

African Disability Rights Yearbook

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African Disability Rights Yearbook

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PREFACE

This is the first issue of the *African Disability Rights Yearbook (ADRY)*. Drawing inspiration from the *European Yearbook on Disability Law*, it is the first publication of its kind that focuses on Africa. It aims to bring into prominence an area traditionally neglected by both African governments and academics. Following in the wake of the adoption of the United Nations Convention on the Rights of Persons with Disabilities, it is the first peer-reviewed journal to focus exclusively on disability as human rights on the African continent. The *Yearbook*, which is projected to appear annually, is set out in three sections. Section A contains academic articles; Section B consists of country-based research, charting recent developments on disability rights legislation, case law and policy developments in selected African states; and Section C deals with relevant developments in the African Union (AU) and African sub-regional organisations. The 2013 *Yearbook* aims to set out the situation as at 31 December 2012.

The publication of the *Yearbook* in 2013 is a milestone in the engagement on the rights of persons with disabilities by the Centre for Human Rights, Faculty of Law, University of Pretoria, under whose auspices this publication was conceived and is being produced. It marks a highlight in the efforts taken by the Centre over the last few years to bring more academic attention to the rights of persons with disabilities in Africa. These efforts have only been possible with the support of the Open Society foundations, in particular, Open Society Initiative for Southern Africa (OSISA).

Over the last years, OSISA has collaborated with the Centre for Human Rights, University of Pretoria, to strengthen the teaching and research in law faculties in the Southern Africa on disability rights. The collaboration consists of the following elements:

(a) Efforts are made to assist in the building of capacity of law faculties in the region, through the attendance of the LLM (Human Rights and Democratisation in Africa) with a focus on disability rights by staff members from these law faculties. The staff members subsequently return to their faculties, institute and develop teaching on disability rights, and institutionalise faculty-based activities and 'centres' around disability rights. So far, the following faculties have participated: Universidade Eduardo Mondlane, Mozambique (Faculdade de Direito); the University of Botswana; the University of Malawi (Chancellor College, Faculty of Law); University of Namibia; Midlands State University, Zimbabwe (Faculty of Law); University of Zambia; and University of Dodoma (Tanzania); University of Namibia. These faculties/centres have the responsibility/mandate to research on disability rights; promote awareness and sensitise key stakeholders in the population about the rights of persons with disabilities and the existing legal framework; elaborate position papers and advocate for particular legal reforms; keep record of/identify and engage in litigation of selected cases pertaining to the violation of the rights of persons with disabilities; and provide legal advice to persons with disabilities.

(b) The Centre presents a one-week intensive short course on disability rights to build capacity and to disseminate information on disability rights more broadly in Africa. This course is attended by participants from all over the continent.

(c) Together, the participating faculties are developing a curriculum for the teaching of an undergraduate course on disability rights at law schools in the region.

(d) Academic work on and awareness about disability rights is stimulated, in particular, through the publication of this *Yearbook*, an academic conference, and a first Southern African Disability Rights Moot Court Competition.

This *Yearbook* is the accomplishment of many. It has been a project long in planning and preparation, and time consuming in execution. The publication is the end-product of collaborations between the Centre and numerous partners, in particular

a long-standing partner, the Faculty of Law at the University of the Western Cape (UWC).

A very sincere and profound word of thanks goes to the following:

The four editors: the convening editor, Prof Charles Ngwena, who joined the Centre for Human Rights last year; he worked with Dr Ilze Grobbelaar-Du Plessis (UP); Prof Helene Combrinck (UWC) and Dr Serges Djoyou Kamga (UNISA) as co-editors. It is only their dedication and devotion that has made this publication possible. Prof Ngwena was not only the convening editor, but also the editor in charge of Part A. He bore the brunt of the responsibility to keep the project going, and to inspire and lead all involved towards the ever-approaching deadline. Drs Grobbelaar-Du Plessis and Serges Djoyou Kamga took responsibility for Part B, and Prof Combrinck for Part C. They each sacrificed enormously in terms of time and energy, in order to get to this end product.

Thanks to all contributors, and all reviewers of contributions, for dedicating themselves to this thankless task.

Kate Painting acted as a most appreciated editorial assistant. She meticulously followed up references, guaranteed consistency in style, and ensured felicitous language use. At the Centre, Thuto Moratua Hlalele, Yolanda Booyzen and Kevashinee Pillay also provided logistical and other support.

The *Yearbook* is published by Pretoria University Law Press (PULP), based at the Faculty of Law, University of Pretoria. The patient and professional contribution of Lizette Hermann is much appreciated.

We also thank the members of the advisory board, who agreed to assist with the policy direction, review of manuscripts and lending credibility and lustre to this *Yearbook* by associating themselves with this endeavour. The *Yearbook* is very fortunate to have representation from all corners of the globe, including individuals and institutions at the leading edge of disability rights research, training and teaching.

Lastly, to the Open Society Foundation – and specifically OSISA – and its staff: Many thanks in particular to Louise Olivier, for her confidence, inspiration and consistent support, which took the Centre and me personally along an exciting and challenging new road; and to Louise Ehlers and Patricia Mwanyisa, who came on board later. Other Open Society staff also inspired and played important roles along the way.

In line with the right of access to information and knowledge, this *Yearbook* is accessible freely as a free full downloadable document on the Centre's website www.chr.up.ac.za

On behalf of all those involved, and of the Centre, I wish to express the hope that this *Yearbook* will soon come to be regarded as an indispensable tool to understand and chart legislative and policy developments on disability rights in Africa, and that it will contribute to bridge the gap between the discourse of rights and its practical application and actual realisation.

Frans Viljoen
Director, Centre for Human Rights

EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the first issue of the *ADRY*. The *ADRY* is a peer-reviewed journal that is published once a year with 2013 as its augural year.

The *ADRY* comes in the wake of the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006 and its ratification by an increasing number of states, including African states. The CRPD underscores the status of persons with disabilities as rights-bearers rather than recipients of charity. In its preamble, it underscores that persons with disabilities should have 'full enjoyment of all human rights and fundamental freedoms on an equal basis with others'. Yet it is a truism that in the African region, the majority of persons with disabilities live in abject poverty and at the mercy of charity. Disability-related oppression, marginalisation and socio-economic exclusion remain deeply embedded in African socio-economic systems, notwithstanding that we are beginning to see promising signs of change and transformation in some African states.

The CRPD is paradigm-setting. It constitutes a shift from traditional ways of looking at disability as individual impairment to focusing on state obligations to dismantle a *disabling* environment and, in its stead, create an *enabling* environment which is inclusive and accommodates all human beings in their diversity. It is a call to arms for African human rights systems. The CRPD creates a new vision of disability and inclusive equality which must find its expression not merely in policy and lawmaking. More crucially, to overcome the legacy of systematic inequality and discrimination that persons with disabilities have endured and continue to endure, the vision of the CRPD and its injunctions require implementation at the domestic level. They require the African region and its people to transform the landscape of persons with disabilities in ways that *fulfil* disability rights and tangibly guarantee equal participation in civil, political, economic, social and cultural spheres.

Against the backdrop of the CRPD and a changing human rights landscape for persons with disabilities, the *ADRY* seeks to contribute towards promoting the respect, protection and fulfilment of disability rights in the African region through providing an annual forum for critically examining issues that pertain to the disability rights of individuals and peoples of the region, and reporting on disability rights-related developments at a country and African regional levels. It comprises three sections. Section A contains articles that interrogate critically contemporary human rights issues that are of concern to persons with disabilities in the Africa. Section B contains summaries or overviews of developments relating to the rights of persons with disabilities in selected countries. The section aims to report on a segment of African countries on a rotation basis each year. A country-based researcher is appointed for each country that is reported. The report is prepared using a standardised questionnaire or template. Section C – the last section – provides an overview of developments relating to disability rights at the sub-regional and regional level of the African Union.

Section A of this inaugural issue features articles by: Enoch MacDonnell Chilemba, examining the right to primary education of children with disabilities in Malawi; Serges Djoyou Kanga, also examining the right to primary education of children with disabilities but in respect of Cameroon; Elizabeth Kamundia, exploring the application of right of persons with disabilities to living independently and being included in the community in the context of Kenya; Esau Mandipa, analysing the legal and institutional frameworks for realising the rights of persons with disabilities in Zimbabwe; Janet Lord and Michael Ashley Stein, interrogating the implementation of the CRPD in the African region; Magdolna Birtha, examining the involvement of the disability movement in policy-making through a case study on Zambia; Charles Ngwena, critically appraising the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* as it applies to the right to education of learners with intellectual disabilities; and Likando Kalaluka,

analysing the prospects and effectiveness of litigation pertaining to disability rights in Zambia. We extend our heartfelt gratitude to external reviewers who peer-reviewed contributions in this section.

Section B reports on the state of disability rights in the following countries: Cameroon by Christophe Tchudjo and Joseph Ombe; Côte d'Ivoire by Pierre Olivier Lobe; Ghana by Esther Gyamfi; Mozambique by Emerson Casimiro Uassuzo Lopes; Namibia by Ruusa Ntinda; Nigeria by Ngozi Umeh and Ramola Adeola; The Democratic Republic of Congo (DRC) by Florent Mubaya Kiwele Kya Bantu; South Africa by Ilze Grobbelaar-du Plessis and Chazanne Grobler; and Tanzania by Peter Josiah Shughuru. The reports on Côte d'Ivoire, Cameroon and the DRC appear in French. Where practicable, the *ADRY* will endeavour to publish country reports other than in English as part of accommodating diverse linguistic communities in the African region.

Section C on sub-regional and regional developments contains the following contributions: Helene Combrinck's overview of a disability rights framework and developments in the African regional human rights system; Lorenzo Wakefield's commentary on progress by the African Committee of Experts on the Rights and Welfare of the Child as they relate to the rights of children with disabilities; and commentaries on three economic sub-regions by: Lucyline Murungi on East Africa Community (EAC); Aquinaldo Mandlate on the Southern African Development Community (SADC); and Benedicta Armah on the Economic Community of West African States (ECOWAS).

We earnestly hope that the *ADRY* will contribute towards the promotion of disability rights in the African region. More pertinently, we hope that the *ADRY* will become an invaluable forum and source for all stakeholders, including persons with disabilities, disabled peoples' organisations, human rights advocates, judges, scholars, teachers, legislators, and policymakers as they consider ways of transforming the disability landscape at the domestic and/or regional levels in Africa in ways that complement the vision of the CRPD.

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

SECTION A: ARTICLES

THE RIGHT TO PRIMARY EDUCATION OF CHILDREN WITH DISABILITIES IN MALAWI: A DIAGNOSIS OF THE CONCEPTUAL APPROACH AND IMPLEMENTATION

*Enoch MacDonnell Chilemba**

Summary

The Convention on the Rights of Persons with Disabilities, which Malawi ratified in August 2009, affirms the recognition that disabled children are entitled to enjoy human rights such as primary education, including compulsory and free primary education, on an equal basis with others. However, almost 98 per cent of Malawi's disabled children do not have access to education. This article observes that the situation could be attributed to the failure by the government of Malawi to conceptualise and implement the right to primary education for disabled children as envisaged by the international conceptual approaches and legal standards of inclusive education. The standards, as provided for in article 24 of the Disability Convention, emphasise the right of disabled children to attain compulsory and free primary education in mainstream schools together with all other children. Accordingly, this article explores the measures that Malawi could take to ensure a domestic implementation framework and conceptual approach that complies with international standards and approaches. This article first highlights the challenges that Malawi faces in the provision of primary education to disabled children before analysing the pertinent concepts such as inclusive education. It further discusses the applicable international legal standards before examining Malawi's approach to the provision of primary education of disabled children. Ultimately, it evaluates Malawi's constitutional, legislative and policy framework for the implementation of the right and suggests a number of measures that Malawi can implement in order to ensure compliance with international standards and conceptual approaches.

* LLB (Hons) (Mal), LLM (UP, RSA), LLD Candidate & Doctoral researcher at the Community Law Centre & the Centre for Disability Law and Policy at the University of the Western Cape; Lecturer in Law at the Faculty of Law, University of Malawi; advocate of the High Court and Supreme Court of Malawi; enochilemba@yahoo.com. This work builds on the author's LLM thesis, 'A critical appraisal of the right to education of children with disabilities in Malawi', submitted in partial fulfilment of the requirements of the LLM (Human Rights and Democratisation) Degree, (University of Pretoria) and also on the author's current doctoral research.

1 Introduction and background

Education is a fundamental right for all children, including children with disabilities (disabled children), to the extent that it is regarded as having double dimensions as a human right in itself and an indispensable means of realising other rights.¹ Primary education, on which this article focuses, is one of the components that make up the umbrella right to education.² The right is guaranteed in a number of human rights treaties, which include the United Nations (UN) Convention on the Rights of the Child (the CRC);³ the African Charter on the Rights and Welfare of the Child (the ACRWC);⁴ and the Convention on the Rights of Persons with Disabilities (the CRPD).⁵ Malawi is one of the state parties to these treaties.⁶ Despite this, most disabled children in Malawi do not have access to primary education.⁷ The Malawi Government has acknowledged that almost 98 per cent of the disabled children do not obtain an education.⁸ Accordingly, this article seeks to explore the measures that Malawi could take, which comply with international standards and accepted conceptual approaches, to realise the right to primary education of children with disabilities.⁹

This article first gives a general introduction and background, which includes a synopsis of the challenges that Malawi faces in the provision of primary education to disabled children. It also analyses applicable concepts such as compulsory and free primary education (compulsory and FPE) and inclusive education. Thereafter, it discusses international legal standards relating to the right before examining Malawi's approach to the provision of primary education of disabled children. Lastly, this article

- 1 See generally, Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education, (Twenty-first session, 1999), UN DocE/C12/1999/10 (1999), para 1; M Verheyde 'Article 28: The right to education' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 7; M Jones 'Inclusion, social inclusion and participation' in MH Rioux *et al* (eds) *Critical perspectives on human rights and disability law* (2011) 77.
- 2 The components are generally referred to as levels of education, namely: primary, secondary and tertiary levels. See KD Beiter *The protection of the right to education by international law* (2006) 19; International Standard Classification of Education (ISCED) (1997) para 37.
- 3 Adopted on 20 November 1989, entered into force on 2 September 1990, see arts 28 & 29.
- 4 Adopted on 11 July 1990, entered into force on 29 November 1999, see art 11.
- 5 Adopted on 13 December 2006, entered into force on 3 May 2008, see art 24.
- 6 Malawi signed the CRPD on 27 September 2007 and ratified it on 27 August 2009; ratified the CRC on 2 January 1991; and signed the ACRWC on 13 July 1999 and ratified it on 16 September 1999.
- 7 A Chavuta *et al* *Inclusive education project: Shire Highlands education division – Malawi baseline study report* (August 2008) 7-9.
- 8 See Malawi Government, National Policy on the Equalisation of Opportunities for Persons with Disabilities (2005) 5 (the EOPD policy).
- 9 Indeed, states parties have an obligation to ensure the enjoyment all human rights that are guaranteed by the instruments they ratify. See generally F Viljoen *International human rights law in Africa* (2012) 5-6 & 8-9; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-48.

evaluates Malawi's constitutional, legislative and policy framework for the implementation of the right and suggests a number of recommendations.¹⁰

1.1 A synopsis of Malawi's challenges

The provision of primary education for disabled children in Malawi is beset by impediments which include a lack of adequate schools that provide inclusive education, discussed below, or special needs education (SNE). This explains the glaring situation whereby 98 per cent of the country's disabled children do not attain an education. This implies that Malawi is not adhering to the 'four-As (4As)' international standard relating to education in general as elaborated by the Committee on Economic, Social and Cultural Rights (Committee on ESCR) in General Comment 13.¹¹ The 4As standard requires education to satisfy the elements of availability, accessibility, acceptability and adaptability.¹² Availability of education implies that functioning educational institutions and programmes must be available in sufficient quantity within the state to cater for all children.¹³ The accessibility standard requires the state to ensure that educational institutions and programmes, including the environment, services, and all necessary facilities are accessible to all children.¹⁴ Accessibility has three overlapping dimensions which require

10 The article has consulted a number of sources pertaining to education and other rights of disabled children, which include: LE Bassier 'Justice for all? The challenges for realising the right to education for children with disabilities' 2005 (8) *Journal of Race, Gender & Justice* 531; B Bekink & M Bekink 'Children with disabilities and the right to education: A call for action' (2005) 16 *Stellenbosch Law Review* 125; D Filmer 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141; L Wakefield & N Murungi 'Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 133; SA Djoyou Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 171; African Child Policy Forum *The lives of children with disabilities in Africa – A glimpse into a hidden world* (2011). Although the existing literature has addressed the rights of disabled children such as education, this work contextualises the discourse with reference to Malawi. For example, Combrinck's work gives a general picture of the right to formal education of disabled children in the African context and any specific references to countries were by way of illustration and do not include Malawi. See 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: A legal perspective* (2008) 299. Similarly, Akinbola's study specifically looks at inclusive education in Nigeria and does not focus on primary education alone. See 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* 457.

11 General Comment 13 (n 1 above). The Committee has also explained the social and economic rights of disabled persons in General Comment 5. See Committee on ESCR, General Comment 5 'Persons with disabilities' (1994).

12 General Comment 13 (n 1 above) para 6. The 4As standard applies to the right to education in general. See 3 below for a further discussion on the international legal standards relating to the right to primary education for disabled children.

13 General Comment 13 (n 1 above) para 6(a).

14 General Comment 13 (n 1 above) para 6(b).

that there must be physical accessibility;¹⁵ economic accessibility;¹⁶ and accessibility without discrimination.¹⁷ The attribute of acceptability entails that the form and substance of education, curricula and teaching methods are relevant, culturally appropriate and of good quality and are regarded as such by parents and learners, including disabled children.¹⁸ Lastly, the standard of adaptability requires education to be flexible to adapt to the needs of changing societies and to be responsive to the needs of learners within their diverse social and cultural settings.¹⁹

Malawi experiences a number of obstacles that make compliance with this 4As standard a pipedream. The situation is apparently exacerbated by Malawi's failure to implement inclusive education, discussed below.²⁰ Indeed, a study commissioned by the Cheshire International and Montfort College (Cheshire and Montfort study) found that Malawi faces difficulties to implement inclusive education due to, amongst others, limited resources; insufficient funding; and environmental barriers.²¹ The study found that challenges facing teachers and learners include a lack of knowledge and skills in teaching disabled children; inadequate teaching and learning resources; negative attitudes by teachers and the community towards disabled children; inaccessible school infrastructure; and a lack of assistive devices.²²

On its part, the Malawi Government acknowledges that by 2008, the country was short of 34 203 and 60 203 primary school teachers to achieve a teacher-pupil ratio of 1-60 and 1-40 respectively by 2015.²³ In respect of teachers trained in SNE, Malawi had 500 teachers against 50 586 students in primary schools by 2006.²⁴ Montfort College, which is owned by the Catholic Church, is the only school that has been training SNE teachers in Malawi. It is operated jointly by the Church and the Malawi Government's SNE Department.²⁵ The SNE Department has since proposed the setting up of a state institution to train teachers in SNE.²⁶ By 2006, Malawi had two special schools for the blind and four special schools

15 General Comment 13 (n 1 above) para 6(b)(ii).

16 General Comment 13 (n 1 above) para 6(b)(iii).

17 See General Comment 13 (n 1 above) para 6(b)(i); General Comment 5 (n 11 above) para 15.

18 See General Comment 13 (n 1 above) para 6(c); General Comment 5 (n 11 above) para 35.

19 General Comment 13 (n 1 above) para 6(d).

20 See 2.2 below for a discussion on inclusive education, SNE and other conceptual approaches to education of disabled children.

21 Chavuta *et al* (n 7 above) 7.

22 Chavuta *et al* (n 7 above) 8 & 9.

23 See Malawi Ministry of Education, Science and Technology & Malawi National Commission for UNESCO *The development of education: National report of Malawi* (October 2008) 13.

24 A. Salmonsson *Disability is not inability: Baseline study of steps taken towards inclusive education in Blantyre, Balaka and Machinga districts in Malawi – Final report* (2006) 9.

25 Salmonsson (n 24 above) 10.

26 Salmonsson (n 24 above) 11.

for the deaf.²⁷ Three of the four schools were not using sign language but the oral teaching methods, which require the disabled children to read the lip movements of teachers and interpret them. This is not effective as the students have to guess what the teacher is saying.²⁸

In view of the challenges highlighted above, it would be relevant to evaluate the extent to which Malawi complies with the international legal standards and internationally accepted conceptual approaches for the implementation of the right to primary education of children with disabilities.²⁹

2 Conceptualisations pertaining to primary education for children with disabilities

2.1 Compulsory and free education

Education does not have a single agreed definition. It can be understood broadly as an act, process or experience that systematically promotes learning, knowledge and development.³⁰ In the narrow sense, education is understood as a formal instruction of knowledge within a recognised and well-structured system of institutions and programmes.³¹ This article is concerned with formal education at a primary level as it applies to disabled children within the context of disability. Formal education refers to education that is systematically provided in educational institutions such as schools and it comprises primary, secondary and higher education levels as elaborated by ISCED.³² Primary education consists of at least six years of full time schooling and its entry age for children is expected to be between five and seven years.³³

The right to education is one of the social and economic rights (SERs) guaranteed in the International Covenant on Economic, Social and Cultural Rights (the CESCR).³⁴ The CESCR, amongst others, provides for the right to primary education and the concept of compulsory and free

27 Salmonsson (n 24 above) 9.

28 Salmonsson (n 24 above) 17.

29 The evaluation of Malawi's compliance with international standards and internationally accepted approaches is contained in 4 below.

30 P Mittler 'Special needs education: An international perspective' (1995) 22 *British Journal of Special Education* 105.

31 G Mialaret (ed) *The child's right to education* (1979) 11.

32 See ISCED (n 2 above); Beiter (n 2 above) 19. Although other forms of education, including technical or vocational training, are important to all persons, it is not within the scope of this article to discuss such forms of education.

33 ISCED (n 2 above) para 46. Primary education forms the first level of formal education. See ISCED, para 37.

34 See art 13(1). The CESCR was adopted on 16 December 1966, and entered into force on 3 January 1976. Malawi acceded to the Covenant on 22 December 1993.

primary education (FPE).³⁵ The Committee on ESCR, which monitors the implementation of the CESCR, has explained the concept in General Comment 11.³⁶ The notion of compulsory education has at least two elements. Firstly, it entails that the decision regarding access of a child to education must not be optional.³⁷ Secondly, it implies access to education without discrimination.³⁸

On its part, FPE entails primary education that is available without charges to the child, the parent or the guardian.³⁹ This requires the elimination of any fees and direct costs of education, including compulsory levies and other indirect costs such as the obligation to wear relatively expensive school uniforms; costs related to stationery, transport and learning materials; and other obstacles to education, including 'opportunity costs'.⁴⁰ The requirement of compulsory and FPE in respect of disabled children entails state's obligations to provide special facilities such as Braille for some children with visual impairments to ensure the accommodation of disabled children in education.⁴¹ The CRC and the CRPD, amongst other treaties, also recognise the concept of compulsory and FPE.⁴² For example, the CRC requires compulsory and FPE for all children on the basis of equal opportunity.⁴³ It is noteworthy that compulsory education is considered to further or serve the best interests of the child.⁴⁴

2.2 Inclusive education and conceptual approaches to education of children with disabilities

Disability is said to be a dynamic and contested concept.⁴⁵ In addition, there are at least three models of disability, which include the medical, social, and human rights models. The conceptualisation of education of disabled children reflects the model of disability on which the education is based. The concepts of SNE and inclusive education are used in relation to the education of children with disabilities.⁴⁶ These concepts do not have

35 See art 13(2)(a).

36 Committee on ESCR, General Comment 11 'Plans of action for primary education' (1999) para 6.

37 As above.

38 As above.

39 General Comment 11 (n 36 above) para 7.

40 As above. See also CRC Committee, Concluding observations on Mozambique (2002) para 306; Beiter (n 2 above) 513 & 514; J Sloth-Nielsen & BD Mezmur *Free education is a right for me: A report on free and compulsory primary education* (2007) 10.

41 See General Comment 5 (n 11 above) para 35.

42 See the CRC, art 28(1)(a); and the CRPD, art 24(2)(a). See 3.1 below for further discussion on the CRPD and its applicable education provisions.

43 Art 28(1)(a).

44 See G Van Bueren *The international law on the rights of the child* (1995) 237.

45 R Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnadóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 8.

46 Mittler (n 30 above) 105.

agreed meanings.⁴⁷ SNE is understood as the educational delivery system that puts the primary focus on enabling learners with special educational needs (SEN) to learn in a modified environment or with individualised accommodations for the disability that has been diagnosed.⁴⁸ On its part, inclusive education is broadly conceptualised as a process of responding to the diversity of needs of learners through increasing participation in learning, cultures and communities, and reducing exclusion in education.⁴⁹ It aims at addressing the learning needs of all persons, especially those who are vulnerable to marginalisation and exclusion, by ensuring that schools accommodate all children in spite of their differences and impairments.⁵⁰ Nonetheless, the concept of inclusive education is currently favoured over SNE and is the one that is used in conceptualising the education of disabled children.⁵¹ Furthermore, there are three conceptual approaches to the provision of education of disabled children, namely, special schools, integrated schools and inclusive schools approaches.⁵²

2.2.1 Special schools approach

The special schools approach or special education refers to the provision of education to disabled children in a different environment where they learn separately from other children.⁵³ It is based on the perception that disabled children's impairments are challenges to their learning in mainstream schools.⁵⁴ It perceives disabled children as different from other children in that they do not respond to learning and have special needs which require their segregation from mainstream schools.⁵⁵ Consequently, the approach emphasises the placement of disabled children in their own 'segregated' schools.⁵⁶

The approach puts the focus on the disabled children and their impairments and not on the school system. Accordingly, it is based on the medical model of disability which locates the 'problem' of disability within the individual persons with disabilities (disabled persons) and views their

47 World Health Organization (WHO) & World Bank *World report on disability* (2011) 209.

48 AN Itimu & PB Kopetz 'Malawi's special needs education (SNE): Perspectives and comparisons of practice and progress' (2008) 8 *Journal of Research in Special Educational Needs* 153.

49 R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of Persons with Disabilities* (2008) 21.

50 As above.

51 See UN Human Rights Council *The right to education of persons with disabilities: Report of the UN Special Rapporteur on the right to education, V Muñoz* UN Doc A/HRC/4/29 (19 February 2007) para 9.

52 WHO & World Bank (n 47 above) 210.

53 S Nock 'Implementing inclusive education: A Commonwealth guide to implementing article 24 on the UN Convention on the Rights of People with Disabilities' (2011) 21 *Development in Practice* 447.

54 UN Human Rights Council (n 51 above) para 11.

55 Rieser (n 49 above) 27.

56 UN Human Rights Council (n 51 above).

physiological conditions as the problem associated with disability.⁵⁷ Consequently, the model perpetuates the segregation of disabled persons from the mainstream society and would emphasise segregated education.⁵⁸

2.2.2 Integrated schools approach

The integrated schools approach or integrated education also puts the focus on the disabled children themselves and views their impairments as the 'problem' that hinders their learning in mainstream schools. This entails that the approach embodies elements of the medical model of disability. Hence, it is similar to the conception behind special education in terms of its thinking and techniques.⁵⁹ However, instead of putting the disabled children in segregated environments, the approach requires measures to be taken to 'fix' the disabled children to fit in at mainstream schools.⁶⁰ For example, disabled children can be provided with special teachers and taught with special techniques but are expected to fit in at mainstream schools without making adjustments to the education system and environment.⁶¹ Hence, the idea is that disabled children must be 'fixed' to fit the mainstream school system (and not vice-versa), failing which, they must be sent to special schools.⁶²

2.2.3 Inclusive schools approach

The inclusive schools approach refers to the education of disabled children in the mainstream schools where all children, including disabled children, learn together.⁶³ Accordingly, it is the inclusive schools approach that portrays the ideal conception behind inclusive education. The approach focuses on the school environment and its barriers.⁶⁴ It attributes the challenges that disabled children face in education to the impediments in the mainstream education system and environment.⁶⁵ Accordingly, it aims at identifying and eradicating such hindrances to enable all children to

57 See M Oliver *Understanding disability: From theory to practice* (1996) 32; G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

58 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities* (2010) 16.

59 Rieser (n 49 above) 28.

60 Rieser (n 49 above) 22.

61 Rieser (n 49 above) 28. See also CRC Committee 'Day of general discussion on the rights of children with disabilities' UN Doc CRC/C/69 (6 October 1997).

62 In other instances of integration, the disabled children learn in separate classrooms but within the mainstream school.

63 S Peters *et al* 'A disability rights in education model for evaluating inclusive education' (2005) 9 *International Journal of Inclusive Education* 139 142.

64 Rieser (n 49 above) 28.

65 UNESCO *Open file on inclusive education: Support materials for managers and administrators* (2001) 22.

attain an education.⁶⁶ Hence, the idea is that the mainstream school system must be 'fixed' to accommodate the disabled children (and not vice-versa).

The inclusive schools approach or inclusive education is consistent with the social and human rights models of disability. The premise of the social and human rights models is that disability and the 'problem' associated with it are the outcome of the interaction between disabled persons and the environment where environmental, attitudinal and other barriers in society impose restrictions upon disabled persons.⁶⁷ Consequently, they advocate for the eradication of the barriers to equal participation and inclusion of disabled persons. For example, the human rights model holds that the state has the responsibility to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.⁶⁸ In view of this, the two models would inevitably promote the inclusive schools approach as the mainstream schools would be adjusted to accommodate the education of all children. Therefore, they would ensure inclusive education in keeping with the modern and internationally accepted conceptualisation of the education of disabled children. Indeed, the medical model has fallen out of favour and there has been a shift in the disability approach from the medical to the social and human rights models culminating in the adoption of the CRPD.⁶⁹

Due to its consistency with the social and human rights models, the inclusive schools approach is widely recommended in the provision of education to children with disabilities for respecting the equality of all children.⁷⁰ However, it is considered that it might be difficult to ensure full inclusion of disabled children in education with the effect that no state has a fully inclusive education system.⁷¹ Nonetheless, although flexibility in conceptualising the education to disabled children is often suggested, the internationally accepted approaches require the education of all disabled children to be conceptualised in terms of inclusive education that is based on the inclusive schools approach.⁷²

66 WHO & World Bank (n 47 above) 210.

67 Oliver (n 57 above) 33; H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in Sloth-Nielsen (n 10 above) 31. See also H Hahn 'Public support for rehabilitation programs: The analysis of US Disability Policy' (1986) 1 *Disability, Handicap & Society* 128.

68 Quinn & Degener (n 57 above) 10.

69 Schulze (n 58 above) 16.

70 WHO & World Bank (n 47 above) 210.

71 See generally WHO & World Bank (n 47 above) 210 & 211; Mittler (n 30 above) 105.

72 For further discussion on the conceptualisation of inclusive education in international law, see generally B Byrne 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013) 28 *Disability & Society* 232.

3 International legal standards on the right to primary education of children with disabilities

The CESC, the CRC and the CRPD are amongst the human rights treaties that provide the international legal standards relating to primary education of children with disabilities. The CRC is the first global human rights treaty to expressly prohibit discrimination on the basis of disability.⁷³ It also unequivocally protects the rights of disabled children by obliging state parties to ensure the provision of free special care and assistance to disabled children in accordance with their needs to enable them, amongst others, to access education.⁷⁴ It further provides for the right to primary education, including compulsory and FPE.⁷⁵ In addition, the CRC Committee has elaborated on education and other rights of disabled children in General Comment 9.⁷⁶ Amongst others, the Committee requires states to ensure inclusive primary education, which 'should be the goal of educating children with disabilities' that is flexible enough to accommodate the learning of disabled children.⁷⁷

There are also a number of African regional human rights treaties, such as the ACRWC, which provide for the right to education in addition to other rights of children.⁷⁸ Indeed, the ACRWC guarantees the right to education and recognises compulsory and free basic education, which includes primary education.⁷⁹ It further sets out the rights of disabled children in article 23. Amongst others, it requires state parties to ensure

73 CRC Committee, General Comment 9 'The rights of children with disabilities' (2006) para 2.

74 Art 23. For further discussion on the CRC, the CRPD and disabled children, see generally B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in Freeman M (ed) *Law and childhood studies: Current legal issues* vol 1 (2012) 423.

75 See art 28 (1)(a), which provides that:
'States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all'.

76 See eg General Comment 9 (n 73 above) paras 62-68.

77 General Comment 9 (n 73 above) paras 65 & 66. For aims of education under the CRC, see art 29 & General Comment 1 'The aims of education' (2001). There is also the Universal Declaration of Human Rights, adopted as a non-binding instrument on 10 December 1948, which recognises the right to education in art 26.

78 See eg the ACRWC, art 11. For further discussion on the ACRWC see generally M Gose *The African Charter on the Rights and Welfare of the Child* (2002); Viljoen (n 9 above) 391-409.

79 See art 11(1) & (3)(a), which provides as follows:
'1. Every child shall have the right to an education ...
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
(a) provide free and compulsory basic education'.

that disabled children have special assistance and effective access to training and preparation for employment.⁸⁰

3.1 Convention on the Rights of Persons with Disabilities

The CRPD provides for the (general) rights of disabled children in article 7 and the right to education in article 24.⁸¹ Its preamble also recognises the entitlement of disabled children to enjoy all human rights on an equal basis with other children.⁸²

3.1.1 International standards under the CRPD's article 24: Inclusive education

The CRPD expressly guarantees all disabled children the right to compulsory and FPE in article 24.⁸³ There are at least eight core standards or obligations or elements pertaining to the right under article 24.⁸⁴ First, the CRPD under article 24(2)(a) requires states to ensure the non-exclusion of children with disabilities from the general education system and from compulsory and FPE. Secondly, under article 24(2)(b), the CRPD imposes the duty to ensure that disabled persons can access inclusive, quality and FPE on an equal basis with others. Thirdly, the CRPD imposes the obligation to ensure the provision of reasonable accommodation of the individual requirements of the learners under article 24(2)(c).⁸⁵ It is

80 Art 13(2). African Youth Charter (AYC), adopted on 2 July 2006 and entered into force on 8 August 2009; African Charter on Human and Peoples' Rights (ACHPR), adopted on 26 June 1981 and entered into force on 21 October 1986; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 11 July 2003 and entered into force on 25 November 2005, also contain provisions on education and disability. See ACHPR, arts 17(1) & 18(4); AYC, arts 13 & 24; Women's Protocol, arts 12 & 23. It is not within the scope of this article to give a detailed discussion of these regional treaties.

81 See eg art 7(1), which provides that: 'States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children'.

82 See the CRPD preamble, para (r).

83 See art 24(2)(a), which provides in part that 'States Parties shall ensure that ... children with disabilities are not excluded from free and compulsory primary education ...'.

84 Out of the eight, five key elements are contained in art 24(2), which provides that: 'In realising this right, States Parties shall ensure that:

- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) 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;
- (c) Reasonable accommodation of the individual's requirements is provided;
- (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- (e) Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion'.

85 See also the CRPD Committee 'Concluding Observations on Spain' (2011) paras 43 & 44(a).

noteworthy that the provision of reasonable accommodation is also a crucial element of the right to equality and non-discrimination under the CRPD. Indeed, the Convention guarantees the right to equality and non-discrimination in article 5 and recognises that disability based discrimination includes the denial of reasonable accommodation.⁸⁶ It defines reasonable accommodation as:

[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.⁸⁷

It can be observed that reasonable accommodation is individualistic as it aims at accommodating disabled persons according to their individual needs. This explains the basis for the obligation under the CRPD's article 24(2)(c) that expects states to provide reasonable accommodation which takes into account the 'individual requirements' of the learners. Hence, the concept of reasonable accommodation entails the right of individual disabled persons to benefit from adjustments and modifications of any nature which enable the disabled persons to attain education, or other rights, on an equal basis with others. The modifications must not impose an undue burden on the responsible party or the state.

Fourthly, the CRPD requires states to ensure that disabled persons receive the support required to facilitate their effective education within the general education system in article 24(2)(d). In addition, it recognises the duty to ensure the provision of individualised support to learners with disabilities in 'specialised environments' under article 24(2)(e). This provision is complementary to the extent that it seeks to address the responsibility of the state with respect to cases of persons who, due to the extent of impairment, are not able to 'effectively' learn in 'regular settings'.⁸⁸ Therefore, article 24(2)(e) provides for education of disabled persons in 'environments that maximise academic and social

86 See CRPD, art 2, which defines disability discrimination as: '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'.

Non-discrimination is both a general principle under art 3(b) and a substantive right under art 5. See the CRPD Committee, Communication 3/2011, *HM v Sweden* (2011).

87 Art 2. For further discussion on the concept of reasonable accommodation, see LV Martel 'Reasonable accommodation: The new concept from an inclusive constitutional perspective' (2011) 8 *SUR International Journal on Human Rights* 85. See also UN *From exclusion to equality: Realising the rights of persons with disabilities – Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 60.

88 There is controversy as to whether this provision could give leeway to states parties to retain special schools. See generally Byrne (n 72 above) 239-241. For further discussion on the rationale for this provision, see Schulze (n 58 above) 135.

development'.⁸⁹ The provision is supported by article 24(3)(c) which reiterates the duty of the state to enable persons who are deaf, blind, or deaf-blind to learn life and social development skills in environments that maximise their academic and social development.

Furthermore, the CRPD requires that the education of disabled children must be delivered in the most appropriate language, and modes and means of communication, and that the learning of these modes must be facilitated.⁹⁰ It further expects the employment of qualified teachers, including teachers with disabilities, who are qualified in sign language and, or Braille.⁹¹ Similarly, it requires training of professionals and staff who work at all levels of education. The training must incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support disabled persons.⁹² Lastly, the CRPD obliges states parties to facilitate the learning of sign language; Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring.⁹³

Above all, the CRPD under article 24(1) emphasises the obligation to ensure an inclusive education system at all levels and lifelong learning.⁹⁴ In view of this, article 24(2), which requires the inclusive schools approach, is regarded as the cornerstone of article 24 since it 'enshrines inclusive education by ensuring that persons with disabilities are not excluded from mainstream education'.⁹⁵ Therefore, the CRPD requires

89 It is unlikely that such environments could include special schools since the CRPD expressly recognises the right of disabled children to non-exclusion from the mainstream education system and it does not make reference to special schools or integrated education. Indeed, the Convention requires the education provided in such settings to be consistent with the concept of inclusion. See eg CRPD, art 24(2)(e). It is also noteworthy that the 1993 'Standards Rules', which are non-binding as they are not in treaty form, expect special schools to eventually fall away by being transformed into inclusive schools. See Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, UN General Assembly resolution 48/96 (adopted on 18 December 1992), rule 6, para 8. Accordingly, it can be observed that international legal standards require states to work towards providing the education of all disabled children in inclusive mainstream schools.

90 Art 24(3).

91 Art 24(4).

92 As above.

93 Art 24(3).

94 Art 24(1) provides in part that:
'States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning'.

95 Schulze (n 58 above) 135.

the inclusive schools approach in providing primary education to disabled children.⁹⁶

It is noteworthy that there are at least two international conferences that preceded the adoption of the CRPD which could provide further guidelines on the realisation of inclusive education. For example, the Salamanca Conference adopted the Salamanca Statement on SNE, its principle purpose being to advocate for inclusive education, emphasises that disabled persons must be educated within the regular or mainstream school system.⁹⁷ Amongst others, the Statement requires states to enact laws or policies that implement inclusive education and to enrol disabled children in regular schools.⁹⁸ Therefore, inclusive education that is based on the inclusive schools approach is the prevailing international legal standard for the implementation of the right to primary education of children with disabilities.

3.2 Domestic implementation measures

It is noteworthy that SERs are subject to progressive realisation in that the state is not obliged to fulfil them immediately.⁹⁹ Since primary education is one of the SERs, it implies that states are not obliged to implement it immediately.¹⁰⁰ However, the CESCR requires states to work out and develop a detailed plan within a period of two years from the time they become state parties that indicates a specific period, which must be within a reasonable number of years, within which they will provide compulsory and FPE.¹⁰¹ Hence, the obligation to realise compulsory and FPE is accelerated as it requires that immediate action must be taken.¹⁰² On its part, the CRPD impliedly acknowledges that the obligation to provide compulsory and FPE requires immediate action to be taken.¹⁰³ The CRPD

96 Art 24(2)(a) & (b); Schulze (n 58 above) 133. See also the CRPD Committee 'Concluding Observations on Tunisia' (2011) paras 30 & 32(b) & (d), where the CRPD Committee emphasises this approach. In addition, the CRPD requires the education of disabled persons to be capable of achieving particular purposes, which include the full development of the disabled persons' human potential and sense of dignity; the development of disabled persons to their fullest potential of their personality, mental and physical abilities; and the enabling of disabled persons to participate effectively in a free society. See art 24(1). The 4As standard of education (discussed in section 1 above) also applies in respect of inclusive education under the CRPD. See eg M Jones 'Inclusion, social inclusion and participation' in Rioux *et al* (n 1 above) 74.

97 See Salamanca Declaration, adopted by acclamation in Salamanca, Spain on 10 June 1994.

98 Art 3. It is not within the scope of this article to provide a detailed discussion of these non-binding instruments.

99 Committee on ESCR, General Comment 3 'Nature of states parties obligations' (1990) para 9.

100 S Kalantry *et al* 'Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253 269. See also General Comment 13 (n 1 above) paras 43-45.

101 Art 14.

102 Beiter (n 2 above) 516; Kalantry *et al* (n 100 above) 270.

103 Art 4(2).

Committee has indicated that in implementing the right to education of disabled children, the obligation 'to provide reasonable accommodation is immediately applicable and not subject to progressive realisation'.¹⁰⁴ In respect of national implementation measures, the applicable treaties such as the CESCR, the CRC, the ACRWC and the CRPD expect states to take legislative, policy and administrative measures, amongst others, to realise the right to education at national level.¹⁰⁵

4 A diagnosis of Malawi's conceptual approach to implementation

4.1 Conceptual approach to education of children with disabilities

Malawi commonly uses the concept of SNE as opposed to inclusive education in the provision of education to all persons who face learning challenges and are said to have special educational needs (SEN).¹⁰⁶ Malawi's learners with SEN include disabled children who require access to academic accommodation to ensure their schooling.¹⁰⁷ The responsibility of providing SNE in Malawi has historically been undertaken by church mission schools by following the special schools approach.¹⁰⁸ The state eventually started to participate.¹⁰⁹ The Cheshire and Montfort study found that the provision of SNE in Malawi started with two mission schools for learners with visual impairments in 1950.¹¹⁰ The Roman Catholic Church also commenced the provision of SNE to learners with hearing impairments at Montfort campus in Chiradzulu in 1968.¹¹¹ Malawi's Ministry of Education introduced another SNE programme in 1996.¹¹²

SNE at primary education level in Malawi is provided through resource rooms, itinerant programmes, and special schools.¹¹³ The special schools are usually residential. On their part, the resource rooms entail

104 See Concluding Observations on Spain (n 85 above) para 44.

105 See generally the CESCR, art 2(1); the CRC, Art 4(1); the ACRWC, art 1(1); the CRPD, art 4(1), paras (a), (b) & (c). See also General Comment 3 (n 99 above); General Comment 13 (n 1 above); CRC Committee, General Comment 5 (n 11 above); General Comment No 9 (n 73 above) paras 17 & 18.

106 See eg Malawi's Special Needs Education Policy (SNE Policy), which uses SNE as opposed to inclusive education in most of its provisions. See 5.3 below for a discussion on the SNE Policy.

107 Itimu & Kopetz (n 48 above) 153.

108 Salmonsson (n 24 above) 10.

109 As above.

110 Chavuta *et al* (n 7 above) 11.

111 As above.

112 As above.

113 Itimu & Kopetz (n 48 above) 156.

special classes within the regular schools.¹¹⁴ This depicts elements of the integrated schools approach. The itinerant programme further entails SNE teachers travelling to schools within a particular school zone to provide SNE.¹¹⁵ It sometimes results in one SNE teacher catering for 15 different schools thereby posing a challenge relating to disabled children's access to SNE.¹¹⁶ Accordingly, it can be observed that Malawi mostly uses the integrated and special schools approaches in conceptualising the education of disabled children since there are few special schools and SNE is mostly provided in integrated schools.¹¹⁷ The approach does not emphasise inclusive schools. Therefore, the approach that Malawi follows is at variance with the prevailing and internationally accepted conception of inclusive education.

It can be observed that the failure by Malawi to emphasise the inclusive schools approach coupled with the few schools that provide integrated and special education makes the country fall below the 4As international requirement (discussed above).¹¹⁸ Ultimately, Malawi is not in compliance with the internationally accepted approach and consequently, in contravention of the international standards relating to primary education of children with disabilities.¹¹⁹

4.2 Compulsory and free primary education

The 1995 democratic Constitution of Malawi (the Constitution) and the Education Act,¹²⁰ amongst others, comprise Malawi's pertinent legal measures for implementing primary education, including compulsory and FPE. The Constitution recognises primary education of at least five years.¹²¹ This is at variance with the international standards set by ISCED. On its part, the Education Act defines primary education as the first eight years of formal education.¹²² Hence, there is disharmony between the Constitution and the legislation. Consequently, any school that could provide primary education of five years would not be contravening the law since the Constitution is Malawi's supreme law. Nevertheless, Malawi's public schools follow the prescriptions of the Education Act while private schools often provide primary education of at least six years. Hence, the discrepancy does not have negative implications in practice. Nonetheless,

114 Itimu & Kopetz (n 48 above) 157.

115 As above.

116 Salmonsson (n 24 above) 9.

117 See, the findings in Salmonsson (n 24 above) 18-19. See also Chavuta *et al* (n 7 above) 12; EM Chilemba 'A critical appraisal of the right to primary education of children with disabilities in Malawi' unpublished LLM thesis, University of Pretoria, 2011 42 & 43.

118 See 1 above for the discussion on the 4As standard.

119 See 3.1 above for a discussion on the international legal standards.

120 Chapter 30:01 of the Laws of Malawi. The other applicable laws such as the Disability Act are discussed in 5(2) below

121 See sec 25(2).

122 Sec 2.

the Constitution being the supreme law is expected to prescribe primary education that complies with the international standard of six years.

In terms of the implementation of compulsory and FPE in Malawi, the Constitution and applicable statutes such as the Education Act again come into the picture. The Constitution contains Principles of National Policy that include education related principles in section 13. The principles on education expect the state to 'devise programmes in order to make primary education compulsory and free'.¹²³ However, the principles are directory but not justiciable.¹²⁴ Furthermore, the provision on education in the justiciable Bill of Rights does not make any reference to the concept of compulsory and FPE.¹²⁵ Similarly, the Education Act and other applicable laws do not recognise compulsory and FPE.¹²⁶ Nevertheless, the Education Act is in the process of being amended following a review by the Law Commission of Malawi, which has proposed to introduce compulsory and FPE in state schools for all children under the age of 18 years.¹²⁷ Ironically, learners in state primary schools have not been paying fees since 1994 as a matter of practice and the general governmental position or policy approach. Accordingly, Malawi's Constitution and applicable legislation do not recognise compulsory and FPE as a (justiciable) human right contrary to international standards.

5 A diagnosis of Malawi's legal and policy implementation framework

The Constitution of Malawi, applicable laws such as the Disability Act and the Education Act, and applicable policies, which include the SNE Policy, make up Malawi's legal and policy implementation framework relating to the right to primary education of children with disabilities. It is relevant to evaluate the implementation framework for its compliance with the standards, established above, in order to determine the measures that Malawi must take to realise the right to primary education of disabled children.

¹²³ Sec 13(f).

¹²⁴ Sec 14. The Principles of National Policy are contained in Chapter 4 of the Constitution.

¹²⁵ Sec 25 which provides for education. The Bill of Rights is contained in Chapter 4 of the Constitution and is justiciable. See sec 15.

¹²⁶ See sec 64(1), which provides for the payment of fees.

¹²⁷ See Malawi Law Commission 'Report on the review of the Education Act' (2009) 22. See also Education Bill, sec 9. The Commission has also proposed that primary education should consist of at least seven years.

5.1 Constitutional framework

The Constitution provides for equality and non-discrimination as justiciable rights and recognises disability as a prohibited ground of discrimination.¹²⁸ Moreover, it provides for the justiciable right to education.¹²⁹ Hence, disabled children are entitled to enjoy the right to education. The Constitution also contains disability related principles in section 13 which are in the form of state directives but are not justiciable.¹³⁰ Although the provisions expect the government to support disabled persons by ensuring their fullest possible participation in all spheres of society, amongst others, they do not expressly recognise the obligation to equalise the opportunities of disabled persons in education.¹³¹ In view of the foregoing observations, Malawi should consider revising the constitutional provisions on education to recognise the right to compulsory and FPE which should consist of at least six years. In addition, the provisions on persons with disabilities should be further revised to extend the need to ensure the equalisation of opportunities for disabled persons to education.

5.2 Legislative framework

5.2.1 *The Disability Act*

The Disability Act is Malawi's new disability legislation that was passed in 2012 to replace the 1971 Handicapped Persons Act. The Disability Act is based on the social model of disability as evidenced by the definition of disability, amongst others, which is contained in section 2 and is consistent with the social model and the CRPD.¹³² The Act recognises the right to education under section 10 in three separate paragraphs. Amongst others, it provides for the right to education on the basis of equal opportunity; the obligation to ensure an inclusive education system and lifelong learning;

128 Sec 20(1).

129 Sec 25, which does not recognise compulsory and FPE as discussed in 4.2 above.

130 See sec 13(g), which expects the state to support disabled persons to have greater access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of society.

131 The constitutional provisions on disability are in the process of being amended – mainly to refer to the disabled as 'persons with disabilities' without necessarily changing the substance. See Constitution (Amendment) Bill 13 of 2009.

132 See E Chilemba 'Promoting disability rights in Malawi' 23 July 2012: www.osisa.org/law/blog/promoting-disability-rights-malawi (accessed 29 May 2013). Sec 2 of the Disability Act defines disability as:

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

The definition attributes the disability 'problem' to the environment and not to the disabled persons' impairments and it is also the same as the 'definition' or understanding of disabled persons under CRPD's art 1.

and the obligation to ensure access to quality primary education.¹³³ The section further emphasises the inclusive schools approach as it guarantees the right not to be excluded from the general education system.¹³⁴ This is consistent with the CRPD's article 24(2).¹³⁵ However, the provision does not provide for non-exclusion of disabled children from compulsory and FPE thereby contradicting the Convention. In fact, the Act does not make reference to compulsory and FPE at all with the effect that it does not provide any indications regarding whether in implementing the right to inclusive education, the obligation to ensure the speedy realisation of compulsory and FPE for disabled children will be respected. In addition, the Act does not mention how or whether the other seven elements or standards that are contained in article 24 should be achieved.¹³⁶

Nevertheless, section 10(b) of the Disability Act requires the Government to take 'into consideration the special requirements of persons with disabilities in the formulation of educational policies and programmes, including the provision of assistive devices, teaching aids and learning support assistants'. This could entail the obligation to ensure provision of individualised support to disabled children as required by the CRPD. However, the list of the support to be provided as contained in the Act could be restrictive and exhaustive; and hence, the Act might not capture or reflect the essence of the CRPD's provision. Consequently, the substantive provision on education in the Act leaves out the majority of the core state obligations for the realisation of the right.

Furthermore, section 11 of the Act prohibits discrimination against disabled persons in education.¹³⁷ However, the two sections on education do not mention the concept of reasonable accommodation. In fact, despite defining reasonable accommodation in section 2, the Act does not require the government to ensure the provision of reasonable accommodation in the enjoyment of any rights of disabled persons, including education and

¹³³ See sec 10.

¹³⁴ See sec 10(a), which provides that:

'The Government shall recognise the rights of persons with disabilities to education on the basis of equal opportunity, and ensure an inclusive education system and lifelong learning by:

(a) ensuring that persons with disabilities are not excluded from the general education system at all levels and have access to quality primary education'.

Sec 2 also defines inclusive education as:

'a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities and reducing exclusion from and within education'.

¹³⁵ The text of the legislative provision (sec 10(a)) is also similar to the CRPD's provision.

¹³⁶ See 3.1 above for a discussion on the eight core standards prescribed by the CRPD's art 24.

¹³⁷ Sec 11(1) provides as follows:

'(1) No education or training institution shall –

(a) deny any person admission into or expel the person from the institution;

(b) discipline, segregate or deny the person participation in any event or activity; or

(c) deny any benefits or services to the person, on the basis of disability.'

non-discrimination.¹³⁸ It is surprising that the Act merely defines reasonable accommodation without the concept having any implication on the rights of disabled persons. Consequently, there is no legal basis to claim entitlement to the provision of reasonable accommodation as an element of the right to inclusive education or the right to disability non-discrimination under the Act. This is inconsistent with the CRPD which requires the provision of reasonable accommodation in education, especially in ensuring FPE.¹³⁹ Therefore, although the Disability Act could go a long way in meeting the international standards to a certain extent by recognising inclusive education, it falls a bit short.

In view of this, it would be crucial for Malawi to review the Disability Act to expressly recognise that the failure to provide reasonable accommodation constitutes discrimination. In addition, the sections on education should be amended to expressly require or recognise the provision of reasonable accommodation in education. The education provisions should be further revised to include the seven core obligations for implementing the right to education of CWDs that are contained in CRPD's article 24.¹⁴⁰ Currently, the Act only recognises the duty to ensure the non-exclusion of disabled children from the general education system as a means of implementing inclusive education.

5.2.2 The Child Care, Protection and Justice Act

The Child Care, Protection and Justice Act (the CCPJA), which is Malawi's child specific legislation, 'domesticates' the CRC and the ACRWC.¹⁴¹ This is commendable as it entails that it is possible to invoke the rights of disabled children contained in these treaties before the courts of Malawi. The Act does not have provisions on education and it contains only two provisions relating to disabled children that expect local government authorities to register all disabled children and provide them with assistance to enable them to grow with dignity, on the one hand; and requires the proceedings in a child justice court to ensure that disabled children 'are accorded assistance to meet their special needs where necessary' on the other hand.¹⁴² Therefore, it cannot act as enabling legislation in implementing the right to education apart from facilitating judicial enforcement of the right by virtue of the CRC and ACRWC

138 Indeed, the Disability Act's definition of discrimination does not include the denial of reasonable accommodation unlike the CRPD's definition. See sec 2 of the Act, which defines discrimination as:

'a distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, of any human rights or fundamental freedoms, in the political, economic, social, cultural, civil or other field'.

139 See eg art 24(2)(c); Concluding Observations on Spain (n 85 above) para 44(c).

140 See 3.1 above for the discussion on the obligations.

141 Act 22 of 2010, sec 4(c) of the Third Schedule.

142 Secs 72 & 145(d).

domestication. Nevertheless, since the Constitution recognises education as a justiciable right and Malawi has an education specific law, any drawbacks in the CCPJA might not have negative implications on the right to education of children with disabilities.

5.2.3 The Education Act

Malawi's Education Act does not make any reference to education of disabled children or inclusive education and it does not recognise compulsory and FPE (as discussed above). This is at variance with the applicable international standards. Nevertheless, the proposed Education Bill that seeks to enact new education legislation recognises the concept of compulsory and FPE.¹⁴³ However, the new Bill has not made proposals in respect of the education of disabled persons or inclusive education apart from containing a non-discrimination clause that recognises disability as a protected ground.¹⁴⁴ Moreover, the non-discrimination provision in the Bill, and the Bill in its entirety, does not make reference to reasonable accommodation. However, the omission to make provision for inclusive education under the Education Act or the new Bill could be regarded as having been 'cured' by the Disability Act which guarantees the right to education of disabled children, including inclusive education. Hence, the omission to recognise the concept of reasonable accommodation is the one that is regrettable. Nonetheless, since the Education Act is the principal education legislation, it should have made provision for inclusive education. Accordingly, in the light of its shortcomings, the Education Bill would still require further revision aimed at making provision for inclusive education at all levels, including primary education, and recognising the concept of reasonable accommodation.

5.3 Policy framework

Malawi's National Policy on the Equalisation of Opportunities for Persons with Disabilities (Disability or EOPD Policy) notes that 98 per cent of disabled children in Malawi do not receive formal education.¹⁴⁵ Hence, it has a number of policy statements that seek, amongst others, to promote easy access to schools' physical environments; to provide information and education materials in accessible formats to disabled persons; and to establish a national sign language.¹⁴⁶ Above all, the policy statement on education aims to promote equal access and inclusion of disabled persons in education by, amongst others, designing and developing appropriate technologies, assistive devices and learning materials; providing free appropriate resources to assist disabled persons with their learning needs;

143 Education Bill, sec 13.

144 See sec 4(1)(a).

145 The EOPD policy (n 8 above).

146 The EOPD policy (n 8 above) 12 & 14.

reviewing and reforming the delivery of the national curriculum to cater for disabled children; adapting and adopting communication systems appropriate for learners with SEN; training specialist educators; incorporating SNE in the teacher-training curriculum; and supporting and encouraging inclusive education.¹⁴⁷ However, although the Disability Policy recognises inclusive education, it does not, expressly, prioritise the inclusive schools approach. Instead, it requires the provision of SNE while putting emphasis on special and integrated schools contrary to the international standards.

In addition, there are at least three relevant education policies. First, the National Education Sector Plan (the NESP) sets out the government's goals and objectives of the general education sector to be realised over the 2008-2017 period.¹⁴⁸ The NESP intends to strengthen primary education through three sets of strategies and priorities.¹⁴⁹ Amongst others, the strategies that relate to disabled children aim at moving towards the 'recommended' ratio of 1 teacher to 10 pupils in special schools and 1 teacher to 5 pupils in resource centres by the end of 2017; fostering the development of tools for special needs such as sign language and Braille; and mobilising community participation in 'whole-school development' and management for 'ordinary' learners and learners with SEN.¹⁵⁰ The NESP further intends to introduce additional programmes in teacher training institutions to increase capacity in SNE and to expand the intake in teacher training colleges for mainstream education and SNE.¹⁵¹ Secondly, there is also the 2009 Education Sector Implementation Plan which serves as a guide for the articulation of the broad development objectives of the NESP.

Thirdly, the Special Needs Education Policy (the SNE Policy) 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.¹⁵² 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'.¹⁵³ Amongst others, it expects the government to develop and utilise national sign language; to provide enough and well qualified specialist teachers; to build more resource

147 The EOPD policy (n 8 above) 14 & 15.

148 The National Education Sector Plan 2008-2017, A statement, Ministry of Education, Science and Technology, Malawi (June 2008) (the NESP) v.

149 The NESP (n 148 above) 11. The priorities relate to education quality and relevance; access and equity; and governance and management.

150 As above.

151 The NESP (n 148 above) 19.

152 Malawi Government, National Policy on Special Needs Education (Revised) (2007) (the SNE Policy) 9.

153 The SNE Policy (n 152 above) 21.

centres and special schools; and to establish a bursary scheme for learners with SEN.¹⁵⁴

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.¹⁵⁵ Its objectives include: providing education and training to learners with 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.¹⁵⁶ The Policy also contains relevant concepts and definitions.¹⁵⁷ However, it does not mainly use the concept of inclusive education despite the fact that the Policy was adopted in 2007 after the CRPD was already in force although Malawi had not ratified it.¹⁵⁸

It can be observed that although the applicable policies have a number of positive aspects such as recognising the concept of inclusive education and the need to increase the capacity and provision of SNE, they put emphasis on integrated and special education as opposed to the inclusive schools approach. For example, although the Disability Policy indicates that it will encourage inclusive education, it does not mention the need to ensure that disabled children learn in mainstream schools. Instead, it seeks to establish 'accessible specialist education resource centres throughout the country', which embodies the integrated schools approach.¹⁵⁹ Similarly, the education policies put their emphasis on special schools and integrated education that relies on resource centres.¹⁶⁰ In addition, they do not make reference to the concept of reasonable accommodation. Consequently, they ultimately and generally do not comply with the international standards. Accordingly, it is recommended that the Disability Policy, the NESP, the ESIP and the SNE Policy should be revised to expressly provide that the provision of education to disabled children shall be based on the inclusive schools approach. Hence, they should make it a clear government policy approach to provide primary education of disabled children in inclusive mainstream schools. They should further recognise the obligation to provide reasonable accommodation in ensuring non-discrimination and in implementing inclusive education. Above all, the policies should use the concept of inclusive education as opposed to SNE when referring to education of persons with disabilities.

154 The SNE Policy (n 152 above) 21-22.

155 The SNE Policy (n 152 above) 11 & 12; 14-15.

156 The SNE Policy (n 152 above) 18.

157 The relevant definitions include inclusive education, special school and learners with SEN. See the SNE Policy (n 152 above) 6-7.

158 For further discussion on the SNE policy, see Itimu & Kopetz (n 48 above) 153.

159 The EOPD policy (n 8 above) 15.

160 See eg the NESP (n 148 above) 11.

6 Conclusion

The article has observed that international standards and conceptual approaches relating to primary education of children with disabilities require the education to be conceptualised in terms of inclusive education that is based on the inclusive schools approach. Hence, disabled children must learn in regular or mainstream schools together with other children. The article has further observed that Malawi is facing challenges in implementing the right with the effect that most disabled children do not attain primary education. In terms of the article's findings, at least two conclusions can be drawn from Malawi's conceptualisation and implementation of the right to primary education of disabled children which account for the challenges that the country faces in its quest to realise the right. First, Malawi follows the integrated and special schools approaches as opposed to the inclusive schools approach or inclusive education in conceptualising the education of children with disabilities. As a result, the regular education system does not accommodate the learning of most disabled children. Moreover, there are few schools that provide integrated and special education. Consequently, most disabled children are excluded from primary education. Secondly, with the exception of the Disability Act, which emphasises inclusive education, Malawi's constitutional, legislative and policy framework for the implementation of the right does not prioritise inclusive education, especially the inclusive schools approach; and does not recognise the concept of compulsory and FPE that is backed by law. Moreover, the provisions relating to education in the Disability Act do not capture most of the standards that CRPD prescribes in article 24. Therefore, the implementation of primary education of disabled children in Malawi does not comply with both the international legal standards and the prevailing approaches to the education of disabled children.

Nevertheless, it is noteworthy that although most disabled children in Malawi do not enjoy their right to primary education, the government has taken the bold step to ratify a number of human rights treaties that guarantee the right and prescribe its international standards. Accordingly, there is tangible hope that disabled children in Malawi could begin to enjoy the right to primary education if the government takes the further and crucial steps to first modify the implementation framework and align it with the international standards; and second to take a pragmatic shift from conceptualising primary education and the education of children with disabilities in general in terms of integrated and special education to that of inclusive education that is based on the inclusive schools approach.

CHAPTER 2

FORGOTTEN OR INCLUDED? DISABLED CHILDREN'S ACCESS TO PRIMARY EDUCATION IN CAMEROON

*Serges Djoyou Kamga**

Summary

Cameroon is party to international and regional instruments providing for the right to education, in particular compulsory and free primary education. This article examines the right to inclusive primary education in Cameroon. It investigates the extent to which children with disabilities are included in primary schools. After a clarification of the concept of inclusive education, this article argues that children with disabilities are forgotten under the Cameroonian dispositions relating to access to primary education. This is a blatant violation of the right to universal access to primary education. Therefore, this article calls upon the Cameroonian government to enact laws and policies to implement a universal learning design (ULD) which entails the development of a curriculum and teachers training to meet various needs in a classroom.

1 Introduction

A universal primary education is a first step towards ensuring human development.¹ The importance of primary education is underscored by the international community that calls for compulsory free primary education.

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1 Committee on Economic, Social, and Cultural Rights, General Comment 13, The right to education (art 13 of the ICESCR), Twenty-First Session, 1999, UN Doc E/C 12/1999/10, reprinted in compilation of General Comments and General Recommendations adopted by human rights treaty bodies, UN Doc HRI/GEN/1/Rev6 at 70 (2003), para 1; BR Akinbola 'The right to inclusive education in Nigeria: Meeting the needs of and challenges of children with disabilities' 2010 (10) *African Human Rights Law Journal* 457; F Veriava & F Coomans 'The right to education' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 57.

This call is contained in international instruments such as the Universal Declaration of Human Rights (UDHR)² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ The ICESCR also explains state obligations for a detailed plan of action for the progressive implementation of the right to compulsory education free of charge for all.⁴ The Convention on the Rights of the Child (CRC),⁵ the 1960 United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Convention against Discrimination in Education and the 2000 Millennium Development Goals (MDGs)⁶ also set out the right to free compulsory primary education.⁷ These provisions for free and compulsory primary education are the substance of the political pledges made under the Jomtien World Declaration on Education for All⁸ and the Dakar Framework for Action regarding the national Education for All (EFA) action plan.⁹

Furthermore to ensure an inclusive education with specific attention to people with disabilities (PWDs), the international community also undertook non-binding measures such as the Standard Rules on the Equalisation of Opportunity for Person With Disabilities (The Standard Rules)¹⁰ with rule 6 focusing on ensuring an inclusive education for PWDs; the Salamanca statement and Framework for Action on Special Needs Education¹¹ and the EFA Flagship on Education and disability.¹² The only binding instrument is the UN Convention on the Rights of Persons with Disabilities (CRPD)¹³ and its Optional Protocol.¹⁴

At the regional level, the right to education is secured in the African Charter on Human and Peoples' Rights (African Charter)¹⁵ and the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁶ Cameroon is a party to all the aforementioned

2 Adopted on 10 December 1948, art 26.

3 ICESCR, General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, arts 13(2)(a) and 14.

4 Art 14 and ESCR Committee General Comment 11.

5 Arts 23(2) & (4), & 28(1).

6 UN Res 55/2 of 2000, goal no 2.

7 Art 4(a).

8 Adopted in 1990 in Jomtien, Thailand.

9 The Dakar Goals set at the World Education Forum (2000).

10 Adopted in 1993.

11 Adopted in 1994 in Salamanca, Spain.

12 Adopted in 2001.

13 Adopted in 2006 and came into force in 2008, art 24.

14 Similarly adopted in 2006 and came into force in 2008.

15 Art 17 of the African Charter on Human and Peoples' Rights adopted on 27 June 1981 by the OAU Assembly, OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 *International Legal Materials* 58; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

16 Art 11 & 13 of 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.

instruments,¹⁷ except the CRPD which is signed but has yet to be ratified. It is from this contextual background that the inclusion of children with disabilities (CWDs) in Cameroonian primary schools should be understood. The question is then to what extent are CWDs included in Cameroonian primary schools?

In examining CWDs' access to Cameroonian primary schools, this article will assess state compliance with international law on the question. This question is important as it provides a platform to focus 'on overcoming barriers to learning and participation'¹⁸ of CWDs as well as their full inclusion in society as a whole. Furthermore, while assessing the extent to which Cameroonian national laws are conducive to the inclusion of CWDs at primary level, this article will use a comparative approach by referring to best practices in other countries.

In terms of structure, this article is divided into four parts including the introduction. In setting the stage to understand whether Cameroonian primary schools are inclusive, the second part of this article explains the concept of inclusive primary education under international law. The third part of this article examines the extent to which CWDs are forgotten or included in primary schools. The final part summarises the article in the form of concluding remarks.

2 Understanding the concept of inclusive primary education

2.1 The inclusiveness of primary education

An inclusive education is a process which sets out to ensure the enrolment and admission of all learners in classrooms without any discrimination whatsoever.¹⁹ The inclusiveness of primary education is linked to its being free and compulsory for all, including those with disabilities. The UN Committee on Economic, Social and Cultural Rights (ESCR Committee)

17 ICESCR, ratified on 27 June 1984; CEDAW, ratified on 23 August 1994) and its Optional Protocol (acceded to on 1 November 2004); CRC (ratified on 11 January 1993); African Charter (ratified on 21 October 1986); African Children's Charter (ratified on 5 September 1997).

18 S Stubbs *Inclusive education: Where there are few resources* (2002) 21.

19 MF Tukov 'The education of children with special needs in Cameroon: The role of teachers and parents towards inclusive education' unpublished MPhil thesis in Special Needs Education, University of Oslo, 2008; see also in general H Savolainen *et al* *When all means all: Experiences in three African countries with EFA and children with disabilities* (2006); T Booth & M Ainscow *From them to us: An international study of inclusion in education* (1998); JT Hall *Social devaluation and special education: The right to full mainstream inclusion and an honest statement* (1997); PF Shey 'Parents perspective on the education of children with disabilities in regular schools in Cameroon', unpublished MPhil thesis in Special Needs Education, University of Oslo, 2003; Akinbola (n 1 above) 462; D Goodley *Disability studies: An interdisciplinary introduction* (2011) 138-139.

which is the UN body in charge of monitoring states' compliance with the ICESCR defines primary education as 'the main delivery system for the basic education of children outside the family'.²⁰ According to the ESCR Committee, access to primary education should be compulsory and free for all; it should comply with the '4 A's' framework,²¹ more specifically, it should be available, accessible, acceptable and adaptable, and supplemented with a plan of action to ensure its implementation.²²

As indicated earlier, an inclusive education necessitates the setting up of an education system which accommodates all vulnerable groups such as refugees, internally displaced people, indigenous people and PWDs. The accommodation of these groups should be informed by international policies mentioned earlier but more importantly by national action plans to ensure free education characterised by the '4 A's'.

2.2 Inclusion of children with disabilities

As far as CWDs are concerned, article 24(1) of the CRPD urges member states to protect the right of these children and all PWDs to education. In order to realise 'this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning'. To give effect to this provision, the inclusion of PWDs is generally done under three different arrangements:

- The dual track system which caters for learners with special educational needs in one system and all others in another major system;
- The multi-track system, which caters for various groups in different, parallel systems;
- The one track system or inclusive education system which gathers all learners in one system.²³

The one track system entails the adoption of a universal learning design (ULD) characterised by the development of a curriculum and the training of teachers to meet various needs in a classroom. This approach recognises that CWDs face environmental barriers to education and the ULD would ensure their full inclusion in the education system. Grounded in

20 ESCR Committee General Comment 13(2)(a), para 9.

21 See Preliminary report of the Special Rapporteur on the right to education, K Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33, UN Doc E/CN.4/1999/49, paras 51-56; also K Tomasevski *Human rights obligations in education: The 4-A scheme* (2006).

22 For more on the '4A's' frame work, see K Tomasevski (n 21 above); SA Djoyou Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 171.

23 DR Mitchell 'Introduction' in D Mitchell (ed) *Contextualizing inclusive education: Evaluating old and new international perspectives* (2005) 5; UNESCO 2005; ST Tesemma *Educating children with disabilities in Africa: Towards a policy of inclusion* (2011); 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 (2003) 1.

neurological science, the ULD method seeks to understand how people learn through 'memory, language, perception, problem solving and thinking'.²⁴ An understanding of these learning methods informs the development of the curriculum and the training of teachers for the benefit of all learners in the classroom. The main principles of ULD include multiple means of representation, multiple means of action and expression, and multiple means of engagement to cater for the needs of all learners including those of CWDs.²⁵

According to the CRPD, 'the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development'.²⁶ In light of this, proponents of the dual track system and multi-track system are of the view that children with special educational needs should be separated from mainstream education, especially when the latter is not satisfactory for these children.²⁷ They argue that the deaf and deaf/blind children are considered to be 'children with disabilities' who have 'special education needs'²⁸ and should be afforded a specific setting for their development. Segregating children with disabilities provides them the opportunity to learn without being abused or ill-treated by their non-disabled counterparts.²⁹ Foreign jurisprudence seems to support this approach and the decision of the Supreme Court of Canada in the case of *Eaton v Brant County Board of Education*³⁰ is informative in this respect. In this case, the court was called upon to decide whether the placement, without the consent of her parents, of a child with cerebral palsy who is unable to communicate through speech, sign language, or any other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair in a special needs education centre, was a violation of the right to equality of the child provided for in section 15 of the Canadian Charter of Rights and Freedoms. The court was of the view that the placement of the child in a special setting served the best interests of the child and could not be regarded as discrimination but was rather a good way to accommodate the child in mainstream society. According to Justice Sopinka, forcing a CWD into a mainstream school without considering his or her specific condition may amount to a discrimination which 'forces the individual to sink or

24 EM Dalton *et al* 'The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning' (2012) 1 *African Journal of Disability* 3, available at <http://www.ajod.org/index.php/ajod/article/view/13> (accessed 28 August 2013).

25 Dalton *et al* (as above).

26 CRPD, art 24(3)(c).

27 Rule 6, paras 8 & 9.

28 Stubbs (n 18 above) 23.

29 S Hegarty 'Education of children with disabilities' in P Mittler *et al* (eds) *World Yearbook of Education – Special Needs Education* (1993) 21; see also F Aefsky *Inclusion confusion: A guide to educating students with exceptional needs* (1995) 6; Tesemma (n 23 above) 54.

30 [1997] 1 SCR 241.

swim within the mainstream environment'.³¹ Put differently, it is important to ensure the placement of a child with special educational needs in an appropriate education setting to ensure his or her equality with other children. This was also the position of the Irish High Court in *O'Donoghue v Minister for Health*.³² In this case, while acknowledging the obligation of the state to provide free basic elementary education to all children,³³ the position of the court was unambiguous in stating that:

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 granted, than would be regarded as appropriate for a child suffering from no such handicap.³⁴

In fact, CWDs are generally failed by mainstream education which is tailored to the needs of non-disabled learners. Furthermore, special needs education is beneficial because it affords learners with teachers equipped with expertise in disabilities, small learner-teacher ratio allowing better education, appropriate curriculum, well-tailored buildings and equipment.³⁵ In this vein, UNESCO is of the view that as a result of specific communication needs of deaf and deaf/blind persons, their education may be more properly catered for in special schools or special classes and divisions in mainstream schools.³⁶

However, categorising children under the label 'children with disabilities' lumps learners with different kinds of disabilities in the same group and this may also be detrimental to their educational needs. As correctly observed by Peters, 'those with specific learning disabilities, speech and language impairments, emotional disturbance and mild mental retardation'³⁷ are all gathered in the same category, whereas these children have different concerns. Although the multi-track system could be used to separate learners according to their disabilities, the classification 'wastes valuable special education resources in determining which category a child fits into rather than providing the instructional interventions the child requires'.³⁸ This particular concern led the World Bank to recommend an inclusive education in the following terms:

31 *Eaton*, paras 66-67. For further analysis of this case, see C Ngwenya 'Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective' LLD Thesis, University of the Free State, 2010 478-480.

32 [1993] IEHC 2; [1996] 2 IR 20 (27 May 1993). This judgment was approved by the Irish Supreme Court in *Sinnott v Minister for Education* 2001] IESC 63; [2001] 2 IR 505 (12 July 2001).

33 Art 42(4) of the Irish Constitution.

34 *O'Donoghue* (n 32 above) para 25.

35 Hegarty (n 29 above) 21; Tesemma (n 23 above) 54.

36 UNESCO (1994)18, para 21.

37 Peters (n 23 above) 11.

38 As above.

[M]ost 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.³⁹

Moreover, the CRPD highlights the need to secure access of PWDs to mainstream education and ensure that CWDs are not excluded on the ground of disability.⁴⁰ In a similar vein, UNESCO recognises that the environment is the disabling factor. In other words, teaching methods, curriculum, accessibility to trained teachers, buildings and appropriate assistive devices are important for responding positively to children's diversity.⁴¹ In fact, as observed by Billard 'there is nothing about special education that is not already part of practice in regular schools', there is a need to include CWDs according to their diverse needs in the mainstream education system⁴² through the ULD for example.

Furthermore, 'special needs education' disenfranchises CWDs from mainstream education by putting emphasis on their impairments and not on environmental barriers such as the lack of physical access, adequate equipment and competent teachers trained on the needs of the child.⁴³ In the *Sofia* case,⁴⁴ the European Court of Human Rights held that the equal right to education of CWDs is only effective if the school has an environment conducive to their education and the failure to create such an environment amounts in itself to unequal treatment of CWDs as they are not given the same opportunities as other children.⁴⁵ Similarly, the European Committee of Social Rights in the Bulgarian case of *Mental Disability Advocacy Center v Bulgaria*,⁴⁶ ruled that Bulgaria violated the human rights of children with intellectual disabilities under the European Social Charter by excluding them from mainstream education systems. Placing these children in settings without equal access to education constituted a violation of their human rights.

In Africa, the South African case of *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa & Another*⁴⁷ sheds more light on the meaning of inclusive education. This case deals with the rights of severely and profoundly intellectually disabled children in the Western Cape Province. As a matter of fact, these children are neglected; their

39 RL Metts 'Disability, issues, trends and recommendations for the World Bank' (2000) Social Protection Discussion Paper Series, no 0007, 35.

40 CRPD, art 24(2)(a).

41 As UNESCO 2005; see also art 24(4).

42 Peters (n 23 above) 13; K Ballard (ed) *Inclusive education: International voices on disability and justice* (1999) 169.

43 Stubbs (n 18 above) 23.

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

45 As above.

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

47 2011 5 SA 87 (WCC).

educational needs are inappropriately catered for and are only provided by non-governmental organisations. This set of facts illustrates that the state does not provide schooling for these children and therefore violates their right to a basic education, to equality, to human dignity and their right to protection from neglect and degradation.⁴⁸ This was also the position of the court which called on the state to remedy the situation in doing, amongst others, the following:

[T]ake reasonable measures (including interim steps) in order to give effect to the said rights of severely and profoundly intellectually disable[d] children in the Western Cape, including (but not limited to):

2.1 ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality;

2.2 providing adequate funds to organisations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres, such as to enable them to:

2.2.1 Have the use of adequate facilities for this purpose;

2.2.2 Hire adequate staff for this purpose;

2.3 providing appropriate transport for the children to and from such special care centres;

2.4 enabling the staff of such special care centres to receive proper accreditation, training and remuneration; and

2.5 making provision for the training of persons to provide education for children who are severely and profoundly intellectually disabled.⁴⁹

Not only does putting all CWDs together in a specific educational environment reduce their ability to learn from each other or from their differences, it also increases their exclusion from the society where their teachers are referred to as ‘teachers of the fools’,⁵⁰ for teaching children with mental impairment for instance. Hall’s inclusive education model known as the ‘Being Accepted Model’ entails that inclusion should provide a platform for ‘children to learn and share opportunities of learning and discovering new things as [they] interact socially; being a full member of an appropriate class in the school, and doing the same lesson with others’ and being part of the society.⁵¹ From this perspective, the Salamanca Declaration and CRPD clearly shift the focus from children’s impairments, known as the medical model of disability,⁵² to hindrances to access, known as the social model.⁵³ In this vein, an inclusive education allows ‘education structures, systems and methodologies to meet the needs

48 Para 1.

49 Para 52.

50 Stubbs (n 18 above) 24.

51 Tukov (n 19 above) 31; Hall (n 19 above).

52 Goodley (n 19 above) 7.

53 As above.

of all children'.⁵⁴ It aims to confront exclusionary policies and practices that keep CWDs away from schools.⁵⁵ This approach of shifting the attention from the impairment to environmental and social hindrances to access is further clarified through the CRPD which calls upon state parties to make sure that PWDs have: equal access to an inclusive education and life-long learning process, including access to primary, secondary, tertiary and vocational institutions. This includes facilitating access to alternate modes of communication, providing reasonable accommodation, and training professionals in the education of persons with disabilities.⁵⁶

This provision clearly provides for the inclusion of CWDs into the mainstream education system, which implies the adoption of measures to accommodate and support them. In this context, CWDs' right to primary education is violated if (a) they are prohibited from attending mainstream education with other learners because of their impairment; (b) they are allocated certain subjects because of their disabilities; (c) they do not have access to means of communication appropriate to their disabilities, for example, unavailability or denial of the use of Braille, sign language, augmentative, alternative and other means of communication in official interactions; (d) teachers and staff are not equipped with disability awareness; and (e) buildings and classrooms for learners with disabilities are inaccessible. These violations amount to discrimination at school on the basis of disabilities. Sharing this view, the UN Special Rapporteur on disabilities rights 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.⁵⁷

States should formally identify standards of education to ensure that CWDs can enjoy available, accessible, acceptable and adaptable education on an equal basis with others.⁵⁸ Overall, the education policy makers should always regard the best interests of the child as a paramount factor in determining the type of education to use. The inclusion of CWDs should be done through national action plans to ensure free and universal

54 Stubbs (n 18 above) 21.

55 UNESCO (1999) 9.

56 Art 24.

57 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.

58 Para 28.

primary education. The analysis of the Cameroonian Action Plan for education in the next section will shed critical light on the extent to which CWDs are included or not in primary education.

3 Inclusion of CWDs in Cameroonian primary schools

After the First World War, Germany occupied Cameroon as early as 1884. Nevertheless, it lost its grip on the country when the League of Nations officially mandated Britain and France to administer Cameroon, from 1916 to 1960.⁵⁹ As a result of this arrangement, the country inherited two educational policies from British Cameroon (West Cameroon) and French Cameroon (East Cameroon). However, in 1961, a year after its independence, the country became a federal state, and each region could adhere to the educational system inherited from its colonial masters.

Nevertheless, in order to reform the two educational systems, and integrate them into one national education system, the National Council on Education was created in 1963. Subsequently, the Federal Law 63/COR/5 of 1963 was adopted and modified the primary school duration to six years in the entire country.⁶⁰ The main features of the educational system could be located into two different periods: Immediately after independence (1961-1975); and after the clear elaboration and coming into force of the international human rights standards.

3.1 1961-1975: The exclusion of CWDs

After Cameroon's independence and prior to the development of a robust international framework for inclusive education, the Cameroon educational system was characterised by 'the invisibility of persons with disabilities'.⁶¹ CWDs and especially children with special needs were excluded from mainstream education. Consequently, their education took place within the confines of families where they were taught in local languages within the context of their custom and traditional beliefs.⁶² Keeping CWDs in their families is an infringement of the right to education. This approach was questioned and found lacking in the South African case of *Western Cape Forum for intellectual Disability*⁶³ where Cleaver J stated that:

59 See art 22 & 23 of the League of Nations Covenants; see also C M Fombad *Cameroon* (2003) 21.

60 Tukov (n 19 above) 17.

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

62 Tukov (n 19 above) 18.

63 n 47 above.

The failure to provide the children [with disabilities] with education places them at the risk of neglect for it means that they often have to be educated by parents who do not have the skills to do so and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation ... it must follow that the children's rights to dignity and to be protected from neglect and degradation have also been infringed and there is no valid justification for such infringement.⁶⁴

In Cameroon, when children with special needs were not under the responsibility of their families, they were accepted to private institutions run by religious organisations. These institutions included Ecole Spécialisée pour Enfants Déficents Auditif ESEDA (Special school for children with hearing impairments); L'externat Medico Pedagogue LA COLOMBE (Special School for the Mentally Handicapped (sic) Children) created in 1972; and PROMHANDICAM established in 1975 as a centre for the vocational training of CWDs of both sexes.⁶⁵

It could be argued that CWDs were completely excluded because the government which should have been the main provider of education⁶⁶ relinquished its responsibility to families and private institutions. In fact, prior to the establishment of the Ministry of Social Affairs in 1975,⁶⁷ CWDs were perceived as ill and were therefore submitted to the medical model of disability as they were catered for by the Ministry of Public Health. The latter did very little or nothing at all to ensure the accommodation of CWDs in mainstream or even 'special' schools. Even the creation of the National Rehabilitation Centre for the Handicapped (CNHR)⁶⁸ and subsequently the establishment of the National School for Social Affairs Workers (ENAAS) of Yaoundé⁶⁹ did not enhance access to primary schools for CWDs as most of these children remained at home.

Nevertheless, in 1961, through Decree 61/94 of 21 June 1961, the government established a commission for the protection of 'children in moral danger',⁷⁰ which was subsequently followed by the setting up of the Federal School for Educators and Social Assistants (EFAS) on 18 June 1967 at Bétamba. According to its founding provision, Decree 68/DF/421 of 15 October 1968, EFAS aims to cater for professional training for educators and social workers 'specialised in childhood, individual and

64 Paras 46 & 47.

65 Tukov (n 19 above) 18.

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

67 It was established by Decree 75/467 of 28 June 1975.

68 Decree 78/056 of 23 February 1978.

69 Decree 80/199 of 9 June 1980.

70 Ministry of Social Affairs (MINAS) 'From temporary assistance to a sustainable welfare: Fifty years of social service in Cameroon' available at <http://www.cameroun50.cm/en/component/content/article/220-minas.html> (accessed 29 November 2012). Also Decree 90/524 of 23 March 1990, creating the National Commission for the protection of abandoned and delinquent children and children in moral danger.

family protection and the preventions and treatments of juvenile and social maladjustment'.⁷¹

Unfortunately these measures are the remains of colonial practices which gathered delinquents, 'morally and materially abandoned children',⁷² under the same roof as had been sealed into law by the Decree 1315 of 11 March 1952. It is worth noting that by law, only children sent by court decisions could be admitted to the so-called Reception and Observation Centres.⁷³ Therefore, CWDs are not covered because not only was the concept of 'children in moral danger' unclear but delinquency or being abandoned 'morally and materially' is not a disability.

However, the Ministry of Social Affairs and the Ministry of Education worked hand in hand to address special educational needs; the state commits itself to support schools through, special pedagogical assistance, training of specialised personnel and the development of curriculum materials.⁷⁴ In addition, under the auspices of the Ministry of Social Affairs, the Department of National Solidarity was established to monitor the well-being of PWDs. Furthermore, moving towards a dual track system, lumping CWDs in one education system and other students in a different one, the Rehabilitation Institute for the Blind in Buea, called Bulu Blind Centre, was established to teach blind people, including children, in arts and crafts.⁷⁵

Overall, in spite of a few positive attempts, immediately after independence, Cameroon still did not cater for CWDs' inclusion in primary school because these children were educated within the confines of their families and the private sector. Furthermore, the law catering for children in moral danger as well as abandoned children could not ensure CWDs access to primary school because the law targeted delinquent children. In addition, when there was an attempt to include CWDs at schools, the government adopted a dual track education system characterised by the exclusion of children with disabilities from mainstream education. This was, however, not well implemented because not only were mainstream rural schools not, and are still not, capacitated to welcome CWDs but also most rural areas do not have so called 'special schools'.

71 Ministry of Social Affairs (MINAS) (n 70 above).

72 As above.

73 Decree 4379 of 3 September 1953.

74 Tukov (n 19 above) 19.

75 As above.

3.2 1975-2013: Towards a one track system or inclusive education

From 1975 to date, Cameroon has adopted a legal architecture to ensure an inclusive education at primary level, which unfortunately faces some challenges.

3.2.1 Legal architecture for an inclusive primary education in Cameroon

After the well elaborated International Bill of Rights, Cameroon articulated its primary education system at length. Under the right to primary education framework, state parties to ICESCR are compelled to 'adopt a plan of action',⁷⁶ with clear deadlines,⁷⁷ to give effect to the right to education. In this regard, the plan of action for the progressive implementation of compulsory education free of charge for all is a 'continuous obligation', compelling states to monitor and improve a plan to have permanent universal free primary education.⁷⁸ In attempting to comply with its international obligations under the right to primary education, the government ensures that the Constitution contains a specific provision on the right to education for all. Accordingly the Constitution provides that:

[T]he State shall guarantee the child's right to education. Primary education shall be compulsory. The organisation and supervision of education at all levels shall be the bounden duty of the State.⁷⁹

In giving effect to this provision, the government establishes a primary education system which consists of 'the first six grades of compulsory schooling, normally provided from six to twelve year-olds (though with high repetition rates, students up to age fourteen are often included)'.⁸⁰ Furthermore, it allocates a specific ministry in charge of basic education (nursery and primary schools).⁸¹

More importantly, in line with the conclusion of the World Conference on EFA held in Jomtien, Thailand in 1990, the government adopted the Sector Plan for Primary Education, included in Cameroon's

76 General Comment 11, para 9.

77 General Comment 11, para 10.

78 UNESCO The right to primary education free of charge for all: Ensuring compliance with international obligations (2008) 3.

79 1996 Cameroon Constitution, Preamble, para 23.

80 'Cameroon – Preprimary & primary education' available at <http://education.stateuniversity.com/pages/229/Cameroon-PREPRIMARY-PRIMARY-EDUCATION.html> (accessed 22 July 2013).

81 Decree 2004/320 of 8 December 2004.

1998 Education Framework.⁸² This Plan was strengthened by the 2000 Dakar Framework for Action promoting EFA,⁸³ aiming to ensure the availability of free primary education for all. It could therefore be argued that the Cameroonian Constitution and the National Sector Plan for primary education are non-discriminatory and consequently ensure the inclusion of CWDs in primary schools. This is so because the Constitution guarantees the right to equality and the right not to be discriminated against in these terms: 'all persons shall have equal rights and obligations.'⁸⁴ The right to equality and the prohibition of discrimination apply to all sectors, including education. Thus, everyone, boys and girls, should have equal access to education and should not be discriminated against on any ground including disability.

However, as indicated by the Constitution education 'shall be the bounden duty of the State'.⁸⁵ In other words, the state is not bound to honour the right to education but only has a moral (and not a legal) obligation to do so. This led Djoyou Kamga to argue that the right to education is not justiciable in the country.⁸⁶ The non-justiciability of the right to education in Cameroon contrasts with the situation in South Africa where the Constitutional Court has held that the right is binding on the state and has both a positive and negative aspect. In *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995*⁸⁷ the Constitutional Court observed with reference to the Interim Constitution that '[s]ection 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.⁸⁸ In other words, the state is not only obligated to deliver the right to education, but it is also compelled to ensure that the right is not impeded.

As far as the right to primary education of CWDs is concerned in Cameroon, these children are protected under general non-discriminatory laws under concepts such as 'everyone' or 'all persons' which do not yield the expected results because these children remain invisible. According to Stein and Lord,

The principal difficulty with this approach [protecting CWDs under a general non-discriminatory provision] is that existing human rights obligations are

82 1998 Cameroon's Education Framework 633/PJ L./ATN. Art 7 of this emphasises universal access to education.

83 The goal of Education for All was adopted in Dakar, Senegal, from 26 to 28 April 2000 through the Dakar Framework for Action.

84 Preamble, para 6.

85 Preamble, para 23. Though the preamble is 'part and parcel' of the Constitution (art 65), ensuring its justiciability is very problematic. See Djoyou Kamga (n 22 above) 188-192.

86 Djoyou Kamga (n 22 above) 186-192.

87 1996 (3) SA 165 (CC).

88 *Ex Parte Gauteng Provincial Legislature*, para 9.

not tailored to address the specific barriers faced by persons with disabilities in the realisation of their human rights.⁸⁹

Similarly, Kayess and French argue that incorporating the rights of PWDs in a universal provision will not enhance 'the recognition and respect'⁹⁰ of rights of the beneficiaries because:

[T]o a significant extent, the traditional human rights paradigm is based on an 'able-bodied' norm. In most cases it is not self-evident how traditional human rights are to be interpreted and applied in a manner that will penetrate to the specific human rights violations to which persons with disability are subject.⁹¹

It could therefore be safe to argue that without an explicit constitutional provision on the right of CWDs to access the primary education system, these children will remain behind closed doors, far from schools.

Although the Cameroonian Constitution does not contain specific protection of persons with disabilities (PWDs)⁹² including children, the penal code criminalises the neglect of PWDs.⁹³ Furthermore, in 1983, the Government passed law 83/13 of 21 July 1983 relating to the protection of persons with disability, and seven years later, its Decree of application was also passed.⁹⁴ As correctly observed by the African Union of the Blind (AFUB) *et al*, the 1983 law and its Decree of application should be applauded for addressing the socio-economic integration of PWDs including children.⁹⁵ The 1983 law defines a PWD as an individual who, incapacitated by physical or mental, congenital or accidental deficiency, experiences difficulties to carry out his/her duties as any non-disabled person. In line with this definition, a National Identity Card for PWDs was instituted in order to ensure that these persons are fully accommodated in the society. In this regard, owners of the identity card are entitled to

89 M Stein & JE Lord 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' 19 available at http://www.law.wisc.edu/m/zdq3n/2-20-09_stein-lord_future_prospects_for_un_on_disability_rights.pdf (accessed 22 July 2013).

90 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 114.

91 Kayess & French (as above).

92 The only reference to PWDs in the Constitution is found in article 25(1) which reads: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstance beyond his control'.

93 Art 282.

94 90/1516 of 26 November 1990, binding the modalities of application of law 83/13 of 21 July 1983, relating to the protection of persons with disability.

95 'Study on the rights of persons with disabilities in Cameroon' Report commissioned by the African Union of the Blind (AFUB) and the Cameroon National Association for the Blind (CNAB) in partnership with Disability Rights Promotion International (DRPI) and Swedish Association of the Visually Impaired (SRF) (2007) 36, presented by EJE Mayer <http://drpi.research.yorku.ca/Africa/resources/CameroonRep08> (accessed 22 October 2013).

material and financial assistance in the form of pensions⁹⁶ and medical expenses, though this does not always happen in practice.⁹⁷ In principle though this law seems to advance the provision of services to PWDs, it entrenched the theory of mere assistance to these persons. This is the charity model of disability in which PWDs rely simply on hand-outs and have no rights to services as advocated by the social model of disability.

Nevertheless, the 1983 law explicitly prohibits all forms of discrimination against PWDs.⁹⁸ This provides an entry point for the inclusion of CWDs in primary schools. In this respect, the 1983 law clearly calls for the education of children and young adults with disabilities in mainstream and special schools when necessary. It highlights the need to have special teachers and didactic materials adapted to the children's needs in mainstream schools that enrol CWDs and calls for these schools to facilitate access for these children.⁹⁹ This is a move towards an ULD to be strengthened through cooperation between neurologists, educators and other expert in the field on inclusive education.

In establishing a conducive environment for CWDs in Cameroonian primary schools, the 1983 law and its degree of application have also eased the enrolment of CWDs in terms of age limits to attend mainstream school. In this regard, 'pupils and students with disabilities are authorised to repeat a current class twice if the failures in the examinations are caused by the difficulties related to their physical or mental state'.¹⁰⁰ However, this measure may be counterproductive because allowing CWDs to repeat the class because of disabilities keeps the focus on the impairment and not the lack of access which creates the problem. The best approach informed by the ULD would be to train teachers on how to work with CWDs; to provide appropriate assistive devices commensurate with children's disabilities. Allowing CWDs to repeat the class enhances discrimination against them as they are perceived to be less intelligent or weak learners.

In ensuring that CWDs have economic access to schools, in line with Decree 90/1516 of 26 November 1990, the education of CWDs will be taken care of by the government. Accordingly, PWDs in specialised private training institutions are entitled to assistance in the forms of subventions or specific didactic materials; those at schools and even universities are entitled to gifts in cash or kind. Furthermore, children born of poor parents with disabilities are also entitled to such assistance.¹⁰¹ To give effect to these measures, a 1996 Presidential Decree was adopted. It established a national committee on disability, an advisory body tasked to

96 Art 26 (1) of the 1990 Decree.

97 'Study on the rights of persons with disabilities in Cameroon' (n 95 above).

98 Art 3(1) & (2).

99 Chap 3, art 1 & 3; see also the 1990 Decree.

100 Art 5 (3) of the 1990 Decree.

101 Art 5(4) of the 1990 Decree, see also 'Study on the rights of persons with disabilities in Cameroon' (n 95 above) 50.

co-ordinate actions related to PWDs. In addition, mistakenly assuming that primary school is already free for all including CWDs,¹⁰² the Ministry of Social Welfare in Charge of PWDs has signed an instruction with its counterpart of Secondary Education to ensure free access at secondary level for PWDs.¹⁰³

However, not only are these measures not implemented, they are not enough to ensure the inclusion of CWDs. The measures are not implemented because the training of education professionals including teachers is non-disabled centred and as a result CWDs are not accommodated at schools. Furthermore, these children do not have assistive devices,¹⁰⁴ hence the observation that no attention has been given to their academic and social needs by the government or the schools.¹⁰⁵ In fact, in Cameroon, users may be asked to pay for the assistive devices, from their income.¹⁰⁶ This shows that CWDs from poor families are excluded from primary schools that are economically inaccessible. This led DjoyouKamga to claim that CWDs are excluded from Cameroonian primary schools.¹⁰⁷ Again the solution cannot be found through government largesse but through the establishment of an education system informed by ULD as this will provide avenues to secure the rights to education for CWDs at primary and other levels.

3.2.2 Challenges for inclusive primary education in Cameroon

Legal challenges

In spite of the adoption of a legal architecture for an inclusive education, Cameroon must revisit its commitment to international law pertaining to the inclusion of CWDs in schools. In its report to the human rights council's Working Group on the Universal Periodic Review, though Cameroon mentions what is done to ensure the right to education, nothing is said in connection with what is done to accommodate or include CWDs in schools.¹⁰⁸

102 Djoyou Kamga (n 22 above), the author demonstrates that primary education is not free in Cameroon.

103 See joint circular 34/06/LC/MINSEC/MINAS of 2 August 2006.

104 Tukov (n 19 above) 22.

105 As above.

106 WHO – Geneva 'Disability and rehabilitation status – Review of disability issues and rehabilitation services in 29 African countries' December 2004. In *Ross v Ryanair Ltd & Another* [2004] EWCA Civ 1751, the Central London County Court held that the unavailability of assistive devices, or asking PWDs to pay for them from their own pockets, amounts to a violation of the right of the beneficiaries.

107 Djoyou Kamga (n 22 above) 180.

108 Human Rights Council Working Group on the Universal Periodic Review, Fourth session Geneva, 2-13 February 2009 National Report Submitted in accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1* Cameroon.

However, as mentioned earlier, Cameroon had signed, but not ratified, the CRPD. In addition, it has adopted a law to establish the National Institute of Social Work, and included in the curriculum for its training institute a module that focuses on promotion of social development for PWDs.¹⁰⁹ This was followed by Decree 2009/096 of 16 March 2009, which operationalises the national centre for the rehabilitation of persons with disabilities.

More importantly, in 2010, the government adopted Law 2010/002 of 13 April 2010 on the protection and the promotion of people with disabilities. This law emphasises the prevention of disabilities,¹¹⁰ re-adaptation,¹¹¹ socio-economic and political inclusion of PWDs¹¹² and provides for penal measures for violations. Significantly, it provides for the right to an inclusive education for CWDs,¹¹³ and the right to 'special' education for PWDs.¹¹⁴ This law is a good step towards the implementation of the human rights model of disability as it defines services to PWDs in terms of rights or entitlements that may be claimed in a court of law. In addition, the duty to protect, respect and fulfil attached to these rights. In other words, the state has the positive obligation to protect the rights, and the negative obligation not to hinder their realisation. Even an impediment to the enjoyment of these rights by private entities is an offence.

As far as the inclusive education of CWDs is concerned, the state commits itself to ensure that PWDs have access to education and professional training.¹¹⁵ In so doing, it will contribute to the education cost and pedagogical assistance,¹¹⁶ which could be done through partial or total exemption of school fees as well as provision of scholarships.¹¹⁷ CWDs will be provided with an education system commensurate with their disability.¹¹⁸ Learners with disabilities will also get the benefit of age exemption and be allocated teachers trained on disabilities' issues.¹¹⁹ The 2010 law clearly provides for an inclusive education. This law seems to be the magic crystal ball needed by PWDs and CWDs in particular.

However, its decree of operationalisation is yet to be adopted, hence the country still relies on the obsolete law of 1983. In addition, apart from the 1996 Decree which creates a very ineffective body to monitor disability issues in the country, and the adoption of the 2006 joint circular between

109 Decree 2006/302 of 21 September 2006.

110 Chap 2.

111 Chap 3.

112 Chap 4.

113 Chap 3, sec 3, art 25.

114 Chap 3, sec 3, art 24.

115 Chap 4, sec 1.

116 Chap 4, sec 1, art 28.

117 Chap 4, sec 1, art 29.

118 As above.

119 As above.

the Ministry of Secondary Education and the Ministry of Social Affairs aiming to ensure a free secondary education for PWDs¹²⁰ mentioned earlier, the position is still not satisfactory. Although accessibility of buildings and transport is provided for by the 2010 law, much more needs to be done to ensure accessibility of the built environment and especially schools for CWDs.¹²¹

There is a need to turn the whole society into an inclusive one and this will have ramifications in the education system. Furthermore, it is important to include disability awareness in the training of town planners, architects and construction engineers. As a result all buildings and public spaces including schools will become accessible for all.¹²² The current situation is alarming. CWDs are just not included in primary schools. This was the finding of a report by World Vision¹²³ which observes that unlike Djibouti, Ethiopia, Ghana, Kenya, Lesotho and Mozambique in Africa, Cameroon does not mention disability and inclusion of CWDs in education in its National Sector Plan for education.¹²⁴ Therefore Cameroon should act urgently to establish an inclusive primary education in its territory. Amongst others, the country should ratify the CRPD and give effect to its article 24 urgently. Furthermore, the Cameroonian educational authorities should adopt a decree to implement the 2010 law.

In addition, they should use a multidisciplinary collaboration with other stakeholders. In this perspective, parents of CWDs and the disability movement as activists should work together to ensure educational provision for CWDs. Correspondingly, there is a need to train and produce teachers who are able to cater for the diverse needs of learners. The involvement of experts on curriculum development to set up an inclusive education based on ULD that would benefit all learners including those with disabilities is vital. In this perspective the education method should be informed by the:

[D]esign of instructional materials and activities that allows learning goals to be attainable by individuals with wide differences in their abilities to see, hear, speak, move, read, write, understand English, attend, organise, engage, and remember without having to adapt the curriculum repeatedly to meet special needs.¹²⁵

120 See the joint circular 34/06/LC/MINSEC/MINAS of 2 August 2006.

121 Government Implementation of the Standard Rules as seen by Member Organisations of Inclusion International – ILSMH Cameroon, 1997 http://www.independentliving.org/standardrules/InclInt_answers/Cameroon.html (accessed 22 July 2013). Though this information dates from 1997, it remains relevant in Cameroon in 2013.

122 Government Implementation of the Standard Rules as seen by Member Organisations of Inclusion International – ILSMH Cameroon (n 121 above).

123 World Vision 'Education's missing millions: Including disabled children in education through EFA, FTI [Fast Track Initiative] processes and national sector plans' (2007).

124 World Vision (as above) 24.

125 R Orkwis *Curriculum access and universal design for learning* (1999) 2.

Cultural challenges

The inclusion of CWDs in primary schools is also hindered by cultural barriers to education. Though research shows that some parents of CWDs would like to enrol their children at school,¹²⁶ numerous CWDs are perceived to be a 'disgrace' to their families who hide them or deprive them from any contact with the rest of the community as to them they symbolise the punishment from the gods on the family.¹²⁷ In this perspective, not only does a CWD represent 'a bad omen that may tarnish the family pedigree',¹²⁸ he or she is also perceived by the family as 'unproductive and [an] unnecessary burden'¹²⁹ and should therefore be kept behind closed doors, away from school.¹³⁰ When these children eventually get to school, though they are sometimes accepted by some of their non-disabled peers, they are generally marginalised and despised by their teachers and fellow learners as if they are not human.¹³¹

Consequently, the inclusion of CWDs at primary school level needs a systemic change, not only in teaching approaches and structures but also in changing cultural beliefs that hinder inclusive education. For this to happen, there is a need to educate parents on the imperative to enrol their CWDs at school, to support them and to work in direct collaboration with teachers to ensure the full accommodation of these children in schools and in the society.¹³² Rye observes:

Parents, who in addition to care providing, are active participants in school work, cooperate with teachers regarding school work and home work, child rearing and the child's social life in and out of school [should be applauded for their role *including* the child in the society as a whole]. This form of cooperation has a demonstrable positive impact on the child's well-being, learning and development, and helps prevent difficulties in learning and adjustment.¹³³

Rye's approach ensures that the education system is adapted to communities and responds to the needs of learners within their diverse

126 Tukov (n 19 above) 43.

127 Goodley (n 19 above) 6.

128 H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children rights in Africa: A legal perspective* (2008) 302. Also Goodley (n 19 above) 14.

129 'Study on the rights of persons with disabilities in Cameroon' (n 95 above) 39; also The ACPF (n 23 above) VI.

130 The ACPF (n 23 above) 34.

131 'Study on the rights of persons with disabilities in Cameroon' (n 95 above) 62.

132 On the positive impact of parents' support to CWDs and collaboration between these parents and teachers see in general T Watson *et al* 'The relationship of parents' support to children's school achievement' (1983) 62 *Child Welfare* 175; also KD Sloane 'Home support for successful learning' in SB Silvern (ed) *Advances in reading/language research: Literacy through family, community and school interaction* (1991) 5.

133 H Rye 'Helping children and families with special needs: A resource-oriented approach' in BH Johnsen & MD Skjorten (eds) *Education – Special needs education: An introduction* (2001) 21.

social and cultural environments. In attempting to adapt the education to the environment, while learners can be taught in their local languages together with English and French as suggested by Fonlon,¹³⁴ Njock,¹³⁵ Tadadjeu,¹³⁶ Chumbow¹³⁷ and Essono,¹³⁸ sign language, Braille and other assistive devices should also be made available for CWDs.

4 Concluding remarks

The aim of this article was to investigate to what extent CWDs are included in Cameroonian primary schools. The article found that immediately after independence until 1975, the country failed to include CWDs in mainstream schools that were ill-equipped in terms of teachers and infrastructure to cater for these children. Attempt to include these children in special schools also failed especially because of the quasi-inexistence of such schools in rural areas.

From 1975-2013, attempts to implement an inclusive primary education were hindered by obsolete laws, the non-express provision of the rights to CWDs to education, the lack of decree to implement disability friendly legislations, the non-ratification of the CRPD and cultural attitudes that consider a CWD as a curse to be hidden.

Consequently, the inclusion of CWDs at primary school needs a systemic change. Firstly, the government should ratify the CRPD and its optional protocol and ensure its implementation with special attention to article 24. In doing so, it should amend obsolete laws, adopt decrees of implementation of disability friendly policies and raise awareness on the need to send CWDs to schools. Secondly, not only should the government adopt the ULD which entails structural and infrastructural changes, the development of a curriculum and teachers training to meet various needs in a classroom, it should also consider the use of 'special education' only if it is commensurate with the needs and the best interest of the child. Thirdly, the systemic change of the education system shall also tackle cultural beliefs that demonise the disabled child. For this to happen, there

134 B Fonlon 'A case for early bilingualism' (1963) 4 *ABBIA: Cameroon Cultural Review* 56; B Fonlon 'The language problem in Cameroon' (1969) 22 *ABBIA: Cameroon Cultural Review* 5.

135 BB Njock 'Le problème linguistique au Cameroun' (1966) 73 *L'Afrique et L'Asie* 3.

136 M Tadadjeu 'Language planning in Cameroon: Toward a trilingual education system' in RK Herbert (ed) *Patterns in language, culture, and society: Sub-saharan Africa* (1975) 53; M Tadadjeu *L'enseignement des langues au Cameroun – Language education in Cameroon* (1981).

137 EA Anchimbe 'Socio-pragmatic constraints to native or indigenous language education in Cameroon' in F Olaoba *et al* (eds) *Selected proceedings of the 36th annual conference on African linguistics* (2006) 133.

138 JM Essono 'De l'enseignement des langues nationales dans le secondaire: Les problèmes d'organisation' in M Tadadjeu (eds) *L'enseignement des langues au Cameroun – Language education in Cameroon* (1981) 104.

is a need to educate parents on the need to enrol their CWDs in schools, to support them and to work in direct collaboration with teachers to ensure the full accommodation of these children in schools and in the society as whole.

CHOICE, SUPPORT AND INCLUSION: IMPLEMENTING ARTICLE 19 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN KENYA

*Elizabeth Kamundia**

Summary

This article examines article 19 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which comprises the right to live independently and to be included in the community, from an African perspective. The context is one in which persons with disabilities live with their families but without individualised state funded support services, against a cultural backdrop consisting of a largely communal way of life. This article examines the import of article 19, tracing its history and looking at various sources to flesh out the nature and content of the right to live independently in the community. It then gives content to the core of article 19 in the Kenyan setting, providing guidance on what the essential components of a policy that promotes article 19 in Kenya should be. This article makes policy proposals which are geared towards ensuring choice, support and inclusion of PWDs in Kenya.

1 Introduction

In terms of article 19 of the CRPD all PWDs have the right to live in the community, with choices equal to others, and have the right to be included in the community. The reality is that PWDs, particularly those who require more intensive support, are marginalised and relegated to the outskirts of society.

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It has been stated that 'the CRPD effectuates a paradigm shift in the context of disability'.¹ The Convention does this by taking 'to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society'.² The CRPD interprets and applies traditional human rights in a manner that specifically addresses the particular issues that are faced by PWDs.³

Kenya has ratified the CRPD,⁴ and by virtue of article 2(6) of its Constitution, the CRPD forms part of the law of Kenya.⁵ Hence, Kenya must report on the progress it is making to implement the rights contained in the CRPD, including the right to community living. It is therefore necessary to analyse this right in relation to the circumstances present in the country, to ensure its implementation, and to facilitate its monitoring.

This article examines the significance of article 19, exploring its history and shedding light on the nature and content of the right to live independently in the community. It then gives substance to the core of article 19 in the Kenyan setting, providing guidance on what the essential components of a policy that promotes article 19 in Kenya should be.

This article makes policy proposals which are geared towards ensuring choice, support and inclusion of PWDs in Kenya. Some of the proposals considered are those identified by the state in its report to the Committee on the Rights of Persons with Disabilities as being the steps that the state is taking towards implementing article 19.⁶ These include education for PWDs, community based rehabilitation, and the various funds set up by the government to support PWDs.

- 1 Office of the United Nations High Commissioner for Human Rights, Europe Regional Office 'Getting a life: Living independently and being included in the community. A legal study of the current use and future potential of the EU structural funds to contribute to the achievement of article 19 of the UN Convention on the Rights of Persons with Disabilities (April 2012) 15 http://www.europe.ohchr.org/Documents/Publications/Getting_a_Life.pdf (accessed 2 August 2012).
- 2 CRPD <http://www.un.org/disabilities/default.asp?navid=14&pid=150> (accessed 5 January 2012).
- 3 P Arajärvi 'UN CRPD and the human rights of persons with disabilities' in J Kumpuvuori & M Scheinin (eds) *United Nations Convention on the Rights of Persons with Disabilities - Multidisciplinary perspectives* (2009).
- 4 Ratified on 19 May 2008. Convention and optional protocol signatures and ratifications <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 25 February 2012).
- 5 The Constitution of Kenya 2010, art 2(6) provides: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.
- 6 Committee on the Rights of Persons with Disabilities, Future sessions: Consideration of reports (National report: Kenya's initial report submitted under art 35(1) of the United Nations Convention on the Rights of Persons with Disabilities – 31 August 2011) <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/futuresessions.aspx> (accessed 22 May 2012).

This article is divided into six sections, including the introductory section. The second section defines the foundational terms that are used extensively in the article – ‘community living/independent living’ and ‘institutionalisation’. The contested or relative nature of these concepts is acknowledged and addressed in this section. An attempt is made at contextualising the terms so that they are relevant to the Kenyan perspective.

The third section illuminates the normative implications of article 19 as well as the African human rights framework on disability. This section also explores the position taken by developing countries on article 19 during the negotiations of the CRPD. The fourth section explores the Kenyan context. It discusses the situation of PWDs in Kenya within the ambit of article 19. It also examines and critically analyses the legal and policy framework under which the right to live independently and to be included in the community in Kenya is anchored. The fifth section which precedes the conclusion gives content to the essence of article 19 in Kenya and makes policy recommendations towards realising this right.

This article draws in part from qualitative research.⁷ Interviews with key persons were undertaken in governmental,⁸ constitutional,⁹ and statutory¹⁰ bodies and in Non-Governmental Organisations (NGOs).¹¹ In one case, a group interview was conducted with people with intellectual disabilities.¹² A professional person with a disability¹³ and two parents of children with disabilities were also interviewed.¹⁴ The interviews were conducted between 1 May and 11 May 2012 in Nairobi, Kenya. A semi-structured interview instrument was used. Interviews were in English, Kiswahili and in Kenyan Sign Language with translation. The article is

7 The Article is adapted from: E Kamundia ‘Choice, support and inclusion: Implementing article 19 of the Convention on the Rights of Persons with Disabilities in Kenya’ unpublished LLM thesis, National University of Ireland, 2012.

8 The Ministry of Gender, Children and Social Development <http://www.gender.go.ke/> (accessed 2 July 2012).

9 Kenya National Commission on Human Rights <http://www.knchr.org/> (accessed 2 July 2012).

10 Kenya Society for the Blind <http://www.ksblind.org/site/> and National Council for Persons with Disabilities, Kenya <http://ncpwd.go.ke/> (accessed 2 July 2012).

11 NGOs involved in the research are: United Disabled Persons of Kenya, Leonard Cheshire Disability – Kenya <http://www.lcint.org/?lid=3162>; Sense International (East Africa) <http://www.senseinternational.org.uk/pages/sense-international-east-africa.html>; Users and Survivors of Psychiatry in Kenya <http://www.usp-kenya.com/>; Kenya Association of the Intellectually Handicapped <http://kaihid.org/>; and Ecumenical Disability Advocates Network <http://www.oikoumene.org/en/pro-grammes/unity-mission-evangelism-and-spirituality/just-and-inclusive-communities/people-with-disabilities-edan.html>.

12 The self-advocates interviewed are from the Kenya Association of the Intellectually Handicapped.

13 Dr RMJ Oduor, Lecturer, University of Nairobi.

14 F Wangare of the Kenya Association of the Intellectually Handicapped and J Shiroko of the Brian Resource Center <http://brc.or.ke/> (accessed 2 July 2012).

also informed by numerous discussions with key actors from various parts of the world.¹⁵

2 Defining foundational terms

2.1 Community living

This sub-section is aimed at elaborating the meaning of 'community living', since living as part of our communities serves as the basis for everything we do in life.¹⁶ This sub-section looks at the various ways in which the term 'community' has been defined. The rationale is that different definitions contain glimpses of the truth, and contribute to a fuller picture of the reality requiring definition. This section also explores related terms such as 'communalism' in an attempt to best capture how life in the community is lived in Kenya. As with most words in social sciences, the word 'community' is contested.¹⁷ In defining community from a sociological perspective, Delanty states that communities have been based on ethnicity, religion, class or politics. He notes that communities may be large or small; 'thin' or 'thick' attachments may underlie them; they may be locally based and globally organised; and affirmative or subversive in their relation to the established order. Further, communities may be traditional, modern, and even postmodern, reactionary and progressive. Delanty makes the point that for sociologists, community has traditionally designated a particular form of social organisation based on small groups such as neighbourhoods, the small town or a spatially bonded locality.¹⁸

Taylor writing in the context of communitarianism stresses the social nature of the individual as one that is quite literally embodied in moral relationships. The individual must be seen as rooted in the collective self.¹⁹ Hence, citizenship is based on a social concept of the individual as a member of a community.

The above discussion provides different elements of what 'community' means. This leads us to an exploration of what a 'communal way of life' entails. In this regard, Oduor in discussing communalism in the context of a traditional African ethical outlook states:

15 These actors are from: Inclusion International, Canada <http://www.inclusion-international.org/>; Canadian Association for Community Living, Human Care Association, Japan, <http://www.humancare1986.jp/english.html>; and Open Society Foundations (Mental Health Initiative) <http://www.opensocietyfoundations.org/mental-health-initiative> (all accessed 2 July 2012).

16 Commissioner for Human Rights 'The right of people with disabilities to live independently and be included in the community' CommDH/IssuePaper (2012) 3. https://wcd.coe.int/ViewDoc.jsp?id=1917847#P188_14524 (accessed 19 March 2012).

17 G Delanty *Community* (2003).

18 As above.

19 C Taylor *Sources of the self* (1990).

Communalism ... denotes that outlook which emphasises the social aspect of man's nature, holding that the individual's life can only find fulfilment when that individual co-operates with other members of the community, and puts the interests of the community before his own interests ... Consequently, these communities (traditional African communities) emphasised the need for every member to do his best to contribute towards the good of the community.²⁰

In this way of life, the common good trumps over individual good, social consensus over personal will, inter-dependence over self-dependence.²¹

Interviews undertaken for this study confirm the above discussion of communalism from an African perspective. They also provide insight into what constitutes a person who is considered a full member of the community in Kenya:

The other element about it (Article 19 of the CRPD) is about participation, participation around the community, and when you are participating in the community, we look at very basic things such as going to church, in Kenya we have over 80% Christians, so being able to go to church, to participate in weddings, in funerals, in circumcisions or rites of passage. That for us would be a person who is really accepted within the community, and can function in the community.²²

An inherent part of the right to live in the community is freedom of choice, including freedom to define what 'community' means.²³

One interviewee expressed various facets of community in the Kenyan context:

Africans are too together. You are still your mother's child, son, daughter to death, and you still belong to Kikuyu, Luo, community to death. Independence is good but within a certain set up, that you are independent, you as a person with disability, yes, you can make your own decisions, but living, we're living as a community ... We are inter-dependent [on] each other.²⁴

These discussions help form a more comprehensive picture of what 'community' means. In the context of Kenya, the definition of community also depends on location – and would be slightly different between rural and urban areas. In rural Kenya where people tend to have the same place

20 RMJ Oduor 'Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits' PhD thesis, University of Nairobi, 2011.

21 P Erny *The child and his environment in black Africa: An essay on traditional education* trans GJWanjohi (1981).

22 Interview with H Obande, Chief Executive Officer, United Disabled Persons of Kenya (Nairobi, Kenya, 2 May 2012).

23 United Nations Enable 'Proposals to the draft text - Israel, 4th session of the Ad Hoc Committee, 27 August 2004' <http://www.un.org/esa/socdev/enable/rights/ahc4israel.htm> (accessed 2 August 2012).

24 Interview with E Saka, Sense International (East Africa) (Nairobi, Kenya, 4 May 2012).

of abode over long durations of time, community of place is still the most common understanding of the term community. Belonging to the same ethnic group goes hand in hand with this, as well as participating in the rites of passage that are observed by that ethnic group. Within the urban areas in Kenya, communities form along other lines such as neighbourhood, leisure and religion, in terms of attending the same places of worship.²⁵

According to the Kenya census of 2009,²⁶ 67.7 per cent of the people in Kenya live in rural areas while 32.3 per cent live in urban areas. All of the 12 interviewees interviewed for this study, and based in Kenya, felt that to date, to a large extent, Kenya retains a communal way of life. It was also clarified that in the urban areas, this is swiftly changing to more individualised lifestyles. There is increased rural urban migration, largely driven by a desire to find employment in urban areas. The affect of rural urban migration on PWDs is profound – as families move to urban areas, they lose the natural support of extended families and close knit communities. This further marginalises them.²⁷

From the foregoing, the one common denominator that all definitions of community seem to share is that the term community denotes belonging. A sense of belonging is key to the formation of one's identity, and following this, to participation in the community. This is what has been denied to persons with disabilities, and is what article 19 of the CRPD seeks to remedy. Indeed, PWDs are often excluded from community life, and routinely denied full citizenship, with devastating effects. Taylor has examined the consequences of exclusion observing that our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage if the people or society around them mirrors back a confining, demeaning or contemptible picture of themselves.²⁸

This article uses 'community living' instead of 'independent living'. The two terms have been said to be interchangeable.²⁹ However, in the course of conducting interviews in Kenya, it was pointed out that 'independence' is not a particularly African ideal, and that 'inter-

25 A Tarimo, 'Politicisation of Ethnic Identities and the Common Good in Kenya' (April 2008) http://www.scu.edu/ethics/practicing/focusareas/global_ethics/kenya.htm (accessed 24 April 2013).

26 Kenya National Bureau of Statistics 'Kenya census 2009, Nipo! Natambulika! Counting our people for implementation of Vision 2030' <http://www.knbs.or.ke/> (accessed 25 February 2012).

27 Interview with C Laurin-Bowie, Executive Director of Inclusion International, Canada (28 June 2012).

28 C Taylor 'The politics of recognition' in A Gutmann (ed) *Multiculturalism* (1994).

29 European Coalition for Community Living 'Focus on article 19 of the UN Convention on the Rights of Persons with Disabilities' (Focus Report 2009) <http://www.mh-sme.org/assets/files/ECCL-Focus-Report-2009-final-high-res.pdf> (accessed 9 August 2012).

dependence' was a better-suited term, yet 'inter-dependent living' is not the terminology used in the CRPD. This study is therefore of the opinion that the concept of 'community living' would receive more acceptance in the Kenyan context using the term 'community living' as opposed to 'independent living'.

2.2 Institutionalisation

In Kenya, institutionalisation occurs in the context of mental health care, and to some extent, the provision of education for children with disabilities in separate settings. Institutionalisation has been defined in various ways. According to the European Coalition for Community Living:

An institution is any place in which people who have been labelled as having a disability are isolated, segregated and/or compelled to live together. It is also any place in which people do not have, or are not allowed to exercise control over their lives and their day-to-day decisions. An institution is not defined merely by its size.³⁰

Institutionalisation as used in this study refers to placing PWDs in a separate setting without access to the options and choices that are available to non-disabled people and in a way that detaches them from life in the community. It is important to note that many PWDs, particularly persons with psychosocial disabilities are institutionalised against their will.

The result of institutionalisation is that people are deprived of the normal roles that are available in the community and are unable to plan their own lives. Institutionalisation also restricts privacy, self-determination and freedom of action. This in turn makes it that much more difficult to integrate into community life.³¹

Further, institutionalisation increases the risk of exploitation, violence, neglect and abuse because life in institutions is conducted as a closed system, typically far from the public eye.³² A dismaying example of this in Kenya was brought to light in February 2011, when a CNN investigation revealed how people with psychosocial disabilities in Kenya are 'dumped' at Mathari Hospital, where they face serious neglect.³³

30 European Coalition for Community Living (n 29 above) 10.

31 As above.

32 Commissioner for Human Rights (n 16 above).

33 'Kenya's mentally ill locked up and forgotten' *CNN* 25 February 2011 <http://edition.cnn.com/2011/WORLD/africa/02/25/kenya.forgotten.health/index.html> (accessed 14 April 2012).

3 Import of article 19 of the CRPD and the African human rights framework on disability

3.1 Independent living and living in the community – the core right

Prior to the CRPD, no other human rights instrument contained an explicit right for all PWDs to live in the community as equal citizens.³⁴ However, while the right to independent living, thus worded is only contained in the CRPD, it is not a new right but rather, a creative interpretation of existing rights that has been specially tailored to apply to the context of PWDs.³⁵

Article 19 of the CRPD requires states parties to recognise the equal right of PWDs to live in the community with choices equal to others and to facilitate the full inclusion and participation of PWDs in the community. Community living, also known as independent living in some jurisdictions and explained in Section 2.1 above,³⁶ refers to PWDs being able to live in their local communities as equal citizens, with the support that they need to participate in every-day life.³⁷

The core elements of independent living are self-determination, choice, autonomy, equal access, living in community, inclusion and participation. These elements are universal and not context specific.³⁸ Indeed, independent living 'has been regarded as a concept rather than an issue requiring specific legal definition'.³⁹ According to the UK Office for disability issues, independent living does not mean: doing things for yourself, or living on your own. Instead, it means having choice and control over the assistance and/or equipment needed to go about your daily life and having equal access to housing, transport and mobility, health, employment and education and training opportunities.⁴⁰

Hammarberg, the 2006-2012 Council of Europe Commissioner for Human Rights, summarises the core elements of the right as follows:

34 European Coalition for Community Living (n 29 above).

35 CRPD (n 2 above).

36 European Coalition for Community Living (n 29 above).

37 European Coalition for Community Living *Creating successful campaigns for community living: An advocacy manual for disability organisations and service providers* (November 2008) <http://www.community-living.info/documents/ECCL-Manual-final-WEB.pdf> (accessed 25 February 2012).

38 Interview with Dr M Seifu, Independent Disability Consultant (Galway, Ireland, 24 February 2012).

39 C Parker & L Clements 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living?' (2008) *European Human Rights Law Review* 490.

40 Office for Disability Issues 'Independent living: A cross-government strategy about independent living for disabled people' (February 2008) 28.

Article 19 of the CRPD embodies a positive philosophy, which is about enabling people to live their lives to their fullest, within society. The core of the right, which is not covered by the sum of the other rights, is about neutralising the devastating isolation and loss of control over one's life, wrought on people with disabilities because of their need for support against the background of an inaccessible society.⁴¹

Article 19 is a clear demonstration of how the CRPD blurs the traditional divide in the human rights discourse between the traditional civil and political rights and economic, social and cultural rights.⁴² It is difficult to distinguish the civil and political aspects from the social, economic and cultural aspects of the right to living independently and being included in the community.⁴³

During the CRPD negotiations, states were aware that the article merged civil and political rights that are subject to immediate realisation with economic, social and political rights that are to be progressively realised. During the 7th session of the CRPD negotiations, Serbia and Montenegro pointed out the fact that article 19 merged civil and political rights with economic, social and political rights:

The rights in this article are primarily economic and social, and therefore subject to progressive realisation. This is complicated by the centrality of freedom of choice in the article, which has more immediate implementation implications. Countries in transition may have difficulty guaranteeing the right to freedom of choice in the context of personal assistance. How can personal assistance service be developed so that freedom of choice is more easily guaranteed?⁴⁴

Scholars have also acknowledged the multifaceted nature of article 19. Article 19 has been said to extend the traditional right of liberty. In the words of Kayess and French, article 19 equates the right to liberty with the right of persons with disability to live in and be a part of the community.⁴⁵ It has also been stated that article 19(a) on choice 'implies rights to self-determination in relation to matters affecting where and with whom a disabled person lives and the means by which disabled people are involved in the decisions affecting them.'⁴⁶ Article 19(b), on access to a range of supports and services, 'appears to recognise social and economic rights of

41 Commissioner for Human Rights (n 16 above) chap 1.1.

42 JE Lord & MA Stein 'Ratify the UN Disability Treaty' 9 July 2009 www.fpiif.org/articles/ratify_the_un_disability_treaty (accessed 5 January 2012).

43 G Quinn 'Reflecting Strategically about the UN Convention on the Rights of Persons with Disabilities' (Interights Guest Speaker Series, London, December 2011).

44 Serbia & Montenegro, 7th session, 20 January 2006 <http://www.un.org/esa/socdev/enable/rights/ahc/sum20jan.htm> (accessed 3 August 2012).

45 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1.

46 C Parker 'Article 19 – Living Independently and being included in the Community: Realising the Right to Community Living' (4th International Summer School, Galway, Ireland 22 June 2012).

disabled people'⁴⁷ and is therefore subject to progressive realisation. Article 19(c), on equal access to mainstream services 'is more in the nature of a civil and political right to non-discrimination in relation to accessing goods and services, including the duty to make reasonable accommodations, legislative measures for which are required with immediate effect, but which in practice (such as in relation to making premises accessible) may take time to be realised in practice'.⁴⁸

3.2 The contribution of developing countries to article 19 during the negotiations of the CRPD

Article 19 of the CRPD is one of the articles that saw a clear divide between the negotiating standpoints of the developing and the developed countries.⁴⁹ The issue presents itself differently in developed countries and in developing countries.⁵⁰ The critical issue in developed countries is institutionalisation. In this regard Parker and Clements point out that: '[i]n many parts of Europe the predominant provision for disabled people (children as well as adults) continues to be institutionalisation (often for life)'.⁵¹

The critical issue in developing countries is unavailability of the required support services to enable independence and facilitate participation in the society.⁵² Further, in most countries of the south, mutual caring and support in the community is a norm and it is often felt that there is no need for PWDs to live physically and financially apart from their families. The emphasis is on one becoming a contributing member of the family rather than to manage her/his own household alone. Thus, the concept of independent living associated with the developed countries is

47 Joint Committee on Human Rights 'Implementation of the right of disabled people to independent living' (23rd Report of Session 2010-12) 18 <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/257/257.pdf> (accessed 3 August 2012).

48 As above.

49 This study acknowledges but does not go into debates about what 'development' means as expressed by the terms 'developing countries' and 'developed countries' as the same are beyond the scope of the study. For purposes of this study, I needed to read particular countries contributions, and used the classification from the American Mathematical Society <http://www.ams.org/membership/individual/types/mem-develop> (accessed 9 July 2012).

50 UN Enable 'Daily summary of discussions related to article 15: Living independently and being included in the community' volume 4, no 5, 28 May 2004 <http://www.un.org/esa/socdev/enable/rights/ahc3sum15.htm>; and UN Enable 'Daily summary of discussions related to article 15: Living independently and being included in the community' volume 5, no 5, 27 August 2004 <http://www.un.org/esa/socdev/enable/rights/ahc4sumart15.htm> (accessed 17 November 2011).

51 Parker & Clements (n 39 above).

52 I Komardjaja 'Independent living and self-determination of women with physical disabilities in Bandung, Indonesia' (2004) 24 *Disability Studies Quarterly*.

not always relevant in the developing countries.⁵³ As a result, during the negotiations, developing countries placed great emphasis on support to families taking care of PWDs.⁵⁴ This support was envisaged as being both material and moral. It was emphasised that PWDs should be able to choose to live with their families, respecting social and cultural practices of family norms.⁵⁵ Developing countries also emphasised that 'independent living' should be understood to refer to a principle and not the 'independent living movement',⁵⁶ which may only apply to certain places or regions.⁵⁷ Some questioned whether anyone living in the community can be truly independent, given the necessary interdependence between members of the community.⁵⁸

Examining the stance of developing countries on article 19 during the CRPD negotiations is important because it sheds light on what they perceived the right to mean in their contexts and on what their fears with regard to it were.

3.3 The African human rights framework on disability

The 1981 African Charter on Human and Peoples' Rights⁵⁹ (Banjul Charter) recognises the rights of PWDs at the generic and specific levels.⁶⁰ This recognition is also present in Africa's other key human rights instruments such as the African Charter on the Rights and Welfare of the Child,⁶¹ the African Charter on Human and People's Rights on the Rights

- 53 Y Oka 'Self-reliance in interdependent communities: Independent living of disabled persons in the Asia Pacific Region' Presented at the Post Congress Seminar on Social Rehabilitation, Hamamatsu, Japan, 10-11 September 1988 <http://www.independentliving.org/docs4/oka.html> (accessed 14 November 2011).
- 54 For Morocco's position, see UN Enable 'Report of the third session of the Ad Hoc Committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities' <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm> (accessed 25 October 2011). For Kenya's position, see 'Daily summary of discussions related to article 15: Living independently and being included in the community' vol 5, no 5 (n 50 above). The focus on families was also supported by Botswana, Qatar, Eritrea, Kenya and Jordan.
- 55 India, 3rd Session, May 28, 2004, 'Daily summary of discussions related to article 15: Living independently and being included in the community' vol 4, no 5 (n 50 above). This position was supported by Costa Rica, Morocco and Sudan in the 7th Session of the Ad Hoc Committee on 20 January 2006 <http://www.un.org/esa/socdev/enable/rights/ahc7sum20jan.htm> (accessed 3 August 2012).
- 56 For Thailand's position, see the 5th Session of the Ad Hoc Committee, 3 February 2005 <http://www.un.org/esa/socdev/enable/rights/ahc5sum3feb.htm> (accessed 3 August 2012). This view was also endorsed by Korea and South Africa, in this respect see the 4th session, 27 August 2004 <http://www.un.org/esa/socdev/enable/rights/ahc4sumart15.htm> (both accessed 3 August 2012).
- 57 Kenya, 4th Session, 27 August 2004 <http://www.un.org/esa/socdev/enable/rights/ahc4sumart15.htm> (accessed 3 August 2012).
- 58 Mali, 4th Session, 27 August 2004 (as above).
- 59 Organisation of African Unity, African Charter on Human and Peoples' Rights ('Banjul Charter') 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) <http://www.unhcr.org/refworld/docid/3ae6b3630.html> (accessed 12 January 2013).
- 60 L Mute 'Concept on the list of issues to guide preparation of a protocol on the rights of persons with disabilities in Africa' (2012) (on file with author).

of Women in Africa⁶² and the African Youth Charter.⁶³ At the generic level, the provisions in Africa's human rights instruments, to the extent that they apply to individuals, do ensure protection of PWDs. Of particular importance, in this regard, are provisions which legislate equality and non-discrimination, including article 2 of the Banjul Charter,⁶⁴ article 2 of the 1990 Children's Charter⁶⁵ and article 2 of the 2006 Youth Charter.⁶⁶

At a more specific level, article 18(4) of the Banjul Charter provides that 'the aged and the disabled have the right to special measures of protection in keeping with their physical or moral needs'.⁶⁷ Article 13 of the Children's Charter provides *inter alia* that 'every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community'.⁶⁸

Other instruments that have specific articles touching on PWDs include the 2003 Maputo Protocol (article 23),⁶⁹ the Youth Charter (article 24),⁷⁰ the Charter on Democracy, Elections and Governance (Democracy Charter – articles 8, 31, and 43),⁷¹ the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention – article 9),⁷² and the Protocol on the Protection and Assistance to Internally Displaced Persons (article 4⁷³ and principles 4 and 19⁷⁴). None of these instruments have a specific provision on people with disabilities living independently in the community.

61 Organisation of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> (accessed 12 January 2013).

62 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 <http://www.unhcr.org/refworld/docid/3f4b139d4.html> (accessed 12 March 2012).

63 African Union, African Youth Charter, 2 July 2006 <http://www.unhcr.org/refworld/docid/493fe0b72.html> (accessed 12 March 2012).

64 Organisation of African Unity (n 59 above).

65 Organisation of African Unity (n 61 above).

66 African Union (n 63 above).

67 Organisation of African Unity (n 59 above).

68 Organisation of African Unity (n 61 above).

69 African Union (n 62 above).

70 African Union (n 63 above).

71 African Union, African Charter on Democracy, Elections and Governance, 30 January 2007 <http://www.unhcr.org/refworld/docid/493fe2332.html> (accessed 12 January 2013).

72 African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention'), 22 October 2009 <http://www.unhcr.org/refworld/docid/4ae572d82.html> (accessed 12 January 2013). The latter has not yet been entered into force.

73 International Conference on the Great Lakes Region: Protocol on the Protection and Assistance to Internally Displaced Persons [http://www.internaldisplacement.org/8025708F004BE3B1/\(httpInfoFiles\)/29D2872A54561F66C12572FB002BC89A/\\$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf](http://www.internaldisplacement.org/8025708F004BE3B1/(httpInfoFiles)/29D2872A54561F66C12572FB002BC89A/$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf) (accessed 12 January 2013).

74 Annexed to the Protocol are Guiding Principles on Internal Displacement.

4 The Kenyan context: Lived realities, data, law and policy related to PWDs in Kenya

4.1 The situation of PWDs in Kenya with regard to article 19

According to the 2009 Population and Housing Census report,⁷⁵ Kenya has a total population of 38 610 097 people, 4.6 per cent of whom are PWDs. The 4.6 per cent disability prevalence figure is disputable on several grounds. Firstly, the World Report on Disability of 2011 estimates that including children, over a billion people, or about 15 per cent of the world's population, live with disability.⁷⁶ Secondly, there is a symbiotic relationship between poverty and disability. Hence, the current high levels of poverty in the country are likely to result in a greater proportion of the population being PWDs. Thirdly, there is a problem with the instruments used to identify PWDs, so that mild to moderate impairments frequently go undetected.⁷⁷ Hence, the actual number of PWDs in Kenya is likely to be over five million people, most of who live with their families but without the necessary support to ensure their participation and inclusion in the community. Consequently, the issue of exclusion is important because it affects a significant sector of the society whose inclusion and participation article 19 seeks to ensure.

Several studies done in Kenya demonstrate that for the majority of PWDs, the objectives of article 19 have not been met.⁷⁸ Interviews undertaken for this study reinforce this position. The interviews sought to shed light on the extent to which PWDs are included and participate in community life in Kenya. These are some of the responses from the interviewees:

They [PWDs] are locked up, or they are inside the houses, one because they don't have mobility devices, and two even if they had mobility devices, the environmental barriers, are too many.⁷⁹

and

75 Kenya National Bureau of Statistics and Population and Housing Census <http://www.knbs.or.ke/censuspopulation.php> (accessed 29 June 2012).

76 World Health Organisation & The World Bank 'World Report on Disability' (2011).

77 University of Nairobi 'A final report of the University Disability Mainstreaming Committee' (2011).

78 Kenya UPR Stakeholders Coalition 'Annual Progress Report - An assessment by stakeholders of government's performance in implementation of UPR recommendations' (September 2011) http://www.upr-info.org/IMG/pdf/follow-up_kenya_stakeholders_annual_progress_report_2011.pdf (accessed 24 May 2012); and B Ingstad & L Grut 'See me but do not forget me: People with disabilities in Kenya' (February 2007) SINTEF Health Research, Oslo, Norway <http://siteresources.worldbank.org/DISABILITY/Resources/Regions/Africa/LCKenya2.pdf> (accessed 2 March 2011).

79 Interview with H Obande (n 22 above).

We need to understand the challenges that face people with disabilities, high levels of poverty, societal stigma, and exclusion, which makes it of course very difficult, first of all for them to live independently within their community, and also to be able to make their own decisions ...⁸⁰

It is important to note that the level of participation and involvement in community life depends on how adequately a person's support needs are answered. The needs of people who require high support are often not met, leading to greater incidence of exclusion from society. This distinction has been expressed in terms of 'double invisibility' of some PWDs.⁸¹

It is also critical to note that the majority of PWDs in Kenya live with their families and the primary responsibility for providing the necessary support is situated within the family.⁸² In a study of people with disabilities in Kenya, conducted by Benedicte and Lisbet in 2007, it is noted:

Individual independence can be a solution when the family is non-supportive, but we have seen that those who manage almost as a rule have a supportive family to rely on.⁸³

In spite of the central role of families, a report published by Equal Rights Trust and Kenya Human Rights Commission in 2012, noted that prejudice, stigma and discriminatory attitudes towards disability prevailed within families with far-reaching consequences for the ability of PWDs to participate equally in other areas of life.⁸⁴

In my interview with six self-advocates with intellectual disabilities,⁸⁵ all of whom were living with their families, only one reported a largely positive life at home.

It is clear that the majority of PWDs in Kenya live with their families. However, as stated in section 2, institutionalisation does occur in the context of mental health care, and to some extent, the provision of education in separate settings for children with disabilities.

80 Interview with M Njenga, Administrator, USP Kenya (Nairobi, Kenya, 10 May 2012).

81 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) www.ohchr.org/Documents/Publications/HRDisabilityen.pdf (accessed 1 July 2012) provides: 'Some groups of people with disabilities are more invisible than others ... People with intellectual disabilities find it difficult in many societies to make progress – or at least as much progress as other groups with disabilities'.

82 'The Other Side of "Kenya's Terrible Secret"' *Open Society Foundations* 2 March 2011, states: 'Most [people in need of support services in Kenya] are isolated at home without the support they need'.

83 Ingstad & Grut (n 78 above) 52.

84 Equal Rights Trust in partnership with the Kenya Human Rights Commission 'In the spirit of Harambee: Addressing discrimination and inequality in Kenya' ERT Country Report Series: 1, London, February 2012 http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf (accessed 19 March 2012).

85 Interview with R Wanjiku, E Mbithe, D Ongei, J Akinyi, J Rehema and D Misiko, Self-Advocates, Kenya Association of the Intellectually Handicapped (Nairobi, Kenya 9 May 2012).

In the context of mental health care in Kenya, the only formalised support comes in the form of institutionalisation in psychiatric hospitals. Community based mental health care services in Kenya are limited⁸⁶ and lack adequate funding to reach a wider portion of the population affected. Kenya has little provision for mental health; the government only spends 0.01 per cent of its health budget on mental health.⁸⁷ To a large extent, persons with psychosocial disabilities either live in their homes without support, and without meaningful engagement in the community, or as homeless people particularly in urban areas or are institutionalised in psychiatric hospitals, usually Mathari hospital – the main referral public mental hospital in Kenya.

With regard to education, learners with disabilities largely access education from primary school level onwards in boarding schools away from their families and their communities. This is largely due to a lack of choice of schools within their communities.⁸⁸ As has been described in section 2, living in the community in Kenya is linked with one's ethnic group. Special schools for learners with disabilities tend to be few and far between and are necessarily attended by learners with disabilities from all over the country. This inevitably entails a severance with one's community from an early age and has negative implications on the fulfilment of article 19 for children with disabilities in Kenya.

It is clear from the foregoing that PWDs are not fully included in the community. Further data from the interviews confirms that there have not been many initiatives on community living in Kenya.

4.2 Kenya's legal and policy framework related to article 19 of the CRPD

This section presents Kenya's legal and policy framework as it relates to article 19. Critical analysis of this framework is carried out in section 5.

4.2.1 The Constitution of Kenya

Kenya passed a new constitution in 2010, which for the first time provides explicit protection for vulnerable Kenyans including children, minorities and marginalised groups, and PWDs.

86 Interview with M Njenga (n 80 above).

87 Mind Freedom Kenya 'Report on mental health in Kenya' (October 2008) www.nsue.ie/m/uploads/files/MINDFREEDOM_KENYA_MF-K.pdf (accessed 2 July 2012).

88 Public education in Kenya is based on an 8-4-4 system, with eight years of primary education followed by four years of secondary school and four years of college or university. Kenya – Educational System – Overview <http://education.stateuniversity.com/pages/772/Kenya-EDUCATIONAL-SYSTEM-OVERVIEW.html> (accessed 2 July 2012).

The Constitution protects PWDs against discrimination by providing that the state must not discriminate directly or indirectly against any person on the ground of disability under article 27(4). Similarly, under article 27(5), a person may not discriminate against another person merely on account of that other individual having a disability.⁸⁹

Article 54 of the Constitution affirms the rights of PWDs in certain specific regards. These include the right to be treated with respect and dignity; to access education in an integrated setting, 'to the extent compatible with the interest of the person'; to reasonable access to all places, public transport and information; and to access materials and devices to overcome constraints arising from a person's disability. Article 54(2) requires the state to progressively ensure that at least five per cent of the members of the public in elective and appointive bodies are PWDs. The constitution also makes provisions for ensuring the effective representation of PWDs within elective and appointive bodies.⁹⁰

The right to live independently and be included in the community is not one of the rights that is exclusively identified under the constitution generally, or under the disability specific constitutional article (article 54). However, article 19(c) of the CRPD is covered by the extensive anti-discrimination provisions in the Constitution.

Article 19 comprises both civil and political and socio-economic rights. Article 27 of the Constitution of Kenya on equality and freedom from discrimination is the key civil and political right in the Constitution that to some extent echoes article 19.

Article 43 of the Constitution addresses economic and social rights, the right to health care services accessible and adequate housing, adequate food of an acceptable quality, clean and safe water in adequate quantities, social security and education. Article 21(2) of the Constitution requires the state to take measures to achieve the progressive realisation of the rights guaranteed under article 43. The implementation of the social economic rights provided for under the Constitution would go a long way towards promoting article 19 of the CRPD.

4.2.2 The Persons with Disabilities Act

The aim of the Persons with Disabilities Act 14 of 2003⁹¹ is to provide for the rights and rehabilitation of PWDs, to achieve equalisation of

89 L Mute 'The rights of persons with disabilities in Kenya, initiatives, considerations and priorities' Seminar on Rights of Persons with Disabilities in the Commonwealth, New Delhi, India, 15 January 2011.

90 The Constitution of Kenya, arts 54(2), 81(c), 81(2)(c)(i), 97(1)(c), 98(1)d, 177(1)(c), 232(1)(i)-(iii).

91 http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 10 January 2011).

opportunities for PWDs, and to establish the National Council for Persons with Disabilities. The National Council for Persons with Disabilities is charged with formulating and developing measures and policies designed to enhance the welfare of PWDs.⁹² The Act also establishes the National Development Fund for Persons with Disabilities to provide monetary assistance to organisations and PWDs.

The rights provided for in the Act include civic 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. The government is tasked with the progressive realisation of some of these rights. The principle of non-discrimination runs through all these rights.⁹³

The Act does not contain an express right for PWDs to live in the community. It was enacted in 2003, prior to the coming into force of the CRPD. Examining the Act for compliance with article 19 reveals that one aspect of the article is very weakly covered under the Act. Article 7(1)(b)(i) echoes article 19(c) in providing that one of the functions of the National Council for Persons with Disabilities is to 'achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they ... are afforded full access to community and social services'. It is important to note that the use of the words 'to the maximum extent possible' somewhat waters down the strength of the provision. The Act does not contain any provisions with regard to article 19(a) and (b).

4.2.3 The Mental Health Act

The Mental Health Act, Chapter 248, Laws of Kenya regulates voluntary and involuntary treatment of persons with mental and intellectual disabilities. A person received as a voluntary patient intending to leave the hospital must give the person in charge of the hospital seventy-two hours' notice in writing of his intention to leave and the release shall be at the discretion of the person in charge of the mental hospital.⁹⁴ Further, under the Act, the court is empowered to make certain orders with regard to a person with a mental illness. These are orders for the management of the estate of any person with mental disorder and for the guardianship of any person with a mental disorder by any near relative or by any other suitable person. In cases where there is no known relative or other suitable person,

92 The Persons With Disabilities Act, sec 7(1)b.

93 E Kamundia 'Employment of persons with disabilities: A critical analysis of the Persons with Disabilities Act 2003' unpublished LLM thesis, University of Nairobi, 2010.

94 Mental Health Act, sec 10(3) http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 16 April 2012).

the court may order that the Public Trustee be appointed manager of the estate and guardian of the mentally ill person.⁹⁵

This Act relates to article 19 in that mental health care is one of the areas under which institutionalisation occurs in Kenya, and this is the Act that regulates institutionalisation in this context.

4.2.4 National Disability Policy of 2006

The key policy with regard to PWDs is the National Disability Policy of 2006. 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'.⁹⁶

One of the aims of the policy is to 'eliminate disparities in provision of services and ensure that services are available to all citizens with disabilities'. This substantially echoes article 19(c) of the CRPD. The closest the policy comes to mirroring article 19(a) and (b) is where it provides as its aim the 'inclusion and active participation of persons with disabilities in development and decision-making processes'.

Other policies and legal documents that specifically touch on PWDs include the draft national social protection policy,⁹⁷ the Kenya Vision 2030⁹⁸ and The Presidential Circular 1 of May 2008. None of these policies and legal documents explicitly recognises the right of PWDs to live independently in the community.

4.2.5 Cash Transfer Programmes

Kenya does not have a welfare system to support sectors of the population who are less advantaged such as those who are unemployed, or who are unable to meet their basic needs for whatever reasons.⁹⁹ It does however provide piece meal support to a few specific groups of disadvantaged people including older persons, orphans and vulnerable children.¹⁰⁰ In the

⁹⁵ Sec 26.

⁹⁶ Ministry of Gender, Children and Social Development 'National disability policy' (2006).

⁹⁷ Ministry of Gender, Children and Social Development 'Social protection policy' (2011)? <http://www.gender.go.ke/index.php/About-Us/social-protection-policy.html> (accessed 2 August 2012).

⁹⁸ Kenya Vision 2030 <http://www.vision2030.go.ke/> (accessed 2 August 2012).

⁹⁹ For Kenya's economic situation, see the United Nations Development Programme 'Summary human development report 2009 – Overcoming barriers: Human mobility and movement' http://hdr.undp.org/en/media/HDR_2009_EN_Summary.pdf (accessed 26 February 2012); and Central Intelligence Agency 'The world fact book: Kenya' <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (accessed 26 February 2012).

¹⁰⁰ Ministry of Gender, Children and Social Development <http://www.gender.go.ke/index.php/Table/SP-Programmes/> (n 97 above).

context of disability, there are two key state established funds. These are the Cash Transfer Programme for Persons with Severe Disabilities set up under the Ministry of Gender, Children and Social Development and the National Disability Fund for Persons with Disabilities set up under section 32 of the Persons with Disabilities Act.

From the foregoing, it is clear that article 19 is not covered substantively in Kenya's domestic legal and policy framework. Hence, the key proposal in this section is that a policy on community living in the country is necessary to flesh out the import of article 19 in the Kenyan context.

5 Giving content to the core of article 19 in Kenya and recommendations

At this juncture the objective of article 19 needs to be established. The article takes the view that 'the bundle of rights and obligations in Article 19 are both a means and an end. The end is always of the persons' own choosing. The means focus on the steps that need to be taken to allow for real choice'.¹⁰¹ Article 19 has a general end in mind – ensuring full inclusion and participation of all people with disabilities, in the community. Put another way, the vision of article 19 for PWDs is that they should not be isolated or segregated from the community. PWDs should be able to sing in the local choir, play with kids at the local playground, drink with their peers at the local pub if they so wish. PWDs should attend their local school, work, vote and participate fully in community life.

This then leads us to a series of questions: What does community life entail? Is it not living somewhere while at the same time, being able to move from one place to another at will? Is it not expressing ones opinions and wishes? Is community life not to some extent dependent on age, doing the things people of one's age do? In this regard then, is not going to school participating in community life? Is not working participating in community life? What about playing? Is not having a family, having friends, establishing relationships participating in community life? Is this not almost inextricably related to the state of one's health?

Examining these questions demonstrates the challenge of defining the core to the right to community living in the context of Kenya. On one side of the coin, is the fact that the above matters are all core to community life. A look at these matters reveals that they constitute a stand-alone right in the CRPD. This brings us to the other side of the coin which is that the drafters of the CRPD must have been convinced that there is a place where these rights end and the right to living independently and being included in

101 Office of the United Nations High Commissioner for Human Rights (n 1 above).

the community begins. Otherwise, article 19 would have simply been the sum total of the achievement of these rights, and would not have been worth having as a stand-alone right in the Convention. The core of this right has been described as being ‘about neutralising the devastating isolation and loss of control over one’s life, wrought on people with disabilities because of their need for support against the background of an inaccessible society.’¹⁰² In this sense then, where institutionalisation is prevalent, it is clearer what this right means to some extent, because at the very minimum it must surely mean the dismantling of such institutions.¹⁰³ But what does it mean in the context of a country in which institutions are not prolific and PWDs are still excluded from community life? What is at the core of article 19 in this situation and what should a policy that implements article 19 in the Kenyan context look like?

In an attempt to answer these questions, this article makes several policy proposals in the recommendations below. Inevitably, some aspects of these policy proposals have to do with the implementation of other rights considering, as argued above, that the key elements that constitute community life have found expression in the CRPD as stand-alone rights. Elements of community life that may not have at their core stand-alone CRPD rights touch upon stigmatisation of PWDs in society. One is hard pressed to find a situation of exclusion that does not have at its core, these two aspects – the failure to fulfil a substantive stand-alone right in the CRPD; and a tendency by society to fear, stigmatise, and discriminate against people with disabilities. To this end, article 19(c) requires that states 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’. As such, article 19(c) makes the other rights core article 19 issues, in light of the fact that the abovementioned services must surely include education, health, employment, recreation and participation in political and public life. Hence addressing, to some extent the fulfilment of other rights in this article is not a diversion – it is addressing a core article 19 issue. To this extent then, article 19 is a study in the interrelatedness and indivisibility of rights. Article 19 cannot be fully implemented without implementing other rights, indeed, article 19 in itself demands the implementation of other rights – yet, there is more to the core of article 19 that cannot wait for the implementation of other rights. The core of community living is not one thing – it consists of many factors interacting with each other.

¹⁰² Commissioner for Human Rights (n 16 above).

¹⁰³ As above. It is important to note that although governments recognise the inevitability of deinstitutionalisation, there is less clarity with regard to the mechanisms that replace institutions and would constitute a human rights based response.

5.1 State obligations

With regard to article 19, what did Kenya bind itself to, when it implemented the CRPD? The answer lies in looking at the interplay between article 4 and article 19. In ratifying the CRPD, Kenya undertook to take effective and appropriate measures to facilitate the full enjoyment of the right of PWDs to live independently with choices equal to others. It also undertook to take effective and appropriate measures to facilitate PWDs' 'full participation and inclusion in the community'.

Part of the required action under article 19 is the explicit recognition of the right to community living.¹⁰⁴ There is no community living policy in Kenya, and article 4(1)(a) may be said to require it as a first step towards ensuring community living for PWDs.

A look at the state obligations reveals that states have bound themselves up to a high ideal; and that is why it is important to keep in mind the principle of progressive realisation.¹⁰⁵ Retrogressive measures are not permissible, unless a state can demonstrate that it has made every effort to use all resources at its disposal to meet its obligation.¹⁰⁶

5.2 Recommendations

In the first place, article 19 read together with article 4 on state obligations requires Kenya to put in place a policy on community living for PWDs. The policy should be designed in such a way as to include persons with high support needs. The following are some of the issues that the policy on community living must address. Though presented as falling under the various sub-articles of article 19, in reality the recommendations cut across the entire article.

To promote choice among PWDs (article 19(a)) the community living policy should:

- Place an obligation on the state to make PWDs aware of their rights;
- Require that PWDs are consulted and actively involved in issues concerning them;
- Require the state to build awareness of the rights of PWDs among families, aiming at changing their attitudes towards their family member with disabilities;

¹⁰⁴ Parker (n 46 above).

¹⁰⁵ Economic and Social Council 'An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant' <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> (accessed 3 August 2012).

¹⁰⁶ Office of the High Commissioner for Human Rights <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (accessed 23 July 2012).

- Provide financial support to families in recognition of their role as carers, and the effect this has on their earning capacity;
- Create flexible working hours for carers of PWDs who are in employment;
- Give clear guidelines on disability assessments, requiring that the applicant's needs occupy a position of prime importance in the assessment;
- Embody a paradigm shift in the CRPD, towards a switch from institutionalisation and towards a community based mental health care system;
- Take into account the interplay between article 19, and the social economic rights provided for under article 43 of the Constitution of Kenya;
- Take into account the link between article 12 on legal capacity and article 19 and hence provide broad principles around the exercise of legal capacity for all persons addressing varying levels of support needs around decision-making;
- In consultation with all the relevant actors address situations where even after all the interventions to prevent severe mental breakdown from happening, the same occurs;
- Give advance directives in mental health care legal standing; and
- Provide for state funding for DPOs upon application.

To promote the provision of individualised support services (article 19(b)) the community living policy should:

- Make it clear that the efforts undertaken under Community Based Rehabilitation (CBR) are tied in directly with participation and inclusion in the community;
- Provide for state funded centres for community living, traditionally known as Centres for Independent Living; and
- Hold a vision for the future that foresees family members receiving direct payments for their caring work, beyond the support currently being provided that is linked to poverty eradication.

To promote equality of access to mainstream services and inclusion (article 19(c)) the community living policy should:

- Give concrete disability mainstreaming guidelines; and
- Provide for inclusive education within the community with the appropriate support to ensure that learners with disabilities access quality education.

Underlying the above recommendations is the need to:

- Address training for government workers on disability issues, and establish a sustainable way of raising awareness;
- Address access, in the broadest sense of the word including access to buildings, public transport and information; and
- Endorse universal design for all upcoming facilities.

6 Conclusion

This article has examined community living for PWDs in the Kenyan context where PWDs live with their families but without state funded individualised support services. The article has confirmed that the majority of PWDs lead isolated lives, despite being physically located within the community. It has also confirmed that institutionalisation does occur in Kenya in the context of mental health care and the provision of education for children with disabilities in separate settings. This article took an in depth look at article 19 of the CRPD to establish what the state obligations are with regard to ensuring that PWDs live independently within their communities. The study then made several recommendations that, if implemented, would go a long way towards ensuring that PWDs participate and are fully included in the community in Kenya.

At this point, it is necessary to make general conclusions. Firstly, in implementing article 19(c), it is important to ensure efforts are not duplicated across government departments. Hence, there is need for coordination among government ministries, via the NCPWD, the coordinating agency under article 33(1) of the CRPD.

Secondly, the monitoring body under article 33(2) of the CRPD needs to be strengthened. Article 19 is primarily about people being allowed to have lives of their own choosing. This makes it extremely difficult to measure. In the context of Kenya, it involves questions like do PWDs attend religious services? Do they undergo rites of passage like their non-disabled peers? Section 5 proposed a community living policy but without a strong monitoring body even if the policy was passed it may not be implemented.

Thirdly, this study did not focus much on what were identified as individual article 19(c) rights. But it suffices here to emphasise that in Kenya, public transport is still inaccessible, public buildings are still, largely, inaccessible and assistive devices are not available to all who need them. Employment of PWDs is still low, and their access to education is far from 'on an equal basis with others'. These issues are not novel but they are certainly not implemented in Kenya and this gap really impacts negatively on the ability of PWDs to live independently in the community.

It is clear that article 19 and the CRPD as a whole, to a large extent, place the obligation for implementation on the state. Hence, the policy recommendations in this study concentrated on what the state should do to meet its obligations under article 19. However, it is important to note that the initiatives of other actors matter. Families of PWDs, DPOs and monitoring bodies must all play their part in ensuring that PWDs live independently in the community.

A CRITICAL ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE REALISATION OF THE RIGHTS OF PERSONS WITH DISABILITIES IN ZIMBABWE

*Esau Mandipa**

Summary

Zimbabwe still has a long way to go with regard to full and effective realisation of the rights of persons with disabilities (PWDs) who have endured marginalisation for a long time. This article examines Zimbabwe's legal and institutional frameworks for the realisation of the rights of PWDs. It is an appraisal of Zimbabwe's laws and institutions for protecting disability rights in the light of the provisions of the United Nations Convention on the Rights of Persons with Disabilities (the CRPD). With the exception of the Constitution, laws that address disability in Zimbabwe predate the CRPD and are framed along the outdated medical model. State institutions tasked with the promotion and protection of PWDs' rights take disability issues as charity issues. The institutions have also not fared well in the past years with regard to the obligation to address marginalisation of PWDs. The time is opportune for Zimbabwe to embrace a human rights-based approach to disability. Equally, it is also an opportune time for Zimbabwe to assume the obligations towards PWDs under the CRPD by becoming a party thereto.

1 Introduction

Developments at an international level which culminated in the adoption of the United Nations Convention on the Rights of Persons with Disabilities (the CRPD)¹ have led to the confirmation of persons with

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1 The United Nations Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008.

disabilities (PWDs) as rights-bearers and valued members of society.² Indeed, the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of PWDs in terms of human rights.³ It embodies a paradigm shift away from a social welfare response to disability to a human rights-based approach. However, it is regrettable to note that Zimbabwe is not yet a party to the CRPD.

PWDs have been portrayed as a historically disadvantaged group⁴ and continue to endure massive human rights violations in many countries. In the Zimbabwean context, PWDs are treated negatively and dehumanised. To start with, the birth of a child with a disability is normally associated with witchcraft, promiscuity by the mother during pregnancy, or punishment by ancestral spirits.⁵ Children born with disabilities are sometimes strangled to death after birth.⁶ Furthermore, there are also widespread reports of children with disabilities being hidden away by their parents when visitors arrive.⁷

It is a common misconception within the Zimbabwean society that PWDs are passive and economically unproductive, and therefore are a burden on the country.⁸ Given the fact that Zimbabwe is a country experiencing severe political and economic crisis and also faces unprecedented developmental challenges, PWDs tend to suffer more human rights violations compared to their non-disabled counterparts.⁹ Not surprisingly, many PWDs beg for alms in towns and cities. No wonder, PWDs in Zimbabwe have been described as 'the forgotten tribe'.¹⁰

Women and children with disabilities in Zimbabwe suffer more human rights violations as they have other vulnerabilities.¹¹ Women with disabilities suffer double discrimination, firstly as women, and secondly as

2 MH Rioux *et al* (eds) *Critical perspectives on human rights and disability law* (2011).

3 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons With Disabilities' (2008) 8 *Human Rights Law Review* 1 5.

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

5 R Chimedza & S Peters 'Disabled people's quest for social justice in Zimbabwe' in F Armstrong & L Barton (eds) *Disability, human rights and education: Cross-cultural perspectives* (1999) 10-11.

6 See 'Woman drowns disabled toddler' *Chronicle* 22 August 2013.

7 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 April 2011).

8 R Lang & G Charowa 'DFID scoping study: Disability issues in Zimbabwe' (July 2007) http://www.ucl.ac.uk/lc-ccr/downloads/scopingstudies/dfid_zimbabwreport (accessed 5 September 2013).

9 As above.

10 T Choruma *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 5.

11 Zimbabwe Human Rights Report (n 7 above).

persons with disabilities.¹² Cultural beliefs and practices weigh too heavily against the realisation of the rights of women with disabilities. Poverty, misery, illiteracy, joblessness and social exclusion are some of the common plights that women with disabilities face in Zimbabwe. Similarly, children with disabilities are normally not sent to school, compared to their non-disabled counterparts.¹³ Without the requisite knowledge and skills, it is very difficult if not impossible for the children to secure any form of employment when they grow up. In the end, a vicious cycle of poverty and disability is created. Yet both the Zimbabwean legal and institutional frameworks for the realisation of the rights of PWDs appear not to adequately address their plight.

The Disabled Persons Act of Zimbabwe (the DPA),¹⁴ which is the primary law dealing exclusively with disability matters, falls short of adequately addressing the human rights of PWDs. The major drawback of this Act is that it follows an outdated medical model of disability which locates disability within the person and views PWDs not as rights holders but as objects for clinical intervention.¹⁵ Furthermore, the government has not developed necessary administrative infrastructures for the effective implementation of the DPA.¹⁶

Other laws that address the issue of disability include the Constitution,¹⁷ the Children's Act,¹⁸ the Mental Health Act,¹⁹ the Social Welfare Assistance Act,²⁰ the State Service (Disability Benefits) Act,²¹ the War Victims Compensation Act²² and the Criminal Law (Codification and Reform) Act.²³ As will be shown, these laws have some shortcomings when it comes to the realisation of the rights of PWDs. Government has done little to ensure the effective implementation of the laws. It is a cause for concern that these laws predate the CRPD.

- 12 I Grobbelaar-du Plessis 'The African women with disabilities: The victims of multilayered discrimination' (2007) 22 *South Africa Publiekreg/Public Law* 405; SA Djoyou Kanga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope' (February 2011) *Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities, Center for Women Policy Studies* 3; R Traustadóttir 'Obstacles to equality: The double discrimination of women with disabilities' (July 1990) available at <http://dawn.thot.net/disability.html> (accessed 5 September 2013).
- 13 See 'The plight of deaf and dumb children in education' *Manica Post* 20 December 2011 where it is reported that 75 per cent of children with disabilities never complete primary school in Zimbabwe.
- 14 The Disabled Persons Act [Chapter 17:01], Act 5 of 1992.
- 15 G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.
- 16 Lang & Charowa (n 8 above) 7.
- 17 Constitution of Zimbabwe, 2013.
- 18 The Children's Act [Chapter 5:06], Act 22 of 1971.
- 19 The Mental Health Act [Chapter 15:12], Act 15 of 1996.
- 20 The Social Welfare Assistance Act [Chapter 17:06], Act 10 of 1988.
- 21 The State Service (Disability Benefits) Act [Chapter 16:05], Act 22 of 1971.
- 22 The War Victims Compensation Act [Chapter 11:16], Act 22 of 1980.
- 23 The Criminal Law (Codification and Reform) Act [Chapter 9:23], Act 23 of 2004.

Apart from laws, a number of institutions have specific responsibilities towards the promotion and protection of the rights and welfare of PWDs. In the main, the institutions include the Ministry of Labour and Social Services, the National Disability Board, the Child Welfare Council, the courts and the recently appointed Special Advisor on Disability and Rehabilitation to the President and Cabinet (the Special Advisor). However, these institutions have also not fared well in addressing the marginalisation of PWDs in Zimbabwe.

Given this background, this article is an appraisal of Zimbabwe's legal and institutional frameworks for the realisation of the rights of PWDs. It has four sections starting with the introduction. The second section is a critical analysis of the legal framework for the realisation of the rights of PWDs in Zimbabwe. This section highlights the need for Zimbabwe to shift from the medical approach of disability to a human rights-based approach. Section three is a critical appraisal of the institutions that are legally or constitutionally tasked with the protection, promotion and fulfilment of the rights of PWDs. The final section is the conclusion. It proffers specific as well as general recommendations on how to achieve a more effective realisation of the rights of PWDs. The CRPD will be used as an analytical tool and yardstick for conducting the appraisal, notwithstanding that Zimbabwe is not a ratifying party.

2 Legal framework

2.1 The Constitution and disability provision

Prior to 2005, the non-discrimination clause in the Constitution of Zimbabwe did not include disability as one of the prohibited grounds. Following widespread campaigns by the National Disability Board and local Non-Governmental Organisations which deal with disability,²⁴ section 23 of the Constitution was amended in 2005 to include physical disability as a prohibited ground.²⁵ While the amendment was applauded for extending protection to disability,²⁶ questions were asked about its inclusiveness. Mental, intellectual, sensory and other types of disabilities, which are protected under the CRPD,²⁷ were implicitly placed outside the scope of constitutional protection. Quinn and Degener have observed that

24 The National Association of Societies for the Care of the Handicapped (NASCOH) and the Southern Africa Federation of the Disabled (SAFOD) were among the NGOs that campaigned vigorously for the inclusion of disability as a ground upon which discrimination is prohibited in the Constitution.

25 See The Constitution of Zimbabwe Amendment No 17, Act 5 of 2005, sec 4.

26 See 'Constitution of Zimbabwe Amendment (no. 17) Bill, 2005 (hb 2005) – Representations made by the Zimbabwe Human Rights NGO Forum to the Portfolio Committee on Justice, Legal and Parliamentary Affairs' available at <http://reliefweb.int/sites/reliefweb.int/node/181818/.pdf> (accessed 15 August 2011).

27 Art 1 of the CRPD.

equality norms in constitutions and legislation often fail to cater adequately for the diversity of disabilities.²⁸

In April 2013, Zimbabwe adopted a new Constitution²⁹ which came into force on 22 August 2013. The Constitution contains some improvements with regard to the realisation of the rights of PWDs. As a starting point, the Constitution recognises the inherent dignity and equal worth of each human being under the provision on founding values and principles. The recognition of the inherent dignity of all human beings is important especially for persons with mental disabilities who are normally treated without dignity.³⁰ More importantly, the Constitution also recognises the rights of PWDs among the founding values and principles.³¹ It can be submitted that there is at least recognition of disability rights and an appreciation of the equal worth of all human beings in Zimbabwe as opposed to the previous Constitution which did not expressly provide for the rights of PWDs in any section. In addition, the clause providing for the recognition of inherent dignity and equal worth of all human beings in the Constitution mirrors some of the general principles underlying the CRPD in article 3 namely, the respect for the inherent dignity and the acceptance of PWDs as part of human diversity and humanity.³²

Similarly, section 22 of the Constitution provides that all institutions and agencies of the government at every level must recognise the rights of persons with physical or mental disabilities, particularly their right to be treated with respect and dignity.³³ This is commendable in that the provision reinforces the equal worth of all human beings, hence the need to treat PWDs with dignity and respect. Unlike the previous position where the realisation of the rights of PWDs was restricted to the Department of Social Welfare, the Constitution mandates all governmental departments and their agencies to assist persons with physical and mental disabilities to achieve their full potential and to minimise disadvantages suffered by them.³⁴ The provision is commendable, given the fact that disability is an evolving, at times

28 Quinn & Degener (n 15 above) 16.

29 The new Constitution was adopted through a referendum held in April 2013. It received presidential assent on 22 May 2013. However, only some sections of the Constitution came into force on the day of presidential assent including the Bill of Rights in chapter 4 and a provision on elections in chapter 7. The Constitution as a whole document came into force on 22 August 2013.

30 It can be submitted further that the recognition of the inherent dignity of all human beings in the Constitution mirrors art 17 of the CRPD, which provides for the right of PWDs to have their physical or mental integrity respected.

31 Secs 3(1)(e) & 3(2)(i) of the Constitution.

32 Art 3(a) & (d) of the CRPD.

33 Sec 22(1) of the Constitution.

34 Sec 22(2) of the Constitution.

contentious, cross-cutting concept³⁵ that cannot be addressed by a single governmental department.

Furthermore, section 22 mandates all government institutions and agencies at every level to develop programmes for the welfare of persons with physical or mental disabilities especially work programmes consistent with their capabilities and acceptable to them or their representatives.³⁶ Government institutions and agencies are also mandated to consider the specific requirements of persons with all forms of disabilities as one of the priorities in developmental plans.³⁷ This appears to be a step forward in attempting to alleviate poverty among PWDs in Zimbabwe and to ensure inclusion and participation in society by PWDs. It can be submitted that the Constitution gives a mandate on the government and its agencies to protect and promote the rights of PWDs in its developmental policies and programmes and is in line with the general obligations of states under the CRPD.³⁸ In addition, the provision requires mainstreaming of disability rights in Zimbabwe and is in line with the CRPD which emphasises the importance of mainstreaming disability issues as a paramount part of the strategies of sustainable development.³⁹

With regard to official languages, the Constitution advances disability rights by making sign language one of the official languages of Zimbabwe.⁴⁰ In addition, the Constitution mandates the development of communication suitable for persons with physical or mental disabilities.⁴¹ It specifically mandates the state to take appropriate measures to ensure that buildings and amenities that are open to the public are accessible to PWDs.⁴² By providing a constitutional mandate on the state to ensure accessibility of buildings and amenities by PWDs, the Constitution is in line with article 9 the CRPD which provides for equal access to the physical environment, transportation, information and communications and other facilities so as to enable PWDs to live independently and participate fully in all aspects of life.⁴³

For the first time in the constitutional history of Zimbabwe, the Constitution contains a dedicated section on the rights of PWDs. Section 83 of the Constitution states that:

35 See paragraph (e) of the Preamble to the CRPD; R Traustadóttir 'From social policy to the human rights law of the 21st century' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities* (2009) 8.

36 Section 22(3)(a).

37 Sec 22(3)(b).

38 In particular, see art 4(1)(c) of the CRPD.

39 Para (g) of the Preamble to the CRPD.

40 Section 6 of the Constitution.

41 Section 22(3)(c) of the Constitution.

42 Section 22(4) of the Constitution.

43 Art 9 of the CRPD; see also art 3(f) of the CRPD, which makes accessibility one of the principles underlying the Convention.

The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realize their full mental and physical potential, including measures:

To enable them to become self reliant;

(a) To enable them to live with their families and participate in social, creative or recreational activities;

(b) To protect them from all forms of exploitation and abuse;

(c) To give them access to medical, psychological and functional treatment;

(d) To provide special facilities for their education; and

(e) To provide State-funded education and training where they need it.⁴⁴

Section 83 shows a constitutional commitment to address some of the major barriers to the equality of PWDs such as access to education and health facilities, exploitation and abuse, and the right to live with their own families. The state has an obligation to ensure that PWDs realise their full mental and physical capabilities. Provisions of section 83 confirm that Zimbabwe has begun to embrace a human rights approach to disability. In many respects, they complement a number of provisions of the CRPD, including: article 16 which provides for freedom from exploitation, violence and abuse; article 23 on the home and family;⁴⁵ article 24 providing for the right to education; and article 25 on the right to health.

However, while section 83 of Constitution makes the realisation of the economic, social and cultural rights of PWDs contingent upon resources that are available to the state, it does not underscore that the state has a duty to ensure the progressive realisation of such rights. This is a weakness that needs to be addressed. The position would have been better if the Constitution had conferred an obligation on the government similar to article 4 of the CRPD. Article 4 of the CRPD requires states parties to take measures to the extent of available resources with a view to achieve progressive realisation of economic, social and cultural rights.⁴⁶

Notwithstanding that Zimbabwe is moving towards a human rights-based approach, some of the Constitutional provisions are still aligned to the medical model of disability. The constitutional provision obliging the state to develop welfare programmes for persons with physical or mental disabilities appears to be aligned to an outdated approach which views disability as a welfare issue.⁴⁷ Also, it is not clear whether the concept of persons with 'physical and mental' disabilities in section 83 includes persons with intellectual and sensory disabilities. A holistic concept of disability should include intellectual and sensory disabilities and

44 Sec 83(a)-(f) of the Constitution.

45 Art 23(3) of the CRPD, which provides that PWDs have equal rights with respect to family life.

46 Art 4(2) of the CRPD.

47 Ngwenya (n 4 above) 620.

disfigurement.⁴⁸ Furthermore, like the previous Constitution, the new Constitution does not address the plight of women and children with disabilities who suffer double discrimination. This is in contrast to articles 6 and 7 of the CRPD which make provision for these social groups. Also, the Constitution does not do enough to move away from a 'special schools approach' so as to clearly embrace inclusive education. Unlike article 24 of the CRPD which recognises a right to inclusive education, section 83 appears to reinforce the notion of separate education by its reference to 'special facilities'.⁴⁹

2.2 The Disabled Persons Act

As indicated above, the DPA⁵⁰ is the major law that addresses disability in Zimbabwe. However, the DPA is not a human rights document in that it does not confer any rights to PWDs or confer any obligations on the state. The DPA also follows the outdated medical model of disability in all its provisions. For these reasons, the DPA should be repealed and substituted by an entirely new Act that is in line with the provisions of the CRPD.

Terminology matters when one is dealing with disability issues. According to Nyirinkindi, terms and labels become significant in colouring perceptions and determining what rights may be attached to PWDs.⁵¹ Although the term 'disabled person' is used by many disability activists and scholars, the manner in which it is used in the Act is pejorative and reflects a medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society. However, unlike the DPA, the Constitution makes use of the term 'persons with disabilities'. It is therefore submitted that the DPA has to be in line with the Constitution.

A disabled person is defined as:

[A] person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability, which gives rise to physical, cultural or social barriers inhibiting him from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society.⁵²

48 See art 1 of the CRPD which gives reference to physical, mental, intellectual and sensory impairments; 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: A legal perspective* (2008) 303;

49 Sec 83(e) of the Constitution.

50 Act 5 of 1992.

51 L Nyirinkindi 'A critical analysis of paradigms and rights in disability discourses' (2006) 12 *East African Journal of Peace and Human Rights* 49 52.

52 Sec 2 of the DPA.

This definition follows the outdated medical model of disability as it fails to appreciate that disability is not only limited to individual impairments but also to barriers caused by both attitudinal and environmental factors. Kayess and French have observed that the medical model has been the most powerful influence in the conceptualisation of disability in modern history.⁵³

It is suggested that the name 'Disabled Persons Act' should be discarded in favour of the internationally preferred terms like 'Persons with disabilities'.⁵⁴ It does not clarify the fact that disability results from the interaction between persons with impairments and their surrounding societies. Hence, the name 'Persons with Disabilities Act' should replace 'Disabled Persons Act'.

The definition of disability under the DPA does not appreciate that disability is an evolving concept which changes over time. The Act should adopt a similar provision like article 1 of the CRPD which does not explicitly define PWDs but is rather indicative and inclusive. The CRPD states that:

Persons with disabilities 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 an equal basis with others.⁵⁵

The CRPD does not define PWDs but rather indicates who they are in an inclusive fashion. This is a flexible approach as opposed to a single and fixed definition provided for under the Act.

The DPA establishes the National Disability Board (NDB)⁵⁶ which is empowered to issue and serve adjustment orders to ensure access to mainstream public services by all PWDs. The Act states that where the NDB considers that any premises to which members of the public are ordinarily admitted or any premises in which services or amenities are ordinarily provided to members of the public are inaccessible to PWDs, it may serve an adjustment order requiring the owner of the premises or the provider of the service to undertake action at his/her own expense to secure reasonable access by PWDs.⁵⁷ Due to the nature of many impairments, the inhospitable physical infrastructure, particularly in rural areas, profoundly hampers PWDs from accessing mainstream public services like health, education and justice. Adjustment orders have the

53 Kayess & French (n 3 above) 6.

54 See the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, A/RES/48/96 (20 December 1993) para 19 in which the use of terminology which reflects a medical and diagnostic approach and, ignores the deficiencies and imperfections of the surrounding society is castigated.

55 Art 1.

56 Sec 4 of the DPA.

57 Sec 7 of the DPA.

capacity to assist PWDs in the realisation of the right to access mainstream public services and enable them to live independently and to participate fully in all aspects of life.

As part of the implementation measures of adjustment orders, section 7(8) of the DPA makes it a criminal offence to fail to comply with an adjustment order. It is also 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 or amenity.⁵⁸ All these are positive steps to ensure the right of access to essential services by PWDs.

However, it appears that the criminalisation of failure to comply with adjustment orders under section 7(8) of the DPA is only a paper provision. There is no single prosecution to date that was based on the DPA.⁵⁹ Ultimately, the Act lacks a clear enforcement mechanism. Furthermore, the fact that the NDB cannot issue adjustment orders to state hospitals, clinics, nursing homes, schools or educational training centres without the consent of the relevant Minister of the institution concerned is a weakness.⁶⁰ Requiring ministerial consent effectively renders adjustment dependant on the political willingness of the government. Many government workplaces, magistrates offices and state recreational facilities are not accessible to PWDs.⁶¹ As an example, it is very difficult if not impossible for PWDs to access government offices at the Government Complex in Gweru.⁶² The complex has no guiding rails, the elevators have no recorded voices for persons with visual impairments and are too narrow to accommodate wheelchairs, and the toilet cubicles are too high for persons with physical disabilities.⁶³ As part of augmenting the effectiveness of the DPA, the NDB should be given power to issue adjustment orders against government institutions without ministerial consent. This will assist in increasing accessibility to state premises and services by PWDs.⁶⁴

Another weakness is that the DPA only makes provision for adjustment orders relating to already constructed buildings. It does not apply to new buildings under construction or to those to be constructed. Many new public buildings are inaccessible to PWDs. This has resulted in extreme difficulties to PWDs when it comes to access to public services.

58 Sec 8 of the DPA.

59 'Zimbabwe: Disabled Persons Act Defective' *The Standard* 22 January 2012 available at <http://www.allafrica.com/stories/201201230521.html> (accessed 7 February 2012).

60 Sec 7(7) of the DPA.

61 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 25 July 2011).

62 This is the building that houses most of the government ministries in the Midlands province of Zimbabwe.

63 This is a personal observation that was made by the author during a visit to the Complex.

64 Eide *et al* (n 61 above).

Furthermore, the Act does not cover private entities that offer facilities and services to members of the public.

A revised Act should therefore make provisions for prohibiting the construction of inaccessible public buildings or private entities in which services are ordinarily offered to members of the public or in which members of the public are ordinarily admitted. It means that all the architects, construction engineers and others who are professionally involved in the design of buildings should have the necessary knowledge on disability issues.⁶⁵ Building standards regulations should also encompass disability as opposed to the current regulations which are silent on standards for promoting accessibility.

A new Act should address not just inaccessible buildings but also roads and other transportation systems, information, communications and other pertinent services to render them accessible to PWDs. Article 9 of the CRPD, which provides for appropriate measures to be taken to ensure that PWDs have access on an equal basis with others to the physical environment, transportation, information, communication technologies and other services are accessible to the public, contains standards for guiding Zimbabwe in ways that are human rights-compliant.⁶⁶

Apart from the problem of inaccessible buildings and modes of communication, the DPA does not address the right to employment for PWDs. Apart from merely prohibiting discrimination against PWDs in employment,⁶⁷ the Act does not require the state to safeguard and promote the realisation a right to work as is the case under article 27 of the CRPD.⁶⁸ Moreover, the DPA does not provide clear guidance on how equality and non-discrimination in the workplace is to be achieved. Article 27 of the CRPD, which articulates the scope of the duty to provide reasonable accommodation for job applicants and employees with disabilities, is a source of human rights standards for domestic states to emulate.⁶⁹

The DPA is silent on education. It has been reported that one in three children with disabilities is out of school and that 75 per cent of children with disabilities never complete primary school in Zimbabwe.⁷⁰ Although

65 See the Standard Rules (n 54 above) Rule 5.

66 Art 9 of the CRPD.

67 Sec 9 of the DPA.

68 Art 27(1) of the CRPD.

69 Art 27(1) of the CRPD guarantees PWDs the right to work on an equal basis with others. It also further states that work environments should be open, inclusive and accessible to all PWDs.

70 'The plight of deaf and dumb children in education' (n 13 above); Eide *et al* (n 61 above) 70-72, states that the proportion of those who have never attended school is almost three times higher among PWDs as compared to the non-disabled.

inclusive education⁷¹ has been actively considered since 1994, there is still a lot of scepticism about and ambivalence towards its implementation within the education sector.⁷² It appears that inclusive education is not part of the training component for teachers in most of the teachers' colleges in Zimbabwe. As a result, teachers graduate from the training colleges without the requisite skills and competences to teach inclusive classes.⁷³ A new Act should ensure that inclusive education is made an integral part of the education system. Guidance can be taken from the CRPD which advocates an inclusive education system at all levels.⁷⁴ The CRPD also provides for the realisation of the right to education without discrimination and on the basis of equal opportunities for PWDs.⁷⁵ A provision similar to that in the Ugandan Constitution which specifically provides for the right to education of all may be appropriate for Zimbabwe.⁷⁶

The proposed new Act should also address the issue of expensive and inadequate supply of aides and appliances like mobility aides, devices and prosthetics.⁷⁷ For persons with albinism, the major barrier is that of very expensive and inaccessible sunscreen products including skin lotions.⁷⁸ The reality in Zimbabwe is that there are high unemployment rates.⁷⁹ For the few who are employed, the situation is worsened by poor salaries. This means that the majority cannot afford aides and appliances for PWDs. The Act should include a state obligation to subsidise the purchase of aides and appliances which are in short supply and are very expensive. Such a move will assist to ease the suffering of PWDs and give them self-determination. This will also go a long way in increasing the level of independence in the daily lives of PWDs and the exercise of their further rights.⁸⁰

Another gap in the DPA is that it does not expressly provide for wide participation of PWDs and their organisations in decision-making or implementation of disability-related policies.⁸¹ This is in contrast to article 4 of the CRPD which calls for the involvement of PWDs and their representative organisations in implementation of disability-related

71 According to R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of People with Disabilities* (2008) 2, inclusive education is a process of responding to the diversity of needs of learners through increasing participation in learning, cultures and communities, and reducing exclusion. The ultimate goal of inclusive education is that schools accommodate all children in spite of their differences.

72 O Mafa 'Challenges of implementing inclusion in Zimbabwe's education system' available at <http://www.onlineresearchjournals.org/IJER/abstract/2012/may/Mafa.htm> (accessed 17 January 2013).

73 O Mafa (n 72 above) 19.

74 Art 24 of the CRPD.

75 Art 24(1) of the CRPD.

76 The Constitution of the Republic of Uganda, 1995 sec 30.

77 Lang & Charowa (n 8 above).

78 'The agony of being an albino' *NewsDay* 20 July 2011.

79 The World Bank estimates that the unemployment rate in Zimbabwe is 85 per cent. See <http://data.worldbank.org/country/zimbabwe> (accessed 5 September 2013).

80 See the Standard Rules (n 54 above) Rule 4.

81 Choruma (n 10 above) 10.

legislation and policies.⁸² The failure to provide for the participation of PWDs in disability issues defeats the clarion call of the disability movement, namely, 'nothing without us about us'.⁸³

2.3 The Mental Health Act

This Act⁸⁴ provides for the consolidation and amendment of the law relating to the care, detention and after-care of persons who are 'mentally disordered' or 'intellectually handicapped', whether for the purposes of treatment or otherwise.⁸⁵ It also provides for the establishment of various Boards including the Mental Hospital Board and the Special Boards. The Mental Hospital Board is tasked with the treatment, rehabilitation and general welfare of 'mental patients' amongst other functions,⁸⁶ whilst the Special Boards make reports in relation to 'mental patients' detained in various institutions.⁸⁷ In addition, the Act establishes the Mental Health Review Tribunal which primarily presides over applications and appeals made by or on behalf of 'mental patients' detained in institutions concerning their treatment or general welfare or for release from detention.⁸⁸

The care, detention and after-care of persons who are 'mentally disordered' or 'intellectually handicapped' as advocated for by this Act⁸⁹ assists persons with mental disabilities in the realisation of the right to the highest attainable standard of health. Similarly, rehabilitation as advocated for by the Act⁹⁰ is in order to enable persons with mental disabilities to attain and maintain maximum independence, and social and vocational ability.⁹¹ However, the Act also has shortcomings. The Act provides for involuntary treatment of persons with mental and intellectual disabilities in that it does not contain provisions for consent to treatment. By making provisions for the detention of persons with mental disabilities in special institutions separated from the mainstream healthcare facilities, the Act has a discriminatory orientation in which there is a parallel healthcare system that secludes persons with mental and intellectual disabilities. Discrimination against persons with mental or intellectual disabilities is prohibited under the CRPD. Article 25 of the CRPD provides for the enjoyment of the right to the highest attainable standard of health

82 Art 4(3) of the CRPD provides that states parties have a mandate to closely consult and actively involve PWDs when it comes to development and implementation of legislation and policies addressing disability. See also art 33 of the CRPD.

83 See Kayess & French (n 3 above) 4; Lang & Charowa (n 8 above) 29.

84 Mental Health Act [Chapter 15:12], Act 15 of 1996.

85 See the Preamble to the Act.

86 Secs 68(1) & 69-72.

87 Sec 73.

88 Secs 75-81.

89 See the Preamble to the Act.

90 See Part II of the Act.

91 See art 25 of the CRPD which provides for health-related rehabilitation.

without discrimination on the basis of disability.⁹² Similarly, seclusion and involuntary treatment of persons with psychosocial disabilities has been found by United Nations treaty monitoring bodies to constitute torture and ill-treatment.⁹³

Like the DPA, terminology used by the Mental Health Act is at variance with the best practices at the international level. Terms such as 'mentally disordered,' 'intellectually handicapped,' or 'mental patients,' demean, degrade, belittle, stigmatise and devalue persons with mental and intellectual disabilities. Pejorative terms disempower rather than empower PWDs. Terms like 'persons with a mental disability' or 'persons with an intellectual disability' should substitute the 'mentally disordered,' 'intellectually handicapped' or 'mental patients'.

Section 30 of the Mental Health Act provides for the indefinite detention of prisoners found to be 'mentally disordered' or 'intellectually handicapped' in special institutions. This is a clear violation of the right to liberty, amongst other rights. The CRPD provides that the existence of a disability must not justify deprivation of liberty in any circumstance.⁹⁴ The Mental Health Act should, therefore, be amended so as to be in line with the CRPD.

2.4 The Social Welfare Assistance Act

The Social Welfare Assistance Act⁹⁵ provides for the granting of social welfare assistance to 'destitutes' or 'indigent persons'⁹⁶ and their dependents. Social welfare may be provided in the form of cash, food, clothing, rehabilitation, occupational training or the provision of orthopaedic and orthoptic appliances.⁹⁷ The Act classifies 'physically and mentally handicapped' persons as 'destitutes' or 'indigent persons' who are therefore eligible to receive social welfare assistance from the Department of Social Welfare.⁹⁸ It is very clear that the Act was drafted alongside a misconception that disability is always associated with indigence. Disability may be associated with poverty but it is not always the case. In any event, the Department of Social Welfare, which is tasked with the provision of social welfare assistance, 'is probably the most impoverished

92 See art 25 of the CRPD.

93 See 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading Treatment or punishment' A/HRC/22/53 available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 17 May 2013).

94 Art 14(1)(b) of the CRPD.

95 n 20 above.

96 According to sec 2, a destitute or indigent person has been defined as any person who lacks means of subsistence.

97 Sec 5 of the Act.

98 Section 6 of the Act. Other groups who are eligible to receive social welfare include people who suffer continuous ill-health or persons over 60 years of age.

and demoralised of all government departments'.⁹⁹ It lacks adequate resources,¹⁰⁰ such that the capacity of the Department to alleviate poverty and protect, promote and fulfil the rights of PWDs is highly questionable.

The Act follows the outdated medical model of disability which depicts PWDs not as subjects with legal rights but as objects of welfare.¹⁰¹ It fails to reorient the focus from needs to rights. As long as PWDs are portrayed as incapable of supporting themselves and are always made objects of charity or welfare, it becomes very difficult to talk of their human rights. This disempowering approach is in direct contrast to the principles underlying the CRPD like respect for independence of PWDs, individual autonomy, inherent dignity, and full and effective participation and inclusion in society.¹⁰² By way of illustration, the rights to live independently and to be fully included in the community which are guaranteed under the CRPD¹⁰³ cannot be realised if PWDs are assumed to be objects of social welfare or charity.

Requiring the Act to treat PWDs as rights-holders rather than indigents who are the objects of charity is not to deny the link between disability and poverty. PWDs are amongst the World's 'poorest of the poor'¹⁰⁴ and this is equally true in the Zimbabwean context in which PWDs are highly vulnerable to poverty.¹⁰⁵ By making provision for social welfare assistance in the form of cash, supply of food and other assistance to PWDs,¹⁰⁶ the Act makes a positive contribution towards the adoption of measures that have the capacity to reduce poverty as advocated for at the international level.¹⁰⁷

2.5 The State Service (Disability Benefits) Act

This Act¹⁰⁸ provides for payment of monetary compensation on the death or disablement of members or former members of the Defence Force, the Police Force and the Prison Services. It also provides for monetary compensation on the death or disablement of any person whilst assisting

99 King George VI School and Centre for Children with Physical Disabilities 'Disability in Zimbabwe' available at <http://www.kinggeorge6.org/home/the-centre/disability-in-zimbabwe> (accessed 9 April 2011).

100 As above.

101 Quinn & Degener (n 15 above) 1.

102 Art 3 of the CRPD.

103 Art 19 of the CRPD.

104 WHO 'Global Programming Note 2006-2007: Call for resource mobilisation and engagement opportunities' available at http://www.who.int/nmh/donorinfo/vip_promoting_access_healthcare_rehabilitation_update.pdf.pdf (accessed 5 September 2013).

105 NASCOH 'Disability in Zimbabwe' available at <http://www.nascoh.org.zw/?Pageid=82> (accessed 9 April 2011); Choruma (n 10 above) 12.

106 Sec 5 of the Act.

107 Art 28 of the CRPD.

108 The State Services (Disability Benefits) Act (n 21 above).

the mentioned forces and services.¹⁰⁹ The Act provides for vocational training and a temporary allowance for such training to the permanently disabled members of the mentioned forces.¹¹⁰ Vocational training includes any form of education or training which permits a disabled person to support himself or herself, and his/her dependants or will increase his/her capacity to do so.¹¹¹ The provision of vocational training as advocated for by the Act has the capacity to assist PWDs to attain and maintain maximum independence and full inclusion and participation in all aspects of life as to complement best practices at the international level.¹¹²

Furthermore, the Act also provides for a clothing allowance.¹¹³ In the event that the condition of a disabled person who is eligible for compensation under the Act requires the wearing of, say, an artificial limb or to use crutches or any other appliance which may result in tear of the clothing, a clothing allowance is provided for. This sounds positive and limits the financial burden upon PWDs.

However, the tone of the Act appears to make reference to physical disability only and disregards other types of disabilities recognised at an international level like mental, intellectual or sensory disabilities.¹¹⁴ As has been argued above, physical disability is not the only form of disability. The Act makes reference to disabilities arising only from physical injuries. In the First Schedule¹¹⁵ of the Act, reference is made only to physical injuries like loss of limbs and legs in the ascertainment of the degrees of disablement for compensation purposes. Another concern is that the Act lacks an enforcement mechanism. A common problem with the laws that address disability in Zimbabwe is that paper provisions are not translated into actual benefits for PWDs.

In addition, disablement for the purposes of the Act has been defined as permanent injury or disfigurement.¹¹⁶ This again means that those members who acquire physical disabilities which are long-term or short-term but not necessarily permanent are not covered by the Act. The Act's cover is very limited in scope. It is suggested that the Act should follow the CRPD which makes reference to long-term impairments as opposed to permanent impairments.¹¹⁷

109 Sec 37 of the Act.

110 Sec 26 of the Act.

111 Sec 13 of the War Victims Compensation Act (n 22 above).

112 Art 26 of the CRPD, which calls for the need to ensure vocational ability to PWDs.

113 Sec 31 of the State Services (Disability Benefits) Act.

114 See sec 15 and the First Schedule of the Act, which gives an outline of the degrees of physical disablement that will be considered before compensation is payable. This has been done to the expense of other types of disabilities like mental or sensory.

115 The First Schedule is the standard form that is used in ascertaining the degrees of disablement under the Act.

116 Sec 2 of the State Services (Disability Benefits) Act.

117 Art 1 of the CRPD.

2.6 War Victims Compensation Act

The War Victims Compensation Act¹¹⁸ provides for the payment of compensation in respect of disablement or deaths of persons caused by war. If a disability results from the repercussions of war, the victim is entitled to monetary compensation after the assessment of the degree of disablement by the Commissioner of War Victims Compensation.¹¹⁹

The Act is the only domestic law that makes special provisions for women with disabilities (WWDs) and children with disabilities (CWDS), albeit it is in the context of disabilities directly or indirectly linked to war.¹²⁰ The Act provides for generous monetary compensation to disabled women.¹²¹ In addition to monetary compensation, it makes provision for an educational allowance for children who acquire disabilities as a result of war.¹²² The educational allowance is also available to children with disabled parents who are entitled to compensation under the Act.¹²³ Although the Act is silent on the underlying reasons for having special provisions for women and children with disabilities, it may be argued that it appreciates the double marginalisation of these two groups of PWDs in a way that complements international best practices.¹²⁴ It is widely recognised that WWDs and CWDS are among the social groups that require particular attention and support as they are doubly marginalised.¹²⁵

Like the State Service (Disability Benefits) Act, discussed earlier, the Act appears to make explicit reference to physical disabilities only and is therefore narrow in its scope.¹²⁶ Also, the levels of monetary compensation under the Act have not been reviewed since the 80s. The absence of review so as to cater for inflation and currency depreciation¹²⁷ shows a lack of seriousness in the implementation of the Act.

118 n 22 above.

119 Sec 12 of the Act.

120 Part VI of the Act.

121 Sec 24(1) of the Act.

122 Secs 25 & 26 of the Act.

123 Sec 26(1) of the Act.

124 Articles 6 & 7 of the CRPD, which provide specifically for women and children with disabilities, respectively.

125 Djoyou Kamga (n 12 above); Traustadóttir (n 12 above).

126 See sec 7 and the First Schedule of the Act for the assessment of degrees of physical impairments.

127 In March 2009, Zimbabwe experienced hyperinflation up to 24 000 per cent. Zimbabwe then adopted a multi-currency regime which saw the United States Dollar, South African Rand and the Botswana Pula being used as the official currencies. See 'How Zimbabwe lost control of inflation' *Newzimbabwe* 11 December 2009 available at <http://www.newzimbabwe.com/pages/inflation180.17386.html> (accessed 25 August 2013); 'Currency regime: Where do we go now from here?' *Zimbabwe Independent* 1 March 2012.

2.7 Criminal Law (Codification and Reform) Act of 2004

This Act¹²⁸ regulates criminal conduct in ways that extend specific protection to PWDs in respect of some offences. Sexual conduct involving a 'mentally incompetent' adult is charged as rape, aggravated assault or indecent assault, as the case may be, and is punishable under the Act.¹²⁹ The Act is welcome in as much as it strives to protect the rights to privacy, not to be treated in an inhuman and degrading manner,¹³⁰ bodily integrity and dignity of women with 'severe' intellectual disabilities who are commonly victims of rape as they may not be in a position to positively identify the perpetrators.¹³¹ Given the position that women with a 'severe' intellectual disability may not be competent and compellable witnesses before the courts,¹³² the Act extends protection to a class of person that may not be able to resist or report forced sexual violence.

However, the Act falls short of the international standards as it does not guarantee protection to women with disabilities in general. It should be amended so as to include all women with disabilities.¹³³ The Constitution requires the state to protect PWDs from all forms of exploitation and abuse.¹³⁴ The state has a constitutional obligation to take positive measures for the protection of women with disabilities from sexual abuse.¹³⁵

Another gap in the Act is that the disability of a rape victim is not included amongst the aggravating factors to be considered by a judge or magistrate when meting out an appropriate sentence to the accused under the Act.¹³⁶ To assist with deterrence, the disability of a victim should be treated as an aggravating factor. In addition, the language of the Act should be amended so as to remove offensive terms such as 'mentally incompetent adult' in favour of language that is aligned to the CRPD.

128 The Criminal Law (Codification and Reform Act) (n 23 above).

129 Sec 64 of the Act.

130 On top of being an inhuman and degrading treatment, rape has also been classified as torture in the cases of *Aydin v Turkey* ECHR (25 September 1997) and *Mejia v Peru* IACHR (25 November 2004).

131 See AL Pillay 'Competency examinations with rape survivors having mental retardation' available at <http://behavmed.ukzu.ac.za/upload/> (accessed 8 May 2011), in which it is indicated that women with mental retardation are commonly victims of rape due to the inability to protect themselves, insufficient understanding of sexual behaviour and the fact that they are stigmatised, marginalised and vulnerable to exploitation.

132 Sec 246 of the Criminal Procedure and Evidence Act [Chapter 9:07].

133 See art 16(2) of the CRPD, which mandates the putting in place of measures to prevent all forms of abuse, violence or exploitation and gives reference to gender-and age-sensitive assistance and support.

134 Sec 83(c) of the Constitution.

135 See also art 16(1) of the CRPD, which places an obligation on states parties to take measures to protect PWDs from all forms of exploitation, violence and abuse.

136 Sec 65(2) of the Act.

3 Institutional framework

3.1 The National Disability Board (NDB)

As has been indicated above, the DPA establishes the NDB,¹³⁷ its main functions being, amongst others, to formulate and develop measures and policies that are designed to achieve equal opportunities for PWDs by ensuring that they obtain education and employment. It is also tasked to ensure that PWDs participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services, and to issue the above-discussed adjustment orders.¹³⁸ These objectives are in line with the principles outlined under the CRPD especially equality of opportunity of PWDs and accessibility.¹³⁹

The NDB has achieved some success although it has not made enough of an impact. It lobbied successfully for the inclusion of PWDs in the Constitution which saw persons with physical disabilities being included in the non-discrimination clause. It established the Disability Fund in 2003 and 2006 and received funding from the national reserves¹⁴⁰ and it also successfully lobbied for the inclusion of children with disabilities in the Basic Education Assistance Module (BEAM).¹⁴¹

However, the NDB is largely invisible due to lack of resources. It operates under the financially ailing Department of Social Welfare. From its introduction in 1992, the NDB has not had an office to operate from.¹⁴² It also does not have a secretariat of its own and the Minister of Labour and Social Services (the Minister) is yet to appoint the Director for Disabled Persons' Affairs.¹⁴³ In addition, it appears that the Minister has more powers on the operations of the NDB. Not only does the Minister appoint members of the Board but he/she also appoints the Chairperson and the Deputy,¹⁴⁴ can assign personnel from his/her ministry to perform secretarial and administrative functions of the Board,¹⁴⁵ and records of meetings of the Board must be furnished and kept by the Minister.¹⁴⁶ It is

137 Sec 4 of the DPA.

138 Sec 5 of the DPA.

139 See arts 5 & 9 of the CRPD.

140 Lang & Charowa (n 8 above) 31.

141 According to N Marongwe 'Observatory Case Studies: The Basic Education Assistance Module (BEAM) in Zimbabwe' available at http://www.aidsandemergencies.org/cms/documents/5_Agency.pdf (accessed 10 October 2011), BEAM is the largest form of educational assistance in Zimbabwe that was launched by the Government as a response to the worsening social conditions and high drop outs of school children.

142 P Chitambara 'Social Protection in Zimbabwe' available at <http://www.tedriz.co.zw/index.php?option=com> (accessed 20 May 2013).

143 In terms of sec 3 of the DPA, there has to be a Director for Disabled Persons' Affairs constituting part of the Public Service.

144 Sec 4(3) of the DPA.

145 Sec 4(7) of the DPA.

146 Sec 4(5)(b) of the DPA.

the Minister who approves every cost to be incurred by the Board.¹⁴⁷ This means the NDB cannot make its own decision but has to rely on the Minister's instructions. The Minister is the only one administratively responsible for the NDB. Consequently, the effectiveness of the NDB overly depends on whether the Minister has a full appreciation of disability issues. The perception is that the NDB has been neglecting disability issues and this has impacted negatively on the realisation of the rights of PWDs generally.¹⁴⁸

As part of reform, the NDB should, therefore, be empowered to issue adjustment orders against governmental institutions without the consent of the ministers such that the process becomes speedy. The NDB should have autonomy in making disability-related decisions as opposed to reliance on the Minister's instructions. In its work, the NDB also needs to have a mechanism for monitoring its resolutions. Recently, the NDB resolved that the Zimbabwe Revenue Authority (ZIMRA) ought to exempt PWDs from paying import duty on vehicles imported by PWDs. This resolution has not been implemented and yet no action has been taken.¹⁴⁹ Generally, the objectives of the NDB need to be broadened so as to include the monitoring and enforcement of the rights of PWDs and their entitlements in Zimbabwe.

3.2 The Child Welfare Council: Inadequate protection of the rights of CWDs

The major Act which deals with children's issues in Zimbabwe is the Children's Act.¹⁵⁰ This Act establishes a Child Welfare Council (CWC)¹⁵¹ with one of its functions being 'to promote and encourage the co-ordination of the activities of organisations which have the promotion and protection of the rights of children as their object'.¹⁵²

However, the composition of the CWC does not expressly include organisations which deal with the rights of children with disabilities. Section 2A(1)(C) simply states that six representatives from Private Voluntary Organisations (PVOs) or other organisations which the Minister¹⁵³ considers deal with issues concerning the welfare and upbringing of children form part of the membership of the CWC. It is submitted that there are many organisations in Zimbabwe that deal with issues of welfare and upbringing of children which are not necessarily

147 Sec 5(c) of the DPA

148 According to Lang & Charowa (n 8 above) 30-31, the NDB is invisible and since 1994, the Social Welfare staff have been working on other responsibilities to the detriment and neglect of disability issues.

149 'The agony of being an albino' *NewsDay* 21 July 2011.

150 The Children's Act (n 18 above) as amended.

151 Sec 2A(1) of the Act.

152 Sec 2B(C) of the Act.

153 Minister refers to the Minister of Labour and Social Services.

DPOs or any representatives of PWDs. Furthermore, not all PVOs are aware of the rights and entitlements of children with disabilities. The Minister may therefore appoint any six organisations that do not deal with rights of children with disabilities as the members of the CWC. This may mean that the rights of children with disabilities may not receive special attention in the activities of the CWC.

There is therefore an urgent need to revisit the Children's Act so that organisations that deal with the rights of CWDs or PWDs in general are clearly included in the composition of the CWC. This will go a long way in ensuring that the best interests of children with disabilities receive special attention in the functioning of the CWC. Given the position that the CWC is starved of resources, especially financial resources, specific funds should be channelled to the CWC for it to function properly. Finally, the suggested reforms should not be developed and implemented without the active involvement of PWDs and/or their representative organisations. As indicated earlier on, article 4 of the CRPD mandates active involvement and close consultation of PWDs, including children with disabilities, through their representative organisations when it comes to the development and implementation of disability-related legislation and policies.¹⁵⁴ This is in line with the clarion call of the disability movement which is 'nothing without us about us.'¹⁵⁵

3.3 The Special Advisor on Disability and Rehabilitation to the President and Cabinet

The recent establishment of the office of Special Advisor on Disability and Rehabilitation to the President and Cabinet is a highly positive development since the office acts as a focal point within government for the implementation of disability-related policies. This is in line with the CRPD which calls for focal points within governments for matters relating to the implementation of disability rights.¹⁵⁶

However, it is still not clear what the priorities of the new office are and whether it has any coherent strategies for addressing disability.¹⁵⁷ The qualifications of the incumbent of the office of Special Advisor are not clear. The current incumbent is Retired Brigadier-General Muchemwa who was appointed by the President. The activities of the Special Advisor are not yet known. According to Nilsson there is a need to question the role, mandate and appointment of this new office.¹⁵⁸

154 Art 4(3) of the CRPD.

155 See Kayess & French (n 3 above) 4.

156 Art 33 of the CRPD.

157 See Lang & Charowa (n 8 above) 29.

158 S Nilsson & A Nilsson? 'Disability rights in Zimbabwe' (30 January 2011) available at <http://www.msc.st/docs/HRBA-Disability-Zimbabwe-revised-2011-01-30.doc> (accessed 25 July 2011).

It is suggested that the mandate of the Special Advisor should be clearly articulated. However, the articulation of such a mandate should not result in unnecessary duplication and overlapping of roles with that of the NDB, CWC and the Ministry of Labour and Social Welfare. Furthermore, in order to leave no room for political appointments, there is a need to come up with a clear criterion for the appointment of the Special Advisor. It is proposed that the Special Advisor has to be an individual who is suitably qualified and has extensive experience in the field of disability.

3.4 The Ministry of Labour and Social Services

The Ministry of Labour and Social Services is responsible for the rights and needs of PWDs in Zimbabwe. Together with the Ministry of Health and Child Welfare, it is responsible for the provision of wheelchairs and other assistive devices or appliances to PWDs among other activities. According to Eide *et al*, less than one fourth of PWDs who claimed that they need assistive devices have received them.¹⁵⁹ This shows that the Ministry is failing to deliver according to its responsibilities.¹⁶⁰ Furthermore, the Ministry has no budget at all addressing the needs of PWDs which may be the reason why it is failing in its obligations. In this regard, the Ministry is failing to live up to expected standards at the international level which require the availability of mobility aids, devices and assistive technologies to PWDs, amongst other essentials.¹⁶¹

It is suggested that the Ministry should have a specific budget catering for disability issues in Zimbabwe. The Ministry should also prioritise disability issues among its functions. The current position in which disability issues are relegated to the peripheries of the Ministry's priorities has to be changed.

3.5 Disability through the courts

Courts of law can play a very crucial role when it comes to the realisation of the rights of PWDs. In Zimbabwe however, it is regrettable that only one case on disability has been decided by the Supreme Court sitting as a Constitutional Court. This is the case of *Simon Mvindi & 5 Others v the President of the Republic of Zimbabwe & 3 Others*.¹⁶² The case arose during the disputed March 2008 elections. During the elections, ballot papers were not available in Braille, electronic format or any other form accessible to PWDs especially those with visual impairments. Instead, sections 59 and 60 of the Electoral Act [Chapter 2:13] required voters in need of assistance especially PWDs to be assisted by the Zimbabwe Electoral Commission

¹⁵⁹ Eide *et al* (n 61 above) 103.

¹⁶⁰ As above.

¹⁶¹ Art 4 of the CRPD.

¹⁶² SC 106/08.

officials and Police officers on duty at the polling stations in casting ballots but not by their chosen relatives or friends.

All six applicants in this case are persons with visual impairment who made a constitutional challenge to the provisions of sections 59 and 60 of the Electoral Act. They argued that the sections infringed their right to free expression of political will and the right to a secret ballot. The applicants further submitted that they preferred to be assisted by relatives or friends to cast ballots as opposed to polling and police officers who may be strangers to them. By way of remedy, the applicants wanted the sections of the Electoral Act to be declared unconstitutional because there was infringement of the constitutionally guaranteed right to free expression.¹⁶³

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 found that PWDs have a right to vote in secret like any other person. The Court declared sections 59 and 60 of the Electoral Act null and void saying that the provisions violated the principle of secret ballot. Furthermore, government, through the electoral authority, and political parties were ordered to consider developing political communications and voting materials in sign language and ballot papers in large print or Braille.

The judgment is welcome in that it is in line with best practices at international level in which the right of PWDs to vote by a secret ballot and the use of appropriate assistive technologies are guaranteed.¹⁶⁴ However, government and political parties were not given any deadline to implement the decision and it is not clear whether the decision is going to be implemented at all.

4 Conclusion

Zimbabwe has a long way to go in improving the realisation of the rights of PWDs. The first recommendation is for Zimbabwe to be a party to the CRPD, since the Convention embodies the best practices for the realisation of the rights of PWDs. Ratification and the ultimate domestication of the CRPD will have far reaching implications for reform in Zimbabwe especially in major sectors like education, health, housing, employment and politics. This will ensure full and effective inclusion of PWDs in the facets of life.

¹⁶³ Sec 20 of the previous Constitution, which provided for the right to freedom of expression.

¹⁶⁴ See art 29 of the CRPD, which further states that PWDs should be assisted by persons of their own choice in the voting process.

The new Constitution of Zimbabwe is an improvement with regard to the realisation of the rights of PWDs. Section 83 has a disability focus. It imposes new obligations on the state including obligations to give PWDs access to medical treatment, education and to enable self-reliance. However, it is a major concern to note currently disability-related legislation in Zimbabwe predates the CRPD. The legislation was modelled along the outdated medical model of disability. There is therefore an urgent need to review the legislation and align it with the new Constitution and better still the CRPD.

Among the institutions dealing with disability, it can be submitted that the NDB and the Special Advisor need to have their objectives clearly articulated and even broadened so as to ensure the full and effective realisation of the rights of all PWDs in Zimbabwe. More referrals are needed on disability issues to the courts of law so as to provide impetus for the development of domestic jurisprudence on disability. There should be mainstreaming of disability as provided for under both the CRPD and the Constitution.

It is high time for Zimbabweans to be reminded that all human beings have something to contribute towards humanity and that social structures should be built inclusively with human empowerment as a key goal.¹⁶⁵ PWDs are equal members of society who have to be treated as rights-bearers always. Disability is a universal human experience.¹⁶⁶ It should be mainstreamed in major socio-economic areas like education, health, employment and political participation.¹⁶⁷

165 Quinn & Degener (n 15 above) 12.

166 See WHO International Classification of Functioning, Disability and Health available at <http://www.who.int/classifications/icf/en/> (accessed 16 August 2011).

167 D Jones & L Webster 'A handbook on mainstreaming disability' available at <http://www.eldis.org/vfile/upload/1/document/0708/DOC23069.pdf> (accessed 6 September 2013).

CHAPTER 5

PROSPECTS AND PRACTICES FOR CRPD IMPLEMENTATION IN AFRICA

Janet Lord* & Michael Ashley Stein**

Summary

African states strongly embraced the adoption of the CRPD, along with its Optional Protocol. The Working Group that developed the foundational text of the treaty included delegations from seven African nations. Likewise, the lone seat allocated within the Working Group to represent national human rights institutions was held by a South African Human Rights Commissioner. Sixteen African countries signed the CRPD on the first day it opened for signature, and 34 have ratified it, contributing to a rapid entry into force. In addition, 18 African states are party to the Optional Protocol to the CRPD, thereby assenting to its complaint procedure and procedure of inquiry. The Committee on the Rights of Persons with Disabilities has included experts from the continent, and the current Special Rapporteur on Disability is South African. Also significant is the declaration by the African Union of 1999-2009 and 2010-2019 as African Decades for Persons with Disabilities. The CRPD has therefore been enthusiastically embraced on the African continent, but so too have prior human rights treaties, with uneven subsequent progress. By the same token, the CRPD challenges Africa's states parties – as it does states parties from all regions of the world – to ensure treaty implementation in a manner that responds to broad obligations while being duly consonant to domestic social and legal norms. To foster dialogue around progressive and culturally appropriate CRPD implementation, this article begins with a brief overview of the treaty. Next, it identifies a number of CRPD provisions with particular salience for Africans with disabilities, and showcases innovative approaches, often led by disability rights advocates rather than by the obligated states, that are advancing domestic implementation of those rights on the continent. The article concludes with some thoughts regarding entry points for future CRPD advocacy that can advance implementation regionally across Africa.

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1 Introduction

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD)¹ along with its Optional Protocol² by general consensus on 13 December 2006³ was an initiative strongly embraced by African states.⁴ The Working Group that developed the foundational text of the CRPD negotiations included delegations from seven African nations – Cameroon, Comoros, Mali, Morocco, Sierra Leone, South Africa, and Uganda.⁵ Likewise, the lone seat allocated within the Working Group to represent national human rights institutions was held by a commissioner from the South African Human Rights Commission.⁶

Sixteen African countries signed the CRPD on 30 March 2007, the first day it opened for signature,⁷ and 34 have ratified the treaty,⁸ contributing to its rapid entry into force. In addition, 18 African states are party to the Optional Protocol to the CRPD, thereby assenting to its complaint procedure and procedure of inquiry. The CRPD has included experts from Algeria, Kenya, and Tunisia,⁹ and the current Special Rapporteur on Disability is South African disability rights advocate, Mr Chalklen.¹⁰ Also significant is the declaration by the African Union of 1999-2009 as the African Decade for Persons with Disabilities, an

- 1 Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006) (CRPD).
- 2 Optional Protocol to the Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006).
- 3 The negotiation history of the CRPD, as well as updates on state parties, can be found on a website maintained by the UN Department of Economic and Social Affairs (DESA); See UN Enable 'Promoting the rights of persons with disabilities: Full participation and equality in social life and development' (2006) <http://www.un.org/esa/socdev/enable/rights/> (accessed 8 January 2013).
- 4 See MA Stein & JE Lord 'Human rights and humanitarian assistance for refugees and internally displaced persons with disabilities' in I Grobbelaar-du Plessis & TH Van Reenan (eds) *Aspects of disability law in Africa* (2011) 31.
- 5 UN Enable (n 3 above).
- 6 UN Enable (n 3 above), noting participation of the redoubtable Charlotte McClain-Nhlapo.
- 7 Algeria, Cape Verde, Republic of the Congo, Ethiopia, Gabon, Ghana, Kenya, Liberia, Morocco, Mozambique, Niger, Nigeria, Sierra Leone, South Africa, Sudan, Tunisia, Uganda and Tanzania; UN Enable (n 3 above).
- 8 Algeria, Benin, Burkina Faso, Cape Verde, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Tanzania and Zambia; UN Enable (n 3 above).
- 9 UNHR 'Elected members of the Committee on the Rights of Persons with Disabilities' <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (accessed 8 January 2013).
- 10 UN Enable (n 3 above).

observance extended for a second decade, 2010-2019.¹¹ A new continental plan of action (CPOA) was adopted by the African Union Executive Council in January 2013.¹² The CPOA mirrors most of the provisions of the CRPD, while also referencing governing African bodies and specifically African contexts. And in 2009, the African Commission expanded the mandate of the focal point on the rights of older persons in Africa to include the rights of disabled persons.¹³

The CRPD has therefore been enthusiastically embraced on the African continent, but so too have prior human rights treaties, with uneven subsequent progress. By the same token, the CRPD challenges Africa's states parties – as it does states parties from all regions of the world – to ensure treaty implementation in a manner that responds to broad obligations while being duly consonant to domestic social and legal norms.¹⁴ Ncube put it well when observing that 'substantive rights will often get their complexion from the local cultural environment within which they have to be given concrete, practical meaning'.¹⁵ Thus, the recurring question that must be raised is whether the CRPD is being appropriately adopted, implemented, and understood within an African context.

To foster dialogue around progressive and culturally appropriate CRPD implementation, this article begins with a brief overview of the treaty. Next, this article identifies a number of CRPD provisions with particular salience for Africans with disabilities, and showcases innovative approaches, often led by disability rights advocates rather than by the obligated states, that are advancing domestic implementation of those rights on the continent. This article concludes with some thoughts regarding entry points for future CRPD advocacy that can advance implementation regionally across Africa.

- 11 Press Release by the Secretariat of the African Decade of Persons with Disabilities (SADPD), 'African Decade of Persons with Disabilities Extended to 2019' *We Can Do* 2 November 2008 <http://wecando.wordpress.com/2008/11/02/news-african-decade-of-persons-with-disabilities-extended-to-2019/> (accessed 17 January 2013). An excellent overview of the African regional system and its response to disability rights issues may be found in J Biegeon 'The promotion and protection of disability rights in the African human rights system' in Grobbelaar-du Plessis & Van Reenan (n 4 above) 53.
- 12 Continental Plan of Action for the African Decade of Persons with Disabilities (CPOA), African Union, January 2013.
- 13 SADPD (n 11 above).
- 14 See 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 *University of Washington Law Review* 449.
- 15 W Ncube 'The African cultural footprint? The changing conception of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 14-15.

2 The CRPD

Persons with disabilities share a common history of stigma, discrimination and segregation the world over. As a result, disabled persons often find themselves denied basic human rights and fundamental freedoms, including the right to pursue an education, engage in meaningful work that pays a living wage, reside where they choose, move about freely, and generally participate in the lives of their communities.¹⁶ Legislation, policy and programming – as well as responsive advocacy campaigns – must therefore be attuned to the manifestations of harm particular to disabled persons and the types of settings in which they occur, including the home, within the family, at school, in social care facilities, and in refugee camps.¹⁷

Accordingly, while the denial of human rights is an unfortunate and common experience amongst persons with disabilities globally – including Africa's 55 nations – socio-legal norms about disability take on varied and local manifestations that are contextually relevant when considering CRPD implementation.¹⁸ African scholar Kisanji, for instance, reports that in various communities specific disabling conditions are regarded as a curse or a bad omen attributable to witchcraft or sorcery.¹⁹ Thus, to combat negative attitudes towards persons with disabilities and to raise awareness about the need for inclusion, the Swaziland Ministry of Education introduced a scheme wherein children composed songs and performed plays in schools and local communities; they also built ramps, made toilets accessible, and designed accessible playgrounds.²⁰

The CRPD's 25 preambular paragraphs and 50 articles provide a framework within which disability rights may be addressed in African country contexts. The aim of the drafters was not to create 'new' or 'special' rights for persons with disabilities, but instead to articulate how existing human rights obligations apply specifically to persons with disabilities.²¹

16 See World Health Organisation & World Bank *World report on disability* (2011) 29 (World Health Organization).

17 See MA Stein & JE Lord 'Forging effective international agreements: Lessons from the UN Convention on the Rights of Persons with Disabilities' in J Heymann & A Cassola (eds) *Making equal rights real: Taking effective action to overcome global challenges* (2012) 27.

18 See DW Anderson 'Human rights and persons with disabilities in developing nations of Africa' Paper presented at the Fourth Annual Lilly Fellows Program National Research Conference, 13 November 2004 http://www4.samford.edu/lillyhumanrights/papers/Anderson_Human.pdf (accessed 7 January 2013).

19 J Kisanji 'Growing up disabled' in P Zinkin & H McConachie (eds) *Disabled children & developing countries* (1995) 195, discussing epilepsy and leprosy.

20 R Rieser *Implementing inclusive education: A commonwealth guide to implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* (2008) 148.

21 For a comprehensive overview of the CRPD, see MA Stein & JE Lord, 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Person with Disabilities: European and Scandinavian perspectives* (2009).

The CRPD structure consists of an introductory set of provisions that outline its purpose (article 1) and key definitions (article 2), along with articles of general or cross-cutting application (articles 3-9). Among the obligations adumbrated in the instrument, states parties must (i) adopt legislative, administrative and other measures to implement enumerated rights; (ii) abolish or amend existing laws, regulations, customs and practices that discriminate against persons with disabilities; and (iii) adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes. In relation to economic, social and cultural rights, states parties must take measures to realise these rights progressively to the maximum extent of available resources.

The CRPD sets forth specific substantive rights covering civil, political, economic, social and cultural rights (articles 10-30). African government delegations and disability rights advocates pressed for a treaty that was comprehensive in its approach; encompassing civil, political, economic, social and cultural rights. They likewise insisted that the entrenched interrelationship between disability and poverty be reflected in the text, thus contributing references to disability-inclusive poverty reduction programs and making explicit the right to an adequate standard of living.

The CRPD further establishes a system of monitoring and implementation (articles 31-40) and includes final provisions that govern the treaty's operation (articles 41-50). Of considerable significance, and attributable in part to African lobbying, is that certain obstacles that inhibit disability rights implementation in the African context are anticipated and accounted for in the text. For instance, the need to ensure that international cooperation programming is inclusive of persons with disabilities made its way into article 32 as an implementation measure. Likewise, insistence by African state representatives that guidance was needed to delineate the population of persons with disabilities for whom the treaty was drafted helped ensure the establishment of a definitional baseline in article 1.

The framework for national level monitoring (article 33) was facilitated by African national human rights institution participation in the CRPD negotiations –in particular the South African Human Rights Commission – along with several disability-specific African commissions. The Committee on the Rights of Persons with Disabilities is tasked with monitoring implementation by states parties through its oversight of the mandatory state reporting requirement and through the issuance of recommendations. An Optional Protocol to the CRPD, comprised of 18 articles, gives the Committee competence to examine individual complaints and initiate inquiries with regard to alleged violations of the

Convention by states parties to the Protocol.²² Finally, it bears noting that the CRPD drafters consciously desired and enumerated the active participation of disabled peoples organisations (DPOs) in the conception, implementation, and monitoring of every facet of the treaty.²³

3 CRPD implications for Africa

Building on domestic African experiences, the sections that follow help identify particular challenges for persons with disabilities on the continent relating to: physical and mental integrity; living in the community; situations of risk; health; and legal recognition.²⁴ When doing so, we underscore successful CRPD-based responses that have facilitated domestic-level human rights implementation.²⁵ These themes are resonant with the call by the Secretariat of the African Decade of Persons with Disabilities to 'promote equal provision of services especially in the areas of health, education, employment, skills training and development, and access to justice for all persons with disabilities who suffer and are victims of exclusion and human rights violation.'²⁶

Moreover, the issues highlighted underscore human rights concerns that ought to be reflected in any future African region guidelines or treaty standards on the rights of persons with disabilities.

3.1 Physical and mental integrity

Violations of the physical and mental integrity of adults and children with disabilities take many forms. Disability is a major 'risk factor' when accounting globally for vulnerability to torture, cruel, inhuman or degrading treatment or other abuse.²⁷

Stigmatisation and discrimination associated with disability in many communities increase vulnerability to violence and abuse. For example, the forced ingestion of substances harmful to human health is regarded in

22 The history, powers, and transformative potential of the CRPD Committee is examined in MA Stein & JE Lord 'Monitoring the committee on the rights of persons with disabilities: Innovations, lost opportunities, and future potential' (2010) 31 *Human Rights Quarterly* 689.

23 See MA Stein & JE Lord 'The United Nations Convention on the Rights of Persons with Disabilities: Process, substance, and prospects' in F Gomez Isa & K de Feyter (eds) *International human rights law in a global context* (2009) 495

24 We stress – as we have throughout our work – that the CRPD must be understood and implemented holistically, across articles, and that highlighting particular rights does not infer their precedence.

25 Lord & Stein (n 14 above).

26 SADPD (n 11 above) para 6.

27 Report of the Office of the High Commissioner for Human Rights 'Expert seminar on freedom from torture and ill-treatment and persons with disabilities' (11 December 2007) <http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorture-reportfinal.doc> (accessed 6 January 2013).

some African communities as an antidote to mental disability.²⁸ Remedies thought to 'cure' disability proliferate around the world, are peddled via the internet or, in rural communities with limited access to the internet, are discovered through word of mouth, while elsewhere, as in Ghana, religious quackery subjects Ghanaians with psychosocial disabilities to abuse in prayer camps where they are chained to trees for hours, denied food, and exposed to the sun in a bogus 'healing' process.²⁹ According to Sierra Leone disability rights advocate Bangura, persons with epilepsy are 'subjected to traditional treatments that are "tantamount to torture" – cuts, burning, inhaling or drinking potions'.³⁰ Some accounts tell of autistic persons being thrown into the bush and left to die in West African communities on the ground that they are 'possessed' and their behaviour 'demonic'.³¹ Equally disconcerting are numerous accounts from Tanzania of people with albinism being killed due to the 'superstitious belief' that utilising their bodily parts 'will lead to great wealth' and reports from Kenya regarding mistreatment and abuse in the Mathari Psychiatric Hospital.³²

To combat this often deadly stigma, African DPOs have: organised the reporting of these types of human rights abuses;³³ raised awareness regarding the equal dignity and worth of persons with disabilities,³⁴ and repealed retrogressive 'mental health' laws which permit involuntary

- 28 JE Lord 'Shared understanding or consensus-masked disagreement? The anti-torture framework in the Convention on the Rights of Persons with Disabilities' (2010) 33 *Loyola of Los Angeles International & Comparative Law Review* 78, n 285, reviewing customary practices, including the forced ingestion of harmful substances to 'heal' persons with psycho-social disabilities, a practice observed during field work in Ethiopia.
- 29 See generally R Whitaker *Mad in America: Bad science, bad medicine, and the enduring mistreatment of the mentally ill* (2001); World Health Organisation & Mental Health and Poverty Project *Mental health and development: Targeting people with mental health conditions as a vulnerable group* (2010) 9 (WHO/MH) http://whqlibdoc.who.int/publications/2010/9789241563949_eng.pdf (accessed 8 January 2013); Human Rights Watch 'Ghana: People with Mental Disabilities Face Serious Abuse' 2 October 2012 <http://www.hrw.org/news/2012/10/02/ghana-people-mental-disabilities-face-serious-abuse> (accessed 17 January 2013).
- 30 'Stigma is toughest foe in an epilepsy fight' *New York Times* 29 August 2011 <http://www.nytimes.com/2011/08/30/health/30epilepsy.html?pagewanted=all> (accessed 6 January 2013). Bangura also reported that one of the association's members survived drinking two liters of kerosene. Girls and young women are subjected to sexual assault as a purported 'cure', says Bangura.
- 31 See WHO/MH (n 29 above) 'Attributions of mental health conditions to possession by evil spirits or punishment for immoral behaviour frequently lead to harmful treatment practices' 9.
- 32 See *Albinism Foundation of East Africa, Petition* (13 December 2008) http://www.albinismfoundationea.com/index.php?option=com_content&task=view&id=6&Itemid=2 (accessed 8 January 2013); 'Rights groups accuse Kenya of patient abuse' *CNN* 2 March 2011 http://articles.cnn.com/2011-03-02/world/kenya.health_1_human-rights-rights-groups-solitary-confinement?_s=PM:WORLD (accessed 17 January 2013).
- 33 *Albinism Foundation of East Africa* (n 32 above).
- 34 For example, the Cape Town Declaration by the Pan African Network of People with Psychosocial Disabilities <http://www.panusp.org/about-us/> (accessed 7 January 2013).

confinement and forced medical treatment.³⁵ The South African Human Rights Commission concurrently has engaged in local training exercises and advocacy activities, and released public statements regarding disability equality.³⁶

3.2 Living in the community

Disability rights advocates around the world are campaigning vigorously for the elimination of living arrangements that segregate and isolate persons with disabilities, often in state-sponsored institutions. In Africa, institutions are not as prominent as in many parts of the 'developed' world³⁷ and in consequence isolation is more likely to take place within the community. For example, human rights organisations and journalists have documented 'leper colonies' and amputee camps in parts of West Africa.³⁸ Bangura reports that in Sierra Leone persons with epilepsy 'are often driven from schools, jobs, homes.'³⁹ Kisanji similarly notes the practice of hiding away disabled children is common in some communities across the continent, although he attributes this practice to paternalistic impulse rather than disability animus.⁴⁰

At the same time, orphanages and social care homes are problematically on the rise in Africa, particularly in sub-Saharan African countries greatly impacted by HIV/AIDS.⁴¹ Children who have lost their parents due to AIDS may themselves have disabling illnesses, but are also at a high risk of acquiring newly disabling conditions when they are housed in congregate settings with sub-standard care and limited stimulation.⁴² Moreover, instances of abuse against persons with disabilities in institutional settings – and particularly individuals with mental and

35 Efforts are underway in Ghana, Kenya, South Africa, Tanzania, and Uganda, to name a few African countries. See Movement for Global Mental Health <http://www.globalmentalhealth.org/home> (accessed 8 January 2013).

36 See South African Human Rights Commission 'SAHRC statement to observe World Mental Health Day' 9 October 2011 <http://www.sahrc.org.za/home/index.php?ipkArticleID=80> (accessed 8 January 2013). Much of the SAHRC's disability-related work has been conducted in conjunction with the Harvard Law School Project on Disability which both raises the prospects for academic support of CRPD implementation as well as the continuing challenge to the adequacy of state-based efforts.

37 Disability Rights International, formerly Mental Disability Rights International, has documented egregious disability rights violations against persons with disabilities in institutional settings, for example in orphanages, social care homes, and psychiatric hospitals. These reports are available on their website, Disability Rights International <http://www.disabilityrightsintl.org/> (accessed 8 January 2013).

38 See L Polman *The crisis caravan: What's wrong with humanitarian aid?* (2011) 63-72; 'The last leper colonies' *African Review* 22 April 2010.

39 *New York Times* (n 30 above).

40 Kisanji (n 19 above).

41 J Sloth-Nielsen & BD Mezmur 'HIV/AIDS and children's rights in law and policy' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 279-80.

42 The exclusion of children with disabilities from social interaction has been shown to stifle both mental and physical well-being. See D Hutchinson & C Tennyson *Transition to adulthood: A curriculum framework for students with severe physical disability* (1986).

intellectual disabilities – are increasingly coming to light. For example, in *Purohit & Moore v The Gambia*⁴³ the African Commission on Human and Peoples' Rights found numerous human rights violations perpetrated against persons with mental disabilities housed in a psychiatric hospital in the Gambia.

There are some models of advocacy that tackle disability stigma and attendant segregation with the specific aim of facilitating community inclusion. DPOs in Sierra Leone, for instance, are working to counter the extreme prejudice associated with epilepsy through education and awareness raising campaigns as well as by ensuring access to inexpensive and often highly effective anti-seizure medications that are inaccessible to many persons living in poverty.⁴⁴

3.3 Situations of risk

African delegations to the CRPD negotiations strongly supported the inclusion of language addressing the protection of persons with disabilities in various situations of risk, whether natural disaster, armed conflict, or other emergency and humanitarian situations. The provision capturing this issue is article 11 of the CRPD.

In the African context, there are various manifestations of risk for persons with disabilities, and DPOs are beginning to highlight their experience in humanitarian crises. Situations of risk can disable people and exacerbate or create secondary impairments for persons with existing disabilities. These circumstances also impact persons with disabilities through the break-up of support networks of family and community; their displacement or abandonment; and the general destruction of health, rehabilitation, and transportation infrastructure. Similarly, situations of risk – and in particular, armed conflict – can have a devastating effect on the mental and psycho-social well-being of the effected population.⁴⁵

Sexual violence is a prevalent problem for displaced women and girls with disabilities generally, but the experience of such abuse is exacerbated when they are subject to conflict or displacement in Africa.⁴⁶ A Human Rights Watch report on Northern Uganda, for example, documented

43 See Communication No 241/2001, *Purohit & Moore v The Gambia* ACHPR (2003) <http://www1.umn.edu/humanrts/africa/comcases/241-2001.html> (accessed 7 January 2013).

44 See *New York Times* (n 30 above); see also 'The isolation of epilepsy sufferers' *Inter Press Service News Agency* 22 December 2011 <http://ipsnews.net/news.asp?idnews=106293> (accessed 8 January 2013).

45 JE Lord & MA Stein 'Ensuring respect for the rights of people with disabilities' in VO Pang *et al* (eds) *The human impact of natural disasters: Issues for the inquiry-based classroom* (2010)

46 Stein & Lord (n 4 above).

instances of physical and sexual violence against women and girl refugees with disabilities who were unable to flee rebel forces.⁴⁷

Child soldiering is another predominant marker of conflict and human rights abridgement in Africa. Mezmur's analysis reveals that African regional mechanisms and international law and programming equally fail to accommodate the experiences of girl soldiers.⁴⁸ The same critique must be applied to child soldiers with disabilities either created or aggravated by their military experience. The 2003 Accra Peace Agreement on Liberia,⁴⁹ to note one example, is silent on child soldiers with disabilities. The CRPD could usefully inform the development of peace agreements and post-conflict transitions as could the work of the Peace and Security Council of the African Union,⁵⁰ and the African Committee of Experts on the Rights and Welfare of the Child⁵¹ to better address the specific needs of child soldiers with disabilities.

Finally, a situation of acute risk for Africans with disabilities is displacement, either as a consequence of armed conflict or natural disasters. The World Health Organisation estimates that as many as 3.3 million of the world's forcibly displaced persons live with disabilities, one third of them are children.⁵² Across the African continent, refugees and internally displaced persons with disabilities face particular challenges, for example refugee camp settings, yet examples of successful disability accommodations abound.⁵³ One humanitarian assistance organisation detailed their experience in West Africa improving accessibility to sanitation facilities for persons with disabilities with simple and low cost

47 Human Rights Watch 'As if we weren't human: Discrimination and violence against women with disabilities in Northern Uganda' 26 August 2010 <http://www.hrw.org/en/reports/2010/08/26/if-we-weren-t-human> (accessed 8 January 2013).

48 See BD Mezmur 'Children at both ends of the gun: Child soldiers in Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 212.

49 Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra, 18 August 2003 http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_08182003.pdf (accessed 8 January 2013).

50 For the webpage of the African Union, Peace and Security Council, see The Organs of the AU, the Peace and security council http://www.africa-union.org/root/au/organs/The_Peace_%20and_Security_Council_en.htm (accessed 8 January 2013).

51 African Committee of Experts on the Rights and Welfare of the Child <http://www.africa-union.org/child/home.htm> (accessed 8 January 2013).

52 See UNHCR, The UN Refugee Agency 'People with disabilities: Largely invisible or forgotten' <http://www.unhcr.org/pages/4a0c310c6.html> (accessed 8 January 2013).

53 See generally Women's Commission for Refugee Women and Children *Disabilities among refugees and conflict-affected populations: Resource kit for fieldworkers* (June 2008) (Women's Commission).

solutions.⁵⁴ Other practices include collaboration between the United Nations High Commissioner for Refugees and the World Food Programme which prioritised food distribution to refugees with disabilities and their families.⁵⁵ Another successful approach established mobile units for food distribution for those who are unable to wait in line or access transport to reach food distribution centres.⁵⁶

3.4 Health

In all regions of the world, health care is often unavailable to persons with disabilities on an equal basis with others on account of inaccessible health care facilities; in more egregious circumstances, treatment is denied altogether on the basis of disability.⁵⁷ While African states do not bear responsibility for ensuring good health, they are accountable for guaranteeing persons with disabilities the right to the 'highest attainable standard of health' on an equal basis with others, in accordance with the obligations in the CRPD as well as general human rights law and regional African treaties.⁵⁸

There are many different implications of the right to health for persons with disabilities on the African continent, ranging from child mortality to river blindness to basic vaccines. One prominent example – because of its prevalence in sub-Saharan Africa – is the need to ensure that HIV/AIDS pandemic programming is accessible to persons with disabilities.⁵⁹ Research conducted on HIV/AIDS and disability in several African countries discloses that persons with disabilities are often absent from

- 54 JE Lord & MA Stein 'Enabling refugee and IDP law and policy: Implications of the UN Convention on the Rights of Persons with Disabilities' (2011) 28 *Arizona Journal of International and Comparative Law* 401; See WaterAid (Mal) 'All people, one goal, all access: Water and sanitation access for people with disabilities' Briefing note (2007) http://www.wateraid.org/documents/plugin_documents/all_people_one_goal_all_access.pdf (accessed 8 January 2013); WaterAid (Ethiopia) 'Equal access for all-2: Water and sanitation access for people with motor disabilities' Briefing note 9 (December 2006) http://www.wateraid.org/documents/plugin_documents/briefing_note_disability.pdf (accessed 8 January 2013).
- 55 Lord & Stein (n 54 above).
- 56 See Women's Commission (n 53 above) 18.
- 57 World Health Organisation (n 16 above).
- 58 CRPD (n 1 above) art 25; See also African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, art 16(1); African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999, arts 11(h), 14 & 20; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, arts 2, 5 & 14.
- 59 See generally JE Lord & A deFranco 'HIV/AIDS, disability and discrimination: A thematic guide on inclusive law, policy and programming' (2012) http://www.one-billion-strong.org/Portals/_Appleseed/images/default/Documents/HIV%20Aids%20Disability%20and%20Discrimination.pdf (accessed 19 April 2013); S Nduta *et al A handbook on best practices regarding HIV and AIDS for disability* http://www.vsointernational.org/Images/hiv-aids-and-disabilities-handbook_tcm76-25401.pdf (accessed 17 January 2013).

HIV/AIDS programming including screening.⁶⁰ This exclusion is attributable to patently false assumptions of sexual inactivity and equally wrong ideas about low risk for sexual abuse or drug usage among disabled populations.⁶¹ Yet it remains the case that public sexual and reproductive health programs continue to disregard disabled populations when combating HIV/AIDS, with particularly deleterious consequences for women and adolescent girls with disabilities.⁶²

DPOs in many AIDS-affected African countries are actively engaged in HIV/AIDS advocacy and working to ensure disability-inclusive programming. In Zambia, a DPO coalition combined a general objective to learn more about the CRPD with a specific desire to make public health services, including HIV/AIDS education, disability-inclusive. The project increased the human rights capacity of disabled persons and enabled them to achieve equal access to health care.⁶³ Similarly, national disability and HIV organisations in Tanzania and Mozambique worked in collaboration with Rehabilitation International to develop educational materials as a component of HIV/AIDS education and outreach.⁶⁴ We note that some African states, for example Mozambique, South Africa, Uganda, Zambia and Zimbabwe, have demonstrated good practices in collaborating with DPOs,⁶⁵ but underscore that combating HIV/AIDS remains a state obligation and on where greater efforts are urgently needed.

- 60 NE Groce 'HIV/AIDS and disability: Capturing hidden voices' *Report of the World Bank and Yale University Global survey on HIV/AIDS and Disability* (April 2004); NE Groce 'HIV/AIDS and people with disability' (2003) 361 *The Lancet* 1401.
- 61 NE Groce & R Trasi 'Rape of individuals with disability: AIDS and the folk belief of virgin cleansing' (2004) 363 *The Lancet* 1663.
- 62 K Fleming *et al* 'Vulnerability for households with persons with disabilities and HIV/AIDS in Chongwe, Zambia' *American Institutes for Research* (2010) 6–7 http://www.air.org/files/Vulnerability_for_Households_w_Disability_and_HIV_in_Chongwe_Zambia_Final.pdf (accessed 17 January 2013).
- 63 See generally MA Stein *et al* 'Disability rights, the MDGs and inclusive development' in M Langford *et al* (eds) *The Millennium Development Goals and human rights: Past, present and future* (2013).
- 64 Rehabilitation International *et al* *HIV AIDS Awareness and Disability Rights Training Manual* (December 2007) http://www.aidslex.org/site_documents/DB-0045E.pdf (accessed 8 January 2013). Combating AIDS-related stigma and violence against women and girls with disabilities was the life work and legacy of disability rights advocate G Charowa, founder of the Disabled Women Support Organisation of Zimbabwe, 'NEWS: Disability advocate, Gladys Charowa, dies' *We Can Do* 21 April 2008 <http://wecando.wordpress.com/2008/04/21/news-disability-advocate-gladys-charowa-dies/> (accessed 8 January 2013).
- 65 The World Bank 'HIV/AIDS & Disability: Three Country Studies – South Africa, Uganda, and Zambia' The International Bank for Reconstruction and Development World Bank: *ACTAfrica – AIDS Campaign Team for Africa* (July 2010) 5-16 <http://siteresources.worldbank.org/EXTAFRRREGTOPHIVAIDS/Resources/Conference-Edition-HIV-AIDS-Disability.pdf>.

3.5 Legal recognition

Equal recognition by and before the law for persons with disabilities is a human rights concern in developed and developing countries alike across the world.

Legal capacity

Persons with disabilities are routinely subjected to laws and practices that deprive them of their legal capacity and, consequently, of their freedom to make basic choices, including how, with whom, and where to live. This is as true in African states as it is for countries around the world, and is reflected in national legislation, much of which was established during colonisation but nonetheless continues to impede the full enjoyment of basic human rights amongst persons with disabilities. Article 12 of the CRPD is serving as a global impetus for reforming these laws.

Failure to respect the autonomy and dignity of persons with disabilities with respect to medical decision-making is a graphic manifestation of infringement on legal capacity, as evidenced by practices of forced treatment, especially in the case of persons with mental and intellectual disabilities. The African Commission on Human and Peoples' Rights pointed to retrogressive Gambian legislation tellingly entitled the 'Lunatics Detention Act' which effectively stripped persons with disabilities of their decision-making capacity.⁶⁶ In other instances, legislation in a specific autonomy realm restricts decision-making capacity on the basis of disability. Numerous examples exist across the continent of electoral codes that summarily remove the right to vote for persons with mental, intellectual, and on occasion physical disabilities.⁶⁷

Some significant processes are underway to develop legislative and policy responses that ensure the equal recognition by the law of persons with disabilities. Among states parties, South Africa has proposed legislation for establishing a framework for supported decision-making for persons with disabilities.⁶⁸ This example, however, is a notable exception; otherwise, the closest that African states have come to engaging this crucial issue has been consideration or promulgation of general equality clauses within statutes or constitutions. Amongst DPOs, the advocacy efforts of the Zambian Federation of Disabled Persons stands out in this regard for undertaking a careful review of the revised constitution, focusing in

⁶⁶ See *Purohit & Moore v The Gambia* (n 43 above).

⁶⁷ Exclusions based on disability, usually mental and/or intellectual disability, are widespread across the continent and in all regions. See for example the Electoral Law of Burundi (2005, amended 2009) art 5; the Constitution of Seychelles (1993, amended 2000) art 114; the Liberia New Election Law (1986) sec 3.1 & 2.33; & the Namibia Election Act (1992, amended 2003) sec 13(2).

⁶⁸ A copy of the South African draft law is on file with the authors.

particular on the various provisions that pertained to legal capacity and decision-making making numerous suggestions to bring the text into compliance with the CRPD.⁶⁹ Equally significant are the efforts of regional and domestic DPOs to repeal mental health laws that permit involuntary detention and treatment, as noted above.⁷⁰

Access to justice

Much in the same vein, access to justice by persons with disabilities raises multidimensional barriers from physical access to courthouses, to ensuring that people with various disabilities are accommodated by materials in alternative formats, making court websites accessible for persons who use assistive technology, and installing listening systems in courtrooms. Equal access must include all roles in the judicial process, from parties and witnesses to judges, jurors, prosecutors and attorneys.

Courts housed in old structures across Africa present numerous barriers for persons with mobility impairments such as stairs, narrow doorways, and inaccessible rest-rooms. Equally problematic are new structures financed by international development aid that take no account of accessibility at the design phase and thus introduce barriers and create future redevelopment costs for beneficiary countries. Note, for example, the reconstructed Ministry of Foreign Affairs in Monrovia financed by the Chinese government that took no account whatsoever of physical access, notwithstanding the fact that Liberians who used wheelchairs and had various mobility impairments worked there.⁷¹

The first case to come before the South African Equality Court was brought by a wheelchair-using trial lawyer because she could not access the court house buildings. South Africa conceded that the failure to provide proper access was a form of unfair discrimination and committed to rendering court buildings accessible.⁷² In Zambia, a DPO coalition protested detention of a Deaf youth accused of murdering his mother who was not provided an interpreter or access to legal representation. After several months, he was given assistance and exonerated from what was

69 A copy of the legal analysis of the revised constitution draft done in collaboration between the Harvard Law School Project on Disability and ZAFOD is on file with the authors.

70 Movement for Global Mental Health (n 35 above).

71 Observation by J Lord on field mission disability assessment to Liberia in 2004.

72 *Esthé Muller v DoJCD & Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03); 'Equality Court victory for people with disabilities' *South African Human Rights Commission* 24 February 2004 <http://www.info.gov.za/speeches/2004/04022415461001.htm> (accessed 8 January 2013); 'Government sets date for all courts to be accessible' *Inclusion Daily Express* 15 September 2004 <http://www.inclusiondaily.com/archives/04/09/15/091504sacourtaccess.htm> (accessed 8 January 2013). The authors note that although the courthouses nearest to the plaintiff's home were made accessible, the same has yet to be true for other courthouses named in the settlement as well as for courthouses more generally.

deemed a false accusation.⁷³ More generally, the Zambian Federation of Disabled Persons designed and implemented an access to justice project funded by Irish Aid to address systemic barriers that persons with disabilities faced in seeking justice in the Zambian court system.⁷⁴

4 Entry points for regional advocacy

Africa has been at the forefront of embracing the CRPD, as evidenced by rapid State ratification and attendant surges in disability law and policy development and reform. African countries, like those on every continent, face significant challenges in making the treaty's mandates real in culturally appropriate ways that comport with their respective and varied domestic contexts. In many instances African states parties have been inventive and resourceful in responding to implementation challenges. As is the case across the globe, some of the most creative disability rights initiatives arise at the behest of, and/or in collaboration with local DPOs.⁷⁵

Africa has also demonstrated leadership in implementing disability rights through various institutional arrangements at the regional level. The African Commission on Human and Peoples' Rights for example, contributed to the progressive development of human rights law in its first disability case *Purohit*, which underscored the duty of African states to take concrete steps towards full implementation of human rights obligations even in the face of resource constraints. Of considerable significance in that case was overt recognition that persons with mental disabilities have political rights when, in so many parts of the world, such rights are summarily stripped away without any consideration of state obligations to facilitate legal capacity through supportive decision making frameworks or other accommodations.

Other regional mechanisms that can be harnessed to forward progressive approaches to CRPD implementation in Africa include the African Committee of Experts on the Rights and Welfare of the Child,⁷⁶ the African Union,⁷⁷ the New Partnership for Africa's Development,⁷⁸ the

73 Email communications with Zambian advocates (on file with authors). For the website of the Zambian Federation of the Disabled, see ZAFOD 'Zambia federation of the disabled was registered in 1990 under Cap 551 of the laws of Zambia' http://www.safod.org/about%20safod/Countries/zambia_web.htm (accessed 8 January 2013).

74 Zambia Federation of Disability Organisations 'Advocacy and influence' http://www.zafod.org/index.php?option=com_content&view=article&id=55&Itemid=61 (accessed 8 January 2013).

75 Stein & Lord (n 17 above).

76 African committee of experts on the rights and welfare of the child (n 51 above).

77 <http://www.au.int/en/> (accessed 8 January 2013).

78 <http://www.nepad.org/> (accessed 8 January 2013).

African Peer Review Mechanism,⁷⁹ and the Network of African National Human Rights Institutions.⁸⁰ That said, the chief obstacle for utilising such mechanisms to advance disability law and policy is the lack of awareness and understanding of disability rights and the particular barriers that so often impede access of persons with disabilities to basic needs in society. Until political will is harnessed around disability issues at the national and regional levels, disability issues will remain marginal and without prioritisation.

Of particular interest and concern is the move to draft an African Union protocol on the rights of persons with disabilities.⁸¹ While there is much to commend this effort, such work should be undertaken in the same spirit of drafting that animated the CRPD process and which ought to direct the treaty's domestic implementation. Only a process in which African disability advocates across the continent are engaged through careful discernment of what issues merit capture in a treaty instrument and whether and how it would help to advance the rights specifically of Africans with disabilities should be undertaken. Significant steps have been taken in this direction since the initial drafting, which did not include persons with disabilities or DPOs.⁸²

5 Conclusion

The progressive developments recorded in this article constitute a viable and altogether hopeful set of interventions that can be built upon in order to further advance an emerging and uniquely African disability rights narrative. Ratification of the CRPD across the continent and the impetus that it has created for domestic law and policy change offers Africans with disabilities and their allies the promise of rights realisation. These developments present a challenge for civil society and for national human rights institutions to engage in effective monitoring required to hold African governments accountable for treaty compliance. Moreover, they represent a challenge at the regional level, particularly for the AU as a policy formulation body with little disability expertise and limited implementation capacity. This is of special concern if a regional protocol is to be developed, or the CPOA is to have effect, without the parallel political and resource commitments necessary to engender change through a regional treaty. For disability rights scholars and practitioners alike, the approaches developed across the region warrant further study and

79 <http://www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about> (accessed 8 January 2013).

80 <http://www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about> (accessed 8 January 2013).

81 SADPD (n 11 above).

82 L Mute 'Concept on the list of issues to guide preparation of a Protocol on the Rights of Persons with Disabilities in Africa' (August 2012) 4-6 (unpublished working paper on file with the authors).

attention to inform disability rights work in the African context and beyond.

CHAPTER 6

‘NOTHING ABOUT CRPD MONITORING WITHOUT US’: A CASE STUDY ON THE INVOLVEMENT OF THE DISABILITY MOVEMENT IN POLICY-MAKING IN ZAMBIA

*Magdolna BIRTHA**

Summary

Article 33 of the UN CRPD is the most comprehensive provision referring to national level implementation and monitoring ever included in an international human rights treaty. It requires states parties to establish a triangular mechanism comprising of government, an independent element and civil society, in particular organisations of persons with disabilities (DPOs), to handle and monitor the implementation of the Convention. Bearing in mind that the human rights model introduced in the CRPD shall be applied to a historically marginalised group, the fulfilment of this obligation is essential but also challenging. Nevertheless our knowledge is very limited on the criteria of effective involvement. This chapter intends to explore and identify some of the key factors of active and effective civil society participation in policy-making through the example of Zambia. The paper also discusses the financial challenges of a developing country when implementing and monitoring the UN CRPD. In Zambia the disability movement took the leading role and initiated the establishment of the Independent Monitoring Unit (IMU). Since the Human Rights Commission of Zambia – as the Paris Principle compliant independent body – does not actively participate in the work of the monitoring body, the Zambian solution to implement article 33 of the CRPD cannot be considered as a good practice. However, it is certainly an interesting case study on the empowerment and involvement of the organisations for persons with

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Special thanks go to Wamundila Waliuya and Milika Sakala, who have been extremely helpful and inspiring during the field trip in Zambia. Without their help this study could not have been written. I would like to thank to all interviewees working for various disability organisations in Zambia, who generously offered their time and shared their expertise. I am grateful to my supervisor, Professor Gerard Quinn, for all of his precious comments.

disabilities. It is important to consider how far we can take the principle 'Nothing about us without us!' to ensure the participation of the disability movement but also achieve compliance with the CRPD.

1 Introduction – article 33 and its implications at the national level

The UN Convention on the Rights of Persons with Disabilities (CRPD or the Convention) seeks to ensure the full and equal enjoyment of human rights for the estimated 650 million persons with disabilities in the world facing multiple discrimination.¹ Approximately 80 per cent of them are living in developing countries.² Since the existing human rights conventions were-theoretically inclusive of disability, but were insufficient in challenging national laws that excluded the rights of persons with disabilities, there was a strong need for the Convention addressing the human rights of persons with disabilities in particular. The Convention does not create any new rights, but intends to tailor general human rights to persons with disabilities under the overarching philosophy of non-discrimination. The CRPD merges civil and political and socio-economic rights within an international human rights treaty. Most importantly, the CRPD represents a paradigm shift from the 'medical model' of disability to the human rights model. The new approach no longer considers persons with disabilities simply as beneficiaries of charity or welfare, but as holders of the same rights as anyone else in society. As Lewis points out, the CRPD has the potential to become a transformative international legal instrument, which innovates by driving a new politics of disability.³

Article 33 of the CRPD is arguably the most comprehensive provision on national level implementation and monitoring ever included in an international human rights treaty.⁴ No other previous UN convention comprises such an explicit reference to domestic interpretation. The only partially comparable example to article 33 of the CRPD could be article 3 of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which requires states parties to designate or maintain a 'national preventive mechanism'.⁵ As the report of the Mental Disability Advocacy Centre (MDAC) highlights, article 33 of the CRPD articulates the general

1 OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009).

2 OHCHR 'Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors' Professional Training series, no 17 (2010).

3 O Lewis 'The expressive, educational and proactive roles of human rights: An analysis of the United Nations Convention on the Rights of Persons with Disabilities' in B McSherry & P Weller (eds) *Rethinking rights-based mental health laws* (2010) 97-128.

4 G de Beco 'Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe' OHCHR study (2011) 4.

5 OPCAT, art 3.

principle of participation that runs throughout the treaty to ensure states parties involve persons with disabilities in interpreting and implementing CRPD rights (article 3 of the CRPD).⁶ Persons with disabilities and their representative organisations have actively participated in drafting the Convention. This momentum was the beginning of a long process to enable the disability movement to speak on its own behalf and fight for the realisation of human rights as equally acknowledged and respected members of society.⁷ The empowerment of the disability movement is probably the key element in understanding the CRPD.

This paper focuses on the Zambian solution to designate an article 33 monitoring framework. There is a very strong disability movement in Zambia, which intends to fully participate in the implementation of the CRPD. Since the government did not take any steps to designate an article 33 framework, some representative organisations of persons with disabilities initiated the establishment of the IMU. They believe that persons with disabilities should play the leading role themselves, in line with the Convention, when implementing the CRPD. Yet, the well-known slogan from the drafting process of the Convention – ‘Nothing about us without us!’ – raises some unanswered questions. We can certainly consider it as a way to correct past exclusions, as it guarantees that the voice of civil society is heard during policy-making. The question is how far to take this principle to ensure participation of persons with disabilities, but avoid the situation of civil society becoming the sole owner of policy-making? The CRPD does not intend to give the role of policy-maker to civil society, but wishes to empower persons with disabilities and their representative organisations to participate in a meaningful way in all decision-making processes relating to their lives.

1.1 Article 33(1) of the CRPD – focal point and coordination mechanism

According to article 33(1) of the CRPD, states parties shall appoint one or more focal points within government for matters relating to the implementation of the Convention. Focal points are therefore an issue of internal public administration and have to be formally designated.⁸ Countries can choose, depending on the structure of the state to designate one focal point in the most relevant ministry for disability matters, or

6 Mental Disability Advocacy Centre ‘Building the architecture for change: Guidelines on article 33 of the UN Convention on the Rights of Persons with Disabilities’ (2011).

7 G Quinn ‘The United Nations Convention on the Rights of Persons with Disabilities – What role for philanthropy?’ International Human Rights Funders Group, San Francisco (2010).

8 A Hoefmans & G de Beco ‘The UN Convention on the Rights of Persons with Disabilities: An integral and integrated approach to the implementation of disability rights’ Study commissioned by the Belgian Federal Public Service Social Security (2011).

designate several focal points (sub-focal points) in different departments. Sub-focal points are often designated in federal states where responsibilities are shared between various layers of government.⁹ Gatjens provides a non-exhaustive list of requirements for the focal point.¹⁰ He highlights that, amongst other characteristics, the designated entity should be close to the central authority that issues policies and has an effect on the government departments. If the government has an in-depth understanding of the paradigm shift addressed in the CRPD neither the Ministry of Health nor the Ministry of Social Affairs would be appointed as article 33(1) bodies.¹¹ It is very important that staff of the designated entity have a comprehensive knowledge about the social/human rights model of disability. Adequate resources and a stable budget are necessary for the focal point to effectively perform its duties around the CRPD implementation.

It is not an obligation but article 33(1) also mentions the establishment of a coordination mechanism, which aims to facilitate the co-operation between governmental bodies to avoid adopting isolated measures at different departments.

1.2 Article 33(2) – the independent monitoring framework

Article 33(2) requires states parties to:

[M]aintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

Article 33(2) of the CRPD makes a clear distinction between three dimensions (promotion, protection and monitoring), where tasks need to be carried out in regard to the implementation of the CRPD. These activities are listed in the thematic study of the United Nations High Commissioner for Human Rights.¹² Promotion includes scrutiny of

9 'Final report of the work forum on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)' Organised by the Belgian Presidency of the Council of the European Union and the European Commission, Brussels (2010).

10 LFA Gatjens 'Analysis of article 33 of the UN Convention: The critical importance of national implementation and monitoring' (2011) 14 *SUR International Journal on Human Rights* 71.

11 The Ministry of Health is not a good choice to be designated as focal point as it represents the old medical model by treating persons with disabilities as patients. The Ministry of Social Welfare tends to consider persons with disabilities as objects in the government welfare system and that often maintains their dependency instead of having a holistic approach towards disability rights.

12 De Beco (n 4 above).

compliance of draft legislation to ensure consistency with the obligations under the Convention, scrutiny of existing legislation, regulations and practices, awareness raising, human rights education and research. Protection shall cover investigation and examination of individual and group complaints, litigation, conducting enquiries, issuing reports and filing *amicus curiae* briefs. Monitoring includes collecting data and information on human rights violations, developing indicators and benchmarks, assessing progress, visiting places where violations often occur and the contribution to State Reports to the UN Committee. The framework, established under article 33(2) of the CRPD shall include at least one independent mechanism that is compliant with the Paris Principles. As Waddington points out, unfortunately the High Commissioner's report does not specify whether this independent mechanism must play a role in all three tasks of the framework.¹³

1.3 Article 33(3) – the participation of civil society in monitoring the CRPD

According to article 33(3) of the CRPD, civil society, in particular persons with disabilities and their representative organisations shall be involved and participate fully in the monitoring process of the Convention. The word 'shall' leaves no doubt on the binding nature of this provision. As it was mentioned earlier, the concept of 'participation' runs throughout the whole Convention as a general principle. Article 4(3) of the CRPD refers to the importance of involving persons with disabilities in all policy and decision-making processes concerning their lives. Paragraph (o) of the Preamble to the CRPD also emphasises that persons with disabilities should be actively involved in decision-making processes, policies and programmes, including those directly concerning them. These articles of the Convention clearly present a paradigm shift from the medical to the human rights model. There is a clear reference that persons with disabilities are not objects of charity, care or pity anymore but rights holders and active citizens who may wish to participate in monitoring the fulfilment of their human rights.

The well-known mantra '[n]othing about us without us!' and the involvement of persons with disabilities should be considered as one of the key elements in the successful implementation of the CRPD. Considering the invisibility of persons with disabilities in the human rights system, this provision is an extremely important challenge in all states parties. However, the Convention does not give instructions on how to establish a

13 L Waddington 'Reflections on the establishment of a framework to promote, protect and monitor implementation of the UN Convention on the Rights of Persons with Disabilities (article 33(2) CRPD) by the European Union' Maastricht Faculty of Law Working Paper, 2011 6 <http://dx.doi.org/10.2139/ssrn.1746866> (accessed 30 June 2013).

partnership between the disability movement and the governing bodies. Considering the conceptual complexity of 'participation', it is necessary to take a comprehensive look and define the critical success factors. The guidelines of the Mental Disability Advocacy Centre on article 33 of the CRPD present a set of requirements to achieve meaningful participation.¹⁴ First and foremost involvement should happen in a structured manner and cannot be fully realised through ad hoc methods. Meaningful participation of the organisations of persons with disabilities should be guaranteed by capacity building and obtaining necessary knowledge. Accessibility, transparency and the availability of multiple forms of involvement are other important assets.

1.4 Article 33 triangulation – dynamics and function

As Quinn points out, the triangulation articulated in article 33 requires a balance of power and functions between the government, the national human rights institution and civil society.¹⁵ The government is deemed to be responsible to ensure and promote the full realisation of human rights and fundamental freedoms for all persons with disabilities in line with article 4 of the CRPD. Therefore they must coordinate the implementation of the Convention across and within different departments. In order to ensure the accountability of the state and guarantee that international law provisions become a reality, a framework shall be designated including one or more independent elements. Independence is understood according to the Paris Principles. The United Nations Paris Principles provide the benchmark for national human rights institutions (NHRI) to be accredited and define at which level they may participate in the work of national human rights institutions.¹⁶ The NHRI is usually the human rights commission, the equality body or the office of the ombudsman. In addition to their fully independent status, they are expected to frame relevant domestic questions within the scope of international law and investigate in the field of equality and non-discrimination effectively. The third element of the triangulation makes article 33 truly innovative, by involving in the monitoring process the voice of civil society and in particular persons with disabilities. The independent body still has its function to perform but the activities are enriched with the duty of collaborating with civil society. The government also needs to consult with Disabled Persons Organisations

14 MDAC (n 6 above) 23-24.

15 New Zealand Parliament, presentation by G Quinn, 19 February 2009 <http://www.nuigalway.ie/cdlp/documents/publications/GQ-190209.pdf> (accessed 4 January 2013).

16 The International Coordinating Committee currently uses three levels of accreditation: 'A' status institutions demonstrate compliance with the Paris Principles. They can participate fully in the international and regional work and meetings of national institutions, as voting members. 'B' status institutions do not fully comply with the Paris Principles, therefore they can only participate as observers in the work of the national human rights institutions. 'C' status institutions do not comply with the Paris Principles, thus they do not have any rights of privileges with the ICC.

(DPOs) when it comes to policy and decision making in line with article 4(3) of the CRPD. Presumably, this collaboration is a great challenge and requires some important structural and functional changes in the work of the NHRI and the governmental bodies. It is a fascinating time to explore the dynamic of these innovatory changes and the solutions countries choose to designate their article 33 mechanism.

Most states parties are still in the process of establishing their article 33(2) framework to 'promote, protect and monitor' the implementation of the CRPD. Therefore it is very important to ensure the participation of DPOs from the very first stage. Knowledge is still very limited on what kind of initiatives or good practices are taking place in states parties in order to provide realistic opportunities for active and effective involvement of persons with disabilities instead of the formal consultations that happened in the past.

2 Conceptualising the involvement of the disability movement

2.1 Defining 'civil society' and the role of NGOs in governance

It is essential to conceptualise the phenomenon 'civil society' before discussing civic participation of persons with disabilities in Zambia. Civil society is a theoretical concept and there is no universal definition in use.¹⁷ According to the general definition by Meidinger, civil society has been characterised as a sphere of social life that is public but excludes government activities.¹⁸ Bratton claims that there is a link between the democratisation process in Africa and the concept of civil society empowerment.¹⁹ This may explain why there is a strong disability movement in Zambia actively participating in the implementation of the CRPD. Nevertheless, Cohen and Arato describe the participatory model of democracy in which both the governing elite and the citizens play an active role in forming opinions and develop a conception of civic virtue through political experiences.²⁰

When discussing the key features of civil society, Charnovitz highlights the voluntary manner and the individual commitment.²¹ In his view, new political actors in particular non-governmental organisations

17 PJ Simmons 'Learning to live with NGOs' (Autumn, 1998) 112 *Foreign Policy* 82.

18 E Meidinger 'Forest certification as environmental law making by global civil society' In E Meidinger *et al* (eds) *Social and political dimensions of forest certification* (2003) 293.

19 M Bratton 'Civil society and political transition in Africa' (1994) 11 *IDR Reports*.

20 JL Cohen & A Arato *Civil society and political theory* (1993) 7.

21 S Charnovitz 'Nongovernmental organisations and international law' (2006) 100 *American Journal of International Law* 348.

could take a role in policy-making after globalisation has considerably weakened the power of ruling governments.²² Despite the involvement of non-governmental organisations (NGOs) being considered as a late-twentieth-century phenomenon, Charnovitz dates it back much earlier.²³ Due to the long-term marginalisation of persons with disabilities, the participation of disability NGOs is still a relatively new concept. Although in other disciplines, such as environment protection, the UN co-operated with the non-governmental sector as partners in implementing programs, the collaboration with DPOs has started very recently after the conclusion of the CRPD.²⁴

The role of civil society in governance can be described in five key areas: information collection and dissemination; policy development consultation; policy implementation; assessment and monitoring; and advocacy for [environmental] justice.²⁵ These categories may be great starting point to define how the organisations of persons with disabilities can participate in policy- and decision-making processes. Gemmill and Bamidele-Izu contend that existing structures do not enable civil society to perform the aforementioned roles effectively.²⁶ Drafters of the CRPD intentionally incorporated a legal obligation on states parties to ensure the active and critical role of the disability movement in the governance system. Furthermore, provisions of article 33 integrate the disability movement into the structured space of civilian actors. In order to achieve meaningful involvement of persons with disabilities, significant changes in the structure of the governance are necessary.

It is important to make a distinction between DPOs and other types of NGOs in the context of disability. The term 'non-governmental organisation' was first used by the United Nations in 1945 to specify the role of consultants that were not representing national governments.²⁷ NGOs can certainly work for the protection of the rights of persons with disabilities in several ways. They can focus on the rights of persons with disabilities in general or represent particular groups within the disability community for instance persons with Down Syndrome, or persons with visual impairment. They can also organise their work around thematic areas, such as employment or education. NGOs can offer services for persons with disabilities or do purely advocacy work. DPOs can be defined

22 S Charnovitz 'Two centuries of participation: NGOs and international governance' (1996-1997) 18 *Michigan Journal of International Law* 183.

23 Charnovitz (n 22 above) 183.

24 TG Weiss 'International NGOs, global governance and social policy in the UN system' (1999) *GASPP Occasional Papers 3/1999 STAKES*, Helsinki.

25 B Gemmill & A Bamidele-Izu 'The role of NGOs and civil society in global environmental governance' in DC Esty & MH Ivanova (eds) (2002) *Global Environmental Governance: Options & Opportunities* Yale School of Forestry & Environmental Studies 77.

26 Gemmill & Bamidele-Izu (n 25 above) 78.

27 N Srinivas 'Against NGOs?: A critical perspective on nongovernmental action' (2009) 38 *Nonprofit and Voluntary Sector Quarterly* 614.

as a form of non-governmental organisation that is particular in terms of its composition and leadership: both the membership and the leaders are persons with disabilities themselves.

2.2 Public participation in the African context

With regard to the roots of a civil society movement in Africa, voluntary associations were first constructed as a response to the disruptive effect of market economy during the colonial period.²⁸ According to Bratton, those organisations shortly became explicitly political. Despite aspirations of the ruling elite to eliminate these groups around the time of independence, most of them successfully proved to be a strong alternative institutional framework. In Zambia, associational life mostly started with mineworkers' unions which could provide a ground for formulating opposition, together with economic networks against post-colonial autocracy by the end of the 1980s. Responding to the popular protest of civic actors, African governments created political openings, which lead to a more favourable atmosphere for free expression and association.²⁹ For instance, in Zambia a number of NGOs were created to monitor the government's performance on human rights since the 1980s. These associations were essential to educate people about citizenship and democracy.

In South Africa, the Constitution provides a framework to guarantee public participation in the legislative process.³⁰ As a consequence of the involvement of citizens in public life, the democratic system functions in a representative and participatory way at the same time.³¹ As Nyati points out, it is a government's duty to facilitate meaningful participation of the public in the legislative process and guarantee that everyone's opinion is considered.³² The aspiration behind this provision is to avoid the continuation of any exclusive policies that deprived fundamental rights of people in past regimes. The Constitutional Court decision in *Doctors for Life International v Speaker of the National Assembly*³³ is a very important milestone in addressing the extent to which public participation in the legislative process is protected by the South African Constitution. The judgment set the standard of the constitutional obligation to facilitate public participation and to develop more accountable legislation.

In Kenya, the *Endorois* case is a very important source to illustrate the legal concept of people's participation as a duty of the state.³⁴ The African

28 Bratton (n 19 above) 5.

29 Bratton (n 19 above) 6.

30 Secs 59 (1)(a), 72 (1)(a), & 118 (1)(a).

31 L Nyati 'Public participation: What has the Constitutional Court given the public?' (2008) 12 *Law, Democracy & Development* 102.

32 Nyati (n 31 above) 104.

33 (2006) 12 BCLR 1399 (CC).

34 SA Djoyou Kanga 'The right to development in the African human rights system: The Endorois case' (2011) 44 *De Jure* 381.

Commission on Human and Peoples' rights stated that the lack of meaningful participation of the Endorois community was a violation of the right to development.³⁵ As Kanga's commentary explains, the right to development is binding in the African Charter on Human and People's Rights (ACHPR) and was first tested through this case. The court's decision highlights the state's role as a duty bearer to guarantee people's participation and clarifies the beneficiaries of the right to development. The right to development includes a number of elements, such as non-discrimination, participation, equity, accountability, and the threshold of people's participation.³⁶

2.3 Development of research terminology

As part of a preliminary study, interviews were conducted with members of the European disability movement to develop the conceptual frame of 'involvement' and 'participation' as both are required under article 33 of the CRPD.³⁷ First of all, it is important to distinguish 'involvement' from 'consultation'. Consultation means a somewhat passive role in which one can express his or her opinion without necessarily being considered in the whole decision-making process. The government often consults with civil society only at a later or the last stage of any negotiations, which does not ensure their participation from the very beginning and their contribution may remain tokenistic. If civil society has no other possibilities than commenting on drafts already put on the table by the government, they have very little influential input. Exclusion from meaningful participation is unacceptable, not only in the scope of the aforementioned South African case-law but in the scope of the CRPD as well.

One of the most important concepts developed for purposes of the study described here is the distinction made between 'active' and 'effective' participation. Active participation refers to the regular presence of disability organisations during high-level meetings and negotiations. Active involvement does not guarantee that any of the contributions offered by civil society will be considered by governing forces. Effective involvement occurs when the contribution of civil society – in this case most importantly, organisations of persons with disabilities – is reflected in laws and policies. Therefore, it is arguably important to examine if the participation of civil society through its various methods is not only active but also effective. As part of the intention to use inclusive research methods, interviewees in Zambia were asked for a feedback on whether they agreed or not with such a conceptual division between 'active' and

35 Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, See African Commission, 27th Activity Report, 2009.

36 Kanga (n 34 above) 391.

37 In total ten interviews have been conducted with leaders of European umbrella DPOs between March and July 2012.

'effective' participation. Since their reaction was positive, these terms will be used throughout the chapter.

3 An example of emerging promising practice: Zambia

In the following section, the Zambian solution to implement article 33 of the CRPD will be analysed, as a promising practice for influential involvement of the disability movement. Nevertheless, it is important to take a look at the functioning of the whole article 33(2) mechanism and evaluate the participation of civil society accordingly. Some remarks will be made on possible ways to improve the sustainability of the CRPD in Zambia.

The former British colony of Northern Rhodesia, became independent from the United Kingdom and was named Zambia in 1964. According to the Global Competitiveness Report, Zambia is ranked as 102 out of 144 countries, which looks at factors that affect economic growth.³⁸ The UN Human Development Index is a useful tool to get a glimpse of the social situation of certain countries. It represents a push for a broader definition of well-being and provides a composite measure of three basic dimensions of human development (health, education and income). According to the 2013 report, Zambia is ranked 163 out of 187 countries.³⁹ Social indicators, such as life expectancy at birth (about 49.4 years) or the GNI per capita (\$1358) are still very concerning.

3.1 The CRPD and Zambia

Zambia signed the CRPD on 9 May 2008 and ratified the Convention on 1 February 2010. It has also signed but not yet ratified the Optional Protocol of the Convention on 29 September 2008. Article 35 of the CRPD requires governments to submit a report to the UN Committee on the Rights of Persons with Disabilities on their progress towards implementing the treaty. The first report should be submitted within two years of the Convention coming into force. Since the CRPD entered into force in Zambia in March 2010, the government was due to submit its State Report by March 2012. A number of DPOs participating in the implementation process have highlighted that no report was sent to the UN by this deadline. Civil society is still planning to make its own shadow report on

38 'The Global Competitiveness Report' <http://www.weforum.org/reports> (accessed 31 January 2013).

39 The 2013 UN Human Development Report 'The Rise of the South: Human Progress in a Diverse World' UNDP.

the implementation of the Convention and hopes to present it in front of the UN in a few years.⁴⁰

3.2 Background information on the empirical data collection

This paper presents the findings of the interviews that were conducted with 12 disability organisations in 2012 in Lusaka as part of a field trip.⁴¹ It was agreed that anonymity be preserved for the interviewees before recording, therefore personal references to staff members who participated in the study will be avoided.

In this chapter, primarily the answers of representatives of the disability movement will be analysed when describing factors of effective involvement in policy and decision-making processes. A few interviewees are not self-advocates themselves, but working for an organisation that is involved in the work of the monitoring framework. The study is far from scientific in the sense that it comes from the ground-up, but it intends to offer a first glimpse at active and effective involvement of the disability sector in implementing the Convention. This chapter does not give a fully comprehensive picture on the key factors of effective participation, but wishes to define some important prerequisites.

3.3 Article 33 implementation in Zambia

Zambia initially chose to designate several focal persons in the relevant Ministries under article 33(1) of the CRPD to coordinate the implementation of the Convention. However, civil society representatives were not satisfied with the performance and level of collaboration of these bodies. The Zambian Federation of the Disabled (ZAFOD) called on the Permanent Secretary of the Ministry for Community Development, Mother and Child Health Care to designate a fully competent focal person.⁴² The government department made a clear statement in February

40 It is important to note that the UN CRPD Committee is facing some delays in evaluating the state reports. Since many countries have ratified the Convention right after it was open for ratification, a big number of reports were submitted around the same time.

41 The list of organisations who participated in the empirical research are: Zambia Federation of the Disabled (ZAFOD), Zambia Agency for Persons with Disabilities (ZAPD); Zambia Law & Development Commission (ZLDC); Sight Savers International (SSI); Opportunity Zambia (OZ); Zambia National Library and Cultural Centre for the Blind (ZNLCCB); Zambia National Federation of the Blind (ZANFOB); Mental Health Users Network of Zambia (MHUNZA); Zambia Association of Parents of Children with Disabilities (ZAPCD); Zambian National Association of the Deaf (ZNAD); a free-lance disability rights consultant.

42 ZAFOD is the umbrella organisation of DPOs representing 12 disability organisations.

2012 indicating that they are in the process of re-appointing focal points in every Ministry who will be in charge of disability issues.⁴³

Due to the lack of any state action to designate a CRPD compliant article 33(2) framework, ZAFOD initiated the establishment of the Independent Monitoring Unit (the IMU) to advance and monitor the implementation process of the CRPD. The purpose of the IMU is to assist in the 'domestication' of the CRPD into Zambian legislation. It is important to emphasise that despite the guidance of the Convention, the IMU was not formally acknowledged by government decision since its creation as an article 33(2) CRPD body. This is probably a direct consequence of the fact that the establishment was purely based on the advocacy work of civil society. It raises some concerns whether the state will recognise recommendations submitted by the IMU in the future.

The IMU is an 18 months project, thus there is no guarantee for its sustainability. Operation of the framework started in January 2011 after capacity building workshops had been carried out for staff members of the participating DPOs. Developing countries experience serious burdens when implementing international human rights treaties. The fact that the IMU project was founded by two major international donor organisations – the European Commission and Power International – draws attention to the obstacle that systematic monitoring activities, including data collection, requires sufficient resources from the state.⁴⁴ The question is to what extent a state party should use sources of international co-operation to implement the Convention if there are no internal sources available in line with article 4 of the CRPD?

According to the first progress report of the IMU, the project has the specific objective to encourage civil society to independently promote and monitor domestication of the CRPD in Zambia.⁴⁵ The composition of the IMU is pluralistic including government departments and agencies,⁴⁶ international human rights organisations,⁴⁷ the National Human Rights Institution,⁴⁸ and a number of umbrella DPOs.⁴⁹

43 More information on the work of the Ministry for Community Development, Mother and Child Health Care is available at <http://www.mcdss.gov.zm/cultural.php> (accessed 15 October 2012).

44 The European Commission financed the project with €89,993 and Power International contributed €9,999.

45 Zambia Federation of Disability Organisations (ZAFOD), Independent Monitoring Unit of the implementation of the domestication of the UN CRPD (IMU) *Periodic report to the government by the IMU* (December 2011).

46 Ministry of Community Development, Mother and Child Health Care; Zambia Agency for Persons with Disabilities (ZAPD); relevant domestic government ministries (eg Health, Education Justice); Zambia Law Development Commission (ZLDC).

47 Action on Disability and Development (ADD); Opportunity Zambia (OZ); International Labour Organisation (ILO); Power 4 Good/ POWER International.

48 Human Rights Commission, Zambia.

49 ZAFOD; Sight Savers International (SSI); Zambia National Federation of the Blind (ZANFOB).

The disability movement in Zambia under the leadership of the ZAFOD interprets article 33 of the CRPD as a 'way to form a framework for the government and civil society to [adequately] implement ... the Convention'.⁵⁰ ZAFOD emphasised the necessity to collaborate with a broad range of stakeholders, including non-governmental organisations outside of the disability movement. However, they believe that the leading role should be played by DPOs who have first-hand experience.⁵¹ It was actually a common misunderstanding within the disability movement, that a platform including different stakeholders would fulfil the requirement of pluralism under the Paris Principle and therefore could serve as an independent body. The IMU is far from being independent in the current structure as its membership consists of governmental bodies.

The Zambia Agency for Persons with Disabilities (ZAPD) is also part of the IMU among other ministerial departments. The Agency carries out a number of activities such as promoting and administering services for all persons with disabilities, keeping statistical records, advising the Ministries on the economic situation of persons with disabilities and coordinating rehabilitation with government bodies. Several interviewees clarified that the role of ZAPD in the framework is to be the link between government and civil society by facilitating an exchange of information. As one interviewee pointed out, the Agency could act as the watchdog and transfer the message from stakeholders to the Ministries. In many countries there is a communicational gap between government and civil society, which eliminates any constructive dialogue or collaboration. It is an interesting initiative in Zambia to resolve this problem.

3.4 How independent is the Zambian article 33(2) framework?

The Human Rights Commission, Zambia (HRC Zambia) is the National Human Rights Institution (NHRI) in the country. It is accredited by the International Coordinating Committee (ICC) as fully compliant with the Paris Principles. The HRC Zambia was established under article 125 of the Constitution of Zambia and mandated by the Human Rights Commission Act⁵² to *inter alia* investigate and remedy human rights violations, conduct human rights education, monitor the conditions under which persons are detained in prisons and elsewhere, and to monitor government's fulfilment of international and regional human rights treaties and human rights obligations under national law. In order to achieve compliance with the CRPD, the HRC Zambia shall play a role as an independent element in the framework established under article 33(2) of the CRPD to promote, protect and monitor the implementation process. Surprisingly, the institution does

50 The IMU periodic report (n 46 above).

51 More information on the work of IMU is available at <http://www.slideshare.net/MilikaSakala/imu-report-to-government> (accessed 25 January 2013).

52 39 of 1996.

not actively participate in the work of the IMU even though it is formally listed among the members.

The Zambian solution to implement article 33 is practically lacking the active contribution of the independent element, and therefore cannot be considered fully compliant with the CRPD. Drafters of the Convention logically incorporated the concept of independence into the framework to guarantee effectiveness and checks and balances of the mechanism. The NHRIs traditionally have experience in human rights monitoring but also play the role of the 'watchdog' to check that government decisions are in line with international human rights standards. Independence is essential to be able to effectively monitor human rights.

While looking for the reasons of the lack of collaboration between disability organisations and the HRC Zambia, the problem of miscommunication immediately became clear. The Commission claimed not to be invited to IMU meetings, however ZAFOD expressed their wish to collaborate with the HRC and thus guarantee sustainability and effectiveness for the monitoring framework.

In fact, the HRC Zambia has not yet been active in monitoring the rights of persons with disabilities, despite their aspirations articulated in the draft National Plan of Action for the period 2010-2020.⁵³ According to this working plan they are willing to carry out advocacy for the enactment of effective legislation for the protection of persons with disabilities and advocate for their involvement in the labour market. They acknowledge the importance to collaborate with the organisations of persons with disabilities and plan to establish a better working relationship with civil society on the occasion of the forthcoming Universal Periodic Review (UPR) and the UN CRPD Committee hearing. All of this shows that the working relationship between the NHRI and the disability movement is yet to be developed to be able to carry out the tasks under article 33 together.

3.5 Current focus of the Independent Monitoring Unit

A number of laws and policies are currently under revision in Zambia. In 2011, the newly elected government promised in its electoral campaign to 'change and benefit within 90 days'. Several interviewees reported that the government is really serious about law making, and keen on consulting with civil society to ensure a dynamic law-making process. It is a really important time for human rights advocates in Zambia to participate and incorporate provisions of the CRPD into disability related pieces of legislations being reviewed by parliament.

53 Human Rights Commission Zambia, Annual Report 2009 http://www.hrc.org.zm/media/annual_report_2009.pdf (accessed 4 July 2013).

Presumably it varies significantly depending on the issue in question to what extent civil society wants to be involved in the policy-making process. If there is a debate on the situation of children with albinism in primary education, disability organisations may wish to turn the decision maker's attention to the needs of children with disabilities in schools facing multiple discrimination but do not necessarily participate in the whole process. In contrast, if the government is revising mental health legislation, disability organisations most likely seek to participate from the very beginning to push the discussion in a CRPD compliant direction. Therefore the adequate level of participation could be defined briefly as the highest possible presence that satisfies disability organisations.

3.5.1 The Persons with Disabilities Act

As one of the interviewees pointed out, the main priority for the IMU was the review of the Persons with Disabilities Act⁵⁴ to ensure the new law is compliant with the CRPD. The Bill was enacted in September 2012.⁵⁵ The IMU submitted comments during the review process, which were included in the draft text. Representatives of DPOs were satisfied that their voice was being heard. As one of them pointed out:

It takes a longer while for government to actually implement an international human rights treaty, but the IMU and civil society could provide them with sufficient guidance on how to do it right.⁵⁶

The priority areas the IMU focused on in its submission were education, employment, accessibility, mental health and legal capacity. Although the previous Act from 1996 contains a few solid provisions regarding anti-discrimination, education and accessibility, in general it refers to the old medical model by looking at persons with disabilities in a pitiful way, seeking only medical care and focusing exclusively on rehabilitation and the prevention of disability. DPOs working in the IMU agree that different pieces of legislation shall be CRPD compliant, and the new Disability Act must cover all civil and political rights and social, economic and cultural rights guaranteed in the Convention. Paragraph (b) of the Objectives of the new Persons with Disabilities Act includes a provision to 'promote the participation of persons with disabilities with equal opportunities in the civil, political, economic, social and cultural spheres'.⁵⁷ Nevertheless Part V of the Act deals with specific areas in details, such as education, employment and social protection, health care, rehabilitation, accessibility and political and public life.⁵⁸

54 33 of 1996.

55 http://www.parliament.gov.za.zm/index.php?option=com_docman&task=cat_view&gid=171&Itemid=113&limit=5&limitstart=0&order=date&dir=ASC (accessed 22 January 2013).

56 Interview with an advocate, 11 July 2012.

57 The Persons with Disabilities Bill, 2012.

58 The Bill (n 57 above) part V.

3.5.2 The constitutional review process

At the time of writing, Zambia is in the process of negotiating a new Constitution under the lead of a Technical Committee of Experts, appointed by the government. The Technical Committee started drafting the new Constitution on 1 December 2011. The review is a response to demands for a more democratic political system in the country. The state intends to promote transparency, accountability and the participation of people in governance by developing viable institutions.⁵⁹ According to Ndulo, the draft Constitution of Zambia retains dictatorial presidential powers as contained in the 1996 Constitution instead of moving towards a more democratic state. He argues that the draft even expands dictatorial powers by allowing the president to unilaterally divide and create provinces or districts or by appointing all the important posts without consultation.⁶⁰

The constitutional review process, at least formally aims to be consultative and to reach a broad range of social groups.⁶¹ The government shows its willingness to involve public opinion in a meaningful way and promises that contributions will be taken into account in a systematic manner. This openness during the drafting procedure may create a favourable atmosphere for the disability movement to effectively advocate in a number of issues relating to the CRPD. Given the important momentum when the government put the concept of participation and democratisation on their political agenda, a highly marginalised group may find effective ways to advocate for a real change. Presumably the democratisation process in general facilitates the empowerment of civil society by stipulating the creation of a strong grass-root movement. ZAFOD and the Human Rights Commission have both submitted comments to the Technical Committee in regard to the new Constitution.⁶² ZAFOD was lobbying for including the provision of the equal recognition before law of persons with disabilities in line with article 12 of the CRPD.

3.5.3 Other legislation under review

There are two other acts under review in Zambia at the time of writing.

59 MB Ndulo 'Review of the Draft Constitution for the Republic of Zambia' *Zambian Watchdog* 20 August 2012.

60 Ndulo (n 59 above) 19.

61 <http://zambianconstitution.org/> (accessed 4 July 2013).

62 Submission of the HRC Zambia is available here: http://www.hrc.org.zm/media/hrc_submission_to_technical_committee_on_drafting_zambian_constitution.pdf (accessed 4 July 2013); submission of disability organisations is available here: http://zm.sightsavers.org/in_depth/advocacy/14215_Submissions%20by%20a%20consortium%20of%20persons%20with%20disabilities%20organisations%20on%20the%20draft%20constitution.doc (accessed 4 July 2013).

One is the Town and Country Planning Act,⁶³ which is expected to include accessibility provisions in line with the CRPD.⁶⁴ The Human Rights Commission reported in 2010 that chapter 283 of the Act is lacking adequate regulation on accessible environments.⁶⁵ Thus, they suggested the government revise the instruments of area planning. The report also emphasises the importance of involving persons with disabilities from the very first stage in drafting the development plan and in prioritising which currently available financial resources can be spent on improving accessibility.

In addition, there is a review of the out-dated Mental Health Disorders Act 1951,⁶⁶ which fails to promote the dignity and autonomy of persons with psychosocial disabilities.⁶⁷ The Mental Health Users Network of Zambia (MHUNZA) and ZAFOD have been actively involved in drafting the new Mental Health Act since July 2012 by collecting data, generating evidence and developing mental health policies in collaboration with international experts on mental health law. The main capacity builder in the region, Opportunities Zambia (OZ) emphasised that decision makers should meet with advocates to avoid drafting legislation influenced by the medical approach to disability.⁶⁸ It is important to educate government officials on the principles and obligations of the CRPD.

3.6 Criteria for effective participation through the example of the IMU

The following section discusses the experiences of the Zambian disability movement on how to achieve effective participation when implementing and monitoring the CRPD. Representatives of the IMU member organisations gave a clear idea about what they believe the key elements of effective involvement are. Some of the answers certainly overlap each other. It is important to note that the opinions presented here do not necessarily reflect the views of the disability sector as such.

63 Town and Country Planning Act (Cap 283).

64 For further information on the Town and Country Planning Act: http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=038789&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL (accessed 17 January 2013).

65 The HRC Zambia 'State of Human Rights Report in Zambia: Human Rights & the Environment' UNDP, 2010.

66 The Mental Health Disorders Act represents the old medical model and allowed detention of anyone who was suspected to be a person with a psychosocial disability. The law further went on to address people with psychosocial disabilities as idiots, imbeciles or morons.

67 Mental Health and Poverty Project, Policy Brief *Developing Effective Mental Health Laws in Africa* http://www.who.int/mental_health/policy/development/MHPB7.pdf (accessed 18 January 2013).

68 More information on the Mental Health Act review process is available at <http://www.opportunityzambia.org/?p=394#more-394> (accessed 27 January 2013).

Generally speaking, the range of critical success factors seems to be broad and sweeps beyond the common argument that the state party is lacking money to invest in disability rights. Rather, it includes elements such as the on-going democratisation process or the willingness of government to build up a collegiate relation and use the expertise of civil society.

3.6.1 Transparent early stage participation

It was agreed amongst the interviewees in Zambia that civil society needs to be included from the very beginning in any policy-making process to ensure their voice is being heard. In the view of Opportunity Zambia, transparency is an absolute prerequisite for facilitating engagement and effective involvement. The Zambia National Association of the Deaf highlighted the necessity of capacity building and empowerment of the disability movement. This can happen through professional training sessions to teach the disability organisations writing submissions and planning advocacy work. There is already interest expressed by the Zambia National Library and Cultural Centre for the Blind to attend more training on contributing to law reform processes.

3.6.2 Broad collaboration

A great challenge for an advocacy platform is to ensure the participation of a broad range of people coming from the grass-roots level. In Zambia, ZAFOD has already established close working relations with a number of DPOs and intends to find consensus before sending joint submissions to the government. International human rights NGOs, service providers, family organisations and researchers are important allies of the disability movement, however no considerable collaboration has happened with organisations outside of the IMU so far in regard to CRPD monitoring.

3.6.3 Awareness-raising at the grass-roots level

The IMU often works in smaller working groups to provide a better atmosphere for discussions. Interviewees found 'it is a good way to make in-depth recommendations and improve effectiveness'. Members of the IMU went to villages to raise awareness on the CRPD by bringing hard copies of the Convention in large print, Braille and easy-to-read versions. They wanted to educate members of the local disability communities on the provisions of the Convention and asked for input on the submissions the IMU was planning to prepare. This is certainly an important initiative to reach the local people and ensure their opinions are considered when promoting the rights of persons with disabilities at a higher level.

3.6.4 Continuous evaluation

Several interviewees emphasised that the work of the monitoring body also has to be monitored on a regular basis. The designated IMU should report back on any on-going issues to their local members in order to prevent arbitrary decision making practices in the platform.

3.6.5 Direct influence by providing evidence-based information

A simple but straightforward definition was given by Sight Savers Zambia on how to measure the impact of civil society participation: 'We can talk about effectiveness when our opinions are included in the final text of the law or policy document'. This is a great example to see the difference between active and effective involvement as mentioned above in the methodological section. Most interviewees expressed their disappointment when their involvement was tokenistic by being invited to meetings and not considered as partners in the policy-making process. They recognised when their involvement was only active not effective. Therefore disability organisations try to make sure that their contribution gets in the final version of the new Acts. However, the definition of Sight Savers symbolises the far end, when all opinions are considered. This definition does not solve the problem of measuring effectiveness if civil society contributions were only partly considered by the governing bodies. No other interviewees came up with a more precise definition.

Collecting representative data across the country and providing evidence-based information seems to be the area that requires most financial resources within monitoring activities. In this regard, challenges were reported due to the limited resources in disseminating results of research carried out by disability organisations.

4 Strengths of the work of the IMU

First and foremost, the greatest strength of the IMU lies in the commitment of members of the Zambian disability movement. They allocate their time and limited resources to review pieces of legislations, even if they have to do it on a voluntary basis. Their monitoring activities currently aim to incorporate the CRPD provisions into domestic law.

Although the intensity of the members' contribution within the IMU varies significantly, all of the interviewees were aware of the current national legislative changes, such as the review of the Constitution or the Persons with Disabilities Act. They also contributed to the submissions prepared by the IMU in one way or another. Representatives of DPOs seemed to be familiar with the provisions and national level implications of the Convention and used a very CRPD compliant language. Being able

to apply appropriate concepts of the CRPD, such as accessibility, reasonable accommodation, or supported decision making certainly facilitates a stronger position of civil society during negotiations with the government bodies.

A number of the IMU member organisations emphasised the importance of engaging in strategic advocacy work by planning and lobbying in a structured manner. Pro-activity and initiating meetings with the previously identified stakeholders is another asset, which promotes sustainability of participation. As mentioned above, the IMU raises awareness on the CRPD and involves the voice of the community through maintaining connections with the grass-roots level. This facilitates better representation. There is no available data on the frequency of such meetings, but the initiative can be certainly considered a great example and may be followed by other countries.

Another important achievement of the established IMU is that it could help to bring together the fragmented disability movement for a common purpose, namely to address disability rights to the government effectively. A representative of a big organisation emphasised that it is a success of the IMU that the government now recognises the state obligations under CRPD and shows willingness to implement the Convention in different legislations and policies.

5 Challenges and recommendations

In the following section, there is a brief overview of some of the challenges the IMU is currently facing and a number of recommendations will be made on the necessary changes to improve the sustainability of the platform.

5.1 Lack of government support

Since the funding of the IMU comes to an end in January 2013 the project will probably face some serious challenges in the near future. The informational webpage of the IMU has already been de-activated due to budget matters. After the evaluation of the progress report, the platform still expects 25 per cent of the EU fund to come to the IMU. In the meantime they have received some funding from the Open Society Initiative of South Africa (OSISA) to cover activities for the next two years focusing on mental health issues and the Persons with Disabilities Act, which has now been enacted.⁶⁹ The sustainability of the Monitoring Unit

⁶⁹ More information on the Open Society Initiative in Southern Africa is available at <http://www.osisa.org/> (accessed 22 January 2013).

is still uncertain and a guaranteed fund would be necessary to enable them to strategically plan future activities.

Despite the fact that article 33(2) of the CRPD imposes a duty on the state to maintain, strengthen, designate or establish a framework that promotes, protects and monitors the implementation of the Convention, the Zambian government has not acknowledged the IMU as the monitoring body. Moreover, the state has not provided any funding for the IMU since it was established by civil society. This raises serious concerns on the effective operations of the IMU in the future and clearly questions its financial viability.

5.2 Unbalanced participation

The fact that ZAFOD as the umbrella organisation of DPOs in Zambia, takes the leading and coordinating role in the work of the IMU is understandable, although slightly concerning how much ZAFOD dominates the whole framework. Although ZAFOD represents 12 organisations, it does not represent every person with disabilities in the country. The IMU and ZAFOD are not distinguished in the notion of some IMU member organisations. Some of them consider the IMU as a business of ZAFOD rather than a common project. It may affect their willingness to share the tasks occurring in the monitoring process. The reason for the dominance of ZAFOD could be that they provide the secretariat for the IMU and organise the capacity building training for other DPOs. It might have a positive impact on the work of IMU if participants had a clearer understanding of the mutual contribution they are supposed to make.

Those members representing government entities did not feel actively involved in the work of the IMU. For instance, the Zambia Law Development Commission, which is tasked with 'review[ing] and consider[ing] proposals for law reform referred to the Commission by the Minister or the members of the public' has not interacted with the IMU on a regular basis.⁷⁰ The Commission was unable to review the Disability Act, due to the short deadline provided and certain procedural burdens. However, they refer to their limited mandate and capacity to act only upon a government request; the legislation which established the Law Development Commission does not include such a limitation.

The Mental Health Users Network in Zambia has made a remark that the Anti-Gender-Based Violence Act 2011 reviewed by ZLDC still includes a discriminatory section regarding persons with mental health disabilities. According to the law, persons with mental health disabilities could only apply to a court for a protection order in case they are assisted

70 Zambia Law Development Commission Act (Chap 32) Part II 4. (2)(c)?.

by a third party, and not on their own behalf.⁷¹ Disability advocates expressed disappointment that a non-CRPD compliant Act could be passed without any consultation between them and the Law Development Commission. Considering the current focuses of the IMU, the Law Development Commission could be a key strategic partner in reviewing draft legislations.

5.3 Representation

It is very challenging to ensure that the voice of the whole disability movement is being represented in submissions of the IMU. As many of the interviewees emphasised, one of the key elements of effective participation is to find a common direction that all relevant civilian actors agree on. It facilitates better lobbying by having broader co-operation. In contrast, Gemmill and Bamidele-Izu argue that it may be a mistake to seek 'consensus' as it could result in prolonged discussions and watered-down conclusions.⁷² In Zambia some of the umbrella DPOs, do not have a nation-wide membership, however, they claim to be a national organisation and legitimate enough to represent a large number of people. This is the reason why the Norwegian Disability Consortium seeks to provide smaller grant schemes available for capacity building of fragmented parts of the disability movement in Zambia.⁷³

5.4 Lack of an independent element

As mentioned earlier, it is essential to involve the HRC Zambia in the work of the IMU, as it would ensure independence and compliance with the Paris Principles. In Zambia, the disability movement has taken the leading role in establishing the monitoring mechanism, but at the same time missed out on the opportunity to facilitate an active collaboration with the independent Human Rights Commission. In the drafters' vision, the three core elements of the article 33 framework (government, NHRI and civil society) are conscious about the need for collaboration when sharing tasks among each other around the CRPD implementation. A lack of trust or bad experiences during previous collaboration between the NHRI and NGOs could be the reason for such isolation. Considering that the HRC Zambia has not done extensive work on disability matters before the CRPD entered into force, it is a learning process for the Commission as well. Presumably, the working method of the NHRI was neither accessible nor transparent towards civil society in the past. This can be seen as the reason why civil society does not consider closer collaboration with the

71 The Anti-Gender-Based Violence Act 2011 Part III 10. (4)?.

72 Gemmill & Bamidele-Izu (n 25 above) 78.

73 More information on the Norwegian Disability Consortium is available at <http://www.opportunityzambia.org/wp-content/uploads/2009/12/Criteria-OZ-Small-Grants-Final-28082009.pdf> (accessed 22 January 2013).

NHRI. It is certainly necessary to tackle isolation and establish the basis of a more inclusive and balanced relationship between the entities involved in the article 33(2) framework.

6 Conclusion

There is a very strong, well-organised disability movement in Zambia actively involved in implementing the CRPD through a grass-roots initiative, the IMU. The government has neither formally designated the IMU as an article 33(2) monitoring framework, nor provided funding for its operation. Therefore, the Zambian solution cannot be considered as a promising practise for article 33 implementation. Yet, the disability movement raises awareness of the Convention, actively participate in law-review processes and strategically plan their advocacy work. In their view, the leading role in advocacy should be played by persons with disabilities from the very first stage.

According to article 33 of the CRPD, an independent element, preferably, the Paris Principle compliant National Human Rights Institution shall be involved in the framework to promote, protect and monitor the implementation of the CRPD. In Zambia, despite of the fact that the Human Rights Commission is currently not participating in the monitoring activities, civil society seems to be satisfied with the functioning of the framework and finds its own involvement active and effective. It may be time-consuming but it is definitely necessary to establish good relations between the Human Rights Commission and the disability movement based on mutual trust and acknowledgement. This would stipulate important structural changes and engagement when implementing the Convention.

Since the current focus of the IMU is around law-review processes, some other tasks relating to protection or monitoring CRPD implementation under article 33(2) may be neglected. They work closely with the government who shows willingness to provide a supportive atmosphere for civilian participation and consider seriously the submissions and professional advices of the DPOs. Facilitating the strong involvement of the disability movement in monitoring the CRPD could enrich the democratisation process in Zambia.

After creating a CRPD compliant legal base in national legislation, at a next stage, the IMU aims to monitor the implementation of those acts and the CRPD countrywide. Even if the IMU is facing financial challenges, members of the disability organisations make an enormous effort to be able to keep on the monitoring activity and make a real change in line with the UN CRPD.

WESTERN CAPE FORUM FOR
INTELLECTUAL DISABILITY V
GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA: A CASE STUDY
OF CONTRADICTIONS IN
INCLUSIVE EDUCATION

Charles Ngwena*

Summary

Using South Africa as the main case study, this article critically explores domestic commitment towards fulfilling the obligations imposed on the state by article 24 of the Convention on the Rights of Persons with Disabilities. Article 24 guarantees a right to inclusive education. The article uses the decision of the Western Cape High Court in the case of Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another (2011) as the main pivot for discussion. It is argued that despite having an enabling constitutional environment, South Africa has been ambivalent about fulfilling its obligations under the Convention. On the one hand, South Africa has made significant strides in establishing an enabling legal and policy environment for the attainment of inclusive education. Mainly as part of post-apartheid transformation, it has made significant strides in developing equality jurisprudence that comports not just with the notion of inclusive education, but inclusive citizenship generally. On the other hand, the policy background to the Western Cape Forum for Intellectual Disability case demonstrates poignantly contradictions in the implementation of inclusive education by the state. The facts reveal a contradiction in state policy that outwardly embraces inclusive education but is inwardly exclusionary.

1 Introduction

The adoption of the Convention on the Rights of Persons with Disabilities (CPRD) has the potential to bring about a paradigm shift in the treatment of disabled people at a domestic level, including in the education field.¹ An

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

increasing number of countries have signed and ratified the CRPD.² This is a hopeful sign but not a sufficient barometer for measuring commitment to comply with state obligations to fulfil rights in the CRPD. It is trite that states may sign or ratify an international treaty not because of an altruistic desire to internalise an international law norm but for a variety of other reasons, including narrow political self-interest, that have little to do with benefiting citizenry.³ Article 26 of the Vienna Convention on the Law of Treaties requires states to perform their treaty obligations in good faith.⁴ Whether one can find, at the domestic level, laws, policies, and more crucially, programmes that have been implemented in a manner that resonates with the main objectives of the CRPD is a more dependable indicator of domestic commitment towards compliance with treaty obligations.⁵ Ultimately, treaty obligations must be ‘translated into reality’ so that rights-holders at the grassroots level can derive tangible benefits.⁶

Using South Africa as the main case study, this article critically explores domestic commitment towards fulfilling the obligations imposed on the state by article 24 of the CRPD which guarantees individuals a right to inclusive education. More specifically, the article uses the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*⁷ as the main pivot for discussion. South Africa has signed and ratified the CRPD as well as the Optional Protocol to the CRPD.⁸ The thrust of the arguments in this article is that the facts that led to litigation in *Western Cape Forum for Intellectual Disability* show that, like many other jurisdictions, South Africa has been ambivalent about fulfilling its obligations under the CRPD. On the one hand, South Africa has made significant strides in establishing an enabling legal and policy environment for the attainment of inclusive education. Mainly as part of post-apartheid transformation, it has made significant strides in developing equality jurisprudence that comports not

2 As of July 2013, the CRPD had been signed by 156 countries and ratified by 133 countries. Available at: http://www.un.org/disabilities/convention/convention_full.shtml (accessed 30 August 2013).

3 A Geisinger & MA Stein ‘A theory of expressive international law’ (2007) 60 *Vanderbilt Law Review* 78.

4 Art 26 of the Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol 1155, 331.

5 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* 287 309-314.

6 United Nations High Commissioner for Human Rights *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, Annex, Plan of Action Submitted by the United Nations High Commissioner for Human Rights, UN Doc A/59/2005/Add.3 (2005) para 22; I Boerefijn ‘International human rights in national law’ in C Krause & M Scheinin (eds) *International protection of human rights: a textbook* (2012) 631.

7 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another* 2011 5 SA 87 (WCC).

8 South Africa signed the Convention and the Optional Protocol to the Convention on 30 March 2007 and ratified the same on 30 November 2007: *Convention and Optional Protocol Signatures and Ratifications*, available at <http://www.un.org/disabilities/countries.asp?id=166> (accessed 9 October 2012).

just with the notion of inclusive education but inclusive citizenship generally. On the other hand, the factual background to *Western Cape Forum for Intellectual Disability* demonstrates poignantly contradictions in the implementation of inclusive education by the state. The facts reveal a contradiction in state policy that outwardly embraces inclusive education but is inwardly exclusionary.

More generally, the article highlights the persistent dangers of an embedded double discourse of inclusive education at the domestic level. Inclusive education is an idea that has been globalised. The trend among national authorities has been to concede the imperative of reforming the education system to render it inclusive but without substantially overhauling its discriminatory content.⁹ Commitment towards an education system that accommodates the learning needs of diverse learners, including disabled learners is often juxtaposed with state policy and administrative practices that simultaneously promote the exclusion of disabled learners, especially, intellectually disabled learners.¹⁰ The education policy that was challenged in *Western Cape Forum for Intellectual Disability* supports this claim.

This article has five sections. The first section – the present section – is the introduction. The second section provides an overview of inclusive education, especially its normative values. The third section is a summary of the decision of the Cape High Court in *Western Cape Forum for Intellectual Disability*. The fourth section is an appraisal of *Western Cape Forum for Intellectual Disability*. The fifth section is the conclusion.

2 Normative and transformative equality values animating article 24 of the CRPD on the right to inclusive education

The normative impetus behind the CRPD is inclusive equality. It is the imperative of securing equality and human dignity for disabled people in all socio-economic sectors. Article 24 of the CRPD specifically responds to the legacy of exclusion and marginalisation of disabled learners in the education sector. It guarantees disabled learners a right to equality and non-discrimination in state provision of education. More significantly, article 24 breaks new ground by recognising ‘inclusive education’ as a

9 S Miles & N Singal ‘The education for all and inclusive education debate: conflict, contradiction or opportunity?’ (2010) 14 *International Journal of Inclusive Education* 1 9; R Slee & J Allan ‘Excluding the included: A reconsideration of inclusive education’ (2001) 11 *International Studies in Sociology of Education* 173 174; R Slee ‘Driven to the margins: Disabled students, inclusive education and the politics of possibility’ (2001) 31 *Cambridge Journal of Education* 385 388; LJ Graham ‘Caught in the net: A Foucaultian interrogation of the incidental effects of limited notions of inclusion’ (2006) 10 *International Journal of Inclusive Education* 3 11-12.

10 Slee & Allan (n 9 above) 173.

discrete human right.¹¹ The recognition of inclusive education as a human right is largely a culmination of global advocacy for an education system that is inclusive as to accommodate diverse learning needs and capacities. Article 24 constitutes not just a consolidation of the global consensus on Education for All¹² but also the construction of a transformative paradigm for protecting and fulfilling the right to education.

At a more general level, article 24 is part of the larger transformative paradigm of the CRPD. As one of its fundamental premises, the CRPD implicitly embraces the notion of human rights as indivisible, interdependent and interrelated.¹³ More than any other existing United Nations human rights treaty in recent times,¹⁴ the CRPD dissolves the dichotomy between civil and political rights and socio-economic rights. It builds on the Covenant on Economic, Social and Cultural Rights¹⁵ in decisively moving away from a neoliberal philosophy that conceives human rights as negative freedoms only. Article 24 is as much an obligation of restraint that requires the state to desist from invidious discrimination based on disability as it is a positive obligation which requires the state to take certain steps to fulfil the right to education of disabled learners.¹⁶ The state is not only enjoined to ensure that disabled persons are not excluded from the 'general education system',¹⁷ it is also required to take positive steps to provide disabled learners with individualised materials and other support so as to facilitate effective

11 CRPD, art 24(1).

12 Global consensus and guidelines on the imperative of an education system that is inclusive of historically marginalised and excluded social groups, including disabled people, and is captured by the slogan Education for All, are contained in many documents that preceded the CRPD, including the following documents: United Nations Educational, Scientific and Cultural Organization *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990); World Conference on Special Needs Education: Access and Quality *The Salamanca Statement and Framework for Action on Special Needs Education* Salamanca, Spain, 7-10 June 1994; United Nations General Assembly, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, GA Resolution 48/96 (1996), Rule 6; World Education Forum *The Dakar Framework for Action, Education for All: Meeting Our Collective Commitments* Dakar, Senegal, 26-28 April 2000; Committee on the Rights of the Child *General Comment No 1: The Aims of Education* CRC/GC/2001/1 (2001); United Nations Educational, Scientific and Cultural Organization *Guidelines for Inclusion: Ensuring Access to Education for All* (2005); Committee on the Rights of the Child *General Comment No 9: The Rights of Children with Disabilities*, CRC/C/GC/9 2007 (2006) paras 62-69.

13 Preamble to the CRPD, para (c); Art 13 of the Proclamation of Tehran 1968, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, UN Doc A/CONF 32/41; Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, UN doc A/CONF 157/24 para 5, Part 1.

14 For a discussion on partial fusion of civil and political rights and socio-economic rights, see: C Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769.

15 International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.

16 S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 220-226.

17 CRPD, art 24(2)(a).

education and maximise academic and social development in a way that is consistent with the goal of 'full inclusion'.¹⁸

Philosophically, the notion of 'full inclusion' in the CRPD ultimately appeals to egalitarian distribution. It calls for transcending notions of equality that are overly built around politics of identity which locate the locus of injustice for disabled people in demeaning representations but overlooking structural inequality.¹⁹ In responding to both social exclusion and material exclusion, article 24 seeks to achieve the objects of what Nancy Fraser, in her critical theory of social justice, has called 'status recognition' for historically 'misrecognised' social groups that suffer from 'status subordination'.²⁰ For Fraser, the concept of misrecognition is more holistic. It is not just about having one's self-image being distorted by others who do not see the other as an equal such that, in a Hegelian sense, there is no mutual recognition.²¹ It is much more. Fraser explains misrecognition in this way:

Misrecognition, accordingly, does not mean the depreciation and deformation of group identity, but social subordination – in the sense of being prevented from participating as a peer in social life. To redress this injustice still requires a politics of recognition, but in the 'status model' this is no longer reduced to a question of identity: rather, it means a politics aimed at overcoming subordination by establishing the misrecognised party as a full member of society, capable of participating on a par with the rest.²²

Fraser's point is that to be misrecognised is not simply to be frowned upon or devalued by the attitudes, beliefs or misrepresentations of others. In a more holistic sense, misrecognition is when someone is denied the status of a full partner in socio-economic interactions as a result of institutionalised patterns that stem from social, economic and cultural values. Therefore, repairing the historical exclusion and marginalisation of a social group such as disabled people is not merely a case of responding to a free-standing cultural harm for the reason that such exclusion and marginalisation implicate a larger socio-economic framework.²³ Rather, it also requires eradicating patterns of 'status subordination' of disabled people that arise from 'parity-impeding' structural inequality.²⁴ Ultimately, the achievement of social justice requires redistribution of

18 CRPD, arts 24(2)(d) & (e).

19 N Fraser 'Rethinking recognition' (2000) 3 *New Left Review* 110.

20 As above, 113-116.

21 The basic premise in the Hegelian model of identity is that identity is constructed dialogically through interaction with others. Where each subject sees the other as an equal but also separate from the other, there is mutual recognition. However, where one is not seen as an equal by the other, such as where one is seen as inferior there is 'misrecognition'. With misrecognition, the effects are that the relationship of the parties to each other is distorted and the identity of the party labelled inferior is injured: Fraser (n 19 above) 109-110; GWF Hegel *Phenomenology of Spirit* (1977) 104-109.

22 Fraser (n 19 above) 113.

23 As above.

24 Fraser (n 19 above) 114.

resources, so as to enable an erstwhile disabled social group. Thus, over and above seeking to achieve 'cultural recognition' of disabled people, a responsive theory of equality should also seek to achieve socio-economic recognition.²⁵ In a juridical sense, Fraser can be understood as appealing to a notion of positive rights which is built around rights as capabilities and enablement. It is a notion that ultimately coalesces around the imperative of justiciable socio-economic rights.

As part of achieving economic recognition, article 24 transcends the equal treatment or formal equality model so as to embrace substantive equality. Responsiveness to material deprivation through redistributive justice serves to recognise the vicious circle between poverty and disability.²⁶ Redistribution through substantive equality addresses systemic inequality which would otherwise be left untouched by mere prohibition of invidious discrimination. Redistribution through socio-economic rights is an affirmation of the link between equality and human dignity.²⁷ Ultimately, article 24 seeks to repair, more holistically, the historical marginalisation and exclusion of disabled learners from not just the education system but also other socio-economic systems that have been constructed on the assumption of able-bodiedness.²⁸ It does so by putting the primary economic cost of accommodation on society rather than on disabled learners and their families or carers.

The accent in the CRPD, including in article 24, on the duty of the state to accommodate human diversity by, *inter alia*, providing individualised support, is the Convention's greatest transformative potential. The duty to accommodate difference underscores a paradigm shift from an historically dominant understanding of disability as a bio-statistical aberration that resides primarily in the individual.²⁹ According to this approach, which has been described as the 'medical model' or the 'individual impairment model', physical or mental impairment is the reason why the affected individual cannot participate equally in society.³⁰ Individualising disability as intrinsic pathology in this way serves to entrench the status quo. It gives normative and ontological validity to binary categories in which one part of humanity is normal but the other is abnormal. In this way, the state is absolved from adjusting existing socio-economic arrangements to accommodate disabled people. Disabled people, including disabled learners, are required to first fit into existing socio-economic arrangements before they can claim equality.

25 Fraser (n 19 above) 116-120.

26 Preamble to CRPD, para (t); E Stone 'A complicated struggle: Disability, survival and social change in the majority world' in M Priestley (ed) *Disability and the life course: Global perspectives* (2001) 50-52.

27 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 51-54.

28 Kanter (n 5 above) 290.

29 JE Bickenbach *Physical disability and social policy* (1993) 61-68.

30 M Oliver *Understanding disability: From theory to practice* (1996) 30-33.

The normative construction of disability under the CRPD is different. It is a ringing rejection of conceiving disability as individual impairment and equality as formal equality. Though in its partial definitional construction of disability,³¹ the CRPD acknowledges the link between bodily impairment and disability, at the same time, it signals a departure from the reductionist lens of the 'medical model' or the 'individual impairment model' of disability that conflates functional impairment with intrinsic limitations.³² Instead, it sees disability through the lens of a 'human rights model' of disability whose ultimate focus is not on identifying intrinsic bodily impairment but on the interaction between impairment and the environment and overcoming systemic barriers in order to accommodate diverse (dis)abilities.³³ The CRPD's focus is on understanding disability as a social phenomenon of restricted or denied socio-economic participation that has an explanation beyond intrinsic bodily impairment. The larger explanation is that disability is the outcome of the manner in which the prevailing socio-economic environment intersects with the body. In this sense, the CRPD subscribes to the 'social model' of disability.³⁴ It has ushered into mainstream human rights discourse a transformative epistemology of disability that is built around inclusive equality that is aimed at overcoming status subordination.

Article 24 gives concrete expression to the recognition of human diversity by enjoining the state to provide, at all levels, an 'inclusive education' system that is aimed at achieving the 'full development of human potential and sense of dignity and self-worth'.³⁵ Inclusive education must be directed at 'strengthening of respect for human rights, fundamental freedoms and human diversity'.³⁶ It seeks to facilitate disabled persons in the development 'of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential'.³⁷ Inclusive education should also be directed at enabling disabled people to participate equally and effectively in society.³⁸ If it is to achieve social justice, it should have the potential to yield an education system in which there is 'open access, participatory parity and socio-economic equality' for all learners.³⁹

31 Art 1 of the CRPD provides an inclusive rather than exhaustive definition of disability. It says: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

32 Kanter (n 5 above) 291.

33 As above.

34 On the 'social model' and on critique of the 'medical model' or the 'individual impairment model', see generally: V Finkelstein *Attitudes and disabled people: Issues for discussion* (1980); M Oliver *The politics of disablement* (1990); Oliver (n 30 above); S Linton *Claiming disability: Knowledge and identity* (1998).

35 CRPD, art 24(1)(a).

36 As above.

37 CRPD, art 24(1)(b).

38 CRPD, art 24(1)(c).

39 N Fraser *Justice interruptus: Critical reflections on the 'postsocialist' condition* (1997) 77.

The duty to accommodate disability that is articulated in article 24 makes it abundantly clear that the CRPD departs from a 'one size fits all' school structure and architectural environment, curriculum, and pedagogical theory and practice. To fulfil the right to inclusive education, states must provide disabled learners the support they need to attain 'effective education' but through the 'general education system'.⁴⁰ The provision of additional human, financial, and physical resources is crucial to discharging the duty to provide accommodation and ensuring parity in participation among diverse learners in settings, such as the African region, where hitherto disabled learners have largely been marginalised.⁴¹ The goal should be the provision of education on an equal basis with others.⁴² Under the Convention, inclusive education includes learning about 'life and social development skills'.⁴³ Facilitating learning through Braille, sign language, augmentative learning and other alternative modes of learning are part of designing and implementing a curriculum that incorporates a universal design for learning to address a wide range of learning needs.⁴⁴ Inclusive education, under the Convention, requires the design and implementation of a curriculum which takes difference into account within a pedagogy which goes beyond imparting scholastic knowledge as to also embrace non-scholastic knowledge and skills, depending on the needs and capacities of the individual learner.

3 Decision of Western Cape High Court in *Western Cape Forum for Intellectual Disability*

The purpose of this section and the next, as alluded to in the introduction of this article, is to appraise whether the South African education system is in compliance with its states obligations under article 24 of the CRPD. Using the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability*, the focus of sections three and four is on examining the extent to which the learning needs of learners who have intellectual disabilities are accommodated. Section three outlines the facts and the decision while section 4 focuses on analysis.

40 CRPD, art 24(2)(a).

41 T Chataika *et al* 'Access to education in Africa: Responding to the United Nations Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability and Society* 385-393; African Child Policy Forum *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011).

42 CRPD, art 24(2)(b).

43 CRPD, art 24(3).

44 CRPD, art 24(3)(a); EM Dalton *et al* 'The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning' (2012) 1 *African Journal of Disability*, available at: <http://doi.org/10.4102/ajod.v1i1.13> (accessed 25 March 2013).

3.1 The facts

Section 29(1) of the South African Constitution⁴⁵ guarantees everyone a right 'to a basic education, including adult basic education'. Purporting to discharge its constitutional duty under section 29(1) of the Constitution, the state, through the South African Department of Education, established 'full-service or mainstream schools' to cater for the needs of children who were not classified as having intellectual disabilities. It also established 'special schools' to cater for the learning needs of disabled children who were classified as having 'moderate to mild intellectual disabilities'. These were children with an intelligent quotient (IQ) of 30-70. However, the state did not establish any schools for children with 'severe and profound intellectual disabilities'. These were children with an IQ of 20-25 and below 20, respectively. Western Cape Forum for Intellectual Disability (the Forum), a non-governmental organisation which provided care for children with intellectual disabilities in the Western Cape, one of South Africa's nine provinces, brought an application before the Western Cape High Court challenging the constitutionality of state education policy in respect of the non-provision of schools as well as unfavourable financial support for children who were classified as having 'severe or profound intellectual disabilities'.

To determine which of the children with intellectual disabilities would be admitted to special schools, the Department of Education had developed and implemented a screening instrument called the 'National Strategy on Screening, Identification, Assessment and Support' (the NSIAS Strategy).⁴⁶ Under the NSIAS Strategy, children who were assessed as eligible for admission comprised children who fell within 'Levels 4 and 5' learning needs. They were considered as in need of moderate to high levels of support. However, children who fell outside Levels 4 and 5 were excluded. These were children with severe or profound intellectual disabilities.⁴⁷

The Department of Education's view was that no amount of education was beneficial for children with severe or profound intellectual disabilities.⁴⁸ Such children would have to principally depend on their parents for acquiring life skills but not the education system.⁴⁹ The most that the Department could say about the provision of schools for children with severe and profound intellectual disabilities was that 'they *may* be able to access support' at special schools at some point in the future but without indicating the form that such support might take, the extent of the support,

45 Constitution of the Republic of South Africa, 1996.

46 *Western Cape Forum for Intellectual Disability* (n 7 above) para 11.

47 Paras 11-19.

48 Paras 3.9, 17.

49 Para 17.

where the support would be rendered or when precisely it would be rendered.⁵⁰

Through the Department of Education, the state directly funded the education of children admitted to mainstream schools and special schools, with children in special schools receiving a higher amount per head. However, there was no direct funding made for the education of children with severe or profound disabilities. For these children, the state only made indirect funding of an amount *less* than the funding for children in mainstream schools and special schools. Also, this indirect funding, which the state described as a 'subsidy', was not made through the Department of Education, as was the case with the other children, but through the Department of Health. The subsidy went to organisations such as the Forum which had voluntarily established 'Special Care Centres'. But even the Special Care Centres could not meet the demand for places. In the Western Cape, the Forum could only cater for 1 000 children, leaving 500 children with severe or profound intellectual disabilities without access to a 'special care' facility.⁵¹

Against this backdrop, the Forum argued that the state was in breach of its constitutional obligations towards children with severe or profound disabilities because it had not provided them with schools. Furthermore, it argued that state financial support for children with severe or profound intellectual disabilities was not only inadequate, but also compared unfavourably with support given to their counterparts. Over and above relying on section 29 of the Constitution, which, *inter alia*, guarantees the right to basic education, the Forum relied on the following fundamental rights that are guaranteed by the Constitution: the right to equality and non-discrimination on the ground of disability (section 9); the right to human dignity (section 10); and the right of children to be protected from neglect and degradation (section 28).

3.2 State's defence of its education policy: *White Paper 6*

The state argued that it had taken reasonable measures to fulfil the constitutional rights to equality and basic education of disabled learners. It highlighted that its efforts had to be assessed in the light of the legacy of gross inequality in the apartheid system of education, the limited resources at its disposal, and competing socio-economic needs. It argued that it was impracticable for the state to meet vast education needs of disabled children all at once. Instead, it could only address the legacy of underdevelopment and inequitable access to education resources incrementally. To show its commitment towards fulfilling its constitutional obligation, the state explained that it was in the process of

50 Para 18 (emphasis added).

51 Para 48.

implementing *White Paper 6*.⁵² *White Paper 6* was developed in 2001 as the national Department of Education's flagship policy on inclusive education.

During apartheid, the education system had not only been discriminatory on the ground of race. The education system had also been discriminatory on the grounds of disability, socio-economic class and geographical location, with learners who were black, poor and rural-based faring the worst.⁵³ Only 20 per cent of disabled learners had access to special schools.⁵⁴ The policy articulated in *White Paper 6* sought to transform this unenviable legacy by accommodating the full and diverse learning needs of disabled learners, including learners with severe disabilities so that such learners 'could develop and extend their potential and participate as equal members of society'.⁵⁵ To reconcile with scarcity of resources, *White Paper 6* proposed a 20-year time-frame that was divided into short-term, medium-term and long-term goals as the mechanism for progressively implementing inclusive education. Education would be provided through the medium of 'full-service' and 'special schools'.⁵⁶ Full-service schools would be 'mainstream' schools catering for a wider range of learning needs, including the needs of learners with 'mild to moderate' disabilities who require 'low intensive support'.⁵⁷ Learners with severe and profound disabilities who require 'intense levels of support' would be catered for in special schools.⁵⁸

3.3 The decision

The court found that the state had not taken reasonable measures to meet the learning needs of severely and profoundly intellectually disabled children. More specifically, it found that the state policy in question treated children with severe or profound intellectual disabilities differently in the provision of schools and in the funding of education as to constitute unfair discrimination contrary to section 9(3) as well as a breach of the right to basic education contrary to section 29(1) of the Constitution. The court also found that the policy, necessarily, violated the children's right to human dignity contrary to section 10 of the Constitution as the state education policy had the effect of impairing the dignity of such children as well as stigmatising them.⁵⁹ Furthermore, the court held that, contrary to section 28 of the Constitution which guarantees children's rights, the state

52 Department of Education *Education White Paper 6: Special needs education: Building an inclusive education and training system* (2001) (hereinafter referred to as *White Paper 6*).

53 As above, 9.

54 As above.

55 As above, 5.

56 As above, 42-43.

57 As above, 22.

58 As above, 22 and 24.

59 *Western Cape Forum for Intellectual Disability* (n 7 above) para 46.

had neglected the children through failure to provide an education that imparts knowledge and skills.⁶⁰

While the court concluded that all the four constitutional rights relied upon by the applicant, namely, the right to equality, the right to human dignity, the right of children to be protected from neglect and degradation, and the right to education had been violated, it reached its decision principally by applying the right to equality and the right to basic education. To repair the constitutional violations, the court ordered the state to provide basic education of an adequate quality to children with severe and profound intellectual disabilities through making adequate funds and facilities available, including training and hiring of educators and provision of transport to educational facilities. The order was framed as a structural interdict so as to be responsive to individual violations as well as systemic constitutional violations.⁶¹ The state was ordered to report to the court within a year, detailing the steps it had taken to implement the order. In this way, the order sought to ensure a level of supervision by the court in respect of state compliance with the remedy.

In determining the equality and non-discrimination issue under section 9 of the Constitution, the court invoked the test for determining discrimination that had been developed by the South African Constitutional Court in *Harksen v Lane NO & Others*.⁶² In accordance with this test, the court asked the question whether the differentiation between children with severe and profound intellectual disabilities and those without such disabilities had a rational connection to a government purpose and ultimately whether it constituted unfair discrimination.⁶³ It concluded that there was no rational connection, and for this reason, state policy constituted unfair discrimination.⁶⁴ The court's reasoning was that imposing the burden of the scarcity of financial resources only on children with severe and profound intellectual disabilities could not be said to be rational.⁶⁵ But even if there was a rational connection, the court concluded that the policy was neither reasonable nor justifiable and could not, therefore, be saved by section 36 – the general limitation clause of the Constitution.⁶⁶

Drawing mainly from the leading decision of the South African Constitutional Court on the interpretation and application of socio-economic rights – *Government of the Republic of South Africa & Others v*

60 As above.

61 As above, paras 50-52; C Mbazira 'From ambivalence to certainty: Norms and principles for the structural Interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 1.

62 *Western Cape Forum for Intellectual Disability* (n 7 above) para 26; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

63 As above.

64 *Western Cape Forum for Intellectual Disability* (n 7 above) para 26.

65 As above.

66 As above, para 42.

*Grootboom & Others*⁶⁷ – the court was of the view that it could not be said that state education policy which had failed to respond to the needs of learners who were the most vulnerable and had the greatest need, was reasonable, not least because the state had not provided evidence that meeting their needs was unaffordable. The cost of providing education to the small number of children affected was, according to the court: ‘small in relation to the overall budget’.⁶⁸ The state had failed to justify why the budgetary shortfall that ought to be shared by all learners should fall only on children with severe or profound intellectual disabilities.⁶⁹

In reaching its conclusion, the court also took into cognisance that the right to education of disabled children was more than just a fundamental right under domestic law. It was also an international human right which is recognised under United Nations and regional treaties, including under the CRPD that South Africa has ratified.⁷⁰ While conceding that the right to education of disabled children could not be fulfilled all at once, the court could not agree with state policy that excluded children from admission to schools or gave them a lesser priority when allocating financial resources on the ground that children with severe or profound intellectual disabilities were ineducable, not least because such a policy detracted from South Africa’s international obligations.⁷¹

The court also drew support for its conclusion from persuasive foreign jurisprudence.⁷² It accepted the applicant’s argument that when determining whether the state has complied with its obligation to provide education for intellectually disabled children, education should be conceived in more holistic terms.⁷³ The court agreed with the human rights proposition that education for disabled learners should be conceived in terms which are broader than merely achieving scholastic objectives.⁷⁴ Education for intellectually disabled learners should also be aimed at developing, to the fullest extent, human potential, human personality, and a sense of dignity and self-worth of individual learners.⁷⁵

67 As above, paras 43-45; *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), specifically paras 43-44.

68 *Western Cape Forum for Intellectual Disability* (n 7) para 48.

69 As above, para 29.

70 As above, paras 20-23.

71 As above.

72 As above, para 25. The court cited with approval an Irish decision: *O’Donoghue v Minister for Health* [1993] IEHC2, [1996] 2 IR 20 (27th May, 1993).

73 *Western Cape Forum for Intellectual Disability* (n 7 above) para 19.

74 Implicitly acknowledging the holistic nature of the learning needs of children with intellectual disabilities, the court referred to, paras 20-23: Art 23 of the Convention on the Rights of the Child; Arts 11(1), 11(2)(a) and 13 of the African Charter on the Rights and Welfare of the Child; Art 15 of the Revised European Social Charter; the Preamble to, and art 24 of CRPD.

75 *Western Cape Forum for Intellectual Disability* (n 7 above) paras 19-25.

4 Appraising South Africa's approach to inclusive education

On the one hand, *Western Cape Forum for Intellectual Disability* shows a jurisdiction which, mainly as a result of overarching post-apartheid transformation, has developed an admirable stock of equality jurisprudence and policies that are well placed to promote inclusive education and complement article 24 of the CRPD at a domestic level. On the other hand, the facts that gave rise to the case show a jurisdiction that, at an implementation level, has paradoxically succeeded in perpetuating the apartheidisation of inclusive education. *Western Cape Forum for Intellectual Disability* demonstrates the juxtaposition of equality jurisprudence that is enabling with disabling discourses of inclusive education.

4.1 Indigenous substantive equality jurisprudence

The conclusion by the Western Cape High Court that the state had violated the fundamental rights of children with severe and profound disabilities was inevitable. The conduct of the state in denying these children admission to school as well as equitable funding for education was incompatible with the imperatives of the equality and socio-economic rights jurisprudence that South Africa has developed since 1994. The South African Constitution can be understood through a metaphor of a bridge.⁷⁶ The Constitution serves as a conduit facilitating passage from a past where the state played a lasting role in spawning and sustaining grossly unequal citizenship to a future where the goal is the achievement of inclusive citizenship. Equality is the Constitution's key transformative value and right in the attainment of inclusive citizenship.⁷⁷

Equality is a pervasive value and right under the Constitution. It finds its most direct articulation in section 9. The normative content of the right to equality under section 9 and the extent to which it complements the human right to inclusive education under article 24 of the Convention can be gleaned implicitly from the South African Constitutional Court's equality jurisprudence. The Constitutional Court has underlined in several cases that section 9 contemplates substantive equality and not merely

76 E Mureinik 'Bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

77 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 249-250; D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 315; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155 162.

formal equality.⁷⁸ The Court's exacting approach to the determination of unfair discrimination is particularly instructive of the Constitutional Court's approach to substantive equality. Sections 9(3) and (4) outlaw unfair discrimination. Section 9 takes cognisance of the historical exclusion of disabled people by listing 'disability' as one of the grounds protected against unfair discrimination. Though it has borrowed from other jurisdictions, the Constitutional Court has developed its own practical test for determining discrimination. In a series of cases but most notably in *Harksen*,⁷⁹ the Court enunciated the test for unfair discrimination.

The *Harksen v Lane* test preceded the CRPD and was prompted by South Africa's own historical circumstances. Notwithstanding, it is responsive to disability-related discrimination in a manner that resonates with the CRPD's cardinal purpose of ensuring the full and equal enjoyment of all human rights by disabled persons and promoting respect for their inherent dignity.⁸⁰ The *Harksen v Lane* test demonstrates a remarkable convergence between the vision of equality of the South African Constitution and that of the CRPD.

4.1.1 *The Harksen v Lane test: The framework*

The *Harksen v Lane* test entails asking three main questions. These are: (1) whether there is a rational and legitimate reason for the policy, law or practice that differentiates between people or groups of people such as the differentiation that was in issue in the policy adopted by the state in *Western Cape Forum for Intellectual Disability*; (2) whether the differentiation amounts to unfair discrimination; and (3) if the discrimination amounts to unfair discrimination, whether it can be justified under section 36 of the Constitution – the limitation clause.

Though all the three stages of the *Harksen v Lane* test serve important juridical purposes, nonetheless, it is the second stage that is crucial. It is at this stage that a convergence between the South African approach to equality and that of the CRPD is most apparent. The approach that the Constitutional Court has developed to interrogate the second stage has the

78 Eg *President of the Republic of South Africa & Another v Hugo* 1997 (6) BCLR 708 (CC) para 41; *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) at 1565H–1566A; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) para 46; *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC) para 62; and *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 26.

79 *Harksen* (n 62 above). The other cases in which the Constitutional Court has developed its test for determining unfair discrimination include: *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC); *Prinsloo v Van der Linde & Another* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and Another v Hugo* (n 78 above); *Larbi-Odam & Others v MEC for Education (North-West Province) & Another* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* (n 78 above).

80 CRPD, art 1.

achievement substantive equality and human dignity as its ultimate goal. At this stage, the court focuses primarily on eliciting the ‘impact’ of the discrimination on the complainant and the social group(s) to which the complainant belongs. In determining impact, the factors taken into account include: (a) the position of the complainant in society and whether the complainant belongs to a group that has suffered from patterns of disadvantage in the past; (b) the nature of the provision or power and the purpose it seeks to achieve, including considering whether the provision or power is intended to achieve a worthy and important social goal; and (c) the extent to which the provision or power had affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious manner.⁸¹ It must be stressed that these factors serve as judicial guidance but without constituting a closed list.⁸² Furthermore, no factor is determinative on its own. Rather, it is the cumulative effect of the factors that steers the court towards a particular determination.⁸³

The focus on impact requires the judicial inquiry to depart from the abstracted universalism of formal equality and instead to focus on the concretised universalism of substantive equality.⁸⁴ In this way, the *Harksen v Lane* approach aspires towards overcoming ‘status subordination’ in the way espoused by Fraser.⁸⁵ It is a situation-sensitive juridical approach that focuses on lives as lived and injuries as experienced by different groups in our society.⁸⁶ The approach necessarily entails integrating the standpoint and experience of those at the receiving end of exclusion and marginalisation.⁸⁷ Focusing on impact requires judicial sensitivity to social group difference which is tied to social hierarchies that exclude and disadvantage the complainant or members of the social group to which the complainant belongs. It signals a constitutional commitment to remedying systemic subordination and disadvantage in order to achieve a type of substantive equality which integrates human dignity. In focusing on eliciting the impact of the act or norm in question in a larger social context as the crucial factor in determining unfair discrimination, the South African Constitutional Court has followed the approach of the Supreme Court of Canada.⁸⁸

81 *Harksen* (n 62 above) paras 51-53; JL Pretorius ‘Constitutional framework for equality in employment’ in JL Pretorius *et al* (eds) *Employment equity law* (2001) para 2.6.2.

82 *Harksen* (n 62 above) para 51; Pretorius (n 81 above) para 2.6.2.1.

83 *Harksen* (n 62 above) para 51; Pretorius (n 81 above) para 2.6.2.1.

84 AC Scales ‘The emergence of feminist jurisprudence: An essay’ (1985-1986) 95 *Yale Law Journal* 1373 1387-1388.

85 Fraser (n 19 above); See the discussion in para two of this article.

86 *National Coalition for Gay and Lesbian Equality* (n 78 above) para 126.

87 As above.

88 A leading Canadian decision in this regard is *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 253 259; C Sheppard *Inclusive equality: The relational dimensions of systematic discrimination in Canada* (2010) 38.

In *President of the Republic of South Africa v Hugo*,⁸⁹ the Constitutional Court cast the objects of the equality clause not only in terms of eradicating unfair discrimination but also realising human dignity. It said:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.⁹⁰

The Constitutional Court has reiterated the centrality of human dignity in equality adjudication in several other cases.⁹¹ In the context of equality adjudication, human dignity has a distinct orientation and role. Though in other contexts, human dignity can serve multifarious purposes, including the Kantian injunction of treating a person as a person and not as a means to an end,⁹² in the South African equality context it has come to play a central and integrated role in the determination of unfair discrimination. Respect for human dignity serves equality by protecting social groups and individuals belonging to protected social groups from being treated as members of a lower caste.⁹³ It puts an end to notions of hierarchical citizenship or premiere citizenship for some groups that were assiduously and zealously cultivated under colonialism and apartheid.⁹⁴

Human dignity is non-hierarchical. In the South African context, as, indeed, under the CRPD, human dignity cannot depend on functional capacities. Achieving, as a prerequisite, a certain prescribed baseline of functional capacity cannot be what entitles a disabled person to have an equal claim on resources but the fact of being human alone.⁹⁵ In this respect, human dignity brings to substantive equality an intrinsically egalitarian human essence which is absent in other transformative discourses such as the genus of 'capabilities approach' that has been developed by Martha Nussbaum, for example.⁹⁶

89 n 78 above.

90 Para 41.

91 See for example: *Prinsloo* (n 79 above) paras 31-33; *Harksen* (note 62 above) para 50; *Pretoria City Council* (n 78 above) para 81; *National Coalition for Gay & Lesbian Equality* (n 78 above) paras 120-129; *Minister of Finance* (n 78 above) para 116.

92 LWH Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) 63 *Heidelberg Journal of International Law* 537 540-542.

93 *National Coalition for Gay and Lesbian Equality* (n 78 above) para 129.

94 A Chaskalson 'The Third Bram Fischer Lecture: Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 193 199.

95 MA Stein 'Disability human rights' (2007) 95 *California Law Review* 75 77 106-110.

96 MC Nussbaum *Women and human development: The capabilities approach* (2001). Nussbaum's capabilities approach can be contrasted with that of Amartya Sen that is not organised around hierarchical human essences: A Sen *Development as Freedom* (1999) 74-110.

Nussbaum's capabilities approach has a transformative trajectory which has many parallels with substantive equality. Like substantive equality, it is an alternative philosophical approach and standard for thinking about inequality and eradicating disadvantage and marginalisation so as to create conditions that are conducive to parity in socio-economic participation and, ultimately, freedom and full realisation of human rights. The capabilities approach and substantive equality both give rise to normative duties and corresponding rights. Both formulate claims by implicating the state as having a primary responsibility to eradicate systemic inequalities and level the playing field through constructing new notions of entitlement among disadvantaged groups and individuals and socio-economic redistribution. In these respects, Nussbaum's capabilities approach and substantive equality can be said to be equally committed to human freedom and emancipation as to both find confluence in a social model of disability.⁹⁷ However, the one important difference the two emancipatory philosophies have is that Nussbaum's 'capabilities approach', unlike its substantive equality counterpart, admits hierarchical human essences that are based on 'essential' functional capabilities.⁹⁸

The main misgiving regarding Nussbaum's notion essential capabilities is that it is not immediately open to holistic inclusiveness and participatory democracy.⁹⁹ It raises profound questions, including questions about: who does the listing; what goes into the list of essential capabilities and what is left out; and whether the inclusionary criteria do not marginalise groups which have been historically culturally misrecognised such as persons with impairments that impact of cognitive ability and practical reasoning.¹⁰⁰ Ultimately, the discomfiture with Nussbaum central capabilities is about whether they do not inadvertently resurrect the notion of 'normal' bodily capabilities and thus discriminate against disabled people.¹⁰¹

Michael Stein has argued that Nussbaum's capabilities approach is under-inclusive in that it is ultimately tethered to notions of 'normal' bodily capacities such that it excludes, for example, those who have mental disabilities that prevent them from achieving 'normal' mental

97 C Baylies 'Disability and the notion of human development: Questions of rights and capabilities' (2002) 17 *Disability & Society* 725.

98 Stein (n 95 above) 77 98-110.

99 The list that Nussbaum has advanced can be summarised as comprising 10 central human capabilities, namely: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) concern for other species; (9) play; and (10) control over one's environment. It is fair to point out that Nussbaum does not regard the list as exhaustive or incontestable. In Nussbaum's own words, the list is not a 'complete theory of justice'. Rather, it is intended as a basis for determining a decent social minimum which is open to debate: Nussbaum (n 96 above) 74-80.

100 Baylies (n 97 above) 733-734.

101 As above.

'functionings'.¹⁰² Nussbaum's conceptual framework of beginning with a prescribed list of 'central capabilities' sits uneasily with the heterogeneous public sphere of substantive equality in which capabilities have no organic centre. Though Nussbaum's approach is useful in providing a philosophical basis of constitutional principles that ought to guide the state in discharging its responsibilities towards vulnerable groups and individuals, in the end, it is an incomplete guide, precisely because it is under-inclusive. Indeed, Nussbaum's approach is vulnerable to criticism that it is reductionist and insufficiently sensitive to human difference and freedom.¹⁰³

4.1.2 *The Harksen v Lane test and the duty to accommodate*

The duty to accommodate a social group or individual that is excluded or marginalised by prevailing socio-economic arrangements should be understood as part of how South African equality jurisprudence constructs inclusive citizenship. Under the CRPD, the duty to take all appropriate steps to ensure that reasonable accommodation is provided is a general equality and non-discrimination principle.¹⁰⁴ Furthermore, it is also a principle that applies specifically to each of the socio-economic spheres that are addressed by the CPRD, including education.¹⁰⁵ Though not expressly articulated in the *Harksen v Lane* test, reasonable accommodation is, nonetheless, a principle which is implied.¹⁰⁶ The duty to provide reasonable accommodation is integral to the determination of whether there has been unfair discrimination and whether such discrimination can be justified. It is a principle for giving effect to substantive equality by recognising that in order to treat people equally, it may be necessary to treat them differently by accommodating difference. As a non-discrimination principle, the duty to accommodate under the Constitution obtains for all protected grounds and not just disability.

In *MEC for Education: KwaZulu-Natal & Others v Pillay*¹⁰⁷ the Constitutional Court posited the duty to provide reasonable accommodation as part of the achievement of substantive equality under the Constitution. It said that interpreting equality requires equal concern and equal respect which includes treating people differently, if need be, in order to achieve equality rather than identical treatment.¹⁰⁸ Chief Justice Langa, who delivered the leading judgment in *Pillay*, said that at the core

102 Stein (n 95 above) 98-110.

103 K van Marle "The capabilities approach", "The imaginary domain" and "Asymmetrical reciprocity": Feminist perspectives on equality and justice' (2003) 11 *Feminist Legal Studies* 255 272-273; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 8.

104 CRPD, art 5(3).

105 CRPD, art 24(2)(c).

106 CG Ngwenya 'Reasonable accommodation' in Pretorius *et al* (eds) (n 81 above) para 7.2.

107 2008 (2) BCLR 99 (CC).

108 As above, para 103; *National Coalition for Gay and Lesbian Equality* (n 78 above) para 132.

of the principle of reasonable accommodation is 'the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.¹⁰⁹ According to the Court, reasonable accommodation ensures that 'we do not relegate people to the margins of society because they do not or cannot conform to certain social norms'.¹¹⁰

A society which values dignity, equality, and freedom, as does the society envisaged by the South African Constitution, must, therefore, require people to act positively to accommodate diversity.¹¹¹ Against this backdrop it is easy to see that the state was apt to fail in *Western Cape Forum for Intellectual Disability*. It is easy to appreciate why the education policy that was in issue was bound to offend the constitutional guarantee on both equality and human dignity. The policy to exclude children from admission to schools as well as to allocate them the least financial resources on the ground that they did not have the same capacity, or even the need, to learn as their counterparts, amounted to treating them as second-class citizens in a political order in which, like in apartheid times, there is legitimised hierarchical social ranking that serves the interests of a dominant group. It had the effect of perpetuating disadvantage and the scarring of a sense of dignity and self-worth that is associated with membership of a particular social group.

Use of the NSIAS Strategy to determine who was included in, or excluded from, school rather than to identify the learning needs, meant that state policy was insisting on identical treatment and, thus, detracting from substantive equality. Children with severe or profound intellectual disabilities were set to fail the criteria laid down by the NSIAS Strategy. In *President of the Republic of South Africa v Hugo* the Constitutional Court highlighted the importance of transcending a sameness approach when it said:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not be necessarily unfair in a different context.¹¹²

109 *Pillay* (n 107 above) para 73.

110 As above.

111 Para 75.

112 n 78 above para 41.

In *Western Cape Forum for Intellectual Disability*, state policy did not meet the requirements of substantive equality because it insisted on identical treatment rather than a learner-centred approach. The determination of substantive equality is not an abstract consideration but rather a concrete consideration of the lived experience of the individual and the protected group(s) to which the individual belongs.¹¹³ A blind commitment to sameness of persons, as would be required by formal equality, serves to hide rather than reveal structures of privilege and oppression and their relationship with specific social groups. Social groups do not come to the substantive equality table amorphous, behind a veil of ignorance and stripped of the particularities of their social identities and histories of oppression and marginalisation. Instead they come with their historical disadvantages and vulnerabilities.

The NSIAS Strategy served to universalise the learning capacities of certain groups by treating as an aberration the learning capacities of other groups. In order to be admitted to school or have equal claim on educational resources, children with severe and profound intellectual disabilities were in practice being asked to first become like their counterparts. This is something that was impossible for them to achieve. Put differently, state education policy was trapped, in part, in formal equality. The policy did not have the capacity to treat children with severe and profound intellectual disabilities with equal concern and equal respect. Rather than remedy structural inequality, state education policy in *Western Cape Forum for Intellectual Disability* had the effect of freezing the status quo of the historical exclusion of disabled people from the education system. It had the effect of accentuating rather than ameliorating marginalisation and disadvantage.

4.2 The right to education and South African socio-economic rights jurisprudence

Like the CRPD, the South African Constitution recognises socio-economic rights as justiciable rights. Section 29 of the Constitution, which guarantees the right to basic education, requires the state to, *inter alia*, expend resources within its available resources in fulfilment of the right it guarantees.¹¹⁴ It is part of a regime of other socio-economic rights that are designed to remedy material disadvantage which would otherwise undermine the realisation of substantive equality and human dignity.

¹¹³ *National Coalition for Gay and Lesbian Equality* (n 78 above) para 126.

¹¹⁴ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 9.

In *Khosa & Others v Minister of Social Development & Others*,¹¹⁵ the Constitutional Court explicitly drew a link between the socio-economic rights, equality and human dignity. The Court highlighted that when vindicating the rights of protected social groups under the Constitution, the determination of entitlement to a socio-economic right and the entitlements to equality and human dignity reinforce each other.¹¹⁶ The exclusion of a vulnerable protected group from access to a socio-economic right on the basis of a constitutionally protected associational characteristic such as disability has the capacity to found violations of socio-economic rights as well as equality and human dignity. Excluding a vulnerable group, such as children with severe and profound intellectual disabilities, from access to a socio-economic right is not only materially impoverishing but it also negates equal participation in education and has a 'strong stigmatising effect'.¹¹⁷

In post-apartheid South Africa, the rationale for socio-economic rights is set against a legacy of gross material deprivation of certain social groups. It will be recalled that one of the important findings in *White Paper 6* is that the provision of education to disabled learners was highly discriminatory leaving a sizeable proportion of learners without any access to schools.¹¹⁸ If the state were to omit meeting the needs of those that do not have the means to achieve a certain minimum level of survival or human development, the omission would serve to freeze the status quo and perpetuate structural inequality. It would render the promises of a Constitution merely vacuous, especially for historically marginalised and disadvantaged groups such as disabled people. Disabled people are over-represented in the indices of socio-economic exclusion, including exclusion from education, employment, and healthcare.¹¹⁹ Particularly in a country with an abiding legacy of racial and gender oppression, disability accentuates old inequalities and the vulnerability to poverty of historically marginalised groups.¹²⁰

In the leading case on the interpretation of socio-economic rights – *Grootboom*¹²¹ – the Constitutional Court emphasised that while the courts are not there to make budgetary decisions and allocate resources, as these are prerogatives of the executive, nonetheless, courts have a duty to inquire into the 'reasonableness' of policies and programmes that are aimed at discharging state obligations to fulfil socio-economic rights. Regardless of scarcity of resources, policies and programmes that are intended to fulfil

115 *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) BCLR 569 (CC).

116 Paras 40-43.

117 Para 74.

118 *White Paper 6* (n 52 above).

119 T Emmett 'Disability, poverty, gender and race' in B Watermeyer *et al* (eds) *Disability and social change: A South African agenda* (2006) 207-221; J Andrews *et al* 'Issues in disability assessment' in Watermeyer *et al* (eds) as above 245-247.

120 Emmet (n 119 above) 207-209.

121 *Grootboom* (n 67 above).

socio-economic rights must be reasonable not only in their conception but also in their implementation. In *Grootboom*, the Court emphasised that even a well intentioned programme will not pass constitutional muster if it lacks reasonableness.

According to the reasoning of the Constitutional Court in *Grootboom*, for a policy or programme to pass constitutional muster, it must, *inter alia*, cater for those in desperate need but within the ambit of available resources.¹²² It must not leave out a significant section of the community that is in need.¹²³ The state is not at liberty to ignore the needs of those who are in a crisis and in desperate need merely in order to make room for longer-term strategies. In *Western Cape Forum for Intellectual Disability*, it was not unreasonable to devise a twenty-year plan to meet the education needs of children with disabilities. This is because the education needs, especially need for schools, could not be met all at once. However, it was unreasonable to exclude children with severe and profound intellectual disabilities from school provision. It was also unreasonable to commit the least state resources to the education of such children. These were children, who ironically, had the greatest education needs. For these children, the best the state could muster was a vague promise that their education needs *might* be met at some point in the future.

4.3 Contradictions

White Paper 6 is trapped in a contradictory philosophy of inclusive education. On the one hand, it reflects commitment towards a social rather than an individual impairment model of disability.¹²⁴ It does not assume that barriers to learning primarily reside in the learner. The accent is not on 'mainstreaming' or 'integrating' disabled learners into a pre-existing education system.¹²⁵ Rather, the core of the policy is on accommodating disabilities in all the facets of the education system, including the curriculum and the built environment. The emphasis is on identifying and removing barriers to learning by designing the education system and environment with a view to fitting the needs of the learner, including training educators and providing assistive devices. Inclusion of disabled learners is conceived in terms of recognising and respecting diverse learning needs, recognising that all learners have learning needs, and providing support to enable maximum learning and participation in environments that do not segregate disabled learners from their counterparts. The distinction between 'full-service' and 'special schools' seems to be prompted primarily by an understanding that some learners

122 As above, para 44.

123 As above.

124 *White Paper 6* (n 52 above) 24; JE Bickenbach *et al* 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' (1999) 48 *Social Science & Medicine* 1173.

125 *White Paper 6* (n 52 above) 17.

may require more intensive support than others and that organisational arrangements may require separate facilities in order to facilitate the development of maximal learning.¹²⁶ The policy's intention is to maximise the realisation of the potential of disabled children rather than to segregate.

At the same time, *White Paper 6* shows a remarkable failure to discard old master dichotomies. While it professes to accept and recognise difference, it still reads the disabled body against an implicit normative ideal.¹²⁷ There is no evidence that *White Paper 6* has engaged at a deep level with the ontological integrity of intellectually disabled children so as to eschew frameworks that stereotype and marginalise them in the education sector. There is no evidence that the power of naming and normatively scripting difference has been interrogated and democratised with a view to constructing an education system that gives central importance to diversity and participatory democracy as to include disabled people and disabled learners socially, intellectually and culturally in the naming and scripting.¹²⁸ On closer analysis, implementation of *White Paper 6* confirms a failure to overcome exclusionary practices and oppressive relations of old.

Use of the NSIAS Strategy to regulate admission to special schools and exclude children with severe or profound intellectual disabilities is a clear indication of state thinking that is still trapped in an apartheidising discourse, and so is its use of funding policy to deny adequate assistance to such children. It shows the resilience of notions of 'special education' that coalesce around intellectual disability as defectiveness.¹²⁹ The NSIAS Strategy was organised around IQ tests as the 'objective' classificatory criteria. IQ tests come with a history and archaeology of being used as instruments for stigmatisation and social exclusion.¹³⁰ Historically, IQ tests have been used by governments that succumb to eugenic thinking.¹³¹ Though purporting to be an objective scientific calculus for measuring and classifying, ultimately, they cannot disguise the locus of the normative power of who is doing the classifying, under which norms, and for what purposes.¹³² In particular, when IQ tests are used as labelling instruments to facilitate excluding learners from the education system rather than identifying need, they serve no less a nefarious purpose as they have served eugenicists.

126 *White Paper 6* (n 52 above) 16 and 21.

127 C Soudien & J Baxen 'Disability and schooling in South Africa' in Watermeyer *et al* (eds) (n 119 above) 149-160.

128 Slee (n 9 above) 393; BB Bernstein *Pedagogy, symbolic control, and identity: Theory, research, critique* (1996) 6-7.

129 Slee & Allan (n 9 above) 174.

130 SJ Gould *The mismeasure of man* (1981) 155-157; S Dubow *Scientific racism in modern South Africa* (1995) 211-212.

131 As above.

132 Soudien & Baxen (n 127 above) 157-158.

5 Conclusion

Worldwide, state education authorities have tended to reduce inclusive education to a banality. They have shielded behind a 'benign commonality' of the vocabulary of inclusive education to give a veneer of inclusiveness.¹³³ However, on closer analysis, many national education systems continue to relate to inclusive education as 'special education' rather than education within the 'general system of education' as required by the CRPD. They continue to create spatial domains of learning and learners that distinguish between the mainstream and the periphery. Education systems professing to be inclusive have remained protective of the status quo of an education system that excludes rather than includes learners who are different from the mainstream. The CRPD does not require assimilation of disabled learners into the mainstream as that would merely serve to create 'islands in the mainstream'.¹³⁴ Rather, it requires treating disabled learners as part of the fabric of the mainstream through a school structure, pedagogy and curriculum that is responsive to the learning needs of all learners.¹³⁵

The achievement of inclusive equality in access to education requires unconditional recognition of previously excluded learners and not equivocal or token notions of inclusion that belie so many triumphant proclamations of inclusive education by national authorities, including South African education authorities.¹³⁶ Though the explanation for the continued apartheidisation of the education system even under the rubric of inclusive education can be explicated on failure to follow through policy or to commit resources, the more intractable reason is ideological. It is a result of lack of commonly shared normative and ontological epistemologies of the status of disabled learners. Some types of inclusive education draw impetus from educational philosophies that countenance status subordination. They continue to categorise learners through a binary system that affirms one set of learners as normal but invalidates another set as abnormal. Clearly, the inclusive values that underpin the CRPD are incompatible with the recognition of hierarchical difference. Article 24 refutes rather than affirms the place of binary hierarchies and master dichotomies in inclusive education. The inclusive education policy that was in issue in *Western Cape Forum for Intellectual Disability* failed both

133 Graham & Slee (n 9 above) 277.

134 S Cook & R Slee 'Struggling with the fabric of disablement: Picking up the threads of the law and education' in M Jones & LA Basser Marks (eds) *Disability, diversity and legal change (international studies in human rights)* (1999) 327-328.

135 CRPD, art 4(1)(c); A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2007) 34 *Syracuse Journal of International Law & Commerce* 563-592.

136 Soudien & Baxen (n 127 above) 149-163; Slee & Allan (n 9 above) 173; L Barton 'The politics of special education needs' in L Barton & M Oliver (eds) *Disability studies: Past, present and the future* (1997) 138; Graham (n 9 above) 3.

the domestic constitutional equality promise as well as that of the CRPD by inscribing hierarchical difference and entitlement among learners.

TOWARDS AN EFFECTIVE LITIGATION STRATEGY OF DISABILITY RIGHTS: THE ZAMBIA EXPERIENCE

*Likando Kalaluka**

Summary

This article seeks to come up with effective strategies for litigating disability rights in Zambia. In doing so, it outlines the international and national legal frameworks that govern the rights of persons with disabilities. It also highlights the legal and attitudinal challenges that affect disability rights litigation in Zambia and other African countries, within the realities of poverty and general under-development associated with most African countries. Thereafter, the article uses the best practices, both in terms of court or tribunal decisions and constitutional or statutory provisions, from a selected number of African countries to come up with a broader litigation strategy for disability rights. The article also draws inspiration from the provisions of the Convention on the Rights of Persons with Disabilities and the African Charter on Human and Peoples' Rights.

1 Introduction

This article examines how the Convention on the Rights of Persons with Disabilities¹ (CRPD) together with regional and national laws in Africa may shape litigation strategies for disability rights in Zambia. The adoption of the CRPD has triggered legislative reforms² in various countries. Increasingly, persons with disabilities are approaching courts at

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1 United Nations General Council Resolution 61/106 (2006).

2 T Degener & G Quinn 'A Survey of international, comparative and regional disability law reform' International Disability Law Symposium, Disability Right Education Defense Fund, California, USA http://dredf.org/international/degener_quinn.html (accessed 17 September 2013).

national, regional and international levels to secure the recognition and protection of their human rights.³ The peculiar circumstances existing in Zambia and across Africa bring to the fore a number of challenges which impact on disability rights litigation, including poverty, culture, stigma and the existing legal framework.

The CRPD recognises that the majority of persons with disabilities live in conditions of poverty.⁴ As such, they do not have the means to meet the legal and other attendant costs of litigation. Further, the lack of physical infrastructure such as accessible roads and buildings in Africa discourages persons with disabilities from moving from their homes and going to court for hearings.⁵

In Zambia, as in most African countries, persons with disabilities often suffer social exclusion and marginalisation arising from cultural prejudices and stigma that attach to their disabilities.⁶ Consequently, they are often denied the basic human rights that are available to non-disabled persons. In most African countries, the courts are generally viewed as institutions that favour those who can afford the cost of litigation and the protracted nature of court proceedings.⁷ Persons with disabilities consider the usually protracted litigation proceedings as merely exposing them to ridicule and scorn from members of their society. The technical nature of court proceedings discourages persons with disabilities from instituting court proceedings. In one Kenyan case,⁸ the High Court dismissed a claim for discrimination on the ground of disability because the non-discrimination clause of the Kenyan Bill of Rights⁹ did not expressly include disability as a prohibited ground. The court's reasoning was that while the statutory law¹⁰ prohibited discrimination on the basis of disability, the prohibition could not be constitutionally enforced as disability was not expressly listed in the Bill of Rights.

This article appraises the Zambian legal framework with a view to developing an effective litigation strategy for protecting disability rights. In order to capture the best practices, it draws from the experiences of selected

3 P Harpur 'Time to be heard: How advocates can use the Convention on the Rights of Persons with Disabilities to drive change' (2011) 45 *Valparaiso University Law Review* 1271-1275.

4 CRPD, para (t) of the Preamble.

5 M Mannak 'South Africa: The plight of South Africa's disabled youths' *Radio Netherlands Worldwide* 26 July 2012 <http://allafrica.com/stories/201207270270.html> (accessed 27 July 2012).

6 Interview with W Waliuya, Human rights and education Advisor, Africa Development Department at Power International (Lusaka, Zambia, June 2012).

7 S Gloppen 'Public interest litigation, social rights and social policy' Arusha Conference, 'New frontiers of social policy', 12-15 December 2005. See also R Bowd 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Institute for Security studies (Policy Brief no 13, October 2009).

8 *Duncan Otieno Waga v Attorney-General* [2013] eKLR.

9 Kenyan Constitution of 1969 as amended in 1997, arts 26-51, since repealed by Kenya's Constitution of 2010.

10 Kenyan Persons with Disabilities Act 14 of 2003.

African countries.¹¹ While the selected countries have diverse historical, cultural and legal backgrounds, nonetheless, they serve as jurisdictions from which comparative lessons can be drawn.

This article has six sections, including section one, the Introduction. Section two discusses the concept of disability rights litigation and the purposes it serves. The third section sets out the background of disability law in Zambia. It highlights the norms and values that influence how disability is perceived in Zambia. The section also explores the nature and extent of Zambia's obligations under regional and global treaties.

Section four discusses the challenges faced by persons with disabilities when seeking to litigate disability rights. Section five seeks to develop an effective litigation strategy for disability rights in Zambia drawing from the experiences of other countries. Section six is the conclusion.

2 Objects of disability rights litigation

2.1 Concept of disability rights litigation

This section will not attempt to come up with a universally accepted definition of disability rights litigation as the concept incorporates the term 'disability' which is evolving and culture-dependent.¹² However, for the purposes of this chapter, a working definition of 'disability rights litigation' will be given. The term 'disability rights litigation' refers to the entire process of prosecuting the rights of persons with disabilities before national or international courts or tribunals. This includes obtaining instructions to litigate, preparing briefs for trials, conducting trials and enforcing court decisions. Disability rights litigation emanates from society's failure to take appropriate measures to ensure that persons with disabilities are able to participate fully in society and to enjoy their fundamental human rights on an equal basis with others. Morris illustrates society's shortcomings which may actually lead to disability rights litigation as follows:

My impairment is the fact that I can't walk; my disability is the fact that the bus company only purchased inaccessible buses. Or, that my impairment is the fact that I can't speak; my disability is the fact that you won't take time and trouble to learn how to communicate with me.¹³

11 Botswana, Kenya, Malawi, Madagascar, Mozambique, South Africa and Zimbabwe.

12 R Traustadóttir 'Disability studies, the social model and legal developments' in O M Arnardóttir and G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 4.

13 J Morris 'Impairment and disability: Constructing an ethics of care that promotes human rights' (2001) 16 *Hypatia* 13.

Disability rights litigation also encompasses seeking to enforce the duty of reasonable accommodation¹⁴ by requiring the adoption of appropriate modifications and adjustments to ensure persons with disabilities enjoy or exercise all their human rights by persons with disabilities on an equal basis with others. The idea in disability rights litigation is not to ensure that persons with disabilities are treated equally with their non-disabled counterparts, but that necessary and appropriate measures and modifications should be undertaken so as to equalise opportunities for persons with disabilities to fully participate in society and to enjoy their rights.¹⁵ Therefore, disability rights litigation seeks to realise equality and non-discrimination in a way that achieves substantive equality as opposed to mere formal equality. The CRPD provides that specific measures taken to accelerate or achieve de facto equality shall not be deemed to be discriminatory.¹⁶

The CRPD therefore, requires both public and private individuals and entities to adopt positive measures so as to ensure the full participation in society and enjoyment of the fundamental rights on an equal basis with others. Disability rights litigation is intended to enforce such a requirement.

2.2 Access to justice

Access to justice is both the 'means' and an 'end' of disability rights litigation.¹⁷ It is a 'means' in that it is the vehicle which gives persons with disabilities an opportunity to enforce the protection of their fundamental human rights before an impartial and independent tribunal or court. On the other hand, access to justice is an 'end' where it is sought to avail individuals with the relevant procedures, institutions and processes that recognise, protect and enforce fundamental human rights.

The CRPD acknowledges the importance of access to justice by providing that state parties must ensure the effective access to justice for persons with disabilities on an equal basis with non-disabled persons.¹⁸ It further provides that there is a need for procedural and age-appropriate accommodation before, during and after court proceedings so as to facilitate the effective participation of persons with disabilities in the justice system.¹⁹ For there to be meaningful access to justice in Zambia, there is a need for measures to be put in place to ensure that persons with disabilities

14 CRPD, art 2.

15 T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments* (1995) 56.

16 CRPD, art 5.

17 JE Lord *et al* 'Human rights. Yes! Action and advocacy on the rights of persons without disabilities' Human Rights Education Series, Topic Book 6, University of Minnesota Human Rights Resource Centre, 2007.

18 CRPD, art 13.

19 As above.

are not hindered either by physical infrastructure or by a lack of accommodative procedures or devices, from participating in the justice system.

In the same vein, the African Charter on Human and Peoples' Rights²⁰ (ACHPR) recognises the importance of access to justice by providing that all persons have the right to have their causes or claims heard by a court of competent jurisdiction.²¹

2.3 Fighting stigma and prejudicial perceptions

The prevalence of stigma and the prejudicial perceptions of disability in Zambia cause persons with disabilities to grow up accepting marginalisation and exclusion from society as a necessary consequence of their disabilities.²² Exclusion from mainstream society means that the majority of persons with disabilities develop low self-esteem. As a result, persons with disabilities who suffer human rights abuses may not consider themselves as deserving the dignity and respect afforded to others. Ultimately, they fail to appreciate the need to have their fundamental human rights and freedoms fully recognised and respected.

Instituting disability rights litigation has the potential to bring to the open the many challenges persons with disabilities face. When judicial precedents are set, persons with disabilities become aware of their rights.²³ Further, when courts issue appropriate orders condemning discrimination, marginalisation and inaccessible buildings or roads, it encourages society to embrace persons with disabilities as persons with rights equal to others. In the process, stigma and prejudicial perceptions will gradually be replaced with societal norms and values that accept disability as human diversity, leading to the full recognition and inclusion of persons with disabilities in all sectors of society.

2.4 Setting up legal precedents

Securing legal precedents which are binding on lower courts is an important strategy. According to Waliuya, the Zambia Federation of Disability Organisations²⁴ (ZAFOD) came up with the Advancing Disability Equality Project²⁵ (ADEPt) with the primary aim of setting legal

20 African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 1982 entered into force on 21 October 1986 (ACHPR).

21 ACHPR, art 7(1).

22 Waliuya (n 6 above).

23 As above.

24 An umbrella body of CSOs dealing with awareness and promotion of disability rights in Zambia.

25 Advancing Disability Equality Project, launched by ZAFOD in 2008.

precedents in matters involving violations of the rights of persons with disabilities. To achieve this objective, ZAFOD has retained a local law firm to provide legal advice and engage in litigation on behalf of indigent persons with disabilities who experience disability rights abuses. The legal fees for all such cases are paid by ZAFOD on behalf of persons with disabilities who are actual parties to the court proceedings. ZAFOD identifies common cases where disability rights are frequently abused and then forwards such cases to local law firms so that court proceedings may be instituted with a view of setting up precedents.

In *Sela Brotherton (suing as National Secretary of Zambia Federation of Disability Organisations) v Attorney-General & 16 Others*²⁶ court proceedings were instituted against several defendants seeking an order to compel adjustments to public and private buildings so as to make them accessible to persons with disabilities. Before the matter could proceed to trial, one of the defendants applied to dismiss the court proceedings on a point of law on the ground that the court proceedings were statute barred. It was also argued that the court proceedings were based on the previous Persons with Disabilities Act²⁷ which was enacted in 1996, while most of the defendants' buildings were constructed long before 1996 and as such, the law enacted in 1996 could not have retrospective effect and criminalise or render unlawful that which was lawful at the time of construction.

In opposing the application, it was argued that the plaintiff organisation only came into existence in 2009, which is barely a year before court proceedings were commenced and as such, could not be statute barred.²⁸ The plaintiff also argued that in any event the cause of action only arose in 2008 when the plaintiff carried out access audit exercises which exposed the inaccessible buildings of the defendants. Furthermore, the plaintiff contended that the provisions of the Act were enacted taking into account the need for the inclusion, and protection of the rights of persons with disabilities. The High Court of Zambia held that the provisions of the Act did not have retrospective effect. It cannot apply to buildings constructed long before it came into operation.

The court also found that the action was statute barred in that it was commenced over 14 years after the Act came into operation. It is submitted that the proceedings were not correctly decided. The court failed to take in to account the paradigm shift requiring the focus for change to move from persons with disabilities to the attitudinal and physical infrastructure. Furthermore, the court misdirected itself when it held that action premised under any statute can only be properly commenced if it is brought within

26 (2009) HP/1402.

27 Persons with Disabilities Act, Chap 65, now repealed by the Persons with Disabilities Act 6 of 2012.

28 Statute of Limitation of 1939 of the United Kingdom which applies in Zambia by virtue of sec 2 of the British Acts Extension Act, chap 10 of the laws of Zambia.

12 years of that statute coming into operation. It is noteworthy that the court proceedings set up a precedent that do not advance the rights of persons with disabilities. ZAFOD has since appealed²⁹ against the court's ruling but the appeal is still pending determination.

2.5 To guarantee the respect, protection and fulfilment of human rights

If a person alleges that any provision of the Bill of Rights in the Zambian Constitution³⁰ has been or is likely to be contravened in relation to him or her, he or she may apply to the High Court for appropriate remedies to protect the rights in issue.³¹ Under the Zambian Constitution, the High Court has a wide discretion to issue such directives and make such orders as are necessary to prevent the infringement of human rights. An individual does not necessarily have to wait until his or her rights are actually infringed upon, before commencing court proceedings for protection.

A person whose rights have been infringed may also institute court proceedings seeking damages and other appropriate remedies. This is illustrated by the South African case of *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton*,³² in which court proceedings were commenced on behalf of a child with a physical disability against a private school alleging that most of the school facilities were not fully accessible to her. In response, the private school submitted that it had taken steps to accommodate the child with disabilities but that the school buildings were too old to adequately accommodate her. The Equality Court held that the school unfairly discriminated against the child and ordered that the school undertake appropriate remedial adjustments.

2.6 Social policy reform

Disability rights litigation is also important in bringing about changes in social policy. This is illustrated by the South Africa case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*,³³ which was brought against the state for failure to provide direct funding for children with severe and profound intellectual disabilities. It was further argued by the applicant that while the state provided minimal funding for children with moderate to mild intellectual disabilities enrolled

29 *Sela Brotherton (Suing as National Secretary of Zambia Federation of Disability Organizations) v Attorney-General & 16 Others* SCZ/8/232/2013.

30 Constitution of Zambia chap 1 of the laws of Zambia.

31 Constitution of Zambia, art 28.

32 Equality Court Case 1/2010, 3 December 2010 <http://www.sahrc.org.za/home/21/files/MPL%20Judgement.pdf> (accessed on 16 July 2013).

33 2011 5 SA 87 (WCC).

in special schools, it neglected children with severe and profound disabilities not enrolled in special schools. It was argued, on behalf of the respondent, that due to the severity of the affected children's intellectual disabilities, no amount of education would be beneficial to them and that if the little funding that the state apportions towards the education of persons with such severe intellectual disabilities is considered in the light of social economic history of the country, it will be apparent that in fact the affected children's rights to education are not being infringed. It was also argued that the state was following government policy³⁴ which was aimed at achieving inclusive education by systematically moving away from segregation on the basis of the severity or otherwise of a child's intellectual disability.

The case was determined by the court's finding that the government policy was discriminatory as it actually singles out children with severe and profound intellectual disabilities for less favourable treatment. The court went further to order a 'structural interdict' setting out actual steps the state was to undertake to remedy the inequalities of the policy in issue.

2.7 Legal reforms

Oppressive national laws may also be challenged through disability rights litigation before national, regional and international courts. *Purohit & Moore v Gambia*³⁵ illustrates the challenge of domestic law under a regional treaty. In that communication, the applicants challenged the provisions of the Lunatics Detention Act³⁶ which provided for the compulsory detention of persons with mental and or intellectual disabilities into special institutions under Gambia's domestic law. The African Commission on Human and People's Rights (African Commission)³⁷ ruled that the said provisions of the Act were discriminatory and urged the Government of the Gambia to repeal the said Lunatics Detention Act. However, it is noteworthy that the impugned Lunatics Detention Act has not yet been repealed or amended³⁸ following the communication in the *Purohit* case.

3 Applicable legal framework and background

This section will discuss the existing legal framework in Zambia in so far as it affects disability rights and disability rights litigation.

34 Department of Education, Education White Paper 6 'Special needs education: Building an inclusive education and training system' (July 2001).

35 Comm No 241/2001 (2003).

36 Lunatics Detention Act of Gambia, 1917.

37 Established under art 30 of the ACHPR to promote human and people's rights and to ensure their protection in Africa.

38 Mental Health 'The Gambia, situational analysis' World Health Organisation (2013) http://www.who.int/mental_health/policy/country/thegambia/en/ (accessed 16 July 2013).

3.1 International and regional legal framework

Zambia ratified the CRPD on 1 February 2010 to signify its acceptance to be bound by the terms and principles that make the CRPD the most progressive disability rights treaty.³⁹ While ratification of the CRPD does not allow for individual complaints alleging that rights under the CRPD have been violated, it nonetheless allows for a peer review mechanism whereby Zambia is required to submit periodic reports to the CRPD Committee for discussion by both the CRPD Committee and other state parties on how the disability rights are being implemented.⁴⁰ In order for the CRPD Committee to have the competence to hear individual complaints of disability rights violations, the state party in issue has to ratify the CRPD Optional Protocol.⁴¹ Since Zambia is yet to ratify the CRPD Optional Protocol, the CRPD Committee has no competence to hear individual complaints of disability violations allegedly committed in Zambia.

At the African regional level, Zambia ratified⁴² the ACHPR on 20 July 1987 and as such Zambia is bound to uphold and protect the rights enshrined in the ACHPR. The ACHPR provides for the recognition and protection of various human and people's rights⁴³ and with respect to disability rights, expressly provides that persons with disabilities have the right to special measures of protection in keeping up with their physical or moral needs.⁴⁴ While there are no detailed provisions as to the content and exact nature of the special measures of protection persons with disabilities have the right to, the fact that the ACHPR provides that in considering communications, the African Commission⁴⁵ shall draw inspiration and be guided by the various human rights instruments adopted under the auspices of the United Nations.⁴⁶ This means that the provisions of the CRPD may be called upon by the African Commission to establish the nature of special members persons with disabilities are entitled to in keeping up with the physical and moral needs.

39 United Nations Enable *Development and human rights for all: Convention and Optional Protocol signatures and ratifications* <http://www.un.org/disabilities/countries.asp?id=166> (accessed 22 July 2013).

40 United Nations Human Rights: Office of the High Commissioner for Human Rights *Committee on the Rights of Persons with Disabilities* <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 26 June 2013).

41 CRPD, Optional Protocol, art 1(2).

42 C Heyns (ed) *Human rights law in Africa* (1997) 7.

43 ACHPR, arts 1- 26.

44 ACHPR, art 18(4).

45 ACHPR. In terms of art 56, admission criteria for communications include the requirement that the complaints of human and people's rights violations are brought within a reasonable time after exhausting local remedies if any, unless the local remedies involve protracted procedures.

46 ACHPR, art 60.

Further, Zambia has signed but not yet ratified the African Charter on the Rights and Welfare of the Child (ACRWC)⁴⁷ which provides that:

Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his [or her] physical and moral needs so as to ensure his [or her] dignity, promote his [or her] self-reliance and active participation in society.⁴⁸

The ACRWC further obliges state parties to provide necessary and appropriate assistance and supports to the disabled children and to ensure that they have access to training and preparation for employment and recreation opportunities so as to ensure their fullest possible social integration and personal growth.⁴⁹

Another regional initiative of relevance to Zambia is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).⁵⁰ Zambia ratified the Maputo Protocol and as such she is bound by its provisions.⁵¹ The Maputo Protocol explicitly provides for the rights of women with disabilities to dignity and freedom from discrimination⁵² and requires state parties amongst others, to protect the rights of women with disabilities and to take legislative and administrative steps to prevent the exploitation and abuse of women with disabilities.

The legal effect of signing or ratifying these international or regional instruments in terms of everyday litigation before national courts received judicial pronouncement in the case of *Attorney-General v Roy Clark*⁵³ where the Supreme Court of Zambia held:

[I]n applying and construing our statutes, we can take into account international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in the laws.

Therefore, the provisions of the international and regional instruments do not have the binding effect of the law before national courts in Zambia, but may be relied on to persuade the courts to determine matters before them in accordance with the spirit and text of such international or regional instruments. The influence of international instruments was also in issue

47 Eastern and Southern Africa 'The African Charter on the Rights and Welfare of the Child' (Unicef) http://www.unicef.org/esaro/children_youth_5930.html (accessed 30 June 2013). See Organisation of African Unity, Document CAB/LEG/24.9/49 (1990).

48 ACRWC, art 13(1).

49 ACRWC, art 13(2).

50 Adopted by the African Union on 11 July 2003, in Maputo Mozambique.

51 *The Maputo Protocol: A clear and present danger* 'The countries that have ratified it' (2011) <http://www.maputoprotocol.com/the-countries-that-have-ratified-it> (accessed 16 July 2013).

52 The Maputo Protocol, art 23.

53 (2008) ZR 38.

in the Botswana case of *Attorney-General v Dow*⁵⁴ where it was held that even though the provisions of an international convention are not domesticated to form part of national law, such provisions may still be useful in interpreting the national law so as to give effect to the human rights standards as contained in the convention, the provisions of which Botswana has agreed to be bound.

Therefore, even though international instruments are not domesticated, they form part of the international legal framework that shapes or influences disability rights litigation. The nature and effect of domestication will be discussed in more detail in the following sub-section.

3.2 National legal frameworks

Zambia's national legal framework for the promotion and protection of disability rights is mostly governed by the laws passed by Parliament⁵⁵ and legal precedents set by national courts. The legal framework of disability rights in Zambia is primarily anchored on the Constitution, which though not having express provisions as to the promotion and protection of disability rights in its Bill of Rights, remains the premise for disability rights protection. In *Brotherton NO v Electoral Commission of Zambia*,⁵⁶ the court found that persons with disabilities were discriminated against even though the Bill of Rights did not list disability as one of the prohibited grounds of discrimination. This decision contrasts with that of the Kenyan High Court in *Waga*⁵⁷ where on account of Kenya's previous Constitution not expressly listing the disability as a prohibited ground of discrimination, a case for discrimination was held not to have been established.

Besides the Constitution, there are two main statutes that govern disability rights in Zambia.⁵⁸ These are the Persons with Disabilities Act⁵⁹ and the Mental Disorders Act.⁶⁰ The Persons with Disabilities Act provides for the various rights of persons with disabilities and also seeks to promote their participation in civil, political, economic, social and cultural spheres on equal basis with others. This Act domesticates⁶¹ some, though

54 Appeal Court 1994 6 BCLR 1.

55 Constitution of Zambia, art 62. Article 80 of the Zambia Constitution also bestows on Parliament the authority to confer the power, on any person or authority, to create statutory instruments which also have the force of law.

56 2011/HP/0818.

57 n 8, above.

58 Interview with Hope Ndhlovu-Chanda, Chief, Research and Planning, Zambian Human Rights Commission (Lusaka, Zambia 29 June 2012).

59 Persons with Disabilities Act 6 of 2012.

60 Mental Disorders Act, Chap 305 of the laws of Zambia.

61 Secs 2, 4, 5, 6, 7, 8, 9 and 10 of the Persons with Disabilities Act domesticates arts 1, 2, 4, 5, 12 and 23 of the CRPD. Also provisions relating to the right to education, health and rehabilitation, employment and accessibility are domesticated by the Act.

not all, rights protected under the CRPD.⁶² According to Ndhlovu-Chanda,⁶³ while the non-express domestication of some rights may have a chilling effect on the full rights of persons with disabilities, it is hoped that this may not adversely affect their protection and recognition as the core rights to equality and non-discrimination and equal recognition before the law, have been domesticated.

The Mental Disorders Act provides for the care and support of persons it describes as suffering from 'mental disorders or defects' and also for the custody of the persons and for the administration of their estates. This Act does not do much to enhance the rights of persons with disabilities as it firstly refers to persons with mental disabilities in derogatory terms such as 'idiots' and 'imbeciles'.⁶⁴ Additionally the Act does not recognise the legal capacity of persons with intellectual or psychosocial disabilities and considers them incapable of managing their own affairs; instead, it provides for the administration of their estates and for their institutionalisation.⁶⁵ According to Waliuya,⁶⁶ the Mental Disorders Act is scheduled to be repealed by the enactment into law of the Mental Health Bill.⁶⁷ Prior to repeal, the Mental Disorders Act remains the law in Zambia. However, to the extent that it is inconsistent with the Persons with Disabilities Act, the provisions of the latter enactment will prevail.⁶⁸

Additionally, by interpreting provisions of the Constitution and statutes, courts also shape the national legal framework for disability rights in Zambia. In *Brotherton*⁶⁹ the High Court of Zambia found that the Electoral Commission failed to provide reasonable accommodation and support services as required under the law thereby effectively shaping the requirements of a good electoral law.⁷⁰

62 The Persons with Disabilities Act does not expressly domesticate the provisions of the CRPD relating to the rights of women and children with disabilities, the right to nationality, independent living and being included in the community, privacy and freedom of expression and opinion.

63 Ndhlovu-Chanda (n 58 above).

64 Sec 5.

65 Secs 5, 7 and 8.

66 Waliuya (n 6 above).

67 Zambia UK Health Workforce Alliance & Zambia Ministry of Health Conference 'Current Health Bills/Acts & restructuring of the Zambian health service within ministries' Maynard Theatre, The Kings Fund, 11 – 13 Cavendish Square, London, 8 May 2013 16 <http://www.zuhwa.com/wp-content/uploads/2013/05/Dr.-Simoongas-Presentation-.pdf> (accessed 6 July 2013). This Bill was first presented in Parliament for enactment in 2006 but has not been enacted into law yet. It seeks to provide for the respect, autonomy and self-determination of persons with mental disabilities.

68 Persons with Disabilities Act sec 3.

69 n 56 above.

70 The Electoral Act 12 of 2006, secs 18, 60, 28, 40 and 41.

4 Challenges of litigating disability rights in Zambia

4.1 Non-justiciable rights

According to Dube,⁷¹ the greatest obstacle to disability rights litigation in Africa is the existence of constitutional provisions which usually classify disability rights under non-justiciable clauses. Such clauses usually fall within the Directive Principles of State Policy and as such they are not binding on the state and cannot be enforced. The Zambian Constitution provides⁷² that provisions of the Directive Principles of State Policy are not justiciable and that they shall not, despite being referred to as rights, be legally enforceable in any court, tribunal or administrative institution or entity. Article 112(f), which is under the Directive Principles of State Policy, provides:

[T]he State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable.

Apart from the foregoing provision, the Zambian Constitution does not have any express provision relating to disability rights. This leaves the recognition and protection of disability rights at the broad discretion and interpretation of the general non-discrimination constitutional provisions⁷³ to the courts. The Zambian High Court in *Brotherton*⁷⁴ adopted a broad approach to the interpretation of the Constitution when it was called upon to consider whether the Electoral Commission of Zambia's failure to adhere to the rights falling under the Directive Principles of State Policy such as those relating to social and physical amenities suitable for needs of persons with disabilities to participate in national elections, amounted to discrimination against persons with disabilities' right to vote. The court held that discrimination was proved notwithstanding that the rights relating to the provision of accommodative supports for voters with disabilities fall within the non-justiciable provisions of the Constitution.

In that case, the court did not make any distinction between the right to vote as a civil and political right, and the right to be availed the appropriate amenities, infrastructure and resources which fall within the Directive Principles of State Policy. The court's approach not to

71 BA Dube 'Forced evictions and disability rights in Africa' (September 2008) http://www.nyulawglobal.org/Globalex/Forced_Evictions_Disability_Rights_Africa.htm (accessed 28 July 2012).

72 Constitution of Zambia, art 111.

73 Constitution of Zambia, arts 11-26 inclusive.

74 n 56 above.

distinguish between the two sets of rights advances disability rights litigation and is commendable. However, the mere classification of disability-related rights as non-justiciable rights has a chilling effect on disability rights litigation as it stifles persons with disabilities' rights to access to justice.

4.2 Disability not listed as a prohibited ground of discrimination

The Zambian Constitution⁷⁵ does not list disability as one of the prohibited grounds of discrimination. A question therefore arises as to whether courts in Zambia may entertain a claim for discrimination on the ground of disability in view of disability not being one of the grounds upon which discrimination is prohibited. In *Brotherton*, the High Court found that disability discrimination is still prohibited notwithstanding the non-express provision in the Constitution. In this case the petitioner claimed that the respondent had unlawfully discriminated against the persons with disabilities contrary to article 23 of the Constitution as read together with section 19 of the previous Persons with Disabilities Act. The court held:

The first allegation made is that the Respondent has discriminated against the organisation's members and persons with disabilities in general contrary to Article 23 of the Constitution as read with Section 19 of The Persons with Disabilities Act. The Article basically provides that a person shall not be discriminated in any manner by any person acting by virtue of any written law or performance of a function of any public office.⁷⁶

In finding a case for discrimination, the court further reasoned that the respondent in carrying out its public functions is bound not to treat those seeking its services in a discriminatory manner notwithstanding the non-listing of disability as one of the prohibited grounds of discrimination in the Constitution. The position taken by the Zambian court is in line with the European Court of Human Rights⁷⁷ in *Glor v Switzerland*⁷⁸ where disability was not listed as a prohibited ground of discrimination in the European Convention on Human Rights (ECHR). In this case it was held that the list of grounds upon which discrimination is prohibited under article 14 of the ECHR is not exhaustive and that disability is to be included as a prohibited ground of discrimination.

75 Art 11, which provides that every person in Zambia is entitled to the fundamental rights and freedoms whatever his race, place of origin, political opinions, colour, creed, sex or marital status.

76 n 56 above.

77 Established under the European Convention on Human Rights (ECHR) Rome, 4 November 1950.

78 Application 13444 [2004] ECHR.

However, *Waga*⁷⁹ provides an interesting perspective with respect to rights which are provided for in national legislation but not expressly provided for in the Bill of Rights. In the latter case, the Kenyan High Court held that there could be no constitutional protection under section 22(1) of the Constitution because the right not to be discriminated against on the basis of disability is not expressly provided for in the Bill of Rights.⁸⁰ The court's refusal to find for the applicant was notwithstanding that the Persons with Disabilities Act prohibited discrimination on the basis of disability.⁸¹ In arriving at its decision, the court relied on the Supreme Court's position in the case of *RM (suing through next friend JK) v Attorney-General*⁸² where it was held:

In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s 82 and its limitations. Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80's and 90's, s 82 of the Constitution was amended in 1997 and the prohibited category expanded to include "sex" ... At the moment one can only conclude that the exclusion was deliberate and we do not consider it the function of the Court to fill the gaps.⁸³

The court consequently found that construing section 82 to include the ground of disability would be usurping constituent power of the people enshrined in the Constitution. This is also in contrast with the communication of the African Commission in *Purohit*⁸⁴ where a finding for discrimination was made even though the ACHPR⁸⁵ does not expressly list disability as a prohibited ground of discrimination. In its communication, the African Commission observed:

Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.⁸⁶

It follows that while the general jurisprudence appears to favour the position that the expressly listed grounds of prohibited discrimination are not exhaustive, the non-listing of disability as a prohibited ground of discrimination is not desirable as it leaves to the subjective discretion of the

79 n 8 above.

80 Kenyan Constitution, arts 26 to 51.

81 Kenyan Persons with Disability Act (n 10 above).

82 (2008) 1 KLR (G & F) 574.

83 At 606.

84 n 35 above.

85 The ACHPR, art 2.

86 *Purohit* para 49.

court or tribunal, which discretion may not always be exercised judiciously.

4.3 The incidence of poverty

The high poverty incidence levels in Africa also play a role in discouraging disability rights litigation. Zambia falls under the low and middle income countries⁸⁷ bracket which are characterised by poverty, general unemployment and poor physical infrastructure. According to Daniel Mont,⁸⁸ disability and poverty are so intricately interlinked that the problem of disability cannot be adequately addressed without dealing with the problem of poverty. The World Bank presents the linkage as follows:

Poverty causes disability through malnutrition, poor health care, and dangerous living conditions. Disability can cause poverty by preventing the full participation of disabled people in the economic and social life of their communities, especially if the proper supports and accommodations are not available. In fact, the qualitative evidence suggests that disabled people are significantly poorer in developing countries, and more so than [their] non-disabled counterpart[s].⁸⁹

It follows therefore that poverty affects disability rights litigation as persons with disabilities living in poverty are least likely able to afford legal practitioners or to pay requisite court fees. Consequently, they are less inclined to institute disability rights litigation.

Further, professional lawyers are usually concentrated in urban areas.⁹⁰ Persons with disabilities living in rural areas have to travel long distances to access professional legal advice, the police or indeed a court. According to a *Radio Netherlands Worldwide* report,⁹¹ a South African girl who uses a wheel chair had this to say:

Where I live, many pavements are in bad shape and there are not a lot of off-rumps. It's also dangerous so I can't go places on my own.⁹²

It follows that even if persons with disabilities know their rights, there are other barriers that they need to navigate such as long distances and

87 The World Bank *How We Classify Countries* (2012) <http://data.worldbank.org/about/country-classifications> (accessed 17 July 2012).

88 D Mont 'Measuring disability prevalence' (March 2007) (SP Discussion Paper No 0706) 1 <http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf> (accessed 18 July 2013).

89 The World Bank *Data and statistics on disability* <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:21249181~menuPK:282717~pagePK:148956~piPK:216618~theSitePK:282699,00.html> (accessed 29 June 2012).

90 Ndhlovu-Chanda (n 58 above).

91 Mannak (n 5 above).

92 As above.

inaccessible roads and buildings that militate against persons with disabilities instituting court proceedings.

4.4 Stigma and prejudicial attitudes

The stigma and prejudicial attitudes which society often harbours towards persons with disabilities serves to deter them from instituting disability rights litigation. This is because persons with disabilities are often perceived as second class citizens not entitled to enjoy human rights on an equal basis with others. One woman with a physical disability, when interviewed by the Human Rights Watch⁹³ in Uganda, had this to say:

At a community meeting, they didn't allow me to talk. It happens to all persons with disabilities. It is as if we weren't human ... On occasions when food is being given, sometimes persons with disabilities are given what others leave behind on their plates.⁹⁴

Persons with disabilities who grow up in conditions of perpetual marginalisation are least likely to consider disability rights litigation as they feel they will not be allowed to articulate their claims in court and, or, are just intimidated to speak out.⁹⁵ It is noteworthy that in the South Africa case of *Hoffmann v South Africa Airways*,⁹⁶ the Constitutional Court of South Africa did make some positive observations when it considered how the courts ought to view stigma and prejudice in relation to the protection of fundamental rights. It held:

The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of others ... not subject to our Constitution.⁹⁷

While the court in *Hoffmann* was referring to society's prejudicial views targeted at persons with HIV, it is hereby submitted that the court's reasoning should equally apply to matters involving persons with disabilities. In Zambia, the position is worsened by the Mental Disorders Act which refers to persons with mental and intellectual disabilities in derogatory terms such as 'idiots' and 'imbeciles'.

So far the chapter has discussed the challenges facing disability rights litigation in Zambia and the discussion has shown how the existing legal framework, poverty, cultural values and attitudinal perceptions may discourage persons with disabilities from instituting disability rights

93 Human Rights Watch "As If We Weren't Human": Discrimination against women with disabilities in Northern Uganda' (2010).

94 At 3.

95 As above.

96 (2000) 11 BCLR 1235.

97 Para 36.

litigation. The following section will now conjoin the best practises discussed throughout this chapter with a view of devising effective disability rights litigation strategies.

5 Devising effective litigation strategies

The reason why persons with disabilities have little success before courts is partly to do with the lack of a strategic approach.⁹⁸ A court will entertain a case depending not only on its merits but also on the manner in which the claims are articulated and the strategies employed by the litigants. In order to achieve the objects of litigation, there is need to plan who will be the parties, nature of claims, choice of forum, procedure to be adopted and the applicable law. It is in this regard that this section will seek to devise effective litigation strategies for disability rights.

5.1 Ratification and domestication of the CRPD

The CRPD⁹⁹ obliges all state parties to adopt appropriate legislative, administrative and other measures to promote the full realisation of disability rights. Since Zambia adopts the dualist approach to domestication of international instruments, the CRPD and its Optional Protocol need to be domesticated to become part of national law. Domestication in this regard, involves the enactment of laws that incorporate the provisions and principles of the CRPD.¹⁰⁰ This is necessary to ensure that disability rights legislation is tailored to address the specific challenges that persons with disabilities face in each country. The need for domestication is further amplified by the fact that even a country that adopts a monist approach such as Madagascar, has enacted national legislation for the protection of the rights of persons with disabilities.¹⁰¹

Furthermore, it is imperative that dissatisfied litigants have the option of invoking international human rights instruments to seek redress after exhausting local remedies. Ratification of the CRPD's Optional Protocol¹⁰² provides such an alternative avenue by allowing individuals to lodge communications of disability rights abuses to the Committee established under the CRPD.¹⁰³ Zambia should ratify and domesticate

98 MA Stein *et al* 'Cause lawyering for persons with disabilities' (2009-2010) 123 *Harvard Law Review* 1658.

99 CRPD, art 4(1).

100 L Gerntholtz *et al* 'Disability rights, HIV/AIDS in Eastern and Southern Africa: A review of international, regional and national commitments on disability rights in the context of HIV/AIDS in Eastern and Southern Africa' Final Report (August 2010) 17.

101 Loi No 97-044 Sur Les Personnes Handicapées, which provides for the implementation of the various disability rights in Madagascar.

102 CRPD Optional Protocol, art 1.

103 CRPD, art 34(1).

both the CRPD and its Optional Protocol in order to pave the way for the provisions of international instruments to become part of the national law.

5.2 Civil advocacy and disability rights awareness drive

It is important for CSOs and society in general to raise disability rights awareness in the local communities through public meetings. This will contribute towards enabling persons with disabilities and members of society generally to acquire basic understanding of disability rights and also to dispel the stigma and attitudinal barriers that exclude persons with disabilities from participating fully in society.

Gloppen¹⁰⁴ recognises the importance of CSOs' involvement in the following terms:

It also seems clear that litigation efforts that are part of a broader mobilisation strategy are more likely to result in positive judgments and judgments that are implemented and cause changes in policy. Sometimes a single case may have a significant effect on jurisprudence and cause a change in public policy, but a systemic effect on social policy is more likely where there is an overall strategy, a set of cases building up jurisprudence in the field, and an organisational apparatus that is able to capitalise on the momentum caused by the legal process and sustain political pressure through mobilisation and debate.¹⁰⁵

The foregoing observation presents a holistic approach to strategic litigation. It epitomises the broad mobilisation of human and other resources to facilitate not only the effective litigation in courts but also appropriate legal reform and enhances human rights awareness in society generally. According to Robb¹⁰⁶ there is an urgent need for concerted efforts by CSOs and society in general to ensure that stigma is stamped out to enable persons with disabilities to enjoy their human rights and to participate in society on an equal basis with others.

Furthermore, CSOs and society at large need to mobilise to speak out against wrongs committed against persons with disabilities and to condemn any acts which undermine the disability rights movements. In Mozambique, a journalist¹⁰⁷ was convicted of libel for reporting on a matter in which a disabled girl child was dismissed from a private school for complaining about the failure to construct an access ramp at the school

104 n 7 above.

105 At 27.

106 Interview with Annie Robb, Programme Manager, Ubuntu South Africa (Cape Town, Republic of South Africa, 26 June 2012). Annie Robb is also the Administrator of the Pan African Network of People with Psychosocial Disabilities.

107 Committee to Protect Journalists 'Mozambican journalist sentenced in criminal libel case' (2 August 2012) <http://cpj.org/africa/mozambique/> (accessed 6 August 2012).

as required by law.¹⁰⁸ Mobilisation of CSOs and society generally to condemn the said expulsion would not only enhance disability rights but would also spur on disability rights litigation.

It is recommended that in order to assist indigent persons with disabilities with meritorious cases suitable for disability rights litigation, CSOs should mobilise and raise money to meet the legal fees and other costs associated with litigation. CSOs should further advocate for the establishment of effective national legal aid systems, and also facilitate and initiate public interest litigation aimed at enhancing disability rights.

5.3 National human rights institutions (NHRIs)

In Zambia, the NHRI is known as the Human Rights Commission (HRC). It was established by article 125 of the Constitution¹⁰⁹ which provides that the functions, powers, composition and administrative procedures shall be prescribed by an Act of Parliament.¹¹⁰ According to the Human Rights Commission Act,¹¹¹ the HRC has the authority to investigate any human rights violations and to issue summons or orders requiring the attendance of any authority before the HRC and the production of any document or record relevant to any investigation being carried out by the HRC.¹¹² According to Ndhlovu-Chanda,¹¹³ the power to investigate human rights violations includes the power to investigate disability rights violations.

NHRIs are guided by the Paris Principles.¹¹⁴ The Paris Principles provide the guidance and competences for institutions to effectively promote and protect human rights. They specifically require NHRIs to have a broad mandate for the protection of human rights and to be independent from the state. They require adequate funding from the state to enable NHRIs to carry out their mandate. Since NHRIs have the mandate to monitor the implementation of human rights laws,¹¹⁵ they are an ideal strategic partner to both persons with disabilities and CSOs advancing disability rights. NHRIs are better placed to access public records and government institutions such as schools and hospitals. Usually, public records which would make vital evidence in disability rights litigation would not be readily available to litigants. However, NHRIs have the right to access to public records or buildings so as to fulfil their mandate to protect and promote human rights. A close working

108 Children's Rights Act, Mozambique 2008.

109 Article 125(2) provides that the Human Rights Commission shall be autonomous.

110 Constitution of Zambia, art 126.

111 Human Rights Commission Act, 1996.

112 Human Rights Commission Act, secs 9 & 10 (2).

113 Ndhlovu-Chanda (n 58 above).

114 United Nations General Assembly Resolution 48/134 (20 December 1993).

115 CRPD, art 33 (2).

relationship with NHRIs would therefore facilitate access to public records and institutions to collate evidence needed for disability rights litigation.

5.4 CRPD national implementation and monitoring

The CRPD requires¹¹⁶ state parties to designate one or more focal points within government and in accordance with their legal and administrative systems, to maintain and establish a frame work, including one or more independent mechanisms to promote, protect and monitor the implementation of the CRPD.

In designating one or more focal points within government, it is imperative that the terms of reference for such focal points are clearly spelt out. Waliuya¹¹⁷ expressed concern over the fact that while the Zambian government has designated focal point officers in all government ministries, most of the focal points officers are not aware of their terms of reference or conversant with disability rights.

There is therefore a need to have focal point officers in all government ministries and departments who are conversant with their terms of reference and with basic knowledge of disability rights so that they can contribute positively to the development of disability rights policies and where necessary highlight policies that are not CRPD compliant. This will assist in implementation and coordination.

5.5 Judicial activism and responsiveness

The extent to which the judicial system responds to social change, coupled with the activism of judicial officers, has a strong bearing on the extent to which disability rights may be effectively litigated upon. While it is difficult to come up with a universally accepted definition of judicial activism, it generally refers to the philosophy whereby judges interpret the law not necessarily according to the confines of already set precedents but in such a manner to reflect the contemporary conditions and values.¹¹⁸ In this regard, owing to the novelty of the disability rights movement,¹¹⁹ courts are required to be responsive to the social change by interpreting the law in accordance with current social trends. A good example of a court or tribunal which responds to social change or a paradigm shift in the area of disability rights, is the African Commission's bold interpretation of the ACHPR¹²⁰ in *Purohit*, as regards the requirement to exhaust local remedies

116 CRPD, art 33(1).

117 Waliuya (n 6 above).

118 EK Quansah & CM Fombad 'Judicial activism in Africa: Possible defence against authoritarian resurgence' 3 <http://www.ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf> (accessed 15 July 2013).

119 Degener & Quinn (n 2 above).

120 ACHPR, art 56(5).

before lodging a complaint. The brief facts of *Purohit* were that the applicants initiated communication to the African Commission on behalf of persons with psychosocial disabilities complaining that the Lunatics Detention Act discriminates against persons with psychosocial and intellectual disabilities. The Lunatics Detention Act provided for the involuntary detention of persons with psychosocial and intellectual disabilities and it was the applicants' contention that it infringed the rights of such persons to enjoy the best attainable state of mental health and their rights to special measures of protection in keeping with their physical and moral needs.

On the question of admissibility¹²¹ of the complaint, the African Commission decided that since the affected persons were indigent and also, due to the non-effective legal aid system in Gambia, the affected persons cannot realistically be expected to avail themselves of the legal procedures of challenging their involuntary admission into mental health institutions. Had the African Commission interpreted the ACHPR narrowly, the communication would not have been admitted as the applicants had not exhausted any local remedies in that they did not challenge the impugned legislation before national courts in the Gambia.

It is therefore crucial that courts in Zambia are bold enough to respond to changing social and legal dynamics of society, in order to set the ground work for successful litigation of disability rights. In Zambia and Botswana, the courts exhibited boldness and high levels of judicial activism when it was held that even though the provisions of international instruments have not been domesticated to form part of national law, national law must be interpreted in a manner that embraces the purpose and provisions of international instruments to which Botswana and Zambia respectively, have agreed to be bound.¹²²

5.6 Competent and affordable legal advice

Closely related to the responsiveness of the courts, is the need to have competent lawyers who specialise in disability rights cases or have the experience of working with discrimination and equality-related cases. The disability perspective to human rights presents a shift away from the traditional equality of treating all human beings equally.¹²³ Instead focus is now on substantial equality and dictates that society takes appropriate and necessary steps to equalise opportunities¹²⁴ for persons with disabilities. A lawyer when presented with the relevant facts of a case will be required to give competent advice as to the appropriate remedies to

121 As above.

122 See subsection 3(1) and pages 174 & 175.

123 Degener & Koster-Dreese (eds) (n 15 above).

124 As above.

seek, the right forum to commence proceedings, and the rightful process with which to institute proceedings.¹²⁵ Wrong advice with respect to any of the foregoing areas may result in court proceedings being dismissed either at the preliminary stage or in the judgment. Disability rights law is therefore a specialised area of law which requires competent lawyers to handle.

Waliuya¹²⁶ observed that the non-availability of lawyers specialised in disability rights has led to the failure of disability rights litigation in Zambian courts.¹²⁷ He stressed that most persons with disabilities have as a result lost confidence in the judicial system owing to the lack of competent lawyers specialised in disability rights litigation. He maintained that it is in this regard that ZAFOD has engaged in the capacity building exercise of involving lawyers seized with the conduct of disability rights abuse cases, in a number of workshops, conferences and negotiations for legal reforms.

Where competent and specialised disability rights lawyers¹²⁸ are available, persons with disabilities are faced with the prospects of high legal fees should they seek to commence court proceedings. As mentioned earlier, persons with disabilities are usually amongst the poorest and most marginalised people in their communities and as such they cannot afford legal fees and other costs of litigation. It is essential to provide legal aid services to indigent persons with disabilities to facilitate disability rights litigation.

To overcome the cost of litigation, CSOs should mobilise funds to meet the legal fees of persons with disabilities as they seek to enforce their rights. This would ensure that indigent persons with disabilities do not have to worry about raising funds to meet legal fees while ZAFOD's objective of obtaining court orders to set up precedents on disability rights is also achieved. Further, disability law should be part of all law schools' curriculum in universities and colleges in Zambia so that student lawyers receive the necessary training while lawyers already in practice should have disability law training as part of their continuous professional development. This will sensitise more lawyers in disability law.

5.7 Accessible court premises and infrastructure

Physical access to court premises, including the road infrastructure, is a very crucial component of the litigation strategy of disability rights in Africa. Indeed the CRPD provides that in order for persons with

¹²⁵ Gloppen (n 7 above).

¹²⁶ Waliuya (n 6 above).

¹²⁷ As above.

¹²⁸ Ndhlovu-Chanda (n 58 above).

disabilities to live independently and to participate fully in their societies, state parties are required to take appropriate measures to ensure that persons with disabilities have access to the physical environment, transportation, information and communication technologies, and other facilities available to non-disabled persons.¹²⁹ In most Africa countries, there are poor road infrastructures, characterised by potholes and generally ungraded roads, whereby persons on wheel chairs have restricted movements outside their homes. The inaccessible roads and building infrastructures discourage persons with disabilities from undertaking the uncomfortable and often dehumanising journey to the court premises.

In Kenya, a High Court judge was taken round the court building by a litigant in a wheelchair demonstrating how difficult it was for persons with disabilities to access the court building without ramps.¹³⁰ This was in the case of *Paul Pkiach Anupa v Attorney-General & Others*¹³¹ where the inaccessible court premises were challenged for denying the petitioner access to justice. Among the relief sought, is an order that the court buildings be made accessible. The Court held:

It is no doubt that mobility or accessibility of public buildings including court houses is one such effort in aiding access to justice for all Kenyans ... The current physical structure of the ... law courts is such that it is a hindrance to justice seekers owing to the physical barriers that make it a herculean task for persons with disabilities to access the courts.¹³²

Lawyers with physical disabilities face the same difficulties. In the South African case of *Esthé Muller v the Department of Justice & Another*¹³³ an attorney with quadriplegia brought a case with respect to difficulties in accessing the court buildings. In her statement, she alluded to how sometimes she had to be carried up the stairs due to the inaccessible court rooms and stated: 'It's embarrassing for my client to have his lawyer carried into court. It's also embarrassing for me'.

The foregoing matter was resolved by way of a settlement agreement after the respondents agreed that their failure to make the court buildings accessible was a form of discrimination against the applicant. The Zambian Government should therefore take appropriate steps to modify and adjust all court rooms and buildings, and other physical infrastructure such as roads, to make them accessible to persons with disabilities. This should include making available all necessary support and services such as sign language interpreters, social workers and accommodative procedures aimed at ensuring that persons with disabilities have effective access to justice.

129 CRPD (n 1) art 9.

130 'Judge shown how disabled have it rough' *Daily Nation Newspaper* 3 August 2012.

131 Constitutional Petition 93/2011.

132 Paras 65 & 66.

133 Equality Court, Germiston Magistrates' Court, January 2003.

6 Conclusion

Devising an effective national litigation strategy requires harmonising a range of activities that constitute, and result in, access to justice. These activities include constitutional and legal reforms, judicial activism and disability rights awareness drives among persons with disabilities and society at large. Perhaps the most significant of these activities, is the need to change the attitudinal and prejudicial perceptions the Zambian society often harbours against persons with disabilities. In terms of priority, the need to eradicate the deep entrenchment of prejudice and stigma against persons with disabilities outweighs the need for constitutional and other strategies for effective disability rights litigation. As long as society continues to view persons with disabilities with prejudice and stigma, constitutional and legal reforms will not effectively advance the cause of disability rights litigation and neither will judicial activism achieve its intended purpose. The implementation of all the good practices and laws in Zambia will not achieve much if disability rights are weighed-down by prejudice and stigma.

Indeed, the leitmotif of the CRPD is to achieve a shift in the manner people view persons with disabilities and also how they relate with disability issues that arise from human impairments. This is to be achieved by recognising that the primary problem with regard to the marginalisation and exclusion of persons with disabilities is not the human impairments. Rather, it is societal norms and values acting in concert with inaccessible physical infrastructure which, by design, exclude persons with disabilities from fully participating in society. Zambia will also need to adopt positive affirmation measures such as the provision of necessary support services so as to equalise opportunities to enable persons with disabilities to participate fully in society. Such positive affirmative measures include constitutional and legal reforms so as to enforce or compel compliance with the change envisioned by the CRPD.

SECTION B: COUNTRY REPORTS

CAMEROUN

Maître Christophe Tchudjo*
Joseph Ombe**

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Cameroun?

Suivant les résultats du 3ème Recensement Général de la Population et de l'Habitat (3e RGPH) institué par Décret Présidentiel no 2001/251 du 13 septembre 2001, publié en 2005, on estime que la population du Cameroun est d'environ 20.000.000 d'habitants.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Cameroun. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Cameroun?

Suivant la loi no 83/13 du 21 juillet 1983 relative à la protection et la promotion de la personne handicapée, le handicapé est « toute personne qui, frappée d'une déficience physique ou mentale, congénitale ou accidentelle, éprouve des difficultés à s'acquitter des fonctions normales à toute personne valide ». ² Toutes recherches sur les personnes handicapées au Cameroun sont désormais basées sur ce critère défini par la loi no 2010/002 du 13 avril 2010 portant Protection et Promotion des Personnes Handicapées définit le handicapé comme « Toute limitation des possibilités de pleine participation d'une personne présentant une déficience à une activité dans un environnement donné » et ainsi la « personne handicapée » désigne « toute personne dans l'incapacité d'assurer par elle-même tout ou partie des nécessités d'une vie individuelle ou sociale normale, du fait d'une déficience physique ou mentale, congénitale ou non ». ³

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1 Rapport de présentation des résultats définitifs du 3e RGPH, Yaoundé, le 30 mars 2010

2 Recueil des OMD et des textes juridiques de promotion et de protection des personnes handicapées, 2010. Joseph POUAGAM P115.

3 Recueil des OMD et des textes juridiques de promotion et de protection des personnes handicapées, 2010. Joseph POUAGAM P115.

1.3 Quel est le nombre total et le pourcentage des personnes handicapées au Cameroun?

Au Cameroun, les personnes handicapées sont estimées à près de deux millions neuf cent dix mille (2.910.000) au regard des résultats officiels du 3^{ème} recensement général de la population et de l'habitat publiés le 14 avril 2010.⁴

1.4 Quel est le nombre total et le pourcentage des femmes handicapées dans votre pays?

Il faut dire qu'au Cameroun aucune étude spécifique n'a encore été menée ni sur les femmes handicapées, ni sur les jeunes.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés dans votre pays?

Aucune étude spécifique n'ayant été menée sur les jeunes handicapés au Cameroun.

1.6 Quelles sont les formes de handicap les plus répandues dans votre pays?

Les formes de handicaps les plus répandues sont:

- (1) Les Sourds qui représentent 38.8%,
- (2) Les Infirmités Motrices Inférieures qui représentent 15%,
- (3) Les Muets qui représentent 14.3%,
- (4) Les Aveugles qui représentent 10.9%,
- (5) Les Lépreux qui représentent 06.7%,
- (6) Les Infirmités Motrices Supérieures qui représentent 06.3%,
- (7) Les Malades Mentaux qui représentent 06.3%,
- (8) Les Albinos 1.4%.⁵

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) au Cameroun? Le Cameroun a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). Le Cameroun a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

La convention et le protocole facultatif s'y rapportant ont été signés par le

⁴ Rapport de présentation des résultats définitifs du 3^{ème} RGPH, Yaoundé, le 30 mars 2010.

⁵ L'ÉDS-MICS 2011

Cameroun le 1er octobre 2008. Le processus de leur ratification est en cours.⁶

2.2 Si le Cameroun a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? Votre pays a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Le processus de ratification de ces textes étant encore en cours, il est impossible pour nous d'apporter des réponses appropriées aux questions en 2.2, en 2.3 et en 2.5.

2.3 Si le Cameroun a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport du Cameroun. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées au Cameroun?

Le processus de ratification de ces textes étant encore en cours, il est impossible pour nous d'apporter des réponses appropriées aux questions.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, le Cameroun a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies du Cameroun? Si oui, quels étaient les effets de ces observations ou recommandations?

Les rapports du Cameroun ont généralement fait mention des droits des personnes handicapées. Par exemple, le rapport initial du Cameroun à la Commission Africaine mentionne les droits des personnes handicapées.⁶ En plus le troisième rapport périodique du Cameroun à la Commission Africaine mentionne aussi les droits des personnes handicapées.⁷

En termes de recommandation, la Commission Africaine a régulièrement demandé au Cameroun de fournir des informations détaillées sur les conditions de vie des personnes handicapées et sur les mesures visant à préserver leurs droits.⁸ En réponse le Cameroun a été plus précis sur les conditions de vie des personnes handicapées et sur les mesures visant à préserver leurs droits dans son dernier rapport à la commission Africaine.⁹

⁶ Para 227, 242, 255-258 du rapport initial du Cameroun soumis à la commission Africaine en 2002.

⁷ Voir le paragraphe 526, et le chap 9 du rapport. 53ème Session de la Commission Africaine des Droits de l'homme et des peuples, soumis le 24 Avril 2013.

⁸ 53ème Session de la Commission Africaine des Droits de l'homme et des peuples, soumis le 24 Avril 2013, para 19.

2.5 Y'avait-il un quelconque effet interne sur le system légal du Cameroun après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Le processus de ratification de ces textes étant encore en cours, il est impossible pour nous d'apporter des réponses appropriées aux questions

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous le system légal camerounais ? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Suivant le système légal Camerounais qui est dualiste, les traités internationaux rentrent en vigueur après ratification et promulgation par le Chef de l'Etat. Les traités internationaux ratifiés ont une valeur supra légale.¹⁰

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation Camerounaise? Fournir les détails.

Nous pouvons dire que la définition du handicap retenue par la loi no 2010/002 du 13 avril 2010 portant Protection et Promotion des Personnes Handicapées est le résultat d'une évolution insufflée par les définitions des textes internationaux.

3 Constitution

3.1 La constitution du Cameroun contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

Le 17ème tiret du préambule de la Constitution du Cameroun (loi no 2008/001 du 14 avril 2008 modifiant et complétant certaines dispositions de la loi no 96/06 du 18 janvier 1996 portant révision de la constitution du 02 juin 1972) énonce clairement que « La nation protège et encourage la famille, base naturelle de société humaine. Elle (la nation) protège la femme, les jeunes, les personnes âgées et les personnes handicapées ». L'on peut dire que cette disposition de la Constitution traite directement du handicap et des droit des personnes handicapées (le doit à la protection).

9 Voir 53ème Session de la Commission Africaine des Droits de L'homme et des peuples, soumis le 24 Avril 2013; Rapport du Cameoun Chp 9.

10 Recueil des OMD et des textes juridiques de promotion et de protection des personnes handicapées, 2010. Joseph POUAGAM 7 Article 9 paragraphe 3 de la constitution de la république du Cameroun.

3.2 La constitution du Cameroun contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

A part les dispositions générales du préambule de la Constitution que l'on peut dire traitant indirectement du handicap parce qu'il proclame que « *l'être humain, sans distinction de race, de religion, de sexe, de croyance, possède des droits inaliénables et sacrés* »¹¹ et l'égalité de tous en droits et devoirs, en ce que ces dispositions évitent des exclusions liées à la constitution physique de l'Homme, il n'y a aucune autre disposition pouvant se rattacher même indirectement au handicap.

4 Législation

4.1 Le Cameroun a-t-il une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

- La loi no 83/13 du 21 juillet 1983 relative à la protection et la promotion de la personne handicapée, faisait de la protection des personnes handicapées un devoir de solidarité nationale essentiellement.
- Elle accorde par exemple des dispenses d'âge aux enfants handicapés pour l'accès à l'école à différents niveaux au cas où leur retard scolaire est dû ou lié à leur handicap.
- La loi no 2010/002 du 13 avril 2010 portant Protection et Promotion des Personnes Handicapées quant à elle traite de la prévention du handicap, de la réadaptation et de l'intégration psychosociale et économique de la personne handicapée, ainsi que de la promotion de la solidarité nationale à l'endroit des personnes handicapées.
- Le Décret no 2009-096 du 16 mars 2009 portant création, organisation et fonctionnement du Centre National de Réhabilitation des Personnes Handicapées Cardinal Paul Emile LEGER (CNRPH/PEL) qui institue et crée un Centre devant désormais non seulement procéder à la détection et aux soins pour prévenir le handicap, mais aussi apporter des soins appropriés à toutes personnes dont la maladie est liée à quelque type de handicap que ce soit, y compris l'alphabétisation et la formation des personnes handicapées ayant des chances de réhabilitation.
- Le Décret no 77/405 du 7 décembre 1977 fixant les conditions de création et de fonctionnement des œuvres sociales privées.
- L'Etat du Cameroun s'estimant incapable tout seul d'encadrer et prendre en charge les personnes handicapées, a permis par ce texte aux personnes et institutions privées de créer des œuvres sociales privées pouvant s'occuper de cette branche du service public humanitaire qui a pour but d'apporter une aide matérielle et morale ou un encadrement éducatif des personnes de tout âge, sexe ou race, aux familles ou aux groupes afin de promouvoir leur épanouissement des personnes vivant avec le handicap. Ce texte a étendu ses dispositions aux foyers d'accueil et d'hébergement en ce qui concerne les conditions matérielles, morales et sociales des pensionnaires.
- A côté de ces lois et décrets, il existe des Arrêtés instituant certaines facilités au bénéfice des personnes handicapées et des lettres circulaires portant instructions à l'endroit de certains dirigeants des établissements scolaires et hospitaliers et réglant certains aspects particuliers des lois et décrets ci-dessus.

11 Recueil des OMD et des textes juridiques de promotion et de protection des personnes handicapées, 2010. Joseph POUAGAM P.9-10

4.2 Le Cameroun a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

Le Cameroun n'a pas de législation concernant indirectement le handicap, sauf à dire que toutes les lois camerounaises en ce qu'elles sont impersonnelles traitent aussi et indirectement du handicap.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) du Cameroun ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits ; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

- Courant année 2002, le Tribunal de Première Instance de Yaoundé a connu d'une affaire Ministère Public et Ministère des Affaires Sociales Contre NYAMDJI Camille handicapé visuel (un aveugle) de son état,¹² poursuivi de rébellion en ce qu'il s'était opposé à l'exécution de la décision du Ministre des Affaires Sociales expulsant un groupe de personnes handicapées visuels dont il faisait partie, du Centre d'Ecoute de Yaoundé. Alors qu'il était menacé d'une peine délictuelle (prison ferme), Maître Tchudjo (l'un des rédacteur de ce rapport), jeune Avocat que j'étais, et épris de la cause des personnes handicapées, je m'étais spontanément constitué aux côtés du prévenu et j'ai juste évoqué l'existence de la loi no 83/13 du 21 juillet 1983 relative à la protection des personnes handicapées et de son décret d'application (textes qui n'étaient pas connue du juge qui en a demandé la production), à la découverte de cette loi seulement sans s'en référé au contenu, le juge paniqué, a admis le nommé NYAMDJI Camille au bénéfice des circonstances atténuantes et l'a condamné juste à une amende quoiqu'il avait déjà passé un (01) mois de détention préventive). Il faut dire que l'impacte de cette décision a été circonscrit à cette procédure étant donné que la sensibilisation fait défaut au point où certaines langues camerounaises parlent de l'indifférence de tous par rapport à la cause des handicapés.
- Le deuxième cas est celui d'un handicapé auditif (Sourd-muet) au nom de MBAH Justice MBAT, poursuivi devant le Tribunal de Grande Instance de Yaoundé courant 2010, et à qui l'on imputait des faits de coaction d'assassinat dans l'affaire DIBOULE (une affaire à connotation politique qui avait coûté la mort à un militant du parti politique Social Democratic Front) et alors détenu à la Prison Centrale de Yaoundé depuis près de trois ans avec 14 coaccusés. Présent à l'une des audiences, moi Maître Tchudjo (l'un des rédacteurs de rapport), je me suis spontanément constitué pour sa défense et sur la base du préambule de la Constitution qui dispose que « nul ne peut être poursuivi, arrêté ou détenu que dans les cas et selon les formes déterminées par la loi » et que j'ai estimé avoir été violé par aussi bien à l'enquête préliminaire qu'à l'information judiciaire, j'ai soulevé avec bonheur, l'exception de nullité de la procédure à l'égard de MBAH Justice MBAT qui n'avait jamais été entendu (eu égard à sa condition de sourd-muet) à aucune des phases citées plus haut. Le Président du Tribunal m'a demandé ce qu'il fallait faire pour parvenir à son audition. Sur la proposition du conseil (que j'étais), le Président de la juridiction a

12 Jugement no 384/cor du 18 octobre 2002, Affaire: Ministère Public et Ministère des Affaires Sociales Contre NYANDJI Camille.

commis un expert en langage de signes, lequel à l'audience qui suivait a bien servi d'interprète entre le Tribunal et le nommé MBAH Justice MBAT.¹³

Le Tribunal a alors conclu que les droit du nommé MBAH Justice MBAT avaient été violés à l'enquête préliminaire et à l'information judiciaire au cours desquelles personne n'avait tenu compte de sa condition de sourd-muet, le juge a annulé la procédure en ce qui le concerne et l'a renvoyé sans peine ni dépens à sa famille.

Il faut dire que cette deuxième décision a eu plus d'impact dans la mesure où depuis ce jour, les sourds-muets traduits en justice se voient toujours assistés d'un interprète en langage de signes.

6 Politiques et programmes

6.1 Le Cameroun a-t-il des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

- En matière d'accès à l'école et aux emplois la loi no 83/13 du 21 juillet 1983 susvisée accorde les dispenses d'âge pour l'accès à différents niveau des enseignements et le Décret no 90/1516 du 26 novembre 1990 fixant les modalités d'application de la loi no 83/13 du 21 juillet 1983 accorde 10% des postes à pourvoir aux personnes handicapées dans les différentes structures publiques et privées, pour les postes qui leur sont accessibles.
- La loi no 2010/002 du 13 avril 2010 portant promotion et protection des personnes handicapées est plus innovante, mais n'est pas encore applicable dans la mesure où son Décret d'application reste attendu.

6.2 Le Cameroun a-t-il des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Il n'y a pas au Cameroun de politique englobant indirectement le handicap à part les politiques générales qui sont non discriminatoires.

7 Organismes handicapés

7.1 En dehors des cours ou tribunaux ordinaires, le Cameroun a-t-il un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Non. Il n'existe pas du tout.

13 Jugement no 289/ADD/crim du 11 juin 2009, Affaire: Ministère Public et Ayant droits de DIBOULE contre Ni John Fru NDI, MBAH Justice MBAT et autres.

7.2 En dehors des cours ou tribunaux ordinaires, le Cameroun a-t-il un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Non. Il n'existe pas du tout.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- Le Cameroun est-il doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de votre pays à jamais abordé des questions relatives aux droits des personnes handicapées.

Il existe bien au Cameroun une Commission Nationale des Droits et des Libertés, mais qui est juste chargée d'observer et de dresser un rapport annuel sur l'état de violation des droits de l'homme et des libertés du citoyen sans aucun pouvoir protecteur des dits droits et libertés.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous au Cameroun pays des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Oui, entre autres:

- **la FENAHCAM, Fédération Nationale des Handicapé du Cameroun**
Elle est l'organisation cordannatrice des droits des personnes handicapées

- **CJARC (centre de jeunes aveugles réhabilités du Cameroun)**
Ce centre forme les aveugles en Braille, orientation et mobilité, dactylo et information. En plus elle s'occupe de l'intégration scolaire et suivi des aveugles dans les activités culturelles. Elle la promotion de la femme et des enfants aveugles.

- **GOODWILL – Cameroun**
Cette asossociation organise des séminaires, publie des brochures et documents et fait

La promotion pour l'emploi de la personne handicapée

- **ANAC (Association Nationale des Aveugles du Cameroun)**
L'ANAC s'occupe de la Défense des droits des personnes handicapées

Collecte des doléances des aveugles et les soumet à l'attention des pouvoirs publics à travers le ministère des affaires sociales

• **AHMAC (Association des Handicapés Moteurs Amputés du Cameroun)**

L'AHMAC rassemble les handicapés moteurs amputés ; veille au respect et à l'application des résolutions nationales et internationales en faveur des personnes handicapées

• **Well Being Africa Association**

Promotion et défense des droits des personnes handicapées, des mineurs, des victimes de la lèpre et des femmes vulnérables

9.2 Dans les pays de l'Afrique Centrale, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Oui. Au Cameroun par exemple, les OPH sont coordonnées au niveau national par la FENAHCAM, Fédération Nationale des Handicapé du Cameroun.

9.3 Si le Cameroun a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Le Cameroun n'a pas encore ratifiée.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Les OPH au Cameroun se déploient au moyen des plaidoyers et des lobbyings pour s'assurer leur intégration au processus de mise en œuvre des textes nationaux et internationaux.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

La non ratification de la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH et l'absence de Décret d'application de la loi n°2010/002 du 13avril 2010 portant protection et promotion des personnes handicapées.

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Non.

9.7 Y'a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre ?

Non.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Nous croyons qu'il faille œuvrer par plaidoyer et le lobbying pour amener les pouvoirs publics à s'intéresser davantage aux droits des personnes handicapées.

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Développer dans les universités camerounaises des modules d'enseignement sur les Droits des Personnes Handicapées. Sensibiliser les populations sur la dignité des personnes handicapées et sur le respect de leurs droits.

9.10 Y'a-t-il des instituts de recherche spécifiques en Afrique Centrale qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Non, pas du tout.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Au Cameroun, le Ministère des Affaires Sociales a entre autres pour mission de promouvoir les droits des personnes handicapées et de veiller à la concrétisation de la solidarité nationale en faveur des personnes handicapées. Il assure notamment la tutelle de tous les organismes chargés de l'encadrement des personnes handicapées. Le Ministère des Affaires Sociales du Cameroun octroi des aides aux OPH aussi bien en termes de capacitation, que d'appui financier et matériel pour l'accomplissement de leurs objectifs.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées au Cameroun?

Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet La Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

Au Cameroun, dans certaines régions, et familles, les enfants nés avec le handicap sont considérés comme des sorciers venus pour déranger la famille et la ruiner matériellement. Pour s'en débarrasser, certains parent déposent leurs enfants handicapés au bord de l'eau et s'enfuient avec la conviction qu'en tant que sorciers, ils vont rentrer dans l'eau et repartir à leur lieu d'origine.¹⁴ A cet effet, il y a lieu de promouvoir l'éducation et le recrutement de celles des personnes handicapées qui sont les plus méritantes afin qu'elles servent d'exemples à tous. Et communiquer suffisamment à ce sujet.

11.2 Comment le Cameroun répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

- **Accès aux bâtiments publics**

La pratique des rampes dans les bâtiments publics restent un souhait même si l'exigence est contenue dans la loi no 2010/002 du 13 avril 2010 portant protection et promotion des personnes handicapées qui n'est appliquée par personne. Une circulaire prise par le Premier Ministre du Cameroun en date du 08/07/2008 imposait déjà la prise en compte de l'approche handicapée dans les bâtiments publics.

- **Accès au transport public**

La carte d'invalidité donne droit à des réductions des coûts dans l'avion et dans les trains. Il en va autrement pour ce qui est des véhicules terrestres à moteur étant donné qu'ils s'agissent des entreprises privées non subventionnées par l'Etat.

- **Accès à l'éducation**

Aussi bien la loi no 83/13 du 21 juillet 1983 que la loi no 2010/002 du 13 avril 2010 (plus récente et non encore assortie du Décret d'application), recèlent des dispositions en faveur de la scolarité gratuite pour les enfants handicapés et ceux nés des parents handicapés indigents.

- **Accès à la formation professionnelle**

Ce qui est dit ci-dessus est valable aussi pour la formation professionnelle.

14 Bien que n'étant pas écrit, il s'agit des pratiques que l'on retrouve chez des peuples de certains pays africains, même au Cameroun et en Côte d'Ivoire

- **Accès à l'emploi**

La loi no 2010/002 du 13 avril 2010 recèle des dispositions qui demandent de réserver 10% des postes aux personnes handicapées, mais dans la limite des postes disponibles.

- **Accès à la détente et au sport**

Il existe au Cameroun, une fédération sportive pour handicapés (HANDISPORT) qui organise des événements sportifs pour handicapés.

- **Accès à la justice**

La possibilité existe pour les personnes handicapées indigentes d'être admises au bénéfice de l'assistance judiciaire qui les dispense de tout ou partie des frais d'enregistrement de la décision obtenue.

- **Accès aux soins de santé**

La carte d'invalidité donne droit à des réductions des coûts d'exams de laboratoire.

11.3 Le Cameroun accorde-t-il des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Oui. Au titre de la solidarité nationale dont le Ministère des Affaires Sociales (MINAS) a la conduite de la politique.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc) au Cameroun?

Oui. L'organe chargé des élections au Cameroun (Elections Cameroon ou ELECAM) met en place progressivement le mode vote pour les handicapés visuels, auditifs et autres, bien que le processus n'est pas encore achevé.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapée**

Pas de mesures spécifiques.

- **Enfants handicapés**

Accès à l'école et aux soins de santé.

- **Autre (exemple: populations indigènes)**

Pas de mesures particulières.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement au Cameroun au sujet les personnes handicapées?

Oui, seulement timidement en matière électorale.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Cameroun? Pourquoi?

Le développement de l'enseignement du Droit des Personnes Handicapées dans les grandes écoles et universités du Cameroun. La ratification de la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international, la sensibilisation des populations en général et des décideurs en particuliers sur la prise en compte des mesures en faveur de la dignité des personnes handicapées.

CÔTE D'IVOIRE

*Pierre Olivier Lobe**

1 Les indicateurs démographiques

1.1 Quelle est la population totale de Côte d'Ivoire?

La Côte d'Ivoire comptait, au dernier recensement de 1998 de l'Institut National de Statistique (INS), 18 millions d'habitants. Elle s'évalue aujourd'hui à plus de 20 millions.

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en Côte d'Ivoire. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées en Côte d'Ivoire?

Les données statistiques sont du domaine de l'Institut National de l'INS; à travers le Recensement Général des Populations et de l'Habitat (RGPH) qui permet d'identifier les populations handicapées.

Les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées tiennent compte de la définition même des personnes handicapées. Il faut donc se référer à la définition du handicap, qui prend en compte toutes les personnes en situation de handicap. Toute personne déficiente pour diverses raisons est dans une situation de handicap.

Les critères tiennent compte des différentes catégories de handicaps

- Personne handicapée moteur
- Mal voyant handicapé visuel
- Sourd muet handicapé auditif
- Dépigmentation génétique albinos
- Les bègues
- Celui qui réunit plusieurs types de handicap est un cas de polyhandicap

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- Handicap le plus lourd: handicapé intellectuel ou psychique.¹

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en Côte d'Ivoire?

Selon le rapport de l'INS sur le Recensement Général de la Population et de l'Habitat de 1998, la Côte d'Ivoire compte 85 517 personnes handicapées.

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en Côte d'Ivoire?

Le nombre de femmes (tout âge confondu) handicapées s'élève à 78 368 selon l'INS, qui n'en détermine pas le pourcentage que cela représente. Le nombre de femmes majeures est de 39 135.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en Côte d'Ivoire?

Selon l'INS Les enfants âgés de moins de 15 ans représentent 29,40% de la population des handicapées.

1.6 Quelles sont les formes de handicap les plus répandues en Côte d'Ivoire?

Se référant aux données de l'INS, dans le tableau ci-dessous, on note deux types:

- (1) L'handicap physique;
- (2) L'handicap auditif (sourd-muet).

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en Côte d'Ivoire? La Côte d'Ivoire a-t-elle signé et ratifié la CDPH? Fournir le(s) date(s). La Côte d'Ivoire a-t-elle signé et ratifié le Protocol facultatif? Fournir le(s) date(s).

La Côte d'Ivoire a seulement signé la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CPDH) le 7 juin 2007, jusqu'à ce jour la convention n'a pas encore été ratifiée par la Côte d'Ivoire.

¹ Informations obtenues avec Monsieur Dosso Karim, Inspection d'éducation spécialisée, Chef du Service réadaptation et réinsertion de la Direction de la Protection des Personnes Handicapées: *interview du 6 juin 2013.*

- 2.2 Si la Côte d'Ivoire a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? La Côte d'Ivoire a-t-elle soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?**

La convention n'a pas encore été ratifiée par la Côte d'Ivoire.

- 2.3 Si la Côte d'Ivoire a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport de votre pays. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées en Côte d'Ivoire?**

La convention n'a pas encore été ratifiée par la Côte d'Ivoire.

- 2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, la Côte d'Ivoire a-t-elle également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Était-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de la Côte d'Ivoire? Si oui, quels étaient les effets de ces observations ou recommandations?**

Ce n'est qu'en décembre 2009, dans le cadre de l'Examen Périodique Universel, que la Côte d'Ivoire se soumettait pour la première fois à l'exercice de présentation d'un rapport exigé par les différents instruments auxquels elle est partie. Le rapport présente en son paragraphe 127,² la situation des handicapés.

- 2.5 Y'avait-il un quelconque effet interne sur le system légal de la Côte d'Ivoire après la ratification de l'instrument international ou régional au 2.4 ci-dessus?**

Non. Toutefois, le Ministère de la Justice, des Droits de l'Homme et des Libertés Publiques, à travers la Direction Générale des Droits de l'Homme et des Libertés Publiques, travaille à proposer au Gouvernement et au Parlement des projets de textes visant à la prise en compte et à l'incorporation de ses engagements internationaux dans l'ordonnancement juridique national.³

² Rapport de la Côte d'Ivoire au Conseil des Droits de l'Homme des Nations Unies, dans le cadre de l'Examen Périodique Universelle, doc no A/HRC/WG.6/6/CIV/1 du 3 septembre 2009.

³ Entretien du 7 juin 2013 avec Dr KAMATE Banhouman André, Directeur de la Promotion des Droits de l'Homme, Ministère de la Justice, des Droits de l'Homme et des Libertés Publiques.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale en Côte d'Ivoire? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Aux termes de l'article 87 de la Constitution, les traités internationaux régulièrement ratifiés ont une autorité supérieure à celle des lois nationales, sous réserve de leur application par les autres parties. Le traité entre donc directement dans l'ordonnement juridique interne. Cependant, les juridictions résistent encore à appliquer les dispositions d'un traité.

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

Pour l'heure, il n'y a eu aucune évolution de la législation nationale relativement à l'incorporation d'instruments internationaux sur les personnes handicapées. En dehors de la Charte Africaine des Droits de l'Homme et des Peuples, dont l'esprit de quelques dispositions ont été reprises dans le Titre 1er de la Constitution ivoirienne relatif aux Libertés et Droits, aucun texte ratifié par la Côte d'Ivoire n'a été textuellement incorporé dans la législation nationale.

Cela pourrait se justifier par le fait qu'en vertu de l'article 87 de la Constitution, les textes internationaux régulièrement ratifiés sont directement applicables dans l'ordre juridique interne, avec une autorité supérieure à celle des lois.

3 Constitution

3.1 La constitution ivoirienne contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La constitution ivoirienne contient une disposition concernant directement le handicap, l'article 6 qui dispose: « *L'Etat assure la protection des enfants, des personnes âgées et des personnes handicapées* ».

3.2 La constitution ivoirienne contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

L'article 7 alinéa 2 pourrait être retenu comme une disposition concernant indirectement la personne handicapée: « *L'Etat assure à tous les citoyens l'égal accès à la santé, à l'éducation, à la culture, à l'information, à la formation professionnelle et à l'emploi* ».

Le texte prescrit « l'égal accès » de divers droits à tout citoyen. C'est dire que la personne handicapée bénéficie de ces mêmes droits.

4 Législation

- 4.1 La Côte d'Ivoire a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.**

Le seul texte législatif est la Loi no 98-594 du 10 novembre 1998 d'orientation En faveur des personnes handicapées. Elle définit les types d'handicap et détermine la politique générale en faveur des handicapés. La loi renvoie à un décret d'application pour les modalités pratiques, dont le projet est en cours d'élaboration.

- 4.2 La Côte d'Ivoire a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.**

La législation en général interdit toute discrimination, et protège ainsi les personnes handicapées.

5 Décisions des cours et tribunaux

- Les cours (ou tribunaux) en Côte d'Ivoire ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits ; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.**

Aucune information disponible sur ce point.

6 Politiques et programmes

- 6.1 La Côte d'Ivoire a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.**

Oui, il existe une politique nationale en faveur des personnes handicapées:

- Le Programme nationale de Réadaptation à Base Communautaire (RBC) en faveur des personnes handicapées. Il faut simplement ajouter que la Réadaptation à Base Communautaire (RBC) est une approche communautaire de la personne handicapée.

6.2 La Côte d'Ivoire a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Oui, d'une part, le programme de formation et d'insertion de l'Agence pour le Développement de la Formation Professionnelle (AGEFOP) destiné à tous et qui prend en compte les handicapés.

A partir d'une prospection qui lui permet de toucher du doigt l'existence de personnes handicapés en vue d'identifier la nécessité de mettre en œuvre le programme, ensuite une campagne de sensibilisation en vue d'inciter la cible à s'intéresser au programme; s'en suit une formation qui porte sur un certain nombre de projets. Il s'agit d'abord d'une formation technique puis d'une autre formation en gestion. L'AGEFOP après la formation offre aux personnes ayant participé au programme tout le matériel ayant servi à celle-ci.

D'autre part, la politique générale de recrutement et d'insertion socio-professionnelle des jeunes diplômés a prévu une mesure dérogatoire pour le recrutement des personnes handicapées à la Fonction Publique qui a permis de recruter trois cent trente-sept (337) d'entre eux⁴.

7 Organismes handicapés

7.1 En dehors des cours ou tribunaux ordinaires, la Côte d'Ivoire a-t-elle un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Non, il n'en existe pas.

7.2 En dehors des cours ou tribunaux ordinaires, la Côte d'Ivoire a-t-elle un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Oui, il s'agit de la Direction pour la Promotion des Personnes Handicapées (DPPH), créée par le décret 2011-281 du 5 octobre 2011 portant organisation du Ministère d'Etat Ministère de l'Emploi, des Affaires Sociales et la Solidarité.

La Direction de la promotion des Personnes Handicapées est chargée:

- De concevoir et de mettre en œuvre les politiques nationales visant la promotion et la protection des personnes handicapées;
- De mettre en œuvre une politique cohérente d'encadrement, de formation et d'insertion des personnes handicapées dans le tissu social, notamment dans le monde du travail;

4 Protection juridique des personnes handicapées : *Politique nationale en faveur des personnes handicapées*, Document du Ministère de la famille, de la Femme et des Affaires Sociale, 2007, p.10.

- D'initier et de conduire les actions visant l'intégration sociales des personnes handicapées dans le processus de développement;
- D'assurer la protection et la promotion des droits des personnes handicapées;
- De concevoir et de mettre en œuvre les stratégies de prise en charge intégrée des personnes handicapées;
- De concevoir et de mettre en œuvre les stratégies de prise en charge intégrée des personnes handicapées;
- De contrôler les activités des institutions spécialisées d personnes handicapées;
- De développer les actions visant la réadaptation fonctionnelle des personnes handicapées.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 La Côte d'Ivoire est-elle dotée d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de Côte d'Ivoire à jamais abordé des questions relatives aux droits des personnes handicapées.**

La Côte d'Ivoire est dotée d'une Commission Nationale de Droits de l'Homme, qui exerce des fonctions de concertation, de consultation, de promotion et de protection des droits de l'homme en général, qui incluent ceux des personnes handicapés en particulier.

Depuis sa création en 2005, la Commission Nationale des Droits de l'Homme de Côte d'Ivoire (CNDHCI) n'a pas eu à traiter d'affaires spécifiques aux Droits des personnes handicapées.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

- 9.1 Avez-vous en Côte d'Ivoire des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.**

Il y a environ une centaine d'organisations de personnes handicapées en Côte d'Ivoire, dont l'activité tourne essentiellement autour de plaidoyers pour la mise en œuvre des mesures à l'endroit des personnes handicapées. Elles organisent des formations à l'attention de leurs membres et les regroupent à travers des bases pour mieux défendre leurs droits.

Ces organisations sont regroupées en une confédération: la Confédération des Organisations de Personnes Handicapées de Côte d'Ivoire (COPH-CI), qui coordonne toutes les activités. Cette confédération se compose de six (6) fédérations d'Organisations de personnes handicapées par types de handicaps et de deux mouvements spécifiques. Ce sont:

- la Fédération Nationales des Associations des Handicapés Physiques et Accidentés de Travail de Côte d'Ivoire (FENAHPAT-CI);
- la Fédération des Aveugles et Mouvements Associés de Côte d'Ivoire (FAMA-CI);
- la Fédérations des Associations des sourds de Côte d'Ivoire (FASO-CI);
- la Fédération des Associations et Organisations pour le bien-être des Albinos de Côte d'Ivoire (FAOBA-CI);
- la Fédération National des Organisations pour la Promotion des Bègues de Côte d'Ivoire (FENOB-CI);
- la Fédération Ivoirienne des Associations des Sourds-Aveugles (FIASA);
- le Groupement pour l'insertion des personnes Handicapées Physiques de Côte d'Ivoire (GIEHP-CI);
- l'Association des Femmes Vivant avec Handicap de Bouaké (A.Fe.VH.B).

9.2 Dans les pays de l'Afrique de l'Ouest, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Les réalités dans la sous-région diffèrent d'un pays à un autre. Il existe toutefois la Fédération Ouest Africaine des Personnes Handicapées (FOAPH), dont le siège a été récemment déplacé de Bamako (Mali) à Dakar (Sénégal).⁵

9.3 Si la Côte d'Ivoire a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

La convention n'a pas encore été ratifiée par la Côte d'Ivoire.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

La convention n'a pas encore été ratifiée par la Côte d'Ivoire. Et ne peut être mise en œuvre

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

La convention n'a pas encore été ratifiée par la Côte d'Ivoire. Et ne peut être mise en œuvre

5 http://www.lesoleil.sn/index.php?option=com_content&view=article&id=29261:yatma-fall-nouveau-directeur-executif-de-la-federation-ouest-africaine-des-associations-de-personnes-handicapees&catid=59:house-design&Itemid=108 (consulté le 5 juin 2013).

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Non

9.7 Y'a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

Non

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Il est nécessaire d'assister les OPH pour constituer un lobby fort pour la réalisation des droits des personnes handicapées ; continuer à les sensibiliser sur l'importance de cette convention pour les personnes handicapées dans le pays

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Il est nécessaire d'associer les représentants de ces OPH aux commissions techniques mises en place pour réfléchir sur les différents projets s'inscrivant dans le cadre des personnes handicapées. Le principal défi des OPH étant la garantie du droit à l'éducation pour tous, il est souhaitable que les initiatives dans l'éducation et la formation des personnes handicapées soient soutenues.

9.10 Y'a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Non, il n'en existe pas à l'heure actuelle.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Il existe deux branches:

- Le Ministère des Affaires Sociales chargée directement de la protection des Personnes Handicapées. Ses activités en faveur des personnes handicapées se déroulent à travers les pouvoirs et les fonctions de la Direction de la Promotion des Personnes Handicapées tel que présentés au point 7.2.
- Le Ministère de la Justice, des Droits de l'Homme et des Libertés Publiques Chargé de manière régalienne de la protection des Personnes Handicapées.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en Côte d'Ivoire? (exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet La Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

Il existe en Côte d'Ivoire des pratiques rituelles dont les personnes handicapées sont les cibles et victimes. En effet, les populations de personnes albinos sont sous la menace de sacrifices rituels de même que les enfants handicapés et les nains.⁶

Dans le cas des albinos, leurs organes sont recherchés pour des rituelles. En ce qui concerne les enfants victimes d'infirmités motrices cérébrales, on les appelle les enfants serpents. Selon certaines traditions, ces enfants doivent être « accompagnés » (tuer).

D'une manière générale, le handicap est perçu comme une malédiction ou de la sorcellerie.⁷

11.2 Comment la Côte d'Ivoire répond-t-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

La Côte d'Ivoire accuse un retard dans l'aménagement des infrastructures pour les personnes handicapées.

- **Accès aux bâtiments publics**

A ce jour aucune mesure concrète n'est prise pour améliorer l'accès des personnes handicapées aux bâtiments publics.

- **Accès au transport public**

Les transports publics ne sont pas adaptés aux besoins des personnes handicapées.

6 Propos recueillis auprès de Monsieur Dosso Karim, Inspection d'éducation spécialisée, Chef du Service réadaptation et réinsertion de la Direction de la Protection des Personnes Handicapées; interview du le 6 juin 2013.

7 Propos recueillis auprès de Madame KOFFI-AGUIE Laurentine, Vice-présidente de la Ligue Ivoirienne des Droits de l'Homme (LIDHO), entretien du 3 juin 2013.

- **Accès à l'éducation**

De gros efforts sont faits dans ce domaine. Les écoles spécialisées sont en nombres insuffisants et leurs capacités d'accueils sont en deçà des besoins exprimés par les populations.

- **Accès à la formation professionnelle**

Les projets de l'Agence pour le Développement de la Formation Professionnelle permettent aux handicapés d'avoir accès à la formation professionnelle; toutefois les entreprises hésitent à accueillir les handicapés au terme de leur formation en raison de préjugés sur leur capacité à produire des résultats.

- **Accès à l'emploi**

Les entreprises privées hésitent à employer les personnes handicapées; l'Etat quant à lui prend des mesures pour assurer l'emploi des personnes handicapées au sein de la Fonction Publique; la plus récente a été l'intégration de 337 personnes handicapées au sein de la Fonction Publique.⁸

- **Accès à la détente et au sport**

Les lieux de détente et les infrastructures sportives ne sont pas adaptées ou appropriées aux personnes handicapées; de plus les personnes handicapées se rétractent à fréquenter les lieux de détente et de sport en raison des aprioris fondés sur le regard des autres.

- **Accès à la justice**

Il existe le principe de l'accès à la justice pour tous; toutefois les populations handicapées en raison de leur vulnérabilité n'ont pas toujours les moyens de soutenir une action en justice face à des personnes valides qui ont la capacité de réunir plus aisément des moyens financiers.

- **Accès aux soins de santé**

Le dispositif sanitaire n'est pas adapté aux besoins des handicapés, et le personnel n'a toujours pas la technicité pour accueillir et prodiguer les soins aux handicapés.

11.3 La Côte d'Ivoire accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

La réponse à cette question est sujette à controverse. L'Organisme officiel, la Direction de la Protection des Personnes Handicapées, soutient que des subventions sont accordées chaque année aux Organisations des Personnes Handicapées, à travers les fédérations reconnues, qui se chargent de l'administration de ces fonds. Des organisations estiment cependant ne recevoir aucune subvention de l'Etat.⁹ Il convient de noter que des fonds sont bel et bien dégagés par l'Etat en faveur des Fédérations de personnes handicapées, c'est seulement que ces subventions étatiques sont mal administrées par les responsables d'organismes bénéficiaires.

8 Protection juridique des personnes handicapées: *Politique nationale en faveur des personnes handicapées*, Document du Ministère de la famille, de la Femme et des Affaires Sociale, 2007, p.10.

9 Monsieur Dosso Karim de la Direction de la Protection des Personnes Handicapées, Ministère de la Fonction Publique soutient que des subventions sont allouées aux OPH. Toutefois, le Président de l'Organisation Ivoirienne des Démocrates Handicapés, Monsieur KONE Yacouba et Monsieur YAÔ Abel de l'Organisation des Personnes Handicapées de l'Eglise CMA affirment le contraire. Selon eux, il y a quelques associations qui reçoivent juste un soutien financier ponctuel de l'Etat (Ministère en charge des affaires sociales) pour des activités qu'elles organisent.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc.) en Côte d'Ivoire?

Les personnes handicapées ont toujours eu du mal à participer à la vie politique en Côte d'Ivoire. Elles sont très peu présentes sur l'échiquier politique et très peu parmi elles occupent des postes politiques, en raison du fait qu'elles n'ont pas l'opportunité de pousser loin les études. Toutefois, elles ont la possibilité d'exprimer leurs choix politiques lors des scrutins qui sont organisés. A l'occasion des dernières élections générales des lieux spécifiques ont été aménagés pour leur permettre de voter.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

• **Femmes handicapées**

Les femmes handicapées sont victimes de violences physiques et sexuelles.

• **Enfants handicapés**

Les enfants sont victimes de violences physiques.

• **Autre (exemple: populations indigènes)**

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattus ou prises en compte présentement en Côte d'Ivoire au sujet les personnes handicapées?

L'actualité porte présentement sur trois sujets:

- (1) Amélioration de la politique nationale en faveur des personnes en situation de handicap, dont les nouveaux termes devraient être validé et adopté dans les prochains mois.
- (2) Ratification de la Convention des Nations Unies relative aux Droits des Personnes Handicapées, dont l'autorisation de ratification a été donnée par l'assemblée nationale le 20 juin 2013.
- (3) Prise de décrets d'application de la loi d'orientation no 98-594 du 10 novembre 1998 en faveur des personnes handicapées.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en Côte d'Ivoire? Pourquoi?

La mise en œuvre effective et accrue de la loi no 98-594 du 10 Novembre 1998 d'orientation en faveur des personnes handicapées qui reconnaît l'égalité de chances et de traitement des personnes handicapées, notamment en matière de formation et d'emploi.

La Reconnaissance d'une part du langage des signes comme une langue nationale et d'autre part de la profession d'interprète en langage des signes par l'Etat.

Accorder un rôle important aux organisations d'employeurs et de travailleurs dans la réinsertion professionnelle des personnes handicapées.

La ratification de la convention des Nations Unies relative aux Droits des Personnes Handicapées.

1 Population indicators

1.1 What is the total population of Ghana?¹

The 2010 Population and Housing Census (PHC) states that the population of Ghana is 24 658 823 showing an increase of 30,4 per cent over the 2000 PHC of 18 912 079.²

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in your country and the criteria used to determine who falls within the class of persons with disabilities in your country?

The Ghana 2010 PHC is an improvement over the 2000 PHC. The 2010 PHC provided for the enumeration of persons with disability (PWDs) in order to address the need for data.³ The 2010 PHC followed the essential concepts and definitions of 'a modern Population and Housing Census' as recommended by the United Nations (UN)⁴ to obtain the statistical data on the prevalence of disability. Ghana Statistical Service (GSS) employed the International Classification of Impairments, Disabilities and Handicaps' (ICIDH, WHO 1980) definition of disability.⁵ The GSS translated the ICIDH concepts into simpler, non-technical language that could be understood by respondents. Thus information was collected on persons with visual or sight impairment, hearing impairment, mental retardation, emotional or behavioural disorders and other physical challenges.

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1 Ghana lies in the centre of the West African coast with a total area of 238 533 square kilometres.

2 GSS 2010 PHC summary report of final results (May 2012) 1 (2010 PHC summary report) http://www.statsghana.gov/docfiles/2010phc/Census2010_Summary_report_of_final_results.pdf (accessed 3 August 2013).

3 Ghana 2000 PHC Enumeration Form without enumeration of PWDs; & Ghana 2010 PHC Enumeration Form enumerating PWDs 9.

4 2010 PHC summary report (n 2 above) ix.

5 2010 PHC summary report (n 2 above) xiii.

1.3 What is the total number and percentage of people, women and children with disabilities in Ghana?

In Ghana there are 737 743 persons with some form of disability, representing 3 per cent of the total population.⁶

- Ghana does not have data on 'the total number and percentage of women with disabilities'. The 2010 PHC states that the percentage of 'females' with some form of disability is 52,2 per cent. This data shows that the percentage of females with some form of disability is higher than the percentage of males, which is 47,5 per cent with some form of disability.⁷
- The 2010 PHC of Ghana did not collect data on children with disability.⁸

1.4 What are the most prevalent forms of disability in Ghana?

The most prevalent form of disability in Ghana is the visual or sight impairments with 40,1 per cent of the total population having some form of disability. This is followed by persons with physical disabilities, other than visual impairment of 25,4 per cent; then by persons with psychosocial disabilities with 18,6 per cent, people with intellectual disabilities with 15,2 per cent and then other forms of disability with 10,4 per cent.⁹

2 International obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in your country? Has your country signed and ratified the CRPD and the Optional Protocol? If so, provide the date(s).

- Ghana signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in March 2007. The Ministry of Employment and Social Welfare laid the Convention in Parliament on 20 July 2011, in accordance with article 75¹⁰ of the 1992 Constitution.
- Ghana became the 119th state to ratify the CRPD and the Optional Protocol on 31 July 2012.¹¹

6 2010 PHC summary report (n 2 above) 12.

7 As above.

8 2010 PHC summary report (n 2 above).

9 2010 PHC summary report (n 2 above) 13.

10 Art 75(1) & (2) of 1992 Constitution of Ghana provide: '(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by: (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.'

11 West African Regional Portal on the Rights of People with Disabilities 'Ratification of the CRPD by Ghana on July 31, 2012' <http://proadiph.org/Ratification-de-la-CDPH-par-le.html> (accessed 8 May 2013); Human Rights Watch 'Ghana: Disability Rights Convention Ratified' 22 August 2012 <http://www.hrw.org/news/2012/08/22/ghana-disability-rights-convention-ratified> (accessed 8 May 2013).

2.2 If your country has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for submission of the report? Has your country submitted its report? If not, what reasons does the relevant government department give for the delay?

- Ghana signed and ratified the CRPD as seen from 2.1.
- Ghana's initial country report is due in 2014.¹²
- In 2012, the Ministry of Social Welfare and Employment was tasked with handling disability issues.
- However, the National Council for Persons with Disabilities (NCPWDs), responsible for disability issues, has been moved from the Ministry of Social Welfare and Employment to the Ministry of Gender, Children and Social Protection (Ministry). This means that the Ministry of Gender, Children and Social Protection currently has the mandate to submit the country's periodic report.

2.3 If your country has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities had reviewed the report, indicate if the Committee made any concluding observations and recommendations to your country's report. Was there a domestic effect in your country on disability issues due to the reporting process?

See 2.2 above.

2.4 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, has your country also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in your state's United Nations Universal Periodic Review (UPR) report? If so, what was the effect of these observations or recommendations?

United Nations Instruments

- **Convention on the Rights of the Child**

Ghana ratified the Convention on the Rights of the Child (CRC) on 5 February 1990. Ghana's second state report¹³ to the Committee on the Rights of the Child (Committee) was due in 1997, but submitted in March 2005 and concluding observations were adopted on 27 January 2006. Ghana's second state report to the Committee identified the following steps taken to promote the rights of PWDs:

- The Commission on Human Rights and Administrative Justice (CHRAJ), the Women and Juvenile Unit of the Police Service (WAJU),¹⁴ Ghana Legal Aid, Civil Society Organisations (CSO) and other stakeholders have undertaken educational programmes to address discrimination among vulnerable groups such as PWDs.

¹² Art 32(1) & (2) of CRPD.

¹³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Second Periodic Reports of States Parties Due in 1997*, Ghana, 14 July 2005, CRC/C/65/Add.34.

¹⁴ Now Domestic Violence and Victim Support Unit (DOVVSU).

- The Ministry of Manpower Development and Employment (MMDE) developed a policy on disability in 2002 to take account of discrimination against PWDs.
- The Federation of the Disabled and the Department of Social Welfare (DSW) sensitise the public on the rights of PWDs through advocacy.
- Ghana's government and the private sector have rehabilitated and established a number of schools designed for people with visual impairments, deaf persons and children with mentally disabilities.
- DSW identifies and registers PWDs, parents of children with disabilities are counselled to accept their disabilities and assisted to seek medical help, where necessary. The Department also runs a Community Based Rehabilitation Programme that integrates PWDs into mainstream society and children with disabilities are encouraged to enrol in regular and special schools.
- The Ministry of Education has included important aspects of the disability policy into its Teacher Training programmes including peripatetic.
- Electronic media (television) is reaching out to the deaf persons with news items and other social development messages including HIV/AIDS.¹⁵
- Interventions in the form of special provisions for the treatment of the children with disabilities, availability of public places, educational facilities and inclusive education.¹⁶

The Committee in its concluding observation¹⁷ made the following recommendations with regard to the rights of children with disabilities:

- The Committee recommended the full implementation of article 4 of CRC to ensure the protection of the rights of children with disabilities.¹⁸
- The Committee recommended increasing and prioritising budgetary allocations to ensure that there is a full implementation of the rights of the child, particularly children belonging to vulnerable groups including children with disabilities.
- The Committee expressed concern about the lack of statistics regarding children with disabilities, the limited capacities for early detection and the treatment of children with disabilities; the inaccessibility of buildings and transportation and the absence of a policy aimed at inclusion and integration.
- In the light of The Standard of Rules on the Equalisation of Opportunities for Persons with Disabilities, the Committee further encourages the inclusion of children with disabilities into regular educational system and their integration into society.¹⁹

Regional Instruments

• African Charter on Human and Peoples' Rights (ACHPR)

Ghana ratified the ACHPR on 24 January 1989. Although Ghana's second periodic report was due in 1993, it was submitted in 2000. In the report under article 18 of the Charter, the following aspects regarding disability rights were mentioned:

- Firstly, in compliance with article 18 of ACHPR, article 29 of the 1992 Constitution of Ghana protects PWDs from discrimination, guarantees working and normal living conditions, and ensures the wellbeing of PWDs in the family context.²⁰

15 CRC/C/65/Add.34 (n 13 above) 25.

16 CRC/C/65/Add.34 (n 13 above) 53.

17 Committee on the Rights of the Child, forty-first session, Consideration of reports submitted by states parties under article 44 of the Convention *Concluding Observations: Ghana* 17 March 2006 CRC/GHA/CO/2.

18 CRC/C/GHA/CO/2 (n 17 above) 4.

19 CRC/GHA/CO/2 (n 17 above) 10.

20 Ghana: 2nd Periodic Report to the ACHPR, 1993-2000 31 <http://www.achpr.org/states/ghana/reports/2nd-1993-2000> (accessed 20 May 2013).

- Concluding observations on the second periodic report have not been adopted by the Committee.

- **United Nations Universal Periodic Review (UPR)**

Ghana's first cycle of the universal periodic review²¹ took place from 5 to 16 May 2008. The UPR report indicated that the 1992 Constitution of Ghana provides in Chapter 5 for the protection of fundamental human rights and freedoms of PWDs. Ghana's second cycle of the universal periodic review²² took place from 22 October to 5 November 2012. This report indicated with regard to disability rights that, Ghana is committed to comply with its international human rights obligations. Ghana ratified the CRPD in July 2012. The effect of the ratification of the CRPD is that Act 715 will be amended to reflect the provisions of the CRPD, in order to effectively promote and protect the rights of PWDs.²³

2.5 Was there any domestic effect on your country's legal system after ratifying the international or regional instrument in 2.4 above?

The ratification of the CRC and the ACHPR led to the adoption of laws aimed at protecting and promoting human rights. Ghana enacted the following legislation to promote the rights of PWDs:

- The Children's Act (Act 560) in 1998, which conforms to the CRC.
- The 1992 Constitution of Ghana.
- The Juvenile Justice Act (Act 653) of 2003.
- The establishment of the Ministry of Women and Children's Affairs (MOWAC).²⁴
- The establishment of the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456).
- The Persons with Disability Act, 2006 (Act 715).
- The National Health Insurance Act, 2003 (Act 650).
- The Domestic Violence Act, 2007 (Act 732).
- Remarkable improvement made in the field of education in attempting to pursue the policy on Free Compulsory and Universal Basic Education (FCUBE).

2.6 Do ratified international treaties automatically become domestic law under your legal system? If so, are there any cases where the courts applied international treaty provisions directly?

Ghana operates under a dualistic legal system. International treaties must be ratified in Parliament with a majority vote and assented to by the President.²⁵ After such ratification by Parliament the international treaty will be legally enforceable. Furthermore, the internal domestic laws must be amended to conform to the international instruments.²⁶ Where there is conflict between domestic law and ratified international instruments, the international instrument takes precedence over domestic law.

21 UPR First Cycle - Ghana A/HRC/WG.6/2/GHA/1 29 <http://www.ohchr.org/en/hrbodies/upr/pages/ghsession.aspx> Check link (accessed 20 May 2013).

22 UPR Second Cycle - Ghana A/HRC/WG.6/14/GHA/1 15; <http://www.ohchr.org/en/hrbodies/upr/pages/GHsession14.aspx> (accessed 20 May 2013).

23 'Disability Act falls short of UN CRPD: Report' *Global Accessibility News* 1 July 2013. <http://globalaccessibilitynews.com/2013/07/01/disability-act-falls-short-of-un-crpdp-report/> (accessed 6 August 2013).

24 Now the Ministry of Gender, Children and Social Protection.

25 Art 75(1) & (2) of 1992 Constitution.

26 Sec 2 of Ghana Law Reform Commission Act 1975 (NRCD 325).

The first prominent case came in 1993 when the court held in *National Patriotic Party v Inspector General of Police (NPP v IGP)*²⁷ that the Protocol to the ACHPR could be invoked without formal incorporation into local law, where the same rights were also protected in the Ghanaian Constitution.

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim in national legislation? Provide details.

The Persons with Disability Act 2006 (Act 715) was passed into law in August 2006 to provide for PWDs. Act 715 contains some civil rights,²⁸ social rights²⁹ and political rights,³⁰ similar to those provided for in the CRPD.³¹ Since the Disability Act of 2006 had been passed before ratification of the CRPD in 2012, the CRPD has not been incorporated verbatim into Act 715. The following are some provisions in the CRPD that are not included in Act 715, which still need to be addressed:

Equality and non-discrimination clauses³²

Act 715 does not address equality of PWDs before and under the law as the CRPD provides.³³ The non-discrimination provision³⁴ in Act 715 is not detailed enough. The provision does not address the need for prohibiting all kinds of discrimination on the basis of equality as addressed by the CRPD.³⁵ Such a provision is vital in determining the significance of the legislation, particularly in view of the fact that Ghana's constitutional non-discrimination clauses³⁶ do not provide for disability. Act 715 needs to address non-discrimination in detail in order to effectively do away with the negative attitude of the society against PWDs.³⁷

Women with disabilities and Children with disabilities clauses³⁸

Act 715 does not address the fundamental human rights of women with disabilities (WWD) and children with disabilities. There is therefore the need for Act 715 to address the rights of WWD and the prerequisite need for their empowerment. This is necessary for the reason that WWDs suffer multiple discrimination³⁹ and they are among the most excluded in our society.⁴⁰ The African Charter on Women's Rights, of which Ghana is a signatory, provides that state parties should ensure:

27 [1993-94] 2 GLR 459 467.

28 Secs 1-7, 23-29, & 38 of Act 715.

29 Secs 9-17, 31-35, & 36 of Act 715.

30 Secs 39 & 40 of Act 715.

31 Civil rights: arts 18(1), 19-22, 23(1) & 24(1) of the CRPD; social rights: arts 25-28 & 30-31 of the CRPD; and political rights: art 29 of CRPD

32 Art 5 of the CRPD.

33 Art 5 of the CRPD.

34 Sec 4 of Act 715.

35 Art 5(2) of the CRPD.

36 Arts 17(2), 35(5), & (6) of the 1992 Constitution; K Appiagyei-Atua K 'The new disability law in Ghana, the way forward', a speech delivered in the second annual CHRAJ-GBA-CHRI Lectures on 'Advancing economic, social and cultural rights in Ghana' 2006.

37 'Campaign launch, on improving attitudes towards PWDs' <http://www.cepdghana.org/content/view/42/1/> (accessed 9 August 2013).

38 Art 6 & 7 of the CRPD.

39 'Respect our rights ... persons with disabilities tell public services providers' *The Chronicle* undated <http://thechronicle.com.gh/respect-our-rights-persons-with-disability-tell-public-service-providers/> (accessed 9 August 2013).

40 O Mensah *et al* *Strengthening the disability movement in Ghana through organizational capacity and advocacy: Contextual analysis of the disability situation in Ghana* (2008) 113 <http://www.gfdgh.org/Context%20analysis.pdf> (accessed 9 August 2013).

[T]he protection of women with disabilities and take specific measures to commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making ... [State parties should also] ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.⁴¹

Empowerment of WWD will ultimately enable them to contribute to the socio-economic development of the nation. Act 715 is furthermore silent on the full enjoyment of human rights and fundamental freedoms of children with disabilities on an equal basis with other children.⁴² The principle of the best interests of the child with a disability⁴³ and provision for disability age-appropriate assistance clauses enabling children with disabilities to realise their rights⁴⁴ are also absent from Act 715. The incorporation of such provisions will necessitate measures, policies and strategic plans to promote and protect the rights of children with disability.⁴⁵

Awareness-raising⁴⁶

Act 715 did not address the need for Ghana to adopt immediate, effective and appropriate measures for awareness-raising regarding the rights of PWDs and to foster respect for the rights and dignity of PWDs. So that, the state can effectively combat stereotypes, prejudices and harmful practices relating to PWDs through public awareness campaigns and promoting awareness-training programmes. The incorporation of this provision will encourage all organs of the media to portray PWDs in a manner consistent with the purpose of a comprehensive Persons with Disability Act. Currently the media does not have adequate information on PWDs, nor does it face any direct or indirect pressure from any recognised body to cover disability issues.⁴⁷

Accessibility⁴⁸

Accessibility provisions addressed under Act 715 do not cover the state's obligation to provide training for stakeholders on accessibility issues; and different forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters. Addressing accessibility provisions in detail under Act 715 will guarantee the provision of live assistance and intermediaries throughout society to cater for the needs of PWDs. This would go a long way to solve problems of wrong interpretation and guarantee quality services to hearing-impaired persons. It is for this reason that GNAD⁴⁹ appealed to the government of Ghana to recognise Sign Language as the official language for the hearing impaired and make provision for the employment of sign language interpreters.

41 Art 23 of the Protocol to the ACHPR on the Rights of Women in Africa.

42 Art 7(1) of the CRPD.

43 Art 7(2) of the CRPD.

44 Art 7(3) of the CRPD.

45 'Parents urged to stop concealing children with disabilities' *The Chronicle* undated <http://thechronicle.com.gh/parents-urged-to-stop-concealing-children-with-disabilities/> (accessed 9 August 2013); 'The spirit child phenomenon' *Ghana Web* 5 July 2013 <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=278609> (accessed 9 August 2013).

46 Art 8 of the CRPD.

47 Mensah *et al* (n 40 above) 94.

48 Art 9 of the CRPD.

49 'Provide sign language interpreters for all deaf students' *The Ghanaian Times* 12 September 2012 <http://newtimes.com.gh/story/provide-sign-language-interpreters-for-all-deaf-students-gnad> (accessed 8 August 2013).

Right to life⁵⁰

Act 715 does not safeguard the inherent rights of PWDs. As a result of this omission, some traditional practices still encourage the killing of PWDs especially children with disabilities.⁵¹ There is a 'spirit child' phenomenon that started in some parts of the Upper East region in the northern part of Ghana in 1975. It is a cultural practice whereby children born with disabilities or whose birth coincides with a tragic incident in the family, such as the loss of a parent, are killed. Such babies are called 'spirit children' and are thought to be a 'bad omen'. The community is considered to be blasphemous and cursed by the gods and for this reason the 'unfortunate creature' must return.⁵² Afrikids is an NGO in the northern Ghana region. After twelve years of awareness campaigns by Afrikids and improved access to education, the people of the Upper East region stopped with the killing of children.⁵³ However, there is still a need to incorporate provisions on the right to life in Act 715 in order to effectively and totally put an end to the killings of children with disabilities.

Freedom from protection, violence and abuse⁵⁴

Act 715 does not contain provisions mandating the state to take appropriate measures to prevent all forms of exploitation, violence and abuse of PWDs by ensuring, *inter alia*, appropriate forms of gender – and age – sensitive assistance and support for PWDs, their families and caregivers. Activists supporting the rights of PWDs were concerned with the slow implementation of the Persons with Disability Act, especially the lack of legislative instruments to implement the new law.⁵⁵ Despite the legal protection provided for in the law, discrimination against PWDs in employment and the inaccessibility of public buildings continues to be a problem. The reason for this is that there is no obligation on the state to take appropriate measures to prevent all forms of exploitation, violence and abuse of PWDs. Finally, the absence of independent monitoring authorities⁵⁶ creates a vacuum in the implementation process of Act 715. The non-existence of a monitoring team to exert pressure on the state has resulted in a delay of the implementation process of Act 715 as is evident from calls for the rapid implementation of the Act.⁵⁷

50 Art 10 of the CRPD.

51 'Spirit Child: An investigation into the ritual killing of disabled Ghanaian children deemed to be possessed by evil spirits' *Aljazeera* 10 January 2013 <http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html> (accessed 8 August 2013); Laura Pannack Photography 'Saving the cursed children of Ghana' (2012) http://laurapannack.com/commissions/stories/ghana/#PHOTO_1 (accessed 8 August 2013); CW Munyi 'Past and present perceptions towards disability: A historical perspective' (2012) 32 *Disability Studies Quarterly* <http://dsq.sds.org/article/view/3197/3068> (accessed 8 August 2013).

52 'The spirit child phenomenon' (n 45 above).

53 'Ghanaian communities commended for abolishing killing of "spirit children"' *Ghana Business News* 30 April 2013 <http://www.ghanabusinessnews.com/2013/04/30/ghanaian-communities-commended-for-abolishing-killing-of-spirit-children/#sthash.GOVWQVVb.dpuf> (accessed 9 August 2013).

54 Art 16 of the CRPD.

55 2012 *Country Reports on Human Rights Practices – Ghana* 19 April 2013: <http://www.refworld.org/docid/517e6e33e.html> (accessed 8 August 2013).

56 Art 16(3) of the CRPD.

57 'Expedite action on implementation of Disability Act – CHRAJ' *Modern Ghana* 2 December 2009 <http://www.modernghana.com/news/252164/1/expedite-action-on-implementation-of-disability-act.html> (accessed 8 August 2011); 'Persons with disability bemoan slow action on implementation of Act' *My Ghana Tv* <http://videos.myghana.tv/watch-listen-to-ghana-news-on-tv-live-online/persons-with-disability-bemoan-slow-action-on-implementation-of-act.html>; 'GFD calls for implementation of the Disability Act 715' *GNADGH* 8 July 2007 <http://gnadgh.com/news/?p=10> (accessed 8 August 2011).

3 Constitution

3.1 Does the Constitution of your country contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

Article 29 of the 1992 Constitution:

- Article 29 of the 1992 Constitution contains the rights of PWDs. Article 29(8)⁵⁸ mandates Ghana's Parliament to enact such laws as are necessary to ensure the enforcement of the provisions. Hence, the Parliament of Ghana enacted the Persons with Disability Act 2006 (Act 715).
- Article 29 of the 1992 Constitution guarantees PWDs right to:
 - family life;
 - social activities;
 - recreational activities;
 - community integration;
 - well resourced indispensable specialised establishment;
 - protection against all forms of exploitation, discrimination, abusive or degrading nature;
 - easy access to Justice;
 - availability of public places;
 - a convenient and accessible business and working environment; and
 - adoption of requisite laws, regulations, policies and measures to enforce disability rights.⁵⁹

Article 37(2)(b) of the 1992 Constitution:

- In order to secure and protect social order, Ghana has the mandate as a state to direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.⁶⁰
- Furthermore, article 37(2)(b) of the 1992 Constitution gives Ghana constitutional guidance in the protection and promotion of all other basic human rights and freedoms of PWDs.

Article 37(3) of the 1992 Constitution:

- According to Article 37(3) the state shall be constitutionally guided by international human rights instruments in promoting disability rights.

3.2 Does the Constitution of your country contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The constitutional provisions are:

⁵⁸ Art 29(8) of the 1992 Constitution provides: 'Parliament shall enact such laws as are necessary to ensure the enforcement of the provisions of this article'.

⁵⁹ Art 17(4)(a) of the 1992 Constitution.

⁶⁰ Art 37(1) of the 1992 Constitution.

Article 17(1) of the 1992 Constitution:

The reference to 'all persons' in the article denotes all Ghanaians, including PWDs, the right to have access to the justice system.

Article 17(2)(3) of the 1992 Constitution:

This provision guarantees non-discrimination against all Ghanaians including PWDs.

4 Legislation

4.1 Does your country have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

The Persons with Disability Act, 2006 (Act 715) is an act to provide for PWDs, to establish a National Council on Persons with Disability and to provide for related matters.

4.2 Does your country have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

The legislation is the following:

Children's Act, 1998 (Act 560)

The Children's Act (Act 560) is an act to reform and consolidate the law relating to children, to provide for the rights of the child, maintenance and adoption, regulating child labour and apprenticeship, for ancillary matters concerning children generally and to provide for related matters. Section 3 of Act 560 deals with non-discrimination against a child on the ground of disability. Section 10(1) of Act 560 provides for the treatment of a child with a disability. Section 10(2) of Act 560 addresses the right of the child to special care, education and training for maximum potential and to be self-reliant.

Labour Act, 2003 (Act 651)

Act 651 is an Act to amend and consolidate the laws relating to labour, employers, trade unions and industrial relations. The law establishes a National Labour Commission, and provides for related matters. Section 3(e) of Act 651 caters for the economic right of PWDs. Section 14(e) of Act 651 prohibits an employer to discriminate against an employee on grounds of disability. Part IV of the law regulates the employment of PWDs.

National Health Insurance Act, 2003 (Act 650)

Act 650 is an Act to secure the provision of basic healthcare services to persons resident in the country through mutual and private health insurance schemes. Section 81(2)(d) of Act 650 guarantees the mandatory enrolment of PWDs on the scheme.

5 Decisions of courts and tribunals

- 5.1 Have the courts (or tribunals) in your country ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases have had.**

The courts (or tribunals) have not decided many cases relating to disability rights. However, the Persons with Disability Act protects PWDs, in addressing violations of their rights. A case relating to disability rights, *Ghana Federation of the Disabled (GFD) v Attorney General, Ghana Highway Authority and Millennium Development Authority (MiDA)*,⁶¹ is pending before the High Court. On 8 February 2013 GFD took action against three public institutions for neglecting the needs of PWDs in the construction of the George Walker Bush Highway. The transportation network did not take the needs of PWDs into account in the design, construction and operation of the transportation network.⁶²

GFD is requesting the Human Rights Court in Accra, to order the Ghana Highway Authority, MiDA and the Attorney General to modify the highway to integrate the needs of PWDs as provided in Act 715. The next court date is 16 June 2013.

6 Policies and programmes

- 6.1 Does your country have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

Disability Policy 2000⁶³

The guiding principle is that for Ghana to achieve any meaningful and sustainable development, it needs to harness all its human resources. This policy considers the fact that all people irrespective of sex or disability can contribute to the national development process if given the opportunity.

61 Suit number HRC/12/12, pending before the High court.

62 Sec 23 of Act 715: Transportation, integration of needs of PWDs.

63 Act 715 was enacted based on the Disability Policy, April 2000.

6.2 Does your country have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

National Youth Policy⁶⁴

This serves as a guideline for the government to engage the youth and other stakeholders in meaningful partnership to develop appropriate interventions and services for youth empowerment and development. Accordingly the policy ensures the active participation of young people with disabilities.

Education Strategic Plan⁶⁵

The Education Strategic Plan (ESP) 2010-2020 sets out government's strategies for the education sector over the next decade. The ESP has a policy objective to improve access to quality education for PWDs. Inclusive Education (IE) and Special Educational Needs (SpED) to young PWDs is informed by three guiding principles:

- The right to education;
- The right to equality of educational opportunities; and
- The right and obligation to be included in and participate fully in the affairs of society.

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does your country have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and powers.

In Ghana there is not yet an official body that specifically addresses violation of the rights of people with disabilities.

7.2 Other than the ordinary courts or tribunals, does your country 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 powers.

Commission on Human Rights and Administrative Justice (CHRAJ)⁶⁶

The CHRAJ was established by an Act of Parliament.⁶⁷ The CHRAJ is composed of one Commissioner and two deputy Commissioners who are appointed by the

⁶⁴ National Youth Policy of Ghana, Ministry of Youth and Sports August 2010.

⁶⁵ Education Strategic Plan 2010-2020, Ministry of Education, February 2012.

⁶⁶ Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) regulates CHRAJ.

⁶⁷ Arts 216 & 217 of the 1992 Constitution.

President of Ghana acting in consultation with the Council of State.⁶⁸ The Commissioners in the performance of their functions are not subjected to the direction or control of any person or authority.⁶⁹ The CHRAJ has the constitutional function⁷⁰ to investigate complaints of violations of fundamental human rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of public duties. The CHRAJ also has the duty to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complainants allege violations of fundamental human rights and freedoms under the Constitution. The CHRAJ has the mandate to educate the public as to human rights and freedoms by publications, lectures and symposia. The CHRAJ has the constitutional power to seek a remedy in respect of such acts or omissions and to provide for other related purposes.

The CHRAJ has the constitutional power⁷¹ to question any person in respect of any matter that the CHRAJ is investigating. The CHRAJ has the mandate to order⁷² any person to appear before them and to disclose any document or record relevant to any investigation to them.

The CHRAJ cannot investigate⁷³ a matter pending before a court, or matters involving the government of Ghana's relations with another government or international organisation. Finally, the CHRAJ cannot investigate matters relating to the President of Ghana's exercise of prerogative of mercy.

Department of Social Welfare (DSW)⁷⁴

The Department of Social Welfare is a statutory agency mandated to promote and protect the rights of children, justice and administration of child related issues, community care for PWDs and needy adults. The DSW investigates cases of contravention of children's rights. The DSW operates health assessment to provide early diagnostic medical attention to mothers and infants to determine the existence or onset of disability.⁷⁵

Domestic Violence and Victim Support Unit (DOVVSU)⁷⁶

Domestic Violence and Victim Support Unit of the Police provides focal points for complaints and counselling.⁷⁷ DOVVSU is mandated to provide protection from domestic violence particularly for women and children and for connected purposes.

The Ghana Police Service⁷⁸

The Police Service aims at ensuring that all officers fulfil their obligations and discharge their duties whilst promoting, protecting and respecting the human rights

68 Art 70 (1)(a) of the 1992 Constitution; sec 2 of Act 456.

69 Sec 6 of Act 456.

70 Art 218 of the 1992 Constitution; sec 7 of Act 456.

71 Art 219(1) of the 1992 Constitution; sec 7 of Act 456.

72 Sec 8(1) of Act 456.

73 Art 219(2) of the 1992 Constitution; sec 8(2) of Act 456.

74 Secs 16(2) & 19 of Act 560; secs 20 & 35 of Act 715.

75 Secs 34 of Act 715.

76 Regulations 14 of Police Service Regulations, 2012 (C.I. 76) established DOVVSU.

77 Sec 6 of the Domestic Violence Act, 2000 (Act 732).

78 Secs (1) & (2) of The Police Force Act, 1970 (Act 350).

of individuals.⁷⁹ As a result, complaints about domestic violence could be lodged with the police. The police are mandated to respond promptly to a request for assistance from domestic violence even when the person reporting is not victim of the domestic violence.

8 National human rights institutions

8.1 Does Ghana have a Human Rights Commission or an Ombudsman or a 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 your country has ever addressed issues relating to the rights of persons with disabilities.

The Constitution provided for the establishment of an independent Commission on Human Rights and Administrative Justice (CHRAJ).⁸⁰ The functions of the CHRAJ,⁸¹ as set out by the Constitution, include the duty to investigate complaints of violations of fundamental human rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his public duties. The CHRAJ also has the duty to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental human rights and freedoms under the Constitution. The CHRAJ also has the duty to educate the public on human rights and freedoms. The CHRAJ was established by an Act of Parliament, during 1993. The CHRAJ has offices located in all the ten regional capitals and in the administrative districts of Ghana. The CHRAJ was established by the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456).

Though the mandate of the CHRAJ does not specifically and explicitly include 'addressing disability rights' the structure of the CHRAJ ensures that human rights and freedoms are promoted and protected throughout Ghana. The CHRAJ has investigated few cases relating to the rights of PWDs.

79 Secs 6 & 7 of Act 732.

80 Sec 6 of Act 456.

81 Sec 7 of Act 456.

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 your country? If so, list each organisation and describe its activities.

There are a number of organisations that represent and advocate for the rights and welfare of PWDs in Ghana. The activities of DPOs are mostly to sensitise the public of their existence, advocate for equal opportunities in society and promote the rights of PWDs through building their capacity and ensuring the full inclusiveness of their needs, aspirations, and active participation in national and local policies and programmes. The DPOs in Ghana⁸² are:

- **Ghana Federation of the Disabled (GFD)**
The GFD is the national umbrella of DPOs in Ghana. GFD was established in 1987 with the aim of promoting the rights of PWDs, advocating for equal opportunities in society and for active participation in national and local policies and programmes.
- **Ghana Society of the Physically Disabled (GSPD)**
GSPD is an organisation of persons who are physically disabled. It is the largest DPO in Ghana. They operate at national, regional and district levels.
- **Ghana Blind Union (GBU)**
GBU's membership comprises of people who are visually impaired. GBU functions at national and regional levels with less activity at a district level. GSPD is helping GBU to establish branches at the district level.
- **Ghana National Association of the Deaf (GNAD)**
GNAD's membership comprises of people who have hearing impairments. GNAD functions at a national and regional level.
- **Ghana Association of Persons with albinism (GAPA)**
GAPA's membership comprises of people with albinism. GAPA functions at national level with regional branches in Volta, Upper West and Northern Regions.
- **Parent Association of Children with Intellectual Disability (PACID)**
The membership of this organisation consists of parents of children with intellectual disabilities. PACID operates at a national level.
- **Mental Health Society of Ghana (MEHSOG)**
MEHSOG members are people who have experienced some form of mental health disability over a period of time. Though they have fully recovered, they continue to experience discrimination, stigmatisation and rejection by their families due to the prejudice created by traditional beliefs. MEHSOG functions at a national level and does not have branches at a regional level.

82 The author surveyed some executives of DPOs and some PWDs on 'Overview of Disability Rights in Ghana' (hereinafter referred to as Responses from questionnaire by some executives of DPOs and some PWDs).

- **Share Ghana**

This organisation's focus is specifically for people with neurological disorders. Share Ghana operates at a national level.

Non-Governmental Organisations' (NGOs) activities, amongst others, are to advocate for the rights and welfare of PWDs. Most of these NGOs undertake projects to enhance the welfare of PWDs, and sponsor disability programmes which promote the welfare of PWDs. The NGOs are:

- **Centre For Democracy And Development Ghana (CDD)**⁸³

CDD Ghana is an independent, non-partisan organisation based in Accra, Ghana. CDD is dedicated to the promotion of society and good governance based on the rule of law, appropriate checks on the power of the state and integrity in public administration. In CDD's human rights work, it focuses on the promotion and protection of the rights of vulnerable groups in society as well as expansion of citizenry access to justice.

- **SEND-Ghana**⁸⁴

SEND-Ghana is an affiliate of SEND (Social Enterprise Development) Foundation of West Africa. Its focus is into research and advocacy to contribute to poverty reduction and strengthen good governance practices in Ghana. Most of its developmental operations are in the 50 poorest districts in the Greater Accra, Northern, Upper East and Upper West Regions of Ghana. SEND-Ghana champions pro-poor policy programmes which contribute to create an enabling environment for vulnerable citizens. SEND-Ghana empowers, at grassroots level, people such as people with disabilities, SEND-Ghana activities are enhanced by the numerous research projects undertaken.

- **Sight-savers**⁸⁵

Sightsavers has been working in Ghana since the 1950s. Currently they are working with the Ministry of Health to support the current five-year action plan for eye care at both regional and national levels. Projects in Ghana include integrating children who are blind or visually impaired into mainstream schools, helping people regain their confidence and livelihoods after losing their sight, as well as preventing and treating eye problems in the poorest areas of the country. Sightsavers is also tackling the shortage of eye care workers by supporting local people to train as eye care professionals. Sightsavers pursue programmes to promote the welfare of PWDs.⁸⁶

- **Basic-Needs**⁸⁷

In Ghana Basic Needs currently operates in the rural areas of the Northern, Upper East, Upper West and Greater Accra Regions. Basic Needs works to end the suffering of people with mental illness by ensuring that their basic needs are met and their basic rights are respected.

- **Right to Dream Foundation**⁸⁸

Right to Dream provides professional sports, education and leadership academies to under privileged young talents. Right to dream advocates that disabilities should not deprive PWDs of realising their dreams. Currently, Right to Dream's para-

83 CDD's website: <http://www.cddghana.org> (accessed 8 August 2013); CDD Ghana 'Background information' http://www.g-rap.org/grantee_profiles/cdd.html (accessed 8 August 2013).

84 SEND-Ghana's website: <http://www.sendwestafrica.org> (accessed 8 August 2013).

85 Sight Savers' website: <http://www.sightsavers.org> (accessed 8 August 2013).

86 Sightsavers 'The first if its kind' 2012 http://www.sightsavers.org/our_work/around_the_world/west_africa/ghana/12911.html (accessed 12 May 2012).

87 Basic Needs' website: <http://www.basicneeds.org> (accessed 8 August 2013).

88 Right to Dream Foundation's website: <http://www.righttodream.org>; 'Right to dream' <http://www.escapecity.org/organisations/right-to-dream> (accessed 8 August 2013).

sports programme aims to develop young athletes with disabilities into sporting role models and medal winners who will represent Ghana at Rio in 2016 and in future sporting events.

- **Right to Play**⁸⁹

Right to Play promotes gender equality and equity at all levels by promoting participation in regularly scheduled sport and play activities for girls and PWDs.

9.2 In the countries in your region, are DPOs organised or coordinated at a national and/or regional level?

See 9.1 above.

9.3 If Ghana has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Ghana ratified the CRPD less than a year ago. DPOs have not commenced with their involvement in the implementation process due to the fact that policies and agencies are still to be established.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

On 18 March 2013, the Executives of the GFD held a meeting with President JD Mahama. The agenda of the meeting was to discuss the role of DPOs in the implementation of the CRPD and the need for enactment of a legislative instrument (LI) to operationalise Act 715. On the implementation process of the CRPD, the executives of GFD were assured that measures were underway to put in place a technical team to monitor and document the implementation of the CRPD, to prepare and submit shadow report.⁹⁰

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The main challenge with implementation is the unwillingness on the part of government departments and agencies to include DPOs in the implementation process. As a result DPOs lack adequate information on the state of implementation.⁹¹

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

There are no specific instances of 'best-practice models' because no effort has yet been made to ensure involvement of DPOs.

89 Right to play – Ghana: 'International programs' <http://www.righttoplay.com/switzerland/our-impact/Pages/Countries/Ghana.aspx> (accessed on 8 August 2013).

90 Responses from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

91 Responses from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

The implementation process of the CRPD has not started.

9.8 Has your research (for this project) shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

- DPOs have to contribute to the implementation of the relevant legislation that will promote the human rights of PWDs. However, DPOs do not have the skills.⁹² This means that there is a need to research and put together 'Guidelines on DPOs Inclusive Administration of relevant legislation'. Such 'researched guidelines' would serve as a manual for DPOs on how to be effectively involved in the implementation of international, regional and local legislation that affect them directly.
- In some instances a disagreement between the National DPOs and a Federation who oversees disability policy, programmes and assignments occurs. There are similar cases of disagreement over these matters at regional and district levels.⁹³ There is a need for a researched guideline on 'the roles of DPOs in nation building in this era of disability paradigm shift'.⁹⁴
- PWDs as well as some government agencies like Legal Aid, the Ghana Police Service, the Department of Social Welfare, and the Attorney General's Department lack adequate information on disability rights and the provisions of the CRPD.⁹⁵ DPOs need to be educated on the CRPD and must be skilfully trained to be able to, in turn educate government agencies. Besides, to ensure easy reading, there must be copies of abridge versions of the CRPD⁹⁶ both for the benefit of DPOs and the heads of government institutions and agencies.
- There is a need to harness the unique role that the press and the media can play with awareness-raising in the education and implementation of CRPD and other instruments.⁹⁷

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 made the following recommendations:⁹⁸

- DPOs recommended intensive education on the provisions of the international and regional instruments that affect their lives.
- DPOs need to be educated on the implementation process, the monitoring, the preparation of the country report, as well as the role DPOs could play.
- DPOs recommended that copies of the relevant instrument must be made available in an abridged form. This would facilitate easy reading and understanding.

92 Responses from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

93 Responses from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

94 Proposal from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

95 Responses from questionnaire by some heads of public institution, 30 May 2013.

96 Proposal from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

97 Mensah *et al* (n 40 above) 4 & 94.

98 Recommendations from questionnaire by some executives of DPOs and some PWDs, 30 May 2013.

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?

The research has revealed that almost all the organisations that promote the rights of PWDs undertake research at some point in time. DPOs have been involved in most of this research, because they play an important role in reporting accurate information with regard to PWDs. However CDD-GHANA, Centre for Disability and Rehabilitation Studies-KNUST⁹⁹(CEDRES) and the Department of Special Education (University of Education-Winneba) collaborate and involve DPOs in their research.

10 Government departments

10.1 Do you have government departments that are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the departments.

There are no government departments specifically responsible for promoting and protecting the rights and welfare of PWDs.

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in your country? (For example, in some parts of Africa ritual killing of certain classes of PWDs such as people with albinism occurs. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

Most Ghanaians are still prejudiced by the belief that PWDs are either cursed or are children of evil spirits.¹⁰⁰ Such negative cultural beliefs encourage stigmatisation and discrimination depriving PWDs of their fundamental rights.¹⁰¹

⁹⁹ Kwame Nkrumah University of Science and Technology, Kumasi.

¹⁰⁰ Mensah *et al* (n 40 above); AR Denham *et al* 'Chasing spirits: Clarifying the spirit child phenomenon and infanticide in northern Ghana' (2010) 71 *Social Science and Medicine* 608 [http://www.academia.edu/267798/check link](http://www.academia.edu/267798/check-link)(accessed 9th August 2013); 'Spirit Child: An investigation into the ritual killing of disabled Ghanaian children deemed to be possessed by evil spirits' (n 51 above); 'Saving the cursed children of Ghana' (n 51 above).

¹⁰¹ 'More chiefs oppose Dr Danaa's nomination as Chieftaincy Minister' *Peace FM Online* 6 February 2013 <http://www.elections.peacefmonline.com/politics/201302/155493.php> (accessed 10 May 2013); 'Cultural factors undermining development of disabled' *Modern Ghana* 5 December 2007 <http://www.modernghana.com/news/149283/1/cultural-factors-undermining-development-of-disabl.html> (accessed 7th August 2013); Munyi (n 51 above).

11.2 How does Ghana respond to the needs of persons with disabilities with regard to the areas listed below?

- **Access to public buildings**

Owners or occupiers of a place to which the public has access shall provide appropriate facilities that make the place accessible to and available for use by a PWD.¹⁰²

- **Access to public transport**

The needs of PWDs must be taken into account in the design, construction and operation of the transportation network.¹⁰³

- **Access to education**

It is mandatory for a child with a disability of school going age to be enrolled in school. There should be provision made for the necessary facilities and equipment that will enable PWDs to fully benefit from the school or institution. And there shall be free education for PWDs and the establishment of special schools for PWDs who by reason of their disability cannot be enrolled in formal schools.¹⁰⁴

- **Access to vocational training**

There shall be a vocational training in each region.¹⁰⁵

- **Access to employment**

The Ministry shall through the public employment centres, assist to secure jobs for PWDs.¹⁰⁶

- **Access to recreation and sport**

As far as practicable there shall be the provision of adequate facilities, programmes and incentives to enable PWDs have access to sports and cultural events.¹⁰⁷

- **Access to justice**

Where a PWD is a party in judicial proceedings, appropriate facilities shall be provided in accordance with the condition of the PWDs to facilitate effective participation.¹⁰⁸

102 Sec 6 of Act 715.

103 Sec 23 of Act 715.

104 Secs 16, 17 & 18 of Act 715.

105 Sec 21 of Act 715.

106 Sec 9 of Act 715.

107 Secs 38 & 39 of Act 715.

108 Sec 5 of Act 715.

11.3 Does Ghana provide for disability grants or other income support measures for persons with disabilities?

Two per cent District Assembly common fund¹⁰⁹

Article 252 of the 1992 Constitution mandates Parliament to allocate not less than 5 per cent (amended to 7.5 per cent in 2008)¹¹⁰ of total revenues¹¹¹ of Ghana's income to the District Assemblies for development; in compliance with Ghana's constitutional mandate to strengthen the democratic system.¹¹² The fund is paid into the District Assemblies Common Fund (DACF) on quarterly instalments.¹¹³ The fund is administered by the District Assemblies Common Fund Administrator (DACFA) who is appointed by the President of Ghana and approved by Parliament.¹¹⁴ The DACF is allocated to Metropolitan, Municipal and District Assemblies (MMDAs) based on a formula proposed by the DACFA and approved by Parliament.¹¹⁵ In developing the formula, the overriding criterion has been to attain a balanced and equitable development, with the overall goal of improving the living conditions of the people.¹¹⁶ Five factors have been developed for the formula.¹¹⁷ These are the equality factor, the need factor, the responsive factor, the service pressure factor, and the reserve factor. PWDs are allocated two per cent of the DACF,¹¹⁸ there may be variations in the percentage allocated as a result of an introduction of a new indicator with its variable attached weight.¹¹⁹

109 National Council on Persons with Disability Guidelines for the disbursement and management of the District Assembly Common Fund Allocation to Persons with Disability 3.

110 P Bazaanah 'Nature of Ghana's Inter-Governmental Revenue Transfer within the decentralized structure of governance: A case of the District Assemblies Common Fund' unpublished paper, Institute of Development Studies, University of Cape Coast, Ghana, 2012 23. http://www.academia.edu/3300157/NATURE_OF_GHANAS_INTER-GOVERNMENTAL_REVENUE_TRANSFER_WITHIN_THE_DECENTRALIZED_STRUCTURE_OF_GVERNANCE_A_CASE_OF_THE_DISTRICT_ASSEMBLIES_COMMON_FUND (accessed 15 August 2013).

111 Sec 17 of The District Assemblies Common Fund Act, 1993 (Act 455) interprets total revenues of Ghana as: 'All revenue collected by or accruing to the central government other than foreign loans, grants, non-tax revenue and revenues already collected by or for District Assemblies under any enactment in force'.

112 Art 35(6)(d) of the 1992 Constitution enjoins the state to: 'make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts and by affording all possible opportunities to the people to participate in decision-making at every level in national life and in government'.

113 Secs 1(1) & (3) of The District Assemblies Common Fund Act, 1993 (Act 455).

114 Secs 1(5) & 3 of Act 455.

115 Secs 3 & 7 of Act 455.

116 Bazaanah (n 110 above) 27.

117 The 'NEED' category is meant to measure a district's lack of services relative to other districts in the country.

The 'RESPONSIVENESS' category was incorporated in the formula to motivate districts to generate local revenue and is comprised of measures that are believed to reflect the District Assembly's efforts in that regard.

The 'SERVICE PRESSURE' category is meant to capture the intensity of use of public facilities in a district. It has comprised solely of the population density of the district since the inception of the DACF.

'EQUALITY' stipulates which percentage of the DACF allocation is to be distributed evenly between the districts.

'RESERVE' amount is used for bulk purchases for the District Assemblies and to support the Regional Coordinating Councils and the office of the DACF Administrator in their monitoring roles. Also, a proportion of the 'RESERVE' is distributed evenly between all the members of parliament for development projects of their choice in their constituencies.

118 According to the Guidelines for utilising the District Assemblies Common Fund (2013), Two per cent of the DACF shall be utilised to support initiatives by PWDs in the district. This fund is meant to assist PWDs to organise programmes to create awareness about their activities, their rights and obligations.

119 AB Banful 'Do institutions limit clientelism? A study of the District Assemblies Common Fund in Ghana' unpublished Postdoctoral fellow, Development Strategy and Governance Division, International Food Policy Research Institute, Washington DC, USA, 2009 12 & 13 <http://www.ifpri.org/sites/default/files/publications/ifpridp00855.pdf> (accessed 1 October 2013).

Livelihood Empowerment Against Poverty Program (LEAP)¹²⁰

The Livelihood Empowerment Against Poverty (LEAP) Programme provides cash and health insurance to extremely poor households across Ghana to alleviate short-term poverty and encourages long term human capital development. Eligibility is based on poverty and having a household member in at least one of three demographic categories: single parent with an orphan or vulnerable child (OVC); elderly poor; or a person with an extreme disability unable to work (PWD).

Income Support for PWDs in business¹²¹

PWDs in business are to enjoy special incentives.

11.4 Do people with disabilities have a right to participation in political life (for example, political representation and leadership, and voting independently) in Ghana?

In Ghana, it is required that a person or institution which organises a national, regional or district activity, shall as far as practicable ensure that facilities are made available for the participation in the activity by PWDs.¹²² Ghana's 2012 national elections drew PWDs into political activities. The Electoral Commission engaged some PWDs for various jobs in the electoral process.¹²³ Tactile ballot jackets were provided, the visually impaired were allowed to vote guided by their chosen guides and the polling stations were made accessible to PWDs. A visually impaired person has been appointed a Minister.¹²⁴

11.5 Specific categories experiencing particular issues/vulnerability:

- **Women with disabilities**

They experience double discrimination in every human endeavour both as mothers with disability and in most cases as single mothers with disability.

- **Children with disabilities**

Most children with disabilities are denied care and acceptance into the family and community. Subsequently, they are denied access to education and health facilities. Their situation is worsened by the fact that there are inadequate data collection mechanisms and early assessment facilities in order to monitor them, identify their disabilities and get them the required intervention.

- **Other (for example indigenous peoples)**

- There is inadequate mechanism to facilitate re-integration of people who become disabled later in life into the economic mainstream. As a result most successful people, who become permanently disabled later in life end up being relegated to the background, become dependents and are marginalised.

120 Department of Social Welfare 'Cape Coast Metropolitan Office' <http://www.dswcapecoast.com/> (accessed 17 May 2013).

121 Sec 10(2) of Act 715.

122 Sec 39 of Act 715.

123 'Participation of the disabled in Politics to improve' *Modern Ghana* 15 April 2013, <http://www.modernghana.com/news/45803/1/participation-of-the-disabled-in-political-to-impro.html> (accessed 10 May 2013).

124 'Visually impaired lawyer nominated Minister' 21 January 2013 <http://www.ghana.gov.gh/index.php/component/96-top-headlines/1926-dr-daannaa-nominated-as-minister-of-chieftaincy-and-traditional-affairs> (accessed 10 May 2013).

- Most people who have recovered from mental health disabilities continue to experience discrimination, stigmatisation and rejection by their families due to the prejudice created by traditional beliefs.

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?

Parliament has a mandate to bring a duly passed Act into operation through the adoption of a statutory instrument.¹²⁵ A statutory instrument to Act 715 is currently under consideration in Parliament. A statutory instrument can serve to provide for how the objectives of the Act should be achieved as well as clarify any ambiguities in the Act. A statutory instrument needs to be adopted before PWDs can have full enjoyment of the rights and benefits provided for under Act 715. The following are some sections of Act 715 that require the adoption of a statutory instrument in order to come into operation:

- Section 9 and 10 – Establishment of employment centres for PWDs;
- Section 7 – Education;
- Section 21 – Special education;
- Sections 31-35 – Health care;
- Section 22 – Library (Minimum standards); and
- Section 23 – Transportation (minimum standard).

12.2 What legal reforms are being proposed? Which legal reforms would you like to see in your country? Why?

The LI bringing Act 715 into force is currently under consideration in parliament.¹²⁶ Once the Act is in force, Ghana will improve its domestic legal framework on the rights of PWDs that gives effect to provisions of the CRPD. This will strengthen efforts to reform policies, so as to improve the lives of Ghanaians with disabilities.¹²⁷ Consequently, Ghana will undertake effective policy measures to develop the necessary infrastructure to address issues concerning the rights of PWDs. Again, programmes will be adopted to sensitise and encourage the community for positive engagement with PWDs in order to strengthen the promotion and the protection of the rights of PWDs.¹²⁸

125 Sec 4 of Statutory Instrument Act 1959 (No 52 of 1959); F Bennion *Constitutional law of Ghana: Law making under The Republic* (1969) 267 & 380.

126 'Denying Ghana's disabled their rights' *CHRI Africa* 23 June 2011 <http://chriafrika.blogspot.com/2011/06/denying-ghanas-disabled-their-rights.html> (accessed 7 August 2013); 'Disabled youth call for implementation of LI on Disability Act' *The Chronicle* undated <http://thechronicle.com.gh/disabled-youth-call-for-implementation-of-li-on-disability-act/> (accessed 7 August 2013).

127 'Ghana's Disability Act: The state must set the pace' *Ghana Business News* 26 July 2013 <http://www.ghanabusiness.com/2013/07/26/ghanas-disability-act-the-state-must-set-the-pace/> (accessed 7 August 2013).

128 'Persons with disability stranded six years after passage of Act 715' *Modern Ghana* 3 January 2012 <http://www.modernghana.com/news/369894/1/persons-with-disability-stranded-six-years-after-p.html> (accessed 7 August 2013).

MOZAMBIQUE

*Emerson Casimiro Uassuzo Lopes**

1 Population indicators

1.1 What is the total population of Mozambique?

The total population of Mozambique according to the 2007 Census¹ was 20 366 795,² but recent estimates indicate that the number has grown to 23 515 934.³

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Mozambique and the criteria used to determine who falls within the class of persons with disabilities in Mozambique.

A National Census is used to obtain data on the prevalence of disability in Mozambique. Between 2007 and 2008 a National Household Survey Among People with Disabilities was carried out in Mozambique as part of a project jointly organised by Mozambique's National Statistical Office (INE), the Federation of People with Disabilities in Mozambique (FAMOD), and a Norwegian based NGO, the *Stiftelsen for Industriell og Teknisk Forskning* (SINTEF), as partner.⁴

1.3 What is the total number and percentage of people, women and children with disabilities in Mozambique?

According to the 2007 Census:

- 475 011 people were reported to have a disability, representing approximately 2,5 per cent of the population in Mozambique.⁵

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1 INE *Tabelas - III Recenseamento Geral da População e Habitação* available at: <http://www.ine.gov.mz/> (accessed 26 September 2013). The 2007 Census used the terminology of persons with disabilities to gather data which reflects the prevalence of certain disabilities, defined as people who have 'impairments of physical, mental or sensory nature'.

2 Mozambique's Government's Official Website: <http://www.portaldogoverno.gov.mz/Mozambique> (accessed 26 September 2013).

3 MUNDI *Moçambique População Perfil* 2012 available at: http://www.indexmundi.com/pt/mocambique/populacao_perfil.html (accessed 26 September 2013).

4 SINTEF *Living condition[s] among people with disabilities in Mozambique: A national representative study*(2009) available at: <http://www.safod.org/Resource%20centre/LC%20Report%20Mozambique%20-%20final.pdf> (accessed 26 September 2013).

- 225 259 women were reported to be living with a disability, representing approximately 47 per cent of the total numbers of persons with disabilities in Mozambique.⁶
- 103 276 persons with disabilities were children between the ages 0 to 15 years old, representing approximately 21 per cent of the total population with disabilities.⁷

1.4 What are the most prevalent forms of disability in Mozambique?

According to the 2007 Census, of the total percentage of persons with disabilities the following was recorded:⁸

- (1) 98 375 had a physical impairment (amputee or stunted legs);
- (2) 61 203 had a hearing impairment;
- (3) 44 567 had a visual impairment;
- (4) 40 372 had an intellectual impairment;
- (5) 39 099 had an intellectual impairment and a physical impairment (amputee or stunted arms);
- (6) 34 538 had paralysis; and
- (7) 167 229 had 'other impairments'.

2 International obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in Mozambique? Has Mozambique signed and ratified the CRPD and the Optional Protocol? If so, provide date(s).

Mozambique signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁹ and its Optional Protocol¹⁰ on 30 November 2010, and subsequently ratified both on 31 December 2010.

5 INE *Tabela população portadora de deficiência por idade, segundo área de residência e sexo, Moçambique* (2007), <http://www.ine.gov.mz/> (accessed 26 September 2013). These figures have been subject to recurring debates due to the lack of a robust systematic collection of data regarding the number of disabled people living in the country, see The Leonard Cheshire Disability and Inclusive Development Centre, University College London *Disability Policy Audit in Namibia, Swaziland, Malawi and Mozambique* (2008) 81, available at: http://www.ucl.ac.uk/lc-ccr/downloads/DISABILITY_POLICY_AU_DIT_RESEARCH_FINAL_REPORT.pdf (accessed 26 September 2013).

6 INE (n 5 above).

7 As above.

8 As above.

9 Resolução no 29/2010 de 31 de Dezembro de 2010; Publication: *BR no 052, I Série, 8º Supl. de 31 de Dezembro de 2010, pág. 336-(403) a 336-(426)*.

10 Resolução no 30/2010 de 31 de Dezembro de 2010 Publication: *BR no 052, I Série, 8º Supl. de 31 de Dezembro de 2010, pág. 336-(426) a 336-(429)*.

2.2 If Mozambique has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for the submission of the report? Has Mozambique submitted its report? If not, what reasons does the relevant government department give for the delay?

- The Country Report was due two years after the CRPD was entered into force; therefore it was due by 31 December 2012.
- The Ministry of Women and Social Action is responsible for submitting the Country Report. The first Draft Country Report has not yet been prepared – the reason for the delay is not known.
- The Ministry of Justice on previous occasions mentioned organisational arrangements as one of the key reasons for the general delay in submitting the report to the international treaty monitoring body, the Committee on the Rights of Persons with Disabilities.¹¹

2.3 If Mozambique has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities has reviewed the report, indicate if the Committee made any concluding observations and recommendations to Mozambique's report. Was there a domestic effect in Mozambique on disability issues due to the reporting process?

See 2.2. To date, no report has been submitted to the Committee on the Rights of Persons with Disabilities.

2.4 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; has Mozambique also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in your state's United Nations Universal Periodic Review (UPR) report? If so, what was the effect of these observations or recommendations?

- Generally, Mozambique ratifies international and regional human rights instruments without reservation, but fails to comply with its reporting obligations to both the United Nations and African regional treaty monitoring bodies.¹²

11 Most of the treaties were signed in a transitional period during or after the civil war, and only recently has there been a more efficient inter-ministerial structure to start preparing submission of overdue reports. Information provided by the Delegates of the Ministry of Justice during the 49th Session of the African Commission on Human and Peoples' Rights, held in Banjul, The Gambia, May 2011.

12 OSISA *Mozambique: Justice sector and the rule of law* (2006) 6 available at: [http://www.afrimap.org/english/images/report/Mozambique%20Justice%20report%20\(Eng\).pdf](http://www.afrimap.org/english/images/report/Mozambique%20Justice%20report%20(Eng).pdf) (accessed 26 September 2013).

- As per the UPR, Mozambique was last reviewed by the UPR in February 2011.¹³

2.5 Was there any domestic effect on Mozambique’s legal system after ratifying the international or regional instruments in 2.4 above?

The Mozambican civil law legal system is based on the Romano-Germanic tradition law, whereby once international treaties or other international instruments are ratified and published, they automatically enter into force in national law as set out in the Constitution.¹⁴ According to article 204 of the Constitution, it is the competency of the Council of Ministers to prepare international treaties for signature, the President of the Republic has to sign international treaties,¹⁵ and Parliament has to ratify international treaties. This means that constitutional provisions, such as the Bill of Rights and the ratification of international treaties and covenants, are ineffective if they are not supplemented with national legislation and regulation relating to human rights.¹⁶ Furthermore, the constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples’ Rights.¹⁷

2.6 Do ratified international treaties automatically become domestic law under your legal system? If so, are there any cases where the courts applied international treaty provisions directly?

See question 2.5 above.

13 UN Human Rights Council *Report of the Working Group on the Universal Periodic Review: Mozambique* (2001), available at: <http://www.refworld.org/topic,50fbce51b1,50fbce5208,4dd4ea602,0,,,MOZ.html> (accessed 26 September 2013). During this tenth session of the UPR, recommendations were made by the recommending states, which contained express reference to disability rights. The recommendations focused on the ratification of the CRPD and its Optional Protocol. Mozambique clarified that the National Assembly adopted a resolution approving the ratification of the CRPD. At the time, Mozambique’s Minister of Justice confirmed that resolutions approving Mozambique’s ratification of the CRPD and its Optional Protocol were in the process of publication prior to the deposit of the instrument of ratification.

14 According to article 18 of the Mozambican Constitution: ‘[v]alidly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published, for as long as they are internationally binding on the Mozambican State’.

15 Mozambican Constitution, art 162.

16 Mozambican Constitution, art 18(1)(2).

17 Mozambican Constitution, art 43; OSISA (n 12 above) 23.

There have been some ongoing debates as to the interpretation of Article 17(2) of the Constitution which states that ‘[t]he Republic of Mozambique shall accept, observe and apply the principles of the Charter of the United Nations and of the Charter of the Organisation of African Unity’. This provision seems to refer to application of the principles, but not the substantive provisions of the Universal Declaration and the African Charter. Article 17(2) is complemented by article 43 of the Constitution, which states that ‘[t]he constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples’ Rights’. Article 43 goes much further than Article 17(2) in emphasising the centrality of these human rights treaties. Article 43, contains explanatory language aimed at providing constitutional guidance on the interpretation of human rights provisions under Mozambique’s Constitution. The Mozambican courts have not tested the application and interpretation of international instruments to which Mozambique is a state party. Therefore many of the principles of international law still need to be substantively developed in the Mozambican context.

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim in national legislation? Provide details.

International treaties are received in the form of a resolution approved either by Parliament or by the Council of Ministers. The CPRD and its Optional Protocol were adopted by a resolution from the Mozambican Parliament.¹⁸

3 Constitution

3.1 Does the Constitution of Mozambique contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

- Article 37 of the Mozambican Constitution, states that citizens with a disability shall fully enjoy the rights enshrined in the Constitution, and shall be subject to the same duties, except those which their disability prevents them from exercising or fulfilling.
- Article 125(1) of the Mozambican Constitution states that persons with disabilities shall have a right to special protection by family, society and the state. According to article 125(2) the state shall promote the creation of conditions for learning and developing sign language. Article 125(3) states that the state shall promote the creation of conditions necessary for the economic and social integration of the disabled. The state shall promote, in co-operation with associations of the disabled and with private entities, a policy that will guarantee (a) the rehabilitation and integration of the disabled; (b) the creation of appropriate conditions to prevent them from becoming socially isolated and marginalised; (c) priority treatment of disabled citizens by public and private services; and (d) easy access to public places.¹⁹ Article 125(5) states that the state shall encourage the establishment of associations of the disabled.

3.2 Does the Constitution of Mozambique contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

Article 15 of the Mozambican Constitution, in the context of National Liberation, Defence of Sovereignty and Democracy, and the armed conflict that ended with the signing of the General Peace Agreement in 1992 states that the state shall ensure the special protection of those who were disabled in the national liberation struggle, as well as the orphans and other dependants of those who died in this cause.

Article 16(1) of the Mozambican Constitution maintains that the state shall ensure special protection for persons disabled during the armed conflict that ended with the signing of the General Peace Agreement in 1992 as well as the orphans and other direct dependants. Article 16(2) confirms that the state shall, likewise protect those who have been disabled in the performance of public service or a

¹⁸ Resolução no 29/2010 de 31 de Dezembro de 2010; Publication: *BR no 052, I Série, 8º Supl. de 31 de Dezembro de 2010, pág. 336-(403) a 336-(426)* and Resolução no 30/2010 de 31 de Dezembro de 2010 Publication: *BR no 052, I Série, 8º Supl. de 31 de Dezembro de 2010, pág. 336-(426) a 336-(429)*.

¹⁹ Mozambican Constitution, art 125(4).

humanitarian act. Article 16(3) determines how the rights established in this article are to be made effective.

Another provision indirectly applicable to the rights of people with disabilities in Mozambique is article 95, which states that all citizens shall have the right to assistance in the case of disability or old age, therefore, the state shall promote and encourage the creation of conditions for realising this right.

With respect to childhood, the Constitution states that all children have the right to protection from the family, from society and from the state, keeping in mind their full development and, in particular orphans, disabled and abandoned children, shall be protected by family, by society and by the state against all forms of discrimination, ill treatment and the abusive use of authority within family and other institutions.²⁰

Article 35 of the Constitution ensures that all citizens are equal before the law, and they shall enjoy the same rights and be subject to the same duties, regardless of various status or conditions, therein enunciated.

4 Legislation

4.1 Does Mozambique have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

Mozambique has enacted different pieces of legislation that mention people with disabilities or deal with issues relating to disabilities. The follow table sets out the most prominent legislation that mentions or refers to disability related issues:

Legislation	Description
Decree no 53/2008 of 30 December 2008	Regulates the Construction and Maintenance of Technical Accessibility, Circulation and Use of Public Service Systems by People with Disabilities. It approves the technical specifications on accessibility and the use of the International Symbol of Access.
Resolution no 68/2009 of 21 November 2009	Creates the Strategy for People with Disabilities in Public Service.
Ministerial Diploma no 134/2010 of 19 August 2010	Assistance to demobilised combatants with a disability and their relatives or dependents.
Decree no 78/2009 of 15 December 2009	Creates the National Disabilities Council.
Resolution no 20/1999 of 23 June 1999 Disability Policy	Disability Policy that outlines some specific rights for people with disabilities, including but not limited to the right to independent living; the right to integration in the family and community; the right to rehabilitation and access to compensation means; the right to formal, special or vocational education; the right to employment; and the right to social protection.

²⁰ Mozambican Constitution, art 121(1)(2).

4.2 Does Mozambique have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

Decree no 11/2009 of 29 May 2009 Regulation on Automobile Transportation	Regulates automobile transportation and sets forth exemption and reduction of rates in urban and inter-urban and public transport.
Law no 23/2007 of 21 August 2007 Labor Law	The Labour Law protects the rights of employees from disadvantaged groups, amongst others people with disabilities. ^a
Law 1 no 12/2009 of 12 March 2009 Law on the rights and duties of the persons living with HIV and AIDS	Establishes the rights and duties of persons living with HIV and AIDS, and takes measures necessary for the prevention, protection and treatment of the same and indicates that people with a disability have the right to be secured proper communication and civic education in the appropriate language or means taking into account their special needs.
Law no 6/92 of 6 May 1992 Law on the general framework of the National Education System (NES)	This legislation redresses the general framework of the National Education System (NES) and enunciates the right of children with disabilities to education and foresees special classes of mainstream schools, ensuring the right of children with multiple disabilities or severe mental disorders to benefit from education tailored to their needs in a personalised manner. Article 29(3) of the legislation sets forth that vocational training shall be provided to children with disabilities in order to assist their integration into society and the labour market.

- a. The law mentions that measures that benefit certain disadvantaged groups, namely, by reason of their sex, reduced capacity to work, disability or chronic illness, for the purpose of guaranteeing the exercise of the rights established in this law on an equal footing and to correct a factual situation of inequality in social life, shall not be considered discriminatory.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Mozambique ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases have had.

There is no data on the decisions made by judiciary in Mozambique in respect of an issue(s) relating to disability.

6 Policies and programmes

6.1 Does Mozambique have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

National Disability Strategy²¹

The policy facilitates the promotion and protection of the rights of people with disabilities. It provides guidance for disability considerations in policy and legislative reform. The underlying principles and strategies are aiming to ensure people with disabilities' effective participation in every aspect of contemporary society. It outlines some specific rights for people with disabilities, including, but not limited to the right to independent living; the right to integration in the family and community; the right to rehabilitation and access to compensatory means; the right to formal, special or vocational education; the right to employment; and the right to social protection. Most of the provisions of the strategy have to be implemented, due to government's insufficient financial resources. This means that accessibility to public services, buildings and public transportation for people with disabilities to facilities remains a general problem, which is compounded by negative social attitudes by the larger public.²²

Strategy for People with Disabilities in Public Service

The policy's aims are to strategically promote and develop vocational education for people with disabilities, as well as to create conditions for the maintenance, integration or reintegration of people with disabilities in public anointing; phasing mechanisms, percentages or quotas reserved for people with a disability in the institutions of the state, as well as the need to ensure career development and advancement.²³

Landmine Survivor Assistance

This programme has been in place since 2004. The aim is to develop a strategy for supporting landmine survivors and others with injuries that have been caused by the civil war, 1976-1992. This is a multi-sectoral programme, involving the Ministry of Health, the Ministry of Women and Social Action and the National Demining Institute. Assistance to victims comprises two essential components: medical care, provided by the Ministry of Health; and psychosocial assistance, provided by the Ministry of Women and Social Action, and also a number of humanitarian organisations including Network of Associations of Assistance to Victims of Mines, Red Cross, AMA, Handicap International, Power, FAMOD

21 Approved by Resolution 20/1999 of 23 June.

22 The Leonard Cheshire Disability and Inclusive Development Centre (n 5 above) 83.

23 Resolution no 68/2009 of 29 November, Strategy for People with Disabilities in Public Service, Executive Summary.

(*Forum das Associações Moçambicanas de Deficientes/Forum of the Mozambican Associations of People with Disabilities*) and UNICEF.²⁴

6.2 Does Mozambique have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

A number of health rehabilitation centres are located in the ten provincial capitals. Most of the centres are government-funded, and provide physiotherapy to people with disabilities.

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Mozambique have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and powers.

There are no bodies other than courts that specifically address the violation of rights of people with disabilities.

7.2 Other than ordinary courts or tribunals, does Mozambique have any official body that, though not established to specifically address the violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and powers.

The only other bodies addressing the violation of rights of people with disabilities are the National Human Rights Institutions discussed in question 8 below.

8 National human rights institutions

8.1 Does Mozambique have a Human Rights Commission or an Ombudsman or a 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 Mozambique has ever addressed issues relating to the rights of persons with disabilities.

- Mozambique has a Human Rights Commission and an Ombudsman which were

²⁴ Ministério dos Negócios Estrangeiros e Cooperação, Instituto Nacional de Desminagem *Plano Nacional de Acção contra Minas* (2008-2014) 3, available at: http://www.gichd.org/fileadmin/pdf/other_languages/portuguese/LMAD/NMAS-Mozambique-2002-2006-po.pdf (accessed 26 September 2013).

established in terms of the Constitution.²⁵ According to the founding provisions of the Constitution, Mozambique is one sovereign, democratic state founded on various values. Both, the Mozambican Human Rights Commission and the Ombudsman are part of the state institutions that support constitutional democracy in terms of the Constitution. Both these institutions are required to be independent and subject only to the Constitution and the law.²⁶

- The Mozambican Human Rights Commission was created by the Law no 33/2009 of 22 December which governs its powers and functions, while the Ombudsman was created by the Law no 7/2006 of 16 August.
- Both of these National Human Rights Institutions have as a backdrop the defence and promotion of the rights and freedoms of individuals.²⁷ The Constitution clearly enunciates that constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights. The Constitution also establishes freedoms and guarantees which the state must give effect to.²⁸ Therefore, the National Human Rights Institutions should ensure the promotion and protection, not only of the rights enshrined in the Constitution, but also enshrined in other international instruments to which Mozambique is a party, including the CRPD.
- Since their creation, there are no records of the resolution or consideration of issues relating to the rights of persons with disabilities by either of the aforementioned National Human Rights Institutions in Mozambique.

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 Mozambique? If so, list each organisation and describe its activities.

Organisation		Funding Year	Forms of Disability
ACAMO	Associação de Cegos e Amblíopes de Moçambique	1995	Visual
ACRIDEME	Associação de pais e amigos de Crianças Deficientes Mentais	1994	Mental
ADEMIMO	Associação de Deficientes Militares e Paramilitares de Moçambique	1992	Visual/Auditory/Motor/Intellectual
ADEMO	Associação dos Deficientes Moçambicanos	1989	Visual/Auditory/Motor/Intellectual
ADESU	Associação dos Deficientes do Ensino Superior	1995	Mental
ADPPDCM	Associação de Desporto da Pessoa Portadora de Deficiência da Cidade de Maputo	2007	Visual/Auditory/Motor/Intellectual

25 Mozambican Constitution, art 256.

26 Mozambican Constitution, art 258.

27 Article 5 of the Law establishing the Human Rights Commission and art 15 of the Law on Ombudsman.

28 Mozambican Constitution, arts 11(e) and 43.

ADPPDPM	Associação Desportiva para Pessoas com Deficiência da Província de Maputo	2003	Visual/Auditory/Motor
AJODEMO	Associação dos Jovens Deficientes de Moçambique	1995	Motor
AMDV	Associação Moçambicana dos Deficientes Visuais	2003	Visual/Motor
AMMD	Associação Moçambicana de Mulheres portadoras de Deficiência	2007	Motor
AMOFAS	Associação Moçambicana dos Familiares e Amigos dos Surdos	1995	Auditory
ASUMO	Associação dos Surdos Moçambicanos	1999	Auditory
CERCI	Cooperativa para a Educação e a Reabilitação de Cidadões Inadaptados	2002	Visual/Auditory/Motor/Intellectual
CINFORTECNICA	Associação de Jovens Técnicos Portadores de Deficiência de Moçambique	2005	Visual/Auditory/Motor/Intellectual
CODDEFAM	Comité de Defesa dos Deficientes das Forças Armadas de Moçambique	2002	Visual/Auditory/Motor/Intellectual
CPM	Comité Paralimpico de Moçambique	2008	Visual/Auditory/Motor/Intellectual
NLHUVUKU	Grupo teatral	1997	Motor
RAVIM	Rede para Assistência as Vitimas de Minas	2005	Motor
FAMOD	Forum das Associações Moçambicanas de Deficientes	1998	Rede nacional das APCD

9.2 In the countries in your region, are DPOs organised or coordinated at a national and/or regional level?

FAMOD functions as an umbrella for DPOs in Mozambique. FAMOD members cover organisations dealing with all types of disabilities whose activities cover all geographical areas of Mozambique. FAMOD's vision is to strengthen the interest of the members of associations through courses, seminars and workshops: to change societies' attitudes with reference to people with disabilities; to integrate the subjects of disability in project and programmes of national development and to coordinate and to share the information with partners that work with people with disabilities.²⁹

9.3 If Mozambique has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

There is working relationship between the Mozambican DPOs and the Ministry of Women and Social Action. This relationship has facilitated interactions with the disability sector through its civil society structures.

²⁹ SAFOD Research Program *Forum Mozambican of Associations of Disabled*, available at: <http://www.safod.org/SRP%20Web%20site/Mozambique%20SRP%20Country%20R%20eport.pdf> (accessed 26 September 2013).

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

It is difficult to ascertain the extent to which organisations in Mozambique specifically monitor the implementation and their participation in the implementation of the CRPD.³⁰

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

Most of the barriers associated with implementation are a lack of political will, resources and funding for DPOs. DPOs in Mozambique are operating in a society that has little awareness of disability issues.

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?

The ratification of the CRPD itself may be seen as an important recognition of the rights of persons with disabilities. This was due to the involvement and engagement of DPOs in the ratification process. Since ratification there is no outstanding development.

9.8 Has your research (for this project) shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

Resource constraints (both qualified personnel and funding) limit the extent to which DPOs are able to comprehensively engage with the implementation process. This will be an area for capacity building and support with respect to DPO's engagement with the implementation process in future.

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?

See question 9.8 above.

30 The Leonard Cheshire Disability and Inclusive Development Centre (n 5 above) 87. In a focus group discussion organised by FAMOD, the attendants representing a number of DPOs expressed the view that the Mozambican Government has only come up with a wish list in the form of policies.

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?

There are currently no specific research institutes in Mozambique that work on the rights of persons with disabilities, which have facilitated the involvement of DPOs in the process.

10 Government departments

10.1 Do you have government departments that are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the departments.

Ministry for Women and Social Action is the main government body with the main responsibilities *vis a vis* disability and they focus, amongst others on coordinating other sectors' activities relating to the dissemination of already established policies and supervising their implementation.

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in Mozambique? (For example, in some parts of Africa ritual killing of certain classes of PWDs such as people with albinism occurs. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

Stigmatisation and discrimination amongst Mozambique's disabled population serves to compound poverty and reduces the possibilities of persons with disabilities in Mozambique.

11.2 How does Mozambique respond to the needs of persons with disabilities with regards to the areas listed below?

- **Access to public buildings**

There is currently a need to ensure compliance with accessibility. These challenges have been responded to by approval of the Regulation on Construction and Maintenance of Technical Accessibility,³¹ Circulation and Use of Public Service Systems by People with Disabilities.³¹ New Government buildings under

31 Decree no 53/2008 of 30 December 2008.

construction included some improvements for those with disabilities, including accessibility ramps.

- **Access to public transport**

Decree no 11/2009 of 29 May 2009, approves the Regulation on Automobile Transportation and sets forth the exemption and reduction of rates in urban and inter-urban areas and public transport for disabled people. This is based upon non-discriminatory constitutional principles and outlines specific rights for people with disabilities. A considerable percentage of people with disabilities lives in rural areas and are constrained in their ability to move far from home to seek either medical care or to attend to other situations due to transport costs, services being predominantly found in cities.

- **Access to education**

Mozambique's Ministry of Education and Culture is primarily responsible for monitoring policies and implementing strategies to ensure that disabled people have access to basic education and skills training. The legislation in place, mainly, Law no 6/92 of 6 May enunciates the right of children with disabilities to education and foresees special classes in mainstream schools ensuring the right of children with multiple disabilities or severe mental disorders to benefit from education tailored to their capacities in a personalised manner. Article 29(3) of the Law sets forth that vocational training shall be provided to children with disabilities in order to assist their integration into society and the labour market.

- **Access to vocational training**

The Ministry of Labour, through the Institute for Employment and Professional Training (INEFP) provides training which enables people with disabilities to acquire specific skills and thus become self-employed.³²

- **Access to employment**

The Law no 23/2007 of 21 August 2007 which approves the Labour Law, contains important provisions concerning employment of persons with disabilities. Pursuant to the Law, employers shall promote the adoption of appropriate measures that allow employees with disabilities or chronic illnesses to have the same rights and duties as other employees, with respect to access to employment, vocational training and promotion, as well as suitable working conditions to enable them to perform socially useful activities, taking into account the specific circumstances of their impaired working capacity. It also defines the role of the state, in coordination with trade union and employer associations and organisations representing people with disabilities to promote employment and takes into account the means and resources available, stimulates and supports actions leading to the vocational rehabilitation of persons with disabilities and to their placement in jobs suited to their residual capacities. Accordingly, special measures to protect access to employment for persons with disabilities must be instituted and implemented by the state.

- **Access to recreation and sport**

Mozambique's government through the Ministry of Youth and Sports has been working towards creating an enabling environment for young people to engage in sporting and recreational events, with specific provisions to promote the involvement and participation of youngsters with a disability. The government has established a Sports Federation for People with Disability.³³

32 Disability and Development Partners *Disability and HIV & Aids in Mozambique* (April 2008) 8, available at: <http://www.ddpuk.org/full-report.pdf> (accessed 26 September 2013).

33 As above.

- **Access to justice**

There is no specific programme to support access to justice for persons with disabilities. In general, there are a number of obstacles to the application of the right to access to justice in the country. These include but are not limited to poverty and therefore the inability to afford legal fees, lack of awareness, corruption, inaccessible buildings and transport. There are some institutions and programmes in Mozambique designed to provide pro bono assistance with regard to access to justice, which in general can indirectly benefit people with disabilities.

- **Access to health care**

The Ministry of Health provides rehabilitation centres and the Ministry of Women and Social Action is responsible for coordinating psychosocial and economic reintegration activities, which include community-based rehabilitation. Therefore, physiotherapy and orthopaedic services are provided by both ministries.

11.3 Does Mozambique provide for disability grants or other income support measures for persons with disabilities?

Basic social security in Mozambique is provided to nationals without own means of subsistence, including people with disabilities, who are living under absolute poverty. This system is managed by the Ministry of Women and Social Action, through INAS – *Instituto Nacional de Acção Social*. Decree no 52/2011 of 12 October, regulates conditions of access to the grants.

11.4 Do people with disabilities have a right to participation in political life (for example, political representation and leadership and voting independently) in Mozambique?

The most basic form of political participation, is free and regular voting to choose one's representatives. Free and fair elections require universal suffrage for all eligible men and women to vote in Mozambique and do not exclude minorities such as people with disabilities.

11.5 Specific categories experiencing particular issues or vulnerability:

Women with disabilities

Women with disabilities, in particular, bear the brunt of inequality based on disability, gender, and socio-economic status.

Children with disabilities

Education and access to education remains one of critical issues or vulnerability.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Mozambique at the moment?

Recognition of, and the need to address the inadequate inclusion of people with disabilities in HIV & AIDS policies and prevention and treatment programmes in Mozambique.

12.2 What legal reforms are being proposed? What legal reforms would you like to see in Mozambique? Why?

Some of the key aspects that need to be addressed in Mozambique relate to increasing awareness about disability in Mozambique among people with disabilities as well as the non-disabled, in order to improve respect of human rights for people with disabilities. The concerns of people with disabilities include lack of access to socio-economic opportunities and employment, limited access to buildings and transportation, and the lack of wheelchairs. Specialised access facilities are rare, and there are few job opportunities for people with disabilities in the formal sector.

The country's only psychiatric hospital is overburdened with patients and lacks the means to ensure basic nutrition, medicine or shelter. Hospital doctors also reported that many families abandon their relatives with disabilities. Demobilised persons with disabilities continued to assert that they did not receive their pensions.

Accessibility to facilities remains a problem in Mozambique. The Construction and Maintenance of Technical Accessibility, Circulation and Use of Public Service Systems by People with Disabilities was adopted.³⁴

34 'FAMOD deplora inacessibilidade da Assembleia da República para os deficientes' 6 December 2012, available at: <http://www.verdade.co.mz/destaques/democracia/32706-famod-deplora-inacessibilidade-da-assembleia-da-republica-para-os-deficientes> (accessed 26 September 2013).

NAMIBIA

*Ruusa Ntinda**

1 Population indicators

1.1 What is the total population of Namibia?

According to the 2011 population census, the total population of Namibia is 2104 900.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Namibia and the criteria used to determine who falls within the class of persons with disabilities in Namibia?

The methodology used to determine the population and the total percentage of people with disabilities is the general household census of 2006.²

1.3 What is the total number and percentage of people with disabilities in Namibia?

According to the 2006 Namibia Inter-censal Demographic Survey, the population of people with disabilities is 102 100.³

1.4 What is the total number and percentage of women with disabilities in Namibia?

According to the 2006 Namibia Inter-censal Demographic Survey, the population of women with disabilities amounts to 52 433.⁴

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1 Republic of Namibia 'Namibia 2011 Population and Housing Census Preliminary Results' 2 http://www.gov.na/documents/10180/34849/2011_Preliminary_Result.pdf/0ea026d4-9687-4851-a693-1b97a1317c60 (accessed 31 May 2013).

2 Namibia Inter-censal Demographic Survey (2006) http://www.npc.gov.na/publications/census_data/NIDS_report_final_revised_04%20August%202010.pdf (accessed 03 June 2013).

3 2006 Inter-censal Demographic Survey (n 2 above) 16.

4 As above.

1.5 What is the total number and percentage of children with disabilities in Namibia?

Statistics on the total number and percentage of children with disabilities in Namibia are not available.

1.6 What are the most prevalent forms of disability in Namibia?

According to the National Planning Commission Disability statistics in Namibia 2004, the most prevalent forms of disability include:⁵

- Visual impairment: 35 per cent
- Hearing impairment: 21 per cent
- Speech and communication impairments: 11 per cent
- Developmental and intellectual impairments: 5 per cent
- Physical impairment: 37 per cent

2 International obligations

2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities in Namibia?

Namibia signed and ratified the CRPD and its Optional Protocol on 4 December 2007.⁶

2.2 If Namibia has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for the submission of the report? Has Namibia submitted its report? If not, what reason does the relevant government department give for the delay?

The CRPD initial report has been overdue since 2009.⁷ The responsible departments for the submission of the report are the Ministry of Health and Social Services which has the main obligation to promote and protect of the rights and welfare of persons with disabilities, and the Office of the Prime Minister which houses the nation's Disability Unit. No reasons were evident from the research as to the delay in the submission of the report.

5 CK Haihambo 'Inclusive education: Challenges of students with disabilities in institutions of higher education in Namibia' Doctoral thesis, University of South Africa, 2010 4.

6 United Nations enable, Development and human rights for all, Convention and Optional Protocol Signatures and Ratifications <http://www.un.org/disabilities/countries.asp?id=166> (accessed 19 August 2013).

7 Human Rights Council, Working Group on the Universal Periodic Review, Tenth session, Geneva, 24 January-4 February 2011 'Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1' Namibia <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/173/07/PDF/G1017307.pdf> (accessed 20 February 2013).

- 2.3 If Namibia has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities has reviewed the report, indicate if the Committee made any concluding observations and recommendations to Namibia's report. Was there a domestic effect in Namibia on disability issues due to the reporting process?**

As the country report was not submitted, there were no observations or recommendations to make.

- 2.4 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, has Namibia also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in Namibia's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations or recommendations?**

Namibia has submitted its first, second and third periodic reports on the implementation of the United Nations Convention on the Rights of the Child and two optional protocols (1997-2008) which referred to children with disabilities. But according to the Legal Assistance Centre these reports did not capture a full or accurate picture and expert observations were not implemented.⁸

- 2.5 Was there any domestic effect on Namibia's legal system after ratifying the international or regional instrument in 2.4 above?**

In *Frans v Paschke & Others*⁹ (rights of the child) an international instrument was used. This case dealt with the common law rule that prohibited Frans, who was born out of wedlock, from inheriting from his father. The court held that, such laws are in violation of the Namibian Constitution of 1990 and international law obligations that form part of the Namibian law.

- 2.6 Do ratified international treaties automatically become domestic law under Namibia's legal system? If so, are there any cases where the courts applied international treaty provisions directly?**

Namibia is a monist state. International treaties become part of the domestic laws upon ratification as a whole by virtue of articles 143 and 144 of the Namibian Constitution, unless reservations are submitted. Therefore, no enabling legislation is required. There are however no cases that have considered the CRPD directly or indirectly.

⁸ 'Alternative report to Namibia's first, second and third periodic reports on the implementation of the United Nations Convention on the Rights of the Child and two optional protocols (1997-2008)' prepared by the Gender Research & Advocacy Project Legal Assistance Centre (January 2012) http://www2.ohchr.org/english/bodies/crc/docs/ngos/Namibia_LAC_GRAP_CRC61.pdf (accessed 31 May 2013).

⁹ (PI1548/2005) [2007] NAHC 49 (11 July 2007).

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim in national legislation? Provide details.

The CRPD or parts thereof have not been incorporated verbatim or otherwise in national legislation. However, other international instruments such as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights influenced the drafting of charter 3 of the Namibian constitution that contains the bill of rights.

3 Constitution

3.1 Does the Constitution of the Republic of Namibia of 1990 (the Constitution) contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

There are no provisions in the Namibian constitution that directly addresses disability.

3.2 Does the Namibia Constitution contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Constitution contains some provisions that indirectly address disability. These include:

- Article 23 of the Namibian Constitution provides for affirmative action in order to remedy the injustices of the past. Article 23(2) states that it is for the advancement of persons in Namibia that have been disadvantaged by past discriminatory laws or practices. While women are mentioned in article 23(2), there is no reference to disability or persons with disabilities. However in terms of section 18 of the Affirmative Action (Employment) Act 29 of 1998 disability is listed as a targeted group.
- Article 10 of the Constitution deals with equality and freedom from discrimination. Under article 10(1) all are equal before the law and in terms of article 10(2) no person may be discriminated against. This can be used to argue that people with disabilities fall under 'all'. However this argument may be disputed on the basis that disability is not listed as a ground for non-discrimination. In addition, the grounds listed under article 10(2) are exhaustive or can be viewed as a closed list. This is due to the fact that 'other status' is not included.

4 Legislation

4.1 Does Namibia have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

• The National Disability Council Act 26 of 2004

In terms of section 4(1) the Council has the power and function to make representations on behalf of any person with a disability before any organ of state,

or provide or procure legal assistance for any persons with disabilities, if the matter in question relates to the rights of, or the integration of persons with disabilities in society. It also has the duty to recommend to Cabinet the taking of necessary steps in order to facilitate compliance with the National Policy on Disability and the amendment of any law.

• **Affirmative Action (Employment) Act 29 of 1998**

This Act is aimed at addressing the injustices of the past. In order to place the previous disadvantaged groups on a par with other groups in society for the full realisation of their rights. According to section 18(c) of this Act, persons with disabilities are listed as one of the designated groups.

Furthermore, the Affirmative Action (Employment) Act sets out in section 19 the preferential treatment of such designated groups. It provides that in filling positions of employment a relevant employer shall give preferential treatment to suitably qualified persons of designated groups.

4.2 Does your country have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

Section 2(1) of the Racial Discrimination Prohibition Amendment Act 26 of 1991 states that:

- (1) No person shall:
 - (a) deny any other person access to or the use of any public amenity or any facility in a public amenity;
 - (b) permit any other person such access or use on less favourable terms or conditions than those upon which he or she would otherwise permit such access or use; or
 - (c) require any other person to leave or cease to use any such amenity or facility,

This Act indirectly protects PWDs because the concepts of ‘no person’ and ‘any other person’ implicitly include PWDs.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Namibia ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases have had.

In conducting this research, the researcher was unable to obtain any court cases that dealt with cases that directly or indirectly deal with disability.

6 Policies and programmes

6.1 Does Namibia have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

Policies and programmes that address disability issues in Namibia are as follows:

- Namibia has a National Policy on Disability 2004. It was put in place with the mandate to accept the principles of participation, integration and equalisation of opportunities defined by the United Nations in the World Programme of Action Concerning Disabled Persons and The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.
- The National Policy on Special Needs and Inclusive Education (2008) was put in place to enable the regular school system to meet the diverse educational needs of all children, and increase the opportunities available to students with disabilities.
- The National Policy for Mental Health (2005)

This policy has the mandate to regulate matters with regard to mental health and institutionalisation of people with mental disabilities. This policy is outdated. A new Mental Health Bill draft has been discussed to replace it. The eighth draft of a Mental Health Bill was circulated in 2011. The drafting process has been dragging on for years; there are doubts if it will ever be passed.¹⁰ The current mental health policy has been criticised in that there are no special provisions for children with mental disabilities. In addition, in terms of the policy, only 211 psychiatric beds are available for the mental health needs of over 1.8 million people in Namibia and only 90 registered psychologists nationwide.¹¹

6.2 Does Namibia have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- The policy on 'Decentralization in Namibia' was adopted by the Ministry of Regional and Local Government and Housing in 1998. It is an inclusive policy which indirectly addresses disability. Its paragraph 2(1) reads: 'Decentralization is an instrument the state can use to bring about democratic participation to [all] people at lower levels of government'.
- Namibia's Environmental Assessment Policy for Sustainable Development and Environmental Conservation of 1995 was adopted for the benefit of all Namibians including those with disabilities. The Preamble states that: 'The State shall actively promote and maintain the welfare of the people by adopting policies ...'. PWDs are not excluded.
- Similarly, the Vision 2030 Document addresses 'people's quality of life' in chapter 4 and this includes PWDs.

10 LAC Alternative Report (n 8 above) 18.

11 LAC Alternative Report (n 8 above) 18-19.

7 Disability bodies

- 7.1 Other than the ordinary courts or tribunals, does Namibia have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.**

Namibia has a National Disability Council that deals with violations of the rights of persons with disabilities. According to section 16(3) of the Namibia Disability Council Act, the Council may run programmes or conduct campaigns to inform the public to raise the awareness concerning an issue relating to disability. The National Disability Council was established so that line Ministries would be required to report annually to the Council on activities related to disability programmes. At every level programmes that are aimed at social, economic and political development include persons with disabilities in order to increase their visibility at all levels from decision making to implementation. Courts in Namibia have the jurisdiction to hear any case arising from the exercise of the functions and powers of the National Disability Council.¹²

- 7.2 Other than ordinary courts or tribunals, does Namibia have any official body that though not established to specifically address the violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

No such body exists.

8 National human rights institutions

- 8.1 Does Namibia have a Human Rights Commission or an Ombudsman or Public Protector? 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 Nigeria has ever addressed issues relating to the rights or persons with disabilities.**

Namibia has an Ombudsman provided for under articles 89 to 94 of the Namibian Constitution.¹³ His/her duties include the promotion and protection of human rights for all citizens, including persons with disabilities but there is no provision in the Ombudsman's mandate that directly makes provisions for the rights of persons with disability. There are no indications as to whether the ombudsman ever addressed issues relating to the rights of persons with disabilities.

¹² The National Disability Council Act 26 (2004), art 16(3).

¹³ The Constitution of the Republic of Namibia, 1990.

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 Namibia? If so, list each organisation and describe its activities.

There is a national umbrella disabled people's organisation in the country, known as the National Federation of People with Disabilities in Namibia. It has a strong working relationship with service providers in the disability sector, for example Leonard Cheshire, the Association for Children with Language, Speech and Hearing Impairments in Namibia and the Onyose Trust.¹⁴ The federation advocates for the rights and welfare of persons with disabilities. It was founded in 1990. It has six national affiliate members. These are:

- **The Namibian Federation for the Visually Impaired**
Provides services needed by the visually impaired, including rehabilitation; to promote the well-being of blind and partially sighted persons; promotes social integration in all fields of life; and disseminates information in order to promote a positive attitude among the community of Namibia towards visually impaired persons.¹⁵
- **Namibia National Association for the Deaf**
Provides training related to deafness and empowers deaf people.
- **National Association of Differently Able Women**
Builds organisational capacity for CRPD implementation; documents human rights abuses; and conducts advocacy with the Ministry of Transport to ensure accessible roads and transport.¹⁶
- **Namibian Association for Children with Disabilities**¹⁷
Builds organisational capacity of persons with disabilities and their allies such as parents and sympathetic educationalists; and advocates for and supports inclusive education.¹⁸
- **Albino association of Namibia**
Disseminates information and promotes education about albinism; and provides support services to persons with albinism.¹⁹

14 'Disability Policy Audit in Namibia, Swaziland, Malawi and Mozambique: Final Report' (July 2008) Research Commissioned by the Southern African Federation of the Disabled's DFID-funded Research Programme http://www.ucl.ac.uk/lc-ccr/downloads/DISABILITY_POLICY_AUDIT_RESEARCH_FINAL_REPORT.pdf (accessed 20 February 2013).

15 The Namibian Federation for the Visually Impaired: <http://visuallyimpairednamibia.com/> (accessed 29 May 2013).

16 Disability Rights Fund: <http://www.disabilityrightsfund.org/grantee/africa/2009/namibian-association-differently-abled-women-nadawo.html> (accessed 28 April 2013).

17 Policy Audit Report (n 14 above) 8.

18 Namibia Association of Children with Disabilities: <http://www.osisa.org/education/namibia/namibia-association-children-disabilities> (accessed 26 March 2013).

19 RN Ntinda 'The rights of people with albinism: A conceptual and rights based comparative analysis' LLB dissertation, University of Namibia, 2011 39 http://digital.unam.na/bitstream/handle/11070.1/834/ntinda_thrights_2011.pdf?sequence=1 (accessed 20 February 2013).

9.2 In the countries in your region, are DPOs organised or coordinated at a national and/or regional level?

They are mostly organised at the national level under the National Federation of People with Disabilities in Namibia.

9.3 If Namibia has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

- By conducting consultations with the DPOs on issues surrounding the disability sector.
- By providing a conducive environment for NGOs and other organisations. It is noteworthy to mention that some of the executive members of the National Federation of People with Disabilities in Namibia (NFPDN) are also spearheading the disability department under the Office of the Prime Minister.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

- They have taken steps in order to be actively involved in the processes taken by the government on disability issues. This is in terms of section 3(1)(d) of the National Disability Council Act that states that before a law relating to persons living with disabilities is passed, there must be consultations with persons with disabilities, organisations of persons with disabilities, and organisations rendering services to persons with disabilities, taking into consideration relevant information regarding the implementation of the National Policy on Disability.²⁰
- Ensuring that persons with disabilities are consulted in all disability matters. This is made possible by the fact that some of the executive members of the National Federation of People with Disabilities in Namibia (NFPDN) – which is the national umbrella disabled people's organisation in the country – are also spearheading the disability department under the Office of the Prime Minister.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The barriers faced by DPOs in engaging with implementation include the lack of resources and the lack of interest by the general public on disability matters.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

- Namibia has a member of parliament with albinism, Mr S Ankama, who is also the Deputy Minister of Works and Transport. But since albinism is not recognised as a disability in Namibia it is unclear if this will be seen as a best practice but it is in the researchers view that albinism be viewed as a disability due to the stigmatisation and discrimination that persons with albinism experience.
- Inclusive education and community-based rehabilitation represent complementary and mutually supportive approaches to serve those with special needs. By adopting community-based rehabilitation as a strategy, the government further strengthens its principle of decentralisation of programme implementation.²¹

20 Responses by the Government of Namibia, Human Rights Resolution 17/11 on violence against women and girls and disability (2011) 3 <http://www2.ohchr.org/english/issues/women/docs/.../Governments/Namibia.do> (accessed 24 May 2013).

21 Responses by the Government of Namibia (n 20 above) 7-8.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

There are no specific outcomes regarding the recognition of the rights of persons with disabilities. The situation for persons with disabilities still remains the same as it was before the ratification of the CRPD as there has been no change in law. The old policy on disability prior the CRPD still operates.

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 University of Namibia promotes capacity building and provides support in relation to research on disability matters, by providing and recommending such DPOs, people with disabilities and others for research grants. The university also has a disability unit and offers a module on inclusive education under the Bachelor of Education degree.

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?

- There is a need for proper implementation monitoring and evaluation of the laws in place to protect the rights of persons with disabilities.
- There is a lack of coordination and overlapping of duties among the relevant Ministries who have responsibility for the design, implementation and evaluation of disability services.²²
- In order for Namibia to put in full and effective operation of the rights-based approach to disability, more human and financial resources need to be committed.²³ However, Namibia still perceives disability under welfare and charity and not under human rights even after ratifying the CRPD.²⁴
- Accurate data on the persons with disabilities is needed. It will provide policy makers and service providers with information on all persons with disabilities in order to better tailor programmes to meet the actual needs and anticipate future developments.²⁵
- There is a need for the rights and needs of all disabled people to be incorporated in all sectors.²⁶

22 Policy Audit Report (n 14 above) 10.

23 As above.

24 As above.

25 Statistics, Data and Evaluation, and Monitoring 'Programme monitoring and evaluation: The disability perspective in the context of development' Annex II 'Data and statistics for disability-sensitive policies and programmes' <http://www.un.org/esa/socdev/enable/monitor/dme62.htm> (accessed 20 February 2013).

26 Responses by the Government of Namibia (n 20 above) 7.

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?

The research institution in the region working on the rights of people with disabilities is the Centre for Human Rights, University of Pretoria.

10 Government departments

10.1 Does Namibia have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).

The National Disability Council and the Ministry of Health and Social Services have the main obligation for the promotion and protection of the rights and welfare of persons with disabilities in line with other ministries. In addition, the Office of the Prime Minister also has a Disability Unit which was established in 2001.²⁷ However despite the existence of these structures, there appears to be limited action directed at promoting the rights and welfare of persons with disabilities. For example, according to the most recent annual report from the Office of the Prime Minister (2008-2009), the Disability Unit did not appear to conduct any activities regarding improving access to healthcare services for children with disabilities. The functioning of the National Disability Council also appears to be problematic. The state report states that 'Namibia's National Disability Council Act creates a council tasked with monitoring the implementation of Namibia's National Policy on Disability'.²⁸ This policy, which was adopted by the executive Cabinet in 1997, identifies children with disabilities as a key target group. However, there are no available reports documenting actions conducted by the Council. Although government ministries are required to submit a report on the implementation of the Disability Policy to the Council, such reports have not been submitted. Neither has the Council drafted annual reports which should be submitted to the Minister of Health and Social Services and then to the National Assembly as required by the National Disability Council Act.²⁹

27 Policy Audit Report (n 14 above) 8.

28 LAC Alternative Report (n 8 above) 53.

29 LAC Alternative Report (n 8 above) 16.

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in Namibia? (For example, in some parts of Namibia ritual killing of certain classes of PWDs such as people with albinism occurs. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

Disabled people encounter multiple levels of exclusion and discrimination, as evidenced by the 2004 Disability Living Conditions Survey.³⁰ There are many customary practises, for instance disabled persons are abandoned as they are believed to be a sign of bewitchment, that violate the rights of person's with albinism especially in the rural areas.³¹

11.2 How does Namibia respond to the needs of person with disabilities with regard to the areas listed below:

- **Access to public buildings**

Public and private facilities have taken the needs of people with disabilities into account. Public buildings provide access to wheelchair users. Public toilet facilities cater for persons with physical disabilities. The parking areas have designated parking bays for persons with disabilities that are situated as near to the entrance of the building as possible.

- **Access to public transport**

The Disability Council Act also addresses Environmental Accessibility and stipulates that, the state must develop mandatory standards and guidelines to make the physical environment accessible to all persons with disabilities. Furthermore, the state must ensure that architects, construction engineers and others who are professionally involved in the design and construction of the physical environment have access to the disability policy and the requirements for making public places accessible to disabled people.³²

- **Access to education**

According to the 2004 Disability Living Conditions Survey, disabled children are more than twice as likely not to have received a primary education as their non-disabled counterparts.³³ As a result, access to education is one of the areas that the government heavily invests in, in terms of the National Policy on Special Needs and Inclusive Education (2008) and the National Policy Guidelines for Educationally Marginalised Children (2002). In addition, since the beginning of this year, the government has provided free primary education. Educational

30 Policy Audit Report (n 14 above) 8.

31 See R Ntinda 'Customary practices and children with albinism in Namibia: A constitutional challenge?' in OC Ruppel (ed) *Children's rights in Namibia* (2009). This article dealt extensively with this matter.

32 Responses by the Government of Namibia (n 20 above) 5.

33 Policy Audit Report (n 14 above) 10.

services for children with disabilities are provided through a total of nine special schools. However, mainstream schools which accept learners with learning disabilities but often do not have special facilities to assist these learners. According to statistical data from the Ministry of Education, 32169 learners with disabilities were enrolled in the education system in 2009.³⁴

- **Access to vocational training**

This is provided for in terms of the National Vocational Training Act 18 of 1994.

- **Access to employment**

According to the 2004 Disability Living Conditions Survey about 98 per cent of disabled people were unemployed.³⁵ This is a clear indication that the government is not doing enough to provide persons with disabilities with access to employment.

- **Access to recreation and sport**

Access to recreation and sport is provided for through special programmes such as Disability sports Namibia and the Special Olympic Namibia. The organisations provide year-round sports training and athletic competition in a variety of Olympic-type sports for children and adults with intellectual disabilities. These activities provide persons with disabilities with opportunities to develop physical fitness, demonstrate courage, experience joy and participate in a sharing of gifts, skills and friendship.³⁶

- **Access to justice**

The Legal Aid Department in the Ministry of Justice provides legal aid services for every Namibian who is not able to afford a private lawyer. It ensures that persons with disabilities receive general information on the Namibian legal system as well as specific information on how to seek and qualify for legal aid. This information is also readily available to people with sensory loss in Braille and in large prints respectively. This information is also being made available to persons with hearing impairments, especially when requiring legal assistance. Furthermore, trained sign language interpreters are made available in courts for deaf people who use this form of communication.³⁷

- **Access to health care**

According to the 2004 Disability Living Conditions Survey³⁸ the majority of disabled people are able to access health services, with over two-thirds of respondents actually doing so.³⁹ It was found that hospitals and primary health care clinics were the most accessible. However, there was gross inadequacy in the provision of vocational rehabilitation, counselling services and access to assisted devices.⁴⁰ The right to health is a controversial issue as it is not justiciable. Patients at state health facilities are expected to pay a fee of approximately US\$1 per visit and, although a waiver system exists, the government admits that it is 'uneven' in its application.⁴¹ A recent study assessing the experience of parents of children with learning disabilities or mental health problems access to healthcare services, noted that many patients are not exempted from this fee and some do not access healthcare services because of the cost involved.⁴²

34 LAC Alternative Report (n 8 above) 15.

35 Policy Audit Report (n 14 above).

36 JP Kennedy Jr Foundation for the Benefit of Persons with Intellectual Disabilities (2013); Special Olympics Namibia: <http://www.specialolympics.org/Regions/africa/Locations/Special-Olympics-AF-Namibia.aspx> (accessed 26 May 2013).

37 Responses by the Government of Namibia (n 20 above) 6-7.

38 Policy Audit Report (n 14 above) 10.

39 Policy Audit Report (n 14 above) 10.

40 Policy Audit Report (n 14 above) 10.

41 LAC Alternative Report (n 8 above) 20.

42 LAC Alternative Report (n 8 above) 16.

11.3 Does Namibia provide for disability grants or other income support measures for persons with disabilities?

The government has a pension and a social grant scheme for persons with disabilities, provided they are registered. These are administered by the Ministry of Health and Social Services.

11.4 Do people with disabilities have a right to participation in political life (political representation and leadership) in Namibia?

Persons with disabilities have a right to participation in political life (political representation and leadership, and voting independently). Voting centres provide access to wheelchair users. However, there is no provision for Braille for people who cannot see partially or fully. They cannot vote independently and must be accompanied by someone they trust. Namibia has Mr Ankama who is a person with albinism who is a member of parliament as a Deputy Minister of Works and Transport.

11.5 Specific categories experiencing particular issues/ vulnerability:

• Women with disabilities

According to the Disability Council Act the state must ensure that women with disabilities have comparable opportunities to participate in all aspects of life equal to that of their fellow citizens.⁴³ In addition general protection for women's rights is provided for and protected under the following provisions of the Constitution: article 5 which provides for the protection of human rights; article 10 which provides for equality; and article 25(4) which provides for the enforcement of human rights.

• Children with disabilities

The Disability Council Act requires parents of children with disabilities to be provided with information about services available so that they can make informed decisions about the needs of their children in cases where these children cannot do so themselves. Early intervention, such as stimulation and education must be provided to children as early as possible in order to prevent developmental disabilities. Furthermore the state must ensure that children with disabilities have equal opportunities and equal access to education, sports and recreation and all other services in the community such as health care.⁴⁴ There is a need for an explicit focus on the problem of children with mental health disabilities.⁴⁵

• Other (for example, indigenous peoples)

They are provided for under the equality clause (article 10) and the affirmative action clause (article 23) of the Constitution.

43 Responses by the Government of Namibia (n 20 above) 4.

44 Responses by the Government of Namibia (n 20 above) 4.

45 LAC Alternative Report (n 8 above) 17.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Namibia at the moment?

In conducting this research, no information was found in this regard.

12.2 What legal reforms are being raised? Which legal reforms would you like to see in Namibia? Why?

The researcher did not come across any proposal for law reform on disability in Namibia. However, there is a need for the disability policy to be reformed and move away from a medical to human rights based approach. There is also a clear need for more proactive public programmes to address the needs of children and their families, with a particular focus on marginalised groups, including children with disabilities and indigenous minorities.⁴⁶

46 LAC Alternative Report (n 8 above) 1.

NIGERIA

*Ngozi C Umeh**
*Ramola Adeola***

1 Population indicators

1.1 What is the total population of Nigeria?

According to the 2006 Population and Housing Census the total population of Nigeria was 140 431 790.¹

1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Nigeria, and the criteria used to determine who falls within the class of persons with disabilities in Nigeria

The methodology used to obtain statistical data on the prevalence of disability in Nigeria was through field interview (National Census).²

1.3 What is total number and percentage of people with disabilities in Nigeria?

The total number of people with disabilities in Nigeria according to the 2006 Census were 3 253 169 and the percentage is approximately 2.32 per cent.³

1.4 What is the total number and percentage of women with disabilities in Nigeria?

The total number of women with disabilities in Nigeria in line with the 2006 Census is 1 544 418 and the percentage is 1.1 per cent.⁴

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1 Federal Republic of Nigeria Official Gazette, No 2 Abuja, 2 February 2009, Vol 96, National population commission *Census Priority Table: 2006 Population distribution by, sex and class size of householdstate and local government area table HH (ADD 1)*, Vol IX, April 2010.

2 Interview with surveyor C Nwogwu, State Director National Population Commission, Imo State, Nigeria.

3 *Census Priority Table* (n 1 above) 14 – 15.

4 *Census Priority Table* (n 1 above) 20 – 21.

1.5 What is the total number and percentage of children with disabilities in Nigeria?

According to the 2006 Census the total number of children with disabilities in Nigeria is 1 002 062 and the percentage is 0.71 per cent.⁵

1.6 What are the most prevalent forms of disability in Nigeria?

The most prevalent forms of disability in Nigeria include:

- (1) visual impairment;
- (2) hearing impairment;
- (3) physical impairment;
- (4) intellectual impairments; and
- (5) communication impairment.⁶

2 International obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in Nigeria? Has Nigeria signed and ratified the CRPD and the Optional Protocol?

Nigeria signed and ratified both the Convention and its Optional Protocol on 30 March 2007 and 24 September 2010⁷ respectively.

2.2 If Nigeria has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for submission of the report? Has Nigeria submitted its report? If not, what reason does the relevant government department give for the delay?

The Ministry of Women Affairs and Social Development is responsible for the submission of Nigeria's country report. Nigeria's Report was due by May 2012. The delay was caused by lengthy national processes.

⁵ *Census Priority Table* (n 1 above) 40 – 41.

⁶ 'Interview source from Mrs Comfort Nnaji, principal planning officer, ministry of Women Affairs and Social Development Imo State Nigeria': CC Opara, Principal Assistant Social Welfare Officer I, Ministry of Women Affairs and Social Development Imo State.

⁷ Consolidated disability findings from the 2010 US State Department Country Reports on Human Rights practices http://www.usicd.org/doc/africa_disability_references1.pdf (accessed 15 April, 2013); <http://www.un.org/en/rights/html> (accessed 15 April 2013); E-mail communication from Prof O Nnamdi on 19 April 2013.

- 2.3 If Nigeria has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities had reviewed the report, indicate if the Committee made any concluding observations and recommendations to Nigeria's report. Was there a domestic effect in Nigeria on disability issues due to the reporting process?

Nigeria has not submitted the report. Therefore there were no observations.

- 2.4 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, has Nigeria also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in Nigeria's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations or recommendations?

Regional instruments

- **African Charter on Human and Peoples' Rights (ACHPR)**

Nigeria's fourth periodic report⁸ (the report) on human rights incidences and interventions to the Committee on the ACHPR did not report specifically on the rights of persons with disabilities. The report made reference to the constitutional, administrative and judicial measures adopted towards the protection of the family and rights of women, children, the aged and the disabled, to the extent that government directs its policies towards ensuring that suitable and adequate shelter, food and welfare of the disabled and other citizens are provided.

- **African Charter on the Rights and Welfare of the Child (ACRWC)**

The Nigeria report on the status of implementation of the African Charter on the Rights and Welfare of the Child (ACRWC)⁹ did not mention the right of persons with disabilities.

United Nations instruments

- **Convention on the Rights of the Child (CRC)**

The Minister of Women Affairs and Social Development while presenting the Nigeria Country Report¹⁰ did not specifically report on the rights of persons with disabilities.

- **Convention on the Elimination of all forms of Discrimination against Women (CEDAW)**

Nigeria in its sixth periodic report in 2008 did not report specifically on the rights of persons with disabilities.¹¹

8 http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf (accessed 24 April 2013).

9 <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Initial-State-Report-Nigeria.pdf>.

10 <http://www.refworld.org/docid/43fb2c612.html> (accessed 28 April 2013).

11 http://www.iwraw.ap.org/resources /pdf141_shadow_reports/Nigeria_SR_by-html (accessed 28 April 2013).

• **UN Universal Periodic Review (UPR)**

Nigeria's UPR took place on 9 February 2009.¹² During the session, no mention was made of disability rights except that Nigeria has ratified the Optional Protocol to the CRPD.

2.5 Was there any domestic effect on Nigeria's legal system after ratifying the international or regional instruments in 2.4 above?

After ratifying the ACHPR, the ACRWC, and the CRC, they were incorporated into Nigerian legislation through an Act of the National Assembly (the legislature) in line with the Nigerian Constitution.¹³ The Constitution states that no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Consequently, the ACHPR was adopted in its entirety as part of Nigerian law by the (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria. Since then, Nigeria has since, progressively been implementing the ACHPR through Chapter 2 and 4 of the Constitution and through other government ministries, commissions and organisations. Moreover, there is the Child's Right Act which has been adopted by the 22 states of the Federation. States that have passed the Child Right Act have been encouraged to develop mechanisms for the effective implementation of the legislation in their domains. Nigeria has through this Act mainstreamed the provisions of the CRC. Nigeria has yet to domesticate the CEDAW.

2.6 Do ratified international treaties automatically become domestic law under your legal system? If so, are there any cases where the courts applied international treaty provisions directly?

Nigeria follows a dualistic approach under which international instruments or treaties become domestic law only when such a treaty has been enacted into law by the National Assembly.

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim into national legislation? Provide details.

The ACHPR was incorporated in its entirety into Nigerian legislation. The Amended 1999 Constitution of the Federal Republic of Nigeria, in chapter II and IV make provision for socio economic rights and civil and political rights¹⁴ respectively. These provisions essentially conform to the provisions in the ACHPR. However, the chapter II group of rights are rendered non justiciable¹⁵ under the Nigerian Constitution and cannot expressly be determined by any court of law in Nigeria. Nigeria has also mainstreamed the CRC.

12 <http://www.reliefweb.int/.../Nigeria/report-working-group-universalperiodicreview.2006> (accessed 28 April 2012).

13 See sections 12(1), (2) & (3) of the Amended Constitution of the Federal Republic of Nigeria.

14 The chapter II group of rights is referred to as the Fundamental Objectives and Directive Principles of state policy, while the chapter IV group of rights is referred to as Fundamental Rights. See sections 13-24 and 33-46 of the Amended 1999 Constitution of the Federal Republic of Nigeria.

15 By virtue of sections 6(6)(c) of the Amended Constitution of the Federal Republic of Nigeria; see also 2.5 above.

3 Constitution

3.1 Does the Constitution of the Republic of Nigeria of 1996 (hereinafter referred to as the ‘Constitution’) contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

The Constitution does not contain any provision or provisions that directly address disability.

3.2 Does the Constitution contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

The Amended 1999 Constitution of Nigeria contains some provisions that indirectly address disability. These include:

- Section 42(2) which prohibits discrimination based on the circumstances of a person's birth; and
- Sections 14, 16(1) and 17 which guarantee the right to equality and fundamental rights for all.

4 Legislation

4.1 Does Nigeria have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

- There is a 1993 Nigerians with Disability Decree passed by the Nigerian military government in 1993.

This legislation directly addresses disability by providing for the rights and social welfare of persons with disabilities.

Some legislation on disability can be found in some states¹⁶ in Nigeria

- Lagos State Special People's Law 2011 set up an Office of Disability Affairs whose functions include:

The issuance of guidelines for the education, social development and welfare of persons living with disability; investigation, prosecution and sanctioning in appropriate cases the violation of any of the provisions of the law subject to an individual's right to seek redress in court; re-orientation and education of the public on the right attitude towards persons living with disabilities; issuance of directives and guidelines on all manner of disabilities, preventive or curative exercises; actualising the enjoyment of all rights in the law by persons living with disabilities; keeping and updating a register and database of persons living with

¹⁶ The Edo State House of Assembly is currently considering a bill, to enact into law, to make provisions for the establishment of a commission for persons with disabilities. <http://www.lagosstate.gov.ng/entities.php?k=207> (accessed 26 September 2013).

disabilities; and an advocacy and enlightenment campaign drive targeted at members of the public on ways to empathise with persons living with disabilities.

The law also establishes a Disability Fund, which shall be administered by the office and to which individuals, corporate bodies and government may make contributions. As settled in the law, the purpose of the Fund is to advance the cause of persons living with disability in the state.

4.2 Does your country have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

• **The Child Rights Act, 2003**

It states that children are entitled to freedom from discrimination on the grounds of belonging to a particular community or ethnic group, place of origin, sex, religion, the circumstances of birth, disability, deprivation or political opinion. Further, it provides categorically that the dignity of the child shall be respected at all times. The Act specifies that children in need of special protection measures should be protected in a manner that will enable them to achieve their fullest, possible social integration.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Nigeria ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases has had.

Generally, after researching the same, I was not able to find any Nigerian case or decision relating to a disability issue or issues.¹⁷

6 Policies and programmes

6.1 Does Nigeria have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- There is a national policy aimed at integrating persons with disabilities in governance.¹⁸ This policy is intended at providing equal opportunity for persons with disabilities to contest elective positions, have access to elections, and the ability and opportunity to vote in elections.

¹⁷ The researchers also interviewed senior lawyers, judges and lawyers in the Ministry of Justice.

¹⁸ J Xinhua 'Nigeria develops policy on integration of disabled persons' 29 February 2010 <http://www.englishpeopledaily.com.cn/00001/90777/90855/7045385.html> (accessed 10 April, 2013).

- The National Social Welfare Policy¹⁹ aims to take care of the developmental needs of persons with disabilities, orphans and vulnerable children, as well as the elderly in society. The main objective of the policy is to provide a comprehensive social welfare package to check the growing menace of street begging in and around cities by citizens, as well as take into consideration the plight of the aging sector of the country's population and other vulnerable groups.

6.2 Does Nigeria have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

The Nigerian National Policy on Education,²⁰ recognises that children and young persons with special needs shall be provided with inclusive education services.

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does your country have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.

The Joint National Association of Persons with Disabilities (JONAPWD) is the official body in Nigeria that specifically addresses the violation of the rights of people with disabilities. The Executive Council of JONAPWD acts as a conduit between the Nigerian government and persons with disabilities in order to promote the rights of persons with disabilities. JONAPWD protects persons with disabilities by reporting any form of inhuman treatment they are subjected to, to the government. It has been able to establish partnership with other mainstream human rights organisations, like Action Aid Nigeria, coalition for change and PACT Nigeria. However, it has been argued that JONAPWD does not have the capacity to become an effective rights-based advocacy body as a result of the absence of a strategic plan including an obvious lack of transparency.²¹

7.2 Other than the ordinary courts or tribunals, does your country have any official body that though not established to specifically address a violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Association of Comprehensive Empowerment of Nigerians with Disabilities (ASCEND) started as a movement for the empowerment of Nigerians with disabilities. It is a platform for all Nigerians with disabilities to come together and speak with one voice.²² ASCEND is more or less a socio-political group with the objective aim of integrating persons with disabilities in society generally, and in politics in particular.²³

¹⁹ <http://allafrica.com/stories/201202090857.html> (accessed 26 September 2013).

²⁰ Revised National Policy on Education 2008 sec 7: Special Needs Education, Abuja, Nigeria

²¹ R Lang & L Upah 'Disability scoping study in Nigeria' (2008) 19.

²² As above.

²³ (n 21 above) 20

8 National human rights institutions

- 8.1 Discuss Nigeria's position with regard to a Human Rights Commission or an Ombudsman or Public Protector in Nigeria? 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 Nigeria has ever addressed issues relating to the rights of persons with disabilities.**

Nigeria has a National Human Rights Commission. One of the functions and powers of the Human Rights Commission is to deal with all matters relating to the protection of human rights as guaranteed by the Nigerian Constitution, the ACHPR, United Nations Charter, the Universal Declaration of Human Rights and other International treaties on human rights to which Nigeria is a signatory.

Furthermore, the National Human Rights Commission has addressed issues relating to the rights of persons with disabilities in Nigeria in the following ways: it has created the office of a special rapporteur as well as a program officer on persons with disabilities. This is a way to integrate disability issues into the National Human Rights Commission's work and to have a desk responsible for disability concerns.²⁴

The Nigerian Human Rights Commission also conducted a survey to support facilities in tertiary institutions aimed at assisting persons with disabilities to enjoy inclusive education. It was found that few tertiary institutions in Nigeria have basic facilities like ramps, lifts with sound and brailled floor numbering to assist persons with disabilities. It has also planned workshop and advocacy visits for institutions to improve access to persons with disabilities. The National Human Rights Commission has provided ramps and lifts with sound and brailled floor numbering in its head office at Abuja, Nigeria.

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 your country? If so, list each organisation and describe its activities.**

In addition to the JONAPWD and the ASCEND, mentioned in 7.1 & 7.2 above which are the national umbrella bodies, there is a multiplicity of other DPOs working at a national, state and local level. Most of these organisations cater for the needs of single impairment groups:

- **The Leprosy Mission**

24 The Nigeria Report (n 9 above) 4.

Provides medical and vocational rehabilitation services to individuals with leprosy; they have also undertaken public campaigns to educate and inform the public about leprosy

- **The Spinal Cord Injury Association of Nigeria**

Provides therapeutic care and support for people with spinal cord injury

- **Deaf Women in Nigeria**

Takes care of women with hearing and communication impairments

- **The Accidents Victim Support Association**

Provides services for people with mobility problems and other physical, vision and hearing impairments

- **Centre for Citizens with Disabilities**

Provides development and integration persons with disability in all spheres of life

- **The Nigerian National Association of the Deaf**

Offers assistive services to people with hearing impairments

- **Resource Centre for Advocacy on Disability**

Assists with advocacy support through networking on disability issues

- **Persons with Disabilities Action Network**

Inclusive Participation and Access through research and documentation, advocacy capacity building, resource mobilisation and networking

- **Leonard Cheshire Disability**

Provides training, workshops and research

- **National Handicap Carers Association of Nigeria**

A support group for persons with disabilities

- **Christian Blind Mission**

Running community based rehabilitation programmes for persons with disabilities

- **Inclusion International**

Advocates for human rights of people with intellectual disabilities and their families

Admittedly and according to Lang,²⁵ disability organisations in Nigeria are weak and are always in conflict with each other. This does not allow them to communicate with one unifying voice in effectively advocating for their rights.

9.2 In the countries in your region, are DPOs organised and coordinated at a national and/or regional level?

DPOs in the West African region are organised at a national level in their various countries and are also organised and coordinated at a regional level.

25 Lang & Upah (n 21 above) 20.

9.3 If your country has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

Though the CRPD has not been domesticated in Nigeria, the Ministry of Women Affairs try to partner with DPOs through focus group discussions on issues concerning them with respect to policies, programmes and operational modalities that will make for effective social inclusion of persons with disabilities in society. Furthermore, the government has also provided disability desks in each of the 774 local government areas and at the office of the National Commission on Human Rights.

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

- In Nigeria, DPOs have tried to lobby government towards a rights based approach to disability issues.
- They have also partnered with the national government in developing policies and programmes on disability even though participation is generally poor.
- DPOs have also lobbied the Independent National Electoral Commission (INEC) to amend section 57 of the Electoral Act, so as to ensure that all Nigerians with disabilities have access to voting and can be voted for during elections.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

DPOs in Nigeria face the following barriers when it comes to engaging with implementation:

- Lack of political will
- No national disability legislation
- Non-existence of administrative structures for effective implementation.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

To the best of my knowledge, there are no best practice models for ensuring effective involvement of DPOs in Nigeria.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

The introduction of the Disability Bill in the National Assembly in order to secure disability rights is an example of a specific outcome in recognising the rights of persons with disabilities. Furthermore, disability legislation has been enacted in some states of the Federation with disability advisors and desks provided.

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?

In the area of teacher training and funding of schools, a lot of capacity building and support is required. DPOs need to be sensitised to the dangers of adopting the welfare approach to disability as this will further perpetuate their exclusion from society. The greatest challenges DPOs face is the non-existence of any structure to apply and implement a rights based approach to disability issues.

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

- DPOs need be trained and sensitised through public lectures and the media on the principles of the social/human rights approach to disability.
- There is a need to adopt a national legislation on disability, so that the proposed national commission for persons with disability can take off.
- There is a need to establish an adequate administrative infrastructure at a national, state, and local level to ensure effective implementation and consequently provide an opportunity for DPOs to play or take a leading role.
- There is a need to ensure DPOs are represented at the policy making bodies of both federal and state governments.

10 Government departments

10.1 Does Nigeria have government departments that are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the departments

The government department responsible for promoting and protecting the rights and welfare of persons with disabilities in Nigeria is the Federal Ministry of Women Affairs and Social Development.²⁶

The Ministry provides some basic rehabilitation services. They also organise seminars and workshops for persons with disabilities. The Ministry is also responsible for the formulation of policies and programmes for persons with disabilities.

²⁶ This is situated at Abuja.

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in Nigeria? (for example, in some parts of Nigeria ritual killing of certain classes of PWDs occurs, such as people with albinism. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

There are deep-seated negative social attitudes and perceptions of persons with disabilities, who deserve compassion and concern. Ritual killing of people with albinism also occurs. There is no comprehensive legislation on disability and a non-homogenous disability movement.

11.2 How does Nigeria respond to the needs of person with disabilities with regard to the areas listed below?

- **Access to public buildings**

Most public buildings in Nigeria are not accessible to persons with disabilities. Only very few tertiary institutions and government offices have ramps, lifts with sound and floors with brail numbering.

- **Access to public transport**

Nigeria's public transport system is not sensitive to the plight of persons with disabilities and there is no social inclusion project or programme envisaged

- **Access to education, vocational training and health care**

The number of persons with disabilities in mainstream schools is dismally low. They are usually kept in special schools and are prevented from having close interaction with other pupils and the community at large.

Nonetheless, one positive factor relates to education, vocational training and health care. A number of national and international non governmental organisations (NGOs)²⁷ are working within the disability sector to provide vocational training which will focus on computer technologies and ICT,²⁸ care giving projects and inclusive education.

The Ministry of Women Affairs and Social Development provides some rehabilitation, medical and vocational services to persons with disabilities. Sometimes the Ministry of Health assists with funds.

27 Interview with CC Opara, principal assistant social welfare officer, Ministry of Women Affairs and Social Development, Imo State. See also Xinhua (n 18 above) 19.

28 Christian Blind Mission (CBM), Leprosy Mission (LM), and Leonard Cheshire Disability (LCD).

- **Access to employment**

There are no policies or programmes to enable persons with disabilities to gain full or even part time employment. Efforts to provide financial independence come largely from NGOs.²⁹

- **Access to recreation and sports**

Very few persons with disabilities have access to recreation and sporting facilities. Persons with disabilities in rural areas are usually forgotten.

- **Access to justice**

There is a Legal Aid Office attached to the Ministry of Justice that renders pro bono legal services to persons with disabilities who cannot afford to live on less than one dollar per day. Another organisation, International Federation of Women Lawyers (FIDA), also provides access to justice for persons with disabilities by offering pro bono services.

11.3 Does Nigeria provide for disability grants or other income support measures for persons with disabilities?

In Nigeria income support measures for persons with disabilities come in the form of grants.

11.4 Do people with disabilities have a right to participation in political life (political representation and leadership) in Nigeria?

Persons with disabilities have a right to participation in political life.

11.5 Specific categories experiencing particular issues or vulnerability

- **Women with disabilities**

They are highly vulnerable and bear a disproportionate burden of caring for other persons with disabilities. In the majority of cases they find it very difficult to get married as a result of their disability, and are usually raped and abandoned. These women also suffer stigmatisation.

- **Children with disabilities**

Children are more vulnerable as they are entitled to care by parents and the community. Unfortunately children with disabilities are usually stigmatised and hidden away from public view, and as a result they do not have access to inclusive education and so do not have the opportunity of interacting with other children. This leads to low self-worth and great disempowerment.

29 Xinhua (n 18 above) 24. LCD is working in Lagos, Ibadan, Port Harcourt, Imo and Enugu States and has trained a number of teachers in mainstream schools on the inclusive education approach as against the integration approach which they are used to. The CBM is also piloting community-based rehabilitation programmes in some states in Nigeria.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Nigeria at the moment?

At the moment, there is a National Social Welfare Policy to take care of the developmental needs of persons with disabilities, orphans and vulnerable children, as well as the elderly within society.³⁰ It is on the verge of being developed and has attracted a lot of attention and workshops.

12.2 What legal reforms are being raised? What legal reforms would you like to see in your country? Why?

- Advocacy efforts are being channelled to ensure that the Disability Bill before the National Assembly is enacted into law.
- The Nigerian Constitution amended to include disability rights specifically and these rights should be made justiciable.
- There should be a body responsible for evaluating and monitoring accessibility in all sectors of human endeavours for persons with disabilities.
- Disability awareness should be incorporated in the training of teachers, doctors, architects, lawyers, construction engineers, nurses and the like.
- There should be a legal provision that mandates representatives of persons with disabilities to participate in policy making and to work with government institutions.

30 This formed part of the resolutions of the 14th regular meeting of the National Council on Women Affairs and Social Development held in Ado Ekiti, Southern Nigeria on 9 February 2012.

REPUBLIQUE DEMOCRATIQUE DU CONGO (RDC)

*Pierre Olivier Lobe**

1 Les indicateurs démographiques

1.1 Quelle est la population totale de la République Démocratique du Congo (RDC).

Depuis l'année 1984, il n'a jamais été organisé de recensement de la population totale habitant la RDC, seules des estimations ont été utilisées ces dernières années, la dernière estimation du Gouvernement date de l'année 2011, et fait état de plus ou moins 70.000.000 d'habitants, dont 52% au moins sont des femmes.

1.2 La méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en RDC, et les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées en RDC:

Les statistiques sont peu développées dans ce pays, à ce jour seules les enquêtes faiblement documentées et réalisées généralement par les Organisation des Personnes Handicapées nationales et internationales sur une partie du territoire ont servi pour resencer les personnes handicapées

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en RDC?

Il est estimé qu'il ya, 10.500.000 personnes handicapées en RDC, ce qui fait en termes de pourcentage, près de 15% de la population.¹

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en RDC?

Il n'existe aucune statistique établissant avec exactitude le pourcentage de femmes handicapées en RDC.

* Florent Mubaya Kiwele Kya Bantu, Avocat à la Cour d'Appel, Kinshasa, DRC.

1 Rapport annuel 2012 du Ministère des Affaires Sociales Humanitaires et Solidarité Nationale.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en RDC?

Comme pour les femmes handicapées, il n'existe pas à ce jour, des statistiques établissant avec exactitude le pourcentage des enfants handicapés en RDC.

1.6 Quelles sont les formes d'handicap les plus répandues en RDC?

Toutes les formes d'handicap se retrouvent partout en RDC,

- (1) L'handicap moteur,
- (2) L'handicaps visuel,
- (3) L'handicaps auditif et
- (4) L'handicaps mental

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées en RDC. La RDC a-t-elle signé et ratifié la CDPH? A quelle(s) date(s) ? La RDC a-t-elle signé et ratifié le Protocol facultatif? A quelle(s) date(s)?

Non, la RDC n'a pas encore jusqu'à ce jour ni signé, ni ratifié ou adhéré à la CDPH, comme non plus pour le Protocol facultatif.

2.2 Si la RDC a signé et ratifié la CDPH, quand doit elle soumettre son rapport, et le service du gouvernement responsable de la soumission du rapport. La RDC a-t-elle soumis son rapport?

La RDC n'est pas encore partie à la CDPH, et de ce fait, elle n'a pas l'obligation de présenter de rapport initial ou périodique au comité de surveillance institué par la CDPH.

2.3 Si la RDC a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport de la RDC. Y'avait-il des effets internes découlant du processus de rapport liés aux questions des handicapés en RDC?

Comme dit au point 2.2, la RDC n'est pas encore partie à la CDPH, et par conséquent n'a jamais soumis de rapport.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, la RDC a-t-elle également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du

handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de l'Examen Périodique Universel (EPU) des Nations Unies présenté par la RDC en décembre 2009? Si oui, quels sont les effets de ces observations ou recommandations?

Les instruments internationaux relatifs aux droits de l'homme des Nations Unies: la RDC est partie à six des neuf principaux instruments internationaux des droits de l'homme. Pour certains de ces instruments, elle a accumulé des retards dans la présentation de ses rapports périodiques devant les organes de traités. Les observations faites lors de présentation de ces rapports sont devenues dépassées vu le temps écoulé pendant lequel la RDC a rompu tout contact avec les organes de surveillance des traités internationaux relatifs aux droits de l'homme. La question de la personne handicapée n'a pas été posée.

Concernant les instruments régionaux, la RDC est partie à Charte Africaine des droits de l'homme et des Peuples. La même réalité exposée ci-dessus concernant les instruments internationaux des droits de l'homme s'applique malheureusement en ce qui concerne cet instrument régional

La RDC a présenté son rapport au cycle premier de l'Examen Périodique Universel, EPU, en décembre 2009, et elle a reçu et accepté 124 recommandations des Etats ayant examiné son rapport. De toutes ces recommandations, seules quatre(4) sont relatives à la personne handicapée, les 3,6 et 7 portent sur la ratification de la CDPH, et une, la 24, demande à la RDC d'améliorer la situation des personnes vulnérables, et d'adopter une législation pouvant garantir la protection et la promotion des personnes handicapées, des enfants et des femmes.

2.5 Y'avait-il un quelconque effet interne sur le système juridique de la RDC après la ratification de l'instrument international ou régional invoqué au 2.4 ci-dessus?

En effet on a observé quelques fois des modifications de la loi nationale pour la rendre en conformité avec les dispositions d'une convention. Par exemple, en droit pénal congolais, il n'y avait pas d'infraction autonome défendant et punissant la torture, après l'adhésion de la RDC à cet instrument, il a été nécessaire de modifier le code pénal pour y introduire une nouvelle infraction spécifique réprimant la torture, dont la définition se réfère à l'article 1er de la Convention relative à la torture et autres peines ou traitements cruels, inhumains et dégradants. Cette loi punit indistinctement toute personne ou agent public qui se rendrait coupable des actes de torture, y compris à l'égard des personnes handicapées.) La Loi no 11/008 du 09 Juillet 2011 portant criminalisation de la Torture a prévu des peines selon qu'il s'agisse des personnes normales ou celles protégées du fait de leur âge ou condition.

L'infraction de torture est punie d'une peine de cinq à dix ans de servitude pénale principale et d'une amende de cinquante mille à cent mille Francs congolais.

Le coupable sera puni de dix à vingt ans de servitude pénale principale et d'une amende de cent mille à deux cents mille francs congolais lorsque les faits commis auront causé à la victime un traumatisme grave, une maladie, une incapacité permanente de travail, une déficience physique ou psychologique, ou lorsque la victime est une femme enceinte, un mineur d'âge ou une personne de troisième âge ou vivant avec handicap.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous votre système juridique? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

La Constitution du 18 Février 2006 en son article 215 dispose: « Les traités et accords régulièrement conclus, ont dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie. »

La RDC applique le système juridique dit « monisme », avec primauté du droit international sur le droit interne, c'est à dire, toute convention régulièrement ratifiée entre automatiquement dans le système juridique national et a une autorité supérieure à la loi nationale.

Toutefois, la condition de réciprocité ne joue pas en matière des droits de l'homme, parce que cette matière ne constitue pas en effet des obligations réciproques, mais plutôt des obligations objectives qui lient les Etats.

Pour ce qui est de l'applicabilité des normes internationales des droits de l'homme par le juge national, l'article 153 in fine de la même Constitution dispose: « Les cours et tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés, les lois, les actes réglementaires pour autant qu'ils soient conformes aux lois ... ». Les dispositions des traités qui ne sont pas directement applicables, donc celles « non self-executing », font l'objet d'intégration dans le système juridique national par une loi de mise en oeuvre votée par le Parlement.

Bien que les conventions régulièrement ratifiées sont automatiquement intégrées dans l'ordre juridique congolais, et ont une autorité supérieure à la Constitution et aux lois nationales, les cas où les tribunaux ont fait application directe des dispositions des traités internationaux sont encore rares, du fait tout simplement du manque de formation et d'information des juges.

Sinon rien ne peut empêcher sur le plan juridique les juridictions congolaises d'appliquer les conventions internationales relatives aux droits de l'homme, le refus de les appliquer constituerait non seulement une violation des articles 153 et 215 de la Constitution ci-dessus cités, mais aussi une violation de la convention elle même.

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

En application de la théorie du monisme ci-haut évoqué, tout traité ratifié ou auquel la RDC adhère, est automatiquement incorporé dans la législation nationale, et peut être invoqué immédiatement devant les tribunaux, si toutes ses dispositions ou une partie de celle-ci sont « self-executing » « auto-exécutoire », excepté les dispositions qui nécessitent l'intervention de la loi pour les rendre applicables en droit national (loi de mise en oeuvre votée par le Parlement).

Par exemple, en droit pénal congolais, il n'y avait pas d'infraction autonome défessant et punissant la torture, mais après l'adhésion de la RDC à la Convention contre la torture et autres peines ou traitements cruels, inhumains et dégradants, il a été nécessaire de modifier le code pénal pour y introduire une nouvelle infraction

réprimant la torture, loi de 2006, dont la définition se réfère textuellement à l'article 1^{er} de la Convention relative à la torture. (La RDC n'ayant pas encore ratifié la CDPH, elle n'est donc pas encore partie à cette convention, et celle-ci ne peut nullement s'appliquer sur sa juridiction.)

3 Constitution

3.1 La Constitution de la RDC du 18 février 2006 contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution de la RDC du 18 février 2006 telle que modifiée et complétée à ce jour par la Loi no 11/002 du 20 janvier 2011 portant révision de certaines dispositions de la Constitution de la RDC, traite en son titre II, des droits humains, des libertés fondamentales et des devoirs du citoyen et de l'état.

L'article 45 de la Constitution de la RDC sur la liberté de l'enseignement, stipule en son second alinéa: « Toute personne a accès aux établissements d'enseignement national, sans discrimination de lieu d'origine, de race, de religion, de sexe, d'opinions politiques ou philosophiques, de son état physique, mental ou sensoriel, selon ses capacités. »

L'article 49 de la même Constitution dispose: « La personne du troisième âge et la personne avec handicap ont droit à des mesures spécifiques de protection en rapport avec leurs besoins physiques, intellectuels et moraux. »

L'Etat a le devoir de promouvoir la présence de la personne avec handicap au sein des institutions nationales, provinciales et locales. Une loi organique fixe les modalités d'application de ce droit.

Cette loi initiée par la Députée Nationale Eve BAZAIBA MASUDI vient d'être adoptée par les chambres du Parlement lors de la dernière session de mars 2013, et transmise au Chef de l'Etat pour sa promulgation.

3.2 La Constitution de la RDCongo contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

La Constitution de la RDC du 18 février 2006 telle que modifiée et complétée à ce jour par la Loi no 11/002 du 20 janvier 2011 portant révision de certaines dispositions de la Constitution de la RDC, traite en son titre II, des droits humains, des libertés fondamentales et des devoirs du citoyen et de l'état. Ce titre consacre l'égalité des citoyens devant la loi, et instaure le principe de l'égalité et de la non-discrimination qui peut être fondée sur la race, la tribu, la religion, la condition sociale, l'origine familiale, la résidence, les convictions politiques, ...

L'article 11 dit: « Tous les êtres humains naissent libres et égaux en dignité et en droits ... ». L'article 12 ajoute: « Tous les congolais sont égaux devant la loi et ont droit à une égale protection des lois. »

L'article 13: « Aucun congolais ne peut, en matière d'éducation et d'accès aux fonctions publiques ni en aucune autre matière, faire l'objet d'une mesure discriminatoire, qu'elle résulte de la loi ou d'un acte de l'exécutif, en raison de sa religion, de son origine familiale, de sa condition sociale, de sa résidence, de ses opinions ou de ses convictions politiques, de son appartenance à une race, à une tribu, à une minorité culturelle ou linguiste. »

L'article 16 quant lui renchérit en disant: « La personne humaine est sacrée. L'Etat a l'obligation de la respecter et de la protéger. Toute personne a droit à la vie, à l'intégrité physique ainsi qu'au libre développement de sa personnalité dans le respect de la loi, de l'ordre public, du droit d'autrui et des bonnes moeurs. Nul ne peut être tenu en esclavage ni dans une condition analogue. Nul ne peut être soumis à un traitement cruel, inhumain ou dégradant. Nul ne peut être astreint à un travail forcé ou obligatoire. »

Il y a lieu d'ajouter aussi l'article 51 qui stipule: « L'Etat a le devoir d'assurer et de promouvoir la coexistence pacifiques et harmonieuse de tous les groupes ethniques du pays. Il assure également la protection et la promotion des groupes vulnérables et de toutes les minorités. Il veille à leur épanouissement. »

Toutes ces dispositions visent à protéger la personne humaine, y compris la personne vivant avec handicap. L'Etat a mis en place un dispositif constitutionnel et légal en vue de protéger tout être humain, sans discrimination quelconque.

4 Législation

4.1 La RDC a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

La Loi no 09/001 du 10 Janvier 2009 portant Protection de l'Enfant donne un traitement spécial à l'enfant avec handicap physique ou mental, il en est ainsi de l'enfant se trouvant dans une situation qui peut constituer un obstacle ou une difficulté à l'expression normale de toutes ses facultés physiques ou mentales, notamment les fonctions intellectuelles et cognitives, le langage, la motricité et les performances sociales.

4.2 La RDC a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

- A l'état actuel de la législation congolaise, le principe consacré par la Constitution et les lois de la République est celui de l'égalité de tous et de la non discrimination» reconnu à tout citoyen, et ce la personne handicapée comprise.
- En plus, la Loi portant organisation des élections présidentielle, législatives, urbaines, municipales et locales, garantit, sans discrimination aucune, le droit à tout citoyen en âge de majorité de participer à la direction des affaires politiques du pays dans les conditions fixées par la Constitution, ceci implique que des candidats puissent se présenter quel que soit le mode de scrutin, tous les candidats bénéficiant d'un traitement égal de la part de l'Etat, notamment dans l'utilisation des médias, la représentation paritaire homme-femme et la promotion des personnes vivant avec handicap, celles-ci devant se trouver sur les listes des candidats que les partis ou regroupements politiques présentent.

5 Décisions des cours et tribunaux

- 5.1 Les cours (ou tribunaux) de la RDC ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.**

La recherche n' a pas révélé des cas où les tribunaux ont statué sur des questions relatives aux handicaps. En plus les OPH que nous avons contactées n'ont aucune information précise concernant cette préoccupation.

6 Politiques et programmes

- 6.1 La RDC a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.**

Il est vrai qu'il n'existe pas une politique ou un programme ayant pour cible les personnes avec handicap. C'est pour combler à cette carence que le Gouvernement de la République par le truchement du Ministère des Affaires Sociales, Action Humanitaire et Solidarité Nationale est entrain de recruter deux experts nationaux aux fins de mener une enquête documentée devant déboucher sur le recensement des personnes handicapées, identifier les difficultés qu'elles rencontrent, les multiples défis auxquels elles font face, les besoins nécessaires pour leur épanouissement social, et concevoir un plan d'action national et une stratégie appropriée pour arriver à répondre aux problèmes spécifiques des personnes handicapées.

Les états généraux de la personne handicapée devaient être convoqués après ce recensement, et c'est à cette occasion qu'une politique ou plan national devait être défini. Les dates pour la tenue de ces travaux ne sont pas encore fixées, mais les autorités du Ministère des Affaires sociales que nous avons rencontrées nous ont parlé des mois à venir, tout étant fonction des ressources financières qui font toujours cruellement défaut dans ce pays.

- 6.2 La RDC a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.**

Les politiques ou programmes de la RDC que ça soit en matière de protection des droits de la personne humaine, d'éducation, de justice, d'accès aux fonctions publiques, s'adressent à tous les citoyens en général sans qu'il ne soit fait de distinction d'ordre discriminatoire basée sur la condition physique de la personne.

7 Organismes handicapés

- 7.1 En dehors des cours ou tribunaux ordinaires, la RDC a-t-elle un organisme officiel qui s'intéresse spécifiquement à la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

Non dans l'état actuel de la législation nationale, il n'existe aucun organisme officiel chargé de la question de violation des droits des personnes handicapées. C'est la Commission Nationale des Droits de l'homme qui n'est pas encore installée, qui aura dans ses attributions tous les problèmes liés à la violation des droits des personnes avec handicap.

- 7.2 En dehors des cours ou tribunaux ordinaires, la RDC a-t-elle un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

Il n'existe pas actuellement pareil organisme officiel en RDC.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 La RDC est-elle dotée d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de la RDC à jamais abordé des questions relatives aux droits des personnes handicapées.**

Après son adoption par l'Assemblée Nationale et le Sénat en décembre 2012, la Loi organique no 13/011 portant institution, organisation, et fonctionnement de la Commission Nationale des Droits de l'Homme, CNDH en sigle, a été promulguée par le Président de la République en date du 21 mars 2012, et publiée au Journal Officiel depuis le 1er avril 2013.

Cette loi détermine la mission, les attributions, l'organisation, la composition et le fonctionnement de la CNDH, institution citoyenne d'appui à la démocratie, chargée de la promotion et de la protection des droits de l'homme en République Démocratique du Congo.

En ce moment où nous rédigeons ce rapport, elle n'est pas encore opérationnelle. Toutefois la loi la créant précise en son article 4 que la Commission nationale des droits de l'homme est chargée de la promotion et de la protection des droits de l'homme, elle veille au respect des droits de l'homme et des mécanismes de garantie des libertés fondamentales.

L'article 6 de la même loi consacré aux attributions de la CNDH, en son point 5, stipule: « la CNDH a pour attributions de veiller au respect des droits de la personne avec handicap ». Il est vrai qu'à ce jour la CNDH n'est pas encore opérationnelle, et ses structures non encore mises en place, donc aucun travail n'a été accompli par elle.

Dans sa composition, parmi les associations devant proposer les animateurs, il est prévu qu'un des 9 membres soit une personne issue d'une Organisation des personnes handicapées (OPH).

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en RDC des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Les organisations engagées dans la promotion et la protection des droits de la personne handicapée sont abondantes, et la Constitution garantit la liberté d'association.

Ci-après nous citons quelques unes, toutes étant bien entendu totalement impliquées dans la défense des droits de la personne handicapée:

- Association des Personnes Handicapées LA PERSEVERANCE « APHAP »
- Association des Handicapés Chrétiens de Kisenso « APHCK »
- Réseau des Comités de Réadaptation Communautaire « RCRC »
- Coopérative des Mamans Vivant avec Handicap « COMAVAH »
- Fondation des Œuvres Sociales pour le Progrès des Personnes Vivant avec Handicap) « FOSPHA »
- Conseil National pour la Promotion des Aveugles « CNPSA »
- Centre Psychopédagogique de Limeté « CPL »
- Association des Personnes avec Handicap Chrétiennes « APHAC »
- Coopération des Personnes vivant avec Handicap « COPEHANG »
- PAROUSIA – ONGD/ASBL
- Collectif pour la Réinsertion des Personnes vivant avec Handicap « COREPH »
- Centre Professionnel d'Assistance et de Promotion pour la Personne vivant avec Handicap « CEPAPHA »
- Coordination des Femmes avec Handicap de Kinshasa-Est « COFHAKINE »
- Fraternité des Aveugles Catholiques de Kinshasa « FACK »
- Union des Frères et Sœurs Aveugles en Mission pour Christ « UFSAMC »
- Association des Personnes vivant avec Handicap pour le Développement « APHAD »

- Action et Solidarité pour la Promotion Sociale des Personnes vivant avec Handicap « ASOPHA »
- Association des Personnes vivant Handicap des Télécommunications « APHATEL »

Toutes ces OPH ont le même rayon d'action, à savoir, la personne en situation d'handicap, et la promotion et la protection de ses droits, ou une forme donnée d'handicap, certaines étant actives sur toute l'étendue du territoire de la RDC, et d'autres dont le champ d'action se limite soit à la province, soit à la ville où elles sont établies.

9.2 Dans les pays de votre région, l'Afrique centrale, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Il existe des fédérations au niveau national qui regroupent les OPH, les plus connues sont:

Réseaux au niveau national

- Fédération Congolaise des personnes handicapées (FECOPEHA)
- Fédération des ONG Laïques à Vocation Economique du Congo (FOLECO)
- Fédération Nationale des Personnes Handicapées du Congo (FENAPHACO)
- Consortium de Plaidoyer sur Assistance aux Victimes des Mines et autres personnes en situation de Handicap (CPAV)
- Agir pour les Elections Transparentes et Apaisées (AETA)
- Caucus des Femmes Congolaises
- Cadre de concertation pour l'intégration des personnes vivant avec handicap (CCIPVH)
- Réseau National des Organisations des Droits de l'Homme au Congo (RENADHOC)
- Rassemblement des Organisations des Femmes pour le Développement (ROFED)
- Réseau des Comités de Réhabilitation Communautaire (RCRC)

Comme il en existe aussi au niveau régional ou international:

Réseaux au niveau régional et international

- Fédération des Associations des Femmes Handicapées d'Afrique Centrale (FEAFHAC)
- Association des Centres des Handicapés d'Afrique Centrale (ACHAC)
- Organisation Mondiale des Personnes Handicapées (OMPH)
- Réseau UMOJA (Région des grands lacs d'Afrique)
- Afrique Handicap
- Hope for Handicap

9.3 Si la RDC a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Jusqu'à ce jour, la RDC n'a pas encore ratifié la CDPH.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

La CDPH n'ayant pas encore ratifié par la RDC, les OPH ont fait un travail énorme de sensibiliser des membres du Gouvernement, principalement le Ministre des Affaires Sociales, Action Humanitaire et Solidarité nationale, et les amener à comprendre l'importance qu'il y avait à ratifier la CDPH, qui garanti au mieux les droits de la personne handicapée.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

La RDC n'a pas encore ratifié la Convention.

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

La RDC n'est pas encore concernée.

9.7 Y'a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

OPH de la RDC non concernées.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le renforcement des capacités et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

La RDC n'ayant pas encore ratifié la CDPH, le travail qui demeure est celui d'assister les OPH pour constituer un lobby fort au niveau de la Présidence de la République pour la promulgation de la loi déjà votée par le Parlement congolais (Assemblée Nationale et Sénat) pour continuer de sensibiliser sur l'importance de cette convention pour les personnes handicapées de la RDC.

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

- Le problème majeur que rencontrent les OPH est celui d'insuffisance des ressources matérielles ou financières. Elles sont pleines de bonnes foi et volonté et de dynamisme, mais faute de ressources financières adéquates, elles n'arrivent pas à accomplir les objectifs qu'elles se sont assignés.
- Le principal problème est d'autonomiser la personne vivant avec handicap pour lui permettre de subvenir à ses besoins et abandonner la mendicité des rues, phénomène déplorable auquel on assiste chaque jour malheureusement dans les grandes villes de la RDC, où handicapé et mendicité vont généralement ensemble.

9.10 Y'a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Les seuls instituts existant sont ceux qui dispensent des cours de formation à des personnes avec handicap, tels que les aveugles, les handicapés moteurs, les sourds muets (Ecole des Sourds muets des Soeurs de la Charité de Kasenga), les centres ou instituts de recherche n'existent presque pas.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Oui il existe au sein du le Ministère des Affaires Sociales, Action Humanitaire et Solidarité Nationale, une direction et deux Services chargés spécifiquement des questions de la personne avec handicap. Ce sont les suivants:

10.2 La Direction de Coordination des activités de Réadaptation des Personnes Handicapées (DICOREPHA).

Elle a pour attributions, (1)le suivi de l'exécution des projets initiés en faveur des personnes handicapées, (2)l'organisation et le suivi des réunions du Conseil national de réadaptation et de reclassement des personnes handicapées avec les partenaires sociaux, (3)la définition et la coordination de la politique nationale d'encadrement promotionnel des personnes handicapées pour leur participation active à la production nationale ainsi que (4) la supervision des activités de tous les établissements officiels, privés (Centres et Ateliers) et Associations s'occupant de la formation et de la réinsertion professionnelle des personnes handicapées.

10.3 Le Centre National d'Apprentissage professionnel pour Handicapés Physiques et Invalides (CENAPHI).

Il a pour attributions principales (1) d'apporter les appuis techniques et financiers pour le reclassement et la réinsertion sociale des jeunes formés et (2) la formation et la réadaptation professionnelle des personnes handicapées en vue de leur participation au développement du Pays.

10.4 Le Service National de Réadaptation, Apprentissage, Placement et Reclassement Socio-professionnel des Aveugles du Congo (SENARAC). Ce Service a pour attributions (1) Assurer la réadaptation, l'apprentissage, le placement et le redressement Socio-Professionnel des Aveugles, (2) Procéder à la réadaptation et à l'apprentissage des métiers adaptés aux Aveugles, (3) la réadaptation des Aveugles adultes et (4) la création des emplois dans l'informel et le formel au niveau local et national surtout dans les milieux ruraux.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en RDC ? (exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet La Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

La quasi-totalité des personnes handicapées en RDC vit en deçà du seuil de la pauvreté du fait que l'action minimale du gouvernement en leur faveur a peu d'impact. Les structures gouvernementales de prise en charge des personnes handicapées sont soit inopérantes, soit inefficaces. La question du handicap n'est pas encore dans les priorités du gouvernement, d'autres questions prenant le dessus telles que la paix, la stabilisation du pays, la reconstruction nationale ... A cela il faut ajouter les discriminations dont les personnes handicapées sont parfois victimes en matière d'éducation, d'emploi ...

11.2 Comment la RDC répond-t-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

Le gouvernement de la RDC a, comme tous les gouvernements du monde, des structures et des mécanismes destinés à garantir le plein épanouissement des personnes handicapées, lequel est censé passer par la prise en charge sociale et médicale, l'accès à l'éducation et à l'emploi, la réinsertion économique, etc.

Malheureusement, la réalité de la vie quotidienne des personnes handicapées en RDC est tout autre.

- **Accès aux bâtiments publics**

Aucune mesure spécifique concernant l'accès aux bâtiments publics par les personnes handicapées n'a été prise à ce jour, même ceux utilisant des fauteuils roulants ont souvent de la peine pour y accéder.

- **Accès au transport public**

La même observation que dessus.

- **Accès à l'éducation**

La Constitution garantit l'accès à l'enseignement public dans les mêmes conditions pour tous les citoyens, les mêmes principes d'égalité et de non discrimination sont de mise. L'article 45 de la Constitution de la RDC sur la liberté de l'enseignement, stipule en son second alinéa: « Toute personne a accès aux établissements d'enseignement national, sans discrimination de lieu d'origine, de race, de religion, de sexe, d'opinions politiques ou philosophiques, de son état physique, mental ou sensoriel, selon ses capacités. »

- **Accès à la formation professionnelle**

Il existe à travers le pays plusieurs écoles et instituts spécialisés dans la formation des personnes avec handicap, relevant soit du secteur public, soit des églises et des privés (Ecoles pour Aveugles, sourds muets ...)

- **Accès à l'emploi**

La Constitution garanti à tout citoyen l'accès à l'emploi dans des conditions d'égalité et de non discrimination.

- **Accès à la détente et au sport**

Les installations sportives sont généralement entre les mains des églises qui organisent parfois des compétitions destinées aux personnes handicapées.

- **Accès à la justice**

A l'instar des autres citoyens, l'accès à la justice est garanti à toute personne dans les mêmes conditions d'égalité et de non discrimination.

- **Accès aux soins de santé**

L'accès aux soins, il est vrai, constitue un véritable problème, pour les personnes handicapées,

11.3 La RDC accorde-t-elle des subventions pour handicap ou autre moyen de revenue en vue de soutenir les personnes handicapées?

L'Etat congolais n'a pas mis en place une politique ou un programme allant dans le sens d'accorder des subventions aux OPH ou aux personnes handicapées, si ce n'est que des modiques sommes d'argent qui leur sont remises sporadiquement par le Ministère des affaires Sociales pour une petite assistance

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc.) en RDC?

La Constitution de la République reconnaît à tout citoyen congolais les mêmes droits que tous les autres congolais, et les principes d'égalité devant la loi et celui de non discrimination y sont bien affirmés. Des personnes avec handicap accèdent à des responsabilités aux mêmes conditions de mérite et de compétence comme tous les autres citoyens.

Le droit de prendre part à la gestion des affaires publiques, soit directement, soit indirectement, est un droit garanti à tout citoyen congolais, sans discrimination aucune.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapées**

L'absence totale de statistiques fiables et crédibles rend difficile de connaître les problèmes qui peuvent se poser à une catégorie spécifiques des personnes handicapées. Néanmoins l'autonomisation de la femme handicapée reste un défi

- **Enfants handicapés**

La même observation vaut pour les enfants handicapés aussi.

- **Autre (exemple: populations indigènes)**

La même observation s'applique aussi ici.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement en RDC au sujet des personnes handicapées?

Le processus d'adhésion à la CDPH, est en cours parce que l'Assemblée Nationale a été saisie par le Gouvernement de la République d'un projet de loi portant sur l'autorisation de ratifier la CDPH, l'examen dudit projet de loi a été eu lieu pendant la session de Mars 2013, et cette loi vient d'être votée par les deux chambres du Parlement, et transmise au Président de la République pour sa promulgation qui va déclencher le processus d'adhésion avec le dépôt des instruments de ratification auprès du Secrétaire Général des Nations Unies.

C'est seulement tout récemment qu'à l'initiative d'une dame Députée Nationale, du nom de Eve BAZAIBA MASUDI, qu'une proposition de « loi organique portant promotion et protection de la personne avec handicap » a été déposée au bureau du Président de l'Assemblée Nationale.

L'examen de cette proposition de loi a été programmé pour la session de mars 2013, et vient d'être adoptée par les deux chambres du Parlement, et transmis au Chef de l'Etat pour sa promulgation et sa publication au Journal Officiel. Une fois promulguée et entrée en vigueur, cette loi répondra à l'exigence contenue dans l'article 49 dernier alinéa de la Constitution de la RDC qui stipule : «La personne du troisième âge et la personne avec handicap ont droit à des mesures spécifiques de protection en rapport avec leurs besoins physiques, intellectuels et moraux.

L'Etat a le devoir de promouvoir la présence de la personne avec handicap au sein des institutions nationales, provinciales et locales. Une loi organique fixe les modalités d'application de ce droit. »

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en RDC? Pourquoi?

Les réformes à souhaiter sont de deux ordres, principalement dans un premier temps, c'est de voir la RDC ratifier rapidement la CDPH pour sa mise en oeuvre immédiate, et en second lieu, c'est d'obtenir du Parlement que soit adoptée la loi organique portant promotion et protection de la personne avec handicap. De ces deux instruments et avec l'aide des partenaires, un plan d'action national sur la promotion et la protection des droits de la personne handicapée pourra être élaboré, et une stratégie définie en conséquence.

Ce plan aura le mérite de faciliter la mise en oeuvre de la CDPH en définissant les mesures à prendre pour encourager la participation des personnes handicapées à la vie sociale. L'approche du handicap a changé, en particulier parce que les personnes handicapées se sont organisées d'elles-mêmes, et aussi parce que l'on considère, de plus en plus, que le handicap est une question de droits de l'homme.

Il y a nécessité de penser aussi à l'élargissement des opportunités de travail et d'emploi pour les personnes handicapées qui accèdent à des niveaux plus élevés d'études ou de formation.

La RDC étant un pays en situation de conflits, il conviendrait de penser à toutes les personnes devenues handicapées du fait de la guerre, des fractures et des amputations des membres du fait des balles, mines antipersonnel et autres armes de guerre susceptibles d'engendrer un handicap. La situation des personnes qui subissent ces traumatismes et lésions est souvent aggravée par les délais prolongés pour obtenir des soins d'urgence et une réadaptation à long terme (cas des militaires mutilés, démobilisés ou blessés de guerre)

SOUTH AFRICA

*Ilze Grobbelaar-du Plessis**
*Chazanne Grobler***

1 Population indicators

1.1 What is the total population of South Africa?

According to the 2001 Census the total population of South Africa was 50 586 757.¹ Data of the 2011 Census is not yet available. According to the General Household Survey of 2011 the total population of South Africa was 51 770 560.²

1.2 The methodology used to obtain the statistical data on the prevalence of disability in South Africa, and the criteria used to determine who falls within the class of persons with disabilities in South Africa.

A National Census is used to obtain data on the prevalence of disability in South Africa:

- In the 2001 Census, measurement of disability was based on the definition from the 1980 WHO International Classification of Impairments, Disabilities and Handicaps (ICIDH).³

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1 Statistics South Africa *Mid-year population estimates (2011)* <http://www.statssa.gov.za/publications/P0302/P03022011.pdf> (accessed 26 September 2013).

2 Statistics South Africa *Census 2011: Methodology and highlights of key results* http://www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf (accessed 26 September 2013).

3 Statistics South Africa *Census 2011* <http://www.statssa.gov.za/Publications/P03014/P030142011.pdf> (accessed 26 September 2013). 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 2001 Census therefore used the terminology of 'disabled' and the data gathered reflects the prevalence of certain disabilities.

- The 2011 Census used a set of disability questions developed by the Washington Group,⁴ which measured the type and degree of difficulties experienced by people in South Africa. The definition of disability in the 2011 Census was broader than that of the previous 2001 Census.⁵
- The data from the 2001 Census and 2011 Census are not comparable due to the change in approach in the disability-related questions.

1.3 What is the total number and percentage of people, women and children with disabilities in South Africa?

According to the 2001 Census, 2 255 982 (approximately 2.3 million people, therefore 5 per cent of the South African population) were reported to have a serious disability.⁶

- 52 per cent of the total number of persons with disabilities in South Africa, were women (1 173 939 women with a disability).
- 8,5 per cent of the total number of persons with disabilities, were children between the ages 0 to 9 years old, and 13,6 per cent of persons with disabilities were youth between the ages 10-19 years that are living with a disability.⁷

According to the 2011 Census, which used the new classification system (see 1.2 above), 2 339 000 people in South Africa, therefore 5,2 per cent of the population (aged 5 years and older) are classified as people with a disability:

- 1 260 000 women are reported to be living with a disability, therefore 5,4 per cent of the women in South Africa are women living with a disability.⁸

1.4 What are the most prevalent forms of disability in South Africa?

According to the 2001 Census of the total percentage of persons with disabilities, the following was recorded:

- Visual impairment – 32,1 per cent;
- Hearing impairment – 20,1 per cent;
- Communication impairment – 6,5 per cent;
- Physical impairment – 29,6%;
- Intellectual impairment – 12,4%; and
- Emotional impairment – 15,7%.

Based on the sample of the 2011 General Household Survey, of the total of 45 345 000 South Africans aged 5 years and older who reported some degree of impairment or difficulty with carrying out activities:⁹

- 3 001 000 had sight impairments;

4 This was first introduced in the 2009 General Household Survey questionnaire. These questions relate to the 'difficulties' that people have in executing a series of activities such as seeing, hearing, walking, communicating, self-care, remembering and concentrating. Therefore not only severe disabilities are measured with these questions.

5 Disability is defined as difficulties encountered in functioning due to body impairment or activity limitation, with or without the use of assistive devices.

6 Statistics South Africa *Census 2001: Prevalence of disability in South Africa* <http://www.statssa.gov.za/Publications/Report-03-02-44/Report-03-02-44.pdf> (accessed 26 September 2013).

7 As above.

8 Department of Women, Children & People with Disabilities *First Draft Country Report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities: For Public Comment* (26 November 2012) <http://www.info.gov.za/view/DownloadFileAction?id=179901> (accessed 26 September 2013) (First Draft Country Report for Public Comment).

9 As above.

- 840 000 had hearing impairments;
- 1 028 000 experienced difficulty walking;
- 1 107 000 reported challenges remembering and concentrating;
- 1 564 000 reported challenges with self-care;
- 364 000 experienced difficulties with communication;
- 4 271 000 made use of spectacles or contact lenses;
- 110 000 used hearing aids;
- 347 000 made use of walking sticks or walking frames;
- 83 000 used wheelchairs; and
- 24 000 used other assistive devices.

2 International obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in South Africa? The South African position with regard to signing and ratifying the CRPD and its Optional Protocol is.

South Africa signed the CRPD and its Optional Protocol on 30 March 2007, and subsequently ratified both on 30 November 2007. The Convention entered into force on 3 May 2008.¹⁰

2.2 If South Africa has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for the submission of the report? Has South Africa submitted its report? If not, what reason does the relevant government department give for the delay?

- The Country Report was due two years after the CRPD was entered into force; therefore it was due by 3 May 2010.
- The Department of Women, Children and People with Disabilities (DWCPD) is currently responsible for submitting the report.
- The First Draft Country Report to the UN on the implementation of the CRPD was released on 26 November 2012 for public comment, and the aim is to complete and deposit the final First Country Report during 2013.
- The reason for the delay is mentioned as being due to changes in organisational arrangements with the transition from the Office on Status of Disabled People to the DWCPD.¹¹

¹⁰ Landmark UN treaty on rights of persons with disabilities enters into force (2008) <http://www.un.org/apps/news/story.asp>? (accessed 2 October 2013).

¹¹ First Draft Country Report for Public Comment 1; and (n 10 above).

- 2.3 If South Africa has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities has reviewed the report, indicate if the Committee made any concluding observations and recommendations to South Africa's report. Was there a domestic effect in South Africa on disability issues due to the reporting process?**

South Africa's country report has not been submitted. This means no observation or recommendations were made by the Committee on the Rights of Persons with Disabilities, and consequently there is no domestic effect on disability issues due to the reporting process.

- 2.4 While reporting under various other United Nation's instruments, the African Charter on Human and Peoples' Rights or the African Charter on the Rights and Welfare of the Child, has South Africa also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in South Africa's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations or recommendations?**

UN Instruments

• **Convention on the Rights of the Child (CRC)**¹²

In 1999 South Africa submitted a State Report, and in 2000 Concluding Observations were adopted. In the Concluding Observations of the Committee on the Rights of the Child,¹³ the Committee mentioned in several instances the rights of children with disabilities, and mention was made of the positive aspect of 'Curriculum 2005'.¹⁴ The Committee raised concerns with regard to the data collection mechanism, which was insufficient to afford a systematic and comprehensive collection of disaggregated quantitative and qualitative data for all areas covered by the Convention in relation to all groups of children in order to monitor and evaluate progress achieved, and assess the impact of policies adopted with respect to children. The Committee recommended that the system of data collection must be reviewed with a view to incorporate all the areas covered by the Convention.¹⁵ Furthermore, the Committee raised the point that the principle of non-discrimination, in article 2 of the CRC, is reflected in the Constitution of the Republic of South Africa, 1996 (the Constitution) and South African legislation, but raised their concern that insufficient measures were in place to ensure that all children are guaranteed access to education, health and other social services.¹⁶ Lastly, the Committee raised the concern that the legal protection, facilities, and

¹² South Africa has signed and in 1995 ratified the CRC.

¹³ CRC/C/15/Add.122.

¹⁴ Curriculum 2005 aims at facilitating a more inclusive school environment, including programmes to encourage non-discrimination, especially of children with disabilities.

¹⁵ Such a system should cover all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable, which includes, amongst others, children with disabilities.

¹⁶ Of particular concern were certain vulnerable groups of children such as children with disabilities, especially those with learning disabilities. The recommendation made by the Committee was that South Africa must increase her efforts to ensure the proper implementation of the non-discrimination article.

services for children with disabilities, and in particularly mental disabilities, are insufficient and made the following recommendations:¹⁷

- South Africa should reinforce its early identification programmes to prevent disabilities;
- establish special education programmes for children with disabilities; and
- further encourage their inclusion in society and seek technical cooperation for the training of professional staff working with and for children with disabilities from, *inter alia*, UNICEF and WHO.

These observations and recommendations have been given effect to, however some remain a challenge. Data collection and the disaggregation of disability-related statistics remain a challenge, but the DWCPD is trying to finalise a monitoring and evaluation framework to facilitate the standardisation of disaggregating data.¹⁸ The National Strategy on Screening, Identification, Assessment and Support (SIAS) of 2008 has been developed in response to the inclusive education policy's call for an overhaul of the process of identifying, assessing and enrolling of learners in special schools and to curb the unnecessary placement of learners in special schools. The strategy is also responding to the enhancement of the nature and quality of support that has to be provided to learners who require additional support.¹⁹ The Children's Act 38 of 2005 specifically recognises the special needs of children with disabilities.²⁰

• **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²¹**

South Africa's latest Country Report was submitted in 2010. According to the Country Report, black women and women with disabilities are affected the most by the unequal legacy of South Africa.²² The report specifically made mention of women with disabilities in the workplace. The *Public Service Handbook on Reasonable Accommodation for People with Disabilities in the Workplace*, and the *Job Access Strategic Framework on the Recruitment, Employment and Retention of Persons with Disabilities in the Public Service*, aim at ensuring that the Public Service meets its minimum 2 per cent target for the employment of people with disabilities in the workplace, as well as the minimum 2 per cent representation of women with disabilities in senior management levels in the Public Service.²³ According to the Report the South African Government has established the mainstreaming of the 1997 Integrated National Disability Strategy White Paper and guidelines through the former *Office on the Status of Disabled Persons* in the Presidency.²⁴

17 Claiming Human Rights – In South Africa <http://www.claiminghumanrights.org/southafrica.html> (accessed 26 September 2013).

18 First Draft Country Report for Public Comment, 62. The SIAS strategy provides guidelines for early identification and support, how to determine the nature and level of support required by learners and how to determine the best learning site for the support. The strategy also provides guidelines on the central role that parents and teachers play in implementing the strategy as well as on the alignment of services by various government sectors.

19 First Draft Country Report for Public Comment, 28.

20 See section 4 on South African Legislation for a further discussion on domestic legislation.

21 South Africa ratified the CEDAW in 1995.

22 Report to the CEDAW Committee on South Africa's implementation of CEDAW 1998-2008 (2010) (CEDAW Report) http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CGE_SouthAfrica48.pdf (accessed 2 October 2012) 21.

23 CEDAW Report (n 22 above) 48.

24 This policy enables a multi-faceted approach to advance the rights of people with disabilities in all areas. Targeted assistance, programmes and support in addressing inequities and health needs are very important. Barriers, such as environmental barriers and attitudes, often hinder participation in society for people with disabilities and impairments. The Report further mentioned that these disabilities often cause social segregation. CEDAW Report (n 22 above) 117.

Regional Instruments

• African Charter on Human and Peoples' Rights²⁵

According to article 18 of the African Charter on Human and Peoples' Rights the aged and persons with disabilities shall have the right to special measures of protection in keeping with their physical needs. In the First Periodic Report it was mentioned that South Africa had attempted to comply with article 18 of the Charter:

- Mention was made of sub-programmes responsible for subsidising workshops for the blind and work centres for people with disabilities.
- Various policy guidelines that affect the lives of people with disabilities have been developed.²⁶

The report serves as a framework within which rehabilitation services can be provided, and further serves as a vehicle to mobilise resources for the establishment and provision of medical rehabilitation services. *Standardisation of Provision of Assistive Devices (Technology)*²⁷ in South Africa was highlighted in the report, which can play a role in ensuring equitable distribution of assistive devices in the country. The report further stated that three booklets on disability prevention were being field-tested. Sign language training for primary health care workers,²⁸ along with the audiotapes with HIV/AIDS messages,²⁹ and assistive devices³⁰ have been provided in order to comply with article 18. Furthermore the accessibility of health facilities has been prioritised.³¹

UN Universal Periodic Review (UPR)

South Africa was last reviewed by UPR on 31 May 2012. During this session none of the 29 recommendations, made by the recommending states, mentioned disability rights.³²

2.5 Was there any domestic effect on South Africa's legal system after ratifying the international or regional instrument in 2.4 above?

According to the Constitution it is clear that South Africa follows a dualistic approach and requires the incorporation of an international instrument unless it is

25 Since ratifying the African Charter on the Rights and Welfare of the Child (ACRWC) in 2000, the government has not yet submitted any report to the African Committee of Experts on the Rights and Welfare of the Child.

26 For example the *National Rehabilitation Policy* was launched in August 2001.

27 Printed 2003.

28 Since 1998, training sessions have been held for health workers to learn sign language. The purpose is to give health workers the opportunity to learn basic sign language so that they can communicate with deaf patients who visit health facilities. It was not intended to make trainees fluent in sign language. It was recorded that to date 72 health workers have been trained.

29 Audiotapes have been produced carrying selected HIV/AIDS messages to create awareness among blind people. These tapes were launched on 6 September 2001 in Polokwane. To date 20 000 copies have been produced and distributed throughout the country, catering for all 11 official languages.

30 Provision of assistive devices countrywide is prioritised, with a particular focus on rural areas, children and women. Donor funds have also been used to reduce the backlog. On the maintenance side, wheelchair repair centres have been established in the nine provinces. These centres are mainly run by people with disabilities and take the repair service to the people.

31 A project has been initiated to encourage health facility managers to make their facilities accessible to people with disabilities. Facilities were then assessed and those who meet the set criteria are awarded certificates in Bronze, Silver or Gold (Gold the highest grading), as appropriate.

32 UPR Info *Statistics of UPR recommendations* http://www.upr-info.org/database/statistics/index_sur.php (accessed 26 September 2013).

'self-executing'.³³ The Constitution includes provisions on the role of international law with regard to the interpretation of the Bill of Rights and statutory interpretation:

- Section 39(1) of the Constitution provides that when interpreting the Bill of Rights a court, tribunal or forum: a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) *must* consider *international law*; and c) may consider foreign law.
- Section 231(1) of the Constitution provides that the negotiating and signing of all international agreements is the responsibility of the national executive. According to section 231(2) an international agreement binds the Republic only after it has been approved by resolution in Parliament by both the National Assembly and the National Council of Provinces.³⁴
- Section 231(4) of the Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation.³⁵
- Section 233 of the Constitution further provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

Applying the above duties and obligations specifically to the international instruments (mentioned in 2.4 above) by ratifying CEDAW, South Africa committed herself to undertake a series of measures to end discrimination against women in all forms.³⁶ In order to ratify CEDAW, the General Law Fourth Amendment 132 of 1993 was enacted, which removed all traces of legislative discrimination against women.

Legislation that specifically deals with equality in South Africa reflects deliberate endeavours to incorporate the objectives and specific provisions of CEDAW in South African domestic law. In this regard the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; the Recognition of Customary Marriages Act 120 of 1998 and customary law of succession were enacted. Other relevant laws include the Preferential Procurement Policy Framework Act 5 of 2000 and the Broad-Based Black Economic Empowerment Act 53 of 2003.³⁷ The objectives of CEDAW and its specific provisions have also been incorporated into the *South African National Policy Framework for Women's Empowerment and Gender Equality* and other transformation policies. This includes the National Skills Development Strategy, Codes of Good Practice on Black Economic Empowerment, local government policies, and policies relating to gender parity in integrated development plans and processes.³⁸

33 However, in *Government of RSA & Others v Grootboom & Others* 2001 1 SA 46 (CC) para 26, the Court stated that: 'where the relevant principle of international law binds South Africa, it may be directly applicable'.

34 Section 231(3) provides that an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

35 Section 231(4) determines that a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Section 231(5) further provides that the Republic is bound by international agreements, which were binding on the Republic when the Constitution took effect.

36 This includes incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women; and establishing tribunals and other public institutions to ensure the effective protection of women against discrimination.

37 See question 4 on legislation.

38 CEDAW Report (n 22 above).

States parties to the CRC are obliged to develop and undertake all actions and policies in the light of the best interests of the child.³⁹ The Constitution makes provision in section 28 for the rights of the child and clearly reflects the CRC. South Africa has recently adopted a comprehensive law with the enactment of the Children's Act 38 of 2005.⁴⁰ This act is in part fulfilment of the obligations set out in the CRC and the ACRWC.⁴¹

2.6 Do ratified international treaties automatically become domestic law under your legal system? If so, are there any cases where the courts applied international treaty provisions directly?

See question 2.5.

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim in national legislation? Provide details.

National legislation regarding, for example, the rights of children (as mentioned above), often reflects international treaties, such as the CRC, and in a way they incorporate treaty provisions. This form of indirect domestication is evident in acts such as the Children's Act (see question 2.4). Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act, provides that any person interpreting the Act may be 'mindful' of international law (which will include the CRPD), and the Act reflects the objects of CEDAW. The Labour Relations Act 66 of 1995 proclaims as one of the primary objects of the Act 'to give effect to the obligations incurred by the Republic as a member state of the International Labour Organization' and requires the Act to be interpreted in compliance with the public international law obligations of the Republic, this includes the obligations in CEDAW (and also the later ratified CRPD).

3 Constitution

3.1 Does the South African Constitution contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

- Section 9(1) of the Constitution provides for equal protection and benefit of the law, and a right to non-discrimination to everyone. Section 9 provides for a vertically-applicable right in section 9(3) in providing that *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.

³⁹ UNICEF *Convention on the Rights of the Child* <http://www.unicef.org/crc/> (accessed 26 September 2013).

⁴⁰ This Act sets out principles relating to the care and protection of children, defines parental responsibilities and rights and makes provision for matters such as children's courts, adoption, child abduction and surrogate motherhood. The principles call for the prioritisation of the best interests of the child, the right to the child being able to participate in any matter concerning that child, children living with disability or chronic illness and a child's right of access to court.

⁴¹ UNICEF Innocenti Research Centre *Reforming child law in South Africa: Budgeting and implementation planning* (2007) http://www.unicef-irc.org/publications/pdf/reformingchildlaw_reprint.pdf (accessed 26 September 2013).

- Section 9 furthermore provides for a horizontally-applicable right to non-discrimination in section 9(4) when providing that *no person* may 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. Section 9(3) and 9(4) are the only sections which directly addresses disability in the Constitution.

3.2 Does the South African Constitution contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability

The South African Bill of Rights, contained in chapter 2 of the Constitution, deals with most of the substantive constraints on public power, and therefore instructs the state to use the power that the Constitution gives in ways that do not violate fundamental rights, and to promote and fulfil those rights contained in the Bill of Rights. Although the Constitution is mostly concerned with state power and with the law, there are a number of provisions in the Bill of Rights that place, in certain circumstances, duties on private individuals (such as section 9(4) as discussed in 3.1 above). Most of the rights contained in the Bill of Rights apply to 'everyone' and therefore most of these rights would also be applicable to and include persons with disabilities. These rights contained in the Bill of Rights that are indirectly applicable to persons with disabilities are listed and captured in the footnote.⁴²

4 Legislation

4.1 Does South Africa have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

South Africa does not have comprehensive disability legislation that deals exclusively with matters relating to disability or with persons with disabilities. However, South Africa has enacted different pieces of legislation that mention people with disabilities or deal with issues relating to disabilities in the legislation. The following sets out the most significant legislation that mentions or refers to disability related issues:

- **Broad-Based Black Economic Empowerment Act 53 of 2003**

This Act deals with economic empowerment of black women and men and *persons with disabilities*. The Act gives priority to issues such as employment equity and equalising opportunities.⁴³

- **Child Justice Act 75 of 2008**

Deals with the crimes mentioned in sections 23 to 26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, listing it as a Schedule 3 offence when dealing with child offenders.

⁴² Sec 10 (Human dignity); sec 11 (Life); sec 12 (Freedom and security of the person); sec 22 (Freedom of trade, occupation and profession); sec 23 (Labour relations); sec 27 (Health care, food, water and social security); sec 28 (Children); sec 29 (Education).

⁴³ It aims to do this through human resources development, preferential procurement and state asset restructuring.

- **Children's Act 53 of 2003**

The Children's Act is there to provide the necessary care and assistance to children, where section 11 deals specifically with matters concerning children with disabilities or chronic illnesses. In section 6(2)(d) and (f) the Act states that all proceedings, actions or decisions in a matter concerning a child must protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child and recognise a child's disability and create an enabling environment to respond to the special needs that the child has.

- **Co-operatives Act 14 of 2005**

Amongst others one of the objectives of this act is to facilitate the provision of support programmes that target emerging co-operatives, specifically those co-operatives that consist of black persons, women, youth, *disabled persons* or persons in the rural areas and that promote equity and greater participation by its members.

- **Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007**

This Act deals with legal aspects of or relating to sexual offences. Specifically, it enacts comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and *persons who are mentally disabled*.⁴⁴

- **Criminal Procedure Act 51 of 1977**

The Criminal Procedure Act deals with, *inter alia*, an accused's competency to stand trial. Section 194 provides that no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

- **Domestic Violence Act 116 of 1998**

This Act prohibits any forms of violence within domestic relationships. Domestic relationships include between family members or caregivers and *persons with disabilities*.

- **Electoral Act 73 of 1998**

This Act provides that voters with *disabilities* should be assisted by a person of their choice where necessary, and *persons with disabilities* can be registered as special voters. This allows them to vote on a predetermined day before election day either at the voting station or at their residence (See sections 33 and 39 of the Act).

- **Electronic Communications Act 36 of 2005**

Section 2(s)(iii) determines that the primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose according to section 2(s) ensure that broadcasting services, viewed collectively (iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled.

44 The offences including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and *persons who are mentally disabled* in respect of sexual abuse or exploitation. Furthermore this Act creates a duty to report sexual offences committed with or against children or *persons who are mentally disabled*. See secs 23 to 26, 54 and 57 of the Act.

- **Electronic Communications and Transactions Act 25 of 2002**

Section 1(l) states the objects of this Act are to enable and facilitate electronic communications and transactions in the public interest, and for that purpose to ensure that, in relation to the provision of electronic transactions services, the special needs of particular communities, areas and the disabled are duly taken into account.

- **Employment Equity Act 55 of 1998**

This Act seeks to promote and achieve equity in the workplace. This Act specifically prohibits the unfair discrimination of employees on the ground of disability. Furthermore chapter 3 deals with the employer's duties regarding affirmative action, ensuring that persons from designated groups have equal job opportunities. People with disabilities form one of these designated groups.

- **Labour Relations Act 66 of 1995**

This Act regulates the right to fair labour practices entrenched in section 27 of the Constitution. No person may be unfairly discriminated against on an arbitrary ground such as disability.

- **Mental Health Care Act 17 of 2002**

This Act aims at regulating and providing mental health care, treatment and rehabilitation services available for everyone and specifically regulates the manner in which the property of persons with mental illness, and persons with severe or profound intellectual disability may be dealt with by a court of law (see section 3 of the Act for the objectives).

- **National Building Regulations and Building Standards Act 103 of 1977**

This Act is currently under review, proposed amendments (in 2008) have undergone radical changes with respect to the section on providing facilities for people with disabilities. The requirements which should be met include: People with disabilities should be able to safely enter the building and be able to safely use all the facilities within it, specifically toilets. Furthermore lifts in buildings must be able to serve the needs of persons with disabilities. This means that there must be no obstacles/barriers that will prevent people with disabilities from accessing facilities within the building such as the lifts. The regulations refer specifically to people with impaired vision, but also relate to wheelchair users, or people who have trouble walking without assistance. Buildings that incorporate halls or auditoriums for public use are obliged to ensure that a reasonable percentage of space is available for wheelchair users or other 'assistive devices'.

For any building used by the public to meet the standards and measurements contained in the 'SANS 10400-S document'. The application of the National Building Regulations Part S: Facilities for persons with disabilities.

- **National Education Policy Act 27 of 1996**

This Act's aim, amongst others, is to ensure that no person is denied the opportunity to receive an education, to the maximum of his or her ability as a result of physical disability.

- **National Health Act 61 of 2003 and the Sterilisation Act 44 of 1998**

These Acts prohibits forced sterilisation of persons with disabilities. The National Health Act stipulates that all persons, including persons with disabilities, have a right to reproductive health services including family planning.

- **National Land and Transport Act 5 of 2009**

The Minister may make regulations for the requirements and time-frames for vehicles and facilities to be made accessible to persons with disabilities, including

principles for accommodating such persons in the public transport system (Section 8 of the Act).

- **National Road Traffic Act 93 of 1996**

This Act, amongst others, states which disabilities or illnesses disqualify a person from obtaining or holding a learner's or driver's licence.⁴⁵

- **Postal Services Act 124 of 1998**

Section 2(h) of this Act specifically states that one of the objects of the Act is to ensure that the needs of persons with disabilities are taken into account in the provision of postal services.

- **Preferential Procurement Policy Framework Act 5 of 2000**

This Act seeks to provide a framework for preferential treatment of women of all races, black people and persons with disabilities in procurement transactions, as a means of addressing historical imbalances, to accelerate de facto equality.⁴⁶

- **Promotion of Equality and Prevention of Unfair Discrimination Act**

This Act promotes the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution. This specifically includes discrimination against people with disabilities.

- **Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999**

These Acts sets out a framework for managing skills development. The implementation of the Employment Equity Act requires synergy with that of the Skills Development Framework. Furthermore, the Skills Development Strategy sets out skills development targets for women of all races (54 per cent); black people, including women, and *persons with disabilities*.

- **Social Assistance Act 13 of 2004**

This Act regulates the eligibility of social assistance (section 5 of the Act) and section 9 specifically deals with the condition or requirements in respect of *disability grants*.

- **South African Library for the Blind Act 91 of 1998**

To provide for the South African Library for the Blind; for library and information services to blind and print-handicapped readers; and for matters connected therewith.

- **South African Schools Act 84 of 1996**

The purpose of this Act is to provide uniform education for 'everyone'. The Schools Act states that as far as is reasonably possible education should be provided for students with special education needs. Measures should be taken to try and provide physical facilities at public schools for it to be accessible to disabled people.

45 The Act, clearly states that the test centre can issue a licence if they are satisfied that all the requirements have been met and in the case of an applicant is found to be competent to drive with the aid of spectacles or contact lenses, an artificial limb or other physical aid, endorse the licence accordingly; and in the case where the applicant is a physically disabled person who has to drive a vehicle adapted for physically disabled persons, or a vehicle adapted specifically for that physically disabled applicant, endorse the licence accordingly.

46 The Act introduces a point system for adjudicating state tenders or contracts. The framework includes preferential points for black women and men, white women and persons with disabilities.

4.2 Does your country have legislation that indirectly addresses disability? If so, list the main legislation and explain how the legislation relates to disability.

- **South African Citizenship Act 88 of 1995**

This Act provides for the acquisition, loss and resumption of South African citizenship, and for matters incidental thereto. This includes and ensures the rights of persons with disabilities to have equal access to nationality.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in South Africa ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases have had.

The Constitutional Court determined in 1997 in *Prinsloo v Van der Linde*⁴⁷ that human dignity constitutes a criterion to determine unfair discrimination. The Court endorsed the view that:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

The Promotion of Equality and Prevention of Unfair Discrimination Act provides for the establishment of Equality Courts in all magisterial districts, which in principle should provide easy access to persons who believe they have been discriminated against on, amongst others, the basis of disability.

The importance of human dignity was emphasised in *WH Bosch v The Minister of Safety and Security & Minister of Public Works*⁴⁸ when the Equality Court in Port Elizabeth held that:

There is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or potential violation of the disabled person's right to equality and maintenance of his dignity that was tendered or averred by the respondent. The court therefore found the discrimination to have been unfair.

The judgment directed that all South African Police Services (SAPS) stations be made accessible to persons with disabilities.

In another Equality Court case in Germiston, *Esthé Muller v Minister of Justice & Minister of Public Works*,⁴⁹ an out-of-court settlement in 2004 created precedence by directing that all court buildings be made accessible to persons with disabilities. *Bosch* and *Muller* resulted in the creation of a dedicated programme within the Department of Public Works to renovate existing public services buildings.

47 1997 3 SA 1012 (CC) para 32.

48 Case no 25/2005 (9).

49 Case no 01/2003.

Similarly, the Equality Court ruled in favour of Lettie Oortman against the St Thomas Aquinas private school (*Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton*)⁵⁰ when the court directed that not only was the school obliged to re-admit Chelsea Oortman, but that the school had to take reasonable steps to remove all obstacles to enable Chelsea to have access to all the classrooms and the toilets allocated to her by using a wheelchair. The SAHRC (see question 8) had assisted Oortman and addressed the issues relating to the rights of persons with disabilities in Mpumalanga's Equality Court. The court found that the school had not taken all the reasonable steps to accommodate Oortman and the school had to remove all obstacles for the learner in order to enable her to have access to the classroom, washbasin and toilet allocated to the learner by using her wheelchair.

In the *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration & Others*,⁵¹ an employee was dismissed after being injured in a car accident. The Bank failed to accommodate the employee, which rendered the dismissal 'automatically unfair' in terms of labour practice. The Bank had not complied with the Code of Good Practice on Dismissal. The Court noted that the underlying constitutional rights are the right to equality, the right to human dignity, the right to choose an occupation, and the right to fair labour practice. Judge Pillay noted that marginalisation of persons with disabilities in a workplace is not because of their ability to work, but because the disability is seen as an abnormality or flaw; that integration and inclusion in mainstream society aims not only to achieve equality, but also to restore the dignity of persons with disabilities.

6 Policies and programmes

6.1 Does South Africa have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **National Disability Strategy**

The White Paper on an Integrated National Disability Strategy of 1997⁵² facilitates the promotion and protection of the rights of people with disabilities.

- It provides guidance for disability considerations in policy and legislative reform.
- The policy aims at integration of disability issues in all government development strategies, planning and programmes.⁵³

- **Raising awareness**

The majority of disability awareness work targets the public at large. Initiatives include:

50 Equality Court Case 1/2010 (December 2010).

51 [2008] 4 BLLR (LC) 356-390.

52 The INDS is currently under review, with the aim of strengthening institutional mechanisms, the monitoring and evaluation framework, national priorities and targets for the next 10 to 15 years, ensuring full alignment of the CRPD.

53 Office of the Deputy President *Integrated National Disability Strategy White Paper* (November 1997) <http://www.info.gov.za/whitepapers/1997/disability.htm> (accessed 26 September 2013). There must be an integrated and co-ordinated management system for planning, implementation and monitoring at all spheres of government, and, to complement the process, there must be capacity building and wide public education.

- Government's political outreach programmes, including 'Taking Parliament to the People' (quarterly) and the 'Izimbizo' programme, where Members of Parliament and Provincial Legislatures as well as Cabinet Ministers and Mayors, provide a monthly platform for communities, particularly in deep rural areas, to engage their leadership directly on issues of human rights, development and service delivery. The guidelines for these public meetings require that persons with disabilities and their organisations be targeted as participants, and that it be ensured that all venues are accessible and sign language interpreters are available. Responses to public questions with regard to disability are based on the CRPD. These events also coincide with bringing services closer to remote communities, with mobile services from the Departments of Home Affairs, Health and Labour, the South African Social Security Agency and the National Youth Development Agency present on site for ease of access to those who would normally find it difficult to access these services.
 - The former Office on the Status of Disabled Persons developed and distributed policy guidelines for portraying disability in the media to media practitioners. The aim of the policy guidelines was to encourage frequent and positive portrayals of people with disability in mass media. The Department of Social Development conducted 64 community advocacy and awareness programmes that benefited 20 000 people.
 - The Department of Basic Education (DBE) in collaboration with the Government Communication and Information Service produced and broadcast awareness raising programmes on national television and subsequently distributed DVDs on the right of children with disabilities to schools in the communities. The DBE website also has the Thutong Education Portal that raises awareness on an on-going basis. A number of departments conduct media campaigns to raise awareness on the portrayal of persons with disabilities in a manner consistent with the principles of the CRPD.
- **Accessibility**
 - Accessibility in schools – the *National School Infrastructure Norms* include specifications for universal design with regard to new school buildings.
 - National Accessibility Programme: The National Accessibility Programme is a large, multi-year research and innovation project that addresses the marginalisation of persons with disabilities from mainstream society and the economy, ensuring their participation and inclusion at all levels of society through the use of Information and Communication Technology (ICT).⁵⁴
 - Broadcasting Digital Migration Policy and Broadband Policy: Digital broadcasting must contribute significantly to accelerating the building of social cohesion and achieving national identity in South Africa through the dissemination of appropriate content that adequately reflects the country's cultures. Digital broadcasting provides services for persons with disabilities with closed captioning embedded in the television signal, which becomes visible when a special decoder is used. The South African decoder will, as a matter of policy, enable viewers to see captions, which assist them to read what is being said in that particular programme.⁵⁵ The Independent Communications Authority of South Africa, the regulatory body, developed a Code on Persons with Disabilities as required by section 70 of the Electronic Communications Act 36 of 2005, as well as section 2(h) of the Postal Services Act.⁵⁶

54 National Accessibility Programme <http://www.napsa.org.za/> (accessed 26 September 2013); and First Draft Country Report for Public Comment, 25.

55 Broadcasting Digital Migration Policy <http://www.info.gov.za/view/DownloadFileAction?id=88342> (accessed 26 September 2013).

56 This Code provides and regulates key aspects of access to ICT services for persons with disabilities and compels ICT service providers to comply with its requirements. These include: All service providers are required to meet specific targets in respect of the rights of access for persons with disabilities, including access to postal services and the built environment, as an integral component of their licences; annual awareness programmes on the rights of persons with disabilities to universal access to ICT services are coordinated through ICASA and the Code has been made available in different formats across all nine provinces; and awareness programmes through the use of community radio stations in local languages.

- A disability portal, the National Accessibility Programme, was launched in 2008 as a partnership project between government, the African Advanced Institute for Information and Communication Technology and the disability sector, and is positioned as an integrated service provider to the disability community and industry offering accessible technology services, communication services, data synthesis services and other commercial services.⁵⁷
 - Policy on the Provision of Reasonable Accommodation and Assistive Devices in the Public Service (2012): This policy seeks to assist government departments in planning for and implementing reasonable accommodation measures for employees with disabilities.
- **Accessible transport**
 - Standard design guidelines (Universal accessibility standards) to address accessibility in the passenger rail environment commenced in 2005, and culminated in the adoption of such universal guidelines in March 2008 by the Passenger Rail Agency of South Africa (PRASA) and the Department of Transport. PRASA is currently updating the guidelines and policy in consultation with organisations of persons with disabilities to strengthen universal access on its trains and stations as an integral component of its programme, which will upgrade 134 core stations by 2014.
 - The Airport Companies of South Africa (ACSA) has worked with the disability sector to improve services on passenger assistance units (PAUs) by increasing the number of units available at ACSA airports, as well as training PAU personnel. DPOs periodically report on isolated instances where people with physical disabilities are discriminated against in terms of boarding flights. These are usually resolved through intervention by, amongst others, the Civil Aviation Authority, the Department of Transport, as well as the Department of Women, Children and Persons with disabilities (DWCPD).
 - The Department of Transport is furthermore finalising norms and standards for accessible scholar transport and specifications for accessible school buses have been developed.
 - The Integrated Transport System, which provides universal accessibility on municipal bus services, is currently rolled out in metropolitan and larger local municipalities.
 - **Education**
 - Guidelines for Inclusive Teaching and Learning of 2009.
 - National Strategy on Screening, Identification, Assessment and Support (SIAS) of 2008. The aim of introducing the SIAS strategy in the education system is to overhaul the process of identifying, assessing and providing programmes for all learners requiring additional support to enhance participation and inclusion. One of the key objectives of the strategy is to provide clear guidelines on enrolling learners in special schools and settings.⁵⁸
 - Education White Paper 6 on Special Needs Education: This policy supports inclusive education. The Education White Paper outlines six strategies to be implemented to try and achieve the goal of inclusive education.⁵⁹
 - Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres of 2007: The aim of these guidelines is to ensure that special schools function well and offer appropriate, quality education to learners.⁶⁰
 - Guidelines for Full-Service or Inclusive Schools of 2010: These guidelines form part of the Schooling 2025 Plan of the Department of Basic Education to strengthen the implementation of Inclusive Education, and to ensure greater access for all learners. The guidelines provide criteria or minimum standards that a school or institution

57 National Accessibility Programme (n 54 above).

58 SIAS Book <http://www.thutong.doe.gov.za/inclusiveeducation//Policy//Policies/tabid/3261/Default.aspx> (accessed 26 September 2013).

59 As above.

60 SNE Guidelines 1 <http://www.thutong.doe.gov.za/inclusiveeducation//Policy//Policies/tabid/3261/Default.aspx> (accessed 26 September 2013).

must comply with to be considered an inclusive or a full service school or institution.⁶¹

- Guidelines for Responding to Learner Diversity in classrooms through National Curriculum Statement of 2011. These guidelines are intended to provide teachers, principals, subject advisors, administrators, school governors and other personnel, parameters and strategies on how to respond to learner diversity in the classrooms through the curriculum. One of the most significant barriers to learning is the school curriculum. Barriers to learning arise from the different aspects of the curriculum such as the content, the language, classroom organisation, teaching methodologies, pace of teaching and time available to complete the curriculum, teaching and learning support materials and assessment.⁶² In responding to the diversity of learner needs in the classroom, it is imperative to ensure differentiation in curriculum delivery to enable access to learning for all learners. All schools are required to offer the same curriculum to learners while simultaneously ensuring variations in mode of delivery and assessment processes to accommodate all learners. Respecting diversity implies a belief that all learners have the potential to learn.⁶³
- National Protocol on Assessment of 2011: The *National Protocol for Assessment Grades R - 12* standardises the recording and reporting processes for Grades R – 12 within the framework of the *National Curriculum Statement Grades R – 12*. With respect to persons with disabilities the national policy on assessment is also contained herein and must comply with the prescriptions set out in the *Education White Paper 6 on Special Needs Education*.⁶⁴
- **Liberty and security of a person with a disability**
 - The Department of Correctional Services separates offenders with disabilities who are housed in a secure detention unit to ensure that they are not exposed to any danger, in particular within the context of the current over-crowding in the majority of correctional facilities.
 - Monitoring and evaluation is done by means of Statistical tool G388-form, which has been reviewed and mainstreamed to accommodate offenders with disabilities.⁶⁵
 - The White Paper 8 on Corrections in South Africa: Correctional institutions should be designed to cater for the needs of offenders with disabilities and should be consistent with the national policy framework on persons with disabilities. The policy should reflect both the equality of rights of disabled offenders and the particular needs that offenders with disabilities have. The provision of appropriate facilities must not be limited to the physical accommodation needs, but must include the provision of appropriate facilities for the enhancement of rehabilitation amongst these offenders. The White Paper further states that 'the courts need to make a greater commitment to consider the individual circumstances of each offender, and in this instance, the courts should consider imposing non-custodial sentences for offenders with disabilities'.⁶⁶

61 Education White Paper: 2.2. Guidelines for Full-service/inclusive schools 2 <http://www.thutong.doe.gov.za/inclusiveeducation//Policy//Guidelines/tabid/3262/Default.aspx> (accessed 26 September 2013).

62 Department of Education, *Education White Paper 6: Special needs education: building and inclusive education and training system* (2001) 19.

63 Guidelines for Responding to Learner Diversity in Classrooms through National Curriculum Statement 2 <http://www.thutong.doe.gov.za/inclusiveeducation//Policy//Guidelines/tabid/3262/Default.aspx> (accessed 26 September).

64 National Policy for Assessment 34 <http://www.education.gov.za/LinkClick.aspx?fileticket=nynQZ8rrq0c%3D&tabid=419&mid=1840> (accessed 26 September 2013).

65 Statistical analysis to monitor trends in the prisoners with disabilities population is done monthly through reporting on the Management Information System (MIS), which reports on location, type of disability, age, gender and racial group.

66 White Paper on Corrections in South Africa 80 <http://www.info.gov.za/view/DownloadFileAction?id=68870> (accessed 26 September 2013). According to the White Paper the Department should also use the system of ongoing assessment to consider referrals, depending on the nature of the crime, to court for conversion of sentences of disabled offenders to correctional supervision and community service. To ensure that offenders with disabilities are treated in an appropriate manner, it will be important that members of staff are well educated and trained in the management of disabled offenders.

- **Living independently and being included in the community**
 - The Department of Social Development has developed policy guidelines on residential facilities and minimum norms and standards for residential facilities, which have given effect to providing guidelines, minimum norms and standards to the transformation and improvement of the quality of life for persons with disabilities in residential facilities. Supported/assisted living and independent living programmes constitute a move towards units/homes that are more open and smaller and within the community to facilitate de-institutionalisation. These are suitable for people who do not require 24 hour care and have some degree of independence.
- **Personal mobility/health/habilitation and rehabilitation**
 - The National Rehabilitation Policy of 2006's objectives includes facilitating human resource development, which takes into account the needs of both the service providers and the consumers as well as the appropriate allocation of funding, such as funding for assistive devices. The policy aims at securing the rights of all persons to have equal access to healthcare, which includes mental health and rehabilitation services. This Policy further aims to assist people with disabilities to attain maximum independence and full inclusion in all aspects of life.⁶⁷
- **Participation in cultural life, recreation, leisure and sport**
 - Sport and Recreation South Africa (SRSA) must, in accordance with its funding policy in terms of section 10(1)(d) of the National Sports and Recreational Act 18 of 2007, increase the profile and financial assistance to volunteers, women, senior citizens, neglected rural areas and persons with disabilities, in sport and recreation. The SRSA Funding Policy of 2008 states that preference will be given to those clients (National Federations) whose activities clearly impact on government priorities and one of them is the 'advancement of women and persons with a disability'.
 - The Performing Art Policy ensures that 5 per cent of performers contracted for celebration and/or commemoration of national days constitute performers with disabilities.⁶⁸

6.2 Does South Africa have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- The Proximity of Courts Programme: This service provides periodic courts to rural and remote communities that would otherwise not have access to courts. Furthermore Legal Aid provides legal assistance at the expense of the state.
- The Expanded Public Works Programme (EPWP): This programme is aimed at providing poverty and income relief through temporary work for the unemployed to carry out socially useful activities.⁶⁹
- The Community Work Programme (CWP) (2009): This programme provides an employment safety net by giving participants a minimum number of regular days off work.

67 National Rehabilitation Policy <http://www.doh.gov.za/docs/policy/2000/rehabpolicy.pdf> (accessed 26 September 2013); and First Draft Country Report for Public Comment 24,39 and 43.

68 First Country Report for Public Comment 58.

69 First Draft Country Report for Public Comment 51.

- The National Policy Framework for Teacher Education and Development (2006): The overriding aim of the policy is to equip teachers to undertake their essential and demanding tasks, to enable them to continually enhance their professional competence and performance, and to raise the esteem in which they are held by the people of South Africa. This includes addressing inclusive education and being able to comply with the policies on disabilities.⁷⁰

7 Disability bodies

- 7.1 Other than ordinary courts or tribunals, does your country have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and its powers.**

There are no bodies other than courts that specifically address the violation of rights of people with disabilities.

- 7.2 Other than ordinary courts or tribunals, does your country have any official body that though not established to specifically address the violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

The only other bodies addressing the violation of rights of people with disabilities are the National Human Rights Institutions discussed in question 8 below.

8 National human rights institutions

- 8.1 What is South Africa's position with regard to a Human Rights Commission or an Ombudsman or Public Protector? 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 the Public Protector of South Africa has ever addressed issues relating to the rights of persons with disabilities.**

South Africa has a South African Human Rights Commission (SAHRC) and a Public Protector, which were both established in terms of chapter 8 of the Constitution.⁷¹ Both these institutions are required to be independent and subject only to the Constitution and the law.

⁷⁰ The National Policy Framework for Teacher Education and Development in South Africa (2006) <http://www.pmg.org.za/files/gazettes/061023educ-teachers.pdf> (accessed 26 September 2013).

⁷¹ According to the founding provisions of the Constitution, South Africa is one sovereign, democratic state founded on various values. In order to comply with the founding requirements, the Constitution establishes certain important institutions designed to provide and support the envisaged system of constitutional democracy and open government.

• **South African Human Rights Commission (SAHRC)**⁷²

The mandate of the SAHRC is contained in section 184 of the Constitution, which determines that the SAHRC must promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic. Section 184(2) provides for the powers, as regulated by the national legislation,⁷³ necessary to perform its functions, including the power to investigate and report on the observance of human rights; take steps and secure appropriate redress where human rights have been violated; carry out research; and educate. Furthermore, according to section 184(3), the SAHRC must yearly require the relevant organs of state, to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.

The SAHRC has to promote respect for the human rights of persons with disabilities, and promote the protection, development and attainment of human rights of persons with disabilities (See question 3 above). In this regard, the SAHRC has recently assisted and addressed the issues relating to the rights of persons with disabilities in *Oortman* and *Muller* (in this regard see question 5.1 above).

In terms of article 33(2) of the CRPD: '[s]tates should designate or establish one or more independent mechanisms to promote, protect and monitor the implementation of the Convention taking into account the Paris Principles.' The SAHRC is a status National Human Rights Institution, and constitute the independent monitoring mechanism envisaged in article 33 of the CRPD.⁷⁴

In advocating on issues relating to older persons and persons with disabilities, the SAHRC has created a *Section 5 Committee on Disability and Older Persons*.⁷⁵ The *Section 5 Committee on Disability and Older Persons* has a sub-committee, which convenes once or twice a year with various departments. The sub-committee engages in the monitoring and observing process of the rights of people with disabilities with regard to the implementation of the CRPD.⁷⁶

• **Public Protector**⁷⁷

Section 182 of the Constitution determines that the Public Protector has the power, as regulated by national legislation⁷⁸ to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. The Public Protector may not investigate court decisions, must be accessible to all persons and communities and any report issued by the Public Protector must be open to the public, unless exceptional circumstances, to be determined in terms of national legislation,

72 SAHRC website: <http://www.sahrc.org.za>.

73 Human Rights Commission Act 54 of 1994.

74 Section 14(1)(b)(vi) of the South African Human Rights Commission Bill of 2013; SAHRC *Submission to the United Nations High Commissioner for Human Rights: Human Rights of Persons with Disabilities: Human Rights Council Resolution 16/15 (31 August 2011)* <http://www.ohchr.org/Documents/Issues/Disability/PoliticalParticipation/NHRIs/ResponseNHRISouthAfrica.doc> (accessed 26 September 2013).

75 Members of the Committee on Disability and Older Persons represent a range of organisations, including many South African DPOs such as, and including, the Western Cape Cerebral Palsy Association, Down Syndrome South Africa, the QuadPara Association of South Africa and the South African Disability Alliance as well as the Cape Mental Health Society.

76 SAHRC 'Overview of SAHRC Activities on CRPD' <http://nhri.ohchr.org/EN/ICC/AnnualMeeting/25/Statementspresentations/Monitoring%20under%20CRPD%20-%20South%20Africa.doc> (accessed 26 September 2013).

77 Public Protector website: <http://www.pprotect.org>.

78 Public Protector Act 23 of 1994.

require that a report be kept confidential. According to section 182 the Public Protector has the additional powers and functions prescribed by national legislation.⁷⁹

The Public Protector's mandate includes the promotion and protection of the rights of people with disabilities and recently, in November 2010, addressed the problem in a report on the investigation into the alleged failure by the Western Cape Department of Health to provide proper health care to a person with a disability. In this report the complainant's son had suffered serious injuries, including a disabling brain injury after an accident. The son, Mr Lobi (Jnr) was in need of long-term nursing care and a wheelchair. Mr Lobi (Jnr) had been lying on his back for 2 years and could not afford care and a wheelchair. The complainant was not informed timeously that his son could be reclassified as a state patient and therefore be provided with the necessary wheelchair. The Public Protector, amongst others, found that there is a serious backlog in the supply of wheelchairs and other assistive devices and confirmed that the supply of this is a constitutional right in terms of section 27 of the Constitution. The Public Protector stated that certain remedial actions should be taken and that urgent steps should be taken to provide Mr Lobi (Jnr) with a wheelchair. Furthermore the Department should introduce adequate measures to try and address this problem and that the budget and use of funds should be revisited.⁸⁰

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 your country? If so, list each organisation and describe its activities.

Organisations that advocate for all disabilities⁸¹

- **Disabled People South Africa (DPSA)**
Ensures development and integration of people with disabilities in all spheres of life in SA.⁸²
- **African Disabled Refugees Organisation**
Advocacy and support for African Refugees.
- **Alexandra Disability Movement**
Programme areas include: advocacy, disability, job creation, and welfare.
- **Association for and of Persons with Disabilities**
Assists in the needs of people with disabilities in the community and offers advice and assistance.

⁷⁹ As above.

⁸⁰ The full report is available on the public protector's website (n 77 above).

⁸¹ Disability Allsorts *A directory of organisations and resources for people with disabilities in South Africa* http://www.unisa.ac.za/contents/management/arcswid/docs/Disability_directory_allsorts09.pdf (accessed 26 September 2013).

⁸² Disabled People South Africa website: <http://www.dpsa.org.za/> (accessed 26 September 2013).

- **Association for Persons with Disabilities**

The Association includes: residential facilities, learning centres, a school support programme, a youth empowerment programme, leadership camps, sports clubs, an entrepreneurship programme, a rehabilitation programme, skills development, and a job creation programme.

- **Association for Persons with Physical Disabilities**

The Association includes: community development, protective workshops, training in work skills, access, awareness, placement, sport and the continual fight for equality for physically challenged people.

- **Association for the Physically Disabled**

Development of communities to enable them to provide services to their own people with disabilities in that specific community.

- **Association for the Rehabilitation of People with Disability**

Works with the community and individuals to ensure the highest level of achievement especially for those with disabilities.

- **Centre for Rehabilitation Studies – African Policy on Disability and Development (A-PODD) Project**

This project is aimed at gathering and analysing research based evidence about whether persons with disabilities engage in national and international policy initiatives that target poverty reduction.

- **Children’s Assessment and Therapy Centre**

Which focuses on providing evaluation for early learning difficulties as well as behavioural and remedial difficulties in children.

- **Children’s Disability Centre**

Early childhood development: medical, developmental assessments of disabled children; therapy; support to children and caregivers; training and skills development in the management of disabled children; gathering and publishing of statistics; resource and consultancy centre networking with other organisations and government authorities.

- **CREATE – CBR Education and Training for Empowerment**

Training and education of community-based rehabilitation workers as well as, amongst others, introductory workshops and courses in disability and rehabilitation.

- **Curamus Association**

For members of the South African Security Services or their dependents who have a disability and those with disabilities caused by war.

- **Disability Action Research Team**

Which conducts research and shares information relating to disability, including information that demystifies disability and empowers persons with disabilities.

- **Disability Alliance (Formerly South African Federal Council on Disability)**

A platform for discussion, joint planning, collaboration and consensus seeking amongst key role players within the disability sector.

- **Disability Connexion**

Part of African Enterprise, an international, interdenominational Christian organisation, connecting people with disabilities to others and the church.

- **Disability Empowerment Concerns Trust**

A broad-based BEE investment vehicle established by the seven largest South African disability NGO's for their benefit.

- **Disability Info and Care**

Specialised training of care-workers, placement of care-workers, personal development programmes for people with disabilities, employment placement, personal consultation, enquiries on all disability issues.

- **The Disability Help-Line – Networking on Disability Issues**

Supports people with disability through networking on disability issues, a telephone help-line, assessments of the accessibility of existing buildings and facilities.

- **Disability Options**

An independent organisation working with people with mobility challenges and other physical, vision, hearing, speech and mental disabilities.

- **Disabled Children's Action Group**

Affiliated to DPSA and promotes the rights of children with disabilities and their development and participation in society. Aims to raise awareness of disability and challenge stereotypes and perceptions of people with disabilities in South Africa.

- **Disabled Care Group**

A support group for people with disabilities or chronically ill persons, or persons who are looking after people with disabilities or chronically ill spouse(s).

- **Disabled Youth South Africa**

Aims to develop a programme to campaign for equal rights for youth with disabilities and awaken the awareness of youth with disabilities about health care, especially AIDS.

- **Gauteng North Services to People with Disabilities**

Promotes the rights and welfare of persons with disabilities in Gauteng North through a variety of activities and services.

- **Health Professions Council of South Africa**

Established to protect consumers of health care services, guide practitioners on educational, professional and ethical issues, and co-ordinate the 12 professional boards in setting health care standards for training and discipline in the professions registered with the Council, ensuring on-going professional competence and fostering compliance with those standards.

- **Hospice Palliative Care Association of South Africa**

Palliative care or pain relief for people with terminal illnesses; support given to their families.

- **Johannesburg Council for the Disabled**

Holistic service for people with various disabilities – welfare, counselling, life skills, education, sports and recreation, skilling and training, workshops, creation of employment opportunities, hydroponic farming.

- **National Council for Persons with Physical Disabilities in South Africa**
A proactive forum for the advancement of persons with physical disabilities, to enable them to achieve maximum independence and integration into the community.⁸³
- **Lowveld Association for People with Disabilities**
Whose mission is to strive to meet the social needs of persons with disabilities in the Lowveld region of South Africa, including improving their quality of life by providing services they need
- **Orion Organisation**
Dedicated to caring and providing for the educational, training and therapeutic needs of children, youth and adults with physical, intellectual and/or mental disabilities; includes group homes, a special day care centre, a semi-frail care facility, workshop and job creation initiatives.
- **OR Tambo Disabled People's Organisation**
Concerned mainly with advocacy and capacity building; also supports programmes for children with disabilities, youth development, home-based care and HIV/AIDS.
- **Parents for Children with Special Educational Needs.**
- **People for Awareness of Disability Issues (PADI)**
PADI is a group of people – both people with disabilities and non-disabled - who since 1987 have been committed to education and awareness on disability issues in both the academic and business worlds.
- **Reach for a Dream**
Fulfilling the dreams of children of any race, colour or creed between the ages of 3 and 18 with life-threatening illnesses.
- **Restoration of Human Abilities Association**
Provides therapeutic, community and educational services to restore abilities lost through mental illness, disability and neglect.
- **Social Aspects of HIV/AIDS Research Alliance.**
- **South African Disability Institute.**
- **South African Sport Association for the Physically Disabled.**
- **Trans Oranje Institute for Special Education**
Sponsoring body for five schools – Transoranje (for deaf learners), Sonitus (for the hearing-impaired), Prinshof (for the blind), Martie du Plessis (for learners with cerebral palsy) and Transvalia (for learners with epilepsy).
- **Western Cape Network on Disability**
Lobbies government to institute various services for people with disabilities on behalf of disability-related NGOs in the Western Cape.

83 National Council for Persons with Physical Disabilities in South Africa website: <http://www.ncppdsa.org.za/> (accessed 26 September 2013).

- **Wheelchair Users Forum South Africa.**
- **Zanempilo Trust.**

Disability specific organisations include:⁸⁴

- The Deaf Federation of South Africa (DEAFSA);⁸⁵
- The South African Blind Worker Organisation of South Africa (SABWO);
- The National Organisation of the Blind in South Africa (NOBSA);
- The South African Federation for Mental Health (SAFMH);⁸⁶
- The Quadriplegic Association of South Africa (QUASA);
- The Down Syndrome Forum of South Africa;
- The South African Epilepsy League;
- South African National Council for the Blind (SANCB);⁸⁷ and
- Dementia South Africa.

9.2 In the countries in your region, are DPOs organised or coordinated at a national and/or regional level?

The paradigm shift, from the medical to the social model, has come about largely through the development of strong DPOs. Central to the concept of the social model of disability is the principle of self-representation by people with disabilities through DPOs.

The South African Disability Alliance (SADA) is a body comprising of the 13 national organisations representing disability issues in South Africa. This body, which was formerly known as the South African Federal Council on Disability, has been reconstituted to be a body of consensus, and the voice of the disability sector in South Africa.⁸⁸ In South Africa DPOs are organised on a national level under umbrella organisations, but there are many organisations that further co-ordinate the DPOs on a regional/provincial level.

9.3 If your country has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

In order to ensure public participation, the DWCPD has established a close and working relationship with the disability sector through its civil society structures, such as the South African Disability Alliance and Disabled People South Africa. The Disability sector participates in the National Disability Machinery, which is a non-statutory consultative forum between government and, organisations of persons with disabilities, business and institutions of higher learning. All national government departments, provincial administrations as well as district and local municipalities are required to appoint/designate a disability focal person/unit to coordinate the mainstreaming of disability considerations within each of these institutions. These focal points converge in the National Disability Machinery,

84 Disability Allsorts (n 81 above).

85 DEAFSA website: <http://www.deafsa.co.za/> (accessed 26 September 2013).

86 SA Federation for Mental Health website: <http://www.safmh.org.za/> (accessed 26 September 2013).

87 South African National Council for the Blind website: <http://www.sanccb.org.za> (accessed 26 September 2013).

88 A list of the members of SADA can be found at <http://www.dpsa.org.za/partnerships/>. SADA will be registered as a non-profit organisation, and thereafter, it will exist as a legal entity.

which is constituted by, amongst others, the Inter-Departmental Coordinating Committee, the Provincial Coordinating Forum, and the National Disability Forum, which brings civil society on board.⁸⁹

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

It is difficult to ascertain which organisations in South Africa specifically monitor the implementation of the CRPD. The Secretariat of the African Decade of Persons with Disabilities (SADPD) is one such organisation. In September 2009, the SADPD hosted an annual disability workshop on Human Rights Monitoring and the CRPD in Cape Town. Participants from over eleven African countries, including experts on disability issues from civil society, academia, governments and the UN, attended this event. Most participants came from countries that have ratified the CRPD. Among the issues discussed at the workshop were the challenges faced by African States in implementing the CRPD.⁹⁰

CREATE (Community Based Rehabilitation Education and Training for Empowerment), a non-profit organisation based in KwaZulu-Natal, drafted a shadow report and drew from the experiences of members of the Umgungundlovu Disability forum (a network of disability organisations). The report was read by the UN Special Rapporteur on Disability, S Chalklen, and sent to the Conference of State Parties in New York in September 2010.

Except for the actions taken to ensure the implementation of the CRPD in general, the DPOs each have their own achievements with regards to advocating the rights of people with disabilities and implementing the CRPD. CREATE has listed their achievements as follows:⁹¹

- Translation of the CRPD into isiZulu;
- Development of a picture version of the CRPD for people who are illiterate;
- Developed the skills of people with disabilities in 8 of KwaZulu-Natal's 11 districts to advocate for their rights and engage with service providers;
- Many local improvements have happened due to CREATE's advocacy work, for example, a disabled people's organisation receiving seeds and agricultural implements from the Department of Agriculture and people with disabilities being taken to participate in national sports events by their municipality;
- Development of a comic in English and isiZulu on the CRPD for use with youth and children;
- Production of a DVD on CREATE's advocacy work; and
- Initiated the process and authored a shadow report from the Umgungundlovu Disability Forum to the CRPD in Geneva.

In a study done on the role and effectiveness of disability legislation in South Africa (Disability Knowledge and Research programme) by AK Dube (March 2005) it was stated that where successful implementation of policies and legislation, necessary to implement the CRPD, has occurred, it has largely been due to political support by the ministers and senior civil servants in charge of departments, and/or

89 First Draft Country Report for Public Comment, 63.

90 Early in 2011, the SADPD hosted a workshop on the possibility of developing an African Protocol on Disability. The workshop was convened in order that the disability partners of Africa could be informed and deliberate upon the African Disability Protocol that was in the process of being drafted by the Working Group on Older Persons and persons with disabilities in Africa. This idea is still under discussion.

91 CREATE *Advocacy for disability rights* http://www.create-cbr.co.za/index.php?option=com_content&view=article&id=12&Itemid=16 (accessed 26 September 2013).

the sustained commitment and on-going advocacy by the disability sector, led by DPSA.⁹²

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

Problems associated with the implementation include a lack of resources and funding for the DPOs. DPOs only receive part-subsidisation from the state. Procedural bottlenecks have been identified as one of the main causes of 'policy evaporation' within the South African context, and raising awareness about disability issues has to be addressed on an on-going basis.⁹³ With regards to the National Disability Machinery many challenges face DPOs, which include mandate, capacity, functionality and the impact of disability focal points and coordinating structures across all three spheres of government.⁹⁴

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

It is difficult to ascertain at this stage if a 'best-practice models' for ensuring proper involvement of DPOs are in place. The South African government recognises the role that the disability sector, and DPOs in particular, continue to play in promoting and adopting a rights based approach for persons with disabilities and their families during the drafting process of their first draft country report.⁹⁵

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 question 9.4 for the achievements of CREATE.

According to DPSA, the achievement resulting from DPSA's advocacy can be summarised in the following way:⁹⁶

- The Constitution outlaws discrimination against people on the grounds of disability.
- Disability is no longer seen as a charity/welfare issue, but as a human rights and development issue.
- The former Office on the Status of Disabled Persons had been established with the responsibility of implementing the Integrated National Disability Strategy.
- People with disabilities have been placed in key Commissions established by the government as part of the transformation process, for example, Human Rights, Gender, Youth, Special Needs Education and Public Service Commissions.
- People with disabilities are represented on the Boards of SATOUR, National Skills Authority (NSA), NTSIKA Enterprise Development Promotion Agency (NEPA), South African Qualifications Authority (SAQA), National Board for Further Education and Training (NBFET) and the SABC.

92 AK Dube 'The role and effectiveness of disability legislation in South Africa' Disability Knowledge & Research (KaR) Programme http://tugsa63.org/documents/additional%20documents/PolicyProject_legislation_sa.pdf (accessed 26 September 2013).

93 As above.

94 First Draft Country Report for Public Comment 64.

95 First Draft Country Report for Public Comment 2.

96 DPSA *Achievements* <http://www.dpsa.org.za/achievements/>.

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?

- Government acknowledged during the drafting of their First Country Report for Public Comment that capacity and resource constraints limited the extent to which DPOs and disability service organisations were able to participate in the development of the Country Report. This will be an area for capacity building and support with respect to DPO's engagement with the implementation process in future.
- The contributions by the South African National Council for the Blind, the National Council for Persons with Physical Disabilities in South Africa and the South African Federation on Mental Health were appreciated in the First Country Report for Public Comment by the South African government.

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?

See question 9.8 above.

9.10 Are there specific research institutes in South Africa that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

There are currently no specific research institutes in South Africa that work on the rights of persons with disabilities, which have facilitated the involvement of DPOs in the process.

10 Government departments

10.1 Does South Africa have government departments that are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the departments.

- South Africa has the DWCPD,⁹⁷ which was established in May 2009, and incorporates the former Office on the Status of Disabled Persons.
- This Department, amongst others, is responsible for the equity, equality and empowerment agenda in terms of those living with disabilities.⁹⁸
- To achieve this, programmes for persons with disabilities are being implemented and their empowerment will be promoted. The Ministry will also promote the protection of the rights of persons with disabilities and will guide, monitor, evaluate, co-ordinate and facilitate mainstreaming of issues relating to this sector, in terms of national priorities.⁹⁹

97 DWCPD website: <http://www.dwcpd.gov.za> (accessed 26 September 2013).

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in South Africa? (For example, in some parts of Africa ritual killing of certain classes of PWDs such as people with albinism occurs. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

The myth that having sexual intercourse with a virgin will cure a person of HIV, that often includes young girls and women with disabilities, is not limited to South Africa, but is a prevalent problem in Africa. Individuals with disabilities are presumably at risk both because they are, incorrectly, often assumed to be sexually inactive, hence virgins, and because they might be easy targets.¹⁰⁰

11.2 How does South Africa respond to the needs of persons with disabilities with regard to the areas listed below?

- **Access and accommodation**

People receiving less than R 3 500 income a month are eligible for government housing subsidies. The normal subsidies are supplemented with additional funding to provide for the specific needs of a person with a disability.¹⁰¹ The Social Housing Policy (2003) identifies people with disabilities who are able to live independently as one of the target groups for social housing.¹⁰²

98 The DWCPD is specifically responsible for providing and protecting the rights and welfare of persons with disabilities, but many of the other government departments also deal with issues relating to persons with disabilities. They include the Department of Health, providing assistive devices such as wheelchairs to people in need of them; the Department of Justice and Constitutional Development, dealing with the lodging of complaints in the Equality Courts based on discrimination because of disability and access to courts; the Department of Transport, striving for quality and affordable transport for all; the Department of Basic Education, aiming at an Inclusive Education system; the Department of Labour, dealing with elimination of inequality at the work place and protecting human rights; the Department of Social Development, management and oversight over social security, encompassing social assistance and social insurance policies that aim to prevent and alleviate poverty in the event of life cycle risks such as loss of income due to disability; the Department of Communications and Department of Arts and Culture who both have to address the issue of the use of sign language for people with hearing disabilities; and any of the other departments also deal with the welfare and protecting of the rights of persons with disabilities to a lesser extent.

99 The DWCPD core functions include to: facilitate policy implementation towards the empowerment, advancement and socio-economic development of persons with disabilities; mainstream disability considerations into government policies, governance processes and programmes; facilitate, coordinate, oversee and report on the national rights of persons with disabilities programme - as well as those programmes part of South African regional, continental and international initiatives.

100 NE Groce & R Trasi 'Rape of individuals with disability: AIDS and the folk belief of virgin cleansing' (2004) 363 *The Lancet* 1663.

101 First Draft Country Report for Public Comment, 52.

102 L Chenwi & K Tissington *Engaging meaningfully with government over socio-economic rights* (2010) http://www.dhs.gov.za/Content/legislation_policies/Social%20Housing%20Policy.pdf (accessed 3 October 2013).

- **Access to social security**

The Social Security Act 13 of 2004, provides for amongst others, an additional grant-in-aid for disability grant recipients who require full-time attendance by another person owing to his/her physical or mental disabilities.¹⁰³ There is a range of social assistance for care dependency grants, child support grants, grant-in-aid and disability grants.¹⁰⁴

- **Access to public buildings**

The Department of Public Works identified buildings for reconstruction in order to facilitate accessibility for people with disabilities.¹⁰⁵

- **Access to public transport**

According to the Department of Transport the Programme of Action on Accessible Public Transport is an internal working document, which developed the Accessible Public Transport Strategy into a series of programmes that would be implemented over time.

Suggested remedies:¹⁰⁶

- Integrated transport and settlement planning;
- Integrated upgrading of roads;
- Implementation of Part S of the building regulations 2011, upgrading through PRASA's programme;
- Alter Taxi rank classification under the building regulation; and
- Change accessible bus specifications.

- **Access to education**

An integrated strategy and programme of action for the provision of educational support to learners with severe and profound disabilities is currently in development following the November 2010 judgment against the Government of the Republic of South Africa and the Government of the Province of the Western Cape.¹⁰⁷ A process has been initiated by the Department of Basic Education to track individual learners, including learners with disabilities, with the introduction of the Learner Unit Record Information Tracking System in 2008.¹⁰⁸

- The National Strategy on Screening, Identification, Assessment and Support is currently being finalised in a response to inclusive education.¹⁰⁹
- Negotiations are underway with the publishing industry to make prescribed works and textbooks available in digital format.¹¹⁰

103 First Draft Country Report for Public Comment, 23.

104 First Draft Country Report for Public Comment, 50.

105 First Country Report for Public Comment, 10; Department of Public Works website: <http://www.publicworks.gov.za> (accessed 26 September 2013); *Bosch* (see question 5) has also influenced and set a precedent for the accessibility of South African Police Services stations ensuring that in the future disabled persons will have access to all police stations.

106 Parliamentary Monitoring Group *Department of Transport & DWCPD response to hearings on implementation of UN Convention on Rights of Persons with Disabilities* (5 September 2012) <http://www.pmg.org.za/report/20120905-responses-issues-raised-submissions-public-hearings-implementation-un> (accessed 26 September 2013).

107 First Draft Country Report for Public Comment, 29; the Western Cape Forum for Intellectual Disability petitioned for the right to education for children with severe and profound intellectual disabilities to be recognised by the Department of Education.

108 It should be noted that the quality of the data is not in all cases reliable and up to date, and mostly tracks learners who are in special needs schools. First Draft Country Report for Public Comment, 29.

109 First Draft Country Report for Public Comment, 32.

110 First Draft Country Report for Public Comment, 33.

- Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System of 2001 is not fully implemented.¹¹¹

- **Access to vocational training**

The Department of Basic Education in 2011 introduced the process of developing a skills and vocational orientated exit level qualification at Grade 9 level for learners with intellectual disabilities.¹¹²

- **Access to employment**

- The Department of Social Development finalised policy guidelines on the management and transformation of protective workshops aimed at providing decent work and wages, strengthening skills development in these centres and improving employability of persons with disabilities in the open labour market.¹¹³
- The Department of Social Development is responsible for the subsidisation of 293 protective workshops in 2012, providing an income for 14 212 persons with disabilities.¹¹⁴

- **Access to recreation and sport**

- The Department of Arts and Culture supports a number of initiatives to promote arts and culture among persons with disabilities.¹¹⁵
- The Annual Zwakala DeafTV National Championships, in partnership with the South African Public Broadcaster, the Pan South African Language Board, reaches approximately 300 deaf children.
- The Afrika Sinakho 'In the Blood' national touring production showcases performing arts abilities of persons with disabilities in a cast of 80 persons with both persons with disabilities (sight, physical and mentally disabled) and non-disabled artists.
- The Market Theatre's 'Listen with your Eyes' Festival in 2010, produced two plays that were aimed at both the deaf and hearing community.
- The South African Library for the Blind, established under the South African Library for the Blind Act 91 of 1998 receives an annual grant.
- The Strategic Plan for Sport and Recreation (2011-2015) states that one of the aims is to promote sport through programmes specifically aimed at marginalised and discriminated groups such as people with disabilities.¹¹⁶

- **Access to justice**

Some initiatives have included the creation of special courts, including sexual offences courts, family courts, labour courts and equality courts. Although full accessibility of the justice system has not yet been achieved, government has created a range of institutions and mechanisms for facilitating equal access to justice. Among these institutions and programmes is Legal Aid, providing legal assistance at the expense of the state especially to impoverished persons. With regard to access to courts by persons with disabilities in rural areas, the Proximity of Courts Programme is noteworthy. This service provides periodic courts to rural and remote communities that would otherwise have no access.¹¹⁷

111 Department of Education *Implementing inclusive education in South Africa: True stories we can learn from* (November 2002) <http://www.thutong.doe.gov.za/ResourceDownload.aspx?id=37391&userid=-1> (accessed 26 September 2013).

112 First Draft Country Report for Public Comment, 35.

113 A training manual to give effect to the guidelines was developed and has been implemented nationally and in all nine provinces, targeting government officials, national organisations for persons with disabilities, DPOs and representatives from protective workshops; First Draft Country Report for Public Comment, 48.

114 First Draft Country Report for Public Comment, 47.

115 First Draft Country Report for Public Comment, 58.

116 Department of Sport & Recreation Strategic Plan for Sport and Recreation 2011-2015 (2011) <http://www.srsa.gov.za/pebble.asp?reid=807> (accessed 3 October 2013).

117 First Draft Country Report for Public Comment, 16-17.

11.3 Does South Africa provide for disability grants or other income support measures for persons with disabilities?

- Persons with disabilities who are indigent qualify for a range of social assistance grants, including disability grants (USD150 per month in 2012); child support grants (children aged 0-14 years, USD35 per month in 2012), care dependency grants (children with disabilities requiring 24 hour care, USD150 per month in 2012), grant-in-aid (persons who require regular attendance by other persons, USD35 per month in 2012), foster care grant (USD96.25 per month in 2012), war veterans grant (USD152.50 per month in 2012) and older persons grants (USD150 per month plus USD2.500 per annum for those over 75 years in 2012).
- Workers are furthermore protected through unemployment insurance benefits as well as compensation for injury on duty.

11.4 Do people with disabilities have a right to participation in political life (for example, political representation and leadership) in South Africa?

Where political rights¹¹⁸ are concerned, a number of specific factors impact on the rights of persons with disabilities to vote and be elected.¹¹⁹

- Physical barriers exist such as accessible transportation and access to polling stations.¹²⁰
- Accessible information regarding voting times, dates, candidates and the accessibility,¹²¹ bearing in mind that television and radio remain preferred sources of information.¹²²
- Electoral staff that understand and respect the needs of persons with disabilities.¹²³

118 SAHRC (n 76 above).

119 Disabled People South Africa (DPSA), interview with F Hassiem (11 August 2011) see <http://www.dpsa.org.za/> (accessed 26 September 2013). Prior to the local government elections held in early 2011, DPSA, a local NGO that advocates on behalf of persons with disabilities, and IEC representatives formed part of the Disability Reference group of the Western Cape, which consulted with various stakeholders in the disability sector on how voting can be facilitated to include persons with disabilities. The following restrictions were identified: Voter education needs to happen on an on-going basis and Reasonable Accommodation (RA) should be a priority. RA means, *inter alia*, documents in Braille or large print, information in audio, sign language interpretation, introduction of Electronic Voting Machines; Secondly, venue accessibility was cited as a concern, including the need for ramps, assistance, and ballot papers themselves in large print or Braille. The IEC concurred that one of the biggest restrictions to vote and be elected is the issue of access, as well as the issue of whether there are special arrangements made during elections for persons with disabilities. The reference group noted that special voting education must be undertaken so that persons with disabilities, especially those in far outlying or rural areas, understand their rights with regard to applying for special voting procedures.

120 Health Sciences Research Council *IEC Voter Participation Survey 2010/11: An Overview of Results* (14 April 2011). In the 2011 Human Sciences Research Council (HSRC) Survey on Voter Participation (conducted in collaboration with the IEC), about 3 per cent of the participants found that facilities to register and vote were inaccessible.

121 Media Statement issued by the Ministry for Women, Children and People with Disabilities 'People with disabilities can vote at home' 17 April 2011 http://www.wcpd.gov.za/images/uploads/Disability_elections.doc (accessed 2 October 2013). In 2011, the IEC announced that it had procured the necessary equipment to make ballot papers available in Braille at all polling stations. This would enable persons with visual impairments to vote in secret during local and general elections for the first time. However, the Commission noted that the needs of persons with intellectual and psycho-social disabilities been largely overlooked. The Commission thus concluded it must be ensured that they are included in the voting process and are given the opportunity to participate fully in public life: SAHRC (n 76 above).

122 *IEC Voter Participation Survey 2010/11* (n 120 above) 12.

123 IEC 'Findings of IEC voter participation survey' 14 April 2011 <http://www.elections.org.za/content/new.aspx?id=1799> (accessed 27 September 2013).

11.5 Specific categories experiencing particular issues or vulnerabilities

- **Women and children with disabilities**¹²⁴
 - Black women with disabilities, in particular, bear the brunt of inequality based on race, disability, gender, socio-economic status and class.
 - A major concern with regard to disability and gender is the persisting violence against and victimisation of women and children, and in particular women and girls with disabilities. Estimates of the extent of violence vary, as there under-reporting.¹²⁵

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in South Africa at the moment?

The First Draft Country Report was open for public comment during 2013, before the intended deposit thereof to the UN's Committee on 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?

List of future measures and reforms:

- Effort to mainstream disability into Millennium Development Goals (MDGs) since this issue was highlighted at the second Conference of States Parties.¹²⁶
- The South African Law Reform Commission is concluding a lengthy participatory process of reviewing legislation with regard to assisted decision-making for adults with impaired decision-making capacity. The review of legislation seeks to address the inadequacies of the current curatorship system.¹²⁷
- The Department of Public Services and Administration is currently costing the draft policy on reasonable accommodation in the public service, which will bring uniformity across the public service in the provisioning of assistive devices, personal assistance services and technology for disabled public servants.¹²⁸
- The Department of Arts and Culture has just completed an investigation into national braille production needs and related braille policy matters with the aim of developing a braille production strategy for the country.¹²⁹

¹²⁴ First Draft Country Report for Public Comment 59.

¹²⁵ Disaggregated statistics for violence against women and children with disabilities are not available. Women with communication and/or intellectual and/or psychiatric disabilities experience particular difficulties in accessing justice when their rights have been violated.

¹²⁶ South Africa has not, effectively built the inclusive MDGs into its planning frameworks in terms of the alignment and harmonisation of programs. There is a lack of coherent data to measure progress. South Africa will ensure a stronger focus on poverty reduction and the improvement of health for persons with disabilities as well as children. First Draft Country Report for Public Comment, 1.

¹²⁷ First Draft Country Report for Public Comment, 16.

¹²⁸ The South African Police Services (SAPS) have for example procured an extensive range of personal assistive devices for employees with disabilities, including manual and motorised wheelchairs, prosthesis, white canes, vehicle adaptations, as well as a range of technological equipment, to promote independence and productivity during the period 2008-2011. First Draft Country Report for Public Comment, 24-25.

¹²⁹ First Draft Country Report for Public Comment, 25.

- The Department of Social Development is in the process of finalising a strategy for orphans in order to provide them with places of safety if the immediate family is unable to care for a child with a disability.¹³⁰
- Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System (2001) outlines government's strategy to transform the current education system to make it more efficient, more equitable and more just, recognising the right of all learners to attend their local neighbourhood school and to receive the necessary support.¹³¹
- Steps have been taken to develop specifications for accessible school buses in KwaZulu- Natal Province.¹³²
- A Curriculum for South African Sign Language is currently being drafted by a Ministerial Task Team.¹³³
- The White Paper on an Integrated National Disability Strategy (INDS), released in 1997, is currently under review with the aim of strengthening, among others, institutional mechanisms, the monitoring and evaluation framework, national priorities and targets for the next 10 to 15 years, ensuring full alignment with the CRPD.¹³⁴
- The draft Fitness Industry Bill makes provision that a fitness establishment must, amongst others, have at least a defibrillator and a first aid kit for persons with disabilities; and a sufficient number of staff that is specifically trained to assist persons with disabilities.¹³⁵
- The Deaf Federation of South Africa has approached the Constitutional Review Committee to recognised Sign Language as the twelfth official language of South Africa.¹³⁶

130 First Draft Country Report for Public Comment, 22-25.

131 The policy embodies the principles of art 24 of the CRPD.

132 The scholar transport policy which is being developed will incorporate norms for accessibility. Mobile ramps have been procured by the national Department of Education for selected schools to ensure that mini bus taxis can be made accessible. First Draft Country Report for Public Comment, 30; The Department of Transport *Final draft: National scholar transport policy* (February 2009) http://www.fedsas.org.za/downloads/10_52_24_National%20Scholar%20Transport%20Policy.pdf (accessed 27 September 2013).

133 For introduction into the system during 2013. Once this curriculum is completed Higher Education Institutions will be encouraged to increase the number of teacher training courses for teachers using Sign Language as a medium of instruction across subject fields. Currently there are only 3 teacher training programmes, namely at Free State University, the University of the Witwatersrand and UNISA. First Draft Country Report for Public Comment, 34.

134 First Draft Country Report for Public Comment, 5; SAHRC Report November 2002, 20.

135 First Draft Country Report for Public Comment, 56.

136 Affording sign language with official language status would help deaf people to be recognised by all the sectors to accommodate them and to enable them to have full access: Parliamentary Monitoring Group 'Recognition of South African Sign Language as Official Language: Briefing by Deaf Federation of South Africa' 16 February 2007 <http://www.pmg.org.za/minutes/20070215-recognition-south-african-sign-language-official-language-briefing-deaf-federation> (accessed 27 September 2013).

TANZANIA

*Peter Josiah Shughuru**

1 Population indicators

1.1 What is the total population of Tanzania?¹

According to the 2012 Population and Housing Census (PHC) for the United Republic of Tanzania, Tanzania has a total population of 44 928 923 of which 43 625 354 are in Tanzania Mainland and 1 303 569 in Tanzania Zanzibar. The male population constitutes 21 869 990 and the female population 23 058 933.²

1.2 Describe the methodology used to obtain statistical data on the prevalence of disability in Tanzania and the criteria used to determine who falls within the class of persons with disabilities in Tanzania.

- The 2012 Population and Housing Census (PHC) did not obtain data on the prevalence of disability in Tanzania.
- Data on the prevalence of disability was obtained in the 2008 Tanzania Disability Survey,³ the first population-based comprehensive disability survey, which was intended to determine the prevalence and living conditions among people with activity limitations.

The report on the 2008 Tanzania Disability Survey analysed disability in a way that conforms to the description under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Accordingly, the report regards persons with disabilities as:

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1 The United Republic of Tanzania is a union of Tanganyika (Tanzania Mainland) and Zanzibar (Tanzania Zanzibar).

2 The Government of Tanzania, 2012 Population and Housing Census Report http://www.nbs.go.tz/sensa/PDF/Census%20General%20Report%20%2029%20March%202013_Combined_Final%20for%20Printing.pdf (accessed 12 May 2013).

3 Tanzania 2008 Disability Survey Report: Tanzania 2008 Disability Survey 10 June 2010.pdf (accessed 15 May 2013).

- [T]hose who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁴

The survey was based on the population aged 7 years and above.⁵

1.3 What is the total number and percentage of people, women and children with disabilities in Tanzania?

According to the 2002 National Census, Tanzania in 2002 had a total population of 34.6 million people. With the 2,9 per cent intercensal growth rates, the total population of Tanzania was estimated to be 40.6 million persons in 2008.⁶

- Out of the population of 3,166 800, 7,8 per cent aged 7 years and above had some form of activity limitation.⁷
- In terms of gender, 8,2 per cent females and 8,5per cent males had some form of disability.⁸
- The statistical data in the 2008 Disability Survey did not capture the number and percentage of children with a disability. Tanzania's United Nations Universal Periodic Review Report (UPR), reported a total of 746 183 children with various forms of disabilities for the period ending 2009. Of this number 388 015 were reported to be boys, and 358 168 were reported to be girls.⁹

1.4 What are the most prevalent forms of disability in Tanzania?

- The 2008 Disability Survey revealed the most prevalent forms of disability in Tanzania for the population aged 7 years and above. Difficulties in seeing were the most reported form of disability (3,7 per cent), followed by mobility (3,1 per cent), hearing (1,9 per cent), cognition (1,5 per cent) and communication (0,8 per cent).¹⁰
- The survey did not reveal any significant variation on severity among sexes, except for seeing and mobility, the proportion reporting was higher for females than males.¹¹

2 International obligations

2.1. What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities in Tanzania?

Tanzania signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 30 March 2007 and 10 November 2009 respectively, and the Optional Protocol to the (CRPD) on 29 September 2008 and 10 November 2009 respectively.¹²

4 2008 Disability Survey (n 3 above) iv-v.

5 2008 Disability Survey (n 3 above) 5.

6 2008 Disability Survey (n 3 above) 16.

7 2008 Disability Survey (n 3 above) 5.

8 2008 Disability Survey (n 3 above) 5.

9 Tanzania's United Nations Universal Periodic Review Report (19 July 2011) A/HRC/WG.6/12/TZA/1 (2011).

10 Population and Housing Census Report (n 2 above) 63.

11 Population and Housing Census Report (n 2 above) 64.

12 UN Enable *Convention and Optional Protocol Signatures and Ratifications* <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 31 June 2013).

2.2 If Tanzania has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for submission of the report? Has Tanzania submitted its report? If not, what reasons does the relevant government department give for the delay?

- Following the country's ratification of the CRPD, Tanzania's first Country Report was due on 9 November 2011.
- No report has been submitted to date.
- The Department of Social Welfare, under the Ministry of Health and Social Welfare, is the responsible government department for the preparation and submission of country reports. The department started the process of gathering information, and it is not clear when the report will be ready for submission.

2.3 If Tanzania has submitted the report in 2.2 and if the Committee on the Rights of Persons with Disabilities has reviewed the report indicate if the Committee made any concluding observations and recommendations in Tanzania's report. Was there a domestic effect in Tanzania on disability issues due to the reporting process?

As noted in 2.2 above, Tanzania has not submitted its report to date.

2.4 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, has Tanzania also reported specifically on the rights of persons with disabilities in its most recent reports? If so, have concluding observations adopted by the treaty bodies, addressed disability? If relevant, were these observations given effect to? Was mention made of disability rights in Tanzania's United Nations Universal Periodic Review (UPR) report? If so, what was the effect of these observations or recommendations?

A noted irregularity in Tanzania's United Nations' Universal Periodic Review Report (UPR)¹³ was that the Constitution of the United Republic of Tanzania (the Constitution) does expressly prohibit discrimination on the ground of disability. The Bill of Rights in the Constitution does not expressly mention disability in article 13(5) (the non-discrimination article), but provides that:

For the purposes of this Article the expression 'discriminate' means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word 'discriminate' shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying *disabilities* (emphasis mine) in the society.

The word 'disabilities' in the latter part of this provision does not refer to persons with disabilities as a specific category of people subjected to discrimination, but refers to affirmative action to counter oppressive tendencies in general.

¹³ Tanzania's UPR Report (n 9 above).

Tanzania reported in the UPR on the prevalence of disability. Some measures that were reported in the UPR include the adoption of the 2004 National Policy on Disability,¹⁴ the enactment of the Persons with Disabilities Act 9 of 2010 and the continued implementation of the National Action Plan on Care Services, Training and Protection for Vulnerable Children. A further measure that was reported was the adoption of the 2011 National Disability Mainstreaming Strategy for the implementation of the African Decade of Disability (of which Tanzania is signatory).

2.5 Was there any domestic effect in Tanzania's legal system after ratifying the international and regional instruments in 2.4 above?

Tanzania adopted legislative measures to give effect to her international obligations with regard to the following:

- In 2009 Tanzania enacted the Law of the Child Act 21 of 2009 as a legislative response to her obligations under the CRC, as well as under the African Charter on the Rights and Welfare of the Child.
- In 2010 Tanzania enacted the Persons with Disabilities Act 9 of 2010 as a legislative response to her obligation under the CRPD. The domestic measures of this act have to be implemented.

2.6 Do ratified international treaties automatically become domestic law under Tanzania's legal system? If so, are there any cases where the courts applied international treaty provisions directly?

Tanzania follows a dualistic system in which provisions of international human rights treaties require a legislative process for purposes of domestication. Provisions of international human rights treaties have been incorporated through various pieces of legislation and policies. Courts in Tanzania have, in appropriate cases, given judicial notice to international instruments.¹⁵ The Tanzanian Courts have generally used international law as an interpretative tool.

In 1993, the Court of Appeal, while interpreting the constitutional right to bail in *Director of Public Prosecutions v Daudi Pete*,¹⁶ remarked that:

Since our Bill of Rights and duties was introduced into the Constitution under the Fifth Amendment in February, 1985, that is slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of rights and duties.

The court further stated that:

It seems evident in our view that the Bill of Rights and Duties embodied in our constitution is consistent with the concepts underlying the African Charter on Human and Peoples' Rights as stated in the Preamble to the Charter.¹⁷

In the case of *Paschal Makombanya Rufutu v The Director of Public Prosecutions*,¹⁸ the High Court found that:

14 The Government of Tanzania, National Policy on Disability (2004) <http://www.tanzania.go.tz/pdf/NATIONAL%20POLICY%20ON%20DISABILITY.pdf> (accessed 7 May 2013).

15 CB Murungu 'The place of international law in human rights litigation in Tanzania' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 61-63.

16 [1993] TLR 22 34-35.

17 At 35.

18 Miscellaneous Civil Cause No 3 of 1990 (unreported) 10-11, partly reproduced in Murungu (n 15 above) 63.

If there is any ambiguity or uncertainty in our law, then the courts can look at the international instruments as an aid to clear up the ambiguity and uncertainty seeking always to bring it into harmony with the international conventions.

In *John Byombalirwa v Regional Commissioner, Kagera and Regional Police Commander, Bukoba*¹⁹ the High Court held that, the provisions of Universal Declaration of Human Rights of 1948 (UDHR) should be consulted. The Court in particular stated that:

If there is any doubt as to the obligation of the law enforcement agencies and other members of the executive branch of the government in returning the seizure goods to the suspects who have been cleared by courts I wish to point to Art. 17(2) of the Universal Declaration of Human Rights of 1948 which provides that, no one shall be arbitrarily deprived of his property.

In 2005, the High Court in *Legal and Human Rights Centre, Lawyers' Environment Action Team (LEAT) and National Organisation for Legal Assistance v Attorney General*,²⁰ confirmed the status of the UDHR in the Constitution of Tanzania. It held that:

Tanzania is a party to various international Human Rights Instruments. The Universal Declaration of Human Rights (UDHR), which is the core of the International Human Rights law, is incorporated in article 9(f) of our constitution. Article 7 of the UDHR provides for equality before the law and bars discrimination. Article 21 of UDHR provides for the right to participate in the government of one's country directly or by (*sic*) freely chosen representative.

These cases demonstrate the commitment of the courts in Tanzania with regard to applying and incorporating international human rights instrument provisions into domestic law.

2.7 With reference to 2.4 above, has the United Nations CRPD, or any other ratified international instrument, or parts thereof, been incorporated verbatim in national legislation? Provide details.

- Tanzania enacted the Persons with Disabilities Act in 2010.
- This Act reflects in various provisions the CRPD and other international instruments. This is evident from section 4 of the Act, which sets-out the principles of the Act.²¹

¹⁹ [1986] TLR 73 84.

²⁰ High Court of Tanzania, at Dar es Salaam (Main Registry) Misc Civil Cause No 77 of 2005 (unreported) 39.

²¹ Section 4: 'The principles of this Act shall be:
 (a) respect for human dignity, individual's freedom to make own choices and independency of persons with disabilities;
 (b) non discrimination;
 (c) full and effective participation and inclusion of persons with disabilities in all aspects in the society;
 (d) equality of opportunity;
 (e) accessibility;
 (f) equality between men and women with disabilities and recognition of their rights and needs; and
 (g) provide basic standard of living and social protection'.

3 Constitution

3.1. Does Tanzania's Constitution contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

- The Constitution of the United Republic of Tanzania (the Constitution),²² does expressly mention disability in article 11.
- Article 11 does not fall within the Bill of Rights²³ of the Constitution.²⁴

3.2 Does Tanzania's Constitution contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.

- The Bill of Rights in the Constitution does not expressly mention disability or persons with disabilities.
- Reference in the Constitution to 'all human beings', 'all persons', 'every person', 'every citizen', 'no person', and 'any person' can be interpreted to include persons with disabilities.

4 Legislation

4.1 Does Tanzania have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

- Tanzania enacted disability specific legislation in 2010, the Persons with Disabilities Act. The Act was enacted particularly to make provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work protection and promotion of basic rights for persons with disabilities.²⁵
- The Act provides amongst other things for: (i) principles and obligations for realisation of the rights of persons with disabilities;²⁶ and (ii) it sets out a broad institutional arrangement operating at National level, that is the National Advisory Council for Persons with Disabilities down to grass-root level, that is village and *Mtaa* (street) Committees all with mandates to amongst others, protect and promote all matters relating to the welfare and development of persons with disabilities.²⁷

Along with the Persons with Disabilities Act, several other legislation equally contains direct provisions addressing disabilities. The following table lists some of these laws:

²² 1977 (as amended from time to time).

²³ While disability is expressly mentioned in article 11, The Bill of Rights starts from article 12-30 in the Constitution of the United Republic of Tanzania.

²⁴ Article 11(1): 'The state authority shall make appropriate provisions for the realisation of a person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood'.

²⁵ Preamble to the Act.

²⁶ Secs 4-7 of the Act .

²⁷ Secs 8-14, together with the 1st, 2nd, 3rd and 4th Schedules to the Act.

Persons with Disabilities Act	Disability specific legislation. A comprehensive piece of law that directly provides for disability related matters.
Employment and Labour Relations Act 6 of 2004.	<p>The Act expressly prohibits discrimination on multiple grounds including disability. In section 7(4) employers are forbidden to discriminate directly or indirectly against an employee, in any employment policy or practice, on any of the following grounds: colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or religion, sex, gender, pregnancy, marital status or family responsibility, disability, HIV/Aids, age or station of life.</p> <p>Section 37(3)(b)(ii) therein provides that it shall not be a fair reason to terminate the employment of an employee for reasons related to disability.</p>
Law of the Child Act 21 of 2009.	<p>This Act similarly outlines multiple grounds including disability on which grounds, discrimination is not allowed.</p> <p>In section 5(2), a person shall not discriminate against a child on the grounds of gender, race, age, religion, language, political opinion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, being a refugee or of another status.</p> <p>The Act also in section 16(p) considers a child as in need of care and protection if that child is under the care of a person with a disability and such disability hinders the person from exercising proper care or guardianship.</p>
The Penal Code, Cap 16 R.E 2002.	According to section 137, any person who, knowing a woman to be an idiot or imbecile, has or attempts to have unlawful sexual intercourse with her in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile, commits an offence and is liable to imprisonment for 14 years, with or without corporal punishment.
Mental Health Act 21 of 2008	<p>Another broad piece of legislation providing comprehensively on all matters related to mental disorders. It was particularly enacted to provide for the care, protection and management of persons with mental disorders and to provide for their voluntary or involuntary admission in a mental health care facility.</p> <p>The Act has established the Mental health board, mandated to amongst other things supervise and monitor the provision of mental health care services and assurance of quality by inspecting facilities within the mental health care facilities.</p>

4.2 Does Tanzania have legislations that indirectly address disability? If so, list the main legislation and explain how the legislation relates to disability.

National Education Act 25 of 1978	<p>Section 56(l) guarantees every Tanzanian citizen the right to receive such category, nature and level of national education as his ability may permit him.</p> <p>Subsection 2 determines that no person may within Tanzania, be denied an opportunity to obtain any category, nature or level of national education on the grounds of his race, religion, political or ideological beliefs.</p>
The National Elections Act, Cap 343 R.E 2010	<p>Persons with disabilities are covered under section 10 of the Act which determines that all citizens who have attained the age of 18 years, irrespective of ones' ability or disabilities, are entitled to register as voter(s).</p>
The Commission For Human Rights And Good Governance Act 7 of 2001	<p>Section 6(l) mandates the Commission to carry out functions including the following:</p> <ul style="list-style-type: none"> • to Promote within the country the protection and the preservation of human rights; • to receive complaints in violation of human rights generally; • to investigate or inquire into complaints concerning practices or actions by persons holding office in the service of the government, public authorities or other public bodies, including private institutions and private individuals where those complaints allege abuse of power, injustice, unfair treatment of any person, whether a complainant or not, in the exercise of their official duties; • to promote ratification of or accession to treaties or conventions on human rights, harmonisation of national legislation and monitor and assess compliance, within the United Republic, by the government and other persons, with human rights standards provided for in treaties or conventions or under customary international law to which the United Republic of Tanzania has obligations; and • subsection (2) is to the effect that, without prejudice to Provisions of subsection (1) the Commission shall, generally in relation to members of the public, use the Commission's good office to promote, protect and where necessary to provide assistance to persons whose human rights have or are in imminent danger of being violated.

5 Decisions of courts and tribunals

- 5.1 Have the courts (or tribunals) in Tanzania ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases indicating what the facts, the decision(s), the reasoning and impact (if any) the cases have had.**
- Unable to report on the extent to which courts in Tanzania have decided on issues relating to disabilities.

6 Policies and programmes

- 6.1 Does Tanzania have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

Tanzania had since 2004 adopted the following policies or programmes:

- National Policy on Disability;²⁸
- Construction Industry Policy,²⁹ which highlights the need for building regulations to ensure accessibility to built environments for PWDs; and
- National Strategy for Growth and Reduction of Poverty (NSGRP),³⁰ which recognises disability as a cause of poverty.

- 6.2 Does Tanzania have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.**

Some of the programmes and plans include, the National Action Plan on Care Services, Training and Protection for Vulnerable Children,³¹ the National Poverty Eradication Strategy³² and the National Women and Gender Development Policy.³³

²⁸ n 14 above.

²⁹ The Government of Tanzania, Construction Industry Policy (2003) http://www.ncc.or.tz/CI_P.pdf (accessed 18 May 2013).

³⁰ The Government of Tanzania, National Strategy for Growth and Reduction of Poverty (NSGRP) (2005) http://www.povertymonitoring.go.tz/Mkukuta/MKUKUTA_MAIN_ENGLISH.pdf; and the Government of Tanzania, National Strategy for Growth and Reduction of Poverty II (NSGRP II) <http://www.povertymonitoring.go.tz/Mkukuta/Mkukuta%20English.pdf> (both accessed 18 May 2013).

³¹ Citation and check link http://www.riatt-esa.org/sites/default/files/files/resources/national_costed_plan_tanzania.pdf (accessed 10 May 2013).

³² NSGRP (n 30 above).

³³ The Government of Tanzania, Policy on Women in Development in Tanzania (1992) <http://www.tanzania.go.tz/pdf/policyonwomenindevelopment.pdf>; and the Government of Tanzania, National Strategy for Gender Development http://www.mcdgc.go.tz/data/Tanzania_-_National_Strategy_for_Gender_Development.pdf (both accessed 3 August 2013).

7 Disability bodies

7.1 Other than the ordinary courts or tribunals, does Tanzania have any official body that specifically addresses the violation of the rights of people with disabilities? If so, describe the body, its functions and powers.

- The Department of Social welfare under the Ministry of Health and Social Welfare is the specific government department which has a mandate to address issues relating to welfare of persons with disabilities.
- The Commission for Human Rights and Good Governance, a national human rights institution, has a wider mandate to address violations of human rights in general.
- The Persons with Disabilities Act makes provision for a mechanism for a broader institutional framework:³⁴
 - The Act establishes the National Advisory Council for Persons with Disabilities to oversee, at a National level, amongst other mandates, the promotion of implementation and the equalisation of opportunities for persons with disabilities.
 - The Persons with Disabilities (General) Regulations³⁵ will implement the council.

7.2 Other than ordinary courts or tribunals, does Tanzania have any official body that, though not established to specifically address the violation of the rights of people with disabilities, can nonetheless do so? If so, describe the body, its functions and powers.

- The Commission for Human Rights and Good Governance is a constitutional body,³⁶ established to address violations of human rights.³⁷ Its mandate includes: (i) the promotion within the country of the protection and the preservation of human rights; (ii) receiving complaints on the violation of human rights generally;

34 Secs 8 -14.

35 Created under section 61 of the Persons with Disabilities Act.

36 Art 129(1) of the Constitution provides as follows:

'There shall be a Commission to be known as the Commission for Human Rights and Good Governance, whose functions shall be prescribed in Article 130 of this Constitution.

Art 130(1) provides:

'Commission for Human Rights and Good Governance shall discharge the following functions:

(a) to sensitise countrywide about preservation of human rights and duties to the public in accordance with the Constitution and the laws of the land;

(b) to receive complaints in relation to violation of human rights in general;

(c) to conduct inquiry on matters relating to infringement of human rights and violation of principles of good governance;

(d) to conduct research, to impart or disseminate to the public countrywide education in respect of human rights and good governance;

(e) if necessary, to institute proceedings in court in order to prevent violation of human rights or to restore a right that was caused by that infringement of human rights, or violation of principles of good governance;

(f) inquire into the conduct of any person concerned and any institution concerned in relation to the ordinary performance of his duties or functions or abuse of the authority of his office;

(g) to advise the Government and other public Institutions and private sector in respect of human rights and good governance;

(h) to take necessary action in order to promote and enhance conciliation and reconciliation among persons and various institutions appearing or being brought before the Commission.

37 Commission for Human Rights and Good Governance Act 2001, Cap 391 R.E 2002.

(iii) inquiring into complaints alleging violation of human rights; and (iv) in case of necessity, it can institute proceedings in a court of law against any person or body alleged to have violated human rights.

- The Commission, at its headquarters, has for many years maintained a desk for 'special group rights', where the rights of PWDs were directly addressed. Recent developments in the field of disability established a new exclusive desk for addressing disability issues.

8 National human rights institutions

8.1 Does Tanzania have a Human Rights Commission or an Ombudsman or a 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 has ever addressed issues relating to the rights of persons with disabilities.

- See 7.1 and 7.2 above.
- Tanzania has a Commission for Human Rights and Good Governance, a constitutionally created body.³⁸ The Commission is mandated, amongst others, to promote within Tanzania the protection and the preservation of human rights.³⁹
- The Commission also has a mandate to promote ratification of, or accession to treaties or conventions on human rights, monitor and assess compliance by the government and other persons with human rights standards provided for in treaties or conventions or under customary international law to which Tanzania has obligations.⁴⁰

9 Disabled peoples organisations (DPOs) and other civil society organisations

9.1 Are there organisations that represent and advocate for the rights and welfare of persons with disabilities in Tanzania? If so, list each organisation and describe its activities.

Tanzania has a total of ten Disabled Peoples' Organisations (DPOs) that represents and advocate for rights and welfare of people with disabilities. These organisations are:

- Tanzania League of the Blind (TLB)
- Tanzania Association of the Physically Handicap (TAPH)
- Tanzania society of the Deaf (TAD)
- Tanzania Association of the Deaf-Blind (TASODEB)
- Kilimanjaro Association of Spinal cord Injuries (KASI)
- Tanzania Association for the Mentally Handicapped (TAMH)

³⁸ n 36 above.

³⁹ Sec 6(1)(a) of the Act (n 37 above).

⁴⁰ Sec 6(1)(l) of the Act (no 37 above).

- Psoriasis Association of Tanzania (PSORATA)
- Tanzania Users and Survivors of Psychiatric Organisation (TUSPO)
- Association of Spinal bifida and Hydrocephalus Tanzania (ASBAHT)
- Tanzania Albino Society (TAS)

9.2 In the countries in your region, are DPOs organised or coordinated at a national and/or regional level?

At national level, DPOs are organised to form the Tanzania Federation of Disabled Peoples' Organisations (TFDPO), a non-governmental federation established in 1992. This Organisation is as an umbrella organisation with ten national DPOs as members.⁴¹ The organisation's main objective is to afford a common voice with regard to issues of lobbying and advocacy for the rights and welfare of PWDs.

9.3 If Tanzania has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

In Tanzania, DPOs and their umbrella organisation TFDPO, commonly known as *SHIVYAWATA*, regularly take part in discussions with the government on issues affecting the lives of people with disabilities.⁴²

9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?

Lobbying, advocacy and awareness-raising activities amongst DPOs and PWDs themselves, remains the main cause of action to promote awareness to the needs of PWDs and to develop models that will enable their effective participation in the process.

9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?

The following factors account for the major challenges DPOs face in their need to take an effective role in implementation process: (i) financial constraints necessary for mobilisation; (ii) lack of community awareness and involvement on matters concerning PWDs; and (iii) inadequate representation in decision-making bodies, from grassroots to national level.

9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?

- PWDs and DPOs are concerned that the Persons with Disabilities Act only affords minimum assurance that they will in future be given wider platforms for their rights and being fully included.
- These concerns are due to the very broad institutional framework set-out in the Act, which do not address the inclusion of PWDs and DPOs in their compositions. This will minimise their influence in future processes.

41 TFDPO website: <http://www.shivyawata.or.tz/> (accessed 19 May 2013).

42 ILO publication http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_111461.pdf (accessed 19 May 2013). Check link and please provide a full citation.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

- The enactment of the Persons with Disabilities Act and its most recent regulations of May 2013 are directly linked to the DPOs' engagement in the 'CRPDs' implementation.

9.8 Has your research (for this project) shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?

No.

9.10 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?

No.

9.11 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?

- The Comprehensive Community Based Rehabilitation in Tanzania (CCBRT), a locally registered non-governmental organisation, has since its establishment in 1994 been engaged in research and rehabilitation activities in Tanzania.⁴³
- CCBRT comprises of a well-established disability hospital in Dar es Salaam; community programmes across Tanzania; a training and advocacy unit for among other things PWDs.
- Yearly approximately 120 000 adults, children with disabilities and their caregivers receives a better quality of life through CCBRT services.⁴⁴

10 Government departments

10.1 Do you have government departments that are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the departments.

As indicated in 7.1 above, the Department of Social Welfare, under the Ministry of Health and Social welfare, has a mandate to promote and protect the rights and welfare of PWDs in Tanzania.

⁴³ CCBRT website: <http://www.ccbirt.or.tz/> (accessed 10 May 2013).

⁴⁴ As above.

11 Main human rights concerns of people with disabilities

11.1 What are the contemporary challenges of persons with disabilities in Tanzania? (For example, in some parts of Africa ritual killing of certain classes of PWDs such as people with albinism occurs. Tanzania has been in the headlines in this regard. We should have a way of interrogating customary practices that discriminate, injure and kill persons with disabilities).

Around 2008 persons with albinism, in particular those in rural Tanzania, experienced killings virtually due to the irrational belief that their body parts carry the potential for economic wealth. Nearly 60 incidents were reported, and criminal charges instituted against the suspected.⁴⁵ Many people still express their grievances on the manner the government responded to the incidents, and the manner in which the cases are delayed in the judiciary, to date, well after four years the status of many of those cases are unknown.

11.2 How does Tanzania respond to the needs of persons with disabilities with regard to the areas listed below?

<p>Access to public buildings, premises, transport services, stations and platforms services and other recreational services.</p>	<p>The question particularly in respect of access to public buildings, started to be addressed in 2003 when the National Construction Industry Policy was adopted.^a</p> <p>The policy acknowledged the absence of appropriate building regulations that would ensure adherence to accessibility standards.</p> <p>Nevertheless, the question is now comprehensively addressed in law pursuant to the enactment of the Persons with Disabilities (General) Regulations of 2012.</p> <p>These regulations extensively address accessibility in part IX (regulations 49-55), in which it is explicitly required, in mandatory terms that all public buildings, premises, transport services, stations and platform services, and other recreational services should be accessible to persons with disabilities.</p>
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45 EB Makulilo E 'Albino killings in Tanzania: Illogical thinking and racism?' *Peace & Justice Conflict Theory and Analysis* (2004) 594 1 http://www.academia.edu/223271/ALBINO_KILLINGS_IN_TANZANIA 4 (accessed on 29 July 2013).

Access to education and vocational training.	<p>The 2004 National Policy on Disability sets out in lucid terms the policy objective that the government in collaboration with stakeholders shall improve skills training for people with disabilities.</p> <p>This policy objective was concretised under the Persons with Disabilities Act, which under sections 27-29 makes it a fundamental entitlement for PWDs to enjoy as a matter of rights, education and training services.</p> <p>Further, the Act has established the National Fund for Persons with Disabilities to finance amongst other things education and vocational training for persons with disabilities.^b</p> <p>Furthermore, the most recent 2012 Persons with Disabilities (General) Regulations under part IV (regulation 11-21) provides for equality in education, support including school transport facilities for children with disabilities, accessibility, as well as adopting budget guidelines to explicitly mention disability to the government budget for education sector.</p>
Access to employment	<p>Regarding access to employment for persons with disabilities, the Employment and Labour Relations Act 6 of 2004, in unequivocal terms prohibits discrimination on grounds of Disability.^c Accordingly, employers who are convicted of having discriminated against any employee on the ground of disability shall be liable for a fine not exceeding five Million Tanzania Shillings, approximately four thousand (USD).</p> <p>The Persons with Disabilities Act guarantees PWDs' access to employment in broader terms by empowering the minister responsible for persons with disabilities, in collaboration with the minister responsible for employment, to enact regulations requiring employers with the work force of twenty and above to employ persons with disabilities based on a quota system and to ensure that 3 per cent of it constitutes persons with disabilities.^d</p> <p>These regulations are now in place and as envisaged under the Act, they, under part VIII (regulations 40-48) extensively provide for employment based on a quota system, complaint mechanism and career advancement.</p>

- a. (n 29 above).
b. Sec 57(3)(a) of the Persons with Disabilities Act.
c. Sec 7 of the Employment and Labour Relations Act.
d. Sec 31(2) of the Persons with Disabilities Act.

11.3 Does Tanzania provide for disability grants or other income support measures for persons with disabilities?

Since independence, Tanzania has never put in place any form of grants, or income supporting measures for persons with disabilities. Recently under section 57 of the Persons with Disabilities Act, a mechanism was established for a National Fund for Persons with Disabilities.⁴⁶ The fund has not yet been established.

It is foreseeable that when the fund is established, some form of the grant/funds will be allocated particularly to finance education and vocational training, a

⁴⁶ Sec 57(1) of the Persons with Disabilities Act provides: 'there shall be within the office of the Commissioner, a Fund to be known as the National Fund for Persons with Disabilities.

rehabilitation programme on disability, issuing grants to associations of persons with disabilities and financing researches on disabilities.⁴⁷

11.4 Do people with disabilities have a right to participation in political life (for example, political representation and leadership, and voting independently) in Tanzania?

Article 21 of the 1977 Constitution guarantees every Tanzanian, including persons with disabilities, the right to take part (directly or indirectly) in matters relating to the governance of the country. This right has further been explained under the National Election Act, Cap 343 R.E 2010, which sets out voter qualifications. Under Section 10 of this Act all citizens who have attained the age of 18 years, irrespective of ones' ability or disabilities, are entitled register as a voter.

Section 51 of the Persons with Disabilities Act, contains provisions with regards to PWDs political rights.⁴⁸

⁴⁷ Sec 57(3) of the Persons with Disabilities Act.

⁴⁸ Sec 51 of the Persons with Disabilities Act provides:

- (1) Every person with disability who has attained the age of eighteen years and above shall be entitled to enjoy and exercise political rights and opportunity as any other citizen without any form of discrimination.
- (2) Subject to subsection (1), a person with a disability shall have a right to vote, hold public office and otherwise participate in the political rights and opportunity as any other citizen without any form of discrimination.
- (3) The Minister shall, after consultation with the Council and National Electoral Commission -
- (a) ensure that the right and opportunity for persons with disabilities to vote and be elected in public office is guaranteed by-
- (i) ensuring that voting procedure, facilities and materials are appropriate and accessible to understand and use;
 - (ii) ensuring that voter registration locations are accessible to persons with disabilities;
 - (iii) ensuring that all polling places in each voting centre have accessible requirements to voters with disabilities including accommodation of voters who use wheelchairs and devices for persons with low vision and tactile ballot templates for visually impaired and deaf blind persons;
 - (iv) providing training for poll workers on the rights of persons with disabilities and the practical means of assuring their rights;
 - (v) ensuring that voters with disabilities have the same degree of information available when casting their ballot as others;
 - (vi) encouraging and providing reasonable accommodation to persons with disabilities to stand for elections, and to hold office and perform all public functions at all levels in the Government;
 - (vii) guaranteeing the free expression of the will of the persons with disabilities as electors, and where necessary, at their request, allowing assistance in voting by a person of their own choice;
 - (viii) setting up criteria and procedures to be applied in appointing qualified persons with disabilities to be elected or be appointed to represent persons with disabilities in all decision and policy making process during the elections, through affirmative action or special prescribed arrangements;
- (b) promote actively an environment on which persons with disabilities can effectively and fully participate in the conduct of public affairs without discrimination and encourage their participation in the public affairs including-
- (i) participation in non-governmental organizations and association concerned with public and political life of the country including the activities and administration of political parties;
 - (ii) Forming and joining organizations of persons with disabilities to represent their interest at all levels.
- (4) Where a voting place under this section is inaccessible to persons with disabilities, alternative location shall be identified and publicized to be used by such persons.
- (5) The Government shall initiate and encourage appointment of persons with disabilities in the organs of the Government at all levels'.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Tanzania at the moment?

The need for effective implementation of the Persons with Disabilities Act and the regulations thereof are being considered.

12.2 What legal reforms are being proposed? Which legal reforms would you like to see in Tanzania? Why?

See 12.1 above.

**SECTION C: REGIONAL
DEVELOPMENTS**

REGIONAL DEVELOPMENTS

DISABILITY RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM DURING 2011 AND 2012

Helene Combrinck*

An overview

One of the remarkable consequences of the introduction of the Convention on the Rights of Persons with Disabilities (CRPD) is that it is already making its influence felt in most parts of the international human rights system.¹ This is certainly true of the African region, where the impact of the Convention is already discernible even within its relatively short existence. This appears inter alia from the emergence of an increasingly in-depth scholarly analysis (reflected in Section A)² and the progress towards domestic implementation level as documented in Section B.

In this Section, developments in the African human rights system³ during the period 2011 to 2012 are outlined. H Combrinck first examines the African regional system generally, and then L Wakefield looks at the specialised treaty adopted in respect of children's rights, namely the African Charter on the Rights and Welfare of the Child. The Section finally reports on the position in three sub-regional economic communities, namely the East Africa Community, Southern African Development Community and the Economic Community of West African States, with contributions by N Murungi, A Mandlate and B Armah respectively.

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1 One example is the work of the UN Committee on the Rights of the Child: Byrne demonstrates how the CRPD has pervaded the approach of this Committee to the interpretation of art 23 of the Convention on the Rights of the Child, with specific reference to the right to education. See B Byrne 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013) 28 *Disability & Society* 241.

2 It may be argued that the recent establishment of academic programmes specialising in disability rights, including those offered by the Centre for Disability Law and Policy at the University of the Western Cape and the disability rights modules developed under the auspices of the Centre for Human Rights at Pretoria University have been instrumental in this regard.

3 The term 'African human rights system' has been described as the 'architecture of norms and institutions comprised in the core pan-continental human rights treaties adopted under the Organisation of African Unity or African Union' – Secretariat of the African Decade of Persons with Disabilities *The Architecture for an African Disability Rights Mechanism* (2011) 20. This meaning is also adopted here.

The main aim of this Section is to give an update on recent events in the African region.⁴ However, in order to establish a 'baseline' for purposes of future editions, a brief contextualisation is provided in order to locate disability rights in the broader African rights regime. In each subsection outlined above, the authors therefore briefly track the development of 'norm acceptance' in respect of disability rights⁵ and also look at the institutional arrangements for norm enforcement.

1 Introduction

The history of disability rights at the African continental level has been described as (at best) one of 'benign neglect'.⁶ However, as noted, there have also been a number of significant shifts in this dispensation. In order to understand the current position, this subsection commences with an overview of the foundational framework, with specific reference to the African Charter on Human and Peoples' Rights (the African Charter),⁷ and looks at the implementation mechanism for this framework. It then examines recent events, with an emphasis on the debates regarding the need for a new, 'uniquely African' human rights instrument.

2 The normative framework

The gradual acknowledgment of disability rights in the African human rights system should be seen against the background of two parallel historical trajectories. On the one hand, there was the growing recognition internationally of disability as a compelling human rights concern; on the other, the slow shift of the Organisation of African Unity (OAU) towards a human rights orientation.⁸ Considering that the African Charter was drafted and adopted at the beginning of the 1980s, this historical perspective assists towards understanding why this foundational

4 In certain instances, it is necessary to go further back than 2011 in order to provide a clear sense of context.

5 For a helpful discussion of the notions of 'norm acceptance' and 'norm implementation' see CH Heyns & F Viljoen 'The regional protection of human rights in Africa: An overview' in PT Zeleza & PJ McConnaughay (eds) *Human rights, the rule of law, and development in Africa* (2004) 129-143. These concepts are utilised for purposes of this section.

6 TP van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' *SUR International Journal on Human Rights* (2011) 14 153.

7 OAU Doc CAB/LEG/67/3 rev. 3 adopted on 26 June 1981 and entered into force 21 October 1986.

8 See 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) 56-57, where these two historical paths are tracked.

document contains limited references to disability,⁹ it also explains certain subsequent events, as appears below.

While the Charter must be read in its entirety, two of its provisions are of interest here. These are article 2 (the prohibition of discrimination) and article 18(4), which provides that the aged and the disabled have the right to 'special measures of protection' in keeping with their physical or moral needs.

Although article 2 does not explicitly include disability as one of the 'listed' grounds,¹⁰ the phrase 'or other status' implies that this is not a closed list. Disability-based discrimination can therefore be read in by analogy.¹¹ Article 18(4), on the other hand, has been regarded as more problematic and has (correctly) been subjected to criticism, most notably for being 'vague and unclear'¹² and for conflating the rights of the aged with those of persons with disabilities.¹³

In the period following the adoption of the African Charter, disability rights began to slowly trickle into the regional system. For example, in 1985, the OAU adopted the Agreement for the Establishment of the African Rehabilitation Institute (ARI). The objectives of the ARI included 'manpower development'¹⁴ and had a strong emphasis on rehabilitation. A further development was the adoption of the African Charter on the Rights and Welfare of the Child in 1990, with a specific article dedicated to the rights of children with disabilities.¹⁵

- 9 At the international level, the conceptual and philosophical shift from a medical or welfare approach to disability to the social model had begun to materialise in the adoption of two Declarations on the Rights of People with Disabilities during the 1970's (the Declaration on the Rights of Mentally Retarded Persons in 1971 and the Declaration on the Rights of Disabled Persons in 1975 respectively) and would also result in the adoption of the World Programme of Action concerning Disabled Persons in 1982. However, at the time this shift was by no means 'systemically' entrenched. See 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) 30.
- 10 'Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' (Emphasis added).
- 11 This view was expressed by the African Commission on Human and Peoples' Rights in the communication brought before it in *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003). For further discussion see Biegon (n 8 above) 70-71; SA Kamba '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* 219 237.
- 12 Kamba (n 11 above) 238.
- 13 Secretariat of the African Decade of Persons with Disabilities (note 3 above) 5. It could be argued that this commingling has in recent years held back the development of both sets of rights – see the discussion below.
- 14 The ARI was established with the technical assistance of the International Labour Organisation.
- 15 Art 13. See also the commentary in this section Lorenzo Wakefield on 'Making progress: The African Committee of Experts of the Rights and Welfare of the Child and the rights of children with Disabilities'.

Biegon notes that the end of the UN Decade of Persons with Disabilities (1983-1992) coincided with the rise of democratisation across the continent in the 1990s that brought with it a more 'favourable environment for the agitation of respect for and protection of human rights'.¹⁶ This was reflected in the Grand Bay (Mauritius) Declaration and Plan of Action, adopted by the OAU Ministerial Conference on Human Rights in Africa in April 1999.¹⁷ This Declaration notes that the rights of people with disabilities and people living with HIV/AIDS, in particular women and children, are not always observed and urges all African states to work towards ensuring the full respect of these rights.¹⁸ Significantly, in July 1999, the OAU Heads of State and Government adopted a resolution declaring the period 1999-2009 as the African Decade of Persons with Disabilities.¹⁹

In 2000, with the adoption of the Constitutive Act²⁰ of the African Union (AU), and the transition from the OAU to the AU, the move towards a human rights mandate for the regional body was formalised. This Act leaves no doubt about the human rights focus of the AU.²¹ This shift in emphasis also saw an acceleration in the endorsement of disability rights in the African system. For instance, the first AU Ministerial Conference on Human Rights in Africa, held in Kigali in May 2003, adopted a Declaration that included specific reference to persons with disabilities (among other concerns).²² Noting 'the plight of the vulnerable groups including persons with disability in general', delegates called upon member states 'to develop a Protocol on the protection of the rights of people with disabilities and the elderly'.

It is notable that the main African instruments adopted since 2000, specifically the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),²³ the African Youth Charter,²⁴ the African Charter on Democracy, and

16 n 8 above, 58.

17 Grand Bay (Mauritius) Declaration and Plan of Action CONF/HRA/DECL (I), adopted by the OAU Ministerial Conference on Human Rights in Africa, meeting from 12-16 April 1999 in Grand Bay, Mauritius.

18 Art 7.

19 OAU Council of Ministers and the Assembly of State and Government in July 2000 in Lome, Togo. This was 'renewed' when the AU declared 2010-2019 as the second African Decade on the Rights of Disabled Persons.

20 AU Constitutive Act adopted in Lome, Togo, 11 July 2000 and entered into force 26 May 2001.

21 See eg article 3(h), which states that one of the objectives of the AU is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.

22 MIN/CONF/HRA/Decl.1(I), adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003.

23 CAB/LEG/66 6/Rev 1, adopted on 11 July 2003 in Maputo, Mozambique and entered into force on 25 November 2005.

24 Adopted on 2 July 2006 in Banjul, The Gambia and entered into force on 8 August 2009.

Elections and Governance²⁵ and AU Convention for the Protection and Assistance of Internally Displaced Persons²⁶ all contain disability-related provisions. While these provisions have attracted some criticism in respect of their limited scope and occasionally unwieldy formulation,²⁷ they do provide 'an evolving convergence as to the standards to be achieved'²⁸ by states in respect of the promotion and protection of disability rights in Africa.

3 Institutions

The African Charter makes provision for the following mechanisms to monitor its implementation: state reporting; a communications procedure; and a judicial procedure. In the case of the former two, state reports and communications are received by the African Commission on Human and Peoples' Rights (the African Commission). For the judicial procedure, the relevant institution is the African Court on Human and Peoples' Rights. To date, the African Commission has examined only one disability-related communication. Biegon further observes correctly that disability has been conspicuously absent from both the Commission's thematic resolutions and state reports submitted to the Commission.²⁹ For the judicial procedure, the relevant institution is the African Court on Human and Peoples' Rights, although at the time of writing no cases relating to disability have served before the court.³⁰

It is not entirely implausible that the African Commission's first dedicated efforts on disability rights in 2009 may have been inspired by the CRPD coming into force in 2008, given that it had not previously made attempts to act on the 2003 Kigali Declaration. In May 2009, the Commission expanded its pre-existing 'Focal Point on the Rights of Older Persons in Africa' to also include people with disabilities. This initiative is discussed below.

It is encouraging to note that certain of the AU's organs have now also assumed responsibility for the promotion of disability rights. For example, the Pan-African Parliament (potentially) deals with disability issues

25 Adopted on 30 January 2007 and entered into force on 16 September 2013.

26 Adopted on 23 October 2009 and entered into force on 27 January 2013.

27 See eg Van Reenen & Combrinck (n 6 above) 142; Kamga (n 11 above) 240-244.

28 This term was employed by the European Court of Human Rights in a different context but is also apposite here – *MC v Bulgaria Application* 40 EHRR 20.

29 Biegon (n 8 above) 69-70.

30 The current status of the African Court can best be summarised as 'all dressed up and nowhere to go'. Having largely overcome its initial logistic problems, the African Court is now being held back by the reluctance on the part of states to ratify the Protocol establishing the Court and to make the Declaration allowing individuals and NGOs to submit cases directly to the Court. For a more detailed discussion of the *status quo*, see M Killander & AK Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 199 213-216.

through its Committee on Gender, Family, Youth and People with Disabilities.³¹

In November 2012, the third Session of the AU Conference of Ministers of Social Development adopted the theme of 'promoting the rights and welfare of persons with disabilities'.³² Under this banner, delegates examined a number of disability-related reports, including the Reviewed Continental Plan of Action on the African Decade of Persons with Disabilities (2010-2019); the Draft African Union Disability Architecture (AUDA); a report on the restructuring of the African Rehabilitation Institute (ARI); and the proposed Protocol on the Rights of Persons with Disabilities.³³

4 Recent developments

As noted above, the Kigali Declaration of 2003 called on Member States to develop a Protocol (to the African Charter) with the purpose of protecting the rights of persons with disabilities and the elderly. The African Commission subsequently appointed a 'Focal Point on the Rights of Older Persons in Africa' in November 2007.³⁴ In order to remedy the omission of people with disabilities, the Focal Point was expanded in 2009 to become a 'Working Group on the Rights of Older Persons and People with Disabilities in Africa'.³⁵ The five-member Working Group was mandated *inter alia* to draft a concept paper for consideration by the African Commission that would serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities.

Members of the Working Group attended an Expert Seminar on the Rights of Older Persons and People with Disabilities in Accra, Ghana from 26-28 August 2009. While the objective of the seminar was to initiate the drafting of a (single) Protocol on the Rights of Older Persons and People with Disabilities in Africa, two distinct documents emerged from the event. The first draft Protocol, which related to 'Older Persons', enjoyed further consultation and was later submitted to the African Commission

31 Biegon cautions that anything concrete is yet to emanate from this Committee (n 8 above) 61.

32 Some critics may question the concurrent use of the notions 'rights and welfare' of people with disabilities.

33 Third Session of the African Union Conference of Ministers of Social Development, held in Addis Ababa, Ethiopia, 26-30 November 2012, CAMSD/MIN/Rpt(III) para 24 (Report of session).

34 Res 118: (XXXXII 07), adopted at 42nd Ordinary Session of ACHPR held in Brazzaville, Congo, 15-28 November 2007.

35 Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res143 (XXXXV) 09, adopted at 45th Ordinary session of ACHPR held in Banjul, Gambia 13-27 May 2009.

for consideration.³⁶ The second product of the Expert Seminar, relating to persons with disabilities, had a far stormier course ahead.

This document, known as the 'Accra Draft', has been criticised for having been developed without the participation of persons with disabilities; at a time when the principle of 'nothing about us without us' is finally gaining recognition in human rights discourse, through the CRPD and its emphasis on participation, this omission in itself should have been sufficient to sink the Accra Draft before it even set sail. Second, as Kamga points out, the Accra Draft presented a diluted version of international standards, most notably the CRPD, without adequately – if at all – introducing an 'Africa-specific' perspective;³⁷ that was the *raison d'être* for a supplementary regional instrument. It is therefore hardly surprising that the Accra Draft was in 2011 'put on hold' for further reflection.³⁸

At its 49th Ordinary session,³⁹ the African Commission reconstituted the Working Group to include three new members to bring expertise on disability.⁴⁰ The Working Group subsequently resolved to develop a concept note on the desirability of a Protocol; the completed concept note on the Rights of Persons with Disabilities in Africa and its deliberations on this note persuaded the Working Group in 2012 that such a Protocol is indeed needed.⁴¹

Significantly, the Third Session of Ministers of Social Development resolved at its November 2012 meeting that the Working Group should finalise the drafting of the Protocol on the Rights of Persons for adoption in 2014. The draft Protocol should be circulated to Member States and persons with disabilities should be consulted in the drafting of the Protocol. The Protocol should be presented for discussion by the next session of the AU Conference of Ministers of Social Development (scheduled for 2014).

The debates about the adoption of an 'African Disability Protocol' have thus now to some degree been settled, at least in respect of whether it is regarded as needed by the Working Group.⁴² Questions remain on the

36 At the time of writing, it awaits consideration by the African Union Commission.

37 Kamga (n 11 above) 224.

38 49th Ordinary Session ACHPR held in Banjul, Gambia 26 April-12 May 2011.

39 49th Ordinary session of ACHPR held in Banjul, Gambia 26 April-12 May 2011.

40 Dr AIG Aboderin, Mr AK Dube and Mr Lawrence Mute.

41 See Commissioner YKJ Yeung Sik Yuen 'Intersession Activity Report' (13 April 2012) <http://www.achpr.org/sessions/51st/intersession-activity-reports/older-disabled> (accessed 20 September 2013); Commissioner YKJ Yeung Sik Yuen 'Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa' presented during the 52nd Ordinary Session of the ACHRPR in held in Yamoussoukro, Cote d'Ivoire, 9 - 22 October 2012, para 8.

42 As endorsed by the Ministers of Social Development (above). While this is not the view of the author, an analytical discussion is beyond the scope and purpose of this section.

form such an instrument should take.⁴³ Among the alternatives proposed have been a new, separate African-specific treaty on the rights of persons with disabilities, with a new treaty body; alternatively, that a new set of treaty standards should be adopted, but without establishing a treaty body, which would be akin to the African Women's Protocol.⁴⁴ Whether the maxim 'from Africa always something new'⁴⁵ will be applicable to the African Disability Protocol remains to be seen.

It has also been proposed that the existing potential of the African human rights system to realise the rights of people with disabilities should be explored more fully. This may, for example, entail the adoption by the African Commission of thematic resolutions that could act as guidelines to the interpretation of the African Charter.⁴⁶ This could supplement an African Disability Protocol, especially while the drafting of the latter remains underway. The proposal has considerable merit and should be further explored by disability rights advocates.

43 A comprehensive discussion of the background and a consideration of the different options is provided in Secretariat of the African Decade on Persons with Disabilities (n 3 above) 5-47. Kamga takes this one step further by providing a thought-provoking argument for the adoption of a Protocol to the African Charter – see Kamga (n 11 above) 235-249.

44 See Secretariat of the African Decade on Persons with Disabilities (n 3 above) 36-45. One may assume that such a Protocol would be subject to the same limitations in norm enforcement as the Women's Protocol.

45 The original Latin phrase '*semper aliquid novi Africa affert*' is ascribed to Pliny the Elder.

46 See Secretariat of the African Decade on Persons with Disabilities (n 3 above) 32-35.

REGIONAL DEVELOPMENTS

MAKING PROGRESS: THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD AND THE RIGHTS OF CHILDREN WITH DISABILITIES

*Lorenzo Wakefield**

1 Introduction

The rights of children on the African continent are enshrined within the African Charter on the Rights and Welfare of the Child (ACRWC). This Charter has been ratified by 46 States¹ on the continent and, as a result, many states parties to the ACRWC have harmonised their legislative and policy framework in a bid to domesticate the provisions of the Charter as well as other relevant international and regional treaties.² The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is established as the body to promote the ratification of the ACRWC and monitor the domestication of this treaty by states parties.³

This subsection provides a brief overview of the ACRWC as the main instrument underpinning the normative framework on the rights of children with disabilities in Africa⁴ and reports on recent developments in the work of the African Children's Committee.

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1 According to the list of ratified states parties on the website of the African Committee of Experts on the Rights and Welfare of the Child. However, the author is aware that this list might be outdated as Swaziland – who is reported not have ratified the ACRWC has subsequently ratified. See <http://AfricanChildrensCommittee.org/wp-content/uploads/2011/03/French-and-English-AfricanChildrensCommittee-Updated-Status-of-the-ACRWC.pdf> (accessed 30 August 2013).

2 For example, Lesotho passed its Children's Protection and Welfare Act on 8 June 2011; on 30 March 2011 Zanzibar's Revolutionary Council passed its Children's Bill into an Act; the Liberian Children's Law was adopted on 4 February 2012, amongst others.

3 Art 32.

4 The normative framework for addressing the rights of children with disabilities in Africa consists of multiple intersecting treaty provisions, including art 7 of the United Nations (UN) Convention on the Rights of Persons with Disabilities and art 23 of the UN Convention on the Rights of the Child (CRC). However, this section is confined to the ACRWC.

2 African Charter on the Rights and Welfare of the Child

2.1 The substantive provisions

The scope of application of the ACRWC is inclusive of all children and the rights contained within this treaty apply equally to all children. However, special recognition is given to children with disabilities in article 13.

Article 13(1) provides that ‘every child who is physically or mentally disabled’ has the right to special measures of protection in keeping with his or her physical and moral needs. This entrenches a broad protective framework to children with disabilities in society and is linked to promoting their independence and participation in communities.

Article 13(2) contains more detailed provisions than the broad framework in article 13(1).⁵ An important element in this sub-article is that it goes beyond an obligation on states parties only towards a disabled child, but also places obligations on states parties towards *care-givers* of children with disabilities. This has been correctly argued to provide a higher level of protection for disabled children by African states that have ratified the ACRWC.⁶ What article 13(2) is silent on are key important socio-economic obligations that should have been given express recognition, specifically the rights to education and health care. Needless to say, the provisions of articles 11⁷ and 14⁸ would equally apply to children with disabilities. However, the specificity required in both education and health care access for children with disabilities is lost within such a broad framework. Article 13(2) further speaks of training and preparation for employment, which could suggest that children with disabilities should only be ‘trained’ with the goal of future economic activity, as opposed to the provision of education from a rights-based perspective.

Article 13(3) relates to accessibility and the duties of states parties in this respect. Even though such special provisions are welcomed, the sub-article could arguably be limiting when it states ‘... and other places to

5 Art 13(2) reads as follows: ‘States parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development’.

6 See M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 90.

7 Art 11 contains the education provisions of the ACRWC.

8 Art 14 contains the health provisions of the ACRWC.

which the disabled may legitimately want to have access to'. There is no definition of what is meant by 'legitimately'.

Both sub-articles 13(2) and 13(3) are limited in their application in that the obligations placed on states parties are subject to available resources. Article 13(3) is formulated a little more strongly in that it requires progressive realisation. It therefore leaves an open-ended obligation on states parties to comply with the provisions of article 13, but at the same time is not prescriptive in the necessary achievements to be reached by states parties. Even though treaties cannot provide prescriptions of necessary achievements, it is left within the mandate of the relevant treaty body to provide guidance in this regard.⁹

2.2 The mandate of the African Children's Committee

The mandate of the African Children's Committee is contained in part three of the ACRWC.¹⁰ This mandate can be summarised as promoting and protecting the rights within the ACRWC; monitoring the implementation by states parties; interpreting the provisions of the ACRWC; and performing any further tasks entrusted by the Heads of State and Government of the African Union. These are all 'standard' functions of a treaty body and can be found within multiple treaties in which monitoring bodies of this nature are established.¹¹ The African Children's Committee has developed guidelines to give effect to its mandate, which include guidelines to conduct investigations.

The African Children's Committee is also mandated with receiving communications relating to a violation of the provisions of the ACRWC. The Committee has developed guidelines for the consideration of communications and at the time of writing, has finalised one communication in the matter of *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*.¹² It also has one pending communication that relates to the situation of children in the conflict

9 An interpretation by the African Children's Committee of art 13 of the ACRWC is recommended, including the prescriptive achievements that are necessary to implement arts 13(2) and 13(3).

10 Art 42.

11 For example see art 30 of the African Charter on Human and Peoples' Rights where the African Commission on Human and Peoples' Rights is established or arts 43, 44 and 45 of the Convention on the Rights of the Child that establish and codify the mandate of the UN Committee on the Rights of the Child.

12 Decision: No 002/Com/002/2009. A copy of this judgment can be downloaded here: <http://www.acerwc.org/wp-content/uploads/2011/09/002-09-IHRDA-OSJI-Nubian-children-v-Kenya-Eng.pdf> (accessed 29 August 2013). The facts and merits of this case will not be discussed in this article. For a further analysis of this decision see: E Durojaye & E Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the *Nubian Children communication*' (2012) 12 *African Human Rights Law Journal* 564.

region of northern Uganda. The Committee is still in the process of investigating this matter.

The African Children's Committee has encountered a number of structural stumbling blocks in exercising its mandate, such as a lack of sufficient time for Committee meetings, especially now that the time has come for states parties who have ratified to submit country reports.¹³ The Committee has also failed to intensify its efforts or adopt new ways and strategies to ensure that states parties to the ACRWC submit country reports on time.¹⁴ Despite these limitations, the Committee has made some inroads in recognising and promoting the rights of children with disabilities on the African continent.

3 Recent activities of the African Children's Committee in relation to children with disabilities

During its 52nd Ordinary Session in 1990, the Organisation of African Unity Council of Ministers adopted a resolution to declare the 16th of June the Day of the African Child, to be commemorated every year.¹⁵ It has been correctly argued that this 'is an optimal date for the Committee to popularise the ACRWC, and is a means to ensure that its objectives are translated into reality'.¹⁶ The African Children's Committee, during its 17th ordinary session, adopted the theme for the 2012 Day of the African Child to be '[t]he rights of children with disabilities: The duty to protect, respect, promote and fulfil'.¹⁷

Upon adoption of a theme, the African Children's Committee develops a concept note that addresses the problem – in this instance the promotion and protection of the rights of children with disabilities – and

13 See J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336 351.

14 See J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 *African Human Rights Law Journal* 534 541.

15 Council of Ministers, 52nd Ordinary Session, 'Resolution on African Decade for Child Survival, Protection and Development' CM/Res.1290 (LII). See: http://www.au.int/en/sites/default/files/COUNCIL_EN_3_8_JULY_1990_COUNCIL_MINISTERS_FIFTY_SECOND_ORDINARY_SESSION.pdf (accessed 29 August 2013). The significance of the date of 16 June is that it recalls and commemorates the 1976 uprisings in Soweto, when a protest by school children in South Africa against apartheid-inspired education resulted in the public killing of the unarmed young protesters by police officials.

16 See A Lloyd 'Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child: Recent developments' (2003) 3 *African Human Rights Law Journal* 329 337.

17 See L Wakefield & UM Assim 'Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child: Recent developments' (2011) 11 *African Human Rights Law Journal* 699 714.

gives guidance to states parties in respect of both the lead-up to the Day of the African Child and subsequent activities. States parties are expected to report to the African Children's Committee on its celebrations on the theme and, importantly, on measures in place to further realise the rights mentioned in the theme. These measures are crucial to ensure that such commemorative days are not just once-off events with very little impact, but rather are sustainable in order to ensure that the relevant rights contained within the ACRWC are realised in a systematic manner.

In relation to the Day of the African Child 2012 theme on children with disabilities, the African Children's Committee identified six areas of concern, which would be in line with the *Call for Accelerated Action*¹⁸ on children's welfare on the continent. These six areas were the links between poverty and disability; social attitudes, stigma and discrimination; access to education; violence against children with disabilities; the importance of statistics and data collection; and the right to be heard and to participate.¹⁹

The Committee also proposed the following four activities to be undertaken by states parties in addressing these areas of concern:

- (a) Compile and adopt national plans of action to protect, respect, promote and fulfil the rights of children with disabilities;
- (b) Conduct and review national legislation and policy frameworks to align it with the normative human rights framework at both a regional and international level;
- (c) Strengthen all areas of service provision to accommodate and include children with disabilities; and
- (d) Introduce or reinforce accessible complaints mechanisms for children and families with disabilities.²⁰

These activities go beyond celebratory or lamenting events that are normally associated with days of this nature. The then chairperson of the Committee, MA Kabore, reiterated this during her opening remarks at its 19th ordinary session when she said that '... such activities could be envisaged in terms of concrete and urgent measures in favour of children with disabilities'.²¹ They require more investment and should be

18 The Call for Accelerated Action on the Implementation of the Plan of Action towards an Africa Fit for Children was adopted by the Ministers of the African Union Member States in 2007 in Cairo, Egypt. See <http://www.carmma.org/resource/call-accelerated-action-implementation-plan-action-towards-africa-fit-children> (accessed 30 August 2013) for an explanation on this process.

19 African Children's Committee *Concept Note on the commemoration of the Day of the African Child on 16 June 2012 under the theme: The rights of children with disabilities: The duty to protect, respect, promote and fulfill* paras 21-38.

20 African Children's Committee (n 19 above) paras 39-46.

21 See African Union *19th Session of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee)*, 26-30 March 2012, Addis Ababa, Ethiopia, para 13. The 19th session report is available for download at: <http://www.AfricanChildrensCommittee.org/wp-content/uploads/2011/03/English-African-Childrens-Committee-Session-19-Report4.pdf> (accessed 30 August 2013).

commended to go a long way in ensuring that the rights of children with disabilities are realised by states parties to the ACRWC.

Monitoring the activities in line with the Day of the African Child concept note is just as important as stipulating what the activities should be. The African Children's Committee therefore incorporated a reporting guideline to states parties when they made the concept note available. It was expected that states parties report to the Committee on the implementation of the activities undertaken in respect of the theme for the Day of the African Child and the concept note. It also goes without saying that these activities cannot be reported on based solely on one day's celebrations.

During the 20th session of the African Children's Committee the UNICEF liaison office to the African Union presented a report on how certain states parties to the ACRWC celebrated the Day of the African Child based on this theme.²² The extent to which states parties gave recognition to the rights of children with disabilities was notable. While one-day celebrations are not necessarily the most effective methods to systematically address challenges, it is worthwhile to acknowledge that if these celebrations caused states parties to give thought to the plight of children with disabilities, then the concept note adopted by the African Children's Committee reached half of its intended objectives. The other half would be reached once states parties report on the implementation of the activities.

The activities proposed in the Day of the African Child concept note serve as a strong basis for implementing the provisions of the ACRWC. Therefore the African Children's Committee should use this as basis when interrogating the country reports by states parties to the ACRWC. This would go a long way in domesticating the provisions of the ACRWC as it pertains to the special recognition envisaged by the ACRWC in relation to children with disabilities.

22 A report on the 20th session of the African Children's Committee is not yet available on the African Children's Committee's website. However, the author was present at this session.

REGIONAL DEVELOPMENTS

DISABILITY RIGHTS IN THE SUB-REGIONAL ECONOMIC COMMUNITIES DURING 2011 AND 2012

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1 Introduction

This subsection reports on recent events relating to disability rights in the East Africa Community (EAC), the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). The core purpose of these Communities is the pursuit of economic integration in the respective subregions; it is therefore understandable that their mandates did not, at least initially, include a clear human rights focus. However, in recent years, an extension of the Communities' purview to include human rights generally, and to some extent, disability rights in particular, can be discerned.¹ This subsection tracks this expansion and also identifies opportunities for further advancement in each subregion.

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1 See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *Africa Human Rights Law Journal* 223-224-225; 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) 65.

2 The East Africa Community

2.1 Legal framework and institutions of the EAC

The East Africa Community (EAC) consists of five Partner States: Burundi, Kenya, Rwanda, Tanzania and Uganda.² The core legal instrument of the EAC is its establishing Treaty of 1999,³ which is supported by a number of protocols⁴ addressing various aspects of co-operation.⁵ Significantly, the Treaty does not contain substantive human rights provisions.

The EAC Treaty sets out the fundamental principles of the Community, which include good governance that is understood to include, amongst other things, the recognition, protection and promotion of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter).⁶ While the core business of the EAC is the pursuit of economic integration amongst member states, issues of good governance and protection of human rights are increasingly forming part of the EAC's agenda as the Community moves deeper into integration.⁷ Indeed, to the extent that the EAC Treaty refers to respect for human rights as a component of good governance, makes reference to aspects of human rights such as gender mainstreaming, and even predicates the admission of new members of the Community on their human rights record,⁸ it can be argued that it has incorporated human

2 Treaty establishing the East Africa Community, (1999) (EAC Treaty) para 2. For a historic overview of economic integration in post-colonial East Africa see H Ochwada 'The history and politics of regionalism and integration in East Africa' in K Omeje & TR Hepner (eds) *Conflict and peace building in the African great lakes region* (2013) 56; AT Mugomba 'Regional organisations and African underdevelopment: The collapse of the East African Community' (1978) 16 *Journal of Modern African Studies* 261 262.

3 The EAC Treaty was signed on 30 November 1999 and entered into force on 7 July 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to this EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007.

4 As of March 2013, the EAC had adopted 21 Protocols to the Treaty, the most recent of which is the Protocol on the establishment of the EAC Common Market East Africa Community (2009). See http://www.eac.int/index.php?option=com_docman&Itemid=226 (accessed 22 August 2013).

5 F Viljoen *International human rights law in Africa* (2012) 471-2 highlights the phases of regional integration. These are the establishment of a preferential trading area or arrangement, a customs union, a common market, an economic union, and ultimately a political union. The EAC is currently (2013) at the third stage.

6 EAC Treaty, art 6.

7 OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 302; LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 13 *SUR International Journal on Human Rights* 119 123.

8 Art 3(3)b.

rights into the Treaty.⁹ This is a remarkable departure from the purely economic pursuit of its predecessor.¹⁰

Among the institutions established by the EAC Treaty,¹¹ the East Africa Legislative Assembly (EALA) and the East Africa Court of Justice (EACJ) are particularly significant to the promotion and protection of human rights, and hence the rights of persons with disabilities. As the legislative arm, the EALA spearheads the development of the law of the Community, and generally provides guidance to the secretariat on legal matters of concern to the Community.¹² For instance, the EALA has adopted resolutions urging Partner States to ratify the Convention on the Rights of Persons with Disabilities (CRPD)¹³ and also to implement the provisions of the Convention.¹⁴ In its 2009 resolution on violence against women in the EAC region, the EALA identified women with disabilities as one of the groups of women that are especially vulnerable to violence.¹⁵

The EACJ is the judicial organ of the EAC,¹⁶ tasked with ensuring adherence to law in the interpretation, application of, and compliance with the Treaty.¹⁷ The EAC Treaty does not specify the law applicable by the EACJ; however article 27(2) of the Treaty provides for the adoption of a Protocol to extend the jurisdiction of the Court beyond the interpretation of the Treaty to other matters including human rights. The adoption of the Protocol is therefore pivotal to the promotion and protection of human rights in the sub-region, including the rights of persons with disabilities – The absence of the Protocol significantly compromises the potential of the EACJ to promote and/or protect the rights of persons with disabilities to the extent that the exercise of such jurisdiction is often contested.¹⁸

⁹ Ruppel (n 7 above) 305.

¹⁰ Art 2(1) of the 1967 East African Co-operation Treaty established the sole purpose of the defunct Community as the pursuit of commercial and other relations of Partner States so as to achieve development and expansion of economic activities the benefits of which were to be equally shared.

¹¹ EAC Treaty, art 9(1).

¹² EAC Treaty, art 49(2)(d).

¹³ EALA 'Resolution of the Assembly urging the EAC Partner States to Ratify the Resolution of the UN General Assembly on the Convention on the Rights of Persons with Disabilities' in the Official Report of the Proceedings of the East African Legislative Assembly 37th sitting – second assembly: second meeting – second session 24 September 2008, 21.

¹⁴ EALA 'Resolution of the Assembly Urging the East African Community and Partner States to take urgent and concerted action to end violence against women in the EAC region and particularly the Partners States' (2009).

¹⁵ EALA (n 14 above).

¹⁶ EAC Treaty, art 9.

¹⁷ EAC Treaty, art 23.

¹⁸ The challenges of the exercise of a human rights jurisdiction by the EAC have been highlighted by various commentators including TO Ojienda "Alice's adventures in wonderland": Preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) 2 *East African Journal of Human Rights and Democracy* 94 95; Ruppel (n 7 above) 306; and ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312. The EACJ has itself put forward its views on the exercise of the extended jurisdiction in *Katabazi & Others v Secretary General of the East African Community & Another* (2007) AHRLR 119 (EAC

The prolonged failure to adopt such a Protocol to extend the Court's jurisdiction has resulted in legal action against the EAC Secretary General, with the EACJ in 2011 finding the Secretary General in violation of the Treaty for this failure to adopt the Protocol.¹⁹ Despite this determination, no action was taken and a follow up case was filed in 2012 against the Secretary General.²⁰ The Protocol was yet to be adopted as at the date of writing.

If the Protocol is eventually adopted, it will open an avenue for the inclusion of international standards such as the CRPD into the legal framework and hence enhance the protection of the rights of persons with disabilities in the subregion. Until such time, it is arguable that the African Charter should serve as a basis for the promotion and protection of the rights of persons with disabilities within the EAC in light of article 6 of the Treaty.

2.2 The promotion and protection of disability rights in the EAC

The EAC Treaty does not provide for disability specific measures. However, the Treaty calls for the promotion and protection of human rights in accordance with the African Charter.²¹ The EAC Treaty refers to persons with disabilities in the context of social welfare and education. Article 102(2) of the Treaty makes reference to collaboration by Partner States in 'putting in place education and training programmes for people with special needs and other disadvantaged groups'. In article 120(c), the Treaty calls for the development and adoption of a common approach towards disadvantaged and marginalised groups, including persons with disabilities, through rehabilitation and provision of amongst others, foster homes, health care, education and training. Article 39 of the Protocol on the EAC Common Market further calls for the harmonisation of social policies by Partner States in various aspects, including the promotion and protection of the rights of marginalised and vulnerable groups.²²

2007); *Nyong'o & 10 Others v The Attorney General of Kenya & 5 Others* Ref No 1 of 2006; *Sitenda Sibalu v The Secretary General of the EAC & 4 Others* Ref No 27 of 2010; and *The Attorney General of the Republic of Uganda & Another v Omar Awadh & 6 Others* Appeal No 2 of 2011. In *East African Law Society & Others v Attorney General of the Republic of Kenya & Others* (Ref No 3 of 2007) [2008] EACJ 1 (1 September 2008), the EACJ had to adjudicate human rights issues though the matter arose from articles 5(3)(g) and 7(1)(a), a factor that clearly indicates the necessity for an express human rights mandate. It is however important to note that none of these cases have focused on the rights of persons with disabilities in particular.

19 *Sibalu* (n 18 above); see also EAC Secretariat, Draft Protocol to the EAC Treaty expanding the jurisdiction of the EACJ (2005) art 10.

20 *Sitenda Sibalu v The Secretary General of the EAC* (2012). The matter was yet to be determined as at the time of writing.

21 EAC Treaty, art 6(d).

22 Protocol to the EAC Treaty on the establishment of the Common Market, art 39(2)(d).

As aforementioned, the EALA adopted a resolution in 2008 calling on Partner States of the EAC to ratify the CRPD. To date, four member states of the EAC have separately ratified the CRPD while Burundi has signed but not ratified the Convention.²³ It would require a more in-depth enquiry to establish the extent to which the subsequent resolution on the implementation of the CRPD was adhered to. Following a meeting of the key stakeholders on disability rights, including departments of the EAC Secretariat, EALA, partner states, civil society, and organisations of persons with disabilities (DPOs), the secretariat of the EAC developed a policy on persons with disabilities based on the article 120(c) of the Treaty.²⁴

The Policy is intended to 'be used as a yard stick to inform other policies, programmes and sectoral plans among EAC partner states'.²⁵ It acknowledges that the promotion and protection of the rights of persons with disabilities requires the adoption of a broad range of measures 'beyond a single piece of legislation'.²⁶ This recognition is profound and reflective of the general trend in the promotion and protection of the rights of persons with disabilities, which often entails the adoption of a disability specific statute backed by policy measures. The Policy also highlights measures taken in each of the member states towards the protection of persons with disabilities. However, while the Policy is a welcome step towards harmonisation of standards on the protection of the rights of persons with disabilities, it fails to give clear direction for action in this regard.²⁷

2.3 Protection of the rights of persons with disabilities in the future of the EAC

The EAC development strategy for the decade, that is 2011-2020, does not contemplate disability specific action, save in as far as there is an intention to ensure the improvement of health and education that could arguably

23 At the time of the Resolution, all member states of the EAC had signed, but only Kenya and Uganda had ratified the CRPD.

24 EAC Secretariat, EAC Policy on Persons with Disabilities (2012). It is important to note that the Council is the ultimate policy making organ of the Community. However, the Secretariat is mandated to co-ordinate and harmonise policies and strategies relating to the development of the Community through the Coordination Committees (article 71(1)(e)). Thus while the Policy in its current form is still instructive and unlikely to be rejected or fundamentally altered by the Council, it nevertheless has to be adopted by the Council to be an official policy of the Community.

25 EAC Policy on Disability 7.

26 EAC Policy on Disability 2.1.2.

27 Though the Policy was adopted in 2012, it does not refer to the EAC Strategic Plan for Gender, Youth, Children, Persons With Disability, Social Protection and Community Development (2012-2016) EAC Secretariat Arusha, Tanzania March 2012, yet this Strategic Plan contemplates the development of a Policy by December 2013 (para 4.3.4).

benefit persons with disabilities.²⁸ However, the EAC Strategic Plan for Gender, Youth, Children, Persons with Disability, Social Protection and Community Development (2012-2016)²⁹ aims to improve the conditions of the vulnerable members of society through the effective introduction and implementation of social protection programmes within the region, and to improve the livelihoods of persons with disabilities.³⁰

The strategic plan also seeks to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities for improved livelihoods.³¹ The mainstreaming of and interventions to address the social and development of, *inter alia*, persons with disabilities, is one of the priorities of the Strategic Plan.³² The Strategic Plan is arguably a lot more comprehensive than the Policy, and a lot more instructive on the potential entry points for the protection of the rights of persons with disabilities. The challenge with it however is that it approaches the issue from a social welfare as opposed to a rights perspective as is required under the CRPD.

The adoption of the Protocol for the extension of the mandate of the EACJ could be another entry point for the entrenchment of the rights of persons with disabilities at the subregional level. If a catalogue of rights is included in the Protocol, there would be an opportunity to include a disability specific provision alongside a general non-discrimination clause that recognises disability as one of the prohibited grounds of discrimination. In the alternative, if a more general provision allowing the Court to refer to international human rights instruments is allowed, the possibility of importing the standards of the CRPD into the subregion will be heightened. Either way, the opportunity presented by the adoption of the Protocol should be explored appropriately by those working to advance disability rights.

It is also noteworthy that the EAC Treaty dedicates certain sections to the development of some social groups, particularly women.³³ This is not necessarily done from a human rights perspective, but is significant in showing that there is sensitivity to the peculiar challenges of marginalised social groups in the EAC, that can be expanded to persons with disabilities.

28 4th EAC Development Strategy (2011/12-2015/16) 'Deepening and accelerating integration' (2011) 14.

29 EAC Strategic Plan for Gender, Youth, Children, Persons With Disability, Social Protection and Community Development (2012-2016) EAC Secretariat Arusha, Tanzania March 2012. The Policy seems to overlap with the EAC Strategic Plan for Gender, Youth, Children, and Social Protection and Community Development (2011 – 2015) of 2010.

30 As above, para 4.1.4.

31 As above, para 4.2.4.

32 As above, para 4.2.3.

33 EAC Treaty, arts 121-122.

3 Southern African Development Community

3.1 Legal framework and institutions

The Southern African Development Community (SADC) consists of fifteen members, extending to the Democratic Republic of the Congo and including the smaller 'island states' such as Mauritius and Seychelles.³⁴

The Treaty of the Southern African Development Community (SADC Treaty), which is the constitutive instrument, contains a general prohibition of discrimination on certain grounds. Disability is expressly listed amongst these grounds.³⁵ In addition to the Treaty, SADC member states have further adopted a number of instruments that include reference to some aspects of disability.³⁶

The SADC Protocol on Health, which envisages cooperation between SADC member states in respect of certain health aspects, *inter alia* provides that States Parties shall promote effective measures to prevent and manage disabilities; increase access to improved technology related to assistive devices, and the creation of a barrier free environment for the equalisation of opportunities for persons with disabilities; and promote community based rehabilitation programmes.³⁷ While the objectives of removing barriers and increasing accessibility are laudable, the emphasis on rehabilitative services and environmental accessibility may be disconcerting.

The Charter of Fundamental Social Rights in the SADC (Social Rights Charter) contains further provisions speaking to disability.³⁸ Member states are required to create an enabling environment so that all persons with disabilities, whatever the origin and nature of their disability, are

34 At the time of writing, the SADC has fifteen members; membership has in the past years varied due to suspension of some member states and admission of new members. See <http://www.sadc.int/member-states/> (accessed 25 September 2013).

35 Art 6(2) of the Treaty of the Southern African Development Community (SADC Treaty), adopted on 17 August 1992 and entered into force in 1993.

36 In fact, most SADC areas of cooperation are closely inter-linked with disability. In terms of art 21 of the SADC Treaty, cooperation will be sought in respect of, *inter alia*, food security; infrastructure and services; human resources development and science and technology; and social welfare. For instance, the type of infrastructure to be developed by SADC member states must be accessible to all, including persons with disabilities. In the same vein science and technology should be employed to advance the rights of everyone, including people with disabilities.

37 Art 15 of the SADC Protocol on Health, adopted in 1999 and entered into force in 2004.

38 The Charter provides a framework for regional cooperation in the collection and dissemination of labour market information, promotes the establishment and harmonisation of social security standards and health and safety standards at workplaces across the subregion. It also promotes the development of institutional capacities as well as vocational technical skills in the region. See www.sadc.int (accessed 25 September 2013.)

entitled to 'concrete measures' aimed at improving their social and professional integration. These measures must, 'according to the capacities of beneficiaries', relate to vocational training, accessibility and mobility, transport, housing and employment.³⁹ While this article ostensibly takes a progressive approach in its broad scope of application (specifically all persons with disabilities, whatever the origin and nature of their disability), and the goals of 'social and professional integration' conform with the CRPD, the phrase 'according to the capacities of beneficiaries' raises serious concerns.

The Social Rights Charter's provisions are taken further in the Code on Social Security, which devotes its article 14 to people with disabilities.⁴⁰ The concrete measures referred to in the Charter are specified more clearly here: member states should ensure that persons with disabilities are entitled to social security, and in particular, benefit from 'social safety net mechanisms'.⁴¹ Member states should further ensure that social security instruments guarantee equality of access and coverage to persons with disabilities.⁴² The special needs (including the need for assistive devices) and circumstances of persons with disabilities should be provided for in national social insurance and social assistance instruments.⁴³

In 2008, SADC member states adopted the SADC Protocol on Gender and Development, which includes an article dedicated to persons with disabilities.⁴⁴ However, the substance of this article is disappointing: States Parties are required, in accordance with the SADC Health Protocol, to adopt legislation and related measures to protect persons with disabilities that 'take into account their particular vulnerabilities'. In addition to the fact that this provision does not contain any statement of rights, the deferral to the (inadequate) Health Protocol and the protective approach adopted towards people with disabilities as a 'vulnerable group' are less than satisfactory.

The Protocol also more generally aims to harmonise the implementation of treaties to which SADC member states have subscribed or ratified. Importantly, the CRPD is included in the list of treaties enumerated in this regard.⁴⁵

In addition, the SADC armory on disability rights also includes Principle 7(9) under the SADC Principles and Guidelines Governing

39 Art 9(1) & (2).

40 Code on Social Security in the SADC (Social Security Code), adopted in 2008.

41 Social Security Code, art 14(1).

42 Social Security Code, art 14(2).

43 Social Security Code, art 14(4).

44 Art 9 of the SADC Protocol on Gender and Development (Gender Protocol), adopted in 2008.

45 See art 3(b) of the Gender Protocol.

Democratic Elections.⁴⁶ In terms of this principle, member states holding elections are required to encourage participation of women and persons with disabilities in all aspects of the electoral process. The principle of participation is also reiterated in the SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region, which lays the foundation for democratic governance and elections in the region.⁴⁷

Despite the promising framework sketched above, it should be noted, however, that certain of these instruments still adopt a 'medical' approach to disability, which may in the long-term not be optimal for to the promotion of disability rights.⁴⁸

3.2 Recent developments

The period from 2011 to 2012 held both positive and negative aspects in the promotion and protection of the rights of persons with disabilities in the SADC region. On the positive side, between 2011 and 2012 the Secretariat and member states of the SADC began a process envisaging the development of policy documents and strategic plans in areas relevant to the disability sector. These include food and nutritional security, non-transmissible diseases, and African traditional medicines.⁴⁹

On the negative side, the SADC Tribunal, which is responsible for ensuring adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, saw its activities suspended in May 2011.⁵⁰ This setback left a major gap in the subregional human rights regime and at the time of writing the Tribunal remains out of action.

In sum, the SADC subregional framework boasts of a more generous inclusion of disability rights in its key documents than, for example, the East Africa Community – admittedly in some instances with some flaws. However, it should be added that SADC is arguably the most attenuated

46 SADC Principles and Guidelines Governing Democratic Elections, adopted in 2004.

47 SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region, adopted in 2001.

48 See generally, 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* (2011) xxiii –xxv. See also 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) 5.

49 See the 2010-2011 Activity report of the SADC Secretariat, available at <http://www.sadc.int/documents-publications/show/2112>, (accessed 20 September 2013). The plans also captured the need to obtain essential medicines for treatment of various diseases (diseases leading to disabilities included) and the manufacture of medicines within the subregion. At the time of writing, the status of these documents was unclear.

50 For further details on the reasons behind the suspension of the activities of the SADC Tribunal, see E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' *ICSID Review* (2013) 1.

among the African subregional economic communities in terms of its capacity to implement and monitor rights-related instruments.

4 Economic Community of West African States

The Economic Community of West African States (ECOWAS) was founded in 1975 by sixteen West African states.⁵¹ The Revised ECOWAS Treaty provides as one of its underlying principles, the 'recognition, promotion and protection of human and peoples' rights' in accordance with the provisions of the African Charter.⁵² Furthermore, Community members also agree to cooperate towards achievement of the realisation of the African Charter on Human and Peoples' Rights.⁵³ This incorporates, by reference, the provisions of article 18(4) of the African Charter relating to persons with disabilities.⁵⁴

In terms of institutional arrangements, the Community is made up *inter alia* of the Community Parliament and the Community Court of Justice. The Community Parliament, which plays an important consultative role, may consider issues relating to human rights and fundamental freedoms and make recommendations to the organs of the Community.⁵⁵

The ECOWAS Court of Justice gives advisory opinions on matters that require an interpretation of the Community text and also has jurisdiction to determine cases of human rights violations that take place within any member state.⁵⁶ This human rights mandate was introduced by the 2005 Supplementary Protocol, which extended the jurisdiction of the Court to cases of human rights violations that occur in any member state.⁵⁷ This implies that the Court can receive cases on disability-based discrimination and other human rights violations of persons with disabilities; the Supplementary Protocol also introduced direct individual access to the Court.

51 Currently, its membership consists of fifteen states which are; Benin, Burkina Faso, Cape Verde, Cote D'ivoire, Gambia, Ghana, Equitorial Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo – see <http://www.ecowas.int> (accessed 25 September 2013).

52 Revised ECOWAS Treaty 1993, art 4(h).

53 Revised ECOWAS Treaty, art 56(2).

54 See Biegon (n 1 above) 67.

55 Arts 6 & 13, Revised ECOWAS Treaty; Art 6, Protocol A/P.2/8/94 relating to the Community Parliament, adopted in 1994 http://www.parl.ecowas.int/English/the_parliament.html (accessed 25 September 2013).

56 Arts 6 & 15, Revised ECOWAS Treaty. See http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5 (accessed 25 September 2013).

57 Article 3(4) Supplementary Protocol A/SP.1/01/Amending Protocol A/P.1/7/91 relating to the Community Court of Justice.

Although the ECOWAS Court is one of the more prolific human rights bodies in the African human rights system, and commentators have noted its 'growing confidence and competence' in the field of human rights.⁵⁸ It has however not yet been presented with a disability-related case.

In 2012 the ECOWAS Commission adopted the ECOWAS Humanitarian Policy to standardise the practice of humanitarian action in ECOWAS member states. Its overall strategic objective is the prediction, prevention and overall management of disasters and conflicts; and enhancing the protection and social situations in West Africa as basic conditions for regional integration, peace, security and development. One of the objectives of this policy is to promote special measures for the protection of vulnerable persons, including 'physically challenged persons' during emergency situations.⁵⁹ The priority measures proposed include 'ensuring the domestication and implementation of relevant international instruments relating to the prohibition of discrimination based on disability'.⁶⁰ Prominent among these instruments is the CRPD. These steps towards domestication of the CRPD, albeit in this mainly humanitarian context, may lead to further concretising the rights of persons with disabilities in the sub-region.

58 Ebobrah (n 1 above) 245.

59 Strategic Objective 5 ECOWAS Humanitarian Policy, ECOWAS Commission 2012.

60 Priority measure (b) ECOWAS Humanitarian Policy.