

African Disability Rights Yearbook

Volume 2 2014

Pretoria University Law Press
PULP

2014

African Disability Rights Yearbook

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

BusinessPrint, Pretoria

To order, contact:

PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

Cover:

Yolanda Booyzen, Centre for Human Rights

ISSN: 2311-8970

© 2014

TABLE OF CONTENTS

	EDITORIAL	v
	SECTION A: ARTICLES	
1	The right to inclusive education in Botswana: Present challenges and future prospects <i>Obonye Jonas</i>	3
2	The Basic Education Act of 2013: Why it is one step forward and two steps back for children with disabilities in Kenya <i>William Aseka</i> <i>Arlene S Kanter</i>	33
3	Too little, too late? The CRPD as a standard to evaluate South African legislation and policies for early childhood development <i>Sue Philpott</i>	51
4	Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa <i>Heléne Combrinck</i>	75
5	Termination of pregnancy of persons with mental disabilities on medical advice: A case study of South Africa <i>Ashwanee Budoo</i> <i>Rajendra Parsad Gunputh</i>	101
6	Economic discourses of disability in Africa: An overview of lay and legislative narratives <i>Shimelis Tsegaye Tesemma</i>	121
	SECTION B: COUNTRY REPORTS	
	Botswana <i>Thuto Hlalele</i> <i>Romola Adeola</i> <i>Adebayo Okeowo</i> <i>Daba Bacha Muleta</i> <i>Lucius Batty Njiti</i>	151
	Egypt <i>Lila Meadows</i> <i>Nadia Adib Bamieh</i> <i>Janet E Lord</i>	169
	Kenya <i>Elizabeth Kamundia</i>	185
	Malawi <i>Enoch MacDonnell Chilemba</i>	207

Mauritius 227
Ashwanee Budoo
Roopanand Amar Mahadew

Uganda 247
Louis O Oyaro

Zambia 267
Natasha Banda
Likando Kalaluka

Zimbabwe 287
Esau Mandipa
Gifi Manyatera

SECTION C: REGIONAL DEVELOPMENTS

Developments regarding disability rights during 2013:
The African Charter and African Commission on Human
and Peoples' Rights 309
Heléne Combrinck
Lawrence M Mute

Baby steps: Developments at the African Committee of
Experts on the Rights and Welfare of the Child (2013-2014) 319
Lorenzo Wakefield

Disability rights in the sub-regional economic
communities during 2013 323
Lucyline Nkatha Murungi

EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the second volume of the *ADRY* amidst what promises to be steadily growing visibility of disability rights in the African region. During the course of 2014, Angola, Burundi, the Republic of Congo, Côte d'Ivoire, and Guinea Bissau became the latest members of the African Union to ratify the Convention of the Rights of Persons with Disabilities (CRPD). The CRPD now enjoys at least a 70 per cent level of ratification among African States. Clearly, the winds of disability rights are blowing across the continent.

The 2014 issue of the *ADRY* addresses disability rights within the foundational structure laid down by the inaugural issue. The structure comprises a tripartite division between: articles; country reports; and shorter commentaries on recent regional and sub-regional developments. To this end, Section A of the 2014 volume features six chapters that speak to the intersection between disability rights and a range of crucial socio-economic sectors that, even when they focus on specific countries, nonetheless, are emblematic of unmet rights across the African region as a whole. The first two chapters focus on the imperatives of the duty of the State to provide inclusive education for learners with disabilities. In the first chapter, Obonye Jonas begins by discussing the principles underpinning the human right to inclusive education so as to elicit its normative essence, not least because inclusive education can be understood in divergent ways. Ultimately, the author puts Botswana's laws, policies and programmes under the spotlight. Jonas concludes that Botswana's school system has a long way to go before it can adequately respect, protect and fulfil the human right to inclusive education in the manner contemplated by article 24 of the CRPD. This is because Botswana exhibits several gaps, including the absence of enabling legal measures to protect the right to inclusive education, and inconsistencies between policies purporting to subscribe to inclusive education and a school system which in practice remains inaccessible to learners with disabilities in a variety of ways.

William Aseka and Arlene Kanter follow with a joint chapter which also hones in on inclusive education but in the context Kenya. The authors critically appraise the Basic Education Act of Kenya of 2013 using article 24 of the CRPD as their main normative yardstick. The Basic Education Act is a measure that came at the back of the Constitution of Kenya of 2010. The Constitution contains provisions that guarantee persons with disabilities a right to have access to educational institutions and facilities that are integrated into society (article 54(b)). It also guarantees every child a right to free and compulsory basic education (article 53(b)). The authors argue that, on the one hand, the Basic Education Act is a progressive development. The Act establishes, for the first time in Kenya's history, a legal right to education for *all* children. On the other hand, the Basic Education Act has significant shortcomings. In the authors' view, in a number of areas it falls short of meeting standards of inclusive education which are laid down by article 24 of the CRPD. Aseka and Kanter submit that, in the main, the Act's shortcomings lie in perpetuating a discriminatory 'separate but equal' school system through retaining 'special schools', and failing to establish a system which ensures the provision of reasonable accommodations.

In the third chapter, Sue Philpott examines the intersection between early childhood development, the implicit normative standards that are laid down by the CRPD in this area, and South African legislative, policy and other measures for supporting early childhood development. The author's point of departure is that provision of early childhood development has important implications for the development of all children and more so for children with disabilities. Early childhood development provides opportunities for early interventions as well as lays the foundation for social inclusion and participation. Drawing from normative standards laid down by the CRPD, Philpott evaluates how South Africa is faring in the provision of early childhood development by examining the responsiveness of legislative and policy measures in the specific areas of social services and social protection, health and nutrition, and education. The author argues that when measured against the CRPD, South Africa's efforts fall short in many spheres. The

country's efforts are 'too little' in respect of social services, social protection and health, and 'too late' in respect of early learning and inclusive education. In the area of inclusive education, Philpott's arguments and observations incidentally reinforce those of Jonas, Aseka and Kanter in terms of underscoring shared shortcomings among African jurisdictions.

One of the areas in which disability-related discrimination remains not only historically embedded but also largely inscribed in many laws across the world is the exclusion from the right to vote of persons legally deemed to lack the requisite mental decision-making capacity. This area comes under scrutiny in the fourth chapter by Helène Combrinck. Against the backdrop of the paradigm-changing standards ushered in by the CRPD, Combrinck's chapter is partly an exploration and appraisal of the historical misrecognition of persons with psychosocial disabilities in respect of the right to vote. The chapter is also an explication of the normative standards that are prescribed by the CRPD in order to protect the right to participate equally in voting by people with psychosocial disabilities. The author examines the implications of the CRPD's standards in terms of requiring transformative legal and other reforms at the domestic level in order to recognise the legal capacity of an erstwhile excluded social group. Whilst the author's jurisdictional focus is, ultimately, South Africa, nonetheless, the discussion has much wider application. This is an area where most jurisdictions in different parts of the world still sit with laws that unjustifiably continue to disenfranchise persons with psychosocial disabilities among other social groups whose mental health has historically been officially stigmatised to the point of being made the object of naked discrimination. Combrinck underscores that the CRPD normatively requires the recognition of legal capacity of *all* persons with psychosocial disabilities. Therefore, in order to comply with the CRPD and overcome the status subordination of persons with psychosocial disabilities, it is not up to States to cherry-pick *some* persons with psychosocial disabilities for legal recognition when instituting reforms as this would be tantamount to incomplete and, indeed, discriminatory reform.

The fifth chapter by Ashwantee Budoo and Rajendra Gunputh continues with the theme of exploring the implications of the CRPD standards for African domestic legal regimes which sanctify the status subordination of persons that are deemed to lack requisite decision-making capacity but focusing on reproductive self-determination. Equally significant, the chapter extends the exploration to include the implications of provisions of the domestic constitution that are applicable to reproductive health decision-making. Budoo and Gunputh appraise section 5(4)(a) of the South African Choice on Termination of Pregnancy Act of 1996 against the standards prescribed by the CRPD as well as fundamental rights guaranteed by the South African Constitution of 1996. Section 5(4)(a) of the South African Act permits the decision to terminate the pregnancy of a woman who is 'severely mentally disabled' to be made by a proxy in the form of a natural guardian, spouse, legal guardian or curator personae. The authors argue that, at a philosophical level, one of the shortcomings with section 5(4)(a) is that it implicitly adopts a 'medical model' of disability in its conceptualization and regulation of 'mental disability' in contradistinction to a 'social model'. Consequently, through an implicit discourse of disability as lack, it fails to recognise the human dignity and equality of women with mental disabilities. Budoo and Gunputh conclude that section 5(4)(a) of the Choice on Termination of Pregnancy Act fails both human rights and constitutional muster. It patently violates provisions of the CRPD, not least the rights to: equal recognition before the law (article 12); reproductive choice (article 23); and free and informed consent (article 25). In equal measure, the authors conclude that section 5(4)(a) also violates several provisions of the South African Constitution, not least provisions that guarantee the rights to: equality (section 9); human dignity (section 10); and reproductive choice (section 12(2)(a)). The authors call for remedial legislative reform.

The last chapter by Shimelis Tsegaye Tesemma breaks from the focus on a specific jurisdiction as the preceding chapters do. The author develops a narrative that considers the laws of several African countries within a context of unmasking the moral assumptions that underpin the intersection between disability and economic perspectives or models of disability, and their intended as well as unintended consequences on the dignity and equality of persons with disabilities.

Foremost, the author seeks to highlight that laws which are ostensibly intended to provide support to persons with disabilities can concomitantly undermine any such support if persons with disabilities are substantively treated as a burden on a specific sector or on society as a whole. The thrust of Tesemma's argument is that economic discourses that portray disabled people as economically dependent, as is implicit in many social security or social welfare laws of African States and beyond, for example, are instances of a contradictory discourse which perpetuates the charity model of disability at the same time as purporting to meet individual need. The author argues that this ambivalent discourse should be replaced by laws that embrace a discourse of 'independent living' so that when a disabled person comes into contact with the social welfare system, he/she is treated as a rights-holder and not as someone seeking alms.

In Section B of the *ADRY*, a new set of countries are reported on – eight in all – thus adding to the stock of countries that were reported on in the 2013 volume. The country reports in this volume are on: **Botswana** by Thuto Hlalele, Romola Adeola, Adebayo Akeowo, Daba Bacha Muleta and Lucius Batty Njiti; **Egypt** by Lila Meadows, Nadia Adib Mamieh and Janet Lord; **Kenya** by Elizabeth Kamundia; **Malawi** by Enoch MacDonnell Chilemba; **Mauritius** by Ashwanee Budoo and Roopanand Amar Mahadew; **Uganda** by Louis Oyaro; **Zambia** by Natasha Banda and Likando Kalaluka; and **Zimbabwe** by Esau Mandipa and Gift Manyatera.

Section C reports and comments on African regional and sub-regional developments. Helène Combrinck and Lawrence Mute report on developments relating to the work of the African Commission on Human and Peoples' Rights; Lorenzo Wakefield on developments relating to the African Committee of Experts on the Rights and Welfare of the Child; and Lucyline Nkatha Murungi on the East Africa Community.

We sincerely hope that readers will find the 2014 volume of the *AYDR* – our very second issue – a useful resource and an addition to archives on disability rights in the African region. The volume seeks to build upon the inaugural issue of 2013 in terms of reinforcing the main objective of providing a forum for developing a critical disability rights discourse in the African region as well as reporting on recent developments in the disability rights field. In similar vein, it is our hope that this volume contributes towards the *ADRY* becoming a critical bibliographical source for African regional and country-specific discourses on disability as a human rights issue.

The financial assistance of the Open Society Initiative for Southern Africa (OSISA) is acknowledged with gratitude.

Editors
Charles Ngwena (convening editor)
Ilze Grobbelaar-du Plessis
Helène Combrinck
Serges Djoyou Kamga

SECTION A: ARTICLES

THE RIGHT TO INCLUSIVE EDUCATION IN BOTSWANA: PRESENT CHALLENGES AND FUTURE PROSPECTS

Obonye Jonas*

Summary

For many years children were prevented from enjoying their rights. They were regarded as ‘... [mere] recipients of welfare rather than holders of specific rights’.¹ This conception has left children vulnerable to exploitation without human rights safe-guards. While all children are vulnerable, those with disabilities are exposed to increased vulnerability on account of negative traditional beliefs,² societal stereotypes, stigma and ignorance. This article proceeds on the assumption that equipping children with disabilities with necessary education and skills through inclusive education will go a long way in ensuring both their personal and socio-economic development. It argues that the delivery of inclusive education to learners will be more effective if done through a human rights model. Through this model, the inherent equality of all people is recognised regardless of differences, abilities or disabilities. The article argues that despite the fact that inclusive education has gained immeasurable currency in modern pedagogy, Botswana has not done enough to cater for the education needs of children with disabilities and address the challenges that they face.

1 Introduction

The demand for social justice in the education sector, particularly in relation to children with disabilities has gained impetus in the world,

* LLB (UB); LLM (Pretoria); Senior Lecturer, Law Department, University of Botswana and Practising Attorney with Jonas Attorneys. E-mail: jonas15098@yahoo.co.uk or obonye.jonas@mopipi.ub.bw.

1 T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 12.

2 In many parts of Africa, including in Botswana, it is widely believed that disability is a result of witchcraft. See G Dart ‘Provision for learners with special educational needs in Botswana: A situational analysis’ (2007) (22) *British Journal of Special Education* 56. For a contrary view, see B Ingstad ‘The myth of the hidden disabled: A study of community based rehabilitation in Botswana’ unpublished PhD thesis, University of Oslo, 1990, who argues that societies are beginning to embrace PWDs.

especially over the latter half of this century. Previously, in Botswana as was the case with many African countries, children with disabilities were denied opportunities to attend normal schools. They were mostly removed by their keepers from public view, hidden and isolated as they were considered to be a curse. However, in the last few decades, the world has experienced the emergence of a human rights movement whose objective is to lobby states to guarantee the fundamental rights and freedoms of persons with disabilities. One of the themes that emanated from this movement is the protection and promotion of the right of children with disabilities to receive education. Thus, in the intervening years, there has been a remarkable paradigm shift from excluding children with disabilities from education to their inclusion. This transformation was inspired by amongst other things, the children's rights theory, which at its rudimentary level, postulates that all children are worthy of dignity and concern to grow up and become active citizens. In a nutshell, the message is that all children are children and deserve to be treated and live as children. Today, more and more learners with special needs are studying under one roof, side by side with their peers who do not suffer from any disabilities. This concept is commonly referred to as inclusive education. The concept of inclusive education has western origins where it began taking roots in the 1980s. Today, it has become a secular religion in education settings throughout the world. Botswana has committed to providing education for *all* through its Vision 2016 Agenda.³ However, despite the fact that inclusive education has gained immeasurable currency in modern pedagogy, Botswana has not done enough to cater for the education needs of and address challenges faced by children with disabilities. This article identifies the need for Botswana to put in place a comprehensive system of laws and properly coordinated policies to facilitate the successful implementation of an inclusive education strategy.

1.1 The meaning of inclusive education

According to Guidelines of the United Nations Educational Scientific and Cultural Organisation (UNESCO), inclusive education is:

[T]he process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision covering all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children ...⁴

³ Botswana National Vision, Presidential Task Force (1997).

⁴ UNESCO 'Guidelines for inclusion: Ensuring access to education for all' (2005) 13, available at <http://www.disabilityrightsfund.org/node/445> (accessed 23 April 2013).

For Staub and Peck, inclusion entails, 'full-time placement of children with mild, moderate and severe disabilities in regular classrooms'.⁵ In the view of Guthrie and Waldeck:

Inclusiveness in education is a rights-based approach to education, i.e. the right of a student to have equal access to education. Its proponents argue that inclusion is concerned with the protection of human rights for all students. Inclusion represents a philosophical shift from related practices such as 'mainstreaming' and 'integration' where the focus is on placing students with disabilities in mainstream settings with the aspiration that all students would benefit from the experience. Inclusion places a focus on the quality of the participation of the student with disabilities and involves welcoming students with disabilities as full members of the group and values that student for their contribution. In the context of disability discrimination, inclusiveness embraces the notion that separation of students by reason of differences arising out of their disability is detrimental not only to the student with a disability but also to all other participants in the education institution as well.⁶

The inclusion model or movement requires that a child with a disability be placed in the same education environment he or she would otherwise have been placed in if it were not for the disability. Although inclusive education has gained wide acceptance in Botswana, especially in academic circles, the media and within government through texts of its policies, there has not been any critical engagement with its meaning, application and relevance within the context of Botswana.⁷ It has been said that there is acute scarcity of empirical literature in the area and most of the published works are anecdotal and reflect no more than personal opinions of authors.⁸ In other words, the available literature in the country on the subject is in the realm of *abstractum* and theory and does not speak to the lived realities of inclusive education. The Ministry of Education, Skills and Development in the country has conceded the lack of proper understanding of the concept of inclusive education by stakeholders when it stated,

most stakeholders do not understand the benefits that will accrue from a comprehensive implementation of the Special Education programmes to both special needs learners and the mainstream learners. It is important that all stakeholders should be sensitised to these benefits as well as the need to support these programmes.⁹

5 D Staub & CA Peck 'What are the outcomes for nondisabled students?' (1995) 52 *Educational Leadership* 36.

6 R Guthrie & E Waldeck 'Disability standards and inclusiveness in education: A review of the Australian landscape' (2008) 9 *International Journal of Discrimination and the Law* 133 141.

7 S Mukhopadhyay 'Factors influencing the practice of inclusive education in Botswana primary schools' unpublished PhD thesis, University of Botswana, 2009 97.

8 As above.

9 Division of Special Education Task Force (2001) 9.

1.2 Inclusion versus integration

For clarity in understanding and conceptualisation purposes, it is apposite to distinguish 'inclusion' from 'integration' from the outset. This distinction is not pedantic but bears practical implications. The concept of integration was introduced into the disability discourse after the Second World War, in acknowledgement of increasing awareness of the potentialities and capabilities of persons with disabilities.¹⁰ Integration simply means introducing learners with disabilities into a regular learning environment without modifying and adapting the curricula to any great extent to suit their special needs.¹¹ The learner is usually given some additional support to help him or her to do classroom work. However, the intention is to make the learner fit the programme or curriculum rather than to make the programme or curriculum fit the learner.¹² Proponents of the idea of integration point out that it ensures egalitarianism and that it helps in harnessing the untapped potential of persons with disabilities.¹³ Relatedly, its adherents also place premium on financial and opportunity costs expended in specialised schools supporting learners who could be self-sufficient and productive.¹⁴ On the other hand, inclusion is a more radical model. It requires the transformation and adaptation of the school environment curriculum, teaching and learning methods, organisation, and prudent management of resources to ensure that all learners are enabled to optimally participate in mainstream education regardless of their disability.¹⁵

2 The merits of inclusive education

Inclusive education calls for the development of a flexible system that entails a wide range of learning environments and different kinds of support structures so that learners can learn effectively according to their intellectual capacities, skills, talents and interests. It is designed to be profitable or useful to disadvantaged and vulnerable learners through finding ways of lessening the hurdles which exclude or hinder them from accessing education or achieving their educational potential. In the words of Banks, inclusive education could help with reducing prejudice in the teaching-learning process thus ultimately helping learners to develop

10 See para 4, UN General Assembly Resolution A/RES/48/96 (4 March 1994).

11 S Chhabra et al 'Inclusive education in Botswana: The perceptions of school teachers' (2010) 20 *Journal of Disability Policy Studies* 219.

12 As above.

13 D Hodgson 'The educational rights of persons with disabilities: International human rights law and Australian law perspectives' (2012) 12 *International Journal of Discrimination and the Law* 183 198.

14 D Neal 'The right to education: The case of special education' (1982) 54 *Australian Quarterly* 147 150.

15 As above.

positive democratic attitudes and actions.¹⁶ Overall, the concept of inclusive education is flexible in nature and character and thus permits teachers to pay attention to how each learner can learn at an optimal level and unleash his or her potential. The concept also adopts a multi-vector approach in implementing the provision of inclusive education, recognising that although the government must be the predominant role-player, as a duty-bearer in the provision of inclusive education, other relevant stakeholders must be involved in the process to make inclusive education a reality.

To this end, successful implementation of inclusion strategies is dependent to a large extent on the attitudes of teachers and the supporting staff, since they are the ones responsible for the day-to-day implementation of inclusion policies and strategies.¹⁷ Close cooperation and collaboration of special educators and regular teachers is also imperative if optimal inclusion is to be realised.¹⁸ The Salamanca Statement on Principles, Policy and Practice in Special Needs Education¹⁹ describes inclusion as 'the most effective means of combating discriminatory attitude, of creating welcoming communities, building an inclusive society and achieving education for all ...'²⁰ It further states that education for children with disabilities must be extended to them within the context of a regular education setting.²¹ Beiter has interpreted this to mean that there should not be two parallel education systems: one for the children with disabilities and one for the non-disabled, but rather that education for children with disabilities must be provided in integrated and mainstreamed education set-ups, of course with necessary modifications to suit learners with disabilities.²² Thus, the utilitarian value of the inclusion model lies in its emphasis on restructuring, transforming and adapting school programmes, curricula, revising assessment procedures, applying appropriate technology and adopting fitting practices 'in order to accommodate a much wider range of ability' and aid learning, communication and mobility.²³

3 The de-merits of inclusive education

Despite the generally acknowledged utility of the inclusive education approach, there are commentators who argue that it does more harm than good. They argue that it is a lofty policy driven by unrealistic expectations

16 JA Banks *An introduction to multicultural education* (2008) 34.

17 Guthrie & Waldeck (n 6 above) 142.

18 Hodgson (n 13 above) 200.

19 Adopted by the World Conference on Special Needs Education: Access and Quality (Salamanca, Spain, 7-10 June 1994), available at unesdoc.unesco.org/images/0009/000984/098427eo.pdf (accessed 21 April 2013).

20 Salamanca Statement (n 19 above) principle 2.

21 As above.

22 KD Beiter *The protection of the right to education by international law* (2006) 96.

23 P Westwood *Commonsense methods for children with special educational needs* (2007) 187.

in which schools or policy-makers force learners into the regular mode of education.²⁴ It has also been contended that where inclusive education is emphasised, the socialisation part of education takes precedence over and to the detriment of academic education.²⁵ For opponents of inclusive education, socialisation cannot be the main goal of learning at the expense of academic education.²⁶ They argue that many inclusive education environments are cosmetic and without tangible benefits because these are based merely on the sitting of learners with disabilities in a regular class and feign normalisation without considering whether such learners participate and learn or not.²⁷ It has also been argued that inclusive education deprives learners with disabilities of a special classroom environment that is properly adapted to accommodate their specific needs.²⁸ It has been contended further that learners with disabilities always leave the regular education setting with low self-esteem or self-concept.²⁹ Some learners with disabilities have 'reported that life in the mainstream was characterized by fear, frustration, ridicule and isolation'.³⁰ It has also been said that inclusion may also lead to learners with disabilities being harmed or teased by regular education learners and their safety being endangered.³¹ Further, inclusion is said to have disadvantages even for regular class learners because an inclusive class is far more active than a regular class and this may have a disruptive effect on the learning progress of regular class learners.³²

Research has also shown that teachers consider inclusive education to be difficult and stressful to implement.³³ Studies conducted in Botswana have confirmed this view. For instance, in 2006, Brandon surveyed the attitudes of Botswana teachers of family and consumer sciences towards inclusive education and found that they were negative.³⁴ Another study conducted by Chhabra et al has shown that 'teachers in Botswana schools did not have favourable or supportive attitudes towards inclusion'.³⁵ This latter study also established that teachers in Botswana are reluctant to include learners who need specialised and individualised programs or modified programs.³⁶ Some of the identified problems associated with

24 SL Berg 'The advantages and disadvantages of the inclusion of students with disabilities into regular education classrooms' MSc, unpublished thesis, University of Wisconsin-stout, 2005 32.

25 As above.

26 As above.

27 As above.

28 As above.

29 As above.

30 SJ Salend *Creating inclusive classrooms: Effective and reflective practices* (2001) 27.

31 As above.

32 As above.

33 M Whiting & J Young *Integration: Social justice for teachers: Paper presented at the Australian Association for Research in Education Conference*, quoted in Chhabra et al (n 11 above) 221.

34 DP Brandon 'Botswana's family and consumer science teachers' attitude towards the inclusion of students with physical disabilities' (2006) 24 *Journal of Family and Consumer Science Education* 19.

35 Chhabra et al (n 11 above) 226.

36 Chhabra et al (n 11 above) 225.

inclusive education include overcrowded classrooms, inflexible timetables, unavailability of relevant teaching materials and inadequate specialist support.³⁷ In this regard, the study by Chhabra et al on the implementation of special education in Botswana indicates that teachers are concerned about the inadequate equipment and the non-availability of paraprofessionals in schools implementing inclusive education.³⁸ It may be that the resistance of teachers in the implementation of inclusive education also emanates from lack of support from the government. Despite the above criticisms, the mainstreaming of education opportunities through inclusive education has been said to possess both symbolic and practical significances: its symbolic significance is that all children or people are born with equal dignity and must not be unjustifiably differentiated. On the practical side, the mainstreaming underscores and guarantees equal rights and opportunities between children with disabilities and those that are non-disabled.³⁹

4 Understanding the concept of disability in a human rights context

The term 'disability' features prominently in this paper and it is important to place it in its proper perspective and context. The Convention on the Rights of Persons with Disabilities (CRPD) states that People with Disabilities (PWDs) include '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 equal basis with others'.⁴⁰ Although this definition concerns itself with the social model to disability, it suffices for purposes of this paper in giving insight in the subject under discussion. However, it is also important to note that the concept of disability has also assumed a human rights dimension. Traditionally, disability was not considered to be a human rights issue.⁴¹ The Human Rights Model only emerged in the 1980s.⁴² In

37 Chhabra et al (n 11 above) 221.

38 As above.

39 J Fortin *Children's rights and the developing law* (2003) 371.

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

41 ML Perlin *International human rights and mental disability law: When the silenced are heard* (2012) 3.

42 Apart from the human rights model to disability there are two other models. (a) The medical model, which postulates that the 'problem' of PWDs is located in their physiological limitations. According to this model, the physiological condition of persons with disabilities itself is seen as a problem of disability. It views PWDs as wards of benevolent guardians because it considers their inability to perform 'properly' in mainstream society as cause for charitable intervention. (b) The Social Model which suggests that disability occurs as a result of interaction between PWDs and the environment, where environmental limitations or barriers such as human prejudice, institutional bottle-necks, amongst others impose restrictions upon persons with disabilities. This model posits that the failure of the environment to adjust to the special needs of PWDs accounts for the 'problem' of disability.

terms of this model, disability is viewed as a human rights issue and that 'problems' linked to any condition of disability are seen as inherent in external factors such as society's stereotypes, prejudices and artless perceptions on disability rather than from the persons with disability.⁴³ Consequently, according to this model, the state has an important duty to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.⁴⁴ At a theoretical level, the human rights approach to disability concerns itself with how society subjugates PWDs and how this marginalisation can be best addressed.⁴⁵ As Quinn and Degener observe:

[T]he human rights perspective means viewing [PWDs] as subjects and not as objects. It entails moving away from viewing [PWDs] as problems toward viewing them as rights holders importantly, it means locating any problems outside the person and especially in the manner by which various economic and social processes accommodate the difference of disability or not as the case may be. The debate about disability rights is therefore connected to a larger debate about the place of difference in society.⁴⁶

In terms of the human rights model, there must be reasonable accommodation for people living with disabilities to avoid social differentiation. A human rights approach to disability 'obligates society to remove the attitudinal and physical barriers to equality and inclusion of PWDs'.⁴⁷ In this way, disability is considered within the context of diversity in terms of which persons with disabilities can establish and pursue their own concept of self-worth and dignified personhood. This idea led to the adoption of numerous instruments aimed at the promotion and protection of rights of PWDs at the UN level. Key amongst these is the CRPD.⁴⁸ Today it is readily accepted that disability is a human rights issue. However, the Bill of Rights of the Constitution of Botswana is silent on the rights of PWDs. This amounts to legislative neglect and partly accounts for the government's tepid attitude towards the protection and promotion of PWDs.

However, it should be noted that on 14 March 1995 Botswana ratified the Convention on the Rights of the Child (CRC)⁴⁹ and incorporated the bulk of its provisions into Botswana law through the Children's Act.⁵⁰ In terms of this treaty, the right to education to children imposes a duty upon

43 H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa* (2008) 31.

44 G Quinn et al *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

45 M Rioux & A Carbert 'Human rights and disability: The international context' (2003) 10 *Journal on Developmental Disabilities* 1.

46 Quinn et al (n 44 above) 10.

47 Perlin (n 41 above) 4.

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

49 General Assembly resolution 44/25 of 20 November 1989, came into force on 2 September 1990. Botswana ratified this convention on 14 March 1995.

50 Act 8 of 2009.

states 'to make primary education compulsory and freely available for all'.⁵¹ The Convention on the Rights of the Child Committee (CRC Committee) has observed that inclusive education should be the model of choice for educating children with disabilities.⁵² The Committee further noted that the extent of inclusion within a given education system will vary, and further that '[a] continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future'.⁵³ Thus, inclusion may extend from placement of all children with disabilities into a regular classroom to placement into a regular classroom 'with varying degrees of inclusion, including a certain portion of special education'.⁵⁴ The Committee has also recognised that the concept of inclusion is broad and goes beyond the fundamental question of how learners with disabilities can be accommodated within a classroom, programs or curricula.

5 Inclusion as a right under international law

As a prefatory note, it is important to note that Botswana is a dualist state. This means that provisions of international instruments do not create justiciable rights in the country unless they are legislatively incorporated into Botswana law. Despite this, Botswana courts cannot ignore relevant provisions of human rights instruments in their adjudicatory processes because these instruments lay down higher normative principles and legal imperatives which the country must incrementally gravitate towards achieving.⁵⁵ The CRPD is the first legally binding international instrument to lucidly, exclusively and comprehensively deal with the rights of persons with disabilities. In terms of article 7 of this instrument, states parties are obliged to take necessary and targeted measures to ensure the full enjoyment of rights and fundamental freedoms by children with disabilities on a comparable basis with children without disabilities. Article 24 is strikingly pertinent; it obliges states parties to establish an inclusive education system at every strata of learning.⁵⁶ It also forbids the exclusion of children with disabilities 'from the general education system on the basis of disability' or deprivation of 'access to an inclusive, quality and free primary education and secondary education on an equal basis with others

51 Article 28 thereof.

52 See General Comment No 9 of the CRC *What works in inclusive education*. Committee para 67, Committee on the Rights of the Child, General Comment No 9 *The rights of children with disabilities* (Forty-third session, 2007), UN Doc CRC/C/GC/9 (2007). Available at <http://www1.umn.edu/humanrts/crc/comment9.html> (accessed 22 April 2013).

53 General Comment no 9 (n 52 above) para 66.

54 Hodgson (n 13 above) 200.

55 For a detailed discussion on the position of international law in Botswana see O Jonas 'Corporal punishment in Botswana schools: A human rights perspective' (2012) 17 *International Journal of Law and Education* 78.

56 See art 24(1).

in the community in which they live'.⁵⁷ States parties to the Convention are also under a duty to ensure that reasonable accommodation is made for individuals with diverse needs, and that children with disabilities receive the necessary support within the regular education system to facilitate their learning.⁵⁸ To implement the provisions of the aforesaid, article 24 of the CRPD, the inclusion of PWDs in the mainstream education system must be done under three different track systems:

- The dual track system which provides for learners with special educational needs in one system and learners without disabilities in another and major system;
- The multi-track system, which caters for the needs of various groups in different, parallel systems;
- The one track system or the inclusive education system, which gathers all learners [those with disabilities and those without] in one system.⁵⁹

The latter track requires the adoption of a Universal Learning Design (ULD) 'characterised by the development of curriculum and the training of teachers to meet the various needs in a classroom'.⁶⁰ This approach seeks to eliminate environmental barriers to education for children with disabilities and ensure that they are fully included in the education system.⁶¹ The ULD offers a menu of differentiated learning activities that accommodate learners with different abilities.⁶² In a study done in 2008 under the auspices of the Curriculum Development Division in the Ministry of Education, it was recommended that Botswana must adopt the ULD approach to address the problems of access to the curriculum by learners with disabilities.⁶³ To date the recommendations of this study have not been implemented in the country.

57 See art 24 (2)(a) & (b).

58 Art 24(c)-(d). See also Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which states in part that:

'States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system. General educational authorities are responsible for the education of persons with disabilities in integrated settings. Education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organization'.

59 See SD Kamga 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) 1 *African Disability Rights Yearbook* 27 30, referencing DR Mitchell 'Introduction' in D Mitchell (ed) *Contextualising inclusive education: Evaluating old and new international perspectives* (2005) 5.

60 As above.

61 As above.

62 As above.

63 See the Draft National Report on the Development of Education 'Inclusive education: The way of the future' (2008) 30.

The CRPD requires states parties to take measures to ensure that

the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.⁶⁴

Against the backdrop of the above, supporters of the dual track and multi-track systems have been arguing that learners with special education needs should be separated from learners that are in mainstream education, especially where mainstream education is not satisfactory for this group of learners.⁶⁵ In the view of proponents of these systems, learners with special education needs belong to a special education set-up that is tailored for their specific needs for their development. In their view such an environment will permit them to learn optimally without being abused or ill-treated by their counterparts who do not suffer disabilities.⁶⁶

Comparative jurisprudence lends credence to this approach and the decision of the Supreme Court of Canada in *Brant Country Board of Education v Eaton* (the *Eaton case*)⁶⁷ is instructive in this regard. In this case, a twelve year old girl with cerebral palsy was unable to communicate through speech, sign language or other alternative communication system. She was also severely visually impaired, mobility impaired and wheel chair-bound. Unfortunately, she was placed in a regular class set-up despite the fact that she was considered to be an 'exceptional pupil' by the Identification, Placement and Review Committee (IPRC). After about three years, the teachers and assistants formed the view that the mainstream education arrangement was not in her best interests and that indeed the education environment might harm her. The IPRC directed that the student be removed from the mainstream set-up and be placed in a special educational unit. The parents appealed this decision through various quasi-judicial and judicial tribunals up to the Supreme Court. Before the Supreme Court, the question was whether or not the decision to remove the child from the mainstream education set-up to an education set-up for children with special education needs violated her right to equality guaranteed under section 15 of the Canadian Charter of Human Rights and Freedoms.

The court ruled that the placement of the child in a setting for learners with special education needs was in the best interests of the child and could not be viewed as discriminatory as it fostered the development of the child. In the opinion of Justice Sopinka, introducing a learner with special educational needs into a mainstream education set-up without regard to

64 Article 24(3)(c).

65 Kamga (n 59 above) 31.

66 As above.

67 [1997] 1 SCR 241.

their capability to cope amounts to forcing 'the individual to sink or swim within the mainstream environment' and this may be detrimental to them.⁶⁸ Whereas the court in this case sanctioned the removal of the pupil from a mainstream setting to a setting for pupils with special needs, it will be incorrect to argue that the court supported the philosophy that learners with disabilities should learn in a separate environment. What appears to have been decisive for the decision of the court in this case were the peculiar circumstances of the case and not the theories behind inclusive schools *vis-à-vis* segregated schools for children with disabilities. In other words, the court assessed the suitability of the education settings in issue and concluded on the basis of evidence placed before it that in that particular case, and that case alone, the interests of the pupil would be best served by removing her from the mainstream education system and placing her in a setting for learners with special education needs. This means that if the mainstream education system makes sufficient accommodation for learners with special needs, then it is wholly appropriate for learners with disabilities to be admitted in the mainstream education system. Thus, the *Eaton* case must be understood within its specific context and setting, regard being had to the facts and evidence presented before the court. It must not be understood as laying a principle of general application that learners with disabilities cannot be accommodated in a regular classroom.⁶⁹

The other case that has been erroneously relied upon in literature as supporting the proposition that children with disabilities must be separated from non-disabled learners in the mainstream education system is that of *O'Donoghue v Minister for Health*.⁷⁰ In this case a pupil had contracted Reyes Syndrome, a serious viral infection, at eight months old, suffering brain damage as a result. He consequently acquired severe mental and physical disabilities. On account of his disabilities, the child was denied a full time admission to state funded pre-school facilities. However, following sporadic training to improve his motor skills, responses, and recognition the child's condition improved to mild disabilities. Following the refusal of school authorities to admit her son in the regular school, the child's mother sued for the admission of her son into a regular primary school. The court awarded her the relief as there was evidence that children suffering from mild or moderate disabilities received full-time education in mainstream schools. The court also stated the following, albeit, *obiter dictum*:

In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for

68 Para 67 of the judgment.

69 See paras 73, 74 and 75 respectively.

70 [1993] IEHC 2; [1996] 2 IR 20 (27 May 1993).

granted, than would be regarded as appropriate for a child suffering from no such handicap.⁷¹

Although the above sentiments may be correct, the overriding consideration in each case is the doctrine of the best interests of the minor child. More narrowly, the inquiry within the context of access to education by learners with special needs is whether or not the mainstream set-up, which is the ideal system, is adequately adjusted to accommodate the needs of learners with disabilities to maximise their academic and social development. In other words, what is required is an all-inclusive assessment of the needs of the learner taken together with the extent of the inclusivity and individualised support of the concerned school. In other words, the procedure is not automatic that a child with a disability is necessarily excluded from a regular classroom. The sentiments expressed here show that inclusive education is distinctly a model of choice. It has been noted that although the multi-track system could be useful in separating learners according to their abilities, the classification 'wastes valuable special education resources in determining which category a child fits into rather than providing the instructional interventions the child requires'.⁷² In this connection, the World Bank has stated that:

Most children with special education needs can be successfully and less expensively accommodated in integrated schools than in segregated institutional settings; and ... the vast majority of children with special education needs can be cost-effectively accommodated in regular primary schools.⁷³

It has been correctly observed that excluding children with disabilities from mainstream education disenfranchises them by placing emphasis or focus on their impairments rather than the environmental constraints such as lack of physical access, adequate equipment and the availability of special educators.⁷⁴ In the *Sofia*⁷⁵ case, the European Court of Human Rights reasoned that if the right to equal education opportunity means anything, it is that children with disabilities must be afforded equal education for all children with reference to their disabilities and that schools must create enabling environments for effective learning by children with disabilities. The court stated that the failure to create an enabling environment for children with disabilities constitutes a violation of the right to equal education opportunity. In *Mental Disability Advocacy Center v Bulgaria*,⁷⁶ the European Committee of Social Rights ruled that Bulgaria violated the right to education of children with intellectual disabilities by excluding them

71 *O'Donoghue* para 25.

72 SJ Peters 'Inclusive education: Achieving education for all by including those with disabilities and special needs' paper prepared for the Disability Group, the World Bank quoted in Kamga (note 59 above) 32.

73 Quoted in Kamga (n 59 above) 33.

74 S Stubbs *Inclusive education: Where there are few resources* (2002) 23.

75 Case No 13789/06, decision of 18 May 2007.

76 Complaint No 41/2007, decision delivered on 3 June 2008.

from the mainstream education system. In the South African case of *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa*⁷⁷ the Western Cape High Court implored the government of South Africa to take concrete and targeted measures to ensure that children with profound mental disabilities access education. For his part, the UN Special Rapporteur for Disability has stated that:

States parties [to the CRPD] must ensure an inclusive education system at all levels and life-long learning. Learners with disabilities therefore have a right not to be excluded from the general education system on the basis of disability and to reasonable accommodation for the individual learner's needs. This not only means that learners have a right to attend mainstream schools and not be relegated to segregated schools, it also means that the special education needs of persons with disabilities must be taken into account in the general education system. This goes beyond grouping all learners together in one classroom to ensuring the provision of effective individualised support that maximises academic and social development.⁷⁸

The Education for All (EFA 2000)⁷⁹ also affirms the idea of providing quality education for all children in an inclusive setting. From the above analysis, it is clear that international law acknowledges and guarantees the right to education for children with disabilities, and to the extent practicable to receive their education within the regular education system. Most importantly, international law requires that children with disabilities must be provided with education on an equal footing with non-disabled children. In this connection, international law requires that necessary assistance be made available to children with disabilities so that they can harness their extraordinary potential to learn and secure better futures for themselves. In a sense, there is absolute need for the rethinking of education set-ups to embrace learners that are disadvantaged by reason of disability. Hence, this necessitates a paradigm shift in the education setting from exclusion to inclusion: and this shift is overdue, hence it must be rapid.

Despite the imperatives of international law in guaranteeing the right to inclusive education, Botswana's attitude to the protection of this right has been tepid. This is demonstrated by the fact that no mention or reference is ever made of the right to inclusive education in the states parties' reports submitted by Botswana to the CRC Committee, the monitoring body for the implementation of CRC provisions.⁸⁰ Botswana

77 2011 (5) SA 87 (WCC).

78 Report of the United Nations High Commissioner for Human Rights on progress in the implementation of the recommendations contained in the study on the human rights of persons with disabilities [A/HRC/4/75], para 36.

79 Education for All is a global movement led by UNESCO aiming to meet the learning needs of all children, youth and adults by 2015.

80 Botswana's initial states parties' report on the implementation of the CRC, which was submitted in 2001, was discussed by the Committee on the Rights of the Child on 16 September 2004. It is lagging behind in relation to the second and third combined CRC reports. These reports were due in 2007 and have not been submitted yet.

is yet to submit the initial and second reports to the African Children's Rights Committee, the monitoring organ of the ACRWC. It is also disappointing that the CRC Committee has not raised the question of the implementation of the right to inclusive education *mero motu* with Botswana in 2004 when the country submitted its first and only report. The failure by Botswana to submit these reports to these treating monitoring bodies deprives it the opportunity to receive feed-back on its efforts geared towards the implementation of children's rights guaranteed under these instruments.⁸¹

6 The right to inclusion in Botswana: Praxis, law and policy analysis

6.1 Truncated background information

According to Dart, in traditional Tswana societies, children from villages were educated by age group under a system called *bogwale* for males and *lokwapa* for females.⁸² He however notes that there are no records that show how children with disabilities were integrated into this form of education system. More significantly, Dart opines that many children with disabilities, who are unable to cope with a modern western education system which is too formal, would probably have coped better with the traditional education system because it was mainly oral and placed emphasis on practical life skills and knowledge.⁸³ Missionaries and colonial authorities discouraged this system of education in favour of the imposed western conception of education. Chiefs also outlawed it as they turned to Christian practices.⁸⁴ According to available records and literature, in Botswana, the provision of education to learners with special needs started about forty years ago.⁸⁵ Missionaries from the Dutch Reformed Church established a school for the blind or the severely visually impaired in Botswana in 1969 and missionaries from the Lutheran Church established a school for the deaf or those with severe hearing problems in the country in 1970.⁸⁶

81 Dinokopila has described Botswana's record in submitting states reports before various treaty monitoring bodies as 'unimpressive' see BR Dinokopila 'Bringing the Paris Principles home: Towards the establishment of a National Human Rights Commission in Botswana' (2012) 13 *University of Botswana Law Journal* 60.

82 Dart (n 2 above) 57.

83 Above.

84 G Mautle 'Formal education among the peoples of Botswana before 1840' (2001) 9 *Mosenodi; Journal of The Botswana Educational Research Association* 25.

85 S Mukhopadhyay et al 'Inclusive education for learners with disabilities in Botswana primary schools' (2012) *Sage Open* 1, available at <http://sgo.sagepub.com/content/2/2/2158244012451584> (accessed 9 May 2014).

86 As above.

In 1977 the government of Botswana adopted its first education policy commonly known as *Education for Kgahisano* which recommended that each Motswana child must enjoy his or her right to education without reference to their disability, race, ethnicity, culture or background.⁸⁷ The policy experienced implementation problems and in 1992 the government set up the Second National Commission on Education to review the country's education system with a view of addressing its shortcomings.⁸⁸ The Commission submitted its report to government in 1993. Against the background of this report, the country's Revised National Policy on Education (RNPE)⁸⁹ was formulated and adopted by the National Assembly as Government Paper 2 of 1994. This policy contains a number of disparate aspects of special education. We will return to this policy shortly for further reflections on it. As part of its efforts to implement inclusive education, in 1984 the Government of Botswana established a Special Education Unit under the Ministry of Education, Skills and Development, now called the Special Education Division, which is tasked with all administrative works relating to learners with disabilities.

It is apposite at this juncture to indicate that Botswana has a population of about two million. The Government of Botswana Central Statistics Office estimates in its *Welfare Core Indicators Survey* that of the two million, about 4,4 per cent aged six and above live with some form of disability which increased with age.⁹⁰ Blindness and inability to use legs account for the greater bulk of disability, constituting 46 percent and 22 percent, respectively.⁹¹ The Survey is however silent on the government's strategies to address disability concerns save to note that 'disability still remains a challenge' in the country.⁹² It should be acknowledged that for inclusive education to be a success, comprehensive legal and policy frameworks must be drawn out and effectively implemented by trained professionals who also have the benefit of adequate resources at their disposal. More importantly, at the risk of repetition, the right to education must be made justiciable.

6.2 The legal framework

The Constitution of Botswana⁹³ does not contain socio-economic rights in its Bill of Rights. It only promises a few civil and political rights. Thus, the right to education, as with all socio-economic rights, is not constitutionally guaranteed in Botswana, let alone the right of children with disabilities to

87 As above.

88 As above.

89 Government Paper 2 of 1994, approved by the National Assembly on 07 March 1994.

90 See the Botswana Welfare Core Indicators Survey (July 2013) 10. Available at http://www.cso.gov.bw/index.php?option=com_releases&id=267 (accessed 4 September 2013).

91 As above.

92 Botswana Welfare Core Indicators Survey (n 90 above) 12.

93 Cap. 01:01, Laws of Botswana.

receive education that meets their needs. Like the Constitution, the Botswana Education Act⁹⁴ is also silent on the right to education.⁹⁵ In contrast, the Constitution of Kenya⁹⁶ affirms the right of all children, without distinction on any grounds such as disability, to free and compulsory basic education.⁹⁷ Further, it clearly recognises the right of persons with disabilities 'to access educational institutions and facilities'.⁹⁸ Despite that the Constitution and the Education Act of Botswana are silent on special needs for learners with disabilities, by adopting the Jomtien Declaration (UNESCO, 1990) above, the Government recognised and affirmed that education is fundamental to all children, and it is a basic human right. To this end, it is imperative that it be made accessible to all children, including those with disabilities.⁹⁹ In addition, in signing the Dakar Framework for Action¹⁰⁰ the government committed itself to achieving education 'for every citizen in every society and ... especially for the most vulnerable and disadvantaged children'.¹⁰¹

Locally, section 18(1) of the Botswana Children's Act states that: '[e]very child has a right to free basic education'. It is submitted that the government is under an obligation to provide such free basic education. Although socio-economic rights are generally non-justiciable in Botswana on account of their exclusion from the Bill of Rights of the Constitution, it is submitted that in Botswana the right to education is justiciable within the strictures of the aforesaid section 18(1) of the Children's Act. The operative part of that provision for purposes of justiciability is the phrase, 'free basic education'. This simply means that the state has a duty to provide this basic education to children and provide it for free. In other words, the state is prohibited from levying parents for academic costs of their children. Section 18(2) thereof bolsters the sacrosanctity of the child's right to basic education by making it a punishable offence for any parent, other relative or guardian to deny the child to go to school without justifiable excuse. Commenting on materially similar provisions of the Nigerian Child's Rights Act of 2003, Akinbola correctly asserted that:

[T]he right to education was raised from a non-justiciable entitlement to a new legal imperative. The Child's Rights Act [has] brought into Nigerian socioeconomic rights jurisprudence a new dispensation which equates the right to education in the country with international standards. This recognition thus paved the way for the recognition of children (both able and

94 Cap. 58:01, Laws of Botswana.

95 Contrast with section 5(1) of the South African Schools Act 84 of 1996, which provides in this connection that 'a public school *must* admit learners and serve their educational requirements without unfairly discriminating in any way' (my emphasis).

96 Kenya's new Constitution was adopted on 4 August and promulgated on 27 August 2010.

97 See art 53 thereof read in tandem with art 27.

98 Art 54 thereof.

99 See Dart (n 2 above) 58.

100 Adopted in Dakar Senegal in 2000.

101 See clause 7(iii) thereof.

disabled), as bearers of a right which may be enforced against parents, other individuals ...¹⁰²

The above sentiments apply with equal force and measure to Botswana's situation. In terms of section 52 of the Botswana Children's Act, the parent, care-giver, relative or guardian of a child with disability is required to extend to such a child 'special assistance or care' to ensure his or her dignity,¹⁰³ self-esteem, self-reliance,¹⁰⁴ and to 'enable [him or her] to actively participate in social, cultural, religious and educational activities subject to the child's mental and physical capabilities'.¹⁰⁵ At a comparative level, the Kenyan equivalent statute guarantees the right to inclusive education expressly. In terms of section 5 of the Kenyan Children's Act,¹⁰⁶ no child shall be discriminated on the basis of his or her disability. The Act also recognises the right of all children, including those with disabilities to free, compulsory and basic education in accord with article 28 of the CRC.¹⁰⁷

As indicated above, in the Botswana scheme of laws, only section 18(1) of the Children's Act touches on children's right to education. The laws of Botswana are generally silent on the needs and challenges faced by children with disabilities in the school environment. This constitutes a legislative anomaly when regard is being had to the developing trends at the international scene which are geared at protecting the rights of children with disabilities especially in relation to education. Despite the legislative lacunae in Botswana in this regard, a stop-gap measure has been adopted by way of policies.

6.3 The policy framework

As stated above, Botswana has adopted a number of policies that concern some aspects of the special needs of learners with disabilities. These include: the RNPE, National Development Plan 9 (NDP 9),¹⁰⁸ the Inclusive Education Policy (IEP), the Early Childhood Care and Education Policy (the ECCEP)¹⁰⁹ and a few others. Chief amongst these is the RNPE. This policy recommends to the government to ensure that all learners in the country including those with special needs have equal education opportunities.¹¹⁰ More relevantly, it recommends to the government to prepare children with special educational needs for

102 BR Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) 10 *African Human Rights Law Journal* 47.

103 Sec 52(a).

104 Sec 52(b).

105 Sec 52(c).

106 8 of 2001.

107 Sec 7(2) thereof.

108 Adopted in 2003.

109 Prepared by the Ministry of Education in 2001.

110 Recommendation 88(a).

integration as far as possible with their peers in ordinary schools.¹¹¹ The Policy also recommends that the government should ensure ‘a comprehensive assessment that is based on the child’s learning needs, and not on group norms, and which is followed by individualised instruction’.¹¹² The policy also urges the government ‘to promote the early identification and intervention which will ensure the maximum success of the rehabilitation process’, and to ‘ensure the support and active participation of the children’s parents and community through an education and information campaign’.¹¹³

In addition, the policy recommends that each school should have a Senior Teacher responsible for the special needs of learners with disabilities. The Senior Teacher is also tasked with the coordination of a school intervention team in cases of learner disability. It is also required that teachers should have elements relating to special needs education as part of their pre-service or in-service training.¹¹⁴ However, the RNPE has been trenchantly criticised for failing to address the question of access to the general curriculum for learners with disabilities.¹¹⁵ It is also criticised for not making the education needs of children with disabilities a priority despite their naturally precarious circumstances.¹¹⁶ In this connection, Mthombeni and Fidzani have observed that the policy does not seek to address the problem of inaccessibility of school buildings to learners with disabilities.¹¹⁷ Moreover, it is silent on strategies that the government seeks to employ in addressing under-representation of learners with disabilities in accessing the general curriculum.¹¹⁸ A number of key objectives relating to special education are also contained in the country’s NDP 9.¹¹⁹ Although NDP 9 basically rehashes what is contained in the RNPE, notably, it shifts the language from *integrated education* in RNPE to *special education* in NDP 9.¹²⁰ The ECCEP also requires that the special needs of learners with disabilities be taken into account in education set-ups. It states that any centre that admits learners with special needs must liaise with the Division of Special Education within the Ministry of Education, Skills and Development for guidance and support. This policy also

111 Recommendation 88(b).

112 Recommendation 88(c).

113 As above.

114 Recommendation 95.

115 E Moswela ‘A critical analysis of pedagogical styles and access to the general curriculum for deaf students’ MA thesis, University of Botswana, 2011 6.

116 As above.

117 F Mthombeni & L Fidzani ‘Inclusive education and accessibility of junior secondary school buildings in Botswana’ in T Maundeni & M Nnyepi (eds) *Thari ya bana: Reflections on children in Botswana 2011* (2011) 37 38.

118 As above.

119 Adopted in 2003.

120 The distinction between these two concepts has been dealt with above.

requires education centres to make provision for learners with disabilities to access school buildings.¹²¹

In September 2011, the Botswana Ministry of Education and Skills Development adopted the IEP which sets Botswana's goal in this regard as achieving: 'an inclusive education system which provides children [and] young people ... with access to relevant and high quality education which enables them to learn effectively, whatever their ... life circumstances, health, disability, stage of development, capacity to learn or socio-economic circumstances'.¹²² Amongst the goals of this Policy is to ensure that teachers are equipped with the necessary skills and resources to enable children of different abilities to learn effectively.¹²³ The Policy also implores all relevant governmental departments and private entities to work in harmony to develop and maintain an inclusive education system in the country.¹²⁴ In achieving this end, the policy states that the government has committed itself to improving schools' access to good quality teaching aides and learning resources appropriate to the specific needs of children with disabilities.¹²⁵ Significantly, the government of Botswana has undertaken to harmonise relevant planning, policy-making, development and delivery of services so that it can deliver an inclusive education service that meets national requirements and is in line with international best practices.¹²⁶ Despite that the IEP has been in existence for four years, little has been done to implement it. Despite the existence of these policies that emphasise the need for inclusive education in the country, the theory of these policies has hardly been met by their practice. Another problem with Botswana's education policies is that they are disparate and disjunctive. What is required is a unitary and compact special education needs scheme found in a single document. This will promote cohesion and easier implementation.

6.4 Reflections on the praxis

According to a report commissioned by the government of Botswana in 2008,¹²⁷ 10-15 per centum of school going age children are not in schools, the majority of whom are children with disabilities, those with learning difficulties, street children and remote area dwellers.¹²⁸ In relation to the latter, for a long time Botswana has been trying to ensure that children in

121 See clause 22.1 of the Policy. The National Policy on Vocational Education and Training (Ministry of Labour and Home Affairs 1997) also calls for particular priority to be afforded to, amongst others, learners with disabilities, and further requires special training programmes to be put in place for the benefit of these learners.

122 IEP, goal 1.

123 IEP, goal 2.

124 IEP, goal 5.

125 Commitment statement 6.

126 Commitment statement 10.

127 Draft National Report on the Development of Education (n 63 above) 30.

128 As above.

remote areas access education. In some cases, the government has taken such children to boarding schools. It has been observed that this arrangement leads to cultural isolation as the children are being uprooted from their culture and communities.¹²⁹ Thus, many school aged children with disabilities and those from remote areas are not receiving education at acceptable levels. One other problem of Botswana's education system is that, in some instances, it is structurally exclusive by nature of its design. For instance, it has been said that the curricular designs at both primary and secondary school levels are favourable to the needs of 'average' learners. Thus, this curricular design has the potential to exclude from the curricula fast and slow learners. But most critically, it has been said that this design has excluded from its scope all learners with special needs. In an empirical study for the adaptation and modification of the basic and senior secondary curriculum for hearing impaired learners, Kisanji has observed that barriers to curricular access in the Botswana education system can be classified into nine broad areas, namely:

[D]elayed language development; quality of teachers; and through them the quality of teaching; the absence of a developed and legitimate sign language for Botswana and manual codes for Setswana to support deaf children learning it; congested curricula in terms of subjects and content; support materials that are unsuitable and unavailable; inappropriate assessment instruments and examinations; shortage of qualified teachers; poor home school links and collaboration; and weak collaboration between and within [the Ministry of Education, Skills and Development] structures.¹³⁰

The study also contains very comprehensive recommendations with specific regard to curriculum development for students with disabilities and their teachers. Unfortunately, effort on the part of the government to implement these recommendations has been half-measured. In another study concerning itself with the situation of learners with mental retardation in public schools in Botswana, Casey concluded that this category of learners is excluded from the curricular on account of one or more of the following reasons: identification of these children is done too late; there is little or no development or modification of the curriculum to suit their needs; some children were placed in the wrong settings; teaching lacked focus and was often poorly planned; there was an absence of individual planning; many children overstay in a primary school setting until adulthood only to later 'graduate' to their homes without progressing to the next tier of education; inadequate suitably qualified teachers; teachers have to cope with poor supply of basic resources by the government; no creative linkages between the schools and the wider community; and there is no quality procedure and effective oversight

¹²⁹ As above.

¹³⁰ J Kisanji 'Situational analysis for the adaptation and modification of the basic and senior secondary school curriculum Report' (2003) 17.

structures for implementation of special education strategies.¹³¹ The situation for learners with disabilities in vocational schools is no different, Dart has observed that despite that at policy level, the government expresses commitment on its part to facilitate greater access to education and training opportunities for learners with disabilities, very few people actually enjoy this opportunity. The author observed that this was due to, inter alia: 'lack of access to school, or lack of access to the curriculum and qualifications if at school, few training places (even for the general population), poor training in the existing rehabilitation training centers, and underfunded NGO's providing training for this group of students'.¹³²

Unsurprisingly, the findings and recommendations in the studies referenced are also reflected in the earlier seminal work of Procek et al on *Access to vocational educational training for students with disabilities* written in 1994.¹³³ This study is extensive in terms of depth and analytical detail and covers many aspects of special education than its title suggests. Although it was written about two decades ago, it is still as relevant today as it was then, both in terms of analysis and recommendations, as the majority of the problems it identified have not been addressed to this day. According to a study undertaken by Pilime on integration and inclusion in Junior Secondary Schools in Botswana, many schools in the country 'do not have a clear policy on integration and special education needs. Provision is limited ... and given the range of responses on questions pertaining to curriculum it indicates that a further investigation is needed'.¹³⁴ Thus, most learners cannot learn or progress through a curricula that is ill-suited to them. To address this problem, the Curriculum Development Division in the Ministry of Education, Skills and Development intends to adopt the ULD method which offers a menu of differentiated learning activities that accommodate learners of different abilities.¹³⁵ However, as indicated above, this approach is yet to be implemented in the country.

The design of the curricula is gradually being made spiral to allow for constant revision and gradual development of concepts to cater for learners with disabilities. This approach is also suitable for multi-standard classes in remote and mobile communities on account of its ease of variability and re-arrangement of content. Further, in Botswana instructional materials are largely constructed for the average learner. Their design is made to fit the cognitive grade levels to be delivered by the teacher to the learner.¹³⁶ This was found to be often exclusive of learners who fall outside the

131 E Casey 'A study on access to vocational education and training for students with severe disabilities in Botswana' (2008) 36.

132 Dart (n 2 above) 16.

133 E Procek et al 'Study on access to vocational education and training for students with disabilities' (1994) 37.

134 S Pilime 'Integration or inclusion:; The case study of community junior secondary schools in Botswana' unpublished Masters thesis, University of Leeds, 2003 67.

135 As above.

136 Pilime (n 134 above) 37.

designated parameters of an average learner. To address this problem, the Ministry of Education Skills and Development has recommended books that are strong in learner material interaction and high syllabus coverage.¹³⁷ To that end, the Ministry also encourages competition amongst publishers so as to have a wide constellation of materials for selection for use in the syllabi. The Ministry of Education sometimes provides materials to schools that have children with special needs. The Ministry has also collaborated with the Central Resource Centre for the Special Education in the development of training equipment for special needs. The training equipment developed thus far includes: balance training apparatuses; shoe templates-practice lacing; wooden mountains/stairs-climbing exercise and training; different circles/loops movement and sewing pads for sewing, amongst others.¹³⁸ Schools with visually impaired students are supplied with items such as the styluses, reading stands or boxes and brail lent boxes which they use for teaching and learning. The government also supplies assistive devices to foster access to the school curriculum. However, Hopkins has noted that despite government efforts in this regard, its budgetary allocation for delivery of special education in the country is too ever-tightening.¹³⁹ This may create an unfortunate impression that educational needs of children with disabilities are not a priority for the country. Given that special needs education in the country is still at its rudimentary stages, the government must increase, rather than reduce spending in this area so that it develops to acceptable levels.

Another factor which tends to make the curriculum exclusive is the question of subject packaging. The subjects, especially in primary schools, tend to be inclined towards 'academic subjects'.¹⁴⁰ This manner of packaging of subjects allows for lesser opportunity for learners that are academically talented to excel. However, since 2002 the government of Botswana has endeavoured to review syllabi for primary schools by introducing practical oriented subjects in the form of Creative and Performing Arts (CAPA).¹⁴¹ This is meant to foster learners who are not academically talented to excel. At junior and senior secondary school levels, the curriculum has been made flexible by allowing a broad choice of subjects, which include practical oriented courses to enhance excellence by students who are academically gifted. There has also been a problem of access to school facilities by learners with disabilities in the country. Failure to adapt and modify school buildings has excluded many children with disabilities from the mainstream school system. The majority of the schools in the country were not built with children with disabilities in

137 As above.

138 As above.

139 A Hopkins 'Special education in Botswana: A comparative critique', paper presented at the 'Special education consultative stakeholders' seminar' relied upon by Dart (n 2 above) 62.

140 Hopkins (n 139 above) 34.

141 As above.

mind. Thus, this group of children find it difficult to access them. It is thus imperative to modify some existing school buildings by installing ramps in order to facilitate access for learners having disabilities. It is also imperative that the government must modify standard of construction of all educations set-ups to make them easily accessible to learners with disabilities.

A phenomenological research conducted by Abosi et al in 2012 focusing on the experiences of teachers in implementing inclusive education shows that many of the problems besetting the implementation of special education discussed above have not been resolved.¹⁴² For instance, the authors indicate that lack of 'trained special educators' is a 'pervasive barrier' that continues to undermine efforts to include learners with disabilities in regular school classrooms in Botswana.¹⁴³ They also echo the sentiments expressed by Hopkins that lack of funding has also undercut efforts aimed at inclusion.¹⁴⁴ Some of the barriers identified by the study are: lack of parental involvement; inordinately large classes and absence of support mechanisms for implementation. In relation to the latter, the Division of Special Education of the Ministry of Education, Skills and Development is charged with supporting the implementation of inclusive education in schools. However, it must be noted that the Ministry has not satisfactorily supported teachers. It has not provided schools with necessary and appropriate instructional resource materials such as books, infrastructure, computers, television sets, amongst others. Further, there have been no workshops or other platforms for exchange of ideas and experiences by teachers. This is discrepant with the RNPE imperative that calls for regular in-service training for practicing teachers.

Further, none of the schools covered by the study had inclusive education as part of their development plans. In fact, what the authors observed in relation to special education were attempts to convene workshops to share ideas, knowledge and experiences about the implementation of special education. However, these attempts were frustrated by a lack of funding and a shortage of resource personnel to mount workshops. The authors also concluded that there was inadequate infrastructure and resources to implement inclusive education. In particular they noted that there is acute shortage of classrooms to cater for the increasing number of learners with disabilities. They noted that in one school, students with impaired hearing were attending outdoor classes next to a noisy, heavily trafficked area. The authors also observed that

142 Mukhopadhyay et al (n 85 above).

143 This point has also been made by Mukhopadhyay, as early as 2013, who concludes in his situational study about the implementation of special education in Botswana that '[t]hroughout the interviews, the teachers' lack of knowledge and skills appeared to be the dominant theme', see S Mukhopadhyay 'Voices of experience: Botswana primary school teachers on inclusive education' (2013) 5 *European Journal of Educational Studies* 73-77.

144 As above.

although some buildings were structurally modified with ramps, these ramps were too steep and not user-friendly. The study also found that necessary facilities like toilets were inaccessible.¹⁴⁵ The authors described the inclusive education situation in the country as 'appalling'. For successful implementation of inclusive education to occur it is necessary that there should be administrative support from the government and other stakeholders. In addition, there must be adequate materials and personnel resources.

7 General observations

Despite the fact that the government has shown concern to the plight of learners with disabilities in Botswana, at least at policy level, it has not done enough to address their problems. In other words, there is a gap between recommended practice and the reality of implementation of inclusive education on the ground.¹⁴⁶ As shown above, children with disabilities are still excluded from accessing education in Botswana. These are children who are missing out on the opportunity to learn, be better and self-supporting citizens who would not dwell on government hand-outs for survival. In explaining the value of education, Addison trenchantly observes that:

Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home [it] a friend, abroad an introduction, in solitude a solace and in society an ornament. It chastens vice, it guides virtues, [and] it gives at once, grace and government to genius. Without it, what is man? A splendid slave, reasoning savage.¹⁴⁷

In this connection, former South African President Nelson Mandela opined that 'education is the most important weapon which [one] can use to change the world'.¹⁴⁸ Education gives more than just a qualification. Education is as empowering as it is a fulfilling right.¹⁴⁹ An enjoyment of other rights such as the right to information, the right to vote, the right to work, and at times the right to contest for a public office depend on it.¹⁵⁰ It also engenders respect for the dignity and equality of persons. Children with disability, whose rights to dignity and equality are under constant assault, can use education as a shield for protection against such abuses.

145 As above.

146 As above.

147 J Addison, as quoted by Akinbola (n 102 above) 19.

148 See speech delivered by South African former President Nelson at the occasion of the launch of Mindset Network at the University of Witwatersrand, Johannesburg, South Africa on 16 July 2003. The speech is available at http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS909&txtstr=lighting%20your (accessed 25 April 2013).

149 B Bekink & M Bekink 'Children with disabilities and the right to education: A call for action' (2005) 16 *Stellenbosch Law Review* 125.

150 Akinbola (n 102 above) 93.

Education also enables an individual to make critical assessments about life and make rational choices in relation thereto. It has been opined that the provision of education is one of the singularly important functions of latter-day governments.¹⁵¹ Education nurtures a being so that he can grow intellectually and contribute back to the society which helped him or her grow. It is an unqualified and composite right demanding prioritisation for realising, especially for children with disabilities.¹⁵² Weighing in, Professor Devenish states that:

Education is of seminal importance as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear. It gives to them dignity and self-confidence and is a basic right, on which the materialisation of many other rights depends.¹⁵³

The state of Botswana's education system fails to take into account the pluralistic nature of its society especially the fact that there are people who cannot naturally fit into the so-called normal school system and that there are those whose engagement in education needs special dispensations because of the nature of their physical emotional and intellectual being. Excluding children with disabilities from the mainstream education system blots Botswana's claim that it is a shining example of democracy in Africa and the world. The history and experience of democracy is indeed that of mounting inclusion. In this connection, the Committee on the Rights of the Child has opined that, 'inclusion of the child with disability in the groups of children of the classroom can show the child that he or she has a recognized identity and belongs to the community of learners, peers, and citizens'.¹⁵⁴ Furthermore, the Committee notes that, 'it is important to understand that inclusion should not be understood nor practiced as simply integrating children with disabilities into the regular system regardless of their challenges and needs'.¹⁵⁵ Beyond integration, there must be accommodation of the needs of these children. As pointed out above, the Botswana education system makes very minimal provision for children with disabilities. This is mainly on account of the fact that there is no comprehensive special education curriculum in place in regular schools.

As a response to the unavailability of measures to cater for learners with disabilities, parents with long purses have resorted to paying fees to NGOs that provide education for children with disabilities. Naturally, this means that the future of similarly circumstanced children born to poor parents is bleak as these children will go without education for the reason

151 *Brown v Board of Education of Topeka* 347 US 438 (1954).

152 RJR Levesque 'Geraldine van Bueren: The international law on the rights of the child' (1995) 19 *Fordham International Law Journal* 832.

153 GE Devenish 'Aspects of the right to education in the Constitution' (1998) 2 *De Jure* 224.

154 General Comment No 9 (n 52 above) para 64.

155 As above.

that their parents are unable to meet their education costs. However, it must be noted that in recent years, the government has undertaken to educate children with special education needs by paying school fees for them to NGOs. The government's program in this regard is shoddily coordinated and not sufficiently broad-based to include children staying in the remotest areas of the country, and accordingly its results are very minimal. However, and more significantly, this program undermines the idea of inclusive education because it perpetuates and cements exclusion by encouraging a parallel education system for children with disabilities. In this regard, Hopkin has argued that the operational practices of the government of Botswana effect exclusion.¹⁵⁶

To this end, it can be argued that Botswana's operational approaches undermine one of the pillars of the country's national vision,¹⁵⁷ namely that Botswana must be 'an educated and informed nation' by 2016. To this end, all hurdles that bear the potential to frustrate the objectives of the national vision must be removed. It is submitted that the concept of inclusive education is the most effective strategy for the attainment of education for all citizens. The absence of a comprehensively arranged inclusive education system in Botswana undermines the attainment of this ideal. This means that the country is losing the potential of some of its intellectually talented citizens who are excluded from receiving education solely on ground of disability. According to a study commissioned by McBride in 2010, of the 100 children who reach school age, about 86 start school and 69 complete their primary education.¹⁵⁸ This report approximates that the country is losing about a quarter of its future productive citizens.¹⁵⁹ Numerous learners who attend school are not learning and those who learn are not learning optimally as they would have otherwise done in a more flexible system that accommodates children with disabilities.

8 Conclusion

It is clear that over the past two decades the paradigm of disability has shifted from being a medical issue to being a human rights question. The re-conceptualisation of disability as a human rights issue places the principles of inherent human dignity, non-discrimination and equality at the centre of any operational approach to the needs of persons with a disability. Inclusive education is a human rights-oriented strategy intended to integrate children with disabilities into the education mainstream and by

156 AG Hopkin 'Special Education in Botswana: Social inclusion or exclusion?' (2004) 18 *Botswana Journal of African Studies* 89.

157 See Botswana National Vision, Presidential Task Force (1997) 5.

158 R McBride 'Education and training policy support programme: Inclusive education policy in Botswana' Draft Report, unpublished manuscript submitted to Ministry of Education and Skills Development (2010).

159 As above.

extension into society.¹⁶⁰ Inclusive education is about acknowledging and respecting differences in abilities and creating an enabling environment to enable all children without references to their impairments. This education approach also enables learners with disabilities to establish and pursue their own concept of self-worth and respectable personhood to realise their academic and social welfare. To facilitate effective learning in relation to learners with disabilities, serious adjustments must be made to the curricula. In addition, learning methods and practices must be adjusted to suit their needs. In this regard, the Committee on Socio-Economic Rights has noted that:

Modification in training programmes for teachers and other personnel involved in the educational system must be achieved in order to fully implement the philosophy of inclusive education.¹⁶¹

As demonstrated above, Botswana's education laws are silent on the right to inclusive education on the part of children with disabilities despite the fact that the discourse of rights of children with disabilities is receiving exponential focus on the international plane. The situation in Botswana is inconsistent with international law which requires that national legislation, administrative rules and procedures, and practices be in conformity with the imperatives of international law.¹⁶² Rather than committing to legally binding obligations in an effort to protect and promote rights of PWDs, Botswana has elected to come-up with disparate policies dealing with disability rights thus creating a false impression of commitment to protect rights of persons with disabilities as policies by nature not binding. The fact that there is no legislation specifically dealing with rights of PWDs in Botswana is at best a case of legislative misnomer and at worst that of legislative neglect.

The absence of a tailored piece of legislation that specifically addresses the educational needs of children with disabilities in the country sends a sullen message that human rights of children with disabilities do not matter. More critically, the absence of a comprehensive legal protection system for children with disabilities in general and those with special education needs in particular has worked to undermine the potential of children with disabilities to harness their education potentials and attain a future they desire for themselves. Legalisation has been considered to be one way of giving substance to a policy objective.¹⁶³ As pointed out above, what is in place in Botswana as a protection measure is a series of

160 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 12 *South African Public Law* 471.

161 See General Comment No 9 (n 52 above) para 64.

162 General Comment No 1 'The Aims of Education' 2001/04/17 CRC/GC/2001/1 (2001), para 10. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument) (accessed 23 April 2013).

163 D Neal & D I Kirp 'The allure of legalization reconsidered: The case of special education' (1985) 48 *Law and Contemporary Problems* 63 65.

incoherent policies without a legal imperative, which officials can ignore without consequences of legal sanctions. Besides, the implementation of these policies remains woefully inadequate.¹⁶⁴ A curriculum for learners with disabilities, especially those with severe and profound intellectual disabilities is yet to be formulated. Classrooms with the necessary support system are yet to be put in place. Education policymakers must at all times bear in mind the following incontrovertible truth to guide their education planning and policy making:

The increasing challenge to schools when they want to make a difference and they want to be fit for the future, is to examine what they are offering their learners, how it is offered and whether it meets the needs of the learners and the public.¹⁶⁵

To this end, it is extremely important that the government of Botswana must join the international community in efforts to make inclusive education not only real but an attainable priority rather than a policy flourish. A starting point in this regard would be the enactment of laws that guarantee and facilitate the rights of learners with disabilities to inclusive education. Another critical point to note is that inclusive education is expensive. This means that the government will have to increase its budgetary allocation to the Ministry of Education and Skills Development to enable it to operationalise inclusive education facilities. Like all tenets of social justice, the ideal of inclusive education is aspirational. Its attainment would require that concrete, progressive and targeted measures towards its attainment be undertaken. It is submitted that the human rights model to disability, that has inclusive education as its concomitant feature, provides an appropriate framework for the government of Botswana to respond to the challenges and needs of learners with disabilities in the country. In this way, the dignity and self-concept of PWDs will be given practical meaning.

164 Moswela (n 115 above) 5.

165 T Charlton & K David 'Ensuring schools are fit for the future' in T Charlton & K David (eds) *Managing misbehaviour in schools* (1993) 3.

CHAPTER 2

THE BASIC EDUCATION ACT OF 2013: WHY IT IS ONE STEP FORWARD AND TWO STEPS BACK FOR CHILDREN WITH DISABILITIES IN KENYA

William Aseka*
Arlene S Kanter**

Summary

The Basic Education Act 14 of 2013 ensures the right of all children with disabilities to free and compulsory education for the first time in Kenya. However, the Act continues to perpetuate discrimination against Kenyan children with disabilities. First, the law fails to provide reasonable accommodations in education, which amounts to disability discrimination. Second, the law fails to ensure an inclusive education system as required by article 24 of the CRPD. While there has been some debate as to whether article 24 bans all specials schools, the Basic Education Act creates a system in which all children with disabilities are required to attend separate schools, solely based on their disability. Although an inclusive education system may not be possible to achieve in Kenya overnight, the law does not do enough to promote equal educational opportunities for children with disabilities as required by the CRPD. At the very least, children with disabilities should be guaranteed the right to an education in the least restrictive environment, which, we argue, is possible to achieve immediately. The right to education in the least restrictive setting ensures that children with disabilities are provided the opportunity to learn with

* William Aseka received his LLM, with a concentration in International and Comparative Disability Law, at Syracuse University College of Law. He is a graduate of the Catholic University of Eastern Africa in Kenya. He wishes to thank Open Society Foundation for supporting his LLM studies at Syracuse University College of Law. He also thanks Prof Arlene Kanter for her mentorship. Research for this article was supported in part by the Disability Rights Scholarship Program, which is funded and administered by the Open Society Institute (OSI). The opinions expressed herein are the author's own and do not necessarily express the views of OSI.

** Professor Arlene S Kanter is the Bond, Schoeneck & King Distinguished Professor of Law and the Meredith Professor of Teaching Excellence. She founded and directs the College of Law's Disability Law and Policy Program, coordinates the LLM Program in International and Comparative Disability Law, and co-directs the Syracuse University Center on Human Policy, Law, and Disability Studies. She worked with the UN Ad Hoc Committee on drafting the CRPD, and has worked with many governments and organizations on implementing the CRPD. Her upcoming book, *The development of disability rights under international law: From charity to human rights* (Routledge 2014) traces the history of the CPRD and its potential impact.

their non-disabled peers. However, enforcing the right to education in the least restrictive environment should not be the final goal; it is only a means that will lead towards full inclusion for all children with disabilities in Kenya, as mandated by the CRPD.

1 Introduction

Children with disabilities have been subjected to discrimination in education for the longest time in Kenya. According to the Kenya National Survey for Persons with Disabilities, about 67 per cent of persons with disabilities have some primary education.¹ Of those, only nine per cent attended public schools with non-disabled children.² Thus in Kenya today, many children with disabilities are not allowed to attend school at all, and those who do attend school are not allowed to attend school with non-disabled children. Instead, they have been forced to attend special schools designed specifically for their specific type of disability. These special schools have developed based on the assumption that students without disabilities would not want to attend school with children with disabilities and vice versa. As a result, children with disabilities have been denied their basic right to education on an equal basis with their non-disabled peers.

In August 2010, Kenya adopted a new Constitution. This Constitution expressly prohibits discrimination against children and adults with disabilities in education for the first time in Kenya's history.³ Article 54 of the Constitution specifically guarantees the right of people with disabilities to be treated with dignity and respect, and to have 'access to educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person'.⁴ Further, article 53(b) guarantees every child in Kenya the right to 'free and compulsory basic education'.

It is against the background of the new Constitution that the government of Kenya passed the Basic Education Act 14 of 2013 (the Act). The purpose of the Act is to implement article 53(b) of the Constitution by ensuring a free and compulsory education for all children in Kenya. Not only does the Act recognise the importance of the right to a free basic education for all children with disabilities, but it specifically prohibits

1 Kenya National Survey for Person with Disabilities Report (2008) 15.

2 As above.

3 Art 27(4) of Constitution of Kenya provides: 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, *disability*, religion, conscience, belief, culture, dress, language or birth,' (emphasis added).

4 See generally art 54 of Constitution which guarantees the right to access educational institutions, the right to be treated with dignity and to use sign language, Braille etc.

schools from denying admission to students with disabilities;⁵ on the other hand, the Act authorises the creation of a special public education system for students with disabilities.⁶

In 2007, Kenya signed the UN Convention on the Rights of Persons with Disabilities (CRPD), and ratified it in 2008. The purpose of the CRPD is to protect and ensure equal enjoyment of human rights for children and adults with disabilities.⁷ According to the CRPD, state parties are required to protect the best interests of children and to ensure the realisation of their rights under the Convention.⁸ Article 24 of the CRPD specifically guarantees the right to education for all children and adults with disabilities as well as an obligation on state parties to provide an 'inclusive education system'.⁹

The Act may be commended for establishing, for the first time in Kenya, the right of all children, with and without disabilities, to education. However, it falls short of complying with article 24 of the CRPD. The Act legislates the status quo in education by segregating children with disabilities in so-called 'special schools'.¹⁰ It also fails to mention the right to inclusive education, which has been determined to be the best way to achieve quality education for children with disabilities. Some might argue that the Act benefits children with disabilities in Kenya since many of these children were never even allowed to attend public schools and that situation will now change. However, as we argue in this article, the Act discriminates against children with disabilities by continuing a system of special schools, and by failing to create an inclusive education system which would also ensure reasonable accommodations that are necessary to fully implement the goal of inclusive education for all children with disabilities. In particular, in this article, we discuss the extent to which the Act fails to comply with article 24 of the CRPD, and what action Kenya should take to fully protect the right of children and adults with disabilities to education on an equal basis with people without disabilities, as required by the CRPD.

In the first part of the article, we present an overview of the Act which shows, in our view, the ways in which the Act discriminates against children with disabilities. In the second part of the article, we discuss the concepts of equality, non-discrimination and reasonable accommodations, which are essential to any education system that is to comply with article 24 of the CRPD. The final section of the article explores the Act's failure

5 See sec 34 of the Act, which provides: 'A school or person responsible for admission shall not discriminate against any child seeking admission on any ground, including ... disability.'

6 See Part VI of the Act entitled 'Special Needs Education'.

7 Art 1 Convention on the Rights of Persons with Disabilities (CRPD).

8 Art 7(2) of the CRPD.

9 Art 24(1) of the CRPD.

10 Sec 44 of the Act.

to adhere to the principles that are essential in protecting the right of children with disabilities to education, followed by our recommendations.

2 The right of children with disabilities to education under the Act

The Act came into force on 25 January 2013. The Act is divided into 12 parts.¹¹ Most of the Act addresses the relationship between the county and national governments in providing education. However, Parts IV and V of the Act also establish the right of children to free, compulsory education, and the creation of special schools for children with disabilities.¹²

Section 28 of Part IV of the Act is perhaps one of the most progressive provisions of the Act. This section requires the government to implement the right of every child to a free and compulsory education. This mandate is in line with Kenya's obligation under international law, specifically the International Covenant on Economic Social and Cultural Rights¹³ as well as the CRPD. The government is also mandated to establish different schools, in order to achieve this fundamental right to education for every child in Kenya.¹⁴ To ensure that the education is free, the Act provides that no public school may charge a fee for admission to school.¹⁵ To ensure that the education is compulsory, the Act has made it a criminal offence for parents who fail to take their children to school, with a maximum term of two years' imprisonment.¹⁶ Section 34 also prohibits a school from denying admission to a child based on his or her disability.¹⁷ In line with Kenya's international obligations, the Act mandates the government to ensure that all the above provisions are available to every child.¹⁸ In addition, for those children who are marginalised or from disadvantaged

11 Part I deals with the interpretation of terms according to the act, the guiding principles of the Act. Part II establishes the National Education Board, its functions under the Act include *working* with different stakeholders to ensure the removal of barriers to education. Part III establishes the County Education Boards, which functions include, amongst others, coordinating and monitoring education training. Parts IV and VI of the Act establish the free and compulsory education and promotion of special needs education. Parts V through XIII identify the coordination of responsibilities between the county and the national government, which is also beyond the scope of this article. Whether the coordination as proposed by the Act is efficient is outside the realms of this paper.

12 Sec 28 and 44 of the Act.

13 UN General Assembly 'International Covenant on Economic, Social and Cultural Rights', adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 3 January 1976. Article 13 provides for the right to free and compulsory primary education.

14 Sec 28(2) of the Act.

15 Sec 29 of the Act.

16 Sec 31 of the Act.

17 Sec 34(2) of the Act.

18 Sec 39 of the Act.

groups, the government is required to ensure that they are not discriminated against in their access to education.¹⁹

The government is also mandated under the Act to establish and maintain public special schools.²⁰ The children who qualify to enrol in these special schools include children with intellectual, physical, emotional, hearing or vision impairments as well as students with special talents or multiple disabilities.²¹ To ensure that these schools are up and running efficiently, the government is mandated to provide special needs teachers and support staff in the schools.²²

In contrast to the CRPD which adopts a social model of disability,²³ the Act incorporates a medical model of disability. Special schools are defined as those schools whose 'purpose is to help a particular class of children not only attain education but some form of treatment or care'.²⁴ The medical model, also known as the deficit model, views people with disabilities as 'sick' and in need of a medical intervention. This model locates the 'problem' of disability within the person rather than in an environment that creates barriers to the full inclusion and participation of people with disabilities.²⁵ On the other hand, the CRPD, rejects the medical model of disability, and instead adopts a more holistic model of disability, commonly referred to as the social model of disability. The social model of disability sees disability as an interaction between an individual and the environment and society.²⁶ According to this view, people with various conditions and impairments become 'disabled' only when they encounter environmental and other barriers that prevent them from accessing their rights on an equal basis with nondisabled people. According to the social model, therefore, people with disabilities can be included in society when the environmental and other barriers are removed.

The Act does not adopt a social model of disability. It does not declare that all children have a right to education on an equal basis with other nondisabled children; nor does it require the removal of barriers to their full inclusion. Instead, children with disabilities are sent to separate

19 As above.

20 Sec 44(1) of the Act.

21 Sec 44(3)(a), (b) and (c) of the Act.

22 As above.

23 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.

24 Sec 2 of the Act.

25 AS Kanter 'The law: What's disability studies got to do with it or an introduction to disability legal studies' (2011) 42 *Columbia Human Rights Law Review* 403 419-421; G Quinn & T Degener *Human rights & disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 15.

26 Kanter (n 25 above) 420; See also C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613 625.

'special' schools. Moreover, the purpose of education for children with disabilities under the Act is not to ensure their equal right to education but to expose them (only) to an 'appropriate curriculum for children with disabilities'.²⁷ But as the United States Supreme Court wrote 60 years ago, separate educational facilities are inherently unequal'.²⁸ Thus the Act discriminates against children with disabilities not only by creating separate schools, but also by requiring separate curricula for children with disabilities.

As this brief summary of the Act reveals, on one hand, it seeks to protect the right to public education for every child; but, on the other hand, it directly discriminates against children with disabilities by forcing them to attend separate, segregated, special schools with special curricula. As discussed more fully in the next section, the Act fails to provide children with disabilities in Kenya the right to education on an equal basis with their non-disabled peers, in violation of international standards.

3 The right of children with disabilities in Kenya to equality and non-discrimination

3.1 The right to equality in education

The principle of discrimination can be understood as treating similar situations differently without an objective or reasonable justification.²⁹ Both the Constitution of Kenya of 2010³⁰ and the Act³¹ prohibit discrimination on the basis of disability. These laws also recognise the right to positive discrimination, otherwise known as affirmative action.³² Nevertheless, such measures of positive discrimination must be reasonable and justifiable.³³ Some may argue that the establishment of special schools is an example of affirmative action for children with disabilities since these schools provide children with disabilities the different treatment they need in order to remedy past discrimination against them. However, the European Court of Human Rights (ECtHR) as well as other countries' courts have held that the creation and continuation of special schools

27 Ngwena (n 26 above) 625.

28 *Brown v Board of Education*, 347 US483 (1954).

29 *Willis v The United Kingdom* ECHR (11 June 2002) para 48.

30 See art 27(4) of the Constitution of Kenya 2010.

31 Sec 4(e) of the Act.

32 *DH v The Czech Republic* (57325/00) ECHR (13 November 2007) para 175.

33 As above.

amounts to prohibited discrimination.³⁴ According to these views, the way to remedy past discrimination is not to create separate schools but to integrate children with disabilities into regular schools and to provide them with the assistance they may need to succeed.³⁵

It is undisputable that children with disabilities in Kenya are marginalised in the field of education. However, children with disabilities deserve much better than the provisions provided in the Act. The next section of this article explains the way in which the Act violates the right to equality and non-discrimination on the grounds of disability, as required under international law, including the CRPD.

The principles of non-discrimination and equality have been referred to as the flip side of the same coin.³⁶ In other words, for equality to be present, discrimination must be absent.³⁷ However, there is no agreed upon definition of the concept of equality or non-discrimination.³⁸ Formal equality is understood as requiring that similar cases be treated similarly, and different cases be treated differently.³⁹ But the concept of equality refers only to partial equal treatment because human beings can never be in completely identical situations.⁴⁰ Thus equality is not an absolute truth; rather, it is a relational concept: it can only exist in a comparative state between two groups, such as between children with and without disabilities.⁴¹ To attain formal equality in education, then, children with and without disabilities must be afforded the same rights, opportunities and treatment.⁴² To realise the goal of formal equality for children with disabilities in education, therefore, the law may provide simply that

34 See *DH v The Czech Republic* (n 32 above); *Orsus v Croatia* (Application no: 15766/03) ECHR (16 March 2010); and *Horvath v Hungary* (Application no: 11146/11) ECHR (29 January 2013), where the court, even though it did not expressly state that special schools are discriminatory, gave all the reasons as to why education in special schools may be substandard compared to the public mainstream schools; See also *European Action of the Disabled v France* European Committee of Social Rights Complaint 81/2012, where the committee unanimously held that students with autism are entitled to education in mainstream schools.

35 *Brown* (n 28 above).

36 A Bayefsky 'The principle of equality and non-discrimination in international law' (1990) 11 *Human Rights Law Journal* 1; See also C McCrudden & S Prechal 'The concepts of equality and non-discrimination in Europe: A practical approach' *European Network of Legal Experts in the field of Gender Equality* (2009) 12.

37 P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 539.

38 Bayefsky (n 36 above) 2; See also K Frostell 'Gender difference and the non-discrimination principle in the CCPR and the CEDAW' in L Hannikainen & E Nykänen (eds) *New trends in discrimination law: International perspectives* (1999) 33; BG Ramcharan 'Equality and nondiscrimination' in L Henkin (ed) *The International Bill of Rights* (1981) 246-247; EW Vierdag *The concept of discrimination in international law* (1973) 2.

39 McCrudden & Prechal (n 36 above) 11.

40 Ramacharan (n 38 above) 252; Vierdag (n 38 above) 9.

41 J Fawcett *The application of the European Convention on Human Rights* (1987) 299.

42 Vierdag (n 38 above) 14.

children with and without disabilities are to be treated alike.⁴³ The problem with the formal equality approach to education, however, is that it does not take into account various social, economic, and personal characteristics and abilities or disabilities of individual students.⁴⁴ Hence, formal equality is often criticised for assuming that all children are on an equal footing and thereby failing to address the specific barriers that some children may face in accessing their right to equal educational opportunities.⁴⁵ Furthermore, formal equality does not guarantee children with disabilities equal opportunities in schools, as it does not require the schools to provide the accommodations that may be necessary to fully realise their right to education.

In contrast to formal equality is substantive equality, which is understood to mean that the results of the treatment must be equal.⁴⁶ Here, the focus is less on the opportunity for equality, and more on 'equality of results'.⁴⁷ The concept of substantive equality demands that people with and without disabilities, require different treatment in order to ensure that equal results can be achieved.⁴⁸ For example, a law that states that all children are entitled to equal education may satisfy the requirements of formal equality; however, it will not ensure that a child who uses a wheelchair will be able to enter a school that has only stairs at its entrance; nor will it ensure that a child who is blind or deaf will be able to access materials and communicate effectively with other students and the teacher in the classroom; nor will it ensure that a child with a learning disability will be able to receive the tutoring or testing accommodations that he or she may need. Hence, to fully ensure equality in some cases, 'different' treatment must be provided to ensure equal results. In order to ensure equal education for all children, the law must ensure that children with disabilities receive the accommodations or modifications that they require to ensure that they may access education on an equal basis with their non-disabled peers. The Act fails to ensure this 'different' treatment that will guarantee equality of results for children with disabilities in Kenya.

3.2 The right to non-discrimination in education

Non-discrimination is the cornerstone of international human rights law. However, the content and scope of non-discrimination remains in

43 See PG Polyviou *The equal protection of the laws* (1980) 2-3; S Fredman 'Combating racism with human rights: The right to equality' in S Fredman (ed) *Discrimination and human rights: The case of racism* (2001) 17.

44 Fredman (n 43 above).

45 MK Eriksson *Reproductive freedom: In the context of international human rights and humanitarian law* (2000) 30.

46 R Oostland *Non-discrimination and equality of women: A comparative analysis of the interpretation by the UN Human Rights Committee and the UN Committee on Elimination of Discrimination against Women* (2006) 19.

47 Polyviou (n 43 above) 3.

48 Oostland (n 46 above) 21.

dispute.⁴⁹ Discrimination simply means to treat people differently. The jurisprudence of the ECtHR has stated that different treatment of persons who are in an analogous situation with identifiable characteristics amounts to discrimination.⁵⁰ However, not all different treatment amounts to discrimination. Different treatment will not always amount to discrimination if there is an objective and reasonable justification for such discrimination.⁵¹ Different treatment is not in itself conclusive of discrimination even though it is a requisite. For example, the Human Rights Committee found a violation of articles 2(1) and 3 of the International Covenant on Civil and Political Rights (ICCPR) in *Mauritanian Women v Mauritius*⁵² when different treatment based on gender alone was not conclusive. The Committee reasoned that no 'sufficient justification' had been found for the distinction.⁵³

Discrimination can also be direct and indirect. Direct discrimination occurs when people equal in status are treated differently. This means that children with disabilities will be discriminated against when they are denied admission to public schools because of their disability. However, direct discrimination rarely occurs because today in most countries, including Kenya, have constitutional provisions that bar direct discrimination. The Act, too, does not directly discriminate against children with disabilities because public schools are prohibited from denying them admission based on their disability. However, the Act does require children with disabilities to attend public special schools. The question that we must now address is whether this provision is a violation of the right of children to be free from discrimination, as required by the Kenyan Constitution as well as the CRPD.

Although no court decision in Kenya has applied the principle of equality to people with disabilities, other countries' courts have addressed the issue of what constitutes discrimination based on disability. For instance, the US Supreme Court in 1982 held that discrimination based on disability is not a suspect class that would require the government to show

49 Bayefsky (n 36 above) 2; Vierdag (n 38 above) 2; Ramacharan (n 38 above) 246.

50 *Carson v UK* (Application no: 42184/05) ECHR (16 March 2010) para 61; See also *Burden v UK* (Application no: 13378/05) ECHR (29 April 2008) para 60.

51 See *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics case)* (1968) Series A no 6, para 10, where the court stated that: '[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the existence of right laid down in the convention must not only pursue legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means and the aim sought to be realized.'

52 *Mauritanian Women v Mauritius* (Communication no: 35/78) UNHR Committee (9 April 1981) UN Doc CCPR/C/OP/1 (1984) 134.

53 See *Belgian Linguistics case* (n 51 above) where the court held that the non-discrimination principle was only violated if the distinction had no reasonable and objective justification.

a compelling state interest.⁵⁴ All that is required is for the government to show a rational basis for discriminating based on disability.⁵⁵ Having said that, however, in a later case, the Supreme Court held that it is discrimination for the state to provide people with disabilities certain services (in an institution) while providing similar services to people without disabilities in the community.⁵⁶

In addition to direct discrimination, indirect discrimination, otherwise called disparate impact discrimination,⁵⁷ occurs when a neutral law, practice or requirement has a disproportionate effect or impact upon a protected group of people.⁵⁸ The ECtHR has developed no clear distinction between direct and indirect discrimination. However, the Court has found indirect discrimination in several recent cases.⁵⁹ First, in the case of *DH v The Czech Republic*, the Court found indirect discrimination against Roma children in the Czech Republic. A series of tests were used to establish the intelligence and suitability of pupils in mainstream and special schools.⁶⁰ The special schools were designed for those with intellectual disabilities and other learning difficulties. The same test was applied to all pupils who were considered for placement in special schools. However, in practice, the test had been designed for the mainstream Czech population. As a result of their general unfamiliarity with Czech mainstream culture, Roma students performed less well than their Czech peers. Between 50 to 90 per cent of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.⁶¹

54 See *Cleburne v Cleburne Living Center Inc* 473 US 432 (1985), where the Court declined to apply the strict scrutiny test to a challenge to a zoning ordinance that required a special permit for a group home for people with mental disabilities. The Court however, held in favour of the applicants because the city's reasons failed the rational basis test.

55 The US Supreme Court has developed criteria in determining whether a law discriminates people. The criteria are divided into three. The highest level of scrutiny is the 'strict scrutiny test' where the government needs to show compelling reasons for discriminating on this basis of the suspect class ie race, national origin and religion. The second level of scrutiny is intermediate scrutiny test where a government must show an important reason. Discrimination based on sexual orientation or gender is protected by this category. The third is rational basis where government is allowed to limit someone's right based on a rational government interest. This classification includes disability.

56 See *Olmstead v LC* 527 US 581 (1999).

57 Disparate impact is the American version of indirect discrimination. See generally T Loenen 'Indirect discrimination: Oscillating between containment and revolution' in T Loenen & P Rodrigues (eds) *Non-discrimination law: Comparative perspectives* (1999) 196-197.

58 Interights *Non-discrimination in international law: A handbook for practitioners* (2011) 18.

59 S van den Bogaert 'Roma segregation in education: Direct or indirect discrimination – An analysis of the the parallels and differences between Council Directive 2000/43/EC and recent ECtHR case law on Roma educational matters' (2011) 71 *Heidelberg Journal of International Law* 719

60 *DH* (n 32 above) para 79.

61 *DH* (n 32 above) para 184.

In a second case, *Orsus v Croatia*, the Court noted that the concept of indirect discrimination needs further development.⁶² The dissenting judges were critical of the majority opinion for failing to offer 'practical guidance on how to develop and apply the notion of indirect discrimination'.⁶³

Indirect discrimination has also been defined as discrimination that occurs as the result of equal treatment.⁶⁴ This means that a law may require children to be treated in the same way in attaining education but fails to ensure that children with disabilities receive the accommodations or modifications they may need in order to have the same access to education as non-disabled children. For instance, a law may require all children pass a reading test before they may be admitted to a particular school. Although this is a neutral law, its effect may be to discriminate against blind children, for example, if the admission tests for the school are not available in Braille or another alternative format. Indirect discrimination looks at the effect of the rules, rather than how they are constructed.⁶⁵ Thus like the concept of substantive equality, indirect discrimination is also concerned with results. However, a court will likely find indirect discrimination only if there is no objective and reasonable justification for the treatment. The CRPD Committee has held, therefore, that the right not to be discriminated against 'can be violated when states, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.⁶⁶

3.3 Failure to provide reasonable accommodation is disability discrimination

The CRPD prohibits both direct and indirect disability discrimination, in most, if not all, areas of life. Article 5(1) provides that every disabled person shall be treated equally before the law. Article 5(2) specifically prohibits discrimination based on disability. To understand disability discrimination, it is not enough to look at the first two provisions of article 5; paragraph 3 of article 5 is also important since it explains the meaning of disability discrimination as follows: 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that *reasonable accommodation* is provided.'⁶⁷

62 *Orsus* (n 34 above) para 19.

63 As above.

64 Vierdag (n 38 above) 70.

65 Vierdag (n 38 above) 71.

66 To date, the CRPD Committee has adopted views on three individual communications provided pursuant to the Optional Protocol. The CRPD has found violations in two of the three of them, including *HM v Sweden* (Communication no: 3/2011) CRPD/C/7/D/3/2011 (19 April 2012) para 8.3.

67 Emphasis added. See too art 24(2)(c) of the CRPD which provides: 'In realizing this right, States Parties shall ensure that ... *reasonable accommodation* of the individual's requirements is provided', (emphasis added).

For the first time in any international treaty, the CRPD states that the failure to provide reasonable accommodation is considered explicitly as a form of disability discrimination.⁶⁸ Article 2 of the CRPD defines reasonable accommodation as the necessary and appropriate modification on a case by case basis to ensure an individual with a disability enjoys the same rights as others.⁶⁹ However, if an accommodation would cause the state an undue burden, it would not be considered 'reasonable'.⁷⁰ The concept of reasonable accommodation is now being developed by the CRPD Committee in its responses to country reports. The CRPD Committee has already criticised several countries for their failure to provide reasonable accommodations, including in the area of education.⁷¹ Further, in cases that have come before the CRPD pursuant to the Optional Protocol, the CRPD Committee has held that failure to provide reasonable accommodation amounts to disability discrimination.⁷²

In the context of education, reasonable accommodation means changes that a school must make to the building, programmes or services that would enable a child with disability to attain education on an equal basis with his or her nondisabled peers. Reasonable accommodations may include: changing admission rules that may exclude children with disabilities; making renovations or building new schools that are accessible to children with mobility impairments; ensuring communication access for students with sensory disabilities; and providing tutoring or other assistance such as extra time on exams for students with learning disabilities.⁷³ Although the need to provide reasonable accommodations involves a subjective judgment about a student's disability and abilities, the denial of reasonable accommodations may be seen as *sui generis* discrimination.⁷⁴ Of course, ensuring the right of children with disabilities

68 Kanter (n 23 above).

69 Art 2 of the CRPD.

70 As above.

71 See Concluding observations for Hungary CRPD/C/HUN/CO/1 (2012) para 15; Concluding observations for Spain CRPD/C/ESP/CO/1 (2011) paras 20-21; Concluding observations for Tunisia CRPD/C/TUN/CO/1 (2011) para 12; Concluding observations for China CRPD/C/CHN/CO/1 (2012) paras 11-12.

72 See, *HM* (n 66 above), the CRPD Committee held that a failure to provide reasonable accommodation under the CRPD constitutes discrimination. The applicant had complained that she was being discriminated against by the state party for failure to take into account her rights to equal opportunity for rehabilitation and health. The applicant wanted to have a hydrotherapy pool at her home which would change the housing plan in the area in which she was staying. The state party had denied her this permission because it was a major departure from the development plan. According to the state party they would have allowed her to if it was not going to be a minor change to the development plan. The committee reasoned that the essence of preventing disability discrimination is by providing reasonable accommodation. The only time that reasonable accommodation would be denied is when it is causing 'disproportionate or undue burden'. In this case, the state party could not prove that the reasonable accommodation sought by the applicant was going to cause undue burden on the part of the state.

73 See *Bartlett v New York State Board of Law Examiners* (1998) 156 F.3d 321.

74 *Zucke v Regents of the University of California* (1999) 166 F.3d 1041 1046.

to reasonable accommodations does not mean that schools have to change or lower their academic standards.⁷⁵

4 The Act discriminates against children with disabilities

Based on the previous discussion of what constitutes disability discrimination, it is clear that the Act discriminates against children with disabilities in Kenya in a number of ways. First, the Act fails to comply with the fundamental principle of equality. The purpose of the Act is to ensure that all children in Kenya are provided with a free and compulsory primary education. Both children with and without disabilities should be treated 'equally' which involves both the same treatment as well as different treatment based on the need of some children for accommodations. However, the Act creates special schools for children with disabilities without any legitimate justification. Although some children may need assistance or accommodation, that is not true for all children with disabilities. There is no justification for treating children without disabilities differently from children with disabilities who require no accommodation. Yet even for those children with disabilities who may need assistance or accommodations, there is no reason, to require that they attend separate schools or receive separate curricula. Such assistance and accommodations may be provided in regular schools as is done today in many countries throughout the world. By segregating children with and without disabilities on the basis of disability constitutes discrimination against children with disabilities who are relegated to attain their right to free and compulsory basic education only in segregated, special schools.

For example, in the United States, the Supreme Court held in the landmark case of *Brown v Board of Education* that laws that create separate schools are unconstitutional as a violation of the fundamental right of all to equality.⁷⁶ The Supreme Court rejected the doctrine of 'separate but equal',⁷⁷ stating that 'separate educational facilities are inherently unequal'.⁷⁸ Similarly, the European Court of Human Rights has recently

75 *Southeastern Community College v Davis* 442 US 397 (1979) 413, in this case the US Supreme Court held that the Rehabilitation Act does not require an academic institution 'to make fundamental or substantial modifications to its programs or standards'.

76 *Brown* (n 28 above), though this case was based on race, the same principle can be applied to children with disabilities in Kenya who have historically been segregated in public education.

77 The doctrine of separate but equal was established in *Plessy v Ferguson* 163 US 537 (1896), where the court upheld a Louisiana law that required that railway passenger cars have 'equal but separate accommodations for the white and colored races'. Plessy was arrested for refusing to vacate a seat in a coach for the whites.

78 *Brown v Board of Education* (n 28 above) 495; See also *Bolling v Sharpe* 347 US 497 (1954) which was held on the same day as *Brown*. The Court in *Bolling* concluded that segregation in public education is reasonably unrelated to any proper governmental objective.

held in a series of cases involving Roma children that maintaining separate schools and programmes for them is discriminatory, including on the basis of disability.⁷⁹ Moreover, in its response to reports that have been filed by countries that have ratified the CRPD, the CRPD Committee itself has criticised countries that have special schools, citing such schools as a violation of article 24's mandate of an inclusive education system.⁸⁰

The second way in which the Act fails to comply with the CRPD is its failure to ensure the provision of reasonable accommodations. A prohibition on disability discrimination does not entail merely outlawing differences based on disability; it may also entail failing to provide reasonable accommodations to people with disabilities who require such accommodations to exercise their rights. Article 24 of CRPD mandates states parties to ensure that children with disabilities receiving the accommodations they need to access education.⁸¹ The Act ignores the mandate.

The third way in which the Act violates the requirements of the CRPD is that it fails to recognise the right of students with disabilities to an inclusive education system. The definition of an inclusive education system is not included in the CRPD. However, prior international documents have defined inclusive education. The first international document that defined inclusive education is the Salamanca Statement, which provides:

The fundamental principle of the inclusive school is that all children should learn together, wherever possible, regardless of any difficulties or differences they may have. Inclusive schools must recognize and respond to the diverse needs of their students, accommodating both different styles and rates of learning and ensuring quality education to all through appropriate curricula, organizational arrangements, teaching strategies, resource use and partnerships with their communities. There should be a continuum of support and services to match the continuum of special needs encountered in every school.⁸²

The Kenyan law does not even mention inclusive education, nor does it require that the state is under any obligation to determine whether or not

79 *Orsus* (n 34 above), *DH* (n 32 above), and *Horvath* (n 34 above) all involved Roma children being subjected to special schools and the ECtHR held that special schools are discriminatory in nature unless the government can show a reasonable justification for the different treatment.

80 See Concluding observations for Hungary CRPD/C/HUN/CO/1 (2012) para 39; Concluding observations for Spain CRPD/C/ESP/CO/1 (2011) para 43; Concluding observations for China CRPD/C/CHN/CO/1 (2012) para 35; Concluding observations for Australia CRPD/C/AUS/CO/1 (2013) para 45; Concluding observations for Austria CRPD/C/AUT/CO/1 (2013) para 40.

81 See art 24(2)(c) (n 67 above).

82 UNESCO & Ministry of Education and Science, Spain 'The Salamanca statement and framework for action on special needs education' UN Doc ED-94/WS/18 (1994) 11-12, available at http://www.unesco.org/education/pdf/SALAMA_E.PDF (accessed 22 July 2014).

a student with a disability should be educated in the regular school rather than in a separate school. For example, in the US, which does not require that all students with disabilities are educated in inclusive classrooms, students with disabilities are nonetheless insured their right to an education in the 'least restrictive environment'. This means that students with disabilities in the US are entitled to attend schools and participate in classes and programmes that are the least restrictive of their individual liberties.⁸³

In the context of education, the least restrictive requirement has been interpreted to require the inclusion of students in the mainstream or 'regular' schools and classrooms. The least restrictive requirement also means that education for children with disabilities should be in the mainstream schools with the supplemental aids and services the students may need. This additional requirement is intended to facilitate the integration of children with disabilities in the US into the mainstream education system.⁸⁴ As a result, one federal court of appeals in the US overturned a 1983 decision that had authorised the placement of a child with a severe mental disability in a specialised school.⁸⁵ In this decision, the appeals court reasoned that the services the student required could be provided just as easily in the public school as in the special school. Accordingly, the court held that to require the student to attend a separate school amounted to a violation of the law's least restrictive placement requirement. The Court rejected the lower court's holding that schools have the broad discretion in deciding to place children with disabilities in segregated or mainstream schools. Accordingly, the appeals court considered the benefits the child would receive in a segregated setting versus the regular school. If the benefits that a child would receive in the segregated setting could be achieved in the regular school setting, then the child should be educated in the least restrictive, regular school setting. This decision has led the authors to conclude that the court's test now creates a presumption in favour of the inclusion of children with disabilities in regular classrooms and schools.

In 1989, another appeals court in the US developed an alternative test to determine the propriety of placing a child in a separate school rather than his neighbourhood school.⁸⁶ In *Daniel RR v State Board of Education*, this appeals court determined that the school had not complied with the

83 MC Weber et al *Special education law: Cases and materials* (2013) 287.

84 Individuals with Disabilities Education Act 20 USC § 1412(a)(5)(A): the Individuals with Disabilities Education Act is a Federal law that requires states to have programmes that will allow children with disabilities to access education on an equal basis with other children. The Federal government supports the education through allocation of funds to School Districts for Special Education.

85 See *Ronker v Walter* 700 F.2d 1058 (1983).

86 Different tests have been developed over the years and the third was set out in the case of *Sacramento City v Rachael H* 14 F.3d 1398 (1994) where the 9th Circuit added a third dimension to the *Daniel RR* test which is cost. Here the court must look at the cost of educating children with disabilities in segregated settings and regular settings.

least restrictive setting requirement of the US education law.⁸⁷ In this case, the appeals court inquired first whether the education, with the use of supplemental aid and services, could be achieved satisfactorily. Secondly, the court determined if segregation was necessary for the education of the child. If so, then the court must examine whether the school has mainstreamed the child to the maximum extent appropriate, specifically whether the school has made efforts to include the child in programmes with nondisabled children wherever possible. The first part of this test requires the court to look at the steps the school has taken to include the child with disabilities in the regular classroom.⁸⁸ It is important to note that mere gestures by schools to include children with disabilities in regular classrooms would not pass this test, according to the court.⁸⁹ Here, the court must look at unique benefits the child will receive in regular classrooms such as development of social skills resulting from interaction with nondisabled peers.⁹⁰ Under this second part of the *Daniel RR* test, courts are also required to look at the effect of inclusion of children with disabilities on other children in school. If the inclusion leads to disruption in the classroom, then segregation may be justified.⁹¹ The test also allows segregation if the inclusion will demand the teacher's attention to the disadvantage of other children.⁹² However, caution should be exercised while examining the negative effects of inclusion of children with disabilities on other children.⁹³

As these cases illustrate, the right to education in the least restrictive environment developed in the US pursuant to its Individuals with Disabilities in Education Improvement Act of 2004, favours the placement of children with disabilities in classes with children who are not disabled. This idea is not present in the Act. As stated, the Act favours special schools over mainstreaming. In this way, children with disabilities in Kenya are denied an opportunity to interact with their peers as part of their education in the least restrictive environment. The purpose of the Act was not only to avoid discrimination of the children with disabilities, but also to ensure that they receive quality education.⁹⁴ Quality can be attained not only by examining what the schools teach but also through ensuring that children with disabilities are, in fact, in public schools. This is because, in fact, public schools have a better curriculum compared to special

87 *Daniel RR v State Board of Education* 874 F.2d 1036 (1989).

88 *Daniel RR* (n 87 above) 1048; See also *Greer v Rome City School Dist* 950 F.2d 688 (1991) 696.

89 *Daniel RR* (n 87 above).

90 *Daniel RR* (n 87 above) 1049; see also M Minow 'Learning to live with the dilemma of difference: Bilingual and special education' (1985) 48 *Law & Contemporary Problems* 157 160.

91 *Daniel RR* (n 87 above) 1048-1049.

92 As above.

93 *Greer* (n 88 above) 697.

94 Sec 64 of the Act.

schools.⁹⁵ Moreover, it has been established that children with disabilities become better students and perform better when they are in the same schools with their non-disabled peers.⁹⁶

Although the CRPD does not refer to the concept of the least restrictive environment, this concept is central to the right to education. The goal of any education system, including Kenya's, must be full inclusion, as envisioned by article 24 of the CRPD. Ensuring the right to education in the least restrictive setting as a first step will be a major achievement for Kenya at the present time. The right of children with disabilities to education in the least restrictive setting may be used as a bridge towards attaining full inclusion for children with disabilities in Kenya.

Article 24 of the CRPD mandates state parties to ensure an inclusive education system.⁹⁷ Kenya ratified the CRPD in 2008 yet its children remain relegated to a woefully inadequate segregated education system. To continue the placement of children with disabilities in special schools in Kenya violates the spirit and language of the CRPD. While it is important to appreciate that article 24 of the CRPD does not explicitly prohibit the operation of special schools, it is also important to have in mind the general principles of article 3 when reading article 24.⁹⁸ Article 3 prohibits discrimination and seeks to ensure equality of treatment and results of all children and adults with disabilities. Kenya's adherence to a separate education system for students with disabilities fails to respect the differences, dignity and equality rights of children with disabilities in Kenya. Furthermore, article 24 is subject to the principle of progressive realisation.⁹⁹ Although progressive realisation of a right means that the right need not be realised immediately it does not mean that a state may deny children with disabilities the right to education in mainstream schools, entirely. The minimum core content of article 24 is to ensure that there is no discrimination on the basis of disability. Such regressive

95 See the above mentioned Roma Cases where it was discovered that all the special schools designed for Roma children had a poor curriculum compared to public schools where non-Roma children attended (n 79 above).

96 R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of Persons with Disabilities* (2012) 31.

97 'States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an *inclusive education system* at all levels...' (Emphasis added).

98 Art 3 of CRPD 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; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.'

99 UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para. 1, of the Covenant)' 14 December 1990, E/1991/23.

measures as creating special schools for children with disabilities are not in line with the letter or spirit of the CRPD.

Moreover, the concept of education in the least restrictive setting should not be considered the end result; rather it should be seen as a means towards attaining the result of an entirely inclusive education system for all children with disabilities. Therefore, the longer Kenya waits to amend the Act in order to ensure an inclusive education system, as required under the CRPD, the longer children with disabilities in Kenya will face an inherently unequal education system, and one which appears to violate the CRPD.

5 Conclusion

The Act ensures the right of all children in Kenya the right to a free and compulsory education. However, the Act discriminates against children with disabilities in Kenya. It fails to provide children with disabilities with the right to reasonable accommodation in education, to ensure education in the least restrictive setting, and it fails to require the establishment of an inclusive education system, as required under international law, especially article 24 of the CRPD.

While there has been some debate as to whether or not article 24 bans all special schools for children with disabilities, there is no debate that it prohibits a system which assigns children with disabilities to separate, special schools solely on the basis of their label of disability, as is provided in the Act. Such a policy runs afoul the right to equality and non-discrimination as well as the general principles of the CRPD. Thus although the CRPD does not expressly ban special schools, article 24 of the CRPD has been interpreted by the CRPD Committee as requiring changes in countries that have a system of special schools for students with disabilities. Furthermore, the ECtHR has also consistently held that special schools may amount to discrimination, as have some courts in the US.

Although an inclusive education system in Kenya may not be possible overnight, ensuring the right to an education in the least restrictive environment should be possible to enforce immediately. The right to education in the least restrictive setting would require that each child be assessed individually to determine which classroom is the least restrictive to his or her liberties. A least restrictive classroom is one in which children, with and without disabilities, learn together. However, enforcing the right to education in the least restrictive setting should not be the final goal, but rather a means that will lead towards full inclusion for all children with disabilities in mainstream schools, as mandated by the CRPD.

CHAPTER 3

TOO LITTLE, TOO LATE? THE CRPD AS A STANDARD TO EVALUATE SOUTH AFRICAN LEGISLATION AND POLICIES FOR EARLY CHILDHOOD DEVELOPMENT

*Sue Philpott**

Summary

In the light of growing recognition of the importance of early childhood development in South Africa and internationally, the CRPD provides important pointers regarding the rights of young children with disabilities. A critique of selected South African legislation and policies is provided through the lens of the CRPD, identifying key gaps and inconsistencies. The article concludes by making recommendations as to how the 'transformative potential' of the CRPD could be tapped with respect to advancing the rights of children with disabilities to early childhood development services.

1 Introduction

There has been growing awareness of the importance of early childhood development (ECD) on the well-being of young children and its far-reaching impact on later stages of their lifespan.¹ Inclusion of ECD as a priority in the National Development Plan of the South African government reflects the (political) importance being placed on services for children in the early years.² But given the on-going challenges with access and quality of services for young children with disabilities (as documented in a recent national situation analysis),³ there is reason to seek instruments by which to evaluate current South African legislation and policy on ECD with respect to rights of children with disabilities. One such instrument is

* Centre for Disability Law and Policy, University of the Western Cape. This article originated from a paper presented at the Conference on Disability Rights in Africa, University of Pretoria, November 2013.

1 See for example UNESCO 'Rights from the start: Early childhood care and education' (2012) Global Campaign for Education Paris: UNESCO, WHO & UNICEF 'Early childhood development and disability: A discussion paper' (2012).

2 National Planning Commission National Development Plan: Vision for 2030 (2011).

3 Department of Social Development, Department of Women, Children and People with Disabilities & UNICEF 'Children with disabilities in South Africa: A situation analysis 2001-2011' (2012).

the Convention on the Rights of Persons with Disabilities (CRPD)⁴ a human rights treaty ratified by the South African government in 2008.

The CRPD provides a valuable tool and standard for critique for several reasons. First, it is an international rights treaty specifically addressing disability, taking cognisance of the unique circumstances of adults and children with disabilities. Secondly, the rights-based approach on which it is based emphasises respect, support and celebration of diversity by creating conditions that allow meaningful participation by a wide range of people, including those with disabilities. Thirdly, each of the broad categories of rights contained in the CRPD can be related to elements of ECD: there are rights relating to protection against the abuse of power, rights intended to nurture the capacities of persons with disabilities towards participation as equals in society, and rights that empower them to take up opportunities emerging from a strategy of equality.⁵ Finally, because the South African government is a state party to the CRPD, it is under an obligation to promote the realisation of human rights for all persons with disabilities in various ways, including 'legislative, administrative and other measures'. A critique made using the framework of the CRPD thus directly informs government obligations with respect to the rights of children with disabilities.

But even beyond its status as a human rights treaty, the CRPD has been acknowledged as being a developmental tool⁶ insofar as it affirms the inherent dignity of every person, regardless of disability or difference, placing on society the obligation to support individual freedom and equality, including providing support to those who need it.⁷ The CRPD thus provides 'a moral compass for change as well as legal benchmarks against which to measure that change'.⁸ However, Quinn has observed that the extent to which the CRPD can contribute to such change depends on whether states acknowledge 'the contradiction between [our] universal human rights and [our] practice on disability',⁹ and embrace its 'domestic institutional architecture for change'.¹⁰

This brings us to the focus of this paper – to evaluate current South African law and policy on ECD in light of the letter, spirit and emerging

4 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

5 G Quinn 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a new international politics of disability' (2009) 15 *Texas Journal on Civil Liberties and Civil Rights* 33.

6 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities* (2010).

7 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 and Commerce* 287.

8 Quinn (n 5 above) 34.

9 Quinn (n 5 above) 39.

10 Quinn (n 5 above) 50.

interpretations of the CRPD. But before viewing ECD-related legislation and policies through the lens of the CRPD, it is necessary to delineate what these services encompass and establish their particular importance for children with disabilities.

2 Nature and scope of ECD services and their significance for children with disabilities

2.1 Nature and scope of ECD services

Early childhood has been defined by UNESCO as covering the period from birth to school-going age,¹¹ while other definitions also include the period of gestation.¹² In South Africa, it is recognised that children born into situations of poverty are more likely to be exposed to conditions that are adverse for development (such as nutritional deficiencies and preventable diseases), and services to support the development of young vulnerable children have been identified as an 'essential package' comprising five components.¹³

2.1.1 Nutrition

From the last months of gestation until the age of two, the child's brain is undergoing a period of accelerated growth, especially of the central nervous system. This process requires higher amounts of energy than any other stage in the child's lifespan, and therefore sufficient amounts of nutrients are required for optimal growth of the foetus and young child. Support for young children includes maternal education on the importance of breastfeeding as well as provision of vitamins, supplements (such as vitamin A and folate) and micronutrients to improve the nutritional status of mothers and young children,¹⁴ particularly for children who fail to thrive, namely gain weight as expected.

2.1.2 Health services

Mothers and young children require health services during the periods of pregnancy, childbirth and early childhood. Services for pregnant women include antenatal and obstetric care which aims to ensure optimal health for both mother and newborn. Preventive health care for children under

11 UNESCO 'Strong foundations: Early childhood care and education' (2007).

12 UN General Assembly 'Status of the Convention on the Rights of the Child: Promotion and protection of the rights of children' (2010); WHO & UNICEF (n 1 above).

13 L Berry et al 'Getting the basics right: An essential package of services and support for ECD' in L Berry et al *South African child gauge* (2013).

14 See for example M Hendricks et al 'Promoting healthy growth: Strengthening nutritional support for mothers, infants and children' in Berry et al (n 13 above).

the age of five includes immunisations, while curative services address common childhood illnesses such as diarrhoea and pneumonia. During routine clinic visits children are also to be screened for developmental delays.

2.1.3 Social services

Social services are another component of the 'essential package' and include both social security and child protection services. Beginning with birth registration, children born to poor families may access social grants, intended to mitigate the effects of severe poverty by improving household food security, and reducing child malnutrition and its negative impact on the developing brain.¹⁵ Those subject to child abuse and neglect need to be provided with a responsive child protection system in which investigations are conducted and concluded timeously and victims provided with the necessary support.

2.1.4 Caregiver support

Fourthly, affectionate and responsive care-giving is a key factor required for the well-being of children and for healthy brain development,¹⁶ and it is during the period of early childhood that young children need to form strong emotional attachments to their parents and/or primary caregivers. Support for caregivers includes both information on parenting as well as psycho-social support. The latter is important as many caregivers living in situations of poverty carry a significant burden of care. Where a caregiver is suffering from depression or other psychological distress, his or her ability to provide a safe and nurturing environment is reduced, with research showing an association between caregiver depression and child malnutrition,¹⁷ disturbed mother-infant interactions and poor parenting and safety practices.¹⁸ Psycho-social support is thus important to promote the well-being of caregivers and reduce the risk of poor care-giving.

2.1.5 Opportunities for early learning

Finally, all young children need opportunities for early learning, which includes opportunities to develop physical, socio-emotional, communication and language and cognitive skills. Research indicates that the

15 JM Agüero et al 'The impact of unconditional cash transfers on nutrition: The South African Child Support Grant' (2010).

16 A Schore 'Effects of a secure attachment relationship on right brain development, affect regulation and infant mental health' (2001) 22 *Infant Mental Health Journal* 7.

17 MJ Rotheram-Borus et al 'Philani Plus (+): A Mentor Mother community health worker home visiting program to improve maternal and infants' outcomes' (2011) 12 *Prevention Science* 372.

18 T Field 'Postpartum depression effects on early interactions, parenting and safety practices: A review' (2010) 33 *Infant Behaviour and Development* 1.

'architecture' of the developing brain and the process of skill formation are shaped by the influences of both genetics and experience.¹⁹ Thus the environmental conditions to which young children are exposed – including the quality of relationships and the language environment – are instrumental in 'sculpting' the developing brain.²⁰ For children growing up in poor families, access to quality early learning opportunities prior to formal schooling has been shown to enhance their capacity to benefit from schooling, reduce their rate of dropout and increase the chances that they will be employed as adults.²¹ Support for early learning of young children may be provided through formal, centre-based services, as well as through outreach programmes such as home visiting, community playgroups and toy libraries. Outreach programmes are based on the premise that supporting parents with additional knowledge and skills about parenting will strengthen their ability to provide a nurturing and stimulating environment for their child.²²

2.2 Significance of ECD for children with disabilities

ECD services are significant for all young children, because the impact of interventions at this level by and large cannot be replicated later in life. But particularly for children with disabilities, they provide the opportunity for early intervention. Early intervention services are based on the premise that it is possible to improve outcomes such as cognitive, emotional and social skills of young children, and thus reduce or eliminate the impact of risk factors. For children with disabilities, early intervention has the potential to prevent or minimise further delays or secondary complications.²³ They comprise a range of strategies to promote children's personal development and resilience, strengthen families and facilitate social inclusion of children with disabilities.²⁴

19 P Adamson 'The child care transition: A league table of early childhood education and care in economically advanced countries' (2008).

20 A Siddiqi et al 'Total environment assessment model for early child development' Evidence report prepared for the WHO's Commission on the Social Determinants of Health (June 2007) 3.

21 M Nores & SW Barnett 'Benefits of early childhood education interventions across the world: (Under) investing in the very young' (2010) 29 *Economics of Education Review* 271.

22 S Walker et al 'Inequality in early childhood: Risk and protective factors for early child development' (2011) 378 *The Lancet* 1325.

23 MJ Guralnick & G Albertini 'Early intervention in an international perspective' (2006) 3 *Journal of Policy and Practice in Intellectual Disabilities* 1. For example, research has shown that the decline in intellectual development that occurs after the first 12 to 18 months for children with Down Syndrome can be prevented almost entirely through early intervention. MJ Guralnick 'Effectiveness of early intervention for vulnerable children: A developmental perspective' (1998) 102 *American Journal on Mental Retardation* 319.

24 MB Bruder 'Early childhood intervention: A promise to children and families for their future' (2010) 76 *Exceptional Children* 339. EE Werner 'Protective factors and individual resilience' in J Shonkoff & S Meisels (eds) *Handbook of early childhood intervention* 2 ed (2000) 115. WHO & UNICEF (n 1 above).

Model early childhood programs that deliver carefully designed interventions with well-defined objectives and that include well-designed evaluations have been shown to influence the developmental trajectories of children whose life course is threatened by socioeconomic disadvantage, family disruption, and diagnosed disabilities. Programs that combined child-focused educational activities with explicit attention to parent-child patterns and relationship building appear to have the greatest impacts.²⁵

On an economic level, early intervention is a sound investment, with research showing that appropriate interventions for young, highly vulnerable children produce better outcomes and cost less than later remediation.²⁶ Thus investment in early childhood has been described as a situation of 'pay now or pay more later'.²⁷

ECD services also provide an opportunity for social inclusion, with pre-school programmes for young children referred to as 'fertile ground for high quality inclusive education'.²⁸ Indeed, there is a unique opportunity for inclusion at this level because young children mature at varying rates, and differences in skills are expected and accommodated within the curriculum. In addition, early childhood teaching practices encourage child-initiated learning and active engagement of children with the environment and with each other.

Early childhood inclusion embodies the values, policies and practices that support the right of every infant and young child and his or her family, regardless of ability, to participate in a broad range of activities and contexts as full members of families, communities and society. The desired results of inclusive experiences for children with and without disabilities include a sense of belonging and membership, positive social relationships and friendships, and development and learning to reach their full potential.²⁹

Conversely, failure to adopt inclusive practices within early childhood services is likely to have adverse consequences on development of children with disabilities 'including limiting the full range of stimulation that children can experience, restricting social and educational learning opportunities and perhaps creating low expectations for achievement'.³⁰

25 J Shonkoff & D Philips (eds) *From neurons to neighbourhoods: The science of early childhood development* (2000) 11.

26 JJ Heckman 'The economics of inequality: The value of early childhood education' (Spring 2011) *American Educator* 31.

27 J Lally 'School readiness begins in infancy: Social interactions during the first two years of life provide the foundation for learning' (2010) 92 *Phi Delta Kappan* 17.

28 CC Mogharreban & DA Bruns 'Moving to inclusive pre-kindergarten classrooms: Lessons from the field' (2009) 36 *Early Childhood Educational Journal* 407.

29 DEC/NAEYC 'Early childhood inclusion: A joint position statement of the Division for Early Childhood (DEC) and the National Association for the Education of Young Children (NAEYC)' (2009).

30 M Guralnick 'A developmental systems model for early intervention' (2001) 14 *Infants and Young Children* 1.

Finally, ECD has the potential to reduce inequalities because (regardless of underlying factors) interventions can compensate for vulnerability and disadvantage.³¹ It is thus not inevitable that children with disabilities will be trapped in an inter-generational cycle of poverty and exclusion. The Commission on the Social Determinants of Health found comprehensive ECD services to influence subsequent life chances and health of children, reducing the risk of obesity, malnutrition, mental health problems, heart disease and criminality.³² Referring to ECD as ‘a powerful equalizer’ this report concluded that investment in young children provides one of the greatest opportunities to reduce health inequalities within a generation.

3 Evaluative framework provided by the CRPD

The CRPD provides an evaluative framework by which to assess state action both by virtue of the general obligations which it places on the state, as well as through specific substantive articles.

3.1 General obligations of the state under the CRPD

3.1.1 Legislative, administrative and other measures

Under the CRPD, the state must adopt legislation where necessary, repeal inconsistent legislation, and mainstream disability into policy formulation and programming towards realising the rights of persons with disabilities.³³ This implies that all policies and programmes relating to ECD need to take cognisance of children with disabilities and how their rights can be ensured and promoted.

The CRPD sets out the general obligations of the state, which are closely linked to its general principles.³⁴ Respect for dignity, non-discrimination, inclusion, participation and accessibility are to be the basis for legislative, administrative and other measures of implementation.

Equality and non-discrimination

The principle of equality and non-discrimination in the CRPD reflects ‘substantive equality’ ‘[which] does not mean treating everyone in exactly

31 UNESCO (n 11 above). UNICEF ‘Inequities in early childhood development – What the data say: Evidence from the Multiple Indicator Cluster Surveys’ (2012).

32 Commission on the Social Determinants of Health ‘Closing the gap in a generation: Health equity through action on the social determinants of health’ (2008).

33 This is reflected in the Preamble of the CRPD, para (g): ‘emphasising the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development’.

34 Arts 4 and 3 respectively.

the same way. Indeed, accommodating people's differences is the essence of substantive equality, and ... key to eliminating discrimination against people with disabilities'.³⁵ This stance is based on the Standard Rules for the Equalisation of Opportunities for Persons with Disabilities which refer to the principle of equal rights as implying that

... the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.³⁶

The CRPD requires states to prohibit all forms of discrimination against persons with disabilities 'by any person, organisation or public enterprise'. Denial of reasonable accommodation is viewed as a form of disability discrimination and thus the CRPD requires states to prohibit such denials and to do so immediately, because it is not a right to which the principle of progressive realisation applies.³⁷ And as the focus of reasonable accommodation is on the individual, interventions to remove barriers must be uniquely tailored to their situation. These may necessitate changes to practices, the physical environment or the provision of additional equipment or support. The obligation to provide reasonable accommodation is subject to 'disproportionate or undue burden', thus requiring consideration of the impact of making the relevant changes on the entity concerned.

Inclusion and participation

The CRPD adopts a two-pronged approach towards ensuring that children with disabilities are included and able to participate in society. First, there is a need to remove general societal barriers, enabling them to have access to mainstream services and facilities.³⁸ Indeed, the right to access is enshrined in article 9 and, as a general principle, it applies to all areas of implementation.³⁹ This means that (under article 19(c)) states must ensure that 'community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs'. States are required to take steps to ensure that people with disabilities are able to access the physical environment, which includes 'buildings, roads, transportation and other indoor and outdoor facilities,

35 Statement by Ambassador Normandin to the General Assembly on the Convention on the Rights of Persons with Disabilities, as deputy permanent representative of Canada to the United Nations, at the 61st Session of the United Nations General Assembly (2006).

36 Standard Rules (1994) para 25.

37 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.

38 As above.

39 Standard Rules (n 36 above). Rule 5 relates to accessibility.

including schools, housing, medical facilities ...⁴⁰ In working towards this, it is necessary to develop and implement minimum standards for accessibility of public facilities.

The CRPD also provides for disability-focused services that facilitate participation and inclusion. For example, article 26 defines habilitation and rehabilitation as a means of enabling people with disabilities to 'attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life'. These are not limited to medical and health-related services, but are to be provided in the areas of health, education, social services and life skills.

The CRPD also makes it clear that realising the rights of persons with disabilities is not limited to the provision of disability-related services, but includes the adoption of measures to change attitudes and practices that stigmatise and marginalise people with disabilities. The state is to take action to eliminate discriminatory practices against persons with disabilities on the part of any person, organisation or private enterprise.⁴¹ There needs to be mechanisms in place to guard against discrimination on the basis of disability within services targeting young children, including those run by the private sector.

It is also necessary to put in place legislation and policies that remove barriers to the exercising of rights, and provide programmes, awareness and social support to change the way society operates, in order to give adults and children with disabilities opportunities to participate fully.⁴² States have the responsibility to take positive steps to promote the development and availability of universal design and assistive technology. Principles of universal design should be incorporated in ECD services, such that they are able to cater for the diversity of children. Indeed, the early childhood sector lends itself to inclusive practices based on the principles of universal design. The state also has an obligation to promote research and development of assistive technology, giving priority to technology that is affordable. This includes assistive technology and simple adaptations that could be made to support learning and development of young children with disabilities.

40 Art 9 (1)(a) of the CRPD.

41 Schulze sees this as including the adoption of measures to ensure that privatisation of the health sector does not undermine the availability, accessibility, acceptability and quality of health facilities, goods and services. Schulze (n 6 above).

42 United Nations Office of the High Commissioner for Human Rights 'Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors' (2010).

3.1.2 Progressive realisation to the maximum of available resources

A major challenge facing adults and children with disability is the fact that enjoyment of sectoral rights is often dependent upon resource allocations. Indeed, changing the social, political and legal environments so that people with disabilities will get more resources has been a major objective of the disability rights movement.⁴³ As with other human rights instruments, the CRPD sets out the principle of progressive realisation for economic, social and cultural rights to the maximum of the states available resources.⁴⁴

The notion of progressive realisation genuflects to an inescapable reality that resources are finite and some change take time. Yet this nod towards reality in the Convention does not rob the concept of some core meaning. There needs to be some positive dynamic in place – it must be measurable and it should lead to positive results within a reasonable time frame.⁴⁵

Even in a situation of economic recession, progressive realisation must maintain a minimum level of provision to ensure human dignity and autonomy, and avoid the tendency to cut back first against the weakest.⁴⁶ States must therefore take positive action to reduce structural disadvantages, giving ‘appropriate preferential treatment’ to adults and children with disabilities, towards their full participation and equality.⁴⁷

3.1.3 Monitoring implementation

The CRPD⁴⁸ describes the monitoring and reporting process required of states parties. Schulze notes that the challenge associated with respect to monitoring the rights of persons with disabilities is ‘who gets to define the factors or statistical indicators for collecting data’, adding that the risk of inaccuracy is high, depending on whether the definition of disability is wide or narrow. Accuracy is also compromised by societal attitudes which may make parents reluctant to identify their child as being disabled.⁴⁹

States must collect statistics and data collection in order to formulate and implement policies which give effect to the CRPD. Such information is to be disaggregated as appropriate and used to assess progress in implementation, as well as identify and address barriers faced by persons with disabilities in the exercising of their rights. These statistics must be

43 B Abramson ‘Article 2: The right of non-discrimination’ in A Alen et al (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008).

44 Art 4(2).

45 Quinn (n 5 above) 44.

46 Quinn (n 5 above).

47 UN Committee on Economic, Social and Cultural Rights ‘General Comment No 5: Persons with disabilities’ (1994) E/1995/22 para 9.

48 Arts 31-36.

49 Schulze (n 6 above) 172.

disseminated and accessible to persons with disabilities and their representative organisations.

3.1.4 Consultation with persons with disabilities and their representative organisations

The CRPD emphasises the need to recognise the contributions that disabled adults and children have made (and will make) to society, and affirms that promotion of their rights towards full participation will lead not only to a sense of belonging but also to development of society and the eradication of poverty.⁵⁰ There is an obligation on states to actively consult persons with disabilities and their representative organisations, and to establish mechanisms involving them in monitoring compliance with the provisions of the CRPD.⁵¹ This involvement is not seen as an optional extra, but as a 'key tool to achieve conformity with the Convention'.⁵² This obligation is supplemented by the duty (imposed on states by Article 8) to raise awareness of the contribution and potential of disabled people, counter negative stereotypes and promote positive images of disability.⁵³ In the context of young children with disabilities, engaging with parents of children with disabilities and their representative organisations is critical for the development of effective policies and programmes.

3.1.5 International co-operation

The CRPD also provides for international co-operation to support implementation, through capacity-building and exchange and sharing of information, experiences, training programmes and best practices.⁵⁴ International organisations such as Inclusion International, UNESCO and Save the Children have been very active in promoting inclusive education, and tools and resources have been developed around the Sustainable Development Goals and the Education for All initiative. There is a need to extend these into the arena of ECD for young children with disabilities. The documentation and analysis of examples of good practice would assist states to identify practices that could be replicated and scaled up, as well as

50 CRPD Preamble (m).

51 Article 4(3) obliges states to 'closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations' in the implementation of the CRPD and other policies impacting on adults and children with disabilities. Article 33(3) provides for persons with disabilities to be involved in monitoring implementation.

52 Schulze (n 6 above). See also Committee on the Rights of the Child 'General Comment No 12: The right of the child to be heard' (2009) CRC/C/CG/12.

53 Lawson (n 37 above).

54 Art 32(1)(b) of the CRPD.

providing a framework to guide planning in the most effective use of available resources.⁵⁵

3.2 Specific substantive rights relating to ECD services

In addition to the general obligations placed on states under the CRPD, there are a number of specific substantive rights which provide a benchmark against which to assess ECD interventions provided by the state. These include the article relating to children and articles that correspond to elements of the 'essential package' of ECD services.

3.2.1 Obligations of the state to children with disabilities

The precursor to the article on children (Art 7) is found in the Preamble (r) of the CRPD which provides that 'children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by states parties to the Convention on the Rights of the Child' (CRC). Indeed, the text of this article contains phrases almost identical to those of the CRC.⁵⁶ Because of the close alignment between these treaties, tools developed for interpretation of the CRC⁵⁷ give valuable insights into interpreting the rights of children with disabilities under the CRPD.

3.2.2 Obligations of the state with respect to ECD-related services

There are also provisions of the CRPD which correspond to components of the 'essential package' of services for young children.

Health

Under Article 25, adults and children with disabilities have the right to 'the enjoyment of the highest attainable standard of health without discrimination on the basis of disability'. Children with disabilities are to be provided with access to health services which are available to all children, such as immunisation and growth monitoring. Further, health services are to include 'early identification and intervention ... and services designed to minimize and prevent further disabilities' (Art 25(b)).

55 Examples of good practice are documented in: Save the Children 'Addressing exclusion and invisibility in early childhood years: Report on promising practices in working with young children in South Africa' (2010).

56 The provision in the CRPD (art 7(2)) is almost identical to that in the CRC (art 3(3)).

57 For example UN Committee on the Rights of the Child 'General Comment No 7: Implementing child rights in early childhood' (2005) CRC/C/GC/7; and UN Committee on the Rights of the Child 'General Comment No 9: The rights of children with disabilities' (2007) CRC/C/GC/9.

For children with disabilities, early intervention involving stimulation and interaction with parents soon after birth is essential to development... Early identification can also be promoted through the preparation of all family members, especially parents, to monitor their child's developmental progress through the use of simple instruments, strengthened with a basic understanding of children's capacities at different stages.⁵⁸

Under the CRPD, there are a number of features required of health services.⁵⁹ Services need to be available (of sufficient quantity within the state party) and include measures that address underlying determinants of health.⁶⁰ They also need to be accessible to everyone without discrimination, acceptable, scientifically and medically appropriate and of good quality.

With regard to disability-focused services that facilitate participation and inclusion, the CRPD places an obligation on states to 'organise, strengthen and extend' habilitation and rehabilitation services, which must begin at the earliest possible stage and support persons with disabilities to be independent and to participate in all aspects of society. Indeed, without the benefit of such interventions, it is likely that children with disabilities would not be able to realise the rights to accessibility and education.⁶¹ Habilitation and rehabilitation services should be offered at no cost, where possible, within a service that is efficient and with minimal delays.⁶² The state is responsible for ensuring that services are available in local communities, including rural areas.⁶³

Adequate standard of living and social protection

The CRPD provides for an adequate standard of living and social protection, which includes adequate food, clothing and housing and the continuous improvement of living conditions. Under article 28, state parties must acknowledge the link between disability and poverty and respond by ensuring access to social protection and poverty reduction programmes. Particular mention is made of families living in conditions of poverty, obliging states parties to assist with 'disability-related expenses'

58 UNICEF 'Promoting the rights of children with disabilities' (2007) 13 *Innocenti Digest* 22.

59 In interpreting the right to health in the CRPD, Schulze cites the UN CESCR 'General Comment No 14: The right to the highest attainable standard of health' (Art 12 of the Covenant) (2000) E/C.12/2000/4 para 11; Schulze (n 6 above).

60 This includes safe and potable drinking water, adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel and essential drugs.

61 UNHCHR 'From exclusion to equality: Realizing the rights of persons with disabilities: A handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol' (2007) UN Doc HR/PUB/07/6.

62 General Comment No 9 (n 57 above).

63 This has been understood as referring to community-based rehabilitation, as defined in the joint position paper issued by ILO, WHO and UNESCO. WHO 'Towards community-based inclusive development' (2010).

which include training, counselling, financial assistance and respite care.⁶⁴ States are required to realise this right through a number of different measures including access to clean water, appropriate and affordable services and housing. The CRPD⁶⁵ also places on states the obligation to prevent exploitation, violence and abuse by providing age-appropriate assistance and support as well as protection services that are age- and disability sensitive. States must put in place child-focused legislation and policies to ensure that perpetrators of exploitation, violence and abuse of children with disabilities are identified, investigated and where found guilty, prosecuted.

Caregiver support

The CRPD recognises that ‘the family is the natural and fundamental group unit of society, and is entitled to protection by society and the state and that persons with disabilities and their family members should receive the necessary protection and assistance to enable family members to contribute to the full and equal enjoyment of rights ...’ (Preamble(x)). It provides for equal rights for children with disabilities with respect to family life.⁶⁶

Article 16 requires that service providers acknowledge the processes by which children with disabilities mature, and offer guidance and support as necessary. Parents and other caregivers need particular support to ensure that children with disabilities are not over-protected or treated as babies, thus preventing them from acquiring the necessary competencies for increasing autonomy. In order to reduce the risk of the abandonment or hiding of disabled children, states have an obligation to ‘provide early and comprehensive information, services and support to children with disabilities and their families’.⁶⁷ In line with the twin-track approach, community services that are provided for the general population are to be made available for children with disabilities, and disability-specific support services are to be provided to facilitate the inclusion of disabled adults and children and prevent their isolation.⁶⁸

Education

Educational provisions in the CRPD are based on the view that inclusion is the most effective means of combating discriminatory attitudes and achieving education for all.⁶⁹ It places on the state an obligation to develop

64 Art 28(2)(c).

65 CRPD, art 16: Freedom from exploitation, violence and abuse.

66 CRPD, art 23: Respect for home and the family.

67 CRPD, art 23(3).

68 CRPD, art 19(1)(b).

69 Schulze (n 6 above).

an inclusive education system, specifically education that is provided for all children within the regular education system.⁷⁰ UNESCO's Guidelines for Inclusion stress that the earlier this is done the better.⁷¹

Article 24(1) focuses on the *purpose* of education, which is to be directed towards 'the full development of human potential and sense of dignity and self-worth ...' as well as development of individual 'personality, talents and creativity' and 'mental and physical abilities to the fullest potential'. Although it does not make reference to pre-school education, the CRPD provides for an inclusive education system 'at all levels' with the necessary support within the general education system. Under the CRPD, the obligation of the state is to provide non-discriminatory access, reasonable accommodation and individualised support such that each child is able to develop to their full potential.

The premise that inclusive education nurtures a society in which children with disabilities are accepted and embraced and not stereotyped is reflected in article 8(2)(b) on awareness-raising, in which the state is to undertake measures to foster 'at all levels of the education system, including all children from an early age, an attitude of respect for the rights of children with disabilities'.

4 Evaluation of selected ECD-related legislation and policy using the CRPD

As indicated above, the CRPD provides a useful standard with which to review legislation and policies providing for social services, social security, health and nutrition and education for young children with disabilities.

4.1 Social services

As the primary legal framework in South Africa that gives effect to children's rights to social services, the Children's Act 38 of 2005 prohibits discrimination on the basis of disability, and adopts the social model of disability in addressing factors which limit the ability of children with disabilities to participate in different spheres of life.⁷² Indeed, extensive disability-related provisions have led to recognition of the Act as placing children with disabilities on 'centre stage'.⁷³ Section 11 (entitled 'children

70 This is the definition contained in the Salamanca Declaration, adopted at the World Conference on Special Needs Education. The Declaration calls on states to ensure that children with 'special educational needs' must have access to regular schooling.

71 UNESCO 'Guidelines for Inclusion: Ensuring access to education for all' (2005).

72 H Combrinck *The Children's Act and disability* (2011).

73 L Jamieson & P Proudlock 'From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act' Children's Institute Case Study 4, University of Cape Town (October 2009).

with disability or chronic illness') has the most direct provisions of the Act in relation to disability, and as one of the general principles, is to guide all proceedings, actions and decisions involving children with disabilities. It has been argued that this section contains all the elements of ECD for children with disabilities viz being treated with dignity, enabling their participation in community life and having support for primary carergivers.⁷⁴

ECD has been defined in the Children's Act as 'the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of the child from birth to school-going age'.⁷⁵ Although this definition is very broad, provisions of the Act relate almost exclusively to early learning and focus on services provided in centres. Little consideration is given as to what is needed at the level of the home or community to support parenting and the nutrition, learning and protection of the young child. The bias of the Act towards centre-based services is of particular concern with respect to children with disabilities, because parent education programmes, toy libraries and other similar outreach programmes provide important learning opportunities and parental support for children who are not able to access centres.

Under the Children's Act, government has the responsibility to develop a national strategy towards providing a properly resourced, co-ordinated and managed ECD system, with an appropriate spread of services throughout the province and country, giving 'due consideration' to children with disabilities.⁷⁶ This is an important provision for parents and organisations concerned with service delivery, especially organisations seeking funding and registration. Further, the information included in the records, strategies and profile required by the Act (in section 92) may be used to monitor government's fulfilment of its obligations under the Act.⁷⁷ Such monitoring is important to ensure timeous implementation, with clear time frames and budgets for service delivery. However, while the Act targets particular groups, its strategy omits civil society structures, such as parent organisations and disability-related NGOs. These groups have an important role to play and the relationship between the state and such organisations is of critical importance. Promoting the participation of such groups is one of the obligations of government under the CRPD if programmes are to be fully inclusive of children with disabilities.⁷⁸

74 S Philpott 'Realising the right of children with disabilities to early childhood development in South Africa' unpublished PhD thesis, University of the Western Cape, 2013.

75 Sec 92(1).

76 Sec 92(1).

77 C du Toit & B Mbambo 'Early childhood development' in CJ Davel & A Skelton (eds) *Commentary on the Children's Act* (2010) 8. Sec 99(3) of the Children's Act.

78 Art 4(3) of the CRPD reflects the state's obligation to 'closely consult with' and 'actively involve' persons with disabilities, including children, through their representative organisations.

In funding ECD services, the Act states that priority must be given to poor communities and making services accessible to children with disabilities.⁷⁹ Although it theoretically enables the MEC for Social Development to prioritise funding of ECD on this basis, the Act gives the MEC the discretionary power to provide and fund ECD services.⁸⁰ Further, this limited directive to fund refers only to early learning services, not ECD more broadly. It thus reflects the limitation of the Children's Act in defining ECD widely, but only regulating early learning facilities with no regulation of other ECD services.⁸¹ In addition, there is as yet no national strategy in place to promote their access to ECD services, a problem which is exacerbated by the funding model being used by the Department of Social Development which is not responsive to the needs of children with disabilities. And because information systems do not disaggregate data on children with disabilities it is not possible to measure targeted spending.⁸² Lack of adequate data collection systems for monitoring and planning services for children with disabilities constitutes a violation of the States obligations under the CRPD.⁸³

4.2 Social security

The Social Assistance Act 13 of 2004 gives effect to the constitutional right of access to social security for people who are unable to support themselves and their dependents, and to children's right to social services.⁸⁴ Recognising the extra care required and costs incurred as a result of disability, the Act provides for social assistance for children with disabilities in the form of the Care Dependency Grant (CDG). This is a non-contributory monthly cash transfer, payable to a caregiver of a child who 'requires and receives permanent care or support services due to his or her physical or mental disability'.⁸⁵ To qualify for the grant, the child is required to undergo a medical assessment and the parent must pass a means test. As of May 2014, the value of the CDG is R1 350 per month. Research has shown that the CDG contributes to improving the standard of living of children with disabilities by enabling caregivers to purchase better quality food, pay costs of transport to health facilities, purchase medicines and improve housing.⁸⁶ Although (in the absence of accurate disability prevalence rates) it is not possible to calculate the take-up rate, it

79 Sec 93(4).

80 Sec 93(1).

81 L Richter et al 'Diagnostic review of the ECD sector' Report commissioned by the Department of Performance Monitoring and Evaluation and the Inter-Departmental Steering Committee on Early Childhood Development (2012).

82 Situation analysis (n 3 above).

83 Art 31(2).

84 Secs 27(1)(c) and 28(1)(c) of the Constitution of the Republic of South Africa, 1996.

85 Sec 7(a) of the Social Assistance Act.

86 C de Koker et al *A profile of social security beneficiaries in South Africa* (2006).

is estimated that the CDG is reaching only a quarter of children with severe disabilities.⁸⁷

Using the CRPD as a standard, two particular areas of concern emerge in relation to the Social Assistance Act and children with disabilities. The first is that the assessment process for the CDG is based primarily on the medical model of disability, determining the severity of the child's health condition or impairment by means of an assessment by a medical practitioner. There is failure to take cognisance of factors other than the impairment in the determination of disability. This leads directly to the second concern viz the tendency to view social assistance only as a means of improving the standard of living of children with disabilities. Given the high levels of poverty in the country, this is laudable, but it does not go far enough. Instead, in line with the CRPD, access to social security should be promoted in tandem with strategies to equalise opportunities and create environments in which children with disabilities can thrive. In summary, social security should be viewed as one element of the 'essential package' of services that enables children with disabilities to be included and benefit from all other elements, including opportunities for early learning, towards developing to their full potential.

4.3 Health and nutrition

Since promulgating the National Health Act 61 of 2003, the Department of Health has undertaken a process of 're-engineering primary health care'.⁸⁸ This is one of several initiatives to improve health services,⁸⁹ and has three prongs, viz strengthening of the district health system, greater emphasis on delivery of community-based services and a focus on the social determinants of health.⁹⁰ It includes three programmes, viz primary health care outreach teams,⁹¹ school health teams, and district clinical specialist teams (DCSTs).⁹² It is anticipated that a renewed focus on

87 P Martin et al 'The rights of children with disabilities to social assistance: A review of South Africa's care dependency grant' in P Proudlock (ed) *South Africa's progress in realizing children's rights: A law review* (2014).

88 Department of Health 'Re-engineering Primary Health Care in South Africa: A discussion document' (2010). This was adopted by the National Health Council in January 2011.

89 The others are implementation of the National Health Insurance as a means of financing universal coverage of health services and renewed focus on quality assurance and improvement. Dept of Health Strategic Plan 2010/11-2012/13 21.

90 N Schaay et al 'Overview of health sector reforms in South Africa' Report commissioned by the UK Department for International Development (2011).

91 Each team comprises of four primary health care nurses and six community health workers. Each community health worker is responsible for 250 households and their responsibilities include health promotion and prevention as well as screening and referral. LJ Bamford 'Extending child survival gains: The policy context' in CR Stephen & LJ Bamford (eds) *Saving children 2010-2011: A seventh survey of child health care in South Africa* (2013) 35.

92 There is one team in each district, focusing on improving maternal and child health, chronic illnesses and HIV/AIDS. They comprise: an obstetrician and gynaecologist, a paediatrician, a family physician and an anaesthetist as well as a midwife, a paediatric

primary health care (PHC) will improve access to health services and address persisting inequalities in the health sector, especially in rural areas. It will also be a means of strengthening referral systems to manage patients at regional and district levels.

There are two provisions of the Re-engineering Strategy which are of particular importance for health services for children with disabilities. First, the Integrated Management of Childhood Illness (IMCI)⁹³ – referred to by the Minister of Health as ‘the cornerstone of child health service provision at PHC level’⁹⁴ – is a principal strategy to improve child health, especially in poor communities.⁹⁵ As an intervention in response to the crisis of high maternal and child deaths in the country, the primary focus of IMCI is prevention and curative treatment of common illnesses of childhood (such as diarrhoea, pneumonia and HIV). However, there is no clear directive given when ‘cure’ is not effective and a child develops a permanent impairment (such as hearing loss). The IMCI protocol contains a section on ‘special risk factors’ (which include the mother’s death, prematurity or low birth weight, a teenage mother, or a birth defect), but there is very little guidance on how to deal with them.⁹⁶ There is no mention of therapists as a possible option for referral, although they are included on the Chart of Developmental Milestones in the Road to Health Booklet. Having been effective in reducing child mortality, it is now anticipated that the ‘Care for Development’ component of the IMCI at community level, will be expanded as a potential early intervention tool.⁹⁷ This would be in line with the state obligations under the CRPD.

Secondly, the Re-engineering of PHC details community-based services to support people with non-communicable diseases. This includes conducting household visits to identify those with chronic diseases and disabilities, oral health or visual or hearing impairments. There is also identification and management of common health problems and the provision of basic stroke support and rehabilitation services. Community-based services are to include identification of at-risk households and individuals and promoting of information and support on appropriate home care, such as infant and young child feeding. Significantly, services focusing on chronic diseases do not make reference to the disabling effects of different conditions, nor do they refer to specific conditions affecting children. Although consideration is given to psycho-social support in the management of common health problems, there is no reference to

nurse, and a primary healthcare nurse. Bamford (n 91 above).

93 Department of Health & WHO ‘Integrated Management of Childhood Illness’ (2011).

94 A Motsoaledi ‘A vision for child health in South Africa’ in M Kibel et al (eds) *South African child gauge* (2010) 91.

95 It has been promoted by WHO and UNICEF since the mid-1990s.

96 The options given are to refer to a social worker, to an appropriate support group, and/or for a child support grant.

97 WHO & UNICEF ‘Care for child development: Improving the care for young children’ (2012). L Jacklin ‘The future is in our hands’ in Stephen & Bamford (eds) (n 91 above) 46.

rehabilitation in the process. Similarly, services in response to violence and injuries do not include rehabilitation. Despite this, it is anticipated that the work of the DCSTs will ensure better management of primary health facilities thereby improving quality of services and referral, as required by the CRPD.

As part of the PHC package, the Department of Health has established the Integrated Nutrition Programme,⁹⁸ which has a major focus on breastfeeding and the reduction of under-weight, stunting and wasting amongst children under five years of age. While the programme targets young children, no particular consideration is given to the nutritional needs of children with disabilities. One of the aims of the Infant and Child Feeding Policy⁹⁹ is to improve the nutritional status of children, with an objective 'to provide guidance on feeding children in exceptionally difficult circumstances'. This includes 'children with mothers who have physical or mental disabilities'. The policy thus does not take cognisance of risk factors related to the *child's* disability, such as cerebral palsy, which may result in difficulties with chewing or swallowing, heightening risk of under-nutrition or malnutrition.¹⁰⁰

Rehabilitation services rendered by the Department of Health are guided by the National Rehabilitation Policy¹⁰¹ and aim to help adults and children with disabilities to attain maximum independence and full inclusion in all aspects of life. Rehabilitation is viewed as a means of achieving equalisation of opportunities and protecting the rights of adults and children with disabilities. The goal of the policy is to improve access to rehabilitation services, thereby ensuring the right of all citizens of access to health services. Community-based rehabilitation (CBR) is affirmed as the 'philosophy or strategy' on which rehabilitation services are based, and therefore CBR principles are applicable at all levels, towards promoting accessible, affordable and appropriate services. The Policy identifies a number of different components of rehabilitation (including prevention of disability, identification and diagnosis of different conditions, medical and educational rehabilitation), which involve various government departments working collaboratively. Provision of assistive devices is also part of rehabilitation and constitutes a key mechanism to ensure that disabled adults and children can participate as equals in society.

98 Department of Health 'The primary health care package for South Africa – A set of norms and standards' (2000) 67. Its vision is 'optimum nutrition for all South Africa'. It is recognised that nutrition is multi-sectoral and complex. Nutrition status is improved through a mix of direct and indirect nutrition interventions implemented at various points of service delivery such as clinics, hospitals and communities and aimed at specific target groups.

99 Department of Health 'Infant and young child feeding policy' (2007).

100 E Bostock 'Dysphagia: The silent killer' Poster presented at the Conference of South Africa Doctors (RuDASA) Rhodes: Eastern Cape (2011).

101 Department of Health 'Rehabilitation for all: National rehabilitation policy' (2000) 2.

Although the Strategy for re-engineering of PHC identifies rehabilitation as one of its components (with goals for CBR articulated at the levels of community, clinics and community health centres, where it is envisaged that therapists will be deployed)¹⁰² there is currently no national strategy for CBR. A policy response to the country's shortage and inequitable distribution of rehabilitation professionals by the Department of Health has been the introduction of community service therapists.¹⁰³ However, ongoing challenges include high turnover of staff, lack of continuity of services, and inadequate supervision and support in rural areas. Further the 'transient nature' of these therapists and their lack of accountability have contributed to a breakdown of trust between them and the families that they serve.¹⁰⁴

In summary, the legislation and policies of the Department of Health have gone some way to improving access to health services for children with disabilities. Great emphasis has been placed on improving maternal and child health through servicing of immediate medical needs and the reduction of mortality.¹⁰⁵ Although the re-engineering of PHC is recognised as an opportunity for fulfilling the rights of children with disabilities, the Department of Health is yet to prioritise early intervention, habilitation and rehabilitation (particularly CBR) as part of health services. Current legislative, policy and strategy provisions do not provide adequately for routine and/or early screening for disabilities such as hearing loss¹⁰⁶ and the District Health System is not adequately equipped to deal with children who are at high risk for impairment and disability. As a result, the rights to early identification and intervention (as part of the right to health in the CRPD) and habilitation and rehabilitation for young children with disabilities are not being realised.

4.4 Education

The South African Schools Act 84 of 1996 is the principal legislation governing the education system in the country. Because the legislature has interpreted 'basic education' as including one year of pre-school (for six year olds) and up to Grade 9, this Act is outside the scope of this paper.

Two education-related policy provisions are considered with respect to early learning of children with disabilities. First, White Paper 5 on 'Early Childhood Development' focuses primarily on the establishment of the

102 Department of Health (n 88 above).

103 This is the requirement that newly qualified therapists work in a disadvantaged area for one year.

104 Jacklin (n 97 above).

105 M Chopra et al 'Achieving the health Millennium Development Goals for South Africa: Challenges and priorities' (2009) 374 *The Lancet* 1023.

106 C Storbeck & S Moodley 'ECD policies in South Africa – What about children with disabilities?' (2011) 3 *Journal of African Studies and Development* 1.

Reception Year (Grade R) as an additional year of compulsory schooling. However, it does not address the needs of young children (viz those below the age of 4) for early stimulation and opportunities for learning.

Secondly, Education White Paper 6 on inclusive education is based on respect for diversity in learning abilities, acknowledging that all children can learn if they have the necessary support.¹⁰⁷ It has been described as ‘a discourse driven by the substantive equality imperative of recognising as well as responding affirmatively to diversity’.¹⁰⁸ The ultimate goal of inclusive education is the provision of an education system which maximises the capacities of all learners and enables their participation.¹⁰⁹ White Paper 6 contains a 20-year timeframe to progressively realise this goal, steadily increasing the number of full-service and special schools until there is adequate provision for all learners. It was used as a basis on which to advocate for equal financial provision in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.¹¹⁰ However, the focus of this policy is the primary level of education, and there is a lack of acknowledgement of the pre-school years and the importance of early learning for young children with disabilities. Indeed, ECD is largely absent from White Paper 6.¹¹¹ This is indefensible in light of the substantial input and direction given by the Commission that informed its development.¹¹² This policy therefore does not comply with the requirements of the CRPD that states parties ‘shall ensure an inclusive education system at all levels’.¹¹³

5 Conclusion and recommendations for tapping the ‘transformative potential’ of the CRPD

As indicated in the foregoing discussion, the CRPD provides a standard by which to identify gaps and limitations with respect to legislation and policies on ECD for children with disabilities. It indicates that currently

107 Department of Education ‘Education White Paper 6: Special Needs Education: Building an inclusive education and training system’ (2001).

108 C Ngwenya & L Pretorius ‘Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*’ (2012) 28 *South African Journal on Human Rights* 81 103.

109 Ngwenya & Pretorius (n 108 above).

110 2011 (5) SA 87 (WCC).

111 In one of the few references made to early childhood, White Paper 6 states that district support teams are to include ‘early childhood and adult basic education centres’ (sec 4.3.3.1).

112 This Commission argued that ‘the foundation for inclusive education should be formed in the ECD band’ (118). It recommended a preventative and developmental approach to support, with early identification and intervention taking place specifically at the ECD level. Department of Education ‘Quality education for all: Overcoming barriers to learning and development’ (1997) Report of the National Commission on Special Needs in Education and Training and National Committee on Education Support Services.

113 Art 24(1).

what the South African government is doing is ‘too little’ (with respect to health and social services) and ‘too late’ (with respect to inclusive education). But the CRPD is more than just a standard against which to evaluate legislative measures which have been taken, it also provides directives towards making ECD-related rights a reality for children with disabilities in South Africa,¹¹⁴ and it is towards these that we now turn our attention.

5.1 A mechanism for accountability

Under the CRPD, the state is responsible for monitoring and reporting on its implementation. However, this is a task in which civil society – particularly organisations of disabled people and parents of disabled children – can play an important role. Using the framework of the CRPD, compilation of shadow or alternate reports provides an opportunity to systematically and periodically report on the experiences of children with disabilities and the extent to which their capacities have been nurtured so that they are able to participate as equals in society, and whether they have been able to take advantage of opportunities emerging from a strategy of equality.¹¹⁵ Such critique of state action need not be driven only by the demands of the Committee on the Rights of Persons with Disabilities, but the CRPD-related processes provide a potential framework for local activists and policy makers in the disability sector.

5.2 Guiding interpretation of rights by courts

Secondly, the CRPD can contribute to advancing the rights of young children with disabilities through its use and interpretation by the Courts. Indeed, the Constitution of South Africa requires courts to consider international law in their deliberations,¹¹⁶ as was done in *Western Cape Forum*¹¹⁷ where the CRPD was used to expose the shortcomings of the Department of Basic Education in realising the right of children with severe and profound intellectual disabilities to education. That such a case came to court is commendable, as is the action being taken as a result of the court interdict issued.¹¹⁸ This case demonstrates the potential of international law to shape courts’ interpretation of the state’s obligations and identify where a breach has occurred. The CRPD thus has the potential to be used in respect of other rights of young children with disabilities, such as the right to health and social security.

114 Philpott (n 74 above).

115 See Quinn (n 5 above).

116 Sec 231(4) of the Constitution.

117 *Western Cape Forum* (n 110 above).

118 The Western Cape Department of Education has set up multi-disciplinary teams to support the Day Care Centres that provide for children with severe and profound intellectual disabilities.

5.3 Providing the basis for advocacy coalitions

As was demonstrated in *Western Cape Forum*, organisations of civil society, together with academics and legal experts collaborated in bringing a case against the state in breach of the rights of children with severe and profound disabilities to education. Similarly, in the ECD sector, there exists the potential for coalitions to be established between organisations of parents of children with disabilities, NGOs, and child rights advocates, working together to ensure that the state fulfils its obligations with respect to access to the range of services contained in the 'essential package'.

5.4 Supporting innovative programming

Finally, while legal interventions are important, human rights practice needs to extend beyond these, for 'transformation takes place not only through processes of domestic law and policy change, but more broadly through innovative programming and through the processes of socialization and acculturation'.¹¹⁹

In addressing the question 'Early childhood development: What are the next steps?' Albino & Berry identify actions that can be taken to strengthen service delivery for ECD in the areas of nutrition, health, caregiver support, parenting and early learning.¹²⁰ The CRPD offers an important tool which could be used to shape these 'next steps' such that they provide children with disabilities opportunities to develop to their full potential. This requires that innovative programming at all levels and in all sectors is based on the principle of equality and non-discrimination, with considerations for reasonable accommodations to ensure that strategies are targeted to the unique needs of the individual child. Full and effective participation of children with disabilities in ECD services requires removal of barriers that prevent access to services provided generally for young children, as well as strengthening of disability-specific services such as early intervention and (re)habilitation.

The rollout of ECD services (including nutrition, health care, social protection and education) is recognised as being critical to the successful achievement of the National Development Plan, which reflects the government's vision for the country up to 2030.¹²¹ It is not as yet too late for the CRPD to be used to guide development of services that are inclusive of children with disabilities, and a benchmark by which to assess progress.

119 J Lord & MA Stein 'The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington University Law Review* 467.

120 N Albino & L Berry 'Early childhood development in South Africa: What are the next steps?' (2013) in L Berry et al (eds) (n 13 above).

121 National Planning Commission (n 2 above). B Dlamini 'Reflections on early childhood development' in L Berry et al (eds) (n 13 above)

EVERYBODY COUNTS: THE RIGHT TO VOTE OF PERSONS WITH PSYCHOSOCIAL DISABILITIES IN SOUTH AFRICA

*Helène Combrinck**

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.¹

Summary

Persons with psychosocial disabilities were historically denied the right to vote due to the long-held perception that they do not have the required decision-making capabilities required for voting. The adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2006 has necessitated a re-examination of this perception, leading to the growing recognition internationally that a universal limitation on the right to vote of persons with psychosocial disabilities can no longer be justified. This article accordingly examines the right to vote of persons with psychosocial disabilities in South Africa, which is generally regarded as an exemplary electoral model in the African region. The South African Constitution guarantees universal suffrage; at the same time, persons who are regarded as being 'of unsound mind' are excluded from voting. The article considers this 'systemic electoral inconsistency' against the paradigm shift mandated by the CRPD (and to some extent presaged by earlier international instruments). The traditional justifications for excluding persons with psychosocial disabilities from voting are weighed against the contemporary notions of legal capacity and decision-making, again with reference to the CRPD and recent interpretations by the Committee on the Rights of Persons with Disabilities.

* LLD (University of the Western Cape); Associate Professor, Centre for Disability Law and Policy, University of the Western Cape. This article owes its existence to my attending a training course on mental disability law presented by the Mental Disability Advocacy Centre (MDAC) during July 2011 in Budapest, Hungary, and in particular, a thought-provoking discussion on art 29 of the Convention on the Rights of Persons with Disabilities presented by Oliver Lewis. I am further indebted to participants in the regional workshop of the PANPPD (Pan-African Network of Persons with Psychosocial Disabilities) convened in Cape Town in August 2011 for the information they provided on voting rights in their respective countries and a discussion of voting rights led by Eyong Mbuem from the MDAC at this workshop. I also acknowledge the thoughtful suggestions of anonymous peer reviewers.

¹ *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17.

1 Introduction

The right to vote is regarded as one of the fundamental cornerstones of democracy, and at the beginning of the 21st century, the recognition of this right (which encapsulates the principle of universal suffrage),² appears to be beyond debate. However, for many persons with psychosocial³ disabilities globally, the right to vote remains out of reach, due to the long-held perception that they do not have the decision-making capacity that is required for voting. More often than not, it has gone unremarked that the very same constitutions or legislative enactments that proclaim the principles of non-discrimination and universal suffrage also exclude persons 'of unsound mind' from voting and from standing as candidates in elections.

This position is set to change in the light of a growing recognition that the limitation of the right to vote of persons with psychosocial disabilities cannot be justified on the basis of disability. Indeed, several recent developments, most notably the introduction of the Convention on the Rights of Persons with Disabilities,⁴ point to the need for a radical reconsideration on the part of governments (and society more broadly) of the assumption that persons with psychosocial disabilities should be excluded from voting. While the pursuit of the principles of democratic elections is valued everywhere, this is particularly the case in Africa, given its notorious history of electoral discontent. Ensuring the right to vote, as an aspect of the right to political participation, therefore takes on a distinct note of urgency in this context.

Against this background, this article examines the question whether existing limitations placed on the right to vote of persons with psychosocial disabilities can be sustained, with specific reference to the position in South

2 Defined as 'the right of all the adults in a country to vote in elections': http://www.macmillandictionary.com/dictionary/british/universal-suffrage#universal-suffrage_3 (accessed 11 July 2014); 'the right of all a nation's citizens above a certain age, usually eighteen or twenty-one, to vote, unless they are in violation of certain basic legal requirements': <http://www.wordsmyth.net/?level=3&ent=universal+suffrage> (accessed 11 July 2014).

3 The term 'psychosocial' is used here to refer to the interaction between the psychological and social/cultural components of this disability. The psychological component refers to ways of thinking, processing experiences and perceptions of the world. The social/ cultural component refers to societal and cultural limits for behaviour that interact with the psychological aspect as well as the stigma that society attaches to label people as disabled – World Network of Users and Survivors of Psychiatry *Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 9. Psychosocial disabilities are also sometimes referred to as 'psychiatric disabilities', 'mental disabilities' or 'mental health problems'. Because of the array of different terms used in the literature (legal and otherwise), it is not always possible to establish exact terminological equivalence. For example, the term 'mental disability' is sometimes used as a collective for both psychosocial disability and intellectual disability; in other work it denotes only the former.

4 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008 (CRPD).

Africa. It commences by looking into the background to disability-based voting exclusions and considering the primary current justifications for such restrictions. It then investigates the international human rights framework, with specific reference to the CRPD. It also considers two regional human rights instruments, notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and the African Charter on Human and Peoples' Rights (the African Charter). The article subsequently discusses the position relating to the right to vote of people with psychosocial disabilities in South Africa, and concludes with recommendations for alignment of the law with the CRPD.

While this article constitutes an investigation in its own right, it can also be seen as a 'case study' of the requirement for incisive law reform brought about by the ratification by states parties of the CRPD. In this sense, it also seeks to demonstrate a need for different ways of conceptualising disability and citizenship, in particular psychosocial disability.

2 Background: Understanding disability and the right to vote

2.1 Disability-based exclusions

Earl and Bushner explain that the types of obstacles encountered by voters with disabilities fall loosely into three categories: inaccessible polling places; inaccessible vote recording technologies; and disability-based voting restrictions.⁵ The inaccessibility of polling places generally includes environmental barriers, for instance a lack of parking accommodations and architectural barriers such as stairwells up to the polling site or doorways too narrow for wheelchairs.⁶ Inside the building, persons with visual impairments may require clear and easy-to-read signs in large font.

When it comes to inaccessible voting technologies,⁷ persons with visual impairments are again often at the receiving end. Paper ballots are

5 TH Earle & KM Bushner 'Effective participation or exclusion: The voting rights of people with disabilities' (2001-2002) 11 *Temple Political & Civil Rights Law Review* 327 329; K Schriner et al 'Democratic dilemmas: Notes on the ADA and voting rights of people with cognitive and emotional impairments' (2000) 21 *Berkeley Journal of Employment & Labor Law* 437 483. See also JE Lord et al 'Facilitating an equal right to vote for persons with disabilities' (2014) 6 *Journal of Human Rights Practice* 115 117.

6 Earle & Bushner (n 5 above) 329.

7 These may include paper ballots (the method still used most frequently in developing countries), mechanical lever machines, punch cards, optical scan systems and Direct Recording Electronic (DRE) systems – see <http://inventors.about.com/library/weekly/aa111300b.htm> (accessed 11 July 2014). Earl and Bushner refer to 'voting machines'.

not always available in Braille format (assuming that all voters with visual impairments make use of Braille), and alternatives such as a Braille ‘template’ that can be placed over the paper ballot are not consistently supplied. Similarly, voters with motor impairments, who require assistance in marking their ballot paper, may experience obstacles in the form of small voting booths that do not allow entry of two persons at the same time. In such instances, voting technologies such as direct recording electronic systems may provide potential solutions; however, these are probably out of reach in developing countries for the foreseeable future.

It is however the third category, namely disability-based voting restrictions, that compels our interest here. The first two categories are increasingly addressed⁸ either in general or disability-specific legislation setting standards for accessibility⁹ and reasonable accommodation.¹⁰ There is also a growing trend to make legislative provision for persons with disabilities to make use of assistance of their choice when casting their vote¹¹ – another form of reasonable accommodation. On the other hand, it is noteworthy that the disability-based voting restrictions for the most part affect only persons with psychosocial disabilities and/or those with intellectual disabilities.¹² These restrictions stand alongside constitutional and legislative assurances of equality, prohibition of disability-based discrimination and universal suffrage. This constitutes an internal dissonance between foundational constitutional principles and the exclusion of persons with psychosocial disabilities from voting. Nelson refers to this disjuncture as ‘systemic electoral inconsistency’, an aptly descriptive term that will also be used for the purposes of this article.¹³

2.2 Who votes – and who does not?

Since the earliest democratic formations (from the Greek city states and the subsequent Roman period), public participation was characterised by a

8 See M Waterstone ‘Political participation for people with disabilities’ in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 371 380-381.

9 See art 9 of the CRPD.

10 See art 5 of the CRPD, which makes it clear that a failure to provide reasonable accommodation constitutes disability-based discrimination. ‘Reasonable accommodation’ is defined in art 2 of the Convention 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’ (my emphasis). Reasonable accommodation is therefore aimed at meeting the requirements of a specific individual, whereas ‘accessibility’ entails the identification and elimination of barriers and obstacles to ensure to persons with disabilities (*generally*) access, on an equal basis with others, to the physical environment, to transportation, etc.

11 See eg discussion of South African legislation below.

12 Another group that is regularly excluded is prisoners, whether awaiting-trial or sentenced. The rationale for exclusion for each group is different.

13 JS Nelson ‘Fair measure of the right to vote: A comparative perspective of voting rights enforcement in a mature democracy’ (2010) 18 *Cardozo Journal of International & Comparative Law* 425 429. Although this article deals with sentenced prisoners in Ghana, I argue that the same principle applies.

binary division between those who had the right to take part (the 'insiders') and those who were excluded (the 'outsiders'), such as slaves, women and non-citizens.¹⁴ Schriner and Ochs, in their study of the development of disability exclusions in the United States, make the compelling point that the question of 'who votes' historically has been a contentious one because this issue is 'so basic to the functioning of a representative democracy'.¹⁵

They recount that in early colonial America, property ownership was required as the basis for voting.¹⁶ This requirement was carried forward from the English notion that property ownership was a prerequisite for selfhood; there was also a fear that the votes of landless persons such as renters or tenants would be controlled by the direct and indirect influence of the wealthy.¹⁷ Although the requirement of property ownership was eventually replaced by a taxpaying qualification, states at the same time began to exclude outsiders such as 'foreigners, the free negro, and [women]'.¹⁸ This was also when states began to develop disability-based exclusions.¹⁹ Importantly, the disability exclusions were initially linked to perceptions of economic dependency.²⁰

By 1880, 26 of the 38 American states had enacted provisions disenfranchising persons with 'diminished mental capacities'.²¹ The motivation accepted for these disenfranchising provisions was first, that persons with mental illness were considered to have 'no intellect at all'.²² This disqualified them from participation in civic society, given the emphasis on rationality as the essence of democratic citizenship during this period.²³ A second motivation was based in Social Darwinist theory, which held that 'some persons are more socially desirable than others' and that future generations can be improved biologically by increasing the

14 See J Fishkin 'Equal citizenship and the individual right to vote' (2011) 86 *Indiana Law Journal* 1289-1334.

15 Schriner et al (n 5 above) 483.

16 Schriner et al (n 5 above) 487; JA Bindel 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities' (2009) 65 *New York University Annual Survey of American Law* 87-101. Of course one also had to be an adult white male.

17 Schriner et al (n 5 above) 488. Renters would be susceptible to the power of their landlords, and employees subject to the influence of their employers. This thought replicated ideas already common in England.

18 Schriner et al (n 5 above) 489.

19 Bindel (n 16 above) 102.

20 In Massachusetts, for example, the constitution was amended in 1821 in two respects. First, the property qualification was dropped in favour of a taxpaying qualification; second, 'paupers and persons under guardianship' were excluded from the electorate. This exclusion was justified on the basis that paupers (persons who had no means of self-support and thus were dependent on public relief) and persons under guardianship (insane persons, drunkards, and others whose financial affairs were managed by a guardian for the primary purpose of avoiding dependency on public relief) were viewed as unworthy because of their economic dependency – Schriner et al (n 5 above) 490.

21 Bindel (n 16 above) 102. Terminology used in source.

22 Bindel (n 16 above) 103.

23 Interestingly, similar arguments based on citizenship and inferior mental capacity were proposed at the time to deny women the right to vote – see NF Brescia 'Modernizing state voting laws that disenfranchise the mentally disabled with the aid of past suffrage movements' (2010) 54 *Saint Louis University Law Journal* 943-957-960.

proportion of 'desirable individuals' and decreasing the rate of propagation of 'inferior individuals'. At the time²⁴ concern about a perceived increase in the rate of mental illness in America led to a view that society needed to be protected from the actions of those who were less capable – which included voting.²⁵

The third motivation was one of electoral advantage, which entailed that political parties perceived an advantage in limiting the pool of potential voters by excluding certain groups. Interestingly, the adoption of disenfranchisement statutes often coincided with initiatives to construct 'asylums' for persons with mental illness and institutions for persons with intellectual disabilities; this concentrated people with psychosocial and intellectual disabilities in large numbers in a single location, with a potential to control the outcome of local elections.²⁶

The more contemporary justification for disbaring persons with psychosocial disabilities from voting has been described as 'preserving the political community'²⁷ or 'preserving the integrity of the election process'²⁸ as well as the prevention of voter fraud.²⁹ The assumption is that the political community will be preserved by making a distinction between voters who intend to affect the election outcome by expressing some preference, and those who do not understand the nature of voting and are unable to vote competently.³⁰ As Brescia observes,³¹ there is a prevailing belief that a person with a mental health diagnosis is intrinsically irrational and incapable of participating in civic functions. However, it should be noted that a psychosocial disability does not necessarily affect a person's ability to make decisions or understand concepts.³²

On a more fundamental level, however, the question is whether it is for the state to determine what 'voting competently' means – whether it is the role of the state to determine what is a valid political opinion.³³ It has been

24 The late 19th and early 20th centuries.

25 Bindel (n 16 above) 104-105. Social Darwinism also gave rise to the eugenics movement, which saw prohibitions on marriage and procreation of people with especially intellectual disabilities and also encouraged laws permitting involuntary sterilisation – see KB Glen 'Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond' (2012) 44 *Columbia Human Rights Law Review* 93 104-105.

26 Bindel (n 16 above) 106.

27 PS Karlan 'Framing the voting rights claims of cognitively impaired individuals' (2007) 38 *McGeorge Law Review* 917 925.

28 As above.

29 See also Schriener et al (n 5 above) 486.

30 R Kelley 'Toward an unconditional right to vote for persons with mental disabilities: Reconciling state law with constitutional guarantees' (2010) 30 *Boston College Third World Law Journal* 359 370.

31 Brescia (n 23 above) 959.

32 Brescia concedes that while 'some severe mental disabilities' can inhibit individuals from making decisions or comprehension, by no means do the vast majority of people with mental disabilities lose these functions.

33 MA Stein & R Allen *Third party intervention in the matter of Bujdosó, Zsolt et al. v. Hungary* (2013) para 19.

observed that the (in)ability to cast a rational vote is not specific to people with disabilities.³⁴ Karlan observes that much of political discourse ‘bypasses the conscious mind altogether’;³⁵ a voter will likely vote for a candidate he or she supports, but his or her approval need not be driven by agreement with the candidate's policies.³⁶ In some instances, it may be motivated by the candidate's appearance, a long-standing political affiliation (especially relevant in the South African context) or grounds that would have been impermissible if applied in another context – such as the race, gender, religion or sexual orientation of the candidate.³⁷ As Quinn notes, ‘our choices are nearly always a mix of raw preferences with rationality’.³⁸

The apprehension about voter fraud entails first, that persons with psychosocial or intellectual disabilities may receive inappropriate assistance when voting (for example, from caregivers) or may be unduly influenced.³⁹ Secondly, there is a concern about fraudulent absentee voting.⁴⁰ The first concern involves persons with disabilities receiving inappropriate assistance when voting. At its extreme, this could devolve into proxy voting on behalf of the person with a disability by another, for example, a caregiver.⁴¹ Voting is one context in which delegation of decision-making is impermissible.⁴² Even short of a caregiver engaging in proxy voting, some are concerned that persons with psychosocial disabilities can be unduly persuaded by others. The question of undue influence ultimately becomes one of degree: for example, when do candidates' electioneering promises cross the line to ‘undue influence’?

The issue that arises with fraudulent absentee voting is that absentee ballots may be requested on behalf of a person with a psychosocial disability and cast without the knowledge of this person. However, Bindel points out that these concerns also apply to other groups of voters, such as those with physical or communicational disabilities or newly registered voters.⁴³ And, as Fiala-Butora et al observe, given the lack of any empirical evidence that persons with disabilities are either ‘generally more susceptible or relatively more prone to becoming victims of fraud’, concerns about this aspect must be attributed to prejudice and stigma.⁴⁴

34 Stein & Allen (n 33 above) para 20.

35 Karlan (n 27 above) 917; Brescia (n 23 above) 960.

36 Bindel (n 16 above) 115.

37 Stein & Allen (n 33 above) para 20; Bindel (n 16 above) 115.

38 G Quinn *Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD* (2010) 7.

39 Bindel (n 16 above) 107.

40 Bindel (n 16 above) 108.

41 Bindel (n 16 above) 107.

42 See also the discussion below.

43 Bindel (n 16 above) 122.

44 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* 86.

The strongly held preconceptions described above remain powerfully entrenched, as can be seen in the number of jurisdictions where the right to vote remains elusive to people with psychosocial disabilities. A study conducted in 2009-2010 amongst 27 European Union (EU) member states found that national practice in this regard was diverse: it ranged from total exclusion from political participation, through a case-by-case consideration to full participation.⁴⁵ The majority of EU member states were found to link the right to political participation to the legal capacity of the individual.⁴⁶ These member states had an automatic or quasi-automatic exclusion provision in their legal systems, which denies the right to political participation to all persons under a protective measure such as a partial and plenary guardianship,⁴⁷ regardless of their actual and/or individual level of functional ability or whether they have an intellectual disability or a mental health problem.⁴⁸ Plenary guardianship remains one of the primary mechanisms depriving persons with psychosocial disabilities of the right to vote.

Secondly, several EU member states were observed to have adopted a variety of practices falling between the two ends of the spectrum, in which an assessment is made of the individual's actual ability to vote.⁴⁹ These countries have adopted either an exclusion policy coupled with an individualised assessment or a full participation policy complemented with a specific decision on voting capacity. Furthermore, amongst these countries a differentiation can be made between those in which the individual's situation is assessed by a medical practitioner and those in which the assessment is made by a judge. A minority of countries has lifted all restrictions on political participation, including Austria; Finland; The Netherlands; and Sweden.⁵⁰ This means that these countries have opted for full participation in the electoral process for persons with psychosocial disabilities and with intellectual disabilities.

Bindel similarly reported in 2010 that 41 states in the US disenfranchise persons with 'diminished mental capacities', either in their

45 European Union Agency for Fundamental Rights (FRA) *The right to political participation of persons with mental health problems and persons with intellectual disabilities* (2010) 15; see also Fiala-Butora et al (n 44 above) 75. See Brescia (n 23 above) 946-948 for a brief summary of the position in the US.

46 The notion of legal capacity is discussed below.

47 Guardianship traditionally means that when the state determines that an individual lacks the 'capacity' to make some or all decisions, the state removes the individual's legal right to make those decisions and appoints a guardian to make those decisions for that individual – so-called 'substituted decision-making': L Salzman 'Guardianship for persons with mental illness – A legal and appropriate alternative?' (2011) 4 *St Louis University Journal of Health Law & Policy* 279 279. The notion of guardianship is closely bound up with a discussion of legal capacity; this is however beyond the scope of this article. For a thorough discussion of guardianship and recent changes in guardianship laws, see generally Salzman (above) 279-329; Glen (n 25 above) 92-169.

48 FRA (n 45 above) 15.

49 FRA (n 45 above) 16.

50 FRA (n 45 above) 18.

state constitutions or statutes.⁵¹ A brief overview of Anglophone African jurisdictions reveals a similar trend.⁵²

2.3 Why is the right to vote so important?

The significance of the right to vote cannot be overstated. Waterstone notes that voting should be viewed as more than the instrumental choice of electing a candidate: Voting in a polling place is a way in which a citizen asserts his or her 'place in a community'.⁵³ This is particularly important in the case of people with disabilities, a group that has traditionally been excluded and marginalised. It is this expressive⁵⁴ function of voting that is restricted when people with disabilities are prevented from voting in polling places because of lack of accessibility; the expressive aspect is also curtailed where people with disabilities vote by absentee or 'special' ballot.⁵⁵

It can be said that voting forms the basis of equal citizenship; Fishkin points out that it is also closely bound up with dignity.⁵⁶

It is a dignity inhering in the idea that my vote counts just as yours counts – that I am, with respect to the right to vote, your equal.⁵⁷

Voting exclusion therefore amounts to 'dignitary harm', which may be especially acute when the disenfranchised person is someone who is also disregarded as a full and equal citizen in other contexts, namely when it is part of a broader pattern of unequal treatment.⁵⁸

3 International human rights framework

3.1 General

The right to vote, as an aspect of the right to public participation, is set out in article 21 of the Universal Declaration of Human Rights (UDHR).⁵⁹

51 Bindel (n 16 above) 92. See also Bazelon Centre for Mental Health Law *State laws affecting the voting rights of people with mental disabilities* (2012), available at http://www.bazelon.org/LinkClick.aspx?fileticket=-Hs7F_Ohfgg%3d&tabid=543 (accessed 9 April 2014).

52 Electoral laws in the following jurisdictions contain disability-based voting exclusions: Angola; Botswana; Ethiopia; Ghana; Liberia; Sierra Leone; South Africa; Tanzania; and Zambia. This list, which does not purport to be exhaustive, is limited to Anglophone jurisdictions due to language restrictions.

53 Waterstone (n 8 above) 378.

54 A Winkler 'Expressive voting' (1993) 68 *New York University Law Review* 330 331, 368.

55 Waterstone (n 8 above).

56 Fishkin (n 14 above) 1335-1336.

57 Fishkin (n 14 above) 1336.

58 Fishkin (n 14 above) 1296.

59 Adopted by the UN General Assembly resolution 217 A (III) on 10 December 1948.

Article 21(1) provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. In article 21(2), the principles of 'periodic and genuine elections', 'universal and equal suffrage' and 'secret vote' are set out as expressing the will of the people, which forms the basis of the authority of government.

3.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁶⁰ (ICCPR) recognises the right to participate in public affairs in article 25. It provides that every citizen has the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions,⁶¹ to take part in the conduct of public affairs both directly or through freely chosen representatives. Secondly, they have the right to vote and to be elected at genuine period elections which shall be 'by universal and equal suffrage' and held by secret ballot, guaranteeing the free expression of the will of the electors.

In 1996, the Human Rights Committee (HRC) adopted a General Comment on this article. The Committee noted that limitations on the right to vote are permissible; however, it emphasised that such restrictions should be 'based on objective and reasonable criteria'.⁶² It pointed out that no distinctions are permitted between citizens in the enjoyment of these rights on a number of grounds, including race, colour, sex, language, religion, political or other opinion, property, birth 'or other status'.⁶³ The HRC regards it as unreasonable to exclude persons from voting on the ground of physical disability or to impose literacy, education or property requirements.⁶⁴ At the same time, it states that 'mental incapacity may be a ground for denying a person the right to vote or to hold office'.⁶⁵

It is noteworthy that this General Comment is a product of its time (specifically predating the adoption of the CRPD). Significantly, the Office of the UN High Commissioner for Human Rights, in its 2011 thematic study, observed that 'the legal landscape has changed dramatically since the adoption of the Human Rights Committee's general comment in 1996'. It may therefore be argued that limitations of the right to vote on the basis of psychosocial or intellectual disabilities are no longer compatible with

60 Adopted on 16 December 1966, entered into force on 23 March 1976.

61 Art 2 refers to 'distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

62 Human Rights Committee *General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)* UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) para 4.

63 Para 3.

64 Para 10.

65 Para 4.

the prohibition of discrimination or 'with the present-day understanding of democracy'.⁶⁶

3.3 Convention on the Rights of Persons with Disabilities

The Convention, adopted in 2006, was developed on the basis of 'a recognition that the existing human rights framework had failed to protect the human rights of people with disabilities in an equal measure with others'.⁶⁷ Based on the foundational principles of, inter alia, respect for inherent dignity and individual autonomy, non-discrimination and full and effective participation and inclusion in society,⁶⁸ the CRPD represents a definitive shift in the right of persons with disabilities – not only through the actual substance of its provisions, but also through the transformative power of the instrument as a whole.⁶⁹ While the interpretation of the Convention is still in the early stages of its development, a number of clear trends may already be drawn out.

Article 29 of the Convention (examined below) sets out the right to public participation of persons with disabilities. Given the strong correlation drawn in many national contexts between the right to political participation (including the right to vote) and legal capacity, it is also important to consider article 12, which deals with legal capacity.⁷⁰

Article 12 has been described as lying at the very heart of the revolution in disability introduced by the Convention – treating people as 'subjects' and not as 'objects'.⁷¹ Trömel explains that this is the provision that best reflects the paradigm shift accomplished by the Convention;⁷² it also

66 Office of the UN High Commissioner for Human Rights *Thematic study on participation in political and public life by persons with disabilities* A/HRC/19/36 (21 December 2011) para 28. For this reason, the General Comment is currently being reviewed in this respect – Fiala-Butora et al (note 43 above) 79 fn 48. See also FRA (note 45 above) 9 and discussion of art 29 of the CRPD below.

67 European Commissioner for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (2012) CommDH/IssuePaper(2012)2 12.

68 Art 3 of the CRPD.

69 See generally JE Lord & MA Stein 'The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington University Law Review* 449 449-479.

70 Para (c) of the preamble to the CRPD reaffirms the principle of the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. Additional articles of significance to the present analysis are art 3 (general principles) and art 5 (equality and non-discrimination).

71 G Quinn 'Resisting the "temptation of elegance": Can the Convention on the Rights of Persons with Disabilities socialise states to right behaviour' in O Arnardóttir & G Quinn (eds) *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009), 49; see also 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* 563 595.

72 S Trömel 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities' in *European Yearbook of Disability Law* (2009) 125.

generated the most heated and complex debates during the preparatory negotiations.⁷³ Much of this discussion was devoted to the meaning of 'legal capacity' and whether this notion included both the capacity to *have* rights⁷⁴ ('passive' legal capacity) and the capacity to *act* or *exercise*⁷⁵ these rights ('active' legal capacity).⁷⁶ Certain delegates favoured an approach that would limit the interpretation of legal capacity in article 12 to 'passive legal capacity'; as Lawson explains, this had the potential of authorising a lower standard of human rights protection.⁷⁷ During the negotiations, attempts were accordingly made to qualify (by means of a footnote to the main text) the meaning of 'legal capacity'.⁷⁸ These attempts ultimately proved unsuccessful, and the text as it stands is free of such limitations.⁷⁹

Article 12 is clear in its simplicity. The unequivocal starting point is that all persons have legal capacity, without any mention of a distinction between active and passive legal capacity. This starting point is not conditional ('all persons have legal capacity *provided that they have the capacity to ...*') or presumptive ('*all persons are presumed to have legal capacity until proved otherwise*').⁸⁰ Once this starting point is grasped, it also becomes apparent how other closely related rights should be approached – such as the right to vote. This is when we begin to get a glimpse of the vertiginous paradigm shift⁸¹ brought about by article 12.

In addition to requiring states parties to recognise that persons enjoy legal capacity on an equal basis with others in all aspects of life,⁸² article 12(3) provides that states parties must take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity. This (unconditional) recognition of legal capacity on an equal basis with others in all aspects of life has to include

73 Trömel (n 72 above) 126; M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (2009) 86.

74 Ie being someone who can own property and possess rights provided for by domestic legislation, including the right to vote – European Commissioner of Human Rights (n 67 above) 7.

75 Specifically including the power to dispose of one's property (ie to use it, sell it, give it away or destroy it) and claim one's rights before a court – European Commissioner on Human Rights (n 67 above) 7. This includes exercising the right to vote.

76 This distinction is more familiar to civil law systems than common law systems.

77 Lawson (n 71 above) 596.

78 For an overview of this history, see Trömel (n 72 above) 126-128; Lawson (n 71 above) 595; Schulze (n 73 above) 88-89.

79 However, it is noteworthy that several of the reservations entered by states parties relate to art 12.

80 Eg the declaration entered by Canada includes the following statement 'Canada recognises that persons with disabilities are *presumed* to have legal capacity on an equal basis with others in all aspects of their lives'.

81 See Glen (n 25 above) 96-97 for the origin (in the history of science) of the term 'paradigm shift' and how this has come to be the standard 'term of art' for describing the phenomenon of re-examination and re-orientation in disability rights concretised by the adoption of the CRPD.

82 Art 12(2).

the political sphere;⁸³ furthermore, where the state is required to provide support in exercising legal capacity, this would also apply to the act of voting.

This understanding of article 12 underpins the construction of the right to vote in article 29, a point that was recently emphasised by the Committee on the Rights of Persons with Disabilities in its first interpretive General Comment, which deals with article 12 of the Convention. The Committee explains that recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention, including the right to vote and stand for election in article 29.⁸⁴

The Committee further notes that while the denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, for certain persons with disabilities, a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights.⁸⁵

Article 29 of the CRPD, which sets out the right to public participation,⁸⁶ covers first, the right to participate in elections (both active

83 This reading is reinforced by the definition of disability-based discrimination in article 2 of the CRPD, which reads as follows: "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the *political*, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation' (my emphasis).

84 Committee on the Rights of Persons with Disabilities *General Comment No 1 Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (dated 11 April 2014) para 27.

85 Para 44.

86 Article 29 provides as follows:

'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;

and passive) and second, general public participation.⁸⁷ Under paragraph (a), the article addresses inter alia the questions of accessibility and assistance by a person of the voter's choice.⁸⁸

For present purposes, however, the important section is the undertaking by states parties 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). Two points may be observed. The commitment is first to ensure that persons with disabilities may *effectively and fully participate* and second, that they may *participate on an equal basis with others*. The latter raises the question whether a disability-based voting exclusion of any nature would be permissible. It is notable that these provisions make no exception for persons with an 'established mental incapacity'.⁸⁹

This question was recently answered by the Committee on the Rights of Persons with Disabilities in the communication of *Bujdosó v Hungary*.⁹⁰ The authors of this communication were six Hungarian nationals with intellectual disabilities who had been placed under partial or general guardianship pursuant to judicial decisions. As an automatic consequence of their placement under guardianship, the authors' names were erased from the electoral register.⁹¹ This meant that they were unable to vote in either the parliamentary or municipal Hungarian elections held in 2010. They also subsequently remained disenfranchised.⁹² The authors maintained that they were able to understand politics and participate in elections if they were allowed to do so, and therefore complained that as persons under guardianship, they were, by direct application of the constitutional provisions automatically deleted from electoral registers.⁹³ This automatic ban was unjustified, and therefore breached article 29, read alone and in conjunction with article 12 of the Convention.

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.'

87 See Committee on the Elimination of Discrimination against Women *General Comment 23, Political and public life* para 5 for an explanation of the term 'political and public life'.

88 The degree of assistance was the subject of heated debates over the danger(s) of manipulation – Schulze (n 73 above) 151.

89 The wording would therefore appear to depart from the position previously adopted by the Human Rights Committee on this issue - Lawson (n 71 above) 606.

90 Communication No 4/2011, views adopted on 9 September 2013, UN Doc Ref CRPD/C/10/D/4/2011, dated 20 September 2013.

91 Pursuant to article 70(5) of the state party's Constitution, applicable at the time, which provided inter alia that persons placed under total or partial guardianship did not have a right to vote.

92 Para 2.

93 The decisions incapacitating them did not address their ability to vote, as they were automatically and indiscriminately disenfranchised by operation of the Constitutional provision, regardless of the nature of their disability, their individual abilities, and the scope of the incapacitation measure – para 3.1.

The state party's response mainly revolved around the fact that the relevant legislation had undergone significant changes since the authors had filed their complaint: Hungary's Fundamental Law now required judges to make decisions on suffrage on consideration of the individual circumstances of each case.⁹⁴ While it was therefore still possible for a person with an intellectual disability to be disenfranchised, this would only be done subject to an individual judicial assessment.⁹⁵ The state party further argued that this new provision was in conformity with the right to free elections enshrined in article 3 of Protocol No 1 to the European Convention, and with the judgment of the European Court of Human Rights in the case *Alajos Kiss v Hungary*.⁹⁶

The Committee on the Rights of Persons with Disabilities was of the view that article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities.⁹⁷ Therefore, an exclusion of the right to vote 'on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment', constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention. The Committee referred to its Concluding observations on Tunisia⁹⁸ and Spain⁹⁹ and noted that the same principles applied in casu. Accordingly, the Committee concluded that the relevant provisions, which allow courts to deprive persons with intellectual disabilities of their right to vote and to be elected, are in breach of article 29 of the Convention. Similarly, a breach of article 12 was found.¹⁰⁰

This finding by the Committee is a significant one. It appears that the Committee took up the invitation by the third party intervener to make a

94 Para 4.2.

95 Article XXIII, paragraph (6) of the Fundamental Law.

96 Application No 38832/06, 20 May 2010. See also the discussion below.

97 Para 9.4.

98 The Committee recommended that the state party adopt urgent legislative measures to ensure that persons with disabilities, *including persons who are currently under guardianship or trusteeship*, can exercise their right to vote and participate in public life, on an equal basis with others – Committee on the Rights of Persons with Disabilities *Concluding observations: Tunisia* UN Doc CRPD/C/TUN/CO/1 dated 13 May 2011 para 35.

99 The Committee expressed a similar concern over the fact that the right to vote of persons with intellectual or psychosocial disabilities can be restricted if the person concerned has been deprived of his or her legal capacity, or has been placed in an institution – Committee on the Rights of Persons with Disabilities *Concluding observations: Spain* UN Doc CRPD/C/ESP/CO/1 dated 19 October 2011 para 48.

100 Under art 12(2) of the CRPD, states parties must recognise, and uphold the legal capacity of persons with disabilities 'on an equal basis with others in all aspects of their lives', including political life, which encompasses the right to vote. Under art 12(3) of the Convention, states parties further have a positive duty to take the necessary measures to guarantee to persons with disabilities the actual exercise of their legal capacity. Accordingly, the Committee was of the view that by depriving the authors of their right to vote, based on a perceived or actual intellectual disability, the state party had failed to comply with its obligations under art 29 of the Convention, read alone and in conjunction with art 12 – para 9.5.

finding beyond the narrow confines of this particular matter,¹⁰¹ and in fact provided broader guidance to state parties in the interpretation of article 29. Most significant is the Committee's emphasis that article 29 does not permit any exclusion or 'reasonable restriction'; however, of similar weight is the statement that a disability-based voting exclusion, including a restriction pursuant to an individualised assessment, would constitute discrimination in terms of article 2 of the Convention.

It is also helpful to states parties attempting to gain an understanding of the Convention that the Committee explains that under article 29 of the Convention, the state party is required to adapt its voting procedures, by ensuring that they are 'appropriate, accessible, and easy to understand and use', and allowing, where necessary, assistance in voting upon request of the person with disability.¹⁰²

It is by so doing that the state party will ensure that persons with intellectual disability cast a competent vote, on an equal basis with others, while guaranteeing the secrecy of the vote.¹⁰³

The Committee's reference to article 12(3) further assists in this regard.¹⁰⁴ States parties will therefore be required not only to repeal discriminatory provisions, but also to adapt voting procedures and to take additional supportive measures to ensure that persons with intellectual (and by extension, psychosocial) disabilities may cast their vote on an equal basis with others.

The Committee's approach in the *Bujdosó* matter strengthens the trend that is discernible in its concluding observations to initial reports of states parties. In the majority of the reports that have been considered to date, the Committee has expressed concerns about the way in which states parties approach the political rights of persons with intellectual and psychosocial disabilities. For example, the Committee has voiced its apprehension about the exclusion from voting of persons with intellectual or psychosocial disabilities,¹⁰⁵ the exclusion of persons who are under some form of 'guardianship' limitation (and hence precluded from voting);¹⁰⁶ and provisions preventing persons with intellectual or psychosocial

101 See Stein & Allen (n 32 above) para 15.

102 Para 9.6.

103 Para 9.6.

104 Para 9.5.

105 See Committee on the Rights of Persons with Disabilities *Concluding observations: China* UN Doc CRPD/C/CHN/CO/1 dated 15 October 2013 para 45; *Australia* UN Doc CRPD/C/AUS/CO/1 dated 21 October 2013 para 51.

106 Committee on the Rights of Persons with Disabilities *Concluding observations: Tunisia* UN Doc CRPD/C/TUN/CO/1 (13 May 2011) para 35; *Spain* CRPD/C/ESP/CO/1 (19 October 2011) para 48; *Argentina* UN Doc CRPD/C/ARG/CO/1 dated 18 October 2012 para 47; *Hungary* UN Doc CRPD/C/HUN/CO/1 dated 22 October 2012 para 45; *Azerbaijan* UN Doc CRPD/C/AZE/CO/1 dated 12 May 2014 para 44.

disabilities from running for municipal office.¹⁰⁷ Austria alone was commended for upholding article 29 by allowing all persons, including persons with intellectual disabilities and psychosocial disabilities, to vote.¹⁰⁸

3.4 European regional instruments

In terms of Protocol No 1 to the European Convention, member states undertake to hold free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.¹⁰⁹

The European Court of Human Rights has dealt with the right to vote in a number of noteworthy judgments. The issues to be decided have included an absolute ban on the voting rights of convicted prisoners in the United Kingdom,¹¹⁰ as well as an automatic voting exclusion imposed on persons placed under guardianship.¹¹¹ In the latter case, Mr Kiss (a Hungarian citizen diagnosed with manic depression)¹¹² contested the voting exclusion that resulted from his being placed under partial guardianship.¹¹³

It was common cause that the aim of the constitutional measure in question was to ensure that only citizens capable of 'assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs'.¹¹⁴ The Court was satisfied that this constituted a legitimate aim. The Hungarian government argued, with reference to the margin of appreciation, that it must be permissible for the legislature to establish rules limiting participation in public affairs to this group of citizens only.¹¹⁵

The Court accepted that this is an area in which, generally, a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote can be justified in

107 *Concluding observations: El Salvador* UN Doc CRPD/C/SLV/CO/1 dated 8 October 2013 para 59.

108 *Concluding observations: Austria* UN Doc CRPD/C/AUT/CO/1 dated 30 September 2013 para 48. Peru was also commended for removing voting restrictions on certain persons with intellectual and psychosocial disabilities; however, persons with disabilities who have been 'judicially interdicted' remained ineligible to vote, which was still of concern to the Committee – *Concluding observations: Peru* UN Doc CRPD/C/PER/CO/1 dated 16 May 2012 para 44.

109 Art 3.

110 *Hirst v United Kingdom No 2 (GC)* Application No 74025/01, 6 October 2005.

111 *Kiss v Hungary* (n 96 above).

112 Terminology employed in the ECtHR judgment.

113 Similar to the authors in *Bujdosó* (n 90 above), the applicant was excluded from the electoral register pursuant to the Hungarian Constitution, which contained (at the time) an absolute voting ban for people under guardianship.

114 Para 38.

115 Para 40.

modern times and, if so, how a fair balance is to be struck.¹¹⁶ It was noted that the restriction in question does not distinguish between those under total and those under partial guardianship;¹¹⁷ furthermore, the Court was unwilling to accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. The Court reiterated that while this margin of appreciation is wide, it is not all-embracing.¹¹⁸

Importantly, the Court cautioned that if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the 'mentally disabled', then the state's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (a comparable example is those suffering different treatment on the ground of their gender). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail 'legislative stereotyping' which prohibits an individualised evaluation of their capacities and needs.¹¹⁹

The conclusion reached by the Court was that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote. It accordingly found that there had been a violation of Article 3 of Protocol No 1 to the Convention.¹²⁰

While the Court's conclusion regarding the imposition of an indiscriminate voting restriction of persons under partial guardianship is sound, the judgment may be criticised for its interpretation in that it leaves a margin for the state to permissibly impose an 'individualised judicial evaluation'. This indeed led to the amendment of the Hungarian Constitution that was examined by the Committee on the Rights of Persons with Disabilities in the *Bujdosó* communication (above); while the state party maintained that these amendments, which now allowed individualised assessments instead of the prior 'blanket' restriction, were in line with the European Court's judgment in the *Kiss* matter, the Committee's conclusion was that the (amended) provisions were not consistent with the CRPD.¹²¹

116 Para 41.

117 Para 39.

118 Para 42.

119 The Court referred to its judgment in *Shtukaturov v Russia*, Application No. 44009/05, 27 March 2008 – *Kiss v Hungary* (n 96 above) para 42.

120 Para 44.

121 It is important to consider that the European Court was pronouncing on a violation of the European Convention, while the Committee on the Rights of Persons with Disabilities in *Bujdosó* was concerned with the interpretation of the CRPD.

Importantly, the Council of Europe adopted a Recommendation in 2006 to the effect that the participation of all citizens in political and public life and the democratic process is essential for the development of democratic societies. Society needs to reflect the diversity of its citizens and benefits from their varied experience and knowledge; it is therefore important that persons with disabilities can exercise their rights to vote and participate in such activities.¹²²

The European Commission for Democracy through Law (the so-called 'Venice Commission') has adopted a revised interpretative declaration to the Code of Good Practice in Electoral Matters.¹²³ The aim of this document is to align the Code with the principles guaranteed by article 29 CRPD. Significantly, it notes that universal suffrage is a fundamental principle of the 'European Electoral Heritage'.¹²⁴ People with disabilities may not be discriminated against in this regard, in conformity with article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities and the case law of the European Court of Human Rights.¹²⁵ The declaration also requires that voting procedures and facilities should be accessible to people with disabilities so that they are able to exercise their democratic rights, and allow, where necessary, the provision of assistance in voting, with respect to the principle that voting must be individual.¹²⁶

This declaration is an important development of the original Code, which provided for deprivation of the right to vote and be elected based on 'mental incapacity' or criminal conviction for a serious offence as an exception to the rule of universal suffrage.¹²⁷

Finally, it must be borne in mind that the European Union as a 'regional integration organisation' has acceded to the CRPD in terms of article 44. This may further shape regional developments in line with article 29 of the Convention.¹²⁸

122 Council of Europe *Recommendation Rec (2006) 5* of 5 April 2006. See also Recommendation Rec (2004)10 of 22 September 2004 – persons with 'mental disorder' should be entitled to exercise all their civil and political rights. Any restrictions to the exercise of these rights should be in conformity with the provision of the European Convention and should not be based on the mere fact that the person has a mental disorder. See also *Recommendation Rec (99)4* of 23 February 1999.

123 European Commission for Democracy through Law (Venice Commission) *Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections* (adopted at the 89th Session of the Venice Commission, 16-17 December 2011) CDL-AD(2011)045.

124 Para II.2.

125 A reference is provided here to the judgment in *Kiss v Hungary* (n 96 above).

126 Para II.3.

127 European Commission for Democracy through Law (Venice Commission) *Code of good practice on electoral matters: Guidelines and explanatory report* (adopted by the Venice Commission at its 52nd Session, 18-19 October 2002) CDL-AD (2002) 23 rev para I.1.1(d).

128 Articles 39-40 of the Charter of Fundamental Rights of the European Union guarantee the rights to political participation.

3.5 African regional system

An investigation into the human rights framework at African regional level commences with the African Charter. The right to political participation¹²⁹ is addressed in article 13 of the African Charter.¹³⁰ For present purposes, article 13(1) is of particular interest. As Mbondenyi correctly observes, the formulation of this provision appears somewhat curtailed when compared to its counterparts in similar instruments, which do include explicit references to the obligations resting on states to hold 'periodic and genuine elections'¹³¹ underpinned by universal suffrage and held by secret vote.¹³² He therefore concludes that the right to political participation is recognised in the African Charter in a fairly superficial way.¹³³

The African Commission on Human and Peoples' Rights has however been robust in its interpretation of article 13(1) and is developing a body of jurisprudence emphasising that it will not lightly sanction limitations of the right to political participation.¹³⁴ In the key communication of *Purohit v The Gambia*,¹³⁵ the Commission found that the disputed legislation,¹³⁶ in addition to being discriminatory and violating the guarantee of equal protection of the law,¹³⁷ also constituted a violation of article 13(1) since its application precluded persons detained in the psychiatric unit in question from exercising their right to vote.

The Commission made the following important observation:

The right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State. Legal incapacity may not necessarily mean mental incapacity. For example a State may fix an age limit for the legibility of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under

129 Article 13 reads as follows:

'(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

(2) Every citizen shall have the right of equal access to the public service of his country.

(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

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

131 See eg European Convention.

132 As above.

133 MK Mbondenyi '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* 183 186-187.

134 See *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

135 (2003) AHRLR 96 (ACHPR 2003).

136 The 'Lunatics Detention Act' (Gambia).

137 The Commission further found violations of arts 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the Charter.

Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.¹³⁸

The Commission further explained that since article 13(1) of the African Charter is similar in substance to those provided for under article 25 of the ICCPR and it therefore endorsed the clarification provided by the Human Rights Committee in relation to the latter article.¹³⁹ In this instance, besides the view held by the Gambian government respondent state questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the respondent state to exclude mentally disabled persons from political participation.

The right to vote also features in the African Charter on Democracy and Good Governance.¹⁴⁰ The objectives of this Charter include the promotion of adherence to the values and principles of democracy and respect for human rights and the holding of regular free and fair elections to 'institutionalise legitimate authority of representative governments as well as democratic change of governments'.¹⁴¹ States parties must implement the Charter in accordance with certain principles, which include the effective participation of citizens in democratic and development processes and in governance of public affairs.¹⁴²

Significantly, in terms of article 4, states parties must recognise popular participation through universal suffrage as the 'inalienable right of the people'.¹⁴³ This provision should be read firstly with article 8, which places a duty on states parties to eliminate all forms of discrimination, with a list of specific grounds.¹⁴⁴ Although disability is not explicitly listed, the open-ended formulation of the list allows for its easy inclusion.¹⁴⁵ Secondly, states parties have a duty to promote participation of social groups 'with special needs', including the youth and persons with disabilities, in the governance process.¹⁴⁶

The African regional standards, while not as fully developed as the European counterparts, recognise the broad principles of participation and non-discrimination. The statement by the African Commission on Human

138 Para 75.

139 Para 76. This referred to General Comment No 25 adopted by the HRC discussed above.

140 Adopted on 30 January 2007, came into operation 15 February 2012.

141 Art 2.

142 Art 3(7).

143 Art 4.2.

144 Art 8.1.

145 Art 8.2 further enjoins states parties to adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, persons with disabilities, refugees and displaced persons and other marginalised and vulnerable social groups.

146 Art 31.1.

and People's Rights to the effect that the exclusion of persons with psychosocial disabilities should be considered in conformity with international standards is an important one, bearing in mind that these international standards have evolved since the statement by the HRC on which the African Commission based its original views in the *Purohit* communication.

4 South Africa

Since the advent of democracy, South Africa's electoral history is regarded as one of the African 'success stories'. Who can forget those enthralling images of queues of people waiting to vote, the majority for the first time ever, in the first multi-racial elections in 1994?¹⁴⁷ Subsequent elections, both at national and provincial and at local government levels, have proceeded comparatively smoothly, and the Independent Electoral Committee (IEC) has been lauded for its innovative approaches to election administration.¹⁴⁸

Given the country's history of race-based electoral exclusion, it is not surprising that the Constitution states emphatically that one of the foundational values of the South African state is universal adult suffrage.¹⁴⁹ It further notes 'human dignity, the achievement of equality and the advancement of human rights and freedoms' amongst these values. The right to vote is addressed in section 19, which sets out various aspects of the right to political participation. Section 19(3) provides that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office.¹⁵⁰

These provisions must however be read with sections 47, 106 and 158, which deal with membership of the National Assembly,¹⁵¹ provincial legislatures and municipal councils respectively. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except 'anyone declared to be of unsound mind by a court of the Republic'.¹⁵² Section 106(1)(d) similarly states that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the provincial legislature, except anyone declared to be of

147 See eg 'In Pictures: South Africa's freedom day' *BBC News* (undated), available at http://news.bbc.co.uk/2/shared/spl/hi/africa/04/photo_journal/94election/html/5.stm (accessed on 7 April 2014).

148 See Independent Electoral Commission 'IEC receives fifth award in 12 months' 22 November 2011, available at <http://www.elections.org.za/content/new.aspx?id=1980> (accessed on 7 April 2014).

149 Sec 1(d) of the Constitution of the Republic of South Africa, 1996.

150 Sec 19(3).

151 The South African Parliament consists of the National Assembly and the National Council of Provinces.

152 Sec 47(1)(d).

unsound mind by a court of the Republic. Finally, section 158(1)(c) provides that every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly.

The Electoral Act 73 of 1998 further sets out how the right to vote takes shape in practice.¹⁵³ In terms of the Act, a 'voter' is a South African citizen who is 18 years or older and whose name appears on the national common voters' roll.¹⁵⁴ In order to place their names on this voters' roll, citizens are required to register as voters;¹⁵⁵ the chief electoral officer, who is responsible for registering voters, may not register (amongst others) persons who have been declared by the High Court to be 'of unsound mind or mentally disordered'¹⁵⁶ or are detained under the Mental Health Care Act 17 of 2002.¹⁵⁷

The question of electoral exclusion has served before the South African courts in the form of a limitation on the voting rights of prisoners. Brickhill and Babiuch recount that the right of prisoners to vote was one of the most contentious issues during the negotiation process.¹⁵⁸ These challenges have given the courts an opportunity to pronounce on the limitation of the right to vote.¹⁵⁹

In *August v Electoral Commission*, Sachs accordingly made the following statement:

In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and

153 As Lord et al observe, the legal framework for a fair and democratic process for political participation must look beyond electoral laws to also include anti-discrimination legislation (amongst others) – see Lord et al (n 5 above) 120. In the South African context, this implies that one also needs to consider legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act in understanding the electoral framework; see sec 6 read with sec 9 of this Act, which prohibits unfair discrimination based on disability.

154 Sec 1 (definition of 'voter').

155 Secs 5-7.

156 Sec 8(2)(c).

157 Sec 8(2)(d) of the Electoral Act.

158 J Brickhill & R Babiuch 'Political rights' in S Woolman et al (ed) *Constitutional law of South Africa* 2nd ed (2007) 45-49.

159 See *Masuku & Mbonani v State President* 1994 (4) SA 374 (T), challenging sec 16 of the Electoral Act of 1993, which excluded certain categories of prisoners from voting; *August* (n 1 above), where the courts had to determine whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 3 SA 280 (CC), where a limitation on the right to vote of prisoners serving a sentence without the option of a fine was challenged.

legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.¹⁶⁰

Given these strong views expressed by the Constitutional Court against restriction of the right to vote, I argue that the present exclusion of persons with psychosocial disabilities constitutes an impermissible limitation of this right that may not survive constitutional scrutiny. Brickhill and Babiuch posit that this exclusion constitutes a form of unfair discrimination on the 'prohibited' ground of disability.¹⁶¹ They further argue (correctly) that since the Electoral Act does not make allowance for a person with a psychosocial disability to challenge their disqualification from voting, the provisions may also be found to be overbroad.¹⁶²

In September 2013, when the Electoral Act was undergoing amendments, efforts were made to persuade the relevant portfolio committee¹⁶³ to remove the current restrictions on the right to vote of persons with psychosocial disabilities.¹⁶⁴ The Independent Electoral Commission, in briefing the portfolio committee, however noted that many jurisdictions exclude persons with 'mental disabilities' from registering as voters due to concerns about the faculty to form informed opinions.¹⁶⁵ It stated that the exclusion was not 'arbitrary and automatic', and came into operation at the instance of the High Court after examining medical evidence presented. While the portfolio committee devoted some attention to the reform proposal in its deliberations,¹⁶⁶ the amended Bill as adopted did not include the proposal.¹⁶⁷ This omission represents a lost opportunity to take a first step towards aligning the current South African position with the CRPD by eliminating the electoral exclusion of persons with psychosocial disabilities.¹⁶⁸

Finally, it is with some irony that one notes that the Electoral Act also makes clear provision for what may be termed 'reasonable accommodation' for certain voters. The Act states that a person may assist

160 n 1 above, para 17.

161 Brickhill and Babiuch (n 158 above) 45-49. See sec 9(3) of the Constitution.

162 Brickhill and Babiuch (n 158 above) 45-49.

163 The National Assembly Portfolio Committee on Home Affairs.

164 The Ubuntu Centre 'Submission to The Department of Home Affairs Portfolio Committee: Comment on Electoral Amendment Bill B222013' (28 August 2013), available at <http://www.pmg.org.za/report/20130910-electoral-amendment-bill-b22-2013-public-hearings> (accessed 7 April 2014).

165 See minutes of meeting of Portfolio Committee on 16 September 2013, available at <http://www.pmg.org.za/report/20130916-electoral-amendment-bill-electoral-commission-response-public-submissions> (accessed 7 April 2014).

166 As above.

167 The Electoral Amendment Act 18 of 2013 as adopted included provisions inter alia to give effect to the judgments in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) and *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC).

168 In terms of sec 4(1)(b) of the CRPD, states parties are under an obligation to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

a voter in voting if the voter requires assistance due to a physical disability, including 'blindness or other visual impairment'; the voter has requested to be assisted by the person; and the presiding officer is satisfied that the person rendering assistance has attained the age of 18 years and is not an agent or candidate.¹⁶⁹ A voter may also apply for a special vote if they cannot vote at a voting station in the voting district in which they are registered as a voter, due to that person's 'physical infirmity or disability, or pregnancy'.¹⁷⁰ Finally, at the request of a voter who is unable to read, the presiding officer must assist that voter in voting in the presence of a person appointed by an accredited observer and two agents from different parties, if available.¹⁷¹

These arrangements indicate a recognition of the increasing trend in providing voters with disabilities with reasonable accommodation. They stand in stark contrast however with the exclusion of persons with psychosocial disabilities from voting.

5 Conclusion

Kelley notes that persons with psychosocial disabilities have faced unique challenges in the battle for recognition of their rights.¹⁷² In the African context, this often includes a prevailing perception that psychosocial disability is linked to ill omens, curses and spiritual misfortune. Their position as 'outsiders', who experience exclusion and prejudice, stands starkly against the ideal of full participation in society. The right to vote, in its expressive sense, therefore becomes an important signifier of such participation. As Fishkin proposes, the right to vote is 'fundamental' because it makes citizenship real.¹⁷³

This article has demonstrated that 'systemic electoral inconsistencies' exist in one of Africa's more progressive electoral democracies in respect of the right to vote of persons with psychosocial disabilities. These inconsistencies are in contrast with recent developments in international law, most notably the introduction of the CRPD and the interpretation of article 29 by the Convention's monitoring body.

Waterstone notes that the trend in international human rights law (as well as state domestic laws) has been to move from 'a general statement of voting equality' to more specific protections for people with disabilities.¹⁷⁴ Where domestic law is lagging behind this standard, as is the case with

169 Sec 39(2).

170 Sec 33(1). Sec 33A makes a similar provision for special votes in election of provincial legislatures.

171 Sec 39(1).

172 Kelley (n 30 above) 362; see also Brescia (n 23 above) 957-958.

173 Fishkin (n 14 above) 1355.

174 Waterstone (n 8 above) 381.

South Africa, law reform is clearly indicated. However, as Keys indicates, successful law reform presupposes a significant attitudinal change in the mind-set of public and civil servants, policy makers and other key players, like the judiciary.¹⁷⁵ Law reform, as the key change, has to be underpinned at a more substantive level by 'embracing the notion of capacity as an integral part of all human beings'.¹⁷⁶

As noted above, I propose that the reform of existing South African constitutional and legislative provisions is required in order to reflect the 'paradigm shift' reflected in the CRPD. This reform cannot be based on a midway compromise position where persons with psychosocial disabilities who 'qualify' (however this is determined) are permitted to vote – and those who do not remain excluded.

While this may appear to some to be a startling proposition, Lawson notes that the CRPD is, in many ways, a startling instrument.¹⁷⁷ This is particularly true in the realm of legal capacity and concomitant rights of persons with psychosocial disabilities, where stigma, prejudice and 'dignitary harm' still prevail. But it is precisely the role of the CRPD to startle (and dislocate) preconceived notions underpinning discriminatory laws – such as those denying persons with disabilities the right to vote.

175 M Keys 'Legal capacity law reform in Europe: An urgent challenge' in *European yearbook of disability law* (2009) 63.

176 As above.

177 Lawson (n 71 above) 619. See also Glen (n 25 above) 98.

TERMINATION OF PREGNANCY
OF PERSONS WITH MENTAL
DISABILITIES ON MEDICAL
ADVICE: A CASE STUDY OF
SOUTH AFRICA

Ashwanee Budoo*
Rajendra Parsad Gunputh**

Summary

The South African Choice on Termination of Pregnancy Act 92 of 1996 provides for the termination of a pregnancy of a person with a severe mental disability in the event that the continued pregnancy would pose a risk to the life of the woman or the fetus. Such a termination of pregnancy can be proceeded with after obtaining the consent of the natural guardian, spouse, legal guardian or curator personae. The current article investigates whether the above does not violate the provisions of the Convention of the Rights of Persons with Disabilities since it does not take into consideration the standpoint of the woman whose pregnancy is being terminated. It assesses whether depriving the woman with a mental disability of the right to give her opinion is justified. It then concludes that section 5(4)(a) violates several human rights of a woman with a mental disability and suggests a way forward.

1 Introduction

Being the 'world's largest minority', it is estimated that worldwide there are about 1 billion persons living with a disability.¹ 'Recognising the need to promote and protect the human rights of all persons with disabilities (PWDs), including those who require more intensive support',² the Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006. The CRPD's purpose is 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'.³ Included in the list of PWDs are people who have

* LLD Candidate and tutor at the Centre for Human Rights, University of Pretoria.

** Associate Professor in the law department at the University of Mauritius.

1 United Nations enable 'Factsheet on persons with disabilities', available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 13 March 2014).

2 Para (j) of the Preamble to the CRPD.

3 Art 1, para 1 of the CRPD.

'mental ... impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.⁴

The World Health Organisation (WHO) views mental disorders very broadly. Giving schizophrenia, depression and mental retardation as examples, it characterises mental disorders 'by some combination of abnormal thoughts, emotions, behaviour and relationship with others'.⁵ People with mental disabilities, who form part of the 'most marginalised and vulnerable groups',⁶ face challenges concerning their living conditions which include stigma and discrimination and reduced access to health services.⁷ South Africa, having ratified the CRPD on 30 November 2007,⁸ has the obligation to ensure that its domestic legislation promotes and protects the rights of PWDs. Article 25 of the CRPD protects the right to reproductive health of a PWD and this paper specifically concentrates on the termination of pregnancy of persons with mental disabilities.

According to Daftary and Desai, a medical termination of pregnancy is a 'wilful termination of a pregnancy before the age of viability of the foetus by a qualified medical practitioner under certain stipulated conditions'.⁹ It can be carried out by the use of pharmacological drugs.¹⁰ Practising a medical termination of pregnancy is considered to be 'safe and effective',¹¹ since the termination is practised by someone who has the required skills and is done in an environment which is compliant with minimal medical standards.¹² The Choice on Termination of Pregnancy Act (CTPA)¹³ is an example of how South Africa promotes medical termination of a pregnancy so that women are not subject to vulnerabilities such as death or that which accompanies unsafe abortions.

The CTPA replaced the Abortion and Sterilisation Act 2 of 1975 which 'severely curtailed access to abortion services by requiring a

4 Art 1, para 2 of the CRPD.

5 Website of the WHO, available at http://www.who.int/topics/mental_disorders/en/ (accessed 30 March 2014).

6 WHO 'Mental health and development: Targeting people with mental conditions as a vulnerable group' (2010) vii, available at http://whqlibdoc.who.int/publications/2010/9789241563949_eng.pdf (accessed 30 March 2014).

7 D Mechanic & J Tanner 'Vulnerable people, groups, and populations: Societal view' (2007) 26 *Health Affairs* 1220, available at <http://content.healthaffairs.org/content/26/5/1220.full> (accessed 30 March 2014).

8 United Nations Treaty Collection Databases, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (accessed 30 March 2014).

9 SN Daftary & SV Desai *Selected topics in obstetrics and gynaecology -4: For postgraduates and practitioners* (2008) 118.

10 WHO 'Safe abortion: Technical and policy guidance for health systems' (2012) iv, available at http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf (accessed 30 March 2014).

11 WHO (n 10 above) 42.

12 WHO (n 10 above) 18.

13 92 of 1996.

physician's, and in some cases a magistrate's, approval for abortion procedures'.¹⁴ The CTPA gave effect to the provisions of the African National Congress' Reconstruction and Development Programme of 1994 which stated, inter alia, that 'the national health system will ... give women the right to choose whether to have an early termination of [their] pregnancy'.¹⁵ The change in the political arena led to a better focus on the reproductive rights of women.¹⁶ Described as 'an expression of female autonomy' which abides by the fundamental rights protected by the Constitution,¹⁷ the CTPA provides 'every woman freedom of choice to have an early, safe and legal termination of pregnancy according to her individual beliefs' subject to certain conditions.¹⁸

Section 5(4)(a) of the CTPA provides that there can be termination of pregnancy for a person when she is 'severely mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy'.

The procedure for such termination is provided for by section 5(5) of the CTPA which states that two medical practitioners or a medical practitioner and a registered midwife who has completed the prescribed training course can, after consultation with the natural guardian, spouse, legal guardian or curator personae, consent to the termination of pregnancy of a person with a mental disability. Such consent can be given in the following circumstances:¹⁹

- (a) [D]uring the period up to and including the 20th week of the gestation period of a pregnant woman referred to in subsection (4)(a) or (b) –
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
- (b) after the 20th week of the gestation period of a pregnant woman referred to in subsection (4)(a) or (b), the continued pregnancy –

14 S Guttmacher et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24 *International Family Planning Perspectives* 191.

15 ANC 'A basic guide to the Reconstruction and Development Programme', available at <http://www.anc.org.za/show.php?id=234> (accessed 25 March 2014).

16 B Klugman & SJ Varkey 'From policy development to policy implementation: The South African Choice on Termination of Pregnancy Act' in B Klugman & D Budlender (eds) *Advocating for abortion access: Eleven country studies* (2001) 255.

17 C Pickles 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996' (2012) 15 *PER* 403 427, available at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2012volume15no5/2012%2815%295Pickles.pdf> (accessed 25 March 2014).

18 F van Oosten 'The Choice on Termination of Pregnancy Act: Some comments' (1999) 116 *South African Law Journal* 60 62.

19 Sec 5(5) of the CTPA.

- (i) would endanger the woman's life;
- (ii) would result in a severe malformation of the fetus; or
- (iii) would pose a risk of injury to the fetus ...

It is to be noted that section 5 of the CTPA makes reference to a mental disability and not to an intellectual disability. The latter has been defined as 'a significantly reduced ability to understand new or complex information and to learn and apply new skills'.²⁰ The scope of the article is persons who have a severe mental disability which can be considered as temporary and can be controlled through medication.²¹ Thus, people whose mental capacity has been affected by illness like 'schizophrenia, depression, mental retardation and disorders due to drug abuse'²² are targeted during the course of this paper.

Further, the paper does not look into the issue of forceful sterilisation, but rather into forceful termination of pregnancy. Sterilisation has been defined as 'a process that renders an individual incapable of sexual reproduction'.²³ Forced sterilisation takes place 'when a person is sterilized after expressly refusing the procedure, without her knowledge or is not given an opportunity to provide consent'.²⁴ The current paper does not look into the issue of rendering a PWD incapable of sexual reproduction but instead into the termination of a current pregnancy with the person having the possibility of conceiving again in the future.

The present paper investigates whether the termination of a pregnancy of a woman with a mental disability, as provided for under the CTPA, violates the rights protected by the CRPD. Firstly, the model adopted will be explained. Then, the CRPD will be examined and the articles which are affected by such a termination of pregnancy will be analysed while making reference to the relevant sections of the Constitution of the Republic of South Africa, 1996 which give effect to the provisions of the CRPD. While reference will be made to the Constitution, it is to be noted that the current paper is limited to investigating the potential violations of the different provisions of the CRPD. It will further assess whether limiting the rights of a woman with mental disabilities to give consent concerning the termination of her pregnancy can be justified in an open and democratic society in terms of section 36 of the Constitution. Finally, there will be a

20 WHO's definition for intellectual disability, available at <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> (accessed 30 March 2014).

21 Intellectual Disability Rights Service – Criminal Justice Support Network 'A step-by-step guide to section 32 applications', available at http://www.idrs.org.au/s32/_guide/p040_4_2_IDandMI.php#.Uzlu3aiSwVY (accessed 30 March 2014).

22 WHO's definition for mental disorders, available at http://www.who.int/topics/mental_disorders/en/ (accessed 4 June 2014).

23 Mosby's Medical Dictionary 8th edition (2009).

24 Global Campaign to Stop Torture in Health Care 'Sterilization of women and girls with disabilities: A briefing paper' (2011) 1.

conclusion and recommendations to ensure that the rights of a woman with disabilities are not violated.

2 Approach adopted

There is not yet an agreed definition of disability and the debate about defining the term 'has been long-running and sometimes bitter'.²⁵ There are two different models to disability, namely the medical model and social model.²⁶ The models of disability reflect²⁷ the behaviour that people have towards disability.

2.1 The medical model

The medical model, the least preferred one, tends to regard PWDs as being 'imperfect'.²⁸ Disability is viewed as a problem which requires medical care: It identifies the disability which the person has and considers PWDs as objects for clinical intervention.²⁹ The case of *Purohit v The Gambia*³⁰ is an example of the application of the medical model. The Lunatics Detention Act in contention in the above case considered people living with mental disabilities as a special group of persons who should be given special treatment for them to be able to perform and live in society.

Ngwena, applying the medical model, considers PWDs as being unable to manifest themselves in the mainstream and to live independently.³¹ Under this model, PWDs are treated as persons living with impairments and words such as 'handicapped', 'incurable', 'suffering' and 'wheelchair bound' are used to refer to them.³² Crossley, while highlighting that under the medical model PWDs are considered as being impaired, pointed out that this model views PWDs as 'innately, biologically different and inferior'.³³ They therefore need to be 'cured' to overcome the challenges that they encounter in not forming part of the mainstream.³⁴

However, this model has been criticised since it creates dependency, marginalises PWDs from society and introduces barriers for PWDs to

25 S Moore *Social welfare alive* (2002) 401.

26 P Tassoni et al *Children's care, learning and development* (2005) 315.

27 As above.

28 As above.

29 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) 11.

30 *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

31 C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613.

32 Tassoni et al (n 26 above) 315.

33 M Crossley 'Disability kaleidoscope' (1999) 74 *Notre Dame Law Review* 649.

34 As above.

access their fundamental economic, social and political rights.³⁵ PWDs are not considered as right holders but instead as people living with an imperfection, thus focusing on the disability and not on the person.³⁶

Since it considers PWDs as being inferior compared to other persons, the medical model is considered to be 'oppressive' and out-dated.³⁷

2.2 The social model

The preamble to the CRPD outlines the foundation of the social model and recognises it as follows:³⁸

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

Disability is therefore viewed as the relationship that PWDs have with the society and as 'an interaction between the person and the social environment'.³⁹ It is a new 'attitude' towards PWDs and it 'emphasises their rights to make choice[s] and be independent'.⁴⁰ It tackles the stigma and marginalisation that PWDs face in society due to their status of being disabled. It investigates the physical and social barriers that PWDs face in society.⁴¹

The social model is a 'tool' which contributes 'not just in a struggle for better services', 'but for full economic, social and political inclusion in society'.⁴²

2.3 Model adopted

For the purpose of this paper, the social model is adopted because it is the one which takes into consideration the human rights of persons with mental disabilities. The medical model considers a person with mental disabilities as someone who is imperfect and who cannot be a right holder.

35 South African Integrated National Disability Strategy White Paper (November 1997), available at <http://www.info.gov.za/whitepapers/1997/disability.htm> (accessed 5 November 2012).

36 Tassoni et al (n 26 above) 315.

37 As above.

38 Para (e) of the Preamble of the CRPD.

39 R. Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 16.

40 Tassoni et al (n 26 above) 315.

41 M Oliver *Social work with disabled people* (1983) 23.

42 AL Chappell 'Still out in the cold: People with learning difficulties and the social model of disability' in T Shakespeare (ed) *The disability reader: Social science perspectives* (1998) 211.

The medical model violates the human rights of PWDs since it categorises them as people who cannot exercise their rights effectively in society.

The social model focuses on the removal of barriers so that PWDs can live in society without any difficulty. It imposes an obligation on states to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.⁴³

This paper will be based on the social model whereby a person with a mental disability is considered as someone who should be empowered in society and not as someone who should be marginalised and who cannot benefit from her human rights. The paper will take into consideration that there should be means to remove the barriers in society for women with mental disabilities to enjoy motherhood.

3 Possible violations of the provisions of the CRPD in the event of a forced termination

Section 5 of the CTPA can give rise to forced termination of pregnancies in the event the person with the mental disability wants to carry on with the pregnancy despite knowing the threats that it would pose to her life or to that of the fetus. The problem arising is whether such a termination of pregnancy does not violate the rights of women who have a mental disability since it is a forced one. A forced termination of pregnancy is when 'a woman wants to carry her pregnancy to term, but is required to terminate it against her will'.⁴⁴ In the event that the woman has expressed her willingness to keep the child but the medical advice is to terminate the pregnancy, section 5 of the CTPA poses a potential threat to several human rights of a woman living with a mental disability such as her right to reproductive choice, her right to free and informed consent, her right to dignity, and her right to equal recognition before the law.

3.1 The right to reproductive choice

Recognising that there are inequalities that arise when a woman is pregnant,⁴⁵ Millennium Development Goal (MDG) 5 provides that by 2015, universal access to reproductive health should be achieved.⁴⁶ The CRPD recognises the reproductive rights of PWDs in its article 23. The relevant parts of the article are as follows:

⁴³ Quinn & Degener (n 29 above) 10.

⁴⁴ Women's rights without frontiers 'What is a forced abortion?', available at http://www.womensrightswithoutfrontiers.org/index.php?nav=forced_abortion (accessed 20 March 2014).

⁴⁵ Target 5.B of the MDG 5.

⁴⁶ UN website, available at <http://www.un.org/millenniumgoals/maternal.shtml> (accessed 6 November 2012).

(1) States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

...

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

It clearly stipulates that PWDs should not be discriminated against with regard to parenthood and that PWDs have the right to freely decide about the number of children they have. There is a rights-based approach to reproductive rights and governments must make sure it takes into consideration the 'unique needs of women'.⁴⁷ Addressing the 'unique needs' includes women living with disabilities. Furthermore, paragraph (n) of the Preamble to the CRPD recognises 'the importance for persons with disabilities of their individual autonomy and independence, including their freedom to make their own choices'. The state should therefore ensure that PWDs and other women who are pregnant are treated equally and PWDs should be able to enjoy the right to decide whether to have a child or not despite living with a mental disability.

The Constitution also provides for the right to reproductive choice. Article 12(2)(a) confers upon the persons in South Africa the right 'to make decisions concerning reproduction'. However, the reproductive rights of PWDs are often ignored, be it at the national or international level.

For a long time, feminists have struggled to enable women to 'make decisions about their bodies, sexuality and child bearing'.⁴⁸ Kallianes and Rubinfeld have highlighted the irony that exists concerning women with disabilities: despite the fact that women are perceived as sexual objects, women with disabilities are considered as 'asexual' or 'undesirable' as mothers.⁴⁹ Asch identifies the following as being constraints to reproductive freedom of women with disabilities:⁵⁰

It starts in exclusion from sex education classes and in parental silence about sexuality and motherhood ... inaccessibility of affordable gynaecological services; lack of safe contraception ... and the still-prevalent sterilizations.

47 BM Ahlberg & A Kulane 'Sexual and reproductive health and rights' in S Tamale (ed) *African sexualities: A reader* (2011) 313.

48 V Kallianes & P Rubinfeld 'Disabled women and reproductive rights' (1997) 12 *Disability and Society* 203.

49 Kallianes & Rubinfeld (n 48 above) 204.

50 A Asch 'Reproductive technology and disability' in N Taub & S Cohen (eds) *Reproductive laws for the 1990s: A briefing handbook* (1988) 87.

The right of a woman to decide whether she wants to terminate her pregnancy was firstly recognised in the case of *Roe v Wade* in 1973.⁵¹ Feminist theories present different options for the protection of women's rights⁵² and these extend to the right to reproductive choice. Feminist theorists consider choosing as a 'defining and unifying feature' of their principles and define choice as encompassing 'the positive right to bear and raise a child and the free choice not to abort'.⁵³

The reproductive health of women should be protected irrespective of whether they have a disability or not.

Section 27 of the Constitution of South Africa imposes an obligation on the state to provide access to reproductive health care services to everyone in its territory.⁵⁴ The WHO considers reproductive health to be achieved in a situation where:

[P]eople are able to have a responsible, 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.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa expressly provides that women have the right to decide whether they want to have children or not.⁵⁵ A woman should be given the ability to decide when to have children as it is a fundamental component of her human rights and human dignity.⁵⁶

The UN Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No 14⁵⁷ incorporates the right to reproductive choice as part of the right to health and includes the following:⁵⁸

[T]he right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.

51 *Roe v Wade* 410 US 113 (1973).

52 LM Brown 'Feminist theory and the erosion of women's reproductive rights: The implication of fetal personhood laws and in vitro fertilization' (2005) 13 *Journal of Gender, Social Policy & the Law* 87 89.

53 L Sayce & R Perkins "'They should not breed": Feminism, disability and reproductive rights' (2002) 32 *Off Our Backs* 18 19.

54 Sec 27(1)(a) of the Constitution.

55 Art 14(1)(a).

56 MK Eriksson *Reproductive freedom: In the context of international human rights and humanitarian law* (2000) 10.

57 CESCR 'General Comment No 14: The right to the highest attainable standard of health (Art 12 of the Covenant)' 11 August 2000, E/C.12/2000/4.

58 Para 8 of General Comment No 14.

The above provision does not expressly make mention of PWDs but nevertheless it does encompass them.

Exercising one's right to reproductive choice also ensures that one is not subjected to inhumane and degrading treatment. Article 15 of the CRPD protects PWDs from inhuman and degrading treatment by providing that 'no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'.⁵⁹ Similarly, the Constitution provides that no one should be 'treated or punished in a cruel, inhuman or degrading way'.⁶⁰

Inhumane and degrading treatment has been defined in the case of *International Pen* by the African Commission as including 'not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience'.⁶¹

If, during her examination, the PWD expressed her willingness to have a baby, she will be subject to psychological suffering because she has to go through the pain of abortion and the idea that she is not like other women who can decide whether they want to face the risk of any danger to their life or that of the fetus. By forcing her to have her pregnancy terminated, she is being humiliated.

Moreover, allowing a PWD to decide whether she wants to continue her pregnancy or not ensures that her right to form a family is protected. Article 23 of the CRPD imposes an obligation on states to ensure that there is no discrimination against PWDs concerning parenthood and to further ensure that '[t]he rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children ...' are protected. Being described as the 'fundamental and natural unit of society',⁶² states have an obligation to ensure that everyone has the right to form a family. However, women with disabilities are often perceived as too dependent and weak to make fit parents and serve as good role models. Not taking into consideration the right to reproductive choice of a woman with a disability, the state is impeding upon the PWD's right to form a family.

PWDs face an uphill battle when it comes to have their right to reproductive choice respected. For instance, not so long ago, forced sterilisation of persons forming part of vulnerable groups was widely practiced since they were considered as an inferior category of persons who

59 Art 15(1) of the CRPD.

60 Sec 12(1)(e) of the Constitution.

61 *International Pen (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); see also *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) paras 36 and 37.

62 Human Rights Education Associates 'The right to family', available at http://www.hrea.org/index.php?base_id=158 (accessed 30 March 2014).

gave birth to 'undesirable' children.⁶³ In 1927, the US Supreme Court decided in favour of a law which provided for the sterilisation of a woman who was 'feeble-minded'.⁶⁴ The Applicant contended the substantive law and argued that such an order violated her rights. However, the Court, while highlighting that 'three generations of imbeciles are enough',⁶⁵ stated the following:⁶⁶

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

However, in the contemporary world, forced sterilisation has been condemned by different human rights bodies. It has been considered as an act of violence against women and a form of torture and cruel and degrading treatment.⁶⁷

Moreover, a more human-rights approach to sterilisation was adopted in the case of *Eberhardy* where the contention was whether the guardians of a person with a mental disability can give consent to a permanent sterilisation.⁶⁸ The judges held that sterilisation procedures can be considered as 'the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate'.⁶⁹ In *Eberhardy* the Court pointed out that instead of making orders for sterilisation, the state's interests lie in protecting persons with mental disabilities from being subjected to forced sterilisation.⁷⁰

In Canada, in 1928, Alberta adopted the Sexual Sterilization Act which recommended sterilisation as a means to have liberty from mental institutions. An amendment to the Sexual Sterilization Act in 1937 allowed for the forced sterilisation of persons with mental disabilities. The

63 P Paupenoe 'The progress of eugenic sterilization' (1934) 25 *The Journal of Heredity* 19 21.

64 *Buck v Bell* 274 US 200 (1927).

65 *Buck v Bell* (n 64 above) 207.

66 *Buck v Bell* (n 64 above) 209.

67 UN Committee on the Elimination of Discrimination Against Women 'General Recommendation No 19: Violence against women, article 16 (and article 5) of the Convention (Women and Health)' (1992) para 22; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/7/3 (2008) paras 38 and 39; UN Committee Against Torture 'General Comment No 2: Implementation of article 2 by States Parties' CAT/C/GC/2 (2008) para 22; Human Rights Committee 'General Comment No 28: Equality of rights between men and women' CCPR/C/21/Rev.1/Add.10 (2000) paras 11 and 20; UN Committee on the Rights of the Child 'General comment No 13: Article 19: The right of the child to freedom from all forms of violence' CRC/C/GC/13 (2011) 17 paras 16 and 21.

68 *The guardianship of Joan I. Eberhardy, Incompetent: Quintin Eberhardy and Mary Eberhardy, guardians v Circuit Court for Wood County* 307 Wisconsin Supreme Court (1981), available at <https://www.courtlistener.com/wis/9zJf/in-matter-of-guardianship-of-eberhardy/> (accessed 23 June 2014).

69 *Eberhardy* (n 68 above) 893.

70 *Eberhardy* (n 68 above) 896-897.

Sexual Sterilization Act was repealed in 1972 since it was morally and legally reprehensible. The CTPA can be similarly viewed because it treats persons with mental disabilities as an inferior category of people who cannot take care of their children.

In 2011, the European Court of Human Rights (ECtHR), in the case of *VC v Slovakia*, held that sterilisation interfered with one of the bodily functions of the woman and violated her right to reproductive choice.⁷¹ Drawing a parallel between forced sterilisation and forced termination of pregnancy, the latter also interferes with one's reproductive system. Therefore, deciding on behalf of the PWD whether she wants to terminate her pregnancy is a limitation of the right to reproductive choice.

The question which arises is whether this limitation is justified. Their rights should be limited to serve a particular purpose which is 'worthwhile and important in a constitutional democracy'.⁷² Application of section 5(4)(a) will ensure that a PWD's life or that of the fetus is not threatened. Empowering a woman with a mental disability by informing her of the danger that she or the fetus can encounter serves as a means through which the rights of the woman can be protected. Therefore, section 5 of the CTPA is baseless in an open and democratic society where everyone should be able to decide about whether to reproduce or not, even if that poses a danger to their life.

The right to reproductive choice, as discussed, is to ensure that women with disabilities are treated along the same lines as persons who are living without any disability concerning whether they want to have a termination of their pregnancy or not. Section 5(4)(a) of the CTPA thus denies women with disabilities their right to reproductive choice.

3.2 Right to free and informed consent

Article 25 of the CRPD states as follows:

States Parties shall require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.

The CRPD imposes an obligation on South Africa to ensure that health professionals take into consideration the free and informed consent of the person who is being examined.

⁷¹ *VC v Slovakia* Application No: 18968/07 ECtHR (2011).

⁷² I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 179.

The International Disability Caucus suggested the following definition for informed consent:⁷³

Informed decisions can be made only with knowledge of the purpose and nature, the consequences, and the risks of the treatment and rehabilitation supplied in plain language and other accessible formats.

As pointed out by the case of *Christian Lawyers Association v Minister of Health*, informed consent has 3 pillars namely knowledge, appreciation and consent.⁷⁴ A termination of pregnancy cannot therefore occur unless a woman has given her consent after having been educated about the issue at hand.

The CRPD Committee has expressed concern in relation to forced treatment in mental health services without one's free and informed consent.⁷⁵ The Committee specifically recommended that states⁷⁶ 'incorporate into the law the abolition of surgery and treatment without the full and informed consent of the patient, and ensure that national law especially respects women's rights under article 23 and 25 of the Convention'.

The Concluding Observation of the CRPD on the initial report of Argentina pointed out to the fact that legal guardians of persons with mental disabilities can give authorisation for an abortion on their behalf and this can lead to the choice of the person not being respected.⁷⁷ It recommended the following to the state:⁷⁸

[T]ake steps to provide the necessary support to women under guardianship or trusteeship to ensure that the women themselves are the ones who give their informed consent for a legal abortion or for sterilization.

Terminating the pregnancy of a PWD without her consent will have a very serious impact on her enjoyment of the rights enshrined in the Constitution. Her constitutional rights will not only be limited but will be waived. She will be in a situation where her personal will has no importance and she will be treated as an object which has to live its life according to the recommendations of other persons.

Therefore, a state has an obligation to ensure that there is full and informed consent before subjecting any woman, including one with a

73 International Disability Caucus 'Article 21? Health and informed consent'.

74 *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) 515.

75 CRPD Committee *Concluding observations: Tunisia*, para 28, UN Doc CRPD/C/TUN/CO/1 (2011).

76 *Concluding observations: Tunisia* (n 75 above) para 29.

77 CRPD Committee *Concluding Observations on the Initial Report of Argentina as approved by the Committee at its eighth session* (17-28 September 2012) CRPD/C/ARG/CO/1 para 31.

78 *Concluding Observations on the Initial Report of Argentina* (n 77 above) para 32.

mental disability, to any medical intervention. Section 5 of the CTPA does not provide for the informed consent of the woman whose pregnancy is to be terminated and this contravenes article 25 of the CRPD.

3.3 Right to dignity

The right to dignity is recognised by both the CRPD and the Constitution. The CRPD makes reference to dignity in several of its provisions and one of the general principles of the CRPD is the 'respect for inherent dignity' of PWDs.⁷⁹

The CRPD has as its purpose the promotion of respect for the inherent dignity of PWDs.⁸⁰ Section 10 of the Constitution protects the right to dignity. It provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'. The right to dignity is asserted in the Constitution 'to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings'.⁸¹ It is a 'value' which ensures that there is a proper interpretation of 'many, possibly all, other rights'.⁸² The case of *Makwanyane* gave considerable weight to the right to dignity and emphasised that the right to dignity is the cornerstone of the Constitution and is one of the values upon which the state is founded⁸³ and that 'this must be demonstrated by the State in everything that it does'.⁸⁴ The Constitution requires South Africa to 'acknowledge the value and worth of all individuals as members of our society'.⁸⁵ Coupled with the right to life, the right to dignity is considered as 'absolute' and as 'the source of all other rights'.⁸⁶

Although dignity is a term which does not have a precise definition,⁸⁷ 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society'.⁸⁸ Concerning PWDs, dignity implies that they are treated 'first as people and only then with people of particular characteristics' and that treatment should not be based 'on some idea about the person's disability'.⁸⁹

79 Art 3(a) of the CRPD.

80 Art 1 of the CRPD.

81 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

82 As above.

83 Sec 1(a) of the Constitution.

84 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

85 *National Coalition for Gay and Lesbian Equality & Anor v The Minister of Justice & Others* 1999 (1) SA 6 (CC) para 28.

86 *Makwanyane* (n 84 above) paras 84 and 144.

87 *Egan v Canada* (1995) 29 CRR (2d) 79 106.

88 *The National Coalition for Gay and Lesbian Equality* (n 85 above) para 28.

89 LA Basser 'Human dignity' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 36.

PWDs' right to dignity can be infringed if there is a recommendation for the termination of her pregnancy since it subjects her to different treatment due to her living with a disability. According to O'Sullivan and Bailey, 'denying a woman the freedom to make and act upon decisions concerning reproduction treats her as a means to an end and strips her of her dignity'.⁹⁰ Section 5(4)(a) of the CTPA provides for the termination of the pregnancy of a woman who has a severe mental disability. However, the section ignores that by categorising them as people who are unable to decide whether they can bear children, it is classifying them according to their disability and not recognising them as individuals who are entitled to enjoy motherhood. The section is therefore offensive to women who live with mental disabilities since it denies them access to their fundamental rights and freedoms.⁹¹

3.4 Right to equal recognition before the law

Article 12 of the CRPD provides for the right of PWDs to equal recognition before the law. It further imposes on states the obligation 'to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'. The right to equality is expressly protected by section 9 of the Constitution. Section 9(1) provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. The right to equality 'includes the full and equal enjoyment of all rights and freedoms'.⁹² The Constitution strives to 'develop a society based on equality and respect by all for all'.⁹³

Concerning PWDs, their right to equality is 'inherent in their humanity, which means that they possess the same rights and obligations as other citizens'.⁹⁴ The case of *Shtukaturov v Russia* is an application of the wording of article 12 of the CRPD where the ECtHR held that even if a person is placed under guardianship, his will has to be taken into consideration when the subject matter potentially violates his fundamental rights and freedoms.⁹⁵ Therefore, persons with mental disabilities are all

90 M O'Sullivan & C Bailey 'Reproductive rights' (1998) 16-15, available at http://www1.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/16-Reproductive%20Rights.pdf (accessed 30 March 2014).

91 I Grobbelaar-du Plessis & T Van Reenen 'Introduction to aspects of disability law in Africa' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2012) xvi.

92 Sec 9(2) of the Constitution.

93 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 59.

94 J Lecomte, West Montreal and Lisette-Dupras Readaption Centres, Quebec and Céline Mercier, University of Montreal, Quebec 'The emergence of the human rights of persons with intellectual disabilities in international law: The cases of the Montreal Declaration on International Disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in F Owen & D Griffiths (eds) *Challenges to the human rights of people with intellectual disabilities* (2009) 52.

95 *Shtukaturov v Russia* Application No: 44009/05 ECtHR (27 March 2008).

human beings who should be afforded the same opportunity as others. The law should not view PWDs differently on the basis of their disability.⁹⁶ Such a step would include affording the PWD the opportunity to consent to the termination of their pregnancy.

Furthermore, General Comment 1 of the CRPD Committee expands upon article 12 of the CRPD.⁹⁷ Paragraph 31 of the CRPD General Comment recognises that women with disabilities 'are often denied control of their reproductive health and decision-making'. The CRPD General Comment raises concerns about PWDs being denied their legal capacity because of the 'unsoundness' of their mind.⁹⁸ The CRPD Committee, while making reference to the CRPD, clarifies that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'. Section 5(4)(a) of the CTPA is a reflection of removing the legal capacity of PWDs on the basis of them having 'impaired decision-making skills ... because of a cognitive or psychosocial disability'.⁹⁹ This practice has been considered as being discriminatory towards PWDs.¹⁰⁰

Discrimination on the basis of disability is defined by the CRPD as follows:¹⁰¹

[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The CRPD considers non-discrimination as one of its principles.¹⁰² The Preamble mentions that all human beings, without discrimination on the basis of their disability, must be guaranteed the full enjoyment of all their human rights and fundamental freedoms.¹⁰³ It further recognises that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.¹⁰⁴ The CRPD also acknowledges that there are aggravated forms of discrimination against PWDs on the basis of sex amongst others.¹⁰⁵ The CRPD imposes an obligation on states parties 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with

96 As above.

97 Committee on the Rights of Persons with Disabilities 'General Comment 14 – Article 12: Equal recognition before the law' (2014) CRPD/C/GC1 adopted during the eleventh session (31 March-11 April 2014).

98 Para 12 of the CRPD General Comment.

99 Para 13 of the CRPD General Comment.

100 As above.

101 Art 2 of the CRPD.

102 Art 3(b) of the CRPD.

103 Para (c) of the Preamble of the CRPD.

104 Para (h) of the Preamble of the CRPD.

105 Para (p) of the Preamble of the CRPD.

disabilities'.¹⁰⁶ Article 5 expressly provides that there should be prohibition of 'all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.¹⁰⁷ There should be 'reasonable accommodation' to prevent any form of discrimination against PWDs.¹⁰⁸ The CRPD further recognises the vulnerability of women with disabilities and has a specific provision relating to their protection.¹⁰⁹

The right to equality as enshrined in the UDHR ensures that everyone benefits from their human rights in the same manner.¹¹⁰ Article 5 of the CRPD protects the right to equality of PWDs. It provides that PWDs are entitled to 'equal protection and equal benefit of the law'. Similar to human dignity, achievement of equality is one of the founding provisions of the Constitution of South Africa.¹¹¹ Furthermore, the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom'.¹¹²

The Constitution provides for non-discrimination in its section 9. Section 9(3) of the Constitution protects PWDs from discrimination as follows:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Disability is listed as a ground on which there should not be discrimination. This provision has been applied in the case of *Western Cape Forum for Intellectual Disability v Government of the RSA*¹¹³ where it was held that the state education policy and practice constituted unfair discrimination under section 9(3) of the Constitution as the funding and provisions of schools accommodating children with disabilities was inferior to that of children with no disabilities.

To ensure that the best interests of the PWD is protected, section 5(4)(a) of the CTPA does provide for the consent of two medical practitioners or that of a medical practitioner and that of a midwife who

¹⁰⁶ Art 4(b) of the CRPD.

¹⁰⁷ Art 5(2) of the CRPD.

¹⁰⁸ Art 5(3) of the CRPD.

¹⁰⁹ Art 6 of the CRPD: '(1) States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. (2) States Parties shall take all appropriate measures to enjoy 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 set out in the present Convention.'

¹¹⁰ Art 1 of the UDHR.

¹¹¹ Sec 1(a) of the Constitution.

¹¹² Sec 7(1) of the Constitution.

¹¹³ *Western Cape Forum for Intellectual Disability v Government of the RSA* 2011 (5) SA 87 (WCC).

has completed the prescribed training course in relation to the termination of the pregnancy of a person who is severely mentally disabled.¹¹⁴ Nevertheless, two different persons may have different opinions and this is an example of the incapacity to provide for 'a rational explanation as to why similarly placed persons are treated in a substantially different way'. There is therefore unequal treatment since the same category of persons can be treated differently. Since the act does not define who a person with a severe mental disability is, it is arbitrary and not of general application.¹¹⁵

Recommending a termination of pregnancy for a PWD will constitute a violation of her right to equal recognition before the law and subsequently the right to be protected from discrimination. That recommendation will be made on behalf of the PWD only based on the fact that the PWD has a mental disability and does not have the mental capacity to make reasonable decisions. If she was without the mental disability, she would not be deprived from having a child. The CRPD clearly stipulates that women with disabilities are more vulnerable to discrimination.

4 Conclusion and recommendations

It has been observed that section 5 of the CTPA violates several provisions of the CRPD. These violations could be justified in terms of section 36 of the Constitution but as analysed in the paper, limiting the right of a woman with a mental disability to decide whether she wants to terminate her pregnancy or not is not justified since it does not fulfil the conditions listed in section 36 of the Constitution. The major recommendation is to have certain amendments made to section 5 of the CTPA so that it does not continue to violate the rights of persons with mental disabilities. The amendments, if implemented will ensure that South Africa abides by its general obligations under the CRPD, one of which is '[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.¹¹⁶

The first problem identified with section 5 of the CTPA is that it does not offer the woman with the mental disability the choice whether she wants to keep the child or not. It is thereby recommended that the section should be amended to provide for a procedure whereby the views of the woman is considered while terminating her pregnancy. By doing so, the right to reproductive choice of the woman will be respected. The authors acknowledge that it can be challenging for a woman with a severe mental

114 Art 5(4) of the CTPA.

115 Sec 36(1) of the Constitution.

116 Art 4(1)(b) of the CRPD.

disability to freely make a decision as to whether she wants to continue with her pregnancy or not. It is therefore further recommended that this section incorporates the principles of free and informed consent. This will ensure that the persons who are terminating the pregnancy at least explain to the woman with the mental disability all the aspects of the termination and its implication. By not providing for this option in the current law, the right to reproductive choice and the right to give free and informed consent for the termination of the pregnancy is completely overlooked.

Another argument advanced for the termination of the pregnancy of a person who has a mental disability is that she will not be in a position to understand the gravity of the situation since her life or that of the fetus might be at risk. It is being proposed that section 5 of the CTPA is amended to include the conduct of a social enquiry report in the event a person with a mental disability has refused to terminate her pregnancy after having been fully informed about what the pregnancy entails. The social enquiry should give details about the family background of the person and about whether the PWD has the capacity to make rational decisions. This process will give effect to the provisions of the CRPD which emphasise reasonable accommodation which has been defined as follows:¹¹⁷

[N]ecessary 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

The exploration of other avenues concerning the ability of the PWD to make the right informed decision would give effect to the principle of reasonable accommodation.

It has also been noted that the Act does not clearly define what a severe mental disability is. The WHO, while defining mental disorders, gave examples of that type of disability. However, the list can be considered as non-exhaustive. As discussed above, a mental illness is temporary and can be cured. The medical practitioner can prescribe medicines to reduce the severity of the mental disability and this would thus empower the woman to make a decision concerning the termination. In the same line of thought, the act does not make reference to intellectual disabilities which is life-long and cannot be dissipated. The question which arises is whether while conducting the examination, the medical practitioners make a distinction between mental and intellectual disability. Most of the times, mental disabilities and intellectual disabilities are confused and people with intellectual disabilities also fall within the rubric of persons targeted by section 5 of the CTPA. It is recommended that the CTPA gives a precise ambit within which section 5 should operate so that it does not impede upon the rights of persons with intellectual disabilities.

117 Art 2 of the CRPD.

CHAPTER 6

ECONOMIC DISCOURSES OF DISABILITY IN AFRICA: AN OVERVIEW OF LAY AND LEGISLATIVE NARRATIVES

*Shimelis Tsegaye Tesemma**

Summary

The article presents the dominant economic discourses of disability in Africa cutting across both charity and medical models. Within such discourses, persons with disabilities are depicted as unproductive and as dependents of the welfare system, and by extension, as dependents of non-disabled tax payers or non-disabled benefactors. This perceived dependence is fuelled by the vicious nexus between poverty and disability where poverty triggers disability and disability in turn leads to further impoverishment. The article also discusses the pros and cons of economic policy instruments that aim to economically empower persons with disabilities, including by increasing the demand for disabled workers via financial and tax-related incentives to employers. It focuses, in relatively greater detail, on the dilemmas facing persons with disabilities in accessing social welfare at the risk of facing discrimination by the disability-insensitive public. The article discusses the employment challenges faced by and opportunities presented to persons with disabilities, including in the area of self-employment and entrepreneurship. The latter is related, amongst others, to efficiency/productivity and human capital considerations that underlie investments in education, which might exclude children with disabilities from education services now and in the future from employment opportunities later in youth and adulthood. The article suggests a shift in both mindset and practice away from charity/economic dependence discourses to an independent living paradigm, where the focus is on the socioeconomic self-reliance and independence of persons with disabilities.

* BSc (Addis Ababa University), MA (Addis Ababa University), DEd (University of South Africa), Head of the Child Protection and Development Programme at the African Child Policy Forum (ACPF), responsible, amongst others, for pan-African disability projects.

1 The multiple faces of the 'economic discourse' of disability: Introduction

The article concentrates, on (categorical) social welfare that targets persons with disabilities and the dilemmas associated with accessing social welfare, namely that of claiming (mostly through medical/scientific certification) one's 'injured' identity at the risk of facing discrimination by the disability-insensitive public. The article ends with some suggestions on possible ways of advancing economic emancipation, empowerment and independent living of persons with disabilities.

2 Disability and poverty: The nexus

Poverty¹ and disability are intertwined. Disability often leaves people without education and employment or with low paid jobs, hence it is a trigger of poverty, which in turn exacerbates peoples' exposure to disablement.

Poverty can delay people from seeking medical help when sick or prevent women from getting access to skilled birth attendance or pregnant women from getting badly-needed mineral supplements.² Such delays might also be caused by the distant location of health facilities combined with lack of money for transport and treatment. For instance, Asphyxia during birth, often resulting from the absence of a skilled attendant, leads to an estimated 1 million children with learning difficulties and impairments such as cerebral palsy.³ About 70 per cent of cases of spina bifida – a disability that affects from 1000 to 3000 children per million in Africa – are preventable if folic acid supplements are taken by women before and after pregnancy and during the first trimester.⁴ Similarly, maternal iodine deficiency leads to 18 million babies being born with mental disabilities annually and vitamin A deficiency leaves about 350000 children blind in developing countries.⁵

1 Poverty is understood here to refer to both income poverty and deprivation (the attainment of states of being that are fundamental to living an acceptable quality of life such as being well-sheltered, being well-nourished, being able to move about freely, or being able to form and maintain a family). See J Braithwaite & D Mont Disability and poverty: A survey of World Bank poverty assessments and implications' SP Discussion Paper (2008) 13.

2 UNESCO (United Nations Educational, Scientific and Cultural Organization) *EFA global monitoring report 2010: Reaching the marginalized* (2010) 181.

3 As above.

4 Spina Bifida Association of America (2009) cited in ACPF *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011) xi.

5 UNESCO (n 2 above) 181.

Poor people also live under worse hygienic conditions (lack of sewage systems, lack of access to clean water and nutritious food),⁶ which may compound their risks of being disabled. Similarly, children living in poor, urban slums are exposed to the debilitating effects of some poisonous chemicals. In many African cities, urban slum dwellers come into contact with stockpiles of obsolete pesticides such as Polychlorinated Biphenyls (PCBs), dioxins, and dichlorodiphenyltrichloroethane (DDT) and e-waste that contaminate soil and water, causing reproductive and developmental disorders and damaging the nervous system.⁷ Exposure to heavy metals, also common in urban waste dumpsites, poses serious threats, particularly to children and during foetal development.⁸

Equally important, disability leads to poverty, evident in the fact that persons with disabilities account for the predominant majority of the world's poor. The Convention on the Rights of Persons with Disabilities (CRPD), in its preamble, not only recognises the fact that the majority of persons with disabilities live in conditions of poverty but also calls for addressing the negative impact of poverty on persons with disabilities.⁹

About 20 percent of the poor in developing countries are reportedly disabled.¹⁰ While one in six or seven of the world's population is disabled,¹¹ one in five of the world's poor lives with a disability.¹² This may be due to exclusion from education and employment opportunities, low-pay, and a very high cost associated with care, mobility and support facilities and services. Further, according to Slee:¹³

The impoverishment of disabled people revolves around segregation from the paid labour market, enforced dependency, the high costs of support and housing for independent and community living, and the pervasive impact of economic rationalism on the public policy and welfare provision.

In addition, persons with disabilities have extra needs, such as medicines, hearing aids, glasses, sticks, wheelchairs, special diets (due to allergies), extra clothing, extra hearing, special beds, guide dogs, readers for the blind, incontinence pads, breathing apparatuses and the like. Persons with disabilities also have to pay for adaptations to the home, or personal care, as well as for items such as individualised cars and freezers, which are

6 B Ingstad & AH Eide 'Introduction- disability and poverty: A global challenge' in AH Eide & B Ingstad (eds) *Disability and poverty: A global challenge* (2011) 5.

7 B Gordon et al *Inheriting the world: The atlas of children's environmental health and the environment* (2004) 36.

8 As above.

9 UN General Assembly 'Convention on the Rights of Persons with Disabilities', adopted 24 January 2007, A/RES/61/106 (CRPD) Preamble.

10 A Elwan *Poverty and disability: A survey of the literature* (1999) 15.

11 World Health Organization (WHO) & World Bank *World report on disability* (2011) 29.

12 Elwan (n 10 above) 15.

13 R Slee 'Disability, class and poverty: School structures and policing identities' in C Christensen & F Rizvi (eds) *Disability and the dilemmas of education and justice* (1996) 100.

otherwise considered a luxury for a non-disabled person.¹⁴ Persons with disabilities also have to pay more for some of the basic items. For instance, people with limited mobility may have to use the nearest shops, rather than the cheapest shops.¹⁵ These accommodation requirements translate into direct financial costs that drain limited available resources, hence compounding their poverty. For example, households with persons with severe or very severe disabilities in Sierra Leone spent on average 1.3 times more on health care than their non-disabled counterparts.¹⁶

To do the same things as an able-bodied person, a person with physical disabilities may need more income ... With the same level of income a disabled person may be able to do far fewer things, and may be seriously deprived in terms of the capabilities that he or she has reason to value.

The mainstreaming of disability in the poverty reduction agenda is therefore an urgent development priority. Persons with disabilities need to be given access to education and employment opportunities without discrimination. Awareness should be built around issues that impede the socioeconomic participation of persons with disabilities and persons with disabilities should be given greater access to community activities and social networks. Factors that compound the vulnerability of persons with disabilities to deprivation should be addressed through appropriately designed social protection measures. Legislative provisions that uphold the right to employment opportunities should be accompanied by concrete programmatic and budgetary responses, including those that ensure accessibility of the work environment.

The socio-cultural barriers that resulted in chronic poverty and economic deprivation of persons with disabilities have left many of them with no economic options other than begging, and its attendant debilitating influences. Now with the introduction of more and more progressive national legislation and greater awareness around the issue of disability, especially following the adoption of the CRPD, encouraging efforts are being made in many countries to ensure that persons with disabilities enjoy the right to access social welfare benefits as well as the right to opportunity of employment (including self-employment). It is to the latter issue that we now turn.

14 L. Reith 'Exploring the Link between poverty and disability' in Combat Poverty Agency *Disability, exclusion and poverty: A policy conference* (1994) 60.

15 Reith (n 14 above) 61

16 J. Trani et al *Disability in and around urban areas of Sierra Leone* (2010) 36.

3 Employment of persons with disabilities

3.1 Formal employment and its challenges

Given their often limited access to education and the attitudinal and physical barriers to overcome, people with disabilities are more likely to be unemployed.¹⁷ The International Labor Organization (ILO) estimates that the level of unemployment worldwide amongst disabled people is two to three times higher than for other people.¹⁸ In some countries one in every six to eight persons with disabilities is unemployed. According to the 2005 figures, only 12,4 percent of persons with disabilities in South Africa were employed.¹⁹ There is a complex picture when attempts are made to disaggregate the employment pattern by disability type. For example, a study found that people with intellectual impairments were three to four times less likely to be employed than people without disabilities. Besides being less likely to be competitively employed and more likely to be employed in segregated settings, persons with intellectual impairments were also more likely to have more frequent and longer periods of unemployment.²⁰

The low level of employment of persons with disabilities may be due to a lack of adequate education or training, preconceived ideas about people with disabilities on the part of employers, lack of physical accessibility to the workplace, and lack of adequate transportation.²¹ Persons with disabilities may also face physical barriers to job interviews, to the actual work setting, and to attending social events with fellow employees²² as well as facing obstacles to accessing labour market information in disability-friendly formats.²³

Perhaps the most important challenge relates to the tendency of employers considering the employment of persons with disabilities as a less productive venture, or as one that entails high 'maintenance' costs. Although data for Africa is hard to come by, studies elsewhere have revealed a positive rate of return of investments in the employment of

17 Ingstad & Eide (n 6 above) 5.

18 M Turmusani *Disabled people and economic needs in the developing world: A political perspective from Jordan* (2003) 31.

19 S Mitra 'The recent decline in the employment of persons with disabilities in South Africa, 1998-2006' (2008) 76 *South African Journal of Economics* 480.

20 MM Verdonschot et al 'Community participation of people with an intellectual disability: A review of empirical findings' (2009) 53 *Journal of Intellectual Disability Research* 303.

21 Handicap International *Good practices for the economic inclusion of people with disabilities in developing countries: Funding mechanisms for self-employment* (2006) 17.

22 International Labour Organization *Strategies for skills acquisition and work for people with disabilities* 2006 http://www.hsrc.ac.za/research/output/outputDocuments/4388_Schn_eider_Strategiesforskills.pdf (accessed 8 June 2014).

23 SE Butler et al 'Employment barriers: Access to assistive technology and research needs' (2002) 96 *Journal of Visual Impairment & Blindness* 664.

persons with disabilities. In the Six Mary's Place guesthouse project, for every £1 invested in Six Mary's Place Guest House, almost £6 is returned in social added value, in the form of savings in mental health and welfare benefits, new tax income, and increased personal income.²⁴

In cases where persons with disabilities get employment, they are often paid very low salaries²⁵ and are less likely to get promoted.²⁶ The flexibility of work schedules and other aspects of work preferences of persons with disabilities, including having proper time to prepare for work, to travel to and from work, and to deal with health concerns, often translate into low paying contingent and part-time work arrangements.²⁷

3.2 Self-employment and its challenges

Whenever formal employment becomes an uphill struggle, persons with disabilities often resort to self-employment, which requires, amongst others, a start-up capital, which can be obtained from family savings, grants and loans from relatives, moneylenders, non-governmental organisations (NGOs), microfinance institutions or banks.²⁸ Given the predominately poor status of disabled people, savings are less likely to present themselves as a source of capital, and people with disabilities might turn to microcredit schemes. But, even the latter option has not been very successful. According to Handicap International, persons with disabilities constituted less than 0,5 per cent of the clients of microfinance services in developing countries.²⁹

A number of factors contribute to the limited access to microcredit of people with disabilities, such as the practice of relying on personal skills and character in evaluating the viability of loans,³⁰ and the related attitude of considering persons with disabilities as unworthy of credits.³¹ Further, those socioeconomic factors that exclude poor people from such services such as 'elite capture' also exclude people with disabilities, and at a greater rate. This is partly tied to the tendency of considering persons with disabilities as less productive and hence less capable of paying back. But

24 S Durie & L Wilson *Six Mary's Place: Social return on investment report* (2007) <http://www.socialfirms.org.uk/FileLibrary/Resources/Quality%20&%20Impact/SROI%20report%20-%20Six%20Marys%20Place.pdf> (accessed 7 June 2014).

25 Ingstad & Eide (n 6 above) 5.

26 Elwan (n 10 above) 14.

27 WHO & World Bank (n 11 above) 239.

28 Handicap International (n 21 above) 18.

29 Handicap International (n 21 above) 3.

30 Leonard Cheshire Disability and UNECA *UN Convention on the Rights of Persons with Disabilities: A call for action on poverty, discrimination and lack of access* (2008) 37.

31 The judgments made towards one's creditworthiness or credit-unworthiness are more than just about lack of savings, mobility challenges or stigmatisation. Karl Marx observed, a long time ago, that one of the situations in which credit is conceivable is that a rich creditor extends credit to a poor man whom he regards as industrious and orderly. According to Marx, credit is 'the greatest possible recognition [and judgment] of man's worth by economics' or indeed 'the economic judgment on the morality of

there are other equally important factors, including those related to the design of the credit schemes. The first of these factors relate to lack of sufficient start-up capital, credit history and being unable to produce the collateral required,³² which is also linked to lack of flexibility in these credit operations to facilitate inclusion of persons with disabilities.³³ The second set of factors are attitudinal and include stigmatisation and discrimination, the reluctance to buy goods and services from people with disabilities, leading to their lack of self-confidence and self-exclusion, as well as negative self-image and lack of confidence that is inculcated from a lifetime of being denigrated.³⁴

The third set of factors are impairment-related such as mobility and transportation challenges and the attendant difficulties to make weekly repayments and attend meetings and market products, further compounded by inaccessible buildings and marketplaces, contributing to their limited participation in entrepreneurship education and training.³⁵ Difficulties in keeping accounts, compared to non-disabled people, are also cited as a challenge especially facing persons with visual impairments.³⁶

3.3 Employment of persons with disabilities: Opportunities

In light of these and related employment challenges, the CRPD obliges states parties to protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value. It also urges states parties to enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training. The Convention calls for the promotion of employment opportunities, including self-employment and entrepreneurship, and career advancement

man'. The man in need of credit is not defined just by his deprivation but also by the demoralising judgment that he has to put up with that 'he does not inspire confidence, that he is, in short, a social pariah and a bad man'. See R Livingstone 'Elements of political economy' in Q Hoare (ed) *Karl Marx: Early writings: Introduction by Lucio Colletti* (1974) 263. There is, therefore, more ignominy on a man who seeks and is denied credit because he is not worthy of it than the man who just seeks credit. Denial of credit to a person – who is already in a poorer state than his creditor – amounts to recognising that that person is less than poor, less moral, less human than the poor, and is, therefore, degrading in moral and economic terms.

32 JM Cramm & H Finkenflugel 'Exclusion of disabled people from microcredit in Africa and Asia: A literature study' (2008) 19 *Asia Pacific Disability Rehabilitation Journal* 22.

33 Handicap International (n 21 above) 32.

34 M Albu *Economic empowerment of disabled people: Lessons from Northern Uganda about developing the market for enterprise-based skills development services* (2005) 11.

35 Cramm & Finkenflugel (n 32 above) 22.

36 As above.

for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.³⁷

At the national level, with a view to improving access to employment opportunities of persons with disabilities, some countries have put in place legislation to prohibit discrimination to employment or to equal pay on the basis of disability, while others have more progressive legislation that requires appropriate steps be taken to ensure that persons with disabilities get access to gainful employment, including access to microfinance and income-generation schemes.

Non-discrimination is often addressed through constitutional provisions in the majority of countries and through disability-specific legislation such as those in effect in Ghana, Kenya, Uganda and Sierra Leone. Other countries have taken legislative steps to address some of these obstacles, through non-discrimination provisions contained in generic employment equity legislations such as in South Africa.

There are, for example, laws that entitle employers of persons with disabilities to tax exemptions – often covering a wide range of areas. The Ugandan Persons with Disabilities Act of 2006 entitles private employers who employ ten or more persons with disabilities either as regular employees, apprentices or learners on a full time basis to a tax deduction of 15 percent of all payable tax upon proof to the Uganda Revenue Authority.³⁸ The Act requires employers to carry out appropriate modifications in their work premises to facilitate the employment of persons with disabilities, and claim tax exemption on any costs incurred as a result of such modifications.³⁹

Kenya's Persons with Disabilities Act, 2003 potentially increases not just the demand for disabled employees, but also accessibility of the work/office environment for disabled customers. The Act entitles a private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities for additional deductions from his net taxable income equivalent to 50 percent of the direct costs of the improvements, modifications or special services.⁴⁰

Similarly Ghana's Persons with Disability Act 715 of 2006 not only requires the government to grant a person who employs a person with a disability an annual tax rebate of the taxable income in respect of each person with a disability employed but also allows tax exemption to manufacturers of technical aids or appliances for use by persons with

37 CRPD (n 9 above) art 27.

38 Ugandan Persons with Disabilities Act, sec 17.

39 Ugandan Persons with Disabilities Act, sec 13(4).

40 Kenyan Persons with Disabilities Act, sec 16(2).

disabilities.⁴¹ Section 10(2) of the Act requires the government to grant special incentives to persons with disabilities engaged in business and also to business organisations that employ persons with disabilities. Section 11(a) and (b) requires employers to provide the relevant working tools, and appropriate facilities required by the person with disabilities for the efficient performance of the functions required by the employment. These provisions emanate from the prevalent perception amongst employers that 'employing persons with disabilities ... will necessarily entail high costs for the employer'.⁴²

The good intentions of these provisions notwithstanding, financial incentives to increase the demand on disabled labour might connote tendencies of commodification⁴³ of disability, as the willingness to employ a person with disability or to manufacture assistive and adaptive devices might be triggered more by the anticipated financial gain from the transaction than anything else.⁴⁴ In other words, these discourses run the risk of approximating disability to just financial benefits.⁴⁵

On the employee side, there are some legislative examples that attempt to raise the take-home-pay of disabled employees, hence their quality of life. For example, section 12(3) of Kenya's Persons with Disabilities Act⁴⁶ states:

An employee with a disability shall be entitled to exemption from tax on all income accruing from his employment.

Although this is an attempt to raise the amount of take-home pay by exempting employees with disabilities from income tax provisions, it might also be argued that such a provision might deprive such a person the right to make contributions to the public good from which he/she is equally a beneficiary. The potential of such discourses to perpetuate the

41 Ghanaian Persons with Disabilities Act, secs 10(1) & 36.

42 The UN Economic and Social Council cited in UN Enable 'Mainstreaming Disability in the development agenda'. Economic and Social Council: Commission for Social Development: Note by the Secretariat (2007) para 30(d). Ugandan Persons with Disabilities Act, sec 17.

43 In effect, such provisions not only increase the demand for workers with disabilities, but also boost the demand for assistive and adaptive devices – leading to the growing *commodification* of disability itself. Here, disability is 'marked, circumscribed, and commodified by designated products, spaces, and abstracts that not only brand its members but position them as a target market segment ripe for commodification and economic exploitation'. See E DePoy & S Gilson 'Disability, design, and branding' in LJ Davis (ed) *The disability studies reader* (2013) 489.

44 Special education as an industry further exemplifies this, the very existence of which depends on finding disabled students, discovering new categories of disability, establishing special university programs for special educators, funding federal grants for special education, and relying on the participation of special educators in awarding themselves these grants. See W Roth *The assault on social policy* (2002) 83

45 Roth (n 44 above) 83.

46 Kenyan Persons with Disabilities Act.

dependency myth surrounding persons with disabilities, namely that of considering the disabled as the tax payer's burden cannot be denied.

Many countries also have specific measures, for example quotas, aimed at increasing employment opportunities for people with disabilities.⁴⁷ In South Africa, the country's National Skills Strategy, Sectoral Education and Training Authorities require the allocation of four per cent of traineeships to people with disabilities.⁴⁸ The country also binds its government departments and state bodies to ensure that at least two per cent of their workforce must consist of people with disabilities.⁴⁹

The Code of Good Practice: Key Aspects on the Employment of People with Disabilities (Disability Code)⁵⁰ – issued as required by the South African Employment Equity Act 55 of 1998 – requires employers to make 'reasonable accommodation' for people with disabilities, which will include the elimination of obstacles at the workplace and the introduction of positive measures to adapt policies, practices and the working environment in promoting the disability-accessibility of the workplace. The Code also provides for safeguards to be put in place against unfair discrimination throughout the full cycle of employment – from recruitment to promotions and termination of employment.⁵¹

On the self-employment front, some countries have attempted to address the factors that impede disabled peoples' access to microfinance and loans by including them in the development and implementation of microfinance and income generating schemes as well as in the management of microfinance and vocational programmes. Malawi's Technical, Entrepreneurial and Vocational Education and Training Authority Act 6 of 1999, for instance, requires a person with a disability be represented in the board of Technical, Entrepreneurial and Vocational Education and Training Authority (TEVETA).⁵²

The Kenyan Persons with Disabilities Amendment Act 11 of 2003 (as amended in 2007)⁵³ states:

The Minister responsible for matters relating to credit unions, co-operatives and other lending institutions, on the advice of the Council shall establish a

47 WHO & World Bank (n 11 above) 235.

48 W Rowland *Nothing about us without us: Inside the disability rights movement of South Africa* (2004).

49 Department of Labour *Commission for Employment Equity: Annual report 2007-2008* (2008).

50 Department of Labour Employment Equity Act 55 of 1998: Code of Good Practice: Key Aspects on the Employment of People with Disabilities GG 23702, GN 1345, 19 August 2002, Item 6.

51 Code of Good Practice (n 50 above), Item 7.

52 The Technical Entrepreneurial and Vocational Education and Training Authority Act, sec 6(i).

53 Kenyan Persons with Disabilities Act, sec 37.

scheme through which such institutions shall extend credit facilities to persons with disabilities.

Ghana's Persons with Disabilities Act not only legislated the right to get access to loans of persons with disabilities, but also the right to be provided with appropriate training to start a business.⁵⁴ According to section 13(1) of the Act,

Where the name of a person with disability remains on a job search list for more than two years, the Ministry shall take the name of that person off the list, and where applicable –

- (1) Give that person appropriate training,
- (2) Provide that person with necessary working tools and materials, and
- (3) Assist that person to access loan capital for that person to start a business

Some countries have also implemented projects where persons with disabilities are included through their representatives. The Ethiopian Federation of Persons with disabilities and the National Union of Persons with Disabilities in Uganda were involved in the work of mainstream microfinance institutions to ensure better outreach of such services to disabled beneficiaries.⁵⁵ To conclude, the limited access to employment opportunities of persons with disabilities is compounded by their lack of access to education services, which may be attributed to factors ranging from attitudinal barriers that consider children with disabilities as 'uneducable' to school-related factors such as physical and epistemic (subject matter/curricular content) accessibility challenges, and the ethos and philosophy of organisation of contemporary schools.⁵⁶ The economic efficiency/future productivity rationale of investments in education also lies at the heart of this challenge. The next section takes a look at this aspect through an economic lens.

4 Economic efficiency discourse of education of children with disabilities

The economic efficiency argument – relating to the use of future productivity and rate of return logic in making investment decisions in the education of children with disabilities – assumes that the education of children with disabilities is very costly and cost-ineffective, when compared with the education of non-disabled children.

⁵⁴ Ghanaian Persons with Disability Act, secs 13(1) & 10(2).

⁵⁵ A Leymat 'Inclusive microfinance: Reaching disabled people through partnership development' (2010) http://www.gre.ac.uk/_data/assets/pdf_file/0005/451976/6_Leymat_FullPaper.pdf (accessed 11 June 2014).

⁵⁶ ST Tesemma 'A critical analysis of law and policy on education of disabled children in South Africa' unpublished DEd thesis, University of South Africa, 2013 225.

Existing schemes for funding education are dictated more by efficiency,⁵⁷ and less by equity⁵⁸ rationales, which in turn derive their inspiration from the current political ideology of education that envisions that the best quality education is a good to be rationed and competitively sought after, leading to increasing commoditisation and *markertisation* of education services. Education as a commercial commodity promotes (neoliberal) values of competitive individualism, separation, exclusion,⁵⁹ and eventually inequality. As Rioux⁶⁰ observes, the school system is one that perpetuates structural inequality being ‘an important pillar of the meritocracy’.⁶¹ The meritocracy is justified because social and economic efficiency and progress – presumed essential in any society – are dependent on searching and rewarding people whose natural capacity is the source of sustenance of the social wellbeing, culture and progress of society.⁶²

In such a system where both excellence and failure are considered as individualised attributes,⁶³ and where there is a competition amongst schools for enrolling exceptionally clever learners, learners with disabilities might be seen as ‘non-marketable commodities’.⁶⁴ This is referred to by some writers as the ‘human capital approach’ – a reductionist notion that strips education of its basic purpose and substance and lends it an economic subservient role. Here, education’s function is limited to merely structuring the supply of qualified people over a long period in accordance with economic demands.⁶⁵ In short, this approach emphasises the ‘economic value of education, the rate of return on schools and the productive utility of human knowledge’.⁶⁶ Beiter acknowledges the significance of economic progress in creating the resources badly needed to realise rights, but at the same time cautions against seeing economic progress as the sole or the most important function of education.⁶⁷

57 Efficiency is generally understood to mean ‘reducing the cost of achieving a given level of effectiveness, or improving the volume and quality of outcome achieved from fixed budgets’. See J Beecham & M Knapp ‘Inclusive and special education: Issues of cost-effectiveness’ in OECD *Inclusive education at work: Students with disabilities in mainstream schools* (1999) 328.

58 Equity takes into consideration the varying characteristics of learners and uses the concept of equal treatment being possible only when the system provides unequal resources as a means of compensating for the unequal needs of various learners. See DD Sage & LC Burrello *Policy and management in special education* (1986) 126-127.

59 Tomlinson (1994) cited in AD Vlachou *Struggles for inclusive education* (1997) 5, 170.

60 M Rioux ‘Disability rights in education’ in L Florian (ed) *The SAGE handbook of special education* (2007) 113.

61 Rioux (n 60 above) 113.

62 Rioux (n 60 above) 115.

63 Vlachou (n 59 above) 1.

64 J Blackmore ‘Big change questions: Can we create a form of public education that delivers high standards for all students in the emerging knowledge economy?’ (2000) 1 *Journal of Educational Change* 381.

65 Tesemma (n 56 above) 43.

66 KD Beiter ‘The protection of the right to education by international law’ (2006) 19 *International Studies in Human Rights* 607.

67 Beiter (as above).

Although the reduction of costs through the elimination of resource wastage and leakage is an important principle of efficiency, the tendency of making investment decisions in education solely on the basis of its rate of (economic) returns and future productivity estimations would have unwelcome effects for disabled learners who may not always be highly productive in economic terms.⁶⁸ The economic efficiency argument would also trigger a resource prioritisation frenzy, whereby the financing of the education of disabled children – which may not necessarily pay off financially in the near future – might be considered an ‘irrelevant luxury’ in the face of competing demands for scarce resources for apparently more urgent demands such as food. This is observed by Mittler:⁶⁹

To some such issues [related to the education of disabled children] may seem an irrelevant luxury when the day-to-day concerns of families with a disabled child are with the basic necessities of food and drink, the beliefs and superstitions of neighbours about disability and their inability to secure a school place for their child.

A further extension of this idea is the link between inclusive education reform efforts and future gains in productivity and wealth accumulation, as well as between inclusive education and reduction in future dependence on social welfare.⁷⁰ Of course, empirical studies have established a clear link between education and future productivity and growth. For instance, it was estimated that a 20 per cent increase in the primary school enrolment would increase economic growth by 0,3 percentage points per year.⁷¹ Another estimate found that investment in one extra year of primary education will increase future productivity by 10 to 30 per cent.⁷²

Other studies have estimated the economic loss resulting from failure to provide education – also termed the economic cost of exclusion – and found that it is, in general, very costly.⁷³ For example, the Gambia loses (in income terms) approximately 10 per cent of its Gross Domestic Product (GDP) by excluding so many children from education. In Mali and

68 A Artiles & A Dyson ‘Inclusive education in the globalization age’ in DR Mitchell (ed) *Contextualizing inclusive education: Evaluating old and new international perspectives* (2005) 43.

69 P Mittler ‘Childhood disability: A global challenge’ in P Mittler et al (eds) *World yearbook of education 1993: Special needs education* (1993) 9.

70 R Rieser *Implementing inclusive education: A commonwealth guide to implementing article 24 of the UN Convention on the Rights of Persons with Disabilities* (2008) 38.

71 E Anderson & S Hague *The impact of investing in children: Assessing the cross-country econometric evidence* (2007).

72 J van der Gaag & J-P Tan *The benefits of early child development programs: An economic analysis* (1998) 7.

73 Children with disabilities are disproportionately represented amongst the educationally excluded in developing countries. In many countries one in 100 children with disabilities are excluded from education services. See ST Tesemma *Educating children with disabilities in Africa: Towards a policy of inclusion* (2011) 19. It is estimated that 76 per cent of children with disabilities in Sierra Leone are out of school. See Leonard Cheshire disability/UNECA (n 30 above) 113. In Ethiopia, less than one per cent of children with special needs have access to education. See UNESCO *A human rights-based approach to education for all* (2007) 7. Ninety-eight per cent of children with

Nigeria, for example, the projected cost of non-school-going children is worth over two years of average GDP growth.⁷⁴

These types of economic arguments seem to have formed part of the rationale for the (inclusive) education reforms of some countries.⁷⁵ For instance, the White Paper on Education and Training⁷⁶ has, years back, echoed the efficiency and productivity purpose of South African education:

The productivity of the system [of education and training] – what it produces in terms of personal learning, marketable skills, and examination results, in relation to what it has cost – is very low in much of the system. Improving *efficiency and productivity* is essential in order to justify the cost of the system to the public, to secure more funds for development when they are needed, to raise the quality of performance across the system, and thus improve the life chances of the learners.

The following provision of the Consultative Paper 1 (South Africa)⁷⁷ juxtaposes the *economic efficiency discourse* with the *human capital approach*, as an apparent justification for the country's inclusive drive:

Rates of return on a high per capita investment of public resources in, 'special' or 'specialized' schools are low, and few disabled learners are able to secure jobs on completion of learning. This is so since learning has until now not imparted the generic competencies that allow for transferable skills and lifelong learning, and few employers have taken the employment of the disabled as their responsibility.

On a similar note, *White Paper 6 on Special Needs Education: Building on Inclusive Education and Training System*⁷⁸ promotes the education of disabled children with an eye on ensuring future productivity and economic efficiency and as a means of combating economic and charitable dependence:

Given the serious human resources constraints in the country and the demands for justice, there is an onus on the Government to ensure that all human resources are developed to their fullest potential. In the long run such a policy will lead also to a reduction in the Government's fiscal burden as the

disabilities in Malawi did not have access to education. See EM Chilemba 'The right to primary education of children with disabilities in Malawi' (2013) 1 *African Disability Rights Yearbook* 4.

74 M Thomas & N Burnett *Exclusion from education: The economic cost of out-of-school children in 20 countries* (2013) 13.

75 C Acedo et al (eds) *Defining an inclusive education agenda: Reflections around the 48th session of the International Conference on Education* (2008) 9.

76 Department of Education *White Paper on Education and Training (South Africa)* (1995) para 4(23) (emphasis added).

77 Department of Education Consultative Paper No 1 on Special Education: Building an Inclusive Education and Training System, First Steps (1999) chap 6, para 2.6.

78 Department of Education *White Paper 6 on Special Needs Education: Building on Inclusive Education and Training System* (2001) para 2.1.3.

inclusive education and training system increases the number of productive citizens⁷⁹ relative to those who are dependent on the state for social security grants.

White Paper 6⁸⁰ further states that:

... [t]he important features of this strategy are its emphasis on cost-effectiveness⁸¹ and exploiting the economies of scale that result from expanding access and provision within an inclusive education and training system.⁸²

The economic efficiency discourse is also echoed in the country's Disability Strategy⁸³ albeit shrouded in an emancipatory rhetoric where it states that 'Access to ABET [Adult Basic Education and Training] is the key to the economic liberation of adults with disabilities'.

In spite of the good intentions of such arguments, experts caution against such orientations where economic productivity is considered as the sole or the most important function of education.⁸⁴ They also warn against the reliance purely on the 'economic value of education, the rate of return on schools and the productive utility of human knowledge'⁸⁵ in making investment decisions. Katarina Tomaševski, the former Special Rapporteur of the Commission on Human Rights on the Right to Education, had the following to say:

To refuse to educate children with disabilities on the grounds that there is no evidence that such an investment would help eliminate poverty or enhance

79 Although rare in Africa, studies in the USA conclude that the additional costs of special education are reimbursed to the community 35 times over through output and taxes paid within 10 years. Cost-benefit analyses show that for every dollar spent on special education, the disabled adult will earn 11 dollars. See UNESCO 1978 cited in R Brouillette 'Theories to explain the development of special education' in P Mittler et al (eds) (n 69 above) 259.

80 White Paper 6 (n 78 above) para 4.4.12.1.

81 In fact, although studies are limited in the African context, and without forgetting the local specificity of cost estimations, there is no conclusive evidence as to whether or not an inclusive education system is more or less efficient than a special education system. A study conducted in the context of the US, for example, found that 'inclusive education programs do not necessarily cost more or less than traditional special education programs. The costs are simply different from those carrying out traditional special education programs'. See LW Jones & LA Power-deFur 'Financing inclusive education programs' in LA Power de-Fur & FP Orelove *Inclusive education: Practical implication of the least restrictive environment* (1997) 63. In contrast, according to study in the UK, public school-based inclusion (in early childhood education) was found to be 41 per cent less costly than the traditional, more segregated, special education classroom model. For instance, total instructional costs per hour are eight per cent lower for inclusion than for the traditional model (USD 5,77 versus USD 6,28). See SL Odom et al *The costs of inclusive and traditional special education preschool services* (2001) http://csef.air.org/publications/related/jsel/odom_hik.PDF (accessed 15 June 2014).

82 White Paper 6 (n 78 above) para 4.4.12.1.

83 Office of the Deputy President Integrated National Disability Strategy White Paper of 1997, chap 3.

84 Beiter (n 66 above) 82.

85 Beiter (n 66 above) 607.

the rate of economic growth will be cruel ... no state admits to doing it. Nevertheless, children with disabilities may be excluded from school because providing wheelchair access might not be commercially viable,⁸⁶ or because their learning is deemed not to yield a sufficient marginal return on investment. This type of reasoning challenges the very assumptions of human rights, namely that there should be equal human rights for all.⁸⁷

In spite of the above challenges plaguing the funding of education of children with disabilities, the key to ensuring the full enjoyment of the right to education of disabled children is to acknowledge that access to publicly funded education services is a right that cannot and should not be calculated in terms of input-output terms.⁸⁸ As Hegarty rightly observes, people should be able to enjoy their entitlement to the resources that their education requires, regardless of the fact that education may or may not succeed in making them employable or economically self-sufficient.⁸⁹

Thus, seen through a human rights lens, education should not be geared towards just economy-related knowledge but more importantly towards fostering the full development of human personality and towards strengthening respect for human rights. Education should not just prepare pupils to be wage earners and tax payers, but also for fulfilling their role, *inter alia*, as parents, as political activists, as agents of social cohesion and tolerance and as equal members of society.⁹⁰ If the purpose of education falls short of the latter ideal, then it might run the risk of compromising inherent human dignity,⁹¹ as well as compromising the right to education of children with disabilities, especially those with severe impairments.

5 Social welfare and disability

5.1 Social welfare schemes for persons with disabilities and their impact

In some societies a work-based system emerges for those who can work and a needs-based system for those who cannot. Society then takes on an obligation to support those who may be excluded from the paid labour

86 Rieser cites World Bank estimates that it costs between two and four times as much to educate a child with a disability in an inclusive setting as a non-disabled child. See Rieser (n 70 above).

87 K Tomaševski *Education denied: Costs and remedies* (2003) 33.

88 As above.

89 S Hegarty *Educating children and young people with disabilities: Principles and the review of practice* (1995) 16.

90 Beiter (n 66 above) 607.

91 As above.

mechanism,⁹² which translates into social welfare;⁹³ in different countries, it is also termed (amongst others): a disability grant, 'Invalid's Pension', or Disability Allowance.

Table 1: Social assistance programmes for disabled people in developing countries.^{94 95}

Country	Type	Transfer amount	Eligibility
Lesotho	Disability pension (cash transfer)	USD16.6 per month	Destitute and disabled
Mauritius	Basic Disability Pension	USD 82 per month	People aged 15-59 certified by a Medical Board as either permanently or substantially incapacitated to work to a physical degree of 60 per cent
	Carer's Allowance	USD 50 per month	Paid to beneficiaries of the basic disability pension who need the constant care and attention of another person. The allowance is paid for children with disabilities younger than age 15 if their parents' annual income does not exceed USD 4900.
	Child Allowance	USD 31 per month for a child under 10; USD 29 for children aged 10 or older	Payable to the first three children of a basic disability pensioner. Children must be younger than age 15 (age 20 if a full-time student)
	Carer's Allowance for beneficiaries of Invalid Basic Pension	USD 42 per month	Beneficiaries of Invalid Basic Pension who need the constant care and attention of another person
Namibia	Disability grant (DG) and Blind person's grant	USD 25 per month	Disabled and/or blind

92 Turmusani (n 18 above) 8.

93 These may include the provision of pensions, attendant care allowances, health-care support, mobility allowances and the provision of adaptive equipment.

94 T Guthrie et al *Social security policy options for people with disabilities in South Africa: An international and comparative review* (2001) 40.

95 US Office of Retirement and Disability Policy *Social security programs throughout the World: Africa* (2009) <http://www.ssa.gov/policy/docs/progdesc/ssptw/2008-2009/africa/mauritius.html> (accessed 20 May 2014).

South Africa	Disability grant – cash transfer (means tested)	Maximum USD 95 per month	Working-age adults unable to work due to disability, plus means test (permanent and temporary)
	Care dependency grant – cash transfer	USD 77 per month	Primary carer of child with severe disabilities in need of full-time care plus means test

Some of the disability grants and benefits being implemented in various countries are very encouraging in terms of alleviating deprivation amongst persons with disabilities. Some have been more effective while others have been plagued by challenges, such as those related to the determination of eligibility, bureaucratic hurdles, and the high opportunity cost of accessing these benefits.

In terms of impact of social welfare grants, Marriott and Gooding conclude, on the basis of limited anecdotal evidence, that social welfare grants had a positive impact⁹⁶ in terms of reducing deprivation, including in household health and economic status⁹⁷ as well as having a positive impact on self-esteem by enabling persons with disabilities to contribute to the household budget. They also noted, however, that disabled people often lack control over spending of the grant.

At times, even with welfare grants, notwithstanding the mixed picture in terms of reducing deprivation, disability-related costs are so high that they offset any chances of coming out of poverty for the majority of the disabled population.⁹⁸ A study in South Africa gives an indication of the size of the additional costs such as medical expenses and special foods of a little over half the grant amount compared to the disability grant amount, which is a maximum USD 95 per month.⁹⁹ For instance, 31 percent of grant beneficiaries indicated that medical expenses with a mean amount of USD 15 were spent on medical expenses as a result of impairment, which also included an additional USD 6 on therapy or treatment, while 16 per cent indicated that they had to pay a mean amount of USD 9 a month to assistants or people who take care of them. Sixteen percent indicated that

96 There is, however, a concern echoed by some that welfare grants would create dependency and discourage employment. A report by the South African Department of Social Development suggests that over 36 per cent of the disability grant recipients have 'physical disabilities that should not necessarily render them unable to obtain gainful employment'. See Department of Social Development *Linking social grants beneficiaries to poverty alleviation and economic activity* South Africa (2006) 3.

97 A Marriott & K Gooding *Social assistance and disability in developing countries* (2007) 5.

98 There is also the concern echoed by some that welfare grants would create dependency and discourage employment. A report by the South African Department of Social Development suggests that over 36 per cent of the disability grant recipients have 'physical disabilities that should not necessarily render them unable to obtain gainful employment'. See Department of Social Development (n 96 above) 3.

99 Marriott & Gooding (n 97 above) 39.

they regularly spend money on other expenses, such as nappies or special food, as a result of the beneficiary's disability, averaging USD 14 a month.¹⁰⁰

In 1998, Zimbabwe introduced a disability pension to blind and disabled people that amounted to USD 5 per month. But, the cost of a bus ride to the district welfare office to collect the grant for a blind person accompanied by an assistant amounted to 80 per cent of the benefit value.¹⁰¹

One of the rationales for having such types of categorical grants, with the potential to stigmatise persons with disabilities, emanated from the concern that disabled people often have limited access to mainstream social assistance schemes. The reason is that such schemes rely on means testing, which may not necessarily take into account the extra costs encountered by disabled people.¹⁰²

5.2 Social welfare versus discrimination: Dilemmas of 'injured' identity and independent living

In addition to implementation challenges facing social welfare programmes, severe criticisms have also been levelled against social welfare benefits specifically targeted to persons with disabilities on account of their design and rationales. Most social welfare systems targeted for persons with disabilities rely on medical expertise and diagnostic examinations to determine eligibility. The person with a disability seeking the service is considered the patient, while the physician or rehabilitation counsellor is considered all-knowing and in control of making decisions he or she believes are in the best interest of the client or 'patient'.¹⁰³ The physician is assigned the role of 'scientifically' and medically (dis-)proving that the person is less productive or unproductive to be entitled for social welfare benefits, while the 'patient' or the 'client' is expected – indeed coerced – to passively and unquestionably accept what the professional advises to be in his/her best interests.¹⁰⁴

According to Schweik, social welfare, itself is a more formalised, scientific and bureaucratic form of organised charity, executed under the auspices of professionals.¹⁰⁵ For some, there is a thin line between begging for alms and social welfare. As some people with disabilities were left with

100 De Koker et al (2006) cited in Marriott & Gooding (n 97 above) 58.

101 Marriott & Gooding (n 97 above) 44.

102 Marriott & Gooding (n 97 above) 32.

103 I Marini 'The history of treatment toward persons with disabilities' in I Marini et al (eds) *Psychosocial aspects of disability: Insider perspectives and strategies for counselors* (2012) 19.

104 As above.

105 SM Schweik *The ugly laws: Disability in public* (2009) 79.

no option but to exhibit their impairments¹⁰⁶ to the gaze of the non-disabled public¹⁰⁷ mostly on city streets to garner pity for alms, so too persons with disabilities seeking social welfare have to be gazed at by professionals to get medically certified as having an 'injured' identity. Further, as the beggar is 'the most conspicuous figure of dependency', and begging, a reflection of 'purposeful parasitism',¹⁰⁸ dependence on social welfare was also considered the result of 'willed incapacity'.¹⁰⁹

An example is the Social Welfare Assistance Act of Zimbabwe,¹¹⁰ which provides for the granting of social welfare assistance, in the form of cash, food, clothing, rehabilitation, occupational training or the provision of orthopaedic and orthoptic appliances, for what it refers to as 'destitutes' or 'indigent persons' and their dependents. The term destitute or indigent persons (also synonymous in common parlance with vagrant, pauper or beggar) is defined under section 2 as any person who lacks means of subsistence, and includes persons with physical and mental impairments.

Therefore, for some social welfare merely replaced the *tin can*, where '... scenes of proving worthiness for aid ... shifted from the street to the offices of certifying doctors'.¹¹¹ When doctors are assigned to determine who is entitled to welfare benefits, the political issue of redistribution thus becomes a clinical problem, a medical concern,¹¹² also referred to as the medicalisation of social welfare.¹¹³

The dilemma is that when persons with disabilities are proved and 'certified' with a 'disabled identity' – by extension – put on an 'injured identity' to access benefits from the state, the values and beliefs that cast that identity in a demeaned social location in the first place are reinforced, thereby heightening discrimination against them. This is a manifestation of the tension between the definition of disability in anti-discrimination law and in social welfare law, where discrimination and differential treatment may be allowed when they work for the benefit of persons with disabilities, especially when the system requires that the person with a disability be treated as such in order to gain access to welfare benefits. For Jones and Marks,¹¹⁴ for persons with disabilities seeking social welfare services, it is often the case that:

106 Schweik (n 105 above) 59.

107 Schweik (n 105 above) 55.

108 SL Snyder & DT Mitchell *Cultural locations of disability* (2006) 40.

109 Snyder & Mitchell (n 108 above) 56.

110 Social Welfare Assistance Act 10 of 1988 (Chapter 17:06).

111 Schweik (n 105 above) 79.

112 Sundby (1990) cited in Schweik (n 105 above).

113 M Holmqvist *The institutionalization of social welfare: A study of medicalizing management* (2008) 12.

114 M Jones & LAB Marks 'Law and social construction of disability' in M Jones & LAB Marks (eds) *Disability, Divers-ability and legal change* (1999) 17.

Having once suffered the ordeal of proving and providing evidence of, for example, a permanent loss of limb or loss of mobility or level of intellectual capacity, it is not unusual to be required to re-establish this on a regular basis when welfare entitlements are reviewed.

The dilemma facing persons with disabilities between claiming an 'injured' identity and risking discrimination is heightened by welfare laws that require certificates of invalidity to access social welfare benefits. According to Zatu 86 – 5 of January 1986 related to the adoption of social measures in favour of persons with disabilities of Burkina Faso, the Ministry of Health has instituted a card called *Carte d'invalidité* (Card of Invalidity) to entitle them to enjoy fee and tariff reductions in public health, transport and recreation facilities.¹¹⁵ Persons with disabilities are allowed to get privileged access to economic and social benefits upon producing this *Carte d'invalidité*. To access public funds, they have to strangely enough prove that they are economically incapable, or to use the French term – *invalide*.

On a similar tone, the Kenyan National Social Security Fund Act (as revised in 2009) entitles a person to what it termed 'invalidity benefits' if:

- (a) he is subject to such physical or mental disability as to be suffering from permanent total incapacity, or
- (b) he is subject to such physical or mental disability as to be suffering from partial incapacity of a permanent nature and is unable by reason of such disability to earn a reasonable livelihood.¹¹⁶

The 2000 *loi portant statut, protection et promotion de la personne handicapée* (law for the protection and promotion of the rights of persons with disabilities) of Central African Republic¹¹⁷ stipulates that:

a person with disabilities should have a *certificate attesting to their disability*, automatically entitling them to acquittals, exemptions, discounts and subsidies when buying orthopaedic equipments or when accessing medical and hospital services; and when undergoing laboratory and radiological tests and surgical interventions. This certificate also entitles persons with disability to reduced tariffs related to public transport, leisure and sports and school enrolment.

The Tanzanian Disabled Persons (Employment) Act 2 of 1982 requires the Commissioner (of Social Welfare) to establish and maintain a register of persons with disabilities to be known as the Persons with Disabilities Register. According to article 3, a person whose name is for the time being in the register is in this Act referred to as a 'person registered as

115 *Ministère de la promotion des droits humains* (Burkina Faso) Zatu 86 – 5 of January 1986 related to the adoption of social measures in favour of persons with disabilities of Burkina Faso of 1986, art 3.

116 Kenyan National Social Security Fund Act (as revised in 2009), sec 22.

117 *République centrafricaine Loi portant statut, protection et promotion de la personne handicapée* of 2000, title 2, chap 3, art 20 (emphasis added).

handicapped by disablement'.¹¹⁸ Under of the Kenyan Persons with Disabilities Act, the National Council for Persons with Disabilities is entrusted with the function, inter alia, of registering persons with disabilities to facilitate their full enjoyments of the rights and privileges provided by the Act.¹¹⁹

According to these provisions, welfare law in favour of people with disabilities can be activated when, first of all, it is proved that 'the person concerned has the sort of disability which the legislation is designed to address'.¹²⁰ To establish evidence of the disability, the person with a disability must seek the opinion of medical and paramedical professionals, who carry out screening and testing to establish his/her 'invalid' status. For instance, it would appear that a person with intellectual disabilities might have to be 'judged to be incapable of controlling his/her affairs' to access welfare benefits.¹²¹ Although such procedures are intrusive, it is equally mandatory for the welfare system to 'ensure that only genuine applicants benefit from the law'.¹²² Persons with disabilities are thus made to offer themselves for public appraisal, while, at the same time, scrutinising others to guard against social counterfeits.¹²³

Thus, the quest of people with disabilities to be treated as ordinary or 'normal' members of the community is challenged by laws which are only available on proof of abnormality¹²⁴ – the *carte d'invalidité*.¹²⁵ Therefore, the emphasis becomes placed on 'what disabled people cannot do' instead of what they can.¹²⁶ In fact, this dilemma has been plaguing welfare systems the world over for quite a long time, leading to efforts to ensure access to social welfare benefits of persons with disabilities without compromising dignity.

Under such circumstances, where disability becomes a 'ticket to a grant',¹²⁷ no wonder that some non-disabled persons may be tempted to falsify their medical documents in an attempt to 'appear' disabled and access social welfare benefits. Such discourses might lead to the *commodification* and proliferation of disability itself where new disabled identities are claimed for the sake of (economic) welfare economic benefits. There is thus a need to decide exactly what constitutes a disability, which would make the 'bureaucrat ... suspicious of the supplicant [of the social welfare system], for there are incentives for the

118 Tanzanian Disabled Persons (Employment) Act, art 7(1).

119 Kenyan Persons with Disabilities Act, sec c(i).

120 M Jones & LAB Marks 'Law and social construction of disability' (n 114 above) 17.

121 M Jones & LAB Marks 'Law and social construction of disability' (n 114 above) 18.

122 M Jones & LAB Marks 'Law and social construction of disability' (n 114 above) 17.

123 Kasson (1990) quoted in Schweik (n 105 above) 87.

124 M Jones & LAB Marks 'Law and social construction of disability' (n 114 above) 19.

125 Ministère de la promotion des droits humains (Burkina Faso) (n 115 above).

126 Marriott & Gooding (n 97 above) 44.

127 N Natrass *Disability and welfare in South Africa's era of unemployment and AIDS* (2006) 8.

supplicant to act as if belonging to a particular category'.¹²⁸ Contrary to the legal dictum: presumed innocent until proved guilty, 'persons with disabilities and other supplicants are presumed fraudulent in seeking benefits and must prove their veracity'.¹²⁹ Embedded within these notions is the presumption that disability might be faked, manufactured.¹³⁰ According to the Kenyan Persons with Disabilities Act,¹³¹ any attempt at giving false information to get registered – hence to falsely put on a disabled status to access benefits – is a criminal offence:

A person is guilty of an offence if he knowingly gives false information to the Council for the purpose of being registered or for the purpose of acquiring any privilege due to persons so registered.

Similarly, the Cameroon Penal Code¹³² states:

Any physician, surgeon, dresser or nurse, dentist or midwife who for the advantage or disadvantage of any person falsely certifies or conceals the existence of any diseases or disability, or falsely certifies the performance or result of an inoculation, or gives misleading information on the origin of a disease, on the duration of a disability, or on the cause of any death, shall be punished with imprisonment for from two months to three years and with fine of from five thousand to one hundred thousand francs.

However, some social welfare policies have made extra efforts to avoid these invalidating discourses, such as the South African Strategy for Social Welfare. The White Paper introduces the interesting notion of *developmental social welfare* defined in the preamble as:

a humane, peaceful, just and caring society which will uphold welfare rights, facilitate the meeting of basic human needs, release people's creative energies, help them achieve their aspirations, build human capacity and self-reliance, and participate fully in all spheres of social, economic and political life.¹³³

This concept has a number of progressive elements. At a more fundamental level, the concept, contrary to medical and charity notions, promotes social welfare as a human right, without losing sight of the

128 Roth (n 44 above) 83.

129 As above.

130 For example, according to the Penal Code of the Republic of Cameroon 'Whoever having means of support, or being able by work to obtain them, begs in any place for alms by *feigning sores or disablement* shall be punished with imprisonment for six months to two years' (sec 246(c)) (emphasis added). See Republic of Cameroon Penal Code of the Republic of Cameroon: Law No 65-LF-24 of 12th Nov 1965 and Law No 67-LF-1 of 12th of June 1967 (2001). A similar provision is found under section 5, article 243 of the Penal Code of Burkina Faso. See Ministère de la Justice (Burkina Faso) Code Pénal: Décret No96-5-451/PRES du 18 décembre 1996 portant promulgation de la loi no 43/96/ADP du 13/11/1996 (1997).

131 Kenyan Persons with Disabilities Act, sec 47.

132 Penal Code of the Republic of Cameroon of 1967 (n 130 above) sec 259(1).

133 Department of Welfare *White Paper for Social Welfare: Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa* (1997), Preamble.

imperative of meeting basic human needs. It promotes the idea of employing social welfare as an instrument to build human capacity and unlock people's creative energies, as well as ensure full inclusion and self-reliance.

The strategy provides for a range of services such as rehabilitative, preventative, developmental and protective services and facilities, as well as social security, including social relief programmes, social care programmes and the enhancement of social functioning.¹³⁴ According to the Strategy, welfare programmes aim to 'contribute to the optimal social development of individuals, families and communities'.¹³⁵ It is also an investment in human capital development and in turn contributes to economic development. The approaches to social welfare will, according to the Strategy, be such that they complement and strengthen people's efforts, enhance their self-respect and independence¹³⁶ and allow people 'to take charge of their own circumstances in a meaningful way'.¹³⁷

The 2001 amendment to the Social Assistance Act, empowered provinces to replace the role of the Pension Medical Officer – previously responsible for evaluating and adjudicating disability grants recommendations – by assessment panels, whose members did not necessarily have to be medical doctors.¹³⁸ This is an example of a move away from medicalised models of social welfare to social models, where 'social' factors are introduced into a purely 'medical' issue.¹³⁹ So, as is has been the case in South Africa, legislative provisions should not present welfare grants as an instrument designed to compensate people for their disabilities (in the medical sense); they should rather present them as a means of compensating people with disabilities for the impact of their disability on earning potential (in the social and economic sense).¹⁴⁰

Similarly, the draft national social protection strategy of Ghana centres on a programme of cash transfers called 'Livelihood Empowerment for Alleviation of Poverty'. This includes a grant – not just for all persons with disabilities – but for those 'without productive capacity'.¹⁴¹ According to the draft policy, the Disability Grant 'recognises that some persons have disabilities that are so severe that they will not be able to earn a living even if they have the opportunity to participate in livelihood programs and even if education and employment policies are inclusive'.¹⁴²

134 White Paper for Social Welfare (n 133 above) sec 7(a).

135 White Paper for Social Welfare (n 133 above) sec 15.

136 White Paper for Social Welfare (n 133 above) sec 23.

137 White Paper for Social Welfare (n 133 above) sec 27.

138 RSA Social Assistance Act (as amended in 2001) (2001).

139 Natrass (n 127 above) 4-5.

140 Natrass (n 127 above) 3.

141 Government of Ghana *The National Social Protection Strategy (NSPS): Investing in people* (2006).

142 Government of Ghana (n 141 above).

As these examples demonstrate, a shift in both mindset and practice is required away from a medicalised paradigm of social welfare to an *independent living* paradigm. At a more fundamental level, the *independent living* model views environmental barriers and societal attitudes as the factors that stand in the way of independent living and economic self-reliance of persons with disabilities. It unseats the notion of linking impairment with ‘willed dependency’ where persons with disabilities are branded as undisciplined bodies incapable of entering into productive employment.¹⁴³ The *independent living paradigm* challenges existing models of social welfare by shifting the focus away from the view of considering expert knowledge as key to understanding disability to ‘the experience of being disabled as the key to understanding disability’.¹⁴⁴ By doing so it challenges the notion of persons with disabilities as patients within an occupation – called social welfare – dominated by experts playing an oversight function over those in need and preoccupied with ‘the management of ‘social dependents’’.¹⁴⁵ Instead, it repositions the focus on the obligation of the state to respect and fulfil the rights of persons with disabilities to social welfare services.¹⁴⁶

6 Concluding remarks

The economic discourses of disability that portray persons with disabilities as economically invalid and economically dependent on non-disabled tax payers and on the welfare system or charitable individuals for survival, have to be replaced by the discourse of *independent living*. Both legislative and programmatic responses need to adopt the *Independent Living paradigm* of social welfare, which considers a person with a disability coming in contact with the social welfare system as a rights holder and a citizen instead of as a person in need of care. They regard such a person as a consumer of a service (instead of a client), whose inputs, recommendations and informed consent inform the ultimate decisions concerning his or her welfare.¹⁴⁷

Through legislative, policy and programmatic measures, a flexible and responsive system has to be promoted that supports disabled people’s participation. Instead of relying on the concept of ‘incapacity for work’ as the underlying basis for entitlement, a more flexible approach has to be adopted in order to enable people to try out work and work-related activity.

143 Snyder & Mitchell (n 108 above) 39.

144 S Moore *Social welfare alive!* (2002) 413.

145 There are some attempts to break away from medicalised and charity discourses littering social welfare systems such as *welfare, grants, allowances* to an *independent living fund* in line with the *independent living paradigm*. See Department of Work and Pensions (UK) *The future of the Independent Living Fund: Public consultation* (2012) 5.

146 Snyder & Mitchell (n 108 above) 56.

147 KK Kirst-Ashman *Introduction to social work and social welfare: Critical thinking perspectives* (2010) 302.

In other words, one needs to adopt a balanced package of work-related conditions, with safeguards, alongside a programme of comprehensive support, for example, by expanding financial support for the extra costs associated with employment, such as alternative transport, assistive technology and personal assistance.¹⁴⁸

Given the extra costs associated with disability, the creation of employment opportunities has to be accompanied by social assistance schemes.¹⁴⁹ The suggestions made by the UN Rules on the Equalisation of Opportunities¹⁵⁰ are worth noting:

- Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement services.
- Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.

What is needed is a supportive link between disability benefits and income-generating opportunities.¹⁵¹ This is perhaps stated most clearly in a report for the South African government (co-authored by the South African Federal Council on Disability):¹⁵²

Social security systems should be seen not merely as safety nets and poverty-alleviating measures, but also as measures to promote self-sufficiency and independence. The disability sector wish to stress that social grants should not be viewed as creating dependency, but rather as enabling development by overcoming many of the barriers faced by persons with disabilities, and thus equalising opportunities. It should be *not* seen as 'social protection' but rather as 'social support', encompassing a wide range of transfers, services, and subsidies.

To conclude, any social assistance effort directed at persons with disabilities should be considered a right instead of a moral charity, and an investment instead of just a safety net.¹⁵³ It should also compliment, not diminish, efforts on the education, employment and political representation fronts.

Finally, persons with disabilities have to be listened to, and their views on social assistance, have to inform policies. Policies on social assistance, as on any other area, have to build on the timbre and pitch of the voices of

148 Disability Rights Commission (2006) cited in Marriott & Gooding (n 97 above) 63.

149 Marriott & Gooding (n 97 above) 69.

150 UN 'The Standard Rules on the Equalization of Opportunities for Persons with Disabilities' (1993) Rule 8.

151 Marriott & Gooding (n 97 above) 63.

152 Guthrie et al (n 94 above) 125.

153 Guthrie et al (n 94 above) 27.

people with disabilities themselves. In the final analysis, it is important to promote 'self-help', 'self-advocacy', peer counselling and the removal of environmental obstacles and societal attitudes.¹⁵⁴

154 I Marini 'The history of treatment toward persons with disabilities' (n 103 above) 19.

SECTION B: COUNTRY REPORTS

BOTSWANA

*Thuto Hlalele**
*Romola Adeola***
*Adebayo Okeowo****
*Daba Bacha Muleta*****
*Lucius Batty Njiti******

1 Population indicators

1.1 What is the total population of Botswana?

According to the 2001 Population and Housing Census the total population of Botswana was 1 680 863.¹ According to the 2011 Population and Housing Census, the total population of Botswana is 2 024 904 people.²

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Botswana. What criteria are used to determine who falls within the class of persons with disabilities in Botswana?

Desktop research was used and reliance was placed on statistical data from 2001 and 2011 Population and Housing Census.³ As pertinent information related to this research from the 2011 census was not yet available, the information was obtained through a telephonic enquiry made to the Central Statistics Office of Botswana.

* Academic Associate, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

** LLD Candidate, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

*** LLM Student, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

**** LLM Student, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

***** LLM Student, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

1 Republic of Botswana '2011 Population & Housing Census: Preliminary Results Brief' (2011) <http://ecastats.uneca.org/aicmd/Portals/0/Census%202011%20Preliminary%20Brief%20Sept%2029%202011.pdf> (accessed 16 April 2014).

2 M Mmatli et al 'Analysis of disability population and housing census 2011' 3 (on file with authors).

3 See 'Decent work country programme for Botswana 2011-2015' Report of the Republic of Botswana (2011) 12 (Decent work country programme for Botswana 2011-2015) <http://www.ilo.org/public/english/bureau/program/dwcp/download/botswana.pdf> (accessed 16 April 2014); 'Revised national population policy: Improving the quality of life' Report of the National Council on Population Development, Ministry of Finance and Development Planning, Botswana (2010) 21 (National Council on Population Development Report) [http://botswana.unfpa.org/drive/RevisedNationalPopulationPolicyBotswana\(FINAL\).pdf](http://botswana.unfpa.org/drive/RevisedNationalPopulationPolicyBotswana(FINAL).pdf) (accessed 16 April 2014).

1.3 What is the total number and percentage of people with disabilities in Botswana?

In the light of the 2001 Population and Housing Census, there were 58 976 persons with disabilities (PWDs) in Botswana.⁴ About 66 per cent of these persons lived in rural areas.⁵ According to the 2011 Population and Housing Census, there are 59 103 PWDs of the total population of 2 024 904.⁶ This figure accounts for 2,92 per cent of the total population of Botswana.

1.4 What is the total number and percentage of women with disabilities in Botswana?

Of a total of 1 035 776 females in Botswana, 29 592 are disabled.⁷ In other words, 2,9 per cent of the total population of females in Botswana are disabled.⁸ In comparison, there are 29 511 males with disabilities out of a total population of 989 128 males in Botswana accounting for 3 per cent of the population of males in Botswana.⁹

1.5 What is the total number and percentage of children with disabilities in Botswana?

While the total number of children with disabilities was not ascertained, information on the number and percentage of children with disabilities within the school attending range of ages 5-17 was obtained.¹⁰ These figures can be split into three categories: children with disabilities still at school; those who have left school and those who never attended school. The total population of children with disabilities still in school is 8 264. The number of those who have left school is 747, while the total number of those who never attended school is 2 285.¹¹

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Botswana?

The most prevalent forms of disabilities are:

- Sight/visual impairment (40,7 per cent)
- Hearing impairment (17 per cent)
- Speech impairment (9,9 per cent)
- Impairment of leg(s) (11,7 per cent)
- Intellectual impairment (3,3 per cent)
- Mental health disorder (7,8 per cent)
- Impairment of arm(s) (6,3 per cent)
- Inability to use the whole body (2,5 per cent)¹²

4 Decent work country programme for Botswana 2011-2015 (n 3 above) 12.

5 As above.

6 Decent work country programme for Botswana 2011-2015 (n 3 above) 3.

7 Decent work country programme for Botswana 2011-2015 (n 3 above) 5

8 As above.

9 As above.

10 As above.

11 Decent work country programme for Botswana 2011-2015 (n 3 above) 18.

12 Decent work country programme for Botswana 2011-2015 (n 3 above) 6.

2 Botswana's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of Persons with Disabilities (CRPD) in Botswana? Did Botswana sign and ratify the CRPD? Provide the date(s).

Botswana has neither signed nor ratified the CRPD and its Optional Protocol.

2.2 If Botswana has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Botswana 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?

- Botswana has neither signed nor ratified the CRPD and the Optional Protocol to CRPD.
- If Botswana had signed and ratified the CRPD and the Optional Protocol the Office of the President would be responsible for submitting the report.¹³
- Though Botswana is not a state party to the CRPD, a voluntary report is underway.¹⁴

2.3 While reporting under various other United Nation's instruments, or under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Botswana 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?

• African Charter on Human and Peoples' Rights

In its 2008 report to the African Commission on Human and Peoples' Rights, Botswana mentioned that the Ministry of Education and Skills Development had developed an equal opportunity policy to ensure the realisation of rights of 'learning students, staff and community in aspects of institutional or professional life' so as to ensure that they are not discriminated against on any ground including disability. However, Botswana did not make further mention of the rights of PWDs in the report.¹⁵ In its concluding observation, the African Commission on Human and Peoples' Rights did not make mention of the rights of persons with disabilities.¹⁶

13 See Republic of Botswana 'Office of the President (OP)' <http://www.gov.bw/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Office-of-People-with-Disabilities/> (accessed 16 April 2014).

14 Child Rights International Network 'Botswana: Children's rights references in the universal periodic review (second cycle)' (2012) <http://crin.org/en/library/publications/botswana-childrens-rights-references-universal-periodic-review-second-cycle> (accessed 16 April 2014).

• **International Covenant on Civil and Political Rights**

Similarly in its 2007 report to the Human Rights Committee, Botswana mentioned that the Ministry of Education has developed an 'equal opportunity policy for learning students, staff and community to ensure that they are not discriminated against on any ground including disability. It does not make any mention of the rights of persons with disabilities.¹⁷ In its concluding observation, the Human Rights Committee does also not make mention of the rights of persons with disabilities.¹⁸

• **Convention on the Elimination of All Forms of Discrimination against Women**

In its report to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), Botswana made mention of disability three times.¹⁹ The first mention of disability in its report was a restatement of section 15(3) of the Botswana Constitution. The second mention of disability was with reference to a study on the Socio-Economic Implications of Violence against Women in Botswana which documented the effect of violence on women. In its third mention of disability, Botswana emphasised that the Ministry of Education was preparing an Equal Opportunities Policy to ensure equal learning opportunities and that no one is discriminated against on any ground including disability. Though disability was mentioned three times, there was nothing in the report on the rights of PWDs. In its concluding observations, the CEDAW Committee urged Botswana to ratify the CRPD and give special attention to data collation on disabled women.²⁰

2.4 Was there any domestic effect on Botswana'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 Botswana's legislature to incorporate it into the legal system before the instrument can have force in Botswana's domestic law? Have Botswana's courts ever considered this question? If so, cite the case(s).

Botswana is a dualist state hence, domestication of international instruments is required prior to application. Through the Children's Act of 2009, it domesticated the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.²¹ However, it has not domesticated the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination and the

15 Republic of Botswana 'First periodic report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights' (2008) 93 http://www.achpr.org/files/sessions/46th/state-reports/1st-1966-2007/staterep1_botswana_2008_eng.pdf (accessed 16 April 2014).

16 'Concluding observations and recommendations on the initial periodic report of the Republic of Botswana' 47th Ordinary Session, Banjul, The Gambia (12-26 May 2010) http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 30 April 2014).

17 Human Rights Committee 'Initial report of state parties due in 2001: Botswana' (2007) 26 UN Doc CCPR/C/BWA/1.

18 Human Rights Committee 'Concluding observation of the Human Rights Committee: Botswana' (2008) UN Doc CCPR/C/BWA/CO/1.

19 'Combined initial, second and third periodic reports of states parties: Botswana' (2008) UN Doc CEDAW/C/BOT/3.

20 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Botswana' (2010) 11 UN Doc CEDAW/C/BOT/CO/3.

21 See 'Universal periodic review (second cycle): Botswana stakeholder report – Submitted 9 July 2012' (2012) 2 http://lib.ohchr.org/HRBodies/UPR/Documents/Session15/BW/JS1_UPR_BWA_S15_2012_JointSubmission1_E.pdf (accessed 20 June 2014).

Convention Against Torture (CAT).²² However, it has a Constitution which provides for fundamental human rights.

- **Case law**

In protecting human rights, the courts often refer to the rights in the Constitution. This judicial culture resonates in the statement of the Court of Appeal in the case of *State v Marapo* where the Court emphasised that 'Botswana is one of the countries in Africa where liberal democracy has taken root ... and international human rights norms should receive expression in the constitutional guarantees of this country'.²³ In *Attorney-General v Dow* Botswana Court of Appeal emphasised that:²⁴

Botswana is a member of the community of civilised states ... it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.

Conceding that the dualist nature of the Constitution requires domestication of international treaties, the Court of Appeal has, nonetheless, emphasised that international obligations that are not domesticated should serve as an interpretative source.²⁵

2.5 With reference to 2.4 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.

While Botswana has domesticated the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child through the Children's Act of 2009,²⁶ it has neither signed nor ratified the CRPD. As a dualist state, it requires treaties to be domesticated before they can have the force of law. As the CRPD has not been domesticated, it has no force of law.

3 Constitution

3.1 Does the Constitution of Botswana contain provisions that directly address disability? If so, list the provision, and explain how each provision addresses disability.

The Constitution of Botswana has no provision that directly addresses disability rights.²⁷

²² As above.

²³ (2002) AHRLR 58 (BwCA 2002) para 22.

²⁴ (2001) AHRLR 99 (BwCA 1992) para 109.

²⁵ *Dow* (n 24 above) para 108.

²⁶ Universal periodic review (second cycle): Botswana stakeholder report (n 21 above).

²⁷ The 1966 Constitution of Botswana contains a Bill of Rights which covers civil and political rights.

3.2 Does the Constitution of Botswana contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Constitution of Botswana has provisions relating to non-discrimination and the right to equality enshrined in section 15(2). This indirectly safeguards PWDs from any form of discrimination.

4 Legislation

4.1 Does Botswana have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

There is a Building Control (Amendment) Regulation of 2009²⁸ developed in light of the 1990 and 2007 Building Control Acts of Botswana. The regulation requires that for the construction of non-domestic buildings and apartments, a Disability Access Certificate should be obtained from the local building authority. This certificate serves to confirm that the design of the proposed structure caters for the accessibility needs of PWDs. The Early Childhood Care and Education policy of 2001 also addresses disability directly.

4.2 Does Botswana have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

• **Employment Act**

The Employment Act, 1982²⁹ provides for the rights and obligations of employers and employees. Though it is silent on the rights of PWDs, section 125 of the Convention empowers the Minister 'to make regulations in relation to employment of infirm or handicapped persons.'³⁰

• **Workers Compensation Act**

The Workers Compensation Act 23 of 1998³¹ provides that where a worker becomes permanently disabled, no deduction shall be made to compensation given to such person in certain circumstances arising from occupational injuries and diseases.

28 Building Control (Amendment) Regulations 2009. <http://www.environ.ie/en/Legislation/DevelopmentandHousing/BuildingStandards/FileDownload,21091,en.pdf> (accessed 29 April 2014).

29 Employment Act of Botswana (1982), available at <http://www.elaw.co.za/african%20legislation/Botswana/Employment%20Act%20of%201982.pdf> (accessed 16 April 2014).

30 As above.

31 Worker's Compensation Act 23 of 1998: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125673.pdf (accessed 16 April 2014).

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Botswana 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.

Although the Botswana Court of Appeal in the cases of *Attorney General of Botswana v Dow*³² and *Makuto v The State*³³ concluded that discrimination on account of disability falls within the scope of the right to non-discrimination within the Constitution of Botswana, these cases did not specifically centre on the rights of PWDs.

However, in *JNG Express (PTY) Ltd v Botswana Insurance Co Ltd*, the High Court of Botswana decided on a case touching on the termination of an employee who allegedly suffered an epileptic fit. The employee in this case suffered a seizure following a prank by a co-worker who 'leapt from behind a bush with a mighty roar' at a game camp. When the employee later recuperated and resumed work, a letter of termination was given to her. This letter was based on the alleged conclusion that the employee suffered an epileptic fit. The court held that the termination of the employee who had allegedly suffered what seemed to be an epileptic fit was 'both substantively and procedurally unfair'.³⁴ Relying on the earlier decision of the Botswana High Court in *Moseki v Johnson Crane Hire (Botswana) (Pty)(Ltd)* – where the Botswana High Court set out the principles for termination on employment due to ill-health – the court held that³⁵

[i]ncapacity arising from ill health or injury can ... be a legitimate reason for terminating a contract of employment if it is fairly done ... the employer is obliged to establish the nature and extent of the disability through meaningful consultation with the employee, either with or without the intervention of a medical doctor.

The court further stated that '[i]f the incapacity is serious or permanent, the employer should consider alternative employment or adapting the employee's work to accommodate such disability'.³⁶

6 Policies and programmes

6.1 Does Botswana have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

Botswana has a disability policy called the 1996 National Policy on Care for People with Disabilities (1996 Disability Policy). The policy document was drafted in

32 n 24 above.

33 2000 (2) BLR 130 (CA).

34 *JNG Express (PTY) Ltd v Botswana Insurance Co Ltd* (2006) 1 BLR 421 (HC) <http://www.elaws.gov.bw/displaylrpage.php?id=58&dsp=2> (accessed 29 April 2014).

35 As above.

36 As above.

consideration of the guidelines for the national development plan of the country, the United Nations World Programme of Action Concerning Disabled Persons and also by taking cognisance of human rights in line with the country's Constitution.³⁷ The Disability Policy has nine principles which cut across human rights protection, inclusion, participation, empowerment, inclusive education, integration, continuous societal involvement in care for PWDs, needs-specific equality and effective coordination of care for PWDs.³⁸

The policy also provides guidelines and establishes responsibilities for the various bodies involved in the care PWDs. In line with the policy, the state is mandated to: prevent the social, emotional and physical deprivation of PWDs; to maintain a system of care for people with disabilities; to ensure that the welfare of people with disabilities has its rightful place in development programmes in the broad education, health, social, physical and economic spheres; and to ensure that people with disabilities are not disadvantaged in securing employment whenever possible.³⁹

The role of society in implementing the Disability Policy is also mentioned.⁴⁰ The policy stipulates that the community, organisations and individuals should contribute to provide effective care of people with disabilities. It further obliges the business community to support programmes for PWDs.

Though the 1996 Disability Policy details protection for PWDs, there is a Draft Policy underway which seeks to align the protection of PWDs with the CRPD.⁴¹

6.2 Does Botswana have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

There is an Inclusive Education Policy which seeks to ensure accessible and equitable education for all including PWDs. According to the Assistant Minister of Education and Skills Development the Inclusive Education Policy seeks to:⁴²

Achieve an inclusive education system which provides children, young people and adults with access to relevant, high quality education which enables them to learn effectively, whatever their gender, age, life circumstances, health, disability, stage of development, capacity to learn or socio-economic circumstances.

There is also a Science and Technology Policy (STP) which was approved by parliament in 1998. The STP seeks to 'develop adequate human resource capacity with an optimum mix of capabilities to generate and apply Science and Technology [S&T] based on the needs of industry and the society'.⁴³ As part of the strategies for realising this objective, the policy requires the state to '[c]reate opportunities for the

37 See The National Policy on Care for People with Disabilities (1996) (1996 Disability Policy) <http://www.gov.bw/en/Citizens/Sub-Audiences/People-with-Disabilities-/National-Policy-on-Care-for-People-with-Disabilities/> (accessed 30 April 2014).

38 Art 1.

39 Art 4.2.

40 Art 4.3.1.

41 See BR Dinokopila 'The rights of persons with disabilities in Botswana: Policy and institutional framework' in I Grobbelaar-du Plessis & T van Reenan *Aspects of disability law in Africa* (2011) 269-271.

42 'MOE launches inclusive education policy' *The Voice* 1 March 2013 <http://www.thevoicebw.com/2013/03/01/moe-launches-inclusive-education-policy/> (accessed 30 April 2014).

43 Science and Technology Policy (1998) http://www.ub.bw/ip/documents/1998_Science%20and%20Technology%20Policy%20for%20Botswana.pdf (accessed 30 April 2014).

disabled in S&T education and training by increasing enrolment',⁴⁴ and '[c]onduct research on medical technologies for use by disabled persons'.⁴⁵

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Botswana 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. There is a Coordinating Office for People with Disabilities (CPWD) within the Office of the President. The CPWD is charged with the responsibility to 'develop and coordinate the implementation of policies, strategies and programs through mainstreaming them into development agenda to empower people with disabilities'.⁴⁶

It is noteworthy to mention that under the Office of the President, there is a memorial fund known as the Sir Seretse Khama Memorial Fund (SSKMF) which was established by statutory instrument in 1981 in Botswana with the core mandate to assist people with disabilities with various assistive devices.⁴⁷ These assistive devices could be walking frames, wheelchairs, hearing aids, walking sticks and the like. The fund is supervised by the CPWD.

7.2 Other than the ordinary courts or tribunals, does Botswana 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 Education and Skills Development, the Ministry of Health, the Ministry of Labour and Home Affairs and the Ministry of Local Government are four relevant government departments involved in protecting PWDs through their thematic mandates.

Created to facilitate quality education in order to stimulate economic growth, the Ministry of Education and Skills Development has a Special Education Division⁴⁸ which is charged with ensuring that PWDs have access to education taking into account the different types of disability.⁴⁹ Within the Ministry of Health, there is a Rehabilitation Services Division which caters for PWDs.⁵⁰

44 5.3.3(h).

45 5.3.3(j).

46 See Office of the president of Botswana: <http://www.gov.bw/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Office-of-People-with-Disabilities/> (accessed 16 April 2014).

47 Republic of Botswana 'Sir Seretse Khama Memorial Fund' (2012) <http://www.gov.bw/en/News/Sir-Seretse-Khama-Memorial-Fund-Appeal/> (accessed 16 April 2014).

48 Dinokopila (n 41 above) 274; Ministry of Education and Skills Development <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Education-MoE/Tools--Services/Ministry-Directory/?FromPageID=2329&FromPageType=1&pid=1&ClearSearch=true> (accessed 29 April 2014).

49 See OC Abosi 'Trends and issues in special education in Botswana' (2000) 34 *Journal of Special Education* 48.

50 National Policy on Care for People with Disabilities: <http://www.gov.bw/en/Citizens/Sub-Audiences/People-with-Disabilities-/National-Policy-on-Care-for-People-with-Disabilities/> (accessed 29 April 2014).

The Ministry of Labour and Home Affairs (MLHA) as 'a provider of essential services that are important for social and economic development'⁵¹ is mandated to promote labour standards, ensure social security, promote gender equality and handle issues of immigration. Though without specific mandates to protect PWDs, the MLHA is tasked with ensuring that policies on social welfare are created taking into account the needs of PWDs.⁵² Further, there is a Division of Culture and Social Welfare within the MLHA that gives 'advice on employment placement and recreation needs'⁵³ and as such provides special services for PWDs. Within the Ministry of Local Government, there is the Social and Community Development Department which helps with welfare needs and also provides welfare services to PWDs.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Botswana have a Human Rights Commission or 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 or the Ombudsman or Public Protector of Botswana has ever addressed issues relating to the rights of persons with disabilities.

Botswana does not have a Human Rights Commission. However, efforts are underway for the formation of one. In line with this, a draft memorandum has been submitted for consideration on the subject.⁵⁴

Botswana, however, has an Office of the Ombudsman which was established in 1995 by an act of parliament⁵⁵ and officially commenced its work in December 1997.⁵⁶ Its main role is to investigate any action taken by or on behalf of a government department or other authority to which the Act applies, action taken in the exercise of administrative functions of that department or authority. The Act does not bestow the Ombudsman with an express human rights mandate.

51 Ministry of Labour and Home Affairs 'Ministry functions': <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Labour--Home-Affairs-MLHA/About-the-MLHA/Functions/> (accessed 29 April 2014).

52 Dinokopila (n 41 above) 274.

53 Empowering People with Disabilities: <http://www.gov.bw/tn/Citizens/Sub-audience/People-with-Disabilities-/Empowering-People-with-Disabilities/#DownloadFiles> (accessed 30 April 2014).

54 Human Rights Commission: <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Human-Rights-Commissions1/> (accessed 16 April 2014).

55 Ombudsman Act Cap 2 (1995), available at <http://www.apcof.org/files/OmbudsmanWord1.doc> (accessed 16 April 2014).

56 Office of the Ombudsman: <http://www.gov.bw/en/Ministries--Authorities/Ministries/Office-of-the-Ombudsman-of-Botswana/> (accessed 16 April 2014).

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Botswana have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

Some of the civil society organisations involved in advocating for the rights of PWDs in Botswana are:

- The Botswana Council for the Disabled, which is an umbrella body which coordinates and manages all other nongovernmental organisations in Botswana, it also lobbies government on issues relating disability.
- Ditshwanelo Centre for Human Rights advocates for the rights of all marginalised people within Botswana
- Botswana Society of People with Disabilities and Leonard Cheshire Disability. Leonard Cheshire Disability has a Young Voices project which brings together young disabled persons from 21 countries around the world. The Young Voices has done commendable work in highlighting some of the challenges faced by PWDs in various countries across Africa including Uganda, Mauritius, Zimbabwe and Botswana.⁵⁷
- The Botswana Society of People with Disabilities which aims at developing an effective and united disability movement in Botswana.

9.2 In the countries in Botswana's region (Southern Africa) are DPOs organised/coordinated at national and/or regional level?

DPOs in Southern Africa are coordinated and organised on a national level.⁵⁸ In Botswana, there is the Botswana Council for the Disabled which is the umbrella body overseeing the activities of 30 civil society organisations within the country.

9.3 If Botswana has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Botswana is yet to ratify the CRPD.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

This is not applicable as there is no CRPD to pursue for implementation.

57 'Reality (Botswana) - Leonard Cheshire Disability Young Voices' *LCD Young Voices* 27 July 2009 <https://www.youtube.com/watch?v=U4pz53-3qdo> (accessed 17 June 2014); Young Voices, Leonard Cheshire 'Where': <http://youngvoices.leonardcheshire.org/about/about-young-voices/> (accessed 17 June 2014).

58 See R Ntinda 'Namibia' in *African Disability Rights Yearbook* (2013) 261 269; see also I Grobbelaar-du Plessis & C Grobler 'South Africa' (2013) *African Disability Rights Yearbook* 307 331.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

As the CRPD has not been ratified, these barriers cannot be assessed.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

None were identified.

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 have been instances of interventions made by civil society organisations in other areas of human rights protection in Botswana, for instance the rights of children and indigenous peoples. There has however not been such parallel experience in relation to PWDs.

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?

Civil society organisations in Botswana need to engage the government more from a legislative aspect. This is lacking and partly explains the reason why the country is yet to sign the CRPD.

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?

Civil society organisations in Botswana need capacity building when it comes to reporting on the rights of PWDs within the country. During the preparation of this report, it was difficult to come across information on disability rights within Botswana. There were instances when we reached out to organisations in Botswana in a bid to conduct interviews but they did not respond.

9.10 Are there specific research institutes in the region where Botswana 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 is a regional research and advocacy civil society organisation named the Disability, HIV and AIDS Trust (DHAT) based in Botswana. This organisation plays an important role in that it educates the public, disabled people's organisations and government on the link between HIV/AIDS and disability. This

organisation also conducts research and formulates practical guidelines and interventions in this field.⁵⁹

10 Government departments

10.1 Does Botswana 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).

There is the CPWD under the Office of the President. The CPWD is mandated to create and coordinate the implementation of policies geared towards protecting PWDs in Botswana.

11 Main human rights concerns of people with disabilities in Botswana

11.1 Contemporary challenges of persons with disabilities in Botswana (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

The already difficult situation faced by PWDs in Botswana is unfortunately further complicated by the superstitious belief some hold regarding PWDs. A 2006 analysis of the Disable policy succinctly captured this stating that⁶⁰

[m]any disabled people live in isolation and shame behind closed doors because of their condition. Some are suffering additional emotional pains arising from embarrassment due to the inability to accept their conditions... Many people link disability with superstition and revenge for the commission of crimes. The resultant attitudes then force the disabled to hide and shy away from seeking help even when it is available.

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access and accommodation**

Although the state has a National Policy on Disability, challenges with accessibility and reasonable accommodation still exist for PWDs. One area in which this resonates is in access to buildings. Although the state has developed a building

59 H Kotzé 'Country profiles report: Southern Africa Disability Rights and Law School project' (2012) http://www.osisa.org/sites/default/files/disability_open_learning_-_country_reports_final.pdf (accessed 16 April 2014).

60 'Botswana: Disabled policy comes under review' *Integrated Regional Information Networks (IRIN)* 1 November 2006 http://www.irinnews.org/report.asp?ReportID=56144&SelectRegion=Southern_Africa&SelectCountry=BOTSWANA (accessed 16 April 2014).

regulation which seeks to ensure that PWDs have access to buildings, gaps still exist in implementation.

Acknowledging this challenge, Thomas Motingwa (the Coordinator of the CPWD) has noted that 'a lot of ... buses have no ramps or the option of level entrance'. As such, PWDs face difficulties accessing transport systems.⁶¹ Besides from this problem, the attitude of society towards these persons has also been a significant challenge. According to Motingwa, PWDs are 'shown attitudes' when trying to access transport systems.⁶²

- **Access to social security**

There is no statutory disability benefit but cash benefits are provided to PWDs under the certain schemes such as the destitute programme.⁶³

- **Access to public buildings and public transport**

PWDs still face numerous challenges with respect to accessing major public facilities such as the transport system, worship centres, and major shopping centres. In addressing this challenge, the CPWD has engaged in sensitising the Ministry of Infrastructure, Science and Technology on the need for accessibility.⁶⁴

- **Access to education**

The shortage of learning assistive devices for PWDs has been highlighted as a challenge with regards to access to education in Botswana. It has been noted that 'direct funding is not allotted to primary schools for buying equipment and structural modifications to support students with disabilities'.⁶⁵ However, it is noteworthy to mention that the Ministry of Education and Skills Development has developed an Inclusive Education Policy which seeks to address the challenges of learners with disabilities.⁶⁶ To ensure that the objective of providing inclusive education is realised irrespective of considerations such as disability,⁶⁷ it is recommended that adequate resources be earmarked for its implementation.

- **Access to vocational training**

In response to the need to ensure vocational training for PWDs, the Ministry of Education has proposed vocational training for PWDs between the ages of 31 and 40.⁶⁸

- **Access to employment**

Access to employment for PWDs still remains a challenge in Botswana.⁶⁹ However, in response to this issue, the government has taken affirmative action

61 E Amogelang 'Motingwa fights for people with disabilities' *The Patriots on Sunday* 18 February 2013 <http://www.thepatriotsonunday.co.bw/mutingwa-fights-for-people-with-disabilities/> (accessed 30 April 2014).

62 As above.

63 UNDP International Poverty Centre 'Poverty status report for Botswana: Incidence, trends, and dynamics' (2005) 69 <http://www.ipc-undp.org/publications/reports/Botswana.pdf> (accessed 30 April 2014); Social Security Administration, United States of America *Social security programs throughout the world: Africa, 2011* (2011) 37-38.

64 Z Kajevu 'Botswana must address issues concerning people with disabilities' *Sunday Standard* 11 August 2013 <http://www.sundaystandard.info/article.php?NewsID=17541&GroupID=2> (accessed 16 April 2014).

65 S Mukhopadhyay et al 'Inclusive education for learners with disabilities in Botswana primary schools' (2012) *SAGE Open* 1 6.

66 R Belpaire 'Inclusive education policy and implementation plan' http://eeas.europa.eu/delegations/botswana/documents/speeches/inclusive_education_en.pdf (accessed 29 April 2014); M Otukile-Mongwaketse & S Mukhopadhyay 'Botswana PGDE Student Teachers' attitude towards inclusive education: Implication for teacher education' (2013) 2 *Turkish Journal of Teacher Education* 36.

67 'MOE launches inclusive education policy' (n 42 above).

68 Amogelang (n 61 above).

69 State of the Nation Address by His Excellency Lt Gen Seretse Khama Ian Khama, President of the

significantly with regards to graduates with disabilities. According to Ruth Radibe, the Director of the Department of Social Protection within the Ministry of Local Government and Rural Development, '[s]ince April 2013, 62 per cent of graduates with disabilities have been placed in the various sectors in the Public services for permanent employment.'⁷⁰

- **Access to recreation and sport**

Although PWDs participate in sport and recreational activities, the Coordinator of CPWD has emphasised the need of affording opportunities to PWDs so that they can realise their potential in sports and recreational activities.⁷¹

- **Access to justice**

Although the Constitution of Botswana guarantees access to justice, there is a need for institutional safeguards to protect PWDs. The judiciary and law enforcement authorities need to be properly trained so as to create an enabling environment for PWDs to access justice.⁷²

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Botswana?

Generally, PWDs are perceived to have political participation. However section 6 (1)(c) of the Electoral Act provides that⁷³

[n]o person shall be qualified to be registered a voter who ... is a person certified to be [insane] or otherwise adjudged or declared to be of unsound mind under any law for the time being in force in Botswana' is disqualified from registering as a voter.

The problem with this provision is that neither the Electoral Act nor the Mental Disorders Act defines who an insane person or someone of 'unsound mind' is. It is problematic because exclusion on the grounds of disability – perceived or actual – denies persons with intellectual disabilities the right to participate in political life on an equal basis with others, without any exception regarding their alleged capacity.⁷⁴

11.4 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Botswana?

- **Right to health**

Although the right to health is not expressly provided for under the Constitution of Botswana, its Disability Policy mandates the Ministry of Health to support rehabilitation centres for PWDs and support civil society organisations advancing

Republic of Botswana to the fifth session of the tenth parliament (2013) 51 <http://www.gov.bw/Documents/Nation%20Address/STATEOFTHEMATIONADDRESS.pdf> (accessed 30 April 2014).

70 Statement by Ruth Moedi Radibe, Director Department of Social Protection, Ministry of Local Government and Rural Development of the Republic of Botswana during the 52nd United Nations Commission for Social Development held in New York, United States of America, 12 February 2014 <http://papersmart.unmeetings.org/media2/1731818/botswana.pdf> (accessed 30 April 2014).

71 M Mokganele 'Official calls for more sponsorships for disability sport' *Mmegi Online* 18 October 2010 <http://www.mmegi.bw/index.php?sid=8&aid=5689&dir=2010/October/Monday18> (accessed 30 April 2014).

72 'March 2014 Judicial Colloquium Gaborone, Botswana' <http://pinkanatomybw.com/2014/04/01/march-2014-judicial-colloquium-gaborone-botswana/> (accessed 29 April 2014).

73 The Electoral Act (1968), sec 6(1)(c) <http://www.constitutionnet.org/files/Botswana-Electoral%20Act%201968.pdf> (accessed 17 June 2014).

74 M Dingake 'Electoral law reform – The need to enfranchise people with disabilities' *The Botswana Gazette* 10 October 2013 <http://www.gazettebw.com/?p=5396> (accessed 16 April 2014).

care to PWDs.⁷⁵ Within the Ministry of Health, there is a Rehabilitation Services Division which caters for PWDs.⁷⁶ Through its institutions and norms, Botswana appears to be on the right path towards realising the right to health for PWDs, not least, through its vision 2016 which seeks to ensure access to quality health care facilities for all Batswana.⁷⁷

- **Right to education**

Although the right to education is not contained in the Constitution, Botswana has taken strides to ensure the right to education for PWDs. Aside from its Disability Policy which mandates the Ministry of Education to ensure that special education for PWDs is actualised, Botswana has developed an Inclusive Education Policy which seeks to ensure inclusive education for all persons including PWDs.⁷⁸

- **Right to social security**

Although social security is not recognised as a human right in the Constitution of Botswana, the state provides cash benefits to PWDs under the destitute programme.

11.5 Specific categories experiencing particular issues/vulnerability:

- **Women with disabilities**

Aside from unemployment and gender-based violence,⁷⁹ one of the challenges faced by women with disabilities is forced sterilisation. According to a newspaper report, '[w]omen with disabilities are sometimes sterilized without their consent because the health workers think they are creating unnecessary burdens for their families'.⁸⁰

- **Children with disabilities**

The greatest challenge faced by children with disabilities is the problem encountered with their education. Even though Botswana tries to practice an inclusive model of education, there is still a shortage of aid materials and teachers for the few disabled children who attend school.⁸¹

- **Other (for example, indigenous peoples)**

Indigenous peoples already face denial of rights inclusive amongst which are disenfranchisements and land seizures.⁸² Owing to the fact that indigenous peoples

75 1996 Disability Policy (n 37 above) sec 4.3.1.3.

76 UNDP International Poverty Centre (n 63 above) 94.

77 Vision 2016 Botswana: FAQ <http://www.vision2016.co.bw/vision-faq.php#toggleView%28q1%29> (accessed 30 April 2014).

78 'MOE launches inclusive education policy' (n 42 above).

79 Report of the Regional Conference of Disabled Women in Lilongwe, Malawi, that was organised by DPI in Collaboration with SAFOD, PAFOD and FEDOMA from 11-15 September 2007 quoted in 'Demand of women with disabilities for their human right to life' http://www.diwa.ws/index.php?option=com_phocadownload&view=category&download=26:demand-of-african-women-with-disabilities&id=1:download&Itemid=65 (accessed 30 April 2014).

80 C Baputaki 'HIV/AIDS: People with disabilities cry foul' *Mmegi* 5 December 2008 <http://www.genderlinks.org.za/article/hiv-aids-people-with-disabilities-cry-foul--mmegi-botswana-2008-12-05> (accessed 30 April 2014).

81 See Mukhopadhyay et al (n 65 above) 4.

82 According to the African Commission on Human and Peoples' Rights, there are certain criteria for identifying indigenous Peoples, namely, attachment to land, cultural distinctiveness from the rest of society, and socio-political marginalisation due to vulnerability to the more dominant society. In light of these criteria, indigenous Peoples are culturally distinct groups who face socio-political marginalisation and whose livelihood capabilities are dependent on the territories they occupy. See African Commission on Human and Peoples' Rights 'Indigenous Peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa' (2006) 10 http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf (accessed 17 June 2014).

are already a marginalised group in Botswana, indigenous peoples with disabilities are most probably prone to further marginalisation in view of their disabilities.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

The need to have a legislation tailored towards disability rights has been a recurrent theme in Botswana because this will create the pathway towards solving some of the very knotty issues such as accessibility being faced by PWDs in Botswana.

12.2 What legal reforms are being raised? Which legal reforms would you like to see in your country? Why?

The 1996 Disability Policy which is under review is a notable legal reform. However, it is recommended that Botswana should ratify and domesticate the CRPD and enact a law that mirrors the CRPD. For this purpose, it is recommended that civil society organisations should engage in lobbying the government and ensure that Botswana ratifies the CRPD.

EGYPT

*Lila Meadows**
*Nadia Adib Bamieh***
*Janet E Lord****

1 Population indicators

1.1 What is the total population of Egypt?

86 895 099 million.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Egypt. What criteria are used to determine who falls within the class of persons with disabilities in Egypt?

The 2006 census used a measure of mobility impairment to calculate the prevalence of disability in Egypt. Experts estimate that the actual number is likely to be much higher, as the census only accounted for impairment and did not include activity limitations or participation restrictions as part of its measure.

1.3 What is the total number and percentage of people with disabilities in Egypt?

The 2006 Egyptian census estimated that 1,8 per cent of the Egyptian population is living with disabilities. The UN estimates a much higher figure, estimating that 12 million people are living with some type of disability.²

* University of Maryland School of Law & Summer Fellow, Burton Blatt Institute, Syracuse University.

** PhD, NAS Foundation, Cairo Egypt.

*** LLB, LLM, LL.M; Burton Blatt Institute, Syracuse University & Harvard Law School Project on Disability.

1 Central Intelligence Agency 'CIA World Factbook: Egypt' updated 22 June 2014, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (accessed 12 August 2014).

2 WHO 'World report on disability 2011: Technical appendix A' 295, available at www.unicef.org/protection/World_report_on_disability_eng.pdf (accessed 20 August 2014).

According to the Government of Egypt's UPR Report in 2010,³ statistics for 2006 indicated that there are 475 576 persons with disabilities in Egypt, 170 360 of them females. A 2011 study of the World Health Organization (WHO), UNICEF, and local civil society organisations estimated the percentage of persons with disabilities to be approximately 11 per cent, or approximately 8.5 million persons.⁴

1.4 What is the total number and percentage of women with disabilities in Egypt?

The 2006 census indicated that of the 475 576 persons with disabilities in Egypt, 170 360 of them are females. The census did not include activity limitations or participation restrictions in its definition of disability.

1.5 What is the total number and percentage of children with disabilities in Egypt?

Information on this is not available as census data was not disaggregated as to age.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Egypt?

There is little reliable data concerning the prevalence and forms of disability in the Egyptian population. A 2002 study commissioned by the Japan International Cooperation Agency found that mental disabilities comprised almost 75 per cent of all disability in Egypt with mobility impairment making up 15 per cent and visual and hearing impairment constituting the remaining 11 per cent.⁵

2 Egypt's international obligations

22.1 What is the status of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) in Egypt? Did Egypt sign and ratify the CRPD? Provide the date(s).

Egypt signed the CRPD on 4 April 2007. Egypt ratified the CRPD on 14 April 2008. The Government of Egypt and Egyptian disability advocates participated in the drafting of the CRPD within the Ad Hoc Committee.

On signature of the CRPD, Egypt entered the following statement as an Interpretive Declaration:⁶

3 Egyptian Government 'National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Resolution – Egypt' Human Rights Council Seventh Session Geneva, February 2009, A/HRC/WG.6/7/EGY/1 (National report).

4 WHO (n 2 above).

5 Japan International Cooperation Agency, Planning and Evaluation Department 'Country profile on disability: Arab Republic of Egypt' (March 2002), available at: <http://digitalcommons.ilr.cornell.edu/gladnetcollect/233/> (accessed 20 August 2014).

6 UN Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities on its 1st session*, 8 October 2009, CRPD/C/1/2.

The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub') but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law.

Egypt has not signed or ratified the Optional Protocol to the CRPD. In its UPR Report in 2010, the Government of Egypt pledged to consider ratifying the Optional Protocol to the CRPD.⁷

2.2 If Egypt has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Egypt 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?

In view of Egypt's ratification of the CRPD in 2008, its first report was due on 3 June 2010. To date, it has not submitted its report to the CRPD Committee. The National Council on Disability Affairs is responsible for reporting Egypt's progress in implementing the CRPD. Due to political instability in Egypt since 2011 and several changes in national leadership, the government has yet to produce the 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 Egypt 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? Was mention made of disability rights in Egypt's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?

Egypt has submitted numerous reports to relevant human rights treaty bodies, including the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. It is, however, late in submitting its periodic reports under current reporting cycles for all the human rights treaties within the UN system that it has ratified.

Egypt has, in past reports, to some extent made references to persons with disabilities. It has not, however, done so in any detailed, consistent or comprehensive manner.⁸

⁷ National report (n 3 above).

⁸ Egypt has participated in several conferences, raising issues that pertain to persons with disabilities including the World Conference of Human Rights (1993), the World Conference on Social Development (1993), the International Conference on Population & Development (1994), and the Regional Consultations on Violence Against Children (2005-2007).

Egypt is a party to the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.

In Egypt's Universal Periodic Review, in 2010, Egypt includes a section on persons with disabilities.⁹ While it notes the ratification of the CRPD in 2008, it provides no information on efforts made to implement the CRPD domestically.

2.4 Was there any domestic effect on Egypt's legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that has been ratified require Egypt's legislature to incorporate it into the legal system before the instrument can have force in Egypt's domestic law? Have the courts of Egypt ever considered this question? If so, cite the case(s).

The Ministry of Social Affairs capitalised on the momentum around disability issues and drafted the Law for Persons with Disabilities for consideration by the Egyptian parliament. Due to political unrest and regime changes, however, the law was never brought before Parliament. On 1 January 2014, the Egyptian Council on Human Rights drafted an amended version of the Law for Persons with Disabilities and organised a one day conference for comment on the draft. To date, no further action has been taken. The Law for Persons with Disabilities would act to supplement the provisions of the CRPD. According to article 151 of the Egyptian Constitution, treaties become binding domestic law upon ratification without any further implementing steps from the legislature after ratification and signature.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

According to the article 151 of the Egyptian Constitution, treaties become domestic law upon ratification. The CRPD therefore, operates as domestic law in Egypt. Because of continued political transition, Egypt has not significantly reformed laws that would enhance its compliance with the CRPD.

3 Constitution

3.1 Does the Constitution of Egypt contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

Egypt's current Constitution was approved by popular referendum on 14 and 15 January 2014 and contains several provisions related to disability. The Constitution became effective on 18 January 2014 following announcement that the text was approved by general referendum. Chapter 2, article 81 directly establishes the 'rights of the disabled'. The article states:

The state shall guarantee the health, economic, social, cultural, entertainment, sporting and education rights of dwarves and people with disabilities. The state shall provide work opportunities for such individuals, and allocate a percentage of these

⁹ National report (n 3 above).

opportunities to them, in addition to equipping public utilities and their surrounding environment. The state guarantees their right to exercise political rights, and their integration with other citizens in order to achieve the principles of equality, justice and equal opportunities.

Article 80 establishes the rights of children and explicitly guarantees the rights of children who have disabilities, committing to both their incorporation into society and rehabilitation.

Article 214 establishes the National Council for Disability Affairs (NCDA), endowing the council with legal personality, technical, and financial independence.

Article 244 grants persons with disabilities 'appropriate representation' in the House of Representatives to be elected after adoption of the Constitution.

3.2 Does the Constitution of Egypt contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Egypt's current Constitution was approved by popular referendum in January 2014 and contains several articles that relate both directly and indirectly to disability.

- Article 9 ensures equal opportunity for all citizens without discrimination.
- Article 11 requires the state to protect and care for woman who are considered 'most in need' and, as such, this provision accords protection to women with disabilities who are particularly at risk.
- Article 16 commits the state to providing care, including job opportunities to those wounded in state security operations. This provision thus covers individuals who acquired disabilities in this context.
- Article 17 provides citizens the right to 'social securities to ensure a decent life, if they are unable to support themselves and their families in the event of the incapacity to work'. This provision would thus protect individuals with disabilities who are unable to work or support themselves.
- Article 18 entitles citizens to health and quality, comprehensive health care services. The article specifically commits the state to establishing 'a comprehensive health care system covering all diseases' and thus provides access to all individuals, including persons with disabilities.
- Article 19 requires the state to provide free educational services in accordance with global quality criteria. As such, students with disabilities would be entitled to free educational services.

4 Legislation

4.1 Does Egypt have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

The Social Welfare Law 79 of 1975 and subsequent amendments, in particular Law 25 (1977) and Law 92 (1980), are amongst those that deal specifically with persons with disabilities' welfare rights. The main function of these provisions is to ensure that people who acquire impairments through work related injuries or disease receive appropriate compensation and pensions.

The Law of Civilian Employees 47 of 1978 and the Law of Public Sector Employees 48 of 1978 include articles relating to the employment of workers with disabilities. These statutes were introduced to secure employment for disabled workers in state sponsored agencies and organisations.

Rehabilitation Law 39 (1975), amended under Law 49 (1982) raised the employment quota for disabled workers from 2 per cent to 5 per cent. The definition of disability under the Rehabilitation Law is 'any individual who became unable to depend on him/herself in performing his/her work or another type of work and remains in it. His/her inability to do so is the result of physical, mental, sensory or congenital impairment'.¹⁰

'Rehabilitation' in Law 39 is defined as presenting social, psychological, medical, educational, and professional assistance to all disabled persons and their families to enable them to overcome the negative consequences resulting from impairment.

Also the Egyptian childhood law number 12 for the year 1996 concerned the disabled children in its 6th chapter under the name 'Care and rehabilitation for the disabled child', articles (76) and (77) provides that disabled child have the right to:

- (1) Enjoy special social, health and psychological care, which increases their ability to depend on themselves and to facilitate their integration and participation in their society.
- (2) Rehabilitation, which includes all social, psychological, medical, educational and vocational services, required to help the disabled child and their families to overcome the consequences of their handicap.

The law determines that the state should provide rehabilitation services, technical aids and appliances free of charge and according to the budget allocated for this purpose. It provides that the Ministry of Social Affairs has the duty to establish the institutions and bodies required to provide rehabilitation services to children with disabilities. In addition, the Ministry of Social Affairs can provide certificates giving the rights to other bodies to open such institutions according to the regulations identified by the internal charter. On the other hand, the Ministry of Education is entrusted with establishing schools and classes to educate disabled children according to their abilities and potential, and the entry requirements, curricula, and examinations are to be decided by the internal charter.¹¹

4.2 Does Egypt have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

Various pieces of legislation indirectly address issues related to disability insofar as they address, amongst others, access to social services for persons living in poverty, political participation for citizens, and access to employment.

¹⁰ Act 39 of 1975, amended by Act 49 of 1982.

¹¹ Act 39 of 1975, amended by Act 49 of 1982, art 78.

5 Decisions of courts and tribunals

- 5.1 Have the courts (or tribunals) in Egypt 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.**

Information is unavailable on this issue.

6 Policies and programmes

- 6.1 Does Egypt have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

Egypt does have a number of policies and programmes that directly address disability issues. These include the following:

- **Policies**
 - Five-year Strategic Plan for Inclusion of Students with Disabilities in Education (2007-2012): Ministry of Education.
 - Ministerial Decree for Inclusion of Students with Disabilities into the General Education System.
- **Programming**
 - The Egyptian government provides separate educational facilities for individuals with intellectual disabilities (covering the Autism spectrum), hearing disabilities, and visual disabilities. Students at segregated schools receive the same services as mainstream public schools but operate on an adapted curriculum.
 - The Ministry of Education supports inclusion in the public and private schools. The Ministry is gradually increasing the number of students with disabilities who are admitted to the general education system. At the post-secondary level students with disabilities are admitted to Egyptian state universities. Currently universities provide adapted services for students with visual impairments and are building capacity to become more inclusive of students with hearing impairment.
 - The National Federation for Scouts has special programmes and training for scout leaders working with scouts with disabilities.
 - Very Special Arts is a national NGO affiliated with the International Organization of Special Arts and Disability. Very Special Arts trains people with disabilities in all forms of art and organises annual national and international exhibitions focused on raising awareness about the abilities of people with disabilities.
 - Special Olympics have programmes to train and promote sports for persons with disabilities. Athletes from Egypt participate in national, regional, and international events, including in the winter games despite Egypt's warm climate.
 - The Egyptian Paralympic Foundation has programmes to train and promote athletes with disabilities.

6.2 Does Egypt have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

The Ministry of Telecommunications provides training and education for teachers working with students with disabilities. Al Azhar University provides specialised programmes in higher education for students with visual impairments.

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Egypt 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 newly established National Council for Disability Affairs is an independent government council established by Prime Minister Kamal El Ganzouri in June 2011 to investigate issues related to persons with disabilities. Complaints and comments may be submitted to the body for investigation related to individual rights.

The Council also adopts a general comprehensive policy through the set-up of the different national committees and their sub-committees throughout the country that supports policies and services to promote issues such as inclusion in schools and universities, accessibility in all its forms, health services, employment, legal issues, raising awareness in the media, and collaboration with the Ministry of Health to set up comprehensive and inclusive centres for needed medical services.

7.2 Other than the ordinary courts or tribunals, does Egypt have any official body that though not established to specifically address violations of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Egyptian National Council for Human Rights and the National Women's Council have the mandate to investigate issues related to persons with disabilities. The Egyptian National Council for Human Rights was established by Law 94 of 2003 and operates under a broad mandate to investigate human rights as they pertain to social, economic, civil, and cultural rights.¹² The National Women's Council was established by Presidential Decree 90 of 2000 with the mandate to investigate matters pertaining to the social, economic, cultural, health, and educational rights of women throughout Egypt.¹³

¹² Act 94 of 2004, art 8.

¹³ Presidential Decree 90 of 2000, art 5.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Egypt 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, Ombudsman or Public Protector of Egypt has ever addressed issues relating to the rights of persons with disabilities.

The National Council for Human Rights was established by Act 94 of 2003 as an independent body responsible for promoting, developing and protecting human rights, strengthening human rights values, and raising awareness of human rights. The Council enjoys 'A' status in accordance with the International Coordinating Committee of NHRIs.¹⁴ The Council does have a disability committee tasked with addressing the rights of persons with disabilities. The Council has hosted, in collaboration with disabled peoples' organisations, various seminars and conferences considering issues pertaining to the rights of persons with disabilities.¹⁵

The National Council for Women was established by Presidential Decree 90 in 2000 to support women's advancement and to strengthen the role of women in society. Its mandate includes recommending policies on women's development and on the formulation of the national plan for the advancement of women. The Council is also empowered by the establishing Presidential Decree to recommend and comment on draft laws and decisions, which affect women. In addition, the Council carries out national awareness-raising and training activities focusing on the promotion and observance of women's rights.

The Women's Ombudsman Office was established by the National Council for Women in fulfilment of Presidential Decree 90 of 2000. The office has a mandate to consider complaints of human rights violations against women. This office has received training on the rights of women and girls with disabilities.¹⁶

The National Council for Childhood and Motherhood (NCCM) established a hotline to report abuse regarding disability and also provides training and mentoring programmes related to childhood disability policies and laws.¹⁷

14 See OHCHR 'Chart of the Status of NHRIs: Accredited by the ICC' (28 January 2104), available at: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf (accessed 20 August 2014).

15 More information on the National Council on Human Rights is available at www.nchregypt.org (accessed 20 August 2014).

16 For more information on the National Council for Women and the Women's Ombudsmen office visit: <http://ncwegypt.com/index.php/en/home> (accessed 20 August 2014).

17 For more information on the National Council for Childhood and Motherhood visit: <http://www.nccm-egypt.org/> (accessed 20 August 2014).

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Do you have organisations that represent and advocate for the rights and welfare of persons with disabilities in Egypt? If so, list each organisation and describe its activities.

Egypt does have organisations that represent and advocate on behalf of individuals with disabilities. These include, amongst others, the following:

- NAS Foundation for Persons with Disabilities supports the rights of persons with disabilities and their families within their communities. At the national level, NAS designs and implements workshops and capacity building training of NGOs working in the field of disability and/or issues related to disabilities, and carries out activities related to the political participation of persons with disabilities, including a polling station audit study for accessibility. NAS developed the first legal sign language manual for persons with hearing disability in an access to justice project.¹⁸
- The Egyptian Association for the Deaf is the oldest NGO serving persons with hearing disabilities. Its activities include all issues related to the needs of this population.¹⁹
- The Egyptian Initiative for Personal Rights (EIPR) was established in 2002 to strengthen and protect basic rights and freedoms of the Egyptian people through advocacy, research, and litigation in the field of civil liberties, economic and social justice, democracy and political rights. The Initiative specifically addresses issues related to disability.²⁰

9.2 In the countries in Egypt's region, are DPOs organised/coordinated at a national and/or regional level?

DPOs in the Middle East have traditionally operated and coordinated reform at the national level. There are some mechanisms for cooperation and coordination at a regional level in which disability issues are sometimes considered including, for example, the Arab League.²¹ Other, non-governmental organisation networks of DPOs also exist and work to build relationships and collaborate regionally.

9.3 If Egypt has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Efforts to adopt a national disability law have stalled during the current political crisis in Egypt. However, DPOs have been engaged in commenting on the draft legislation, to some extent. DPOs have convened their own meetings to discuss national disability law and policy reform.

18 For more information on NAS, visit the organisation's website at: www.nascenteregy.org (accessed 20 August 2014).

19 For more information on the Egyptian Association for the Deaf, visit their official Facebook page at: <https://www.facebook.com/pages/The-Egyptian-Association-of-the-Deaf/166671676715038> (accessed 20 August 2014).

20 For more information on the Egyptian Initiative for Personal Rights visit the organisation's website at: <http://eipr.org/en> (accessed 20 August 2014).

21 For more information on the Arab League, visit the organisation's website at: <http://www.arableagueonline.org/> (accessed 20 August 2014).

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

A representative of persons with disabilities was selected as a participant on the 50 member committee to draft the 2014 Egyptian Constitution. As a result, several constitutional articles were included in the final version that directly address disability, including articles 80, 214, and 244.²²

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

DPOs, like other civil society organisations in Egypt, face some challenges in operating freely. Required registration, together with the requirement that any foreign funding be subjected to approval, has the potential to create barriers to civil society work.²³

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

The work of organisations such as NAS in advancing the political participation of persons with disabilities and undertaking accessibility audits and election observation is exemplary and supports implementation of article 29 of the CRPD. NAS has also undertaken innovative access to justice projects, in particular training sign language interpreters to represent deaf persons in accessing justice and legal counsel.

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?

Provisions directly addressing the rights of persons with disabilities have been included in the latest Egyptian Constitution²⁴ and reflect efforts by the DPO community to engage in national decision-making processes.

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?

There is ample scope for capacity building and support efforts in order to support DPOs efforts to advance implementation of the CRPD. Amongst these, capacity building in internal DPO governance and administration, training in conducting human rights education to raise awareness of the CRPD, capacity building on how to engage effectively in monitoring efforts at regional and international levels, including training on the CRPD and UPR shadow reporting. Thematic areas where DPOs have expressed interest in capacity building include, amongst others, enhancing access to justice for persons with disabilities, advancing inclusive

²² See arts 80, 214, 244 of the 2014 Egyptian Constitution.

²³ See Law 84 of 2002, Associations and Community Foundations, Ministry of Social Affairs Decree 178 of 2002, and Implementation Regulation for Law 84 of 2002. English translations are available at: <http://www.icnl.org/research/monitor/egypt.html> (accessed 20 August 2014).

²⁴ See arts 80, 214, 244 of the 2014 Egyptian Constitution.

education, addressing accessibility in public accommodation, and undertaking disability law reform.

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 are still quite new to engaging in law and policy advocacy and are interested in obtaining training and capacity building on the rights of persons with disabilities under international human rights law, and the CRPD in particular, as well as how to engage effectively in international treaty body processes, for instance through shadow reporting.

9.10 Are there specific research institutes in Egypt's region that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

The National Council for Disability Affairs, the Egyptian Council for Human Rights, and the Egyptian Initiative for Personal Rights are all actively engaged in work on the rights of persons with disabilities and directly involve people with disabilities in their advocacy efforts. In March 2014 the American University in Cairo held a symposium on disabilities across the Middle East that attracted participants from across the region. The National Council for Childhood and Motherhood also engages DPOs in their training and mentoring programmes surrounding disability.

Helwan University has recently established a university-wide Disability Centre in which one division is devoted to disability rights. The Centre is working nationally, regionally and internationally on advancing research and inclusive programming.

10 Government departments

10.1 Does Egypt have a government department/departments that is/are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the department(s).

The Ministries of Education, Social Affairs, and Manpower are all responsible for promoting the rights of people with disabilities in terms of creating programming and policies that are inclusive of the rights of persons with disabilities.

11 Main human rights concerns of people with disabilities in Egypt

11.1 Contemporary challenges of persons with disabilities in Egypt (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

Persons with disabilities in Egypt face a number of human rights challenges, amongst them, accessibility to the built environment and to information and communication about services. In rural areas especially, there is limited understanding about disability and issues of stigma and discrimination lead families to isolate and hide their children with disabilities. Lack of understanding about disability and lack of information about services is a persistent problem, especially in rural areas.²⁵

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access and accommodation**

As noted in previous sections, access to the built environment is very challenging throughout the country, making social services difficult to access and community engagement a challenge. While Egypt does have accessibility standards and building codes pertaining to accessibility they are not uniformly implemented nor are they effectively enforced.²⁶

- **Access to social security**

Persons with disabilities receive special subsidies to purchase household products, wheelchairs, and prosthetic devices. Persons with disabilities also receive expeditious approval for the installation of new telephone lines and reductions on customs duties for specially equipped private vehicles.

- **Access to public buildings**

Access to public buildings is very challenging, especially given that many public buildings are in old structures that have not been retrofitted (for example, court houses, public offices, schools).

- **Access to public transport**

Persons with disabilities may ride government-owned mass transit buses free of charge, but the buses are not wheelchair-accessible and thus assistance from friends and relatives is needed.

25 N Hussein 'Al-Ma'brouk in rural Egypt: A socially constructed identity' (2012) 31 *International Journal of Sociology and Social Policy* 168.

26 A Sherif et al 'Application of special needs design code: Accessibility vs inclusion in Egyptian public schools' (2007) paper presented and published at the Arch Cairo 4th International Conference 'Towards new architectural dimensions: Linking & bridging academia and the professional' Cairo University, Cairo, Egypt (March 2007).

- **Access to education**

There is no prohibition against discrimination on the basis of disability in education. In practice, schools are physically inaccessible and teachers are not trained in disability accommodation. In poor areas, school overcrowding is a serious problem, amplifying barriers for children with disabilities. The Ministry of Education has set up a special education department within the structures responsible for administering basic education. The department is mandated to ensure that educational services are provided to children with disabilities, together with appropriate skills and capacity training. There are currently 840 special education schools for the different stages of education.

- **Access to employment**

The government policy for employing persons with disabilities is based on a quota system (five per cent) for companies with more than 50 employees.²⁷ According to most sources, however, the employment quota is not enforced. Moreover, companies often place persons with disabilities on their payroll to meet the quota without actually employing these individuals.

- **Access to recreation and sport**

Egypt has a strong tradition of sport. Egypt has participated in the Paralympic Games for many years. Persons with disabilities also take part in sports through 40 clubs for persons with disabilities and 44 sports centres in various parts of Egypt. These clubs are overseen by the National Council for Persons with Disabilities and the relevant Egyptian parliamentary committee. Egyptian players and teams – both male and female – have won various international championships and medals at the Paralympic Games.

- **Access to justice**

Disability access is a new reform focus in Egypt and, consequently, there is a lack of knowledge and understanding about disability access amongst justice sector personnel and indeed amongst the Egyptian disability community as well. Research undertaken by NAS during an earlier project addressing accessibility of court proceedings for deaf or hard of hearing participants revealed multiple barriers that create an unwelcoming environment for all persons with disabilities. More work is required to implement court and other justice sector reforms that take into account accessibility concerns and prevent the undermining of democratic reform efforts. Barriers currently manifest in relation to accessibility of the Egyptian court system for persons with disabilities:

- Courts housed in old structures that present numerous barriers for persons with mobility impairments. This includes for example, narrow doorways, stairs, and inaccessible restrooms;
- Limited awareness of and participation in justice sector reform processes by DPOs;
- Lack of awareness or unintended insensitivity to disability-related concerns and needs amongst court personnel;
- Inflexible court policies, practices and procedures; and
- Inaccessible public information about courts and court services. This includes a lack of effective auxiliary aids and services for persons with disabilities (for example, assistive listening devices, alternate document formats, sign language interpretation and accessible websites).

27 Law 39 of 1975 Rehabilitation of Disabled Persons (amended 1982).

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Egypt?

DPOs are working to ensure that all people with disabilities have the ability to participate in political life. Several DPOs have participated in ensuring people with disabilities are able to access polling stations during elections. For example, in prior elections, the Egyptian Human Rights Council has accredited NGOs, including several DPOs, to participate in domestic electoral observation efforts.

11.4 Are people with disabilities' socio-economic rights, including the rights to health, education and other social services protected and realised in Egypt?

The government provides health care and rehabilitation in the form of free diagnostic and follow-up services which are provided at government health centres and clinics. The Ministry of Social Solidarity grants a disability allowance to the heads of families with a disabled person. A total of 381 585 families received the allowance in the 2007/2008 financial year. In addition, pocket money is given to blind students who enrol in Egyptian universities.

11.5 Specific categories experiencing particular issues/vulnerability:

- **Women with disabilities**

Women with disabilities in Egypt are especially at risk for marginalisation, discrimination and increased vulnerability. Stigma, particularly in rural areas, leads some families to hide women with disabilities due to shame. This stigma can lead to discrimination, a lack of access to rehabilitative services, and missed educational opportunities for women and girls with disabilities. Women with disabilities may also be at an increased risk of domestic violence, labour exploitation, and homelessness than other women in Egypt.

- **Children with disabilities**

Less than four per cent of children with disabilities in Egypt are able to access rehabilitative services. The lack of services and supports for disabled children and their families has led to further marginalisation of this population. Service providers working with children with disabilities in Egypt have noted that many families are poorly informed regarding how to help their child adapt to and overcome disabilities in every day activities and as a result keep their children in the home where they are socially isolated. Social isolation contributes to increased incidences of sexual abuse, exploitation, and lower school enrolment amongst children with disabilities.

- **Other (for example, indigenous peoples)**

The bi-directional link between disability and poverty is well documented. Despite the strong link, persons with disabilities are often left off of the development agenda. According to the UN, more than 48,9 per cent of Egyptians are living below the poverty line.²⁸ Long-term malnutrition of children between the ages of six months and five years affected 31 per cent of all children in 2011, an increase of 8 per cent since 2005.²⁹ The conditions of poverty not only cause disability, but also exacerbate its effects and constrain service delivery for the disabled. Access to

28 UNICEF Child poverty and disparities in Egypt: Building the social infrastructure for Egypt's future" (February 2010), available at: http://www.unicef.org/egypt/Child_poverty_and_disparities_in_Egypt_FINAL_-_ENG_full_report_-_23FEB10.pdf (accessed 20 August 2014).

29 As above.

education, vocational training, employment, justice, transport, and social security are all affected by the current levels of poverty in Egypt. While these issues are prevalent and affect disabled persons throughout Egypt, the effect is especially acute on rural Egyptians.

Egypt is home to close to half a million refugees.³⁰ Though the exact number of refugees in Egypt with disabilities is unknown, the nature of the conflicts driving refugees into the country suggests that these populations could face significant physical and mental health disabilities. As non-citizens, these individuals do not receive the full protection of the Constitution or the same entitlement to individual rights and public services. Due to the nature of the UNHCR resettlement process and the inability to return to their country of origin, most individuals who flee to Egypt live in a protracted refugee situation. For refugees with disabilities, this can mean years without proper rehabilitative care, lack of vocational and educational opportunities, and increased vulnerability.

Refugees with disabilities are highly vulnerable in Egypt and face major obstacles in accessing basic needs and services and, further, are rarely successful in seeking resettlement in third countries. More attention must be given to article 11 of the CRPD which requires states parties to protect persons with disabilities in situations of risk, which includes displaced individuals and their families.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Egypt at the moment?

Egypt is undergoing political transition and both constitutional and law reform efforts are ongoing. Political transitions represent both challenges and opportunities in terms of advancing the rights of persons with disabilities.

12.2 What legal reforms are being raised? What legal reforms would you like to see in your country? Why?

While there is a national disability law in draft form, it has not as yet been acted upon. Any disability law reform must comply with the general obligations set forth in article 4 of the CRPD and must, consonant with article 4(3) of the CRPD, include the participation of persons with disabilities and their representative organisations. Further, prior to the adoption of any national disability law, the legal framework must be assessed to determine all areas of inconsistency between the CRPD and domestic law.

30 United Nations High Commission on Refugees '2014 UNHCR country operations profile – Egypt' UNHCR Global Appeal 2014-2015 Egypt, available at <http://www.unhcr.org/528a0a2b0.html> (accessed 20 August 2014).

KENYA

*Elizabeth Kamundia**

1 Population indicators

1.1 What is the total population of Kenya?

According to the 2009 Population and Housing Census report,¹ Kenya has a total population of 38 610 097 people.

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Kenya. What criteria are used to determine who falls within the class of persons with disabilities in Kenya?

A national census is used to obtain data on the prevalence of disability in Kenya. The census questionnaire consists of a set of questions meant to solicit information about the household, including questions about disability.² Key areas assessed in the 2009 census were: visual, hearing, speech, physical, mental, self-care difficulties and other.³

1.3 What is the total number and percentage of people with disabilities in Kenya?

According to the 2009 Census, 1 330 312 million (3,5 per cent of the Kenyan population) were reported to have a disability.⁴

* LLD Candidate and Disability Rights Project Coordinator, Centre for Human Rights, University of Pretoria. Email: elkamundia@gmail.com.

1 Kenya National Bureau of Statistics http://www.knbs.or.ke/index.php?option=com_phoca_download&view=category&id=2:2009-census-documents&Itemid=637 (accessed 5 May 2014).

2 Kenya National Bureau of Statistics http://www.knbs.or.ke/index.php?option=com_content&view=article&id=150&Itemid=636 (accessed 5 May 2014).

3 Kenya National Bureau of Statistics http://www.knbs.or.ke/index.php?option=com_content&view=article&id=155:number-of-persons-with-disability&catid=112&Itemid=638 (accessed 5 May 2014).

4 As above.

1.4 What is the total number and percentage of women with disabilities in Kenya?

According to the 2009 Census, there are 682 623 women with disabilities in Kenya (3,5 per cent).

1.5 What is the total number and percentage of children with disabilities in Kenya?

Statistics on this issue are not available.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Kenya?

According to the 2009 Census, the most prevalent form of disability is 'physical/self care'.⁵ The number of persons with disabilities disaggregated by types of disability and gender as per the 2009 Census:

- Physical/Self Care – 215 627 (female), 198 071(male)
- Visual impairment – 177 811 (female), 153 783 (male)
- Hearing impairment – 97 978 (female), 89 840 (male)
- Speech impairment – 75 020 (female), 86 783 (male)
- Mental impairment – 60 954 (female), 75 139 (male)
- Others – 55 233 (female), 44 073 (male)

2 Kenya's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in Kenya? Did Kenya sign and ratify the CRPD? Provide the date(s).

Kenya signed and ratified the UN Convention on the Rights of Persons with Disabilities on 30 March 2007 and 19 May 2008 respectively.⁶

5 Office of the High Commissioner for Human Rights 'CRPD future sessions' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=800&Lang=en (accessed 23 April 2014).

6 Office of the High Commissioner for Human Rights 'Ratification status for CRPD' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 23 April 2014).

- 2.2 If Kenya has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Kenya 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?**

Kenya's country report was due in May 2010. The report was submitted by the Ministry of Gender, Children and Social Development. Kenya held elections in 2013 and government departments were reorganised following the change of government. Currently, the Department of Social Services under the Ministry of Labour, Social Security and Services bears responsibility for disability.

Kenya has already submitted its state report to the UN Committee but the report is yet to be considered.⁷

- 2.3 While reporting under various other United Nation's instruments, or under the African Charter on Human and People's Rights, or the African Charter on the Rights and Welfare of the Child, did Kenya 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 Instruments⁸**

- **The International Covenant on Economic, Social and Cultural Rights**

In September 2006, Kenya submitted its state report to the Economic and Social Council. On the rights of persons with disabilities, Kenya reported on the situation of expectant mothers with physical disabilities, stating that they were often unable to access healthcare due to inaccessible hospitals – in particular, hospital beds. Kenya also reported on education for children with disabilities.⁹

In the concluding observations of the Committee, it recommended that Kenya:

- take special measures to increase employment of persons with disabilities;
- take measures to cater to the special needs of children with disabilities in education; and
- take immediate steps to introduce a comprehensive compulsory health insurance scheme for everyone, including persons with disabilities.¹⁰

Most of these observations and recommendations have been given effect to, at least in law. To illustrate, article 54(2) of the Constitution and section 13 of the Persons with Disabilities Act 14 of 2003 promote the employment of persons with

7 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

8 Office of the High Commissioner for Human Rights 'Ratification status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=en (accessed 23 April 2014).

9 Office of the High Commissioner for Human Rights 'Reporting status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=KEN&Lang=EN (accessed 27 April 2014).

10 As above.

disabilities. However, there is limited data to show whether there has been an actual increase in their employment as a result of the law.

▫ **The Convention on the Rights of the Child**

In March 2013, Kenya submitted its state report to the Committee on the Rights of the Child.¹¹ On the rights of children with disabilities, Kenya reported that it has adopted 'Concluding Observations' issued by the Committee on the Rights of the Child in 2007. In the 2007 concluding observations, the Committee specifically recommended that Kenya take fully into account General Comment No 9 on the rights of children with disabilities.¹² The actions that Kenya has taken in response to the Committee's observations, as reported in Kenya's 2013 report, include enacting a Constitution that protects the rights of persons with disabilities and setting up a Cash Transfer Programme in 2010 to assist households with severely disabled persons.¹³

• **Regional Instruments**

▫ **African Charter on Human and Peoples' Rights**

In its June 2006 report under the African Charter on Human and Peoples' Rights, Kenya reports that it has taken legislative measures towards protecting the rights of persons with disabilities. The state identified major challenges affecting persons with disabilities to include culture, infrastructure and equipment, lack of reliable data on persons with disabilities, inadequate budgetary allocation on issues of persons with disabilities and poor implementation of the Persons with Disabilities Act.¹⁴ In its concluding observations to Kenya, the African Commission on Human and Peoples' Rights merely commended Kenya for establishing the National Council for Persons with Disabilities but did not make substantive 'Concluding Observations' on disability.¹⁵

▫ **UN Universal Periodic Review**

Kenya was last reviewed by the Human Rights Council-Universal Periodic Review on 6 May 2010. The state reported that it has enacted some important legislation and adopted progressive policies to promote the rights of persons with disabilities. However, the state noted that there are still gaps in harmonisation of various policy interventions. Kenya was urged to reinforce protection of vulnerable groups, notably children with specific needs.¹⁶

11 As above.

12 For the full contents of the General Comment No 9 (CRC/C/GC/9), see <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/GC/9> (accessed 5 May 2014).

13 Office of the High Commissioner for Human Rights 'Reporting status for Kenya' (n 9 above).

14 African Commission on Human and Peoples' Rights 'Kenya: Initial report, 1992-2006' <http://www.achpr.org/states/kenya/reports/1st-1992-2006/> (accessed 27 April 2014).

15 Centre for Human Rights 'Concluding observations of the African Commission on Human and Peoples' Rights on the Initial Report of the Republic of Kenya adopted at its 41st Ordinary Session held at Accra, Ghana from 16-30 May 2007' http://www1.chr.up.ac.za/images/files/documents/ahrdd/kenya/kenya_concluding_observations_2007.pdf (accessed 27 April 2014).

16 Office of the High Commissioner for Human Rights 'Human Rights Council – Universal Periodic Review' <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights6May2010am.aspx> (accessed 27 April 2014).

- 2.4 Was there any domestic effect on Kenya'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 Kenya's legislature to incorporate it into the legal system before the instrument can have force in Kenya's domestic law? Have Kenya's courts ever considered this question? If so, cite the case(s).**

Prior to the Constitution of Kenya, 2010, Kenya was a dualist state. Section 2(6) of the Constitution of Kenya can be read as having turned Kenya into a monist state.¹⁷ It provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution'.¹⁸

The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child have been fully domesticated in Kenya through the enactment of the Children's Act.¹⁹ Various aspects of international instruments are given effect in different laws.²⁰

- **Case law**

Courts in Kenya have considered the question of international law vis-à-vis Kenya's domestic legal system. On the one hand there is the view, espoused by the High Court in *Re the Matter of Zipporah Wambui Mathara*,²¹ that international law supersedes conflicting local law. On the other hand, is the view that international law is not above any local statute as they are both law under the Constitution and hence equal in stature. This was the view of the High Court in *Beatrice Wanjiku v The Attorney General*.²²

- 2.5 With reference to 2.4 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.**

The Persons with Disabilities Act of Kenya was passed in 2003 (prior to the CRPD) and is currently under review to align it with the CRPD.

3 Constitution

- 3.1 Does the Constitution of Kenya contain provisions that directly address disability? If so, list the provision, and explain how each provision addresses disability.**

Article 54 of the Constitution is a stand-alone article on disability:

17 For the argument that art 94(5) of the Constitution creates the possibility that Parliament still has a role in the domestication process, see M Oduor 'The current status of international law in Kenya' (2013) *Social Science Research Network* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326135 (accessed 5 May 2014).

18 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

19 As above.

20 As above.

21 (2010) eKLR <http://kenyalaw.org/caselaw/cases/view/71032/> (accessed 27 April 2014).

22 (2011) eKLR <http://kenyalaw.org/caselaw/cases/view/81477/> (accessed 27 April 2014).

- 54.** (1) A person with any disability is entitled –
- (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
 - (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
 - (c) to reasonable access to all places, public transport and information;
 - (d) to use Sign language, Braille or other appropriate means of communication; and
 - (e) to access materials and devices to overcome constraints arising from the person's disability.
- (2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.'

Other articles that address disability directly are the following: 7(3)(b), 21(3), 27(4) and (5), 54, 81(c), 82(2)(c)(i), 83(1)(b), 97(1)(c), 98(1)(d), 99(2)e, 100(b), 120(1), 177(1)(c), 193(2)(d), 227(2)b, 232(1)(i)(iii) and 260.

3.2 Does the Constitution of Kenya contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Constitution contains provisions that make reference to 'marginalised persons', 'groups affected by past discrimination' and 'persons or groups previously disadvantaged by unfair competition or discrimination' in articles 10(2)b, 27(6), 91(1)(e) and 227 (2)(b). Persons with disabilities fall under these classifications.

4 Legislation

4.1 Does Kenya have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

The Persons with Disabilities Act, 2003 directly addresses issues related to disability. Currently, the Act is under review.²³ Kenya has also enacted other legislation addresses disability.²⁴

• **The Persons with Disabilities Act 14 of 2003²⁵**

The aims of the Persons with Disabilities Act are to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Council for Persons with Disabilities (NCPWD). The Act also establishes the National Development Fund for Persons with Disabilities to provide monetary assistance to organisations and persons with disabilities.

²³ Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

²⁴ For a comprehensive review of legislation that touches on the right to legal capacity for persons with disabilities, see: Kenya National Commission on Human Rights 'Briefing paper: How to implement Article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya' <http://www.knchr.org/ReportsPublications/ThematicReports/GroupRights.aspx> (accessed 27 April 2014).

²⁵ Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20133> (accessed 25 May 2014).

The rights provided for in the Act include civil and political rights, equal rights of access to opportunities for suitable employment, to special and non-formal education, appropriate health care, participation in sporting and recreational activities and to a barrier free and disability friendly environment.²⁶

Subsidiary legislation under the Act includes The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 and The Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010.

- **Social Assistance Act 24 of 2013**²⁷

Section 23 of the Act provides that a person with a disability is eligible for social assistance under the Act if the person suffers from severe mental or physical disability, the person's disability renders them incapable of catering for their basic needs and there is no known source of income or support for the person.

- **The Mental Health Act 10 of 1989**²⁸

The intent of the Act is to amend and consolidate the law relating to: the care of persons who are suffering from a mental disorder or mental subnormality with a mental disorder; the custody of their persons and the management of their estates; and the management and control of mental hospitals.

Section 16 of the Act authorises non-consensual psychiatric treatment as well as detention. Section 26 of the Act provides that the court may make orders for the management of the estate of any person suffering from a mental disorder and for the guardianship of any person suffering from a mental disorder.

- **Matrimonial Causes Act 34 of 1941**²⁹

One of the grounds of divorce according to section 8 of the Matrimonial Causes Act is where a spouse is incurably of [unsound mind] and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Similarly, one of the grounds for nullifying a marriage under section 14(f) is where either party was at the time of marriage of [unsound mind] or subject to [recurrent fits of insanity] or [epilepsy].

- **Criminal Procedure Code**³⁰

Sections 162, 163, 164 and 280 of the Criminal Procedure Code establish the procedure through which a court may determine that a person is of unsound mind and the subsequent consequences, including that once so declared a person may be consigned to a mental hospital or, in the wording of section 280, a 'lunatic asylum' until such time as the medical officer or the court or the Attorney General deem such person to be of sound mind.

- **Sexual Offences Act 3 of 2006**³¹

The Act recognises persons with disabilities as 'vulnerable witnesses' under Section 31 and authorises the use of intermediaries to enable the 'vulnerable witnesses' engage with the judicial system. An intermediary is 'a person authorized by a court,

26 E Kamundia 'Choice, support and inclusion: Implementing article 19 of the Convention on the Rights of Persons with Disabilities in Kenya' (2013) 1 *African Disability Rights Yearbook* 65.

27 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2024%20OF%202013> (accessed 25 May 2014).

28 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20248> (accessed 25 May 2014).

29 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20152> (accessed 25 May 2014).

30 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075> (accessed 25 May 2014).

31 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2062A> (accessed 25 May 2014).

on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.' Section 31(10) provides that an accused shall not be convicted solely on the uncorroborated evidence of an intermediary.

- **The Basic Education Act 14 of 2013**³²

Part VI of the Basic Education Act focuses on promotion of [special needs] education. This part addresses, inter alia, the establishment and management of [special institutions]. Under the Act, children with [special needs] are identified as including 'intellectually, mentally, physically, visually, emotionally challenged or hearing impaired learners, pupils with multiple disabilities and specially gifted and talented pupils'.³³ The Cabinet Secretary is required to ensure that every special school is provided with appropriate trained teachers and infrastructure for learners with disabilities.³⁴

- **Penal Code**³⁵

According to Section 12 of the Penal Code, a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. Section 146 prohibits 'defilements of [idiots] or [imbeciles]'.

- **The Elections Act 24 of 2011**³⁶

The Act disqualifies a person of unsound mind from being registered as a voter or being nominated as a Member of Parliament, county assembly, governor, speaker and other public offices. Section 36 outlines the criteria for allocation of special seats by political parties which include a requirement that the list shall include eight candidates, four of whom shall be persons with disabilities.

- **The Employment Act 11 of 2007**³⁷

The Employment Act explicitly prohibits an employer from discriminating directly or indirectly against an employee or prospective employee on grounds of disability.

- **The Children's Act 8 of 2001**³⁸

The Children's Act explicitly prohibits discrimination against a child on the ground of disability under Section 5. Section 107(2) of the Act provides for the extension of guardianship when a child suffers from a mental or physical disability or illness rendering him or her incapable of maintaining himself or herself or managing his own affairs and property without a guardian's assistance.

32 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2014%20OF%202013> (accessed 25 May 2014).

33 Section 44(3) of the Basic Education Act.

34 Section 44(4) of the Basic Education Act.

35 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063> (accessed 25 May 2014).

36 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%207> (accessed 25 May 2014).

37 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20226> (accessed 25 May 2014).

38 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20141> (accessed 25 May 2014).

4.2 Does Kenya have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

Other acts that mention or indirectly address issues relating to disability include the Trustee Act,³⁹ Civil Procedure Act and the Civil Procedure Rules, 2010,⁴⁰ Kenya Citizenship and Immigration Act,⁴¹ HIV and AIDS Prevention and Control Act,⁴² Sale of Goods Act,⁴³ National Social Security Fund Act,⁴⁴ Law of Succession Act,⁴⁵ Traffic Act,⁴⁶ Evidence Act,⁴⁷ Kenya National Commission on Human Rights Act⁴⁸ and the National Gender and Equality Commission Act.⁴⁹

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Kenya 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.

In *Fredrick Gitau Kimani v The Attorney General*⁵⁰ the Petitioner, a public officer, who was diagnosed with diabetes and whose left leg had been amputated, was relieved of his duties on medical grounds. He had been certified by the NCPWD as a person with a disability. According to the Persons with Disabilities Act, the retirement age for persons with disabilities is 60 years of age. However, the petitioner retired at 55. The Petitioner argued that the early retirement amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of article 27(4) of the Constitution as read with section 15(6) of the Persons with Disabilities Act. The Court held that the Petitioner was discriminated against and awarded him damages.

*Kenya Society for the Mentally Handicapped (KSMH) v The Attorney General*⁵¹ was brought by KSMH on its own behalf and in the public interest. KSMH accused the state of violating the rights of persons with mental and intellectual disabilities by

- 39 Section 31 Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20167> (accessed 25 May 2014).
- 40 Section 93 and Rule 15, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2021> (accessed 25 May 2014).
- 41 Sections 13 & 27, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20172> (accessed 25 May 2014).
- 42 Section 22, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20246A> (accessed 25 May 2014).
- 43 Section 4, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2031> (accessed 25 May 2014).
- 44 Sections 38 & 44, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2045%20of%202013> (accessed 25 May 2014).
- 45 Section 5, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20160> (accessed 25 May 2014).
- 46 Section 31, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20403> (accessed 25 May 2014).
- 47 Sections 125, 126 & 136, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080> (accessed 25 May 2014).
- 48 Section 11, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%205B> (accessed 25 May 2014).
- 49 Sections 2, 8 & 11, Kenya Law <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%205C> (accessed 25 May 2014).
- 50 (2012) eKLR <http://kenyalaw.org/caselaw/cases/view/81883> (accessed 28 April 2014).
- 51 (2012) eKLR <http://kenyalaw.org/caselaw/cases/view/86061> (accessed 28 April 2014).

discriminating against them in the provision of support and services contrary to articles 21(3), 28 and 27(1) of the Constitution. One of KSMH claims was that the state was slow to formulate and develop measures and implementing policies designed to achieve equal opportunities for persons with mental and intellectual disabilities to obtain education and employment and access to healthcare. The Court held that the petitioners failed to present facts and evidence to support their legal arguments and dismissed the petition.

In the case of *In the matter of Leah Wachu Waiganjo (a person suffering from a mental disorder) and in the matter of an application by William Kibera Waiganjo to be appointed manager to the estate of and guardian to the said Leah Wachu Waiganjo*⁵² an application was made by William Kibera Waiganjo (the applicant) to be appointed guardian *ad litem* and manager of the estate of Leah Wachu Waiganjo (the subject). The basis of the application was that Leah suffers from a mental disorder that rendered her incapable of managing her affairs. Medical evidence was produced to show that she suffered from temporal lobe epilepsy and periodic depression. Based on the Court's observations of Leah and the medical reports, the Court appointed the applicant to be Leah's guardian *ad litem*, to manage her estate, including proper provision for her maintenance, and to take any appropriate legal action for her benefit and for the benefit of her estate.

6 Policies and programmes

6.1 Does Kenya have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability

- **National Disability Policy of 2006**

The key policy with regard to persons with disabilities is the National Disability Policy of 2006.⁵³ The Policy recognises disability as a 'human rights and a development phenomenon that cuts across all aspects and spheres of society and which requires support from all sectors'.⁵⁴ The Policy echoes some of the rights of persons with disabilities that have been recognised in the CRPD including accessibility, education and employment. The policy aims to abolish all forms of discrimination against persons with disabilities and to provide equal opportunities to persons with disabilities. The Policy takes cognisance of the importance of awareness raising on disability and to this end states that the 'Government shall seek to increase the levels of public awareness on the needs, aspirations and capacities of persons with disabilities so as to enhance their acceptance, participation and integration in society'. The Sessional Paper for the Policy is yet to be presented to Parliament for approval.⁵⁵

The National Human Rights Policy also addresses disability. Other policies that address disability but that are still in draft form include the Draft Mental Health Policy, Draft Special Needs Education Policy and the Draft National Social Protection Policy.⁵⁶

52 (2012) eKLR <http://kenyalaw.org/caselaw/cases/view/80879> (accessed 28 April 2014).

53 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

54 As above.

55 As above.

56 As above.

- **The National Guidelines for HIV Testing and Counseling**

The National Guidelines for HIV Testing and Counseling in Kenya recognise that provisions should be made for persons with disabilities to access HIV Testing and Counselling (HTC) services in a manner that meets their specific needs.⁵⁷

- **Cash Transfer Programme**

Kenya is piloting the 'Persons with Severe Disability Cash Transfer Programme (PWSD-CT)'.⁵⁸ Under this Programme, the government defines persons with severe disabilities as referring to:

[T]hose who need permanent care including feeding, toiletry, protection from danger from themselves or other persons, and from the environment. They also need intensive support on a daily basis which therefore keeps their parents and guardians / caregivers at home or close to them throughout.⁵⁹

The overall objective of the Programme is 'to enhance the capacities of the caregivers through cash transfers thereby improving the livelihoods of persons with severe disabilities and mitigating the effect of the disability to the household'. The eligibility criteria are '[a] household with a person with severe disability and extremely poor households'.⁶⁰

6.2 Does Kenya have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **The National Land Policy**

Section 3.6.5, clause 194 of the National Land Policy makes provision for land rights of vulnerable groups who include persons with disabilities.

Kenya Vision 2030, the country's development blueprint, also touches on disability in its description of measures to be taken to enhance the lives of vulnerable groups.⁶¹

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Kenya 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 National Council for Persons with Disabilities was set up by the Persons with Disabilities Act, 2003 to promote the right of persons with disabilities in Kenya and to mainstream disability issues in all aspects of national development.⁶² While the Council does not specifically address violations of rights of individuals, it is charged under Section 7 of the Act to formulate and recommend to the government

57 Kenya National Commission on Human Rights (n 24 above).

58 Ministry of Labour, Social Security and Services <http://www.labour.go.ke/index.php/2013-11-19-06-15-24/department-of-social-services> (accessed 28 April 2014).

59 Ministry of Gender, Children and Social Development *Guidelines for identifying persons with disabilities for cash transfer* (2011).

60 As above.

61 Kenya Vision 2030 <http://www.vision2030.go.ke/> (accessed 5 May 2014).

62 National Council for Persons with Disabilities <http://ncpwd.go.ke/> (accessed 5 May 2014).

measures to promote the rights of persons with disabilities. The bodies that specifically address violations of rights of people with disabilities are courts and the bodies described in question 8 below.

- 7.2 Other than the ordinary courts or tribunals, does Kenya 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.**

See question 8 below.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Kenya have a Human Rights Commission or 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 or the Ombudsman or Public Protector of Kenya has ever addressed issues relating to the rights of persons with disabilities.**

Kenya has a National Gender and Equality Commission, Kenya National Commission on Human Rights and a Commission on Administrative Justice (The Office of the Ombudsman) all established pursuant to article 59 of the Constitution, the National Gender and Equality Commission Act, the Kenya National Commission on Human Rights Act and the Commission on Administrative Justice Act respectively.

The Kenya National Commission on Human Rights (KNCHR)⁶³ monitors compliance with the CRPD, having been designated as the monitoring body under article 33(2) of the Constitution in 2010 by the Attorney General of Kenya. The Commission has a 'Disability Focal Point' that ensures that the rights of persons with disabilities are secured in various legislation and policies.⁶⁴

The National Gender and Equality Commission (NGEC)⁶⁵ has a department on 'Disability and Elderly', whose mandate is to 'effectively promote mainstreaming of issues of disabilities and elderly into all aspects of socio-cultural, economic and political development and monitor implementation of the right of persons with disabilities and the elderly'.⁶⁶ The NGEC has been conducting county visits to monitor the Cash Transfer Programme for Persons with Severe Disabilities.⁶⁷

63 Kenya National Commission on Human Rights <http://www.knchr.org/Home.aspx> (accessed 29 April 2014).

64 Kenya National Commission on Human Rights <http://www.knchr.org/Departments/ResearchCompliance.aspx> (accessed 29 April 2014).

65 National Gender and Equality Commission <http://www.ngeckkenya.org/> (accessed 29 April 2014).

66 National Gender and Equality Commission 'Disability and elderly' <http://www.ngeckkenya.org/program/22/disability-marginalized-elderly> (accessed 29 April 2014).

67 National Gender and Equality Commission <http://www.ngeckkenya.org/news/1040/ngec-decries-neglect-of-children-with-severe-disabilities-> (accessed 29 April 2014).

The Commission on Administrative Justice (CAJ)⁶⁸ has a complementary mandate on human rights, but the core bodies on human rights and equality matters are KNCHR and NGEC.

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Kenya have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

Kenya does have organisations that represent and advocate for the rights and welfare of persons with disabilities.⁶⁹ These include:

- **Association of the Physically Disabled in Kenya**
Its focus is the rehabilitation of people with physical disabilities, cerebral palsy and multi-handicapped children.
- **Autism Society of Kenya**
Set up by parents to cater for children with Autistic Spectrum Disorder in Kenya.
- **Brian Resource Centre**
Set up to maximize the full potential of the Deaf blind person and their families.
- **Christoffel Blinden Mission**
Helps people in need in developing countries, specifically those who are blind or otherwise disabled.
- **Ecumenical Disability Advocates Network**
Set up to support the work of individuals, churches and non-church organisations concerned with the issues affecting persons with disabilities globally.
- **Kenya Albino Association**
Set up to provide sunscreen lotions to persons with albinism to prevent skin cancer and for economic empowerment.
- **Kenya Association for the Intellectually Handicapped**
Set up to empower parents of children with intellectual disabilities in order to create opportunities for them to participate more meaningfully in their children's lives.
- **Kenya National Association of the Deaf**
Set up to represent and advocate for the rights of the Deaf community in Kenya.
- **Kenya Society for the Blind**
Set up to promote the welfare, education, training and employment of the blind and assist in the prevention and alleviation of blindness.

⁶⁸ Commission on Administrative Justice <http://www.ombudsman.go.ke/> (accessed 29 April 2014).

⁶⁹ For a more comprehensive list of organisations of and for persons with disabilities in Kenya, see *Kenya disability directory: 2009-2010 edition* <http://www.afri-can.org/directory/Kenya%20Disability%20Directory%20-%202010.pdf> (accessed 30 April 2014) and Kenya Disability Directory http://www.kenyadisabilitydirectory.com/index.php?option=com_content&view=featured&Itemid=101 (accessed 30 April 2014).

- **Kenya Paraplegic Organisation**

Formed to undertake initiatives as they pertain to persons with paraplegia and matters affecting them in Kenya.

- **Liverpool VCT Care and Treatment**

Provides high quality VCT, Care and Treatment services to the Deaf community and to inform HIV/AIDS policy formulation in Kenya and beyond.

- **Sense International (East Africa)**

Works in partnership with others in the region to strengthen their capacity to provide services for persons who are deafblind.

- **Users and Survivors of Psychiatry Kenya (USP-Kenya)**

A membership organisation whose major objective is to promote and advocate for the rights of persons with psychosocial disabilities in Kenya (mental health conditions).

- **Women Challenged to Challenge**

Formed to advocate for the rights of women with disabilities.

9.2 In the countries in Kenya's region (East Africa) are DPOs organised/coordinated at national and/or regional level?

United Disabled Persons of Kenya (UDPK) is an umbrella organisation, which brings together organisations of Persons with Disabilities with the aim of giving a collective voice on matters touching on disability.

The Disability Caucus on the Implementation of the Constitution (DCIC) is a coalition of organisations of and for persons with disabilities in Kenya formed pursuant to the promulgation of the Constitution in 2010 with the aim of ensuring that the rights of persons with disabilities were taken into account in the implementation of the Constitution. UDPK and DCIC work closely with the KNCHR to promote the interests of persons with disabilities in the new constitutional dispensation.⁷⁰

9.3 If Kenya has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

There are several government bodies that work on the rights of persons with disabilities. The main government department that is responsible for promoting the rights of persons with disabilities and coordinating disability issues within government in line with article 33(1) of the CRPD is the Department of Social Services.⁷¹ This responsibility is shared with the National Council for Persons with Disabilities (NCPWD).⁷² KNCHR and NGEK also play a role as identified under question 8 above. Each of these government bodies involves DPOs in the implementation process in different ways. The Ministry of Gender, Children and Social Development wrote Kenya's state report under Article 35 of the CRPD. In the state report, the Ministry makes it clear that the report was the result of a consultative process involving DPOs amongst other actors. The Department of

70 Kenya National Commission on Human Rights 'Submission to Harvard University on development of Guidance Note on National Human Rights Institution and the Convention on Rights of Persons with Disabilities' (4 September 2013).

71 Department of Social Services <http://www.labour.go.ke/index.php/2013-11-19-06-15-24/departments-of-social-services> (accessed 1 May 2014).

72 National Council for Persons with Disabilities <http://ncpwd.go.ke/> (accessed 5 May 2014).

Social Services and the NCPWD are currently involving DPOs in the review of the Persons with Disabilities Act.⁷³

With regard to monitoring the Convention, KNCHR's monitoring strategy involves engaging with DPOs. So far, KNCHR has conducted monitoring surveys in 10 counties and involved a representative from DPOs in the monitoring teams conducting the monitoring visits.⁷⁴ The selection of the representative from DPOs is done on a rotational basis amongst DPOs who are members of United Disabled Persons of Kenya (UDPK).⁷⁵

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

In Kenya, the constitution making process served to unite DPOs under a common agenda. Once the Constitution was promulgated, there was need to ensure that the hard won gains would not be lost, and hence the Disability Caucus for the Implementation of the Constitution (DCIC) was formed. This unity, as well as having an umbrella body of DPOs (UDPK), enables DPOs to participate in legislative processes.⁷⁶

DPOs under the DCIC have been proactive in engaging with government in implementation of the CRPD. Advocacy by DCIC and the Kenya Association of the Intellectually Handicapped prior to the August 2010 constitutional referendum resulted in the government registering and assisting some adults with intellectual disabilities in exercising their right to vote.⁷⁷ Prior to the elections of 4 March 2013, the DCIC engaged with the Independent Electoral and Boundaries Commission on political participation by persons with disabilities. DCIC lobbied for dissemination of information in accessible formats, the result of which was that for the first time, sign language interpretation was provided during the announcements of national election results.⁷⁸

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The following barriers were identified:⁷⁹

- lack of awareness amongst policy makers on the CRPD;
- lack of resources and technical capacity by DPOs to conduct research that can inform the implementation of the CRPD;
- lack of a unified voice by DPOs (DPOs tend to organise by disability type and each DPO lobbies for issues which are more relevant to it); and
- tokenistic involvement in policy processes.

⁷³ Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

⁷⁴ Kenya National Commission on Human Rights (n 70 above).

⁷⁵ Email from M Njenga on 24 April 2014. USP Kenya has been involved in monitoring the CRPD with KNCHR, see USP Kenya 'Legislation and policy participation' <http://www.uspkenya.com/index.php/programs/what-we-do/legislation-and-policy-participation> (accessed 30 April 2014).

⁷⁶ As above.

⁷⁷ Kenya National Commission on Human Rights (n 24 above).

⁷⁸ Kenya National Commission on Human Rights (n 70 above).

⁷⁹ Email from M Njenga on 24 April 2014 (n 75 above).

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

Kenya has a fairly strong disability movement which has made it easier for independent constitutional commissions such as KNCHR to involve DPOs in implementation of the CRPD. A ‘best practice model’ would be the deliberate targeting of DPOs by quasi-government agencies to ensure the engagement of DPOs in policy processes. For example, in its human rights audit on access to sexual and reproductive healthcare, ‘Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?’, KNCHR specifically targeted DPOs to ensure that the disability angle to reproductive health issues was captured.⁸⁰

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 questions 9.4 and 9.6 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?

The research has shown areas for capacity building and support in relation to research – see question 9.5.

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?

Yes:

- proactive targeting of DPOs by state agencies throughout implementation initiatives;
- capacity building of DPOs on the CRPD;
- broad collaboration amongst DPOs and between DPOs and other ‘mainstream’ human rights institutions; and
- resourcing DPOs to conduct research that can provide evidence based information.

9.10 Are there specific research institutes in the region where Kenya 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.

80 Kenya National Commission on Human Rights http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf (accessed 1 May 2014).

10 Government departments

- 10.1 Does Kenya 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).**

See question 9.3 above.

11 Main human rights concerns of people with disabilities in Kenya

- 11.1 Contemporary challenges of persons with disabilities in Kenya (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).**

Most Kenyans still hold negative cultural beliefs such as the belief that persons with disabilities are cursed. The belief that psychosocial disability is caused by demons is prevalent and people with psychosocial disabilities are often subjected to attempted faith healing procedures which sometimes include beating people on the head in the name of exorcising demons or placing hot objects on the person's body.⁸¹

- 11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:**

- **Access and accommodation**

Article 43(1)(b) of the Constitution provides for the right to housing: 'every person has the right to accessible and adequate housing ...' In reality, many people with disabilities are unable to obtain accessible housing.⁸² The state identifies disabled people as vulnerable and disadvantaged with regard to housing in its state report to the Economic and Social Council.⁸³

- **Access to social security**

Article 43(1)(e) of the Constitution provides that every person has the right to social security. The government has established various funds including the National Development Fund for Persons with Disabilities (established under Part 5 of the Persons with Disabilities Act) as well as the Cash Transfer Programme for Persons with Severe Disabilities (see question 6.1 above). The National Women's

81 'Kenya's traditional healers can help with mental health' *BBC News* 7 July 2013 <http://www.bbc.com/news/health-23189069> (accessed 1 May 2014).

82 E Kamundia 'Independent living for people with disabilities in Kenya: Charting the way forward' in P Kenna (ed) *Contemporary housing issues in a globalized world* (2014).

83 Office of the High Commissioner for Human Rights 'Reporting status for Kenya' (n 9 above)

Enterprise Fund has an allocation of 10 per cent in every constituency for women with disabilities. Despite these measures, most persons with disabilities depend on their families for social and financial support.⁸⁴

- **Access to public buildings**

Section 22(1) of the PWD Act, 2003, provides that 'A proprietor of a public building shall adapt it to suit persons with disabilities'. Section 24 of the PWD Act, 2003 mandates the NCPWD to serve an Adjustment Order upon the owner of a premises or the provider of services, or amenities which the Council considers to be inaccessible to persons with disabilities. This provision became operational on 1 January 2010, which means that proprietors of premises now have five years to comply with the provisions. The NCPWD is undertaking an audit of buildings and institutions that have complied with the requirement on accessibility.⁸⁵

- **Access to public transport**

Section 23 of the Persons with Disabilities Act provides that '[a]n operator of a public service vehicle shall adapt it to suit persons with disabilities in such manner as may be specified by the Council'. In its state report to the UN Committee on the rights of Persons with Disabilities, the state admits that with regard to access to transportation for persons with disabilities in Kenya, 'a lot needs to be done in order to make it more disability friendly'.

- **Access to education**

The Constitution, the Children's Act and the Education Act 2013 guarantee the right to education for learners with disabilities. It is noteworthy, however that the Basic Education Act allows segregated education for learners with disabilities (added by the author). Kenya introduced free and compulsory primary education for all children in 2003. However, education is not free for learners with disabilities because learners with disabilities largely access education from primary school level onwards in boarding schools⁸⁶ where they are required to pay boarding fees. According to the state report to the CRPD Committee, 75 per cent of persons with disabilities have attained at least primary level education, while only 2 per cent have reached university level.⁸⁷

With regard to reasonable accommodation and affirmative action measures taken to advance the right to education for learners with disabilities, the Kenya National Examination Council allows learners with disabilities slightly more time when sitting for examinations and the Joint Admissions Board has put in place affirmative action programmes on university admission where learners with disabilities secure admission with one point less than that of other candidates.

- **Access to vocational training**

The Government of Kenya has established 12 Vocational Rehabilitation Centres in various parts of the country. These centres offer vocational training in different kinds of trades including courses in welding and fabrication and hairdressing. These courses are not highly marketable anymore partly due to technological advancements, and new curriculum needs to be adopted.⁸⁸ Currently, vocational centres also admit learners without disabilities.

84 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

85 As above.

86 Kamundia (n 26 above).

87 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above) http://tinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=800&Lang=en (accessed 23 April 2014).

88 As above.

- **Access to employment**

The Council for Persons with Disabilities has an obligation under section 13 of the Persons with Disabilities Act to secure 5 per cent of all casual, emergency and contractual positions in employment for persons with disabilities. Persons with disabilities in formal employment who earn less than KES 150000 are exempted from paying tax.⁸⁹ However, Kenya has high unemployment rates generally; which rates are significantly higher amongst persons with disabilities.⁹⁰

- **Access to recreation and sport**

The Persons with Disabilities Act provides in section 28(1) that all persons with disabilities shall be entitled, free of charge, to the use of recreational or sport facilities owned or operated by the government during social, sporting or recreational activities. However, some of these places of recreation are not accessible to persons with disabilities which the state attributes to lack of awareness and inadequate resources.⁹¹

- **Access to justice**

The Constitution guarantees the right to access to justice for all persons, including persons with disabilities under article 48. Article 50 of the Constitution guarantees the right to a fair trial and public hearing for all persons, including persons with disabilities. Article 50(m) guarantees the right to an interpreter without payment. Under Section 38 of the PWD Act, 2003, the Attorney General in consultation with the NCPWD is required to make regulations on free legal services for persons with disabilities in particular cases.⁹² Kenya has a National Legal Aid awareness programme that runs pilot projects on legal aid in several courts around the country.⁹³

With regard to sexual offences, please see question 4.1 above on the Sexual Offences Act.

United Disabled Persons of Kenya carried out a baseline assessment on access to criminal justice system by persons with disabilities. The report identified that there are ongoing reforms in Kenya's judiciary and that new courts are fairly accessible as compared to the courts that are housed in older buildings. However, police stations and prison facilities are largely inaccessible to persons with disabilities. Further, police and prison staff are not well trained on the rights of persons with disabilities.⁹⁴

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Kenya?

With regard to political participation and on a positive note, articles 81(c), 82(2)(c)(i), 97(1)(c), 98(1)(d), 100(b) and 177(1)(c) of the Constitution provide for fair representation of persons with disabilities in politics. With regard to the senate, the Constitution provides that the senate shall have two members representing persons with disabilities. Part IV of the Persons with Disabilities Act accords persons with disabilities civic rights.

89 Approximately 1 650 dollars.

90 Disability Rights Promotion International 'State of disabled peoples rights in Kenya (2007) report' <http://drpi.research.yorku.ca/sites/default/files/files/KenyaReport07.pdf> (accessed 5 May 2014).

91 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

92 As above.

93 The Government of Kenya 'National Legal Awareness Programme' <http://justice.go.ke/index.php/programs-commissions/national-legal-awareness-program-naleap> (accessed 2 May 2014).

94 United Disabled Persons of Kenya & Disability Caucus on the Implementation of the Constitution 'Baseline assessment on access to criminal justice system by persons with disabilities' (2012).

Articles 83(1)(b), 99(2)(e) and 193(2)(d) prohibit persons of 'unsound mind' from political participation. However, in practice, if a person lives in the community (not in a psychiatric facility during voters' registration or Election Day) the person is able to exercise their political rights.⁹⁵

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in your country?

With regard to education and other social services, see question 11.2 above.

On health, the Constitution provides that every person has the right to the highest attainable standard of health under article 43(1)(a). The National Reproductive Health Policy, 2008 identifies the need to improve the sexual and reproductive health of youth with disabilities. The policy also recognises that women with disabilities are also entitled to access reproductive health services. In practice, women with disabilities encounter numerous barriers to accessing quality reproductive health care services.⁹⁶

With regard to mental health care in Kenya, formalised support mainly comes in the form of institutionalisation in psychiatric hospitals. Community-based mental health-care services in Kenya are limited⁹⁷ and lack adequate funding to reach a wider proportion of the population affected. Kenya has little provision for mental health; the government has traditionally only spent approximately 0.01 per cent of its health budget on mental healthcare.⁹⁸

11.5 Specific categories experiencing particular issues/ vulnerability:

• Women with disabilities

Women in Kenya remain largely marginalised. They have limited access to and control of resources and other socio-economic opportunities; they have lower literacy levels compared to men; they have poor access to quality healthcare; and are more vulnerable to gender-based violence.⁹⁹ This situation is worse for women with disabilities. The government has put in place several legislative, policy and programmatic measures to address the challenges that face women (most of which are discussed under questions 3, 4 and 6); but a lot more still needs to be done to address the inequality.

• Children with disabilities

The Government has put in place several legislative, policy and administrative measures to protect the rights and welfare children of children with disabilities. The Children's Act establishes the National Council for Children's Services (NCCS). However, children with disabilities still remain vulnerable to human rights violations, a situation that the state attributes to inadequate human and financial resources.¹⁰⁰

95 Medical Disability Advocacy Centre 'The right to legal capacity in Kenya' http://mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2apr2014.pdf (accessed 2 May 2014).

96 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

97 Kamundia (n 82 above).

98 Mind Freedom Kenya 'Report on Mental Health in Kenya' (Nairobi, Kenya, October 2008).

99 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

100 Office of the High Commissioner for Human Rights 'CRPD future sessions' (n 5 above).

- **Other (for example, indigenous peoples)**

Persons with Disabilities are particularly vulnerable to HIV infection, yet HIV and AIDS interventions are not fully responsive to the needs of persons with disabilities.¹⁰¹

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

The Kenya National Commission on Human Rights (together with DPOs, especially DPOs of persons with intellectual disabilities and persons with psychosocial disabilities) is leading reform to guarantee the right to legal capacity for persons with disabilities. Initiatives to reform legal capacity laws have brought together a wide cross section of government officials including judges, officials in independent commissions and senior civil servants amongst others.

12.2 What legal reforms are being raised? Which legal reforms would you like to see in your country? Why?

See question 12.1 for the legal reforms currently being raised in Kenya. Other than ensuring the right to legal capacity for persons with disabilities, the other legal reform that I would like to see in Kenya is the reform of the Basic Education Act 2013 to bring it more in line with Article 24 of the CRPD and ensure for children with disabilities the right to education.

101 As above. The documentary 'The voice of 650 million times one' also addressed this issue <http://www.thevoiceof650million.com/> (accessed 5 May 2014).

MALAWI

*Enoch MacDonnell Chilemba**

1 Population indicators

1.1 What is the total population of Malawi?

At the time of the latest 2008 National Statistical Office (NSO) Population and Housing Census, the population was estimated at 13 077 160 of which 6 358 933 were males and 6 718 227 were females.¹ The population is currently estimated at 16 777 547.

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Malawi. What criteria are used to determine who falls within the class of persons with disabilities in Malawi?

Data on the prevalence of disability were obtained by means of census (decennial). In terms of criteria, persons were asked if they have difficulties with the following: seeing, speaking, hearing, walking/climbing and/or 'any other problem'. Anyone who reported experiencing any difficulties with the abovementioned activities was consequently considered to be within the class of a 'person with a disability'.

1.3 What is the total number and percentage of people with disabilities in Malawi?

According to the 2008 NSO Census, the population of persons with disabilities (PWDs) was recorded at 498 122 representing a disability prevalence rate of 3,8 per cent.

* LLB (Hons)(Mal); LLM (UP, RSA); LL D (UWC, RSA); Lecturer in law, University of Malawi, Chancellor College; Advocate of the High Court and Supreme Court of Malawi; currently, Post-doctoral researcher at the Centre for Disability Law and Policy, University of the Western Cape; enochilemba@yahoo.com. Special appreciation is given to Dr Mwiza Nkhata, Dean of Law, the University of Malawi for assisting with the research and contributing immensely to the report.

¹ National Statistical Office (NSO) *Population and Housing Census 2008: Main report* (2008) 24.

1.4 What is the total number and percentage of women with disabilities in Malawi?

The population of women with disabilities was estimated to be 254 853, representing about 51,1 per cent.

1.5 What is the total number and percentage of children with disabilities in Malawi?

The population of children with disabilities up to the age of 14 was estimated to be 274 465, representing 51,1 per cent.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Malawi?

In terms of the disability statistics, the most prevalent forms of disability/impairment were classified as follows: seeing – 126 110; walking – 103 359; hearing – 76 434; and speaking – 27 585. These four types of disabilities constitute 66,9 per cent of the forms of disability in Malawi.

According to the 2008 census, 1 946 637 people in the country were urban residents and 1 108 286 were rural dwellers. Amongst the urban residents, 45 379 people were classified as PWDs, consisting of 23 544 males and 21 835 females; while 452 743 of the rural residents were classified as PWDs, consisting of 219 725 males and 233 018 females.

2 Malawi's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of Persons with Disabilities (CRPD) in Malawi? Did Malawi sign and ratify the CRPD? Provide the date(s).

Malawi signed the CRPD on 27 September 2007, and subsequently ratified it on 27 August 2009. However, Malawi has not signed or ratified the CRPD Optional Protocol.

2.2 If Malawi has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Malawi 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 Ministry of Justice and Constitutional Affairs (MoJ) is currently responsible for submitting state party reports and it works together with line ministries. In respect of reports that fall under specific ministries such as the CEDAW and CRPD reports (which fall under the Ministry of Gender, Children, Disability and Social Affairs) the specific ministry takes the lead role and MoJ is part of the task team. In such cases, MoJ is entrusted with the responsibility of drafting and vetting the final

report. The CRPD country report for Malawi was due on 27 August 2011; two years after Malawi ratified the Convention. Malawi has not yet submitted the initial report. The reasons that the government gives (unofficially), have to do with lack of funds.

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 Malawi 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

- **Convention on the Rights of the Child (CRC)**

Malawi acceded to the Convention on the Rights of the Child (CRC) on 2 January 1991. It submitted its initial state party report in August 2000. In 2002, the Committee on the Rights of the Child (CRC Committee) adopted its Concluding Observations on the report in which it expressed concern at the challenges (such as widespread discrimination; limited facilities and services; and exclusion from society) facing children with disabilities and other vulnerable children in Malawi. In light of these challenges, the Committee made a number of recommendations.

Malawi submitted its second report, which was considered by the CRC Committee in January 2009. In 2009, the CRC Committee adopted its Concluding Observations on the report in which it mentioned issues relating to children with disabilities in several instances. For example, the Committee was concerned at the persistent de facto discrimination against girls and vulnerable groups of children, including children with disabilities. Accordingly, the Committee urged Malawi to, amongst others, strengthen its efforts to eradicate all discriminatory laws. Furthermore, in respect of the rights and welfare of children with disabilities in general, the Committee welcomed the adoption of Malawi's disability specific policy (discussed in 6.1 below) but expressed concern at the inadequate financial resources allocated to the Disability Ministry and the lack of attention with respect to children with mental illness. Consequently, the Committee advised Malawi on the appropriate recommendations.

Some of the observations and recommendations have been given effect to; while action is yet to be taken in respect of the others. For example, Malawi enacted the Child Care, Protection and Justice Act (CCPJA) in 2010,² which has two provisions on children with disabilities (discussed in 4.2 below). Secondly, Malawi enacted the Disability Act (discussed in 4.1 below),³ which provides for a number of rights (such as education) that can be exercised by all PWDs, including children with disabilities. However, the Act does not have a specific provision on children with disabilities. Thirdly, Malawi ratified the CRPD in the same year that the Concluding Observations were adopted. In addition, Malawi recently enacted the Gender Equality Act.⁴ In respect of the 2002 recommendations, the Disability

² Act 22 of 2010.

³ Act 8 of 2012.

⁴ Act 3 of 2013.

Act recognises the right to 'inclusive education', which requires the education of PWDs to be provided in mainstream/regular schools.

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

Malawi ratified/acceded to CEDAW on 12 March 1987. Malawi submitted the combined second, third, fourth and fifth report to the CEDAW Committee in May 2006 for consideration. In 2006, the CEDAW Committee adopted its Concluding Observations on the report. However, the Concluding Observations did not make reference to women and girls with disabilities.

- **International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

Malawi acceded to CERD on 11 June 1996. The CERD Committee adopted Concluding Observations on Malawi in 2000, which were based on the materials that were at the Committee's disposal since Malawi had not submitted its state party report. However, the Committee did not make reference to PWDs in its Concluding Observations.

Regional Instruments

- **African Charter on Human and Peoples' Rights, African Children's Charter and African Women's Protocol**

Malawi ratified the African Charter on the Right and Welfare of the Child (ACRWC) on 16 September 1999. However, Malawi has not yet submitted any ACRWC state party report. Malawi ratified the African Charter on Human and Peoples' Rights (ACHPR) on 17 November 1989. It also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) on 20 May 2005. Malawi submitted its first ever combined report on the ACHPR and the Africa Women's Protocol in July 2013. The report includes aspects pertaining to the rights of PWDs. For example, the ACHPR report makes reference to the fact that the Malawi Constitution protects the right of PWDs to freedom from disability based discrimination under section 20; that Malawi ratified the CRPD in 2009; and that Malawi enacted the Disability Act in 2012.⁵ On its part, the Women's Protocol report highlights, amongst others, that the adoption of the 2012 Disability Act and 2013 Gender Equality Act seeks to address challenges (such as discrimination on the basis of gender and disability) faced by women with disabilities.

- **UN Universal Periodic Review (UPR)**

Malawi undertook the Universal Periodic Review (UPR) process in November 2010 during the ninth session of the Working Group on the UPR. The Working Group, which falls under the UN Human Rights Council (HRC), released its report in 2010. During the review, a few disability issues were considered. These include the recommendation to adhere to the CRPD Optional Protocol, raised by Argentina; the recommendation to sign and ratify the CRPD Optional Protocol, suggested by Spain; and the recommendation to '[s]trengthen efforts to eliminate discrimination against girls and vulnerable groups such as children with disabilities and orphans', which was put forward by Bangladesh. Some of the observations and recommendations have been given effect to while action is yet to be taken in respect of the others. For example, the 2012 Disability Act, amongst others, prohibits discrimination on the basis of disability in the enjoyment of rights such as education, housing, healthcare and accessibility.⁶

5 The Act is discussed in 4.1 below.

6 See 4.1 below for further discussion of the Act's non-discrimination and other human rights provisions.

2.4 Was there any domestic effect on Malawi'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 Malawi's legislature to incorporate it into the legal system before the instrument can have force in Malawi's domestic law? Have Malawi's courts ever considered this question? If so, cite the case(s).

As highlighted above, Malawi enacted the Disability Act as its new disability legislation.⁷ The Act is based on the social model of disability and as can be appreciated from its provisions discussed in 4.1 below, the passing of the Act has, to some extent, put into effect the provisions of the CRPD. On its part, the CCJPA 'domesticates' the CRC and the ACRWC.⁸

In respect of the legal status of treaties ratified by Malawi, it is noteworthy that the jurisdiction has a dualist legal system which requires ratified treaties to be incorporated by an Act of Parliament to become domestically enforceable.⁹ However, the Constitution provides that the treaties that Malawi ratified before the commencement of the 1995 Constitution do not need to be incorporated to become applicable.¹⁰ Above all, Malawian courts have considered the issue relating to 'domestication' of ratified treaties and they have gone further to apply treaties ratified and incorporated by Malawi (in addition to other international instruments) in a number of cases which did not deal with disability matters. For example, in *Chihana v Republic*, the Supreme Court applied the Universal Declaration of Human Rights, which the 1996 Constitution had incorporated.¹¹ Similarly, in *Kalinda v Limbe Leaf Tobacco Ltd*,¹² the High Court held that the ILO Convention No 158 (Termination of Employment Convention (1983) No 158) is applicable in labour matters through section 211 of the Constitution.¹³ Thus, the courts have affirmed the Constitution's position regarding 'domestication'. Therefore, the CRPD has to be specifically incorporated or 'domesticated' by an Act of Parliament.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Malawi is yet to 'domesticate' the CRPD (as discussed above). Nevertheless, the Disability Act incorporates 'verbatim' a number of provisions that are contained in the CRPD. For example, the definition of reasonable accommodation contained in section 2 of the Act is the same as the definition under the CRPD contained in article 2. Furthermore, section 10 of the Act incorporates the CRPD's requirement of inclusive education in article 24(2).

7 Prior to its enactment, disability issues were provided for under the Handicapped Persons Act (HPA) enacted in 1971.

8 See sec 4(c) of Third Schedule.

9 See Malawi Constitution, sec 211(1); *Chihana v Republic* [1992] 15 MLR 86 (Supreme Court).

10 See sec 211(2), which provides that: 'Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament'. See also DM Chirwa *Human rights under the Malawian Constitution* (2011) 29-30.

11 n 9 above.

12 Civil Cause No 542 of 1995.

13 Malawi ratified ILO Convention 158 on 1 October 1986. See also *Banda v Dimon (Mw) Ltd* [2008] MLLR 92; *Malawi Telecommunications v Makande* [2008] MLLR 35.

3 Constitution

3.1 Does the Constitution of Malawi contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

The 1995 Constitution of Malawi contains a number of provisions that directly address disability. These are explained in Table 3.1 below.

Table 3.1 Disability provisions in the Constitution of Malawi

Section	Provision in words	Explanation
13(g)	The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals – (g) Persons with Disabilities To enhance the dignity and quality of life of persons with disabilities by providing – (i) adequate and suitable access to public places; (ii) fair opportunities in employment; and (iii) the fullest possible participation in all spheres of Malawian society.	The courts are expected to have regard to the provisions in section 13 when interpreting the laws or evaluating government decisions. Hence, the state will be expected to ensure the equalisation of opportunities for PWDs and their participation and inclusion in society as required by section 13(g) whenever it takes any action or decisions that affect PWDs.
20(1)	Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, <i>disability</i> , property, birth or other status or condition. (my emphasis)	PWDs are expressly guaranteed the right to freedom from disability discrimination. This entails that PWDs are entitled to enjoy all human rights on an equal basis with others. In addition, any failure by PWDs to exercise any human rights must not be attributable to disability lest it be considered disability discrimination.
20(2)	Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.	The state is also required to take special temporary measures, including affirmative action, designed to achieve substantive equality of PWDs. Hence, the non-discrimination provision offers crucial protection of the rights of PWDs.
23(4)	All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, <i>children with disabilities</i> and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance. (my emphasis)	The government is given the obligation to ensure the safety and security of children with disabilities and to provide them with assistance. This obligation is based on the Constitution's perception that children with disabilities belong to category of children that are in 'situations of disadvantage'.

30(1)	All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and <i>persons with disabilities</i> in particular shall be given special consideration in the application of this right. (my emphasis)	By virtue of section 20(2) of the Constitution the state will be expected to take special temporary measures, including affirmative action, to realise the right to development of PWDs. Hence, the provision would promote the developmental rights of PWDs.
-------	--	---

3.2 Does the Constitution of Malawi contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Most of the provisions in the Constitution are applicable in the context of disability and would thus indirectly address disability by virtue of the general non-discrimination clause in section 20.

4 Legislation

4.1 Does Malawi have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

(See 2.4 above).

- **Disability Act**

The Disability Act directly addresses disability related issues since, as discussed above, it is Malawi's disability specific legislation. The Act sets out the rights of PWDs in Part 4,¹⁴ which is summarised in Table 4.1 below.

Table 4.1: The substantive provisions on the rights of PWDs in the Disability Act

Section	Description of provisions
Sec 6	Right to health care services: Government to provide appropriate health care services to PWDs, including prevention, early identification, intervention and other services designed to minimise and prevent the occurrence of more disabilities
Sec 7	Non-discrimination in health care and rehabilitation services, including sanctions/penalties for violation
Sec 8	Right of/to accessibility: Government to take appropriate measures to ensure that PWDs have access to the physical environment, transportation, information and communications, including information and communication technologies and systems, and other facilities and services available or provided to the public. Government to ensure, amongst others, the development of a Malawi sign language as a national language for persons with hearing impairments and recognising it as an official language.

¹⁴ Part 4 runs from sec 6 to sec 26.

Sec 9	Non-discrimination in accessing premises and the provision of services or amenities, including sanctions/penalties for violation.
Sec 10	Right to education and training: Government to recognise the rights of PWDs to education on the basis of equal opportunity, and ensure an inclusive education system and lifelong learning
Sec 11	Non-discrimination in education or training institutions, including sanctions/penalties for violation.
Sec 12	Right to work and employment: Government to recognise the rights of PWDs to work and employment.
Sec 13	Non-discrimination in work and employment, including sanctions/penalties for violation
Sec 14	Right to adequate standard of living and social protection: Government to recognise the rights of PWDs to an adequate standard of living, for themselves and their families (and ensure, amongst others, access to adequate food, clothing and housing). Government to ensure equal access by PWDs to appropriate and affordable social services and to social support programmes.
Sec 15	Non-discrimination in social services, including sanctions/penalties for violation.
Sec 16	Right of association and representation: Right to form and join any group or association of one's choice, and Right to be represented at any level in such group or association.
Sec 17	Right to participation in political and public life: Through deliberate policies and measures, Government to guarantee participation in political and public life by PWDs.
Sec 18	Non-discrimination in political and public life, including sanctions/penalties for violation.
Sec 19	Right to cultural and sporting activities, and recreational services. Government to recognise the rights of PWDs to take part in cultural and sporting activities, and access recreational services.
Sec 20	Non-discrimination in cultural and sporting activities, and recreational services, including sanctions/penalties for violation.
Sec 21	Right to housing: In its National Housing Programmes, Government to take into account the needs of PWDs.
Sec 22	Non-discrimination in housing, including sanctions/penalties for violation.
Sec 23	Right to economic empowerment: Government to recognise the importance of empowering PWDs economically, without any form of discrimination, and to ensure that the PWDs are able to access loans and credit facilities for purposes of carrying out income generating activities.
Sec 24	Prohibition of disempowerment, including sanctions/penalties for violation.
Sec 25	Right to information and communication technologies: PWDs to have the right to access information and communication technologies at an affordable cost.
Sec 26	Right to benefit from state (disability oriented) research and information and communication technologies: Government to recognise the importance of research and the role that information and communication technologies play in improving the quality of life of PWDs.

- **Mental Treatment Act**

The Mental Treatment Act currently provides for matters relating to the treatment/handling of mental illness and mental health in Malawi.¹⁵ The Mental Health Bill of 2005 has been drafted as Malawi undertakes the process to replace the Act. Amongst others, the Bill makes provision for accessible and comprehensive mental health care services to persons with mental 'illness/disorders' at all levels of care; for the custody of their property or estates; and for the respect of their human rights. The rights are set out in section 55 and they include the right to 'the best available mental healthcare'.¹⁶

4.2 Does Malawi have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

Malawi has a number of laws that have disability provisions. The legislation is captured in Table 4.2 below.

15 Chapter 34:02 of the Laws of Malawi.

16 See generally sec 55(1), which provides in part as follows:

'(1) Any person suffering from mental disorder or who suffering from mental disorders is being treated as such, shall be entitled the following rights:

(a) to be treated in a least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs, taking into account the need to protect the physical safety of others;

(b) to the best available mental healthcare, which shall be part of the health and social care system;

(c) to be treated in a humane manner and with respect for the inherent dignity of the human person;

(d) to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment;

(e) not to be discriminated against on the grounds of mental disorder; and

(f) to enjoy all the rights provided in the Constitution and any other written law ... '

Table 4.2: Legislative provisions on disability

Name of legislation	Contents/description of pertinent provisions
Child Care, Protection and Justice Act (Act 22 of 2010)	<p>1. Section 72: A local government authority shall 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</p> <p>2. Section 145(d): The proceedings of a child justice court shall be informal and in particular, the presiding officer shall ensure that – (d) children with disabilities are accorded with assistance to meet their special needs where necessary.</p>
Education Act (Act 21 of 2013)	Section 4(1)(a): Requires the Minister responsible for education to promote education without discrimination on various grounds, including disability.
Employment Act (Act 6 of 2000)	<p>1. Section 5(1): Prohibits discrimination against any employee or prospective employee on various grounds, including disability in respect of recruitment, training, promotion, terms and conditions of contract of employment and in all aspect of employment.</p> <p>2. Sec 5(2): Allows for the taking of special measures to achieve de facto equality in employment. Thus it recognises the need for special measures, including affirmative action.</p> <p>3. Section 6(1): Equal remuneration for equal work without discrimination, including disability discrimination.</p> <p>4. Section 57(a): Prohibits the dismissal of any employee on the ground of disability.</p>
Technical, Entrepreneurial and Vocational Education and Training Authority Act (Act 6 of 1999)	Establishes the Technical, Entrepreneurial and Vocational Education and Training Authority (TEVETA) and its board. In terms of the Act, the TEVETA board must have one person (in its composition) representing PWDs. However, the Act does not have substantive provisions that expressly make reference to disability.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Malawi 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.

There are no known or reported court cases on disability in Malawi. Similarly, there are no reported court cases which have dealt with issues relating to disability. Perhaps the passing of the Disability Act could trigger disability rights litigation.

6 Policies and programmes

6.1 Does Malawi have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **National Policy on the Equalisation of Opportunities for Persons with Disabilities**

The National Policy on the Equalisation of Opportunities for Persons with Disabilities (Equalisation Policy) principally seeks to ensure equalisation of opportunities for PWDs in all aspects of society.¹⁷ Its purpose is to promote the rights of PWDs in Malawi and to enable them to play a full and participatory role in society. Its vision is that of 'Malawi becoming a nation where people with disabilities have equal opportunities to participate in various undertakings and realize their potentials and goals in life.' Its mission is to 'promote the inclusion of persons with disabilities at all levels of society through the creation of an enabling environment for the respect of human diversity, human rights and the development of all human potential'. It has 10 guiding principles: Recognition of the diversity of PWDs; advocacy and support to the human rights approach to disability; a twin-track approach to service delivery; ensuring access for PWDs to all public sector activities; ensuring the inclusion of PWDs; participatory approach and community empowerment; monitoring and evaluation of inclusiveness of government programmes; promotion of gender equality and equity in disability programmes; inclusion of PWDs in the workforce; and facilitating and supporting capacity building of DPOs. The overall goal of the Policy is 'to integrate fully persons with disabilities in all aspects of life thereby equalizing their opportunities in order to enhance their dignity and well-being so that they have essentials of life'.

The Policy has seven main objectives: to formulate strategies towards disability prevention, rehabilitation and equalisation of opportunities for PWDs; to support community-based service delivery, in collaboration with local and international development agencies and organisations; to promote efforts that encourage positive attitudes towards children, youth, women and adults with disabilities; to develop programmes that alleviate poverty amongst PWDs and their

17 Malawi Government *National Policy on the Equalisation of Opportunities for Persons with Disabilities* (2005) (the Equalisation Policy).

families; to put in place programmes that create greater awareness and conscientiousness of communities and government relating to disability; to strengthen the National Advisory and Coordination Committee on Disability Issues (NACCODI); and to mainstream disability in the social, economic and political agenda of development programmes. It has a number of policy statements that apply to specific areas or sectors, which include rehabilitation, accessibility, transport, information and communication, education and training, and self-representation and participation.

- **Special Needs Education Policy, 2007**

The Special Needs Education Policy (SNE Policy) provides for the policy approach relating to the education of PWDs in Malawi.¹⁸ The Policy contains relevant concepts and definitions. However, it does not mainly use the concept of inclusive education but special needs education (SNE) in reference to the education of PWDs. The Policy has clear goals, a mission, a vision, and objectives. Its objectives include: Providing education and training to learners with special educational needs (SEN); ensuring equitable access for all learners with SEN; providing educational facilities with needed supportive provisions; ensuring accommodating learning environments for all learners with SEN; and increasing SNE services provisions. The SNE Policy also contains ten guiding principles for its implementation. It identifies eight major components of SNE that include early identification assessment and intervention; advocacy; care and support; management, planning, and financing; access; quality; equity; and relevance. For example, the policy area relating to access is informed by the understanding that 'the education system should encourage all individuals who have special needs to enrol in school and to facilitate the effective participation in all learning activities'. On its part, the policy area of equity seeks to ensure the elimination of gaps between learners with SEN and those without; while the policy area of relevance aims at ensuring that learners with SEN are provided with an education that will adequately prepare them to participate in social and economic activities. The SNE policy further aims at overcoming SNE implementation challenges that include financial constraints, physical environmental considerations, attitudinal barriers, and limited capacity in training specialist personnel.

6.2 Does Malawi have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

Malawi has few policies/programmes that also address disability despite being adopted for other purposes as opposed to specifically deal with disability. These are usually in form of sectoral policies such as education and youth policies.¹⁹

- **National Youth Policy**

The rationale for the adoption of the National Youth Policy seeks to provide 'a framework with guidelines for the facilitation of meaningful youth development programs and services with full participation of the young people themselves at all levels'.²⁰ It mentions youth with disabilities amongst the special groups that will be 'given attention' in implementing the Policy's target areas. However, it does not clarify how this will be done. The Policy recognises the right to freedom from discrimination as one of its eight principles. The relevant principle explicitly recognises the duty to protect the youth from disability based discrimination. It

18 Malawi Government *National Policy on Special Needs Education (Revised)* (2007).

19 The education policies include the *National Education Sector Plan 2008-2017: A statement* (2008).

20 Malawi Government (Ministry of Youth Development and Sports) *National Youth Policy: Youth – The Nation today and tomorrow* (2010).

further provides that the youth are entitled to enjoy all the rights in the CRC and the Constitution of Malawi.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Malawi 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.

Malawi does not have any official body that specifically addresses violations of the rights of PWDs.

7.2 Other than the ordinary courts or tribunals, does Malawi 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 Malawi Disability Act confers power on the responsible Minister to establish institutions and committees for purposes of the proper and effective administration of the Act. It is unlikely that such administrative body would address rights violations. The Act also requires the Minister to establish a National Advisory and Coordinating Committee on Disability Issues (NACCODI), which will be the official body on disability affairs. According to section 5 of the Act, the body will have functions that seek to provide a forum for all key stakeholders on disability issues such as disability mainstreaming; make recommendations to government on best practices regarding disability policies, legislation and programmes; and oversee the implementation, monitoring and evaluation of disability-related programmes.

On its part, the Equalisation Policy requires the Malawi Council on Disability Affairs (MACODA) to regulate the work of disability organisations; implement government policy on disability issues and register NGOs dealing with disability issues.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Malawi have a Human Rights Commission, 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 Malawi has ever addressed issues relating to the rights of persons with disabilities.

The Constitution established the Malawi Human Rights Commission (MHRC) to address the violations of human rights of all persons, including PWDs. There is

also the Human Rights Commission Act,²¹ which makes provision for matters relating to the status and functioning of the MHRC. Amongst others, the Act expects the MHRC 'to promote more particularly the human rights of vulnerable groups, such as children, illiterate persons, persons with disabilities and the elderly'.²²

The Constitution also established the Office of the Ombudsman with similar functions. The Constitution further requires allegations/complaints regarding threats to or violations of human rights to be brought before the courts or the MHRC or the Ombudsman. However, the two institutions are yet to be involved in disability rights litigation.

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Malawi have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

At national level, most of the DPOs work under one umbrella organisation known as Federation of Disability Organisations in Malawi (FEDOMA), which was founded in 1999 to provide a unified voice for all persons with disabilities in Malawi. FEDOMA's objectives include promoting and advocating for rights of people with disabilities; coordinating and strengthening the capacity of the affiliated DPOs; and advocating for and monitoring the equalisation of opportunities for people with disabilities as stipulated in the United Nation's Standard Rules. The DPOs listed in this section below work with FEDOMA.

Apart from FEDOMA and its affiliates, there are also a number of community based organisations (CBOs) that deal in disability issues. For example, the Association of Early Childhood Development lobbies district councils, local and international organisations to invest in childhood development. Most CBOs work with the Government Department of Social Welfare to ensure the protection of the interests of PWDs.

Although most DPOs are actively involved in lobbying and advocating for disability rights, their work suffers due to lack sufficient funds. Most DPOs often depend on funds from international partners and work comes to a halt if they are not funded. In addition, the grants are often tied to particular projects and thus there is no flexibility as to what they should do when they get the funds.

The following are the DPOs that are affiliated to FEDOMA:

- **Malawi Union of the Blind (MUB)**

The Malawi Union of the Blind is a non-governmental organisation that deals with the blind and persons with visual impairments broadly. Since its establishment, MUB has opened up more than 19 district-based branches with about seven thousand registered members. The organisation has a diversified range of

21 Act 27 of 1998.

22 See sec 13(1)(c).

programmes in areas such as health, education, rehabilitation of the rural blind women, advocacy on HIV/AIDS, sexual and reproductive health rights.

- **Disabled Women in Development (DIWODE)**

DIWODE was established in 1996 to fight for the rights of women with disabilities so that they may participate in all aspects of development and become self-reliant. It strives to achieve its objectives by conducting training in business skills and helping women write proposals for securing funds. DIWODE also holds awareness meetings meant to encourage growth of self-confidence amongst women with disabilities.

- **Malawi National Association of the Deaf (MANAD)**

MANAD is an organisation of the deaf formed in 1992 and registered with the government in 1996. It aims at promoting the use and acceptance of sign language in interpretation, encouraging education and career opportunities for the deaf and promotion of welfare of the deaf in various social and economic aspects.

- **Malawi Disability Sports Association (MADISA)**

This organisation was established in 1998 to promote sporting activities for (PWDs) in Malawi. For example, it received funds to assist with the training of PWDs to participate in the 2012 Paralympics. MADISA has 562 registered members from Chiradzulu, Mulanje, Blantyre and Lilongwe districts.

- **Parents of Disabled Children Association in Malawi (PODCAM)**

This is an organisation for parents of children with disabilities. It aims at sensitising its members, teachers and other members of the community on disability issues. It accords the parents a platform to share their experiences and promote educational opportunities for children with disabilities. PODCAM is currently working with a total of 3214 children with various disabilities.

- **The Albino Association of Malawi (TAAM)**

The Albino Association of Malawi was registered in 1997 with the aim of addressing the plight of people living with albinism. TAAM lobbies the private sector and government to mainstream albinism issues and to recognise albinism as a disability.

- **Association of the Physically Disabled in Malawi (APDM)**

APDM was established in 1999 to empower people with physical disabilities to become self-reliant and to participate fully in social life at the national level. The organisation has members from Nkhotakota, Mulanje, Balaka, Neno, Lilongwe and Mangochi districts.

- **Disabled Widows Orphans Organizations of Malawi (DWOOM)**

This organisation was formed to promote the rights of widows and orphans with disabilities and also to provide them with skills that will enable them to economically become self-reliant. The organisation has its headquarters in Rumphu in the northern part of Malawi, and it is currently constructing a vocational training centre which will impart artisan skills to its members.

- **Visual Hearing Membership Association (VIHEMA)**

VIHEMA was registered on 10 June 2008 to advocate for the rights of the deaf and blind. Its vision is to see the deaf and blind accepted and given an opportunity to participate in national development. It does this by raising awareness on needs, problems, limitations, potentials and rights of deaf and blind people so as to change society's negative attitude towards them.

10 Government departments

- 10.1 Does Malawi have a government department/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).**

(See generally section 7.2 above)

Malawi has a specific Ministry that is responsible for disability issues, namely, the Ministry of Gender, Children, Disability and Social Services.²³ The Ministry is responsible for coordinating, monitoring and evaluating the implementation of policies on disability and the elderly, legislation, programmes, and services delivery. Furthermore, the Disability Act establishes NACCODI as the government's official body on disability affairs.²⁴ There is also MACOHA, which was established under the HPA of 1971 to act as the government's agent in respect of the affairs of PWDs. According to section 10 of the HPA, MACOHA's functions include: administering vocational and special training centres for PWDs; administering rehabilitation services for PWDs; and administering services for the care and welfare PWDs. Malawi Against Physical Disabilities (MAP) is another important government agency, which was formed in 1979. It specialises in providing rehabilitation services to PWDs; the early identification of disabilities and interventions; disability awareness and training for general medical staff and health workers; and the support and training of parents of children with disabilities.

11 Main human rights concerns of people with disabilities in Malawi

- 11.1 Contemporary challenges of persons with disabilities in Malawi (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).**

(See 11.2 below)

- 11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto:**

PWDs in Malawi experience discrimination from birth or from the moment the person acquired the disability. Discriminatory practices subsist in all aspects of the

²³ Prior to June 2014, disability issues were under the then Ministry of Disability and Elderly Affairs.

²⁴ See 7.2 above for the discussion relating to NACCODI.

society.²⁵ In most Malawian societies, the birth of a child with disability is considered a tragedy.²⁶ PWDs are identified as ill and different from other persons and consequently their prime predicament becomes exclusion which translates into difficulty in accessing fundamental social, political and economic rights.²⁷ According to the Equalisation Policy, many PWDs make their way through life impoverished, abandoned, uneducated, malnourished, discriminated against, neglected and vulnerable.²⁸ Being a person with a disability in Malawi entails exclusion from essential services; lack of the protection of the family and community; clear and present risk of exploitation and abuse; and ultimately a daily struggle for survival.²⁹ Although all disability matters are under the purview of the Ministry of the PWDs, the most comprehensive compilation of the government's commitment to disability issues before the enactment of the Disability Act was the Disability Policy, which seeks to simultaneously respond to the challenges and needs of the PWDs and promote equality of opportunities.³⁰ With regard to legal responses for addressing discrimination against PWDs, it is regrettable that the Disability Act does not impose the obligation to provide reasonable accommodation in ensuring equality and non-discrimination. This is because, amongst others, the Act (in section 2) does not define discrimination as including the denial of reasonable accommodation. In fact, the Act does not require the provision of reasonable accommodation in any context or in realising any right (such as education or employment). Thus it is unlikely that the Disability Act would provide an adequate legal tool/response for addressing discrimination against PWDs due to this drawback.

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Malawi?

The Constitution guarantees political rights to all persons, including PWDs, in section 40. Since the Constitution prohibits disability based discrimination in section 20(1), this right is required to be exercised by PWDs on an equal basis with others. Hence, the Constitution affords every person the right to form, to join, to participate in the activities of, and to recruit members for, a political party; and to participate in peaceful political activity intended to influence the composition and policies of the Government.³¹ The Constitution also provides that every person shall have the right to vote, to do so in secret and to stand for election for any elective office.³²

Above all, the Disability Act in section 17 guarantees PWDs the right to participation in political and public life through deliberate policies and measures. Thus the government is required to guarantee participation in political and public life by PWDs. In addition, section 18 recognises the right to non-discrimination in political and public life, including sanctions/penalties for violation.

However, the drawback is that while PWDs are guaranteed these political rights; when they actually vie for political office in competition with people without disabilities, the electorate tends to favour the latter. This has to do with societal

25 Interview with Naomi Kaluwa, Projects Manager of the Disability Rights Unit for the Federation of Disability Organisations in Malawi (FEDOMA), at FEDOMA head office, Blantyre, 5 June 2013. Naomi Kaluwa stated, amongst others, that she has handled over 40 cases where PWDs were complaining of unfair and discriminatory treatment at the hands of several employees.

26 Equalisation Policy (n 17 above) 4.

27 Equalisation Policy (n 17 above) 1.

28 As above.

29 As above.

30 See Leonard Cheshire Disability & Inclusive Development Centre *Disability policy audit in Namibia, Swaziland, Malawi, and Mozambique: Final report* (2008) 68-70.

31 See sec 40.

32 Sec 40(1)(a), (c) & (3).

negative attitudes towards PWDs. Therefore, it is in the actual voting process that improvements need to be considered given that barriers for PWDs still exist.³³ In the light of these barriers, the Disability Policy intends to facilitate the establishment of mechanisms to improve access to election and polls by PWDs and also empowering the PWDs through counselling, education and training coupled with public awareness campaigns.³⁴ The Disability Act also envisages deliberate policies and measures by government to guarantee participation in political and public life by PWDs.³⁵

11.4 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Malawi?

• Education

According to the Equalisation Policy, 98 per cent of children with disabilities receive no formal education and even where schools are physically accessible, many children with disabilities remain excluded. This is because parents may fear that the child will not cope or that disclosure of a child with a disability will stigmatise the whole family and affect the marriage prospects of siblings. Other parents also consider that 'investment' in a child with a disability is not worthwhile.³⁶ In terms of vocational training, it is estimated that only 5 per cent of PWDs in need of vocational training and welfare services receive the training.³⁷

Another obstacle to the education of PWDs in Malawi is the lack of SNE or inclusive education facilities. In view of this, Malawi developed the SNE Policy in 2007 (discussed above).

On its part, the Disability Act recognises the right to education and training of PWDs, which includes inclusive education; prohibits discrimination on the basis of disability in education; and prescribes penalties and sanctions for violation of the right to freedom from discrimination in education (as discussed above).³⁸ The Equalisation Policy also makes provision for further interventions to facilitate the education of PWDs apart from developing SNE. These include the design and development of appropriate technologies, assistive devices and learning; provision of free appropriate technology, equipment and resources to assist boys and girls, women and men with disabilities with their learning needs; and promoting awareness amongst parents or guardians on the need to send children with disabilities to school.³⁹ However, the main obstacle to the education of PWDs in Malawi is that despite the Disability Act recognising inclusive education, Malawi continues to utilise integrated and special schools over inclusive schools in practice contrary to the pertinent international standards.⁴⁰

• Health

Apart from health centres being physically inaccessible and situated far apart, health workers discriminate against PWDs. Healthcare information is provided in formats which are inaccessible to PWDs, perhaps due to the fact that they are not

33 Equalisation Policy (n 17 above) 6.

34 Equalisation Policy (n 17 above) 17.

35 Sec 17.

36 Equalisation Policy (n 17 above) 1.

37 Leonard Cheshire Disability & Inclusive Development Centre (n 30 above) 66.

38 Disability Act, secs 10 & 11.

39 Equalisation Policy (n 17 above) 14.

40 See generally EM Chilemba 'The right to primary education for children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' in *African Disability Rights Yearbook* (2013) 3, 18 & 26; A Chavuta et al *Baseline study report on inclusive education in Shire Highlands Education Division in Malawi* (2008) 12.

uniquely targeted for health education.⁴¹ The government seems to be cognisant of this state of affairs and is currently directing the Ministry of Health to ensure the following: promote prevention and occurrence of disabilities; provide early detection and intervention services with regards to disability; provide medical rehabilitation services; and provide specialised training in the area of disability.⁴² In addition, the Disability Act guarantees PWDs the right to access healthcare services and the right to freedom from discrimination in healthcare and rehabilitation services, including sanctions/penalties for violation.⁴³

- **Social services**

The Disability Act recognises the right of PWDs to an adequate standard of living and social protection in section 14 (as discussed above). The section obliges government to ensure adequate standards of living for PWDs and their families, including ensuring that they have access to adequate food, clothing and housing.⁴⁴ Above all, the provision expressly obliges government to ensure equal access by PWDs to appropriate and affordable social services and to social support programmes.⁴⁵ In addition, the Act prohibits discrimination on the basis of disability in all matters relating to social support, including access to appropriate and affordable social services in section 15.⁴⁶ Therefore, it can be observed that in terms of the Disability Act, PWDs in Malawi have the right to social services.⁴⁷

11.5 Specific categories experiencing particular issues/vulnerability:

While disability and its exigencies is a cross cutting issue, women and children remain the most adversely affected. For example, children with disabilities are almost twice as likely not to receive any primary education whatsoever. This problem is further compounded when the gender differentials are taken into account with the effect that 41 per cent of girls with disabilities never attend school compared to 29 per cent of boys with disabilities.⁴⁸ Children are further abused in the form of forced imprisonment. For example, a parent who has a child with disability will send the other children to school while she/he locks up and neglects the child with a disability in the house because the parent cannot afford to stay home and look after such child as the parent has to go and fend for the rest of the family.⁴⁹ This practice is common in Malawi.⁵⁰

Women in Malawi are generally victims of gender based violence and disability exacerbates the situation as they are more defenceless and vulnerable. In addition, women with disabilities are often regarded as mere 'sex objects' rather than marriage partners. This results in a situation where men will merely be intimate with these women, leaving the probability of pregnancy.. The men fail to formalise the relationship or even support the women (or children) physically, emotionally or socially.⁵¹

41 Equalisation Policy (n 17 above) 1.

42 As above.

43 Secs 6 & 7.

44 See sec 14(1)(a).

45 See sec 14(2)(a) & (b).

46 Sec 14(1)(b) further requires government to ensure non-discrimination in the realisation of the right to adequate standards of living.

47 It is also noteworthy that the Disability Act provides for the establishment of a disability trust fund by the responsible minister for the purpose of supporting the implementation of disability programmes and services. See secs 28 & 29.

48 Leonard Cheshire Disability and Inclusive Development Centre (n 30 above) 64.

49 Interview with Mrs Botomani, Principal Child Rights Officer, at Malawi Human Rights Commission, Blantyre 5 June 2013.

50 Interview with Mrs Botomani (n 54 above). Naomi Kaluwa of FEDOMA (n 25 above) confirmed this phenomenon.

51 Interview with Naomi Kaluwa (n 25 above).

The other main legal setback is that the Disability Act has not made specific provision in respect of women, children and older persons with disabilities or albinos.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment? What legal reforms are being raised? Which legal reforms would you like to see in your country?

Although the Disability Act has been passed (which in itself is a significant milestone considering that it took almost eight years before it was actually enacted into law by Parliament), PWDs in Malawi continue to face multiple challenges. At a general level, it seems the Government of Malawi's commitment to properly and comprehensively respond to the needs of PWDs is not 'deep' and consistent. Indeed, issues of disability tend to be benignly invisible in major Government policy documents. For example, there is no mention of the Government's strategy with regard to disability issues in the Malawi Growth and Development Strategy (MGDS). (The MGDS is the Malawi Government's overarching medium term development strategy for Malawi and it is designed to help Malawi attain its long term development goals as articulated in the Malawi Vision 2020). The vulnerability of PWDs is mentioned under social support and disaster risk management themes but the MDGS does not provide how they will help people living with disabilities as a special group. This can be argued as one of the reasons why the government has not been forthcoming with comprehensive projects that specifically target PWDs.

With regard to legal reforms, Malawi could consider reviewing the Disability Act to, amongst others, make specific provision for the rights of women, children and older persons with disabilities and albinos. As discussed in 11.5 above, the Disability Act fails to make such provision. In addition, (as discussed in 11.2 above) the Disability Act does not currently impose an obligation to provide reasonable accommodation in ensuring equality and non-discrimination for PWDs. This is because the Act merely provides for the definition of reasonable accommodation (in section 2) but it does not recognise the denial of reasonable accommodation as constituting disability based discrimination.⁵² Accordingly, Malawi should revise the Act and/to include the denial of reasonable accommodation in the definition of discrimination. This would strengthen the 'legal tools' for ensuring freedom from discrimination and substantive equality for PWDs in Malawi.

Nonetheless, the enactment of the Disability Act presents clear normative standards against which the government can be judged in terms of the steps that it will be taking towards the realisation of the rights of PWDs in the country. Thus the 'appropriate' implementation of the Act coupled with the suggested revisions could offer hope for PWDs in Malawi.

52 See generally Chilemba (n 40 above) 21 & 22.

MAURITIUS

*Ashwanee Budoo**
*Roopanand Amar Mahadew***

1 Population indicators

1.1 What is the total population of Mauritius?¹

The Republic of Mauritius has a population of about 1.3 million, with 1 255 020 inhabitants on the Island of Mauritius; 38 240 on the Island of Rodrigues and 289 in Agalega.²

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Mauritius. What criteria are used to determine who falls within the class of persons with disabilities in Mauritius?

Statistical data concerning the prevalence of disability in Mauritius is obtained from the 2011 Population Census conducted by Statistics Mauritius found under the aegis of the Ministry of Finance and Economic Development, which is the 'official organisation responsible for collection, compilation, analysis and dissemination of the official statistical data relating to the economic and social activities of the country'.³

For purposes of data collection, disability is primarily defined as 'any limitation to perform a daily life activity in a manner considered normal for persons of their age'.⁴ The different criteria to determine whether a person falls within the class of persons with disabilities are as follows:⁵

* LLD Candidate and tutor at the Centre for Human Rights, University of Pretoria.

** Lecturer in Law at the University of Mauritius and LLD Candidate at the University of Western Cape.

1 Mauritius lies in the Indian Ocean with a total area of 2040 square kilometres.

2 Statistics Mauritius 'Population and vital statistics: Republic of Mauritius, year 2012' (2012) 2, available at http://statsmauritius.gov.mu/English/StatsbySubj/Documents/ei1018/Amen ded%20FINAL%20_ESI%202012.pdf (accessed 5 March 2014).

3 Official site of Statistics Mauritius, available at <http://statsmauritius.gov.mu/English/Pages/default.aspx> (accessed on 5 March 2014).

4 Statistics Mauritius '2011 Population Census – Main Results' (2011) 19, available at <http://statsmauritius.gov.mu/English/CensusandSurveys/Documents/ESI/pop2011.pdf> (accessed 5 March 2014).

5 Statistics Mauritius (n 4 above) 12.

- Disturbances of behaviour
- Speaking
- Hearing
- Manual activities
- Personal care
- Memory
- Seeing
- Walking

1.3 What is the total number and percentage of people with disabilities in Mauritius?

According to the 2011 Population Census, there are approximately 59 200 persons with disabilities in Mauritius, representing 4,8 per cent of the population.⁶

1.4 What is the total number and percentage of women with disabilities in Mauritius?

About 30 900 women live with disabilities in Mauritius and this accounts for 51,6 per cent of the population of persons living with disabilities.⁷

1.5 What is the total number and percentage of children with disabilities in Mauritius?

The 2011 Population Census estimated that 1,5 per cent of the population consists of persons who are under 15 and who are living with a disability.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Mauritius?

Physical disabilities are the most prevalent form of disability in Mauritius, these account for 42 per cent of the population living with a disability.⁸ This is followed by persons with visual impairments, amounting to 24 per cent.⁹ Persons who have difficulty remembering, concentrating or acquiring education and learning account for 20 per cent of the population of persons living with disabilities.¹⁰

6 As above.

7 Statistics Mauritius 'Gender statistics, 2012' (2012) 10, available at <http://statsmauritius.gov.mu/English/StatsbySubj/Documents/ei1052/gender.pdf> (accessed 5 March 2014).

8 Statistics Mauritius (n 2 above) 12.

9 As above.

10 As above.

2 Mauritius's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of Persons with Disabilities (CRPD) in Mauritius? Did Mauritius sign and ratify the CRPD? Provide the date(s).

Mauritius signed the United Nation Convention on the Rights of Persons with Disabilities (CRPD) on 25 September 2007 and ratified the document on 8 January 2010.¹¹ However, Mauritius has placed reservations on articles 11,¹² 9(2)(d)¹³ and 24(2)(b)¹⁴ of the CRPD.

2.2 If Mauritius has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Mauritius 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?

- Mauritius' country report was due on 8 February 2012.
- The disability unit, under the wing of the Ministry of Social Security, National Solidarity and Reform Institutions, which is the 'focal point'¹⁵ for disability issues, is responsible for the submission of the report.¹⁶
- Mauritius submitted its report to the Committee on the Rights of Persons with Disabilities (the Committee) on 15 May 2012.¹⁷
- The Committee had not considered Mauritius' country report to date.

2.3 While reporting under various other United Nations' instruments, or under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Mauritius also report specifically on the rights of persons with disabilities in its

11 UN Website, available at <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> (accessed 12 March 2014).

12 Article 11 of the CRPD: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'

13 Article 9.2(d) of the CRPD: 'States Parties shall also take appropriate measures to ... provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms.'

14 Article 24.2(b) of the CRPD: 'In realizing this right, States Parties shall ensure that ... persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.'

15 Article 33(1) of the CRPD provides for a focal point within governments in the following terms: 'States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.'

16 Website of the government of Mauritius, available at <http://www.gov.mu/portal/sites/disability/index.htm> (accessed 13 March 2014).

17 A copy of the report is available on the website of the Office of the High Commissioner for Human Rights at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMUS%2f1&Lang=en (accessed 13 March 2014).

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?

• **The International Covenant on Civil and Political Rights**

Mauritius acceded to the International Covenant on Civil and Political Rights (ICCPR) on 12 December 1973.¹⁸ The last state report that Mauritius submitted was on 27 May 2004, the due date of which was 4 November 1993.¹⁹ Paragraphs 110 to 113 of the report highlight the measures that have been adopted by Mauritius to prevent discrimination against PWDs.²⁰ Concluding observations on the report were adopted on 27 April 2005 but there were no recommendations concerning the rights of PWDs.²¹

• **The Convention on the Elimination of All Forms of Discrimination Against Women**

Mauritius acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 9 July 1984.²² The latest state report which was considered by the CEDAW on 12 August 2010 made no specific reference to the rights of PWDs.²³ However, the Concluding Observation of the Committee on the Elimination of Discrimination against Women,²⁴ highlighted the lacunas concerning the rights of women who are living with a disability in the following paragraphs:

Paragraph 36:

The Committee notes that Mauritius’ state report lacked information and statistics about disadvantaged groups of women, including rural women, elderly women and women with disabilities, who often suffer from multiple forms of discrimination.

Paragraph 37:

The Committee invites Mauritius to provide, in its next state report, a comprehensive picture of the de facto situation of disadvantaged groups of women, including rural women, older women and women with disabilities, in all areas covered by the Convention.

18 United Nations Treaty Collection Database, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 13 March 2014).

19 As above.

20 HRC ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Fourth Periodic Report, Mauritius’ CCPR/C/MUS/2004/4 28 June 2004, available at file:///C:/Users/User.CREATEK2012/Downloads/G0442345.pdf (accessed 13 March 2014).

21 HRC ‘Consideration of reports submitted by States Parties under article 40 of the Covenant-Concluding Observations of the Human Rights Committee-Mauritius’ CCPR/CO/83/MUS adopted on the 83rd session on 27 April 2005, available at file:///C:/Users/User.CREATEK2012/Downloads/G0541376%20(3).pdf (accessed 13 March 2014).

22 Office of the High Commissioner for Human Rights ‘Ratification status for CEDAW’, available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (accessed 13 March 2014).

23 Office of the High Commissioner for Human Rights ‘CEDAW/C/MUS/CO/6-7’. French version available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMUS%2f6-7&Lang=en (accessed 16 May 2014).

24 ‘Concluding Observations of the Committee on the Elimination of Discrimination Against Women’, 8 November 2011, adopted on the fiftieth session CEDAW/C/MUS/CO/6-7, available at file:///C:/Users/User.CREATEK2012/Downloads/G1146814.pdf (accessed 13 March 2014).

• **The International Covenant on Economic, Social and Cultural Rights**

The above Covenant was acceded to by Mauritius on 12 December 1973. Mauritius submitted its most recent report on 3 March 2008, which was due on 30 June 1995. Although Mauritius was reporting under the ICESCR, the report also made reference to the provisions of the CRPD and emphasised how the government is taking measures to protect the rights of PWDs.²⁵ The following areas were reported on: training and employment of PWDs;²⁶ inclusivity;²⁷ pensions and allowances;²⁸ assistive devices;²⁹ education;³⁰ accessibility;³¹ sports culture and leisure;³² basic benefits;³³ and mental health care.³⁴ The Committee on Economic, Social and Cultural Rights, made the following recommendations with regard to PWDs in its concluding observations:³⁵

- The Committee urges the State party to adopt the necessary measures to prevent, diminish and eventually eliminate the conditions and attitudes which cause or perpetuate de facto discrimination against those groups of children, in line with the Committee's general comment no. 20 (2009) on non-discrimination in economic, social and cultural rights.³⁶
- The Committee recommends that the State party strengthen its efforts to eliminate situations that may be discriminatory against children with disabilities and take steps to ensure that all children with disabilities can, as appropriate, study in mainstream schools. In order to implement this approach, the State party should ensure that teachers are trained to educate children with disabilities within regular schools, in line with the Committee's general comment No. 5 (1994) on persons with disabilities.³⁷
- The Committee recommends that the State party considers withdrawing its interpretative declaration concerning article 24, paragraph 2(b), of the CRPD in relation to the policy of inclusive education, as this affects the object and purpose of the Convention. The Committee further recommends that the State party withdraw its reservation concerning article 11 of that Convention, by which it seeks to exclude measures specified in article 11 'unless permitted by domestic legislation expressly providing for the taking of such measures', as this goes to the substance of the provision and affects the object and purpose of the Convention.³⁸

• **The African Charter on Human and Peoples' Rights**

Mauritius ratified the African Charter on Human and Peoples' Rights on 19 June 1992.³⁹ The 2nd, 3rd, 4th and 5th combined state report submitted on 1 January 2008 under the African Charter on Human and Peoples' Rights made reference to the steps taken by the government to ensure a better protection of the rights of

25 Report submitted to the Economic and Social Council-implementation of the International Covenant on Economic, Social and Cultural Rights-fourth periodic report submitted by States Parties under articles 16 and 17 of the Covenant-Mauritius 3 March 2008 E/C.12/MUS/4.

26 Report to the Economic and Social Council (n 23 above) paras 119, 120, 126, 127, 137-140.

27 Para 129.

28 Para 130.

29 Para 131.

30 Paras 132-136.

31 Paras 141-144.

32 Paras 145-146.

33 Para 208.

34 Paras 422-426.

35 Concluding observations of the Committee on Economic, Social and Cultural Rights-consideration of reports submitted by states parties under articles 16 and 17 of the Covenant-forty fourth session-8 June 2010.

36 Concluding observations (n 35 above) para 12.1.

37 Concluding observations (n 35 above) para 30.2.

38 Concluding observations (n 35 above) para 36.

39 African Commission's website 'Ratification table: African Charter on Human and Peoples' Rights', available at <http://www.achpr.org/instruments/achpr/ratification/> (accessed 14 March 2014).

PWDs.⁴⁰ In the concluding observations,⁴¹ the African Commission made the following recommendation concerning children with disabilities:⁴²

- Implement the recommendations of the UN Committee on the Rights of the Child regarding discrimination against certain groups of children, particularly with regard to children with disabilities, children affected and/or infected by HIV/AIDS and children from disadvantaged families and girls.

• **Mauritius' UN Universal Periodic Review**

Mauritius' first Universal Periodic Review (UPR) was conducted on 10 February 2009 and numerous countries raised concerns about Mauritius not having ratified the CRPD at that time.⁴³ The last Universal Periodic Review for Mauritius was conducted on 23 October 2013 during the seventeenth session of the Working Group on the Universal Periodic Review.⁴⁴ The following recommendations were adopted:

- Strengthen coordination within the new institutions for the protection of minors and persons with disabilities;⁴⁵
- Continue with actions aimed at improving the treatment of children with disabilities and children affected and/or infected by HIV/AIDS;⁴⁶
- Make further efforts in increasing participation of persons with disabilities at all levels of political and public life, especially the electoral process;⁴⁷
- Intensify the positive action already taken for improving the living conditions of persons with disabilities;⁴⁸
- Work to ensure inclusive, quality and free primary and secondary education to children with disabilities on an equal basis with other children;⁴⁹
- Support steps regarding the rights of persons with disabilities with administrative arrangements, in order to ensure that these rights are enjoyed by all persons with disabilities within the society, especially children with disabilities;⁵⁰
- Continue implementation of the National Plan of Action, including social programs that aim at carrying out information and education activities with regard to people with disabilities and their social protection according to the relevant Convention which the country has ratified;⁵¹
- Continue increasing skills development programmes to public officers and staff, hospital staff and police officers on how to assist persons with disabilities as well as children with special needs;⁵²
- Withdraw its reservations to the Convention on the Rights of Persons with Disabilities;⁵³ and

40 The report is available at http://www.achpr.org/files/sessions/45th/state-reports/2nd-5th-2008/staterrep2345_mauritius_2008_eng.pdf (accessed 14 March 2014).

41 African Commission on Human and Peoples' Rights-consideration of reports submitted by states parties under article 62 of the African Charter on Human and Peoples' Rights-concluding observation on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius forty-fifth ordinary session, 13-27 May 2009.

42 Para 63.

43 The report of the Working Group is available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/116/86/PDF/G0911686.pdf?OpenElement> (accessed 14 March 2014).

44 The seventeenth session was held from 21 October to 1 November 2013.

45 Para 128.26 of the UPR.

46 Para 128.68 of the UPR.

47 Para 128.106 of the UPR.

48 Para 128.107 of the UPR.

49 Para 128.108 of the UPR.

50 Para 128.109 of the UPR.

51 Para 128.110 of the UPR.

52 Para 128.111 of the UPR.

53 Para 129.10 of the UPR.

- Formulate strict legislation to prevent abuse and exploitation of children with disabilities by parents or other members of society; and provide necessary measures to assist them in their quest of justice⁵⁴

2.4 Was there any domestic effect on Mauritius' legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that has been ratified require Mauritius' legislature to incorporate it into the legal system before the instrument can have force in Mauritius' domestic law? Have Mauritius' courts ever considered this question? If so, cite the case(s).

The ratification of international and regional human rights instruments led to the adoption of many laws aimed at the protection of human rights. Some of the laws pertaining to the rights of PWDs are as follows:

- The Equal Opportunities Act 2008
- The Training and Employment of Disabled Persons Act 1996
- The National Council for Life Rehabilitation of Disabled Persons Act 1986
- The Society for the Welfare of the Deaf Act 1968
- The National Solidarity Fund Act 1991
- The Social Aid Act 1983
- The Lois Lagesse Trust Fund Act 1983
- The Child Protection Act 1994
- The Ombudsperson for Children Act 2003
- The National Women's Council Act 1985
- The Employment Rights Act 2008
- The Social Aid Act 1983
- The Unemployment Hardship Relief Act 1983

The 1968 Constitution of the Republic Mauritius (Constitution of Mauritius) and other legislation make no reference as to whether there is a need to incorporate an international instrument into Mauritius' legal system for it to have any force of law. Since the practice of dualism is more popular in Commonwealth African Countries,⁵⁵ it has been the practice of Mauritius to adopt a law in the Parliament for it to be binding.

The judiciary have, in several instances, emphasised that Mauritius is not bound by international instruments that had not been incorporated in the domestic legislation. In the case of *Matadeen v Pointu*⁵⁶ the court held that '... a State Party is not obliged to incorporate the provisions of the Covenant into its domestic law ... [f]urthermore, interpretation of the Covenant allows a "margin of appreciation" to the State Party in deciding what amounts to the equal protection of the law and there is no reason why that margin of appreciation should be engrossed by the judicial branch of government rather than the legislature or executive'.

In *Jordan v Jordan*⁵⁷ it was highlighted that '... whilst our Constitution proclaims that Mauritius shall be a sovereign democratic State, it also establishes

54 Para 129.39 of the UPR.

55 JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 27.

56 *Matadeen v Pointu* Privy Council Appeal No 14 of 1997 para 24.

57 *Jordan v Jordan* 2000 SCJ 226.

the principle of separation of powers; that each of the three arms of Government has a distinct role to play and each should confine itself to its specific domain; that there was a need for the Legislature to pass the necessary legislation to incorporate a Convention (which is usually acceded to by the Executive) into our municipal law before the Judiciary can take cognizance of it and apply it as its own domestic law'. In *Pulluck v Ramphul*⁵⁸ it was concluded that '[t]he provisions contained in international instruments can therefore hardly be of help to respondents when there is no evidence of their incorporation into our domestic law'.

Finally, *Ex Parte Hurnam Devendranath, a Barrister-at-Law*⁵⁹ clearly established that '[i]t is a well-settled principle that unratified and unincorporated treaties are of no direct effect in our courts'.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Although there is no specific domestic piece of legislation that directly concern the rights of PWDs, the acts listed in 2.4 above each ensures that the rights of PWDs are protected in all spheres of life. The new Government Programme 2012-2015 presented by the then Acting President of Mauritius on 16 April 2012 stipulates that the government intends to introduce a Disability Bill which will give directly give effects to the provisions of the CRPD.⁶⁰

3 Constitution

3.1 Does the Constitution of Mauritius contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

The Constitution of Mauritius does not contain any provisions which directly address disability.

3.2 Does the Constitution of Mauritius contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Section 16(3) of the Constitution provides for an exhaustive list of factors on which people cannot be discriminated against. Disability does not form part of this exhaustive list.⁶¹

58 *Pulluck v Ramphul* 2005 SCJ 196.

59 *Ex Parte Hurnam Devendranath, a Barrister-at-Law* 2007 SCJ 289.

60 Para 52 of the Government Programme 2012-2015, available at http://primeminister.gov.mu/English/Documents/Govt_Prog2012-15.pdf (accessed 16 May 2014).

61 Sec 16(3) of the Constitution of Mauritius: 'In this section, 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex 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 that are not accorded to persons of another such description.'

4 Legislation

4.1 Does Mauritius have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Legislation that directly addresses issues relating to disabilities is as follows:

- **The Training and Employment of Disabled Persons Act 1996 (TEDP)**

The TEDP establishes a Board, known as the Training and Employment of Disabled Persons Board, which has to fulfil the following functions:⁶²

- (a) prevent, as provided under section 16, discrimination against disabled persons resulting from or arising out of their disability;
- (b) encourage the establishment of appropriate vocational centres and other institutions for the training of disabled persons;
- (c) operate and encourage schemes and projects for the training and employment of disabled persons;
- (d) improve generally the social and economic status and condition of disabled persons;
- (e) perform such other functions, not inconsistent with this Act, as the Minister may, in writing, specify or approve.

It further provides for the establishment of a register for PWDs and imposes an obligation on employers to provide for suitable employment⁶³ for PWDs⁶⁴ without any discrimination on the grounds listed in section 16 of the TEDP.

- **The National Council for Life Rehabilitation of Disabled Persons Act 1986 (NCRDP)**

The NCRDP sets up a National Council for the Rehabilitation of Disabled Persons.⁶⁵ The objectives of the council are as follows:⁶⁶

- (a) to co-ordinate the activities of voluntary organisations catering for disabled persons;
- (b) to promote the development and expansion of rehabilitative services;
- (c) to advise the Minister on all aspects of the rehabilitation of disabled persons;
- (d) to coordinate with private international and national agencies engaged in the rehabilitation of disabled persons and to disseminate technical information received from these sources;
- (e) generally to promote the welfare of disabled persons.

- **The Society for the Welfare of the Deaf Act 1968 (SWD)**

The SWD incorporates a Society for the Welfare of the Deaf⁶⁷ which targets the following objectives:⁶⁸

62 Sec 4 of the TEDP.

63 Sec 14 of the TEDP.

64 Sec 13 of the TEDP.

65 Sec 3 of the NCRDP.

66 Sec 4 of the NCRDP.

67 Sec 2 of the SWD.

68 Sec 3 of the SWD.

[T]o aid, train and educate all deaf persons in Mauritius; to assist them in obtaining medical treatment and suitable employment; to grant them any material relief of which they may be in need; to erect, open and manage such training centres, schools and hostels as may be deemed necessary.

The SWD also draws the powers and the boundaries within which the Society for the Welfare of the Deaf is to operate.

- **The Lois Lagesse Trust Fund Act 1983 (LLTFA)**

The LLTFA establishes a Lois Lagesse Trust Fund,⁶⁹ which has as its objective the facilitation of persons with visual impairments in the mainstream. The aims of the Lois Lagesse Trust Fund are as follows:⁷⁰

- (a) to aid, train and educate all blind persons in Mauritius;
- (b) to assist blind persons in obtaining medical treatment and suitable employment;
- (c) to set up and manage training centres, schools and hostels for the blind;
- (d) to cater for the general welfare of the blind.

4.2 Does Mauritius have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

- **The Equal Opportunities Act 2008 (EOA)**

The EOA prohibits direct or indirect discrimination pursuant to section 5 and section 6 of the Act. In both sections, discrimination based on the 'status' of the aggrieved person is prohibited. The interpretation section (section 2) of the EOA includes impairment in the definition of 'status'. It implies that discrimination on the grounds of disability is illegal under the EOA.

- **The National Solidarity Fund Act 1991 (NSF)**

The NSF Act can be indirectly interpreted as being of financial assistance to persons with disabilities. For instance, Section 4 of the Act provides that citizens in need of financial assistance to undergo medical treatment in foreign institutions can financially benefit from this fund.

- **The National Pensions Act 1976 (NPA)**

The NPA caters for disabilities arising out of accidents in employment and financial assistance required in the form of pensions. Section 8 provides for invalid basic pensions⁷¹ whereas section 26 caters for disablement pensions and allowances. There is equally monetary aid provided to former employees who fell victim to industry injuries.

- **The Social Aid Act 1983 (SAA)**

The SAA provides for social assistance to not only a person with disability, but the aid also extends to others who may be dependent on the persons with the disability. Section 3 qualifies a person and the dependants as a beneficiary of social aid if, as a result of any physical or mental disability, one is temporarily or permanently incapable of earning adequately his livelihood, and has insufficient means to support oneself.

⁶⁹ Sec 3 of the LLTFA.

⁷⁰ Sec 4 of the LLTFA.

⁷¹ Section 8(1) of the NPA: 'Subject to section 10, a person shall be qualified to receive an invalid's basic pension where - (a) he is disabled and is likely to be so disabled for a period of at least 12 months; and (b) he has reached the age of 15 and is under the age of 60.'

- **The Child Protection Act 1994 (CPA)**

The CPA provides for the child mentoring scheme which takes care of child victims of neglect, suffering from mild behavioural problems, are in distress or having problems of social adaptations. These problems are often seen in children with disabilities. Under this scheme, they can be properly mentored and looked after. Sexual offences on children with disability, ill treatment or abandonment or forcing a child with a disability to beg would also amount to a criminal offence under the CPA.

- **The Ombudsperson for Children Act 2003 (OCA)**

The OCA ensures that the rights, needs and interests of children including children with disabilities, are given full consideration by public bodies, private authorities, individuals and associations of individuals. It also helps to promote the best interests of the child and promote compliance with the CRPD.

- **The Employment Rights Act 2008 (ERA)**

Persons with disabilities whose contract is being terminated can receive compensation under the ERA. The ERA also provides for a workfare programme. The workfare programme consists of the payment of a transition unemployment benefit to a worker whose agreement has been terminated.

- **The Unemployment Hardship Relief Act 1983 (UHRA)**

Under the UHRA, a person with a disability who is not working may get monetary assistance from the state. According to section 3, any person below the age of 60 with a wife or a child or who has a disability shall be qualified to claim hardship relief.

- **The Building Control Act 2012 (BCA)**

To ensure that persons with impaired mobility and communication have access to buildings in a comfortable manner, section 3 of the BCA provides for accessibility as one essential building requirement.

- **The HIV and AIDS Act 2007 (HAA)**

Section 3 of the HAA explicitly states that HIV or AIDS are not to be considered as a disability. One's HIV status cannot be used as a ground to discriminate against that person. The Act further mentions that HIV or AIDS cannot be regarded as a disability or incapacity in any other act of Parliament also.

5 Decisions of courts and tribunals

- 5.1 **Have the courts (or tribunals) in Mauritius 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 court or tribunals have decided on an issue(s) that relates to disability in Mauritius.

6 Policies and programmes

- 6.1 **Does Mauritius have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

- **National Policy Paper and Action Plan on Disability 2007 (NPP)**⁷²

The NPP, which has the title 'Valuing people with disabilities', recognises that 'without a commitment from Government, civil society and Disabled People Organisations, (DPOs), the rights of persons with disabilities can never triumph over prejudice and discrimination'.⁷³ Chapter 4 of the document expands on the guiding principles, policy objectives and goals. Chapter 5 lays down the National Plan of Action and the recommendations to be followed to ensure a better protection of the rights of PWDs.

- **Special Education Needs and Inclusive Education Policy and Strategy 2006 (SEN)**⁷⁴

The SEN recognises that children with disabilities should attend school and that it is important for the government to have a strategic plan for inclusion and special educational needs. SEN provides for recommendations for a sustainable special education needs strategy.

- **Respite care programme by the Minister of Social Welfare 2010**

Children with a disability registered at the Disability Unit, which is under the aegis of the Ministry of Social Security, National Solidarity and Reform Institutions, have the privilege of regularly participating in leisure activities organised by the Ministry of Social Welfare.

72 Ministry of Social Security, National Solidarity and Senior Citizens Welfare and reform Institutions 'National Policy Paper and Action Plan on Disability – "Valuing People with disabilities"' (2008) available at <http://www.gov.mu/portal/sites/disability/policypaper.pdf> (accessed 18 March 2014).

73 As above 8.

74 Ministry of Education and Human Resources 'Special Needs and Inclusive Education in Mauritius – The Policy and Strategy Document' (2006), available at <http://ministry-education.gov.mu/English/educationsector/Documents/sen.pdf> (accessed 18 March 2014).

6.2 Does Mauritius have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

• Government Programme 2012-2015 (GP)⁷⁵

The following extracts from the GP address disability:

- ‘Government will further pursue the implementation of the UN Convention on the Rights of Persons with Disabilities by giving a new boost to training and employment of persons with disabilities. Relevant amendments will be brought to the Training and Employment of Disabled Persons Act and the National Council for Rehabilitation of Disabled Persons Act.’⁷⁶
- ‘Government proposes to introduce a Disability Bill in line with the Convention provide further protection to persons with disabilities against all forms of discrimination.’⁷⁷
- ‘Government will set up a Respite Care Centre with a view to providing specialised rehabilitative services and leisure facilities to persons with disabilities.’⁷⁸

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Mauritius 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.

There is no official body which addresses violations of the rights of PWDs.

7.2 Other than the ordinary courts or tribunals, does Mauritius have any official body that though not established to specifically address violations of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Equal Opportunities Tribunal established in terms of Part VII of the EOA is an additional platform where issues pertaining to violations of rights of people with disabilities may be addressed. The above Tribunal has jurisdiction in matters referred to it by the Equal Opportunities Division. Section 41 of the EOA provides for appeal to the Supreme Court from the decision of the Equal Opportunities Tribunal if one is not satisfied with the proceedings before it.

⁷⁵ ‘Government Programme 2012-2015: Moving the Nation Forward’ (2012), available at <http://www.labourparty.mu/programme/Govt-Address-2012.pdf> (accessed 18 March 2014).

⁷⁶ Para 51.

⁷⁷ Para 52.

⁷⁸ Para 53.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Do you have a Human Rights Commission, Ombudsman or Public Protector in your country? 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 your country has ever addressed issues relating to the rights of persons with disabilities.

- The National Human Rights Commission (NHRC) has been created by the Protection of Human Rights Act of 1998. The NHRC's mandate is limited to written enquiries made by a victim of a violation or a possible violation of the provisions of Chapter II of the Constitution.⁷⁹ As stated in 3 above, Chapter II of the Constitution does not contain any provision relating to disability and therefore, the NHRC's mandate does not cover the promotion and protection of the rights of PWDs.
- Chapter IX of the Constitution establishes the office of an Ombudsman. The Ombudsman investigates issues of public maladministration. Since the Disability Unit is a public body, the office of the Ombudsman has the responsibility to ensure that the Disability Unit is offering the proper services to members of the public.
- The Ombudsperson for Children Act 2003 provides for the office of the Ombudsperson for Children. The Ombudsperson for Children has to ensure that the rights, needs and interests of all children are protected by public bodies, private associations or individuals. Therefore, the rights, needs and interests of children with disabilities also fall within the Ombudsperson for Children's mandate.

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Do you have organisations that represent and advocate for the rights and welfare of persons with disabilities in Mauritius? If so, list each organisation and describe its activities.

Apart from the organisations in 4.1 above, there are about 62 non-governmental organisations, which represent and advocate for the rights and welfare of PWDs in Mauritius.⁸⁰ Some of these organisations are as follows:

- **The 'Centre d'Education et de Développement pour les Enfants Mauriciens' (CEDEM)**⁸¹
The CEDEM was founded in 1984 and its main objective is to ensure that all vulnerable children have a better quality of life. It has schools which host children with disabilities and slow learners and also concentrates on family counselling.

⁷⁹ Sec 4 of the Protection of Human Rights Act 1998.

⁸⁰ A list of organisations of PWDs in Mauritius is available at <http://www.gov.mu/portal/sites/disability/list.pdf> (accessed 18 March 2014).

⁸¹ CEDEM's website: <http://www.lccedem.org/services.htm> (accessed 19 March 2014).

- **Cypres Handicapped Association**⁸²

The Cypres Handicapped Association's was officially registered in 1998 and focuses on the social and economic empowerment of adults with disabilities.

- **'Fraternité Mauricienne des Malades et Handicapés'**

The above NGO runs a special school for children with severe physical disabilities. It also has a programme whereby it provides training for athletes who play basketball from wheelchairs.

- **Century Welfare Association**

One of the projects of the Century Welfare Association is the Century Special Education Needs School for children with disabilities between the age of 5 and 15. According to the school's website the objectives are 'to provide access to proper attention and care', 'to enhance self-esteem and confidence building', and 'to provide appropriate education and promote self-development'.⁸³

- **'Association Handicapés Sans Frontières'**

This particular NGO promotes sports, leisure and recreational activities for PWDs.

- **The Southern Handicapped Association**

The Southern Handicapped Association was registered with the Registrar of the Association in 1986 and was affiliated with the Ministry of Social Security in 1987. It runs a day care centre for children and adolescents with disabilities. Its current project is the creation of a pre-primary unit for children with mental disabilities aged from 3 to 5 years old.

- **'Fondation Georges Charles'**

The 'Fondation Georges Charles' runs a specialised school for children with intellectual disabilities. It also organises workshops for adolescents and adults with intellectual impairment.

- **'Association des parents d'enfants inadaptés de l'île Maurice' (APEIM)**⁸⁴

The APEIM is 'responsible for the care, support, development and well-being of children and adults with developmental disabilities, moderate to severe mental handicap, in some cases with other related disorders'.

- **'Association de Parents des Déficients Auditifs' (APDA)**

The APDA provides for special education, training, sports and cultural activities for children with hearing impairment. It also runs courses on sign language and an adult education programme for deaf persons.

- **'Liziedan la main'**⁸⁵

'Liziedan la main' was set up in 1981. It engages in the rehabilitation of visually impaired persons. Its services cover eye care, education, training the organisation of recreational/leisure activities such as music and sports.

82 Cypres Handicapped Association's Website, available at <http://cypreshandicappedasso.intnet.mu/> (accessed 19 March 2014).

83 Website of the Century Welfare Association, available at <http://www.centuryassociation.org/services/special-needs-school> (accessed 19 March 2014).

84 Website available at <http://www.apeim.org/index.php?langue=eng> (accessed 19 March 2014).

85 Liziedan la main's website is available at <http://www.lidm.intnet.mu/> (accessed 19 March 2014).

9.2 In the countries in your region, are DPOs organised/coordinated at a national and/or regional level?

In Mauritius, DPOs are regulated by different boards. Some of them are the National Council for the Rehabilitation of Disabled Persons, the Training and Employment of Disabled Persons Board, the Lois Lagesse Trust Fund, the Society for the Welfare of the Deaf and the NGO Trust Fund.

To gain recognition as a DPO, an association must apply for registration under section 6 of the Registration of Associations Act 1978.⁸⁶

9.3 If Mauritius has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

DPOs are generally involved in workshops and conferences that are organised by relevant ministries. Their participation, as mandated by the CRPD, is ensured by their presence and in some cases by the possibility of submitting reports.⁸⁷ However, it is important to highlight that due to the absence of the rights of PWDs and public interest litigation or class action in the Constitution, it becomes quite complex for DPOs and NGOs to ensure a better protection of the rights of PWDs through constitutional litigation.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

The Universal Periodic Review (UPR) for Mauritius was conducted in 2013 and about 20 DPOs came together to present a report on that occasion. They pointed out the main issues and provided for recommendations to be considered.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

There is no proper legal or normative framework concerning DPOs. The nature and the understanding of the role and functions of NGOs or DPOs, by themselves, are questionable. DPOs tend to work in a vacuum where only a single relationship is defined, the one between themselves and the state or financial partners.

86 Section 6 of the Registration of Associations Act provides:
(1) Subject to subsection (2), every application under section 5 shall be accompanied by –
(a) 2 copies of the rules of the association;
(b) a list of the members, showing their names, occupations and addresses;
(c) a list of the officers, showing their titles, names and addresses;
(d) a certified copy of the minutes of proceedings of the meeting at which the rules were approved and the officers were appointed;
(e) a notice of the address of the office of the association; and
(f) the prescribed fee.
(2) An application for registration under section 5 (2) shall also specify –
(a) the names and addresses of the person authorised to represent the foreign association in Mauritius;
(b) the office of the association in Mauritius; and
(c) the nature of the activities in which the foreign association intends to engage in Mauritius.
(3) The Registrar may, by written notice, require the secretary to provide any further information he may reasonably require for the purpose of considering the application.
(4) Where the Registrar is of opinion that the association does not comply with this Act or, as the case may be, with the Sports Act 2001, he shall give written notice to the secretary of the failure to comply and afford the association a reasonable time in which to comply with this Act or as the case may be, with the Sports Act 2013.

87 Art 32 and 33 of the CRPD.

Information about their activities is most of the time not disseminated and they do not seek assistance from third parties. For instance, academics, the university and research tanks are never involved in what they do. There are few efforts to develop a partnership and working relations between various stakeholders. This is a huge barrier impeding the proper functioning of DPOs.

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

No.

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?

No.

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?

Training and education in the field of disability is essential. It is often observed that officers of DPOs are not necessarily qualified to handle issues on disabilities. There is a lack of training of persons who engage in DPOs. In addition, fostering links with other regional DPOs is equally important but this is not currently present in the Mauritian context. This actually impacts on their financial capacity and they fail to be part of important associations of DPOs that benefit from donor aids.

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?

As highlighted in 9.5, there is a need for proper legislative framework within which DPOs can operate. The government should therefore strive towards setting up a legal framework, which will facilitate the operation of DPOs in Mauritius. Apart from the Registration of Associations Act, DPOs do not get legal support and structure from any other legislation. Their functioning, the modes of operation and their financing are not harmonised and well publicised.

9.10 Are there specific research institutes in your region 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 Do you have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the department(s).

The Ministry of Social Security, National Solidarity and Reform Institutions has the Disability Unit which is responsible for promoting and protecting the rights and welfare of PWDs. The activities of the Disability Unit are as follows:⁸⁸

- The Disability Unit is the “focal point” for disability issues in Mauritius.
- It provides information, counselling, guidance and referral services.
- It is responsible for the conceptualisation and implementation of disability policies, projects and programmes and facilitates the process of integration of persons with disabilities in mainstream society.
- It coordinates matters relating to the UN Convention on the Rights of Persons with Disabilities.
- It organises activities, seminars and workshops on disability issues.
- It also provides an array of direct services to persons with disabilities.

11 Main human rights concerns of people with disabilities in Mauritius

11.1 Contemporary challenges of persons with disabilities in Mauritius (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

The Mauritian society still looks down on PWDs.⁸⁹ The reservation that Mauritius has on article 9.2(d) of the CRPD acts as a barrier for accessibility for PWDs. There are no public transportation means that accommodate PWDs in Mauritius. This therefore prevents PWDs from moving around independently. Furthermore, there is a lack of ‘accommodations for PWDs’ during elections.⁹⁰

⁸⁸ Website of the disability unit is available at <http://www.gov.mu/portal/sites/disability/index.htm> (accessed 19 March 2014).

⁸⁹ DPO's submission for Mauritius' UPR.

⁹⁰ US Department of State Affairs 'Mauritius-Executive summary' (2011) 8, available at <http://www.state.gov/documents/organization/186432.pdf> (accessed 19 March 2014).

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

• **Access and accommodation**

The Building Control Act 2012 makes provision for PWDs to access buildings. However, the reservation purporting to article 9.2(d) of the CRPD is a challenge for PWDs since the government of Mauritius does not feel obliged to make sure that all buildings accommodate PWDs.

• **Access to social security**

The Ministry of Social Security, National Solidarity and Reform Institutions provides for a number of social security measures for registered PWDs such as a carer's allowance, constant attendance allowance, special allowance and child allowance.

• **Access to public transport**

See 11.1 above.

• **Access to education**

The reservation to article 24.2(b) of the CRPD acts as a barrier for Mauritius to provide free inclusive education to children with disabilities. They have to either go to specialised schools or face the challenges of being in the mainstream education without any accommodation for them.

• **Access to vocational training**

The Training and Employment of Disabled Persons Act makes sure that PWDs have access to vocational training.

• **Access to employment**

See 4.2 above.

• **Access to recreation and sport**

As far as it is reasonable, recreation and sport activities are organised by either the Ministry for Social Security, National Solidarity and Reform Institutions or the DPOs.

• **Access to justice**

Support is provided for to PWDs whenever they are in contact with the law.

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Mauritius?

Section 33 of the Mauritian Constitution provides for the qualification for membership of the Parliament and it makes no reference to PWDs. However, section 34 states that a person is disqualified from membership if he 'is a person adjudged to be of unsound mind ...'.⁹¹ Nevertheless, no disqualification is made regarding a person with a physical disability. It is noteworthy that in 2009, a person with visual impairments was elected as a Mayor in one of the towns.

91 Sec 34(1)(e) of the Constitution.

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in Mauritius?

Socio-economic rights are not generally protected by the Constitution. However, the Ministry of Health and Quality of Life ensures that everyone has access to healthcare systems in the public hospitals. Moreover, there is a Mental Health Care Act of 1998, which ensures that persons with mental disabilities have access to health.

As for education, see 11.2 above.

11.5 Specific categories experiencing particular issues/vulnerability:

• **Children with disabilities**

Children with disabilities encounter difficulties with regard to access to education since they are not integrated in mainstream education.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Mauritius at the moment?

Currently, the Ministry of Social Security, National Solidarity and Reform Institutions is working on a Disability Bill, which will address specific issues related to PWDs.

12.2 What legal reforms are being raised? What legal reforms would you like to see in your country? Why?

The Concept of a one-stop shop as the principal provider of social services to persons with disabilities is being envisaged by the Government. However, the actions of the Government towards realisation of this project has been very slow with seven years down the line without much progress.

It is proposed that first there must be a proper domestication of the CRPD to provide for the proper legal structure and to hold the government accountable. Consequently, based on those obligations, it would then be possible to pressurise the government whenever such 'statements' are made without appropriate actions.

There equally needs to be a proper educational campaign on disability rights in Mauritius. As it is, the social and compassionate aspect in relation to persons with disabilities are not at all lacking. Mauritians help and contribute socially when it comes to Persons with Disabilities. However, what is equally important is that they work towards the empowerment of those people by acknowledging their rights and start pushing through a legal agenda for them by lobbying various stakeholders.

UGANDA

Louis O Oyaró *

1 Population indicators

1.1 What is the total population of Uganda?

According to the 2002 National Housing and Population Census, Uganda has a total population of 24.4 million people. But with a Population growth rate of 3,2 per cent, Uganda's population was estimated to be at 34.1 million as at mid 2012.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Uganda. What criteria are used to determine who falls within the class of persons with disabilities in Uganda?

Data on disability prevalence is varied. According to the official 2002 Uganda Population and Housing Census, disability prevalence was estimated at 4 per cent. Identification and measurement of disability prevalence though not specifically stated was based on the definition from the 1980 World Health Organization's (WHO) International Classification of Impairments, Disabilities and Handicaps.² According to the Census, 'disability' was defined

as a physical or mental handicap which has lasted for six months or more, or is expected to last at least six months, which prevents the person from carrying out daily activities independently, or from participating fully in education, economic or social activities.³

In contrast, the Uganda National Household Survey of 2009/2010 estimated disability to be at 16 per cent of Uganda's then 30.7 million population. This Survey followed a substantial functional limitation approach rather than an impairment based model to identify disability.⁴

* LLM Candidate, International and Comparative Disability Law and Policy, Center for Disability Law and Policy, National University of Ireland, Galway.

1 Uganda Bureau of Statistics (UBOS) 'Statistical abstract' (2012) 9.

2 WHO *International classification on impairments, disabilities and handicaps: A manual of classification relating to the consequences of disease* (1980) 27, 143 & 183.

3 Government of Uganda 'National Population and Housing Census' (2002) 17.

4 Uganda Bureau of Statistics (UBOS) 'Uganda National Household Survey' (2010) 156, available at <http://www.ubos.org/UNHS0910/unhs200910.pdf> (accessed 24 February 2014).

1.3 What is the total number and percentage of people with disabilities in Uganda?

As already stated, according to the 2002 Population and Housing Census, at least 1 out of every 25 people, or 4 per cent of Uganda's then 24.4 million population, are disabled. Later studies have however revealed a higher prevalence of disability in Uganda. According to the Uganda National Household Survey, the estimated disability population was 16 per cent or 5 088 000 people out of Uganda's then estimated 31.7 million population in 2010.⁵

1.4 What is the total number and percentage of women with disabilities in Uganda?

The 2002 National Population and Housing Census does not provide segregated data on prevalence rates of disability amongst women. The same is true for the National Household Survey 2012.

1.5 What is the total number and percentage of children with disabilities in Uganda?

According to the 2002 Population and Housing Census, disability prevalence was at 2 per cent amongst children. The National Household Survey on the other hand does not provide an estimate on prevalence rates amongst children.

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Uganda?

According to the National Population and Housing Census the most frequently observed types of disability were:

- Loss/limited use of limbs (35 per cent);
- Serious spine problems (22 per cent);
- Hearing impairments (15 per cent);
- Sight impairment (6.7 per cent);
- Speech impairment (3.9 per cent);
- Mental retardation (3.6 per cent);
- Mental illness (3.6 per cent); and
- Other disabilities (9.6%)⁶

⁵ As above.

⁶ National Population and Housing Census (n 3 above) 18.

2 Uganda's international obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Uganda? Did Uganda sign and ratify the CRPD? Provide the date(s).

Uganda signed the CRPD and its optional protocol on 30 March 2007 and ratified both instruments on 25 September 2008 without reservations.⁷

2.2 If Uganda has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Uganda 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?

Uganda submitted its first CRPD country report in March 2013. However, it was due in 2010. The specific reason for the delay is unclear. However, despite having an in-house government department on disability (the Department of Elderly and Disability Affairs in the Ministry of Gender, Labour and Social Development) the National Council for Disability was instead directed by government to spearhead the preparation and submission of the national report on the CRPD.⁸

The committee is yet to review the Uganda country CRPD initial report.

2.3 While reporting under various other United Nations' instruments, or under the African Charter on Human and People's Rights, or the African Charter on the Rights and Welfare of the Child, did Uganda 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?

Generally, most of Uganda's reports to various UN conventions and regional instruments have not specifically addressed persons with disabilities but instead human rights concerns for all persons. There are however isolated cases of mention made of persons with disabilities, they include:

- The 2011 fourth Uganda periodic report to the African Commission on Human and Peoples' Rights on article 16 of African Charter makes mention of the government's mental health initiatives including the need for the enactment of a new national

⁷ UN Enable 'Convention and Optional Protocol signatures and ratifications': <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 24 February 2014).

⁸ Government of Uganda 'Initial status report on the United Nations Convention on the Rights of Persons with Disabilities' (2010) 4.

Mental Health Bill and the revision of the Mental Health Policy.⁹ The Reports also mention the activities of the Equal Opportunities Commission (EOC), its primary objective is to promote equality of opportunity of all marginalised groups including persons with disabilities.¹⁰ Unfortunately, the resultant concluding observations by the African Commission does not make reference to persons with disabilities.

- The 2010 Government of Uganda Report to the Committee of Experts on the Rights and Welfare of the Child notes the various kinds of discrimination faced by children with disabilities in educational institutions especially as a result of the non-provision of reasonable accommodation. It also highlights the various challenges faced by children with disabilities in their access to health services and justice and states that too often such children have been victims of negative community and cultural attitudes. As a solution, the report states that the government has established the National Council for Disability, to implement policy and advance advocacy in favour of persons with disabilities.¹¹ In response, the Committee of Experts recommended that the government put in place measures to raise awareness about disability in order to combat negative social perceptions and discrimination.¹² The Committee also recommended that the government of Uganda put in place measures to encourage integration of children in mainstream education and to promote the training of teachers accordingly.¹³
- Uganda's third periodic report to the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) does not specifically report on women with disabilities. However, it notes with concern the diversity in class amongst women and that such differences often lead to further marginalisation.¹⁴

2.4 Was there any domestic effect on Uganda'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 Uganda's legislature to incorporate it into the legal system before the instrument can have force in Uganda domestic law? Have Uganda's courts ever considered this question? If so, cite the case(s).

Yes. To pick one thematic instrument, the CEDAW and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or Maputo Protocol, have formed the basis for various legislation protecting the rights of women in Uganda. For example, the Prohibition of Female Genital Mutilation Act, 2010 was adopted in December 2009 to protect women from the harmful cultural practice of female genital mutilation and the Domestic Violence Act was adopted in 2010 to play a critical role in protecting women from violence at home and in the community.

According to the Ratification of Treaties Act,¹⁵ all treaties that have been ratified have to be presented before parliament (the legislature). However, the status of ratified treaties in domestic law is still unclear and any presentation before parliament may not have any bearing on its domestic applicability. This has not

9 Government of Uganda 'Fourth periodic report to the African Commission on Human and Peoples' Rights' (2011) 18.

10 Fourth Periodic Report (n 9 above).

11 Government of Uganda 'Implementation on the African Charter on the Rights and Welfare of the Child in Uganda' (2007) 13.

12 African Committee of Experts on the Rights and Welfare of the Child 'Recommendations and observations to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child on the initial implementation Report of the African Charter on the Rights and Welfare of the Child' (2010) 2.

13 African Committee of Experts (n 12 above) 5.

14 Government of Uganda 'Third periodic report to the Committee on the Elimination of Discrimination against Women on the Convention on the Elimination of all forms of Discrimination against Women' (2000).

15 Laws of Uganda, Ratification of Treaty Act, Cap 204, secs 4 & 6; Constitution of the Republic of Uganda, 1995, art 123 (2).

been helped by the fact no regulations or rules have been made to enable the application of the Ratification of Treaties Act. Thus it should be noted that ratification of treaties and their coming into domestic effect has grown out of usage rather than as a result of standardisation by law.¹⁶

In addition, no superior court in Uganda has addressed the question of whether the legislature has to incorporate international treaties before they can have domestic effect. Regardless, there are instances where courts have positively applied international treaties. One of the most recent cases is the application of the treaty in the International Criminal Court (ICC) in the case of *Uganda v Thomas Kwoyelo*.¹⁷ Others include: *Attorney General v Susan Kigula*¹⁸ where the Supreme Court invoked international law to inform its decision on the death penalty and *Uganda v Peter Matovu*¹⁹ where the High Court relied on provisions of the CEDAW.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

Yes, there are a number of treaties whose provisions have been incorporated verbatim into domestic law, these include: the Rome Statute (every significant part has been incorporated in the International Criminal Court Act); the Geneva Convention (has specified provisions incorporated in the Geneva Convention Act); and the Diplomatic Relations Convention (has specific provisions incorporated in the Diplomatic Privileges Act). Additionally, treaties have been incorporated in schedules of specific Acts. Examples include all the above treaties that have appeared in the schedule of the above respective domestic legislation.

The CRPD has not been incorporated verbatim in any national legislation nevertheless as discussed above it has effect and domestic legal status.

3 Constitution

3.1 Does the Constitution of Uganda contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

Yes, the Constitution contains provisions that directly address disability. The following are some of the constitutional provisions which make direct reference to the protection and promotion of persons with disabilities in Uganda:

- National Objective XVI provides that the state shall recognise the rights of persons with disabilities to respect and human dignity.
- National Objective xxiv(C) of the Constitution provides that the state shall promote the development of sign language for the deaf.
- Article 21 provides for equality and prohibits discrimination against all persons and specifically includes persons with disabilities.

16 See: H Onoria 'Uganda case study' in D Shelton (ed) *International law and domestic legal systems* (2011) 594-619.

17 HCT-00-ICD 02/2010 (unreported).

18 Constitutional Appeal No 3/2006 (2009) UGSC 6 (SC) (21 January 2009) 12.

19 Criminal Session Case No 146/2001 (2002) UGHC 72 (19 October 2002).

- Under article 32 the state shall take affirmative action in favour of marginalised groups including persons with disabilities and shall make laws including laws to establish and Equal Opportunities Commission for the full fulfilment of this clause.
- Article 35 provides for the rights of persons with disabilities to respect and human dignity. It also imposes a duty on the state to make laws appropriate for the protection of persons with disabilities.
- Article 75 provides for the composition of parliament to include such representatives including representatives of persons with disabilities.

3.2 Does the Constitution of Uganda contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Yes, the Constitution contains provisions that make reference to universal application of human rights for all persons and groups including persons with disabilities. Some of these include:

- Article 20 provides for the fundamental rights of all individuals and groups (including persons with disabilities) to be respected and protected by the state.
- Article 22 provides for the right to life of all persons.
- Article 24 protects all persons and groups from torture or cruel, inhuman or degrading treatment and punishment.
- Article 26 provides for the right to property for all persons.
- Article 28 provides for the right to a fair hearing for all persons in the formal justice system including disabled persons.
- Article 30 provides for the right to education for all.
- Article 31 provides for the right to found a family? for all persons.
- Article 36 provides for the rights of minorities to participate in the judicial making process.
- Article 38 provides for the civic rights for all persons.

4 Legislation

4.1 Does Uganda have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Yes, Uganda has three primary disability specific legislations:

- The Persons with Disabilities Act, 2006²⁰ is the primary legislation for the protection of human rights for persons with disabilities. It makes provisions for the elimination of all forms of discrimination against persons with disabilities and calls for the equalisation of opportunities.
- The Mental Treatment Act²¹ enacted in 1938 (revised in 1964) is still applicable in Uganda today. The Act itself is primarily related to persons with mental disabilities and follows the old medical model approach to addressing issues. It provides for the declaration of unsound mind by the court and subsequent compulsory detention and treatment and/or rehabilitation.

20 Laws of Uganda, Persons with Disabilities Act, 2006 sec 3.

21 Laws of Uganda, Mental Treatment Act Cap 279 sec 4, 6 & 9.

- The National Council for Disability Act, 2003 establishes the National Council for Disability, its key function is to act as a national body through which the needs, problems, concerns, potential and ability of persons with disabilities of persons with disabilities can be communicated to the government and its agencies. The Council is also responsible for monitoring and evaluating the extent to which the government, nongovernmental organisations and private institutions include and meet the needs of persons with disabilities. Amongst its many functions the Council acts as a coordinating body between government departments, service providers and persons with disabilities.²²

4.2 Does Uganda have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

- The Employment Act, 2006 provides for the protection and equality of all persons employed in the work place including persons with disabilities.
- The Equal Opportunities Commission Act: The Commission was appointed in 2009 with one of its five members being a woman with a disability. The Commission, with a fully-fledged secretariat, has embarked on its work of promoting equal opportunities for marginalised groups, persons with disabilities included.
- The Business, Technical, Vocational Education and Training Act 12 of 2008, promotes equitable access to education and training for all disadvantaged groups, including disabled people.
- The Local Government Act, 1997 provides for representation of disabled people at the various Local Council levels.
- The Parliamentary Elections Statute, 1996: Section 37 of the Parliamentary Elections Statute provides for five seats in parliament for representatives of persons with disabilities.
- The Traffic and Road Safety Act, 1998, prohibits the denial of a driving permit on the basis of disability.
- The Uganda Communications Act, 1998 provides for the promotion of research into the development and use of new communications techniques and technologies, including those which promote accessibility of hearing-impaired people to communication services.
- The Uganda National Institute of Special Education Act, 1998 provides for the establishment of the Kyambogo National Institute of Special Education, training of teachers for children with special needs as well as special education teachers.
- The Workers' Compensation Act, 2000, provides compensation to workers who are injured or disabled through industrial accidents.
- The Equal Opportunity Act, 2006 and the Employment Act 6 of 2006 both prohibit discrimination of persons in employment based on disability.
- The Universities and Other Tertiary Institutions Act, as amended, provides for affirmative action during admission of persons with disabilities to public tertiary institutions.

22 Laws of Uganda, National Council for Disability Act, 2003 sec 4.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Uganda ever decided on 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.

Yes, there are number of cases directly relating to disability that have been decided by courts in Uganda. However, due to poor reporting very few of these cases are readily available. Nonetheless, below are two recently decided cases relating to disability:

- ***Legal Action for Persons with Disabilities v Attorney General***²³

The applicants sued the Attorney General (the official government legal representative), Kampala Capital City Authority (KCCA) and Makerere University Kampala (MUK) on the grounds that public buildings and facilities within Kampala city and Makerere University (an institution of higher education) were not accessible to persons with disabilities. The applicants relied on the anti-discrimination provisions in the Constitution and the Persons with Disabilities Act of 2006 mandating that all public buildings be made accessible to persons with disabilities to enable them to fully participate in society.

In its judgement, the High Court held that KCCA and MUK had taken sufficient reasonable steps within their means to make their buildings and facilities accessible. The court also held that KCCA and especially MUK had limited resources and could not fully make all buildings immediately accessible and that the current state of inaccessibility was attributable to buildings constructed prior to the period when issues of disability became a pertinent national agenda. The court also noted that to expect MUK to prioritise resources to making buildings accessible would substantially increase the cost of education hence affect other students. On the above grounds, the court dismissed the application.

- ***Nyeko Okello & Santo Dwoka v Centenary Rural Development Bank Limited***²⁴

The plaintiffs, both persons with disabilities and customers of Centenary Rural Development Bank (CERUDEB), sued CERUDEB on the grounds that the bank, including access to the main banking hall, was inaccessible for persons with disabilities. Prior to the suit the plaintiffs had notified CERUDEB about the lack of ramps to facilitate their access to the bank but to no fruition. The plaintiffs sued. The bank afraid of costs arising from loss of the suit, eventually constructed the ramps. Since the breach had been remedied the judge advised the plaintiffs to settle the matter out of court. A consent judgement was later entered into between the parties with costs being awarded to the plaintiffs however no damages were awarded by the court.

23 High Court of Uganda, Misc App No 146/2011, judgment delivered 20 May 2014 (unreported), case excerpt available at <http://www.ulii.org/ug/judgment/high-court/2014/42> (accessed 23 June 2014).

24 High Court of Uganda Civil Suit No 23/2008 (unreported).

6 Policies and programmes

6.1 Does Uganda have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **The Uganda National Policy on Disability 2006**

The Policy provides the basis for national interventions and programmes in favour of persons with disabilities in all government departments and activities. The priority areas of focus are accessibility, participation, capacity building, awareness raising, prevention and management of disabilities, care and support, socio-economic security, research, communication (sign language, tactile and Braille literacy) and budgeting. Other aspects considered in this national policy include the protection and promotion of the rights of persons with disabilities in spheres of health including HIV/Aids interventions, education, social security, employment and access to basic human rights services for example access to justice.²⁵

- **National Community Based Rehabilitation Programme**

In 1991, the three government ministries of health, education and social development together with the Norwegian Association of the Disabled (NAD) developed a National Community Based Rehabilitation Programme as the main strategy for the delivery of rehabilitation services and ensuring full participation in poverty eradication programmes and inclusion for persons with disabilities.²⁶ The programme was also designed to ensure early identification, assessment and referral. The programme focuses on awareness, capacity building, livelihood and influencing policy change for persons with disabilities. Currently it is being implemented in the districts of Mbarara, Bushenyi, Mbale, Kabale, Mukono, Iganga, Kamuli, Ntungamo, Rukungiri, Butaleja, Busia and Kayunga.²⁷

- **The National Mine Action Programme**

The Landmine Victim's Assistance programme was launched in 2008 to raise awareness of Uganda's obligation as a state party to the Mine Ban Treaty²⁸ and the CRPD. The plan provides for the

establishment of a framework for rapid response to support landmine survivors and other persons with disabilities and older who are in emergency and conflict situations to enable them participate and re-integrate into the development process and raise awareness on Uganda's obligations.²⁹

25 Ministry of Gender, Labour and Social Development 'National Policy on Disability in Uganda' (2006).

26 Norwegian Association of the Disabled 'Evaluation the Community Based Rehabilitation Program in Uganda' Final Report (2005).

27 Community Rehabilitation Programme for the Disabled: <http://www.mglsd.go.ug/?p=485> (accessed 10 March 2014).

28 United Nations *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* UN Treaty Series Volume 2056, 211.

29 Ministry of Gender, Labour and Social Development 'The Uganda comprehensive plan of action on victim assistance' (2008-2012) 2.

6.2 Does Uganda have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

Yes, these include:

- The National Gender Policy (2007) emphasises the protection of human rights for all women.
- The National Education Policy encourages equality for all in education related programming.
- The National Health Policy puts in place structures to ensure equality in the health sector.

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Uganda have any official body that specifically addresses violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.

Besides the general courts and tribunals, there are no other adjudicatory bodies that specifically address or are established to address violations of rights of persons with disabilities.

7.2 Other than the ordinary courts or tribunals, does Uganda have any official body that, though not established to specifically address violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Equal Opportunities Commission, which is established by the Equal Opportunities Commission Act of 2007,³⁰ is a fully-fledged secretariat that has the mandate to investigate and inquire into matters on its own initiative or by a complaint made to it by persons belonging to marginalised groups including persons with disabilities where discrimination in relation to opportunities has occurred.

30 Laws of Uganda, Equal Opportunities Commission 2008, sec 14.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Does Uganda have a Human Rights Commission, Ombudsman or a Public Protector in your country? 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, Ombudsman or Public Protector of Uganda has ever addressed issues relating to the rights of persons with disabilities.**

Yes. Uganda has a national Human Rights Commission established by the Constitution.³¹ The Commission has the mandate to address all human rights violations including those relating to persons with disabilities. According to the Uganda Human Right Commission Act, the Commission has adjudicatory powers to investigate on its own initiative or by complaint made to it any alleged human rights violation.³² In October 2004, the Commission established the Vulnerable Persons Unit to address issues raised by vulnerable groups including people with disabilities.³³ The Unit amongst its functions, monitors government compliance with its human right obligations to vulnerable persons. It also undertakes activities aimed at ensuring national human rights protection for vulnerable persons. At the time of reporting, it was unclear whether the Commission has handled any cases relating to violations against persons with disabilities. However, the issues raised by people with disabilities for the attention of the Commission are centred on education, transport, employment and accessibility to basic services.³⁴

The second public protection body is the Inspectorate of Government established under chapter 13 of the Constitution. The Inspectorate does not specifically handle matters relating to persons with disabilities. Its primary functions involve the promotion of natural justice, fairness, efficiency and good governance in the administration of public offices.³⁵

9 Disabled peoples organisations (DPOs) and other civil society organisations

- 9.1 Does Uganda 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, there are a number of organisations in Uganda that represent and advocate for the rights of persons with disabilities. By their names it is easy to identify the

31 Arts 51 & 52 of the Constitution of Uganda .

32 Laws of Uganda, Uganda Human Right Commission Act Cap 24 sec 7 (1)a.

33 Uganda Human Rights Commission: http://www.uhrc.ug/?page_id=1675 (accessed 3 March 2014).

34 Uganda CRPD Country Report (n 8 above) 12.

35 Art 225 of the Constitution of Uganda.

specific disability on which they focus. These are often referred to as Disabled Peoples Organisations and they include:

- The National Union of Disabled Persons (NUDIPU). Its main role is to coordinate activities of DPOs in Uganda and provide a common platform to address disability issues.
- The National Union of Women with Disabilities of Uganda (NUWODU). The organisation is primarily focused on the protection and promotion of rights for women with disabilities in Uganda. It provides leadership and training for emerging women's organisations and focuses on economic development projects.
- The Disabled Women Network and Resource Organisation.
- The Uganda Disabled Women's Association.
- Uganda Parents Care for the Mentally Handicapped.
- Comprehensive Rehabilitation Services in Uganda (CoRSU) – a hospital for people with disabilities officially opened on 27 March 2009 and to date provides orthopaedic services, plastic/reconstructive services, and therapy services through facility based and community.
- Uganda Parents' Association of Children with Learning Disabilities (UPACLED).
- Legal Action on Persons with Disability (LAPD) provides legal aid services to persons with disabilities.
- Sight Savers International supports blind prevention and rehabilitation programmes.
- Katalamwa and other Cheshire Homes provides rehabilitation services to children with disabilities.
- Basic Needs UK in Uganda advocates for the rights of persons with psychosocial services.

Other Specific organisations include:

- The Spinal Injury Association (SIA)
- The Epilepsy Support Association of Uganda (ESAU)
- The National Association of the Deaf Blind (NADB)
- The Uganda National Association of the Blind
- The Uganda National Association of the Deaf
- The Uganda Mental Health Association
- The Uganda National Action on Physical Disability
- The Uganda Federation of the Hard of Hearing
- The Uganda Albino association
- The Little People of Uganda

(The list is not exhaustive)

9.2 In the countries in Uganda's region (East Africa) are DPOs organised/ coordinated at national and/or regional level?

In practice, in Uganda, the National Union of Disabled Persons Uganda (NUDIPU) represents an umbrella organisation that brings together DPO's. Currently it is comprised of 14 DPO's and 112 district unions.³⁶ Membership is voluntary and there is no particular legislation or policy obligating DPO's to join.

36 National Union of Disabled Persons of Uganda: <http://nudipu.org/about/membership/> (accessed 4 March 2014).

9.3 If Uganda has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Following the ratification of the CRPD, DPO's have been actively engaged in informing and participating in the implementation of national programmes in favour of persons with disabilities. For example:

- DPO's were actively involved and interviewed during the preparation of the CRPD report to the UN Committee on the Rights of Persons with Disabilities.³⁷
- Since 2009 there has been debate between the government and DPOs on whether the current Persons with Disabilities Act should be annulled or amended to bring it in line with the CRPD – the government is in favour of annulment of the Act while the DPO's favour amendment of specific provisions.³⁸
- In 2009, the government embarked on the translation of the National Disability Policy into tangible activities. This process required a consultative process involving representatives from various DPO's.³⁹

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPO's have collectively and individually engaged in a wide range of activities and projects aimed at informing and ensuring their participation in the implementation process of pro-disability initiatives, some of these activities include:

- Conducting evidence based research and publishing subsequent reports intended to bring disability rights issues to the fore front, identify existing gaps and/or offer recommendations to the government.
- DPOs also carry out direct service provision and/or activities geared at protecting and/or promoting the rights of persons with disabilities.
- They also conduct public awareness campaigns geared at raising knowledge about disability rights, laws and changing attitudes of persons towards disability rights.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

DPOs have over the years faced a number of barriers:

- Financial constraints;
- Low government prioritisation and response;
- Low levels of enforcement of disability laws;
- Poor monitoring and accountability structures; and
- Negative public and individual attitude towards disabled persons.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

Nationally within Uganda, efforts are still being made to come up with best practices to ensure involvement of DPOs. However partnership with other countries and jurisdictions such as Norway and Japan, amongst others, is being

37 Uganda CRPD Country Report (n 8 above) 4.

38 Uganda CRPD Country Report (n 8 above) 7.

39 As above.

encouraged to discuss challenges and glean best practices for the involvement of all DPOs in Uganda.

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?

As a result of their persistence, DPO's are slowly gaining recognition and are consequently actively involved by the government in implementation of disability programmes. DPOs played a crucial role in the development of the Persons with Disabilities Act and in the preparation of the CRPD Uganda report. Because of their efforts the government has been moved to adopt positive steps for persons with disabilities such as: enacting laws providing for the political representation of persons with disabilities, ratifying the CRPD, developing a national disability policy and promoting legislation that encourages employment of persons with disabilities. In 2012, Martin Mwesigwa Babu a member of staff of NUDIPU was successfully nominated by the government of Uganda as a member of the Committee of Persons with Disabilities.⁴⁰

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?

Yes. In the first place, additional research and statistics are required including statistical data on disability prevalence and trends using the WHO International Classification of Functionality (ICF) model to identify disability. More national research towards understanding the correlation between disability and the community, poverty, employment, mortality, family, education, ownership of property, access to justice and health to mention but a few should also be carried out. These findings should then be used to inform comprehensive national legislation, policies and interventions for persons with disabilities.

Secondly, while there is a huge representation of physical disability and other sensory disability like a hearing impairment, persons with mental and/or intellectual disability have not been sufficiently represented. With the introduction of the CRPD more research, representation and advocacy should be directed towards this area.

Many government disability departments and even some DPO's still do not express a proper understanding of the social model human rights approach to disability adopted by the CRPD. This in consequence has led to continued acceptance of medical and charity based interventions for persons with disabilities with less than equal effort directed towards addressing social and physical barriers. As such strategic capacity building is required to address these gaps in ideological understanding.

Additional efforts are also needed to adopt proper advocacy strategies for persons with disabilities. Self advocacy, peer advocacy, group advocacy and family advocacy are some examples of advocacy strategies that have yielded particular

⁴⁰ Office of the High Commissioner for Human Rights 'Elected members of the Committee on the Rights of Persons with Disabilities': <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (accessed 5 March 2014).

success in other jurisdictions. It is crucial that more research and initiatives be directed towards advancing and developing successful advocacy techniques.

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?

Yes. Financial empowerment, capacity empowerment and full commitment by government is still required to enable DPO's to take a leading role in the implementation process of international, regional and national instruments. Recognition by the state of the status and role of DPO's in the disability movement is crucial as envisaged by the slogan repeated during the CRPD drafting process 'nothing about us without us'.⁴¹ Thus besides engaging them right from the inception of national programmes there should be a transparent and clear flow of information between government agencies dealing with disability and DPOs.

9.10 Are there specific research institutes in the region where Uganda 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?

There is no specific research institute singularly dedicated to persons with disabilities. In Uganda all research is regulated by the National Council for Science.⁴² Organisations, institutions and individuals conduct research generally and may at times focus on disability and require involvement with DPO's.

10 Government departments

10.1 Does Uganda have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the department(s).

Yes, these are:

- The Department of Disability and Older Persons, within the Directorate of Social Protection under the Ministry of Gender, Labour and Social Development. This department is headed by a Commissioner under the political supervision of the Minister of Gender, Labour and Social Development assisted by the Minister of State for Elderly and Disability Affairs. It has the overall responsibility of overseeing disability based issues.
- The Ministry of Education and Sports has a Department of Special Needs Education and Career Guidance headed by a Commissioner to ensure the requirements of children with special needs are catered for in the programming of ministry activities.

41 Disability Rights in Uganda – Research Blog: <http://disability-uganda.blogspot.ie/2012/01/nothing-about-us-without-us.html> (accessed 6 March 2014).

42 Laws of Uganda, National Council for Science and Technology Act Cap 209.

- The Ministry of Health has the Disability Prevention and Rehabilitation section, its role is to mainstream disability rights in the health sector.
- At the District and Sub County levels, disability issues are also provided for in the Local Government Act (1997), and are handled under the Department of Community Development. The position of District Inspector of Schools in Charge of Special Needs Education also exists in the District Local Government structure.
- Suffice to mention, the National Council for Disability is an independent statutory body that was established to deal with matters related to disability, its main objectives are: to promote the implementation and the equalisation of opportunities for persons with disabilities; monitor and evaluate the impact of policies and programmes designed for equality and full participation of persons with disabilities; advocate for and promote effective service delivery and collaboration between service providers and persons with disabilities; advocate for the enactment of laws and the reviewing of existing laws with a view to complying with the equalisation of opportunities as stipulated in the Constitution, other national laws and international legal instruments.⁴³

11 Main human rights concerns of people with disabilities in Uganda

11.1 Contemporary challenges of persons with disabilities in Uganda? (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

The challenges faced by persons with disabilities in Uganda are not widely different from those faced by other sub Saharan African countries. Because of the rate at which they occur here are some examples that stand out: poverty, marginalisation and exclusion, discrimination, low government prioritisation resulting in inadequate or no institutional interventions, negative cultural and social attitudes, existence of environmental physical/structural barriers, low levels of education and unemployment to mention but a few.⁴⁴

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access to public buildings**

All newly constructed public buildings such as schools and health facilities have to cater for the needs of persons with disabilities.⁴⁵ In collaboration with the Uganda National Action on Physical Disability, the Ministry of Gender and Labour and Social Development in 2010 developed accessibility standards for the removal of barriers to access buildings.⁴⁶ These standards require that all are accessible and include provisions such as ramps and elevators. In reality however, most buildings are still not accessible to persons with disabilities.

43 Secs 5 & 6 of the National Council for Disability Act.

44 'Disability scoping study: Final report' Commissioned by DFID Uganda (February 2009).

45 Secs 19 & 20 of the Persons with Disabilities Act.

46 Uganda National Action on Physical Disability in collaboration with the Ministry of Gender, Labour and Social Development 'Accessibility standards: A practical guide to create a barrier-free physical environment for persons with disabilities in Uganda' (2010).

- **Access to public transport**

Section 22 of the Persons with Disability Act provides a duty for any person involved in the business of public transport to provide facilities to enable access by DPOs. Section 44 poses penalties for any person who fails to meet these requirements.

- **Access to education**

The right to education is granted to all persons in Uganda by virtue of article 30 of the Constitution which provides that all persons have a right to education. The government is mandated to promote educational development of persons with disabilities⁴⁷ and any prohibition on the basis of disability is outlawed.⁴⁸ The Ministry of Education has a fully fledged Department of Special Needs Education and Career Guidance to promote the education of persons with disabilities.

To promote higher education for and the needs of persons with disabilities, all boards of public universities are mandated to have a member with a disability to represent persons with disabilities.⁴⁹ In addition, during admission to public universities, 4,5 points are awarded to applicants with disabilities to promote affirmative action.

- **Access to vocational training**

Section 11 of the Persons with Disability Act calls on the government to undertake measures to encourage vocational training for persons with disabilities and over the years, the Government of Uganda has been facilitating a vocational training programme to equip persons with disabilities with employable skills to promote their access to employment.⁵⁰

- **Access to employment**

The Persons with Disabilities Act, in section 12 prohibits discrimination in employment on the grounds of disability and details the grounds that are considered to constitute discrimination. Section 13 of the Act provides that persons with disabilities have a right to practice their professions and to carry on any lawful occupation, trade or business of their choice. It also calls on the government and private sectors to promote the right to employment of persons with disabilities, including those who acquire a disability during the course of their employment, to work on an equal basis with others and to earn a living by work. This stance is reechoed in the Employment Act which discourages discrimination on the basis of disability.⁵¹

- **Access to recreation and sport**

The Persons with Disabilities Act contains an extensive enumeration of the right to sports and recreational activities. Under section 30 of the Act, government is required to promote the rights of persons with disabilities to participate in recreational, leisure and sporting activities. The section also prohibits any related discrimination. In addition, in terms of section 30(4) of the Act, the government is required to use at least ten percent of all funds it commits to sports for the development of the recreation and sports of persons with disabilities.⁵²

- **Access to justice**

The various entities of the justice system – including police and courts- are covered by the provisions of Part V of the Persons with Disabilities Act. Section 25 of the

47 Sec 5 of the Persons with Disabilities Act.

48 Sec 6 of the Persons with Disabilities Act.

49 University and other Tertiary Institutions Act, 2001.

50 Uganda CRPD Country Report (n 8 above) 35.

51 Laws of Uganda, Employment Act, 2006, sec 6.

52 Also see Uganda CRPD Country Report (n 8 above) 35.

Persons with Disabilities Act prohibits such entities from excluding a person with disability from accessing services. Section 27 of the Act imposes an obligation on service providers to provide auxiliary aid or services to enable a person with a disability to use the service.

In terms of Court proceedings, the Evidence Act allows witnesses with speaking disabilities to give their testimony in writing or in signs.⁵³

• **Access to health care**

The Persons with Disabilities Act recognises the right of persons with disabilities to enjoy the same rights with other members of the public in all health institutions including general medical care.⁵⁴ It goes on to provide for the duty of the government to provide special health services required by persons with disabilities including providing access to reproductive health services which are relevant to Women with Disabilities (WWDs); enforcing user friendly hospital materials for use by persons with disabilities visiting hospitals; and encouraging population based public health programmes relevant to persons with disabilities.⁵⁵

The Ministry of Health has a Disability and Rehabilitation Section responsible for developing policies and guidelines for reducing the incidence and prevalence of disability, providing rehabilitation and promoting access to health services by persons with disabilities.⁵⁶

• **Access to social security**

There are periodical national budgetary grant schemes targeting PWDs. For example, in the 2010 national budget, the government introduced a Social Assistance Grant for Empowerment (SAGE) programme targeting poor households headed by amongst others persons with disabilities to be managed under the Ministry of Gender Labour and Social Development.⁵⁷

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Uganda?

The Constitution of Uganda recognises in article 59 the right to vote of every citizen irrespective of disability above 18 years of age. Article 38 recognises the right of every Ugandan citizen to participate in the affairs of the government, individually or through his or her representatives in accordance with law. However, persons of unsound mind cannot hold political positions.⁵⁸ Although no definition exists to identify what constitutes unsound mind, the declaration of unsound mind in Uganda involves an adjudicatory process before a Magistrate and is governed by the Mental Treatment Act.

Article 78(1)(c) of the Constitution provides that parliament shall be composed of representatives of amongst others persons with disabilities as parliament may determine. The Local Governments Act, 1997 (amended in 2002 and 2005) provides for the election of two persons with disabilities to district council and the lower councils.⁵⁹

53 Laws of Uganda, Evidence Act Cap 6, sec 118.

54 Sec 7 of the Persons with Disabilities Act.

55 Sec 8 of the Persons with Disabilities Act.

56 Ministry of Health: Community health: http://health.go.ug/mohweb/?page_id=267 (accessed 6 March 2014).

57 Government of Uganda '2010/2011 National Budget'.

58 Art 80(2)(a) & 107(1)(c) of the Constitution of Uganda.

59 Laws of Uganda, Local Government Act Cap 243 secs 10(d) & 23(d).

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in your country?

See question 11.2 above.

11.5 Specific categories experiencing particular issues/vulnerability:

• **Women with disabilities**

Some of the particular issues affecting women with disabilities include concerns relating to availability of accessible and suitable reproductive health and birth services; sexual exploitation; extreme denial of the right to property, family, child support and education; and a lack of socio-cultural structures to address their needs.⁶⁰

• **Children with disabilities**

A specific concern relating to children with disabilities is in regard education. According to the 2008 data used in Uganda's first country report, there were only 183 537 children with disabilities in primary education.⁶¹ This figure when compared to the general enrollment in 2008 of 7 963 000 means that children with disabilities only represented 0,023 per cent of the general primary school population.⁶²

• **Other (persons with mental and intellectual disability)**

At present persons with mental and/or intellectual disabilities are minimally represented, there is limited research as to their status and experience and there is limited national intervention directed to their needs. As a result, they are left to wander the streets without food or family protection since in most cases they have been abandoned or neglected by even their families. The Mental Treatment Act that follows a predominantly medical model is the only law that governs their relationship with the state and legal structures. In the light of the CRPD standards and state obligations on equal recognition before the law for all disabled persons, autonomy, liberty, protection against compulsory detention and involuntary treatment a lot still needs to be done to adopt a humane approach to issues of persons with mental disability.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Uganda at the moment?

Yes, here are a few examples:

- Currently, there is ongoing debate and activity between the government, DPO's and civil society to bring the Persons with Disability Act in line with the CRPD (see 9.3 above).

60 Human Rights Watch "'As if we weren't human": Discrimination and violence against women with disabilities in Northern Uganda' (August 2010) 26-69.

61 Uganda CRPD country Report (n 8 above) 33.

62 Uganda Bureau of Statistic (UBOS) '2012 Statistical Abstract' 12 & 14.

- A Bill to Amend the National Council for Disability Act, 2003 has been tabled before parliament to streamline the election of persons with disabilities into parliament.⁶³
- The government plans to strengthen its monitoring role to ensure that disability programmes are implemented as per the work plans at the various levels.⁶⁴
- The government plans to consult with persons with disabilities and DPOs to fully provide for measures of reasonable accommodation in the Persons with Disabilities Act, the National Council for Disability Act and the National Disability Policy.⁶⁵
- By 2008, the government was finalising the development of regulations and guidelines aimed at ensuring domestic law compliance with the CRPD.⁶⁶

12.2 What legal reforms are being raised? What legal reforms would you like to see in Uganda? Why?

At present the government is committed to ensuring harmony between present and future laws with the CRPD. That said, it is important that:

- National legislation incorporates the interpretation of disability as enshrined in the CRPD in order to realise a human-rights approach to disability as opposed to the predominantly medical model identification.
- The Mental Treatment Act and other laws providing for guardianship, detention and forced treatment of persons with mental disabilities should be reviewed in line with the CRPD.
- Monitoring and enforcement measures of pro disability laws should be put in place and strengthened. This specifically relates to existing laws governing accessibility, employment and equal opportunity. Enforcement is important for the realisation of rights.
- Advocacy laws and programmes should be encouraged to increase awareness.
- Laws intended to organise DPO's and encourage their participation in national disability programmes should be encouraged.
- Laws, policies and guidelines should adopt and prioritise an inclusive approach for all including persons with disabilities.

63 Parliament of Uganda eNewsletter, Vol 5, issue no 23: <http://www.parliament.go.ug/enewsletter/index.php/home/view/126/monday-march-5-2012-friday-march-9-2012> (accessed 30 September 2013).

64 Uganda CRPD Country Report (n 8 above) 13.

65 As above.

66 As above.

ZAMBIA

*Natasha Banda**
*Likando Kalaluka***

1 Population indicators

1.1 What is the total population of Zambia?

According to the 2010 Census of Population and Housing, the total population of Zambia was 13,046,508.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Zambia. What criteria are used to determine who falls within the class of persons with disabilities in Zambia?

A National Census is used to obtain data on the prevalence of disability in Zambia. In the 2010 Census, measurement of disability was based on the definition from the 1980 WHO International Classification of Impairments, Disabilities and Handicaps (ICIDH).² The ICIDH defined 'disability' as a physical or mental handicap which has lasted for six months or more, or is expected to last at least six months, which prevents the person from carrying out daily activities independently, or from participating fully in education, economic or social activities. The 2010 Census therefore used the terminology 'disability' in the context of the medical model of disability as opposed to the social or human rights model.³

* LLB (University of Zambia), LLM in Human Rights and Democratisation (University of Pretoria), Advocate of the High Court of Zambia and Practising Lawyer in Lusaka, Zambia.

** LLB (University of Zambia), LLM in International and Comparative Disability Law and Policy (National University of Ireland), Advocate of the High of Zambia and partner at Messrs Ellis & Co, Legal Practitioners in Lusaka Zambia.

1 Zambia Central Statistical Office, 2010 Census of Population and Housing Preliminary Report.

2 World Health Organisation 'International Classification of Impairments, Disabilities and Handicaps: A manual of classification relating to the consequences of disease' (1980), available at: http://whqlibdoc.who.int/publications/1980/9241541261_eng.pdf (accessed 26 August 2014).

3 The medical model focuses on a person's impairments and ascribes incapability on such persons. See World Health Organisation and World Bank 'World report on Disability 2011' (2012), available at: http://www.who.int/disabilities/world_report/2011/report.pdf. The social model focuses on the attitudinal and environmental barriers that, together with a person's impairments hinder an active participation in society. See the second para of art 1 of the Convention on the Rights of Persons with Disabilities.

1.3 What is the total number and percentage of people with disabilities in Zambia?

According to the WHO, 2 million women and men in Zambia, or 15 per cent of the population have a disability.⁴ In addition, a higher percentage of persons living with disabilities include persons with hearing and visual disabilities and most PWDs live in rural areas where access to basic services is limited.⁵

1.4 What is the total number and percentage of women with disabilities in Zambia?

The total number of women with disabilities accounts for about 2,4 per cent of the population in Zambia.⁶

1.5 What is the total number and percentage of children with disabilities in Zambia?

The total number of children with disabilities in Zambia accounts for 1,6 per cent of the total population.⁷

1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Zambia?

The most prevalent forms of disability in Zambia include:

- Visual impairment;
- Hearing impairment;
- Physical impairment;
- Communication impairment; and
- Intellectual impairment.⁸

2 Zambia's international obligations

2.1 What is the status of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) in Zambia? Did Zambia sign and ratify the CRPD? Provide the date(s).

Zambia signed the CRPD on 9 May 2008 and ratified it on 1 February 2010. The Optional Protocol was signed on 29 September 2008 and has not yet been ratified.⁹

4 As above.

5 World report on Disability 2011 (n 3 above) *Zambian Population*.

6 2010 Census of Population and Housing, Key Findings, available at www.zamstats.gov.zm (accessed 9 September 2014).

7 As above.

8 Interview with Mr Wamundila Waliuya, Human Rights and Education Advisor, Africa Development Department at Power International (Lusaka, Zambia, November 2013).

9 United Nations Enable 'Convention and Optional Protocol signatures and ratifications' <http://www.un.org/disabilities/countries> (accessed 23 January 2014).

- 2.2 If Zambia has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Zambia 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?**

Zambia has not submitted its country report and the government department responsible for submission of the report is the Ministry of Justice through the International Law and Agreements department. Zambia is currently in the process of preparing its country report on the CRPD. The reason for the delay has been resource based in that it requires resources to gather the information and to convene a workshop with relevant stakeholders to consolidate the information. However, Zambia is now in the process of preparing the report for submission.

- 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 Zambia 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 Zambia's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?**

UN Instruments¹⁰

- **The International Covenant on Economic, Social and Cultural Rights**

In April 2005, Zambia submitted its state report to the Committee on Economic Social and Cultural rights. Zambia did not specifically report on matters of disability rights and persons with disabilities. It was noted that the information provided in the report was not sufficient for the Committee on Economic, Social and Cultural Rights to be fully able to assess developments in the status of implementation of most of the provisions of the Covenant.¹¹

In addition, although Zambia has adopted a number of laws in the area of economic, social and cultural rights, the Covenant has not yet been fully incorporated in the domestic legal order.¹²

In the concluding observations of the Committee, it recommended that Zambia:

- exercise a stronger monitoring function in relation to private social security schemes and funds so as to ensure that those schemes provide adequate social protection to their beneficiaries;

10 Office of the High Commissioner for Human Rights 'Ratification status for Zambia' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID (accessed 11 August 2014).

11 Committee on Economic Social and Cultural Rights 'Consideration of reports by states parties under articles 16 and 17 of the Covenant – Concluding observations of the Committee on Economic, Social and Cultural Rights' E/C.12/1/Add.106, paras 11 and 13.

12 Office of the High Commissioner for Human Rights 'Reporting status for Zambia' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode (accessed 11 August 2014).

- take adequate measures to address the difficulties faced by widows and orphans, and in particular to eliminate harmful traditional practices; and
- ensure that street children be provided with preventive and rehabilitative services for physical and sexual abuse, as well as adequate food, clothing, housing, health care and educational opportunities.¹³

Most of these observations and recommendations have not yet been given effect to, although efforts are being made through the constitutional review process and law review and revision which is currently in progress in Zambia.

• **The Convention on the Rights of the Child**

In May 2003, Zambia submitted its state report to the Committee on the Rights of the Child.¹⁴ Zambia reported that it had made positive efforts to protect the interests of children belonging to the most vulnerable groups. Zambia reported that the Law Development Commission is working towards ensuring that domestic legislation fully reflects the principles of the Convention.

Regional Instruments

• **African Charter on Human and Peoples' Rights**

Zambia is currently working on its initial report on the African Charter on the Rights and Welfare of the Child. The National Policy on Disability has been drafted and is before Cabinet for consideration. The Policy provides a framework through which the government will enhance the coordination of efforts by all stakeholders engaged in uplifting the rights of persons with disabilities.

2.4 Was there any domestic effect on Zambia'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 Zambia's legislature to incorporate it into the legal system before the instrument can have force in Zambia's domestic law? Have Zambia's courts ever considered this question? If so, cite the case(s).

After ratifying the CRPD, Zambia has since enacted the Persons with Disabilities Act 6 of 2012. According to its preamble, the Persons with Disabilities Act seeks to domesticate the CRPD and its Optional Protocol. However, the Persons with Disabilities Act only domesticates some of the provisions of the CRPD such as those relating to the general principles,¹⁵ legal capacity,¹⁶ education,¹⁷ health,¹⁸ habilitation and rehabilitation,¹⁹ and personal mobility.²⁰

Under Zambian Law, no international or regional treaties which are signed or acceded to are self-executing but require enabling legislation to become enforceable. Furthermore, the Constitution of the Republic of Zambia of 1996 does not include provisions on the role of international law with regard to the interpretation of the Bill of Rights and statutory interpretation. In the case of *Attorney General v Roy Clarke*,²¹ the Supreme Court held that in applying and construing the Zambian statutes, the courts should take into account international

13 As above.

14 As above.

15 The Persons with Disabilities Act, sec 4.

16 Sec 8.

17 Sec 22.

18 Sec 28.

19 Sec 33.

20 Sec 40.

21 (2008) AHRLR 259 (ZaSC 2008).

treaties to which Zambia is a signatory. However, the Supreme Court acknowledged that unless the international treaties are domesticated, they are only of persuasive value and as such not necessarily binding on Zambian courts.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details

As mentioned earlier, after ratifying the CRPD, Zambia has since enacted the Persons with Disabilities Act of 2012. Zambia has domesticated some of the provisions of the CRPD. Besides the said piece-meal domestication, Zambia has not domesticated any other international or regional instruments on the protection and promotion of disability rights.

3 Constitution

3.1 Does the Constitution of Zambia contain provisions that directly address disability? If so, list the provisions, and explain how each provision addresses disability.

Article 112(f) of the Constitution provides that the state shall endeavour to provide to persons with disabilities such social benefits and amenities that are suitable for their needs and are just and equitable. This provision seeks to ensure that persons with disabilities receive appropriate and necessary support services so as to facilitate the full inclusion in communities and also full enjoyment of their human and fundamental rights. However, article 112(f) falls within the Directive Principles of State Policy.²² According to Article 111 of the Constitution, the provisions of the Directive Principles of State Policy are non-justiciable and cannot therefore be legally enforced in any court, tribunal or administrative institution. Effectively, the disability provisions of the Constitution cannot be enforced and their enforcement is subject to availability of state resources, or in so far as general welfare of the public avoidably demands.²³

3.2 Does the Constitution of Zambia contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Article 23 of the Constitution generally prohibits discrimination either in statutes²⁴ or in the manner any person is to be treated.²⁵ In sub-clause (3) of article 23, the term 'discrimination' is defined to mean affording different treatment to different persons attributable, wholly or mainly to race, tribe, sex, place of origin, marital status, political opinion or creed whereby persons of one such description are subjected to certain restrictions or unfavourable treatment which is not afforded to persons of another description. While article 23 does not expressly prohibit discrimination on the basis of disability, the High Court in Zambia has held the

²² 1996 Constitution of Zambia, part IX.

²³ Art 110 (2) of the Constitution.

²⁴ Art 23 (1) of the Constitution.

²⁵ Art 23 (2) of the Constitution.

Constitutional provisions that generally prohibit discrimination as capturing disability discrimination.²⁶

4 Legislation

4.1 Does Zambia have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Zambia has taken a step towards introducing a new Act to address disability – the Persons with Disabilities Act. However, the Act has been criticised for falling short of some of the standards prescribed by the CRPD. While the Act seeks to domesticate the CRPD, it only provides a piece-meal domestication whereby some but not all the provisions of the CRPD are reproduced in the Act.²⁷ By implication, it means that provisions of the CRPD which are not reproduced remain undomesticated such that enforcing them would be problematic since Zambia adopts a dualistic approach to domestication of international and or regional treaties.

Subject only to the Constitution, section 3 of the Act provides that where there is any inconsistency between the provisions of any other law and the provisions of the Persons with Disabilities Act, then the provisions of the Persons with Disabilities Act shall prevail to the extent of the inconsistency. The import of this particular provision is that the provisions of the Persons with Disabilities Act shall prevail over any other law (other than the Constitution) in so far as that other law impacts on the rights of persons with disabilities. It follows that provisions of the CRPD that are domesticated such as the right to legal capacity, health, education, personal mobility and habilitation and rehabilitation will prevail over all other laws.

Further, section 9 of the Persons with Disabilities Act also makes progressive provisions for the protection of the rights of persons with disabilities who come into contact with law enforcement officers, including the courts. It reads:

Subject to the Constitution, law enforcement agencies shall take into account the disability of a person on arrest, detention, trial or confinement of the person with disability and make reasonable accommodation for that person accordingly, including at investigative and other preliminary stages of the matter.

The foregoing provision seeks to ensure that persons with disabilities are accorded the necessary and appropriate reasonable accommodation as they come into contact with law enforcement agencies.

The other Act that impacts profoundly on persons with disabilities is the Mental Disorders Act (MDA).²⁸ The MDA seeks to provide for the treatment and custody of persons with mental and intellectual disabilities, and also for the

26 In the case of *Sela Brotherton (suing in her capacity as National Secretary of the Zambia Federation of Disability Organisation) v Electoral Commission of Zambia* (2008/HP/ 0818), it was held that even though disability is not one of the expressly prohibited discrimination grounds, public officers are generally estopped from administering public resources in a discriminatory manner. Therefore, the respondent was found to have discriminated against the applicants by failing to provide appropriate support services to allow persons with disabilities to participate in the electoral process.

27 See section 2.4 above.

28 Cap 305 of the Laws of Zambia, 1951.

administration of their estates.²⁹ In its interpretation section, the MDA uses very derogatory words such as 'idiots', 'imbecile', and 'lunatics' to describe persons with disabilities.³⁰ Such terminology encourages stigma and prejudicial attitudes against persons with disabilities.

In section 8, the MDA empowers police officers to apprehend and arrest any person whom he or she has reason to believe is 'mentally disordered or defective' and is a danger to himself or herself, or is wandering at large and unable to take care of himself or herself. Such provisions obviously put persons with disabilities at risk of being arrested if in his or her subjective determination, a police officer has reasons to believe that a person has a mental illness and that he or she may be a danger to himself or herself. The person so arrested is kept in a prescribed hospital or prison.³¹

In section 9, the MDA provides that magistrates may, during the course of an inquiry into the state of mind of any person, order the detention of such person. The reason for the detention is no other than that person is of 'unsound mind'.³² The MDA, therefore, discriminates against persons with intellectual and mental disabilities in that it singles them out for unfavourable treatment which is not extended to others.

The Wills and Administration of Testate Estates Act 60 of 1994 is another example of legislation that discriminates against persons with disabilities. It contains a provision that disqualifies people from legal acts, such as the capacity to make a will, on the basis of disability. Furthermore, the Electoral Commission Act 24 of 1996 has no provisions to ensure that persons with disabilities exercise the right to vote on an equal basis with others. Laws that authorise deprivation of liberty or psychiatric interventions, without the free and informed consent of the person concerned, also fall into the category of laws that discriminate against persons with disabilities.³³

4.2 Does Zambia have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

The following is some of the legislation that indirectly addresses issues relating to disability:

- The Criminal Procedure Code³⁴ affects persons with disabilities in that in sections 161 to 167 it provides that persons with mental disabilities who are unable to defend themselves in criminal proceedings, or who plead the insanity defence, are to be detained at the President's pleasure. The Criminal Procedure Code also provides for periodic reviews of the state of mind of the person so detained.
- The Prisons Act³⁵ provides that prisoners adjudged to be 'mentally disordered or defective' should be detained until they serve their sentence.³⁶ The Prisons Act does not provide for any reasonable accommodation in prison for persons with intellectual or mental disabilities.

29 Preamble of the MDA.

30 Sec 2 of the MDA.

31 As above.

32 Sec 9 of the MDA.

33 Sections 161-167 of the Criminal Procedure Code, Cap 88 of the Laws of Zambia. These provisions authorise the imprisonment of persons with disabilities, on His Excellence's Pleasure, on account of either not being able to defend oneself or if one pleads insanity in criminal proceedings.

34 Cap 88 of the Laws of Zambia.

35 56 of 1965

36 Sec 70.

The foregoing is by no means the only legislation indirectly touching on disability issues.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Zambia 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.

There are a number of cases that the courts have determined which relate to disability. The following are some of the cases, including a brief summary of facts and the decision:

- *Sela Brotherton (suing in her capacity as National Secretary of the Zambia Federation of Disability Organisations) v Attorney General & 16 Others*:³⁷ In this case, the Plaintiff had commenced court proceedings seeking amongst others orders for the adjustments of several public and private buildings which were not accessible to persons with disabilities. The High Court determined the matter on a preliminary issue and held that the action was statute barred on the grounds that the Plaintiff commenced court proceedings outside the 12 years statutory period.
- *Sela Brotherton (suing in her capacity as National Secretary of the Zambia Federation of Disability Organisations) v Electoral Commission of Zambia*:³⁸ The Plaintiff commenced court proceedings seeking amongst others orders and declarations that the respondent was discriminating against persons with disabilities by failing to provide them with the necessary services and amenities to allow them to participate in the electoral process on equal basis with others. The Court ruled that there was discrimination in that the respondent is obliged to manage public affairs in a manner that is not discriminatory.

6 Policies and programmes

6.1 Does Zambia have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability?

The following are the key programmes and policies in place in Zambia which address matters affecting persons with disabilities:

- The National Policy on Education, 1996³⁹ recognises the right to education for each individual, regardless of personal circumstances or capacity. The Ministry of Education has overall responsibility for education, including special education;
- The National Employment and Labour Market Policy (NELP) 2005,⁴⁰ shows the government's intentions to provide improved care and support services to vulnerable groups, including people with disabilities;

37 2009/HP/1402.

38 *Sela Brotherton* (n 26 above).

39 Ministry of Education *Educating our future: National policy on education* (2006).

40 Convention on Biological Diversity (National CHM for the Republic of Zambia): <http://www.biodiv.be/zambia> (accessed 2 September 2014).

- The Sixth National Development Plan (SNDP) 2011 to 2015,⁴¹ builds on the Fifth National Development Plan (FNDP) 2006-2010 and aims to attain the full participation, equality and empowerment of persons with disabilities. It seeks to provide enhanced support to disabled persons through increased government spending on disability; develop inclusive mainstream policies; review existing pieces of legislation; and establish and/or strengthen institutions and systems that cater to people with disabilities.

The government works closely with the Zambia Agency for Persons with Disabilities through the Ministry of Justice in order to address various matters which affect persons with disabilities in Zambia. The Zambia Agency for Persons with Disabilities is a government Agency mandated to safeguard the interests of persons with disabilities in Zambia and to work closely with the DPO in order to ensure the protection and promotion of the rights of persons with disabilities.⁴²

6.2 Does Zambia have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- The National Youth Policy, 2006,⁴³ aims at including disabled youth in mainstream programmes and projects targeting youth; and
- The National Long-Term Vision 2030⁴⁴ articulates Zambia's development agenda for the next 25 years. One of the objectives is to make Zambia a middle-income country by 2030 in which all people will be provided with opportunities to improve their well-being.

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Zambia 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 Zambia Agency for Persons with Disabilities (ZAPD) is established under the Persons with Disabilities Act to promote the rights of persons with disabilities in Zambia and to mainstream disability issues in all aspects of national development.⁴⁵ However, ZAPD does not specifically address violations of rights of individuals. Some of its functions under the Act are to:

- plan, promote and administer services for all categories of persons with disabilities;
- keep statistical records relating to incidences and causes of disabilities, which may be used for the planning, promotion, administration and evaluation of services for persons with disabilities;
- provide rehabilitation, training, and welfare services to persons with disabilities; and

41 The Redd Desk, a collaborative resource for REDD Readiness 'Sixth National Development Plan 2011-2015 (Zambia)', available at: <http://thereddesk.org/countries/plans/sixth-national-development-plan-2011-2015-zambia> (accessed 2 September 2014).

42 Sec 11 of the Persons with Disabilities Act.

43 Ministry of Sport, Youth and Child Development 'Zambia National Youth Policy – 2006', available at: www.youthpolicy.org/national/Zambia_2006_National_Youth_Policy.pdf (accessed 2 September 2014).

44 Republic of Zambia 'Vision 2030', available at: www.mofnp.gov.zm/index.php/vision-2030 (accessed 2 September 2014).

45 Secs 6 & 7.

- recommend to the government measures to promote the rights of persons with disabilities.

The bodies which are specifically mandated to address violations of rights of people with disabilities are courts and the Human Rights Commission described in question 8 below.

7.2 Other than the ordinary courts or tribunals, does Zambia 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 main bodies which are specifically mandated to address violations of human rights which also include the rights of persons with disabilities are courts and the Human Rights Commission described in question 8 below.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Zambia 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 or the Ombudsman or Public Protector of Zambia has ever addressed issues relating to the rights of persons with disabilities.

In Zambia, the Human Rights Commission is established by article 25 of the Constitution and its mandate is articulated in the Human Rights Commission Act, Chapter 48 of the Laws of Zambia. It is tasked with the investigation of human rights violations and maladministration of justice and must propose remedies to prevent human rights abuses. It also mediates for victims of human rights abuse and acts as a spokesperson for detainees.⁴⁶

The Commission may investigate on its own initiative or on receipt of complaints or allegations by individuals or groups, to others acting on their behalf. However, its findings lead only to recommendations which have no legal force, although the government and its agencies are expected to act on them.⁴⁷

The Commission receives an allocation in the government budget like all other regular government departments. However, since its inception, the government has not provided the Commission with an adequate budget or facilities required to undertake the mandated tasks. As a result of the lack of a resource base, the Commission has been unable to attract or retain high calibre and skilled personnel. The Commission also receives international support, which tends to be on a project by project basis. The Norwegian government funded the refurbishment of the Commission's offices.⁴⁸

⁴⁶ Their website is available at: www.hrc.org.zm (accessed February 2014).

⁴⁷ As above.

⁴⁸ Human Rights Watch, 2001.

While the Commission has done commendable work relating to the protection and promotion of human rights generally, it has not done much with respect to the rights of persons with disabilities.

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Zambia have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

The Zambia Federation of Disability Organizations (ZAFOD) is the umbrella organisation representing several disabled persons organisations in Zambia. Its main activities include advocacy and awareness-raising. It also provides small loans to people with disabilities and training in small-scale business management.

The following DPO's are members of ZAFOD:

- Zambia National Association of Disabled Women;
- Zambia National Association of the Deaf;
- Zambian National Association of the Hearing Impaired;
- Zambian National Association of the Partially Sighted;
- Zambian National Association of the Physically Handicapped;
- Zambian Association of Children and Adults with Learning Disabilities;
- Zambia Association of Parents of Children with Disabilities; and
- Mental Health Users Network of Zambia (MHUNZA).

Other significant organisations include:

- Zambian National Federation of the Blind;
- Zambia National Library and Cultural Centre for the Blind; and
- Zambia Association on the Employment for Persons with Disabilities.

Further, some of the key stakeholders where disability rights in Zambia are concerned include the following:

- Ministry of Community Development and Social Services (MCDSS);
- Zambia Agency for Persons with Disabilities (ZAPD);
- Concerned line Ministries – Education, Health, Justice;
- Disabled People's Organisations (DPOs);
- Zambia Law & Development Commission (ZLDC);
- Action on Disability Development (ADD);
- The Human Rights Commission;
- Opportunity Zambia (OZ);
- International Labour Organisation (ILO);
- Sight Savers International (SSI);
- Zambia National Federation of the Blind (ZANFOB); and
- Power4Good / POWER International.

9.2 In the countries in Zambia's region (Southern Africa) are DPOs organised/coordinated at national and/or regional level?

In Zambia, DPOs are organised at a national level. ZAFOD is the umbrella organisation representing several disabled persons organisations in Zambia. Its main activities include advocacy and awareness-raising. It also provides small loans to people with disabilities and training in small-scale business management. ZAFOD also coordinates all other DPOs in Zambia.

9.3 If Zambia has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

The main government agency responsible for promoting the rights of persons with disabilities and coordinating disability issues within government in line with article 33(1) of the CRPD is ZAPD. In addition to this, ZAPD engages directly with the Ministry of Justice on matters of legal advice and policy concerning the rights of persons with disabilities.⁴⁹ It is unfortunate that not much has been reported on how well these government agencies have ensured the involvement of DPOs in the implementation process. Zambia is currently undergoing law review and revision and it is hoped that matters on the implementation of article 33(1) of the CRPD will be considered.

With regard to monitoring the Convention, ZAPD engages with DPOs and so far there has been no available report on any surveys that may have been conducted.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

DPOs in Zambia often engage with government and its agencies on matters concerning the implementation of the CRPD either through the Ministry of Justice, or the Department of Gender and Community Development. However, there are no reports or much information on the outcome of the engagement due to the fact that DPOs have limited resources and sometimes lack awareness on key issues to be addressed.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

Although the Zambian government has appointed disability focal point persons in all the ministries, most of them lack awareness of disability rights and the actual provisions of the CRPD. Furthermore, the framework within which they are supposed to operate has not been established. The Government has also established a Technical Committee to oversee the implementation process of domestication with the involvement of civil society and representatives from disability organisations.

The following are some of the barriers:

- lack of awareness amongst policymakers on the CRPD;
- lack of resources and technical capacity by DPOs to conduct research that can inform the implementation of the CRPD; and

49 www.disabilityadjusted.com/disabilityorganisations.html (accessed 14 August 2014).

- lack of a unified voice by DPOs (DPOs tend to organise by disability type and each DPO lobbies for issues which are more relevant to it).

9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?

An example of ‘best practice model’ for ensuring the involvement of DPOs is the establishment of the Advancing Disability Equality Project (ADEPt) by ZAFOD with a view of facilitating the protection and promotion of the rights of persons with disabilities through strategic litigation aimed at setting up legal precedents on disability rights.⁵⁰ ZAFOD identifies meritorious cases where the rights of persons with disabilities have been violated and transmits them to selected law firms for legal advice and possible prosecution before courts of law; ZAFOD mobilises financial resources to meet the legal costs of prosecuting such cases. In this way, persons with disabilities will not have to bear the high legal fees which often hinder commencement of disability rights litigation.

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?

As stated in 9.5 above there have not been any tangible outcomes due to the lack of awareness and resources which has affected the process of engagement and implementation.

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 research has not revealed a very positive outcome with respect to engagement of DPOs in the implementation process. There is a great need for capacity building, awareness raising and improved resources in order to ensure better engagement in the 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?

Yes:

- Capacity building of DPOs;
- Better collaboration and engagement between DPOs and government agencies in all relevant implementation initiatives;
- Engagement between DPOs and the Human Rights Commission to broaden research, implementation strategies and lessons on field investigations and surveys;
- Encouraging research by DPOs in order to allow for evidence based information to be submitted to government agencies and all relevant stake holders; and
- Strategising on fundraising in order to improve on resources.

50 Interview with Wamundila Waliuya (n 8 above).

9.10 Are there specific research institutes in the region where Zambia 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?

No. However, the Open Society Initiative for Southern Africa has been a very crucial and key institution in the engagement of DPOs and facilitation of the involvement of DPOs in the area of research and outreach particularly through extensive meetings and collaborations with ZAFOD, MHUNZA and other DPOs.

10 Government departments

10.1 Does Zambia have a government department/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).

See question 7.1 above. ZAPD is a government Agency and established under an Act of Parliament.

11 Main human rights concerns of people with disabilities in Zambia

11.1 Contemporary challenges of persons with disabilities in Zambia (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

The most common challenge faced in Zambia is the seclusion of persons with disabilities. Persons with disabilities are often excluded from society by their families and communities generally in the belief that they are cursed. This even affects their right to education because in most instances they are not taken to school. In addition, in some traditional set ups, rituals which may be harmful to a child's health or physical body are conducted on children with disabilities in the belief that disabilities can be cured.

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access to accommodation**

The Constitution does not make specific provisions for the access and accommodation of persons with disabilities. Instead, it only states that the State

shall endeavor to provide among others, decent shelter for all persons.⁵¹ However, this provision cannot be enforced before national courts as it is non-judicial.⁵² Therefore, persons with disabilities continue to lack access to adequate accommodation and usually find themselves in inaccessible accommodation without necessary in-house amenities to enable lead decent lives. The Persons with Disabilities Act provides that the State shall take measures that ensure that persons with disabilities live independently and participate fully in society by among others, identifying and eliminating barriers to accessibility and accommodation.⁵³ However, these provisions do not adequately address the challenge of accessing accommodation for persons with disabilities. The provisions are couched in a manner that merely requires the State to take measures towards providing access to adequate accommodation without specifically conferring a right on persons with disabilities.

- **Access to social security**

Social security plays a very significant role in ensuring that persons with disabilities enjoy adequate standard of living on equal basis with others. This is more so as persons with disabilities are usually excluded from education, vocational training and employment. Section 36 of the Persons with Disabilities Act provides for the promotion of the right to social protection and adequate standard of living for persons with disabilities. However, provisions of the Constitutions that place a duty on the State to provide for social benefits are non-justiciable.

- **Access to public buildings**

Persons with disabilities often find it very difficult to be fully included in societal activities owing to inaccessible public buildings. The plight of persons with physical disabilities and on wheelchairs was brought to the fore in the case of *Sela Brotherton (suing in her capacity as National Secretary of the Zambia Federation of Disability Organisations) v Electoral Commission of Zambia*.⁵⁴ In that case, court proceedings were commenced among others, challenging the setting up of polling stations and voter registration centers in inaccessible public buildings. The Court found that there was discrimination as persons on wheel chairs excluded from fully participating in the electoral process.

However, the constitutional provisions which deal with access to public buildings are non-judicial.⁵⁵ Section 41 of the Persons with Disabilities Act provides that no person shall deny a person with disability access to any premises to which members of the public are ordinarily admitted and that the owner of such premises has an obligation to provide appropriate facilities to make the place accessible to person with disabilities. While provisions of the Persons with Disabilities Act protect the right of access to public places, provisions of the Constitution are compromised by their non-justiciability. At the same time, the *Sela Brotherton v Attorney General* case shows that it is possible for courts to recognise and enforce the right to accessibility.

- **Access to public transport**

Persons with disabilities are usually discriminated against due to the lack of assistive devices and other amenities necessary to enable to access public transport. Generally, public transport vehicles and infrastructure are not equipped with assistive devices for instance, to allow a person on a wheel chair to board a bus or indeed voice recordings to announce when the bus or train approaches a particular

51 Constitution of Zambia, art 112(d).

52 As above, art 111.

53 Persons with Disabilities Act, sec 41(1) and (2).

54 *Sela Brotherton v Electoral Commission of Zambia* (n 26 above).

55 Constitution of Zambia, art 112.

station to enable a visually impaired person know when the bus or train reaches a particular station.

Barriers to access to public transport continue to be a challenge to persons with disabilities notwithstanding that section 42 of the Persons with Disabilities Act provides that a person who provides a service (including public transport) to the public must put in place measures that the service available and access to persons with disabilities in prescribed manner. However, it is of concern that no regulations have been adopted to prescribe the manner in which the measures should be put in place in order to make public transport accessible to persons with disabilities.

- **Access to education**

Persons with disabilities are usually excluded from the education system. This is more so with respect to persons with intellectual and psychosocial disabilities who considered to be untrainable or simply denied education on the basis that there are not enough financial and other resources to for their education. There also very few specialised instructors or teachers to assist persons with disabilities at the level of primary, secondary or even tertiary education. Education facilities also lack infrastructure and other assistive devices necessary to reasonably accommodate persons with disabilities.

The Persons with Disabilities Act provides for the inclusive education at all levels and that the responsible Minister shall, in consultation with the Minister responsible for education come up with rules and guidelines to ensure that persons with disabilities are not excluded from the general education system on the basis of disability.⁵⁶ The provisions relating to access to education are usually not applied in practice as there no prescribed guidelines or guidelines to ensure that persons with disabilities are included in the education sector. Further, the fact that constitutional provisions⁵⁷ relating to equal and adequate educational opportunities are non-justiable, means that access to education cannot be enforced before courts of law.

- **Access to vocational training**

Persons with disabilities are usually have no opportunities to develop their vocational skills so as to make them self-sufficient economically. As result, persons with disabilities continue to rely on family members or social welfare, both of which have limited resources to adequately provide for persons with disabilities.

There are no express provisions in the Constitution and the Persons with Disabilities Act touching on the access to vocational training. The Technical Education and Vocational Training Act⁵⁸ prohibits the refusal of admission to any institution established for purposes of vocational training on the basis of sex, race, tribe, place of origin, colour or creed. It is noteworthy that disability is not one of the listed grounds upon which refusal to admission is prohibited. This makes both the application and enforcement of access to vocational training very difficult.

- **Access to recreation and sport**

The Persons with Disabilities Act provides that a person with disabilities shall have the right to participate in recreational activities.⁵⁹ However, there are no guidelines or rules as to how this right is to be realized or facilitated. Henceforth, persons with disabilities continue to be excluded from recreation and sporting activities.

56 Persons with Disabilities Act, sec 22 (1) and (2).

57 Constitution of Zambia, art 112 (e).

58 The Technical Education and Vocational Training Act, Cap 138 of the Laws of Zambia, sec 21.

59 Persons with Disabilities Act, sec 7.

- **Access to justice**

Persons with disabilities usually find it difficult to access the courts of law due to inadequate and inaccessible roads and buildings. Even where persons with disabilities, persons with disabilities actually access the physical court premises, they usually have to contend with the inaccessible court procedures which do not reasonably accommodate them. It is in this regard that section 8 of the Persons with Disabilities Act provide that the judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection of the law without discrimination. Further, section 9 requires law enforcement agencies to reasonably accommodate persons with disabilities during their interview, arrest, detention trial and confinement. In practice however, these provisions are largely ignored. Persons with disabilities have not been able to enforce the right to access to justice owing to the high costs of engaging legal practitioners to represent them and argue the high technical nature of access to justice.

- **Access to health**

The right to health is most important to persons with disabilities. The right to health like any other social, economic and cultural rights in Zambia is not justiciable. As such, there is no legal mechanism to compel government to ensure that persons with disabilities have access to quality health care services. The Constitution is currently under review and this is one of the areas proposed to be included in the Constitution.

- **Access to habilitation & rehabilitation**

According to the World Health Organisation, habilitation refers to deliberate services put in place specifically targeting persons born with disabilities in an effort to make the environment suitable to their condition. Rehabilitation services on the other hand are targeted at persons who acquire disabilities.⁶⁰ There are no measures or mechanisms in place for the promotion, availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation. The common practice amongst employers is that of retiring on medical grounds those who acquire disabilities while in employment. This has been a major concern amongst PWDs who have found themselves in similar situations as evidenced by the number of cases reported to the ADEPt project under ZAFOD.

- **Access to participation in political and public life**

Inaccessible infrastructure, transportation and information usually cause barriers to the participation of persons with disabilities on an equal basis with others. People who are deaf particularly face communication barriers. For example, in many cases information is transmitted through radio stations. Such communication barriers hinder deaf people from participation in public life. Lack of Braille ballot papers means persons with visual impairments are dependent on a third party to cast their vote, which in itself overrides their right to a secret vote.

Further, almost all polling stations are not accessible to wheelchair users who also find it difficult to reach the ballot boxes that are usually placed too high. These and numerous other barriers serve to reinforce the exclusion and isolation of people with disabilities in political and public life, and, more generally, their participation in decision-making in all areas where their interests are affected in both their public and private lives.

60 World report on Disability 2011 (n 3 above).

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Zambia?

Yes. Persons with disabilities have the right to participate in political life. The challenges exist at a community level with respect to prejudices and stigmatisation. There is no restriction on the right based on disability.

11.4 Are people with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in your Zambia?

Socio-economic rights are not enforceable in Zambia as they are part of Directive Principles of State Policy and are specifically classified as non-justiable.⁶¹

11.5 Specific categories experiencing particular issues/ vulnerability:

• **Children with Disabilities**

There is no legislation that specifically singles out disabled children for specific address. Zambian legislation instead deals with children in general, particularly with regards to the consideration of the best interests of the child. Children with disabilities fall under the Public Welfare Assistance Scheme (PWAS) which was established to protect vulnerable groups such as orphans, street and disabled children amongst others.

The most common challenge faced in Zambia is the seclusion of children with disabilities. Often families of the children exclude them from society in the belief that it is a curse. This even affects their right to education because in most instances they are not taken to school. In addition, in some traditional set ups, rituals which may be harmful to a child's health or physical body are conducted on children with disabilities in the belief that disabilities can be cured. See section 11.1 above.

• **Women with disabilities**

Women generally suffer discrimination and marginalisation in society whereby they are subjected to maltreatment and exploitation.⁶² Where women have disabilities they are especially vulnerable to abusive treatment such as rape and defilement. In some instances, the nature of their impairments makes it very difficult for them to seek redress.

• **Other (for example, indigenous peoples)**

Indigenous peoples, and people with albinism also suffer multiple discrimination arising from the peculiar circumstances. When such persons have impairments, they are usually subjected to multi-faceted discrimination.

61 Constitution of Zambia, art 111.

62 CRPD, preamble para (q).

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

- **The Mental Health Bill of 2012**

It is encouraging to note that the Mental Health Bill of 2012 is currently in progress as it represents a positive step towards the protection of the rights of persons with mental disabilities. In addition, the Persons with Disabilities Act of 2012 is progressive and addresses various matters which are required under the CRPD. The recognition of legal capacity addresses one of the main concerns faced by persons with disabilities in society.

- **The Disability Rights Course and the University of Zambia**

The introduction of a Disability Rights Course at the University of Zambia is also a positive step which will ensure that students, who will eventually become practising lawyers and activists, will be well equipped with the knowledge and expertise to address matters concerning disability rights. The Course will start to be taught at the University to fourth year students in September 2014. In addition, the Legal Aid Clinic at the University of Zambia shall also contain a component on disability rights.

12.2 What legal reforms are being raised? What legal reforms would you like to see in your country? Why?

Given the main areas of concern discussed in the preceding paragraphs, the following are some of the main actions which I believe the government of the republic of Zambia must take into consideration:

- Having appointed disability focal point persons, Zambia should ensure that those appointed as focal point persons are knowledgeable about disability rights issues as promulgated in the CRPD;
- Zambia should ratify the Optional Protocol to the CRPD as soon as possible to show its commitment to fulfilling the promotion and protection of the rights and fundamental freedoms of persons with disabilities in Zambia;
- Government, through its specific ministries, should carry out awareness raising programmes to sensitise their officers on the provisions of the CRPD and disability rights in general;
- Government through its ministries must develop disability inclusive policies and laws that promote participation and involvement of persons with disabilities and reduce discriminatory practices at all levels of society;
- The enactment of a new Mental Health Services Act that promotes and protects the rights and fundamental freedoms of mental health users should be expedited to replace the old discriminatory Mental Disorders Act. The new law should abolish involuntary admission and treatment of mental health users to Mental Health Institutions and focus on ensuring legal capacity and independent living for mental health users;
- The Ministry of Local Government, Early Childhood and Environment should quickly repeal the Town and Country Planning Act and Housing Act to put in place an inclusive law that will promote and ensure the protection of accessibility rights of persons with disabilities to public buildings, facilities and services, including roads.
- The Ministry of Education should review the present Educating Our Future Policy of 1996 to replace it with an Inclusive Education Policy that will promote provision

of reasonable accommodation within the general education system and universal design of curriculum, learning materials and teacher training programmes. Such policy should be backed by inclusive education legislation;

- Government, through the Ministry of Health, should ensure, through policy, administrative and financial measures the facilitation for the provision of free medical care for persons with disabilities as close as possible to their homes. This should include access to HIV/AIDS and reproductive health services;
- Government should ensure the equal participation of persons with disabilities in the political and public life sector through provision of electoral policies and laws that recognise the need for persons with disabilities to exercise their rights participate in the electoral process directly or indirectly. This should include the recognition of the right to a secret ballot;
- The Ministry of Labour and Social Security should as a matter of urgency amend the Labour laws, especially the Employment Act, for the purposes of prohibiting discrimination on the basis of disability in employment; and
- Government should take deliberate measures including institutional, policy, legislative and financial measures, to ensure adequate provision of matters relating to the promotion and protecting of the rights and fundamental freedoms of women and children with disabilities.

It is our view that Zambia still has a lot of work to be done in the promotion and protection of the rights of persons living with disabilities in Zambia. While it is acknowledged that some positive actions have been taken, there is still a lot to be done in achieving a level of participation and inclusion of persons with disabilities in Zambia on an equal basis with others.

There is need to identify and eliminate obstacles and barriers to accessibility in the physical environment, transportation and information communication technology and to provide training to DPO Inspectors on issues of accessibility by persons with disabilities.

Zambia is currently reviewing the Mental Health law to address such crucial matters as legal capacity and the right to independent living. This is a very crucial aspect in ensuring that Zambian laws on disability comply with the standards set out by the CRPD.

It is hoped that at the end of the constitutional review process, most of the matters of concern highlighted will be considered and addressed both at legislative and policy levels and that they will finally be incorporated in the Constitution.

It is hoped that cases will be brought before the courts of law in Zambia regarding disability rights because currently there are no landmark cases or reported judgments which can be referred to and there is need to train judges on matters concerning disability rights. There is very limited precedent and judgments often serve as a very useful source of law in Zambia.

ZIMBABWE

*Esau Mandipa**
*Gift Manyatera***

1 Population indicators

1.1 What is the total population of Zimbabwe?

According to the Zimbabwe Population Census Report of 2012 (the 2012 Census Report), the total population of Zimbabwe was 13 061 239.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Zimbabwe and the criteria used to determine who falls within the class of persons with disabilities in Zimbabwe.

The 2012 Census Report did not seek to identify the type of the disability but focused on the number of persons with disabilities (PWDs) in a family statistical data on the prevalence of disability in Zimbabwe which was obtained from the Zimbabwe Inter-Censal Demographic Survey of 1997 (the Inter-Censal Survey)² and the Zimbabwe Housing and Population Census Report (the Housing and Population Report).³

* LLB (Hons) UZ, LLM (Human Rights and Democratisation in Africa) University of Pretoria; Certificate in Disability Rights in an African Context, University of Pretoria, Disability Rights Lecturer, Faculty of Law, Midlands State University, Zimbabwe.

** LLB (Hons) UZ, LLM University of Turin, MSc CLEF (IUC Turin), LLD Candidate University of Pretoria; Executive Dean, Faculty of Law, Midlands State University, Zimbabwe.

1 See the Zimbabwe Population Census 2012: National Report, available at: http://www.zimstat.co.zw/dmdocuments/Census/CensusResults2012/National_Report.pdf (accessed 7 April 2014).

2 Zimbabwe Inter-Censal Demographic Survey Report of 1997, available at: http://www.childinfo.org/files/ZIM_finalest.pdf (accessed 4 June 2014).

3 Zimbabwe Housing and Population Census Report of 2002, available at: <http://www.zimstat.co.zw/dmdocuments/Census/Census.pdf> (accessed 3 June 2014).

1.3 What is the total number and percentage of people with disabilities in Zimbabwe?

Zimbabwe has had four censuses since attaining independence in 1980. However, none of the censuses provided statistics on the prevalence of disability in the country. Recent studies have estimated the disability prevalence to be 1.4 million of the total population.⁴

1.4 What is the total number and percentage of women with disabilities in Zimbabwe?

There are no official statistics on the total number and percentage of women with disabilities (WWDs) in Zimbabwe. According to the Inter-Censal Survey, the proportion of male to females with disabilities was 56 and 44 per cent respectively.⁵ Furthermore, the Housing and Population Report recorded a national disability prevalence of 2,9 per cent of which 45 per cent were men and 55 per cent were women.⁶

1.5 What is the total number and percentage of children with disabilities in Zimbabwe?

There is no recent statistical data on the total number and percentage of children with disabilities (CWDs) in Zimbabwe. The last comprehensive study on the prevalence of disability amongst children in Zimbabwe was the Inter-Censal Survey. The Survey recorded a total of 218 421 PWDs in the country, which was approximately 2 per cent of the country's total population.⁷ Of these, 57 232 were CWDs,⁸ which was about 26 per cent of the total population of PWDs in 1997. Another study which was conducted by the United Nations Children's Emergence Fund (UNICEF) in 1997, estimated CWDs to be 150 000.⁹ Significantly, such disparities on estimates clearly demonstrate the absence of reliable statistics on the prevalence of disability in the country.

1.6 What are the most prevalent forms of disability in Zimbabwe?

As indicated above, there are no reliable statistics on the prevalence of disability in the country. Despite the absence of official statistics, the most prevalent forms of disability are:

- Physical impairments;
- Mental impairments;
- Speech functional disabilities;
- Hearing impairments; and
- Intellectual and sensory impairments.¹⁰

4 See T Choruma *The forgotten tribe: Persons with disabilities in Zimbabwe* (2007), available at: http://www.africacampaign.info/uploads/media/forgottribeprogressiozim_01.pdf (accessed 5 April 2014).

5 As above.

6 As above.

7 As above.

8 As above.

9 UNICEF 'A study of children and adolescents with disabilities in Zimbabwe', available at: http://www.unicef.org/evaldatabase/files/ZIM_01-803.pdf (accessed 17 June 2014).

10 Choruma (n 4 above) 11.

2 Botswana's international obligations

2.1 What is the status of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) in Zimbabwe? Did Zimbabwe sign and ratify the CRPD? Provide the date(s).

Zimbabwe is a state party to the CRPD. Zimbabwe ratified the CRPD and its Optional Protocol on 23 September 2013, thereby becoming the 135th state party to ratify the Convention and its Optional Protocol.¹¹

2.2 If Zimbabwe has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Zimbabwe 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?

- In terms of article 35, the CRPD mandates state parties to report initially to the Committee on the Rights of Persons with Disabilities within two years of accepting the Convention.¹² Thereafter, state parties are mandated to submit reports at least every four years or upon request by the Committee.¹³
- Zimbabwe's initial report is due on 23 October 2015.¹⁴
- The responsible departments for the submission of the country report are the Ministry of Public Service, Labour and Social Welfare, and the Ministry of Justice and Legal Affairs.¹⁵

2.3 While reporting under various other United Nations' instruments, the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Zimbabwe 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?

11 See the United States International Council on Disabilities' (USICD) data portal, available at: http://www.usicd.org/index.cfm/news_zimbabwe-becomes-135th-state-party-to-ratify-the-crpd (accessed 9 April 2014).

12 See art 35(1) of the CRPD.

13 See art 35(2) of the CRPD.

14 See the country's reporting history and status available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/MasterCalendar.aspx (accessed 5 April 2014).

15 The Ministry of Public Service, Labour and Social Welfare is the Ministry responsible for disability issues in Zimbabwe whereas the Ministry of Justice and Legal Affairs is the Ministry responsible for the country's report process under the United Nations Universal Periodic Review (UPR).

The UPR process

- In October 2011, the Zimbabwean Government¹⁶ underwent its first Universal Periodic Review process under the auspices of the United Nations Human Rights Council in Geneva.¹⁷
- While reporting on the status of vulnerable groups, the Zimbabwean report was silent on the country's intention to ratify and fully domesticate the CRPD.
- The UN Human Rights Council then recommended that the Zimbabwean Government ratify and fully domesticate the CRPD.
- Based on the recommendations of the UN Human Rights Council, the Zimbabwean Government ratified the CRPD together with its Optional Protocol on 23 September 2013.
- Zimbabwe is due for another review in 2016.¹⁸ However, the Zimbabwean government is expected to file its Mid-Term Progress Report in 2014.¹⁹

2.4 Was there any domestic effect on Zimbabwe'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 Zimbabwe's legislature to incorporate it into the legal system before the instrument can have force in Zimbabwe's domestic law? Have Zimbabwe's courts ever considered this question? If so, cite the case(s).

- Zimbabwe follows a dualist approach in the implementation of international treaties. In accordance with this approach, international treaties ratified or acceded to by the Zimbabwean Government will not become self-executing upon ratification or accession. Treaties must first be domesticated through parliamentary approval and be incorporated into the domestic laws through an Act of Parliament before they become binding.²⁰
- Zimbabwe has not domesticated the CRPD. However, section 34 of the 2013 Zimbabwean Constitution²¹ obliges the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party be incorporated into domestic law.

2.5 With reference to 2.4 above, has the CRPD or any other ratified international instrument been domesticated? Provide details.

- See 2.4 above.
- Zimbabwe is party to the Convention on the Rights of the Child (CRC). Provisions of this Convention have been incorporated into the Children's Act [Chapter 5:06].²²
- The same position applies to the Labour Act [Chapter 28:01]²³ wherein international labour standards have also been domesticated.

16 At its first reporting cycle under the UPR, held at Geneva in 2011, Zimbabwe was represented by the Ministry of Justice and Legal Affairs.

17 See the 2012 Foreign and Commonwealth Office Report on Human Rights and Democracy, available at: <http://www.hrdreport.fco.gov.uk/human-rights-in-countries-of-concern/zimbabwe> (accessed 8 April 2014).

18 See the Resident Coordinator's Statement on the follow up workshop to Zimbabwe's Universal Periodic Review (UPR) process, available at: <http://www.zw.one.un.org/newsroom/news/rcs-statement-follow-workshop-zimbabwe%E2%80%99s-universal-periodic-review-upr-process> (accessed 9 April 2014).

19 As above.

20 See sec 327 of the Constitution of Zimbabwe.

21 The Constitution of Zimbabwe, 2013.

22 The Children's Act 22 of 1971 [Chapter 5:06].

23 The Labour Act 16 of 1985 [Chapter 28:01].

3 Constitution

3.1 Does the Constitution of Zimbabwe contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

- **Section 22 of the Zimbabwean Constitution of 2013**

- Section 22(1) of the Constitution of Zimbabwe²⁴ states that the Zimbabwean government and its agencies must recognise the rights of persons with physical or mental disabilities, in particular their right to be treated with respect and dignity.
- Section 22(2) of the Constitution of Zimbabwe mandates the state and all its institutions to assist persons with physical or mental disabilities to achieve their full potential and to minimise the disadvantages suffered by them.²⁵
- Section 22(3) of the Constitution mandates the state to:
 - (a) Develop programmes for the welfare of persons with physical or mental disabilities.
 - (b) Consider the specific requirements of PWDs in the formulation of developmental plans.
 - (c) Encourage the use and development of forms of communication suitable for persons with physical or mental disabilities.
 - (d) Foster social organisations that are aimed at improving the quality of life for PWDs.
- Section 22(4) of the Constitution further mandates the Zimbabwean government to take the necessary measures to ensure accessibility by PWDs, of all buildings to which other members of the public have access.

- **Section 83 of the Constitution²⁶**

- Section 83 provides that the state must take appropriate measures, within the limits of the resources available to it, to ensure the full realisation of rights by PWDs. In particular, the section mandates the Zimbabwean government to implement measures that are designed to:
 - (a) ensure that PWDs become self-reliant.
 - (b) enable PWDs to live with their families and participate in social, creative or recreational activities.
 - (c) protect PWDs from exploitation.
 - (d) give PWDs medical, psychological and functional treatment.
 - (e) provide special educational facilities for PWDs.
 - (f) provide state-funded education for PWDs.

24 In April 2013, Zimbabwe adopted a new constitution through a referendum. The Constitution came into force on 22 August 2013.

25 It is however important to note that the state's obligation on this regard is subject to the availability of resources test.

26 This is a dedicated section on the rights of PWDs in Zimbabwe. This section clearly demonstrates that Zimbabwe now subscribes to the human rights approach with regards to disability. This is a paradigm shift from the outdated medical model of disability. The medical model of disability treats PWDs as objects of welfare whereas the human rights model treats PWDs as holders of rights who should enjoy their rights on a par with their non-impaired counterparts.

3.2 Does the Zimbabwean Constitution contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Constitution of Zimbabwe contains some provisions that indirectly address disability. These include the following:

• **Section 3 (1)(e) of the Constitution**

This section recognizes the inherent dignity and worth of each human being as one of the founding principles upon which Zimbabwe is founded. This provision is of utmost importance in so far as it relates to persons with disabilities.

• **Section 3(2)(i)-(ii) of the Constitution**

Pursuant to this provision, the principles of good governance which bind the state and all its agencies of government shall, amongst other things, include the rights of PWDs.

• **Section 6(4) of the Constitution**

This section provides that the state must promote and advance the use of all languages used in Zimbabwe, including Sign language, and must create conditions for the development of those languages.

4 Legislation

4.1 Does Zimbabwe have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

• **The Disabled Persons Act [Chapter 17:01]**

The Disabled Persons Act (DPA)²⁷ is the primary law that addresses disability in Zimbabwe. This Act provides for the welfare and rehabilitation of PWDs.²⁸ The Act establishes the National Disability Board and sets out the functions of this body.²⁹ The Act creates the Office of Director for Disabled Persons' Affairs whose duties include liaising with ministries and local authorities to ensure the implementation of the policies and measures formulated by the National Disability Board, and co-ordinating the activities of organisations which are involved in working with PWDs.³⁰ Section 9 of the Act endeavours to protect PWDs from non-discrimination in employment.³¹ However, this non-discrimination clause is subject to exceptions based on the nature of the job, the nature of disability the prospective employee has, and whether the employer has special facilities to accommodate the PWD.³² The Act makes it a criminal offence to deny PWDs admission into any premises to which members of the public are ordinarily admitted or to deny provision of any public service amenity.³³

27 The Disabled Persons Act 5 of 1992 [Chapter 17:01].

28 Preamble of the DPA.

29 Sec 5 of the DPA.

30 Sec 3(2) of the DPA.

31 Secs 9(4) and 10(c) make it a criminal offence to discriminate against a PWD in matters to do with employment.

32 Sec 9(2)(a)-(c) of the DPA.

33 Sec 8 of the DPA.

- **The Mental Health Act [Chapter 15:12]**

The Mental Health Act³⁴ provides for the consolidation and amendment of the law relating to the care, detention and after-care of persons with mental disabilities for the purposes of treatment.³⁵ This Act establishes the Mental Hospital Board which has the mandate of rehabilitating, treating and attending to the welfare of 'mental health patients'.³⁶ The Act stipulates the procedure for the committal of persons with mental disabilities to mental health institutions.³⁷ The committal procedure for persons with mental disabilities who face criminal charges is also provided for by the Act.³⁸ Special Boards are established by the Act. The Boards report on the condition of 'mental patients' detained in the various mental health institutions.³⁹ The Mental Health Review Tribunal is also constituted by the Act. This Board hears applications and appeals made by and on behalf of 'mental health patients' detained in mental health institutions regarding their treatment, general welfare and release.⁴⁰

- **State Services (Disability Benefits) Act [Chapter 16:05]**

The State Services (Disability Benefits) Act⁴¹ provides for monetary compensation on the death or disablement of a state official arising out and in the course of duty.⁴² This includes members of the Defence Force, the Police Force and the Prison Services. The Act further provides for compensation on the death or disablement of any person whilst assisting the mentioned forces.⁴³ The Act appears to make reference to physical disabilities only and does not mention other types of disabilities such as mental, intellectual or sensory disabilities.⁴⁴ Disablement is defined in terms of this Act as permanent injury or disfigurement.⁴⁵

4.2 Does Zimbabwe have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.

- **The Social Welfare Assistance Act [Chapter 17:06]**

The Social Welfare Assistance Act⁴⁶ provides for the granting of social welfare assistance to persons in need and their dependants.⁴⁷ PWDs in Zimbabwe have been identified as the worst affected by poverty.⁴⁸ In determining whether a person is eligible to receive social welfare assistance in terms of this Act, considerations laid out in section 6 of the Act are taken into account.⁴⁹ Persons who are 'handicapped mentally or physically' and persons who are 'destitute', 'indigent'

34 The Mental Health Act 15 of 1996 [Chapter 15:12].

35 Preamble of the Mental Health Act.

36 Secs 68(1) and 69-72 of the Mental Health Act.

37 See Part II of the Mental Health Act.

38 Part III of the Mental Health Act.

39 See Part IX of the Mental Health Act.

40 See Part X of the Mental Health Act.

41 The State Services (Disability Benefits) Act 22 of 1971 [Chapter 16:05].

42 Preamble of the State Services (Disability Benefits) Act.

43 Sec 37 of the State Services (Disability Benefits) Act.

44 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* 88. Also see sec 15 and the First Schedule of the Act which only outlines the degrees of physical disablement that will be considered before compensation is payable.

45 Sec 2 of the State Services (Disability Benefits) Act.

46 The Social Welfare Assistance Act 10 of 1988 [Chapter 17:06].

47 Preamble of the Social Welfare Assistance Act.

48 National Association of Societies for the Care of the Handicapped 'Disability in Zimbabwe' available at: <http://www.nascoh.org.zw/?Pageid=82> (accessed 2 April 2014).

49 Section 6 provides that the Director of Social Welfare may grant social welfare assistance to a destitute or indigent person where he/she is satisfied that such person is over sixty years of age, is handicapped physically or mentally, suffers continuous ill-health, is a dependant of a person who is a destitute or indigent or incapable of looking after himself or herself, or otherwise has need of social welfare assistance.

and 'incapable of looking after themselves' are eligible to receive social welfare assistance.⁵⁰ The Act endeavours to assist PWDs by providing social welfare assistance in the various forms laid out in section 5 of the Act.⁵¹ The Department of Social Welfare in the Ministry of Public Service, Labour and Social Welfare has the mandate to provide this social welfare assistance. However, this government department is poorly resourced and funded. It does not have the requisite resources and capacity to alleviate the poverty of PWDs. This department has been described as 'probably the most demoralized of all government departments'.⁵²

- **The War Victims Compensation Act [Chapter 11:06]**

The War Victims Compensation Act⁵³ provides for the payment of compensation to persons who have been disabled as a result of war. Where a person has been disabled as a result of war, they are entitled to claim compensation in terms of this Act. Compensation is paid after an assessment of the degree of disablement by the Commissioner of War Victims Compensation.⁵⁴ This Act has special provisions for women with disabilities and children with disabilities in the context of disabilities caused by war.⁵⁵ The Act provides for increased monetary compensation for women with disabilities.⁵⁶ It also makes provision for educational allowance for children who acquire disabilities as a result of war.⁵⁷ This allowance is also available to children whose parents have been disabled as a result of war.⁵⁸ However, the Act appears to make reference to physical disability only.⁵⁹ It can be submitted that persons who acquire physical disabilities as a result of war are the only persons who are entitled to receive compensation under the Act.

- **The Criminal Law (Codification and Reform) Act [Chapter 9:23]**

The Criminal Law (Codification and Reform) Act⁶⁰ extends specific protection to PWDs in respect of some offences. It criminalises sexual conduct with a 'mentally incompetent' adult.⁶¹

- **The Criminal Procedure and Evidence Act [Chapter 9:07]**

The Criminal Procedure and Evidence Act⁶² provides for the trial procedures of persons with mental disabilities.⁶³ Where a magistrate or judge in the trial of a person with a mental disability has been presented with evidence to the effect that the accused person had a mental disability at the time of committing the offence, a special verdict to the effect that the person is not guilty by reason of insanity can be entered. The magistrate may order the detention of such person in a mental institution for the purposes of treatment. Where the magistrate is presented with

50 Sec 6 (1)(b) & (d) of the Social Welfare Assistance Act.

51 Sec 5 states that social welfare may be provided in the form of cash, food, clothes, pauper burials, foster care, orthopaedic and orthoptic appliances.

52 King George VI School and Center for Children with Physical Disabilities 'Disability in Zimbabwe', available at: <https://sites.google.com/a/kinggeorge6.org/kgvi/Home/the-centre/disability-in-zimbabwe> (accessed 2 April 2014).

53 The War Victims Compensation Act 22 of 1980 [Chapter 11:16].

54 Sec 12 of the War Victims Compensation Act.

55 Part VI of the War Victims Compensation Act.

56 Sec 24 (1) of the War Victims Compensation Act.

57 Secs 25 and 26 of the War Victims Compensation Act.

58 Sec 26(1) of the War Victims Compensation Act.

59 See sec 7 and the First Schedule of the War Victims Compensation Act for the assessment of degrees of physical impairments.

60 The Criminal Law (Codification and Reform) Act 23 of 2004 [Chapter 9:23].

61 Secs 60-64 of the Act.

62 The Criminal Procedure and Evidence Act 4 of 1927 [Chapter 9:27].

63 Sec 192 of the Criminal Procedure and Evidence Act provides that:
'If at any time after the commencement of any criminal trial it is alleged or appears that the accused is not of sound mind, or if on such a trial the defence is set up that the accused was not criminally responsible on the ground of mental disorder or defect for the act or omission alleged to constitute the offence with which he is charged, he shall be dealt with in the manner provided by the Mental Health Act [Chapter 15:06].'

evidence to the effect that the accused person is no longer mentally disordered, he can be released from prison.⁶⁴

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Zimbabwe 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.

There is generally a dearth of jurisprudence on disability rights in the Zimbabwean legal system. Nevertheless, the milestone ruling in the case of *Simon Mvindi v The President of the Republic of Zimbabwe*⁶⁵ which addressed the right to vote of PWDs. During the 2008 elections, ballot papers were not available in accessible format to PWDs. Sections 59 and 60 of the Electoral Act⁶⁶ required polling officers on duty to assist voters in need of assistance especially PWDs to cast their ballot. In *Simon Mvindi*, the applicants were all persons with visual impairments who brought a Constitutional Court application challenging the constitutionality of sections 59 and 60 of the Electoral Act. The applicants cited a violation of the right to a secret ballot by the sections in question. The Court held that PWDs have a right to vote in secrecy like any other person. The Court further declared the sections in question null and void as they violated the applicants' right to a secret ballot. The Court also directed the government to provide voting materials in accessible format so that PWDs could fully exercise their right to vote in secrecy.⁶⁷

6 Policies and programmes

6.1 Does Zimbabwe have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

The government has not formulated meaningful policies that directly address disability. It is important to note that civil society is far more involved in carrying out programmes and implementing policies that address the needs of PWDs. As indicated above, the DPA establishes the National Disability Board, which is tasked with developing measures and policies on the welfare of PWDs. In 2005, the National Disability Board successfully lobbied for the inclusion of disability as a prohibited ground of discrimination in the Constitution. Physical disability was then included as a prohibited ground of discrimination.⁶⁸ The National Disability Board further established the Disability Fund in 2003 and received funding for this

64 Sec 29(2)(c) Mental Health Act. The Mental Health Tribunal will then make recommendations as it sees fit as to the further detention, care, treatment and management of the accused.

65 SC 106/08 (2008).

66 The Electoral Act 25 of 2004 [Chapter 2:13].

67 Mandipa (n 44 above) 95.

68 Mandipa (n 44 above) 91.

Fund from the national reserves.⁶⁹ The Board also lobbied successfully for the inclusion of children with disabilities in the Basic Education Assistance Module (BEAM).⁷⁰

In 2004, the country's first national mental health policy was launched.⁷¹ The aim of this policy was to provide a framework for the design, monitoring and evaluation of mental health programmes. However, delays in implementation and budget constraints made the implementation of this policy difficult.⁷²

The office of the Special Advisor on Disability and Rehabilitation to the President and Cabinet was established in 2007.⁷³ This office acts as a central point within government for matters relating to disability.⁷⁴ It also coordinates the annual National Disability Expo which was launched in 2013. The purpose of this Expo is to provide a platform for government, civil society and any other relevant stakeholders involved with PWDs to interact and share their experiences. The Expo also serves to raise awareness on the rights of PWDs.⁷⁵

6.2 Does Zimbabwe have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

In 2009, the Government launched the Short-Term Emergency Recovery Program (STERP). STERP focused on stabilising the economy. This policy indirectly addressed disability as it provided financial support to revitalise the disability allowance.⁷⁶ The Medium Term Plan (MTP) was Zimbabwe's national economic and development strategy from the period 2011 to 2015.⁷⁷ This policy indirectly addressed disability as it provided for the issuing of grants to PWDs facilities. However, this national policy did not address the economic empowerment of PWDs or income generation initiatives for PWDs.⁷⁸ However, the implementation of the MTP was shortened by the demise of the government of national unity in 2013.

69 R Lang & G Charowa 'DFID scoping study: Disability issues in Zimbabwe' (July 2007) 31, available at: http://www.ucl.ac.uk/lc-ccr/downloads/scopingstudies/dfid_zimbabwereport (accessed 4 April 2014).

70 Mandipa (n 44 above) 91.

71 'Zimbabwe: Mental health policy launched' *IRIN* (undated), available at: <http://www.irinnews.org/report/52472/zimbabwe-mental-health-policy-launched> (accessed 4 February 2014).

72 Zimbabwe Association of Doctors for Human Rights 'Enjoyment of the right to the highest attainable standard of health by all Zimbabweans', available at: <http://www.zadhr.org/newsletters/77-zadhr-newsletter-volume-7-issue-3-august-2009.html?start=3> (accessed 3 April 2014).

73 Mandipa (n 44 above) 93.

74 As above.

75 'Disability expo set for next month' *The Herald* 26 June 2013, available at: <http://www.herald.co.zw/disability-expo-set-for-next-month/> (accessed 4 March 2014).

76 SA Nilsson 'Disability Rights in Zimbabwe', available at: <http://www.msc.st/docs/HRBA-Disability-Zimbabwe-revised-2011-01-30.doc> (accessed 3 April 2014).

77 As above.

78 As above.

7 Disability bodies

7.1 Other than ordinary courts or tribunals, does Zimbabwe have any official body that specifically addresses violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.

The DPA establishes the National Disability Board (NDB).⁷⁹ The functions of the board are set out in section 5 of the Act. The NDB is mandated with formulating policies that are tailored to achieve equal opportunities for PWDs by ensuring that they obtain education and employment. The NDB is also tasked with ensuring that PWDs participate fully in sporting, recreational and cultural activities and that they are afforded full access to community and social services.

The Board is further empowered in terms of the DPA to issue adjustment orders.⁸⁰ Adjustment orders issued by the NDB seek to ensure that PWDs have access to mainstream public services and premises. Where the NDB considers that any public premise or service is inaccessible to PWDs, it may serve an adjustment order. The adjustment order serves as a direction to the owner of the building or the provider of the service to ensure that there is reasonable access by PWDs. The owner or provider must effect such changes so as to ensure reasonable access by PWDs at his/her own expense.⁸¹ Section 7(8) of the DPA makes it a criminal offence not to comply with an adjustment order.

The NDB is however prohibited from issuing adjustment orders on any public institution without the consent of the Minister responsible for the institution. It can be submitted that requiring ministerial consent renders adjustment of state premises and services dependant on the political willingness of the government.⁸² Though the Act empowers the NDB to issue adjustment orders and criminalises non-compliance, no adjustment orders have ever been issued in terms of this Act.⁸³ Furthermore, there have been no prosecutions in terms of this Act.⁸⁴ The NDB is also hindered in its operations by lack of resources.⁸⁵

7.2 Other than the ordinary courts or tribunals, does Zimbabwe have any official body that though not established to specifically address violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

See 8 below.

79 Sec 4 of the DPA.

80 Sec 7 of the DPA.

81 Sec 7(2)(b) of DPA.

82 Mandipa (n 44 above) 82.

83 As above.

84 As above.

85 As above.

8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

8.1 Does Zimbabwe have a Human Rights Commission, Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If the answer is yes, also indicate whether the Human Rights Commission, the Ombudsman or Public Protector of Zimbabwe has ever addressed issues relating to the rights of persons with disabilities.

In Zimbabwe, the Zimbabwe Human Rights Commission is established in terms of section 242 of the Constitution. Its functions include promoting awareness and respect for human rights and freedoms at all levels of society; promoting the protection, development and attainment of human rights and freedoms; monitoring, assessing and ensuring observance of human rights and freedoms; and receiving and considering complaints from the public and taking action with regard to the complaints it receives.⁸⁶

The Commission is also mandated to protect the public against abuse of power and maladministration by the state and public institutions and by officers of public institutions. In addition, the Commission recommends to Parliament effective measures to promote human rights and freedoms. The Commission may also direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of such investigations.⁸⁷

Furthermore, the Commission may also investigate complaints or allegations of human rights violations on its own initiative.⁸⁸ As such, the Commission is empowered to visit and inspect prisons, places of detention, refugee camps and related facilities for the purposes of identifying and redressing cases of human rights violations in such places. With regard to disability rights, the Commission is empowered to visit and inspect places where 'mentally disordered' or 'intellectually handicapped' persons are detained.⁸⁹

Although the constitutional mandate of the Commission appears to be well articulated on paper, serious questions remain with regard to the Commission's ability to take measures against the executive arm of government, especially human rights violations by the police. It appears that the Commission is a weak body that cannot effectively address human rights violations in Zimbabwe. The recommendations or reports by the Commission with regard to human rights violations have no legal force, although the responsible authorities are expected to act on them. Furthermore, from its inception in 2009, the Commission is financially starved and therefore cannot adequately or effectively execute its mandate.⁹⁰

86 Sec 243(a)-(d) of the Constitution.

87 Sec 243(e), (h) & (i) of the Constitution.

88 Sec 243(f) of the Constitution.

89 Sec 243(k)(ii) of the Constitution.

90 'Zimbabwe Human Rights Commission pleads for funding' *SW Radio Africa* 23 May 2013, available at: <http://www.swradioafrica.com/2013/05/23/zimbabwe-human-rights-commission-pleads-for-funding/> (accessed 10 April 2014).

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Does Zimbabwe have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

- Albino Charity Organisation of Zimbabwe: advocates for the rights and welfare of persons with albinism in Zimbabwe.
- Association of the Deaf (ASSOD): representative organisation for persons with hearing and speech functional disabilities.
- Council for the Blind: plays an active role with regards to the rights of persons with visual impairments, especially policy proposals to advance the rights of persons with visual impairments.
- Danhiko Project: an educational and vocational training institution for persons with disabilities in Zimbabwe.
- Deaf Zimbabwe Trust: advocates for the rights of persons with speech-functional and hearing impairments, including recording of television programmes on the rights of 'deaf' people.
- Disabled Women Support Organisation: advocates for the rights of women with disabilities in Zimbabwe, especially the right to economic empowerment.
- Henry Murray School for the Deaf: is an educational institution for children with speech-functional and hearing impairments and also advocates for the rights of persons with speech-functional and hearing impairments.
- Jairos Jiri Association: a long established organisation that represents persons with disabilities in Zimbabwe.
- Margareta Hugo School and Workshops for the Blind: an educational and vocational training centre for persons with visual impairments in Zimbabwe. It also advocates for the rights of persons with disabilities in general.
- Midlands State University Legal Aid Clinic: specialises in strategic litigation on behalf of persons with disabilities in Zimbabwe.
- National Association for the Care of the Handicapped: is an umbrella organisation for organisations of and for persons with disabilities in Zimbabwe.
- Zimbabwe Association of the Visually Handicapped: advocates for the rights of persons with visual impairments in Zimbabwe.
- Zimbabwe Downs Syndrome Association: a representative organisation for persons with intellectual disabilities in Zimbabwe.
- Zimbabwe National Association for Mental Health: advocates for the rights of persons with mental disabilities in Zimbabwe.
- Zimbabwe National League of the Blind: champions the rights of persons with visual impairments, including litigation for the rights of persons with disabilities.
- Zimbabwe Parents of Handicapped Children Association: a representative organisation for parents of children with disabilities and advocates for the rights of children with disabilities in Zimbabwe.
- Zimcare Trust: an educational and vocational training centre for persons with intellectual disabilities.

- Zimbabwe Women with Disabilities in Development: caters for the needs and concerns of women with disabilities in Zimbabwe with regards to national development initiatives.⁹¹

9.2 In the countries in Zimbabwe's region, are DPOs organised/coordinated at a national and/or regional level?

The National Association for the Care of the Handicapped (NASCOH)⁹² is an umbrella organisation that deals with disability in Zimbabwe. Its members include most if not all the organisations listed in 9.1 above. Other member organisations include Abilities, the Disability Agenda Forum, the Disability Resource Centre, the Disabled Child Network, the Disabled Helping Hand Association, the Disablement Association of Zimbabwe and the Zimbabwe Visually Impaired Teachers Trade Union. The objectives of NASCOH include: initiating, promoting and developing the coordination and participation of and between member organisations in matters concerning the care of people with disabilities; periodically reviewing the facilities available for the rehabilitation of people with disabilities in order to promote further developments; and advising the government on any existing or future organisation concerned with the care of people with disabilities and to disseminate information to any interested body.

9.3 If Zimbabwe has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Given the fact that Zimbabwe recently ratified the CRPD, it is not yet clear how the involvement of DPOs in the implementation of the CRPD will be achieved.

10 Government departments

10.1 Does Zimbabwe have a government department/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 Social Welfare**

The Department is responsible for disability issues. It is tasked with the provision of disability grants to PWDs. The Department however is not human-rights oriented in its work but approaches disability as a welfare issue. In addition, the Department 'is probably the most impoverished and demoralized of all government departments'.⁹³ Due to a lack of financial resources, the Department is not in a position to provide meaningful grants. At present, only a few PWDs are receiving the disability grants in the amount of US\$17-00 per month.⁹⁴ It is submitted that the size of the grant is very small and insignificant.

91 The list of DPOs and other civil organisations that deal with disability in Zimbabwe is available at: <http://www.nascoh.org.zw/members> (accessed 24 June 2014).

92 NASCOH is a non-governmental organisation operating in Zimbabwe. It is the umbrella body for voluntary organisations for and of persons with disabilities in Zimbabwe.

93 King George VI School and Centre for Children with Physical Disabilities (n 52 above).

94 'Government to pay disability grants' *The Star* 17 May 2013.

- **The National Disability Board**

As indicated above, the Board is established by the DPA.⁹⁵ Its functions are to adopt policies to ensure access to education and employment by PWDs.⁹⁶ It also ensures that PWDs participate fully in sporting, recreation and cultural activities and are afforded full access to community and social services. It is the Board that issues the above discussed adjustment orders in the event that there are inaccessible public premises and services.⁹⁷

However, the Board is largely invisible due to a lack of resources in that it operates under the financially ailing Department of Social Welfare. The Board has not had an office to operate from since 1992 and there are no meetings by the members due to lack of resources.⁹⁸

11 Main human rights concerns of people with disabilities in Zimbabwe

11.1 Contemporary challenges of persons with disabilities in Zimbabwe (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

- **Negative social attitudes**

Disability in Zimbabwe is surrounded by myths resulting in stigmatisation of PWDs.⁹⁹ Pejorative terms like 'idiots', 'imbeciles', 'mentally retarded' or 'mentally handicapped' are still used in Zimbabwe to refer to persons with mental and intellectual disability.¹⁰⁰ Disability is linked to witchcraft and sometimes the birth of a child with a disability may result in divorce of the mother. There is also a common misconception in Zimbabwe that PWDs are passive and economically unproductive, and therefore are a burden upon the country.¹⁰¹ The negative social attitudes thus negatively affect the inclusion and participation of PWDs as equal members of society. Resultantly, PWDs tend to suffer more human rights violations compared to their non-disabled counterparts.¹⁰²

95 Sec 4 of the DPA.

96 Sec 5 of the DPA.

97 As above.

98 Interview with R Mudarikwa, deputy chairperson of the National Disability Board, 7 March 2014.

99 Choruma (n 4 above) 10.

100 See the Criminal Procedure and Evidence Act (n 62 above) and the Criminal Law (Codification and Reform) Act (n 60) in which pejorative terms like the 'mentally challenged' and 'imbecile' are still used.

101 Lang & Charowa (n 69 above).

102 As above.

11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

• Access and accommodation

The legal framework that addresses the right of access to physical, social communication, information and other services is weak. As indicated above, the National Disability Board cannot issue and serve adjustment orders to state hospitals, clinics, nursing homes, schools or educational training centres without the consent of the relevant Minister of the institution concerned.¹⁰³ The requirement for ministerial consent has resulted in many government workplaces and state recreational facilities not being accessible to PWDs¹⁰⁴ because the required ministerial consent is very difficult to secure. There are no accessibility standards and regulations for public premises and services in Zimbabwe. As a result, roads, bus stations, communication services, transport services and recreational services are not accessible to PWDs in Zimbabwe.¹⁰⁵

• Access to education

It has been estimated that one in three children with disabilities is not attending school and that 75 per cent of children with disabilities never complete primary school.¹⁰⁶ These are damning reports for a country striving to achieve the millennium development goal of universal primary education. It has also been indicated that 32 per cent of people with disabilities in Zimbabwe have had no schooling.¹⁰⁷ This is particularly disturbing if one considers the central role that education plays in fostering the enjoyment of other rights and promoting the development of children, communities and nations. To compound the situation of learners with disabilities in Zimbabwe, section 83 of the Constitution reinforces the idea of special schools for PWDs and does not do enough to embrace inclusive education.¹⁰⁸ Without educational opportunities, children with disabilities will not have the chance to develop to their full potential and will face tremendous barriers to full social and economic participation in society. Without the requisite education, a vicious cycle of poverty and disability is therefore created and compounded for children with disabilities in Zimbabwe. The law does not address the right to education for children with disabilities in Zimbabwe.¹⁰⁹

• Access to employment

Given the fact that Zimbabwe is currently facing unprecedented economic challenges, PWDs are excluded from employment.¹¹⁰ The law is inadequate with regards to the right to employment for PWDs. The laws that address disability in Zimbabwe have a lot of shortcomings with regard to the realisation of the right to employment of PWDs. The laws still embrace an outdated welfaristic approach or medical approach to disability.¹¹¹

103 See sec 7(7) of the DPA.

104 AH Eide et al 'Living conditions among people with activity limitations in Zimbabwe: A representative regional survey', available at: <http://www.safod.org/images/lczimbabwe.pdf> (accessed 4 March 2014).

105 Mandipa (n 44 above) 82.

106 'The plight of deaf and dumb children in education' *Manica Post* 20 December 2011.

107 UNICEF *A study of children and adolescents in Zimbabwe* (2012) 74.

108 Mandipa (n 44 above) 80.

109 See for example the Education Act 5 of 1987 [Chapter 25:04] which does not embody any provision addressing the education of learners with disabilities in Zimbabwe.

110 Zimbabwe Human Rights Report 'Discrimination based on race, sex, religion, disability, language, or social status', available at: <http://www.ncbuy.com/reference/country/humanrights.html?code=zi&sec=5> (accessed 7 June 2014).

111 Choruma (n 4 above) 10.

To start with, the Constitution does not confer any right to employment for PWDs nor does it confer any state obligation to safeguard and promote such right.¹¹² The DPA does not help either. Apart from merely prohibiting discrimination against PWDs in employment,¹¹³ the Act does not confer any right of substance in relation to employment of PWDs. The Act is also not a human rights document and embraces the medical approach to disability as opposed to a robust human rights-approach.¹¹⁴ On its part, the Labour Act [Chapter 28:01] does not help either. In a similar fashion to the DPA, the Labour Act merely protects employees against discrimination on the basis of disability but does not give an obligation upon the state to promote, protect and fulfil the right to employment.¹¹⁵ The government has also done little to ensure the effective implementation of the laws. It is not surprising to note that, over and above the high rates of unemployment in Zimbabwe, PWDs are the worst affected.¹¹⁶

- **Access to health**

The Constitution subjects the realisation of the right to health for PWDs to the availability of state resources.¹¹⁷ Given that the right to health is most important to PWDs, the law in Zimbabwe is inadequate in this regard. The Constitution does not underscore the state's obligation to ensure progressive realisation of the right.¹¹⁸ PWDs, especially those in rural areas, are the most affected with regard to inaccessible health care services. As such, there is no legal mechanism to compel government to ensure full and effective access to health care services by PWDs in Zimbabwe.

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Zimbabwe?

- **Political Participation**

Prior to 2008, PWDs who needed assistance in casting ballots during an election were assisted by police officers, Zimbabwe Electoral Commission members and political party representatives. However, the position was challenged in *Simon Mvindi*.¹¹⁹ After making a finding that a myriad of factors like lack of accessible polling stations, lack of voting materials in accessible formats, lack of accessible campaign literature and inaccessible transportation to and from polling stations renders the right to vote by PWDs hollow, the Supreme Court (sitting as a Constitutional Court) found that PWDs have a right to vote in secret like any other person. Political parties and the government, through the electoral authority, were ordered to consider developing political communications and voting materials in sign language and ballot papers in large print or Braille.

Despite the judgment, political participation by PWDs in Zimbabwe is still weak due to inaccessible polling stations especially in rural areas, limited number of PWD candidates during elections¹²⁰ and lack of accessible voting materials.

Basically, the major weakness in Zimbabwe is that laws make the realisation of socio-economic and cultural rights for PWDs contingent upon resources that are

112 Sec 65 of the new Constitution provides for labour rights but does not confer any right to employment on PWDs or even for persons without disabilities.

113 Sec 9.

114 Mandipa (n 44 above) 80.

115 Sec 5 of the Labour Act.

116 Eide et al (n 104 above).

117 Section 83 of the Constitution.

118 Mandipa (n 44 above) 79.

119 n 65 above.

120 As an example, sec 120(1)(d) of the Constitution provides for only two senators to represent PWDs in Parliament.

available to the state and do not underscore the state's duty to ensure progressive realisation of such rights.

11.4 Specific categories experiencing particular issues or vulnerabilities:

- **Women with disabilities**

Although women with disabilities (WWDs) generally face the same spectrum of human rights abuses that the able-bodied women face, their abuses are magnified due to severe dependence and social isolation. They suffer double discrimination.¹²¹ In Zimbabwe, the situation of WWDs is particularly precarious. They are subjected to harassment, sexual abuse and exploitation. In addition, Zimbabwe being a highly patriarchal society, WWDs are less likely to benefit from any developmental initiatives that are available as compared to men with disabilities.

- **Children with disabilities**

On their part, children with disabilities are doubly marginalised, firstly as children and secondly as PWDs. Children with disabilities are particularly vulnerable. There is need to ensure that their rights and welfare are protected in Zimbabwe. A common scenario in Zimbabwe is that children with disabilities are less likely to complete primary school education compared to their non-disabled counterparts. This results in spill over effects in that due to a lack of education and requisite skills, it is difficult if not impossible for children with disabilities to secure any form of employment. At the end, a vicious cycle of poverty and disability is created and compounded.

- **Elderly people with disabilities**

Not only are women and children with disabilities in need of concerted attention but also elderly people with disabilities. Needs of elderly people with disabilities may largely differ from those of women and children with disabilities. This means that the equal treatment of all PWDs without taking into account the specific individual circumstances may also lead to injustice.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

Firstly, Zimbabwe needs to urgently domesticate the CRPD for the treaty to have local applicability. Zimbabwe is a dual legal system and all international treaties ratified have to be domesticated.¹²²

Secondly, there is need to align the disability laws with the Constitution and more importantly the CRPD. This is again an urgent exercise which should be implemented without any hurdles. It is a cause of concern that laws which address disability in Zimbabwe, with the exception of the Constitution, predate the CRPD and are framed along the outdated medical model of disability which treats PWDs

121 SA Djoyou Kanga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope' (2011) Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities, Center for Women Policy Studies 3.

122 Sec 34 of the Constitution of Zimbabwe, 2013.

as sick people in need of medical treatment and charity. As an example, the DPAs are not a human rights document in that it does not confer any rights on PWDs or confer any obligations on the state.

Other laws that are in need of the alignment process include the Children's Act [Chapter 5:06], the Mental Health Act [Chapter 15:12], the Social Welfare Act [Chapter 17:06], the State Service (Disability Benefits) Act [Chapter 16:05], the War Victims Compensation Act [Chapter 11:16] and the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The bulk of these laws still use pejorative terms that disempower rather than empower PWDs. Terms like 'imbecile,' 'mentally disordered,' 'intellectually handicapped' and 'mental patients' demean, degrade, belittle, stigmatise and devalue PWDs.

Thirdly, it is an opportunity for Zimbabwe to adopt a National Policy on Disability. A national policy is very important with regard to implementation of disability laws. Such a policy should also consider groups of PWDs who face double discrimination for example women and children with disabilities, and the elderly with disabilities.

Fourthly, there is need to take affirmative action programmes in favour of PWDs. Section 56(6) of the Constitution provides for affirmative action. Affirmative action simply means targeted steps for the advancement of people disadvantaged by historical practices or injustices. It is common cause that PWDs are a group of people who have suffered historical marginalisation due to discriminatory practices and tendencies.

A genuinely equal society is one that has a positive approach to accommodating human difference. Formal equality entrenches pre-existing patterns of social disadvantage in a number of fundamental ways and fails to 'reasonably accommodate' the difference of disability. Formal equality therefore creates illusory benefits for PWDs. Thus, there should be affirmative action policies in Zimbabwe laying a firm foundation for the increased participation of PWDs in critical sectors like education, employment, health and politics. Zimbabwe therefore has to take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

Fifthly, there is need to increase the number of senators representing PWDs from the current two senators. Such a move will assist in guaranteeing effective parliamentary representation of PWDs in Zimbabwe.

Sixthly, there is need for increased litigious and non-litigious efforts for the development of domestic jurisprudence on disability. Courts of law play a very crucial role with regard to the realisation of the rights of PWDs. More referrals are therefore needed on disability issues to the courts of law so as to provide an impetus for the development of domestic jurisprudence on disability.

In addition to litigation, the Constitution and other laws can also be enforced through non-litigious means such as citizens lobbying and pressuring the government to give effect to their rights. Commissions, for example, the above-mentioned Zimbabwe Human Rights Commission can be approached whenever there is violation of the rights of PWDs.

In conclusion, disability needs to be mainstreamed in Zimbabwe. It is only through disability mainstreaming that PWDs can be accorded their full rights and fundamental freedoms.

12.2 What legal reforms are being raised? Which legal reforms would you like to see in your country? Why?

See 12.1.

SECTION C: REGIONAL DEVELOPMENTS

Disability rights in the African regional human rights system during 2013

Overview

This section examines developments in the African human rights system during 2013 relating to disability rights. In respect of the African Union, H Combrinck first outlines activities of the African Commission on Human and Peoples' Rights, with a contribution by L Mute on the draft African Protocol on the Rights of Persons with Disabilities. L Wakefield subsequently provides an overview of the work of the African Committee of Experts on the Rights and Welfare of the Child. The Section concludes with an examination of one of the sub-regional economic communities in Africa, namely the East Africa Community, compiled by LN Murungi.

REGIONAL DEVELOPMENTS

DEVELOPMENTS REGARDING DISABILITY RIGHTS DURING 2013: THE AFRICAN CHARTER AND AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

*Helène Combrinck**
*Lawrence M Mute***

1 Introduction

The historical picture of disability rights in the African regional human rights system can be described as one of 'underutilised potential'.¹ The foundational instrument, namely the African Charter on Human and Peoples' Rights (the African Charter),² contains a dedicated provision on the rights of persons with disabilities,³ although this article has been subjected to some criticism, it is noteworthy for its recognition of the principle that persons with disabilities are entitled to specific measures in accordance with their requirements.⁴

* LLD (University of the Western Cape); Associate Professor, Centre for Disability Law and Policy, University of the Western Cape. Helène Combrinck is the author of the section on the African Commission on Human and Peoples' Rights.

** LLB, University of Nairobi, LLM (Law in Development), University of Warwick; Commissioner, African Commission on Human and Peoples' Rights; Chair, Committee for the Prevention of Torture in Africa; Member, Working Group on Older Persons and People with Disabilities in Africa; Rights and Governance Consultant. Lawrence Mute is the author of the section on perspectives on an African Protocol on the Rights of Persons with Disabilities.

1 J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 54.

2 OAU Doc CAB/LEG/67/3 Rev 3 adopted on 26 June 1981 and entered into force on 21 October 1986.

3 Art 18(4).

4 Secretariat of the African Decade of Persons with Disabilities *The architecture for an African disability rights mechanism* (2011) 24.

In recent years, a number of significant shifts towards inclusion of disability rights have become apparent,⁵ with disability rights gradually making their way into the major instruments of the system such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁶

This subsection examines the work relating to disability rights of one institution in the African system during 2013, namely the African Commission on Human and Peoples' Rights (African Commission). A specific aspect, the draft Protocol on the Rights of Persons with Disabilities, as recently completed by the Working Group on the Rights of Older Persons and People with Disabilities in Africa,⁷ is discussed below.

2 African Commission on Human and Peoples' Rights

The African Commission held two ordinary sessions (the 53rd and 54th) and two extraordinary sessions (the 13th and 14th) during 2013. These sessions took place in Gambia, with the exception of the 14th extraordinary session, which was held in Kenya.

2.1 State reporting

In terms of both the African Charter and the African Women's Protocol, states are required to submit reports to the Commission every two years on the steps taken to implement these two instruments. It is significant to note that the majority of the reports submitted to or considered by the Commission during 2013 included reference to the rights of persons with disabilities.⁸ This related either to the implementation of article 18(4) – for

5 See Biegon (n 1 above) 82; H Combrinck 'Disability rights in the African regional human rights system during 2011 and 2012' (2013) 1 *African Disability Rights Yearbook* 362.

6 CAB/LEG/66 6/Rev 1, adopted on 11 July 2003 in Maputo, Mozambique, and entered into force on 25 November 2005.

7 The first African Union (AU) Ministerial Conference on Human Rights in Africa, held in Kigali in 2003, adopted a Declaration that included specific reference to persons with disabilities and called on member states to develop a Protocol on the protection of the rights of people with disabilities and the elderly – MIN/CONF/HRA/Decl 1(1), adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003. The African Commission subsequently appointed a 'Focal Point on the Rights of Older Persons in Africa' in November 2007, which was expanded in 2009 to become a 'Working Group on the Rights of Older Persons and People with Disabilities in Africa'. For an overview of an initial draft Protocol prepared by the Working Group, see Combrinck (n 5 above) 367; SAD Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219 224.

8 This section looks at reports examined by the Committee during 2013 as well as reports submitted during 2013 but awaiting consideration at the time of writing.

example, in the reports of Burundi,⁹ Cameroon¹⁰ and Mozambique¹¹ – or another right, such as the right to health – in the case of Senegal.¹² The report of Malawi, which includes a section on the implementation of the African Women’s Protocol (the only one submitted during this period to do so), also covers the position of women with disabilities.¹³

2.2 Recognition of human rights situation of persons with disabilities

It is significant to note that the rights of persons with disabilities are increasingly acknowledged in the Commission’s activity reports in the section describing the human rights situation in Africa. For example, in its 34th activity report, the Commission observes that the provision of free sunscreen for people with albinism and the accompanying sensitisation campaign in Kenya is a positive development, as is the adoption by the United Republic of Tanzania of measures to stop the killing of persons with albinism, including through the education of local communities and prosecutions to bring the perpetrators to justice.¹⁴

In its 35th Activity Report, the Commission notes as a positive development the adoption of Lesotho’s National Disability Policy, which recognises that persons with disabilities should have equal access to education, training, employment, health and other aspects of life.¹⁵ On the other hand, it expressed concern about the fact that persons with disabilities, and people with albinism, continue to experience prejudice in some countries, with a disproportionate toll on women with disabilities and/or albinism.¹⁶

- 9 Republic of Burundi ‘First Implementation Report’ (2010): http://www.achpr.org/files/sessions/50th/state-reports/2nd-achpr50_staterep_burundi_2010_eng.pdf (accessed 30 June 2014) 48. The Burundi report was considered in 2011; the Committee adopted its concluding observations at its 13th Extraordinary Session in February 2013.
- 10 Republic of Cameroon ‘Third Periodic Report’ (2013): http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3_cameroon_2013_eng.pdf (accessed 30 June 2014) paras 546-562.
- 11 Republic of Mozambique ‘Combined report 1999-2010’ (2012): http://www.achpr.org/files/sessions/55th/state-reports/1-1999-2010/report_initial_and_combined_1999_2010_eng.pdf (accessed 30 June 2014) paras 304-331.
- 12 Republic of Senegal ‘Periodic Report’ (2013): http://www.achpr.org/files/sessions/53rd/state-reports/3rd-2004-2013/periodic_report_2004_2013_eng.pdf (accessed 30 June 2014) para 304.
- 13 Republic of Malawi ‘Report to the African Commission on Human and Peoples’ Rights 1995-2013’ (2013): http://www.achpr.org/files/sessions/14th-ao/state-reports/1-1995-2013/staterep1_malawi_2013_eng.pdf (accessed 30 June 2014) paras 241-243.
- 14 http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_eng.pdf (accessed 30 June 2014) para 20(a)(x) and (xi).
- 15 http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.pdf (accessed 30 June 2014) para 28(a)(v).
- 16 Para 28(b)(vii).

2.3 Resolutions

The Commission firstly adopted a resolution¹⁷ renewing the mandate of the Working Group on Older Persons and People with Disabilities.

It also adopted a resolution aimed at the prevention of attacks and discrimination against persons with albinism.¹⁸ This resolution expressed concern about reports of systematic attacks against persons with albinism, including against women and children, and welcomed the steps taken and efforts made by the countries concerned, including initiating legal action against perpetrators of attacks against persons with albinism and public condemnation of attacks against persons with albinism. It reminds states parties of their obligations under articles 2 and 18(4) of the African Charter and calls upon state parties to, *inter alia*, take effective measures to eliminate all forms of discrimination against persons with albinism, and to increase education and public awareness-raising activities.¹⁹ It requests states parties to include in their reports submitted to the African Commission under article 62 of the Charter information on the situation of persons with albinism (including good practices in protecting and promoting the rights of persons with albinism).²⁰

The Commission has further adopted a resolution on Women's Right to Land and Productive Resources,²¹ which notes that women living with disabilities, amongst others,²² are more affected by marginalisation and calls on states parties to put in place special measures to protect the property rights of women with disabilities.²³

3 Perspective on considerations for an African Protocol on the Rights of Persons with Disabilities

3.1 Background

This subsection provides a personal perspective on the approach being taken to prepare an African human rights instrument on the rights of persons with disabilities.

17 Adopted at the 54th Ordinary Session, November 2013.

18 As above.

19 Para 3.

20 Para 4.

21 Adopted at the 54th Ordinary Session, November 2013.

22 Such as women living in rural areas.

23 Para 6(vi).

The Working Group on Older Persons and People with Disabilities in Africa (the Working Group) was established by the African Commission on Human and Peoples' Rights (the Commission) in accordance with Resolution 143/45 of 2009. The terms of reference of the Working Group include researching and vocalising the rights of persons with disabilities and advising the Commission on the adoption of a Protocol on the Rights of Persons with Disabilities (Disability Protocol).²⁴

The Working Group is chaired by Commissioner Yeung Kam John Yeung Sik Yuen; and presently its members are Commissioner Reine Alapini-Gansou, Commissioner Pansy Tlakula, Commissioner Lawrence Murugu Mute, Dr Tavengwa Machekano Nhongo, Dr Nadia Abdel-Wahab El-Afify, Dr Isabel Anita Gbenisola Aboderin, Mr Kudakwashe Dube and Dr Elly Macha.²⁵

An early initiative by the Working Group to prepare a continental disability rights instrument was unsuccessful on account of a number of reasons. First, there was inadequate consultation with stakeholders. Also, there was a certain amount of conceptual and normative conflation, for example on whether the disability rights instrument should be framed as a charter or a protocol.²⁶

In 2011, the Working Group was expanded to include more experts as well as members with disabilities. Subsequently, the Working Group finalised a concept paper for the Disability Protocol in 2012 and prepared Draft I of the Disability Protocol in 2013. The Working Group adopted Draft II of the Disability Protocol (Draft Protocol) in March 2014 and invited stakeholders' views and reviews.²⁷

24 <http://www.achpr.org/mechanisms/older-disabled/> (accessed 21 May 2014).

The full terms of reference of the Working Group are to:

'(1) hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;

(2) 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;

(3) 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;

(4) 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;

(5) identify good practices to be replicated in Member States; and

(6) submit a detailed Report to the African Commission at each Ordinary Session.'

25 <http://www.achpr.org/sessions/55th/resolutions/269/> (accessed 10 August 2014).

26 See: Secretariat of the African Decade for Persons with Disabilities 'The Architecture for an African Disability Rights Treaty', available at: african-decade.co.za/.../Architecture_for_an_African_Disability_Rights_... (accessed 22 May 2014).

27 <http://www.achpr.org/news/2014/04/d121> (accessed on 21 May 2014)

3.2 Key considerations

A number of considerations continue to inform the Working Group as it is preparing the Disability Protocol. First, Africa's human rights architecture has evolved steadily to a point where specifically-binding instruments have given recognition to and affirmed the human rights of all the most marginalised groups on the Continent. There are African human rights instruments providing affirmations to the rights and protections for children – the African Charter on the Rights and Welfare of the Child (ACRWC),²⁸ women – the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),²⁹ youth – the African Youth Charter (AYC),³⁰ and internally displaced persons – African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.³¹ Indeed, the Working Group itself in 2012 finalised a draft protocol covering the rights of older persons. The Working Group surmises that Africa's human rights architecture will remain lopsided and incomplete without a human rights instrument affirming or reaffirming the rights of persons with disabilities.

Second, while it is true that some of the above-listed African rights instruments make mention of persons with disabilities, their content is by and large informed by the deficit/medical rather than the social/rights model of disability.³² Furthermore, the rights of persons with disabilities in some of those instruments are made subject to progressive realisation and availability of resources while other rights in those instruments are not similarly treated.³³ It is therefore necessary that the rights of persons with disabilities are set out correctly to conform to the letter and spirit of the Convention on the Rights of Persons with Disabilities (CRPD).

28 African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999: <http://caselaw.ihra.org/doc/acrwc/view/> (accessed 8 September 2014).

29 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003: www.achpr.org/instruments/women-protocol/ (accessed 8 September 2014).

30 African Youth Charter, adopted 2 July 2006: http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf (accessed 8 September 2014).

31 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted 22 October 2009: <http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed 8 September 2014).

32 See Article 13 of the ACRWC which makes reference to 'handicapped children'; Article 23 of the African Women's Protocol which provides for 'special protection of women with disabilities'; and Article 24 of the AYC which makes reference to 'mentally challenged youth'. All these provisions overemphasise special measures at the expense of the overall rights of persons with disabilities.

33 For example, Article 13 of the ACRWC requires states parties to provide appropriate assistance to a disabled child who applies for it subject to availability of resources. States are also required to use their available resources to progressively realise accessibility for persons with disabilities. Significantly, this Charter does not apply the principle of progressive realisation to any of the economic and social rights which it establishes, raising the question why it was found necessary to apply the principle in relation to the rights of children with disabilities.

Third, a far more pragmatic consideration is the reality that African states as well as the bureaucracy of the African Union Commission (AUC) need a home-grown instrument with which to drive the disability rights agenda in Africa. While at least 45 African states have ratified the CRPD³⁴ and 33 African States have ratified its Optional Protocol,³⁵ Africa's recent difficult relationship with the International Criminal Court³⁶ illustrates the unfeasibility of simply assuming that the Continent will pliantly look outwards for the inspiration to protect and promote the rights of its people.

Fourth, though, the Working Group is careful to make the explicit acknowledgement that the CRPD is the novel global standard-bearer on the rights of persons with disabilities. Any new disability rights instrument must not undermine the minimum standard established in the CRPD. Consequently, the Working Group's treatment of key disability concepts such as legal capacity is consistent with the standard established in the CRPD.³⁷

Finally, the Working Group is proceeding on the basis that this Protocol offers a veritable opportunity for raising the bar for the rights of persons with disabilities in Africa by establishing further affirmations and clarifications to tackle Africa's specificities and realities. The Draft Protocol, therefore, covers issues which received no traction in the CRPD despite being of concern in Africa. For example, it provides for:

- (1) Protection of parents, guardians and caregivers from discrimination on the basis of their actual or apparent association with persons with disabilities;³⁸
- (2) Protection of persons with disabilities from harmful practices;³⁹
- (3) Provision for their equal right to hold documents of identity;⁴⁰
- (4) Protection against use of traditional forms of justice to deny persons with disabilities access to appropriate and effective justice;⁴¹
- (5) Calibration of provisions on living in the community to have specific regard for community based rehabilitation services which are a key feature of Africa's approach to disability;⁴²

34 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 20 May 2014).

35 As above.

36 Following the 2013 election of an ICC indictee as President of Kenya, the African Union urged its members not to comply or cooperate with the ICC: 'Can the International Criminal Court and the African Union repair relations?' *Africa in focus* 26 December 2013 <http://www.brookings.edu/blogs/africa-in-focus/posts/2013/12/26-international-criminal-court-mbaku> (accessed 21 May 2014).

37 See art 12 of the CRPD and art 7 of the Draft Protocol.

38 Draft Protocol art 3(3).

39 Draft Protocol art 5.

40 Draft Protocol art 7.

41 Draft Protocol art 8(2).

42 Draft art 9(e).

(6) Provision against any presumption that persons with disabilities may be uneducable⁴³ or untrainable;⁴⁴

(7) Clarification that the support required by persons with disabilities to enjoy their legal capacity must respect their rights, will and preferences, and must not amount to substituted decision-making;⁴⁵ and

(8) Unlike the CRPD but in consonance with Africa's human rights standards, the Draft Protocol makes explicit mention that all persons with disabilities too have responsibilities to other individuals, their families and to the community.⁴⁶

An important choice which the Working Group has made is that this disability rights instrument should be framed as a Protocol rather than a Charter. It is essential that the rights of persons with disabilities remain anchored on Africa's flagship human rights instrument, the African Charter, which in article 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'. It is particularly vital that an artificial wall should not be created between the content of the African Charter and the content of a disability rights instrument. It is even possible that the content of the African Charter will gradually be interpreted to fit the modern conceptual framing on the rights of persons with disabilities to be established in the Protocol. The Draft Protocol hence is intended to be an organic progression from the norms established in the African Charter in the same way that the Maputo Protocol developed from provisions in the African Charter.⁴⁷

Framing this instrument as a Protocol also makes practical sense. A Disability Rights Charter would have required the initiation and execution of a totally new institutional infrastructure to monitor the instrument's implementation; whereas a Protocol would be managed institutionally by the African Commission on Human and Peoples' Rights. A Protocol would offer far more convenience for states parties to fulfil their reporting obligations relating to disability as set out in the Protocol alongside their overall reporting obligations under the Charter. Finally, framing the rights of persons with disabilities in a Protocol linked to the African Commission will not only mean that the Commission's established Communications infrastructure can be deployed immediately to offer redress to victims, but

43 For example in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC), it was submitted that the state made no direct provisions to educate children with severe or profound disabilities because they were uneducable and no amount of education would benefit them. Rather, parents would be left to impart life skills to such children.

44 Draft art 11(4).

45 Draft Protocol art 7(b).

46 Draft Protocol art 23.

47 Article 18(3) of the African Charter provides that: 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.'

that complainants may also take advantage of the special standing which the African Commission has before the African Court on Human and Peoples' Rights to prosecute human rights cases.

The Working Group continues to be extremely keen on getting feedback on the Draft Protocol. The Draft will in due course be reviewed to take account of feedback, before being presented to the Commission for consideration and adoption. Following that, it will be submitted to the AUC for onward processing including deliberation by African states before its possible adoption by the African Union.

4 Conclusion

The year under review offers optimistic evidence that disability rights are making further inroads into the African regional human rights system, with specific reference to the work of the African Commission. At the same time, it may be said that there are further opportunities that may be explored, for example, a greater integration of disability rights in the work of the Commission's special thematic mechanisms.⁴⁸ The introduction of the draft African Protocol on the Rights of Persons with Disabilities, while not uncontroversial, offers further potential for deepening an understanding of disability rights on the continent.

48 Secretariat of the African Decade of Persons with Disabilities (n 4 above) 33.

REGIONAL DEVELOPMENTS

BABY STEPS: DEVELOPMENTS AT THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (2013-2014)

Lorenzo Wakefield*

1 Introduction

As the regional treaty body for the rights of children in Africa, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has the mandate to hold states parties to the African Charter on the Rights and Welfare of the Child (African Children's Charter) to account on how they implement the provisions of this treaty.¹ Even though article 13 of the African Children's Charter gives specific recognition to the rights of children with disabilities in Africa, the other provisions of this treaty apply equally to children with or without disabilities.

The 2013 volume of the *African Disability Rights Yearbook*, contained an article on a specific activity related to the 2012 Day of the African Child² theme, which was focused on the rights of children with disabilities.³ This update will focus on activities undertaken by the African Children's Committee during 2013 and up to June 2014 that relate to the promotion, protection and realisation of the rights of children with disabilities in Africa.

The substantive provisions and mandate of the African Children's Committee were discussed in the 2013 volume of the *African Disability Rights Yearbook* and will not be repeated in this update. This update will thus focus on two important aspects of the implementation of the African Children's Committee's mandate during 2013-2014, which are the

* LLM (University of the Western Cape); Research Fellow: Consortium on Crime and Violence Prevention.

1 Art 42.

2 See <http://acerwc.org/the-committees-work/dac/> for further details on the Day of the African Child (accessed 11 June 2014).

3 See L Wakefield 'Making Progress: The African Committee of Experts on the Rights and Welfare of the Child and the rights of children with disabilities' (2013) 1 *African Disability Rights Yearbook* 369 372-374.

ordinary sessions and states parties reports and a strategy for promoting the rights of children with disabilities in Africa.

2 Ordinary sessions and states parties reports

The 22nd ordinary session of the African Children's Committee was held during 4-8 November 2013 in Addis Ababa, while the 23rd ordinary session took place from 7-16 April 2014 at the same location. At the time of writing, a session report for the 23rd ordinary session was not available on the African Children's Committee website.

During the 22nd ordinary session, the African Children's Committee did not engage with any states parties on country reports. A reason for this could be due to the fact that states parties are not that responsive in reporting to the African Children's Committee. The African Children's Committee acknowledged this and launched a campaign on the importance of reporting that is combined with the 25-year anniversary of the African Children's Charter during the 23rd ordinary session⁴ (During the 23rd ordinary session of the Committee engaged with the Government of Liberia on their initial country report on the implementation of the African Children's Charter).⁵

The African Children's Committee has dealt with matters relating to children with disabilities in the 22nd ordinary session. This was done by way of engagement with an organisation called 'Under the Same Sun' which made a presentation on the rights of children with albinism – specifically focused in Tanzania.⁶ Discrimination faced by persons with albinism is rife in the context of Tanzania. This is largely fueled by myths around albinism combined with the use of body parts of persons with albinism for rituals conducted by traditional healers.⁷ It is more than commendable for the African Children's Committee to deal with the discrimination faced by children with albinism, largely because albinism has not found its position within the disability discourse. Kamga correctly

4 See: <http://acerwc.org/25-years-anniversary-universal-ratification-of-and-reporting-on-the-acerwc/> for mention of this campaign. However, the weblink does not contain any detail on the campaign (accessed 14 July 2014).

5 This report was not available online at the time of writing and therefore one cannot engage with the content in relation to reporting on the implementation of the rights of children with disabilities, specifically looking at article 13 of the African Children's Charter.

6 See: African Committee of Experts on the Rights and Welfare of the Child *Report on the Twenty-second session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 4-8 November 2013, Addis Ababa, Ethiopia* 14 and 15.

7 See: <http://www.underthesamesun.com/sites/default/files/Myth%20Busting%20Brochure%20-%20English.pdf> (accessed 7 August 2014) for a factsheet on the myths of albinism and 'Tanzanian witch doctors arrested over albino killing' *BBC News* 14 May 2014 <http://www.bbc.com/news/world-africa-27409965> (accessed 7 August 2014) for a newspaper article on the arrest of a traditional healer for the killing of persons with albinism.

argues that neither the United Nations Convention on the Rights of Persons with Disabilities, nor any of the African Human Rights Treaties (both the African Children's Charter and the African Charter on Human and Peoples' Rights) expressly acknowledges albinism as a disability.⁸

Unfair discrimination against persons with disabilities is universal, despite the type of disability that a person might have. However, what the case above in relation to children with albinism also illustrates is that discrimination faced by persons with disabilities varies from one country to another and one region to another and that one type of solution to dealing with this kind of discrimination is not sufficient. The varied nature of discrimination faced by persons with disabilities – and in this case children – on the African continent was exactly what the African Children's Committee was coming to terms with by engaging on issues in relation to children with albinism.

3 Strategy for promoting and protecting the rights of children with disabilities in Africa

Following from the 2012 theme for the Day of the African Child on the rights of children with disabilities, the African Children's Committee held a workshop in Cape Town, South Africa in December 2013 on monitoring the rights of children with disabilities in Africa. Stemming from this workshop the African Children's Committee adopted a strategy on how it intends to hold states parties to account to realise the rights of children with disabilities.

The African Children's Committee identified the following seven specific areas within the strategy, which are a cause of concern for children with disabilities in Africa that requires a level of action:

- (a) The links between poverty and disability;
- (b) Social attitudes, stigma and discrimination;
- (c) Right to education;
- (d) Right to health;
- (e) The right to be heard and participate;
- (f) Violence against children with disabilities; and
- (g) The importance of statistics, research and evidence gathering.⁹

8 See: SAD Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International & Comparative Law* 219 229-230.

9 See African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *Strategy for promoting and protecting the rights of children with disabilities in Africa* (2014) 4.

These seven areas of concern are all linked to a strategic thematic area based on the African Children's Charter and matters relating to its implementation are given detailed discussion within the strategy.

The strategy goes further by requesting member states of the African Children's Charter to adopt a three-fold approach to develop their own medium-term strategies that consists of development, implementation and monitoring and evaluation of the rights of children with disabilities.¹⁰ In relation to development, the strategy requires of member states to develop national action plans and reviewing the legislative and policy framework. In relation to the implementation phase, this entails strengthening service provision and having efficient and accessible complaints mechanisms for violation of rights.

States parties are not subject to complying with strategy documents, as they do not constitute binding treaties. States parties are however subject to the provisions of the treaty that they have ratified. In this case it would be the African Children's Charter. Strategy documents of this nature are useful in that they give states parties guidelines on what is required by the African Children's Committee when realising the rights of children with disabilities. Therefore developments of this nature should be welcomed. The implementation of this strategy is vitally important in order to realise the rights of children with disabilities in Africa. Thus constant monitoring of the implementation of this strategy should be undertaken.

4 Conclusion

The mandate of the African Children's Committee is to monitor the realisation of all the rights contained within the African Children's Charter.

As one can view from the developments of the activities of the African Children's Committee, the rights of children with disabilities are not ignored or overlooked. The strategy on realising the rights of children with disabilities is welcomed and should be supported. The implementation thereof should also be supported with the necessary capacities in place.

¹⁰ *Ibid.*

REGIONAL DEVELOPMENTS

DISABILITY RIGHTS IN THE SUB-REGIONAL ECONOMIC COMMUNITIES DURING 2013

*Lucyline Nkatha Murungi**

1 Introduction

Although the core purpose of the sub-regional economic communities is the pursuit of economic integration, certain key opportunities have been identified for the inclusion of human rights, and particularly disability rights, in the purview of these Communities. This subsection reports on recent events relating to disability rights in one of these, namely the East Africa Community (EAC); there have been no notable developments in the Southern African Development Community (SADC) and the Economic Community of Western African States (ECOWAS) during the period under review.

2 The East Africa Community

This subsection builds on the discussion of the legal, policy, and institutional frameworks of the EAC, as well as entry points for the promotion and protection of the rights of persons with disabilities in the sub-region, which was undertaken in the 2013 volume of this Yearbook.¹ The subsection is therefore an update on developments relative to disability rights that have taken place in the period between 2013 and part of 2014. Indeed, there have been only a few, but nevertheless noteworthy, developments in the policy, programmatic and implementation aspects of disability rights at the EAC.

* LLM (University of Pretoria); LLD (University of the Western Cape); Head, Children and the Law Programme, The African Child Policy Forum, Addis Ababa Ethiopia.

1 LN Murungi et al 'Regional developments: Disability rights in the sub-regional economic communities during 2011 and 2012' (2013) 1 *African Disability Rights Yearbook* 375.

2.1 Developments during 2013-2014

2.1.1 Ratification of the Convention

One significant development is that Burundi finally ratified the CRPD in May 2014.² The ratification effectively means that all countries in the EAC are now states parties to the CRPD,³ and therefore that a common and coordinated advocacy effort targeting the domestication and implementation of the CRPD is feasible. In addition, whereas the primary role for the implementation of the CRPD rests with states parties,⁴ the Convention envisages a limited role for regional integration organisations such as the EAC in its implementation, through cooperating in a range of ways for the advancement of the rights of persons with disabilities.⁵ The EAC Treaty does not bestow the Community with a mandate to ratify treaties, and indeed, the stage of integration at which the EAC is at does not allow the Community to ratify the Convention as an organisation.⁶ Nevertheless, a uniform position on the Convention amongst partner states is conducive to push a common agenda for the implementation of the Convention in the sub-region.

2.1.2 Disability policy

In 2012, the Secretariat of the EAC embarked on a process of drafting a Disability Policy. In 2013, the Draft Policy was confirmed by the Council of Ministers, which is the ultimate policy making institution of the Community.⁷ The Policy has since been adopted by the Sectoral Committee of the Council in 2013 and can now be formally applied as a reference and coordination point for action on disability rights within the EAC.⁸

2 See UN Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 20 June 2014).

3 Although it has ratified the CRPD, Kenya is the only country in the EAC that is yet to ratify the Optional Protocol to the CRPD on a communications procedure under the CRPD.

4 CRPD, art 32(2)

5 CRPD, art 32(1)

6 CRPD, art 44. The EAC is at the third stage of integration, that is, a common market. See Murungi et al (n 1 above) 376. The competencies of the Community at this stage are largely on the freedom of movement of goods, services and people, as opposed to treaty making on behalf of partner states.

7 East Africa Community Treaty, art 14(1).

8 East Africa Community, Report of the 2nd Meeting of the 2nd Session of the East African Legislative Assembly, Bujumbura, Burundi 20 October-1 November 2013, available at http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CD4QFjAF&url=http%3A%2F%2Fwww.eala.org%2Fkey-documents%2Fdoc_download%2F433-2nd-meeting-of-the-2nd-session-of-the-3rd-assembly-.html&ei=4MKnU7v2Equet0QWB5YQCQDg&usq=AFQjCNEqQX9fMfGBjytTzevq5iSueICPzg&bvm=bv.69411363,d.d2k (accessed 20 June 2014).

2.1.3 Case law

In a decision of 2011, the East Africa Court of Justice (EACJ) found the Secretary General of the EAC to be in contravention of the Treaty for the delay in adopting a Protocol to extend the mandate of the Court to various other issues including human rights.⁹ In 2012, the applicant in that case filed a follow-up case to push for the implementation of the decision. In 2013, the EACJ delivered its verdict on the follow up matter, finding that in terms of the EAC Treaty, the Council of Ministers has a 'determining' mandate on the jurisdiction of the EACJ. Accordingly, the EACJ could not question the decision of the Council of Ministers to exclude human rights from the jurisdiction of the EACJ.¹⁰ This decision will, unfortunately, limit the potential of the EACJ as a platform for the enforcement of human rights, including disability rights.

2.1.4 Conferences

The EAC regularly holds high level stakeholder conferences as one of the platforms to disseminate its policies and to push action amongst partner states on various issues. A biennial conference on disability is one such representative forum organised to monitor the implementation of the CRPD by EAC partner states. The inaugural EAC disability conference was held in Kampala-Uganda in the year 2010.¹¹ One of the key outcomes of that conference was a call for the adoption of an EAC policy on persons with disabilities.¹² The second conference was held in Nairobi-Kenya in June 2014, on the theme of 'Empowerment: The disability concern in the EAC regional integration agenda'.¹³ The 2014 conference assessed partner states' progress in the implementation of the CRPD, the integration of disability and participation of persons with disabilities in the post – 2015 United Nations agenda, an evaluation of progress by partner states towards attaining the Millennium Development Goals (MDGs) in relation to people with disability, as well as addressing partner states' participation in the post-2015 development agenda.¹⁴

9 *Sitenda Sibalu v The Secretary General of the EAC & 4 Others* Ref No 10 of 2010.

10 *Sitenda Sibalu v The Secretary General of the EAC* Ref No 8 of 2012. It is important to note that in a move akin to retaliation on the EACJ for finding against the Council of Ministers and the Secretary General, the Council of Ministers met soon after the decision and decided to exclude the human rights and appellate mandates of the EACJ altogether, instead of extending the current mandate to these areas. This is a matter that the Court took notice of in its decision.

11 See http://gender.eac.int/index.php?option=com_content&view=article&id=142:pwd-conference-kampala&catid=53:press-room&Itemid=183 (accessed 22 August 2014).

12 EAC Policy on Persons with Disabilities 2012 8.

13 See http://gender.eac.int/index.php?option=com_docman&Itemid=189 (accessed 23 June 2014).

14 EAC Communiqué issued at the 2nd EAC Conference on Persons with Disabilities, Nairobi, Kenya 20 June 2014.

One of the key outcomes of the conference was the adoption of a Communiqué setting out recommendations for action in the aforementioned areas. Some key issues of interest in the Communiqué include its calls for the institutionalisation of the conference as a biennial forum to track progress on the implementation of both the CRPD and of the recommendations emanating from previous conferences. The Communiqué also urges the EAC Secretariat to 'coordinate efforts in all Partner States to generate a common position on the post 2015 development agenda for PWD'¹⁵ and 'to lobby the Africa group to advocate for a standalone Development Goal on PWD in the post 2015 development agenda.'¹⁶ The Communiqué further calls upon EAC partner states to mainstream disability concerns in all post MDGs and international sustainable development frameworks in spheres such as education, health, infrastructure, agriculture and employment,¹⁷ and to lobby for the adoption of an 8th Pillar to the African Union Agenda 2063 focusing on special interest groups including persons with disabilities.¹⁸

The call for inclusion of disability concerns into the post 2015 development agenda is timely. The current international development agenda, as set out in the MDG framework, will end in 2015. States are therefore currently engaged in discussions on the focus of the next development framework for the period after 2015, that is, post 2015.¹⁹ As at the time of developing the MDGs, disability was not a core and visible issue to international policy makers.²⁰ As a result, the MDGs did not specifically address disability, except in as far as non-discrimination was an integral part of the goal's achievement as in the case of universal primary education.²¹ The exclusion of a specific disability focus in the MDGs contributed to the marginalisation of disability concerns in the UN

15 The abbreviation 'PWD' is reproduced here as used in the original text of the Communiqué. The author is aware that the use of this abbreviation is not unanimously accepted within the disability rights movement.

16 EAC Communiqué (n 14 above) para 3.4.

17 EAC Communiqué (n 14 above) para 3.5.

18 EAC Communiqué (n 14 above) para 4.3. The AU Agenda 2063 refers to the AU's vision and roadmap towards an integrated, peaceful and prosperous Africa for the next 50 years. More on the vision can be found at <http://agenda2063.au.int/en/about> (accessed 23 August 2014).

19 Some of the deliberations on the Post-2015 development agenda are available at <http://www.un.org/en/ecosoc/about/mdg.shtml> (accessed 22 August 2014) and <http://www.un.org/millenniumgoals/beyond2015-news.shtml> (accessed 22 August 2014).

20 The 1990s were a particularly active decade for purposes of disability rights. However, as at the time of developing the MDGs, international support for a concrete disability agenda had not galvanised enough support to posit disability as a priority concern in the international development agenda or warranting a common position amongst countries. G Quinn & T Degener *Human rights and disability: The current use and future potential of UN human rights instruments in the context of disability* (2002) 29-46, 293-294 map the global discourse on disability rights before the CRPD, showing the vibrant discussion on the need for a responsive framework on disability at the global level, yet not achieving consensus on the need for a standalone treaty on the issue, even as of the year 2000.

21 United Nations Millennium Development Goals 'Goal No 2: Achieve universal primary education' (2000).

development agenda for the past 15 years. Explicit recognition of disability in the post-2015 framework would therefore be instrumental in ensuring that persons with disabilities benefit from the development agenda, and that the CRPD is implemented.

2.2 Emerging opportunities for the promotion and protection of disability rights in the EAC

The EAC is in the process of developing a child rights policy to act as a basis for the harmonisation of child rights standards in the sub-region, and to establish a framework for coordinated action amongst partner states towards matters affecting children.²² The Policy development process is opportune for ensuring the integration of the rights of children with disabilities into child rights action within the EAC.

In addition, the aforementioned 2nd EAC Conference on Persons with Disabilities (2014) called for the development of an EAC Disability Bill. If this recommendation is implemented, there is indeed an opportunity to integrate CRPD standards into the law of the EAC.

3 Conclusion

Evidently, there has been little change in disability rights in the EAC within the year, hence signalling a slow pace for the realisation of the rights in the sub-region. It is laudable that all EAC partner states are now states parties to the CRPD. It is also commendable that the EAC has adopted measures to anchor the disability rights agenda such as through the final adoption of the Disability Policy, as well as the periodic conference on disability. However, in light of the actions of the Council of Ministers to exclude human rights from the mandate of the EACJ, and the decision of the EACJ adjudging itself helpless in the circumstances, there is potential for the gains made in the protection of human rights, including the rights of persons with disabilities, in the EAC to be eroded.

22 As of June 2013, the policy development process was still in the initial stages, with the initial draft that emerged from an inter-agency working group awaiting consideration by government experts from the partner states.