ Supporting the retention of the provision, the Ad Hoc Committee noted that the statement 'including sexual and reproductive health services' was intended 'as a statement on the right to be free from discrimination and its effect was that persons with disabilities would need to be treated on an equal basis with others in this area'.⁷⁷

The CRPD Committee argues that article 25 includes the right to health care on the basis of free and informed consent.⁷⁸ Hence, decisions relating to a person's physical and mental integrity must only be taken with the free and informed consent of the person involved. The Committee further argues that health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities, taking care not to allow substituted decision making by guardians or caregivers.⁷⁹ The foregoing interpretation should be read alongside the understanding that the right to the 'highest attainable standard of health' has been interpreted to include measures to improve sexual and reproductive health services such as access to family planning, pre and post-natal care, emergency and obstetric services and access to information.⁸⁰

Cumulatively, the above interpretations of the right under article 25 mean that the sexual and reproductive health and rights of women with disabilities must be guaranteed on the basis of equal access, reasonable

74 CRPD, art 25(a).

75 See 'Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities – Article 14 – Respect for privacy, the home and the family' <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm#footnote47> (accessed 30 September 2014).

76 M Schulze 'Understanding the UN Convention on the Rights of Persons with Disabilities' 95.

77 Ad Hoc Committee Report of the 6th Session <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> (accessed 20 September 2014) para 85.

78 CRPD General Comment on art 12 (n 69 above), para 37; CRPD Committee Draft General Comment (note 51 above) para 17.

79 As above.

80 Committee on Elimination of Discrimination against Women (CEDAW Committee), General Comment No 21 – Equality in marriage and family relations (art 16) (1994), para 16.

accommodation, and respect for their dignity and integrity. The protection of the integrity of the person which is a component of the right to health⁸¹ entails the protection of their physical and mental integrity on an equal basis with others.⁸² Essentially therefore, neither forced sterilisation, abortion, contraceptive use on women with disabilities, nor can arbitrary restrictions on the exercise of their sexuality be justified. The protection of dignity and integrity also emphasises the need for individualised approaches to each woman with disabilities in their access to sexual and reproductive health and services. This means that blanket measures such as general sterilisation of women with disabilities can also not be justified.

Article 25 calls for gender sensitive health services. It has already been highlighted that the need for gender sensitivity in healthcare services was recognised by the Committee on ESCR in General Comment No 14. It was stated in this regard that

a gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.⁸³

The CRPD Committee has further noted that

it is especially important to take into account the gender dimension of accessibility when providing healthcare, particularly reproductive healthcare for women and girls with disabilities.⁸⁴

Accessibility is one of the more elaborated components of the right to health. Access to sexual and reproductive health and rights demands equality of access to the full range and quality standard of free or affordable healthcare. Equal access should be evaluated in light of the non-discrimination principle and purpose of the CRPD. Safeguards against exclusion of women with disabilities from access to population-based public health programmes purely on the basis of disabilities ought to be put in place. In the view of the Committee on ESCR, accessibility requires that health facilities, goods and services have to be accessible to everyone in the state without discrimination.

81 Committee on CESCR, General Comment No 14: The right to health (2000) para 4.

82 CRPD art 17; CRPD Committee Draft General Comment (n 51 above) para 17.

83 General Comment No 14 (n 81 above) para 20.

84 CRPD Committee General Comment on art 9 (n 56 above) para 36.

5 The relationship between CRPD and the African Women's Protocol in advancing the SRHRs of women with disabilities

The African Women's Protocol and the CRPD provisions that can be applied to advance the sexual and reproductive rights and needs of persons with disabilities have already been highlighted. This section examines the points of convergence between the provisions of the Protocol and the CRPD that are relevant to advancing the sexual and reproductive rights of women with disabilities.

5.1 Non-discrimination in access to SRHRs and services

It would seem that the largest area overlap of the two instruments is the prohibition of discrimination against specific members of society – women and persons with disabilities. The right to non-discrimination is crucial in realising access to sexual and reproductive health services for marginalised and disadvantaged groups such as women and persons with disabilities. In this regard, article 1 of the African Women's Protocol, drawing inspiration from CEDAW, adopts a substantive approach to equality by defining discrimination against women broadly in this manner:⁸⁵

Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their mental status, of human rights and fundamental freedoms in all spheres of life

The Protocol addresses all forms of discrimination against women and girls, including those in the private sphere. The focus on the private sphere is deliberate and aimed at protecting women and girls who are often subjected to inhuman and degrading cultural practices and acts of violence within the family. While the African Commission is yet to clarify the nature of obligation imposed by article 1 of the Protocol, it has explained that the non-discriminatory provision of the African Charter is fundamental to the enjoyment of all other rights in the Charter.⁸⁶

Article 5 of the CRPD reaffirms the substantive notion of equality when it provides that 'States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law'. It further urges states to 'prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'. Moreover, article 5(3) enjoins states to

⁸⁵ See art 1 of the African Women's Protocol above.

⁸⁶ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

adopt appropriate measures that reasonable accommodation is provided. This provision should be interpreted purposively to require targeted measures that will ensure the realisation of the sexual and reproductive health and rights of women with disabilities.

The combined reading of article 5 of the CRPD with articles 1 and 14 of the African Women's Protocol reinforces the point that women with disabilities deserve tailored responses to guarantee their enjoyment of sexual and reproductive health and rights. Therefore, negative attitudes and practices that hinder access to sexual and reproductive health services to women with disabilities need to be addressed. Often, women with disabilities in particular tend to experience attitudinal challenges in the exercise of sexual and reproductive health and rights compared to their male counterparts,⁸⁷ which makes it essential for states to take positive measures in order to facilitate access to sexual health services to person with disabilities.

The Canadian Supreme court decision in the *Eldridge* case⁸⁸ illustrates the measures that are necessary to actualise the protections contained in the right. The case dealt with the legality of regulations that failed to require hospitals to provide interpretation services for deaf patients. The Court held that the failure to make money available for sign-language interpretation that would equip hearing-impaired patients to communicate with health-service providers in the same way that unimpaired patients can, constituted discrimination in violation of the Canadian Charter on Rights and Freedoms.

The Court explained that:

In the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone. Once it is accepted that effective communication is an indispensable component of the delivery of a medical service, it is much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.⁸⁹

The reasoning of the Court in the case underscores the need for states to not only claim that they are providing services to all including women with

87 CRPD Committee Draft General Comment (n 51 above) para 8. See also SE Ahumuza et al 'Challenges in accessing sexual and reproductive health services by people with physical disabilities in Kampala, Uganda' (2014) 11 *Reproductive Health Journal* 4.

88 *Eldridge v British Columbia (Attorney-General)* 1977 151 DLR (4th) 577.

89 As above.

disabilities, but rather demonstrate that they have taken additional measures to prioritise the sexual and reproductive health needs of vulnerable and marginalised groups such as women with disabilities.⁹⁰

5.2 The protection of dignity

The protection of human dignity is at the core of fundamental rights, and even more relevant in the context of human rights that deal with the basic rights of persons. Indeed, the common denominator of all human beings is the recognition of their worth as human deserving to be treated with respect and dignity. Article 3 of the African Women's Protocol provides that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. In a more radical and progressive manner, the African Women's Protocol declares that 'every woman shall have the right to respect as a person and to the free development of her personality'. It enjoins states parties to implement appropriate measures to prohibit exploitation or degradation of women.⁹¹ In addition, the African Commission has noted that states must ensure that 'women are not treated in an inhumane, cruel or degrading manner when they seek to benefit from reproductive health services such as contraception/family planning services or safe abortion care'.⁹²

When a woman is made to undergo medical procedures merely based on her disability and without informed consent, there is no doubt that her right to dignity as guaranteed under the Protocol is undermined.

A provision in the CRPD similar to article 3 of the African Women's Protocol and relevant in advancing the sexual and reproductive rights of persons with disabilities is article 12. This article provides, *inter alia*, that states parties should ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, and are free of conflict of interest and undue influence.

One of the challenges facing people living with disabilities is the fact that they are often treated with indignity by health care providers. In a number of cases, medical decisions are made on their behalf by health care providers with little regard for human rights principles and standards such as autonomy and dignity. This practice raises the question as to whether people with disabilities can make informed decisions about their reproductive choices. This was the subject of contention in the Indian case of *Suchita Srivastava v Chandigarh Administration*.⁹³

90 See E Durojaye 'Realising equality in access to HIV treatment for vulnerable and marginalised groups in Africa' (2012) *Potchefstroom Electronic Law Journal* 214.

91 Art 3 of the Women's Protocol.

92 General Comment No 2 (n 29 above) para 36.

93 2009 (11) SCALE 813 N.

In that case, a 20-year old woman who suffered from a 'mild' intellectual disability got pregnant and a medical board was set up to assess the condition of the woman with a view to ascertaining the consequences of continuation of the pregnancy and the capability of the victim to cope with the same. Subsequently, the board recommended that her pregnancy be aborted. As there was no clear basis in law for proceeding with the termination, the Chandigarh administration approached the Punjab and Haryana High Court seeking approval for medical termination of the pregnancy, keeping in mind that the woman had intellectual disability, was an orphan, and did not have a parent or guardian who could look after her and her prospective child. Relying on expert evidence which indicated that the woman in question was unable to fully comprehend and appreciate the implications of her pregnancy, the High Court granted the application for the termination of the pregnancy.

On appeal to the Supreme Court, it was held that based on the Medical Termination Act of 1971 consent is crucial to any termination of pregnancy. According to the court, while the state could claim to be the guardian of the woman in question since she was an orphan and had been in state-owned welfare institution, that claim could not be used as the basis for making a decision about her pregnancy on her behalf. Since the woman in question was an adult and was merely classified as 'mildly mentally retarded' and not 'mentally ill' her consent should have been sought before any decision is made about her pregnancy. The court further explained that a woman's right to make reproductive choices is a dimension of 'personal liberty', as understood under article 21 of the Indian Constitution, and that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration was held to be a woman's rights to privacy, dignity and bodily integrity. Thus, restrictions could not be placed on the exercise of reproductive choice such as a woman's right to refuse participation in sexual activity or, alternatively, her insistence on the use of contraceptive methods. This case clearly shows that intellectual disability should not be used as an excuse to undermine the human rights of persons with disabilities.

It should be noted that article 25 of the Convention guarantees the right to the highest attainable standard of health of persons with disabilities without discrimination. Given that this provision is similar to article 12 of the ICESCR, and considering that the Committee on CRPD is yet to issue any interpretative guidance on the article, the interpretation provided by the Committee on ESCR in its General Comment 14 ought to apply. In General Comment 14, the Committee explains that the realisation of the right to health also includes the enjoyment of sexual and reproductive health and rights. More importantly, the Committee observes that the enjoyment of the right to health, including sexual and reproductive rights should be accorded to vulnerable and marginalised groups such as women, children, adolescents, people living with HIV and persons with disabilities. This statement along with its earlier General Comment 5, in which the

Committee had observed that persons with disabilities should be protected from all forms of discrimination and human rights abuse, anchor the equal right to sexual and reproductive health and rights for women with disabilities.

The Committee further notes that persons with disabilities are entitled to the enjoyment of the right to highest attainable standards of mental and physical health, including the right to have access to, and to benefit from, those medical and social services.⁹⁴ And that all services provided in this regard should be respectful of the rights to dignity of persons with disabilities.⁹⁵ This statement can be interpreted to include the rights of persons with disabilities to enjoy access to sexual and reproductive health care services. However, it should be pointed out that the ESCR Committee's approach to the health needs of persons with disabilities tended to be therapeutic and failed to appreciate their sexual and reproductive needs. This would seem to reinforce the general misconception about persons with disabilities that they are asexual and should be discouraged from expressing their sexual needs.

5.3 Addressing intersectionality

People who find themselves at the intersection of various factors of vulnerability such as race, religion, class, gender or disability often experience dual or multiple forms of discrimination and hence barriers to the exercise of their rights. Vulnerability is a contested concept the nuances of which are beyond the ambit of this article. In the most simplistic way, factors of vulnerability are those that influence a person's susceptibility to abuse or denial of rights. Such factors of vulnerability vary from one community to another. Women with disabilities are at the intersection of gender and disability, which are factors of discrimination and marginalisation in a majority of societies. In some cases, women with disabilities may experience further marginalisation such as living in rural or marginalised areas, displacement or sexual orientation. Both the CRPD and the African Women's Protocol recognise the negative consequences of the intersection of gender and disability in access to SRHRs for women with disabilities. The CRPD Committee has in fact identified sexual and reproductive health and rights, violence against girls and women, as well as the intersection of gender and discrimination as areas for priority action.⁹⁶ It is argued in this regard that

94 CESCR Committee General Comment No 5 – The rights of persons with disabilities (1995) para 34.

95 As above.

96 CRPD Committee, Half Day of General Discussion on Women and Girls with Disabilities <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD17April2013.aspx> (accessed 25 March 2015).

although women with disabilities experience the same forms of discrimination [that] all women experience, when gender and disability intersect, discrimination takes on unique forms, has unique causes, and results in unique consequences.⁹⁷

Both instruments approach the multiple vulnerabilities of women with disabilities, including in the context of access to sexual and reproductive health and rights by having a sub-group specific but general provision within the treaty. The core purpose of these provisions, however, is to reaffirm the applicability of the treaties to the particular group. In both cases, the specific provisions do not address sexual and reproductive health and rights, thereby limiting their effectiveness in this regard. Nevertheless, the approach of having a dedicated provision on women with disabilities enhances the visibility of their plight in accessing all rights, hence raising the likelihood that their unique challenges will be taken into account in the implementation of the other rights in the treaty.

6 Implications of the CRPD for the protection of the SRHRs of Women with Disabilities

6.1 Does the CRPD introduce any new rights in the context of the SRHRs of women with disabilities?

In the words of the Chair of ad hoc committee for the drafting of the CRPD, 'without creating for the most part new rights, the [CRPD] sets out a detailed code of implementation and spells out *how* individual rights should be put into practice'.⁹⁸ This position notwithstanding, there is no consensus in the disability rights field on whether the final text of the CRPD in fact creates new rights. In its preamble, the CRPD reiterates the continuing exclusion of persons with disabilities from participation as equal members of society and violations of their human rights in all parts of the world despite the existence of various instruments and undertakings.⁹⁹ The preamble also recognises that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, particularly those obligations that have already been undertaken by state parties to the CRC.¹⁰⁰ These assertions suggest that one of the purposes of the Convention is to correct the inequality in the application of existing rights.

⁹⁷ Frohmader & Ortoleva (n 49 above) 8.

⁹⁸ United Nations Information Service 'Committee Negotiating Convention on Rights of Disabled Persons Concludes Current Session' SOC/4680 15 August 2005 <http://www.unis.unvienna.org/unis/pressrels/2005/soc4680.html> (accessed 20 September 2014). Anna Lawson 'The UN Draft International Convention on the Rights of Persons with Disabilities: Purpose progress and potential' Paper delivered at London School of Economics, School of Law and Centre for Disability Studies, 9 March 2006.

⁹⁹ CRPD, Preamble, para (k).

¹⁰⁰ Para (r).

The CRPD is part of a general trend in international human rights law that entails adoption of human rights instruments specific to certain social groups. The trend entails acceptance of the fact that 'certain groups do need separate restatements of how rights apply to them, either because they have specific needs to enjoy their rights, different versions of the same rights, or possibly even slightly different rights'.¹⁰¹

In the context of sexual and reproductive health and rights, the CRPD does not in fact introduce any new rights. Instead, and as indicated in the preceding part, the Convention focuses on making the already existing right to sexual and reproductive health rights relevant to persons with disabilities, and women with disabilities in particular. Indeed, during the negotiation of article 25 of the CRPD, it was specifically argued that:

The Ad Hoc Committee notes that the use of the phrase 'sexual and reproductive health services' would not constitute recognition of any new international law obligations or human rights. The Ad Hoc Committee understands draft paragraph (a) to be a non-discrimination provision that does not add to, or alter, the right to health as contained in article 12 of the International Covenant on Economic, Social and Cultural Rights or article 24 of the Convention on the Rights of the Child. Rather, the effect of paragraph (a) would be to require States Parties to ensure that where health services are provided, they are provided without discrimination on the basis of disability.¹⁰²

In comparative terms, article 25 elaborates much more on the right to health, and gives much more attention to sexual and reproductive health rights. Indeed, unlike the ICESCR which minimally addresses sexual and reproductive health by calling for 'the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child',¹⁰³ article 25 of the CRPD expressly refers to sexual and reproductive health and rights.

101 F Megret 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 *2 Human Rights Quarterly* 497. B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in M Freeman *Law and childhood studies* (2012) 419 argues that the development of the CRPD as a thematic convention is indicative of the increasing recognition of the complexity of disability issues, and the fact that the difference of disability is such that it has not and cannot be effectively addressed by mainstream human rights instruments. See also L Mute 'Domesticating the International Convention on the Rights of Persons with Disabilities: Key considerations for Kenya' (Undated) (not paginated) on file with the authors.

102 Ad Hoc Committee on the CRPD 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its seventh session' New York, 16 January - 3 February 2006 <http://www.un.org/esa/socdev/enable/rights/ahc7report-e.htm#fn4> (accessed 30 September 2014).

103 ICESCR, art 12(2)(a).

The previous experiences of persons with disabilities (such as involuntary sterilisation of women with disabilities)¹⁰⁴ in the context of sexual and reproductive health and rights doubtlessly had a role in the explicit approach of the provisions of the CRPD.

6.2 CRPD and the ‘how’ to make SRHRs work for women with disabilities

As above indicated, the core contribution of the CRPD to the rights of persons with disabilities is the ‘how’ to make the rights relevant to them. It was stated in respect of the CRPD that it is an ‘implementation convention’ and that

the lack of effective implementation is the underlying reason for having this convention. The rights of persons with disabilities are recognized by the other human rights conventions, but we need to actually implement these rights.¹⁰⁵

The foregoing differentiates the CRPD from the African Women’s Protocol which merely recognizes the right. Article 25 of the CRPD, as read together with the other provisions of the Convention, therefore mainly give direction on measures that ought to be put in place to make the exercise of sexual and reproductive health and rights, possible for women with disabilities such as ensuring accessibility, gender sensitivity and equality.

7 Conclusion

The right to health, including reproductive health and rights, is recognised under various provisions in a range of human rights instruments. However, the African Women’s Protocol made the boldest attempt to address sexual and reproductive health and rights in a binding legal instrument. In this way, the Protocol paved a way for similar recognition of these rights in other instruments. The African Women’s Protocol also highlighted the unique challenges experienced by women with disabilities in accessing these rights, but failed to adequately elaborate on challenges related to sexual and reproductive health and rights, or how these rights would be implemented to deliver the rights to women with disabilities.

104 These concerns are reflected in the negotiation archives. See Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm#footnote47> (accessed 30 September 2014).

105 Statement by Chairperson of the Drafting Committee on the CRPD <http://www.unis.unvienna.org/unis/pressrels/2005/soc4680.html> (accessed 20 September 2014).

The CRPD recognises the peculiar circumstances and vulnerabilities of women and children and hence provides a basis for special measures to be adopted to enable their access to sexual and reproductive health and rights. The general principles of the Convention enhance the effectiveness of measures taken to ensure rights by calling for both universal measures such as universal design to facilitate accessibility, as well as individualised measures under reasonable accommodation. It is arguable that whereas the CRPD does not create new rights in relation to sexual and reproductive health and rights, its provisions in this regard provide considerable guidance on how to ensure that the rights are in fact feasible for women with disabilities. The CRPD enhances the implementability and enforceability of the right to health and of sexual and reproductive health rights in general.

There are certainly a number of areas of convergence between the African Women's Protocol and the CRPD in addressing the sexual and reproductive health and rights of women with disabilities. There is also no doubt that the CRPD indeed contributes to better recognition and protection of the sexual and reproductive rights of women with disabilities in Africa. In the African context however, the CRPD is more significant for the purpose of furthering the recognition of sexual and reproductive health rights under the African Women's Protocol, and adding clarity on the measures necessary to implement the recognised rights. The draft Protocol on the Rights of Persons with Disabilities in Africa builds even further on the foundation of the African Women Protocol, and if adopted, has the potential to bolster the protection of the sexual and reproductive health rights of women with disabilities in Africa.

CHAPTER 2

SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN WITH DISABILITIES: IMPLEMENTING INTERNATIONAL HUMAN RIGHTS STANDARDS IN LESOTHO

*Itumeleng Shale**

Summary

Lesotho is party to a number of international human rights instruments including those which provide for equality and non-discrimination of women as well as those that guarantee the rights of persons with disabilities. This article discusses how Lesotho may fulfil its international human rights obligations to realise sexual and reproductive rights of women with disabilities. It explores the international legal framework on sexual and reproductive rights; in particular the standards and obligations contained in the UN Convention on the Rights of Persons with Disabilities (CRPD). It assesses the extent to which the legal and policy frameworks in Lesotho adhere to international standards and argues that alignment of the national legal framework with international standards is the starting point towards fulfilment of the state's obligation to ensure that women with disabilities enjoy sexual and reproductive rights.

1 Introduction

The World Programme of Action of 1982 recognises women and girls with disabilities as a marginalised group.¹ History reflects that women all over the world have for a long time been discriminated against simply because of being women and that such discrimination continues to exist.²

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1 World Programme of Action concerning Disabled Persons, Report of the Secretary General, 15 September 1982, A/RES/37/351/Add.1, para II/2/45, 30.

2 United Nations Convention on Elimination of All forms of Discrimination Against Women (CEDAW), adopted by United Nations General Assembly (UNGA) on 18 December 1979, Preamble, para 6.

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Similarly, persons with disabilities have suffered from discrimination and marginalisation based on their disabilities. This resulted in women with disabilities suffering multiple discrimination based on their sex as women and secondly on account of their status as persons with disabilities.³ This notwithstanding, most national laws and policies, to date fail to address the injustices suffered by women with disabilities in their entirety. Laws and policies that address gender fail to address prejudices suffered by women and girls with disabilities, and those that address disability have forgotten gender.⁴ As a result, women with disabilities are less likely to exercise or even access education and information about sexual and reproductive rights.⁵ Furthermore, women with disabilities who have children sometimes face rejection and scorn by both members of their families and the communities in which they live.⁶

Developments at the international level such as participation of women with disabilities in the International Year of Disabled Persons in 1981, the UN Decade of Disabled Persons 1983-1992, and in the World Conferences on Women culminated in the adoption of instruments such as World Programme of Action 1982,⁷ Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993.⁸ The United Nations also adopted the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) 1979⁹ and Convention on the Rights of Persons with Disabilities (CRPD) 2006.¹⁰ These instruments have led to a confirmation of women with disabilities as rights-bearers and important members of society.¹¹ However, of the international instruments adopted, the CRPD is the only one which has a legally binding provision that outlaws discrimination on the basis of both gender and disability.¹²

Lesotho has joined the move of viewing women with disabilities as rights-bearers by ratifying a number of international human rights

3 SAD Kanga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope?' 2011 Centre for Women Policy Studies *Barbara Faye Waxman Fiducia Papers on women and girls with disabilities*. See also E Mandipa 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' 2013 (1) *African Disability Rights Yearbook* 73.

4 CRPD Committee, Draft General Comment No 3: Article 6 'Women with disabilities' UN Doc CRPD/C/14/R.1 (22 May 2015) para 2.

5 WHO 2009 'Promoting sexual and reproductive health for people with disabilities' *WHO/UNFPA Guidance Note 1*. See also Centre for Reproductive Rights 'Reproductive rights and women with disabilities: A human rights framework' *Briefing Paper 1*.

6 Centre for Reproductive Rights *Briefing Paper 1* (n 5 above).

7 World Programme of Action concerning Disabled Persons, 1982 (n 1 above).

8 Standard Rules on the Equalization of Persons with Disabilities, adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993.

9 CEDAW (n 2 above).

10 United Nations Convention on the Rights of Persons with Disabilities, adopted by UNGA on 13 December 2006 (CRPD).

11 Mandipa (n 3 above) 73.

12 Draft General Comment No 3 (n 4 above) para 3.

instruments including CEDAW and the CRPD.¹³ Amongst rights recognised in these instruments are sexual and reproductive rights of all, including women with disabilities.¹⁴ Sexual and reproductive rights are broadly defined as basic human rights to which every human being is entitled and include having a safe and satisfying sexual life, and being able to decide over one's body without coercion, violence or discrimination. World Health Organisation (WHO) has adopted several definitions of sexual health but the most current defines sexual health as:

[A] state of physical, emotional, mental and social well-being in relation to sexuality. It is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of *all persons* must be respected, protected and fulfilled.¹⁵

In its Draft General Comment on women with disabilities under article 6, the Committee on the Rights of Persons with Disabilities (CRPD Committee) which is a body established under the CRPD to oversee implementation of its provisions, has identified violation of sexual and reproductive rights of women and girls with disabilities as one of the three main areas of concern, which states parties have to focus on when implementing the CRPD at the national level.¹⁶ There has not been extensive research on sexual and reproductive rights of women and girls with disabilities in Lesotho. Available literature which is very limited, can be divided into two: being studies that focus on sexual and reproductive rights of women in the context of gender based violence and HIV on the one hand and studies that focus on persons with disabilities in general on the other. Lesotho National Federation of the Disabled (LNFOD),¹⁷ together with other research partners has undertaken various research projects on persons with disabilities generally but none on sexual and reproductive rights of women with disabilities. Relevant to this article are a study on the living conditions

13 Lesotho ratified the CEDAW on 22 August 1995 and acceded to the CRPD on 2 December 2008.

14 For instance art 12(2) of CEDAW creates a positive obligation for states to lay a foundation for women's reproductive choice. See also the statement of the UN Committee on elimination of all forms of discrimination against women (CEDAW Committee) at its fifty-seventh session 10-28 February 2014 in which states parties are urged to ensure the full respect, protection and fulfilment of sexual and reproductive rights, in line with human rights obligations available on www.astra.org.pl/.../243-cedaw-statement (accessed 14 August 2014). Article 25 of CRPD provides for Persons with disabilities' right to health on an equal basis with others, 'including in the area of sexual and reproductive health and population-based public health programs'.

15 WHO 2006 'Defining sexual health' http://www.who.int/reproductivehealth/topics/sexual/Health/sh_definitions/en/ (accessed 29 March 2015).

16 CRPD Committee Draft General Comment No 3 (n 4 above) para 5.

17 An umbrella body of organisations of persons with disabilities (DPOs).

of persons with disabilities,¹⁸ baseline study on disability mainstreaming¹⁹ and the situational assessment study on HIV/Aids and people with disabilities.

The objective of this article is to consolidate findings in previous research done. It uses data from other similarly placed countries to fill the gap on implementation of Lesotho's obligations towards sexual and reproductive rights of women with disabilities. In this regard, the article uses the UN Economic and Social Council definition of implementation which is:

[M]oving from a legal commitment, that is, acceptance of an international human rights obligation by ratification of, or accession to, a treaty, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligation.²⁰

To achieve the objective of filling the gap on implementation of Lesotho's obligations towards sexual and reproductive rights of women with disabilities, the article reviews the national legal and policy frameworks of Lesotho and the extent to which they are compliant with the provisions of CRPD relating to sexual and reproductive rights of women with disabilities. It is divided into three sections. Section one gives background information on Lesotho and the status of women with disabilities in Lesotho. Section two discusses sexual and reproductive rights of women with disabilities as contained in various international human rights instruments and makes an assessment of the legal and policy frameworks of Lesotho against the standards contained in the international human rights instruments. Section three concludes the article by summarising states' obligations towards sexual and reproductive rights of women with disabilities as contained in the CRPD and makes recommendations on how to overcome challenges which inhibit their full implementation in Lesotho.

1.1 About Lesotho

Lesotho is a small mountainous country located in Southern Africa totally surrounded by the Republic of South Africa. Being one of the least developed economies in the Southern African Development Community (SADC) region, its economy is dependent on sale of water, wool, mohair

18 Y Kamaleri & AH Eide 'Living conditions among people with disabilities in Lesotho: A national representative study' *SINTEF Technology and Society Global Health and Welfare* (Living Conditions Study).

19 Communities of practice in disability advocacy for mainstreaming (COPDAM) Baseline Study: Lesotho 2013 Report (Disability Baseline Study 2013).

20 UN Economic and Social Council 'Report of the High Commissioner on Human Rights on implementation of economic, social and cultural rights' UN Doc E/2009/90, para 3.

and most recently diamonds.²¹ According to the 2006 Population and Housing Census, the population of Lesotho was about 1 880 661 while the most recent estimates calculate the figure to be slightly over two million.²² As at 2012, Lesotho had a Human Development Index (HDI) value of 0.461 and was ranked 158th out of 187 countries on the HDI.²³ According to the 2006 Population and Housing Census, 51,4 per cent of the total population is female.²⁴ Seventy-seven per cent of the total population resides in rural areas while 23 per cent resides in urban areas.²⁵ The unemployment rate in Lesotho is very high as the Integrated Labour Force Survey conducted by the Bureau of Statistics (BOS) in 2008 indicated that 22,7 per cent of the economically active population is unemployed, out of which 14,6 per cent are females.²⁶ Although these are not the most recent statistics, what they indicate however is that women constitute the highest number of the poor and unemployed in Lesotho, a factor which affects their ability to exercise most of the basic human rights.

Studies to determine the population of persons with disabilities in Lesotho were conducted for the first time after the turn of the Millennium.²⁷ According to studies undertaken by the Ministry of Education in 2002 and the then Ministry of Health and Social Welfare in 2008, between 4,2 and 5,2 per cent of the population has one form of disability or another.²⁸ At the time of the 2006 Population and Housing Census, the figure was 3,7 per cent, 2,1 per cent of which were males, while 1,6 per cent constituted females.²⁹

1.2 Women with disabilities and the barriers they face in Lesotho

Women with disabilities constitute about 1,6 per cent of the population of Lesotho (about 32 000 people),³⁰ yet despite these significant figures, their rights are often overlooked, neglected and violated. In Lesotho and many

21 T Masimba 'Lesotho's economy catches flu – from big brother's sneeze' *African Renewal Online* December 2011 www.un.org/africarenewal/.../Lesotho's (accessed 14 August 2014).

22 Statistics <http://countryeconomy.com/demography/population/lesotho> (accessed 16 February 2015). See also World Population Review 2014 'Lesotho Population 2014' www.worldpopulationreview.com/countries/lesotho-population (accessed 16 February 2015).

23 UNDP 2014 Lesotho – Human Development Reports <http://www.hdr.unpd.org/sites/all/themes/...LSO> (accessed 14 August 2014).

24 World Population Review 2014 (n 22 above).

25 As above.

26 Lesotho Integrated Labour Force Survey 2008 www.bos.gov.ls/.../2008_ILFS_report (accessed 14 August 2014).

27 Living Conditions Study (n 18 above) 14.

28 World Population Review 2014 (n 22 above).

29 As above.

30 Living Conditions Study (n 18 above).

other countries, they face barriers to information and services required for fulfilment of sexual and reproductive needs.³¹ It is important to note that challenges which they face in accessing sexual and reproductive health rights are not raised by the disabilities themselves but are precipitated by historic as well as current barriers imposed by the environment in which they live.³² Whereas all persons with disabilities in Lesotho face challenges in their fight for equality, the plight of women with disabilities is made worse by the fact that they face the double disadvantage of disability and womanhood. They suffer the scourge of discrimination as women, and isolation and exclusion within their families, in public services and within the society because of their disabilities.³³ As a result, most women with disabilities in Lesotho live lives characterised by poverty, illiteracy and joblessness.

According to a 2013 baseline study on disability, the barriers which inhibit persons with disabilities from exercising their rights, including sexual and reproductive rights can be categorised into physical and institutional, communicational as well as attitudinal barriers.³⁴ Physical barriers are caused by the infrastructure such as inaccessible healthcare buildings, lack of disability – friendly transportation facilities as well as absence and or inaccessibility of roads to some healthcare centres.³⁵ Institutional barriers on the other hand include laws and policies that do not accommodate the needs of women with disabilities,³⁶ as well as absence of laws or non-implementation of laws that regulate and guard against practices such as forced or coerced sterilisation,³⁷ forced abortion and forced marriages. Persons with disabilities are at higher risk of HIV and other sexually transmitted infections (STIs) yet they are often left out in prevention and treatment programmes.

According to the situational assessment study, as at 2011, about 27,5 per cent of persons with disabilities had not heard about HIV/Aids and its modes of transmission.³⁸ This is attributed to communicational barriers in as much as most information materials on sexual and reproductive health

31 WHO 2009 (n 5 above). See also LNFOD 2011 'Situational assessment analysis study of HIV/Aids and persons with disabilities in Lesotho' (HIV Situational Assessment Study 2011) 11 which reflects that while persons with disabilities are more exposed to HIV/Aids risk factors, they are often excluded from prevention and treatment programmes.

32 Living Conditions Study (n 18 above) 16.

33 As above.

34 Disability Baseline Study 2013 (n 19 above) 7.

35 Disability Baseline Study 2013 (n 19 above) 8.

36 As above.

37 Women and Law in Southern Africa, Research and Education Trust (WILSA) & Community of Women living with HIV (CW) 2014 'Forced sterilization of women living with HIV: Lesotho case study' Unpublished research report (Study on forced sterilization of women living with HIV) 1.

38 HIV Situational Assessment Study (n 31 above) 33.

including HIV are not accessible to persons with hearing and visual impairments.³⁹ Non-recognition of sign-language as an official language and failure to provide such in essential services such as healthcare institutions and police stations also negatively affects the ability of women with hearing impairment to access information that is vital to their sexual and reproductive rights including obtaining relevant information or reporting sexual offences in privacy.⁴⁰

Attitudinal barriers imposed by the non-disabled members of society are often influenced by stereotypical beliefs about women and persons with disabilities as well as sentiments. As a result of these beliefs and sentiments, women with disabilities are dehumanised, called mocking names or viewed as objects of charity.⁴¹ Amongst the barriers associated with attitudes, are that women with disabilities are denied the right to take part in making important decisions about their lives including establishment of sexual relationships, deciding who to marry and found a family with, whether or not to have children and the number and spacing of children if they decide to have them.⁴²

Research on forced sterilisation of women living with HIV has unearthed a practice of forced, coerced and uninformed consent to sterilisation of women living with HIV in Lesotho.⁴³ In some of the cases parents, relatives and caregivers impose their own decisions relating to sterilisation of women whom they view as vulnerable or as being burdens to the families. Although this study did not focus on women with disabilities, the practice of forced or coerced sterilisation has implications on sexual and reproductive rights of women with disabilities whether living with or without HIV.

Attitudinal barriers also result in women with disabilities being subjected to physical, emotional and sexual abuse as well as other forms of gender based violence which also increases the risk of HIV and other STIs.⁴⁴ The belief that persons with disabilities are asexual is entrenched in most Basotho including healthcare professionals which affects access of persons with disabilities to information relating to sexual health, family planning, treatment of STIs and access to HIV/AIDS counselling and testing services.⁴⁵ Because of these beliefs, where a woman with a disability has fallen pregnant and attempts to access prenatal services she is not given services of the same quality as other non-disabled women.

39 As above.

40 L Chipatiso et al 'The Gender-based violence indicators study: Lesotho' *Gender Links* (GBV indicators study) (2015).

41 Disability Baseline Study 2013 (n 19 above).

42 WHO 2009 (n 31 above) 3 illustrates the general problem and the Living Conditions Study (n 18 above) 16 reflects the same in Lesotho.

43 Study on Forced Sterilization of Women Living with HIV 2014 (n 37 above).

44 HIV Situational Assessment Study 2011 (n 31 above).

45 As above.

The effects of these barriers include overlooking, denying or violating sexual and reproductive rights which result in high maternal and infant mortality ratios which according to United Nations Children's Fund (UNICEF) remain unacceptably high in sub-Saharan Africa.⁴⁶ As at 2013, Lesotho had very high maternal mortality ratio of 490 deaths out of every 100 000 live births ranking at an almost similar level with Malawi which has the ratio of 510 and Zimbabwe which is 470 while other countries in the region had lower ratio such as Swaziland at 310, Botswana 170, South Africa 140 and Namibia 130.⁴⁷ In Lesotho, the bulk of these deaths occur in rural areas where women have limited access to quality sexual and reproductive health services.⁴⁸

The Living Conditions study also found that incidents of infant mortality amongst women with disabilities aged 15 years and above, at the time of research were 53 per cent higher compared to women without disability of the same age.⁴⁹ Although due to limited information the Living Conditions study could not explain the difference of infant mortality between women with disabilities and those without disabilities, one can attribute this difference to the fact that the bulk of deaths occur in rural areas where there are limited resources and that a large number of persons with disabilities live in the rural areas.⁵⁰ Therefore women with disabilities who reside in rural areas are at a higher risk of maternal and infant mortality because of lack of healthcare facilities that accommodate their needs.

The foregoing discussion has illustrated a dire status of sexual and reproductive health rights of women with disabilities in Lesotho. Based on this, below is a discussion of how things ought to be in terms of international human rights standards on sexual and reproductive rights of women in general and women with disabilities in particular. These standards are used in the article as a yardstick against which Lesotho's laws and policies are measured.

2 Using international human rights standards on sexual and reproductive rights of women with disabilities to assess national laws and policies

By definition, sexual and reproductive health rights carry with them a number of freedoms including:

- Equality and non-discrimination;

46 UNICEF <http://www.unicef.org> (accessed 14 September 2015).

47 World Population Review 2014 (n 22 above).

48 As above.

49 Living Conditions Study (n 18 above) 53.

50 Living conditions Study (n 18 above) 16.

- Right to marry and found a family;
- Right to reproductive healthcare;
- Right to give informed consent to all medical procedures; and
- Freedom from sexual abuse and exploitation.

2.1 Equality and non-discrimination

2.1.1 International standards on equality and non-discrimination

Equality is a basic human rights principle on the basis of which freedom from discrimination is guaranteed as the most fundamental human right that lays a foundation for enjoyment of all other human rights,⁵¹ hence this article dwells more on discussion of equality and non-discrimination than other rights, as it forms a foundation for implementation of the other rights and freedoms that relate to sexual and reproductive rights. Principles of equality and non-discrimination are enshrined in both international human rights instruments and in customary international law. The right to freedom from discrimination is provided for in virtually all human rights instruments as a guiding principle for implementation of all other human rights.⁵² Under customary international law, the obligation not to discriminate has attained the status of a peremptory norm from which no derogation is allowed.⁵³ State's acceptance of equality as a *grund norm* in relation to women with disabilities is reflected in several binding and non-binding instruments such as the *Declaration on the Rights of Persons with Disabilities*,⁵⁴ *The Standard Rules on Equalisation of Opportunities for Persons*

51 Universal Declaration of Human Rights (Universal Declaration) 1948 article 1 which provides that 'all human are born free and equal in dignity and in rights'.

52 For instance, art 2 of Universal Declaration on Human Rights (Universal Declaration) 1948, arts 2 and 26 of International Covenant on Civil and Political Rights (CCPR) 1966, art 2(2) of the International Covenant on Economic, Social and Cultural Rights (CESCR) 1966, art 2 of the Convention on the Rights of the Child (CRC) 1989 and art 2 of the African Charter on Human and Peoples' Rights (African Charter) 1981 all prohibit discrimination on several grounds such as sex or 'other status'. The term 'other status' has been interpreted to include disability. However its inclusiveness has been discarded by other disability academics and activists in that it does not make the injustices that persons with disabilities suffer visible and therefore makes it less likely for governments to address them. Over and above the general prohibition of discrimination, CEDAW and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) 2003 prohibit discrimination against women in particular. In its art 23(b), the African Women's Protocol specifically prohibits discrimination against women with disabilities on the grounds of their disability.

53 N Lerner *Group rights and discrimination in international law* (2003) 2.

54 Declaration on the Rights of Persons with Disabilities 1957 art 10 provides that 'disabled persons, whatever their origin, nature and seriousness of their handicaps and disabilities have the same fundamental rights as their fellow citizens'. It goes on to protect persons with disabilities against all exploitation, regulation and treatment of a discriminatory nature.

with Disabilities (Standard Rules),⁵⁵ and *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (MI Principles).⁵⁶ With specific reference to women and girls with disabilities, the Beijing Declaration provides that:

[States] are determined to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as ... disability,⁵⁷

... while the Beijing Platform for Action urges states to:

strengthen and encourage implementation of the recommendations contained in the standard rules on equalisation of opportunities for persons with disabilities, paying special attention to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by women and girls with disabilities including their access to information and services in the field of violence against women ...⁵⁸

CRPD, which is the first and by far the only binding international instrument that focuses entirely on protection of the rights of persons with disabilities is premised on the principles of equality and non-discrimination. It recognises that persons with disabilities face difficult conditions because of being subjected to multiple and aggravated forms of discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion ...'⁵⁹ It emphasises the need for gender mainstreaming⁶⁰ and articulates its purposes as 'to promote, protect and ensure the full and *equal* enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁶¹ It also stipulates that equality between women and men shall be considered as one of the core principles of the Convention,⁶² and demands that state parties combat sex-based stereotypes, prejudices and harmful practises related to persons with disabilities.⁶³

Article 6 of CRPD contains state parties' obligation to ensure gender equality for women and girls with disabilities. In its Draft General

55 United Nations Standard Rules on Equalisation of Opportunities for Persons with Disabilities provide that the needs of each and every individual are of equal importance and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.

56 Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health. Adopted by the UN General Assembly in 1991, principle 1(4) provides that there shall be no discrimination on the grounds of mental illness.

57 Fourth World conference on Women, Beijing 1995 *Declaration* para 32.

58 Fourth World conference on Women, Beijing 1995 *Action for Equality, Development and Peace Platform for Action*.

59 CRPD, Preamble, para (p).

60 CRPD, Preamble, para (s).

61 CRPD, art 1(1) (emphasis added).

62 CRPD, art 3(g).

63 CRPD, art 8(b).

Comment on article 6, the CRPD Committee, notes that women and girls with disabilities are often confronted with intersectional discrimination. That is, several forms of discrimination based on various layers of identity which may intersect and produce new forms of discrimination which are unique and cannot be correctly understood by describing them as double or triple discrimination.⁶⁴ This multiple and intersectional discrimination may be direct or indirect discrimination, in the form of denial of reasonable accommodation or structural or systemic discrimination.⁶⁵ That is, a woman or girl with disability may be subjected to intersectional discrimination in a situation where some of her rights such as the right to non-discrimination, freedom from torture and ill-treatment, protection of personal integrity, right to legal capacity, right to family, right to health and others are violated as a result of the intersection of more than one of her identities being her sex, age, disability, social class, the perception that she is innocent, weak, passive, unable or unlikely to speak out, or unlikely to be believed by others to be the object of a sexual assault.⁶⁶

The challenge that faces women and girls with disabilities is that most international and national legal frameworks focus on single dimension discrimination on the basis of which courts provide remedies that do not take into account the magnitude of the discrimination suffered.⁶⁷ Hence article 6 read with other provisions of CRPD requires states parties to adopt a twin-track approach: gender mainstreaming in disability laws and policies as well as disability mainstreaming in gender laws and policies.⁶⁸

When interpreting the right to health as contained in article 12 of CEDAW, the CEDAW Committee, which is a committee established under CEDAW to oversee its implementation emphasised that 'special attention should be given to the health needs and rights of women belonging to disadvantaged and vulnerable groups such as ... women with physical or mental disabilities'.⁶⁹ The need for 'special attention' to be given to women with disabilities is also reiterated in the 1993 Vienna Declaration and Program of Action which asserts that 'special attention' must be given in order to eliminate discrimination and to ensure equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.⁷⁰ The CRPD refers to this as the principle of reasonable

64 Draft General Comment No 3 (n 4 above) para 8.

65 Draft General Comment No 3 (n 4 above) para 20.

66 As above.

67 Draft General Comment No 3 (n 4 above) para 9.

68 Draft General Comment No 3 (n 4 above) para 14.

69 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) General Recommendation No 24: Article 12 of the Convention (Women and Health) 1999, UN Doc A/54/38/Rev.1, chap 1 <http://www.refworld.org/docid/453882a73.html> (accessed 29 March 2015).

70 Vienna Declaration and Programme of Action 1993.

accommodation.⁷¹ It defines 'reasonable accommodation' and the extent to which it has to be provided as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms ...⁷²

In setting forth the duty for reasonable accommodation in the area of sexual and reproductive rights, article 9 of CRPD mandates state parties to ensure to all persons with disabilities, access on an equal basis with others, to the physical environment, transportation, information and communication, including information and communications technology and systems as well as other facilities and services that are open or provided to the public. States' obligations contained in this article are further elaborated by the CRPD Committee General Comment No 2⁷³ wherein it stated that accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. That is, Lesotho as a state party, has a duty to ensure that clinics, hospitals and other healthcare facilities are designed or redesigned in a manner that make them easily accessible to women who have any form of disabilities and failure to do so amounts to discrimination on the basis of disability. Appropriate measures in this regard include ensuring that buildings have ramps for independent access by a woman on a wheelchair and that there are no obstacles that inhibit access by a woman who has visual impairment and uses a cane. Because of the mountainous terrain in Lesotho that makes most places inaccessible on foot, it is also essential to ensure that the budget for the Ministry of Health includes enough emergency vehicles to transport expectant mothers to health centres at the time of delivery and that the said vehicles accommodate women with any form of disability.

The same obligation is imposed in relation to offering reproductive health information in a language and or manner understood by all women. For instance, offering of printed information by Braille and oral information by Sign Language for the benefit of women with vision and hearing impairments respectively or allowing women with visual impairments to handle and feel products essential for sexual and reproductive health such as condoms.⁷⁴

71 J Lord & R Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' (2010) SSRN <http://ssrn.com/abstract=1618903> (accessed 14 September 2015).

72 CRPD, art 2.

73 CRPD Committee, General Comment No 2 UN Doc CRPD/C/GC/2 (2014).

74 NE Groce et al 'Guidelines for inclusion of individuals with disability in HIV outreach efforts' *The World Bank Global AIDS Program* (2008) 11.

2.1.2 National standards on equality and non-discrimination

Currently there is no disability specific law in Lesotho. However, efforts for its enactment are in the pipeline as there is a Disability Equity Bill. The purpose of the Disability Equity Bill is stipulated as to establish a Disability Advisory Council (DAC) and to provide for equalisation of opportunities for and recognition of rights of persons with disabilities.⁷⁵ Implementation of the CRPD is amongst the functions of the DAC.⁷⁶ Enactment of this Bill into a law would therefore be one of the greatest steps towards fulfilment of freedom from discrimination for persons with disabilities in Lesotho.

The 1993 Constitution of Lesotho and other Acts of Parliament namely: the Building Controls Act 1995, Sexual Offences Act 2003, Youth Council Act 2008, Education Act 2010, Penal Code Act 2010, Children's Protection and Welfare Act 2011 and National Assembly Elections Amendment Act 2011, have provisions that directly address non-discrimination on the basis of disability while some indirectly address the issue as discussed below.

The Constitution guarantees freedom from discrimination as a fundamental human right in sections 4 and 18. Section 4 provides that:

[E]very person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms.

Discrimination in this context is defined in section 18(3) as:

[A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The non-discrimination provisions of the Constitution and their interrelation with Lesotho's international human rights obligation not to discriminate were discussed in the case of *Fuma v Commander Lesotho Defence Force (LDF)*,⁷⁷ by the Constitutional Court of Lesotho. Fuma, a member of the LDF was retired on medical grounds in terms of section 24 of LDF Act 1994 by the medical board having reached a conclusion that he is legally blind because of *inter alia* HIV. Fuma contended that the board's decision to retire him was discriminatory on the basis of his HIV status because there were still other officers in the army who were visually

75 Government of Lesotho Disability Equity Bill 2014.

76 Disability Equity Bill, sec 6.

77 *Fuma v Commander LDF (Fuma)* LSHC 68. Judgment of 10 October 2013.

impaired but instead of being retired; they were given other duties in the institution that befitted their condition. He stated that the only factor that influenced the medical board's decision to retire him was his HIV status. In deciding the case, the Court held that:

[The Court] primarily takes a view that the unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter but that by default, it technically assumes the effect of municipal law in the country.⁷⁸

The court went further to consider other international human rights instruments and concluded that the Applicant had been discriminated against on the basis of his disability as well as HIV status. The court did not only condemn discrimination against the applicant as a violation of the CRPD but went further to determine the status of the CRPD in Lesotho by holding that it 'assumes the effect of municipal law in the country'.⁷⁹

Despite the Court having read disability into the phrase 'other status' in section 18 of the Constitution, it is imperative to note that neither section 4 nor section 18 lists disability as a prohibited ground of discrimination. This omission, it is argued, is detrimental to protection of persons with disabilities from discrimination.⁸⁰ It fails to facilitate for the implementation of the general principles contained in article 3 of the CRPD which include respect for the inherent dignity and acceptance of persons with disabilities as part of humanity and human diversity.⁸¹

The only provision in the Constitution which refers to persons with disabilities is section 33 which provides for rehabilitation, training and social resettlement of persons with disabilities as part of Directive Principles of State Policy (DPSPs). Ngwena argues that laws that focus on rehabilitation of persons with disabilities and not adjustments of the environments which impose barriers to their enjoyment of human rights reinforce the outdated medical model of disability by categorising disability as a social welfare issue.⁸² In this regard, Zimbabwe is one of a few countries in the SADC region which Lesotho can learn from. The 2013 Zimbabwean Constitution has a provision on disability which recognises the rights of persons with disabilities, in particular the right to be treated with respect and dignity.⁸³ It mandates the state to assist persons with

78 *Fuma* (n 77 above) para 22.

79 Section 2 of the Constitution places the constitution above all laws, including international law. Therefore, it is unwarranted to assume that *Fuma's* case provides conclusive evidence of applicability of the CRPD in Lesotho in the absence of an Act of Parliament that domesticates the CRPD.

80 G Quinn & T Degener *Human Rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

81 CRPD, art 3(a) & (d).

82 C Ngwena 'Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal of Human Rights* 620.

83 The Constitution of Zimbabwe (Amendment No 20) Act of 2013, sec 22(1).

disabilities to achieve their full potential and to minimise the disadvantages suffered by them.⁸⁴ It sets out activities that the state and all institutions and agencies of government must do to achieve equality⁸⁵ and to take appropriate measures to ensure persons with disabilities equal access to public buildings and amenities.⁸⁶

Apart from the Constitution, the other pieces of legislation mentioned earlier also have provisions aimed at eliminating discrimination against persons with disabilities. For instance, the Buildings Control Act provides for physical access for persons with disabilities, in all public buildings.⁸⁷ This provision gives 'special attention' to the rights of women with physical disabilities and ensures that they have access to public buildings including healthcare facilities as is mandated by article 9 of CRPD. The challenge with this Act however, is highlighted by the Lesotho Disability Baseline Study in which it is remarked that this section is not complied with in as much as many public buildings, including the Government Complex (where most government offices are located) remain inaccessible.⁸⁸ The same is true for a number of healthcare facilities such as clinics and hospitals.

The Sexual Offences Act makes it a criminal offence to engage in a sexual act with a person who has a form of disability that makes it impossible for him or her to consent to the said sexual act. This Act is discussed in detail under freedom from sexual abuse and exploitation. The Youth Council Act of 2008 mandates that youths with disability must be represented in the Youth Council, while the National Assembly Elections Amendment Act 2011 mandates political parties to ensure persons with disabilities equal participation within their political parties. Education Act 2010 provides for inclusive education of children with disabilities in line with the principle of reasonable accommodation in article 9 of CRPD. One of the guiding principles in the Children's Protection and Welfare Act (CPWA) is non-discrimination.⁸⁹ Furthermore, the CPWA has a provision which specifically prohibits discrimination of children on the basis of their disability.⁹⁰ It provides further that a child with disability has a right to dignity, special care, medical treatment and the like⁹¹ The challenge however is with its implementation which has been criticised in that the Ministry of Social Development, under its Children's Unit, does not have specific programmes for children with disabilities, as a result of which children with disabilities are often referred to the Disability Unit

84 Constitution of Zimbabwe, sec 22(2).

85 Constitution of Zimbabwe, sec 22(3).

86 Constitution of Zimbabwe, sec 22(4).

87 Buildings Control Act 1995, sec 19.

88 Disability Baseline Study 2013 (n 19 above).

89 Children's Protection and Welfare Act (CPWA) 2011 sec 6.

90 As above.

91 CPWA, sec 13.

thus failing to include them in mainstream children's programmes in violation of the CRPD.⁹²

While the national laws discussed above, generally prohibit discrimination, none adopts a twin track approach as mandated by CRPD by specifically prohibiting discrimination against women with disabilities as a group because of their particular vulnerability to discrimination, abuse and exploitation. This omission in the legal framework has been noted by the CEDAW Committee in its concluding observations on Lesotho's combined initial, second, third and fourth report to CEDAW.⁹³ The Committee urged the state to have a specific provision in the Constitution which prohibits discrimination against women as defined in article 1 of CEDAW and that the challenges facing women with disabilities should be given particular attention.⁹⁴

Over and above the laws discussed above, Lesotho also has a number of policies geared towards both gender equality and equality for persons with disabilities. The major policy document on disability is the *National Disability and Rehabilitation Policy of 2011 (Disability Policy)*. The objectives of this policy are stated as, amongst others, to create an environment in which persons with disabilities can realise their full potential while being included in the mainstream society. In particular it provides for inclusion of persons with disabilities in education, health, employment and social services. The overarching objective of inclusion in the Disability Policy is thus guided by the principle of non-discrimination and acceptance of disability as one form of human diversity. There is also a *National Strategic Development Plan (NSDP) 2012/2013-2016/2017*. The NSDP approaches disability as a cross-cutting issue and sets out access to quality healthcare services and prevention of causes leading to disability through provision of quality health services.⁹⁵ The two policies can therefore guide the proposed Disability Equity Bill as they are aligned with the principle of non-discrimination as stipulated in CRPD as illustrated above. What remains crucial is implementation of the policies in practice, in particular destigmatisation of disability.

92 Disability Baseline Study (n 19 above).

93 CEDAW Committee Concluding Observations adopted at the Committee's 50th Session on 21 October 2011.

94 As above.

95 National Strategic Development Plan (NSDP) 2012/2013-2016/2017 sec 6.3.

2.2 The right to marry and found a family

2.2.1 International standards on the right to marry and found a family

International human rights instruments recognise the rights of two consenting people to marry and found a family. For instance, article 16 of Universal Declaration provides that:

- (1) Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and found a family.
- (2) Marriage shall be entered into with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 22(3) of CCPR provides for similar rights. This article was interpreted by the Human Rights Committee (HRC) in its General Comment No 19 to 'imply in principle, the possibility to procreate and live together'.⁹⁶ The HRC also emphasises equality of spouses prior, during and at the time of dissolution of marriage.

Article 16 of CEDAW provides for parties' right to marry and equality of spouses within the marriage and at its dissolution. In its General Comment on this article, the CEDAW Committee revisited the general comments by other treaty bodies such as the HRC General Comment No 28 and No 19.⁹⁷ The CEDAW Committee re-emphasised equality and non-discrimination as far as the right to marry is concerned and the state parties' obligation to ensure formal as well as substantive equality.⁹⁸

The African Charter does not specifically provide for the right to marry but provides for protection of the family as the natural unit and basis of society.⁹⁹ Likewise, the African Women's Protocol provides for free and full consent of intending spouses as well as equal rights of spouses during, and at the time of dissolution of marriage but does not specifically provide for the right to marry and found a family and prohibition of discrimination and or barriers to exercise such right.

96 CCPR General Comment No 19: Article 23 (The family) Protection of the family, the right to marriage and equality of spouses 27 July 1990, para 5 UN Doc HRI/Gen/1/Rev.6 at 149 (2003).

97 UN committee on Elimination of Discrimination Against Women (CEDAW) CEDAW General Comment No 24: Article 12 of the Convention (Women and Health), 1999 UN Doc A/54/38/Rev.1 chap 1 para 7.

98 As above, para 8.

99 African Charter, art 18.

With specific reference to persons with disabilities, principle 5 of the ICPD Program of Action provides that:

Governments should take effective action to eliminate all forms of coercion and discrimination in policies and practices ... assistance should be given to persons with disabilities in the exercise of their family ... rights and responsibilities.

The CRPD provides extensively for the rights of persons with disabilities to marry and found a family. It particularly urges states parties to take effective and appropriate measures to eliminate discrimination against persons with disabilities 'so as to ensure that the right of all persons with disabilities, who are of marriageable age to marry and found a family on the basis of free and full consent of the intending spouses, is recognised'.¹⁰⁰ In addressing this issue of legal capacity, article 12 of CRPD mandates states to recognise that persons with disabilities enjoy legal capacity on an equal basis with others.¹⁰¹ That is, to have rights and to act on the basis of such rights without discrimination on the basis of disability. In General Comment No 1, the Committee reaffirmed that the existence of an impairment must never be a ground for denying legal capacity or any of the rights contained in article 12. That is, persons with disability have the right to marry and national laws that purport to deny them same on the basis of lack of legal capacity violate article 12 of CRPD.

It follows therefore that as far as the right to marry and found a family is concerned, the underlying principle in international law is that states may neither restrict adults from marrying nor sanction marriages without consent of any of the spouses. As interpreted by the HRC, the right to marry carries with it, the right of the spouses to choose to procreate. That is, where a woman with disability has decided to marry the question relating to children remains the decision of the woman and her husband. Where the couple has made a decision to have children, the state then has an obligation to fulfil the couple's right to reproductive healthcare as discussed in the next section.

2.2.2 National standards on the right to marry and found a family

At the national level, the Constitution of Lesotho does not provide for the right to marry and found a family but provides for the right to respect for private and family life.¹⁰² Marriage in Lesotho is regulated by both Sesotho Customary Law and Marriage Act of 1974. Neither of the two systems have provisions affirming or denying persons with disabilities the right to marry and found a family. Of relevance to the disability discourse is section 29 of Marriage Act which provides that 'no insane person who is

100 CRPD, art 23(1)(a).

101 CRPD Committee General Comment No 1 (2014).

102 Lesotho Constitution 1993, sec 11(1).

incapable of giving consent to marriage may marry'. The section uses the terms 'insane person' and 'capacity to give consent'. The question that comes to one's mind is compatibility of this section with article 12 of CRPD and CRPD Committee General Comment No 1 which are clear that denial of legal capacity on the grounds of disability constitute discrimination. By denying persons with psychosocial disability the right to marry on the basis of lack of legal capacity, section 29 of the Marriage Act therefore violates article 12 of CRPD.

With the exception of section 29, the laws do not place any barriers to women with disabilities' right to marry. However, in practice women with disabilities experience problems arising from attitudes of members of their families and the society. These attitudes are influenced by the belief that women with disabilities are asexual and therefore unable to marry and or have and raise children.¹⁰³ As a result of these misconceived beliefs, generally women with disabilities, as compared to non-disabled women and men with disabilities are more likely to be unmarried, married later or divorced earlier.¹⁰⁴ A similar situation in Lesotho can be inferred from the findings of the Living Conditions Study which made an enquiry as to the extent to which persons with disabilities participate in family activities and decision making in relation to activities such as weddings, funerals, child-welcoming ceremonies, conflict resolution within families and others. The study reflects that 58 per cent of persons with disabilities are excluded from these activities and decision making in the families including decisions about their own lives.¹⁰⁵

2.3 The right to reproductive health

2.3.1 International standards on the right to reproductive health

As illustrated in the definition of sexual and reproductive rights, reproductive healthcare is a component of the right to health.¹⁰⁶ The right to health was first articulated in article 25 of the Universal Declaration which provides for the right to adequate standard of living including amongst others health and medical care. It was later provided for in article 12 of CESCR which provides for 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The UN Committee on Economic, Social and Cultural Rights (CESCR Committee) when interpreting article 12 warned that CESCR does not confine itself to the definition of health as contained in the WHO

103 Kanga (n 2 above).

104 E Naidu et al 'On the margins: Violence against women with disabilities' *Centre for the study of violence and reconciliation* (2005) 4 <http://www.csvr.org.za/docs/gender/onthemargins.pdf> (accessed 15 August 2014).

105 Living Conditions Study (n 18 above) 9.

106 WHO 2006 'Defining sexual health' (n 15 above).

constitution.¹⁰⁷ It went further that the right to health must not be understood as a right to be healthy but it should be understood that it carries with it freedoms and entitlements including the right to control one's health and body, as well as sexual and reproductive freedom.¹⁰⁸ The CESCR committee emphasised that the right to health contains the following interrelated essential elements: availability, accessibility, acceptability as well as quality.

Succinct reference to the right to reproductive healthcare is made in both CEDAW and African Women's Protocol. In CEDAW, states undertake to ensure that family education includes proper understanding of maternity as a social function,¹⁰⁹ and to ensure that women receive appropriate services in connection with pregnancy, confinement and post-natal period.¹¹⁰ CEDAW specifically urges states to ensure the right to family planning information, counselling and services,¹¹¹ as well as a woman's right to determine the number and spacing of her children.¹¹² When interpreting this article, the CEDAW Committee in its General Recommendation on Disabled Women requests states to report on measures taken to ensure that women with disabilities have equal access to health services.¹¹³ In another General Recommendation on Health the CEDAW Committee mandates states to 'take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity'.¹¹⁴

Article 14 of the African Women's Protocol provides that 'states parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted'.¹¹⁵ The African Women's Protocol is the first human rights instrument to explicitly address women's reproductive rights and HIV.¹¹⁶ When interpreting this article, in its General Comment No 1 the African Commission on Human and Peoples' Rights (African Commission) observed that women and girls face a

107 UN Committee on Economic Social and Cultural Rights (CESCR), General Comment No 14: 'The right to highest attainable standard of health (Art 12 of the Covenant)' E/C.12/2000/4 (11 August 2000) <http://www.refworld.org/docid/45388838d0.html> (accessed 17 August 2014) (General Comment No 14) para 4.

108 General Comment No 14 (above) para 9.

109 CEDAW, art 5(b).

110 CEDAW, art 12(2).

111 CEDAW, art 10 (h).

112 CEDAW, art 16(1)(e).

113 CEDAW, General Recommendation 18, Disabled Women (Tenth Session, 1991) UN.Doc.A/46/38 available on <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (accessed 17 August 2014).

114 CEDAW General Comment No 24 (n 97 above) para 25.

115 African Women's Protocol, art 14(1).

116 African Commission on Human and Peoples Rights, General Comment No 1 on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, adopted at the African Commission's 52nd session from 9-22 October 2012 para 6.

disproportionate risk of HIV infection in sub-Saharan Africa, as they make up 59 per cent of people living with HIV in the region.¹¹⁷ The African Commission noted further that this disparity is occasioned by a number of societal issues including social barriers that inhibit access to healthcare, gender inequalities as well as discrimination against women and girls.¹¹⁸ In General Comment No 2 on the same article, the African Commission noted that the right to health includes women's freedom to decide on maternity, the number and spacing of births and the right to choose contraception method. It noted that this article mandates states parties to remove impediments to health services such as ideology or belief-based barriers.¹¹⁹

At the sub-regional level, article 9 of the SADC Protocol on Gender and Development provides that states parties shall in accordance with the SADC Protocol on Health and other international human rights instruments to which SADC members are parties, adopt legislation and related measures that take into account their particular vulnerabilities, to protect persons with disabilities.

Non-binding consensus documents and resolutions which relate to Sexual and Reproductive health include the Program of Action adopted at the 1994 International Conference on Population and Development (ICPD) in which the world agreed that 'population is not just about counting people but making sure that every person counts'.¹²⁰ The ICPD was set out amongst others to 'provide universal access to family planning and sexual and reproductive health services and reproductive rights'.¹²¹ Furthermore, the Fourth World Conference on Women held a year later in Beijing adopted a Declaration and Platform for Action which identified women and health as well as human rights of women as two of the twelve critical areas of concern.¹²² Although not binding in nature, these instruments provide guidelines as to how states may fulfil their obligations under the binding international human rights instruments and are also persuasive in courts of law.

2.3.2 National standards on the right to reproductive health

At the national level, protection of health is contained in section 27 of the Constitution of Lesotho. However, it is not recognised as a fundamental human right but as one of the Directive Principles of State Policy

117 As above

118 As above.

119 African Commission GC No 2, para 25.

120 See also the opening statement of Mr Babatunde Osotimehin Executive Director of United Nations Population Fund (UNFPA) Addis Ababa, 3 October 2013 www.uneca.org/.../opening-statement (accessed 6 August 2014).

121 <https://www.unfpa.org/public/icpd> (accessed 6 August 2014).

122 Beijing Declaration 1995 (n 51 above) and Beijing Platform for Action 1995 (n 52 above).

(DPSPs).¹²³ Section 25 of the Constitution declares economic, social and cultural rights (categorised as DPSPs in the Constitution) non-justiciable in the courts of law. Section 25 was interpreted in the case of *Baits'okoli v MCC and Others*¹²⁴ in which both the Constitutional Court and the Court of Appeal of Lesotho affirmed the non-justiciability of DPSPs. It follows from the Court's ruling in the *Baits'okoli case* that in as much as section 27 provides for protection of health, the government cannot through a civil suit be called to account for failure to protect health as mandated in the international human rights instruments. Neither international human rights instruments nor section 27 of the Constitution can be relied upon in courts of law to compel the government to fulfil the right to reproductive health under the legal system of Lesotho.

CPWA provides that a child has 'a right to sexual and reproductive health information and education appropriate to his age'. The CPWA should thus be commended for providing for sexual and reproductive health education which, according to the CPWA needs to be provided to all children regardless of their disability.

Lesotho has the National Disability and Rehabilitation Policy (NDRP) 2011 which is aimed at promoting inclusion of people with disabilities in education, health, accessibility, employment, and social services.¹²⁵ There is also the National Strategic Development Plan (NSDP) 2005/15 in which disability has been adopted as a cross cutting issue. One of the strategic objectives in this plan as far as disability is concerned is to ensure that people with disabilities access quality health services and that causes leading to disability are prevented through provision of quality health services. The National Reproductive Health Policy 2008 considers special needs of different target populations and the need to abide by conventions guarding against discrimination on the basis of amongst others, disability. That is despite the shortfalls identified in the legal framework, the policy framework complies with the provisions of article 9 of CRPD which requires reasonable accommodation of persons with disabilities.

The challenge however remains with implementation of these policies to eradicate the barriers that inhibit women with disabilities from accessing reproductive health services. The failure to implement constitutes violation of the CRPD and other international human rights instruments referred to above. The effects of the violation of this right include high rates of maternal and infant mortality which are occasioned by neglect and low quality of healthcare services include having an undesired number of

123 Constitution of Lesotho 1993, sec 27.

124 *Baits'okoli v MCC & Others (Baits'okoli case)* (2004) AHRLR 195 (Lesotho Court of Appeal 2004).

125 LP Leshota 'Reading the National Disability and Rehabilitation Policy in the light of Foucault's technologies of power' (2013) 2 *African Journal of Disability* 7.

children because of lack of knowledge about family planning and susceptibility to HIV/AIDS and other STIs due to lack of knowledge about modes of transmission and prevention. Women with disabilities are even at greater risk as they have less access to public health information and care during the prenatal stage of pregnancy which is likely to result in a greater risk of long-term complications.¹²⁶

2.4 The right to give informed consent to all medical procedures

2.4.1 International standards on the right to give informed consent to medical procedures

Many international human rights instruments contain provisions that guarantee all human beings autonomy over their own bodies. For instance, the basic premise of human rights protection under the Universal Declaration which influenced many other international human rights instruments is that 'all human beings are born free and equal in dignity and rights'.¹²⁷ Imposition of medical treatment on people without consent has been categorised as an infringement on one's dignity, the worse form of which amounts to torture.¹²⁸ Article 5 of the Universal Declaration bans torture and inhuman or degrading treatment.

The right to freedom from torture is also protected by article 7 of CCPR which explicitly bans torture and inhuman or degrading treatment including scientific experimentation without one's consent. In interpreting article 7 of CCPR, the Human Rights Committee emphasised that this article carries with it, the duty to protect individuals against forced abortion as well as forced sterilisation.¹²⁹

The right to health is provided for in article 12 of CESCR. This article was interpreted by the Committee on Economic Social and Cultural Rights (Committee on ESCR), which is a body established to monitor implementation of CESCR in its General Comment No 14 of 2000,¹³⁰ to be closely related to and also include the right to privacy, quality care as

126 NE Groce 2011 'Disability and the Millennium Development Goals: A review of the MDG process and strategies for inclusion of disability issues in Millennium Development Goal efforts' *United Nations Publications* 25.

127 Universal Declaration, art 1.

128 CEDAW Committee General Recommendation No 19 (11th Session, 1992) *Violence against women*. See also UN General Assembly (2010) *Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment A/HRC/13/39/Add.5* www2.ohchr.org/english/bodies/hrcouncil/docs/13session/AHCR (accessed 15 September 2015).

129 Human Rights Committee, General Comment No 28 'Equality of rights between men and women (article 3)' UN Doc CCPR/C/21/Rev.1/Add.10 (2000) para 11.

130 ECSCR, General Comment No 14 'The right to the highest attainable standard of health (art 12)' (22nd Session, August 2000) (UN Doc E/C.12/2000/4) paras 3 & 8.

well as freedom from discrimination, torture and cruel, inhumane or degrading treatment.¹³¹ According to this general comment therefore while in the custody of healthcare givers, patients have a right to be treated with respect which included amongst others, the right to be informed about and be given a chance to consent to or refuse any medical treatment.

CEDAW provides for the rights of women to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.¹³² It further requires involvement of both spouses in sexual and reproductive health issues and their right to be informed in order to make informed choices about the reproductive rights.¹³³

Article 3 of African Women's Protocol provides for the right of all women to dignity which is inherent in all human beings and to the recognition and protection of their human and legal rights. In article 4 of the Protocol, states parties undertake to ensure that every woman shall be entitled to respect for her life and the integrity and security of her person and to ensure that all forms of exploitation, cruel and inhuman or degrading treatment or punishment are prohibited. In relation to health and reproductive rights, the Protocol mandates state parties to ensure that women's right to health, including sexual and reproductive rights are respected and promoted.¹³⁴ The Protocol elaborates further that this guarantee includes the right for a woman to control her own fertility,¹³⁵ the right to decide whether to have children, the number of children and the spacing of children,¹³⁶ the right to freely choose any method of contraception¹³⁷ as well as the right to have family planning education.¹³⁸ Read together, all the rights contained in the Protocol favour the right to give informed consent to any medical treatment and disfavour forced sterilisation or abortions.

The Beijing Platform for Action and the ICPD Program of Action reiterates the reproductive health rights of women. The ICPD Program of Action further illustrates this issue by pointing out that, reproductive health implies that people are able to have a satisfying and safe sex life, and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

131 L Beletsky et al 'Advancing human rights in patient care: The law in seven transitional countries' *Open Society Foundations* (2013). See also Open Society Institute 'Health and Human Rights: a resource guide' *Open Society Foundation* (2013). See also *WHO* The right to health available www.who.int/mediacentre/factsheets/fs323/en/ (accessed 15 September 2015).

132 CEDAW, art 16(1).

133 As above.

134 African Women's Protocol, art 14.

135 African Women's Protocol, art 14(1)(a).

136 Africa Women's Protocol, art 14(1)(b).

137 Africa Women's Protocol, art 14(1)(c).

138 Africa Women's Protocol, art 14(1)(f).

Article 3 of the CRPD lays down the general principles of CRPD which include amongst others respect for the inherent dignity and individual autonomy – including the freedom to make one’s own choices and independence of his or her person. Article 14 protects the right to personal liberty thus outlawing forced institutionalisation of women with disabilities. The CRPD also guarantees the right to freedom from torture and inhuman or degrading treatment or punishment including medical or scientific experimentation without one’s consent,¹³⁹ freedom from exploitation, violence and abuse¹⁴⁰ as well as integrity of the person.¹⁴¹ As far as consenting to medical treatment is concerned the CRPD mandates states parties ‘to require health professionals to provide care of the same quality to persons with disabilities as others, including on the basis of free and informed consent ...’,¹⁴²

Common and explicit in all the above international human rights instruments is the right of women to be informed of and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of regulation or control of their fertility with due regard to their dignity and integrity and free from discrimination, coercion and violence.¹⁴³

While the international human rights instruments are clear on the right to give informed consent, the challenges faced by women and girls with intellectual and psychosocial disabilities cannot be ignored. ‘Incapacity’ is often used in laws and in practice as a valid justification to violate the rights of women and girls with intellectual and psychosocial disabilities. These violations include focus on sexual and menstrual suppression and forced or coerced abortions and sterilisation.¹⁴⁴ Often doctors, parents and guardians substitute their own decisions for women and girls with disabilities.¹⁴⁵ As illustrated under the right to marry and found a family, article 12 of CRPD is clear that denial of legal capacity on the ground of disability amounts to discrimination. Therefore, laws that give doctors, parents or guardians the right to substitute their own decisions for people with disabilities violate article 12.¹⁴⁶ Conversely from substituted decision making, article 12 provides for supported decision making.¹⁴⁷ Hence

139 CRPD, art 15.

140 CRPD, art 16.

141 CRPD, art 17.

142 CRPD, art 25(d).

143 Global Commission on HIV/AIDS and the Law (GHL) *Risks, rights and health* (2012) 65.

144 C Frohmader ‘Submission to the National Inquiry into Equal Recognition before the Law and Legal Capacity for People with Disabilities’ *Women With Disabilities Australia* (2014) 5.

145 As above.

146 World Network of users and survivors of psychiatry ‘Implementation manual for the united national convention on the rights of persons with disabilities’ (2008) art 12.

147 CRPD, art 12(4).

arbitrary control of a woman's fertility, despite of her disability is a violation of multiple provisions of the CRPD.¹⁴⁸

2.4.2 National standards on the right to give informed consent to medical procedure

Lesotho does not have a specific law on informed consent to procedures such as sterilisation. However the Constitution protects a number of rights which are violated when medical treatment is imposed without one's consent. For instance, section 6 of the Constitution provides for the right to personal liberty which includes amongst others, the right not to be detained save as may be authorised by law. This section thus protects women with disabilities from compulsory institutionalisation for purposes of medical treatment without their consent. Section 8 provides for the right to freedom from torture or inhuman or degrading treatment thus protecting against arbitrary imposition of medical treatment in a manner that is degrading to the woman with disability. Section 11 provides for the right to respect for private and family life; thus guaranteeing amongst others, individual autonomy over one's own body and would be violated by arbitrary control of a woman's sexuality and fertility. Sections 18 and 19 of the Constitution protect freedom from discrimination as well as equality before the law. Furthermore, at common law, all competent adults can consent to or refuse medical treatment.¹⁴⁹ If consent is not established, there may be legal consequences for health professionals who administered the treatment without consent.¹⁵⁰

The international and national standards concerning the right to give informed consent to medical treatment notwithstanding, due to the barriers imposed by societal beliefs about sexuality and disability, many women with psychosocial disabilities are subjected to control by the state, health professionals and relatives.¹⁵¹ Their sexuality is controlled by amongst others, compulsory institutionalisation, forced abortions as well as sterilisation.¹⁵² Although there is no research that proves forced sterilisation of women with disabilities in Lesotho, the research on forced sterilisation of women living with HIV raises a possibility of the same being done on other marginalised women including women with disabilities. Research in other jurisdictions which has revealed forced sterilisation of women with disabilities, in particular those with psychosocial disability also mandates legal safeguards against this practice.

148 ICW in Focus 'Forced sterilization of women living with HIV must stop now' 2014. Available at the Global Coalition of Women and AIDS.

149 S Fovargue & J Miola 'One step forward, two steps back? The GMC, the common law and informed consent' 2010 36 *Journal of Medical Ethics* 494.

150 As above.

151 P Block 'Sexuality, parenthood and cognitive disability' (2002) 20 *Journal of Sexuality and Disability* 8.

152 As above.

2.5 Freedom from sexual abuse and exploitation

2.5.1 *International standards on freedom from sexual abuse and exploitation*

In protecting the sexual and reproductive health rights of women in general and women with disabilities in particular, the international human rights instruments discussed in the preceding sections of this article also denounce sexual violence, abuse and exploitation as a cruel and inhuman treatment and a form of torture.¹⁵³ In this regard sexual abuse is defined as 'the actual or threatened physical intrusion of a physical nature, whether by force or under unequal coercive condition',¹⁵⁴ while sexual exploitation is defined as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to profiting monetarily, socially or politically from the sexual exploitation of another'.¹⁵⁵ These two acts are also categorised as violence against women which is defined in the Declaration on Elimination of Violence against Women as:

[A]ny act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.¹⁵⁶

While gender based violence in the form of sexual abuse and exploitation can be suffered by both sexes, because of being subordinated to men, it disproportionately affects women and girls. Women and girls with disabilities are at an even greater risk¹⁵⁷ as perpetrators take advantage because a woman will not be able to run away if she has physical disability, nor scream if she has hearing and speech impairment while a woman with visual disability may not be able to identify the rapist.¹⁵⁸ According to Kotze, vulnerability of women and girls with disabilities to sexual abuse

153 Yakin Ertürk 2010 'Integration of the Human Rights of Women and the Gender Perspectives: Violence against women' in *Fifteen years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994-2009) – Critical Review*. Available on <http://www.ohchr.org/.../Issues/women/...> (accessed 15 September 2015) See also UN General Assembly 'Special Rapporteur on Violence Against Women, its causes and consequences: Integration of the human rights of women and the gender perspectives: Violence against women, intersections of violence against women and HIV/AIDS' E/CN.4/2005/72 (2005). See also CEDAW Committee General Recommendation No 19 (n 107 above). See also UN General Assembly *Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment* (2010) (n 107 above).

154 UN Secretary General's Bulletin on protection from sexual exploitation and abuse (PSE) (ST/GB/SGB/2003/13) www.un.org/en/pseatask (accessed 14 September 2015).

155 As above.

156 Declaration on Elimination of Violence Against Women (DEDAW) 1993, art 1.

157 CRPD, Preamble, para (q).

158 Kamga (n 3 above).

and rape is also aggravated by a myth so called 'virgin cure'.¹⁵⁹ The misconception is that having sexual intercourse with a virgin provides a cure for AIDS. This myth is coupled with yet another misconception that women with disabilities are not sexually active and therefore presumably virgins provide motivation for rapists to target women and girls with disabilities with the hope that they shall be cured from HIV/AIDS.¹⁶⁰ This exposes women with disabilities to the risk of HIV infection. Because the link between violence and HIV is not acknowledged in many jurisdictions Lesotho included, survivors of violence fail to get timely health services to reduce the risk of infection.¹⁶¹ Furthermore, due to fear of stigmatisation, cases of sexual abuse and exploitation are under-reported.¹⁶² Because people living with HIV already face stigma discrimination in many societies,¹⁶³ people with disabilities who are infected with the virus face stigmatisation, discrimination and exclusion from the society. According to the HIV Situational Assessment Study, persons with disabilities in Lesotho who live with HIV or are diagnosed with other STIs do not disclose their status to their sexual partners due to fear of stigma and discrimination. This undermines national efforts to combat HIV.

In order to protect women with disabilities from sexual abuse and exploitation, the CRPD mandates states parties to take appropriate measures including legislative, administrative and other measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse including gender based violence.¹⁶⁴ States also undertake to prevent all forms of exploitation and abuse by amongst others providing age and gender sensitive assistance and support to all persons with disabilities and their families by amongst others providing information on how to avoid, recognise and report instances of exploitation, violence and abuse.¹⁶⁵ In the same vein, the SADC Protocol on Gender and Development mandates states parties to ensure that perpetrators of gender based violence, rape, femicide, sexual harassment, female genital mutilation and all other forms of gender based violence are tried by courts of competent jurisdiction.¹⁶⁶

2.5.2 National standards on freedom from sexual abuse and exploitation

At the national level, section 8 of the Constitution provides for freedom from torture and inhuman and degrading treatment or punishment. Over

159 H Kotze 'A situation analysis of the status and status of disability rights and issues in Southern Africa' OSISA Project on disability rights and Law Schools (2010) 4.

160 As above.

161 GCHL (n 123 above) 64.

162 Chipatiso (n 40 above).

163 Groce (n 74 above).

164 CRPD, art 16(1).

165 CRPD, art 16(2).

166 SADC Protocol on Gender and Development art 20.

and above the constitutional protection, the Sexual Offences Act 2003 criminalises all sexual conduct which takes place under coercive circumstances.¹⁶⁷ The Sexual Offences Act defines ‘coercive circumstances’ to include *inter alia* circumstances in which the complainant is affected by ‘physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary’.¹⁶⁸ The Act also criminalises commitment of a sexual act in relation to or in the presence of a person with disability.¹⁶⁹ In so doing it distinguishes between consensual and non-consensual sexual conduct in relation to persons with disabilities by defining a person with disability for its purposes as:

[A] person affected by any disability of a physical, intellectual, sensory, medical or mental nature or other disability irrespective of its cause, whether temporary or permanent, *to the extent that a person is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act, or is unwilling to communicate his unwillingness to participate in such an act.* (emphasis added)

As an administrative measure, there has also been established within the Lesotho Mounted Police Service, Child and Gender Protection Unit (CGPU) whose main aim is to deal with cases involving children and victims of gender based violence. This is a general unit that does not exclusively deal with persons with disabilities. However some people with disabilities face barrier including accessibility of CGPU offices as well as communication with the police officers stationed therein all of whom are not trained in sign language. As a result, a woman with a hearing disability will have to rely on third parties, friends or relatives to report the offence at the police station. The danger of reliance on a third party is that the story may end up being distorted or not adequately captured.

3 Conclusions and recommendations

The discussion in this article has established that women with disabilities in Lesotho suffer double discrimination based on sex and disability, and that their access to public services including healthcare services is inhibited by physical, communicational and attitudinal barriers. These barriers are insulated by the legal system itself, which does not fully implement the provisions of international human rights instruments to which Lesotho is a party, in particular the CRPD, CEDAW, African Women’s Protocol and SADC Protocol on Gender and Development. While the international human rights instruments are indicative of the fact that the international community is moving towards a more robust recognition of both human

167 Sexual Offences Act sec 3.

168 Sexual Offences Act, sec 2(f)(i).

169 Sexual Offences Act, sec 15.

rights of persons with disabilities and sexual and reproductive rights of all women,¹⁷⁰ this intersection is however not given full attention in the legal system of Lesotho.

The specific obligations contained in the CRPD include ensuring that women with disabilities access services related to their sexual and reproductive rights on equal basis with other women, on the basis of non-discrimination and in accordance with the principle of reasonable accommodation.¹⁷¹ While the Constitution of Lesotho provides for the right to freedom from discrimination and equality before the law,¹⁷² it does not include disability as a prohibited ground for discrimination thus not fully acknowledging the fact that people with disabilities in Lesotho disproportionately face discrimination based on multiple and intersectional grounds. Furthermore, absence of disability specific law and disability mainstreaming policy makes it impractical to implement the principle of reasonable accommodation, this is because the specific needs of women with disabilities are not adequately captured in the national sexual and reproductive health policies and programmes and disability policies do not cater for gender mainstreaming.

The CRPD further mandates states parties to take all measures to eliminate discrimination against persons with disabilities in all matters relating to marriage,¹⁷³ and to recognise the right of all persons with disabilities to marry on the basis of free and full consent.¹⁷⁴ The legal system of Lesotho being the Sesotho Customary Law and the Marriage Act, 1979 do not impose any barriers against persons with disabilities who wish to marry, the requirement of legal capacity as a basis for exercise of this right does not comply with article 12 of CRPD. Further barriers are imposed by attitudes of families and the society which deny persons with disabilities the right to participate in decisions relating to important aspects of their lives including marriage.¹⁷⁵ This thus leaves the government with the obligation to root out such attitudes by amongst others raising awareness that people with disabilities are as valuable members of the society as everyone else.

The CRPD emphasises equality, non discrimination and reasonable accommodation of persons with disabilities in accessing reproductive health services.¹⁷⁶ The legal system of Lesotho does not fully implement this obligation. The Constitution does not recognise the protection of healthcare as a fundamental human right, the violation of which can be

170 Centre for Reproductive Rights discussion paper (n 5 above).

171 CRPD, art 9.

172 Constitution 1993, secs 4, 18 & 19.

173 CRPD, art 23(1).

174 CRPD, art 23(1)(a).

175 Living Conditions Study (n 18 above).

176 CRPD, art 25 read with art 9.

vindicated in a court of law.¹⁷⁷ Furthermore due to absence of disability specific laws and disability mainstreaming policy, the current Reproductive Health Policy does not fully accommodate the specific needs of women with disabilities including dissemination of related information in a manner accessible to all women regardless of the type of their disability.

Regarding medical procedures related to sexual and reproductive rights such as control of women's fertility, the CRPD provides for the right to give informed consent to medical procedures and disfavours substituted decision making for women with psychosocial disabilities.¹⁷⁸ There is no specific law in Lesotho which provides guidelines in this regard and therefore Common Law is relied upon. Although there is no research that indicates that women with disabilities in Lesotho are subjected to forced control of their fertility through institutionalisation and sterilisation, the research conducted by WILSA and CW-Lesotho has however unearthed the practice amongst women living with HIV, thus reflecting that there might be a possibility of the same being done in relation to women with disabilities.

While guaranteeing the sexual and reproductive rights of women with disabilities in positive terms, CRPD also takes cognisance of the particular vulnerability of women and girls with disabilities to exploitation, violence and abuse.¹⁷⁹ It therefore mandates states parties to protect women and girls with disabilities from all forms of exploitation, violence and abuse including of a sexual nature.¹⁸⁰ The legal framework of Lesotho through the Sexual Offences Act 2003 complies with this obligation.¹⁸¹ However, the problem lies with implementation of the Act in as much as inaccessibility of police stations and courts of law, communicational barriers as well as the rules of criminal procedure and evidence affects access to justice by women with disabilities who have fallen victims of sexual abuse and exploitation.

On the basis of the foregoing conclusion, this article makes the following recommendations:

- that the Constitution of Lesotho be amended to include disability as a prohibited ground of discrimination and that health, including sexual and reproductive health be protected as fundamental human rights of all people in Lesotho;
- that the already existing disability friendly laws such as Buildings Control Act 1995, Education Act 2010, Children's Protection and Welfare Act

177 Constitution sec 25.

178 CRPD, art 25.

179 CRPD, Preamble, para (q).

180 CRPD, art 16.

181 Sexual Offences Act, 2003, sec 3.

2011 be implemented so as to ensure reasonable accommodation of persons with disabilities;

- that government speeds up the process of adopting a Disability Mainstreaming Policy and enacting Disability Equity Bill with the aim of ensuring equality, reasonable accommodation and also providing guidelines on implementation of other obligations such as ensuring informed consent to marriage, medical procedures and supported decision making of women with psychosocial disabilities;
- that the government adopt other measures such as equitable allocation of available resources to cater for the basic needs of women and girls with disabilities, involve organisation of persons with disabilities in programme designs, their monitoring and evaluation, so as to ensure that their specific needs are fully accommodated in all national programmes including those related to sexual and reproductive health; and
- that government promotes more research on persons with disabilities, their needs, expectations and expertise; how they can be addressed, accommodated, utilised and included in the legal and policy frameworks.

HOW ASSESSMENTS OF TESTIMONIAL COMPETENCE PERPETUATE INEQUALITY AND DISCRIMINATION FOR PERSONS WITH INTELLECTUAL DISABILITIES: AN ANALYSIS OF THE APPROACH TAKEN IN SOUTH AFRICA AND ZIMBABWE

*Dianah Msipa**

Summary

This paper examines the capacity to testify and access justice of witnesses with intellectual disabilities who have been sexually assaulted, focusing on the situation in South Africa and Zimbabwe. Through the rigid application of rules of criminal evidence and procedure to witnesses with intellectual disabilities, the criminal justice system sometimes perpetuates inequality and discrimination. The testimonial competence of witnesses with intellectual disabilities is often challenged due to the misconception that persons with intellectual disabilities do not make reliable witnesses in court. Using critical disability theory's understanding of disability as resulting from the interactional process between a person with impairment and the environment, it is contended that incompetence to act as a witness is not inherent in the individual with impairment. The environment, which includes the rules of evidence and procedure, also plays a part yet it is often excluded from the assessment. It is argued that assessments of an individual's ability should only be made for the purpose of determining what accommodations they need in order to give effective testimony in court.

1 Introduction

In recent years the vulnerability to and prevalence of rape and other forms of violence against women and girls with disabilities has been the subject

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of much concern as shown in a number of studies.¹ The vulnerability of women and girls with disabilities to different forms of violence is also acknowledged in the Convention on the Rights of Persons with Disabilities (CRPD)² which is a new international human rights treaty dealing specifically with the rights of persons with disabilities. The CRPD, which came to force on 3 May 2008, recognises that they are often 'at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation'.³ Research shows that women and girls with intellectual disabilities are especially vulnerable to rape and other forms of sexual abuse.⁴ One study indicates that individuals with intellectual disabilities are four to ten times more likely to be sexually abused than their non-disabled counterparts.⁵ It is unclear how many of these cases are reported to the police and how many go on to be prosecuted. What is known, however, is that there are some that reach the criminal courts for prosecution. This paper is primarily concerned with what happens when these cases reach the criminal courts. In other words, it is concerned with the interaction between complainants with intellectual disabilities with the criminal justice system focusing on the situation in Zimbabwe and South Africa.

According to the law in these two countries, only witnesses who are regarded as competent to testify may give evidence before the court.⁶ However, the testimonial competence of witnesses with intellectual disabilities is frequently challenged because of a misconception that their disability makes them incompetent and unreliable witnesses.⁷ A finding of incompetence means that the complainant does not get to testify or that the court does not accept her testimony, without which the chances of a successful prosecution may be seriously compromised.

This paper argues that the manner in which testimonial competence is assessed in South Africa and Zimbabwe reveals an approach characterised by a pre-occupation with the abilities of the individual to the exclusion of the environment. These assessments are concerned with asking whether a particular individual is competent to testify and they focus on the individual's own innate abilities in order to answer that question.

1 Report of the Special Rapporteur on Violence against women, its causes and consequences A/67/227 3 August 2012; *Thematic study on the issue of violence against women and girls with disability*, Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/20/5(30 March 2012).

2 Convention on the Rights of Persons with Disabilities GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

3 CRPD, Preamble, para q.

4 F Sampson 'Beyond compassion and sympathy to respect and equality: Gendered disability and equality rights law' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 279.

5 D Sobsey *Violence and abuse in the lives of people with disabilities: The end of silent acceptance?* (1994) 34.

6 M Hannibal & L Mountford *Criminal litigation* (2007) 301.

7 GH Gudjonsson et al 'Assessing the capacity of people with intellectual disabilities to be witnesses in court' (2000) 30 *Psychological Medicine* 307.

Consequently, incompetence has tended to be viewed as something which is inherent in the individual. This approach is inconsistent with the understanding that is relied on in Critical Disability Theory and in the CRPD of disability as the result of an interactive process between a person with impairment and his/her environment.⁸ In this paper, Critical Disability Theory is used to show how this understanding of disability as an interactional process can help to solve the problem of inequality caused by competency assessments which focus solely on the innate abilities of the individual. When witnesses with intellectual disabilities encounter the criminal justice system, the courtroom becomes a type of arena within which the interaction between impairment and environment can be seen. A criminal trial makes for a very formal, complex and highly stressful environment in which those who can communicate well orally may arguably fare better than those who cannot. Witnesses with intellectual disabilities, in particular, would face a much more difficult time in the courtroom than their non-disabled counterparts due to the nature of the impairment which may affect how they communicate. The interaction between the courtroom environment and the impairment is likely to result in the witness's inability to effectively participate in the trial on an equal basis with others. Therefore, an approach to testimonial competence which ignores the disabling effect of the environment and treats incompetence as entirely inherent in the individual provides an incomplete understanding of the problem. In turn, an incomplete understanding of the problem prevents the formulation of an adequate response. Ultimately, the result is the perpetuation of inequality and discrimination as well as the violation of the right to access justice.⁹

The utility of defining disability as an interactional process extends beyond enabling an appreciation of the disabling role which the environment can play and necessitates a response to the problem which also takes both the impairment and the environment into account. That is to say the impairment and the environment are not only part of the problem, but can also be part of the solution. The relevant question then becomes how can they be part of the solution? The answer to that is through the provision of procedural and age-appropriate accommodations.¹⁰ These accommodations formulate a solution which takes both individual impairment and environment into account by paying attention to individual needs and demanding a response in the environment. This makes the provision of accommodations the best method of addressing the problem with the approach to testimonial competence that is taken in South Africa and Zimbabwe. Instead of simply asking whether a particular individual is competent to testify, which is what the current assessments of competence effectively do, I propose that assessments to do with testimonial competence should be concerned with asking what supports an

8 CRPD, Preamble, para e.

9 CRPD, art 13.

10 CRPD, art 13(1).

individual may require in order to participate effectively and on an equal basis with others. In other words, any assessment of the individual should be for the purpose of determining what supports that individual requires as opposed to whether or not that individual is competent to testify. It will therefore, be argued that without the provision of accommodations in a criminal trial involving a witness with intellectual disabilities, the ability to participate effectively on an equal basis with others may be gravely impaired or entirely lost. So important is the provision of accommodations in achieving equality that the CRPD extends the definition of discrimination to include the denial of reasonable accommodations.¹¹

This paper is divided into three parts. The first part demonstrates that the current approach to the assessment of testimonial competence in the two countries fails to take into account the impact of the environment and treats incompetence as inherent in the individual. The second part of the paper deals with how adding a Critical Disability Theory perspective can alter the way in which assessments of competence are thought about. Finally, the third part of the paper suggests the use of accommodations as a solution to the inequality problem created by assessments of competence.

2 Analysing competency assessments in South Africa and Zimbabwe

2.1 Testimonial competence under statute law in Zimbabwe and South Africa: Creating an additional barrier?

The statutes governing criminal procedure and evidence in Zimbabwe and South Africa contain some controversial provisions which create an additional barrier for witnesses with intellectual disabilities. These provisions declare persons with the requisite state of mind as incompetent to testify. In Zimbabwe the relevant statute contains a provision governing '[i]ncompetency from mental disorder or defect and intoxication'.¹² A similar provision also exists within the South African statute.¹³ These provisions have in the past been applied to declare persons with intellectual disabilities incompetent to testify as is demonstrated in the South African case of *S v Thurston*.¹⁴ In an effort to remedy this problem with the then

11 CRPD, art 2.

12 Criminal Procedure and Evidence Act [Chap 9:07] sec 246. It provides that: 'No person appearing or [proven] to be afflicted with *idiocy or mental disorder or defect* or laboring under any *imbecility of mind* arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.'

13 Criminal Procedure Act 51 of 1977, sec 194. It provides that: 'No person appearing or [proven] to be afflicted with mental illness or to be labouring under any *imbecility of mind* due to *intoxication or drugs or the like*, and who is thereby deprived of the *proper use of his reason*, shall be competent to give evidence while so afflicted or disabled.'

14 1968 (3) SA 284 (A).

section 225, which is the predecessor of the current section 194 of the South African Criminal Procedure Act, the Botha Commission of Inquiry on Criminal Evidence and Procedure¹⁵ recommended changes to this provision¹⁶ including the removal of the words ‘idiocy’ and ‘lunacy’, the substitution of the term ‘insanity’ with mental illness and of the word ‘otherwise’ with ‘the like’ as well as the inclusion of the term ‘drugs’. The amended version of this provision is the current section 194.¹⁷ In spite of these changes, section 194 continued to be interpreted by the courts to exclude the evidence of persons with intellectual disabilities.¹⁸ However, the interpretation of section 194 was finally settled by the Supreme Court of Appeal of South Africa in *S v Katoo*.¹⁹ In this case the prosecution sought to call the complainant in a rape trial who was described by a psychologist as having ‘severe mental retardation’,²⁰ as a witness. The evidence of the psychologist was to the effect that the complainant ‘could consequently be described as an imbecile’.²¹ The psychologist asserted that the complainant had a ‘very limited capacity to exercise her will and make choices, and that her mental age was that of a four-year-old child’.²² The trial judge interpreted section 194 to mean that due to her status as an ‘imbecile’, the complainant was not competent to testify. Consequently, the respondent was acquitted. On appeal the specific question which the Supreme Court of Appeal had to answer was ‘whether the court was correct in law in refusing the state an opportunity to present the evidence of the complainant on the charges preferred?’²³ In disagreeing with the finding made by the trial court Jafta AJA clarified that ‘it is only imbecility induced by “intoxication, or drugs or the like” that falls within the ambit of the section (and then only when the witness is deprived of the proper use of his or her reason)’.²⁴ He concluded that the evidence led did not suggest that the complainant was deprived of the proper use of her reason. It simply showed that she had ‘limited mental capacity’.²⁵ Jafta AJA argued that evidence led at trial showed that she did not suffer from a mental illness, but that she was merely an ‘imbecile’ and that alone did not make her incompetent to testify.²⁶ It was therefore, held that she did not fall within the ambit of section 194 and she was in fact competent to testify.

15 Botha Commission ‘Commission of Inquiry into Criminal Procedure and Evidence’ RP 78/1971 Government Printer, Pretoria.

16 The Botha Commission of Inquiry is responsible for the drafting of the Criminal Procedure Act 51 of 1977 that is currently in force in South Africa.

17 Criminal Procedure Act (n 13 above) sec 194.

18 *S v Katoo* 2005 (1) SACR 522 (SCR).

19 As above.

20 *Katoo* (n 18 above) para 6.

21 As above.

22 As above. The equation of an adult with a mental disability with a child has negative implications for the respect of persons with intellectual disabilities. It gives a false picture that they are like children when in fact they are not at all like children.

23 *Katoo* (n 18 above) para 3.

24 As above.

25 As above.

26 *Katoo* (n 18 above) para 11.

Following this decision, it is now settled in South Africa that section 194 need not necessarily apply to persons with intellectual disabilities but instead it applies to cases of mental illness or 'imbecility', that results from intoxication or drugs and which affects a person's powers of reason. Even though section 194 does not per se apply to persons with intellectual disabilities, it may create an additional requirement that affects the equality of persons with intellectual disabilities. This is particularly because of the requirement it creates for the court to conduct an inquiry into the cause of 'imbecility'.²⁷ In holding that the trial court's ruling in *Katoo* was an irregularity and a miscarriage of justice, Jafta AJA reiterated the duty of the trial court to conduct an inquiry in order to decide on the issue of competence.²⁸

The duty of the court to properly investigate any assertion that a witness has the state of mind that falls within the ambit of section 246 of the Zimbabwean statute²⁹ was also reiterated by the Supreme Court of Zimbabwe in the case of *Ndiweni*.³⁰ In this case, the defence made an assertion at trial that a state witness was labouring under some 'mental disorder'.³¹ This assertion was not challenged by the state³² and the trial court did not probe the assertion. The Supreme Court of Zimbabwe found that this was an irregularity.³³ Once an assertion has been made by the defence that a witness is 'afflicted with idiocy or mental disorder or defect',³⁴ the court which has power to decide on the competency of such a witness and must look into that allegation by conducting an inquiry.³⁵ This position is further reiterated in the professional manual for criminal defenders in Zimbabwe which states that:

Certain witnesses are not competent to give evidence according to the rules of evidence. For example, under s 246 CPE ... Where an allegation that a witness is mentally disordered is made during a criminal trial and the witness appears to be mentally disordered, the court must properly investigate whether the witness is incompetent in terms of this provision.³⁶

It would seem that all that is required is for an assertion to be made that a witness is incompetent and this is enough to trigger an inquiry into the mental state of the witness for purposes of assessing whether or not she is competent which constitutes an additional barrier and perpetuates inequality and discrimination for witnesses with intellectual disabilities.

27 Criminal Procedure Act (n 13 above) sec 194.

28 *Katoo* (n 18 above) para 12.

29 Criminal Procedure and Evidence Act (n 12 above) sec 246.

30 *Ndiweni* S-149-89.

31 As above.

32 Generally, assertions that are not challenged are assumed to be accepted.

33 *Ndiweni* (n 30 above).

34 Criminal Procedure and Evidence Act (n 12 above) sec 246.

35 Criminal Procedure and Evidence Act (n 12 above) sec 245.

36 G Feltoe *Criminal defender's handbook* (2009) 103.

Of particular concern however, for the purposes of this paper, is the manner in which the competency assessments themselves are conducted.

2.2 The dual approach to assessment of competence: Inherent incompetence?

The current approach to the assessment of testimonial competence in South Africa and Zimbabwe is problematic because it treats incompetence as inherent in the individual thereby overlooking the impact of the environment on the competence and credibility of a witness. There are currently two approaches that may be taken in the determination of the competence of a witness.³⁷ Firstly, where a witness's competence is challenged, this may be dealt with in a manner similar to that relating to issues of admissibility.³⁸ Where it is necessary to do so, a trial within a trial will be held to decide the matter.³⁹ But a trial within a trial is not always necessary. Secondly, the question of incompetence may be decided by putting the witness in the stand and allowing her to testify.⁴⁰ A decision will then be made based on observing the witness in the stand.⁴¹ Whichever approach is taken, a psychologist is required to assess the witness and advise the court about whether or not the complainant is a competent witness. This can be seen in the South African cases of *Kevin Goodall v the State* and *Chris Bindeman v the State*.⁴²

The courts place great weight on the evidence of a psychologist who will have conducted assessments focusing on the individual's abilities and limitations.⁴³ This means that the focus is on the individual being assessed to the exclusion of his/her surroundings or environment. In other words, the question that will be asked is whether or not this particular individual is incompetent. Incompetence is therefore, seen as inherent in the individual in the sense that it is regarded as a characteristic which is innate or intrinsic in the individual and is attributed to internal factors such as 'mental illness, mental retardation, senility ... excessive use of drugs or alcohol'.⁴⁴ Consequently, experts measure the competence of the individual using a variety of questionnaires and tests, all of which focus on the individual's capabilities.⁴⁵ This focus on the individual makes the law

37 *Dladla v the State* AR483/09 para 12.

38 As above.

39 As above.

40 As above.

41 As above.

42 *Kevin Goodall v the State*, Case No A392/10 (*Goodall*); *Chris Bindeman v the State* A359/12 (*Bindeman*).

43 S Stefan 'Silencing the different voice: Competence, feminist theory and law (1992-1993) 47 *University of Miami Law Review* 777.

44 Stefan (n 43 above) 776.

45 Stefan (n 43 above) 777.

on competence unresponsive to the social and political dimensions that are at play when it comes to competence and the assessment of competence.⁴⁶

Even where competence is assessed by allowing the witness to testify and observing her in the stand, incompetence is treated as a characteristic inherent or innate in the individual. It is the individual's innate abilities that are being assessed to the exclusion of the external environment or setting. Stefan rightly argues that competency assessments are about more than just determining the individual's capabilities, but that they are about 'interpersonal dynamics and social and political structuring of roles and communication'.⁴⁷ She states that 'determinations of competence cannot simply be the result of a series of observations or assessments and tests administered by an objective expert'.⁴⁸ This is because competence or the lack thereof, is 'perceived, assessed and judged'⁴⁹ by other people.⁵⁰ Stefan also argues that the contextual background for competency inquiries consists in a breakdown in communications and that these communications are about the values of the people doing the assessing as well as those who are being assessed.⁵¹

Quite importantly, the author notes that the setting determines the quality of the interaction.⁵² In the courtroom setting, judges infer competence or incompetence from the way that the witness delivers her testimony. This is not a relationship between equals.⁵³ These are relations of power and it is the powerful actor, in this case the judge, who is in control.⁵⁴ The powerful actor is out of the picture and only the powerless actor's capabilities are in question.⁵⁵ Therefore, in these assessments, it is the individual's capabilities that are taken account of to the exclusion of the environment.

In Zimbabwe and South Africa, the ability of a witness to provide sworn evidence is also part and parcel of the assessment of testimonial competence.

2.3 Truth and falsehood: Application of different standards?

A potential source of inequality lies in the requirement for the court to receive sworn evidence. The courts in Zimbabwe⁵⁶ and South Africa⁵⁷ can

46 Stefan (n 43 above) 776.

47 Stefan (n 43 above) 779.

48 As above.

49 As above.

50 As above.

51 As above.

52 Stefan (n 43 above) 781.

53 Stefan (n 43 above) 782.

54 Stefan (n 43 above) 783.

55 As above.

56 Criminal Procedure Act (n 13 above) sec 164(1).

57 Criminal Procedure Act (n 13 above) sec 164.

only receive testimony from a witness who has taken the oath, been affirmed or admonished. In order to demonstrate how this works, I will rely primarily on South African case law simply because the South African courts have dealt with this issue in relatively more detail compared to the Zimbabwean courts. Section 164 of the South African Act makes provision for witnesses who can neither take the oath nor testify under affirmation to be admonished to speak 'the truth the whole truth and nothing but the truth'.⁵⁸ A witness is admonished in circumstances where he/she 'is found not to understand the nature and import of the oath or affirmation',⁵⁹ due to 'ignorance arising from youth, defective education or other cause'.⁶⁰

Differential treatment arises from the fact that witnesses who take the oath are not required to demonstrate that they understand the meaning of the oath,⁶¹ whereas those testifying under admonition are required to demonstrate an understanding of the difference between truth and falsehood.⁶² All that is required of those who take the oath is that they repeat the words prescribed by the statute. Those who are admonished are, however, required to demonstrate an understanding of the difference between truth and falsehood. The South African Constitutional Court in *DPP v Minister of Justice and Constitutional Development* confirmed the position that it is a requirement for witnesses who are admonished to demonstrate an understanding of the difference between truth and falsehood.⁶³ The Constitutional Court stated that:

The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial where such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.⁶⁴

58 Criminal Procedure Act (n 13 above) sec 164(1).

59 As above.

60 As above.

61 *Sikhipha v the State* 2006 SCA 71 (RSA) para 14 (*Sikhipha*).

62 *Motsisi v the State* 513/11 2012 ZASCA 59 (*Motsisi*).

63 *DPP v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 166 (*DPP v Minister of Justice*).

64 As above.

Case law suggests that there are broadly two groups of people who give evidence under admonition; children and persons with intellectual disabilities.⁶⁵ These are the ones who are more likely to be deemed to not understand the nature and import of the oath. I would contend therefore, that this is essentially a difference in treatment between persons without intellectual disabilities and persons with intellectual disabilities. Witnesses who are admonished may therefore, be held to a higher standard and this goes against the principles of equality set out in the CRPD which require that all persons with disabilities access justice on an equal basis with others.⁶⁶

It may be argued that in order to protect the fair trial rights of the accused person, the courts must ensure that the witness with an intellectual disability understands the difference between truth and falsehood. This is a concern based on the impact of the impairment where it is feared that due to the impairment, the witness can simply stand in court and speak lies. Whilst this is a valid concern, it is contended that the solution is not to ask the witness to define the difference between truth and falsehood before they can be allowed to testify because a witness's failure to define the difference between truth and falsehood, which may be a result of the impairment, does not necessarily mean that they cannot actually tell the truth.⁶⁷ This approach would be reflective of the approach generally taken by the courts in which the inability to demonstrate an understanding of the difference between truth and falsehood is seen as innate in the individual and therefore, it is up to the individual to remedy the situation by convincing the court through the provision of a definition of truth and falsehood that they do understand what it means to tell the truth. In other words, this approach assesses the innate abilities and limitations of the individual, in this case, the ability of the individual to define the notions of truth and falsehood.

The requirement for witnesses with intellectual disabilities to demonstrate the difference between truth and falsehood was recently examined in Canada and it is submitted that the approach taken by the Canadian Supreme Court on this issue is preferable, though their decision was based on principles of statutory interpretation. From the language in the Canada Evidence Act,⁶⁸ it was possible for adults with mental disabilities whose competence was challenged to testify without having to

65 *Motsisi* (n 62 above) (persons with intellectual disabilities); *Sikhipha* (n 61 above) (children).

66 CRPD, arts 5(1) & 13.

67 N Bala et al 'A legal and psychological critique of the present approach to the assessment of the competence of child witnesses' (2000) 38 *Osgoode Hall Law Journal* 409. A distinction between the ability to tell the truth and the ability to define the difference between truth and falsehood has been recognised in relation to child witnesses.

68 Canada Evidence Acts, 16(3).

take the oath provided they could communicate the evidence.⁶⁹ They could testify on a promise to tell the truth.⁷⁰ Nonetheless, the courts interpreted this provision by requiring the witness to demonstrate an understanding of the duty to tell the truth.⁷¹ In *R v DAI*,⁷² the Supreme Court of Canada rejected competency assessments requiring witnesses to demonstrate an understanding of the difference between truth and falsehood.⁷³ The majority's decision was based on principles of statutory interpretation and it was held that all that was required by section 16(3) of the Canada Evidence Act was for the witness to be able to communicate the evidence and they could proceed to testify on a promise to tell the truth.⁷⁴ Reading any further requirement into those words would be adding to the legislation words that are not present therein.⁷⁵ Benedet and Grant argue that the bar for competence must not be placed too high especially since the trier of fact is not obligated to accept the witness's evidence.⁷⁶ Rules regulating the admissibility and weight of evidence could be used to deal with the fair trial concerns for the accused person.⁷⁷ Rather than being an empty gesture, testifying on a promise to tell the truth has the effect of underlining the seriousness of the occasion.⁷⁸ After *R v DAI*, the competence assessment must focus on whether or not the witness can communicate the evidence as opposed to the previous position whereby the complainant had to demonstrate an understanding of the abstract notions of truth telling and falsehood.⁷⁹ It is contended that requiring a witness to demonstrate the difference between truth and falsehood amounts to setting the bar higher for witnesses who are admonished to tell the truth. Furthermore, it perpetuates inequality and discrimination for witnesses with intellectual disabilities.

It is submitted that the approach taken in *DAI* is preferable and rather than ask the witness to define the difference between truth and falsehood in abstract terms, the witness should be accommodated to communicate the evidence effectively in court. Much in the same way that a non-disabled witness taking the oath (without demonstrating the difference between truth and falsehood) does not guarantee that they will tell the truth, a witness with disability's inability to define the difference between the two notions does not mean that they will not tell the truth. In any case, the fact that a witness has been allowed to testify does not automatically mean that their evidence will be accepted. There are still other safeguards

69 J Benedet & I Grant 'More than an empty gesture: Enabling women with mental disabilities to testify on promise to tell the truth' (2013) 25 *CJWL* 35.

70 As above.

71 Benedet & Grant (n 69 above) 36.

72 *R v DAI* 2012 SCC 5, [2012] 1 SCR 149.

73 As above.

74 *DAI* (n 72 above) paras 43 & 59.

75 As above.

76 Benedet & Grant (n 69 above) 44.

77 As above.

78 *DAI* (n 72 above) para 36.

79 Benedet & Grant (n 69 above) 33.

in place such as corroborating evidence, credibility of the witness and cross-examination which are there to ensure that the accused person's fair trial rights are not violated. However, the key here is to ensure that the witness is properly accommodated to enable them to tell their story in court. This approach would be in line with Critical Disability Theory which, unlike the medical model of disability, recognises both the impact of the impairment by acknowledging that the impairment may make it difficult for the witnesses to define the notions of truth and falsehood and that the solution to this lies in accommodating the individual with impairment through the environment.

So far, it has been demonstrated that assessments of competence focus on the individual abilities and limitations of the individual to the exclusion of the environment. I now turn to address exactly what an application of the understanding of disability as an interactional process means for witnesses with intellectual disabilities.

3 Introducing a new perspective: Looking at assessments of competence through a Critical Disability Theory lens

Looking at assessments of competence through a critical disability theory lens is very important because of the potential it has to pave the way for more women with intellectual disabilities to testify in courts of law and thereby access justice. The approach taken in Zimbabwe and South Africa which is based on the assumption that incompetence is inherent in the individual with impairment is reflective of the paradigm that was dominant throughout the 20th century in which disability was understood as an 'individual pathology'.⁸⁰ This was sometimes referred to as the medical model of disability⁸¹ and according to this formulation, disability was seen as something that was inherent in the person with impairment because the main focus was on 'individual functional abilities and capabilities'.⁸² Within this paradigm disability was a 'personal misfortune'⁸³ that attracted pity and charity and was to be prevented or treated.⁸⁴ As a result of this model, the law's response to and treatment of persons with disabilities was as objects of charity on whose behalf various social policies were implemented.⁸⁵ Devlin and Pothier put it quite

80 MH Rioux & F Valentine 'Does theory matter? Exploring the nexus between disability, human rights, and public policy' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 49.

81 L Hosking 'Critical disability theory' Paper delivered at the 4th Biennial Disability Studies Conference at Lancaster University (2008) unpublished 6.

82 Rioux & Valentine (n 80 above) 50.

83 Hosking (n 81 above) 6.

84 Rioux & Valentine (n 80 above) 50.

85 As above.

succinctly when they state that '[t]o start from the perspective that disability as misfortune is to buy into a framework of charity and pity rather than equality and inclusion'.⁸⁶ This is contrary to the paradigm which has in recent years dominated disability rights discourse known as the social model.

According to this formulation, disability is understood not as something which is inherent in the individual but as a social construct.⁸⁷ This means that disability is not necessarily a result of impairment, but is a result of the combined effect of impairment and the environment which does not accommodate the needs of persons with disabilities. This formulation of disability as a result of the interaction between an individual with impairment and the environment is the one that is relied on in the CRPD⁸⁸ as well as in Critical Disability Theory. The CRPD recognises that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.⁸⁹ In other words, it is the interaction between impairment and disabling attitudes and environments that potentially results in limited or ineffective participation of persons with disabilities.

What this all means for witnesses with intellectual disabilities is that the courts no longer need to look solely at the abilities and limitations of the individual in determining whether or not they can act as a witness. Understanding that the competence or credibility of a witness is influenced by the interaction between the individual impairment and the environment has the potential to pave the way for more witnesses with intellectual disabilities to be able to testify in court. This is especially so, when one considers the environment that prevails in a courtroom setting.

3.1 Adding the impact of the environment to the question of witness competence and credibility

The courtroom is generally stressful for any witness and this is why witness preparation is essential.⁹⁰ Stress may result from the formality with which the proceedings are conducted and if a witness is not properly prepared, this may negatively impact how they testify. For complainants of sexual assault, the knowledge that they will have to re-live the experience by talking about it in court can in itself cause anxiety and in turn affect how

86 As above.

87 R Traustadottir 'Disability studies, the social model and legal developments' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 116.

88 CRPD, Preamble, para e.

89 As above.

90 T Menaker & RJ Cramer 'The victim as witness: Strategies for increasing credibility among rape victim-witnesses in court' (2012) 20 *Journal of Forensic Psychology Practice* 424.

they testify.⁹¹ The manner in which they testify in turn has a bearing on whether or not they are found to be competent as witnesses. Therefore, the external environment, in this case the courtroom, plays an important part in determining competency. The current approach to assessing testimonial competence does not take the environment into account and is therefore, not capable of adequately addressing inequality for witnesses with intellectual disabilities and ensuring access to justice. Only when the environment is seen as part of the equation can the full impact of the problem be understood. Testimonial incompetence ought to be regarded as resulting from the interaction between characteristics innate in the individual with impairment and the external environment or setting. The failure to take the external environment into account may result in a person being declared incompetent to testify. This has serious implications because in some cases, without the testimony of the complainant, the chances for a successful prosecution may be lost. However, it must still be emphasised that the impact of the impairment itself is still part of the equation.

3.2 Acknowledging the role played by and impact of the impairment

If incompetence, much like disability, is a social construct does this mean that impairment has no part to play in the disabling of an individual? Should individual differences resulting from impairment be taken into account or should they be overlooked, particularly in light of the fact that the inequality and discrimination to which persons with disabilities have been subjected has been said to be due to their being different from their non-disabled counterparts?⁹² Martha Minow refers to the difficulty in knowing when to ignore difference and when to take it into account as the 'dilemma of difference'.⁹³ For sometimes taking difference into account can be seen as perpetuating marginalisation, but at other times, ignoring the difference usually has the effect of marginalising the person.⁹⁴

When it comes to disability, exclusion usually results from ignoring difference.⁹⁵ This is because disability is so unique that the difference cannot be ignored without serious consequences. Consider, for example, a business establishment that claims that it does not discriminate because it opens its doors to everyone, yet its premises are physically inaccessible to some; the result for a person with a physical disability, despite the rhetoric of inclusion, is that they are necessarily excluded because the building is

91 As above.

92 HH Koh & LO Gostin 'Introduction: The human rights imperative' in SS Herr et al (eds) *The Human Rights of persons with intellectual disabilities: Different but equal* (2003) 3.

93 Martha Minow *Making all the difference: Inclusion and exclusion in American law* (1990) 20.

94 Hosking (n 81 above) 11.

95 As above.

inaccessible. Taking difference into account however, means that the owner of that establishment would have to make the building accessible.

One of the critiques of the earlier version of the social model is that it claimed that impairment made no contribution to disability and that disability was entirely a social construct.⁹⁶ It distinguished between impairment and disability and treated the two as entirely separate and distinct, treating disability as something that resulted only from the environment. Tremain rightly argues that impairment cannot be left out of the equation because, for example, it is not argued that black people are disabled because the environment causes them to experience social disadvantage.⁹⁷ It would seem that the only people who can claim to be disabled are those with impairment, and therefore it is 'implicit'⁹⁸ that impairment also contributes to the disadvantaging.⁹⁹

Part of the transformative power of Critical Disability Theory is that it values difference. The model that is relied on by Critical Disability Theory is a mixture of the medical model and the social model.¹⁰⁰ This is why the social model relied on by Critical Disability Theory treats disability as a result of the interaction between a person with impairment and his/her environment. This approach is somewhat realistic because it acknowledges the role played, and contribution made, by impairment.¹⁰¹ When disability is understood as the interaction between the person and his/her environment, then necessarily, the person's difference must be taken into account in order to understand the full impact of the social environment and the barriers it creates. As stated by Devlin and Pothier, 'disability demands a coming to terms with difference'.¹⁰² Indeed Critical Theory in general subscribes to the notion that difference cannot be ignored.¹⁰³

Therefore, acknowledging the effect of the environment on the competence and credibility of a witness does not mean that the impairment itself has absolutely no impact on the competence of the witness. On the contrary, the impairment associated with intellectual disabilities does make it difficult for witnesses to follow the proceedings and participate effectively in the trial. For example, witnesses may have difficulty with concepts such as time, dates and space. They may also have difficulty communicating with others. All these would make it difficult for the witness to effectively participate in the trial. Therefore, the impact of the

96 S Tremain 'Foucault, governmentality, and Critical Disability Theory: An introduction' in S Tremain (ed) *Foucault and the government of disability* (2005) 9-10.

97 As above.

98 As above.

99 As above.

100 Hosking (n 81 above) 7.

101 As above.

102 R Devlin & D Pothier 'Introduction: Toward a critical theory of dis-citizenship' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics and law* (2006) 12.

103 As above.

impairment does indeed play a role in making a witness incompetent and cannot and indeed should not be ignored or overlooked. Care does need to be taken, however, in order to ensure that the impact of the impairment is taken into account in a constructive manner.

3.3 Taking the impact of the impairment into account in a constructive manner using an equality framework

Both the medical model of disability and Critical Disability Theory take the impact of impairment into account though in different ways and to different extents. The medical model states that a person is disabled because of their impairment whilst Critical Disability Theory subscribes to the view that a person is disabled in part because they have an impairment and also because they are in a disabling environment. It is indeed true that impairment plays a part in the disablement of a person. The challenge, as Devlin and Pothier put it, is 'to pay attention to difference without creating a hierarchy of difference – either between disability and non-disability or within disability'.¹⁰⁴ Therefore, the question is how can difference (impairment) be taken into account in a constructive manner? The answer is through the use of an equality framework.

I would contend that difference in and of itself need not be problematic because diversity is one of the main characteristics of humanity. The CRPD recognises this when it calls for '[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity' in article 3(d). Discrimination arises from the fact that difference has been equated with 'inferiority'.¹⁰⁵ It is this equation of difference with inferiority that equality measures are designed to challenge.¹⁰⁶ Regardless of how different persons with intellectual disabilities may be, they are born free and equal in dignity and rights.¹⁰⁷ Quinn puts it aptly when he states that 'all persons not only possess inestimable inherent self-worth but are also inherently equal in terms of self-worth, regardless of their difference'.¹⁰⁸ This means that they are 'entitled'¹⁰⁹ to respect and equal treatment 'even if that equality does not entail identical treatment under the circumstances'.¹¹⁰ This leaves no

104 As above.

105 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* 8.

106 As above.

107 Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, (1948) art 1.

108 G Quinn & T Degener *Human Rights and disability: The current use and future potential of United Nations Human Rights instruments in the context of disability* (2002) 15.

109 Koh & Gostin (n 92 above).

110 As above.

room for a response of pity which according to Gill, 'jeopardizes respect'.¹¹¹ Treating people with intellectual disabilities as equals forces us to take cognisance of the inherent dignity and worth of persons with intellectual disabilities, regardless of how different they may be.¹¹² It is therefore crucial that the principles of equality and non-discrimination be at the forefront when it comes to victims of sexual assault with intellectual disabilities. When equality and respect for persons with intellectual disabilities are at the forefront, 'difference need not mean legal difference'.¹¹³ This means that if the law responds appropriately, there is no need for it to create or perpetuate differences in treatment between disabled and non-disabled people.

This however does not mean that witnesses with intellectual disabilities and non-disabled witnesses should be treated exactly the same as the formal equality model suggests, for this is a model of equality which focuses on 'even-handedness'¹¹⁴ and in effect ignores difference.¹¹⁵ Seeking an equality agenda does not mean that difference should be ignored, neither does it mean that we should seek to eradicate difference – for this would not be possible.¹¹⁶ Rather, it means that a 'genuinely equal society is one that has a positive approach to and positively accommodates human difference'.¹¹⁷ Instead, the equality of opportunity model which is based on the premise that everyone is entitled to equally access opportunities and participate in the social, economic and cultural spheres of life and which is a guiding principle of the CRPD itself under article 3(e), is more appropriate.¹¹⁸

Therefore, the impact of the impairment has to be taken into account along with the impact of the environment within a framework of equality in order to fully understand the dynamics which contribute to the competence and credibility of a witness with an intellectual disability and to formulate an appropriate response to the problem.

4 Formulating an appropriate response through the use of accommodations

The application to assessments of competence of Critical Disability Theory is more than just an academic exercise; it is also about informing the

111 M Gill 'Rethinking sexual abuse: Questions of consent and intellectual disability' (2010) 7 *Sexuality Research & Social Policy* 206.

112 ML Perlin 'A change is gonna come: The implications of the United Nations Convention on the Rights of Persons with Disabilities for the domestic practice of constitutional mental disability law' (2008-2009) 29 *N III University Law Review* 483-84.

113 Perlin (n 112 above) 20.

114 Quinn & Degener (n 108 above) 15.

115 As above.

116 As above.

117 As above.

118 As above.

process of bringing about change and formulating a more appropriate response to the problem. Like all Critical Theory, Critical Disability Theory seeks not only to be explanatory, but to effect change. Devlin and Pothier aptly describe Critical Disability Theory in the following terms: 'Its goal is not theory for the joy of theorization, or even improved understanding and explanation; it is theorization in the pursuit of empowerment and substance, not just formal equality.'¹¹⁹ If disability is viewed as a problem entirely inherent in the individual with impairment, then it might be argued that the responsibility to eliminate the social disadvantage of disability lies chiefly with the individual.¹²⁰ However, if disability is understood as a social construct, then the responsibility shifts from the individual with impairment to the community.¹²¹ However, simply identifying where the responsibility to formulate a response lies is not enough. There is still a need to take this a step further, and clarify the exact nature of the response which is appropriate. This is because there are several responses to difference that are open to the community and these include 'pity, charity, surgical intervention, accommodation, and transformation'.¹²² What then is the appropriate response? Recognising the problems arising from the interaction between impairment and environment allows for adjustments to be made in the environment in response to the impairment in a way that will ensure effective participation of persons with intellectual disabilities as witnesses in a criminal trial. In other words, if the environment is understood as part of the problem, then it is necessarily part of the solution.

The CRPD addresses the unduly burdensome nature of the interaction between witnesses with intellectual disabilities and the criminal justice system by requiring the making of procedural and age-appropriate accommodations.¹²³ The impact of assessments of competence goes beyond the outcome of a case and affects what has been described as 'the most basic "human right"',¹²⁴ the right to access justice.¹²⁵ Usually framed in International Human Rights Law as the right to an effective remedy¹²⁶ the right to access justice, which appears for the first time in the CRPD as a substantive right, is crucial for the protection of human rights because it has a bearing on the enjoyment of other rights.¹²⁷ Cappelletti and Garth effectively summarise the importance of this right by noting that

119 Devlin & Pothier (n 102 above) 8.

120 Devlin & Pothier (n 102 above) 12.

121 As above.

122 As above.

123 CRPD, art 13.

124 M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* 185.

125 CRPD, art 13.

126 See eg the International Covenant on Civil and Political Rights 19 December 1966, 999 UNTS 171, art 2(3)(a).

127 Cappelletti & Garth (n 124 above) 185.

'the possession of rights is meaningless without mechanisms for their effective vindication'.¹²⁸ The inclusion of a substantive right of access to justice in the CRPD was therefore, not fortuitous, but was a response to the 'specific rights experience of persons with disability'¹²⁹ in particular, the numerous barriers they face to accessing justice. For this reason the CRPD expressly includes a requirement for states parties to take measures to 'facilitate their effective role as direct and indirect participants, including as witnesses'¹³⁰ in the legal system in order for them to access justice on an 'equal basis with others'¹³¹ through the provision of procedural and age-appropriate accommodations. Furthermore, the CRPD in article 5(3) makes it a requirement to provide reasonable accommodation by providing that states parties 'shall take all appropriate steps to ensure that reasonable accommodation is provided'. However, there are other measures which have been employed at the domestic level in an effort to address this problem. One such measure is the use of protective measures for vulnerable witnesses.

4.1 Protective measures for vulnerable witnesses versus accommodation

Witnesses with disabilities, including intellectual disabilities, are frequently dealt with in accordance with the measures for the protection of vulnerable witnesses. Legislation governing criminal evidence and procedure in Zimbabwe and South Africa contain measures dealing with vulnerable witnesses. The category of 'vulnerable witness' encompasses a number of witnesses, not just witnesses with disabilities.¹³² Though not expressly included within the definition of vulnerable witness, persons with intellectual disabilities may and do frequently fall under the ambit of this provision. The measures may be applied by the court *mero motu*¹³³ or after an application by either of the parties.¹³⁴ However, the measures do not apply automatically. The court decides whether or not to take any of the measures, and in reaching that decision, has to consider a number of factors including:

- (a) the witness's age, mental and physical condition and cultural background;

¹²⁸ As above.

¹²⁹ F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Humans Rights Quarterly* 512.

¹³⁰ CRPD, art 13(1).

¹³¹ As above.

¹³² Criminal Procedure and Evidence Act (n 12 above) sec 319B. In Zimbabwe, a vulnerable witness is any 'person who is giving or will give evidence in proceedings [who] is likely- (a) to suffer emotional stress from giving evidence or (b) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are conducted, so as not to be able to give evidence fully and truthfully'.

¹³³ Of the court's own free will.

¹³⁴ Criminal Procedure and Evidence Act (n 12 above) sec 319B(b).

- (b) the relationship, if any, between the vulnerable witness and any other party to the proceedings; and
- (c) the nature of the proceedings; and
- (d) the feasibility of taking the measure concerned; and
- (e) any views expressed by the parties to the proceedings; and
- (f) the interests of justice.¹³⁵

The South African Act on the other hand specifically includes persons with disabilities within its definition of vulnerable witness.¹³⁶ In South Africa, the 'special arrangements' which may be made include the 'relocation of the trial',¹³⁷ the rearrangement, removal, or addition of furniture in the court room or a change in the positions where the parties sit or stand,¹³⁸ the appointment of a support person,¹³⁹ giving evidence behind a screen or giving in a different room via closed circuit television¹⁴⁰ and the 'taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned'.¹⁴¹

Protective measures amount to provisions that are already laid down and the only consideration that the court has to make is firstly, whether a witness falls within the category of 'vulnerable witness' and secondly, which of the array of measures to avail to that witness. There is no room for the assessment of individual needs on a case-by-case basis. What is the desirability of having fixed measures that are already set out?

Lawson recognises that the duty to reasonably accommodate under the UK Disability Discrimination Act entails a reactive element as well as an anticipatory element.¹⁴² The reactive element 'embraces those duties which are entirely individualized and reactive in nature, simply requiring duty-bearers to take reasonable steps to accommodate the needs of a particular disabled person with whom they are confronted'.¹⁴³ The anticipatory element entails a requirement to 'anticipate what barriers such people are likely to encounter and to take reasonable steps to remove them in advance'.¹⁴⁴ Lawson notes that there is a possibility that states can create 'anticipatory duties',¹⁴⁵ especially since that 'possibility ... was not clearly contemplated in any of the pre-CRPD discussions'.¹⁴⁶

135 Criminal Procedure and Evidence Act (n 12 above) sec 319C(1)(a-f).

136 Criminal Procedure and Evidence Act (n 12 above) sec 158A(3)(d).

137 Criminal Procedure Act (n 13) sec 158(2)(a).

138 Criminal Procedure Act (n 13) sec 158(2)(b).

139 Criminal Procedure Act (n 13) sec 158(2)(c).

140 Criminal Procedure Act sec 158(2)(d).

141 Criminal Procedure Act sec 158(2)(e).

142 United Kingdom Disability Discrimination Act 1995 c50.

143 A Lawson *Disability and equality law in Britain: The role of reasonable adjustment* (2008) 63.

144 Lawson (n 143 above) 64.

145 Lawson (n 143 above) 31.

146 As above.

However, protective measures for vulnerable witnesses may not be adequate. This is recognised in a thematic study carried out by the UN on violence against women and girls with disabilities. The study states that:

Furthermore, the justice system may fail to accommodate her physical, communication or other specific needs. Victim protection measures and other measures to support victims may be inadequate for women with disabilities.¹⁴⁷

This is especially the case for women with intellectual disabilities because the 'spectrum of intellectual, psychosocial and communication disabilities is broad and highly varied'.¹⁴⁸ Primor and Lerner go on to conclude that:

creating accommodations requires maximum flexibility in order to provide every person with accommodations that meet their specific needs in accordance with the characteristics and severity of their particular disability. Thus, some people may require moral support and reassurance, some will require simplification of the questions. Others need to be able to take a short recess during the testimony for whenever they are unable to concentrate and some individuals may require the use of an interpreter or speech-to-speech transmittal in order to testify. Thus the law should not restrict itself to a limited set of accommodations but rather allow court discretion on individual basis.¹⁴⁹

Therefore, whilst set measures for vulnerable witnesses may be useful, they should not exclude the possibility of providing further accommodation which a particular witness may require. As Lawson puts it, it is 'beyond doubt ... that states will be required to introduce individualized reasonable accommodation duties which are responsive to the circumstances of the particular case'.¹⁵⁰ The wording in the South African legislation may leave it open for the South African courts to do just that. It permits the court to take 'any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned'.¹⁵¹ This is, however, not the case with the Zimbabwean legislation. There is a need for an approach that assesses and accommodates the individual needs of the witness in question. This is exactly what the duty to accommodate does and this is why the CRPD itself in article 13 expressly states that the provision of procedural and age-appropriate accommodations is required.

147 Report of the UN High Commissioner for Human Rights *Thematic Study on the Issue of Violence Against Women and Girls and Disability* UNGAOR, 20th Sess, Supp No 2 & 3, UN Doc A/HRC/20/5, (2012) para 41.

148 S Primor & N Lerner *The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process* (2005) 7.

149 As above.

150 Lawson (n 143) 31.

151 Criminal Procedure Act (n 13 above) sec158(2)(e).

4.2 The duty to accommodate: Offering flexibility in the legal system

The concept of accommodations is an approach that is flexible in responding to the needs of witnesses with disabilities. It is instructive to examine the historical development of the concept in order to demonstrate that it is indeed a concept intended to introduce flexibility in the application of norms.

The concept of reasonable accommodation existed prior to the coming into effect of the CRPD.¹⁵² As Anna Lawson puts it, 'even before the CRPD, there was an understanding that the human rights of disabled people would be effectively enjoyed and protected only if their different circumstances and needs were recognized and, where reasonable, accommodated'.¹⁵³ The concept has been defined outside the CRPD as a 'legal notion'¹⁵⁴ that stems from 'jurisprudence in the realm of labor and indicates a form of relaxation aimed at combating discrimination caused by the strict application of a norm'.¹⁵⁵ The concept's application to persons with disabilities can be traced as far back as 1982 when the World Programme of Action Concerning Disabled Persons was adopted by the UN General Assembly. In the World Programme of Action Concerning Disabled Persons there was a particularly strong emphasis placed on appropriate responses to the individual 'needs and circumstances' of persons with disabilities. It stated that:

[t]he principle of equal rights for the disabled and non-disabled implies that the needs of *each and every individual are of equal importance*, that these *needs must be made the basis for the planning of societies*, and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.¹⁵⁶

The jurisprudence of international bodies also reveals an application of the duty to accommodate to persons with disabilities. In *Hamilton v Jamaica*¹⁵⁷ the Human Rights Committee found that the Jamaican state was in breach of the provision of the *ICCPR* dealing with the humane treatment of detainees¹⁵⁸ because the state had failed to hold a prisoner with paralysed legs in a place that was adapted to meet his needs. The inability to adapt a

152 The term 'reasonable accommodation' was first introduced in disability law in the United States in the Rehabilitation Amendments of 1973 and the regulations which were issued under that statute, though these were delayed until 1977.

153 Lawson (n 143 above) 24.

154 G Bouchard & C Taylor *Building the future: A time for reconciliation abridged report* (2008) 23.

155 As above.

156 World Programme of Action Concerning Disabled Persons, General Assembly Resolution 37/52 (1982) para 25.

157 *Hamilton v Jamaica* Communication No 616/1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

158 ICCPR, art 10.

place of detention to a person's individual needs was also found to constitute a breach of the provision in the *European Convention on Human Rights*¹⁵⁹ on degrading treatment.¹⁶⁰ What these decisions show is that the addressing of a person's individual needs and circumstances is central to the duty to accommodate. The continuing prominence given to individual difference can be seen in the definition of reasonable accommodation in the CRPD, which is defined as the provision of, 'necessary and appropriate modification and adjustments ... *where needed in a particular case ...*'¹⁶¹

Implicit within the concept of reasonable accommodation is the prominence of individual difference. The response is made manifest in the environment, but it is a response to the individual difference. The role of the environment is therefore simultaneously recognised in that it is the failure of the environment to adapt to the needs arising from individual needs that result in discrimination. Lawson puts it this way:

Reasonable adjustment in essence requires that relevant difference in circumstance be identified and that it be responded to in the form of appropriately different treatment.¹⁶²

This highlights the importance of taking difference into account, along with the environment. In this sense, the understanding of disability as an interactional process between individual and environment is neatly encapsulated within the concept of reasonable accommodation. Both elements have to be considered in order to appropriately respond to the individual needs of persons with disabilities in achieving equality. An approach that does not take into account individual differences may allow certain persons with disabilities to fall through the cracks, so to speak. This focus on individual needs and circumstances is what makes the concept flexible enough to respond to the needs of witnesses with intellectual disabilities. It is therefore, not surprising that the concept was specifically referred to as an appropriate response in article 13 of the CRPD.

At this juncture, the question might arise whether or not the fact that a witness requires extensive support is in fact not an indication that the witness is not competent to testify. The issue of support is dealt with in article 12 of the CRPD.

159 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 & 14, 4 November 1950, ETS 5 art 3.

160 *Price v UK* App No 33394/96 (2001) 34 EHRR 1285.

161 CRPD, art 2.

162 Lawson (n 143 above) 296.

4.3 Article 12 of the CRPD: Requiring the provision of supports

Article 12 of the CRPD requires the provision of supports. The construction of legal capacity under article 12 of the CRPD challenges the dominant societal and legal norms to such a great extent that it has been described as “‘emblematic of the paradigm shift” in the approach to disability for which the CRPD as a whole has been hailed’.¹⁶³ During the drafting of the CRPD, the exact construction of legal capacity was subject to much debate.¹⁶⁴ At issue was the question whether legal capacity involves both the capacity to have rights (identity) and the capacity to act (agency). This question was analysed by a group of experts in 2008 who drew up a legal opinion concluding that article 12 embodies both elements of identity and agency.¹⁶⁵ The element of identity is seen in the subparagraph that reads:

States Parties reaffirm that persons with disabilities have the right to *recognition* everywhere *as persons* before the law.¹⁶⁶

The term ‘as persons before the law’¹⁶⁷ embodies the identity element showing that legal capacity means the capacity to have rights. In order to have rights, one must be recognised as a person before the law.

The agency element can be seen in the following subparagraph:

States Parties shall recognize that persons with disabilities *enjoy legal capacity on an equal basis* with others in all aspects of life.¹⁶⁸

The phrase ‘enjoy legal capacity on an equal basis with others’¹⁶⁹ embodies the element of agency, meaning effective capacity to act. In that respect therefore, article 12 is similar in construction to article 15 of the *Convention on the Elimination of All Forms of Discrimination against Women*¹⁷⁰ which embodies both elements of identity and agency. But why is this important?

I would contend that the elements of identity and agency necessarily have to be simultaneously present in any concept of legal capacity that is

163 G Quinn ‘Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD’ (Paper delivered at Harvard Law School, 20 February 2010), (unpublished) 4.

164 A Dhanda (2006-2007) 34 *Syracuse Journal on International Law & Commerce* 438.

165 Leeds Legal Opinion on art 12 of the CRPD <http://disability-studies.leeds.ac.uk/files/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf> (accessed 1 September 2015).

166 CRPD, art 12(1) (emphasis added).

167 As above.

168 CRPD, art 12(2) (emphasis added).

169 As above.

170 *Convention on the Elimination of all Forms of Discrimination against Women*, GA res 34/180, 34 UNGAOR Supp (No 46) at 193, UN Doc A/34/46 (entered into force 3 September 1981).

capable of enabling the real realisation of rights. If legal capacity refers to a 'person's power or possibility to act within the framework of the legal system',¹⁷¹ then legal capacity is necessarily about legal personhood.¹⁷² Indeed it is only through this personhood that one can act. One must have rights and be able to act, for having rights when one cannot act may undermine those rights and one cannot act without a recognised identity that enables one to hold rights in the first place. The unification of both elements of identity and agency in article 12 is to be applauded.

The element of agency embodied within legal capacity under article 12 challenges dominant perceptions about the role of support. Capacity to act does not become a problem until one is dealing with the capacity to act of a person who requires a lot of support, such as a person with a severe intellectual disability, in order to exercise their legal capacity.¹⁷³ Article 12 deals with this situation by stating that:

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.¹⁷⁴

This provision is in line with the statement in the Preamble which:

recognize[es] the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.¹⁷⁵

Article 12 therefore, recognises the reality that we all need support and requires the provision of support.¹⁷⁶ It does, however, go on to require states parties to have in place safeguards which ensure:

that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence ...¹⁷⁷

Nonetheless, cognisance must be taken of the fact that this is a challenge to dominant societal and legal norms. The dominant norm is that the more support a person needs in order to exercise their legal capacity, the more likely they are to be regarded as lacking capacity. Similarly the more support a witness with an intellectual disability requires to testify, the more likely they are to be regarded as incompetent witnesses. However, under

171 A Nilsson 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' *Commissioner for Human Rights Issue Paper* (2012) 12 7 www.commissioner.coe.int (accessed 1 September 2015).

172 As above.

173 R Dinerstein 'Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision-making' (2012) 19 *Human Rights Brief* 9.

174 CRPD, art 12(3).

175 CRPD, Preamble, para j.

176 Nilsson (n 171 above) 19.

177 CRPD, art 12(4).

the construction of legal capacity in article 12, no longer is requiring support seen as an indication of lack of legal capacity, but a necessary part of enabling one to exercise one's capacity. Not only does article 12 require the provision of support, it also reinforces the understanding of disability as the result of the interaction between a person with impairment and his/her environment.

4.4 Article 12 of the CRPD: Recognising the interactional process that is disability

The recognition of the role of supports is also an indication that article 12 looks beyond the individual and acknowledges the role played by the environment in exercising legal capacity.¹⁷⁸ In other words it recognises that incapacity is not inherent in the individual with impairment. The recognition of the importance of support is an example of the requirement to alter the environment rather than trying to 'fix' the individual.¹⁷⁹ Dinerstein puts it succinctly when he says:

The salience of support is a concrete expression of the social, interactive model of disability that animates the entire Convention and sees disability as not a thing in and of itself but rather as a product of the interaction between an individual and his or her built and attitudinal environments.¹⁸⁰

The recognition of the role of the environment challenges the dominant conception that incapacity inheres in the individual. Legal capacity as it is constructed under article 12 indeed represents a paradigm shift. This paradigm means that all people including those who need a lot of support have both the capacity to have rights and the capacity to act. Furthermore, it recognizes that incapacity is not inherent in the individual. It is contended that the paradigm shift in article 12 is crucial for the realisation of the equality rights of persons with disabilities, including intellectual disabilities. They are persons before the law, just like everyone else and they have the capacity to enforce their rights just like everyone else, even if they need support. This challenges prevailing societal and legal norms. This construction of legal capacity requires a lot of reform in order to bring domestic provisions in line with the paradigm shift in article 12. As one scholar aptly puts it, 'the issue of legal capacity reform is probably the most important issue facing the international legal community at the moment'.¹⁸¹ One of the important areas that are affected by legal capacity reform is the area of competence to act as witnesses in criminal proceedings for people with intellectual disabilities. Specifically, what it means is that a person's abilities should only be assessed for the purposes of determining the supports that they will need in order to give effective

178 Nilsson (n 171 above) 12.

179 As above.

180 Dinerstein (n 173 above) 9.

181 As above.

testimony in court, not for the purpose of deciding whether or not they are competent witnesses. As Michael Bach rightly points out, 'the question is no longer: does a person have the mental capacity to exercise his/her legal capacity? The question is instead: What types of support are required for the person to exercise his or her legal capacity?'¹⁸² In the criminal trial setting, the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony?

5 Conclusion

The manner in which assessments of testimonial competence are carried out in South Africa and Zimbabwe takes two approaches. The first approach is to deal with testimonial competence in much the same manner as issues of admissibility. This means that a trial within a trial will be held in order to determine the issue. In this approach, the opinion of a psychologist is relied on by the courts in order to decide on the testimonial competence of the witness. The psychologist will give his/her opinion about whether or not the witness is competent to give evidence by conducting assessments on the innate abilities of the individual. This approach treats the lack of competence as something which is inherent in the individual with impairment. The impact of the environment is often left quite out of the picture. The second approach to the assessment of competence involves allowing the witness to testify and having the court decide on whether or not the witness was a competent witness after having observed the witness give evidence in the witness stand. Similarly, this approach also treats incompetence as something which is inherent in the individual. The assessment normally leaves out the impact of the environment in the assessment of the witnesses' testimonial competence. The fact that the impact of the environment on the competence of a witness is not taken into account means that the environment is not seen as part of the solution. The assessments therefore, do not involve the provision of accommodations. The fact that assessments of competence as they are carried out in Zimbabwe and South Africa fail to take into account the impact of the environment on the competence of a witness with an intellectual disability and do not involve the provision of reasonable accommodations means that these assessments perpetuate inequality and discrimination.

The utility of applying Critical Disability Theory to the assessment of testimonial competence lies in that not only does it allow for the taking into account of the impact of the environment on testimonial competence, but also that it takes into account the impact of the impairment on testimonial competence. Once it is understood that external environments play a part

¹⁸² Nilsson (n 171 above) 19.

in causing the problem of disability, then it follows that the solution to disability based discrimination lies partly in the appropriate adjustment of the external environment. The other part of the solution lies in acknowledging the fact that the impairment does play a part. Impairment does indeed make it difficult for women with intellectual disabilities to effectively participate in a criminal trial as witnesses.

Most domestic jurisdictions respond to this through legislative provisions containing protective measures for vulnerable witnesses. Which of these is the most efficient method of addressing this problem? It has been argued that protective measures for vulnerable witnesses, unlike accommodations, may be inadequate in meeting the needs of witnesses with intellectual disabilities.

The concept of reasonable accommodation is particularly useful in meeting the needs of witnesses with intellectual disabilities. Reasonable accommodation is effective because it takes into account both the individual's difference and the role played by the environment. This is consistent with Critical Disability Theory's understanding of disability as a result of the interactional process between an individual with impairment and the environment. I argue that an essential feature of reasonable accommodation is the flexibility to respond to the individual needs of each witness and this is something that protective measures for vulnerable witnesses fail to do. This is because such measures are specific in offering what courts can choose from and can therefore be unduly rigid. For that reason therefore, they may fall short of the reasonable accommodation standard that is provided for in the CRPD. Nevertheless, they remain useful, albeit to a limited extent.

Therefore, the adjustment in the environment should be a response to the internal; a response to the impairment itself. In the absence of reasonable accommodation in a criminal trial involving a witness with intellectual disabilities, the ability to participate effectively on equal basis with others may be lost. Finally, it is contended that a person's abilities should only be assessed for the purposes of determining the supports that they will need in order to give effective testimony in court, not for the purpose of deciding whether or not they are competent witnesses. In the criminal trial setting, the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony? So, the question that remains to be pondered is whether there is still a place for assessments of competence.

*Marina Mendez Erreguerena**

Summary

Care is a complex issue that may be analysed using different perspectives and theories. It is also a biological imperative for human beings. For many people with disabilities, assistance and support are prerequisites to perform daily tasks and participate in society. In most cases, family is the primary provider of care and support and, within families; care is a role that falls disproportionately on women.

The issue of unpaid carers (sometimes referred to as 'caregivers') may be analysed in terms of the gender equality impact that this role has as well as its social equality and human rights implications. Due to the fact that caring relationships involve carers as well as those they care for, public policies face the challenge of addressing the needs and claims of two groups which are different but related.

In developed countries such as the United States, Spain and Australia, governments have developed policies to address this issue. In contrast, Africa and Latin America show that it is still an invisible concern. Family caregivers provide care in conditions of fragility and lack of resources that allow situations where the rights of persons with disabilities are violated and rights of their family are ignored.

1 Introduction

'Care' is a multifaceted¹ and complex concept as it can be used in various contexts, and its meaning and significance may differ through different

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1 J Swainet *Controversial issues in a disabling society* (2003) 141.

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societies, cultures, families and individuals.² Shakespeare asserts that ‘giving and receiving care is a biological imperative for human beings’³ because at some point in the life cycle, almost all people may be involved in it. Caring can be expressed in different ways such as giving practical assistance, advice, emotional and social support. This paper is focused on informal carers (caregivers), people who provide unpaid assistance to members of their family, friends or neighbours who are elderly and/or have a physical, sensory or intellectual disability.

Caring is a role that falls disproportionately on women, it ‘is seen to be culturally appropriate to women’. Although caring is not an exclusively female activity – across the world, women and girls commit substantially more time than men to provide informal care.⁴ It is this factor combined with a general lack of other support services provided by states that ‘encourages women to take on the role of carer’.⁵ As result, the issue of informal care involves notions about gender inequalities. At the same time, it is inextricably intertwined with other structures of inequality, especially race and social class.⁶

In the domain of human rights, the UN Special Rapporteur on extreme poverty and human rights has highlighted the relational nature of care – in which ‘the rights of caregivers are symbiotically intertwined with the rights of care receivers’. It is a dynamic relationship where the well-being of the caregiver ‘has an impact on the quality of the care they are able to provide’.⁷ Therefore, if informal care is not adequately recognised, supported or valued by the state, the rights of those who rely on care provision for their health, life and well-being may also be violated. In such a ‘caring relationship’ the rights of both caregiver and the carer receiver are inextricably linked. This paper focuses on these complexities and at a macro level, it explores the historical difficulties in the relationship between the emerging disability rights movement and the carers’ movement.

- 2 JD Joubert ‘A profile of informal carers in South Africa’ unpublished MA dissertation, University of Pretoria, 2005 1 <http://hdl.handle.net/2263/30044> (accessed 10 March 2015).
- 3 T Shakespeare *Disability rights and wrongs* (2006) 135.
- 4 See D Budlender *Time use studies and unpaid care work* (2010); United Nations *The world's women 2010: Trends and statistics* (2010); World Health Organization *World report on disability* (2011); V Esquivel *The care economy in Latin America: Putting care at the centre of the agenda* (2011).
- 5 E Begley & S Cahill ‘Why women?’ (2003) 92 *An Irish Quarterly Review* 163.
- 6 S Razavi *The political and social economy of care in a development context: Conceptual issues, research questions and policy options* (2007) iii.
- 7 M Sepúlveda Carmona ‘Report of the Special Rapporteur on extreme poverty and human rights’ A/68/293, 9 August 2013.

1.1 The human rights context

Informal care has been positioned as a human rights issue because its heavy and unequally borne responsibilities create a barrier to gender equality and to women's equal enjoyment of human rights. It also has significant impact on the health and well-being of the informal carers. As result, the rights and well-being of people they care for may be threatened. It would appear to follow that a failure by a state to adequately provide, fund, support and regulate care would contradict their human rights obligations, by creating and exacerbating inequalities and threatening rights enjoyment for those involved in the caring relationship.

The UN Special Rapporteur on extreme poverty has been emphatic on her arguments: States' actions or inactions define who has access to quality care and who assumes the costs of its provision. Thus, 'when the State fails to adequately regulate, fund or provide care, the burden shifts to families who have to make their own arrangements', it may lead in an arrangement that threatens the rights of enjoyment for both informal carers and people with disabilities. Therefore '[s]tates must adopt all necessary policy measures in order to achieve the recognition, reduction and redistribution' of informal care. Public policies should position care as a social and collective responsibility rather than a private and familiar issue, 'and treat unpaid caregivers and those they care for as rights holders. A transformative approach is clearly required under human rights law'. As the causes and consequences of informal care inequalities are multi-layered, multiple and complementary,⁸ it is central to develop complex policy interventions that asserts the rights and need of both parts involved without benefiting one above the other.

Research on informal care in developed nations is well established and extensive. States have conducted surveys in order to gather reliable information about who carers are, where they live, how they live and how many there are. Using this information, states have applied comprehensive public policies to address the rights of informal carers of people with disabilities. Spain, Australia, UK, New Zealand and United States are examples of this.⁹

However, the issue of informal care has received very little attention in Latin America and Africa where statistical information is scarce. Malherbe states that in Africa families have the duty to care for family members with disabilities, but 'this preference does not translate into sufficient statutory

⁸ Sepúlveda Carmona (n 7 above) 69-71.

⁹ See S Yeandle et al 'Voice and choice for users and carers? Developments in patterns of care for older people in Australia, England and Finland' (2012) 22 *Journal of European Social Policy* 432; H Arksey & M Morée 'Supporting working carers: Do policies in England and the Netherlands reflect "doulia rights"?' (2008) *Health and Social Care in the Community* 16.

assistance, or into significant practical assistance to caregivers'.¹⁰ The same situation occurs in Latin America where many countries have laws that oblige family members to provide assistance or help (also the economic obligation) for their relatives but make little or no provision for compensatory support for such carers.¹¹ As Clements notes, in much the same way that the English Poor Law obligation to care for family members was exported to its colonies, the Spanish Civil Code obligation (the duty on family members to provide '*alimentos*') was exported to much of South America.¹²

The social organisation of care in Latin America varies depending on different family dynamics, labour markets, economic structures and traditions. Nonetheless, current data show a number of common features that characterise the social organisation of care in the region, including the fact that care continues to be a function mainly of families, and women within families. It is therefore a matter that is considered to be mainly private.¹³

The dearth of carer specific information; carers' rights legislation and policies; and a carer specific research and literature in Africa and Latin America have the effect of making caregiving an invisible issue: one where carers are not seen as rights holders. Therefore, in these regions, informal carers face multiple obstacles: unemployment, weak health systems, inadequate social protection services and policies, and fragile economies. As result, informal carers and the people they care for frequently live in a situation of extreme vulnerability.

The first part of this paper addresses the concept of care and tackles the development of the carers' rights movement and its theorists. Moreover, this section analyses the gendered nature of informal caregiving and deals with the conflicting relationship between the carers' movement and the disability rights movement.

The second part of this paper goes deeper into the issue of informal caregivers of people with disabilities and the human rights approach. This section analyses examples of public policies that other states have implemented in order to protect the rights of both parts involved in the caring relationship.

10 K Malherbe 'The social security rights of caregivers of persons with disabilities' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 183.

11 L Clements 'Does your carer take sugar? Carers and human rights: The parallel struggles of disabled people and carers for equal treatment' (2013) 19 *Washington and Lee Journal of Civil Rights and Social Justice* 397.

12 As above.

13 K Batthyány Dighiero *Policies and care provision in Latin America: A view of regional experiences* (2015) 16.

The last two sections focus on the situation of informal caregivers of people with disabilities in Africa and Latin America. Due to the fact that these regions are vast, and bibliography about this subject is scarce, this paper compares the policies implemented in selected countries.

2 Care: Complexity, gender and debate

There are very many dimensions to the concept of 'care': public and private; practical and emotional; commodified and uncommodified – and so on. This paper considers the position of those people who provide unpaid care for family or friends: in academic literature such individuals are variously referred to as 'informal carers', 'unpaid care workers', 'caregivers' and 'family carers'.

During the 1980s the rights of caregivers of people with disabilities attracted the attention of researchers and academics in Europe and North America. Feminist scholars in particular focused their analysis on making visible the nature and extent of this work carried out by women in the private domains of the family and home and the cultural and jurisprudential assumptions that this labour was somehow 'natural'.¹⁴ As result, the issue of informal care was identified as a women's issue because caring is a role that falls disproportionately on women. It has an important impact in terms of their equality of opportunities with men. Many time-use studies¹⁵ have demonstrated that women spend more hours than men in caring for members of the family. Discriminatory gender stereotypes, culture practices and the lack of public policies contribute to the perpetuation of this structural inequality. Thus, the carers' rights movement that emerged in the eighties, demands that governments take direct action to challenge this discrimination by developing measures that recognise, reduce and redistribute informal care. Caring policies include health protection and services, provide information, and support carers to balance their work, life and caring roles.

The 'World Report on Disability' states that many persons with disabilities need assistance and support to achieve a good quality of life and to be able to participate in society; most assistance and support comes from family members. State supply of formal services is generally underdeveloped, not-for-profit organisations have limited coverage, and private markets rarely offer enough affordable support to meet the needs of people with disabilities.¹⁶ As a result, members of the families (generally women) have to assume the role of informal carers. This situation has led

14 M Fine & C Glendinning 'Dependence, independence or inter-dependence? Revisiting the concepts of care and dependency' (2005) 25 *Ageing and Society* 603.

15 See R Antonopoulos *The unpaid care work – Paid work connection* (2009); United Nations(n 4 above).

16 WHO *World report on disability* (2011) 137 http://www.who.int/disabilities/world_report/2011/report.pdf (accessed 19 March 2015).

to a debate between the carers' movement and the disability rights movement.

The aim of this paper is not to develop an explanation of this debate but to clarify aspects of how the differences between the two movements arose and the role governments have played in creating these tensions. First, any state policy designed to address the issue of informal care of people with disabilities should address the needs and preferences of both parts in the caring relationship. This paper argues that in order to protect the rights of informal carers and the people they care for, states have an obligation to develop comprehensive and inclusive carers' strategies/legislation. As Rogero García explains, public policies should establish rights and duties around the care and also promote freedom of the people involved (carers and people with disabilities). A proper distribution of care responsibilities requires, firstly that a 'voice' is given to those who receive care and that their rights are respected, and secondly that the rights of those who provide the care (and the context in which that care is provided) are fully addressed.¹⁷

Feminist researchers have led the debate and discussion about care and carers' rights. Arguably, however, they have failed to include the experience of those 'cared for' and as a consequence limited the scope of analysis and as a consequence the potential for compensatory strategies. This paper seeks to argue that supporting informal carers does not necessarily result in less rights or protection for people with disabilities: that the relative impacts do not amount to a zero sum game. This claim is most obviously demonstrated by the fact that the well-being of informal carers has a major impact on those who receive care. As Twigg and Atkin have asserted, caring takes place in a relationship in which both parts are important. Caring cannot be examined separately from the needs and wishes of those they care for. At the same time, it is not possible to focus only on the person with disabilities, ignoring the existence of the informal carer and excluding them from concern.¹⁸ Both, carers and service users, struggle with issues such as dependency versus independence, freedom versus obligation, and symbiosis versus oppositional interests. Consequently, the only way to deal with these struggles is by addressing the needs of both equality and avoiding the prevalence of one above the other.¹⁹

On another hand, Shakespeare states that debate on care and support should recognise that people are different so they have different support needs, aspirations, and values. Consequently, they need different forms of

17 J Rogero García *Los tiempos del cuidado: El impacto de la dependencia de los mayores en la vida cotidiana de sus cuidadores* [The time of caring: The impact of adults' dependency on carers' daily life] (2010) 330-331.

18 J Twigg & K Atkin *Carers perceived: Policy and practice in informal care* (1994) 6.

19 Fine & Glendinning (n 14 above) 617.

care in order to support them in ways that enable them to flourish and achieve their projects; whatever form of care and support is adopted, it needs to be based on respect for both parties – those who deliver care and support and those who receive it. Because the majority of humanity receives and gives care at different points of life and in different relationships, it is wrong to think in terms of opposed interests and separate groups.²⁰

The rights of carers and the rights of persons with disabilities they care for are inextricably linked. For example, for people with psychosocial or intellectual disability, there may be circumstances where they need support from their carers to make decisions and exercise their rights. Article 12 of the Convention on the Rights of Persons with Disabilities provides that states parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. In terms of supported decision-making, family and other relatives (carers) may be central.²¹ A policy that only assesses the needs of one part of this relationship has the potential to leave the other in an inferior position – which in turn may negatively impact on the other party. A failure to fully address the needs of carers risks therefore undermining relationships, creating dependency and denying autonomy for both, carers and people with disabilities.²²

This analysis does not however deny the complexities and tensions that arise between those involved in this relationship. According to Shakespeare,

some voices in disability studies have failed to embrace the challenge of care, regarding it as an aspect of social oppression that can be eliminated, and replaced by the concept of independent living which can liberate *all* disabled people.²³

This author agrees that care has often been the site of oppression and disempowerment since many caregivers (including families) do not recognise the autonomy, self-determination and even dignity of the people with disabilities they care for. As a result, states should develop systems of care and support that maximise independence and choice, and minimise abuse and paternalism. However, it is central to recognise that care and support relationships are complex, just as the people who receive care are diverse. Many people with disabilities have needs that will inevitably generate forms of ongoing dependency and have a strong preference for

20 Shakespeare (n 3 above) 151.

21 Usually people involved in supported decision-making systems want their families to participate in it. See 'Supporting decision making: A guide to supporting people with a disability to make their own decisions' http://www.dhs.vic.gov.au/__data/assets/pdf_file/0011/690680/dsd_cis_supporting_decision_making_0212.pdf (accessed 15 September 2015).

22 J Morris *Independent lives: Community care and disabled people* (1993) 156.

23 Shakespeare (n 3 above) 135.

informal care. Across the range of options, the important values should be accessibility, affordability, variety, choice, quality, flexibility and control; and developing public policies with this aim is central. In other words, it is unrealistic to claim that informal caregivers respect the autonomy, self-determination and dignity of people with disabilities, if they provide care without any training and without any form of compensatory support.

Public policies should not, as a general rule, subordinate the needs and wishes of one category of persons to those of another. In relation to dependency work, achieving this balance may not be easy but that should be the aim. It is central to develop a shared agenda and to adopt an approach that takes into account the relationship and common interests of both parties.²⁴ A good informal carer assessment is not about denying self-advocacy to people with disabilities because it should go along with an approach that enables those who receive care to speak up for themselves and be listened to. At the same time, the informal carer assessment may enable the carer to consider her or himself as a person with needs of her/his own.²⁵

In 2001 Fiona Williams summarised a number of the above propositions when she noted that 'writers on the ethics of care, on independent living and disability, point to the need to link their strategies to a participatory democracy'²⁶ of giving people voice and choice. Those involved in care practices may begin to voice their claims and dialogues between unpaid carers and people with disabilities are central. These practices recognise 'different perspectives and identities, and aims towards a common vocabulary of values' because 'from each positioning the world is seen differently'. A comprehensive policy involves dialogue in which 'differences are seen as important, but not in hierarchical terms; they should encompass rather than replace equality; there is a recognition of the differences in identity and values'.²⁷

3 Informal carers, rights and public policies

The main aim of human rights is transforming power dynamics between individuals in society, in order to challenge oppression, subvert the subordination and marginalization of certain groups and individuals, and promote individual agency, autonomy and respect of the inherent dignity of every human being.

24 V Williams & C Robinson 'More than one wavelength: Identifying, understanding and resolving conflicts of interest between people with intellectual disabilities and their family carers' (2001) 14 *Journal of Applied Research in Intellectual Disabilities* 31.

25 Williams & Robinson (n 24 above) 45.

26 F Williams 'In and beyond New Labour: Towards a new political ethics of care' (2001) 21 *Critical Social Policy* 483.

27 As above.

The unequal distribution of informal care is a human rights concern because it reflects and determines power relations between women and men; between families and relatives of people with disabilities and other families; and between those who can pay care services and those who cannot. States have a duty to act because these inequalities are obstacles to full human rights enjoyment. It follows that when any state fails in its duty and its public policies are inadequate 'either the cost of care is borne by the caregiver alone or the recipient of care suffers'.²⁸ Addressing the issue of informal carers is central because 'support systems and interventions can meet their needs, and local and national organisations can provide them with vital support in order to continue to provide care'²⁹ for their children, husbands, fathers and mothers.

The Convention on the Rights of People with Disabilities sees support and assistance as a means to preserving dignity and enabling individual autonomy and social inclusion. Equal rights and participation are thus to be achieved, in part, through the provision of support services for people with disabilities but also their families.³⁰ The World Report on Disability addresses the adverse consequences for informal caregivers when they performed this task without any support. Stress, disruptions to sleep and the emotional impact of care affect the caregiver's personal health. Moreover, informal care may result in loss of economic opportunities, as caregivers either reduce their paid work or refrain from seeking it.

To address these issues, policy responses should be comprehensive. Policies to address these deficiencies should not be seen as competing with the demands of people with disabilities – either in the context of independent living or of 'participation'. The needs and rights of the informal caregiver may be different from the needs and rights of the persons with disabilities so a balance must be found, so that each person has independence, dignity, and quality of life.³¹ 'Across the range of options, the important values should be accessibility, affordability, variety, choice, quality, flexibility and control'.³²

On another hand, the lack of policies to address the issue of informal care may lead to situations of discrimination. The landmark case *Coleman v Attridge Law*³³ confirmed, for the first time, the existence of (a European) concept of transferred or 'associative' discrimination. It is important to highlight that this concept was applied in a case that involves an informal carer. Sharon Coleman worked as a legal secretary, and was the mother of child with disability. She alleged that, when she returned from maternity

28 A McNally & H Mannan 'Perception of caring for children with disabilities: Experiences from Moshi, Tanzania' (2013) 2 *African Journal of Disability* 1.

29 As above.

30 WHO (n 16 above) 138.

31 As above 142.

32 Shakespeare (n 3 above) 146.

33 *Coleman v Attridge Law* (2008) 722 IRLR para 26.

leave, her former employer refused to allow her to return to her existing job; she was treated less favourably than other employees in comparable positions because she was the primary carer of a child with a disability. Moreover she was not allowed the same flexibility regarding her working hours as parents of non-disabled children; she was described as 'lazy' when she requested time off to care for her child, whereas parents of non-disabled children were allowed time off. In addition, she claimed that abusive and insulting comments were made about both her and her child. No such comments were made when other employees had to ask for time off or a degree of flexibility in order to look after non-disabled children. Having occasionally arrived late at the office because of problems related to her son's condition, she was told that she would be dismissed if she came to work late again. No such threat was made in the case of other employees with non-disabled children who were late for similar reasons.

In its judgment, the European Court of Justice held that she suffered discrimination by association: that the prohibition of direct discrimination is not limited only to people with disabilities.

Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination.³⁴

This case provides an example about one aspect of informal care: they may face discrimination in their workplaces because of their caring role.

In political terms, Fiona Williams suggests an alternative to address the issue of informal care. She argues that an ethic of care needs to be developed: one that 'must drive our democratic practices deeper'. It has to involve dialogues between informal carers and people with disabilities. She suggests that the practices of transversal politics may be helpful because 'it recognises different perspectives and identities, and aims towards a common vocabulary of values.'³⁵ In public policies, the practice involves dialogue between informal carers and people with disabilities, in which differences are recognised and seen as important but not in hierarchical terms.³⁶

Kittay is seen as an early and highly influential voice in identifying the need of informal carers for the support of others to ensure that their own needs are met (as well as those of the person they care for). They, who are predominantly women, can experience inequalities, disadvantage, and

34 *Coleman* (n 33 above) para 56.

35 F Williams 'In and beyond New Labour: Towards a new political ethics of care' (2001) 21 *Critical Social Policy* 483.

36 N Yuval-Davis 'What is transversal politics?'(1999) 12 *Soundings* 94-95.

they run the risk of poverty. Thus, Kittay argues that informal carers' efforts should be reciprocated by society.³⁷ In addition, applying a rights discourse, West addresses their disadvantaged position by proposing a more substantial demand. She states that informal carers should have the right to care and to be supported in this activity. This support may improve informal carers' well-being and provide some security while caregiving.³⁸ Furthermore, it may help to reduce women's disproportionate discrimination in terms of economic activity and gendered role differentiation.³⁹

Given the challenges that informal care provision raises in terms of human rights (for informal carers and people with disabilities), some countries have made significant legal and regulatory changes in relation to care provision.

As a result, there are now laws and even constitutional norms that recognize care and the need to find a more equitable way of distributing responsibilities, both within the family and between public institutions.⁴⁰

These provisions assume that caring for people with disabilities is an important contribution to their societies, help to reduce the dependence on long-term paid care systems and enable those living with health issues or disability to participate more fully in their communities.⁴¹ In addition, by valuing and supporting informal carers, these provisions contribute in the development of strong healthy families that are able to help their members (those who receive care) to reach their full potential as participating members of society. This includes considering the impact of their role on carers' lives and the lives of those they support if carers' well-being is compromised. Caring policies include health protection and services, provide information, and support carers to balance their work, life and caring roles.

Countries that have enacted laws and public strategies to protect carers, have accepted caring as a shared social responsibility. These are focused on improving health and well-being of carers, economic security, information and access, services for carers (for example, emotional support), education and training. The meeting of such needs extends beyond income maintenance benefits and social services provision to equal access to public space and transport, and to anti-discriminatory and anti-

37 EF Kittay 'A feminist public ethic of care meets the new communitarian family policy' (2001) 111 *Ethics* 523.

38 R West 'A right to care' (2004) April/May issue *Boston Review* <http://new.bostonreview.net/BR29.2/west.html> (accessed 15 July 2015).

39 H Arksey & M Morée 'Supporting working carers: Do policies in England and The Netherlands reflect *doulia* rights?' (2008) 16 *Health and Social Care in the Community* 651.

40 Batthyány Dighiero (n 13 above) 13-14.

41 Ministry of Social Development 'The New Zealand carers' Strategy Action Plan for 2014 to 2018' <http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/policy-development/carers-strategy/> (accessed 15 September 2015).

poverty policies. In addition, these kind of policies argue against inequalities in care giving and care receiving.

Williams argues that initiatives of this kind challenge the false dichotomy of carer and cared for, and asserts the fundamental importance of an inclusive citizenship where all those involved in the social processes of care have a voice, particularly those whose voice has historically been marginalised. Therefore, she states that care is not only personal; it is an issue of public and political concern whose social dynamics operate at local, national and transnational levels.⁴² The main objective is to support carers, from the communities in which they live, in the planning and provision of the services that they and the person they are caring for need, and to develop policies to help them to combine employment with caring.

However, in many countries, the situation is different because carers' rights remain an invisible issue and public policies are inadequate or non-existent. Africa and Latin America are continental examples of this.

4 Informal carers in Africa

Research examining the needs and situation of informal carers of people with disabilities is not common in the African context. Thus, there is a need for more qualitative studies to provide rich insights into the realities of care.⁴³

In South Africa, the White Paper for Social Welfare exhibits a clear preference for family care of persons with disabilities. It recognises that: 'the family is a significant support system in meeting the needs of people with disabilities. Appropriate support must be provided for families involved in care-giving'.⁴⁴ The White Paper provides that

home care-givers will be given emotional support in caring for their family members as well as financial support; training in home nursing and how to access the services of organisations providing complementary services, such as psycho-social and spiritual counselling, transport to hospital and home visits.⁴⁵

Moreover, it specifies that women are the key providers of unacknowledged social care to people with disabilities and their needs should be addressed. Malherbe has referred to this policy preference for family care for persons with disabilities and highlighted the fact that its

42 Williams (n 26 above) 487.

43 McNally & Mannan (n 28 above) 1.

44 *White Paper for Social Welfare* (1997) para 1 http://www.gov.za/sites/www.gov.za/files/White_Paper_on_Social_Welfare_0.pdf (accessed 3 November 2014).

45 *White Paper for Social Welfare* (n 44 above) para 88.

provisions do not translate into sufficient statutory assistance, or into significant practical assistance, to caregivers.⁴⁶

South African social assistance legislation provides for a grant payable to the family caregiver. For both grants, it is the fact that the person with disabilities receives home care that leads to the payment of the grant. On one hand, the care dependency grant is payable to the parent, foster parent or primary caregiver of a child with disabilities. The purpose of the care dependency grant is to assist the parent, foster parent or guardian to care for children with disabilities in their family home. Malherbe explains that the grant discontinues if the child receives 24-hour care in a state funded institution for longer than six months. Thus, it illustrates the link between family homecare of the child with disabilities and the payment of the care dependency grant.⁴⁷ On another hand, the *disability grant* is a social grant intended to provide for the basic needs of people with disabilities (adults). In addition, the grant-in-aid is provided as an additional grant to adults who are already receiving the disability grant and it allows them to live at home instead of receiving institutional care. Currently, no grant is payable directly to caregivers while they are providing care for adult family members with disabilities.

As it has been explained in previous sections, support for informal carers goes beyond an economic provision. Other issues such as information and access, services for carers (for example, emotional support), education and training are central. Moreover, a social insurance system that excludes family caregivers or pays them minimum benefits only, cannot be regarded as a reasonable measure to provide access to social security as required by section 27 of the South African Constitution.⁴⁸ Thus, states should step in to remove barriers to the realisation of their social security rights.

In Uganda, the National Policy on Disability states that

the family is the basic unit for providing care and support to people with disabilities (PWDs). PWDs should benefit from the family and community care and protection. It is therefore, the responsibility of the parents or caregivers to PWDs to provide food, clothing, housing, love, care, education, health and other basic services that promote and protect the rights of PWDs.

The policy unquestionably places specific duties on informal caregivers. It does so however in the context of acknowledging that caregivers may themselves be the recipients of services. It provides that 'the objectives of this policy are ... (ii) to promote effective friendly service delivery to PWDs and their caregivers; (iii) to ensure that resources for initiatives that

46 Malherbe (n 10 above) 183.

47 Malherbe (n 10 above) 187.

48 Malherbe (n 10 above) 195.

target PWDs and caregivers are mobilised and efficiently utilised'.⁴⁹ Strengthening and empowerment of people with disabilities and their caregivers is one of the strategies mentioned by this policy. Moreover, it provides that support will include provision of basic, physical and psychosocial needs of PWDs AND their caregivers.

Objectively, however, the National Policy only addresses the claims of informal carers as one to be addressed by 'soft' rights without providing any specific entitlement or clarity over provision about which services they may receive and what kind of support that should be available. Hartley et al in their analysis of the situation of informal carers of disabled children in Uganda found that informal carers (parents) who participated in their study were coping with their children's disabilities without interaction with national community-based rehabilitation (CBR) programmes. 'Several informants expressed the view that more information would assist them in caring for their children and reducing their own stress levels.'⁵⁰ The lack of such support had a negative impact on both the informal caregivers and the carers of children with disabilities. For carers, because they did not receive any support in their task and for children with disabilities, because they did not receive services of quality. Hartley mentions that carers of children with hearing or speech deficits faced particular challenges of the breakdown in communication because of inadequate knowledge in the use of signing and that this was a clear example of the importance of training family caregivers.

Studies about informal caregivers in Kenya indicate that

'because of a lot of care-giving strain and lack of rehabilitation services in the community, carers had to learn new skills to cope with child's disability. They improvise materials for exercises at their homes in order to maintain continuity of therapy'.⁵¹

In addition, information given was scanty or sometimes non-existent and external support was from almost invariably from non-governmental organisations or charitable organisations. Finally, family caregivers identified poverty as a central impediment to the caring process.

5 Informal care in Latin America

In Latin America, despite the progress made on gender equality policies, economic, social and political institutions still operate under the

49 Ministry of Gender, Labour and Social development 'National Policy on Disability in Uganda' January 2006.

50 S Hartley et al 'How do carers of disabled children cope? The Ugandan perspective' (2004) 31 *Child: Care, Health & Development* 174.

51 JK Gona et al 'Caring for children with disabilities in Kilifi, Kenya: What is the carer's experience?' (2011) 37 *Child: Care, Health & Development* 180.

assumption of a sexual division of labour that leads women as primary informal caregivers of people with disabilities. Moreover, there is an absence of policies focused on supporting informal caregivers.

In Colombia, researchers have been addressing this issue and building awareness and there appears to be a general consensus that there is a lack of services to help informal carers on their tasks, and information about the available facilities. This situation may change if the Project of Law 33 of 2009 finally becomes law. This Project recognises family caregivers and establishes their rights; it provides that they will have access to instrumental, emotional and social support. Moreover, caregivers should receive training about the disease or condition of the person in their care, as well as techniques for home care, first aid and medication management. They will have access to health protection and services, and social security. However, currently, this Project has not been enacted as a law. A study conducted to meet the needs of informal carers of people with disabilities revealed that even though the participants considered that there had been some progress in developing public policies related to the needs of people with disabilities, they did not consider that any progress had been made in relation to the needs of informal carers.⁵² The study highlighted the severe need for the development of integrated programmes focused on both the welfare of people with disabilities as well as their informal carers.

Argentina and Chile (like South Africa) provide pensions for parents with a son or daughter with a disability and for married couples when one partner has a disability. However, the laws and programmes of these two nations on disability make no provision for the support of caregivers. In most cases, NGO's provide psychological support, information and even training for informal caregivers.

In the case of Chile, the programme 'Chile Crece Contigo'

is an integrated system of social interventions and benefits that aim to provide comprehensive support for children and their families, from the stage of gestation until they enter the school system at four years of age, by providing the tools needed for them to develop their potential to the maximum. Modular implementation of the social-protection system should activate an increasingly wide-ranging welfare system that would include all citizens.⁵³

However, this programme is only focused on childhood so it may produce a positive impact on family caregivers of children with disabilities.

Uruguay is in the process of developing a National System of Care (NSC). The programme results from a deep study (in which it is asserted

52 MT Buitrago-Echeverri et al 'Necesidades generales de los cuidadores de las personas en situación de discapacidad' [Overall Requirements in Caregivers of People Experiencing Disability] 12 *Investigación en Enfermería: Imagen y Desarrollo* 60.

53 Batthyány Dighiero (n 13 above) 27.

that civil society was central and all the relevant actors involved had a voice) about the situation of caring in the country and it seeks to address the gender nature of care providing. The NSC is focused on four population groups: childhood, people with disabilities, older people and carers (formal and informal). It provides support and counselling for family caregivers, special permissions at work, training and access to formal care. The NSC is currently in its first phase of implementation and testing.⁵⁴ The first action has been to allow people with severe disabilities to choose and hire personal assistants (who cannot be members of their family). It is too soon to make a judgment about the success of this new policy but it definitely implies an important step forward.

In 2010 the strategy of the Costa Rican government (2010-2014) sought to strengthen care options within its social policy, by creating a network of care and development services for children and older adults, and for workers of both sexes and their families. This policy recognised the urgent need to provide care for the most vulnerable sectors and to promote the exercise of a rights-based citizenship. The National Care Network is an institutional network of care services for children and older adults; it is based on an expansion of existing services and also promotes new services and care modalities.⁵⁵ However, this programme does not address the issue of people with disabilities and their informal caregivers: the specific needs of this population group have not been included.

Finally, in Ecuador, article 47(9) of its National Constitution recognises that family of people with disabilities have the right to psychological assistance and to receive support in their productive projects. Moreover, article 49 states that family caregivers will be covered by social security and will receive training. Family caregivers receive a grant and the National Plan called *Plan Nacional para el Buen Vivir (PNBV)* provides to support them in their caring role: psychological assistance, health services and training. This Plan is being implemented gradually and its goals must be met by 2017.

6 Conclusion

This paper has shown that discussions about caring engage multiple dimensions – principally human rights, social protection, gender and socio-economic inequalities. It has argued that in consequence social protection measures should address the rights of caregivers as a core concern and through normative principles. Informal caregivers require

54 R Aguirre & F Ferrari 'La construcción del sistema de cuidados en el Uruguay: En busca de consensos para una protección social más igualitaria' [Building a system of care in Uruguay: In search of consensus for a more egalitarian social protection] (2014) http://repositorio.cepal.org/bitstream/handle/11362/36721/S2014269_es.pdf?sequence=1 (accessed 20 March 2015).

55 Batthyány Dighiero (n 13 above)32.

consideration as the 'subjects' of policies on an equal footing to those they care for and that by acknowledging these factors and by improving their access to social welfare support services, employment support and training – will improve not only the well-being caregivers but also that of the people for whom they care.

According to the CRPD and the social model, disability results from the interaction between persons who have long-term physical, mental, intellectual or sensory impairments and an environment filled with physical, attitudinal, communication and social barriers that hinders their full and effective participation in society on an equal basis with others. Thus, disability is socially constructed by our societies. These are the same societies in which informal care is seen as an exclusively female activity and a private issue inside families. At the same time, the CRPD and the social model provide different principles such as: respect for dignity; individual autonomy; independence; non-discrimination; full and effective participation and inclusion in society; between others. These principles are central in caring relationships however, informal carers need to be trained and supported in order to fulfil with these principles.

Although legislation in Africa and Latin America reflects the view that families have the primary duty to care for family members with disabilities, there is a growing awareness that states should provide protection to these families and support in their care role. Firstly, because care is a gendered activity since women are far more likely than men to be engaged in providing care within home, and to provide care for longer periods of time. Therefore, a neglect of this crucial question creates multiple inequalities that states have the obligation to address. Secondly, because if informal caregivers do not receive support their difficulties may be articulated in the language of 'associative' or indirect discrimination. Thirdly, because the provision of rights and services for caregivers has a positive impact in those they care for.

This paper asserts that in Africa and Latin America, in developing regions, there is a shortage of studies about informal care in terms of national statistics and needs assessment. The dearth of such materials has been an obstacle for this paper and it is evidence of how marginalised this topic is: evidence of the relative invisibility of family caregivers and of how their lives are characterised by conditions of fragility and the lack of resources. In Latin America it is possible to identify a step forward to address these issues. However, the progress made in Chile and Uruguay only impact in a small part of the regional population since the position in the more populated countries (Colombia, Argentina or Brazil) is significantly less. It follows from this analysis that in Africa and Latin

America 'one of the most neglected areas of disability law is the protection of family members providing care to people with disabilities'.⁵⁶

Thinking about reciprocity and yet taking dependency seriously means acknowledging the importance of reciprocating the efforts of those who do the labour of caring. Thus, another (the state) must be available to support and help informal carers. Kittay has chosen to name this notion of reciprocity as 'doulia' which is a term she has adapted from the postpartum caretaker, the 'doula', who assists the mother who has just given birth, not by caring for the infant but by caring for the mother so that the mother can herself care for the infant. From this insight she argues that we have all benefited from the care of another, who has seen us as worthy of an investment of care and attention merely to survive, much less thrive, as we grow into adults. If each is worthy of care, then caregivers, too, deserve care when they are in need.

Even as I care for another, I, too, am worthy of care. This is a notion of fairness and reciprocity that involves at least a third ... This conception provides a theoretical framework that needs specification through explicit programs and policies. It calls for a collective, social responsibility for care, but one that doesn't dilute relationships⁵⁷

between the person who need care and the caregiver. Society has a collective responsibility to support caregivers that must accompany calls for personal responsibility and address gender inequality.

⁵⁶ Malherbe (n 10 above) 181

⁵⁷ E Feder Kittay 'A feminist public ethic of care meets the New Communitarian Family Policy' (2001) 111 *Ethics* 532.

CONFRONTING THE DOUBLE MARGINALISATION OF GIRLS WITH DISABILITIES: PRACTICAL CHALLENGES FOR THE REALISATION OF THE RIGHT TO EDUCATION FOR GIRLS WITH DISABILITIES UNDER THE DISABILITY ACT OF MALAWI

Jim Nyanda

Summary

Girls with disabilities are subjected to multiple challenges due to their disabilities. They face discrimination that most women face. They are discriminated due to their disabilities. They encounter barriers that most children encounter. This is the double marginalisation that breeds and sustains the dehumanising problems experienced by girls with disabilities. This creates a vulnerable group within a vulnerable group. Most of the times, girls with disabilities are more likely than boys to encounter severe difficulties in accessing education. Fortunately, Malawi passed the Disability Act in 2012 which epitomises the social model approach to disability. The Act attempts – to a large extent – to domesticate the state’s obligations under the Convention on the Rights of Persons with Disabilities (CPRD). The hallmark of the Act is a myriad of rights including the right to education. This is an important right that can facilitate the elimination of most forms of discrimination that girls with disabilities face. However, the realisation of the right to education as provided in the Disability Act is hampered by several socio-legal and physical structural challenges. The Act, by failing to recognise that other persons with disabilities like girls with disabilities are multi-disadvantaged, fails to provide the reasonable accommodation that it purports to advance. The notion of dignity and equalisation of opportunities for persons with disabilities can only be realised if the right to education for girls with disabilities is properly articulated in the Act. Further, the remedial mechanisms provided under the Act and it is contended that the remedies it provides should be simplified to make them ‘user friendly’ to people that are multi-vulnerable – such as girls with disabilities. The paper proposes a more expansive formulation of locus standi in enforcement of the rights provided under the Act. It further appraises administrative penalties provided in the Disability Act.

1 Introduction

'Education has a vital role in empowering women' and it is 'one of the best financial investments states can make'.¹ Education is not only a right in itself but also indispensable for the exercise of other human rights.² The Disability Act of 2012 provides the right to inclusive education to persons with disabilities. This is commendable because education is the primary vehicle by which economically and socially marginalised people can lift themselves out of poverty and obtain the means to participate fully in their communities.³ Unfortunately, Malawi has not been making progress in education. The total literacy rate for all adults fell from 64,1 to 61,3 per cent.⁴ Remarkable progress has been made in gross primary school enrollment but the same is not true for secondary schools.⁵ Primary school enrollment rose from 23,6 per cent in 1995 to 38,0 per cent in 1999 to 34,2 per cent in 2012.⁶ According to UNESCO, in 2007 the enrollment ratio for Malawi was about 1 per cent compared to 6 per cent for sub-Saharan Africa and 26 per cent for the world as a whole. Just like the rest of the world, the enjoyment of the right to education remains a distant goal for many people.⁷ Although Malawi adopted free primary education, many people cannot afford quality education due to other hidden costs such as school uniforms and transport costs.⁸

The realisation of the right to education remains a pipe dream for girls with disabilities because they face multifaceted problems over and above other people. These problems hinder the realisation of the right to education. They are subject to disability related discrimination and challenges. They face the vulnerabilities of being children and they encounter challenges that all females encounter. It is imperative that the double discrimination faced by girls with disabilities should be addressed by reasonable accommodation over and above that accorded to the rest of persons with disabilities. Unfortunately, the Disability Act of 2012 does not recognise girls with disabilities as a vulnerable group within a vulnerable group.⁹ Its articulation of the right to education for girls with

1 Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No 13 'The right to education' Doc E/C.12/1999/10 (8 December 1999) para 1.

2 As above.

3 As above.

4 P Zeleza 'The persistent poverty of development and democracy in Malawi' Essay specially written for presentation as Keynote Address at the 2014 Social Science Conference on 'Towards Malawi at 50: Socioeconomic achievements and challenges' Chancellor College, University of Malawi, 26-27 June 2014.

5 As above.

6 As above.

7 General Comment No 13 (n 1 above) para 2.

8 Most primary schools impose development fees.

9 AC Munthali 'A Situation Analysis of People with Disabilities in Malawi' (2011).

disabilities is generalised and does not make special measures to ameliorate and compensate for the multifaceted challenges they face.¹⁰

This paper examines the normative content of the right to education with emphasis on the availability and accessibility of quality education to girls with disabilities. It discusses the core obligations of states *vis-à-vis* the positive realisation of the right to education for girls with disabilities. It establishes that the obligations of states in the realisation of the right to education are classified into core obligations and aspirational obligations.¹¹ States should perform core obligations immediately that do not require the expenditure of resources.¹² The state is obliged to take reasonable legislative and other measures to achieve progressive realisation of this right.¹³ 'Progressive realisation' requires states to continuously strive to strengthen the right to education.¹⁴ This requires clear legislative guarantees of the right to education embedded with affirmative action to address the peculiar predicament of girls with disabilities. There should be legislative provisions that mandate the government to progressively realise the right to education for girls with disabilities within the confines of available resources. In Malawi, there has been perpetual laxity in the allocation of resources towards education for girls with disabilities although the state is not obliged to go beyond available resources to realise it.¹⁵ Malawi wrongly attributes its failure to meet its minimum core obligations to lack of available resources without demonstrating that it has exhausted the available resources at its disposal to satisfy, as a matter of priority, those minimum obligations.¹⁶ This results in failure to realise the right to education which erodes human dignity, freedom and equality thereby rendering the aspiration to realise human rights having a hollow ring.¹⁷ Government policy should be rationally geared towards the realisation of this right.

10 *Price v United Kingdom* (2002) 34 EHRR 53. Under sec 11(2)(2) of The Constitution of the Republic of Malawi foreign case law and principles of public international law are persuasive.

11 M Langford (ed) *The justiciability of social rights: From practice to theory* (2008) 24.

12 *Purohit and Moore v The Gambia* African Commission on Human and Peoples' Rights Communication No 241/2001, Sixteenth Activity report 2002-2003, Annex VII (May 2003) para 84.

13 Cf sec 27(2) of the Constitution of the Republic of South Africa, 1996.

14 *Purohit* (n 12 above) para 84.

15 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

16 CESCR, General Comment No 3 'The Nature of States Parties Obligations' E/1991/23 (14 December 1990) [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En) (accessed 26 August 2014) para 10.

17 *Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal* D&CLD 5846/97 (21 August 1997) (unreported).

2 The double marginalisation of girls with disabilities and the right to education in Malawi

Malawi is a poor country with more than half of the population living below the poverty line.¹⁸ Poverty is incompatible with human dignity which is the foundation stone of human rights.¹⁹ In Malawi, poverty is more manifest amongst persons with disabilities. Malawi has a population of 13.8 million,²⁰ of which about 480 000 are persons with disabilities. This represents 4,18 per cent of the total population.²¹ The prevalence of disability amongst children is at 2,4 per cent²² as compared to 4,8 per cent for the general population.²³ About 2,2 per cent²⁴ of them are girls while 2,5 per cent are boy.²⁵ Statistics demonstrate access to social services is a challenge for persons with disabilities. For example, 40 per cent of people with disabilities fail to receive education. For instance, more than twice as many of children without disabilities 41,1 per cent attended school.²⁶

In Malawi, most girls with disabilities fail to access education due to their disabilities. They face peculiar hurdles to attend, and complete school.²⁷ However, the just like the majority of children with disabilities, they face problems of access to education and other public services.²⁸ Children with disabilities are not culturally accepted in education institutions due to a deep-seated prejudice and fear of disability, which is often viewed as a curse or punishment.²⁹ Parents feel embarrassed to have children with disabilities and rarely send them to school in order to hide their 'embarrassment'. Some parents do not send girls with disabilities to school in order to protect them from the stigma associated with education. Consequently, children with disabilities are isolated. The isolation of children with disabilities perpetuates such myths.³⁰ The National Policy on Special Needs Education demonstrates that lack of sufficient funding,

18 It is ranked 170 on the UN human development index income (UNDP, 2008). UN Human Development Report 2012 www.undp.org.com (accessed 15 April 2013).

19 P Alston 'Ships pebbling in the night: The and the debate seen through the lens of MDG' (2005) 27 *Human Rights Quarterly* 755 786.

20 National Statistical Office, The 2008 Malawi Housing and Population Census Republic of Malawi' Zomba National Statistical Office (NSO) (2008).

21 E Aide & M Loeb (eds) *Living conditions among people with activity limitations in Malawi: A national representative survey* (2004).

22 The 2008 Malawi Housing and Population Census 159,878.

23 The 2008 Malawi Housing and Population Census 498,122.

24 The 2008 Malawi Housing and Population Census 75,157.

25 The 2008 Malawi Housing and Population Census 84,721.

26 A Munthali et al 'From exclusion to inclusion – Promoting the rights of children with disabilities in Malawi' (2012) 40.

27 D Filmer 'Disability, poverty and schooling in developing countries: Results from 11 household surveys' (November 2005) 1.

28 Committee on the Rights of the Child 'Malawi State Report Submitted under article 44 of the Convention on the Rights of the Child' CRC/C/Add 43, 26 June 2001, para 78.

29 K Kallmann 'Child poverty paper: Alliance for children's entitlement to social security.'

30 Malawi State Report (n 28 above) paras 77-78.

environmental barriers, attitudinal barriers, limited capacity to train specialist teachers and the institutional structure impede the realisation of education for *inter alia* girls with disabilities.³¹ Further hurdles include distance to school, an inaccessible physical environment, physical and verbal abuse of children with disabilities.³² Girls with physical disabilities fail to attend and repeat classes due to difficulties in walking to school and home. Similarly girls with hearing impairments fail to participate in class activities.³³ These problems contribute to a failure in examinations and repeating classes or sometimes dropping out.³⁴ The attitude of the society is the main stumbling block to the realisation of the right to education for girls with disabilities. Lack of education affects the likelihood of girls with disabilities to acquire education that will enable them earn better incomes.³⁵ Children with disabilities must have access to regular schools. Governments should prioritise policies and budgetary support to improve their education system to include all children regardless of individual difficulties.³⁶ Girls with disabilities are not exempted from such challenges due to lack of clear legislation that addresses the plight of multi-disadvantaged groups like girls with disabilities and mandates systematic allocation of resources to address their cause.³⁷

Further, most girls with disabilities fail to attain education due to gender related marginalisation. In Malawian society, the female gender is mostly perceived as 'second class', destined for wifely duties due to gender stereotypes. Consequently, girls are raised as 'brides', girls with disabilities are raised to become good wives and are not sent to school. Girls are encouraged to marry early and ridiculed if they continue with their education unlike boys.³⁸ Sometimes, poverty forces girls to enter into early marriages and this results in teenage pregnancies.³⁹ Additionally, girls with disabilities are burdened with domestic chores due to their gender. Boys with disabilities are exempt from this predicament. On the other hand, girls with disabilities face gender related violence which includes sexual violence. This is perpetuated by some customary beliefs that hold that having sexual intercourse with girls with disabilities is a cure for HIV/AIDS or is a charm. Mostly, girls are forced to marry or encouraged to stay at home and help look after the family while boys are supported financially

31 Ministry of Education *National special needs education policy* Republic of Malawi Government: Office of Ministry of Education. Lilongwe, Malawi: Revised legislative document (2007).

32 H Rousso H *Education for all: A gender and disability perspective* (2007).

33 A Chavuta et al Shire Highlands Education Division – Malawi Baseline Study Report: Montfort Special Needs Education College and Leonard Cheshire Disability International Inclusive Education Project (2008) 31.

34 As above.

35 Filmer (n 27 above) 14.

36 The Salamanca Statement and Framework for Action on Special Needs Education, UNESCO, ED-94/WS/18, 1994 in International Save the Children Alliance 'Children's rights: A second chance' (2001).

37 Malawi State Report (n 28 above) para 81.

38 Malawi State Report (n 28 above) para 80.

39 Chavuta et al (n 33 above) 26.

to attain education. For instance, in a family, preference in attaining education is accorded to a boy child and not a girl child who is further laden with a lot of domestic work at the expense of her education.⁴⁰ These are traditional beliefs and customs that reinforce gender inequalities in education and perpetuate women's secondary status in society and invoke exploitative sexual relations.⁴¹ In schools, there are no remarkable affirmation actions that advance access to education for girls. For example, there are few places reserved for girls who make it at secondary school.⁴² This, over time, turns out to be discriminatory as more and more girls fail to get secondary school places.⁴³ This is evident by low literacy rate for females.⁴⁴ The state should specifically accommodate vulnerable people like persons with disabilities especially girls who suffer double marginalisation of being female and disabled. Paternalistic tendencies affect the positive realisation of the right to education for girls with disabilities.⁴⁵ At a communal level, cultural biases which lead to preferential treatment and allocation of resources and opportunities to male children and children without disabilities.⁴⁶ The entrenchment of widespread cultural attitudes and practices in homes, schools and the communities hinder the realisation of the right to education for girls.⁴⁷

3 The normative content of the right to education

This section discusses the normative content of the right to education for girls with disabilities. It contends that education should be available, affordable and of good quality. For example, states are legally obliged to adopt domestic legislation which effectuates the international right to education obligations.⁴⁸ It opines that despite key achievements in terms of the legal framework protecting the rights of disabled people, many girls with disabilities still fail to access education services that they require.⁴⁹ This predicament should be addressed by reasonable accommodation of girls with disabilities.⁵⁰ The 1995 Constitution of Malawi provides the right to education to everyone without specific provision for reasonable

40 Malawi State Report (n 28 above) para 79.

41 Human Rights Committee 'Consideration of Reports submitted by States parties under article 40 of the Covenant Initial Reports of States parties, Malawi Report' CCPR/C/MWI/1 (13 July 2012) para 76.

42 As above.

43 Zeleza (n 4 above) 13.

44 As above.

45 Malawi State Report (n 28 above) para 81.

46 Chavuta et al (n 33 above) 14.

47 Malawi State Report (n 28 above) para 81.

48 This includes repealing legislation that negatively affects the realisation of the right in question. See *Purohit* (n 12 above) para 84.

49 S Philpott 'Vulnerability of children with disability – The impact of current policy and legislation: Child health' in (2006) *Health Review* 271.

50 This requires private or public institutions to adopt certain measures on an individualised basis to accommodate specific needs of the individual with disability without imposing a disproportionate burden on the duty bearer. O De Schutter *International Human Rights Law* (2010) 641.

accommodation for persons with disabilities.⁵¹ Also, The Disability Act provides the right to education to persons with disabilities without specific reasonable accommodation to multi-disadvantaged groups like reference to girls with disabilities.⁵² These two instruments fail to adequately protect the right to education for girls through their vaguely articulated provisions.

3.1 Availability

The provision of quality and dignified life requires the availability of education to girls with disabilities.⁵³ Education should be available to everyone with functioning educational institutions and programmes in sufficient quantity.⁵⁴ This includes developed institutions, programmes, buildings or safety mechanisms, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology.⁵⁵ Further, education should be available to disadvantaged groups like girls with disabilities with the necessary social facilities that are accessible and secure.⁵⁶ However, in Malawi most children with disabilities are likely to drop out of school due to the disability unfriendly environment.⁵⁷ The government does not have the finance and structural capacity to cater for education facilities, infrastructure, education materials and trainers and infrastructure like school are not adequately available.⁵⁸ Consequently, children with disabilities have traditionally been separated from other children and sent to special schools.⁵⁹ These special schools are poorly funded which makes their survival and development is made difficult.⁶⁰ This poses problems to many children with disabilities to develop to their fullest potential.⁶¹ However, some children with disabilities who pass their examinations are integrated in public secondary schools and universities.⁶² However, most schools are ill equipped and ill funded. For example, there are few secondary schools that can integrate vision impaired children.⁶³ The Malawi Government's Policy Investment Framework, states that government will commit to reducing inequalities in the schools across the social groups and regions by

51 Sec 25 of the Constitution of Malawi.

52 Sec 8 of Disability Act 8 of 2012.

53 Poverty makes people more vulnerable to disability and disability reinforces and deepens poverty. See Ministry of Social Development and Persons with Disability *National Policy on Equalisation of Opportunities for Persons with Disabilities* Republic of Malawi, Lilongwe (2006) para 2.1.

54 General Comment No 13 (n 1 above) para 6.

55 As above.

56 General Comment No 13 (n 1 above) para 16(e).

57 As above.

58 Malawi State Report (n 28 above) para 78.

59 As above.

60 Malawi State Report (n 28 above) para 78.

61 Malawi State Report (n 28 above) para 79.

62 Malawi State Report (n 28 above) para 81.

63 As above.

providing bursary schemes, increasing school enrolment of female learners, increasing community participation in management of local schools, and provision of enabling environments for learners with disabilities by 2012. The allocation of monetary resources is erratic. This can be addressed by amendment of legislation to compel the executive to make financial provision towards educational programmes.

3.2 Quality

The state should regulate the minimum quality of education provided. The Committee on Education stated that the form and substance of education, including curricula and teaching methods should be acceptable (for example, relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.⁶⁴ Unfortunately, in Malawi the quality of education available to girls is affected by poor funding. Quality education should be flexible in order to adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.⁶⁵ Interestingly, the Malawi government is revising the curriculum and developing instructional materials to cater *inter alia* for girls.⁶⁶ Quality education can only be realised if educational opportunities of learners with disabilities are maximised when these learners receive classroom support, their teachers have the relevant skills, and funding is sufficient in order to provide appropriate teaching and learning resources.⁶⁷

3.3 Accessibility

Educational institutions and programmes should be physically and economically accessible to persons with disabilities. Dejectedly, there has been little progress made in the area of access and equity, especially for children with disabilities.⁶⁸ Even for those with some access, the infrastructure is not user friendly and most of the teachers are not trained to cater for children with disabilities.⁶⁹ There are plans to continuously integrate children with special needs in conventional secondary schools and adopting the architectural design of new schools to take into account children with special needs.⁷⁰ Education is not accessible if its cost threatens or compromises people's enjoyment of other human rights.⁷¹

64 The Commission on Human Settlements 'Global strategy for shelter for the year 2000' <http://www.un.org/documents/ga/res/43/a43r181.htm> (accessed 17 June 2013).

65 General Comment No 13 (n 1 above) para 8(d).

66 Malawi State Report (n 28 above) para 263(b).

67 P Farrell et al 'SEN Inclusion and pupil achievement in English schools' (2007) 7 *Journal of Research in Special Educational Needs* 172.

68 Malawi State Report (n 28 above) para 270.

69 As above.

70 Malawi State Report (n 28 above) para 263(a).

71 General Comment No 13 (n 1 above) para 8(c).

The government should facilitate free primary education for all. Primary education has been free in Malawi since the introduction of the Free Primary Education programme in 1994 which abolished the payment of tuition and all forms of charges and also abolished a school uniform requirement. However, secondary and higher education is not free. There are no plans to make them free despite states being obliged to progressively introduce free secondary and higher education.⁷²

Education programmes should prioritise underprivileged people like girls with disabilities who are unable support themselves.⁷³ It is imperative that there should be affirmative action like school fees waiver and special social protection programmes for girls with disabilities. Accessible education considers the specific needs of the disadvantaged and marginalised groups.⁷⁴ States should ensure reasonable accommodation of persons with disabilities in education programmes.⁷⁵ Education institutions should be located within short distance and should be physically safe.⁷⁶ States should address the varying needs of different people across the society's social strata in realising the right to education.

3.4 States' obligations

The right to education imposes three types of obligations on the state: to respect, protect and fulfil.⁷⁷ These obligations effectuate the realisation of education as a universal entitlement with programmed target. These targets include ensuring that by 2015 all children have access to good-quality primary education, with particular attention *inter alia* to girls. They include comprehensive early childhood education and care services, especially for the most vulnerable and disadvantaged children.⁷⁸

3.5 Obligation to respect

The obligation to respect requires states to refrain from interfering, directly or indirectly with the enjoyment of the right to education.⁷⁹ States should undertake positive steps to actualise the right to education.⁸⁰ The obligation to respect requires states to avoid measures that hinder or prevent the enjoyment of the right to education. The state should not

72 General Comment No 13 (n 1 above) para 14.

73 General Comment No 13 (n 1 above) para 94.

74 As above.

75 General Comment No 13 (n 1 above) para 31.

76 R Dworkin 'Is wealth a value?' in R Dworkin *A matter of principle* (2005) 293.

77 Langford (n 8 above) 12. Some Constitutions like the South African Constitution contain these obligations. See also General Comment No 13 (n 1 above) para 44.

78 M Woodhead & P Moss (eds) *Early childhood and primary education: Transitions in the lives young children* (2007).

79 General Comment No 13 (n 1 above) para 47.

80 *Grootboom* (n 15 above).

abduct its duty to respect the right to education by delaying the provision of learning materials.⁸¹

3.6 Obligation to protect

The obligation to protect requires states to take measures that prevent third parties from interfering with the enjoyment of the right to education.⁸² This obligation requires the state and its agents to prevent the violation of any the rights to education – by not only the state itself, but also individuals, private entities and other non-state actors.⁸³ This protects the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls with disabilities from going to school.⁸⁴ The right to education can be protected from improper invasion.⁸⁵ The obligation is to provide access to education health-care, sufficient food and water, and social security to those unable to support themselves and their dependants.⁸⁶ Malawi should protect the right to education from cultural practices that hinder girls with disabilities from realising the right to education.

3.7 Obligation to fulfil

The obligation to fulfil imports the obligations to *facilitate* and to *provide*.⁸⁷ States should take ‘whatever steps’ to fulfil their right to education obligations by taking positive measures that enable and assist individuals and communities to enjoy the right to education.⁸⁸ States are also obliged to provide the right to education when an individual or group is unable, for reasons beyond their control, to realise the right.⁸⁹ Arguably, this includes marginalised groups like girls with disabilities. Amusingly, pursuant to articles 2, 3, and 6 of the CRC, Malawi has made some effort to fulfil the provisions of article 4 of the CRC by prioritising budgetary allocations to ensure implementation of the economic, social and cultural rights of children, especially those belonging to economically and geographically disadvantaged groups.⁹⁰ Further, the obligation requires states to give sufficient recognition to the right to education in the national political and

81 *Minister of Health & Others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 50

82 General Comment No 13 (n 1 above) para 47.

83 *Velasquez Rodríguez v Honduras* Judgment of 29 July 1988 Inter-Am.Ct.H.R. (Ser C) No 4 (1988).

84 General Comment No 13 (n 1 above) para 50. Comparatively, see also *SERAC v Nigeria* Communication No 155/96.

85 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 78.

86 *Soobramoney* (n 17 above).

87 General Comment No 13 (n 1 above) para 47.

88 As above.

89 As above.

90 Malawi State Report (n 28 above) para 78.

legal systems, preferably by way of legislative implementation, and to adopt a national education policy with a detailed plan for realising the right to education.⁹¹ States need to maximise the available resources.⁹² Scarcity of resources forces government authorities to adopt policies that effectively prioritise social services.⁹³ Further, the government should facilitate the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous people and of good quality for all.⁹⁴ Furthermore, government should ensure the availability of education by actively developing a system of schools including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.⁹⁵

3.8 Core obligations

States have ‘minimum core obligations’⁹⁶ to ensure the basic level of enjoyment of the right to education.⁹⁷ They have a duty to positively realise educational rights by immediately fulfilling the core obligation and gradually implementing aspirational obligations over time tabled framework.⁹⁸ The prohibition against discrimination is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.⁹⁹ States have a duty to ensure that no one is deprived of *inter alia* the most basic forms of education.¹⁰⁰ The right to education would be largely deprived of its *raison d’être* without establishing such a minimum core obligation.¹⁰¹ A state can only attribute its failure to meet at least its minimum core obligations to lack of available resources if it can demonstrate that it has exhausted every available resource to satisfy, as a matter of priority, those minimum obligations.¹⁰² Malawi as a party to the ICESCR should meet certain minimum core obligations. This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity.¹⁰³ At a minimum, the state is required to adopt and

91 General Comment No 13 (n 1 above) para 46.

92 *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) 137cBd.

93 Minow, participating in an interdisciplinary discussion held at Harvard Law School in 1993, ‘Session I: Applying Rights Rhetoric to Economic and Social Claims, Economic and Social Rights and the Right to Health’ (Harvard Law School Human Rights Program, Cambridge MA 1995) 1, 3.

94 General Comment No 13 (n 1 above) para 50.

95 As above.

96 *Treatment Action Campaign (No 2)* (n 78 above) para 50.

97 General Comment No 13 (n 1 above) para 50.

98 Langford (n 11 above) 22.

99 General Comment No 13 (n 1 above) para 31.

100 General Comment No 13 (n 1 above) 16.

101 As above.

102 As above. See also: ‘The nature of states parties obligations’ in article 2(1) of ICESCR.

103 General Comment 3 (n 12 above).

implement a national educational strategy which includes the provision of secondary, higher and fundamental education.¹⁰⁴ This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.¹⁰⁵ Girls with disabilities should not be deprived of education which can move them out of a life below the basic level of dignified human existence.¹⁰⁶

States have core obligations which are minimum standards for the right to education.¹⁰⁷ These include availability, quality and accessibility of complimentary services like health services.¹⁰⁸ The services must be acceptable to the marginalised groups including girls with disabilities.¹⁰⁹ The availability of the services to girls with disabilities must be attained by the adoption of relatively low-cost targeted programmes.¹¹⁰ The needs of girls with disabilities should be considered.¹¹¹ The state is obliged to take the best interest of the child when dealing with any matter that involves her rights.¹¹² The obligation falls upon the state where parental care is inadequate.¹¹³ This approach is rational since the education of a person later in life is the product of services invested in their childhood.¹¹⁴ A sustainable approach must be anchored in human rights and gender equality in order to tackle educational rights concerns while addressing the structural challenges to the realisation of the right to education.¹¹⁵ Malawi is obliged to remove gender and other stereotyping which impedes the educational access of girls with disabilities.¹¹⁶ The law should create conditions for human rights to flourish.¹¹⁷

4 Malawi's international education rights obligations for girls with disabilities

The first international instrument that provided the right to education was

104 General Comment 13 (n 1 above) para 52.

105 General Comment 3 (n 12 above).

106 *Treatment Action Campaign (No 2)* (n 78 above).

107 *Treatment Action Campaign (No 2)* (n 78 above) para 43.

108 General Comment 13 (n 1 above) para 13.

109 General Comment 13 (n 1 above) para 43.

110 General Comment 13 (n 1 above) para 12.

111 *Treatment Action Campaign (No 2)* (n 78 above) was partly based on secs 28(1)(b) and (c) of the Constitution, which provide that every child has the right to social services.

112 P Alston 'The Legal Framework of the Convention on the Rights of the Child' 91(2) *Bulletin of H.A 1*.

113 *Grootboom* (n 15 above) paras 76-77.

114 DF Alwin & LA Wray 'A life-span developmental perspective on social status and health' (2005) *Journal of Gerontology: Social Sciences* 7.

115 S Fried et al 'Integrating interventions on maternal mortality and morbidity and HIV: A human rights-based framework and approach' (2012) 14 *Health and Human Rights* 21.

116 General Comment No 13 (n 1 above) para 55.

117 E Cameron 'What you can do with rights' Law Commission on England and Wales, The Fourth Leslie Scarman Lecture, Middle Temple Hall, London (25 January 2012) 147-159.

UDHR in article 26.¹¹⁸ It provides for compulsory and free elementary education. It furthermore states that education is aimed at the full development of the person. Subsequently, the (ICESCR),¹¹⁹ articulated the right to education in articles 13 and 14. Article 13, *inter alia* imposes an obligation on governments to provide free and compulsory primary education. Article 14 places an undertaking that 'within two years' of becoming a party, the state will adopt a detailed plan of action for the adoption of free and compulsory education. Article 23 of CRC states that a disabled person has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible. Article 28 of the CRC stipulates that the right to education should be progressively realised. Article 29 of the CRC provides that children have equal rights to free education which must respect and promote the rights of children who receive it. Despite the right to basic education being subject to progressive realisation it is specifically stated that primary education, as a component of basic education, should be free and compulsory.¹²⁰ Article 11 of the African Charter on the Rights and Welfare of the Child provides the right to education in order to promote and develop the child's personality, talents and mental and physical abilities to their fullest potential.¹²¹ Further, states are obliged to take measures that encourage regular attendance at schools and the reduction of drop-out rate.¹²² Additionally, there is a need to adopt special measures to ensure equal access to education for all female, gifted and disadvantaged children.¹²³ State parties under CEDAW are obliged to take appropriate measures to eliminate discrimination against women in the realisation of the right to education.¹²⁴ They should in particular ensure 'the reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely'.¹²⁵ It is clear that girls with disabilities have the right to education as children, females and persons with disabilities but there are robust international obligations that can address this double marginalisation.

118 1948.

119 1966.

120 Kallmann (n 29 above).

121 Art 11(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) (1990).

122 Art 11(3)(e).

123 Art 11.

124 CEDAW, art 10.

125 Art 10(f).

5 The conceptualisation of the double marginalisation of girls disabilities in the Convention of the Rights of Persons with Disabilities (CRPD)

The CRPD is an anti-discrimination convention which requires that government plans prioritise the most vulnerable groups to ensure the realisation of the right to education for everyone.¹²⁶ It is a social model convention that uses a rights approach to disability.¹²⁷ Article 1 requires states to promote respect for the inherent dignity of persons with disabilities.¹²⁸ Article 9 requires states to adopt measures to identify and eliminate obstacles and barriers to access amongst others schools. This is attainable if states devise rights based legal institutions to effectuate legally recognised claims or demands.¹²⁹ The CRPD recognises the double marginalisation faced by girls with disabilities and affords them additional protection as a disadvantaged group within a disadvantaged group. It protects them as disabled. Article 6 recognises that girls with disabilities are subject to multiple discriminations and obliges states to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms; it protects them as females. Article 6(2) places a further duty on states parties to take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms. It protects them as children. Article 7 imposes a duty on states to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

Article 24 of the CRPD recognises the right of persons with disabilities to education without discrimination and equalisation of opportunities. Further, states should ensure an inclusive education to fully develop human potential and sense of dignity, self-worth, strengthening of respect for human rights, fundamental freedoms and human diversity.¹³⁰ The gist is inclusive education, free and compulsory primary education via reasonable accommodation of the individual. States are obliged to take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille and to train

126 GC Christie & PH Martin *Jurisprudence: Text and readings on the philosophy of law* 2nd ed (1999).

127 Disabled people International 'Agreed statement' Human Rights Plenary Meeting in Support of European day of Disabled persons 1991 1994://www.ecpp.co.uk/humanrights.htm (accessed 9 July 2015).

128 Human dignity, freedom and equality are achievable if everyone is provided with basic necessities. *Grootboom* (n 15 above) para 44.

129 Christie & Martin (n 126 above) 122.

130 Art 24(1)(a) of CRPD.

professionals and staff who work at all levels of education.¹³¹ The training should incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.¹³² State parties should take positive steps to realise this aspiration.¹³³ This includes the adoption of necessary legal, financial and operational means of ensuring steady progress towards achieving the goals.¹³⁴ Further, states should identify specific national benchmarks designed to actualise the right to education.¹³⁵ Also, states should maintain meaningful statistics on needs, resources and results.¹³⁶ The CRPD does not adopt a 'one-size-fits-all' approach to education but makes positive discrimination of marginalised girls with disabilities.¹³⁷

6 The domestic law, policy and practice

The right to education is promulgated in the Constitution and various legislative instruments. The Constitution of Malawi does not specifically provide disability rights.¹³⁸ However, it obliges the state to actively promote the welfare and development of the people by progressively adopting and implementing policies and legislation that support persons with disabilities through greater access to public places, fair opportunities in employment and full participation in all spheres of the society.¹³⁹ The government is indulged to provide adequate resources to the education sector and devise programmes in order to eliminate illiteracy in Malawi.¹⁴⁰ Further, the government is obliged to make primary education compulsory and free to all citizens of Malawi and offer greater access to higher learning and continuing education.¹⁴¹ This is provided in principles of national policy rather than a bill of rights which dilute its significance.¹⁴² However, Section 25 of the Constitution grants every person the right to education and stipulates that primary education shall consist of at least five years.

131 Art 24(4) of CRPD.

132 As above.

133 *ERRC v Bulgaria* Complaint No 31/2005, Decision on the merits of 18th October 2006, para 35.

134 *International Movement ATD Fourth World v France* Complaint No 33/2006, decision on the merits of 5 December 2007, paras 58-71.

135 Commission on Human Rights Resolution, 1993/14 in Economic, social and Cultural rights, Handbook for National Human Rights Institutions, professional Series No 12: United Nations New York and Geneva (2005) 22.

136 *International Movement ATD Fourth World* (n 134 above) paras 58-71.

137 *ERRC v Bulgaria* (n 133 above) para 35.

138 FEDOMA has submitted that there ought to be a section in the Constitution specifically providing disability rights including the right to education: Federation of Disability Organisations in Malawi *Memorandum prepared by the Federation of Disability Organisations in Malawi for the Constitution of Malawi Review Commission* (2004) Blantyre.

139 Sec 13(g) of the Constitution of Malawi.

140 Sec 13(f)(i) of the Constitution of Malawi.

141 Sec 13(f)(ii).

142 Many socio-economical rights boil to nothing more than an objective of social policy. See G Tomuschet *Human rights: Between idealism and realism* (2003) 92.

This provision is inadequate to the prescriptions of section 13(f) of the Constitution which requires primary education to be both compulsory and free.¹⁴³ There is no social protection or any pro poor programmes to aid multi-advantaged groups like girls with disabilities. There is some saving grace in section 30 of the Constitution which states that children and persons with disabilities should be given special consideration on the application of the right to development. This compliments section 13(f) of the Constitution which requires the state to provide adequate resources for free and compulsory education.

Section 23 of the Constitution of Malawi encapsulates the right of children to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be hazardous or interfere with their education. This read together with the anti-discrimination provisions in section 20 of the Malawian Constitution necessitates the adoption of special measures that include specially providing resources for education for persons with disabilities despite absence of express provision for the same.¹⁴⁴ Further, section 24(2) invalidates any legislation that discriminates on the basis of sex or marital status. It also provides for the passing of legislation to eliminate customs and practices that discriminate against women. The Child Care, Protection and Justice Act requires district councils

to keep a register of children with disabilities within its area of jurisdiction and give assistance to them whenever possible in order to enable those children grow up with dignity among other children and to develop their potential and self-reliance.¹⁴⁵

However, it does not specify what type of assistance the district councils should provide to such children.¹⁴⁶ While the Act provides for all children, including those with disabilities, to fully enjoy their rights, implementation is incomplete.¹⁴⁷ Section 22 of the Child Care Protection and Justice Act criminalises failure to provide for the education of the child for a person under a maintenance order.

The realisation of the right to education will depend upon a robust reasonable accommodation programme that provides financial support to the underprivileged. Educational programmes should be balanced and flexible and appropriately provide for crises, short, medium and long term needs.¹⁴⁸ The programmes should be reasonable by not excluding a significant segment of society.¹⁴⁹ The current Malawian development blue

143 Malawi State Report (n 28 above) para 67.

144 *Equality Minority Schools in Albania* PCIJ Rep Ser A/B, No 64 (1935); Judgment of 6 April 1935. See also *Steel Workers of America v Weber* 443 US 193 (1979).

145 Sec 72 of the Child Care Protection and Justice Act.

146 Munthali (n 26 above) 40.

147 As above.

148 *Grootboom* (n 15 above).

149 As above.

print, the MGDS II does not adequately provide for children with disabilities who are only mentioned in passing under education.¹⁵⁰ Nonetheless, the government is obliged to be 'promoting a conducive environment for girls and students with special education needs'.¹⁵¹ National Policy on Equalisation of Opportunities for Persons with Disabilities¹⁵² purports to promote the rights of persons with disabilities to enable them to fully participate in society. Furthermore, it seeks to guarantee that tangible steps are taken for disabled people to access the same fundamental rights and responsibilities as any other person in Malawi. The policy strives to streamline disability into all government development strategies, plans and programmes. This is congruent to National Education Strategic Plan and Policy Investment Framework¹⁵³ which advocate for increased enrolment of special needs pupils and greater numbers of specialised teachers. It espouses that learners with special educational needs should receive support through among others improving the supply of teaching and learning materials for special needs education. In the Policy Investment Framework, the government seeks to promote the establishment of special schools for children with disabilities. However, as noted in National Policy on Special Needs Education,¹⁵⁴ there are numerous barriers that affect the implementation of special needs education including inadequate funding, inadequate teaching and learning materials, inaccessible infrastructure, long distances to facilities and shortage of specialist teachers.¹⁵⁵ However, most special-needs schools and resource centres facilities are in a state of disrepair, non-functioning water taps and children with disabilities depend on the goodwill of teachers to access health care.¹⁵⁶ The government should adequately address these problems.¹⁵⁷

The National Policy on Early Childhood Development (ECD),¹⁵⁸ *inter alia* seeks to ensure that '[e]very child has the right to develop to his/her full potential'. This inevitably includes girls with disabilities. Further, it avers that '[n]o child shall be discriminated or abused on the basis of age, sex, race, tribe, health status, economic status, religious or political

150 Ministry of Development Planning and Cooperation 'Malawi Millennium Development Goals Report' Republic of Malawi, Lilongwe (2010).

151 There is no elaboration in the MGDS II as to what a 'conducive environment' might be, but the education and related policies provide some explanation. See Munthali (n 26 above) 40.

152 Approved by Cabinet in July 2006.

153 (NESP) 2008-2017.

154 The policy was developed by the Ministry of Education Science and Technology in 2007.

155 Ministry of Education and Vocational Training *The National Policy on Special Needs Education* (2007).

156 The policy developed by the Ministry of Education Science and Technology in 2007.

157 The 'progressive realization' clause imposes an obligation on states to move as expeditiously and effectively as possible towards realising fully the right to education. Cf *Grootboom* (n 15 above).

158 Approved in 2006, was developed by the Ministry of Gender, Children and Social Welfare.

affiliation in the provision of ECD services by any organisation'. Disability is arguably covered although it is not specifically mentioned one of the grounds of discrimination. National Policy on Orphans and Other Vulnerable Children recognise that children with disabilities are vulnerable.¹⁵⁹ There is an omission of children with disabilities despite including a child without a disability but living in a household headed by a person with a disability, but it excludes children with disabilities. These children too are generally abandoned, malnourished and abused and their needs should have been highlighted.¹⁶⁰ There is need to have a clear legislative and policy framework for education for girls with disabilities.¹⁶¹

7 The conceptualisation of double marginalisation of girls disabilities in the Disability Act of 2012¹⁶²

The Disability Act of 2012 seeks to equalise opportunities of persons with disabilities through the promotion and protection of their rights.¹⁶³ It adopts the social model of disability which stresses on the legitimate claim to be accommodated by the society and not to be treated or rehabilitated.¹⁶⁴ The government and relevant stake holders are obliged to ensure the enjoyment of these rights by persons with disabilities.¹⁶⁵ Section 8 of the Act protects the right of persons with disabilities to inclusive education.¹⁶⁶ This is to be attained by ensuring that persons with disabilities are not excluded from the general education system at all levels and have access to quality and compulsory primary education.¹⁶⁷ This provision is defeated by the fact that Malawi does not have compulsory primary education despite having free primary education. Further, the government ought to be taking into consideration the special requirements of persons with disabilities in the formulation of educational policies and

159 Ministry of Gender and Social Welfare *A Plan of Action for Orphans and Other Vulnerable Children 2010-2011* (2010). However, the definition in the policy does not include disability: a vulnerable child is said to be one 'who has no able parents and guardians, staying alone or with elderly grandparents or lives in a sibling headed household or has no fixed place of abode and lacks access to health care, material and psychological care, education and has no shelter'.

160 Munthali A (n 26 above) 23.

161 There are good policies like the National Policy on Equalisation of Opportunities for Persons with Disabilities, the National Education Strategic Plan (NESP), the National Policy on Orphans and Other Vulnerable Children which advocate for an enabling environment for children with disabilities but these are rarely implemented.

162 Munthali (n 26 above) 40.

163 Disability Act 8 of 2012. In particular it incorporates provisions of the CRC and the CRPD. See: Munthali (n 26 above) iii.

164 Disabled people International 'Agreed statement' Human Rights Plenary Meeting in Support of European day of Disabled persons 1991 1994://www.ecpp.co.uk/humanrights.htm (accessed 11 September 2015).

165 Sec 3 of the Disability Act.

166 Sec 2 of the Disability Act

167 Sec 8(1) of Disability Act.

programmes including assistive devices, teaching aids and learning support assistants.¹⁶⁸

In addition, the government should provide financial assistance to economically needy and deserving students with disabilities pursuing secondary and tertiary education.¹⁶⁹ Section 10 of the Disability Act provides the right to social security, despite being passively worded and forms a basis for the enforcement of the right to social security for persons with disabilities. Girls with disabilities can utilise this right to realise their right to education. Affirmative action is a welcome tool to address disparities in different social strata.¹⁷⁰ The government should adopt deliberate admission policies for girls with disabilities in education and training institution.¹⁷¹ However, the greatest weakness with respect to the right to education in the Disability Act is that it fails to recognise the double disadvantage of girls with disabilities. Further, the Disability Act is not fully operational as evidenced by the absence of a Disability Trust Fund which is meant to raise extra resources to support relevant programmes and services.¹⁷² The operation of the fund will be defined by the government and other stakeholders.¹⁷³ The non-establishment of the disability fund is obviously affecting the realisation of the right to education.

The act is reluctant to fully engage with disability and provide full and proper recognition to the rights of disabled person who face multiple disadvantages.¹⁷⁴ This demonstrates legislative vagueness causes marginalisation of girls with disabilities.¹⁷⁵ The Disability Act adopts a 'one-size-fits-all' approach to education but makes positive discrimination of marginalised girls with disabilities.¹⁷⁶ Section 8 of the Disability Act imports the core obligation of non-discrimination but neglects the aspirational respect of the right. The Disability Act should have specifically recognised the multiplicity of marginalisation that girls with disabilities encounter. It should have set a procedure to revise the right to education targets periodically to secure the rights through progressive

168 Sec 8(1)(a) of Disability Act.

169 Secs 8(1)(a) and 8(1)(c) of the Disability Act. In the form of scholarship grants, student loan programmes, subsidies, and other incentives in public institutions and ensure that a minimum of ten per cent of the allocation for students' financial assistance programmes as created by the local government is set aside for students with disabilities.

170 *Cummings v Birkenhead Corporation* [1972] Ch 12 37.

171 Sec 8(2) of the Disability Act proscribes discrimination in education or training institution on the basis of disability. In *Balaji v State of Mysore* [1963] Supp 1 SCR 439, it was held that college places may be reserved for marginalised candidates without stifling equal access to educational institutions for the more qualified candidates.

172 Sec 16 of Disability Act.

173 Munthali (n 26 above) 14.

174 J Rehman *International human rights law – A practical approach* 2nd ed (2010) 601.

175 The Standard Rules on Equalisation of Opportunity for Persons with Disability General Assembly Resolution 48/96 <http://www.un.org/disabilities/default.asp?id=26> (accessed 27 July 2014) para 3.

176 *ERRC v Bulgaria* (n 133 above) para 35.

realisation.¹⁷⁷ Previously, there was an affirmative programme called Girls Attainment of Basic Education (GABLE) which sought to address gender imbalance. The programme sought to increase girls' enrolment, achievements and persistence in schools. Its strategies included paying primary school fees for non-repeating girls, a social mobilisation campaign that emphasised the importance of girls education amongst girls themselves, parents and communities, and, thirdly, the development of gender-sensitive material.¹⁷⁸ This is an example of programmes that should be adopted and legislated into the Disability Act to cater for girls with disabilities and other marginalised groups. There ought to be deliberate legislative provisions that effectuate the right to education rather than vague and inadequate provisions.

There are three ways of enforcing any right under the Disability Act. These are criminal prosecution, administrative penalties and civil action. The Disability Act creates different administrative penalties. The Disability Act creates the offences of discrimination in education institutions. Denying access or expelling a person due to disability is an offence.¹⁷⁹ This is to ensure that persons with disabilities are not excluded from the general education system at all levels and have access to quality and compulsory primary education.¹⁸⁰ The employment of criminal law to eliminate discrimination in education is welcome as it is cheap and prosecution is done by the state machinery.¹⁸¹ The greatest advantage of criminal prosecution of discrimination and associated offences that offend the right to education is that it is cheap since it is publicly funded. This means that poor victims do not have monetary resources unlike civil law which mainly relies on the proficiency of lawyers. However, the downside of this tool is that there has not been any criminal prosecution despite the prevalence of discrimination.

Administrative penalty is a discretionary monetary sum which is imposed flexibly under civil law rather than criminal law.¹⁸² This means that a person who violates the right to education for girls with disabilities is amenable to administrative penalties. Administrative penalties have several advantages but their objectives are similar to criminal punishment.¹⁸³ These are retribution, reformation of the offender,

177 A Sengupta 'The right to food in the perspective of the right to development' in WB Eide & U Kracht (eds) *Food and human rights in development (2007) Vol II: Involving Issues and Emerging Applications* 107 131.

178 Unfortunately the programme is now defunct.

179 Section 8(1) of Disabilities Act.

180 As above.

181 The objectives of criminal punishment are retribution, deterrence, rehabilitation, restoration and incapacitation Per Mwangungulu J in *Gulumba v Republic* Misc Criminal Application Case No 51 of 2003, High Court Principal Registry (unreported).

182 Cf R Macroy & M Woods *Environmental civil penalties: A more proportionate response to regulatory breach* www.ucl.ac.uk/laws/environment/civil-penalty/ (accessed 29 August 2014) para 2.19.

183 Macroy & Woods (n 182 above) para 2.18.

elimination of any financial gain or benefit from non-compliance, restoration of the harm and deterrence.¹⁸⁴ The latter are easier to impose than criminal sanctions because the criminal procedure is complicated.¹⁸⁵ This ensures the punishment of offenders with reduced burden on regulators to secure a successful prosecution and lessening the procedural costs associated with criminal litigation.¹⁸⁶ Normally, a person who is punished by administrative penalty cannot be, subsequently, prosecuted on the original offence despite the fact that directors may still be prosecuted.¹⁸⁷ The power to impose the administrative penalties is vested in the minister. These include a written warning,¹⁸⁸ directing the person to do a specified act, or refraining from doing a specified act, restoration notices and enforcement undertakings to remedy the effects of the contravention or to compensate persons who have suffered loss because of the contravention;¹⁸⁹ or to ensure that the person or institution does not commit further contraventions.¹⁹⁰ Further, a direction may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a corporation, changes in the management of the institution.¹⁹¹ The administrative penalty is recoverable as civil debt but failure to comply with a penalty is an offence.¹⁹² The penalty is payable within thirty days.¹⁹³ Criminal prosecutions should remain appropriate for serious breaches where there was evidence of intentional or reckless or repeated flouting of the law.¹⁹⁴ Administrative penalties are user friendly and not technical too for the use of persons with disabilities but they are yet to be invoked

The right to education is enforceable by judicial review as the Constitution did not sell people a dummy by providing unenforceable rights.¹⁹⁵ The court has power to scrutinise any executive policy on the right to education for girls with disabilities without offending the doctrine of separation of power.¹⁹⁶ The court would not be usurping the executive function by reviewing the executive policy since its duty is to review a policy whether it is reasonable or not.¹⁹⁷ The state cannot deny an individual or group the ability to make Constitutional claims against it

184 Macroy & Woods (n 182 above) para 2.11.

185 Cf M Faure, A Ogus & N Philipsen 'Curbing consumer financial losses: The economic regulatory enforcement' (2009) 31 *Law and Policy* 161.

186 C Abbot 'The enforcement of pollution control laws in England and Wales: A case for reform?' (2005) 22 *Environmental Planning Law Journal* 68.

187 But the Disability Act is unclear.

188 Section 21(1)(a) of Disability Act.

189 Section 21(1)(b) of Disability Act.

190 Section 21(1)(b)(i)(ii) of Disability Act.

191 Section 21(2) of Disability Act.

192 Section 21(3) of Disability Act.

193 Section 21(4) of Disability Act.

194 Macroy & Woods (n 182 above) para 3.6.

195 *Treatment Action Campaign (No 2)* (n 78 above) para 5. See also sec 20(1) of The Disability Act.

196 *Soobramoney* (n 13 above) para 36.

197 *Grootboom* (n 15 above) para 24 & 38.

with respect and education and without any redress to the affected party.¹⁹⁸ The duty of the court is confined to defining the framework of the government policy and delimiting its scope.¹⁹⁹ The nature of the right infringed and the nature of the infringement guide the court as to the appropriate relief in a particular case.²⁰⁰ The courts can grant any orders which can remedy the violations actual or potential of human rights.²⁰¹ A declaratory remedy may not suffice as an effective remedy. Under the Disability Act, the court may award equitable relief.²⁰² This includes an injunction and specific performance.²⁰³ Further, the court may order the provision of auxiliary aid or services, modification of policies, practices and procedures or alternative methods.²⁰⁴ The court may also grant any other relief as the court may consider appropriate, including monetary damages to the aggrieved person.²⁰⁵

Practically, girls with disabilities may lack the knowledge and resources to bring court action to enforce the right to education. Sometimes organisations willing to pursue the public interest matter may not have the required sufficient interest. The enforcement of the right to education for girls with disabilities would be hindered by the rigid Constitutional provisions that confer *locus standi* to people interested in public interest litigation on behalf of disadvantaged groups. The relevant Constitutional provisions for an application for the protection of rights contained in the Bill of Rights are sections 15(2),²⁰⁶ 41(3)²⁰⁷ and 46(2).²⁰⁸ Accordingly, any person seeking to enforce any right should demonstrate sufficient interest in the protection and promotion of the rights in issue

198 S Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 28.

199 *Cruzan v Director, Missouri Department of Health* 497 US 261, 302 (1990) 303.

200 *Hoffmann v South Africa Airways* 2001 (1) SA 1 (CC) para 45.

201 *Maziko Sauti Phiri v The Privatisation Commission and Attorney General* Constitutional Cause No 13 of 2005 (unreported).

202 Sec 20(2)(a) of Disability Act.

203 Treatment Action Campaign (No 2) (n 78 above) para 22.

204 Sec 20(2)(b) of the Disability Act.

205 Sec 20(2)(c) of Disability Act.

206 It now reads as follows:

'Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.'

207 It now reads as follows:

'Every person shall have the right to an effective remedy by a Court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.'

208 It now reads as follows:

'Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled –

(a) to make application to a competent Court to enforce or protect such a right or freedom; and

(b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.'

which is often difficult. The provisions have been interpreted narrowly presumably to avoid opening 'flood gates' for a variety of reasons pertaining to conflicting theoretical, historical and policy justifications.²⁰⁹ The courts have in a number of cases, interpreted the relevant provisions in two broad categories: the liberal and the restrictive approaches.²¹⁰ Under the liberal approach, courts are more amenable to widening standing to litigants while under the restrictive approach they have employed more restrictive standards.²¹¹ The restrictive approach is epitomised by the Malawi Supreme Court of Appeal, which can properly be stated as the current stand of the law, and liberal approach characterises the High Court.

The conclusive position of *locus standi* was articulated in *Civil Liberties Committee (CILIC) v Minister of Justice & Registrar General (CILIC case)*.²¹² The Supreme Court held that CILIC, a human rights non-governmental organisation whose objectives include the protection, promotion and enforcement of human rights and the rule of law lacked sufficient interest to enforce media freedom. It opined that organisations working in the area of press freedom could maintain an action.²¹³ The litigant must demonstrate that the conduct or decision complained of adversely affects his legal rights or interests in order to establish sufficient interest.²¹⁴ It held that, in determining 'sufficient interest', a court may consider the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty for which relief is being sought, and the role of the applicants in giving advice, guidance and assistance.²¹⁵ Section 20 of the Disability Act give the right to sue to any 'person with a disability' or 'any aggrieved person' may commence legal action against that person in any court. This would restrict some organisation from enforcing rights of girls with disabilities.²¹⁶

Arguably, the amendment to section 15(2) of the Constitution by Constitutional Amendment Act Number 11 of 2010 opened a window for a better enforcement of human rights. The amended section 15(2) widens the category of public litigants to include persons, public or natural and

209 L Stein (ed) *Locus standi* (1979).

210 FE Kanyongolo 'Courts, elections and democracy: The role of the judiciary' 115, 213-14 in FE Kanyongolo 'Malawi Justice Sector and the Rule of Law: A Review by AFRIMAP and Open Society Initiative for Southern Africa' (2006) 138-140.

211 MJ Nkhata 'Public interest litigation and *locus standi* in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?' (2008) 2 *Malawi Law Journal*.

212 MSCA Civil Appeal No 12 of 1999 (unreported).

213 AP Mutharika 'The 1995 Democratic Constitution of Malawi' (1996) 40 *Journal of African Law* 216.

214 Relying on *Regina v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386.

215 As above.

216 As above. Unlike the CILIC these organisations were specifically concerned with the rights and freedoms relating to the press.

organisations interested in the promotion, protection and enforcement of rights including the right to education. Nevertheless, the fact that the amended provision still requires proof of sufficient interest means that the argument of *locus standi* still exists. Consequently, it would be submitted that the present position on *locus standi* is not fully supportive to the protection of interests of vulnerable groups like girls with disabilities.

8 Conclusion

This paper has established that girls with disabilities face multiple disadvantages due to their age, sex and disability. Consequently, these increase the practical challenges which they face to realise the right to education. The paper explored the legal framework and its challenges for the realisation of the right to education for girls with disabilities. The principle legislation, the Disability Act is progressive but coy, the system, programmes and policies cracked and there is inadequate political will. Malawi fails its international obligations to improve the lives of girls with disabilities without a robust education legal framework and a properly implementable education programme.²¹⁷ Human rights can uplift girls with disabilities to realise their right to education. The Malawian human rights system should continually change to increase the level of protection afforded to girls with disabilities to raise their standard of living.²¹⁸ The right to education should be realised progressively but this should not be used as an excuse to indefinitely postpone its implementation but rather to establish clear obligations government for the full realisation of the right.²¹⁹ The state should manage its resources by adopting a holistic approach to the larger needs of the society than focusing on specific needs of particular individuals within the society.²²⁰ This will attain dignity which is inherent basic right for all human rights regardless of disabilities.²²¹

States have obligations to respect, protect and fulfil the availability, accessibility and adaptability of the right to education.²²² All other entities and persons have a negative obligation to desist from preventing or impairing the right of access to education.²²³ The right to education must be protected from improper invasion.²²⁴ The programmes for the realisation of the right to education must be realisable within the available resources and states should not adopt unreasonable policies that negatively

217 *Burnip v Birmingham City Council* EWCA Civ 629 447.

218 H Shue *Basic rights subsistence, affluence and US foreign policy* (1980) 55.

219 See General Comment No 3 (n 16 above) para 9.

220 *Soobramoney* (n 13 above) para 31.

221 *Purohit* (n 12 above) para 84.

222 General Comment No 13 (n 1 above) para 50.

223 *Grootboom* (n 15 above) para 254.

224 *Certification of the Constitution of the Republic of South Africa* (n 85 above) para 78.

affect its realisation.²²⁵ It should specifically accommodate vulnerable people girls with disabilities who suffer double marginalisation. Consequently, the state has the duty to provide education to girls with disabilities where parental support is inadequate.²²⁶ The state has a duty to provide free education benefits to the poor.²²⁷ Malawi is wrongly failing to realise the right to education due to the absence of legal foundation and paucity of resources.²²⁸

225 *Treatment Action Campaign (No 2)* (n 81 above) para 50

226 *Grootboom* (n 15 above) para 76-77.

227 *Cruz del Valle Bermudez v Ministry of Health and Social Assistance* Supreme Court of Justice No 916 15 July 1999.

228 O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 *Journal of African Law* 1.

CHAPTER 6

THE HUGGER-MUGGER OF ENFORCING SOCIO-ECONOMIC RIGHTS IN GHANA: A THREAT TO THE RIGHTS OF PERSONS WITH DISABILITIES

*Justice Srem-Sai**

Summary

At the heart of the Convention on the Rights of Persons with Disabilities (CRPD) is the reaffirmation of the universality, indivisibility, interdependence and interrelatedness of all human rights, and the open acknowledgement that civil and political rights alone cannot fully protect the inherent dignity and worth of persons with disabilities. Accordingly, the aims of the CRPD cannot be realised unless the socio-economic rights of persons with disabilities are rigorously enforced. Ghana, like most African signatories to the CRPD, operates a human rights regime that pays little attention to socio-economic rights. Socio-economic rights are contained in Chapter VI of Ghana's Constitution (1992). The Chapter, titled the 'Directive Principles of State Policy', has been interpreted by its Supreme Court variously, making it impossible to discern, clearly, whether the rights listed in the Chapter are justiciable. These inconsistent interpretations pose a major challenge to the full implementation of the CRPD. This article seeks to achieve three broad objectives: to explain why socio-economic rights have been effectively unenforceable in Ghana; to show how the current situation poses a threat to the full performance of Ghana's obligations under the CRPD; and to propose some ways of going round the impasse. The article is divided into five parts. Part 1 offers a brief description of the landscape of disability in Ghana. Part 2 unpacks the nature of the obligation that states undertake when they ratify the CRPD. It also explains how these obligations cannot be fully performed unless socio-economic rights are rigorously enforced. Part 3 takes a critical look at Ghana's human rights regime under the 1992 Constitution.

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Part 4 will conduct a brief international comparative analysis on how two countries – India and South Africa – have enforced socio-economic rights. The final Part will conclude by drawing on the experiences from other jurisdictions to suggest mechanisms for going round the impasse.

1 Disability and Ghana's political economy

The disability landscape of Ghana, a lower-middle-income West African country,¹ may not be very different from that of other countries within the sub-Saharan region. Even though the *World Report on Disability* estimates Ghana's disability prevalence rate at 12,8 per cent,² the 2010 census shows that there are 737 743 persons (3 per cent of the total population) with some form of disability, 52,5 per cent of whom are females. Of this figure visual or sight impairment constitutes 40,1 per cent, physical disability 25,4 per cent and emotional, behavioural, and intellectual disability 33,8 per cent. Visual or sight impairment is also the most common form of disability amongst both males (38 per cent) and females (42 per cent).³ The challenges that persons with disabilities face globally – disproportionately higher level of poverty, poor healthcare, low education and unemployment – applies to the 3 per cent of the population of persons with disabilities in Ghana. This is coupled with discrimination, exclusion and ill-treatment, factors which are deeply rooted in cultural and religious beliefs and practices.

In Ghana, especially in the rural areas, disability is believed to be caused by evil spirits or other supernatural forces. For example, a study conducted in the Brong-Ahafo region of the country⁴ reveals a common belief that parents use their children for ritual money, thereby making the parents rich while the children become intellectually disabled.⁵ Also, the practice in the upper regions, where disable babies are labelled 'spirit child' by witch-doctors and killed by poisoning is well documented.⁶ The belief is that such babies are a curse from the evil spirits to their parents; and unless killed, their parents will never attain any form of happiness.

- 1 World Bank 'Data for 2012' <http://data.worldbank.org/country/ghana> (accessed 14 July 2014).
- 2 WHO & World Bank 'World report on disability (main report)' (2011) 273. The Report combines both World Health Survey (2002 -2004) and Global Burden of Disease (2004) to arrive at the figures.
- 3 Ghana Statistical Service 'Report on population and housing census, 2010 (Summary)' 12-13.
- 4 Brong-Ahafo Region is one of the 10 regions of Ghana. The Region has the lowest proportion of persons with disabilities (2,3 per cent).
- 5 Inclusion Ghana 'Report on the level of stigmatization and exclusion of persons with intellectual disability and their families in Ghana' (July 2011) 11.
- 6 Al-jazeera 'Spirit child' (Undercover Investigation) <http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html> (accessed 14 July 2013).

Clements and Read observe that ‘the ways we define and theorize disability [including the causes we attribute to it] crucially determine how we approach matters bound up with it’.⁷ The Brong-Ahafo research reveals that 69 per cent of parents believed that intellectual disability could be cured. However, ‘God is mentioned as the source of cure in a lot of cases’, even though all of the parents who said they ‘went to all kinds of spiritual/miracle churches, prayer camps and to traditional priests for a possible cure of their children’ also reported that ‘their children were not healed after all the spiritual healing they sought after’.⁸ Also, in the upper regions, old women who seem to have behavioural or intellectual challenges are labelled as witches and thrown into ‘Witches’ Camps’.⁹ Modernity and democracy have helped to reduce the prevalence of these harmful cultural and religious practices; but they still persist.

The above notwithstanding, Ghana is touted as a leading example of a rising democracy in Africa.¹⁰ Certainly, there is a direct positive correlation between democracy and quality of human rights protection.¹¹ Ghana’s strides in democratic governance in a continent struggling to come out of dictatorship and civil wars could therefore be explained by a reference to her human rights credentials. Whilst Ghana’s human rights records date back to pre-independence, its current human rights achievements cannot be explained without direct and extensive reference to the 4th Republican Constitution, 1992, which ended almost three decades of military dictatorship.¹² Even though the 1992 Constitution contains both civil and political rights and socio-economic rights, it is only the former that could be pointed at with pride. The socio-economic rights are not just invisible, they are also inoperative.

Ghana is a state-party to the CRPD; and is expected to fully perform all the obligations thereunder. However, what are these obligations? And what is their nature? The next part of this article will unpack these

7 L Clements & J Read ‘Life, disability and pursuit of human rights’ in L Clements & J Read (eds) *Disabled people and the right to life: The protection and violation of disabled people’s most basic human rights* (2008) 2.

8 Inclusion Ghana (n 5 above) 12.

9 See generally: ActionAid *Condemned without trial: Witches camp in Ghana* (2012).

10 USAID Ghana *Ghana Democracy and Governance Assessment Report* (2011) 11. The Report also cites a ranking by an organisation called Freedom House, which ranks Ghana as ‘1 out of 7 on Political Rights (with 1 being the best) and 2 out of 7 on Civil Liberties’.

11 C Davenport & D Armstrong II ‘Democracy and the violation of human rights: a statistical analysis from 1976 to 1996’ (2004) 48 *American Journal of Political Science* 538 538-39; R Lang et al ‘Implementing the United Nations Convention on the Rights of Persons with Disabilities: Principles, implications, practice and limitations’ (2011) 5 *European Journal of Disability Research* 206 211; also see H Fein ‘Life-integrity violations and democracy in the world, 1987’ (1995) 17 *Human Rights Quarterly* 170, where it was found that a full dictatorship too may result in human rights protection.

12 Republic of Ghana ‘Report of the Constitution Review Commission’ (2011) 626; Also see E Gyimah-Boadi *Confronting the legacy of human rights abuse in Africa: Lessons from Ghana* (2004) 10.

obligations by discussing their form and content, more particularly those obligations that touch on socio-economic rights.

2 States parties' obligations under the CRPD

In December 2006, the CRPD and its Optional Protocol were adopted by the UN General Assembly. By ratifying the Protocol, a state party

[R]ecognizes the competence of the Committee on the Rights of Persons with Disabilities ('the Committee') to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.¹³

Approximately two years later, the CRPD and its protocol entered into force after the required number of states ratified them in accordance with their articles 45 and 13 respectively.

2.1 Content of obligation

The CRPD is unique in several ways. First; it is the only international instrument which comprehensively addresses the issue of disability rights,¹⁴ the subject having been ignored by almost all the seven¹⁵ preceding UN human rights treaties.¹⁶ Second; for decades, the social model, which asserts that environmental (rather than medical) factors are the real causes of disability, has been discussed and largely accepted.¹⁷ However, it is the CRPD that 'formalizes [the] move away from treating people with disabilities through a medical lens and as objects of pity'.¹⁸

13 Art 1, Optional Protocol to the CRPD, 6 December 2006, UN GAOR, 61st Sess, Item 67 (b), UN Doc A/61/6111.

14 Clements and Read (n 7 above) 509.

15 International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC) (except art 23(1)); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).

16 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 563 575-76; also, M Stein 'Disability Human Right (2007) 95 *California Law Review* 75 79.

17 R Lang 'The United Nations Convention on the right and dignities for persons with disability: A panacea for ending disability discrimination?' (2009) 3 *ALTER, European Journal of Disability Research* 266 268.

18 M Waterstone 'The significance of the United Nations Convention on the Rights of Persons with Disabilities' (2010 – 2011) 33 *Loyola of Los Angeles International and Comparative Law Review* 1 2; also see J Lord & M Stein 'The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review* 449 460.

Further, article 4 sets out the broad tone for the CRPD's implementation. The article requires state parties to take rigorous steps towards the full implementation of the rights and freedoms outlined in the CRPD. These steps include policy and legislative reforms (including repeals) based on consultations with disabled persons; and for the broader purpose of disability mainstreaming. Accordingly, Quinn notes that 'in short, article 4 converts the Convention into a trigger for worldwide disability law reform'.¹⁹

However, it is article 3 which captures the overall purpose of the Convention. It outlines the principles upon which the entire Convention is mounted. Equality and non-discrimination, respect for differences, full and effective participation and inclusion in society; accessibility and recognition of capacity (including evolving capacity) leading to full autonomy and personal independence are stated as the 'General Principles' underlining the CRPD.²⁰ These principles, like the purpose of legislation, may be justifiably treated as aids to interpreting the CPRD. Taken together, it may be clear that the principles are meant not just to undo the entrenched socially-constructed differences between Persons with disabilities and persons without disabilities. They are also meant to trigger concrete state actions that will afford durable compensation for the disadvantages that result from those socially-constructed differences. Of course, these principles are not new to human rights,²¹ and therefore could not be said to, by their mere statement, be unique in anyway. Their uniqueness however becomes apparent when they are read together with the history of disability human rights and the content of some particular provisions in the CRPD.

Under the CRPD, equality and non-discrimination is not to be taken merely on the formal level. Equality must be effective and substantive.²² Since the American with Disability Act, 1990, the anti-discrimination approach has formed the fulcrum around which disability rights protection has revolved.²³ This approach gives prominence to civil and political rights and virtually no attention to socio-economic rights.²⁴ It also treats equality as sameness,²⁵ a premise which constitutes a major fault-line in the

19 G Quinn 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a new international politics of disability' (2009-2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 33 41.

20 Lang (n 17 above) 5.

21 Clements & Read (n 7 above) 509.

22 Lawson (n 16 above) 590.

23 A Kanter 'The United Nations Convention on the Rights of Persons with Disabilities and its implications for the rights of elderly people under international law' (2009) 25 *Georgia State University Law Review* 527 540-42.

24 See generally: A Satz 'Disability, vulnerability, and the limits of anti-discrimination' (2008) 83 *Washington Law Review* 513; also see M Stein 'Same struggle, different difference: ADA accommodations as anti-discrimination' (2004) 153 *University of Pennsylvania Law Review* 579, where it is argued that the anti-discrimination approach forms the theme for the Americans with Disability Act, 1990

25 M Stein 'Disability human rights' (2007) 95 *California Law Review* 75 92.

approach. This is because, persons with disabilities and persons without disability, though equal, are not the same. Indeed, the anti-discrimination approach brought about general awareness in the area of disability rights. That notwithstanding, the approach did not achieve much. It is evident that persons with disabilities still stand at a disproportionately disadvantaged position in relation to the general population. They form as much as 20 per cent of the world's poorest population.²⁶ They lack access to basic amenities like housing, healthcare, food (including clean water) and employment. They are still excluded from the society and are treated with stigma and disrespect. And in spite of the fact that they form probably the largest minority group,²⁷ they are often ignored in policy. For example, the UN Millennium Development Goals, a concerted effort to fight global poverty, did not initially mention disability in any of the 8 Goals or the attendant 21 Targets or 60 Indicators, nor in the Millennium Declaration.²⁸

This disregard for socio-economic rights emanates from the ideological arguments that socio-economic rights are mere political statements which are not amenable to judicial enforcement;²⁹ and that they could only be guaranteed by national policy (rather than law) and achieved progressively when resources are available.³⁰ Ultimately, it is argued that judges lack the democratic legitimacy and the institutional capacity to enforce them.³¹ Civil and political rights on the other hand are seen as negative rights³² that do not require resources for their implementation. They are seen as automatically justiciable and therefore are *rights*.³³

Several years after the Cold War, the dust is beginning to settle. It is now becoming abundantly clear that the distinction between civil and political rights and socio-economic rights is an exaggeration,³⁴ and that the

26 A Elwan *Poverty and disability: A survey of the literature* World Bank Social Protection Discussion Paper Series No 9932 (1999) 15.

27 T Degener 'Disabled persons and human rights: the legal framework' in T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments* (1995) 9.

28 See generally: General Assembly Resolution 55/2, UN GAOR 55th Sess, UN Doc A/RES/55/2 (18 September 2000). This grave omission compelled the UN General Assembly to subsequently adopt a new Resolution 'Realizing the Millennium Development Goals for persons with disability' (A/RES/64/131) to fill the gap.

29 M Cranston 'Human rights: Real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967) 43-51.

30 L Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982-1983) 32 *The American University Law Review* 1 18-19.

31 F Michelman 'The constitution, social rights, and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13 15-16.

32 F Cross 'The error of positive duties' (2001) 48 *UCLA Law Review* 857 863-65; S Bandes 'The negative constitution: A critique' (1990) 88 *Michigan Law Review* 2271 2272.

33 A Dhandha 'The right to treatment of persons with psychosocial disabilities and the role of the courts' (2005) 28 *International Journal of Law and Psychiatry* 155 156.

34 T Campbell 'Poverty as a violation of human rights: Inhumanity or injustice?' in T Pogge (ed) *Freedom from poverty as a human right: Who owns what to the very poor?* (2007); *Airey v Ireland* [1979-80] 2 EHRR 305 316-17.

reluctance to include socio-economic rights in human rights legislation stems from this 'historical construction of an artificial distinction' between the two categories of right.³⁵ There is now an emerging consensus 'that reconciling the two categories of rights is an essential precondition for the realisation of socially embedded human rights'.³⁶

The CRPD, being the first international human rights convention to be drafted following the adoption of the Vienna Declaration and Program of Action, 1993,³⁷ reflects the ideals of that Declaration – a borderless body of human rights. The CRPD, therefore, reaffirms 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'.³⁸ Thus, quite apart from the first generation rights, freedom of expression, of association, the rights to life, to fair trial, and so on, the CRPD also guarantees the second generation rights and does so with great sense of devotion. This striking devotion to socio-economic rights could be gleaned from articles 24 (right to Education), 25 (the right to health), 27 (the right to work and employment) and 28 (the right to adequate standard of living and social protection), amongst others.

Unlike the traditional human rights clauses, the CRPD clauses do not just list the socio-economic rights. The clauses come with a detailed outline of *how* states parties are expected to realise these rights. For example, with respect to the right to education, article 24(2) goes further to spell out the specific steps that the state shall take to realise its obligation. It requires an all-inclusive and unrestricted access to, at least, free compulsory basic education. The article even goes to the extent of listing 'braille, alternative script, augmentative and alternative modes, means and formats of communication ...' as some of the necessary facilities for realising this right.

With respect to the right to work under article 27, the state is specifically required to employ disabled persons in the public sector whilst creating conditions that will encourage the private sector to employ more disabled persons. The principle of reasonable accommodation is self-explanatory.³⁹ Further, the state is to particularly promote 'vocational and professional rehabilitation, job retention and return-to-work programmes

35 P Weller 'Human rights and social justice: The Convention on the Rights of Persons with Disabilities and the quiet revolution in international law' (2004) 9 *Public Space: The Journal of Law and Social Justice* 74 74.

36 P Weller (n 66 above) 82; Vienna Declaration and Program of Action 1993, Art 5; World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF. 157/23 (1993).

37 World Conference on Human Rights, 4-25 June 1993, Vienna Declaration and Programme of Action, UN Doc A/CONF. 157/24 (July 12, 1993); A Dhanda 'Legal capacity in the disability rights Convention: Stranglehold of the past or lodestar for the future?' (2007) 34 *Syracuse Journal of International Law & Commerce* 429 432.

38 Preamble of the CRPD (n 13 above) para C.

39 CRPD (n 13 above) art 2(4).

for persons with disabilities'.⁴⁰ This unprecedented specificity runs through the other articles that guarantee socio-economic rights. Comparing these clauses with those of the earlier instruments reveals a different approach to addressing socio-economic rights, namely, that states are no longer left on their own to determine the content of the socio-economic rights. So, when a state signs and ratifies the CRPD, it is clearly not into business-as-usual.

2.2 Nature of obligation

When states sign up to a treaty, the international obligation under the treaty are, by hypothesis, of international concern and no longer exclusively a matter of their domestic jurisdiction.⁴¹ This principle, however, does not mean or suggest, even remotely, that states parties should fold their arms and wait until complaints are brought against them at the international level before actions are taken. What it actually means is that 'the principal responsibility for ensuring fulfilment of the obligations contained in human rights treaties rests with the government concerned'.⁴² Accordingly, Tunkin argues that:

[T]he principal field of struggle for human rights is the internal system of a state, and especially its socioeconomic system. The international protection of human rights, effectuated primarily by international legal means, is, although important, merely an auxiliary means of securing such rights.⁴³

Therefore, it is the state party (not the international community) which must adopt all appropriate domestic legislative, administrative and other measures for the implementation of the rights.⁴⁴ It must take into account the protection and promotion of the human rights of persons with disabilities in all of its domestic policies and programmes. It has the imperative legal obligation to, in its policies and programmes, show clear and detailed commitment to marshalling its available resources towards ensuring that persons with disabilities are fully integrated into all aspects of society life.⁴⁵ This obligation was echoed by the African Commission on Human and Peoples' Rights, namely, that it is the obligation of 'the states party to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all

40 CRPD (n 13 above) art 27(1)(k).

41 A Robertson 'The implementation system: International measures' in L Henkin (ed) *The international bill of rights* (1981) 332 333.

42 P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 162.

43 G Tunkin *Theory of international law* (1974) 83.

44 A 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* 287 314.

45 CRPD (n 13 above) art 4(2).

its aspects'.⁴⁶ The CRPD obligations may thus be summed up as, to: repeal or adopt certain laws; mainstream concern for persons with disabilities; launch public awareness campaigns; build or adapt certain infrastructures; train specialised personnel; employ certain individuals; provide certain forms of services or assistance; and consult with the representative organisations of persons with disabilities.⁴⁷

Ghana was one of the first countries to sign up to the CRPD and the Optional Protocol when they were opened for signature on 30 March 2007.⁴⁸ Ghana subsequently indicated its total commitment to the obligations therein when it ratified both instruments on 31 July 2012.⁴⁹ International law, treaty or customary, requires that states perform their international obligations in good faith.⁵⁰ Clearly, it is not good faith for a country to say one thing to the whole world and then proceed to do quite another.⁵¹ The question then is whether Ghana is ready to perform its obligations under the CRPD in full and in good faith.

As explained above, a state party to the CRPD cannot perform its obligations fully without a legal system that respects, protects and fulfils socio-economic rights. Thus, for Ghana to be able to discharge its obligations, it must put in place (if it does not already have) a human right system that does not only protect civil and political rights, but also, and perhaps more essentially, that which protects economic, social and cultural rights. What is Ghana's human rights system like? How does Ghana's Constitution treat human rights in general and socio-economic rights in particular? Does Ghana's Constitution, the source of its laws and legal system, support a full performance of the country's obligations under the CRPD? The answers to these questions form the subject of the next part of this article.

46 *Purohit and Moore v The Gambia*, African Commission on Human and Peoples' Rights, CommNo 241/2001 (May 2003) para 84. The Commission, in this case, was dealing with the right to health, particularly mental health, under articles 16 & 18 of the African Charter on Human and Peoples' Rights (Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights* ('ACHPR or Banjul Charter') 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)).

47 F Megret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights' (2008) 30 *Human Rights Quarterly* 494 506; Lord & Stein (n 18 above) 457-59.

48 United Nations Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed 20 July 2013).

49 United Nations Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed 20 July 2013).

50 United Nations *Vienna Convention on the Law of Treaties* (VCLT), UN Doc A/Conf.39/27; 1155 UNTS 331(1969), art 31(1); G Schwarzenberger & E Brown *A manual of international law* (1976) 7.

51 J O'Connor *Good faith in international law* (1991) 124.

3 Human rights in Ghana

Human rights under the 1992 Constitution is built around two main Chapters. Chapter V (articles 12-33), which is titled 'Fundamental Human Rights and Freedoms' and Chapter VI which is titled 'Directive Principles of State Policy'.

3.1 The 'Fundamental Human Rights and Freedoms'

Chapter V of the Constitution contains the traditional civil and political rights. The right to life (article 13), to personal liberty (article 14), to respect for human dignity (article 15), to protection from slavery and forced labour (article 16), to privacy (article 18), to fair trial (article 19), to ownership and protection of private property (article 20), to freedom of association, of movement (including assembly), of expression (including speech), to hold and practice culture, religion and politics (article 21); to equal access to education (including free compulsory basic education (article 25)). It also contains women's rights (article 27), children's rights (article 28) and the rights of persons with disability (article 29) and of the sick (article 30). This Chapter also contains some socio-economic rights, namely, the right to satisfactory, safe and healthy condition of work (including equal pay for equal work); the right to leisure and to paid public holidays; and the right to form and join trade unions (article 24). Free secondary education, technical and vocational training are to be introduced and realised progressively (article 25).

All these rights are to be enjoyed equally by all persons within the territory of Ghana and without discrimination on 'ground of gender, race, colour, ethnic origin, religion, creed or social or economic status'.⁵² Article 17(4)(a) provides that nothing

shall prevent Parliament from enacting laws that are reasonably necessary to provide for the implementation of policies and programs aimed at redressing social, economic or educational imbalance in the Ghanaian society.

Clearly, this Clause, a mirror to the Rawlsian 'difference principle'⁵³ – permits the state to embark on affirmative action and programmes to redress socio-economic unevenness in the country.

Also, Chapter V has a clearly-outline enforcement mechanism. Where a person alleges that his or her rights under Chapter V have 'been, or is

52 Republic of Ghana *Constitution 1992*, art 17(1); also see Hon Justice J Taylor 'The scope of human rights in Ghana' (1993-95) 19 *Review of Ghana Law* 84 92.

53 The 'difference principle' states that social and economic inequalities may be justifiable if they are meant to bring the least advantaged members of society at par with the other members of the society. See J Rawls *On justice as fairness: A restatement* E Kelly (ed) (2001) 42-43.

being or is likely to be contravened ... that person may apply to the High Court for redress'.⁵⁴ The remedies available to such persons includes (but are not limited to) 'orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition, and *quo warranto*'.⁵⁵ In *Awuni and Others v West African Examinations Council*⁵⁶ the Supreme Court held that 'redress' may include monetary compensation, even against the state. Fulfilling the charge in article 33(4), the Rules of Court Committee has enacted Order 67 of the High Court (Civil Procedure) Rules, 2004 (CI 47) to regulate the enforcement of the Chapter V rights.

Yet, the most encouraging provision is that which creates an opening for rights which, even though are not mentioned under Chapter V but which are nonetheless 'considered to be inherent in a democracy and intended to secure the freedom and dignity of man',⁵⁷ to be enforced as if they were expressly mentioned in the Chapter. The implication of this is that the 1992 Constitution is open to the admission of new rights. This, indeed, is a bold acknowledgment of the fact that there are no limits to the lists of human rights. Accordingly, the Supreme Court in *Ahumah-Ocansey v Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney-General and Electoral Commission (Consolidated)*⁵⁸ had used the article 33(5) criteria to admit the right of prisoners to vote as a distinct right into the Chapter.

3.2 The Directive Principles of State Policy (DPSP)

The second Chapter which, together with Chapter V, forms the core of the human rights regime of the 1992 Constitution is Chapter VI (articles 34-41). The Chapter is titled 'The Directive Principles of State Policy'. It contains the rights to 'just and reasonable access by all citizens to public facilities and services' (article 35(3)); to 'economic development ... maximum welfare, freedom and happiness ... adequate means of livelihood and suitable employment and public assistance to the needy' (article 36(1)); and to 'fair and realistic remuneration' (article 36(2)(a)). Also the state is required 'as a fundamental duty' to 'assure the basic necessities of life for its people' (article 36(2)(e)); to 'safeguard the health, safety and welfare of all persons in employment' (article 36(10)); and to 'provide educational facilities at all levels' (article 38(1)).

The entry of the DPSP into Ghana's constitutional law could be traced to Chapter IV of the 3rd Republican Constitution, 1979, where they were primarily designed to achieve two main objectives. First, to 'enumerate a set of fundamental objectives which a people expect all bodies and persons

54 Art 33(1).

55 Art 33(2).

56 [2004] 1 *Supreme Court of Ghana Law Reports* 471.

57 Art 33(5).

58 [2010] *Supreme Court of Ghana Law Reports* 575 614.

that make or execute public policy to strive to achieve'; and, second, to 'constitute, in the long run, a sort of barometer by which the people could measure the performance of their government'.⁵⁹ Quite apart from these two objectives, the DPSP also 'elaborated the social and economic aspects of human right – aspects which are of particular relevance to the conditions of Africa and the developing world generally'.⁶⁰ They also propose 'specific provisions relating to the rights of categories of persons whose situation call for special guarantees and protection in the Constitution'.⁶¹ These purposes were again cited for the inclusion of the DPSP in the 1992 Constitution. According to the Committee of Experts, who deliberated and proposed the Constitution for acceptance, the DPSP are the:

[c]ore principles around which national political, social and economic life will revolve. This is precisely what the Directive Principles of State Policy seeks to do. Against the background of the achievements and failings of our post-independence experience, and our aspirations for the future as a people, the Principles attempt to set the stage for the enunciation of political, civil, economic and social rights of our people.⁶²

The DPSP, per the proposals of the drafter of the two Constitutions (1979 and 1992), were meant to follow the India approach.⁶³ That the DPSP were not intended to be justiciable was very clear from the *travaux préparatoires* to the two Constitutions.⁶⁴ However, unlike the Indian situation, this intention of non-justiciability was not written into either Constitutions. What is rather found in the 1992 Constitution is a provision that the DSPS

shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.⁶⁵

This clearly leaves the status of the DPSP in a dilemma as to whether the rights contained in the Chapter could be enforced through a court action. It may be argued that not carrying the intention into the final Constitution is an indication that the intention was rejected and dropped; thus making them justiciable as any other provision of the Constitution.

It may equally be contended, on the other hand, that the DPSP are by tradition not justiciable; and that there was no need, in fact, that it would

59 See Republic of Ghana *Report of the Committee of Experts on the 1992 Constitution* (1992) para 95.

60 Republic of Ghana (n 59 above) para 139.

61 As above.

62 Republic of Ghana (n 59 above) para 94.

63 See Republic of Ghana *Proposals for Draft Constitution of Ghana* (1991) General Introduction para 7.

64 Republic of Ghana (n 59 above) para 95.

65 Art 34(1).

be mere superfluity, to state expressly in the Constitution that they were not justiciable. Be that as it may, it really does not matter now which view is superior. Suffice it to say that this dilemma continues to heavily afflict the Supreme Court of Ghana, even today and possibly into the foreseeable future.

3.2.1 Justiciability of the DPSP and the Supreme Court

The first time that the justiciability of Chapter VI came into question before the Supreme Court was in *New Patriotic Party v the Attorney-General*⁶⁶ (31st December case), a case that had no link with human rights. In 31st December, the Plaintiff, a political party, complained that the use of public funds by the Government every year to commemorate the anniversary of a *coup d'état* on every 31st day of December was a violation of articles 3(3), (4), (5), (6), (7), 35(1) and 41(b) of the Constitution. Both article 35 and 41 are found in Chapter VI of the Constitution. The Attorney-General objected to the jurisdiction of the Supreme Court on the ground, *inter alia*, that the whole of Chapter VI was not justiciable and therefore articles 35 and 41 could not ground a cause of action. On this issue, the 9 judges on the panel were divided into all the three different positions possible – for, against and neutral.

Adade JSC took the position that the entire Constitution, including Chapter VI, was a legal document and thus was as justiciable as any other provision of the Constitution. He stated:

I do not subscribe to the view that chapter 6 of the Constitution, 1992 is not justiciable: it is. First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable.⁶⁷

Another Justice, Bamford-Addo JSC, took a contrary view. To her, the principles were to serve merely as a barometer to public authorities. She explained:

Now I come to the spirit of the Constitution, 1992. The plaintiff, apart from article 3, relied also on articles 35(1) and 34(b) of the Constitution, 1992, provisions under the 'Directive Principles of State Policy' to ground its claim. But the said principles are not justiciable and the plaintiff has no cause of action based on these articles. Those principles were included in the Constitution, 1992 for the guidance of all citizens, Parliament, the President, judiciary, the Council of State, the cabinet, political parties or other bodies and persons in applying or interpreting the Constitution, 1992 or any other

66 [1993-1994] 2 Ghana Law Reports 35.

67 31st December (n 66 above) 66.

law and in taking and implementing any policy decisions, for the establishment of a just and free society.⁶⁸

It is worth mentioning here that both Justices based their two opposing conclusions on the *travaux préparatoire* to the 1992 Constitution. The 7 remaining Justices did not offer any opinion on the issue. They think, and it appears so, that those articles under Chapter VI which were relied up on by the Plaintiff were irrelevant to the determination of the case.⁶⁹

It took four years, after *31st December*, for the Supreme Court to have another opportunity to consider the issue whether or not Chapter VI of the 1992 Constitution was justiciable. This was in *New Patriotic Party v Attorney-General*⁷⁰ (*CIBA* case). In *CIBA*, too, the same political party sued the Attorney-General, challenging the constitutionality of the Council of Indigenous Business Associations (CIBA) Law, 1993 (PNDCL 312 or the CIBA Law). The CIBA Law compels indigenous businesses of a kind to belong to an association which is basically controlled by the Government. The Plaintiff contends that the law was inconsistent with articles 21(1)(e), 35(1) and 37(2)(a) and (3) of the Constitution and consequently void. Article 21(1)(e) protects the right to freedom of association and is found under Chapter V of the Constitution. However, articles 35(1) and 37(2)(a) & (3) fall under Chapter VI.⁷¹ Unlike *31st December*, *CIBA* has everything to do with human rights, particularly socio-economic rights. Accordingly, *CIBA* provides a much better context for the purposes of this discussion.

The Attorney-General, again, objected on the ground that articles 35 and 37, being part of Chapter VI, were not justiciable and therefore could not be enforced by a court action. This time, Bamford-Addo JSC, having a second bite at the cherry, took the opportunity to explain her earlier general position in *31st December*, that no provision under Chapter VI is justiciable or enforceable. The learned Justice explained that:

... there are exceptions to this general principle. Since the courts are mandated to apply them [the DPSP] in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, 1992, they then in that sense, become enforceable.⁷²

68 *31st December* (n 66 above) 149.

69 For example, Abban JSC (as he then was) observed at 102 of the report that: '[T]he provisions of articles 35(1) and 41(b) of the Constitution, 1992 had no relevance, whatsoever, to the subject matter before the court. Reference to those articles, with due respect, was totally misconceived.'

70 [1997-1998] 1 Ghana Law Reports 378.

71 Article 35(1) declares Ghana as a 'democratic state dedicated to the realization of freedom and justice'. Article 37(2)(a) directs the state to enact appropriate laws to assure the enjoyment of the 'rights of the people to form their own associations free from State interference'. Article 37(3) requires that the state 'be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes'.

72 *CIBA* (n 70 above) 394.

The learned Justice, thus, proceeded on presumption that the provisions of Chapter VI are generally not justiciable; but may be only when they are read in conjunction with other enforceable provisions outside Chapter VI.⁷³ In this regard, she specifically mentioned the 'substantive guaranteed human rights and freedoms set out in Chapter V of the Constitution'. She subsequently applied this formula by reading article 35(1)(e) and 37(2)(a) & (3) (both under Chapter VI) in conjunction with article 21(1)(e) (under Chapter V) to find that the CIBA Law was an 'erosion' of the right to freedom of association.

With the exception of one Justice, Kpegah JSC, who did not think the Plaintiff had *locus standi*, 3 of the 5 Justices who sat on the case concurred with Bamford-Addo JSC's position. In fact, one of the Justices, Atuguba JSC, put the position more clearly. He explained that the DPSP are 'rules of construction to be applied when interpreting other provisions of the Constitution, 1992, just as at common law there is a great body of rules for the construction of statutes' ... and that it is irrelevant that 'some of the provisions of the Directive Principles of State Policy may after all pass for supplementary 'rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned'.⁷⁴ The overall implication of this formula is that no one may know beforehand that a provision under Chapter VI is enforceable.

In 2008, Chapter VI came up again for the Supreme Court's consideration, in *Ghana Lotto Operators v National Lottery Authority*⁷⁵ (*Lotto case*). A group of private lotto operators challenged the constitutionality of the National Lottery Act, 2006 (Act 722). The Act establishes the National Lottery Authority (NLA) to regulate, supervise, conduct and manage National Lotto. It also prohibits the operation of lottery by persons other than the NLA. The Plaintiffs' claim was that the regulation and prohibition offend article 36(2)(b), which falls under Chapter VI of the Constitution. Article 36(2)(b) requires the state to follow an economic objective by 'affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy'. The Plaintiffs therefore argued that, to the extent that it excludes private persons from engaging in lottery business, the law violates the economic objective spelt out in article 36(2)(b). Again, the Defendant challenged the justiciability of article 36(2)(b) in particular and Chapter VI as a whole.

This time all the 9 Justices on the panel were unanimous on the issue of justiciability. The Court recounted Adade JSC's position in *31st December* that the entire Constitution as a legal document is justiciable.

73 J Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006 -2008) 2 *African Journal of Legal Studies* 1 17.

74 *CIBA* (n 70 above) 442.

75 [2007-2008] Supreme Court of Ghana Law Reports 1088.

However, unlike Adade JSC, the Court did not think that all the clauses under Chapter VI were as justiciable as all the other clauses of the Constitution. The Court, speaking through Date-Baah JSC, stated:

The Constitution is a legal document containing the most important rules on political governance. The courts have the responsibility of ensuring that these rules are complied with. To my mind, therefore, the starting point of analysis should be that all the provisions in the Constitution are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution.⁷⁶

The Court went on to state that some particular provisions under Chapter VI may, by their very nature, not lend themselves to judicial enforcement and that '[t]he very nature of such a particular provision would rebut the *presumption of justiciability* in relation to it'.⁷⁷ However, perhaps, the most important statement that the Court made in the case is that:

The rights set out in chapter 6, which are predominantly the so-called ESC rights, or economic, social and cultural rights, are becoming, by international practice and the domestic practice in many jurisdictions, just as fundamental as the rights in chapter 5. The enforceability of these ESC rights is a legitimate purpose for this court to seek to achieve through appropriate purposive interpretation. We therefore think that the interpretation that we give to article 34 should take into account this purpose of achieving an expansion of the range of enforceable human rights in Ghana.⁷⁸

Clearly, this statement demonstrates the Court's readiness to accord socio-economic rights in the Constitution their rightful place in the comity of human rights. Thus, even though the Court in this case did not find a violation of article 36(2)(b) by Act 277, it indicated strongly that where

a government introduces legislation which is flagrantly at odds with any of the objectives set out in the article, we believe that this Court has jurisdiction to strike down the provisions in the legislation which are incompatible with the objectives concerned.⁷⁹

Welcomed as this statement may be, it is clearly not enough. It is even no real step at all when viewed through the lenses of socio-economic rights in general and Ghana's obligations under the CRPD in particular. Copious in the statement is the reference to 'legislations which are flagrantly at odds' with the DPSP. This makes it necessary to ask what actions the Supreme Court of Ghana in particular and the courts of Ghana in general may take when the measure is not a 'legislation'; and more importantly when it is not 'flagrantly at odds' with a right.

⁷⁶ *Ghana Lotto Operators* (n 75 above) 1099.

⁷⁷ (n 75 above) 1107.

⁷⁸ (n 75 above) 1104-05.

⁷⁹ (n 75 above) 1113.

The statement, we respectfully submit, seeks to treat socio-economic rights as civil and political rights, negative rights, with which the state cannot interfere. Indeed, it may be easy to envisage a situation where the government will put in place policies, programmes and legislations which may make it possible for persons to be evicted from homes without notice, thus violating a negative duty not to interfere in people's right to housing. However, these are extremely rare and unlikely situations. What seems to be the obligation under the CRPD, as pointed out in the previous parts of this work, is for state parties to take specific *positive* steps towards ensuring progressive realisation of the rights to healthcare, food, housing, education and employment of persons with disabilities.

Viewed from this angle, the statement made by the Court could hardly be said to be friendly to the realisation of socio-economic rights in general and Ghana's obligations under the CRPD in particular. But this is exactly the situation that the Supreme Court has put Ghanaians and, particularly, the about 1 million persons with disabilities in Ghana. It is necessary to turn and review how socio-economic rights are treated by courts in other jurisdictions.

4 Socio-economic rights enforcement in India and South Africa

Ghana is not entirely alone, and certainly not the first to be in this dilemma. The issues *whether* socio-economic rights are, first, justiciable; and second, *how* to enforce them, plague other national constitutions. It may not be true to say that other countries have completely resolved this dilemma. It is however true to say that some countries have made some remarkable progress in the area. Of particular mention are India and South Africa.

4.1 India

Like Ghana, the Indian Constitution has a chapter on DPSP – Part IV – also containing socio-economic human rights. Part IV sets forth 'the humanitarian precepts that were ... the aims of the Indian Social Revolution.'⁸⁰ Also, according to Robinson, the DSPP is an attempt 'to create an ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of a liberal democracy'.⁸¹

80 G Austin *The Indian Constitution: Cornerstone of a nation* (1966) 75.

81 N Robinson 'India and the rise of the good governance court' (2009) 8 *Washington University Global Studies Law Review* 1 5.

Article 37 of the Indian Constitution, however, provides that '[t]he provisions contained in this Part shall not be enforceable by any court'; the principles are only to serve as a guide to 'the State'⁸² in its functions. Essentially, the state is to have the DPSP in mind while determining the limits to place on the Fundamental Rights.

When matched against the civil and political rights listed in Part III (the Fundamental Rights) of the Constitution, the Indian courts originally took the position that the rights in Part IV 'run subsidiary to the Chapter on Fundamental Rights'.⁸³ However the decision of the Supreme Court in *Kesavananda Bharati v State of Kerala*⁸⁴ altered this position and held that notwithstanding that they are not to be enforced, the DPSP enjoy the same status as the Fundamental Rights.⁸⁵ In fact, one of the Justices, Mathew J, went a step further to hold that '[i]n building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'.⁸⁶

The express injunction in article 37 notwithstanding, the Supreme Court has, through interpretation, made orders that have resulted in effectively enforcing the socio-economic rights in the same manner as the civil and political rights.⁸⁷ This is based on the understanding that:

The Fundamental Rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.⁸⁸

Thus, today, one may safely argue that no court in India would cede jurisdiction on the sole ground that an alleged human rights violation is in respect of a socio-economic right.⁸⁹

Specifically in respect of disability rights, the Supreme Court of India has made some significant progress. This progress, one may argue, is

82 'The State' is defined in art 12 to include 'the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India'.

83 *State of Madras v Champakam Dorairajan* (1951) SCR 525 531.

84 (1973) 4 SCC 225.

85 See para 672.

86 See para 1769.

87 *Francis Coralie Mullin v the Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Chameli Singh and Others v State of UP and Another* (1996) 2 SCC 549; *Olga Tellis v Bombay Municipal Corporation* (1965) 3 SCC 545; *Shantistar Builders v Narayan Khimalal Toame* (1990) 1 SCC 520; *Daily Rated Casual Labour Employed under P & T Department v Union of India* [1988] 1 SCR 598

88 *Kesavananda Bharati v State of Kerala* (n 84 above) para 1776.

89 *Dharwad PWD Employees Association v State of Karnataka* [1990] 1 SCR 544, 549-50.

attributable to the Court's jurisprudence on the enforcement of socio-economic rights as outline above. For example, in *Javed Abidi v Union of India*,⁹⁰ the Court ordered that 'those suffering from the aforesaid locomotor disability to the extent of 80 per cent and above would be entitled to the concession from the Indian Airlines for travelling by air within the country'. The Court's jurisprudence may be traced in line of cases, including *BR Kapoor & Anrv Union of India & Others*⁹¹ (on access to healthcare), *Amita v Union of India*⁹² (on employment rights), *National Federation of Blind v Union Public Service Commission*⁹³ (on affirmative action), *Bhagwan Dass & Another v Punjab State Electricity Board*⁹⁴ (on employment rights), and *Sukhvinder Singh v Union of India & Others*⁹⁵ (on pension entitlements). Accordingly, it is suggested that the Indian Rights of Persons with Disability Bill, 2014, when passed into law, would have a substantial backing from the Supreme Court in particular and the judiciary in general.

4.2 South Africa

A review of the South African experiment presents slightly different regime from the Ghanaian and the Indian regimes. Unlike the latter two, the structure of the South African Constitution does not distinguish between the two categories of rights.⁹⁶ Socio-economic rights are under the same Chapter II of the Constitution as the civil and political rights. This arrangement makes the South African Constitution unique in the sense that the question whether the socio-economic are justiciable cannot be advanced from the text of the Constitution – that question was answered before the coming into force of the Constitution.⁹⁷

This leaves only the issue of *how* to enforce the socio-economic rights to be addressed. Consequently, the Constitutional Court has over the years devised mechanisms of how to enforce socio-economic rights.⁹⁸ This mechanism includes active court supervision of the enforcement socio-economic rights.

90 (1998-1999) 1 SCC 467.

91 (1989) 2 SC 330.

92 (2005) 13 SCC 721.

93 (1993) 2 SCR 556.

94 (2008) 1 SCC 579.

95 Civil Appeal No. 5605 of 2010.

96 Mubangizi (n 73 above) 4.

97 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Re Certification)* (1996) 4 SA (CC) 744 para 77; see E Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2006/7) 38 *Columbia Human Rights Law Review* 321 359.

98 *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 SA (CC) 765; *Government of Republic of South Africa v Grootboom* (2001) 1 SA (CC) 46; *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA (CC) 721.

In respect of disability rights, specifically, much may not be said about the Constitutional Court. This is substantially due to the fact that the Court is pretty much younger; and is yet to see cases that touch specifically on socio-economic rights of persons with disabilities. Suffice it to say, however, that the Court's foundational approach to the enforcement of socio-economic rights is more likely than otherwise to set it on the path that will, at least, not stifle disability rights, particularly those aspects that involve socio-economic rights.

5 Recommendations and conclusion

5.1 Recommendations

We have noted in the previous parts that justiciability of socio-economic rights involves two sub-questions. First, *whether* they could be enforced; and if so, second, *how* to enforce them.⁹⁹ We have also established from the international comparative analysis in part 4 that the South African Constitutional Court in *Re Certification*¹⁰⁰ had relieved itself of the first question by holding, even before the Constitution came into force, that socio-economic rights are justiciable. The Court had since been preoccupied with the second question relating to how to enforce these rights. In this regard, the Court has built, or perhaps, is in the process of building, for itself and for the international human rights community an enviable jurisprudence.¹⁰¹

We have also considered a different situation, the Indian situation, where the Constitution expressly injuncts the courts from adjudicating upon the DSPS. In this second scenario, we have shown that the Indian Court has found three methods of going round the first hurdle: the expansionist approach, enforcement of legislation and enforcement of the DSPS by and of themselves. Accordingly, the Indian courts have enforce the DSPS in a manner that is almost the same as how they enforce the 'Fundamental Rights'.

In particular, we have argued that the Indian Court's jurisprudence on the enforcement of socio-economic rights is a chief contributory factor to its relatively progressive approach to the rights of Persons with disabilities. Based on the Indian experience, we have suggested that the South African Court, whose approach to the enforcement of socio-economic rights is

99 D Landau 'The reality of social rights enforcement' (2012) 53 *Harvard International Law Journal* 189 196; also see Christiansen (n 97 above) 359.

100 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Re Certification)* (1996) 4 SA (CC) 744 paras 77-78.

101 Landau (n 99 above) 198-200; also see B Ray 'Engagement's possibilities and limits as a socioeconomic rights remedy' (2010) 9 *Washington University Global Studies Law Review* 399 400.

acclaimed to be one of the most progressive, may be even more progressive with time.

We have pointed out in part 3 of this essay that Ghana's Supreme Court started its journey by creating an avoidable hurdle for itself, namely, that the DSPS are not justiciable by and of themselves.¹⁰² We noted that the Court spent its first 15 years under the 1992 Constitution working its way round this hurdle. As explained, the current position of the Court is that the socio-economic rights under Chapter VI of the Constitution, the DSPS, enjoy a 'presumption of justiciability'.¹⁰³ This, we submitted, means that there are instances, which instances are yet to be spelled out, where the presumption may be rebutted in which case a socio-economic right may not be justiciable. Accordingly, the Court is yet to cross the first hurdle, after which it will have to start building its own processes with respect to *how* to enforce socio-economic rights.

The above situation, we have argued, poses a major challenge, not just to the enforcement of socio-economic rights in general, but also to the successful implementation of the CRPD in particular. In other words, as it stands, the socio-economic rights that form the cutting edge of the CRPD is clamped *ab initio* by the Supreme Court of Ghana. The natural consequence of this clamping is that the about 1 million persons with disabilities in Ghana, notwithstanding the coming of the CRPD and all its positives attributes will continue to endure the disadvantages of disability. To avert this consequence, the following should be done:

5.1.1 Constitution amendment

The position of Ghana's Supreme Court on the justiciability issue has been highly dependent on the composition of the panel of judges sitting on the cases. The implication therefore is that the current position may vary again, for better or for worse, depending on the orientation of the individual justices constituting the panel. This is because, the Supreme Court has the power to vary or depart from its own previous decisions.¹⁰⁴ Thus, the first (and perhaps the most definitive recommendation) is that the Constitution be amended to expressly state that socio-economic rights in general and Chapter VI (the DSPS) are justiciable. This will require that Chapter VI of the Constitution, too, be assigned an enforcement mechanism just as Chapter V (the 'Fundamental Human Rights and Freedoms') has.

This will, firstly, put the matter beyond the discretion of any individual justice and ultimately beyond the Supreme Court. Secondly, such

102 *CIBA* (n 70 above) 394.

103 *Lotto* (n 75 above) 1107.

104 Republic of Ghana (n 52 above) art 129(3).

amendment will carry the Supreme Court swiftly across through the current impasse. This will then bring the Ghana Court closer to the Indian and the South African Courts, having only to deal with the second sub-question – *how* to enforce these rights.

It may be argued that such an amendment may open a floodgate for all sorts of claims to be brought, compelling the judiciary to veer off into the province of the executive and the legislative arms of government, which arms have the exclusive control over the state's power to make policies and allocate resources. Genuine as this concern may be, we argue, it is an exaggeration of the situation. The practice is not novel.

In 2008, Langford concludes after analysing about 2 000 judicial and quasi-judicial decisions across 29 national and international jurisdictions that

courts have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools, and the development and improvement of state programmes to address homelessness, endemic diseases and starvation.¹⁰⁵

The European Court of Human Rights had rejected an argument that seeks to draw a 'water-tight' distinction between the enforcement of socio-economic rights and civil and political rights.¹⁰⁶ Also, the Inter-American Court of Human Rights in *Acevedo Buendia et al v Peru*,¹⁰⁷ has reaffirmed that socio-economic rights under article 26 of the American Convention are justiciable. We have already stated the African Commission's position on the subject.¹⁰⁸ All this points strongly to one direction that socio-economic rights are no more non-justiciable,¹⁰⁹ and that the only question that may be asked is how they are enforced.

5.1.2 Expansionist approach

While awaiting a constitutional amendment, we recommend that the Court adopt the Indian expansionist approach. This approach involves the reading of socio-economic rights into civil and political rights, particularly the right to life. In *Grootboom*, the South African Court rejected the invitation thrown to it by the Applicants to adopt the expansionist

105 M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) (2008) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3; also for similar findings see generally: V Gauri et al *Courting social justice: judicial enforcement of social and economic rights in the developing world* (2010); R Gargarella et al *Social transformation in new democracies: An institutional voice for the poor* (2006).

106 *Airey v Ireland* [1979-80] 2 EHRR 305 31617.

107 1 July 2009 Series C No 198 para 99.

108 See *Purohit v The Gambia* (n 46 above).

109 N Robinson (n 81 above) 62-63.

approach of the Indian Court.¹¹⁰ The court did so on the reasoning that the Constitution had already provided for justiciable rights to health, for which reason there was no need to read the right to health care into the right of life. It is therefore quite clear that where the socio-economic rights are, by constitution, not justiciable, courts may read them into the civil and political rights, in particular the rights to life.

Ghana's position, as we have showed in this work, leaves us in doubt whether socio-economic rights are really justiciable. In this sense, it is suggested strongly that Ghanaian courts adopt the Indian expansionist approach by reading the socio-economic rights in Chapter VI of the Ghanaian Constitution into their related civil and political rights in Chapter V. In any case, and as we have noted in the previous chapters of this work, it is now clearer that the distinction between the two category of rights is not 'water-tight'.

5.1.3 Enforcement by legislation

Article 29 of Ghana's Constitution provides for the right of persons with disabilities. There is also a National Policy on Disability, 2000. In August, 2006, about 6 months before the CRPD was adopted, Ghana's Persons with Disability Act, 2006, (Act 715) came into force. These provisions, however, are largely anti-discriminatory in nature and focus largely on civil and political rights. That notwithstanding, they, Act 715 in particular, guarantee some socio-economic rights, namely the rights to employment,¹¹¹ education¹¹² and health.¹¹³

The above provisions notwithstanding, Ghana's Constitution Review Commission in its 2011 Report recommended that steps should be taken 'without further delay in order to operationalize the rights of persons with disabilities in the Constitution and the Persons with Disabilities Act'.¹¹⁴ A gap analysis commissioned by the Ghana Federation for the Disabled (GFD) and published in 2013 concludes that Ghana's Persons with Disabilities Act is 'lacking in certain vital provisions contained in the UNCRPD without which Ghana cannot boast of a robust regime for effectively protecting the rights of persons with disability'.¹¹⁵

Thus clearly, the provisions in the Persons with Disabilities Act are far from meaningful; the reason being that they remain largely unenforced and perhaps unenforceable. Indeed, it cannot be authoritatively stated that this

110 See *Soobramoney* (n 98 above) para 19.

111 Sec 9.

112 Sec 18 & 19.

113 Sec 31 & 32.

114 Republic of Ghana (n 12 above) para 450.

115 LADA Group *Gap Analysis Report on the Persons with Disability Act 2006 (Act 715) and the United Nations Convention on Rights of Persons with Disabilities (UNCRPD)* (April 2013) 19 (A copy on file with writer).

situation is solely due to the unwillingness of the Ghanaian courts (the Supreme Court in particular) to enforce these rights. What however could be asserted is that the enforcement of these rights by the courts will make the provisions meaningful. It is therefore recommended that the Supreme Court adopt the approach of the Indian Court, where Acts are enforced in place of the non-justiciable Constitutional provisions.¹¹⁶

5.1.4 Education and awareness creation

It is true that law, including court decisions, is a tool for social (including attitudinal) change. But it is also very true that law alone is not a panacea to social change. Deliberate efforts on the part of the state and civil society directed at positively affecting attitudes of people towards persons with disabilities is a strong accompaniment. The Ministry of Education and the Ghana Education Service should design a subject or, at least, a topic on disability rights. This topic if taught at the basic level of education throughout the country will go a long way to make the future generation of citizens understand disability.

6 Conclusion

The discussion has not been about whether socio-economic rights are enforceable in the same manner as civil and political rights, neither has it been about which of the two categories of rights takes precedence over the other. The central issue considered in this essay is whether socio-economic rights are justiciable in Ghana; if so, to what extent. If not, then, why and how to make them justiciable like in India, South Africa or elsewhere.

The discussion reveals that the question whether socio-economic rights are justiciable involves two 'sub-questions'. First, *whether* they are enforceable, namely, whether they could form the basis of a court action at all. If so, then, *how* they may be enforced. Ghana's current position on these issues is that there is a 'presumption of justiciability' in favour of socio-economic rights. This means that there are circumstances where some socio-economic rights may not be justiciable. This position, a product of about two decades of inconsistent jurisprudence of the Supreme Court, is an improvement over what used to be the case in prior to the *Lotto* case.

We have, however, also argued that this position is insufficient and not in line with current trends in the field. We demonstrated this by looking at

116 See *Bandhua Mukti Morcha v Union of India*[1984] 2 SCR 67 103-04.

the CRPD, an instrument which highlights the current thinking,¹¹⁷ namely, that human dignity (of persons with disabilities) cannot be adequately protected without taking socio-economic rights, too, seriously. We argued further that Ghana's current position on the enforcement of socio-economic rights poses a major challenge to the realisation of the aims of the CRPD in particular and the human rights enforcement in general.

To overcome this challenge, Ghana should amend its Constitution to make Chapter VI, which contains socio-economic rights, justiciable. This will put a definite answer to the first sub-question, whether socio-economic rights are enforceable. The courts of Ghana will then look to India, South African or elsewhere to adopt the best of the mechanisms that are being used to enforce socio-economic rights. This will supply the answer to the second sub-question, *how* to enforce socio-economic rights. This, we submit, will put Ghana on the way to meeting its obligations, fully, under the CRPD. Until this is done, we believe that Ghana's human rights credentials, which already lags behind, cannot be advanced further.

117 The UN Secretary-General *Secretary-General's Message on the Adoption of the Convention of the Rights of Persons with Disabilities* delivered by M Brown, Deputy Secretary General, UN Doc SG/SM/10797, HR/491 1, L/T/4400 (13 December 2006); where the CRPD was described as 'remarkable and forward-looking document'.

SECTION B: COUNTRY REPORTS

ERITREA

Futsum Abbay*

1 Population indicators

1.1 What is the total population of Eritrea?

No population census has ever been conducted in Eritrea. Thus, population estimates, which are indicated in various scholarly research materials and government documents, vary from 3 to 6 million.¹ The 2010 Eritrea Population and Health Survey (the 2010 EPHS), the 3rd in its series after the country's 1991 de-facto independence, puts the country's total resident population in 2010 to be 3.2 million.² However, another government document, the Country Program (CP Document 2013-2016), gives a different figure, 3.8 million, by citing the same survey.³ In answering the questions relating to population indicators of this report, the report relies on the 2010 EPHS.

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- 1 For example, the author of this report (F Abbay), in his article 'The rights of persons with disabilities in Eritrea: An assessment of their legal securities and uncertainties' (2013) 19 *East African Journal of Peace and Human Rights* 50, puts the estimate of Eritrea's total population as 5 415 300 by citing the 2011 UNDP estimate.
- 2 National Statistics Office (NSO) (Eritrea) and FAFO AIS, Eritrea Population and Health Survey 2010, (Asmara, Eritrea, 2013) 2-3 (2010 Eritrea Population and Health Survey) www.malaria-surveys.org/documents/Eritrea_2010EPHS_Final_Report.pdf (accessed 7 November 2014).
- 3 Eritrea Country Program Document (E/ICEF/2013/P/L.1) http://www.unicef.org/about/execboard/files/2013-PL1-Eritrea_CPD-final_approved-English.pdf (accessed 4 November 2014).

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Eritrea. What criteria are used to determine who falls within the class of persons with disabilities in Eritrea?

The methodology used to gather statistical data on the prevalence of disability in Eritrea in the 2010 EPHS is through a household questionnaire survey. Without providing for a definition of disability, the 2010 EPHS seeks to obtain information on disability status by posing only two questions in its Core Household Questionnaire.⁴ The questions were relating to the identification and type of disability.⁵ All the questionnaires of the survey do not seek to glean information on education, literacy, employment, etc of persons with disabilities. The main objective of the survey rather was to gather and analyse data on fertility, mortality, family planning, and health.⁶ The criteria used to determine who falls within the class of persons with disabilities in the survey were to be physically or mentally disabled.

1.3 What is the total number and percentage of persons with disabilities in Eritrea?

According to the 2010 EPHS, the total number of persons with disabilities in Eritrea is 149 103, out of which, 96 748 live in rural areas. According to this survey, persons with disabilities constitute around 5 per cent of the country's total population.⁷

1.4 What is the total number and percentage of women with disabilities in Eritrea?

Other than indicating the total number and percentage of persons with disabilities in Eritrea, the 2010 EPHS does not provide information on women with disabilities. However, as indicated in 1.1 and 1.3 above, the survey provides for the total number of resident population and total number of persons with disabilities in Eritrea respectively. The survey also notes that the total women population represents 55 per cent of the Eritrean total resident population.⁸ Thus, the number and percentage of women with disabilities can be referred by induction. As mentioned in 1.3 above, the number of persons with disabilities is 149 103. Thus, 55 per cent of the 149 103 would be women with disabilities, which would constitute around 82 000.

1.5 What is the total number and percentage of children with disabilities in Eritrea?

See the explanation given in 1.4 above.

In the context of children, nevertheless, the Survey does not provide for the total number and percentage of children under 18 years of age. It rather gives the total population percentage of children under 15 years to be 47 per cent of the total population of the country.⁹ Thus, one would infer the total number and percentage

4 The 2010 Eritrea Population and Health Survey (n 3 above) Appendix E 'The Core Household Questionnaire' 417.

5 2010 Eritrea Population and Health Survey (n 2 above).

6 2010 Eritrea Population and Health Survey (n 2 above) XIX.

7 2010 Eritrea Population and Health Survey (n 2 above) 15.

8 2010 Eritrea Population and Health Survey (n 2 above) 11.

9 As above.

of children with disabilities in the country only in regard to children with disabilities under 15 years. In other words, as explained in 1.3 above, the total number of persons with disabilities in the country is 149 103. Therefore, 47 per cent of this figure in Eritrea or around 70 000 in number are children with disabilities under 15 years.

However, note that the following documents give a different figure on the total number and percentage of children population of the country. According to the Eritrea's 4th Report on the Implementation of the Convention on the Rights of the Child (CRC), the total number of children under 18 years of the population of Eritrea in 2010 was 1 474 904. This number constitutes 15,7 per cent of the total population of the country.¹⁰ Nevertheless, for the same year, the Eritrea Country Program (CP) Document indicates that the population of children under 18 years was 2.6 million.¹¹

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Eritrea?

According to the 2010 EPHS, the most prevalent forms of disability in Eritrea are vision, mental/intellectual and motion impairments.¹² However, the survey uses inappropriate terminologies, such as, dumbness and blindness. Physical disabilities and mental illnesses caused by war and landmines are the most prevalent form of disability in Eritrea due to the 30 years of liberation war from 1961 to 1991 and the border dispute war with Ethiopia from 1998 to 2000.

2 Eritrea's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Eritrea? Did Eritrea sign and ratify the CRPD? Provide the date(s).

No. Eritrea has not yet signed or ratified the CRPD.

2.2 If Eritrea has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Eritrea submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

See 2.1 above.

¹⁰ Government of Eritrea, 4th Country Report on the Implementation of the Convention on the Rights of the Child, December 2011 See Eritrea: Basic indicators (Eritrea 4th Report on CRC) <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.ERI.4.doc> (accessed 21 November 2014).

¹¹ See Eritrea Country Program (CP) Document (n 4 above).

¹² The 2010 Eritrea Population and Health Survey (n 2 above) 15.

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Eritrea also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

• **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

In May 2014, Eritrea submitted its 5th report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women to the UN Committee on Elimination of Discrimination against Women. With regard to the rights of persons with disabilities, Eritrea reported on the enrollment rate of females with disabilities, in particular, the blind and the deaf, in the three special schools for students with disabilities.¹³ It also reported on other measures relating to provisions of cash allowance, mobility appliances and involvement of community in volunteering services to persons with disabilities.¹⁴ Nevertheless, the Committee has not yet reviewed this latest Eritrea report. In the single concluding observations in February 2006 with regard to the consideration of Eritrea's 1st, 2nd and 3rd Reports on the Implementation of CEDAW, the Committee did not make any recommendations on issues of women with disabilities.¹⁵

• **Convention on the Rights of the Child (CRC)**

In December 2011, Eritrea submitted its 4th country report on the implementation of the Convention on the Rights of the Child.¹⁶ In this report, the country reported on the rights of persons with disabilities in general and on the rights of children with disabilities in particular. It focuses on community-based rehabilitation programmes, rights to land for farming and residence purposes, provisions of orthopedic appliances and donkeys, access to educational institutions, special schools, the DPOs, and other undertaken administrative and policy measures.¹⁷ Despite the reported efforts, the report notes that a large number of children of school-going age with disabilities are still excluded from education.¹⁸ The UN Committee on the Rights of the Child has not yet examined this report. Nevertheless, in its concluding observations in regard to the consideration of the consolidated 2nd and 3rd Report of Eritrea on the Implementation of the CRC in June 2008, the UN Committee on the CRC recommended:

- Continued awareness raising of children with disabilities, including their rights, special needs and potential;
- Collection of adequate statistical data on children with disabilities and to use such data in developing policies and programmes to promote their equal opportunities in society;

13 Government of Eritrea 5th Periodic Report on the Implementation of CEDAW due in 2012 and published in May 2014, para 31 (Eritrea 5th Report on CEDAW).

14 Eritrea 5th Report on CEDAW (n 13 above) paras 105-107.

15 UN Committee on the Elimination of Discrimination against Women (CEDAW) 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Eritrea' CEDAW/C/ERI/CO/3 (3 February 2006) (Concluding Comments of the Committee on CEDAW on Eritrea's Report 2006) <http://www.refworld.org/docid/44118344c1.html> (accessed 22 November 2014).

16 Eritrea's 4th Report on CRC (n 10 above).

17 Eritrea's 4th Report on CRC (n 10 above) paras 20, 35, 72, 83, 180-188 & 324-331.

18 Eritrea's 4th Report on CRC (n 10 above) para 330.

- [Providing] children with disabilities with access to adequate social and health services, as well as to quality education; [and]
- [Ensuring] that professionals working with and for children with disabilities, such as medical, paramedical and related personnel, teachers and social workers are adequately trained.¹⁹

Accepting these recommendations, Eritrea reported in its 4th Report that the government took a number of measures, amongst others, to expand community-based rehabilitation programmes; raise awareness of community and of teachers, directors and supervisors; adapt elementary school textbooks to meet the needs of children with disabilities; construct resource rooms in various regions of the country; publish the first sign language dictionary; implement the donkey for school project; promote education for children with disabilities; and develop comprehensive policy on persons with disabilities and inclusive education policy.²⁰

• The African Charter on the Rights and Welfare of the Child

In July 2012, Eritrea submitted its initial report on the implementation of the African Charter on the Rights and Welfare of the Child to the African Committee of Experts on the Rights and Welfare of the Child (ACRWC).²¹ In this report, the Government of Eritrea reported on the rights of children with disabilities by focusing on establishment of community-based rehabilitation programmes, organisations of persons with disabilities and special schools.²² However, the ACERWC has not yet considered the report.

• Universal Periodic Review

In November 2013, Eritrea submitted its 2nd Cycle Report on the Universal Periodic Review to the Working Group on the UPR of the UN Human Rights Council.²³ In this report, with regard to persons with disabilities, Eritrea reported on special needs education of children with disabilities.²⁴ The report states the long-term strategy of the government to provide inclusive education in all schools.²⁵ Several member states of the Working Group recommended that Eritrea should ratify the CRPD.²⁶ This was also one of the recommendations echoed in the first report of the Working Group in response to Eritrea's submission of the first report on UPR in 2009.²⁷ Eritrea accepted this recommendation and reported in its 2nd Cycle Report on UPR in 2013 that all the internal legal processes for ratifying the CRPD were finalised.²⁸

19 UN Committee on Rights of the Child (CRC) 'Concluding observations on Eritrea after consideration of its consolidated 2nd and 3rd periodic report' CRC/C/ERI/CO/3 (23 June 2008) para 52 (Concluding Comments of the Committee on CRC on Eritrea's Reports 2008) <http://www.refworld.org/docid/4885cfaad.html> [accessed 21 November 2014].

20 Eritrea 4th Report on CRC (n 10 above) paras 20, 35, 180, 182, 185, 324-331.

21 Government of Eritrea 'Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child' submitted to the African Committee of Experts on the Rights and Welfare of the Child (July 2012) (Eritrea Initial Report on ACRWC), available at <http://acerwc.org/wp-content/uploads/2013/09/Initial-Report-on-African-Charter-on-Rights-and-Welfare-of-Child.doc> (accessed 3 November 2014).

22 Eritrea Initial Report on ACRWC (n 21 above) paras 29-33.

23 Government of the State of Eritrea '2nd Cycle National Report on the Universal Periodical Review (UPR)' (Eritrea 2nd Report on the UPR) <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/WG.6/18/ERI/1&Lang=E> (accessed 4 November 2014).

24 Eritrea 2nd Report on the UPR (n 23 above) para 20.

25 Eritrea 2nd Report on the UPR (n 23 above) paras 20 & 22.

26 United Nations Human Rights Council 'Report of the Working Group on the Universal Periodic Review Eritrea' A/HRC/26/13 (7 April 2014), Recommendations 122.15, 122.23, 122.24, 122.27-122.29 (Report of the UN Working Group on UPR on Eritrea 2014), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/26/13&Lang=E> (accessed 5 November 2014).

27 UN Human Rights Council 'Report of the Working Group on the Universal Periodic Review Eritrea' A/HRC/13/2 (4 January 2010) para 79, Recommendations 1, 7 & 8 (Report of the UN Working Group on the UPR on Eritrea 2010) <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/13/2&Lang=E> (accessed 5 November 2014).

28 Eritrea 2nd Report on UPR (n 23 above) paras 20 & 22.

2.4 Was there any domestic effect on Eritrea's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Eritrea's legislature to incorporate it into the legal system before the instrument can have force in Eritrea's domestic law? Have Eritrea's courts ever considered this question? If so, cite the case(s).

Eritrea is a dualist legal system with respect to relationship between international law and municipal law in its domestic affairs.²⁹ This relationship is not explicitly stated in the 1997 ratified but unimplemented Eritrean Constitution.³⁰ It is rather through interpretation of its provisions. Article 2(3) of the Constitution declares that the Constitution is 'the supreme law of the country'.³¹ Thus, any laws, acts or orders of the state have to be in conformity with the provisions of the Constitution.³² Pursuant to the Constitution, if international agreements, treaties and protocols are to form part of the country's national law and to become enforceable domestically, the National Assembly should ratify them by promulgating them in law.³³ Even so, since any laws inconsistent with the provisions of the Constitution are void, the validity of the rules of international law within the Eritrean domestic jurisdiction would be to the extent of their conformity with the country's Constitution.³⁴

With regard to court cases on the status of international law within Eritrea's domestic jurisdictions, it is not easy to find information on court cases. The same also is true with court cases on national laws. Eritrea does not publish court judgments in journals or any other reporting systems. They are simply deposited in the archives of court registrars. Thus, the country does not yet have a case reporting system.

29 ACERC 'Harmonization of Children Laws in Eritrea country brief' 2-3 <http://www.acerc.org/wp-content/uploads/2012/05/English-ACERC-Eritrea-Harmonisation-of-Laws-on-Children.pdf> (accessed 23 November 2014).

30 Ratified but unimplemented Constitution of 1997 (the Constitution). Pursuant to Proclamation No 55/1994, a Constitutional Commission was established to prepare a Draft National Constitution with popular participation. After a preparation of the Draft Constitution, Proclamation 92/1996 established a Constituent Assembly with the mandate of ratifying the drafted Constitution. Accordingly, the Constituent Assembly ratified the Draft Constitution on 23 May 1997. However, the ratified Constitution was never implemented into practice. Nevertheless, various government national reports and government high officials claim that the Constitution is in practice and cite its provisions in elaborating its implementation. See the full texts of the national reports cited in 2.3 below.

Recently, however, the President of the country, Isaias Afewerki, announced during his speech on the occasion of the 23rd Independence Day Celebrations on 24 May 2014 that a constitutional drafting process would be initiated to draft a new constitution. See the full text of the speech on the web-site of Eritrea's Ministry of Information: <http://www.shabait.com/news/local-news/17116-president-isaias-afewerkis-speech-on-the-occasion-of-the-23rd-independence-day-celebrations> (accessed 26 August 2015).

Noting that the 1997 ratified but unimplemented Constitution is the only constitution in the country consisting of the basic human rights and fundamental freedoms, the author of this report seeks to make reference to the provisions of this Constitution throughout the report in analysing the disability-related constitutional rights in the country.

31 Art 2(3).

32 As above.

33 Art 32(4).

34 Art 2(3).

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Eritrea has not yet domesticated any of the ratified international human rights instruments into its national law by an act of the National Assembly.³⁵ As to the CRPD, the country is not a signatory or ratifying state party to the CRPD.

However, since domestication of international law can also be done through incorporation of its contents into a country's domestic legal system, some legislation enacted in Eritrea following ratifications of international agreements by the Government have incorporated principles and obligations enshrined under the international human rights instruments. For example, the 2007 Female Circumcision Abolition Proclamation of Eritrea aims to protect the human rights of women, including those of women with disabilities, by eliminating by law one of the prevalent harmful practices performed against women in the country.³⁶ Moreover, in its 2013 2nd Cycle Report on UPR, Eritrea reported that the drafting process of new codes that will replace the transitional ones was in the final stage.³⁷

3 Constitution

3.1 Does the Constitution of Eritrea contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

Articles 14(3), 41(6)(C) and 52(1) of the 1997 Eritrean Constitution directly address issues relating to disability.³⁸ Its article 14 prohibits discrimination of persons on the ground of their disability by including 'disability' amongst the list of prohibited factors against discrimination.³⁹ Article 41(6)(C) and 52(1) of the Constitution mention physical or mental incapacity as a reason for removing the President and judges respectively.

3.2 Does the Constitution of Eritrea contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Due to the general non-discrimination clause in article 14 of the Eritrean Constitution, all the human rights and fundamental freedoms enshrined under it also apply indirectly to persons with disabilities on an equal basis with others.

35 Art 32(4)

36 Female Circumcision Abolition Proclamation 158 of 2007.

37 Eritrea 2nd Report on UPR (n 23 above) para 5.

38 The Constitution, arts 14 (3), 41 (6)(C) & 52(1).

Also, see the text relating to the brief background of the ratified but unimplemented 1997 Eritrean Constitution in (n 30 above).

39 Art 14(2).

4 Legislation⁴⁰

4.1 Does Eritrea have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- **The 2004 'Goods for the Disabled Government Assistance Regulation'**
Eritrea has only one disability-specific regulation: the 2004 'Goods for the Disabled Government Assistance Regulation'.⁴¹ The objective of the regulation is to provide full or partial government assistance to persons with disabilities with respect to customs duties on imported goods specifically designed for their use.⁴²

The other disability-related provisions in Eritrea are scattered in the various general laws of the country. The following are the main ones.

- **Transitional Civil Code of 1991**
Articles 339-379, 591, 628, 670, 791, 863, 1728(3) and 1729(1) are provisions that directly address issues on disability or persons with disabilities.⁴³

Articles 339-379 of the Code lay down the rights, powers and limitations of insane, infirm and judicially interdicted persons. Articles 343-344 of the Code stipulate that consent is deemed to be vitiated in the following circumstances: (1) juridical acts performed by a person at the time and in a place in which his state of insanity was notorious, (2) juridical acts performed by a person where the infirmity which renders such person unfit to take care of himself and to administer his property is apparent. This defect may result an annulment of the acts on the ground of error. In the context of marriage, for instance, article 591 of the Civil Code relating to Family Law states that the consent to marry may be vitiated if the spouse has an

error regarding the state of health or the bodily conformation of the (other) spouse, who is affected by leprosy or who does not have the requisite organs for the consummation of the marriage.⁴⁴

40 The discussion in this sub-section is taken from the author's article (n 1 above) 53-63 & 68. Unless ideas are paraphrased, the author of this report has maintained the original footnoting. Moreover, the discussion of this section and section 11 of this report relating to disability legislative rights is drawn from provisions of the transitional codes of 1991 and other proclamations and regulations promulgated between 1991 and May 2015. Following the liberation of the country from Ethiopia in 1991, the Eritrean Government adopted all the then existing Ethiopian codes with some minor amendments as transitional codes. The codes, which were adopted as transitional ones were: the Civil Code, the Penal Code, the Civil Procedure Code, the Penal Procedure Code, the Commercial Code and the Maritime Code. In May 2015, the Eritrean Government published new codes replacing the 1991 Transitional Civil Code, the 1991 Transitional Penal Code, the 1991 Transitional Civil Procedure Code and the 1991 Transitional Penal Procedure Code. See the news posted on Eritrea's Ministry of Information web-site: <http://shabait.com/news/local-news/19792-goe-puts-into-effect-civil-and-penal-codes-and-associated-procedures> (accessed 25 August 2015). It was also reported that a new Commercial Code was to be published in the near future. Despite this new legal development, the author of this report does not seek to analyse the provisions of these newly adopted laws due to time constraint and being a very recent development.

41 Goods for the Disabled Government Assistance Regulation Legal Notice 82 of 2004.

42 As above.

43 Transitional Civil Code of 1991 (the Civil Code).

44 As above.

In a divorce, according to article 670 of the Civil Code, a confinement of one of the spouses in a lunatic asylum since not less than two years is mentioned as one of the serious causes for divorce.⁴⁵

However, 'judicial acts performed by a person may not be impugned on the grounds of his insanity where his condition is not notorious'.⁴⁶ For example, article 863 of the Civil Code relating to Succession Law states, a will may not be invalidated unless the testator was notoriously insane.⁴⁷

Articles 351-357 of the Civil Code provide provisions on procedures for declaration of insane and infirm persons as judicially interdicted persons. The subsequent articles determine the rights and limitations of judicially interdicted persons. Pursuant to article 368 of the Civil Code, a judicially interdicted person cannot make a will during his/her interdiction period. As articles 369 and 628 of the Code stipulate, a judicially interdicted person has the right to enter into a marriage contract with permission of a court. To request for divorce, as article 370(1) of the Code states, a consent of the judicially interdicted person and of his/her guardian is required.⁴⁸ According to articles 370(2) and 791 of the Civil Code, an application for disowning a child can be instituted either by the judicially interdicted person or by his/her guardian. In terms of medical treatment, according to article 20(3) of the Transitional Civil Code, a judicially interdicted person may not refuse to submit himself/herself to medical examination or treatment. It is up to his/her guardian.⁴⁹ According to article 1729(1) relating to General Contracts, judicially interdicted persons cannot also be witnesses in contracts.⁵⁰ In general, during the declaration of the interdiction decision or after, the court may specify certain acts the judicially interdicted person may perform himself/herself.⁵¹

- **Labour Proclamation No 118/2001**

Articles 3(30), 63-64 and 70-83 of the Labour Proclamation contain provisions that directly address disability-related issues.⁵² Articles 63 and 64 of the Labour Proclamation aim to regulate the working conditions of the disabled.⁵³ Article 64(1) further prohibits discrimination of the disabled on the ground of their disability in cases of employment opportunities, treatment and employment remuneration. Articles 70-83 of the Labour Proclamation also regulate employment injuries, occupational diseases, and their associated services and benefits, such as, disability compensation.⁵⁴ Nevertheless, the provisions of this chapter do not apply to injuries or disabilities sustained before the commencement or outside the scope of employment.

- **'Proclamation No 146/2005 to Determine the Rights and Obligations of Employees, Beneficiaries and the Employer under the Public Sector Pension Fund'**

Articles 2(17), 10(1)(B-C), 11(1)(B) and 24 of this Public Sector Pension Proclamation specifically address issues on disability.⁵⁵ According to articles 10 and 11 of the Proclamation, employees, who contribute to the Pension Fund and who retire from their pensionable employment or service due to permanent and

45 Art 670 of the Civil Code.

46 Art 347(1) of the Civil Code.

47 Art 863 of the Civil Code.

48 Art 370(1) of the Civil Code.

49 Art 20 (3) of the Civil Code.

50 Art 1729(1) of the Civil Code.

51 Art 371 of the Civil Code.

52 Labour Proclamation 118 of 2001 (the Labour Proclamation) arts 3(30), 63-64 & 70-83.

53 Chap 3, arts 63-64 of the Civil Code.

54 Chap 5, arts 70-83 of the Civil Code.

55 Proclamation to Determine the Rights and Obligations of Employees, Beneficiaries and the Employer under the Public Sector Pension Fund 146 of 2005 (the Pension Proclamation).

total disability, are entitled to their pension or gratuity benefits depending on the number of contributions paid.⁵⁶

• **Proclamation on the Establishment of Community Courts No 132/2003**

With regard to elections, the Proclamation on the Establishment of Community Courts bars citizens with chronic mental problems from standing for election as judges.⁵⁷

• **Proclamation on Election of Regional Assemblies No 140/2004**

The Proclamation on the Election of Regional Assemblies also prohibits persons with mental impairments from voting.⁵⁸ On a positive note, article 12 of this Election Proclamation guarantees the blind and other disabled persons to be accompanied by a person of their choice during the voting process.⁵⁹

• **Nationality Proclamation No 21/1992**

Article 4 of the Eritrean Nationality Proclamation contains a discriminatory provision on granting Eritrean nationality by naturalisation against persons with disabilities who are not of Eritrean origin and have entered and resided in Eritrea in 1952 or after.⁶⁰ It states that any person who is not of Eritrean origin and has entered, and resided in Eritrea in 1952 or after should, amongst other things, be 'free of any of the mental or physical handicaps ... will not become a burden to Eritrean society and can provide for his own and his family's needs'.⁶¹

• **National Service Proclamation No 82/1995**

The National Service Proclamation obliges all adult citizens, men and women, between the ages of 18 and 40 to render compulsory national service consisting of six months of military training and twelve months of service in military duties or national development activities.⁶² The Proclamation exempts individuals with disabilities, including those with mental illness, from national service or part of the military training.⁶³

• **Transitional Penal Code of Eritrea (1991)**

Articles 48, 49, 133-137, 559, 589(B) and 591(1) of the Penal Code are the relevant criminal provisions directly addressing disability issues.⁶⁴

According to article 48 of the Penal Code, a person is not criminally 'responsible for his acts when, owing to age, abnormal or deficient condition was not, at the time of his act, fully capable of understanding the nature and consequences thereof ...' Articles 133-137 of the Code also contain provisions concerning confinement and treatment of offenders with mental illness or impairments.⁶⁵

With regard to crimes committed upon persons with disabilities, article 559 of the Penal Code stipulates that an abduction of an 'insane, idiot or feeble-minded woman' is an offence and is punishable with rigorous imprisonment not exceeding five years. Also, article 591(1) of the Code stipulates that sexual intercourse or any

56 Arts 10(1)(B-C) & 11(1)(B) of the Pension Proclamation.

57 Proclamation on Establishment of Community Courts 132 of 2003, art 4 (the Community Court Proclamation).

58 Proclamation on Election of Regional Assemblies 140 of 2004 (the Regional Election Proclamation) art 5 (2).

59 The Regional Election Proclamation (n 58 above) art 12(G)(1).

60 Nationality Proclamation 21 of 1992 (the Nationality Proclamation) art 4(2)(D).

61 As above.

62 National Service Proclamation 82 of 1995 (the National Service Proclamation) art 8.

63 The National Service Proclamation (n 62 above) arts 13 & 15.

64 Transitional Penal Code of 1991 (the Penal Code) arts 48, 49, 133-137, 559, 589(B) & 591(1).

65 Arts 133-137 of the Penal Code.

other indecent act with an idiot, a feeble-minded, or insane person is punishable with rigorous imprisonment not exceeding five years or with simple imprisonment for not less than three months. Note here the inappropriate terminologies used under articles 559 and 591 of the Transitional Penal Code in the above relating to persons with disabilities.

4.2 Does Eritrea have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

See the discussion in 3.2 above.

All national laws of Eritrea are also applicable to persons with disabilities because of the nature of their general application. Amongst other things, the national laws include: the Transitional Civil Code,⁶⁶ Transitional Penal Code,⁶⁷ Transitional Commercial Code,⁶⁸ Transitional Maritime Code,⁶⁹ Transitional Civil Procedure Code,⁷⁰ Transitional Criminal Procedure Code,⁷¹ Nationality Proclamation No 21/1992,⁷² National Service Proclamation No 82/1995,⁷³ Land Proclamation No 58/1994,⁷⁴ Labour Proclamation No 118/2001,⁷⁵ Water Proclamation No 162/2010,⁷⁶ Proclamation No 146/2005 to Determine the Rights and Obligations of Employees, Beneficiaries and the Employer under the Public Sector Pension Fund,⁷⁷ Martyrs' Survivors Benefit Proclamation No 137/2003,⁷⁸ Proclamation on Establishment of Community Courts No 132/2003,⁷⁹ and Proclamation on Election of Regional Assemblies No 140/2004.⁸⁰

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Eritrea ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

As explained in 2.4 above, Eritrea does not have a case reporting system. As a result, court cases are not easily available for reference. The only way to track court cases is by conducting research into court files in the archives of court registrars throughout the country.

66 The Civil Code (n 43 above).
 67 The Penal Code (n 64 above).
 68 Transitional Commercial Code of 1991.
 69 Transitional Maritime Code of 1991.
 70 Transitional Civil Procedure Code of 1991.
 71 Transitional Criminal Procedure Code of 1991.
 72 The Nationality Proclamation (n 60 above).
 73 The National Service Proclamation (n 62 above).
 74 Land Proclamation 58 of 1994 (the Land Proclamation).
 75 The Labour Proclamation (n 52 above).
 76 Water Proclamation 162 of 2010.
 77 The Pension Proclamation (n 55 above).
 78 Martyrs' Survivors Benefit Proclamation 137 of 2003.
 79 The Community Court Proclamation (n 57 above).
 80 The Regional Election Proclamation (n 58 above).

6 Policies and programmes

6.1 Does Eritrea have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **National Disability Policy**

The Government of Eritrea reported in its 2011 4th Country Report on the Implementation of the CRC that it has drafted and prepared a comprehensive national disability policy.⁸¹ However, during research of this country report on Eritrea no draft or official version of this policy were traced.

The Government also repeatedly reported in its various national reports submitted to international and regional human rights mechanisms that it has programmes providing for orthopaedic appliances, cash allowances, educational materials, provision of education in special schools, establishment of community-based rehabilitation programmes and so on, for persons with disabilities in Eritrea. For more details, see also 2.3 above.

6.2 Does Eritrea have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **2010 National Health Policy**

The 2010 Eritrean National Health Policy affirms as a principle that the provision of health care services should be equitably promoted 'to all people regardless of their location, ethnicity, gender, age, social, economic, cultural and political status'.⁸² It does not, however, contain detailed guidelines, standards or norms on persons with disabilities or disability. One important feature in the National Health Policy in the context of disability is that it provides for a rehabilitative health care and gives strategic directions to strengthen this health care by undertaking preventative and rehabilitative interventions to reduce disabilities caused by injuries.⁸³ Sadly, the Policy considers disabilities, blindness, deafness and mental disorders amongst the non-communicable disease.⁸⁴

- **The 2010 National Education Policy**

Affirming that education is a fundamental human right, the 2010 Eritrean National Education Policy aims to make basic education available to all free of charge.⁸⁵ It does not, however, contain specific guidelines or principles on disability or persons with disabilities.

81 Eritrea 4th Report on CRC (n 10 above) paras 72 & 83.

82 National Health Policy of Eritrea (March 2010) 16.

83 National Health Policy of Eritrea, 19.

84 National Health Policy of Eritrea, 18.

85 National Education Policy of Eritrea (September 2010) para 2.

7 Disability bodies

- 7.1 Other than the ordinary courts and tribunals, does Eritrea have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.**

No. Eritrea does not have such bodies.

- 7.2 Other than the ordinary courts or tribunals, does Eritrea have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

No.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Eritrea have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Eritrea has ever addressed issues relating to the rights of persons with disabilities.**

No. Not even the 1997 ratified Eritrean Constitution provides for provisions for the establishment of such bodies.

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Eritrea have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

According to the several national reports of Eritrea on implementations of regional

and international human rights instruments, there are four associations of persons with disabilities in Eritrea.⁸⁶ They are:

- **Eritrean National war-Disabled Veterans Association (ENWDVA)**

The Main objective of this association is to rehabilitate and integrate war-disabled veterans into society.

- **Eritrean Association of the Blind (ERNAB)**

It provides assistance and service for its members and aims to advocate for the rights of the blind in the country.

- **Eritrean National Association of the Deaf (ERINAD)**

It aims to integrate the deaf into the Eritrean community; represent the interests and voices of the Eritrean deaf; and to ensure access to comprehensive services and equal opportunities.⁸⁷

- **National Association of Autism and Down syndrome**

As it presently stands, this is a parent support group, and is an association of families of children with autism and down syndrome. It aims to raise awareness and enhance the educational opportunities for children with autism and down syndrome.

9.2 In the countries in Eritrea's region (East Africa) are DPOs organised/coordinated at national and/or regional level?

No unifying single umbrella organisation of DPOs exists at a national level in Eritrea that could collectively voice disability issues.⁸⁸

9.3 If Eritrea has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

See 2.1 above.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

See 2.1 above.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

See 2.1 above. DPOs' role in the country in implementing international and regional instruments is little or not at all. Even so, they encounter a multiple of barriers in conducting many of their activities, especially relating to lobbying, advocating, and playing a role in bringing about pertinent national policy and legal reforms on the rights of persons with disabilities. For some of the barriers, see 9.9 below in the light of recommendations for enhancing the role of DPOs in implementing international and regional human rights instruments.

86 See, for example, Eritrea 4th Report on CRC (n 10 above) para 181.

87 Constitution of Eritrean National Association of the Deaf (ERINAD) (1998) <http://www.enadeu.org/erinad/about-erinad> (accessed 2 December 2014).

88 Abbay (n 1 above) 55.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

See 2.1 above.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

See 2.1 above.

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

See 2.1 above.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

For DPOs to be empowered to take a leading role in the implementation processes of international or regional human rights instruments, the following should occur:

- First, DPOs should have good knowledge and information about the contents and implementation processes of the international and regional human rights instruments.
- Second, they should receive relevant education and training to develop their research and advocacy capacity skills not only to play a role in implementing international and regional human rights instruments but also to advocate and lobby for required legal reforms and for the protection of the rights of persons with disabilities.
- Third, they should have adequate financial resources, technical and other support to undertake their activities.
- Fourth, DPOs, representing various persons with disabilities with different types of disabilities within the disability community, should forge to have one voice for the disability community as a whole, instead of creating unnecessary competitions and conflicts amongst them.
- Fifth, DPOs should strengthen their organisational structures and create relations with other DPOs and advocating groups for the rights of persons with disabilities.

9.10 Are there specific research institutes in the region where Eritrea is situated (East Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

No.

10 Government departments

10.1 Does Eritrea have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The Rehabilitation and Integration Division of the Social Welfare Department within the Ministry of Labour and Human Welfare of the Eritrean Government is the government body responsible for issues relating to disability and persons with disabilities. Although the mentioned body is not specific to disability-related issues, it works in collaboration with other relevant government bodies, such as, the Ministry of Education, Ministry of Health, and so on. As reported in the 4th Periodic Report on the Implementation of the CRC by Eritrea,⁸⁹ some of the activities conducted by the Ministry of Labour and Human Welfare of the Eritrean Government include:

It drafted a comprehensive national policy on persons with disabilities.⁹⁰ It established community rehabilitation programmes (CBR) in areas covering over 90 per cent of the country.⁹¹ Moreover, it provided children with disabilities with various orthopaedic appliances.⁹² It also provided many students with disabilities, who reside in inaccessible villages, with donkeys and accessories to enable them attending schooling.⁹³

Other activities by the Ministry of Education of the Government include:

It conducted training courses and workshops to promote the education of children with special needs. It prepared policy, strategy and guideline on special needs education and inclusive education. It also undertook curriculum modifications to accommodate the special educational needs of children with learning difficulties. It conducted pilot special needs education classes in some regions of the country. Moreover, it provided an orientation course on inclusive education to suit the needs of children with disabilities.⁹⁴

89 Eritrea 4th Report on CRC (n 10 above) paras 72, 83, 180, & 184-187.

90 Eritrea 4th Report on CRC (n 10 above) paras 72 & 83.

91 Eritrea 4th Report on CRC (n 10 above) paras 180 & 184.

92 Eritrea 4th Report on CRC (n 10 above) para 187.

93 Eritrea 4th Report on CRC (n 10 above) paras 185-186.

94 Eritrea 4th Report on CRC (n 10 above) paras 324, 325 & 331.

11 Main human rights concerns of people with disabilities in Eritrea⁹⁵

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access to physical and environmental structures**

Inaccessible physical and environmental structures and buildings is another concern and challenge persons with disabilities encounter in their daily activities in Eritrea. This negatively affects how persons with disabilities in the country enjoy and exercise the existing rights relating to political participation, education, health, employment, transportation, housing, cultural and leisure and other available social services. The country has not yet adopted a modern regulation on construction of buildings that takes into account the needs and concerns of persons with disabilities. The current law is out-dated, being introduced in 1938 during the Italian colonisation.⁹⁶

Relating to other contemporary challenges of persons with disabilities in Eritrea and their legal responses, see the other sub-sections of this section below. See also sections 3 and 4 above.

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Eritrea?

As stated in 3 above, the only mention of disability in the 1997 Eritrean Constitution is in the non-discrimination clause in article 14.⁹⁷ Therefore, the application of the constitutional provisions relating to the right to participation in political and public life is through the general application of the provisions.

Article 7(1) of the Eritrean Constitution affirms the right of citizens (including citizens with disabilities, my emphasis) to active participation in all political, economic, social and cultural life of the country as a fundamental principle of the state. Article 7(4) of the Constitution further guarantees citizens, including citizens with disabilities, the right to equal opportunity to participate in any leadership position in the country. Article 19(5) of the 1997 Constitution also guarantees citizens, including citizens with disabilities, the right to assemble and demonstrate

95 The discussion in this sub-section are also either taken or adopted from the author's article (n 1) No population census has ever been conducted in Eritrea. Thus, population estimates, which are indicated in various scholarly research materials and government documents, vary from 3 to 6 million. The 2010 Eritrea Population and Health Survey (the 2010 EPHS), the 3rd in its series after the country's 1991 de-facto independence, puts the country's total resident population in 2010 to be 3.2 million. However, another government document, the Country Program (CP Document 2013-2016), gives a different figure, 3.8 million, by citing the same survey. In answering the questions relating to population indicators of this report, the report relies on the 2010 EPHS. above) 55-57 & 63-72. Except when ideas are paraphrased, the author of this report has maintained the original footnoting.

96 I Yemane 'Beyond affirmative action: Guaranteeing equality of opportunity for the disabled in employment through assistive technology' unpublished LLB thesis, University of Asmara, 2006 sec 2.2.2.2.

97 The Constitution (n 30 above) art 14.

peaceably. Article 19(6) of the Constitution further recognises the right of citizens to form organizations for political, social, economic and cultural purposes.

Article 20 of the Constitution also affirms the right to vote and to be elected to an elective office. However, the government has not yet enacted national election legislation. The only election legislation in the country is in regard to regional assemblies.⁹⁸ As stated in 4.1 above, the Proclamation on the Election for Regional Assemblies excludes persons with mental impairments from voting. Similarly, the Proclamation on the Establishment of Community Courts prohibits citizens with chronic mental problems from standing for election as judges.⁹⁹

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your country?

The entitlement of persons with disabilities to social and economic rights under the 1997 Eritrean Constitution is through interpretation and application of the general provisions. The Eritrean Constitution obliges the state to provide to all citizens, including citizens with disabilities, health, education, cultural and other social services within the limits of the country's resources. Moreover, the state has the responsibility to ensure social welfare to all citizens and in particular that of the disadvantaged groups, which also include citizens with disabilities.¹⁰⁰

• Health and rehabilitation services

As stated above, the right to health is amongst the social services provided for under the 1997 Constitution. The 2010 Eritrean National Health Policy also affirms as a guiding principle that the provision of health care services should be equitably promoted 'to all people regardless of their location, ethnicity, gender, age, social, economic, cultural and political status'.¹⁰¹ The 1994 Macro Policy of the Eritrean Government also seeks to establish a public health care system to which the general population has easy access.¹⁰² Public health care services are available for no or nominal fees to the public, particularly to those living in extreme poverty. Due to the poor economic growth of the country, however, the supply and distribution of essential medical drugs are inadequate. Up to date, Eritrea has not adopted mental health legislation.

In terms of rehabilitation services, persons with disabilities in Eritrea very often do not receive adequate rehabilitation services. The Ministry of Labour and Human Welfare of the Government makes efforts to distributing orthopaedic appliances and other materials with the goal of alleviating some of their mobility problems. Nevertheless, the distribution and types of appliances are very limited and are insufficient to meet the needs of persons with disabilities. For instance, as reported in the 4th Report on the Implementation of the CRC, only 300 children with disabilities received orthopaedic appliances between 2008 and 2010.¹⁰³ The Eritrean Government also undertakes community-based rehabilitation (CBR) programmes in 51 sub-regional administrations, covering over 90 per cent of the country's territory.¹⁰⁴

98 The Regional Election Proclamation (n 58 above).

99 The Community Court Proclamation (n 57 above).

100 The Constitution (n 30 above) art 21(2).

101 National Health Policy (n 82 above) 15.

102 *Macro Policy* of Eritrea November 1994 11, § 3.

103 Eritrea 4th Report on CRC (n 10 above) para 187.

104 Eritrea 4th Report on CRC (n 10 above) paras 180 & 183-184.

- **Education**

The 1997 Eritrean Constitution requires the state to make education available to all citizens. From independence of the country up to present, not only basic primary level education is free and compulsory, but also all publicly funded levels of schooling in Eritrea are provided to the public, including to persons with disabilities, for free. Nevertheless, as acknowledged in Eritrea's 4th Periodic Report on the Implementation of the CRC, a large number of children with disabilities do not attend school.¹⁰⁵ The 2010 EPHS also indicated that 8 per cent of school-aged females and 15 per cent of males mention disability or health problems as a reason for not attending a school.¹⁰⁶ Even those who attend do not receive adequate educational support.¹⁰⁷ According to this report, in the academic year of 2009/2010, there were 14 036 students with disabilities, out of which, 44 per cent attended elementary, 31 per cent middle school, and 25 per cent secondary school.¹⁰⁸ There are three special elementary schools for persons with disabilities in Eritrea: One school for the blind and two schools for the deaf. The rate of enrolment of students with disabilities in these three special schools is very low. As reported in Eritrea's 5th Report on implementation of the CEDAW, the total number of students with disabilities enrolled in the three special schools in the academic year of 2011/2012 was 252, out of which, 67 were with vision impairment, and the rest, 185, were with hearing impairments.¹⁰⁹ After completing their studies at the special elementary schools, students with disabilities are integrated into mainstream educational institutions with little or no resources allocated to meet their particular needs.

- **Social security**

As stated above, the 1997 Eritrean Constitution obliges the government to 'secure, within available means, the social welfare of all citizens and particularly those disadvantaged'.¹¹⁰ So far, the government has not yet enacted a social welfare legislation that applies to all citizens. There are, however, legislation on some benefit/payment schemes laws for some groups of citizens. For instance, Proclamation No 146/2005 establishes pension rights to regular employees in the civil service and their beneficiaries.¹¹¹ The Martyrs' Survivors Benefit Proclamation also provides tax-free benefit payments to the survivors of the martyrs.¹¹² Other programmes of the government include: monthly benefit payments to the war-disabled citizens,¹¹³ and Taking care severely war-disabled citizens in care-giving institutions.¹¹⁴ However, other than for blind students enrolled in middle and high school education, no regular benefit payment schemes are created for persons whose disabilities are caused by other reasons, such as, diseases, landmines, accidents, and so on.¹¹⁵

105 Eritrea 4th Report on CRC (n 10 above) para 330.

106 The 2010 Eritrea Population and Health Survey (n 2 above) 21.

107 Eritrea 4th Report on CRC (n 10 above) para 330.

108 Eritrea 4th Report on CRC (n 10 above) para 328.

109 Eritrea 5th Report on CEDAW (n 13 above) paras 30-31.

110 The Constitution (n 30 above) art 21(2).

111 The Pension Proclamation (n 55 above).

112 The Martyrs' Survivors Proclamation (n 78 above).

113 It is a known fact that 'war-disabled fighters' in Eritrea receive monthly payments from the Government.

114 There are institutions that only provide care for 'war-disabled fighters'. There is one such centre in Asmara (the capital city) and another in May-Habar town.

115 Many of my friends who do not have any means of supporting themselves are not receiving such monthly payments from the government after completion of their secondary school studies.

11.4 Case studies of specific vulnerable groups

- **Women with disabilities**

Regarding the total population of women with disabilities in Eritrea, see 1.4 above. Although no or little research has been conducted relating to the lives of women with disabilities in Eritrea women with disabilities in the country are subjected to more discrimination, exclusion, abuse, and prejudice in the Eritrean society than men with disabilities. The discrimination and exclusion they encounter in their daily lives is not only because of their disability but also of their gender.

- **Children with disabilities**

Regarding the total number and percentage of children with disabilities in Eritrea, see 1.5 above. Like on women with disabilities, no or little research has been done on the lives of children with disabilities in Eritrea. Children with disabilities are vulnerable to more discrimination, exclusion, abuse, and prejudice than other children with no disability. The discrimination and exclusion they experience is both due to their disability and age. Thus, the interests, needs and concerns of children with disabilities are often ignored than those of non-disabled peers.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Eritrea at the moment?

According to the research there was no or little discussion on legal issues relating to the rights of persons with disabilities in Eritrea. The legal measures mentioned in the national reports by the country were a preparation of a comprehensive disability policy, which has never been final and official, and a finalisation of internal judicial procedures for ratifying the CRPD, which has not yet resulted in a ratification of the Convention.

12.2 What legal reforms would you like to see in Eritrea? Why?

Eritrea needs to take a number of constitutional and legislative reforms with the goal of improving and ensuring the promotion and protection of the human rights of persons with disabilities. As it is elaborated in 3, 4, and 11 in the above, the country does not provide adequate guarantees and legal protections for the rights of persons with disabilities. Amongst the required possible reforms would be:

It is overdue for the country not only to implement its unenforced 1997 ratified Constitution but also make amendments into it to include more constitutional protections for the rights of persons with disabilities. It should also adopt a disability policy and comprehensive disability legislation that promote and protect the human rights of persons with disabilities. Moreover, as explained in 3, 4 and 11 of this report, the scattered disability-related provisions under the various national laws of the country do not adequately protect, ensure and fulfil the human rights and fundamental freedoms of persons with disabilities. They should, therefore be revised and reformed to bring them in conformity with international disability human rights, norms and standards. Lastly, at international level, Eritrea is not yet a state party to the CRPD and its Optional Protocol, and thus, should ratify them as soon as possible.

LESOTHO

*Itumeleng Shale**

1 Population indicators

1.1 What is the total population of Lesotho?

Lesotho's last population and housing census was in 2006 and reflected a population of 1 880 661.¹ By the end of 2014 the population was estimated at 2 074 465 people.²

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Lesotho. What criteria are used to determine who falls within the class of persons with disabilities in Lesotho?

Statistical data on the prevalence of disability in Lesotho is reflected in the 2006 Housing and Population Census conducted by the Bureau of Statistics. The data was obtained through scientific data collection where enumerators went from house to house asking questions related to education, sex, age, disability, household characteristics, housing amenities and others.³

Similar tools were used in 2010 in the study on the living conditions of persons with disabilities:

- Households were screened in order to identify households in which there are persons with disabilities (PWDs).
- Face-to-face interviews were conducted in selected households with both PWDs and non-disabled members of the households.

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1 Lesotho Bureau of Statistics (BOS) www.bos.gov.ls (accessed 24 November 2014).

2 Available on <http://countryeconomy.com/demography/population/lesotho> (accessed 16 February 2015). See also World Population Review 2014 'Lesotho population 2014' www.worldpopulationreview.com/countries/lesotho-population (accessed 16 February 2015).

3 BOS (n 1 above).

- Questionnaires were administered. There were specific questions designed for PWDs and there were also those designed for PWDs' household members as well as those for households where there were no PWDs.⁴
- The criteria used in the living conditions study to determine who falls within the class of PWDs in Lesotho were based on the International Classification of Impairments, Disabilities and Handicaps (ICIDH).⁵
- There were six disability types (that is, core domains) registered in the study. These were vision, mobility, hearing, remembering, self-care and communicating.⁶
- The selection also considered an impairment that may be physical, cognitive, mental, sensory, emotional, developmental, or some combination of these, whether present from birth, or occurring during a person's lifetime

1.3 What is the total number and percentage of persons with disabilities in Lesotho?

According to the Ministry of Health and Social Welfare's (which is currently divided into two separate individual ministries) National Disability and Rehabilitation Policy (NDRP) 2011,⁷ Lesotho has a very limited coordinated disability database to provide statistics of persons with disabilities.⁸

Several institutions such as the Ministry of Education and Training and Ministry of Development Planning undertook studies in the early 2000s to estimate the population of people with disabilities in Lesotho. The two ministries estimated the population of people with disabilities at 4,2 per cent (Bureau of Statistics, 2002) and 5,2 per cent (Ministry of Health and Social Welfare, 2008).⁹

For the first time in census history the Bureau of Statistics (BOS) included questions on disabilities during the 2006 Population and Housing Census. The results of the census were presented for the first time to stakeholders in December 2009 and they indicate that 3,7 per cent of the total population of Lesotho has some form of disability of which 2,1 per cent constitute males and 1,6 per cent females.

The methodology used in obtaining this data is as reflected in 1.2 above.

1.4 What is the total number and percentage of women with disabilities in Lesotho?

The total number of women with disabilities (WWDs) is estimated at 33 191 which is 1,6 per cent of total population.¹⁰

1.5 What is the total number and percentage of children with disabilities in Lesotho?

Reliable estimates could not be ascertained due to lack of statistics, but the Ministry of Education and Training database shows that out of the total enrolment of 424

4 Y Kamaleri & AH Eide 'Living conditions among people with disabilities in Lesotho: A national representative study' (Living Conditions Study) *SINTEF Technology and Society Global Health and Welfare* (2011) 27.

5 Living Conditions Study (n 4 above). See also International Classification of Impairments, Disabilities and Handicaps (ICIDH) (1999) www.who.ch/icidad (accessed 26 May 2015).

6 Living Conditions Study (n 4 above) 27.

7 Government of Lesotho, Ministry of Health and Social Welfare National Disability and Rehabilitation Policy (NDRP) (2011) <http://www.gov.ls/social> (accessed 22 September 2015).

8 As above.

9 BOS (n 1 above).

10 Lesotho Demographic Survey 2006.

855 pupils, a staggering 5,2 per cent (22 233) had a disability of one form or another.¹¹

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Lesotho?

The most prevalent forms of disabilities in Lesotho are visual, hearing, mobility, remembering, self-care and communication impairments.¹²

2 Lesotho's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Lesotho? Did Lesotho sign and ratify the CRPD? Provide the date(s).

Lesotho ratified the CRPD on 2 December 2008.

2.2 If Lesotho has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Lesotho submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

Lesotho's first country report was due in 2010. The Human Rights Unit in the Ministry of Law and Constitutional Affairs in collaboration with other ministries including the Ministry of Social Development and Ministry of Foreign Affairs are responsible for submission of the report. Lesotho has not yet submitted its initial report. Reasons advanced for failure to submit the reports on time include lack of financial and technical resources.¹³

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Lesotho also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

Lesotho is a state party to several international human rights instruments under both the UN and AU auspices. The majority if not all the treaties to which Lesotho

11 C Chitereka 'People with disabilities and the role of social workers in Lesotho' (2010) 8 *Social Work and Society International Online Journal* <http://www.socwork.net/sws/article/view/25/69> (accessed 23 March 2015).

12 Living Conditions Study (n 4 above).

13 Interview with Ms Polo Chabane, Head of Human Rights Unit conducted on 23 February 2015.

is a party require states parties to submit periodic reports. The same is required by other UN and AU human rights implementation mechanisms such the Universal Periodic Review of the UN and the African Peer Review Mechanism of the AU. Whilst the extensive ratification of international human rights instruments by Lesotho is highly commended, regrettably almost all Lesotho's reports which would reflect the extent to which Lesotho has implemented the human rights contained in these instruments are overdue. As far as disability is concerned, Lesotho's reports reflect the following:

• **Lesotho's reports to the UN treaty bodies**

As far as the international human rights instruments adopted by the UN are concerned, Lesotho's latest reports are:

- Initial report to Human Rights Committee (HRC) which oversees implementation of International Covenant on Civil and Political Rights (ICCPR) 1966 which was due in 1993 but submitted in 1998; this report does not mention disability even in the paragraph where it reports on measures that the country has taken to implement the non-discrimination provisions of the ICCPR.
- Fourteenth periodic report to Committee on the Elimination of Racial Discrimination (CERD) submitted in 1998: the report does not make reference to disability.
- Initial Report to the Committee on the Rights of the Child (CRC) which was due in 1994 but was submitted in 1998: Part IV (A) of the report is specific on the measures taken in relation to children with disabilities. It makes reference to section 33 of the Constitution of Lesotho 1993 which provides for rehabilitation, training and social resettlement of PWDs. It also refers to the efforts of the government towards enactment of the disability legislation.¹⁴
- Combination of initial to fourth report to Committee on Elimination of all forms of Discrimination against Women (CEDAW) which was submitted in 2010: This report refers to disability when reporting on the administrative measures that Lesotho has taken to implement CEDAW. It states that Lesotho has adopted the Gender and Development Policy 2003,¹⁵ the aim of which is to ensure that Lesotho builds 'a nation that perceives women, men, girls and boys as equal partners based upon the principle of equal participation in development'. The report links this policy with the principle of gender equality as contained in the Constitution of Lesotho as well as the National Vision 2020,¹⁶ which specifically states that 'men, women and people with disabilities will be equal before the law'.¹⁷ Reference is also made to the National Reproductive Health Policy 2008,¹⁸ which considers special needs of different target populations and the need to abide by conventions guarding against discrimination on the basis of several grounds including disability.¹⁹ Lesotho also reported its activism strategies including commemoration of the International Day for Persons with Disabilities.²⁰

• **Universal Periodic Review (UPR)**

Lesotho submitted to its first UN Universal Periodic Review (UPR) on 22 February 2010 and the same was considered by the working group on UPR between 1 and 14 May 2010.

14 Lesotho Initial Report to Committee on the Rights of the Child (CRC), UN Doc CRC/C/11/Add.20 (27 April 1998) paras 147-164.

15 Government of Lesotho, Ministry of Gender, Youth and Sports '2003 Gender and Development Policy' <http://www.gov.ls/gender> (accessed 26 May 2015).

16 Government of Lesotho, Ministry of Finance and Development Planning '2000 National Vision 2020' <http://www.gov.ls> (accessed 26 May 2015).

17 Combined initial to fourth periodic reports of states parties: Lesotho, UN Doc CEDAW/C/LSO/14 paras 30, 71, 78.

18 Government of Lesotho, Ministry of Health and Social Welfare '2008 National Reproductive Health Policy'.

19 Lesotho report to CEDAW (n 14 above) para 192.

20 Lesotho report to CEDAW (n 14 above) para 90.

- The report mentioned disability rights under the caption 'elimination of discrimination against vulnerable groups'. It indicated that the government of Lesotho has adopted several measures to cater for the needs of PWDs. These measures include establishment of a Rehabilitation Unit in the Ministry of Health and Social Welfare whose main aim is empowerment and rehabilitation of PWDs; establishment of Special Education Unit in the Ministry of Education; and adoption of a Community Based Rehabilitation Programme. The report also indicates that the government has adopted measures for inclusion of PWDs by sponsoring their sporting activities as well as using and encouraging the use of disability inclusive Information Communication Technology.
- Argentina and Spain recommended that Lesotho ratifies the Optional Protocol to CRPD (CRPD-OP). These recommendations were noted by Lesotho. Lesotho's response in this regard was that she will consider ratification of this Optional Protocol after consultation with relevant stakeholders. However she will not be bound in respect of this recommendation.²¹

Following this first cycle of the UPR, Lesotho adopted the National Disability and Rehabilitation Policy 2011²² which focuses on disability as a human rights issue and recognises that PWDs should have equal access to education, training, employment, health and other human rights. The Children's Protection and Welfare Act 2011²³ which has extensive provisions on protection of children with disabilities in line with the CRPD was also enacted.

Lesotho's second UPR report was reviewed on January 2015. As far as disability is concerned, Lesotho reported on transformation of the Department of Social Welfare which was within the Ministry of Health and Social Welfare into an independent Ministry of Social Development.

- According to the report, this new ministry 'focuses on the protection of the rights of PWDs, orphans and other vulnerable groups through self-sufficiency initiatives as opposed to social welfare approach which was residual and remedial hence resulting in dependency and stigma among beneficiaries'.²⁴ Within the Ministry of Social Development, there is the Department of Disability Services which is tasked with dealing with issues relating to PWDs.
 - The report also highlights advocacy efforts that Lesotho has taken in order to disseminate information on disability and the rights of PWDs.²⁵
 - Amongst the recommendations made, Libya recommended that Lesotho should incorporate the provisions of the CRPD into the national legal framework and ensure equal work opportunities for PWDs. This recommendation has been accepted by Lesotho.
 - Benin's recommendation that Lesotho ratify the OP-CRPD has been deferred.
- **Lesotho's reports under other African Human Rights mechanisms**
 - (1) First periodic report to the African Commission on Human and Peoples' Rights (1991 – 2000) submitted on 1 August 2000: Paragraph 1.11(a) reports on measures that Lesotho has take to 'improve [the] disabled'. The state reported that the government has 'declared its policy on disabled children through the [then] department of Social Welfare's NDRP 2008'.²⁶ The quoted aims of the policy include reduction of dependency of PWDs on others, promotion of self-reliance, rehabilitation services for PWDs with special needs, expansion of skills training

21 Report of the Working Group on the UPR: Lesotho UN Doc A/HRC/15/7/add.1 (15 September 2010) para 5.

22 NDRP (n 7 above).

23 Children's Protection and Welfare Act (CPWA) No 7 of 2011.

24 UPR Report (n 21 above) para 18.

25 UPR Report (n 21 above) para 19.

26 NDRP (n 7 above).

services, integration of PWDs into education, training and employment programmes alongside other non-disabled persons.²⁷

- (2) First Periodic Report to the African Committee of Experts on the Rights of the Child submitted in 2014: Efforts to obtain copy of the report were unsuccessful.

2.4 Was there any domestic effect on Lesotho's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Lesotho's legislature to incorporate it into the legal system before the instrument can have force in Lesotho's domestic law? Have Lesotho's courts ever considered this question? If so, cite the case(s).

As a dualist country, international human rights instruments have to be incorporated into domestic laws before they can have the force of law in Lesotho. This question has been considered by the courts of law in a number of cases. The earliest case was one shortly after independence, *Joe Molefi v Legal Advisor and Others*²⁸ in which the appellant sought an order declaring that he is a refugee as contemplated by the UN Convention Relating to the Status of Refugees. The Convention had been ratified by the United Kingdom during the time when Lesotho was its protectorate and was also extended to Lesotho. One of the questions raised in this case was whether that Convention could be regarded as part of the municipal law and therefore applicable to the Petitioner as contemplated by section 38 of the Aliens Control Act on which the Petitioner relied. The Court held that the Petitioner could not rely on the Convention since it was not domesticated.

Similarly, in *Basotho National Party and Another v Government of Lesotho and Others*,²⁹ the applicants, a political party that had just lost the 2002 general elections, sought an order that the court direct the Government of Lesotho to

take necessary steps, in accordance with its constitutional processes, to adopt such legislative and other measures necessary to give effect to the rights recognised in international conventions such as the Universal Declaration 1948, African Charter and others.

The Court explicitly stated that these Conventions cannot form part of the laws of Lesotho until they are incorporated into municipal law by legislative enactment. It stressed that:

The court cannot usurp the functions assigned the executive and the legislature under the Constitution and it cannot even require the executive to indirectly introduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making activities of the executive and the legislature.

The two cases cited above illustrate a strict dualist approach in that the courts rejected reliance on international human rights instruments and insisted on domestic legislation. However, the other cases of *Molefi Tsepe v IEC & Others*,³⁰ *Fuma v Commander LDF and Others*,³¹ and *Senate Gabasheane Masupha v Senior*

27 Lesotho's First Periodic Report to the ACHPR para 1.11 http://www.achpr.org/files/sessions/31st/state-reports/1st-1991-2000/achpr31_staterep_lesotho_2002_eng.pdf (accessed 30 September 2015).

28 *Joe Molefi v Legal Advisor & Others* [1970] 3 ALL ER 724.

29 *Basotho National Party & Another v Government of Lesotho & Others* Constitutional Case No 5/2000 [2003] LSHC 6 (BNP).

30 *Tsepe v Independent Electoral Commission & Other* [2005] LSHC 96.

31 *Fuma v Commander LDF & Others (Const/8/2011)* [2013] LSHC 68

Resident Magistrate for the District of Berea and Others,³² present a totally different approach that the same High Court of Lesotho and Court of Appeal (both sitting in their constitutional jurisdiction) took to applicability of undomesticated international human rights instruments in Lesotho.

In the *Molefo Tsepe* case, the Court was called on to declare the Local Government Elections Act 1998 (as amended by an Amendment Act of 2005), which reserved one third quota of all Local Government seats for women, discriminatory and unconstitutional. The Court held that there was no discrimination in the Act and relied on articles 3 and 26 of ICCPR, General Comment 18 of the Human Rights Committee, articles 3 and 4 of CEDAW, article 18(3) and (4) of African Charter as well as the SADC Declaration on Gender Equality. The Court stated that:

If regard be had to Lesotho's international law obligations, these, if anything, reinforce the interpretation of section 18(4)(e) of the Constitution and require equality which is substantive and not merely formal and restitutionary in its reach.³³

In *Fuma v Commander LDF & Others*, the applicant was a former member of the army who lodged a case in the High Court of Lesotho sitting in its constitutional jurisdiction. The Applicant's case was that after he became visually impaired, the medical board of the army recommended that he be retired on medical grounds. He challenged this retirement on the ground that he was not given a chance to make presentations before the board prior to its decision and also that it was not his visual impairment that informed the decision of the medical board but the fact that he was HIV positive. He illustrated that there are members of the army whom after being visually impaired were not retired but were given other duties that suited their condition. He asserted that the difference with him was that he had become visually impaired as a result of the HIV and that it is on the basis of his HIV status that the board retired him.

The Court held that the retirement was discriminatory and violated both the constitution of Lesotho and Lesotho's international human rights obligations. In holding that Lesotho has an international human rights obligation not to discriminate, the Court sought guidance from the South African case of *AZAPO & Others v President of South Africa*,³⁴ where it was considered that municipal law should be interpreted to avoid a conflict with a state's international treaty obligations.³⁵ On this basis, the court concluded that Lesotho is bound by provisions of the CRPD, though it has not yet been domesticated.

In the *Masupha* case, a daughter of a late principal chief challenged constitutionality of section 10 of the Chieftainship Act 1968 which limits the right to succession to office of chief to first born male children. Amongst other grounds, she relied on non-discrimination provisions of ICCPR, CEDAW, African Charter and African Women's Protocol. The Court held that:

These instruments, it is clear, are aids to interpretation not the source of rights enforceable by Lesotho citizens. In the present matter, there's no aspect of the process if interpreting section 10 of the [Chieftainship] Act which leaves its meaning exposed to any uncertainty, to the resolution of which the instruments in question could contribute further than the considerations which have already been taken into account.

32 *Senate Gabasheane Masupha v Senior Resident Magistrate for the district of Berea & Others* C of A (CIV) 29/2013 [2014] LSCA (*Masupha*).

33 *Tsepe* (n 30 above).

34 *AZAPO & Others v President of South Africa* 1996 (4) SA 672 (CC).

35 *Fuma* (n 31 above) para 22.

After ratification of the CRPD in 2008, Lesotho adopted policies and laws aimed at incorporating the human rights principles enunciated in the international instruments referred to above. These include amongst others: National Disability and Rehabilitation Policy of 2011,³⁶ Education Act of 2010³⁷ and Children's Protection and Welfare Act 2011.³⁸

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

The CRPD has not yet been domesticated. A Disability Equality Bill³⁹ has been tabled before parliament and is yet to be debated for it to be passed into law. LNFOD is holding consultative meetings, workshops and research in order to lobby the government to pass this Bill into an Act.⁴⁰

3 Constitution

3.1 Does the Constitution of Lesotho contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

The 1993 Constitution of Lesotho has only one provision that addresses disability directly. This is section 33 which provides for rehabilitation, training and social resettlement of persons with disabilities. It provides in particular that Lesotho shall adopt policies designed to 'provide for training facilities, including specialized institutions, public or private and place disabled persons in employment and encourage employers to admit disabled persons to employment'.

3.2 Does the Constitution of Lesotho contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Sections 4 and 18 of the Constitution provide for freedom from discrimination in enjoyment of the rights provided for in the Constitution. Both sections list prohibited grounds of discrimination. Disability is not listed as a prohibited ground of discrimination. However, since the list is open ended in that it prohibits discrimination on the basis of 'other status', this indirectly addresses disability in that no one may be discriminated on the basis of 'other status' including his or her disability.

36 NDRP (n 7 above).

37 Education Act 3 of 2010.

38 CPWA (n 23 above).

39 Government of Lesotho 2014 Disability Equality Bill 2014 (Zero draft).

40 N Sefuthi 'Director's corner' (March 2015) Issue 4 vol 2 *Disability Lesotho*.

4 Legislation

4.1 Does Lesotho have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- **Buildings Control Act 1995**

Section 19 provides for physical access for PWD's, in all public buildings. In terms of this section, the Minister may publish a notice in the Government Gazette which directs any person making a plan or specification of any proposed building to provide physical access for persons with physical disabilities.

The challenge with this Act is that the Minister may publish that notice only if he shall so wish; this is not a mandatory process. The provisions of this act are not complied with in regard to some key public buildings. One clear example of this non-compliance is the Maseru based Government Buildings Complex.

- **Sexual Offences Act 2003**

Section 3 provides that anyone who engages in sexual intercourse with a PWD who does not have the capacity to consent to such an act commits an offence.⁴¹ It further provides that, anyone who engages in sexual intercourse in the presence of a person with a disability commits an offence.⁴² In as much as the rationale behind this section is described as protection of PWDs from sexual assault and exploitation, the section has been viewed as prohibiting PWDs from consensual sexual relations thereby reinforcing the stereotype that PWDs are asexual.

- **Youth Council Act 2008**

The Act establishes the Youth Council as the appointed youth structure which will administer youth development in Lesotho. Section 5 provides that youth with disabilities shall be nominated by the disability federation into the council for the representation of the youth with disabilities. Lesotho National Federation of Organisations of the Disabled (LNFOD) nominated a representative of all youth with disabilities into the council in 2010.

- **National Assembly Electoral Amendment Act 2011**

Section 30 provides that all political parties registered under the electoral commission must facilitate the participation of persons with disabilities in all aspects of political participation. Political parties must ensure that, persons with disabilities have access to the political venues and the communication rights of PWD's are respected in the political domain.

- **Children's Protection and Welfare Act 2011**

The Act promotes the protection and promotion of rights of children living in Lesotho, including the rights of children with disabilities. The non-discrimination clause of the Act (Principle II clause 6) states that, children with disabilities shall not be discriminated against on the basis of their disabilities. Section 13 provides that a child with disability has a right to dignity, special care, medical treatment, rehabilitation, family and personal integrity, sports and recreation. The Act states that the education and training should be specifically aimed to help the child with

41 Sexual Offences Act 3 of 2003, sec 3(1) read with sec 2(f).

42 Sexual Offences Act (n 41 above) sec 3.

a disability to enjoy a full and decent life and achieve the highest degree of self-reliance and social integration.⁴³

4.2 Does Lesotho have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

• **Penal Code Act 2010**

The Penal Code Act provides that any person who does an act that brings about premature termination of pregnancy in a female person commits an offence of abortion.⁴⁴ The Act however provides that it shall be a defence where the act has been committed by a medical practitioner:

In order to prevent the birth of a child who will be seriously physically or mentally handicapped, and the person performing the act has obtained in advance from another registered medical practitioner a certificate to the effect that the termination of the pregnancy is necessary to avoid the birth of a seriously physically or mentally handicapped child ...⁴⁵

This provision has met a lot of criticism from organisations of persons with disabilities who before the Act was passed, brought to the attention of the Ministry of Law, Constitutional Affairs and Human Rights that the provision contravenes the CRPD.⁴⁶ The Act was however passed and the provisions complained about remains the law in Lesotho.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Lesotho ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

The Courts had an occasion to address the issues of disability, in particular the status of CRPD in the laws of Lesotho, albeit briefly, in only one case of *Fuma v LDF & Others*,⁴⁷ the facts of which are stipulated in 2.4 above. Having declared that the applicant had been discriminated against on the basis of disability as well as his HIV status, the court held that:

[The court] primarily takes a view that the unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter but that by default, it technically assumes the effect of municipal law in the country.⁴⁸

43 CPWA (n 23 above) sec13.

44 Penal Code Act 2010, sec 45(1).

45 Penal Code Act 2010, sec 45(2)(b).

46 N Sefuthi 'Director's Corner Game changer for people with disabilities: Adoption of the CRPD' (November 2014) Issue 30 *Disability Lesotho* http://www.lnfpd.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_November_2014pdf (accessed 26 May 2015).

47 *Fuma* (n 31 above).

48 *Fuma* (n 31 above) para 22.

6 Policies and programmes

6.1 Does Lesotho have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **National Disability and Rehabilitation Policy (NDRP) 2011⁴⁹**

The NDRP is aimed at guiding the government in designing the disability specific programmes and interventions. The purpose of this policy is to create an environment in which PWDs can realise their full potential. The objective of the policy is to ensure meaningful inclusion of PWDs in mainstream society. It is intended to guide all the government ministries in designing inclusive and disability-specific programmes. It promotes inclusion of people with disabilities in education, health, accessibility, employment, and social services to mention but a few. It calls upon every ministry of the government to implement the policy while the disability focal ministry coordinates the implementation of the policy.

- **National Strategic Development Plan (NSDP) 2012/13-2016/17⁵⁰**

Disability has been adopted as a cross cutting issue in the NSDP. It requires the government to adopt strategies that promote the welfare of people with disabilities in a variety of ways including: ensuring that people with disabilities access quality health services; preventing disability through provision of quality health services; increasing the number of teachers who are equipped in the education of children with disabilities; ensuring PWDs' access to formal and non-formal education; improving employment opportunities for PWDs; ensuring accessibility of public buildings, roads and other social services; and lastly reviewing the disability grant policy for purposes of enhancing the lives of the beneficiaries.⁵¹

6.2 Does Lesotho have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **Gender and Development Policy (GDP) 2003⁵²**

The aim of the GDP is to ensure that Lesotho builds a nation that perceives women, men, girls and boys as equal partners based upon the principle of equal participation in development. It is therefore indirectly addresses equality of women and girls with disabilities.

- **National Vision 2020⁵³**

This is national poverty reduction strategy which was adopted after a national dialogue. PWDs were amongst the stakeholders consulted before the strategy was adopted.⁵⁴ It provides that one of the aims is to make sure that by the year 2020, 'there will be no gender disparities. Men, women and people with disabilities will be equal before the law and will be afforded equal opportunities in all aspects of

49 NDRP (n 7 above).

50 Government of Lesotho '2012 National Strategic Development Plan (NSDP): Growth and development strategic framework 2012/13-2016/17' www.gov.ls (accessed 24 December 2014).

51 NSDP 2012/2013-2016/17, sec 6.3.

52 GDP (n 15 above).

53 National Vision 202 (n 16 above).

54 National Vision 2020(n 16 above) para 1.2.2.

life'.⁵⁵ In relation to health, the strategy provides that by the year 2020 Basotho (a term used to refer to people of Lesotho) shall be a healthy nation; the country will have a good quality health system with facilities and infrastructure accessible and affordable to all Basotho, irrespective of their disabilities.⁵⁶ Promotion of special education programmes for PWDs with the involvement of DPOs is listed as one of strategic actions in this strategic document.⁵⁷

- **National Reproductive Health Policy 2008**⁵⁸

It considers special needs of different target populations and the need to abide by conventions guarding against discrimination on the basis of disability.⁵⁹

- **National Strategic Plan on Vulnerable Children April 2012-March 2017**⁶⁰

It states that one of its aims is to implement the NDRP 2011.⁶¹ It notes as one of the key achievements, government's establishment of bursary schemes for vulnerable children including children with disabilities attending secondary schools.⁶² The strategies devised in order to protect the rights of vulnerable children include advocacy work by government working together civil society organisations, care, support and rehabilitation of children with disabilities. Adolescent sexual and reproductive health of all children is also included in the services that will be provided for all children.⁶³

- **National Social Protection Strategy 2014/15-2018/19**⁶⁴

This strategy is aimed at ensuring the well-being of all citizens, in particular of the most vulnerable. It proposes undertaking research to get a better understanding of the actual situation of disability and chronic illnesses in Lesotho and to map the existing initiatives to improve it and to work with LNFOD to publicise the National Disability Mainstreaming Plan. It also provides for a disability grant of two hundred and fifty Maloti (M250.00)⁶⁵ per person per month, phased in over four years, to all those with severe disabilities with the transfer value indexed to inflation.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Lesotho have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

Lesotho does not have an official body that specifically addresses violation of the rights of persons with disabilities. However, one of the proposals made in the

55 National Vision 2020 (n 16 above) para 2.3.1.

56 National Vision 2020 (n 16 above) para 2.3.4.

57 National Vision 2020 (n 16 above) 38.

58 National Reproductive Health Policy (n 18 above).

59 National Reproductive Health Policy (n 18 above).

60 Government of Lesotho Ministry of Social Development '2012 National Strategic Plan (NSP) on Vulnerable Children' (April 2012 to March 2017)

61 NSP on Vulnerable Children (n 60 above) 16.

62 NSP on Vulnerable Children (n 60 above) 26.

63 NSP on Vulnerable Children (n 60 above) 28.

64 Government of Lesotho, Ministry of Social Development 'National Social Protection Strategy 2014/15 to 2018/19' (2014).

65 An equivalent of 21US Dollars.

Disability Equality Bill is the establishment of a Disability Council, which will amongst others address violations of the rights of persons with disabilities.⁶⁶

- 7.2 Other than the ordinary courts or tribunals, does Lesotho have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

Lesotho has the Office of the Ombudsman whose overall mandate is to investigate or inquire either on complaint or upon own initiative where there are allegations of infringement of fundamental rights and freedoms.⁶⁷ That is, this office can address violations of the rights of persons with disabilities

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Lesotho have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Lesotho has ever addressed issues relating to the rights of persons with disabilities.**

Lesotho does not have a NHRI yet. The Constitution has been amended to provide for the establishment of a Human Rights Commission.⁶⁸ However the enabling legislation is still in a Bill form, Human Rights Commission Bill 2012 and has not been passed into law yet.

As indicated above, there is an Office of the Ombudsman whose overall mandate includes investigation of allegations of human rights violations.

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Lesotho have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

Lesotho National Federation of the Disabled (LNFOD) is the umbrella body of disabled peoples' organizations (DPOs). The mission of LNFOD is to protect the rights of persons with disabilities in Lesotho by providing support to DPOs and

⁶⁶ Disability Equality Bill (n 39 above) Preamble.

⁶⁷ Constitution of Lesotho 1993, sec 132. See also Ombudsman Act 1996.

⁶⁸ Sixth amendment to the 1993 Constitution of Lesotho.

empowering their members with life skills, financial and material resources and representing their needs to government, development partners and the wider society.

The Disabled Peoples Organisations (DPOs) in Lesotho are:

• **Lesotho National Association of Physically Disabled (LNAPD)**

LNAPD is an association of people with physical disabilities which seeks to address their needs and aspirations through leadership and competence training strategies and self-advocacy. It promotes and supports all activities that are pertinent to human rights and social development. LNAPD is also the founder and operator of the Itjareng Vocational Training Centre for the disabled. LNAPD'S mandate as a DPO is to advocate for the socio-economic rights of the people with physical disabilities. It ensures that people with physical disabilities access public services on an equal basis with their able bodied counterparts through lobbying and advocacy to the service providers. LNAPD implements a Human Rights Programme and a Community Based Rehabilitation Programme for the physically disabled in two districts of Leribe and Mafeteng out of the ten districts of Lesotho.

• **Intellectual Disability Association of Lesotho (IDAL)**

IDAL was formerly named Lesotho Society of Mentally Handicapped Persons. It was founded in 1992 by parents of children with intellectual disabilities. It aims to represent and protect the rights of children with disabilities (including severe or multiple disabilities) and individuals of all ages with intellectual disability through the empowerment of parents and such youth.⁶⁹ IDAL operates in 21 branches in 8 districts of the country with a membership of 2 000 individuals. IDAL uses a community based approach to provide parents, care-givers and individuals with the support, training and knowledge needed to live and engage in their own communities. IDAL advocacy work is on the four key areas of education, health, protection and employment. IDAL also runs a programme in which youth with intellectual disabilities are trained on rights contained in the Convention on the Rights of the Child (CRC) as well as Convention on the Rights of Persons with Disabilities (CRPD).⁷⁰

• **Lesotho National League of the Visually Impaired Persons (LNLVIP)**

This is an organisation of the visually impaired persons of Lesotho which was established in 1986. Some of those reasons that led to establishment of LNLVIP are: to advocate for the rights of the visually impaired persons in Lesotho; to ensure that visually impaired persons get access to education like any other able bodied persons; to create a vocational centre where the visually impaired trainees are taught life skills; and to facilitate placement and employment of the visually impaired persons in Lesotho.⁷¹

• **National Association of the Deaf in Lesotho (NADL)**

NADL's mandate is to assist the deaf community in Lesotho to access their human rights. NADL aims to fulfil this mandate by primarily focusing on the promotion of sign language in the public and private sector so that the deaf community can receive quality services on an equal basis with others. NADL is also charged with training Sign Language Interpreters. It promotes knowledge of Lesotho Sign Language amongst its members and to the service providers. This has been done by producing learning materials such as the Lesotho Sign Language Dictionary, and the Lesotho Sign Language DVD for beginners. These materials help new learners and persons who have contact through services with the deaf community to

69 Information available at <http://www.idal.org.ls> (accessed 26 May 2015).

70 As above.

71 Information about the organization available at <http://www.lnlvip.org.ls> (accessed 26 March 2015).

familiarise themselves with the basics of the language. NADL's Core Activities include: promotion and advocacy for the human rights of deaf people in Lesotho in all walks of life; raising awareness on the importance of sign language and inviting all people to learn it; advocating for the mainstreaming of deaf issues into the national agenda as well as in all the sectors of the society; empowering young deaf people on issues of education, human rights, HIV/AIDS, life skills and ensuring provision of inclusive social services for deaf people in community councils within jurisdiction where deaf people live.⁷²

9.2 In the countries in Lesotho's region (Southern Africa) are DPOs organised/coordinated at national and/or regional level?

In several countries in Southern Africa, DPOs are organised at both sub-regional and regional levels.

- At the sub-regional level, there is Southern Africa Federation of the Disabled (SAFOD) which is a leading southern African disability-focused network engaged in coordination of activities of DPOs in the Southern African Development Community (SADC) region. SAFOD was formed in 1986. To date there are 10 countries which are affiliated to SAFOD through National Federations of Disabled People Organisations (NFDPOs).⁷³ Lesotho affiliates to SAFOD through LNFOD.
- At the regional level there is Africa Disability Forum (ADF) whose aim is to unify and amplify the voice of Africans with disabilities, their families, and their organisations in advocating for their rights and inclusion in all aspects of development and society at Pan African, sub-regional and national levels.⁷⁴

9.3 If Lesotho has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Lesotho has ensured involvement of DPOs in the process of implementation of CRPD.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

LNFOD, as the umbrella body of DPOs in Lesotho, works very closely with the Ministry of Social Development, the Parliamentary Council as well as various parliamentary committees to ensure that the Disability Equality Bill is passed into law. In all the lobbying and advocacy efforts, LNFOD involves representatives of all DPOs and always reports back to the entire membership on progress of the implementation process. For instance, when LNFOD designed its Advocacy Action Plan, DPO's were involved from the beginning stage to ensure that issues for people with disabilities were well reflected in the program design and objectives.⁷⁵

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

- Lack of statistical data regarding disability;

72 Information about the association available at <http://www.nadl.org.ls> (accessed 26 May 2015).

73 Information about SAFOD and its activities available at <http://safod.net> (accessed 26 May 2015).

74 As above.

75 Interview with Ms Maja Matsoha-Makhoali, LNFOD's human rights and advocacy officer.

- Poor monitoring of programmes implemented by DPOs in the communities; and
- Resource constraints, in particular lack of financial and human resources as well as technical knowledge on strategies which DPOs can engage in order to be part of and follow-up implementation efforts.

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

Although not yet passed into law, the establishment of a Disability Advisory Council in terms of Disability Equity Bill, 2014, will provide a platform for DPOs to be meaningfully involved in the formulation and implementation of laws, policies and programmes that relate to or affect persons with disabilities.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

Through LNFOD’s advocacy programmes, the government in collaboration with LNFOD and its development partners drafted a Disability Equality Bill and National Disability Mainstreaming Plan which are awaiting approval.⁷⁶

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

Capacity building in relation to research is needed. Areas that need further research include a review of the laws of Lesotho in order to ascertain their compliance with the CRPD, particularly in the areas of access to justice as well as criminal law: how rules of criminal law, criminal procedure and evidence affect PWDs as victims, witnesses or perpetrators of crime. Capacity building is also needed for skilled human resource, coordination, advocacy and project management skills. As far as human resources is concerned, the main problem is that currently LNFOD has very limited human resources. However, with the limited human resources that it has, LNFOD has made considerable strides in ensuring adoption of policies and programmes within the Ministry of Social Development and to have the current Disability Equality Bill. More personnel with skills in advocacy, lobbying and follow-up strategies would help to ensure that the policies are effectively implemented and that the Bill is finally passed into law.

In relation to data collection, there are many statistical data gaps on disability in Lesotho. It is therefore highly recommended that, DPOs be assisted with data collection and analysis so that they can assess the suitability of government services, policies and programmes to PWDs in the areas of welfare, employment, health services and education. This would also empower DPOs to lobby for specific laws, policies and programmes that are geared towards implementation of CRPD.

With respect to collaboration, DPOs should work closely with government ministries and departments as well as other CSOs whose mandate is not exclusively on disability but on human rights in general or specific to women’s rights, children’s rights or access to socio-economic rights such as water, as there are

76 As above.

PWDs within these groups and concerted efforts may help in implementation of specific provisions of CPRD which affects the groups concerned.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

- Coordination: In this respect, it is suggested that, DPO's be equipped with coordination, advocacy and project management skills which include practical varied examples of how DPOs in other jurisdictions engage with governments ministries and departments in the implementation process including disability mainstreaming.
- Data collection: There are lots of statistical data gaps as far as disability in Lesotho is concerned. It is therefore highly recommended that DPOs be in a position to collect and analyse their own data so that they can assess the suitability of government services, policies and programmes to PWDs in the areas of welfare, employment, health services and education. This would also empower DPOs to lobby for specific laws, policies and programmes that are geared towards implementation.
- Collaboration: DPOs should work closely with other CSOs whose mandate is not exclusively on disability but on human rights in general or specific on women's rights, children's rights or access to socio-economic rights such as water, as there are PWDs within these groups and concerted efforts may help in implementation of specific provisions of CPRD which affects the groups concerned.

9.10 Are there specific research institutes in the region where Lesotho is situated (Southern Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

There are none. However Open Society Initiative for Southern Africa (OSISA) works with LNFOD and involves DPOs in research initiatives such as a study to review the existing laws and policies in Lesotho to determine their harmony with the CRPD.

10 Government departments

10.1 Does Lesotho have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The Department of Disability Services in the Ministry of Social Development.

11 Main human rights concerns of people with disabilities in Lesotho

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Lack of Social support and respite care facilities for children with severe disabilities**

For many parents who have children with severe disabilities, raising them becomes a full time task since there are no respite care facilities for children with severe disabilities in Lesotho. Consequently parents, especially mothers, have to leave employment and care for their children on a full time basis. Since there is no government financial support in this regard, parents are left destitute and dependant on relatives, friends and neighbours for basic commodities such as food, clothing and medical care.⁷⁷

- **Unemployment**

The rate of unemployment in Lesotho is very high. According to the Living Conditions Study, the rate is twice as high, at about 70 per cent for PWDs.⁷⁸ Currently there are no legal responses to this challenge. However, LNFO and its partners are lobbying government and advocating for affirmative action employment policies as well as financial assistance to PWDs to start businesses so as to create self-employment.

- **Denial of access to justice**

CRPD addresses a full spectrum of issues related to disability and offers guidance to governments on how to protect the rights of PWDs. Non-domestication of CRPD has therefore resulted in being a barrier to PWDs access to justice. This injustice is made even worse by section 2 of the Constitution on the basis of which courts have rejected reliance on non-domesticated international human rights instruments.

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Lesotho?

The National Assembly Electoral Amendment Act of 2011 ensures participation of PWDs in the political life in Lesotho. Section 30 provides that all political parties registered under the electoral commission must facilitate the participation of persons with disabilities in all aspects of political participation. Political parties must ensure that, persons with disabilities have access to the political venues and that the communication rights of PWD's are respected in the political domain. However, in the latest February 2015 elections only one political party, All Basotho Convention (ABC), had a sign language interpreter in its rallies. Furthermore, one of the members of the Senate, which is the Upper House of Parliament has a physical disability and that has not hindered his right to participate in the political life of the country.

⁷⁷ Information available at www.infod.org.ls (accessed 23 March 2015).

⁷⁸ Living Conditions Study (n 4 above).

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your country?

There is no disability specific law in Lesotho. Although there are laws and policies which, to a limited extent cater for persons with disabilities, they are not efficiently implemented. Furthermore, almost all socio-economic rights are categorised as directive principles of state policy in the Constitution, and in terms of section 25 of the Constitution, such are not justiciable in the courts of law. This leads to gross violations of socio-economic rights of PWDs with impunity.

Furthermore, in comparison with other non-disabled members of the society, PWDs do not have equal access to health, education and other social services. This results from infrastructure that is not disability friendly. For instance, public roads and buildings do not accommodate wheelchair users, have obstacles that inhibit visually impaired persons to move independently and service providers do not understand sign language thus creating barriers for people with hearing impairments.

11.4 Case studies of specific vulnerable groups

- **Women with disabilities**

Women in Lesotho generally face discrimination on the basis of sex. Such discrimination is often justified on the grounds of custom and culture as stipulation in section 18(4)(e) of the Constitution of Lesotho. Since PWDs also suffer discrimination because of the attitudinal and institutional barriers that prevent them from accessing human rights, women with disabilities suffer double the scourge because of their status as women and because of their disabilities. The discrimination leads to denial of sexual and reproductive rights, unemployment, lack of access to education and limited participation in politics.

- **Children with disabilities.**

A feasibility study undertaken by the Ministry of Education in 1993 reflected that there are many children with special needs in regular primary schools in Lesotho. The children with special needs include children with different disabilities such as visual, hearing and physical impairments, epilepsy and psychosocial disabilities. The challenges identified include enrolling children in specialised schools instead of integrating their needs into the mainstream schools which in turn disrupt such children's family life.⁷⁹ Although the study was conducted two decades ago, this challenge still exists. The other challenge identified in a LNFOD Newsletter is restrictive environments in mainstream schools such as inaccessible ablution rooms which results in children, mainly girls, with physical disabilities dropping out of school.⁸⁰

79 Ministry of Education Feasibility Study 1993.

80 P Letsau 'Commemorating women's day' (March 2015) Issue 4 vol 2 *Disability Lesotho* www.lnfod.org.ls (accessed 27 May 2015).

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Lesotho at the moment?

- Drafting of the National Disability Mainstreaming Plan: Currently with the financial assistance of one of LNFOD partners, Communities of Practice in Disability Advocacy for Mainstreaming (COPDAM), the Ministry of Social Development has engaged a consultant to assist the ministry to draft a National Disability Mainstreaming Policy/Plan.
 - Enactment of Disability Equality Law. As stated earlier, a Disability Equality Bill has been draft and its pending debate in parliament in order for it to be passed into law.

12.2 What legal reforms would you like to see in Lesotho? Why?

- Enactment of a disability-specific law: there are a number of laws that make reference to disability but they are not specific and are seldom adhered to. A disability specific law would thus provide a synergy of all laws that apply to disability and also repeal all laws that are not CRPD compliant. This law would also ensure PWDs access to justice in that it would be a commitment by government on the basis of which the government would be held accountable.
- Inclusion of disability as a prohibited ground of discrimination in all the laws, particularly in the Constitution.
- Repeal of discriminatory sections in the laws and review and revision of other laws so that the language used clearly includes persons with disabilities in accordance with CRPD.

MOROCCO

*Arlene S Kanter, * Inviolata Sore** & Daniel Van Sant****

1 Population indicators

1.1 What is the total population of Morocco?

As of September 2014, Morocco had a population of 33 762036.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Morocco. What criteria are used to determine who falls within the class of persons with disabilities in Morocco?

In preparation for the 2014 census, Morocco developed new census questions that address disability based on the International Classification of Performance.² The 2014 census collected information about disability by asking six questions on six functional key areas namely: sight, hearing, movement, perception, self-care and communication.³ Because this census was performed recently, census data disaggregated by disability is presently unavailable.

1.3 What is the total number and percentage of persons with disabilities in Morocco?

According to the 2004 census an estimated 2.2 million, or seven per cent of the population in Morocco have a disability.⁴ However, according to the 2004 General

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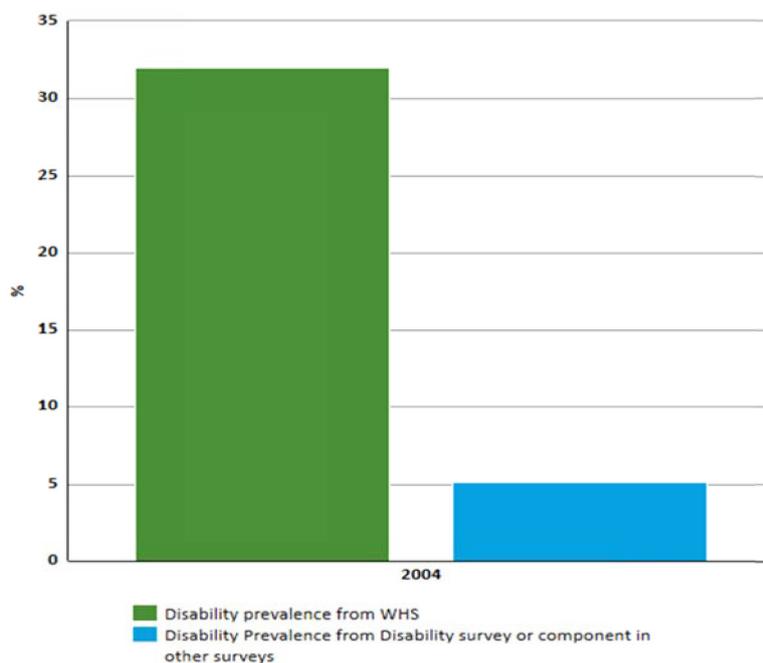
1 'Morocco Population Reached 33.8 Million in September 2014: Census' *Morocco World News* 16 March 2015.

2 Interministerial Delegation for Human Rights 'Mid-term Report on the progress made in the implementation of the recommendations issued at the second cycle of the Universal Periodic Review' (2014).

3 As above.

4 United States Department of State Bureau of Democracy, Human Rights, and Labor 'Morocco' 28 February 2005 (accessed 29 April 2015).

Census of Population and Housing, the number of people with disabilities is approximately 680000, of whom 387000 live in urban areas and 293000 live in rural areas.⁵ A World Health Survey done in 2004 also indicates that 32 per cent of the population has a disability, while the Disability Survey in 2004 estimated only 5,12 per cent, as shown in figure 1.1.⁶ Another estimate places the percentage at seven per cent; and a third study reports that people with physical disabilities alone constitute 10 per cent of the population.⁷



Source: World Report on Disability, 2014 (based on 2004 data)

1.4 What is the total number and percentage of women with disabilities in Morocco?

According to the Moroccan National Survey of 2004-2006, one in four households, or a total of 1309000 households have a person with a disability.⁸ This survey also

5 World Bank Statistics Directorate 'General Census of Population and Housing 2004' (2014).
 6 Knoema 'World Report on Disability, 2014' (2014). This report was published in 2014, but the survey was conducted in 2004 knoema.com/WBRD2014/world-report-on-disability-2014?country=1001140-morocco (accessed 29 April 2015).
 7 A Chetouani 'Etude numérique de problèmes non linéaire et application aux problèmes de dynamique de populations' unpublished PhD thesis, Mohammed the First University (2003).
 8 L. Bakker 'Perceptions of child's disability in the Moroccan context: Religious perspectives' unpublished Master's thesis, Leiden University, 2010.

estimates that 5,12 per cent of the population or 1530000 people have a disability,⁹ Of those, 58,4 per cent live in urban areas, and 41,6 per cent live in rural territories.

The Moroccan National Survey of 2004-2006, estimates that 46,6 per cent of the persons with a disability are female and 53,4 per cent are male.¹⁰

1.5 What is the total number and percentage of children with disabilities in Morocco?

The National Survey of 2004-2006 estimates that 36,6 per cent of Moroccan children have a physical or mental disability, 23,1 per cent have multiple disabilities, 13,8 per cent have a motor disability, 9,3 per cent have autism, 8,7 per cent have a visceral/metabolic disability, 5,1 per cent have a visual disability and 3,4 per cent have a speech/language disability.¹¹

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Morocco?

According to the WHO, the following percentages below show the prevalence of disabilities amongst the Moroccan population.¹²

- 51,9 per cent of people with disabilities have a motor impairment;
- 31,8 per cent have a visceral or metabolic deficiency;
- 28,8 per cent have a visual impairment;
- 25,8 per cent have a speech impairment;
- 23 per cent have a mental impairment;
- 14,3 per cent have a hearing deficit; and
- 4,7 per cent have an 'aesthetic' deficiency.

However, a 2010 study indicates that the cause of:

- 22,8 per cent of disabilities are related to inherited, congenital and perinatal issues;
- 38,4 per cent of disabilities are related to acquired illnesses;
- 24,4 per cent of disabilities are accidents; and
- 14,4 per cent of disabilities are related to aging.

2 Morocco's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Morocco? Did Morocco sign and ratify the CRPD? Provide the date(s).

Morocco signed the UNCRPD on 30 March 2007 and ratified it on 8 April 2009.

9 As above.

10 As above.

11 As above.

12 As above.

Although most countries typically sign and then ratify documents, Morocco actually ratified but did not sign the Optional Protocol on 8 April 2009.¹³

2.2 If Morocco has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Morocco submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

Morocco's Country Report was due on 8 April 2011. Morocco submitted it on 27 April 2015, but only the Arabic Language version of the Moroccan Report is available on the CRPD Committee website. At this time, the CRPD Committee has issued no concluding observations. The Report states that it was prepared by the 'Committee Responsible for the Rights of People with Disabilities Implementation of the International Convention on the Rights of People with Disabilities: The initial report submitted by the participating countries under Article 35 of the Convention'.

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Morocco also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

Morocco has ratified the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.¹⁴ The 2011 concluding observations of the Committee against Torture and the Committee on the Elimination of Discrimination against Women mention disability only insofar as it refers to Morocco's ratification of the CRPD.¹⁵ However, the 2014 concluding observations from the Committee on the Rights of the Child includes a statement that expresses concern that Morocco was not doing enough to identify and treat refugee and asylum-seeking children who have trauma related disabilities.¹⁶

Morocco also ratified the Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁷ State reports and concluding observations of the African Union on Human Rights and People's rights indicates that Morocco has not submitted any of its country reports on these treaties.¹⁸

13 United Nations Enable 'Convention and Optional Protocol signatures and ratifications' <http://www.un.org/disabilities/countries.asp?navid=12&pid=166#M> (accessed 27 April 2015).

14 Office for the High Commissioner for Human Rights *Human Rights Bodies* <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 28 April 2015).

15 Committee against Torture 'Concluding Observations of the Committee against Torture: Morocco' (21 December 2011).

16 Committee on the Rights of the Child 'Concluding Observations on the report submitted by Morocco under article 8, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (13 November 2014).

17 United Nations Children's Fund 'At a glance: Morocco Statistics' 2013 http://www.unicef.org/infobycountry/morocco_statistics.html#120 (accessed 28 April 2015).

18 African Commission on Human and People's Rights 'State reports and concluding observations' <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed 28 April 2015).

Morocco's second Universal Periodic Review (UPR) for the Human Rights Council was completed in 2012. It mentions that a national action plan for the social integration of persons with disabilities was adopted for the period 2008-2017, and that measures have been taken to improve access to information, education, training and employment, to improve physical accessibility and access to transportation, and to promote participation in socio-cultural, sports and leisure activities for people with disabilities. However, the UPR also states that these measures still fall short of meeting the needs of persons with disabilities, particularly with respect to their access to employment and accessibility, in general.¹⁹

In Morocco's Mid-term Report on the progress made in the implementation of the recommendations issued at the second cycle of the UPR, the Inter-ministerial Delegation for Human Rights (IDHR) of Morocco reported on its progress in addressing these concerns. The IDHR reported that it implemented a new national definition of 'disability' to be included in future data collection that will make it possible to update the statistics of disability in Morocco.²⁰ Other implemented changes include: the creation of 555 integrated classes in 383 educational institutions (benefiting 5998 boys and 2226 girls), the creation of integrated hospitals specialising in psychiatry and mental health with a 248-bed capacity (with plans to increase to 720 beds by 2016), the establishment of three psychiatric hospitals in the cities of Agadir, Kénitra, Kalaat Sraghna (with 120 bed capacities), and the development of legislation in the field of mental health, through the proposal of a new draft law.²¹

The National Human Rights Council also recommended that Morocco adopt Bill No 62-09 on enhancing the rights of persons with disabilities. The Council has called for the establishment of a mechanism to monitor public policy, to ensure that the disability perspective and the principle of non-discrimination on the basis of disability are taken into account in all public policies.²²

2.4 Was there any domestic effect on Morocco's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Morocco's legislature to incorporate it into the legal system before the instrument can have force in Morocco's domestic law? Have Morocco's courts ever considered this question? If so, cite the case(s).

Morocco follows a monist approach to international law, as stated in its Preamble to the 2011 Constitution of the Kingdom of Morocco. In relevant part, the Preamble states:

Founded on these values and these immutable principles, and strong in its firm will to reaffirm the bonds of fraternity, or cooperation, or solidarity and of constructive partnership with all other States, and to work for common progress, the Kingdom of Morocco, [a] united State, totally sovereign, belonging the Grand Maghreb, reaffirms that which follows and commits itself:

To comply with the international conventions duly ratified by it, within the framework of the provisions of the Constitution and of the laws of the Kingdom, within respect for its immutable national identity, and on the publication of these conventions, [their]

19 Human Rights Council 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Morocco' (8 March 2012).

20 Interministerial Delegation for Human Rights (n 2 above).

21 As above.

22 Interministerial Delegation for Human Rights (n 2 above).

primacy over the internal law of the country, and to harmonize in consequence the pertinent provisions of national legislation.²³

As such, the Constitution of the Kingdom of Morocco requires that any ratified convention will take 'primacy over the internal law' of Morocco. No additional information or case law on this issue is provided.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

As stated above, Morocco signed the CRPD on 30 March 2007 and officially ratified it on 8 April 2009.²⁴ A 2013 press release from the Moroccan Minister of Foreign Affairs and Cooperation, Saad-Eddine El Otmani, said that the Moroccan government has completed consultations with all those concerned by the promotion of the rights of people with disabilities in order to harmonise Moroccan laws with the CRPD. He also noted that Morocco wants to integrate disabled persons into the post-2015 development program.²⁵ No additional information is provided.

3 Constitution

3.1 Does the Constitution of Morocco contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

Yes, the Constitution of the Kingdom of Morocco prohibits discrimination based on disability as well as on race, gender, language, social status, faith, culture, regional origin and 'other personal circumstances'. Article 34 of the Constitution of the Kingdom of Morocco states as follows:

The public powers enact and implement the policies designed for persons and for categories of specific needs. To this effect, it seeks notably: – to respond to and provide for the vulnerability of certain categories of women and of mothers, of children, and of elderly persons; – to rehabilitate and integrate into social and civil life the physically, sensorimotor and mentally handicapped and to facilitate their enjoyment of the rights and freedoms recognized to all.²⁶

3.2 Does the Constitution of Morocco contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Yes, the Constitution of the Kingdom of Morocco contains articles that address disability indirectly, including the following:

23 The Constitution of the Kingdom of Morocco, Preamble.

24 United Nations Enable (n 14 above).

25 Kingdom of Morocco 'Morocco about to adopt integrated policy for rights of handicapped persons' 25 September 2013 <http://www.maroc.ma/en/news/morocco-about-adopt-integrated-policy-rights-handicapped-persons>(accessed 28 April 2015).

26 The Constitution of the Kingdom of Morocco,art34.

Article 19

The man and the woman enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character, enounced in this Title and in the other provisions of the Constitution, as well as in the international conventions and pacts duly ratified by Morocco and this, with respect for the provisions of the Constitution, of the constants and of the laws of the Kingdom.²⁷

Article 22

The physical or moral integrity of anyone may not be infringed, in whatever circumstance that may be and by any person that may be, public or private.²⁸

Article 31

The State, the public establishments and the territorial collectivities work for the mobilization of all the means available to facilitate the equal access of the citizens feminine and citizens masculine to conditions that permit their enjoyment of the right: – to healthcare; – to social protection, to medical coverage and to the mutual or organized joint and several liability of the State; – to a modern, accessible education of quality; – to education concerning attachment to the Moroccan identity and to the immutable national constants; – to professional instruction and to physical and artistic education; – to decent housing; – to work and to the support of the public powers in matters of searching for employment or of self-employment; – to access to public functions according to the merits; – to the access to water and to a healthy environment; – to lasting [durable] development.²⁹

Since all of the above articles prohibit discrimination generally, they also can be read to indirectly prohibit discrimination based on disability.

4 Legislation

4.1 Does Morocco have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Morocco does have laws directly addressing disability issues, however, the only information available is in French. According to the Ministry of Social Development, Family, and Solidarity (the Ministry responsible for persons with disabilities), three laws directly address people with disabilities. They are: Law No 5-81 (on the welfare of the blind and visually impaired),³⁰ Law No 07-92 (on the social protections of people with disabilities),³¹ and Law No 10-03 (relating to

27 The Constitution of the Kingdom of Morocco, art 19.

28 The Constitution of the Kingdom of Morocco, art 22.

29 The Constitution of the Kingdom of Morocco, art 31.

30 Ministry of Social Development, Family, and Solidarity 'Dahir n° 1- 82- 246 du 11 rejev 1402 (6 Mai 1982) portant promulgation de la loi n°05- 81 relative à la protection sociale des aveugles et des déficients visuels' http://www.social.gov.ma/MdsfsFichiers/pdf/loi_05-81_fr.pdf (accessed 28 April 2015).

31 Ministry of Social Development, Family, and Solidarity 'Dahir n° 1-92-30 du 22 rabia I 1414 (10 Septembre 1993) portant promulgation de la loi n°07-92 relative à la protection sociale des personnes handicapées' http://www.social.gov.ma/MdsfsFichiers/pdf/loi_07-92_fr.pdf(accessed 28 April 2015).

accessibility).³² In addition, Morocco has the following laws:

- The principal law is the Dahir of 1959, which addresses the prevention of mental illnesses and protection of the patients. Its main aim is to guarantee that the institutions treat patients while protecting their rights and their property during their period of mental illness. This law also created the Central Service for Mental Health and Degenerative Diseases, the Mental Health Committee, organised mental institutions and other psychiatric services, specified different manners of patient admission and discharge, and outlined the ways in which patients and their property is to be protected.
- The 1974 'Circulaire' (Ministerial recommendations document), introduced regionalisation and 'deinstitutionalization'. This was the start of a strategic policy to reduce the number of beds in psychiatric hospitals, to create smaller units with fewer beds (20-40 beds), and to integrate mental health into general hospitals.³³
- Law No 14-05 establishes institutions for children with physical disabilities.

However, it has been noted that in recent years, special centres and schools have been established for these children, but their services are generally not affordable to most families.³⁴

The Dahir 1-58-295 relating to the prevention of mental illnesses and protection of the patients is the most recent mental health legislation.³⁵ While this legislation was drafted in 1959, it was reviewed by WHO officials in 1998 and again in 2008.³⁶

The law in Morocco also includes building codes that require access for persons with disabilities. However, the government has not effectively implemented these laws and codes. The codes are rarely enforced, and in many cases, builders and building inspectors are unaware of the laws requiring accessibility.³⁷

The Ministry of Social Development, Family, and Solidarity has the responsibility for protecting the rights of persons with disabilities by implementing a quota of seven per cent for persons with disabilities in vocational training in the private and public sectors. In 2008, the government created 217 classes for children with disabilities.³⁸ In practice, integration was largely left to the private charities.³⁹

32 Ministry of Social Development, Family, and Solidarity 'Dahir n° 1-03-58 du 10 rabii I 1424 (12 Mai 2003) portant promulgation de la loi n° 10-03 relative aux accessibilités' http://www.social.gov.ma/MdsfsFichiers/pdf/loi_10-03_fr.pdf (accessed 28 April 2015).

33 World Health Organization & Ministry of Health Morocco 'WHO-AIMS Report on Mental Health System in Morocco' 2006.

34 Manara Network for Child Rights 'Country profile of Morocco: Are view of the implementation of the UN Convention on the Rights of the Child' (August 2011) <http://www.ibcr.org/editor/assets/Morocco%20Country%20Profile.pdf> (accessed 29 April 2015).

35 World Health Organization Department of Mental Health and Substance Abuse 'Mental Health Atlas 2005' (2005) http://www.who.int/mental_health/evidence/atlas/profiles_countries_j_m.pdf?ua=1 (accessed 28 April 2015).

36 As above.

37 United States Department of State Bureau of Democracy, Human Rights, and Labor '2009 human rights practices: Morocco' (11 March 2010) <http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136075.htm> (accessed 28 April 2015).

38 The Moroccan Family Code (Moudawana) of 5 February 2004 <http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf> (accessed 24 September 2015) trans Human Rights Education Associates (2005).

39 As above.

4.2 Does Morocco have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

- Article 1 of Dahir N 04-2000, B.O N4800 of 1 June 2000 stipulates that all Moroccan children of both sexes, having reached the age of 6 years, have the right and the duty to education.⁴⁰
- The Moroccan Family Code (Moudawana) of 5 February 2004⁴¹ also indirectly addresses the rights of people with disabilities (to the extent that they are not excluded).

The government of Morocco also approved two legal reforms in 2005 to expand health insurance coverage for its citizens. The first is a payroll-based mandatory health insurance plan for public-and formal private-sector employees, which extends coverage from the current 16 per cent of the population to 30 per cent. The second creates a publicly financed fund to cover services for the poor.⁴²

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Morocco ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

No such court or tribunal cases were found.

6 Policies and programmes

6.1 Does Morocco have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- Morocco has a mental health policy which was last revised in 2008 and includes the following components: (1) developing community mental health services; (2) downsizing large mental hospitals; (3) developing a mental health component in primary health care; (4) human resources; (5) advocacy and promotion; (6) human rights protection of patients; (7) equity of access across different groups; (8) financing; and (9) quality improvement. An essential medicines list is present in the country.⁴³

40 The International Labour Office & The African Commission on Human & Peoples' Rights 'Country report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples: Morocco' http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Morocco.pdf (accessed 26 May 2015).

41 n 38 above.

42 J Ruger & D Kress 'Health financing and insurance reform in Morocco' (July 2007) <http://content.healthaffairs.org/content/26/4/1009.full> (accessed 26 May 2015).

43 World Health Organization Department of Mental Health and Substance Abuse (n 35 above).

- In 2000, the government created a Special Commission for the Integration of Persons with Disabilities. The Commission is responsible for developing programmes that facilitate the societal integration of people with disabilities.⁴⁴
- In 2000, the Government instituted an annual 'National Day of the Disabled', aimed at increasing public awareness of issues affecting persons with disabilities. The King's charity, the Mohammed V Solidarity Fund, makes several donations each year to institutions supporting persons with disabilities.⁴⁵
- On 5 December 2001, The International Day of Disabled Persons, the Ministry for the Condition of Women, Protection of the Family and Children, and Integration of the Handicapped sponsored a 2-day workshop with NGO's to promote self-employment of the handicapped. The programme included micro-financing for persons with disabilities.⁴⁶
- The organisation Diwan Alemadalim was established in December 2001 and it functions as an arbitrator between citizens and the administration to combat corruption, misuse of power and to protect the rights of the child.
- The Ministry of Social Development, Family, and Solidarity has responsibility for protecting the rights of persons with disabilities and has attempted to integrate persons with disabilities into society by implementing a quota of 7 percent for persons with disabilities in vocational training in the public sector and 5 percent in the private sector.⁴⁷

6.2 Does Morocco have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability

In addition to the information provided below in response to questions 7 and 8, Morocco has a compulsory social security system, Caisse Nationale de Sécurité Sociale (CNSS), which provides family allowance, disability, sickness, maternity, and pension benefits but not health insurance. It operates about a dozen health clinics providing subsidised care for uninsured people and limited health care benefits for children.⁴⁸

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Morocco have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Ministry of Social Development, Family, and Solidarity has responsibility for protecting the rights of persons with disabilities and has attempted to integrate persons with disabilities into society by implementing a quota of seven per cent for persons with disabilities in vocational training in the public sector and five per cent in the private sector.⁴⁹ However, neither sector has reached its quotas.⁵⁰ The

44 Bureau of Democracy, Human Rights, and Labor 'Country reports on human rights practices' (4 March 2002) <http://www.state.gov/j/drl/rls/hrrpt/2001/nea/8277.htm> (accessed 28 April 2015).

45 As above.

46 As above.

47 As above.

48 Ruger & Kress (n 42 above).

49 Country report (n 40 above)

government also has more than 400 integrated classes for children with learning disabilities, but integration is largely left to private charities.⁵¹ Families typically support persons with disabilities, although some survive by begging.⁵²

7.2 Other than the ordinary courts or tribunals, does Morocco have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

No such official body was identified.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Morocco have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Morocco has ever addressed issues relating to the rights of persons with disabilities.

Morocco has an Ombudsman Institution (Diwan al Malhalim), which combines ancient and modern Islamic tradition with the Swedish ombudsman model and other variations.⁵³ The National Ombudsman's Office (mediator institution) helps to resolve civil matters when the judiciary is unable to do so.⁵⁴ Article 162 of the Constitution provides for the Ombudsman (Office of the Mediator) as an independent and specialised national institution that aims to protect human rights,⁵⁵ including disability rights.

The National Human Rights Council (CNDH) is a national institution for the protection and promotion of human rights.⁵⁶ It also has jurisdiction to,

examine complaints submitted to the Council or the contents of relevant reports published by the different civil society stakeholders, follows up the implementation of the Convention on the Rights of Persons with Disabilities and its Optional Protocol and national initiatives aiming at the protection of the rights of person with disabilities in Morocco in comparison with the substantive provisions of the Convention, and makes relevant recommendations in this area.⁵⁷

50 As above.

51 n 44 above.

52 As above.

53 M Mhamed Iraki & Wali al Madhalim 'In the Kingdom of Morocco: Readings in the Islamic Model of Ombudsman' (12 June 2009).

54 United States Department of State Bureau of Democracy, Human Rights and Labor (n 43 above).

55 Human Rights Council 'Report of the Independent Expert in the field of cultural rights, Farida Shaheed' (2 May 2012) http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-26-Add2_en.pdf (accessed 28 April 2015).

56 As above.

57 Kingdom of Morocco National Human Rights Council 'Conditions and situation of persons with disabilities' <http://www.cndh.org.ma/an/programs/human-rights-protection-programs> (accessed 28 April 2015).

In addition, the royal decree creating the CNDH grants the Council the power to investigate any allegations of human rights violations, to summon people to give evidence in its investigations, and to act as an early warning mechanism to prevent human rights violations including those of persons with disabilities.⁵⁸

The CNDH has thirteen regional human rights commissions which monitor the situation of human rights in the different regions of Morocco.⁵⁹ The CNDH also examines complaints and relevant civil society reports, monitors cases of violations, examines the national laws compliance with international treaties to which Morocco is a party, and contributes to the implementation of mechanisms provided for by these international human rights conventions.⁶⁰

9 Disabled people's organisations (DPOs) and other civil society organisations

9.1 Does Morocco have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

- An umbrella organisation known as 'Collectif pour la Promotion des Droits des Personnes en Situation de Handicap' consists of five organisations which represent the North, South and centre of Morocco. These organisations work to strive for equal civil, social, economic, and cultural rights of persons with disabilities.⁶¹
- Handicap International, an international disability organisation, also works in Morocco to help translate the CRPD into 'practical action that will improve the lives of people with disabilities' in Morocco.⁶² Handicap International works with disabled people's organisations so they can play a leading role in the creation and monitoring of new disability policies so that the Convention is meaningful for all people with disabilities.⁶³ Handicap International currently has three Disability Rights projects in the country of Morocco: A pilot programme with local partners in Tetouan to improve the city's accessibility in compliance with the CRPD (Convention on the Rights of Persons with Disabilities); A partner project with public authorities, based on the LEAD (Leadership and Empowerment for Action on Disability) project, to increase the social, economic and political involvement of 11 million people with disabilities in Morocco, Algeria, and Tunisia through advocacy training workshops and The *Go To The Vote* project to encourage political and legislative involvement from people with disabilities in Morocco and Libya. Building the capacities of local disabled people's organisations, electoral commissions, and political parties, the project aims to change the perception of disability through media campaigns, promote the accessibility of people with disabilities to elections, and ensure that disability is taken into account in electoral programmes.⁶⁴

58 See National Council on Human Rights at <http://www.cndh.org.ma/an/about-cndh/about-us> (accessed 25 May 2015). See also Morocco on the Move 'Morocco is committed to protecting human rights' (2012) https://moroccoonthemove.files.wordpress.com/2012/03/fs_morocco_protectinghumanrights10january2012.pdf (accessed 28 April 2015).

59 National Human Rights Council *About Us* <http://www.cndh.org.ma/an/about-cndh/about-us> (accessed 28 April 2015).

60 As above.

61 Bakker (n 8 above).

62 Handicap International UK *Morocco 2015* http://www.handicap-international.org.uk/where_we_work/africa/morocco (accessed 28 April 2015).

63 As above.

64 As above.

- In the city of Salé and region of Souss-Massa-Drâa, Handicap International promotes the access of adults and children with disabilities to local educational, health, vocational, and administration systems. In Salé, awareness campaigns targeted at the general public on inclusive education, and sponsored debates and events for child education continue to directly benefit 297 children with disabilities and their families. In Souss-Massa-Drâa, technical support to paramedical professionals and the development of provincial disability committees promote the full and equal inclusion of people with disabilities in all facets of Moroccan society.
- In addition, Morocco has undergone a series of major reforms since King Mohammed VI ascended to the throne in 1999. In 2002, substantial amendments to the Decree on the Right to Establish Associations were adopted, and a new Constitution was approved following popular protests in 2011. These reforms have enlarged the legal space for civil society, expanding its rights as well as its role in policymaking and the public sphere. As a result of the more enabling legal environment, Moroccan civil society has undergone substantial development.
- In Morocco, there are several DPOs: The African Campaign on Disability and HIV/AIDS: This organisation is an umbrella organisation under which numerous organisations work collectively to coordinate the efforts of disabled people's organisations and HIV/AIDS organisations and fight for equal access for people with disabilities in Africa to information and services on HIV & AIDS. International Foundation for Electoral Systems (IFES).
- Haut Commissariat aux Personnes Handicapées, a national umbrella organisation which advocates for rights, mobilises persons with disabilities, identifies needs and priorities, and contributes to public awareness. The national coordinating committee ('Le Haut Commissariat aux Personnes Handicapées') reports to the Prime Minister's office. The committee includes representatives of the commission of planning.

In sum, over the last decade, the number of Moroccan organisations working on disability issues has increased dramatically.⁶⁵ Handicap International, for example, is working to build the capacities of these organisations to ensure they are better able to take into account the needs of people with disabilities and to more effectively advance their rights.⁶⁶ In addition, the International Foundation for Electoral Systems (IFES), in partnership with disability experts and organisations from the MENA region, undertook a series of activities in Lebanon, Egypt, Yemen and Morocco to promote greater political and electoral participation of citizens with disabilities. In Morocco, IFES worked with the Collectif pour la Promotion des Droits des Personnes en Situation de Handicap – the largest and most active disabilities rights collective in the country – to create guides and conduct trainings on increased political participation of persons with disabilities, targeted at NGOs, political parties and government officials. Under this project, each nation made important strides in increasing access of the disabled in political and electoral participation.⁶⁷

9.2 In the countries in Morocco's region (North Africa) are DPOs organised/coordinated at national and/or regional level?

Morocco has a national umbrella organisation called 'Haut Commissariat aux Personnes Handicapées'. There is a national coordinating committee ('Le Haut Commissariat aux Personnes Handicapées') reporting to the Prime Minister's

⁶⁵ Handicap International UK (n 62 above).

⁶⁶ As above.

⁶⁷ International Foundation for Electoral Systems 'People with disabilities' (2015) <http://www.ifes.org/Content/Topics/Inclusion-and-Empowerment/Inclusion-of-Persons-with-Disabilities/People-with-Disabilities.aspx> (accessed 28 April 2015).

office. The committee includes representatives of the commission of planning, of the CBR-programme and of an inter-ministerial committee.⁶⁸

In Morocco, IFES worked with the Collectif pour la Promotion des Droits des Personnes en Situation de Handicap – the largest and most active disabilities rights collective in the country.

9.3 If Morocco has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

In Morocco, there are several DPOs:

- The African Campaign on Disability and HIV & AIDS is an umbrella under which numerous organisations work collectively to coordinate the efforts of disabled people's organisations and HIV/AIDS organisations and fight for equal access for people with disabilities in Africa to information and services on HIV & AIDS.
- International Foundation for Electoral Systems (IFES)
- IFES worked with the Collectif pour la Promotion des Droits des Personnes en Situation de Handicap – the largest and most active disabilities rights collective in the country – to create guides and conduct trainings on increased political participation of persons with disabilities, targeted at NGOs, political parties and government officials. Under this project, each nation made important strides in increasing access of the disabled in political and electoral participation.⁶⁹
- Haut Commissariat aux Personnes Handicapées is a national umbrella organisation which advocates for rights, mobilises persons with disabilities, identifies needs and priorities, and contributes to public awareness.⁷⁰ The national coordinating committee, Le Haut Commissariat aux Personnes Handicapées, reports to the Prime Minister's office. The committee includes representatives of the commission of planning, of the CBR-programme and of an inter-ministerial committee. The government expects the committee to participate in policy development and to perform other tasks. The establishment of the committee has had the following effects: improved coordination of measures/programmes in the disability field, improved legislation and integration of responsibility, a better dialogue in the disability field and improved promotion of public awareness.⁷¹

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPOs support the development of persons with disabilities' capacities by providing them with a common platform to exchange and share their experiences and build a common voice.⁷² They often engage in the provision of information on disability for their members (on their rights, but also existing services, facilities and provisions) or specific services, such as sign language training. Many DPOs are engaged in the provision of rehabilitation or socio-economic services to their members, which they consider part of their mandate (this varies significantly depending on the context). In their function of representatives of persons with disabilities, DPOs mostly see their role as raising awareness in society and advocating for equal rights as citizens.⁷³

68 D Michailakis 'Government action on disability policy: A Global Survey?Part II - Government replies as Country Profiles, Morocco' (1997) <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1232&context=gladnetcollect> (accessed 28 April 2015).

69 International Foundation for Electoral Systems (n 67 above).

70 Michailakis (n 68 above).

71 As above.

72 Handicap International Technical Resource Division 'Policy paper on support to organisations representative of persons with disabilities' (2011) <http://www.disabilityrightsfund.org/files/supporttodpo.pdf> (accessed 28 April 2015).

73 As above.

Civil society is very active in providing services to children living with disabilities. The Moroccan Friendship for the Disabled is an organisation working to promote the rights of people living with disabilities and contribute to their professional and social integration. Besides awareness-raising activities, this organisation also launched in October 2010, with the support of Handicap International, works towards training of teachers and educators within the 'Social Integration Classes' programme.⁷⁴

DPOs also work towards improving their living conditions and promoting the respect for dignity and their fundamental rights, together with a preventive action towards impairments and disabilities linked to diseases, accidents and violence. In most cases, this consists of reducing obstacles to full participation, ensuring that persons with disabilities can access the services they require and enjoy their lives to the fullest.⁷⁵

The mental illness advocacy association UNAHM organised a sit-in in front of parliament in Rabat to ask for an urgent intervention from the authorities to guarantee rights for the mentally challenged that follow universal United Nations conventions.⁷⁶

At a week-long conference also held in Casablanca, UNAHM insisted on the need to put the issue of mental disability amongst 'national priorities'.⁷⁷

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

As relatively new organisations whose members often face discrimination, DPOs have had limited opportunities to develop relevant capacities and resources.⁷⁸

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

Although Morocco has a long way to go to realise the goals of the CRPD, the existence of a government office responsible for promoting and protecting the rights and welfare of persons with disabilities, as required under the CRPD, as well as the existence of an umbrella organisation at the country level comprising of DPOs, could be considered good practices. The actions that have been taken by NGOs to date in order to ensure implementation of the CRPD may be seen as a good practice.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

Yes, there have been outcomes regarding the successful implementation of the CRPD. As part of the framework of a national implementation process of the

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ Disability Rights Promotion International 'Mentally challenged in Morocco: We want our rights, not charity' (26 January 2015) <http://drpi.research.yorku.ca/mentally-challenged-in-morocco-we-want-our-rights-not-charity/> (accessed 28 April 2015).

⁷⁷ As above.

⁷⁸ As above.

International Convention on the Rights of Disabled Persons, the draft report recommends that,

the establishment of appropriate measures, including criminal, to fight against all acts of discriminatory terms and stigmatizing language and disrespectful and cruel, inhuman and degrading behavior or to the dignity of persons with disabilities.

The Economic and Social Council (ESC) of Morocco emphasises, through its draft report, the need to implement an integrated national policy to protect the rights of hundreds of thousands of Moroccan citizens affected by disability (1.5 million according to the last census of 2004). It also recalls that the fight against all forms of discrimination and protecting the rights of vulnerable groups is a constitutional commitment under article 34 of the New Constitution. As stated in the ESC report: 'By integrating the issue of the disabled, the new constitution requires the Moroccan government to develop an action plan and an effective strategy to promote integration.'⁷⁹

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

Additional resources are needed to increase the effectiveness of DPOs and to improve their effective engagement in the CRPD implementation process.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

DPOs may be empowered in several ways. First, they may engage in capacity building trainings and programmes; they may seek ways to work together to increase their impact and to broaden their collaboration with other NGOs and mainstream human rights organisations, and they may choose to partner with other organisations to increase their access to financial and other resources.

9.10 Are there specific research institutes in the region where Morocco is situated (North Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

No such institutes were identified in Morocco.

⁷⁹ AM Mantrach 'The situation of the disabled people in Morocco concerned the Economic and Social Council' *Yabiladi* 7 February 2012 <http://yabiladi.com/articles/details/11666/situation-handicapes-maroc-inquiete-conseil.html> (accessed 28 April 2015).

10 Government departments

10.1 Does Morocco have a government department or departments that is/ are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The Ministry of Solidarity, Women, and Social Development is the governmental ministry that is expressly tasked with the responsibility of protecting the rights of persons with disabilities.⁸⁰ It is currently working in four areas:

- **Improving access to information, education, training and employment**

The goal is improving school enrollment rates of children with disabilities to reach the stated government objective of 70 per cent, introduced by the Prime Minister before parliament.

The Ministry works to improve access to information, job training and employment of people at risk or with disabilities, their families and associations working in this area.

- **Improving physical, communication and transportation accessibility**

In order to facilitate the integration of persons with disabilities, the Ministry works to improve access to open spaces, public buildings and the built environment, as well as to means of transportation and communication.

- **Participating in cultural, sporting, tourist and leisure activities**

This programme aims at improving the well-being of persons with disabilities through their participation in sporting, cultural and leisure activities.

The Ministry strives to provide support for greater accessibility to leisure activities, participation in sporting, artistic and cultural events and community based initiatives.

- **Producing information and knowledge about disabilities**

Five years after the completion of the first national survey on disabilities, the Ministry will conduct a second survey. It will enable monitoring of disabilities in different Moroccan cities and an evaluation of policies targeting this area.⁸¹

80 Ministry of Solidarity, Women, and Social Development *About Us* 2015 <http://www.social.gov.ma/index.aspx> (accessed 28 April 2015).

81 Ministry of Solidarity, Women, and Social Development 'Strategy' 2015 <http://www.social.gov.ma/fr/index.aspx?mod=15&rub=261> (accessed 28 April 2015).

11 Main human rights concerns of people with disabilities in Morocco

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- Research on the parental attitudes towards disability often focused on mental disabilities.⁸² This means the other categories of disabilities receive less awareness and, as a result, fewer resources.
- Religious beliefs, in general, have been associated with the idea that disability is a punishment or god-given. This belief remains strongly present in Morocco. In a list recording the causes of health problems, 49,5 per cent of informants with disability in the Moroccan National Survey of 2004 mentioned the divine power as the cause of the disability. The relationship between religion and disability is evident in such attitudes.⁸³

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Morocco?

The International Foundation for Electoral Systems (IFES), in partnership with disability experts and organisations from the MENA region, undertook a series of activities in Morocco to promote greater political and electoral participation of citizens with disabilities. In Morocco, IFES worked with the Collectif pour la Promotion des Droits des Personnes en Situation de Handicap, the largest and most active disability rights collective in the country, to create guides and conduct trainings on increased political participation of persons with disabilities, targeted at NGOs, political parties and government officials. In this project, Morocco made important strides in increasing access for people with disabilities in the arenas of political and electoral participation.⁸⁴

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Morocco?

- The Collectif pour la promotion des droits des personnes en situation de handicap (Disability Rights Promotion Group) (CHDM) indicated that persons with disabilities still endure discrimination, particularly in the workplace.
- CHDM also recommended that Morocco mobilise the necessary resources to allow children with disabilities to enjoy their right to education. CHDM also reported the restrictions on the participation of persons with disabilities in public and political life and mentioned the issue of the restricted legal capacity

82 R Hasnain et al 'Disability and the Muslim perspective: An introduction for rehabilitation and health care providers' (2008) *Center for Rehabilitation Research Information & Exchange* <http://cirrie.buffalo.edu/culture/monographs/muslim/> (accessed 1 May 2015).

83 Foundation du Fonds pour le Maroc 'Inventaire sur la situation des sourds au Maroc' <http://www.fmsourds.org/index.php?a=readmore&n=71> (accessed 1 May 2015).

84 International Foundation for Electoral Systems (n 67 above).

of the 'feeble-minded', making a recommendation on the matter. CHDM reported that 'no investigations had been made and/or prosecutions brought in the case of physical and/or sexual violence suffered by a number of persons with disabilities.'⁸⁵

- Le Collectif autism Maroc (CAM) mentioned the particular problems of autistic children in education, and shortcomings in the right to health of persons with disabilities; it also made recommendations, particularly on stopping the practice of treating autism as a psychosis and establishing a national fund for persons with disabilities.

Le Médiateur pour la démocratie et les droits de l'homme (MDDH) reported that few persons with disabilities were recruited into the public sector.

11.4 Case studies of specific vulnerable groups

• Older Persons

The rights of older persons are a major challenge for Moroccan society.⁸⁶ Despite the new Constitution, which guarantees access to social protection, and the social welfare institutions law, Morocco has not yet had any specific legal provisions protecting the rights of older persons.⁸⁷

• Indigenous Persons

Imazighen, also known as Berbers, are the indigenous peoples of Morocco.⁸⁸ Prior to 2011, the Preamble to the Constitution of the Kingdom of Morocco recognised Arabic as the sole national language and Morocco's government suppressed the Tamazight language as a symbol of Imazighen identity and their cultural rights.⁸⁹ In 2011, the revised Constitution of the Kingdom of Morocco recognised the Tamazight language as an official language of Morocco.⁹⁰ However, since then, the government has yet to implement this provision, despite calls from the Amazigh Cultural Movement (ACM) to do so. Until such a law is implemented, 'the situation of Amazigh or Indigenous persons' rights will remain in a state of limbo'.⁹¹

• Children

Net primary school enrolment rates have been increasing rapidly, reaching 87 per cent for girls and 92 per cent for boys in 2009. However, net secondary school rates are still extremely low, with only 37 per cent of boys and 32 per cent of girls attending secondary school.⁹² The quality of education is also an issue as evidenced by poor retention rates: 25 per cent of school children drop out before the fifth grade, and only 10 per cent make it to 11th grade.⁹³

85 International Disability Alliance 'Universal Periodic Review 13th Session' 26 April 2012.

86 Kingdom of Morocco National Human Rights Counsel 'Rights of Older Persons: Major Challenge Moroccan Society' (8 September 2014) <http://www.cndh.org.ma/an/highlights/rights-older-persons-major-challenge-moroccan-society-0> (accessed 26 May 2015).

87 As above.

88 Country Report (n 44 above).

89 As above.

90 International Workgroup for Indigenous Affairs '2015 yearbook article' http://www.iwgia.org/images/stories/sections/regions/africa/documents/IW2015/Morocco_IW2015_web.pdf (accessed 26 May 2015).

91 As above.

92 Save the Children *Children's Situation in Morocco* 12 April 2013 <http://resourcecentre.savethechildren.se/start/countries/morocco> (accessed 26 May 2015).

93 As above.

With respect to Child Marriages, although reforms to the family law (2004) have raised the minimum age of marriage for women from 15 to 18 years, girls as young as 13 may get married, but only with judicial authorisation.⁹⁴ The number of child marriages, however, is increasing. Between 2009 and 2010, it increased by 3000, with a total of 33253 early marriages recorded.⁹⁵ Although forced child labour is also prohibited, it remains a critical challenge as it concerns nine per cent of children aged 5 to 14 years.⁹⁶ Violence against and abuse of children also remains an issue. Owing to the fact that teachers and parents believe that children should fear them, 'violence is often socially-accepted and approved'.⁹⁷ Sixty-one per cent of children report that they have been beaten by their parents at least once.⁹⁸ Even in school, where corporal punishment is not permitted, it is still widely practiced, with 87 per cent of children reporting that they have been beaten at school at least once.⁹⁹

- **Women**

The issue of women's rights is a highly visible and widely discussed topic in Morocco today. The King has been quoted as saying that since women make up 50 per cent of the population, they should have a similar representation in the legislature.¹⁰⁰ However, less attention is paid to issues affecting women with disabilities.¹⁰¹

- **Persons with Mental Disabilities**

Based on the laws described in section 3.1 above, there is some attention also paid to issues affecting persons with mental disabilities in Morocco. For example, research on parental attitudes towards disability often focused on the needs of children and adults with mental disabilities.¹⁰² Little or no research on attitudes about other types of disabilities has been conducted.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Morocco at the moment?

None that we are aware of.

12.2 What legal reforms would you like to see in Morocco? Why?

In order to ensure greater recognition for the rights of people with disabilities under the CRPD and domestic law, additional research and advocacy is needed. For example, a research institute on disability rights could be established to support DPOs efforts and increase their capacity. Opportunities for DPOs to partner with other regional and international DPOs would also increase their capacity as would trainings by activists, self-advocates and other experts who have experience

94 As above.

95 As above.

96 As above.

97 As above.

98 As above.

99 As above.

100 DH Gray 'Educated, professional women in Morocco and women of Moroccan origin in France: Asserting anew public and private identity' (2006) 2 *Journal Of Middle East Women's Studies* 48.

101 Human Rights Council (n 55 above).

102 Bakker (n 8 above).

working on the advancement of disability rights in such areas as education, employment, political participation, to name a few. Additional lawyer and policy makers could benefit by training on how human rights principles and the CRPD, in particular, apply to people with disabilities. For example, some universities, such as Syracuse University College of Law, now offer specialised advanced legal training in disability rights for lawyers from other countries. If lawyers (especially lawyers with disabilities) from Morocco participated in such programmes, upon their return to Morocco the following year, they would be particularly well suited to advance the rights of people with disabilities in Morocco.

SIERRA LEONE

Romola Adeola*

1 Population indicators

1.1 What is the total population of Sierra Leone?

The last population census in Sierra Leone was conducted in 2004. At the time, the total population of persons with or without disabilities of all ages in Sierra Leone was placed at 4 928 578.¹ Of this figure, the total number of persons with disabilities was placed at 119 260. The final results of the 2004 Population Census of Sierra Leone embargoed until 2006 placed the total population of persons in Sierra Leone at 4 976 871.² The next population census will be conducted in 2015. However, according to the World Bank, the total population of Sierra Leone as at 2013 is estimated to be 6.092 million.³

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Sierra Leone. What criteria are used to determine who falls within the class of persons with disabilities in Sierra Leone?

This report utilised the 2004 Population Census⁴ figures in obtaining the statistical data on the prevalence of disability in Sierra Leone.

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1 M Ovadiya & G Zampaglione *Escaping stigma and neglect: People with disabilities in Sierra Leone* (2009) 7; AC Thomas '2004 population and housing census of Sierra Leone: Population profile of Sierra Leone' *Sierra Leone Union for Population Studies: 2004 Census Population Series 1* (2010) 85 http://www.statistics.sl/reports_to_publish_2010/population_profile_of_sierra_leone_2010.pdf (accessed 25 June 2015).

2 Statistics Sierra Leone 'Final results: 2004 population and housing census' (2006) http://www.sierra-leone.org/Census/ssl_final_results.pdf (accessed 6 April 2015).

3 World Bank 'Sierra Leone' <http://data.worldbank.org/country/sierra-leone> (accessed 6 April 2015).

4 See Thomas (n 1 above).

1.3 What is the total number and percentage of persons with disabilities in Sierra Leone?

The 2004 population census indicates that about 119 260 persons with disabilities are in Sierra Leone,⁵ which is about 2,4 per cent of Sierra Leone's of the population recorded in the 2004 population census.⁶

1.4 What is the total number and percentage of women with disabilities in Sierra Leone?

In line with the 2004 Population Census figures, the total number of women with disabilities in Sierra Leone is 56 530. This accounts for 2,2 per cent of the total female population of 2 481 071.⁷

1.5 What is the total number and percentage of children with disabilities in Sierra Leone?

According to the United Nations Children's Fund's Multiple Indicator Cluster Survey of 2005, about 23,8 per cent of children between the ages of 2 to 9 years were reported to have one form of disability.⁸ Estimated to around 24 per cent, the Advocacy Movement Network suggests that there are about 625 000 children with disabilities in Sierra Leone.⁹

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Sierra Leone?

In light of the 2004 Population Census, there are about:¹⁰

- 31 550 persons with a visual impairment;
- 11 344 with a hearing impairment; and
- 44 371 with physical impairments (from the use of legs, arms and back spine); and about 5 803 persons with a speech impairment.

5 Thomas (n 1 above) 85.

6 Although this figure has been criticised as being 'underestimated' and statistical projections suggest that an estimate of about 526000 PWDs are in Sierra Leone, the 2004 Population Census figure of 119, 260 is the official statistical data. Ovadiya & Zampaglione (n 1 above) 6-7; United Nations Integrated Peace Building Office in Sierra Leone & United Nations Human Rights Office of the High Commissioner 'Moving forward together: From national commitment to concrete action' *Report on the rights of persons with disabilities in Sierra Leone* (2011) 11 <http://unipsil.unmissions.org/LinkClick.aspx?fileticket=HNvCvCysVLQ%3D&tabid=9611&language=en-US> (accessed 6 April 2015); United Nations Economic Commission for Africa 'Africa Regional Report: Main findings and recommendations' African Regional Conference on Population and Development, Addis Ababa, Ethiopia, UN Doc ECA/ICPD/MIN/2013/2 (3 September 2013) 13.

7 Ovadiya & Zampaglione (n 1 above) 7.

8 United Nations Children's Fund 'Multiple indicator cluster survey 2005' T68 http://www.childinfo.org/files/MICS3_SierraLeone_FinalReport_2005_Eng.zip (accessed 6 April 2015).

9 Advocacy Movement Network 'The effect of armed conflict on people living with disabilities in Africa: Case study – Sierra Leone' (2012) http://www.csoforum.info/wp-content/uploads/2012/07/people_living_with_disability__2012.ppt (accessed 6 April 2015).

10 Thomas (n 1 above) 88.

2 Sierra Leone's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Sierra Leone? Did Sierra Leone sign and ratify the CRPD? Provide the date(s).

Sierra Leone signed the CRPD and its Optional Protocol on 30 March 2007.¹¹ On 4 October 2010, Sierra Leone ratified the CRPD.¹² However, Sierra Leone has not ratified the Optional Protocol.¹³

2.2 If Sierra Leone has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Sierra Leone submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

The government department in charge of issues around disability rights is the Ministry of Social Welfare, Gender and Children's Affairs.¹⁴ The state report of Sierra Leone to the CRPD Committee was due on 4 November 2012.¹⁵ However, at the date of concluding the country report in June 2015, Sierra Leone had yet to submit its report to the CRPD committee.¹⁶

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Sierra Leone also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in Sierra Leone's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

While reporting under the UN Convention on the Rights of the Child (CRC),¹⁷ Sierra Leone has reported on the rights of persons with disabilities. On 8 September 2006, Sierra Leone submitted its second periodic report on the CRC to the UN

11 United Nations Enable 'Convention & Optional Protocol signatures and ratification' <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 6 April 2015).

12 As above.

13 As above.

14 United Nations Integrated Peacebuilding Office in Sierra Leone & United Nations Human Rights Office of the High Commissioner (n 6 above) 15; Permanent Mission of the Republic of Sierra Leone to the United Nations Statement by HE Mr Shekou Momodu Touray, Ambassador & Permanent Representative at the Fourth session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, New York (8 September 2011) http://www.un.org/disabilities/documents/COP/cosp4_statement_sierra_leone.doc (accessed 6 April 2015).

15 Reporting status for Sierra Leone http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=SLE&Lang=EN (accessed 25 June 2015).

16 As above.

17 UN Convention on the Rights of the Child 1989 (CRC).

Committee on the Rights of the Child (CRC Committee).¹⁸ In this report, Sierra Leone stated that a National Policy for the Protection of Persons with Disabilities was being developed.¹⁹ While noting the development of the National Policy for the Protection of Persons with Disabilities, the CRC Committee in its concluding observation on Sierra Leone's second periodic report expressed concern about the absence of a legislative framework 'to cover the needs and protection of persons with disabilities'.²⁰ The CRC Committee further made mention of the absence of information in respect of the inclusion of children with disabilities within the society.²¹

On 2 September 2013, Sierra Leone submitted its third to fifth periodic report on the CRC in which it stated some of the steps it had taken in light of the CRC Committee's concluding observation.²² In this report, Sierra Leone emphasised that in 2011, it passed legislation on disability rights.²³ It further stated that it has complementary legislations in which it protects the rights of children with disabilities including the Child Rights Act²⁴ and the National Youth Commission Act.²⁵

Sierra Leone further emphasised in its report that the Special Needs Education Unit for the establishment of Special Schools in the Ministry of Education, Science and Technology with the support of Leonard Cheshire Home 'prepared a six-module curriculum for the training of teachers in teaching pupils with disabilities, set up a computer and braille training centre, and provided quarterly subventions to 12 Special Schools'.²⁶ The CRC Committee will consider this report in 2016.²⁷

In the concluding observation of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) on the sixth periodic report of Sierra Leone,²⁸ the CEDAW Committee expressed concern in relation to the absence of information on the 'situation of elderly women and women with disabilities who suffer multiple forms of discrimination and are less likely to have access to basic services, including education, employment and health care'.²⁹ The CEDAW Committee recommended that specific policy measures be

18 Consideration of reports submitted by state parties under article 44 of the Convention: Second periodic report of states parties due in 1997: Sierra Leone, UN Doc CRC/C/SLE/2 (8 September 2006) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSLE%2f2&Lang=en (accessed 6 April 2015).

19 CRC/C/SLE/2 (n 18 above) para 231.

20 Consideration of reports submitted by state parties under article 44 of the Convention: Concluding observations: Sierra Leone, adopted by the UN Committee on the Rights of the Child, UN Doc CRC/C/SLE/CO/2 (20 June 2008) para 49 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSLE%2fCO%2f2&Lang=en (accessed 6 April 2015).

21 CRC/C/SLE/CO/2 (n 20 above).

22 Consideration of reports submitted by states parties under article 44 of the Convention: Combined third, fourth and fifth periodic reports of states parties due in 2012: Sierra Leone, UN Doc CRC/C/SLE/3-5 (27 January 2015) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSLE%2f3-5&Lang=en (accessed 6 April 2015).

23 The Persons with Disability Act 22 of 2011 (Disability Act).

24 The Child Right Act 43 of 2007.

25 The National Youth Commission Act 11 of 2009; See CRC/C/SLE/3-5 (n 22 above) para 104(i).

26 CRC/C/SLE/3-5 (n 22 above) para 104(ii).

27 Ratification, reporting & documentation for Sierra Leone http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (accessed 6 April 2015).

28 Consideration of reports submitted by state parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against women: Sixth periodic reports of states parties due in 2009: Sierra Leone, UN Doc CEDAW/C/SLE/6 (1 November 2012) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fSLE%2f6&Lang=en (accessed 6 April 2015).

29 Concluding observations on the sixth periodic report of Sierra Leone, adopted by the UN Committee on the Elimination of Discrimination against Women, UN Doc CEDAW/C/SLE/CO/6 (10 March 2014) para 38 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fSLE%2fCO%2f6&Lang=en (accessed 6 April 2015).

adopted in addressing this concern.³⁰ In 2013, the Ministry of Social Welfare, Gender and Children's Affairs developed a strategic plan for 2014-2018 in which it seeks to protect all persons including the elderly and persons with disabilities in the realisation of a Sierra Leonean society where everyone lives in dignity and where rights are protected.³¹ The next due date of Sierra Leone's state report to the CEDAW Committee is 1 February 2018. In its report to the Committee against Torture, Sierra Leone mentioned that it had ratified the CRPD.³² The Committee against Torture welcomed the ratification of the CRPD.³³

In its national report submitted for the Universal Periodic Review process in 2011, Sierra Leone made mention of the fact that it was developing a 'Draft Disability Policy and Bill' which made provision for the creation of a Disability Commission.³⁴ Sierra Leone emphasised that it was committed to the protection of the rights of vulnerable group.³⁵ Spain recommended that Sierra Leone should ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities and strengthen efforts for the protection of children with disabilities.³⁶ Cuba further recommended that Sierra Leone should continue with efforts to ensure the protection of PWDs. These recommendations enjoyed the support of Sierra Leone.³⁷

In its initial and combined report to the African Commission on Human and Peoples' Rights (African Commission) with respect to the African Charter on Human and Peoples' Rights (African Charter),³⁸ Sierra Leone made mention of the fact that it has a Disability Act.³⁹ However, the report does not indicate specific measures taken to protect PWDs in terms of the legislation.⁴⁰ The report only highlights the fact that although there are laws ensuring protection of all persons against discrimination, acts of discrimination against PWDs and women still persist in terms of employment. However, the report indicates that with the enactment of the Disability Act and the creation of the Industrial Court to handle such issues, 'there is hope for improvement'.⁴¹ No concluding observation is available in respect of this report.⁴²

30 CEDAW/C/SLE/CO/6 (n 29 above) para 39.

31 Ministry of Social Welfare, Gender and Children's Affairs 'Strategic Plan 2014-2018' (2013) para 2.2 <http://mswgca.gov.sl/attachments/Documents/MSWGCA%202014-2018%20Strategic%20Plan.pdf> (accessed 6 April 2015).

32 Consideration of reports submitted by states parties under article 19 of the Convention, initial reports of states parties due in 2002: Sierra Leone, para 11(i), UN Doc CAT/C/SLE/1 (9 September 2013) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSLE%2f1&Lang=en (accessed 6 April 2015).

33 Concluding observations on the initial report of Sierra Leone, adopted by the UN Committee against Torture, UN Doc CAT/C/SLE/CO/1 (20 June 2014) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSLE%2fCO%2f1&Lang=en (accessed 6 April 2015).

34 National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: Sierra Leone, UN Doc A/HRC/WG.6/11/SLE/1 (14 February 2011) para 36.

35 A/HRC/WG.6/11/SLE/1 (n 34 above) para 37.

36 Report of the Working Group on the Universal Periodic Review: Sierra Leone, UN Doc A/HRC/18/10, paras 80.1; 80.23

37 A/HRC/18/10 (n 36 above) para 81.17.

38 African Charter on Human and Peoples' Rights 1981 (African Charter).

39 Disability Act (n 23 above).

40 African Charter on Human and Peoples' Rights: Initial to date following article of the Charter report submitted by Sierra Leone (2013) http://www.achpr.org/files/sessions/53rd/state-reports/1st-1983-2013/statrep_1983_2013_eng.pdf (accessed 6 April 2015).

41 African Charter on Human and Peoples' Rights (n 40 above)19.

42 African Commission on Human and Peoples' Rights 'Sierra Leone' <http://www.achpr.org/states/sierra-leone/> (accessed 6 April 2015).

In respect of the African Charter on the Rights and Welfare of the Child (African Children's Charter),⁴³ Sierra Leone became a state party in 2002.⁴⁴ As at 2014, it had not submitted its report to the African Committee of Experts on the Rights and Welfare of the Child.⁴⁵

2.4 Was there any domestic effect on Sierra Leone's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Sierra Leone's legislature to incorporate it into the legal system before the instrument can have force in Sierra Leone's domestic law? Have Sierra Leone's courts ever considered this question? If so, cite the case(s).

As with other international human rights law instruments, state parties to the CRC,⁴⁶ the African Charter,⁴⁷ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁴⁸ the African Children's Charter,⁴⁹ and the CRPD are enjoined to incorporate treaty provisions into their national laws.

By virtue of section 40 of the Constitution of Sierra Leone 1991, Sierra Leone is a dualist system and as such international law instruments have to be domesticated by parliament. Sierra Leone enacted a Child Rights Act in 2007,⁵⁰ which aims at protecting the rights of the child in a manner 'compatible with the Convention on the Rights of the Child, its Optional Protocol ... and the African Charter on the Rights and Welfare of the Child'.⁵¹ Sierra Leone has not domesticated CEDAW. However, through statements of senior state officials, it has pledged to do so.⁵² In its state report to the African Commission on the African Charter, Sierra Leone analysed the provisions of its Constitution in relation to the African Charter.⁵³ However, there is no specific act of parliament as in the case of Nigeria that specifically domesticates the African Charter.⁵⁴

With respect to court cases, Marrah notes that due to the fact that 'a large portion of legal practitioners in Sierra Leone are unfamiliar especially with regional human rights instruments, it has been immensely difficult for human rights litigation ... to be undertaken'.⁵⁵ Consequently, Marrah observes that 'case law in

43 African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter).

44 African Committee of Experts on the Rights and Welfare of the Child: Table of ratification of the African Charter on the Rights and Welfare of the Child and submission of reports on the implementation of the Charter <http://acerwc.org/wp-content/uploads/2013/12/Ratification-and-reports-submission-table-of-the-African-Childrens-Charter-.pdf> (accessed 6 April 2015).

45 As above.

46 CRC (n 17 above) art 4.

47 African Charter (n 38 above) art 1.

48 The Convention on the Elimination of All Forms of Discrimination against Women (1979) art 2(a).

49 African Children's Charter (n 43 above) art 1(1).

50 Child Rights Act (n 24 above).

51 As above.

52 JS Margai 'Sierra Leone prepares to report on CEDAW' *Premier Media Group Ltd* 5 February 2014 <http://premiermedia.sl/content/sierra-leone-prepares-report-cedaw> (accessed 6 April 2015); A Samba 'Sierra Leone news: First Lady assures women on CEDAW domestication' *Awareness Times* 15 May 2014 http://news.sl/drwebsite/publish/article_200525395.shtml (accessed 6 April 2015).

53 African Charter on Human and Peoples' Rights: Initial to date following article of the Charter report submitted by Sierra Leone (n 40 above).

54 A Marrah 'Sierra Leone' in *The impact of the African Charter and Women's Protocol in selected African states* (2012) 153.

55 Marrah (n 54 above) 156.

regards to the African Charter ... are few and far between if not virtually non-existent'.⁵⁶

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

The CRPD has been domesticated through the 2011 Disability Act. As earlier stated, the 2007 Child Right Act of Sierra Leone domesticates the African Children's Charter and the CRC.

3 Constitution

3.1 Does the Constitution of Sierra Leone contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

The Constitution of Sierra Leone does not specifically or explicitly prohibit discrimination on account of disability.⁵⁷ Article 27(3) of the Constitution, which lists discriminatory grounds provides that:⁵⁸

In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.

Although the section mentions the word 'disabilities', the word is used in a different context and not in the context of the prohibition of discrimination on account of disabilities.

3.2 Does the Constitution of Sierra Leone contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Article 8(2)(a) in Chapter II of the Sierra Leone Constitution provides that in the realisation of the Social Order of the state, the government should ensure 'that opportunities for securing justice are not denied any citizen by reason of economic or other disability'.⁵⁹

⁵⁶ As above.

⁵⁷ See United Nations Integrated Peacebuilding Office in Sierra Leone & United Nations Human Rights Office of the High Commissioner (n 6 above) 12; Constitution of Sierra Leone, 1991.

⁵⁸ Constitution of Sierra Leone (n 57 above).

⁵⁹ Constitution of Sierra Leone (n 57 above) art 8(2)(a).

4 Legislation

4.1 Does Sierra Leone have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Sierra Leone does have national legislation that directly addresses the issue of disability.⁶⁰ Significantly, the Disability Act⁶¹ establishes a national commission⁶² with the mandate of ensuring 'the well-being of persons with disability'.⁶³ The Disability Act further provides for the rights of PWDs inclusive amongst which are: (a) the right of a person to free education for persons with disabilities; (b) protection from discrimination in employment; and (c) the right to access public buildings.

4.2 Does Sierra Leone have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

Sierra Leone has several pieces of legislation that indirectly addresses the issues of disability. Amongst others are the Sexual Offences Act⁶⁴ and the Right to Access Information Act.⁶⁵ Article 4(2) of the Education Act recognises disability as a prohibited ground of discrimination.⁶⁶ Article 8(1) of the Sexual Offences Act provides '[a] person who intentionally causes, incites, threatens or deceives another person with a mental disability to engage in a sexual activity commits an offence'.⁶⁷ Such an offender is liable to imprisonment for a term 'not less than five years and not exceeding fifteen years'.⁶⁸ Article 74(1)(i) of the Public Election Act 2012 provides for the process which a visual or physically impaired voter may employ in order to vote. In light of this provision, a visually or physically impaired voter is required to make an application to the Presiding Officer who will provide assistance in the case for a physically impaired voter or inform the visually impaired voter that he can append his 'fingerprint mark in the square corresponding to the name of the candidate'⁶⁹ he seeks to vote for. Article 11(3) of the Access to Information Act provides that materials should be disseminated taking into account the needs of PWDs.

60 Disability Act (n 23 above).

61 As above.

62 Disability Act (n 23 above) art2(1).

63 Disability Act (n 23 above) art 6(1).

64 Sexual Offences Act 60 of 2012.

65 Right to Access Information Act 62 of 2013.

66 Education Act 19 of 2004, art 4(2).

67 The Sexual Offences Act (n 64 above) art 8(1).

68 As above.

69 Public Election Act 26 of 2012, art 74(1)(i).

5 Decisions of courts and tribunals

- 5.1 Have the courts (or tribunals) in Sierra Leone ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.**

The researcher did not come across any court case relating to the rights of persons with disabilities in Sierra Leone.

6 Policies and programmes

- 6.1 Does Sierra Leone have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

Sierra Leone has a specific Disability Act,⁷⁰ which addresses disability. Sierra Leone also has several policies that indirectly include PWDs. Some of these policies will be discussed in the next section 6.2.

- 6.2 Does Sierra Leone have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.**

In 2011, Sierra Leone adopted a National Social Protection Policy, which aims at providing social protection for vulnerable groups within the Sierra Leonean society including PWDs.⁷¹ In 2012, the First Lady of Sierra Leone launched the Mental Health Policy.⁷² One of the objectives of this policy is to 'promote the quality of life (e.g. good health status, social inclusion) of all people with mental disability and their families in Sierra Leone'.⁷³

In 2013, the President of Sierra Leone launched the Agenda for Prosperity,⁷⁴

⁷⁰ Disability Act (n 23 above).

⁷¹ The Republic of Sierra Leone 'National Draft Policy Framework for Social Protection in Sierra Leone' (2009) http://www.fao.org/docs/up/easypol/forum/31/31_National_Draft_Policy_for_Social_Protection_in_Sierra_Leone.pdf (accessed 8 April 2015); The Government of Sierra Leone 'The Agenda for prosperity: Road to middle income status' (2013) 107 (Agenda for Prosperity) http://www.undp.org/content/dam/sierraleone/docs/projectdocuments/povreduction/undp_sle_The%20Agenda%20for%20Prosperity%20.pdf (accessed 8 April 2015).

⁷² Mental Health Coalition in Sierra Leone 'Sierra Leone Mental Health Policy launched by first lady' 15 October 2012.

⁷³ Ministry of Health and Sanitation, Republic of Sierra Leone 'Mental Health Policy' 9 http://www.whosierraone.org/1_docs/mohspartnersdocs/mental_health_policy.pdf (accessed 8 April 2015).

⁷⁴ Agenda for Prosperity (n 71 above).

which is Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013-2018).⁷⁵ This Strategy Paper indirectly addresses disability. Part of the health sector objectives is to provide '[f]ree Health Care at the point of delivery for people with disability' and '[s]trengthen services aimed at providing rehabilitation equipment for people with disability'.⁷⁶ Part of its Labour Market Objectives is to '[d]evelop a comprehensive package of innovative market-oriented entrepreneurship programmes' that focuses on training and building the capacities of youths including PWDs.⁷⁷

The Strategic Plan (2014-2018) developed by the Ministry of Social Welfare, Gender and Children's Affairs also addresses disability. Significantly, the vision statement of the Strategic Plan is a 'Sierra Leonean society where women, men, children, the elderly and people with disability live a life of dignity ... and their human rights are fully protected'.⁷⁸ One of the core values of the Strategic Plan is 'equity and equality'. In this section, 'equal opportunities' for all persons including PWDs is emphasised.⁷⁹ The realisation of these goals entail social, political, economic and technological ramifications.⁸⁰ On a social level, one of the strategic highlights is to ensure the harmonisation of customary and national laws with national instruments protecting the rights of PWDs. On the political level, one of the strategic highlights is to utilise existing mechanisms in drawing attention to the issues of PWDs. On an economic level, one of the strategic highlights is to enhance the capacities of local leaders in protecting and promoting the rights of PWDs. With the use of technology, awareness and advocacy will be furthered. One of the areas in which awareness will be raised is in relation to harmful traditional practices for women, children and PWDs.⁸¹

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Sierra Leone have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

The Disability Act establishes a National Commission for Persons with Disability (National Commission).⁸² The National Commission is to be constituted of a Chairperson,⁸³ representatives from government Ministries of '(i) social welfare; (ii) finance; (iii) youth and sports; (iv) health; (v) education; (vi) employment;

75 This policy builds on Sierra Leone's Second Poverty Reduction Strategy titled 'Agenda for Change'. See The Republic of Sierra Leone 'Agenda for change: Second poverty reduction strategy (PRSP II): 2009-2012' (Agenda for Change) http://unipsil.unmissions.org/portals/unipsil/media/publications/agenda_for_change.pdf (accessed 8 April 2015); 'Agenda for prosperity road to middle income status' *Mysierraleonline.com* 12 April 2013 http://mysierraleonline.com/sl_portal/site/news/detail/1553 (accessed 8 April 2015); the REDD desk 'The Agenda for Prosperity: Third generation poverty reduction strategy paper (2013-2018)' <http://thereddesk.org/countries/plans/agenda-prosperity-sierra-leones-third-generation-poverty-reduction-strategy-paper> (accessed 8 April 2015).

76 Agenda for Prosperity (n 71 above) 67.

77 Agenda for Prosperity (n 71 above) 101.

78 Ministry of Social Welfare, Gender and Children's Affairs (n 31 above) para 2.2.

79 Ministry of Social Welfare, Gender and Children's Affairs (n 31 above) para 2.3.

80 Ministry of Social Welfare, Gender and Children's Affairs (n 31 above) para 3.1.

81 Ministry of Social Welfare, Gender and Children's Affairs (n 31 above) 35.

82 Disability Act (n 23 above) art 2(1).

83 Disability Act (n 23 above) art 2(3)(a).

(vii) transport; (viii) tourism and culture';⁸⁴ four representatives of the Sierra Leone Union on Disability Issues and other Disabled Peoples Organisations 'including at least one female';⁸⁵ two representatives from civil society handling disability issues⁸⁶ and an Executive Secretary.⁸⁷

The functions of the National Commission are provided in article 6 of the Disability Act. In line with article 6(1) of the Disability Act, the National Commission is created to 'ensure the well-being of persons with disability'.⁸⁸

Article 6(2) of the Disability Act sets out specific functions in its sub-articles (a)-(p). In accordance with article 6(2)(a)-(p) of the Disability Act, the National Commission may engage in policy formulation for the protection of PWDs; collaborate with government during national census to ensure 'that accurate figures of persons with disability are obtained in the country';⁸⁹ advise the Minister responsible for social affairs on international treaty provisions that relate to PWDs; proffer means of ensuring that discrimination against PWDs are prevented; investigate allegations of discriminations against PWDs and produce a report on its investigation; implement programmes aimed at employment or income generation for PWDs in partnership with the Ministry responsible for social affairs; assist with rehabilitation of PWDs within their communities in Sierra Leone; direct services geared towards the welfare of PWDs in Sierra Leone and carry out counselling programmes and vocational guidance; maintain a database on PWDs, institutions providing welfare services including rehabilitation and employment; provide assistive mechanisms and access to information on technological mechanisms to organisations and institutions concerned with PWDs; support the government in the development of curriculum for 'teacher training institutions, vocational rehabilitation centres and other facilities' for PWDs;⁹⁰ appraise and report to the ministry in charge of social affairs on the welfare of PWDs and areas of priority; 'issue adjustment orders' in terms of article 26;⁹¹ engage in consultation with government in relation to the provision of housing for PWDs; implement measures for public information on the rights of PWDs; and carry out such other functions in relation to the welfare of PWDs as it deems fit.

Article 7 of the Disability Act sets out the powers of the National Commission. Article 7(1) of the Disability Act provides that the National Commission 'shall have power to do such things as are necessary or convenient to be done for or in connection with the performance of its functions'. Articles 7(1)(a)-(f) of the Disability Act specifically provide for certain powers the National Commission may exercise inclusive amongst which are: to issue Permanent Disability Certificates; carry out inquiries into matters concerning the welfare of PWDs; choose an officer(s) and empower such to make investigations and report to the National Commission on infringements of the Disability Act; create committees which will be constituted of the members and non-members of the National Commission and where necessary may include experts; vest functions to the committee it creates as it may determine; and conduct research or employ the services of individuals in conducting research on the rehabilitation of PWDs.⁹²

84 Disability Act (n 23 above) art 2(3)(b).

85 Disability Act (n 23 above) art 2(3)(c).

86 Disability Act (n 23 above) art 2(3)(d).

87 Disability Act (n 23 above) art 2(3)(e).

88 Disability Act (n 23 above) art 6(1).

89 Disability Act (n 23 above) art 6(2)(b).

90 Disability Act (n 23 above) art 6(k).

91 Disability Act (n 23 above) art 6(m); article 26 of the Disability Act empowers the National Commission to issue adjustment orders where it 'considers that any public premises are inaccessible to persons with disability by reason of any structural, physical or other impediment'. Disability Act (n 23 above) art 26(1).

92 Disability Act (n 23 above) art 7(2)(a)-(f).

Article 7(2) of the Disability Act empowers the National Commission to refer an individual who 'without justifiable cause' does not comply with its orders to the court for contempt. Article 7(3) of the Disability Act mandates the National Commission to 'submit a report of any investigation' to the Minister in charge of social affairs. In its report, the National Commission may give recommendations on compensation payments for 'victims of discrimination'.⁹³ In line with article 7(4) of the Disability Act, persons who are aggrieved by the recommendations of the National Commission in its report 'may appeal to the court'.⁹⁴

The National Commission was 'constituted by Presidential appointments, which were endorsed by Parliament in July 2012'. The Chairperson of the National Commission appointed in 2012 is Fredrick Kamara.⁹⁵

7.2 Other than the ordinary courts or tribunals, does Sierra Leone have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

Sierra Leone has a Human Rights Commission (HRC) with a mandate of promoting and protecting human rights in Sierra Leone.⁹⁶ In discharging its function, the HRC has the power, amongst other things, to investigate allegations of human rights violations, raise public awareness on human rights and issue guidelines on the obligation of public officers in relation to the protection of human rights.⁹⁷ For the purpose of investigation, article 8(1)(a) of the Human Rights Commission Act vests the HRC with 'such powers, rights and privileges as are vested in the High Court of Justice or a judge'⁹⁸ in relation to summoning a witness; requiring document production; and issuing a request for the examination of a witness. Upon investigation of a matter, the HRC is mandated to issue a report⁹⁹ and make orders with regards to compensation.¹⁰⁰ By virtue of article 13, the government is mandated to 'respond publicly and within 21 days to the specific case'.¹⁰¹ As the principal institution specifically created to protect human rights, the HRC has the mandate of protecting the rights of all persons in Sierra Leone including PWDs.

93 Disability Act (n 23 above) art 7(3).

94 Disability Act (n 23 above) art 7(4).

95 State House Communication Unit 'I will promote the interest of persons with disability' (2012) <http://www.statehouse.gov.sl/index.php/component/content/article/529-qi-will-promote-the-interest-of-persons-with-disability> (accessed 25 June 2015); 'Disability Commissioner urges President Koroma' *African Young Voices* 6 August 2012 <http://africayoungvoices.com/2012/08/disability-commissioner-urges-president-koroma/> (accessed 8 April 2015); Statement delivered by Frederick JM Kamara, Chairman and Chief Commissioner of Sierra Leone National Commission for Persons with Disability at the 6th Conference of State Parties to the United Nations Convention on the Rights of Persons with Disabilities held in New York on 19 July 2013 <http://news.sl/drwebsite/exec/view.cgi?archive=9&num=23297> (accessed 8 April 2015).

96 The Human Rights Commission of Sierra Leone Act, 2004, art 2(1) (HRC Act) <http://www.sierra-leone.org/Laws/2004-9p.pdf> (accessed 9 April 2015).

97 HRC Act (n 96 above) art 7(2).

98 HRC Act (n 96 above) art 8(1)(a).

99 HRC Act (n 96 above) art 10(b).

100 HRC Act (n 96 above) art 11.

101 HRC Act (n 96 above) art 13.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.2 Does Sierra Leone have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Sierra Leone has ever addressed issues relating to the rights of persons with disabilities.**

By virtue of the Human Rights Commission Act of 2004, Sierra Leone established the Human Rights Commission (HRC).¹⁰² In 2008, the HRC appointed a Different Abilities and Non-Discrimination Officer (DANDO) for the purpose of addressing issues relating to the rights of PWDs.¹⁰³ In 2012 when the Sierra Leonean government scrapped the tactile voting system, the DANDO, Patrick James Taylor, expressed disappointment over this action.¹⁰⁴ However, tactile ballots 'were regrettably not available for the 2012 elections.'¹⁰⁵

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Sierra Leone have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

Sierra Leone has Disabled Peoples Organisations (DPOs) that advocate for the rights of PWDs in Sierra Leone. These DPOs include: Sierra Leone Union of Disability Issues (SLUDI); Handicap International; Sierra Leone Association of the Blind (SLAB); Sierra Leone Association of the Deaf (SLAD); United Polio Brothers and Sisters Association (UPBSA); Sierra Leone Union of Polio Persons (SLUPP); and Leonard Cheshire Disability and Sightsavers International.

¹⁰² HRC Act (n 96 above).

¹⁰³ Human Rights Commission of Sierra Leone 'Comments and advice on the letter from UNHRC to National human rights institutions in relation to Human Rights Council 7/9 title "Human rights of persons with disabilities"' <http://www2.ohchr.org/english/issues/disability/docs/consultation/NHRIs/SierraLeoneHumanRightsCommission16092008.doc> (accessed 9 April 2015); Office of the UN High Commissioner for Human Rights 'Report of the United Nations High Commissioner for Human Rights – Resolution 10/7 on the human rights of persons with disabilities: National frameworks for the protection and promotion of the human rights of persons with disabilities' http://www2.ohchr.org/english/issues/disability/docs/Sierra_Leone_HumanRightsCommission.doc (accessed 9 April 2015); United Nations Integrated Peacebuilding Office in Sierra Leone & United Nations Human Rights Office of the High Commissioner (n 6 above) 18.

¹⁰⁴ S Banugra & L Powell 'Sierra Leone scraps tactile voting system for elections' *The Guardian* 16 November 2012 <http://www.theguardian.com/global-development/2012/nov/16/sierra-leone-tac-tile-voting-elections> (accessed 9 April 2015).

¹⁰⁵ The Carter Center 'Observing Sierra Leone's November 2012 national elections: final report' (2013) 31-32 https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/sierra-leone-final-101613.pdf (accessed 9 April 2015).

SLUDI is the national umbrella body which advocates for the rights of PWDs in Sierra Leone.¹⁰⁶ In a press conference held on 31 March 2012, it urged the government to set up the Disability Commission.¹⁰⁷ On 11 November 2014, it urged the National Commission to perform its responsibility.¹⁰⁸ On 2 April 2015, SLUDI monitored 15 homes of PWDs to assess how the stay-at-home national policy in combatting Ebola in Sierra Leone has affected them.¹⁰⁹

Handicap International also works to promote the rights of PWDs in Sierra Leone. The projects of Handicap International 'promote better access to jobs and education for persons with disabilities and support care providers to recognize and understand the needs of disabled people'.¹¹⁰

The SLAB, which was formerly the Sierra Leone Youth Society for the Blind (SLYSB),¹¹¹ promotes the rights of persons with visual impairment in Sierra Leone. SLAD, established in 1965, promotes the rights of persons with hearing impairment in Sierra Leone.¹¹² UPBSA is a DPO that advocates for the rights of persons with polio.¹¹³ It is registered with SLUPP,¹¹⁴ which is an umbrella body for the promotion the rights of persons with polio in Sierra Leone.¹¹⁵

Through the Young Voices project, Leonard Cheshire Disability advocates for the rights of young persons with disabilities in Sierra Leone.¹¹⁶ Sightsavers International has also been involved in helping persons with visual impairment.¹¹⁷

106 'SLUDI gets new president' *Cotton Tree News* 12 December 2008 <http://www.cottontreenews.org/home-mainmenu-1/1-latest/1516-sludi-gets-new-president> (accessed 9 April 2015); CO O'Sullivan & M MacLachlan 'Childhood disability in Burkina Faso and Sierra Leone: An exploratory analysis' in M MacLachlan & L Swartz *Disability & international development: Towards inclusive global health* (2009) 168.

107 MT Kamara 'In Sierra Leone, SLUDI urges government to set up commission' *Awareness Times* 2 April 2012 <http://news.sl/drwebsite/exec/view.cgi?archive=8&num=19983> (accessed 9 April 2015).

108 I Mansaray 'SLUDI accuses disability commission' *The New Citizen* 11 November 2014 <http://www.newctzen.com/index.php/politics/11-news/1190-sludi-accuses-disability-commission> (accessed 9 April 2015).

109 I Mansaray 'SLUDI monitors 15 disabled homes' *The New Citizen* 2 April 2015 <http://www.newctzen.com/index.php/11-news/2397-sludi-monitors-15-disabled-homes> (accessed 9 April 2015).

110 Handicap International 'Sierra Leone' http://www.handicap-international.org.uk/where_we_work/africa/sierra_leone (accessed 9 April 2015).

111 'New York: SLDC chairman addresses UN body' *The Patriotic Vanguard* 24 July 2013 <http://www.thepatrioticvanguard.com/new-york-slde-chairman-addresses-un-body> (accessed 9 April 2015).

112 Sierra Leone Association of the Deaf http://www.deafchildworldwide.info/applications/dcw/idcs_input/view/organisations/view_organisation.idcs?Organisation_id=1398 (accessed 13 April 2015).

113 R Alamo & GT Diagne 'Sierra Leone: getting involved in electoral processes – From local to national' in International Disability Alliance (IDA) Human Rights Publication Series Issue 1 – The right to vote and stand for elections (March 2013) http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/HI_Sierra%20Leone_%20Getting%20involved%20in%20electoral%20processes,%20from%20local%20to%20national.pdf (accessed 13 April 2015).

114 Alamo & Diagne (n 113 above).

115 J Hollet & AB Munu 'Government discussion turns to issues of the disabled in Sierra Leone' *Premier News (Freetown)* 29 July 2010 <http://www.jhr.ca/success/2010/07/government-discussion-turns-to-issues-of-the-disabled-in-sierra-leone/> (accessed 13 April 2015); R Horvath et al 'Omega initiative: Sierra Leone trip report' (2002) 7 http://pdf.usaid.gov/pdf_docs/PNACR257.pdf (accessed 13 April 2015).

116 'Human rights and democracy: Bringing to life the UN Convention on rights of persons with disabilities in Sierra Leone' http://ec.europa.eu/europeaid/documents/case-studies/sierra-leone-human-rights_uncrpd_en.pdf (accessed 13 April 2015); Leonard Cheshire Disability 'Young voices: Speaking out for the rights of people with disabilities' <http://youngvoices.leonardcheshire.org/category/sierra-leone/> (accessed 13 April 2015).

117 Sightsavers 'A chance to shine' http://www.sightsavers.net/our_work/around_the_world/west_africa/sierra_leone/11027.html (accessed 13 April 2015).

9.2 In the countries in Sierra Leone's region (West Africa) are DPOs organised/coordinated at national and/or regional level?

DPOs are usually organised at the national level. In Sierra Leone, SLUDI and SLUPP are national bodies for PWDs in Sierra Leone. In Nigeria, the Joint National Association of Persons with Disabilities (JONAPWD) is the umbrella body for PWDs in Nigeria.¹¹⁸ In Liberia, the National Union of the Disabled (NUOD), an umbrella DPO, protects the rights of PWDs in Liberia.¹¹⁹ In Senegal, there is the Senegalese Federation of Associations of Persons with Disabilities (FESAPH); in Togo, there is a Togolese Federation of Associations of Persons with Disabilities (FETAPH); in Benin, there is the Benin Federation of Associations of Persons with Disabilities (FAPHB); in Niger, there is the Niger Federation of Persons with Disabilities; and also in Mali there is a Malian Federation of Associations of Persons with Disabilities (FEMAPH).¹²⁰ Ghana has a Ghana Federation of the Disabled (GFD), which is a national umbrella organisation for PWDs in Ghana.¹²¹

9.3 If Sierra Leone has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

In the development of the Disability Act, which mirrors the CRPD, DPOs were involved.¹²² One of the ways through which Sierra Leone has ensured the involvement of PWDs in the implementation process is through the specific provision for DPOs involvement in the National Commission. Article 3(1)(c) & (d) of the Disability Act specifically provides for representatives of DPOs as part of the National Commission.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPOs have taken several actions in ensuring that they are involved in the implementation process of the CRPD through lobbying, advocacy and providing assistance to the government on disability issues. For instance, in January 2012 prior to the National Elections in Sierra Leone, SLUDI issued a 90-day ultimatum to the government to set up the National Commission in line with the Disability Act which mirrors the CRPD, failing which it threatened to boycott the voters' registration in preparation for the election.¹²³ The ultimatum was eventually withdrawn when the government set up a Technical Committee for the establishment of the National Commission.¹²⁴

118 UN Enable 'List of non-governmental organization accredited to the Conference of States Parties' <http://www.un.org/disabilities/default.asp?id=1482> (accessed 13 April 2015).

119 C Brooks 'NUOD elects new officials for 4-year term' *Liberia News Agency* 10 April 2015 <http://www.liberianewsagency.org/pagesnews.php?nid=4522> (accessed 13 April 2015).

120 West African regional portal on the rights of people with disabilities <http://proadiph.org/-Les-partenaires-.html?lang=en> (accessed 13 April 2015).

121 Ghana Federation of the Disabled 'Overview of GFD' <http://www.gfdgh.org/> (accessed 13 April 2015).

122 Office of the UN High Commissioner for Human Rights (n 103 above).

123 Alamo & Diagne (n 113 above).

124 As above.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

One of the barriers faced by DPOs in engaging in the implementation relates to finances. In March 2015, the president of SLUDI noted the need for financial assistance in order for the organisation to carry out 'advocacy activities across the country'.¹²⁵

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

One relevant good practice from Sierra Leone in ensuring the proper involvement of DPOs relates to the provision for the involvement of civil society organisations in the composition of the National Commission. The Disability Act specifically requires that four representatives of SLUDI and organisations of PWDs should form part of the National Commission.¹²⁶ The Disability Act further provides that two representatives from NGOs dealing with issues of PWDs should be included on the National Commission.¹²⁷

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

There are successful outcomes that resulted from the engagement of DPOs in the implementation process of the Disability Act, which mirrors the CRPD. One of such outcomes is the setting up of the National Commission, which has helped 'tremendously in making the voices of PWDs in Sierra Leone heard nationally and globally'.¹²⁸

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

One of the areas for research support in ensuring that DPOs engage in the implementation process of the Disability Act, which mirrors the CRPD, is in respect of the 2015 Population Census. DPOs need to be supported in this exercise in order to ensure that the true figures on PWDs are reflected in the 2015 Population Census results.

125 AB Barrie 'S/Leone Union on Disability Issues needs Le150m to build secretariat' *Premier Media Group Ltd* 17 March 2015 <http://premiermedia.sl/content/sleone-union-disability-issues-needs-le150m-build-secretariat> (accessed 13 April 2015).

126 Disability Act (n 23 above) art 3(1)(c).

127 Disability Act (n 23 above) art 3(1)(d).

128 Awareness Times 'Sierra Leone making headway on disability issues – NCPWD Executive Secretary' *Mysieraleoneonline.com* 27 July 2013 http://mysieraleoneonline.com/sl_portal/site/news/detail/1696 (accessed 13 April 2015).

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

Although the government of Sierra Leone is taking significant strides in protecting PWDs nationally, it is important that PWDs are given a quota representation in the national parliament. In 2014, the African Youth with Disabilities Network (AYWDN) Sierra Leone 'demanded that the Constitutional Review Process considers allocating a representative quota in Parliament and other key national institutions for persons with disability'.¹²⁹ As at April 2015, the Constitutional Review Process was still on-going in Sierra Leone.¹³⁰ This report recommends that this process should be supported in order to ensure that PWDs assume lead roles in implementing international and regional instruments in Sierra Leone.

9.10 Are there specific research institutes in the region where Sierra Leone is situated (West Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

Most of the advocacy and research on the rights of PWDs have been done by DPOs and academics involved in research on the rights of PWDs. However, on an institutional basis, there is an Educational Centre for the Blind and Visually Impaired (ECBVI), which caters for 'over [a] hundred students' with hearing and visual impairments.¹³¹ The ECBVI has also been involved in providing educational materials to visually impaired persons in the fight against Ebola.¹³²

10 Government departments

10.1 Does Sierra Leone have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The Directorate of Social Welfare within the Ministry of Social Welfare, Gender and Children Affairs is saddled with the responsibility of ensuring that socially marginalised groups including PWDs are protected and that services are provided

129 KM Jaward 'Sierra Leone news: AYWDN-SL demands representation quota for persons with disability' *Awoko* 30 June 2014 <http://awoko.org/2014/06/30/sierra-leone-news-aywdn-sl-demands-representation-quota-for-persons-with-disability/> (accessed 13 April 2015).

130 P Sama 'Sierra Leone news: NCD translates constitutional review materials in local languages' *Awoko* 10 April 2015 <http://awoko.org/2015/04/11/sierra-leone-news-ncd-translates-constitutional-review-materials-in-local-languages/> (accessed 13 April 2015).

131 Executive director of the Educational Centre for the Blind and Visually Impaired Thomas Allieu calls on government and humanitarian organisations to support them with transportation *Sierra Leone Broadcasting Corporation* 8 April 2015 <http://www.slbc.sl/executive-director-of-the-educational-centre-for-the-blind-and-visually-impaired-thomas-allieu-calls-on-government-and-humanitarian-organisations-to-support-them-with-transportation/> (accessed 13 April 2015).

132 'The challenges faced by the visually impaired fighting ebola in Sierra Leone' *ActionAid* 20 February 2015 <http://www.actionaid.org/2015/02/challenges-faced-visually-impaired-fighting-ebola-sierra-leone> (accessed 13 April 2015).

to these groups.¹³³The Ministry of Labour and Employment is mandated to 'support rehabilitation programs' including 'employment for people with mental disabilities'.¹³⁴

11 Main human rights concerns of people with disabilities in Sierra Leone

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

A contemporary challenge of PWDs affecting the right to adequate standard of living, food and access to information is the Ebola crisis. The Executive Director of the ECBVI observed that the 'National Ebola Response Centre ... and other organisations responding are neglecting the visually impaired section of the society'.¹³⁵ PWDs have raised concerns about hunger and social isolation within society.¹³⁶ With regards to information on the Ebola crisis to PWDs, Kamara notes that due to the fact that

people with disability and their families were not represented in planning meetings on the Ebola response, the awareness raising programs do not target persons with disability and therefore, do not reach them.¹³⁷

Huebner further notes that '[b]lanket Ebola awareness messages have been ineffective at reaching people with disabilities due to their geographic and social isolation'.¹³⁸ Responses to the situation have largely come from civil society organisations working to provide food, water, assistive devices, and shelter to assist PWDs in the face of the Ebola crisis.¹³⁹ However, Kamara notes that 'food and access to clean water is required, especially for those with young children'.¹⁴⁰ Kamara further emphasises the need for 'medical attention; ideally, a specific medical team for persons with disabilities, as they are 10 times more vulnerable to the virus than others'.¹⁴¹

133 Ministry of Social Welfare, Gender and Children's Affairs (n 31 above) 45.

134 Ministry of Health and Sanitation, Republic of Sierra Leone (n 73 above) 17.

135 ActionAid (n 132 above).

136 Disabled most at risk as Sierra Leone fights Ebola *Channel 4 News* 26 September 2014 <http://www.channel4.com/news/ebola-sierra-leone-disabled-elderly-vulnerable-lockdown> (accessed 13 April 2015).

137 'Joseph Kamara – Sierra Leone – Ebola, another setback for people with disability' *Children in Crisis* 13 October 2015 <https://childrenincrisis.wordpress.com/2014/10/13/joseph-kamara-sierra-leone-another-setback-for-people-with-disability/> (accessed 13 April 2015).

138 A Huebner 'Ebola's forgotten victims' *Huffington Post* 11 November 2014 http://www.huffingtonpost.com/adam-huebner/ebolas-forgotten-victims_b_6171810.html (accessed 13 April 2015).

139 As above; Children in Crisis (n 137 above); L Pelton 'Food and health education in fight against Ebola' *Global Giving* 23 February 2015 <http://www.globalgiving.org/projects/ebola-healthcare-crisis-epidemic-in-sierra-leone/updates/?subid=54986> (accessed 13 April 2015); K Mansaray 'People with disabilities in Sierra Leone are more vulnerable to Ebola' *Ebola Deeply* 5 March 2015 <http://www.eboladeeply.org/articles/2015/03/7465/people-disabilities-sierra-leone-vulnerable-ebola/> (accessed 13 April 2015).

140 K Mansaray (n 139 above).

141 As above.

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Sierra Leone?

Although the Disability Act does not specifically provide for the right to political participation for PWDs, the Disability Act mandates the National Election Commission to 'ensure that during elections, polling stations are made accessible to persons with disability and ... provide such persons with the necessary assistive devices and services'.¹⁴² By virtue of the Constitution of Sierra Leone, PWDs, as others in the society, can participate in the politics of Sierra Leone. In 2007, Julius Nye Cuffie became the first physically challenged person elected as a member of parliament.¹⁴³ Following re-election in November 2012, President Koroma appointed a visually impaired person as Deputy Minister of Social Welfare, Gender and Children's Affairs.¹⁴⁴

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your country?

Article 17(1) of the Disability Act provides that '[e]very person with disability shall be provided with free medical services in public health institutions'.¹⁴⁵ Article 14(1) of the Disability Act also provides that '[e]very person with disability shall have a right to free education in tertiary institutions'.¹⁴⁶ Article 15(1) of the Disability Act further provides that '[a] person with disability shall not be denied admission to or expelled from an educational institution by reason only of his disability'.¹⁴⁷ In realising the right to health, the Agenda for Prosperity launched by the President of Sierra Leone for 2013-2018 emphasises free Health Care for PWDs.¹⁴⁸ Sierra Leone also has a Social Insurance Trust run by the National Social Security and Insurance Trust which 'operates a contributory scheme that caters for the security of contributors at old age or in the case of disability'.¹⁴⁹ In 2007, Sierra Leone developed a Social Safety Net system which seeks to provide for the vulnerable including PWDs.¹⁵⁰ In 2014, the World Bank 'approved support' for the Social Safety Net system developed by Sierra Leone.¹⁵¹

11.4 Case studies of specific vulnerable groups

Children with disabilities have little to no access to education. Foday-Musa notes that '[m]ost of the Children who have attained the age of going to school have become street beggars, roaming about to fend for their daily bread'.¹⁵² Children,

142 Disability Act (n 23 above) art 29.

143 AK Kabia 'Hon Julius Nye Cuffie (APC)' *Awareness Times* 20 June 2008 <http://news.sl/drwebsite/exec/view.cgi?archive=5&num=8872> (accessed 13 April 2015).

144 'Interview: Sierra Leone's first blind minister' *Politico* 31 January 2013 <http://politicosl.com/2013/02/interview-sierra-leone%E2%80%99s-first-blind-minister/> (accessed 13 April 2015).

145 Disability Act (n 23 above) art 17(1).

146 Disability Act (n 23 above) art 14(1).

147 Disability Act (n 23 above) art 15(1).

148 Agenda for Prosperity (n 71 above) 67.

149 Agenda for Change (n 75 above) 92.

150 F Oddsdottir 'Social protection programmes for people with disabilities' (2014) 11 <http://www.gsdc.org/docs/open/HDQ1137.pdf> (accessed 13 April 2015).

151 'World Bank to help Sierra Leone build social safety net' *The World Bank* 25 March 2014 <http://www.worldbank.org/en/news/press-release/2014/03/25/world-bank-sierra-leone-social-safety-net> (accessed 13 April 2015).

152 T Foday-Musa 'The plight of people with disabilities in post-conflict Sierra Leone' *The Patriotic Vanguard* 19 October 2010 <http://www.thepatrioticvanguard.com/the-plight-of-people-with-disabilities-in-post-conflict-sierra-leone> (accessed 13 April 2015).

particularly girls with disabilities also face sexual and physical abuse.¹⁵³ These abuses are often at the hand of family, community members and traditional healers. According to Banjura '[s]exual abuse of young disabled girls is common'.¹⁵⁴ Banjura notes that there are occasions where traditional healers engage in sexual relations with girls as part of the healing process. Coe notes that '[i]n Sierra Leone, children who are deaf and not able to speak were described as the group most vulnerable to abuse, as they could not easily tell of their abuse'.¹⁵⁵ In one case, a child with cerebral palsy was buried alive due to the belief that the child was bewitched.¹⁵⁶ Powell notes that '[c]onfused and frustrated by the child's inability to talk or walk', it was 'proclaimed that child must be bewitched'. According to Kumar '[i]n Sierra Leone, it is common for children who are blind or suffering polio to be branded a "devil"'.¹⁵⁷

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Sierra Leone at the moment?

Sierra Leone is currently undergoing a Constitution Review Process. In a 2014 public consultation with SLUDI, one of the issues raised was that there should be a Ministry on Disability Issues reflected in the Constitution. The AYWDN Sierra Leone has also demanded for the allocation of a quota for PWDs in parliament and other important national institutions.¹⁵⁸

12.2 What legal reforms would you like to see in Sierra Leone? Why?

One significant legal reform that the author would like to see in Sierra Leone is the revision of the discrimination provision in the Constitution. Article 27(3) of the Constitution of Sierra Leone list grounds on which discrimination is prohibited but does not mention disability. This legal reform is important for the adequate protection of PWDs and also in line with the obligation of Sierra Leone under article 4(1)(a) & (b) of the CRPD which mandate states take steps towards protecting the rights of PWDs.

153 L Powell 'Beyond beliefs' *The Guardian* 19 November 2010 <http://www.theguardian.com/journalismcompetition/sierra-leone-street-children> (accessed 13 April 2015).

154 As above.

155 S Coe 'Outside the circle: A research initiative of Plan International into the rights of children with disabilities to education and protection in West Africa' (2013) 26 <http://www.plan-uk.org/assets/Documents/pdf/26374/outside-the-circle> (accessed 13 April 2015).

156 Powell (n 153 above).

157 D Kumar 'Africa's disabled cursed by apathy and abuse' *Al Jazeera* 23 September 2013 <http://www.aljazeera.com/indepth/features/2013/09/2013922121017135639.html> (accessed 13 April 2015).

158 Jaward (n 129 above).

SWAZILAND

*Simangele Daisy Mavundla**

1 Population indicators

1.1 What is the total population of Swaziland?

According to the 2007 Population and Housing Census there are 481 428 males and 537 021 females which puts the total number of the population in Swaziland at 1 018 449.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Swaziland. What criteria are used to determine who falls within the class of persons with disabilities in Swaziland?

Qualitative data was sought from the 1986, 1997 and 2007 National Census, through the Central Statistics Office (CSO).² The 2007 Census categorises the types of disability in the following terms: seeing,³ hearing, speaking, walking or climbing, remembering or concentrating, and other.⁵

1.3 What is the total number and percentage of persons with disabilities in Swaziland?

People with disabilities in Swaziland are estimated to be at 171 347.⁴ Accordingly,⁵ people with disabilities accounts for 16,8 per cent of the country's population.

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1 Central Statistical Office *Population and Housing Survey (2007)* 1. See also the Central Statistical Office (CSO) [Swaziland], and Macro International Inc *Swaziland Demographic and Health Survey 2006-2007 (2008)* 2.

2 Government of Swaziland: Central Statistics Office (CSO) 2007 *Population and housing census: Fertility, nuptiality, disability & mortality (2010)* 4.

3 CSO as above 40. See also the Deputy Prime Minister's Office (DPMO), *Swaziland Disability Profile (2011)* 6.

4 CSO (n 2 above) 41-42; DPMO *Swaziland Disability Profile* as above 8.

5 As above.

Of note is that the prevalence of disability in Swaziland is higher than the average found in other developing countries (which is at 10 per cent of the total population).⁶ The prevalence of disability is much higher in rural areas. Eighty-two per cent of people with disabilities live in rural areas whilst the remaining 18 per cent live in urban areas.⁷

1.4 What is the total number and percentage of women with disabilities in Swaziland?

Out of the total population (117 347) with disabilities 58 per cent (98 902) when disaggregated by sex are women with disabilities and 42 per cent (72 445) are men with disabilities.⁸

1.5 What is the total number and percentage of children with disabilities in Swaziland?

The Census of 2007 disaggregate incidence of disability by age and for the age group of 0-4 there were 4238 children with disabilities; for the age group 5-9 there 8457 children with disability; for the age group 10-14, there were 10424 children with disabilities and for the age group 15-19 there were 9323 children with disabilities.⁹ The incidence of disability is greatest amongst children, especially between 5 and 14 years, suggesting a strong link between the conditions in which the majority of young children live and the incidence of disability.

According to the 2007 Census, the population of children with disability within the age range of 0-19 is 32442 (19 per cent).

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Swaziland?

The most prevalent form of disability in Swaziland is seeing disabilities followed by people with other disabilities.¹⁰ Out of the 171347 people with disabilities in Swaziland, 78 083 (46 per cent) have seeing disabilities followed by a group classified as other forms of disabilities at 47 691 (28 per cent).¹¹ People with hearing disabilities are 18 389 (11 per cent), while people having remembering/concentrating disabilities are 6 832 (4 per cent).¹² People with walking/climbing disabilities are 17 486 (10 per cent) and those with speaking disabilities are only 2 666 (2 per cent).¹³

6 DPMO *Swaziland Disability Profile* (n 3 above) 8.

7 CSO (n 2 above).

8 CSO (n 2 above). See also DPMO *Swaziland Disability Profile* (n 3 above) 9.

9 CSO (n 2 above).

10 DPMO *Swaziland Disability Profile* (n 3 above) 13.

11 CSO (n 2 above). See also DPMO *Swaziland Disability Profile* (n 3 above) 13.

12 As above.

13 As above.

2 Swaziland's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Swaziland? Did Swaziland sign and ratify the CRPD? Provide the date(s).

The Kingdom of Swaziland became a signatory in 2007 and ratified the Convention on 24 September 2012. Swaziland has also ratified the treaty's Optional Protocol which permits the filing of individual complaints under the treaty by its residents.¹⁴

2.2 If Swaziland has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Swaziland submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

The country's initial report under the CRPD according to the official website was due in October 2014. The Deputy Prime Minister's Office houses the Disability Unit which is under the social welfare department. However, according to the Disability Unit Programmes Manager,¹⁵ the country is not engaged in the process of drafting the state party report due to the fact that they have not received from the treaty body an invitation to write and present the state report.

2.3 While reporting under various other United Nations' instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Swaziland also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

In the UN Universal Periodic Review on 12 December 2011¹⁶ Swaziland reported signing the Convention on the Rights of Persons with Disabilities. Further, The Ministry of Foreign Affairs and International Cooperation revealed that his office conducted training for members of Parliament on, amongst other instruments, the CRPD, and that instrument has been tabled before Parliament for ratification.

14 See the United Nations Treaty Collection Website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en (accessed 25 March 2015).

15 Interview with Disability Unit Programmes Manager Ms Sindi Dube, held in Mbabane, 15 January 2015.

16 Human Rights Council 'Report of the Working Group on the Universal Periodic Review-Swaziland' A/HRC/19/6 (2011).

Further, the Government is considering becoming party to all outstanding international human rights treaties.¹⁷

Lesotho commended the country's determination to address the rights of persons with disabilities and stated that the policies of Swaziland in this regard were appreciated. Uganda noted with appreciation that the most vulnerable, such as the elderly and persons with disabilities, were exempt from paying hospital charges.¹⁸

Spain, Portugal and Argentina recommended that Swaziland conclude the process of ratification of the Convention on the Rights of Persons with Disabilities,¹⁹ the country has ratified accordingly. Ghana recommended that Swaziland must take further action to remove societal discrimination against children with disabilities, street children and children living in rural areas.²⁰

Swaziland has not been reporting diligently under international as well as regional treaty bodies. In 2011 at the UN UPR, Swaziland acknowledged that the state had not met its reporting obligations under the international human rights instruments. For that reason, Swaziland requested technical assistance and capacity-building in the areas of treaty body reporting and following up on concluding observations and recommendations of special procedures and mechanisms of the United Nations, including national monitoring of the implementation of international human rights instruments.²¹

On the state report submitted to the Convention on the Rights of the Child (CRC) Committee in 2006, the following was observed on the rights and welfare of children with disabilities:

Children with disabilities are not mainstreamed and there are few special schools inadequately meeting the needs of such children. Even those schools offering integrated education are physically unfriendly to children with disabilities, with no ramps and other facilities for physically disabled children. Sensory impaired children require urgent attention as there are no Braille facilities in schools and few individuals are trained in sign-language. This also hinders speech and hearing impaired children from accessing health services. Children with hearing disabilities are excluded from the education system from the secondary level. Children who are blind are excluded from tertiary institutions as these lack facilities catering to their needs.²²

The Committee also raised concerns over the fact that there is no integrated policy for children with disabilities, including those which relate to the provision of health, education and sporting facilities and the physical environment. This results in discrimination and limits the opportunities available to disabled children.²³ The Committee further noted that inadequate allocation of resources for the specialised needs of disabled children excludes them from health and educational facilities.²⁴

Swaziland is yet to report under the African Charter on the Rights and Welfare of the Child.

17 Human Rights Council (n 16 above) para 24.

18 Human Rights Council (n 16 above) para 60.

19 Human Rights Council (n 16 above) para 76.3 & 76.4.

20 Human Rights Council (n 16 above) para 76.22.

21 Human Rights Council (n 16 above) para 8.

22 Committee on the Rights of the Child 'Consideration of Reports Submitted by States Parties under article 44 of the Convention initial report of States parties due in 1997 Swaziland' CRC/C/SWZ/1 (2006) para 111.

23 CRC Committee (n 22 above) para 96.

24 CRC Committee (n 22 above) para 104.

2.4 Was there any domestic effect on Swaziland's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Swaziland's legislature to incorporate it into the legal system before the instrument can have force in Swaziland's domestic law? Have Swaziland's courts ever considered this question? If so, cite the case(s).

Swaziland follows the dualist approach to the acceptance of international laws into municipal law. For international instruments to be domesticated in Swaziland parliament's endorsement is required according to section 238 of the Constitution. Section 238 provides as follows:

- (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by -
 - (a) an Act of Parliament; or
 - (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.

The parliament of Swaziland in July 2013 adopted the CRPD and courts are now in a position to make reference to the CRPD.

• **Case Law**

No case law on the protection of the rights of persons with disabilities has as yet come before the courts of Swaziland.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Subsequent to the ratification of the CRPD, the country adopted the National Policy on Disability and it has been followed by the drafting of the Persons with Disability Bill of 2014 which is awaiting enactment into an Act.²⁵

3 Constitution

3.1 Does the Constitution of Swaziland contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

The Constitution of Swaziland²⁶ contains provisions that directly address disability. Section 14, a clause on the fundamental rights and freedoms of the individual, provides for disability in 14(1)(e) and 14(3). The provisions prohibit discrimination on the basis of disability.

Similarly section 20 provides for equality before the law.

Section 30 provides for the rights of persons with disabilities as follows:

²⁵ S Ngwenya 'King orders Parly to ratify 28 international conventions' *Times of Swaziland* 18 September 2012 <http://www.times.co.sz/News/79799.html> (accessed 25 March 2015).

²⁶ The Constitution of the Kingdom of Swaziland 0001 of 2005, which came into force in February 2006.

30. (1) Persons with disabilities have a right to respect and human dignity and the Government and society shall take appropriate measures to ensure that those persons realise their full mental and physical potential.
(2) Parliament shall enact laws for the protection of persons with disabilities so as to enable those persons to enjoy productive and fulfilling lives.

3.2 Does the Constitution of Swaziland contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Constitution addresses the issue of marginalised groups. In this regard see section 60(4) and 95(2)(a) and (b).

4 Legislation

4.1 Does Swaziland have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

There are important legislation which the government of Swaziland has enacted or is in the process of enacting which address disability and are as follows:

- (i) The Persons with Disabilities Bill, 2014 which caters for the general well-being of persons with disabilities.²⁷ The Bill proposes the establishment of a National Committee for Persons with Disabilities. The objectives of the Committee are:
 - (a) improve the socio-economic status of men and women, girls and boys with disabilities;
 - (b) ensure that all persons with disabilities have equal access and opportunities to education, health and other services at all levels;
 - (c) ensure that all buildings and infrastructure are accessible to persons with disabilities;
 - (d) promote inclusiveness and ensure that all institutions provide services to persons with disabilities in the same manner as they provide to the non-disabled except where necessary;
 - (e) ensure that policies in general do not have a negative impact on the status of persons with disabilities, and in particular vulnerable groups.

The Bill further covers registration of organisations of persons with disabilities as well as registration of a person with disability, who will then be issued with a Disability Card.²⁸ The Bill further makes provision for the right to assistance in situation of risk and humanitarian emergencies, including armed conflicts and the occurrence of natural disasters as well as, access to public facilities, amenities and services and buildings for persons with disabilities.²⁹ The Bill further provide persons with disabilities with the right to access to and use of transport facilities as well as the right to the enjoyment of health on an equal basis with persons without disabilities.³⁰

27 It must be noted that the provisions of the draft Bill stated here are likely to be varied as it not yet at the final stages.

28 See secs 21 to 27 of the 2014 Persons with Disability Bill.

29 Secs 30 & 31.

30 Secs 32 & 33.

- (i) Children's Protection and Welfare Act of 2012 in part 2, section 4 provides that 'a child shall not be discriminated against on the grounds of ... disability ...' Furthermore, section 11 states that:
 a child with disability has a right to special care, medical treatment, rehabilitation, family and personal integrity, sports and recreation, education and training to help him enjoy a full and decent life and dignity and achieve the greatest degree of self-actualization, self-reliance and social integration possible.

4.2 Does Swaziland have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

The Employment Act of 1980 as amended provides for the prohibition of the termination of employment of an employee unfairly and according to section 35(3)(e) and (f); an employer is prohibited from terminating an employee's services due to an accident or injury arising out of his employment.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Swaziland ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

The Courts and Tribunals in the country as yet have not decided on issues of disability rights.

6 Policies and programmes

6.1 Does Swaziland have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

There are several policy frameworks which the government of Swaziland has put in place to address disability and they are:

- National Development Strategy (NDS) August 1999;
- National population policy framework for Swaziland 2002;
- National Education Policy 1999; and
- National Disability Policy June 2013.

The National Development Strategy (NDS) in 4.8.2.1 includes persons with disabilities amongst the disadvantaged groups and the government of Swaziland has adopted strategies in addressing issues of PWDs Swaziland. The strategy recommends measures to improve the situation of PWDs as follows:

- Integration and Awareness: The policy aims to integrate PWDs into economic and social activities; ensure the integration of programmes for persons with disabilities

into mainstream education; provide infra-structure for rehabilitation for those who cannot be integrated. Institutions catering for disable people (for example, school for the blind, deaf and vocational training) must be expanded to cater for the existing and expected demand; create institutional and policy mechanisms through which persons with disabilities can be rehabilitated and integrated effectively with the rest of society; and raise awareness on how to prevent the various forms of disabilities.

- Equity: The NDS further calls for the enactment of legislation to protect the disadvantaged groups from abuse and discrimination; ensuring that all infra-structural designs are inclusive of the needs of persons with disabilities; introducing measures that will support the operations of NGOs to help specific groups; and enacting legislation to ensure equal opportunities for persons with disabilities.

The Population Policy in thematic area six and eight³¹ adopts strategies for the addressing issues of PWDs Swaziland. These include, the establishment of a National Unit/framework to deal with issues of persons with disabilities; strengthening and expansion of activities to integrate persons with disabilities into mainstream society; developing a national programme to deal with issues of disability, including improving the capacity for testing and early detection of disabilities and the rehabilitation of persons with disabilities; improving the enforcement of laws and regulations on safety standards; discouraging cultural practices that discriminate against persons with disabilities; improving access to social and public services including transport for persons with disabilities; sensitising the public on issues concerning persons with disabilities; and empowering communities and extended families to care for persons with disabilities.

The 1999 National Education Policy is the official policy of the Ministry of Education and is based on the overall objective of

the provision of opportunities for all pupils of school-going age and adults to develop themselves in order to improve the quality of their own lives and the standard of living of their communities.

Section 5 of the Education Policy specifically addresses special needs. The policy aims at including children with disabilities in the mainstream school system. Section 5.3 of the policy states that:

The Ministry of Education shall facilitate access to education for all learners with disabilities by improving the infrastructure to make it user-friendly from basic through tertiary level [and] shall support the integration and inclusion of children with special learning needs in the Education System.

The 2013 National Disability Policy's vision envisages a Swaziland where persons with disabilities have equal opportunities to participate freely as equal partners in society and be empowered to realise their full potential in all spheres of life without discrimination. The policy's goal is to promote and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities. The National Disability Policy adopts the following objectives:

- To improve the socio-economic status of men and women, boys and girls with disabilities.
- To ensure that all persons with disability have equal access and opportunities to education and health services at all levels.
- To ensure that all buildings and infrastructure are accessible to persons with disabilities.

31 National population policy framework for Swaziland 2002, 45, 4.5.16.

- To promote inclusiveness and ensure that all institutions provide services to persons with disabilities in the same manner as they provide to the non-disabled except where necessary.

6.2 Does Swaziland have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

The National Youth Policy³² serves as a guideline for government's engagement with the youth in the country and one of its objectives is to

provide an enabling environment for the youths development so as to enhance sustainable development by ensuring that young people have access to adequate and appropriate programmes and services regardless of their geographic location, race, gender, level of disability and social, religious and economic circumstances.

The Swaziland National Sports Policy provides for the promotion and identification of persons with disabilities in sports, 'all sports and recreational facilities shall ensure that they meet disability standards' and 'all sports associations must have disability sections within each of their sporting codes'.

Other national policy documents alluding to the rights and recognition of persons with disabilities include the National Social Development Policy, the National Children's policy.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Swaziland have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

In Swaziland there is as yet no body that specifically addresses violation of the rights of persons with disabilities.

7.2 Other than the ordinary courts or tribunals, does Swaziland have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The 2005 Constitution provides for the establishment of the Swaziland Commission on Human Rights and Public Administration/Integrity (SCHRPA). Since its establishment the Commission for Human Rights has not been functional due to lack of funding. The Commission on Human Rights and Public

32 Government of Swaziland – Ministry of Sports, Culture and Youth Affairs 'The Swaziland National Youth Policy' 2009.

Administration/Integrity (SCHRPA)'s adopted its first Strategic Plan for the year 2013-2017 in 2012.³³

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Swaziland have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Swaziland has ever addressed issues relating to the rights of persons with disabilities.**

Part 2 of the 2005 Constitution provides for the establishment of the Commission on Human Rights and Public Administration (SCHRPA). The functions of SCHRPA as set out in the Constitution, include the duty to investigate complaints of violations of fundamental human rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public official in the exercise of his duties.³⁴ The SCHRPA also has the duty to take appropriate action for the remedying, correction or reversal of violation of human rights; publicising the findings and recommendations. Furthermore, SCHRPA has the duty to promote fair, efficient and good governance in public affairs and to promote and foster strict adherence to the rule of law and principles of natural justice in public administration.

It must be noted that though the mandate of the Commission on Human Rights and Public Administration does not explicitly include addressing violation of disability rights, it is inferred that human rights cut across the board and therefore complaints of violation of disability rights will be addressed by the Commission once it is operational.

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Swaziland have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

There are a number of non-governmental organisations (NGOs) that represent and advocate for the rights and welfare of persons with disabilities and are as follows:

³³ See the Swaziland Commission on Human Rights and Public Administration/Integrity Strategic Plan 2013-2017 http://www.sz.undp.org/content/dam/swaziland/docs/publications/UNDP_SZ_Governance_SwazilandCommissionOnHumanRightsAndPublicAdministrationAndIntegrityStrategicPlan2013to2017.pdf (accessed 1 June 2015).

³⁴ The functions of the commission are set out in section 164 of the Constitution.

- (a) The Coordinating Assembly of Non-Governmental Organisations in Swaziland (CANGO) which is an umbrella body for all NGOs, including those with disabilities initiatives;
- (b) The Federation of organisations of the Disabled in Swaziland (FODSWA) is a human- rights oriented coordinating body of DPOs. It was formed in 1993 by organisations of people with disabilities in Swaziland due to lack of coordination of their activities;
- (c) Save the Children, an organisation which advocates for the promotion of all children's rights, including those with disabilities;
- (d) Cheshire Homes of Swaziland which focuses on the rehabilitation of persons with physical disabilities;
- (e) St Joseph's Catholic Mission which houses Ekululameni Training Centre – an initiative that provides vocational training to persons with disabilities over 18 years; and
- (f) Organisations of persons with disabilities – they offer advocacy and development work aimed at empowering persons with disabilities. They are as follows:
 - Swaziland National Association of the Deaf (SNAD);
 - Swaziland Association of Visually Impaired Persons (SAVIP);
 - Parents of Children with Disabilities in Swaziland (PCDSWA); and
 - Swaziland National Association of the Physically Disabled Persons (SNAPDPe).

9.2 In the countries in Swaziland's region (Southern Africa) are DPOs organised/coordinated at national and/or regional level?

In the Southern Africa region, DPOs are organised at national level as there are established bodies known as Federations of Persons with Disabilities and at regional level through the Southern Africa Federation of the Disabled (SAFOD).

9.3 If Swaziland has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

The Kingdom of Swaziland ratified the CRPD on 24 September 2012 which is fairly recent, however, if the drafting of the Disability Policy of 2013 is anything to go by, it can be said that DPOs will in future participate in the implementation of the CRPD. The process adopted for drafting the Disability Policy was participatory, with the Deputy Prime Minister's Office seeking collaboration from other line government ministries, NGOs, the private sector (culminating in a consultative workshop at the Happy Valley Resort at Ezulwini from 24-28 September 2012).³⁵ The views and representations of all those who participated and contributed in any way were taken into consideration in the formulation of the policy.³⁶ A similar process was adopted in the drafting of the Persons with Disability Bill of 2014 where DPOs were playing an advisory role – working in collaboration with the Disability Unit to craft the Draft Bill.³⁷

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPOs have been instrumental in calling government to ratify the CRPD; it is believed that the NGOs in Swaziland have been lobbying government to enact the

³⁵ See the DPMO, Swaziland Disability Policy of June 2013 14-15.

³⁶ As above.

³⁷ n 15 above, and interview with the President of FODSWA, Mr Mandla Methula, held in Mbabane on 15 January 2015.

law on the rights of persons with disabilities since the Swaziland Constitution of 2005 came into force. Their efforts forced government to look into the issue and as a result there is the first draft of the Persons with Disabilities Bill of 2014.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The main challenge is that DPOs must work in collaboration with government as most of the laws and policies oblige and/or recommend strategies for government's implementation in addressing issues of people with disabilities in Swaziland and yet government is seen to lack sufficient political will and/or resources when it comes to implementation of laws, policies and domestication of international instruments.³⁸

Another point is lack of funding and technical skills on the part of DPOs which is necessary for a robust activism on their part.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

Since the ratification of the Convention in 2012, the DPOs in Swaziland have collaborated with the government in matters of common interest while maintaining their individuality in matters where there is limited consensus. That can be viewed as a best practice as government needs DPOs expertise in certain matters and DPOs need government's intervention in matters dealing with legislation hence the need for a good working relationship between the two.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

The evidence shows full participation and/or collaboration between DPOs and government in the implementation of the Convention of Persons with Disabilities in the country. The collaboration resulted in the finalisation of the 2013 Disability Policy which provides guidelines for the improvement of programmes addressing the rights and welfare of disabled persons and the Persons with Disabilities Bill of 2014 which is now with Cabinet. There are consultations currently underway between the Disability Unit and DPOs on the drafting of the National Plan of Action (which is expected to be finalised in 2015) meant for the effective implementation of the Disability Policy.

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

People with disabilities in Swaziland have over the years been at the receiving end of government developmental processes and service delivery, hence it is necessary that persons with disabilities be emancipated enough to be agents of their own course. DPOs have to contribute to the implementation of the Convention as well

38 AH Elde & B Jele 'Living conditions of persons with disabilities in Swaziland – A national representative study' (2011).

as the legislation that will promote their rights, hence there is a need to train DPOs on disability rights and human rights programming.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

- DPOs need technical expertise on disability issues, hence DPOs require intensive education on the provisions of the international, regional and national legal framework protecting and promoting their rights.
- A majority of DPOs would benefit from training on the implementation processes, the monitoring, and the preparation of country reports and or shadow reports; as well as on the role DPOs have to play.
- FODSWA recommended that simplified copies of the relevant legal framework on the promotion and protection of disability rights should be made available to facilitate easy reading and understanding.³⁹
- DPOs lack financial support for their programmes and have limited human resources hence, it is recommended that DPOs be supported financially by funding entities both locally and internationally.
- Since disability is a highly technical and dynamic field which requires the necessary expertise for it to be adequately addressed; it is recommended that tertiary institutions like the University of Swaziland and the Government department spearheading issues of disability in the country establish a research centre that will conduct in-depth research into disability issues so as to build evidence necessary for future programmes.

9.10 Are there specific research institutes in the region where Swaziland is situated (Southern Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

The research has revealed that two research projects have been carried out locally to promote the rights of PWDs. For instance, the Federation of Persons with Disability in Swaziland (FODSWA) revealed that in 2011 they had collaborated with Southern Africa Federation of the Disabled (SAFOD) at regional level in conducting a research on 'Living conditions among people with disabilities in Swaziland – A national representative study'.⁴⁰ UNICEF assisted the government in conducting the 'Situation assessment of children and young persons with disabilities in Swaziland: Key findings' (December 2010).⁴¹

Also, the research has led to two other research projects done by international institutions on Swaziland and these are:

The Leonard Cheshire Disability and Inclusive Development Centre University College London conducted a study in 2008 on the topic, 'Disability policy audit in Namibia, Swaziland, Malawi and Mozambique'.

The Secretariat of the African Decade of Persons with Disabilities (SADPD) conducted a study in 2012 on the topic 'Study on education for children with disabilities in Southern Africa'.

³⁹ n 37 above.

⁴⁰ As above.

⁴¹ Deputy Prime Minister's Office (DPMO) *A situation assessment of children and young persons with disabilities in Swaziland: Key findings* (2010).

10 Government departments

10.1 Does Swaziland have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

A Community-Based Rehabilitation Programme was established in 1990 which was later upgraded to a National Disability Unit in 2000. The National Disability Unit was first housed by the Ministry of Health and Social Welfare.⁴² In 2008, the Unit was transferred to the Deputy Prime Minister's Office under the Department of Social Welfare.⁴³ The mission statement of the Disability Unit is: '[T]o champion significant improvement in the quality of life for persons with disabilities'.

Some of the Unit's core activities include:

- Awareness raising on disabilities;
- Policy development;
- Advocacy for political commitment; and
- Review of discriminatory legislation, amongst others.

11 Main human rights concerns of people with disabilities in Swaziland

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

• Challenges

Some Swazis still hold the general belief that those who have a disability are bewitched or inflicted by bad spirits.⁴⁴ Many believe that being around people with disabilities can bring bad luck. As a result, many people with disabilities are hidden in their homesteads and are not given an opportunity to participate and contribute to society. The Swaziland National Census of 2007 also recognises that the majority of people with disabilities are poor and marginalised with little to no access to services such as public transport, employment and education. People with disabilities are also especially vulnerable to abuse and HIV and AIDS.⁴⁵

42 Deputy Prime Minister's Office (DPMO) *Swaziland National Disability Policy* (2013) 18.

43 As above.

44 R. Lang 'Disability policy audit in Namibia, Swaziland, Malawi And Mozambique: Final report' (2008) 11.

45 *Swaziland Demographic and Health Survey 2006-2007* (n 2 above).

- **Education**

Even though rhetorically the country promotes education as a basic human right and ensures that males and females receive equal treatment and benefits at all levels,⁴⁶ the integration of persons with disabilities into the mainstream of the education system has not been realised so far. A situation assessment of children and young persons with disabilities conducted by the Deputy Prime Minister's (DPMs) office in 2010, reported that the net school attendance ratio was 92 per cent for primary school level and 15 per cent for secondary school level (this refers to the percentage of primary school children with disabilities aged 6-12 years and secondary school children with disabilities aged 13-17 years that are attending school).⁴⁷ However, the government's National Children's Coordination Unit (NCCU) responsible for launching the National Plan of Action for Children, reported that 50 per cent of disabled children 10 years and older had no access to education, 33 per cent had some form of primary education and only 15 per cent had post primary education.⁴⁸ In the 2007 Census 26 per cent of the disabled people reached secondary-level education; however, only 3,5 per cent gained access to colleges, and 2 per cent to University.⁴⁹ The provision of education for people with disabilities has been limited.⁵⁰ There are no equal opportunities for the blind and deaf; as a result they are being left behind. Even though this situation may not be intentional there are insufficient trained personnel such as teachers to ensure disabled persons with visual and hearing impairments progress in the education system.

This is despite the fact that the 2005 Constitution guarantees the right to free primary education for every Swazi child. The Constitution provides as follows:

Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade.⁵¹

According to Methula,⁵² when it comes to education for persons with disabilities, there is still room for improvement as the blind and deaf are being left behind. The dire need for trained personnel is evidenced by the fact that all school for the deaf students who sat for the National Junior certificate failed the exam. The entire class of 2014 failed.⁵³

Education is a corner stone of development hence there is a need to vigorously lobby government to do something in ensuring that learners with disabilities achieve a 100 per cent pass rate in the future. Without the much needed education and PWDs will continue to be marginalised.

46 The National Development Strategy (NDS) 1999.

47 DPMO (n 41 above).

48 The Swaziland National Plan of Action for Children, 2012-2015.

49 CSO (n 2 above) 45.

50 As above.

51 Sec 29(6) of the 2005 Constitution.

52 n 37 above.

53 S Sukati 'School for the deaf records 100% fail rate' *Times of Swaziland* 5 January 2012 <http://www.times.co.sz/News/36257.html> (accessed 25 March 2015). See also, A Zwane 'Deaf schools jump off exam wagon' *Swazi Observer* 10 January 2015 <http://www.observer.org.sz/news/69288-deaf-schools-jump-off-exam-wagon.html> (accessed 25 March 2015).

• **Health**

The Constitution of Swaziland provides for the right to health under social objectives found in the directive principles of state in section 60. It provides as follows:

(8) Without compromising quality the State shall promote free and compulsory basic education for all and shall take all practical measures to ensure the provision of basic health care services to the population.

This entails that the state will take progressive steps to ensure that health facilities, goods and services have to be accessible to everyone without unfair discrimination. This includes physical accessibility (affordability and information accessibility).⁵⁴

Access to health care by people with disabilities is available but is associated with challenges. For example according to the 2010 situation assessment of children and young persons with disabilities in Swaziland report, 27 per cent of young people with disabilities who needed treatment, were receiving it, yet 58 per cent reported that they required treatment but were not receiving it.⁵⁵

The hospitals (particularly government hospitals) in Swaziland are found in urban areas, making it difficult for those in rural areas to access them. The hospitals are also not well equipped to attend to those with visual and hearing impairments. The nurses are not adequately trained to address the health needs of people with disabilities.⁵⁶ Most health centres have not made appropriate adjustments that would allow access to people with physical disabilities. In some cases where adjustments have been made the work undertaken was inadequate. Similarly, the public transportation system of the country does not cater for those in wheelchairs or crutches.

It must be noted that the Department of Social Welfare administers a public assistance programme, which provides means-tested benefits to the needy or destitute in the country.⁵⁷ Those who benefit are mainly the elderly, widows, persons with disabilities and those who are terminally ill. Assistance ranges from E40.00 to E65.00⁵⁸ per month and is usually paid out on a quarterly basis. Social workers estimate that about 40 per cent of the population is needy and yet less than 10 per cent are eligible to access this programme.⁵⁹

However, according to the President of Federation of Persons with Disabilities in Swaziland (FODSWA), Mr Methula, the hospitals in Swaziland are not well equipped to attend to those who visual and hearing impairments. Nursing personnel are not trained to address the health needs of the disabled in this regards hence there is need on the part of DPOs to advocate that government train them in consultation with the DPOs.

All is not well when it comes to the issue of packaging medicine and/or pills for the visually impaired as they cannot be differentiated by touch exposing them to the danger of taking the wrong doses of medication.

Wheelchair users or those who use crutches do not have easy access to health centres as most of them have staircases and for the centres that have off ramps, the

54 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 14 'The right to the highest attainable standard of health' E/C.12/2000/4 (11 August 2000) para 12.

55 See DPMO (n 41 above) and DPMO (n 3 above).

56 As above.

57 CRC Committee (n 22 above) para 263.

58 Approximately US\$ 4 to 6.50.

59 n 15 above.

ramps are usually built inaccurately as some are really steep to afford a wheelchair easy and safe passage.

- **Employment**

The country provides for citizens employment in the Constitution under the economic objectives. It provides as follows:

The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Swaziland and to provide adequate means of livelihood and suitable employment and public assistance to the needy.⁶⁰

Access to employment for PWDs is severely curtailed, with a reported 83,7 per cent being economically inactive; 4 per cent unemployed, and 12,3 per cent employed.⁶¹ People with sight- and hearing-related disabilities face obstacles related to labour market participation. There is a perception that a person who cannot talk or see cannot work.⁶² However, as indicated above PWDs do obtain employment particularly in the private sector.

It was reported that the public service employs around 1,1 per cent of the disabled persons⁶³ whereas; the private sector employs 16,2 per cent. However, 39,5 per cent of the disabled are reported to be employed in family farm/business; whereas, 10,2 per cent are self-employed and 33 per cent are employers.⁶⁴ Due to the fact that the disabled are under employed, disabled persons in the country suffer more poverty than the rest of the marginalised groups.

Mr Methula was of the idea that those with visual and hearing impairments have little access to employment as there are perceptions in the country to the effect that a person who cannot talk or see cannot work, yet there are many vacancies out there which do not require talking or seeing to be executed. Those confined to wheelchairs are unable to work due to the perception that disabled people cannot do anything as well as places of employment do not have the requisite ramps necessary for their independent movement. Due to the fact that the disabled are under employed, disabled persons, in the country suffer more poverty than the rest of the marginalised groups.

The Department of Social Welfare also administers a public assistance programme which provides a means-tested benefit to the needy or destitute in the country.⁶⁵ Those who benefit are mainly the elderly, and those who pass the means-test within the category of widows, PWDs and those who are terminally ill.⁶⁶ It must be noted though that having a disability does not automatically qualifies one to have access to social security and a many disabled persons are not beneficiaries.

- **Access to justice**

The right of access to justice is accorded to everyone living in Swaziland, however, when the visually and the hearing impaired want to vindicate their rights you find that communication is a barrier. Currently the government has employed two sign

60 Sec 59(1) of the 2005 Constitution.

61 CSO (n 2 above) 47.

62 As above.

63 CSO (n 2 above) 48.

64 As above.

65 CRC Committee (n 22 above) para 263.

66 As above.

language interpreters to service the courts in the country and they are based in Mbabane.⁶⁷ Clearly this is not enough. Additionally, the laws of the country require that a victim positively identifies a suspect through identification parades and insists on the ascertainment of bodily features of the accused and clothes.⁶⁸ These are permitted also under the common-law principles which receive evidence to the effect that a witness who identifies the accused in court has also identified him on a previous occasion.⁶⁹ This does not cater for the visually impaired and as such the laws need to be reviewed to cater for other forms of identification other than sight.

Another point is that to access justice one needs a lawyer and lawyers' services are not cheap in Swaziland; hence there is a need for a legal aid scheme to look at PWDs access to justice when they need to vindicate their rights in court.

When it comes to the Human Rights Commission of Swaziland, FODSWA have heard about it but there is not much interaction between the Commission and DPOs. There is no information passed to DPOs about it and on how they can assist persons with disabilities.

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Swaziland?

The 2005 Constitution guarantees the right to vote and to be voted for all persons without discrimination in section 85. Persons with disability have the right to participate in politics. However, accessing this right is often hampered by society's perceptions or attitudes towards persons with disabilities. Over the years voters have shown little confidence in persons with disabilities, hence there have been very few persons with disability serving in top decision making positions. In the parliamentary term of 2008-2013, parliament appointed Mr Tom Mndzebele (a visually impaired Swazi) to be senator. In addition, in the 2013-2017 parliament a man from Kukhanyeni Inkhundla, with a disability, was elected to parliament. The political system in Swaziland does not support positive discrimination in favour of persons with disabilities through a quota system.⁷⁰ Running for political office is based on merit and the individual with more votes will represent that community either in the portfolio of Member of Parliament or Indvuna yenkhundla or Bucopho. In the 2013 elections, for the portfolio of Indvuna yenkhundla four PWDs won and are now serving as constituency developers.

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your country?

See 11.1 above.

11.4 Case studies of specific vulnerable groups

The Constitution of Swaziland in section 84 provides for representation of marginalised groups within the Swazi society as follows:

67 n 15 above.

68 Section 342 of the Criminal Procedure and Evidence Act 67 of 1938, as amended.

69 LH Hoffmann & DT Zeffertt *The South African Law of Evidence* (4ed, 1988) 122.

70 Sec 30 of the 2005 Constitution.

(2) Without derogating from the generality of the foregoing subsection, the women of Swaziland and other marginalized groups have a right to equitable representation in Parliament and other public structures.

However, women and children are marginalised. It is desirable that these groups of people receive adequate protection from the law. In the case of Swaziland three categories of people are given special protection in the constitution and are women, children and disabled persons.

- **Women**

As alluded to in 11.1 living with a disability in Swaziland presents significant challenges particularly for women. There is a general belief that those who have a disability are bewitched or inflicted by bad spirits also apply in case of women with disabilities. Many believe that being around people with disabilities can bring bad luck.⁷¹ As a result, many people with disabilities are hidden in their homesteads and are not given an opportunity to participate and contribute to society. Women and girls with disabilities face dual discrimination and are often worse off than men. They are particularly vulnerable to sexual violence and there have been reported cases of forced sterilisation. According to a 2008 study, Women with disabilities described experiences of sexual exploitation and abuse, which was perceived to be higher amongst disabled women than their non-disabled peers; they felt this was because disabled women were perceived to be 'free' from the HIV virus by non-disabled men.⁷²

- **Children**

Children with disabilities have been historically marginalised and have not been able to access education opportunities to the same extent as their non-disabled peers, rendering them continually vulnerable to those factors such as poverty that limit or restrict access to education.⁷³ This is despite the fact that Swaziland has sought to explicitly define and explain inclusive education in the policy frameworks.⁷⁴

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Swaziland at the moment?

Yes, currently the Disability Unit under the Deputy Prime Minister's Office is spearheading the collection of DPOs, NGOs, and FBOs views to be included in the draft Persons with Disability Bill of 2014. Organisations have been given the opportunity to debate the issues to be included in the Bill as well as debate the strategic plans for its operationalisation in the country.

12.2 What legal reforms would you like to see in Swaziland? Why?

The legal reforms that are necessary to advance the rights of persons with disabilities would be based on the speedy passing by parliament of the Persons with

71 Lang (n 44 above).

72 As above.

73 The Secretariat of the African Decade of Persons with Disabilities 'Study on education for children with disabilities in Southern Africa' (2012).

74 As above.

Disability Bill into an Act of Parliament. The Act will make available the legal tool that will ensure that persons with disabilities are able to lead their lives as full citizens who can make valuable contributions to society if given the same opportunities as others. The Act purports to bring in important provisions on equity, and mindful of the fact that, states are obliged to consult with persons with disabilities, through their representative organisations, when developing and implementing legislation and policies to effectuate the Convention, and on all other policy matters that will affect the lives of persons with disabilities. With regards to receiving an education: the education policy should make provisions for all children living with special needs. That primary education for the disabled be made compulsory under the free universal primary education programme. To avoid setbacks such as failure of entire class of students with disability (as was witnessed in 2014) due to lack of trained personnel, it is recommended that persons with disability themselves be recruited into the education system as assistant teachers; as they have learned sign language and Braille from primary to high school, they are better placed to impart that knowledge. While government's effort to train teachers in the use of sign language and Braille is commendable, it is not sustainable in that it is near impossible to master a language in a period of two years; hence the need to bring in former students as assistant teachers is more appealing.

- Transport and access to buildings: The law of the country should lay down that all public buildings such as courts, hospitals, government offices, transport, roads and overhead bridges have got ramps that allow persons confined in wheelchairs free movement without assistance. The construction of the off ramps should be done in consultation with DPOs so that they are constructed correctly and are not too steep as is witnessed with current ramps. While government is commended for putting in place traffic lights designed to cater for persons who are visually impaired, this initiative should be effected in all the towns both big and small. The traffic lights will only be accessible to persons with disability if there are properly built walkways/ ramps leading to the traffic lights.
- Living independently in the community: The law should stipulate that persons with disabilities should be afforded equal opportunities with the rest of the community. Those who hide children with disabilities, forcing them not to access immunisation from diseases, not to access education and recreational platforms should be prosecuted for treating children with disabilities with cruelty.
- Employment, even when not well qualified: There should be an adaptation of best practices from other countries; for instance, in the employment law of the country there must be affirmative action in favour of persons with disabilities through a quota system, for example, a 3 per cent quota in employment establishments of all the sectors should be occupied by persons living with disabilities.
- Accessing to information: It must be provided in the law that all educational programmes and awareness raising programmes are interpreted in the sign language, particularly on TV. For example HIV/AIDS was declared a national disaster but awareness programmes mostly consist of posters and radio programmes which mean the blind and deaf miss out on valuable information. There is currently the threat of Ebola and there are no programmes on awareness targeting disabled persons at the moment.
- Access to health care: Currently persons with disabilities receive free treatment in public hospitals, while this practice is commendable, it must put into law so that it is protected and guaranteed. The health policy should look into packaging medication for persons with disability as the current envelopes comes with no easy way for the disabled to tell them apart.
- Right to political participation – Exercising political rights, such as voting: It must be law that persons with disabilities are catered for in the election process. Where needs be, ballot papers should also be made available in Braille. To ensure that persons with disabilities are also in top decision making bodies in the country, deserving members of DPOs should be appointed through the use of quota systems into decision making positions.

TUNISIA

*Arlene S Kanter, * Inviolata Sore** & Daniel Van Sant****

1 Population indicators

1.1 What is the total population of Tunisia?

According to the 2014 census, Tunisia's population is 10982754.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Tunisia. What criteria are used to determine who falls within the class of persons with disabilities in Tunisia?

WHO estimates show that the prevalence of disability is 16,3 per cent. This figure is derived from national census, disability survey or components from other surveys.²In 2003, the Ministry of Social Affairs, Solidarity and Tunisians Abroad conducted a comprehensive survey of disability in Tunisia. The data gathered on persons with disabilities were included in the general census, which is conducted every 10 years.³

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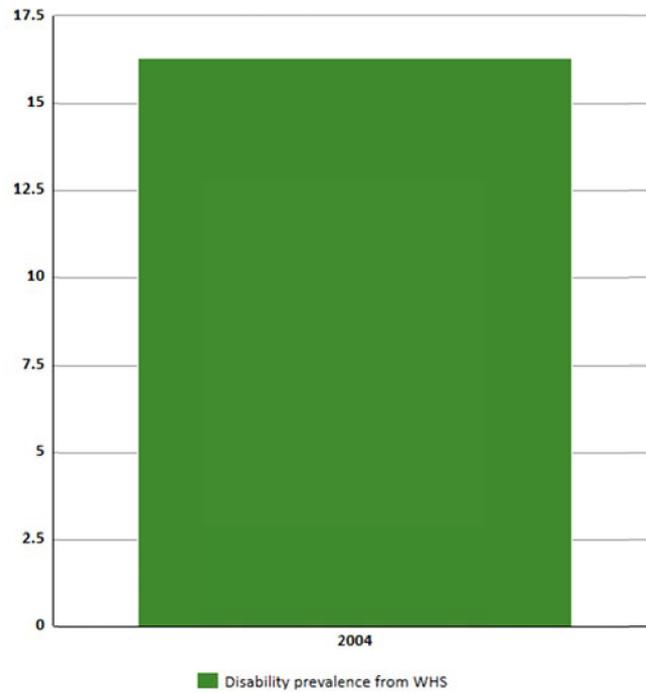
** M.S. Education 2015, Syracuse University.

*** J.D./M.S. Education, expected 2016, Syracuse University.

1 'Population in Tunisia totals 10.9 million people (census)' *Agence Tunis Afrique Presse* 12 September 2014 <http://www.tap.info.tn/en/index.php/society/20974-population-in-tunisia-totals-10-9-million-people-census> (accessed 29 April 2015).

2 World Health Organization & The World Bank 'World Report on Disability' (2011) http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf?ua=1 (accessed 29 April 2015).

3 Committee on the Rights of Persons with Disabilities 'Implementation of the International Convention on the Rights of Persons with Disabilities: Tunisia' (14 July 2010).



Source: Knoema ‘World Report on Disability, 2014’⁴

Most important indicators concerning disability also indicate the prevalence of disabilities as illustrated in the table that follows:

Distribution by type

Type	Number	Percentage
Motor disability	63747	42,1
Mental disability	42016	27,7
Visual Disability	20130	13,3
Auditory disability	18832	12,4
Multiple disability	6698	4,4
Total	151423	100

Source: UNCRPD implementation report– Tunisia⁵

4 Knoema ‘World Report on Disability, 2014’ <http://knoema.com/WBRD2014/world-report-on-disability-2014?country=1001750-tunisia> (accessed 29 April 2015).

5 n 3 above.

1.3 What is the total number and percentage of persons with disabilities in Tunisia?

The 2014 census found that 2,3 per cent of Tunisia's population (around 252000 people) have a disability.⁶

1.4 What is the total number and percentage of women with disabilities in Tunisia?

The percentage of women with disabilities amongst members of the disabled community is 33,6 per cent and the total number is 50863 out of a total of 151423 persons with disabilities by 2003.⁷

1.5 What is the total number and percentage of children with disabilities in Tunisia?

Children and youth with disabilities count for 37 per cent of the persons with disabilities.⁸

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Tunisia?

The most prevalent forms of disability in Tunisia are:

- Motor disabilities with a prevalence of 42,1 per cent;
- Mental disabilities at 27,7 per cent;⁹
- Visual disability at 13,3 per cent; and
- Auditory disability 16,9 per cent respectively.¹⁰

47,8 per cent of these disabilities are due to congenital causes and 38,7 per cent are due to illnesses.¹¹

2 Tunisia's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Tunisia? Did Tunisia sign and ratify the CRPD? Provide the date(s).

The Tunisian government signed the UN Convention on the Rights of Persons

6 UNICEF Middle East and North Africa 'A New Tunisia: An Inclusive Tunisia' 30 March 2015 http://www.unicef.org/mena/media_10157.html (accessed 29 April 2015).

7 Committee on the Rights of Persons with Disabilities 'Implementation of the Convention on the Rights of Persons with Disabilities' (10 November 2010).

8 UN Partnership to Promote the Rights of Persons with Disabilities 'Tunisia – Programme Proposal "The new Tunisia won't be built without us"' (2012).

9 As above.

10 As above.

11 As above.

with Disabilities in 2007,¹² and ratified it and its Optional Protocol on 2 April 2008.

2.2 If Tunisia has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Tunisia submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

Tunisia's country report was due on 2 April 2010 and was submitted to the CRPD Committee on 14 July 2010. DPOs participated in the reporting process.¹³ The first periodic report of Tunisia was prepared during its entry into the democratic transition process that began on 14 January 2012.¹⁴

Yes, Tunisia has domesticated the CRPD and the *Collectif tunisien pour la promotion des droits des personnes en situation de handicap* (CTPDPSH) (Tunisian Grouping to promote the rights of persons with disabilities) is responsible for disability issues and it has recommended that:

- The rights of persons with disabilities should be made an integral part of development programmes;
- the genuine participation of the persons with disabilities in all democratic institutions and in the devising and implementation of policies concerning them should be guaranteed;
- the definition of disability and the conditions for issuing a disability card contained in Outline Act No. 83-2005 should be revised;
- the Guardianship and Trusteeship Act [Year] should be repealed and replaced with legislation on assisted decision-taking;
- legislative provisions on the occupational integration of persons with disabilities should be revised;
- the necessary measures should be adopted to ensure the real application of its inclusive education strategy; and
- that the requisite funds should be raised to ensure that persons with disabilities can lead an independent life based on individual choice.¹⁵

12 A Koné & L Korzekwa 'Persons with disabilities in Tunisia: Legal standing and public perception' (2014) *Babel Initiative* <https://babelinitiative.files.wordpress.com/2014/04/viii-persons-with-disabilities.pdf> (accessed 29 April 2015).

13 International Disability Alliance *CRPD Reports* (2011) <http://www.internationaldisabilityalliance.org/en/crpd-reports-0> (accessed 30 April 2015).

14 UNESCO *Periodic Report Tunisia* (2012) <https://en.unesco.org/creativity/periodic-reports/2012-45> (accessed 30 April 2015).

15 J Hatchard 'Ratification of international and regional human rights instruments by African States (as at 1 November, 1992)' (1992) 36 *Journal of African Law* 186.

2.3 While reporting under various other United Nations instruments, under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Tunisia also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'concluding observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

• **UN Instruments**

Tunisia has acceded to the following international instruments:

- The International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- The Convention on the Elimination of All Forms of Discrimination against Women;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- The Convention on the Rights of the Child.

Country reports are also presented to the Human Rights Committee (ICCPR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the CRPD Committee.

The Committees have provided feedback that should improve implementation and increased recognition of the rights of people with disabilities.¹⁶

Tunisia's most recent Periodic Report was made for the period between 1995-2006.¹⁷ Tunisia made this report during the ordinary session of the African Commission on Human and Peoples' Rights (the African Commission), held from the 15-28 November 2007, in Brazzaville, Congo. In its report, Tunisia has several articles, which talk about rights.

Article 18 talks about protection of the family, of women, of the child, of the elderly and physically disabled persons.¹⁸ The Report recommends that the Tunisian government:

- Put in place concrete measures to ensure that women gain access to and are represented at the high-ranking positions of the Tunisian Government;
- Incorporate into Tunisian national legislation the rights of older persons and people with disabilities;
- Take appropriate measures for the ratification of human rights instruments that Tunisia has not yet ratified/acceded to; and
- Provide information in the next Periodic Reports on the situation of human rights defenders in Tunisia, and more precisely on Non- Governmental Organisations, which are active in Tunisia.

16 International Disability Alliance 'Submission on the List of Issues for Tunisia Committee on the Rights of Persons with Disabilities 4th Session' (2010).

17 African Commission on Human and Peoples' Rights '42nd Ordinary Session: 15-28 November 2007: Congo' (2007) <http://www.achpr.org/sessions/42nd/> (accessed 30 April 2015).

18 As above.

• **Regional Instruments¹⁹**

- African Charter on Human Rights

Tunisia did submit a state report and the concluding observations recommended that the rights of people with disabilities needed to be incorporated into national legislation.²⁰

- Organization of African Unity Convention governing specific aspects of the Refugee Problem in Africa
- Convention on the Elimination of all forms of Discrimination against Women.

Tunisia's State Report states that mothers of children with disabilities are given special considerations in maternity support and employment initiatives for people with disabilities are also discussed.²¹ No concluding observations have been submitted.

2.4 Was there any domestic effect on Tunisia's legal system after ratifying the international or regional instruments in 2.3 above? Does the international or regional instrument that has been ratified require Tunisia's legislature to incorporate it into the legal system before the instrument can have force in Tunisia's domestic law? Have Tunisia's courts ever considered this question? If so, cite the case(s).

Tunisia follows a dualist approach to international law. The new Constitution states that all international treaties ratified by Tunisia, customary international law and general international law have legal force in Tunisia, and that the core international human rights treaties which Tunisia has ratified are applicable and binding in domestic law.²²

Article 20 of the 2014 Constitution of the Tunisian Republic states that 'International agreements approved and ratified by the Assembly of the People's Representatives are superior to laws and inferior to the Constitution'.²³

Yes, there was legal effect on Tunisia's legal system after ratifying the international and regional instruments as highlighted below:

- Participation in several regional and international conferences on the Convention and its implementation, including the regional conferences and seminars that were held in 2009 in Tripoli, Libyan Arab Jamahiriya, Rabat and Doha.²⁴
- Tunisia adopted the section of the CRPD on the promotion and protection of the rights of persons with disabilities. It aims to ensure rights for all Tunisians and ensure equal opportunities in all areas. The law considers that the protection of the

¹⁹ As above.

²⁰ African Commission on Human & Peoples' Rights 'Concluding observations and recommendations on the Consolidated Periodic Report (1995-2006) of the Republic of Tunisia' (2006) http://www.achpr.org/files/sessions/42nd/conc-obs/4th-9th-1995-2006/achpr42_conc_staterep1_tunisia_2007_eng.pdf (accessed 3 June 2015).

²¹ Committee on the Elimination of Discrimination against Women 'Consideration of reports submitted by states parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Tunisia' (2 August 2000).

²² Policy Brief 'Tunisia: Protecting freedom of Expression and Freedom of Information in the New Constitution' (2012) <http://www.article19.org/data/files/medialibrary/3013/12-04-03-ANAL-tunisia.pdf> (accessed 6 May 2015).

²³ Constitution of the Tunisian Republic (26 January 2014) trans Jasmine Foundation http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf (accessed 3 June 2015).

²⁴ Committee on the Rights of Persons with Disabilities 'Implementation of the International Convention on the Rights of Persons with Disabilities: Initial report submitted by states parties under article 35 of the Covenant: Tunisia' 14 July 2014.

disabled is a national responsibility. It also implies the establishment of national strategies for the disabled in all areas.²⁵

- The International Classification of Functioning (ICF) replaced the International Classification of Disability. Tunisia has adopted this new classification in dealing with cases of persons with disabilities (handing out cards for the disabled). The new approach adopted by the World Health Organization (WHO) helped change the view towards the disabled.²⁶
- Tunisia has adopted several measures to protect the rights of persons with disabilities: Promulgating the constitution; and creating a High Council for the Disabled, chaired by the Prime Minister and comprising members of government and civil society (political parties and associations). The Council meets annually to assess the situation of persons with disabilities and make recommendations; ensuring access to medical and social services for people with disabilities; ensuring the basic training necessary for social integration; ensuring effective integration in employment, entertainment and sport; creating an institute for the advancement of persons with disabilities, which provides academic training for education specialised staff along with other missions; supporting associations; ensuring the integration of persons with disabilities in the world of new technologies; raising awareness through the media; developing scientific research partnerships with international actors and creating a national award of the President of the Republic to promote the rights of persons with disabilities.²⁷

Tunisian courts have dealt with several cases which have led to judicial decisions that demonstrate that persons with disabilities have legal protection. For instance:²⁸

- Appeal Court decision No 3509 of 18 May 1981. In this case, the Court found that while according to the medical certificate the appellant suffered from disturbances caused by schizophrenia, this did not impair his intellectual capacities and did not necessarily mean that he was incompetent to resort to law without a guardian.²⁹
- Appeal Court decision No 24709 of 25 February 1992. In this case, the Court ruled to void a contract concluded by a mentally impaired person prior to his being declared legally incompetent because he was known by reputation to be mentally impaired at the time when the contract was concluded.³⁰
- Decision No 35339 of 20 July 2005 of the President of the Court of First Instance in Tunis. In this case, the President of the Court decided not to agree to permit the person concerned to donate one of her kidneys to the National Centre for the Promotion of Organ Transplantation, although she had agreed to do so, as she had been demonstrated to be mentally impaired and her consent to donate was therefore contrary to the provisions of article 2 of Act No 2 of March 1992 concerning the harvesting and transplantation of human organs, which requires the donor to be of sound mind.³¹
- Decision No 45062 of 14 November 2009 issued by the Qaranbaliyah Court of First Instance. In this case, the Court decided to revoke its earlier decision to declare an individual legally incompetent and to restore his legal capacity, as the person concerned had submitted a claim citing a medical certificate showing that he was of sound mind.
- Decision No 20082 of 6 January 2011 issued by the Tunis Court of First Instance. In this case, the Court decided to reject an application to declare an individual legally incompetent as, in the Court's view, the principle was soundness of mind; an application to declare a person legally incompetent and to appoint a guardian for

25 Knoema (n 4 above).

26 As above.

27 As above.

28 Tunisia's Response to List of Issues (February, 2011) <http://disabilitycouncilinternational.org/Africa-and-the-middle-East.php> (accessed 25 September 2015).

29 Constitution of the Tunisian Republic (n 23 above).

30 As above.

31 As above.

him would require evidence of a medical condition and it was insufficient merely to declare a person legally incompetent.³²

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Tunisia has taken a number of measures to harmonise domestic law and policy with the Convention.

- Law No 83 of 15 August 2005 on the advancement and protection of persons with disabilities.³³
- Law No 80 of 23 July 2002, supplemented by Law No 9 of 11 February 2008, which prohibits discrimination against school-age children.³⁴
- Law No 10 of 11 February 2008, concerning vocational training, provides in article 3 that vocational training programmes, both in their substance and organisation, shall be based on the principle of equality of opportunity for all persons seeking training, and that such programmes must comply with the laws concerning persons with disabilities.³⁵
- Under Law No 37 of 16 June 2008 concerning the Higher Committee for Human Rights and Fundamental Freedoms, and specifically article 5 thereof, the Higher Committee is authorised to make unannounced visits to children's shelters and social institutions that care for persons with special needs in order to determine compliance with domestic law on human rights and fundamental freedoms. Tunisia has also promulgated Law No 66 of 3 November 2008.³⁶
- In response to the CRPD committee members' questions in their concluding observations about Tunisia's country report relating to the low reported number of persons with disabilities in Tunisia, particularly women with disabilities, the Government of Tunisia said its definition had departed from the 'medical model' and is currently in line with the World Health Organization (WHO) classification of persons with disabilities.³⁷

3 Constitution

3.1 Does the Constitution of Tunisia contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

Yes, the Constitution contains provisions that address disability directly, article 48 is a stand-alone article on disability.

- **Article 48: Persons with disabilities**
The State shall protect persons with disabilities against any form of discrimination. Every disabled citizen shall have the right to benefit, based on the nature of the disability, from all of the measures guaranteeing their full integration into society. The State must take all necessary steps to ensure this.³⁸

32 As above.

33 Committee on the Rights of Persons with Disabilities 'Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia' (13 May 2011).

34 As above.

35 As above.

36 As above.

37 International Service for Human Rights 'Human Rights Monitor Quarterly' (2011) http://www.ishr.ch/sites/default/files/hrm/files/new_hrmq_issue_3.pdf (accessed 30 April 2015).

38 Constitution of the Tunisian Republic, art 48 trans UNDP.

3.2 Does the Constitution of Tunisia contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Yes, the Constitution of Tunisia contains provisions that indirectly address disability as follows:

- Article 21 of Chapter 2 on the Rights and Liberties states that; All citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination. The State guarantees to citizens individual and collective rights, and provides them with the conditions to lead a dignified life.³⁹
- Article 22: The right to life is sacred and shall not be prejudiced except in extreme cases regulated by law.⁴⁰
- Article 23: The state shall protect human dignity and physical integrity and shall prohibit psychological and physical torture. Crimes of torture are imprescriptible.⁴¹
- Article 32: The state shall guarantee the right to information and the right to access information. The state seeks to guarantee the right to access to communication.⁴²
- Article 38: Health is a right for every person. The state shall ensure free health care for those without support and those with limited income. It shall guarantee the right to social assistance as specified by the law.⁴³
- Article 40: Work is a right for every citizen, male or female alike. The state shall take necessary measures to ensure the availability of work on the basis of competence and fairness. All citizens, male or female shall have the right to adequate working conditions and fair pay.⁴⁴
- Article 46: The state shall commit to protecting women's achieved rights and seek to support and develop them. The state shall seek to take necessary measures to eliminate violence against women.⁴⁵
- Article 47: The state shall provide all forms of protection to all children according to the best interest of the child with no discrimination.⁴⁶

4 Legislation

4.1 Does Tunisia have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

In response to a campaign led by experts, doctors and parents of the disabled, the Tunisian government signed an extensive set of laws and regulations governing the rights of people with disabilities in 2005.⁴⁷

- Article 2 of decree number 2005-3087 of 29 November 2005 requires all Tunisian establishments employing more than 100 individuals to ensure that one per cent of their workforce is made up of disabled persons. These institutions are given tax

39 Constitution of the Tunisian Republic, art 21 trans UNDP.

40 Constitution of the Tunisian Republic, art 22 trans UNDP.

41 Constitution of the Tunisian Republic, art 23 trans UNDP.

42 Constitution of the Tunisian Republic, art 32 trans UNDP.

43 Constitution of the Tunisian Republic, art 38trans UNDP.

44 Constitution of the Tunisian Republic, art 40trans UNDP.

45 Constitution of the Tunisian Republic, art 46trans UNDP.

46 Constitution of the Tunisian Republic, art 47trans UNDP.

47 Koné & Korzekwa (n 12 above).

incentives depending on the type and severity of their employees' handicaps, with the enforcement of these quotas designated to the 'inspecteur du travail'.⁴⁸

Tunisian law requires all buildings, establishments and installations to allow full accessibility to those with motor and/or sensory handicaps.⁴⁹

- The new article 212 of the Penal Code penalizes anyone 'who exposes or allows the exposure of, neglects or allows the neglect with the intention of abandoning, of a child or a disabled person quite unable to protect himself, in a place full of people', by inflicting on him a sentence of three years' imprisonment and a fine of two hundred Dinars.⁵⁰ The sentence will be doubled if the child is exposed or neglected in a place, which is not inhabited by people.
- Article 213 (new) of the same Code adds that the perpetrator of the abandonment shall be punished with life imprisonment should the child or the disabled person die following this abandonment.⁵¹

The guarantee of the health services and social security for physically disabled persons is considered as a (national responsibility) by article 3 of the orientation law no 2005-83 of 15 August 2005, relative to the promotion and protection of disabled persons.⁵²

- Paragraph 106 states that, according to article 3 of the orientation law no 2005-83 of 15 August 2005, relative to the promotion and the protection of the physically disabled, the guarantee of health services and social benefits for the physically disabled is considered as a (national responsibility).⁵³
- Paragraph 107 of Tunisia's State Report on the Implementation of the International Convention on the Rights of Persons with Disabilities states that, in regard to the reforms, the state has carried out:
 - The reinforcement of the health structures in the areas of diagnosis and early screening of illnesses likely to give rise to a disability with the increase of medical examinations during the antenatal phase;
 - The organisation of public opinion sensitisation campaigns relating to the importance of the pre-nuptial medical certificate;
 - The early provision of care for disabled children by means of socio-educational structures specialised in functional re-education and rehabilitation matters,⁵⁴
- Paragraph 108 of the state report focuses on law no 92-83 of 3 August 1992, which states that relative to mental health and to the conditions of hospitalisation for mental disorders requires that the hospitalisation be done with respect for individual liberties and under conditions guaranteeing human dignity.⁵⁵
- Paragraph 109 of the state report continues to elaborate that, a person affected by mental disorders cannot be hospitalised without his consent except where it is impossible to obtain an informed consent or if the state of mental health of the person concerned requires urgent care or threatens his security or the security of others. The restriction of his freedom is strictly limited to the measures required by his state of health and his treatment. The person concerned should be informed, in any case, immediately on his admission or, as soon as his state permits it, of his legal situation and of all his rights. He can communicate with the public health medical inspectors or with the legal authorities, send out or receive personal mail, contact the members of his family or contact the regional mental health committee responsible for examining the situation of hospitalised persons while maintaining respect for individual freedoms and human dignity.⁵⁶

48 As above.

49 As above.

50 n 3 above.

51 n 3 above.

52 n 3 above.

53 n 3 above.

54 n 3 above.

55 n 3 above.

56 n 3 above.

While it seems that Tunisia has made many efforts to improve its legislation related to persons with disabilities, one can still see a very strong presence of the medical model approach.⁵⁷ There is also a strong preference for specialised solutions (transport, school, and so on) and much less focus on ensuring full accessibility of mainstream services, notwithstanding a quite comprehensive accessibility strategy. There seems to be no understanding of the implications of article 12 of the CRPD and many references are made to certain rights being subject to the consent of guardians.⁵⁸

4.2 Does Tunisia have legislation that indirectly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- Article 4 of Tunisia's state report focuses on article 5 of the Tunisian Constitution, which sanctions the inviolability of the human being and his protection against all violations of life. The law protects the right to life by means of criminal sanctions provided for by the Criminal Code, against all those who commit an offence against human life.⁵⁹

The legislator has reserved a special Code for the Child. Likewise, he has made provision in the Penal Code special provisions governing the issue of the physically disabled, the elderly and vulnerable persons.⁶⁰

- Article 4 of the African Charter stipulates that (the human being is inviolable), that (every human being shall be entitled to respect for his life and the integrity of his person) and that (no one may be arbitrarily deprived of this right).⁶¹

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Tunisia ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

See 2.4.

6 Policies and programmes

6.1 Does Tunisia have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

Tunisia has programmes that directly address disability, including:

⁵⁷ Many references to prevention, the definition of persons with disabilities, the article on the right to health, the predominance of doctors on the regional disability commissions.

⁵⁸ International Disability Alliance (n 16 above).

⁵⁹ Koné & Korzekwa (n 12 above).

⁶⁰ Koné & Korzekwa (n 12 above).

⁶¹ n 3 above.

- The Working Group on Rights of Older Persons and People with Disabilities, which originated as a Focal Point, was established by the adoption of Resolution 118 at the 42nd Ordinary Session held in Brazzaville, Republic of Congo from 15-28 November 2007.

Resolution 143 of the 45th Ordinary Session (Banjul, The Gambia – May 2009) extended the mandate of the group by establishing a Working Group on the Rights of Older Persons and People with Disabilities, with the mandate to:

- hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;
- draft a Concept Paper for consideration by the African Commission that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities;
- facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights;
- collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of member states;
- identify good practices to be replicated in member states; and
- submit a detailed Report to the African Commission at each Ordinary Session.⁶²

In regard to government programmes and policies, the Tunisian Constitution:

- Guarantees at least one approach to equality against disability,⁶³
- Children with disabilities have a general right to education,⁶⁴
- There is no relevant provision for protection from discrimination at work for persons with disabilities,⁶⁵
- There is medium degree of integration in regard to inclusive education for children with disabilities,⁶⁶
- There are no financial benefits to families with disabled children,⁶⁷ and
- There is no financial support to low-income families with one severely disabled child.⁶⁸

6.2 Does Tunisia have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

See section 3.2. The Constitution of the Tunisian Republic prohibits discrimination on all grounds – including disability – so all national policies and programmes prohibit this as well.

62 African Commission on Human and Peoples' Rights Working Group on Rights of Older Persons and People with Disabilities <http://www.achpr.org/mechanisms/older-disabled/> (accessed 1 May 2015).

63 World Policy Forum: Tunisia <http://worldpolicyforum.org/countries/tunisia/policies/disability> (accessed 6 May 2015).

64 n 62 above.

65 n 62 above.

66 n 62 above.

67 n 62 above.

68 n 62 above.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Tunisia have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

Yes, Tunisia has official bodies that specifically address violations of the rights of persons with disabilities.

- The government's primary agency to investigate human rights violations and combat threats to human rights is the Ministry of Human Rights and Transitional Justice, established after the October 2011 elections.⁶⁹
- The High Committee for Human Rights and Fundamental Freedoms is a government-funded agency charged with monitoring human rights.⁷⁰
- The Ministry of Social Affairs is charged with protecting the rights of persons with disabilities.⁷¹

There are a good number of references to Tunisian NGOs working for persons with disabilities as well as DPOs. However, it is not clear which of these NGOs are genuine DPOs governed by persons with disabilities.⁷²

7.2 Other than the ordinary courts or tribunals, does Tunisia have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

Yes, the Tunisian National Human Rights Institution works with Office of the High Commissioner for Human Rights (OHCHR) amongst other civil society groups to ensure its compliance with the Paris Principles; supporting the establishment of a transitional justice mechanism in accordance with international human rights standards to monitor and investigate human rights violations and promote accountability; strengthening national protection systems and support the development and monitoring of public policies for the protection of vulnerable groups including women, youth and migrants; and ensuring increased compliance of UN human rights mechanisms and bodies (UPR, Treaty Bodies, and Special Procedures). The office has the mandate to protect and promote human rights.⁷³

69 Tunisia Human Rights Report (2013) <http://www.state.gov/documents/organization/220590.pdf> (accessed 6 May 2015).

70 n 68 above.

71 n 68 above.

72 African Commission on Human and Peoples' Rights (n 17 above).

73 Office of the United Nations High Commissioner for Human Rights 'Report of the OHCHR Assessment Mission to Tunisia' (2011) http://www.ohchr.org/Documents/Countries/TN/OHCHR_Assessment_Mission_to_Tunisia.pdf (accessed 1 May 2015).

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Tunisia have a Human Rights Commission, an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Tunisia has ever addressed issues relating to the rights of persons with disabilities.**

Tunisia has an Administrative Ombudsman who has the role of receiving individual requests from citizens and from non-governmental organisations pertaining to the administrative problems encountered by the civil servants within the public service or against other officials; it is also empowered to submit proposals to the President of the Republic.⁷⁴ In its report, there is no mention of people with disabilities.

In Tunisia, the Supreme Council on Human Rights and Fundamental Freedoms is an autonomous body. One third is composed of representatives of Ministerial Departments and the other two thirds of independent persons. It can receive complaints and grievances from private individuals or non-governmental organisations, and can investigate claims of human rights violations, and submit proposals aimed at improving the law and the practice. It publishes an annual report on its activities and a national report on the human rights situation in the country.⁷⁵

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Tunisia have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

Yes, Tunisia has organisations that advocate for rights and welfare of persons with disabilities. There are, in Tunisia, 87 associations working on the rights of the disabled, with 228 regional networks, and overseeing 269 specialised centres providing a number of educational, social, health and entertainment services.⁷⁶ Countless activities to promote the principles embodied in the Convention were organised by associations concerned with disabilities and non-governmental organisations. Those associations and organisations made great contributions in that regard, including the promotion of the Convention at the conference organised

74 Higher Committee for Human Rights and Fundamental Freedoms in Tunisia <http://www.droitsdelhomme.org.tn/en/#> (accessed 3 June 2015).

75 As above.

76 As above.

in Tunis in 2009 by the Basma Association for the Promotion of the Employment of Persons with Disabilities, in cooperation with the Islamic Educational, Scientific and Cultural Organisation.⁷⁷ Some of the organisations are listed as follows:

Associations and organisations, which played an important role in disseminating awareness of the rights of persons with disabilities and the Convention included:⁷⁸

- Handicap International in Tunisia

The first activities Handicap International initiated in Tunisia began in 1992. In 1997, a partnership between HI and the Ministry for Social Affairs and Solidarity focused on winning the support of national and local decision-makers to ensure that people with disabilities were meaningfully represented in local and national policy. It also sets up initiatives to support disabled peoples' organisations, and to build the capacity of service providers to ensure more services are accessible to people with disabilities.⁷⁹

The Handicap International projects include:

- Inclusive local development to promote the social inclusion of people with disabilities;
- Promoting the meaningful participation of people with disabilities in the transition towards democracy in Tunisia;
- Self-reliance and social inclusion: Fostering greater consideration of people with disabilities in local development efforts. These projects work towards improving the accessibility of services and general environment for people with disabilities living in the towns of Menzel Bourguiba and Bizerte to make the local environment a safer and easier environment to navigate for people with reduced mobility; To ensure that the voices of people with disabilities are heard and listened to at a time of significant political transition as well as promoting the full participation of disabled people across decision making process. HI is also working with service providers as well as national and local authorities to improve policies and develop new legislation that includes disability issues. Another area of support is the participation of people with disabilities in local development initiatives;

- Handicap International Maghreb
- El Imtiaz

The oldest disability-related center in Tunis. It specialises in education for deaf children aged 3-15 who have recently received hearing aids. The center focuses on pre-school education and integration into standard schools, as well as vocational training for those who cannot be integrated; Le Centre pour les Handicaps Mentaux has students ranging from 6-30 years old, usually with rather severe mental disabilities. Its focus is on giving their students autonomy, and they provide several workshops on activities such as ceramics, sewing and woodworking with the hope that this will lead to employment;

- Centre El Walid

Run by L'Association des Parents et Amis des Handicapés Tunisiens (APAHT), has 197 students with 'medium' to 'severe handicaps'. Unlike the other centres, which are public and funded by the government, parents of the students here have to pay an admission fee. The parents therefore almost entirely fund El Walid;

⁷⁷ As above.

⁷⁸ Committee on the Rights of Persons with Disabilities (n 7 above).

⁷⁹ African Commission on Human and Peoples' Rights Working Group on Rights of Older Persons and People with Disabilities (n 62 above).

- La Ferme Thérapeutique pour Handicapés
Using a hands-on approach to achieve professional and social integration, rather than integration in schools. It has 90 students, most of whom have mental disabilities, and is funded by donors and parents, in addition to the subsidies given by the Ministry of Social Affairs.⁸⁰

The Ministry of Social Affairs does not directly provide special education, but rather funds NGOs and associations who act as service providers;⁸¹

- Save the Children Italy – Tunisia;
- Basma Association for the Promotion of the Employment of Persons with Disabilities;
- The National Union for the Blind;
- The Tunisian Union for the Support of Persons with Mental Disabilities;
- The Association of Persons with Motor Disabilities;
- The Tunisian Organization of Mothers;
- The Association for Home Care for Persons with Severe Disabilities;
- The Tunisian Federation of Sports for Persons with Disabilities;
- The Association of Tunisian Guardians and Friends of Persons with Disabilities;
- The Association for the Support of Persons with Hearing Loss;
- The Tunisian Association for the Welfare of the Deaf;⁸²
- Les Anges (Ass parents handicapés lourds) ;
- ATAS (NGO for PW deaf-disability);
- AGIM (NGO for physical disability);
- Organisation Tunisienne de Défense des Droits des Personnes Handicapées (OTDDPH) ;
- The General Association for Persons with Motor Disabilities;
- The Association of Persons with Severe Disabilities Living at Home;
- The Tunisian Association for Multiple Sclerosis;
- The Tunisian Muscular Dystrophy Association;
- The Tunisian Angels Association for parents of children with severe and multiple mental disabilities; and
- Voice of the Deaf Association of Tunisia.

The Government provides ongoing support to those organisations and encourages civil society to further disseminate awareness of the Convention and portray persons with mental disabilities in a positive light

9.2 In the countries in Tunisia's region (North Africa) are DPOs organised/coordinated at national and/or regional level?

In the countries in Tunisia's region, DPOs are coordinated at regional and national levels.

DPOs organised at regional level are:

- **Arab Organization of Persons with Disabilities (AOPD)**
This is an independent non-profit organisation founded in 1998 in Cairo, Egypt. It is a regional organisation composed of DPOs operating in the different Arab Countries. AOPD's main objectives are to promote the rights of people with

80 Committee on the Rights of Persons with Disabilities (n 7 above).

81 As above.

82 Committee on the Rights of Persons with Disabilities 'Implementation of the International Convention on the Rights of Persons with Disabilities: Initial report submitted by states parties under article 35 of the Covenant: Tunisia' (14 July 2010).

disabilities, to empower people with disabilities and to represent Arab people with disabilities in the world at large.⁸³

- **Handicap International Maghreb**

The Handicap International Maghreb programme's main objectives are the structural improvement of living conditions, integration and full social participation of people with disabilities.⁸⁴

9.3 If Tunisia has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

See 9.1.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

With reference to 9.1, international and national based organisations have partnered with Tunisian transitional government to implement the CRPD. DPOs work with these initiatives by raising awareness about disability, and carrying out data collection on prevalence of disabilities.⁸⁵

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The following barriers have been identified:

- Education centres face serious staffing problems, both in quantitative and qualitative terms and the institutions are also out of reach for the students with disabilities.
- The lack of high quality training of staff working in specialised centres naturally affects the results they produce.⁸⁶
- According to the African Commission, Non-Governmental Organisations (NGOs) do not appear to be enjoying the various legislative measures put in place by Tunisia within the context of the implementation of the provisions laid down in the African Charter.⁸⁷

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

Yes, there have been instances where DPOs have been involved in activities and programs geared towards enhancing social and political participation of persons with disabilities. This has been noted variously in the text.

83 International Disability Alliance 'Our Members' <http://www.internationaldisabilityalliance.org/en/about-us/our-members> (accessed 1 May 2015).

84 Handicap International Maghreb Program – Tunisia <http://www.projet-mounassara.org/fr/qui-sommes-nous/programme-maghreb-hi.html> (accessed 25 September 2015).

85 UN Partnership to Promote the Rights of Persons with Disabilities (n 8 above).

86 Committee on the Rights of Persons with Disabilities (n 7 above).

87 African Commission on Human and Peoples' Rights (n 17 above).

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

Yes, there are specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities.

The Collectif tunisien pour la promotion des droits des personnes en situation de handicap (CTPDPSH) (Tunisian Grouping to promote the rights of persons with disabilities) drew attention to the fact that, although Tunisia had adopted measures to encourage the integration of persons with disabilities, even before ratification of the Convention on the Rights of Persons with Disabilities, these measures were little applied in practice. CTPDPSH also described some of the obstacles encountered by persons with disabilities when trying to gain access to buildings, public areas and means of transport, despite existing legislation; difficulties in integrating children with disabilities in the ordinary school system, and the failure to include the notion of 'reasonable accommodation' in the 2005 decree on the employment of persons with disabilities.⁸⁸

CTPDPSH recommended that Tunisia should include the principle of non-discrimination with respect to persons with disabilities in the new Constitution and that the rights of persons with disabilities should be made an integral part of development programmes; that the genuine participation of the persons with disabilities in all democratic institutions and in the devising and implementation of policy concerning them should be guaranteed; that the definition of disability and the conditions for issuing a disability card contained in Outline Act No 83-2005 should be revised; that the Guardianship and Trusteeship Act should be repealed and replaced with legislation on assisted decision-making; that legislative provisions on the occupational integration of persons with disabilities should be revised; that the necessary measures should be adopted to ensure the real application of its inclusive education strategy; and that the requisite funds should be raised to ensure that persons with disabilities can lead an independent life based on individual choice.⁸⁹

9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

The concluding observations specifically note that a need for 'awareness-raising' about people with disabilities exists in Tunisia.⁹⁰ DPOs could assist the state party in raising awareness by providing trainings and other resources and assistance.

88 Universal Periodic Review 13th Session (21 May-4 June 2012): Disability Analysis Reports <http://www.humanrights.gov/dyn/universal-periodic-review---13th-session.html> (accessed 30 September 2015)

89 African Commission on Human and Peoples' Rights (n 17 above).

90 n 33 above.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

DPOs can be empowered by:

- Assisting in data collection;
- Connecting state party bodies with people with disabilities seeking employment;
- Providing training to local, national, and regional governmental bodies; and
- Developing and implementing awareness-raising programming.

9.10 Are there specific research institutes in the region where Tunisia is situated (North Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

Yes, there are international and national research institutions involved with research on persons with disabilities. In the field of disability, several draft studies were launched in 2005 including research centres, laboratories, universities, ministries and associations concerned. In 2006, three studies were launched over a period of four years: improving the quality of life, identifying learning difficulties among children, and identifying biological and genetic factors causing mental retardation. Finally, in 2007, a scientific research unit responsible for the identification of deafness among newborns was created within the Institute for the Promotion of the Disabled. The following are some of the institutions:⁹¹

- Institute for the Promotion of Disabled;
- Nadi Al Bassar is a national non-governmental organisation dedicated to the prevention of blindness and restoration of sight,⁹²
- Basma Association for the Promotion of Employment for the Disabled;⁹³ and
- Institute for the Promotion of the Handicapped.⁹⁴

10 Government departments

10.1 Does Tunisia have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The following Ministries and National Institutions specifically work towards promoting and protecting the rights and welfare of persons with disabilities:

91 In 2003, the Ministry of Social Affairs, Solidarity and Tunisians Abroad conducted a comprehensive survey of disability in Tunisia. The data gathered on persons with disabilities were included in the general census, which is conducted every 10 years. United Nations Committee on the Rights of Persons with Disabilities (n 3 above).

92 L Schwab *Eye care in Developing Nations* (2007).

93 M Hejleh *The country and people of Tunisia* (2015) <http://www.hejleh.com/countries/tunisia.html> (accessed 1 May 2015).

94 As above.

- The Ministry of Youth, Sport and Physical Education created The Tunisian Sports Federation for the Disabled. It is responsible for sports for persons with disabilities and encompasses 153 sports clubs and associations with a membership of some 3825. As a result of the creation of this federation under the Ministry of Youth, Sport, and Physical Education, around 70 sports persons with disabilities won 21 medals, including nine gold medals, at the 2008 Beijing Paralympics.⁹⁵
- Centre Essanad (National Institute for poly and mental disabled)
- Directeur Générale de l'Education Primaire, Ministère de l'Education (General Director of Primary Education, Ministry of Education)
- Ministère de l'Education (Ministry of Education)
- Ministère des Affaires de la Famille et de la Femme (Ministry of Family Affairs and Women)
- Ecole de Santé Publique (School of Public Health)
- Directeur Général de la Promotion Sociale, Ministère Affaires Sociales (Director General of Social Promotion, Social Affairs Ministry)
- Chef Service Statistiques, Ministère des Affaires Sociales (Chief Service Statistics, Ministry of Social Affairs)
- Ministère des Affaires Sociales (Ministry of Social Affairs) and
- Ministère des Droits de l'Homme (Ministry of Human Rights).⁹⁶

11 Main human rights concerns of people with disabilities in Tunisia

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

Intervention of panellists pointed out the following challenges as pertains to political participation:

- The common belief of voting as a highly rational and intellectual decision, and the need to eliminate deeply rooted stereotypes that currently prevent persons with intellectual disabilities from exercising their equal right to vote and be elected.⁹⁷

11.2 Do people with disabilities have a right to participation in political life (political representation and leadership) in Tunisia?

According to a report by the World Health Organization, 13,5 per cent of Tunisia's approximately 11 million citizens over 18 years, the voting age, have a disability.

- On July 8, the Tunisian Organization for the Defense of the Rights of Persons with Disabilities (ODRPWD), and IFES' partnered in the effort to increase accessibility, and Handicap International organised a roundtable discussion about electoral participation and persons with disabilities.

⁹⁵ n 4 above.

⁹⁶ As above.

⁹⁷ Office of the High Commissioner for Human Rights 'Fourth annual interactive debate of the Human Rights Council on the Rights of Persons with Disabilities: Interactive debate on participation of persons with disabilities in political and public life' <http://www.ohchr.org/EN/Issues/Disability/Pages/politicalpubliclife.aspx> (accessed 1 May 2015).

- IFES Chief of Party in Tunisia Nicolas Kaczorowski spoke about measures that can be taken to facilitate the right to vote for persons with disabilities. The ODRPWD is the first Tunisian non-governmental organisation (NGO) managed by persons with disabilities that adopted a rights-based approach to advocacy.⁹⁸

During the October 2011 elections in Tunisia, barriers to effective electoral participation for persons with disabilities included:

- Difficulties in accessing voter and civic information in accessible formats;
- Lack of accessibility of some voting centres; insufficient training of polling officials;
- Lack of awareness and interest of political parties in disability rights.⁹⁹

11.3 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Tunisia?

The socio-economic rights of persons with disabilities are not fully realised in Tunisia due to high level of illiteracy which played a significant role in the lack of awareness and understanding of rights, specifically in a patriarchal society, an upbringing founded on inequality, and the hegemony of a traditional cultural establishment based on the division of roles based on gender. The high level of illiteracy in the interior of the country was due to the fact that schools are very far from villages, especially in rural areas with harsh natural environments, in addition to poor families requiring assistance in farming and household chores, which pulls girls away from school.¹⁰⁰

A report that cut across Jordan, Palestine, Tunisia, Algeria and Lebanon, states that, the realities confronting people with disabilities (PWDs) in many Arab countries in relation to the right to work and education,¹⁰¹ indicate an absence of a descent physical environment that meets their special needs and an absence of appropriate social awareness and specialisation to interact with them as citizens, in addition to a minimal investment of their potential in society. This reality necessitates a reconsideration of public policies approaching issues of disability in its generality, and special needs specifically. The most prominent features which help establish a foundation to invest in the potential of persons with disabilities, lies in the removal of the social and material constraints, which hinder their integration in their local communities, starting from school and ending in the workplace, both in the private and public sector.¹⁰²

The articles listed below form Tunisia's Constitution address health, education and employment of persons with disabilities.

• Article 38: Health

Health is a right for every human being. The state shall guarantee preventative health care and treatment for every citizen and provide the means necessary to ensure the safety and quality of health services.¹⁰³

98 International Foundation for Electoral Systems 'Political Participation of Persons with Disabilities Discussed in Tunis: Inclusion of Persons with Disabilities, All Inclusion and Empowerment' (17 July 2013) <http://www.ifes.org/Content/Publications/Articles/2013/Political-Participation-of-Persons-with-Disabilities-Discussed-in-Tunis.aspx> (accessed 1 May 2015).

99 As above

100 Arab Watch on Economic and Social Rights 'Right to Education Right to Work' (2012) <http://www.annd.org/english/data/publications/pdf/27.pdf> (accessed 1 May 2015).

101 As above.

102 As above.

103 The Constitution of Tunisia (2014).

The state shall ensure free health care for those without means and those with limited income. It shall guarantee the right to social assistance in accordance with the law.

• **Article 39: Education**

Education shall be mandatory up to the age of sixteen years.

The state guarantees the right to free public education at all levels and ensures provisions of the necessary resources to achieve a high quality of education, teaching, and training. It shall also work to consolidate the Arab-Muslim identity and national belonging in the young generations, and to strengthen, promote and generalise the use of the Arabic language and to openness to foreign languages, human civilisations and diffusion of the culture of human rights.

• **Article 40: Work**

Work is a right for every citizen, male and female. The state shall take the necessary measures to guarantee work on the basis of competence and fairness.

All citizens, male and female, shall have the right to decent working conditions and to a fair wage.

• **Article 47: Children**

Children are guaranteed the rights to dignity, health, care and education from their parents and the state.

The state must provide all types of protection to all children without discrimination and in accordance with their best interest.

• **Article 48: Persons with disabilities**

The state shall protect persons with disabilities from all forms of discrimination. Every disabled citizen shall have the right to benefit, according to the nature of the disability, from all measures that will ensure their full integration into society, and the state shall take all necessary measures to achieve this.

11.4 Case studies of specific vulnerable groups

• **Indigenous persons**

A new Constitution of the Tunisian Republic was enacted in 2014, despite lobbying by the ethnic-linguistic Amazigh minority for linguistic rights during the year, the new Constitution retains Arabic as the state language and stipulates the promotion by the state of Arabic and the Arab-Muslim identity.¹⁰⁴

• **People living in rural areas**

According to UNICEF, 84 per cent of the rural population had access to drinking water compared to 99 per cent of the urban population in 2008.¹⁰⁵ Moreover, 64 per cent of the rural population had access to health services compared to 96 per cent in urban areas.

104 Minority Rights Group International 'State of the World's Minorities and Indigenous People 2014 – Tunisia' (3 July 2014) <http://www.refworld.org/docid/53ba8dcd14.html> (accessed 3 June 2015).

105 Manara Network for Child Rights 'Country Profile of Tunisia' (2011) http://www.addc.org.au/documents/resources/20110801-implementation-of-un-crc-tunisia-country-profile_743.pdf (accessed 3 June 2015).

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Tunisia at the moment?

Yes, there have been interactive debates, which seek to identify good practices in the field of participation of persons with disabilities in elections and in the conduct of public affairs. It will also contribute to raising awareness of the challenges that persons with disabilities continue to face in the exercise of their political rights, with a view to considering possible measures to strengthen the participation of persons with disabilities in the political and public life of their countries.¹⁰⁶

Pursuant to resolution 16/15, the Human Rights Council (HRC) held its fourth interactive debate on the rights of persons with disabilities on 1 March 2012. The theme of 2012's panel was participation of persons with disabilities in political and public life. States, inter-governmental organisations (IGOs), national human rights institutions (NHRIs) and non-governmental organisations (NGOs), including organisations of persons with disabilities (DPOs), participated in the debate.¹⁰⁷

Ms Theresia Degener, rapporteur of the Committee on the Rights of Persons with Disabilities, focused her intervention on the jurisprudence elaborated by the Committee on the issue of political participation of persons with disabilities. She noted that in its concluding observations on Tunisia and Spain, the first ones ever adopted by the Committee, the Committee had recommended that relevant legislation be reviewed to ensure that all persons with disabilities had the right to vote and participate in public life on an equal basis with others, regardless of their impairment, legal status or place of residence. Ms Degener challenged the common belief of voting as a highly rational and intellectual decision, and concluded that time had come to eliminate deeply rooted stereotypes that currently prevent persons with intellectual disabilities from exercising their equal right to vote and be elected.¹⁰⁸

12.2 What legal reforms would you like to see in Tunisia? Why?

Tunisia should move towards implementing the CRPD to the fullest. Additional resources are needed by DPOs to help realise the goals of the CRPD. In addition, the gap between what the laws and the CRPD require and the reality on the ground, need to be closed so that people with disabilities in Tunisia will realise their goal as equal citizens in Tunisian society.

¹⁰⁶ HRC 19th Session Concept Note: Interactive Debate of the Rights of Persons with Disabilities.

¹⁰⁷ United Nations Human Rights: Office of the High commissioner for Human Rights: Fourth annual interactive debate of the Human Rights Council on the Rights of Persons with Disabilities <http://www.ohchr.org/EN/Issues/Disability/Pages/politicalpubliclife.aspx> (accessed 25 September 2015).

¹⁰⁸ n 107 above

SECTION C: REGIONAL DEVELOPMENTS

Disability rights in the African regional human rights system during 2014

Overview

For the 2015 volume of the *ADRY* and subsequent volumes, the editors have decided to diversify the possible contents of the section so as to also accommodate commentaries that still look at developments relating to disabilities rights in the African regional human rights systems but without making the preceding year a rigid time demarcation. In other words, at the same time as welcoming commentaries that address developments relating to disability in the African regional human rights system in a given year, Section C will now also accommodate commentaries that address disability rights from an African regional dimension generally. To this end, as mentioned in the editorial, this section contains two commentaries. The first commentary by Enoch McDonnell Chilemba discusses the emergence of disability-specific legislation in the African region through the prism of a selected range of African countries. The discussion seeks to establish whether domestic legislative initiatives are compliant with the CRPD. Against the backdrop of the right to political participation in article 29 of the CRPD, the second commentary in this section by William Aseka Oluchina, seeks to evaluate the extent to which African regional human rights systems and selected African states are compliant with the convention's standards.

REGIONAL DEVELOPMENTS

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

*Enoch MacDonnell Chilemba**

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).

REGIONAL DEVELOPMENTS

THE RIGHT TO POLITICAL PARTICIPATION FOR PEOPLE WITH DISABILITIES IN AFRICA

*William Aseka Oluchina**

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/comunications/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.zamlil.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.

BOOK REVIEW

AS KANTER: *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* (2014)

*Tsitsi Chataika**

1 Introduction

This 'must read' book presents an accessible, personal style and diverse content, which is clearly a reflective product of conversations, ideas and experiences Arlene Kanter has shared with several people in the fields of disability and law. She provides unique insights into the Convention on the Rights of Persons with Disabilities (CRPD) and how it evolved from its foundation as an international legal framework. A unique feature of this book is the author's involvement in the CRPD generation process. Hence, the narrative reflects upon all aspects of the CRPD from personal and interactive perspectives. The author's personal experiences clearly exhibited in this book, sets it apart from most disability rights texts, while at the same matching well-thought out academic writings.

In this book, Arlene Kanter examines the status of the rights of people with disabilities under the international law prior to the adoption of the CRPD. She further critically analyses the CRPD drafting process, its potential for achieving disability rights and its complexities from an insider's perspective.¹ This is so because Kanter made known her participation in the CRPD drafting process, an aspect that significantly enriches this text.

Kanter further argues that by articulating what she refers to as the 'new human rights' (for example, the right to live in the community, accommodations and support) as well as new interpretations of existing human rights (for example, liberty, security, integrity, access to justice and freedom from torture and ill-treatment), the CRPD is not only significant

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1 See acknowledgments, p. vi.

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for people with disabilities, but for the general development of international human rights law. Kanter strongly believes that the success of the CRPD rests on the extent to which individual countries enforce their own domestic laws and policies, guided by this international instrument. Apart from domesticating the CRPD, Kanter also takes the changing of societal attitudes towards people with disabilities as a critical element in ensuring access to disability rights.

The strength of this book lies in its global perspective dimension; thus focusing on disability rights in the United States of America, Africa, Europe, and the Middle East, although not much reference is made to African countries,² which is a weakness of this text. Nonetheless, it is because of this 'global context' that it can either be used as a reference book or as a focus for cross-cultural studies on disability rights. By adopting a comparative perspective, the book explores the CRPD and its potential for achieving disability rights. Thus, this book becomes significant to researchers, policy makers, disability activists, students of international and comparative human rights law, discrimination law and disability studies.

The book is split into eight chapters to support her arguments. In each chapter, Kanter analyses one or two CRPD articles, without necessarily covering all 50 articles and optional protocols. However, she intentionally discussed those articles she felt, present examples of the greatest potential impact of the CRPD on the lives of both people with and without disabilities. She however deliberately excluded article 24, despite its potential for transforming the education systems into more inclusive environments. This is because she is intending to separately publish article 24 in her forthcoming publication, perhaps due to its pivotal role in influencing other disability rights.

Kanter begins with an introduction where she presents the background of the CRPD; thus, its birth, what it provides and why this convention drew international attention as a new approach to human rights treaties and their enforcement. Key to her introduction is the aspect that the CRPD removes the distinction between political, civil, social, economic and cultural rights by embedding them in the overall structure of the CRPD.

Chapter 1³ is divided into two parts, of which the first part discusses the development of the international human rights laws from the emergency of the United Nations (UN) until the adoption of the CRPD in 2006. The second part discusses the CRPD and its tenets, taking into account the drafting process that led to the final document. Since Kanter was part of the drafting process, she relied heavily on her personal notes as well as official UN archives to capture the tone of the Ad Hoc Committee

² See pp 25; 36-37; 51; 83; 94; 82-83; 288-89; 292.

³ pp 21-63.

discussions; an aspect that places her at a very informed position to tackle issues in this text.

Chapter 2⁴ discusses article 19, which is on the right to live in the community for people with disabilities. In this chapter, she presents a strong argument that article 19 should not be used as a reason to deny the person his/her right to live in a home in the community. She goes further to discuss how various countries have denied people with disabilities their right to live in their own homes and community; as well as the meaning of 'home' and 'community' from nine-discipline specific perspectives (70-75). That is

- Architecture;
- Anthropology;
- Etymology;
- Geography;
- Gerontology;
- Environmental psychology;
- Sociology; and
- Law.

Such a multi-disciplinary approach, makes this book relevant to a wider audience, and hence becomes a useful resource to various stakeholders. Also, issues of religion and culture are sensitively addressed.

Chapter 3⁵ addresses article 14, which focuses on the right to liberty and security. Kanter explicitly chronicles various ways in which people with disabilities, particularly those with intellectual impairment, have been perpetually subjected to restrictions on their liberty and freedom in ways that people without disabilities are not. She argues that mental health laws that discriminate against people with disabilities for involuntary treatment and detention violate the intent, if not the language of article 14.

In chapter 4,⁶ Kanter discusses article 15, which focuses on the right to be free from torture and cruel, inhuman or degrading treatment and punishment. She is concerned that the article does not provide any standards to guide the determination of what type of treatment or condition rise to the level of torture or ill-treatment in violation of the CRPD. She further suggests that involuntary institutionalisation be treated as ill-treatment or torture.

4 pp 64-124.
5 pp 125-158.
6 pp 159-201.

Chapter 5⁷ discusses two articles; that is 17 and 25, which focus on the right to protection of the physical and mental integrity of the person and on the right to health respectively. Kanter brings together these two articles because she is convinced that article 17 amplifies the issue of informed consent, which she feels, is part of the right to mental and physical integrity.

Chapter 6⁸ addresses article 13 that is on access to justice for people with disabilities. Here, Kanter argues that access to justice is one of the foundations of any legal system and this encompasses the right to participate in the judiciary system as witnesses, complainants and victims. Key to this chapter is the discussion of many barriers facing people with disabilities in seeking access to justice on an equal basis with people without disabilities as articulated in article 13.

Chapter 7⁹ discusses in depth, the right to legal capacity and supported decision-making of people with disabilities under article 12. From her insider's knowledge, Kanter highlights that this article was one of the most keenly debated articles of the entire CRPD. This was because several countries objected to the inclusion of broad protections upholding the right of all people with disabilities to legal capacity, seeking instead to retain their countries' limitations on legal capacity for people with certain mental incapacities. Kanter documents the arguments that culminated into the final version of article 12, which recognises the legal capacity of all people with disabilities, regardless of the type, scope or severity of their disability. My main worry here is that although she has a sound understanding of the terms disability and impairment, Kanter seems to use them interchangeably in this text. For instance, severity should be of 'impairment' and not 'disability'. Otherwise, there will be double standards on disability activism where disability, which is a social construct, becomes synonymous to 'impairment', which is a medical condition.

Kanter concluded the chapter with a discussion of the implications of article 12 on the right of people with and without disabilities to receive the support and services they may need in order to realise their own human potential. For me, this promotes inclusive development, where both people with disabilities and those without are viewed as equals in society.

Chapter 8¹⁰ concludes the book by focusing on moving beyond the CRPD and provides a discussion on whether or not this legal instrument will make any difference to the lives of people with disabilities. Kanter does so by making reference to international human rights theory and

7 pp 202-220.

8 pp 221-234.

9 pp 235-290.

10 pp 291-305.

scholarship. She also argues that the success of the CRPD is neither by the number of countries that have ratified it nor by its terms, but by the process that led up to the adoption of the treaty. In addition, she feels that the success of the CRPD is based on how it has been used to mobilise self-advocates and their allies throughout the world.

Kanter also presents reasons why some countries choose to sign and ratify international treaties, a discussion that provides interesting insights. She triangulates arguments by various legal scholars on why some countries ratify treaties, one of which is that treaties cause changes in domestic practices since they create binding obligations on state parties. In contrast, other scholars argue that treaties do not make any difference at all in state practices as this process is essentially done ceremonially to merely protect countries' international reputation and to avoid the threat of isolation or punishment. This is seen when a country signs and ratifies a treaty and does not make any effort to re-align its domestic laws and practices.

In this chapter, she also highlights that since it is the first treaty to include direct beneficiaries in the drafting process and in its national implementation, the CRPD presents a new model for the development of future human rights treaties. Also, the domestication of the CRPD has the potential of changing societal attitudes towards people with disabilities and beginning to see them as rights holders entitled to legal protection as equal members of society. Key to Kanter's discussion is the removal of the 'them' and 'us' binary so that communities start to embrace diversity. In her own words, Kanter argues (p 17) that:

The CRPD seeks to remove long-standing barriers between those who are considered "normal" and those who are not, implementation of the CRPD may result in the development of domestic laws that offer greater acceptance not only for people with disabilities but for other marginalized groups as well.

This book serves as a 'one-stop-shop' in that, apart from the presented 8 chapters, it also has very useful appendices. Appendix 1¹¹ provides a summary of the mechanisms that may be used to assist people needing support in decision-making. The way Kanter tabulates the information makes it easy for readers to engage with the information as an advocacy tool for disability rights. The CRPD is presented in Appendix 2¹² and this makes it readily accessible as a reference point when reading this text.

Important to this text is the provision of five convincing discussion points on how the CRPD is regarded as a significant international treaty that protects the rights of people with disabilities. Firstly, Kanter pointed out that the CRPD does not specifically define a 'person with a disability'

11 pp 306-307.

12 pp 309-338.

(p 8) because the Ad Hoc Committee responsible for this statute felt that this would have profiled the medical basis of disability. Rather, the committee agreed that the CRPD categorically states its purpose in safeguarding the rights of people

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 (p 8).

Kanter reaffirms the social model of disability's understanding by disability activists such as Mike Oliver,¹³ whose interests moved from the body to the environment. Thus, it is not the impairment, but rather the interaction of the impairment with various forms of barriers (attitudinal, environmental [physical and communication] and institutional [policies and practices]), which prevent an individual from participating in society.

Secondly, the CRPD's significance relates to the process that led to its adoption (p 8). Unlike other preceding human rights treaties, Kanter stresses that the CRPD was to a greater extent, written by its beneficiaries. This implied the fulfilment of the 'nothing about us without us' disability activists' motto, which since then, has become the guiding principle for the implementation of the CRPD; thus, promoting meaningful participation of people with disabilities in decision-making processes. This was revolutionary as never before in the history of the UN had the direct treaty beneficiaries being invited to play such a major role in the drafting process.

Thirdly, Kanter believes that the CRPD presents a new model for future human rights treaties in terms of its scope and breadth (p 9). In addition, it includes more substantive rights than in any previous treaty. Specifically, Kanter makes reference to what she calls 'new rights' presented by the CRPD. These include the right to 'reasonable accommodations', 'accessibility' (article 9), 'inclusive education' (article 24), 'live in the community, with choices equal to others' (articles 19 & 23), 'supports' (articles 26 & 28), 'communication access' (articles 9 & 21) and 'awareness raising' (article 8) (p 9). These 'new rights' have not been part of the existing human rights under the Human Rights Declaration of 1948, or other subsequent treaties.¹⁴

Kanter presents a fourth way that makes the CRPD significant. That is, it makes clear the interdependency of civil and political rights; and social, economic and cultural rights. She succinctly argues that traditionally, human rights instruments addressed either civil and political rights or social, economic and cultural rights, but not both rights categories of rights. For instance,

13 See M Oliver 'The social model in action: If I had a hammer' in C Barnes & G Mercer *Implementing the social model of disability: Theory and research* (eds) (2004) chap 2.

14 United Nations Declaration on Human Rights (1948).

- The right to equality and non-discrimination of people with disabilities (article 12) can only be realised if there are accommodations in the workplace, public sphere, transportation and communication (article 9).
- The right to liberty for people with disabilities (article 14) is dependent on their right to be free from involuntary institutionalisation on the basis of their impairment (article 19).
- The right to access to justice for people with disabilities (article 13) is made possible if voting places and courthouses are made accessible (articles 8 & 21).

It becomes explicit that the rights of people with disabilities enshrined in the CRPD's articles can only be realised because of their interdependency, thus offering a new model for subsequent international human rights treaties.

Finally, Kanter provides a fifth example of the significance of the CRPD. That is, its unparalleled approach to international human rights enforcement, an aspect she presented in her previous text.¹⁵ She noted that in the past, reporting and monitoring requirements have been heavily criticised as powerless, with limited funding, unclear procedures and politically manipulated. On the contrary, the CRPD imposes stringent monitoring and reporting requirements. Kanter makes reference to article 33, which she clearly unpacks for easy understanding. She highlighted that the article includes an extensive system for monitoring and national implementation. Thus, it requires each member country to establish one or more 'focal points' that are responsible for leading the process of implementation within the government, to ensure that various departments within the government become accountable for the work to be done in implementing the CRPD. Also, article 33 mandates state parties to designate 'a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention'. Key to the implementation and monitoring processes is the active involvement of people with disabilities. Furthermore, Kanter presents article 31, which requires state parties to collect data on disability in order to 'give effect to the present Convention'. She presents a very important point as she unpacks article 31. That is, the importance of not just collecting statistical data on the number of people with disabilities as this has its own challenges. The article emphasises the need to also collect data on people with disabilities and their lives, including various forms of barriers they face in accessing their rights. Here, Kanter argues that no other treaty requires collection of data covering such a diverse range of issues. Thus, it becomes clear that articles 31 (data collection) and 33 (reporting and monitoring), present the most detailed requirements for national level implementation and monitoring of any human rights treaty

15 See S 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 and Commerce* 287.

in the UN's history; thus, making the CRPD a model for subsequent human rights treaties.

Kanter also raises a significant point in that the CRPD Committee members are elected by state parties, which include 18 independent experts who serve in their individual capacities and not as government representatives (p 19). Again, she reminds readers of the 'nothing about us without us' motto, whereby these Committee members are mostly people with disabilities who are also experts in the disability field. Here, Kanter raises an important aspect whereby in the past, people with disabilities were considered interested parties and not experts. Thus, the CRPD makes it clear that the Committee should deliberately include experts with disabilities, thus acknowledging their worth.

Kanter acknowledges that merely ratifying the CRPD and its Optional Protocols, does not guarantee its domestication by member states. This is important because implementation has always been a challenge to many member states, particularly those from low-income countries. Kanter is aware that the CRPD presents a significant step towards the promotion of disability rights. However, she is sceptical about the CRPD's translation into domestic law, yet its success rests upon national implementation. It is because of the realisation of this barrier that Kanter informs the readers how the CRPD addresses this challenge by ensuring that the direct beneficiaries (people with disabilities) continue to be key stakeholders in the CRPD's implementation. Kanter makes it clear that no other treaty has included such a central role for beneficiaries of the treaty themselves; thus making it a learning point for future human rights treaties. She also acknowledges that it is not possible for people with disabilities to solely monitor the CRPD and in particular, forcing governments to comply with the CRPD and its tenets. Kanter argues that positioning people with disabilities at the centre stage, together with their families, friends, supporters and allies, the CRPD is likely to increase awareness about the need for greater discretion for the protection of the equal rights of people with disabilities. Thus, the CRPD will achieve what is yet to be achieved within the international community – that is, 'the promise of equality for people with disabilities under the law' (p 11). Her strong argument in this book is that the lessons of the CRPD are indispensable to the development and realisation of the rights of people with disabilities and to other groups. Accordingly, the CRPD has the potential of not only transforming the lives of people with and without disabilities, but to also provide a new model for the implementation of all future human rights treaties. This in a way, makes various countries realise the notion that what is good for people with disabilities, is good for all.

In thinking critically about how and why the CRPD came into being, Kanter inspires various stakeholders (including disability rights advocates) and future human rights treaties. Let me hasten to say that this powerful book, is an essential reading; not just for disability advocates and

researchers, but for anyone whose intention is to embrace diversity, where all global citizens (including people with disabilities) are seen as rights holders, entitled to legal protection as equal members of society. I am optimistic that her next edition on article 24 (inclusive education), will be equally stimulating.