

# African Disability Rights Yearbook 2023

The *African Disability Rights Yearbook* aims to advance disability scholarship. Coming in the wake 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. It provides an annual forum for scholarly analysis on issues pertaining to the human rights of persons with disabilities. It is also a source for country-based reports as well as commentaries on recent developments in the field of disability rights in the African region.



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African Disability Rights Yearbook 2023

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# EDITORIAL

The editors of the *African Disability Rights Yearbook (ADRY)* are pleased to announce the publication of the eleventh volume of the *ADRY*.

Section A of this volume features four articles by: Sharna-Lee Clarke on protecting the right to a standard of living of internally displaced children with disabilities in KwaZulu Natal, South Africa; Willene Holness on adapting prevention and early intervention measures and parenting capacity assessments in neglect cases involving parents with intellectual disabilities in South African children's courts; Nomatter Sande on going beyond Christian doctrinal disability discourses to embrace human rights in Zimbabwe and Yohannes Zewale on evaluating Ethiopia's Electoral Proclamation through the prism of CRPD voting standards.

Section B contains three country reports by: Ngozi Chuma Umeh on Nigeria; Ilze Grobbelaar-du Plessis on South Africa; and Peter Josiah Shughuru on Tanzania.

Section C on regional developments contains two commentaries by: MK Ande & BD Mezmur on mapping ACERWC's work on the rights of children with disabilities; and Innocentia Mgijima-Konopi & Muluka-Anne Miti-Drummond on refugees with albinism in Africa.

The 2023 volume of the *ADRY* ends with a book review of *The Routledge Disability Handbook of Southern Africa* (2019) which is edited by T Chataika. The book is reviewed by *Yvette Basson*.

The financial assistance of the Wellspring Philanthropic Fund is gratefully acknowledged.

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## **SECTION A: ARTICLES**





# JUMPING IN MUDDY PUDDLES: PROTECTING THE RIGHT TO A STANDARD OF LIVING OF INTERNALLY DISPLACED CHILDREN WITH DISABILITIES IN KWAZULU-NATAL, SOUTH AFRICA

Sharna-Lee Clarke\*

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## Summary

*Internal displacement occurs when persons involuntarily flee from their homes or places of habitual residence but stay within their State's borders to avoid the destructive and harmful effects of natural or man-made disasters. This is a recurring human rights issue in South Africa, with internal displacements occurring frequently in various parts of the country. However, this article focused on the severe floods that occurred in KwaZulu-Natal (KZN) in April and May 2022, which resulted in the internal displacement of 40 000 persons who required urgent intervention and humanitarian support from the State. Due to the trauma and harm caused by displacement, internally displaced persons are generally vulnerable to human rights violations; and children with disabilities are already vulnerable. Therefore, internally displaced children with disabilities require special protection from the State as they are doubly vulnerable and at risk of human rights violations. Thus, this article aimed to evaluate the State's protection of the right to a standard of living of internally displaced children with disabilities in KZN against benchmark standards to determine if the State's response adequately protected the right to a standard of living of these children. The article developed benchmark standards through doctrinal research that relied on the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the African Charter on the Rights and Welfare of the Child, the South African Constitution and Children's Act and drew best practices from the Kampala Convention and the Guiding Principles on Internal Displacement; as well as various secondary legal sources and media articles related to the KZN floods. For the adequate protection of a standard of living for internally displaced children with disabilities, a common*

\* IIE Varsity College, Deputy Dean, Faculty of Law; PhD Candidate (University of Cape Town); LL.M., LL.B. (University of the Western Cape) email: sclarke@varsitycollege.co.za. My thanks to the anonymous reviewers of this article for their helpful comments.

*thread of respect for dignity, non-discrimination, and the provision of special measures to meet the needs of shelter, healthcare and education during and after displacement for children with disabilities was found through both the international treaties and domestic laws.*

## 1 Introduction

Internal displacement refers to ‘the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognised state borders’. As such, internally displaced persons are:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of ... natural or human-made disasters, and who have not crossed an internationally recognised State border.<sup>1</sup>

Internal displacements are not new to South Africa, having been largely experienced during the apartheid era, but also frequently experienced in various impoverished informal settlements around South Africa.<sup>2</sup> In April 2022, the issue of internal displacement received nationwide attention with severe floods and landslides in the province of KwaZulu-Natal (KZN), which destroyed homes and forced thousands of South African families to leave their residential homes and seek refuge elsewhere in KZN.<sup>3</sup> The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported that more than 40 000 persons were internally displaced because of the floods.<sup>4</sup> Many of these persons were children with disabilities who were seriously impacted by the sudden displacement and destruction of their homes. Research has shown that internally displaced persons face severe deprivation and discrimination.<sup>5</sup> Displacement has a highly traumatic and devastating effect on children as it uproots everything they know and exposes them to risks they would not otherwise be exposed to.<sup>6</sup> These risks include healthcare and education deprivation during and

1 African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009, art 1(k) and (l).

2 E Wickeri ‘Grootboom’s legacy: Securing the right to access to adequate housing in South Africa’ Centre for Human Rights and Global Justice Working Paper 5 (2004) 7.

3 South African Government ‘President Cyril Ramaphosa: Declaration of a national state of disaster to respond to widespread flooding’ (18 April 2022) <https://www.gov.za/speeches/president-cyril-ramaphosa-declaration-national-state-disaster-respond-widespread-flooding> (accessed 4 September 2022).

4 Reliefweb ‘South Africa: Floods and landslides’ (April 2022) <https://reliefweb.int/disaster/fl-2022-000201-zaf> (accessed 4 September 2022).

5 United Nations Guiding Principles on Internal Displacement: Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons, Mr Frances M Deng, para 1.

6 E Mooney & D Paul ‘The rights and guarantees of internally displaced children in armed conflict’ Office of the Special Representative of the Secretary-General for Children and Armed Conflict Working Paper 2 (September 2010) 11.

after displacement.<sup>7</sup> It is well known that children with disabilities ordinarily face issues related to deprivation in their daily lives. Still, when internally displaced, their disabilities exacerbate a traumatic and challenging situation.<sup>8</sup>

Further floods in May 2022 aggravated the already dire situation, leaving even more children with disabilities internally displaced.<sup>9</sup> Many informal settlements had been destroyed by the April and May floods, which resulted in the destruction of and severe damage to 8 300 residential dwellings and homes. In addition to the damage to residences, there was extensive damage to public infrastructure. Over 600 schools were damaged, and 66 public healthcare facilities.<sup>10</sup> Due to the tremendous social and economic impact of the floods, the South African government responded quickly with the declaration of a national state of disaster on 18 April 2022. This was necessary to ensure a swift response from and intervention by all government spheres.

While the media hype has died down, the disruptive and destructive effect of the KZN floods is ongoing, which has resulted in a significant need to evaluate the protection of the standard of living of internally displaced children with disabilities. Therefore, this article aims to assess the State's protection of the right to a standard of living of internally displaced children with disabilities in KZN in response to the effect of the recent floods. Benchmark standards have been developed based on the international obligations to protect a standard of living for displaced children with disabilities to assess the State's response to the internal displacement against the benchmark standards. This is necessary to determine if the State's response adequately protected the right to a standard of living for internally displaced children with disabilities. This research uses doctrinal methodology conducted via a desktop study that includes South African and international primary and secondary sources of law.

7 R Adeola & B Mezmur 'The protection of internally displaced children in Africa: A doctrinal analysis of article 23(4) of the African Children's Charter' (2021) 65 *Journal on African Law* 115 at 117.

8 DSD, DWCPD & UNICEF *Children with Disabilities in South Africa: A situation analysis: 2001-2011* (2012) 6 <https://www.unicef.org/southafrica/media/1336/file/ZAF-Children-with-disabilities-in> (accessed 12 September 2022).

9 UNICEF 'Children's lives and rights at risk due to KwaZulu-Natal floods: UNICEF responds to the humanitarian crisis caused by severe flooding, exacerbated by climate change' (20 April 2022) <https://www.unicef.org/southafrica/press-releases/childrens-lives-and-rights-risk-due-kwazulu-natal-floods> (accessed 5 September 2022).

10 SA Government (n 3).

## 2 Defining disability and the limitations of this study

For the purpose of this article, the definition of disability provided in the United Nations Convention on the Rights of the Child's General Comment 9 on the rights of children with disabilities will be relied upon. The definition provided is as follows:

Persons with disabilities include those with 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.<sup>11</sup>

The most recent statistics indicate that 8.6 per cent of the population of KZN presents with disabilities.<sup>12</sup> This amounts to approximately 120 000 persons with disabilities,<sup>13</sup> while 10.4 per cent of those persons with disabilities are children.<sup>14</sup> Unfortunately, exact data on the number of children with disabilities displaced by the floods are unavailable. However, statistics indicate that thousands of children with disabilities lived in areas severely affected by the KZN floods. Therefore, it can be deduced that the severe floods in KZN displaced many children with disabilities. This article is limited by the lack of specific data related to children with disabilities that were displaced because of the floods and has relied on general data related to internally displaced children and persons with disabilities.

This article is limited in its scope to focus only on its purpose, which is to evaluate the State's response in protecting a standard of living for children with disabilities who were internally displaced because of the KZN floods. In doing so, the article will focus on the rights to shelter, healthcare and education, as these rights form the basis of an adequate standard of living for children.

Another limitation of the article is that despite various provisions protecting the rights of refugees internationally and domestically, the provisions related to refugees could not be relied upon to evaluate whether the State has adequately protected the rights of internally displaced children with disabilities because at both the international and domestic

11 UN Committee on the Rights of the Child (CRC), General Comment 9 (2006): The rights of children with disabilities, 27 February 2007, UN Doc CRC/C/GC/9 (2007) para 7.

12 See STATS SA 'Provincial profile: KwaZulu-Natal Community Survey 2016: Report 03-01-10' (2018) <http://cs2016.statssa.gov.za/wp-content/uploads/2018/07/KZN.pdf> p35 (accessed 27 September 2022).

13 The total population in KZN amounts to 10 267 300; see STATS SA 'Census 2011' [https://www.statssa.gov.za/?page\\_id=964](https://www.statssa.gov.za/?page_id=964) (accessed 27 September 2022).

14 See STATS SA (n 12) Table 4.3 indicating the percentage of persons between the ages of 5 and 18 with disabilities in KZN.

level the definition of a refugee provides a requirement that when fleeing their residential home or area the person has crossed the border of their home country into another.<sup>15</sup> This is not the case with internally displaced persons who stay within their country's borders but are forced to leave their homes or areas.

### **3 The international and domestic obligations related to the standard of living of internally displaced children with disabilities in South Africa**

A standard of living is more than simply ensuring that internally displaced children with disabilities are and remain alive during and after displacement. A standard of living refers to the quality of life of the internally displaced child with disabilities. It is closely linked to realising the child's right to shelter, healthcare and education. To develop benchmark standards that can be used to measure the adequacy of the State's protection of a standard of living for internally displaced children with disabilities in KZN, the article must explore the international and national laws containing human rights for children with disabilities. Therefore, this section of the article will rely on international treaties and domestic laws but will also reflect on the provisions of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the United Nations Guiding Principles on Internal Displacement (Guiding Principles on Internal Displacement) to determine best practices and what the standard of living of internally displaced children with disabilities entails.

#### **3.1 The Kampala Convention and the Guiding Principles on Internal Displacement**

A discussion on internal displacement usually centres around the Kampala Convention because the purpose of the Kampala Convention is to provide the obligations and responsibilities of member states to protect and assist internally displaced persons.<sup>16</sup> Under their member status to the Kampala Convention, State Parties are conscious of the vulnerability of internally displaced persons and the special protection they require.<sup>17</sup> Thus, member states are not only bound by the purpose of the Kampala Convention but

15 See definition of 'refugee' in the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3; Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990); and the South African Refugee Act 130 of 1998.

16 Kampala Convention, art 2(d).

17 Kampala Convention, Preamble.

also by its obligations to protect and assist internally displaced persons.<sup>18</sup> In addition, State Parties are also bound by the Guiding Principles on Internal Displacement.<sup>19</sup> This aims to address the specific needs of internally displaced persons and identify rights necessary for the protection and assistance of the internally displaced during and after displacement.<sup>20</sup> The Kampala Convention and Guiding Principles on Internal Displacement complement each other as both provide for the protection of internally displaced persons. Only 33 African States are party to the Kampala Convention and the Guiding Principles on Internal Displacement. South Africa is not one of them, which means that South Africa is not bound by the provisions of the Kampala Convention, and, therefore, internally displaced children with disabilities in South Africa are not afforded special and specific protection for internally displaced persons. Instead, they need to rely on protection from other general international human rights treaties and domestic law. The State gives no authoritative reason why it has yet to ratify the Kampala Convention. Still, the author is of the view that ratifying the convention would signify a commitment by South Africa to uphold the rights and well-being of internally displaced persons, particularly internally displaced children with disabilities, and align its policies and practices with the convention's provisions. Some possible reasons for not ratifying the Kampala Convention include concerns about the compatibility of the Convention with the existing legal framework, the capacity to implement its provisions effectively, and the allocation of resources required for compliance. Additionally, political considerations, such as other priorities on the national agenda, may also influence the decision to ratify the Convention.

Nevertheless, the Kampala Convention contains critical provisions that are relevant and applicable to internally displaced children with disabilities and can therefore serve as best practices for the purpose of this article. Regarding the Kampala Convention, State Parties must respect the human rights of internally displaced persons, particularly the rights of non-discrimination and equality.<sup>21</sup> Non-discrimination is a theme throughout the Kampala Convention and the Guiding Principles on Internal Displacement whereby State Parties are obligated to provide protection and assistance to internally displaced persons without discrimination.<sup>22</sup> During displacement, State Parties must ensure that internally displaced persons are provided with adequate conditions of safety, dignity and security without discrimination. In doing so, the Kampala Convention ensures that State Parties provide internally displaced persons with food, water, shelter, health services, sanitation, education, and social services.<sup>23</sup>

18 Kampala Convention, arts 3, 4 and 5.

19 Guiding Principles on Internal Displacement.

20 Guiding Principles on Internal Displacement, Introduction, para 1.

21 Kampala Convention, art 3(1)(d).

22 See Kampala Convention, art 5(1); See also Guiding Principles on Internal Displacement, principle 1.

23 See Kampala Convention, art 9(2)(a)-(b).

These provisions related to respecting, protecting, and assisting internally displaced persons without discrimination will apply to internally displaced children with disabilities. However, in addition to the general protection provided, the Kampala Convention recognises the vulnerability of persons with disabilities, and children with disabilities, by explicitly providing special protection to children and other persons with disabilities by State Parties.<sup>24</sup> Using the term 'special protection' implies that in the protection and assistance provided to internally displaced persons, State Parties must protect and assist internally displaced children with disabilities in a manner that recognises, respects and provides for the child's disability and special needs.<sup>25</sup> In other words, special care and measures must be implemented for internally displaced children with disabilities, over and above the general measures taken to protect and assist internally displaced persons and children. The Guiding Principles on Internal Displacement recognise that all internally displaced persons and children have the right to an adequate standard of living and that the state must provide, at a minimum, food, water, sanitation, clothing, shelter, education, and health services.<sup>26</sup> The Kampala Convention also requires State Parties to assess the needs and vulnerabilities of internally displaced persons.<sup>27</sup> Moreover, when children are internally displaced, this provision requires a child-based assessment standard to be implemented.<sup>28</sup> Children's rights should shape this child-based assessment standard and have its foundation in dignity, non-discrimination, the child's best interests and participation.

The Kampala Convention and the Guiding Principles on Internal Displacements would be useful tools for the protection of internally displaced children with disabilities; however, because South Africa has not signed and ratified the Kampala Convention and its accompanying Guiding Principles on Internal Displacement, the State is not bound by the provisions related to internally displaced children with disabilities. In a country such as South Africa, plagued by internal displacement for many years, this is unfortunate and a missed opportunity to protect its people. The State must have ratified the Kampala Convention to be held accountable for its response to the internal displacement caused by the KZN floods in terms of this Convention. Instead, it can only be held accountable against the provisions of other international human rights treaties to which the State is bound. Therefore, this article will rely on the provisions of the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the African Charter on the Rights and Welfare of the Child (The African Children's Charter) to benchmark standards for the protection of the

24 See Kampala Convention, art 9(2)(c).

25 See Guiding Principles on Internal Displacement, principle 4(2).

26 See Guiding Principles on Internal Displacement, principle 18.

27 See Kampala Convention, art 5(5).

28 Adeola & Mezmur (n 7) 125.

standard of living of internally displaced children with disabilities as a result of the KZN floods.

### 3.2 The international and regional legal framework

The CRC takes a strong stance against the discrimination of children based on disability when State Parties implement their responsibilities in terms of the CRC and actively obligates State Parties to take all appropriate measures to ensure that children are protected from discrimination.<sup>29</sup> In doing so, the CRC references children with disabilities in article 23, the leading article for implementing the CRC for children with disabilities.<sup>30</sup> Article 23 highlights that children with disabilities should enjoy a full and decent life, ensuring dignity and full participation in society.<sup>31</sup> Furthermore, the CRC emphasises that children with disabilities have the right to special care and that State Parties are obligated to provide support to children with disabilities and their families appropriate to their needs and circumstances.<sup>32</sup> In addition, the CRC obligates State Parties to ensure that all children, including those with disabilities, have access to education, health services, and recreational activities.<sup>33</sup> In Article 27, the CRC provides for the right to an adequate standard of living, survival and development of all children that follow the child's physical, mental, and social development and requires State Parties to take proper measures to protect this right.<sup>34</sup> While the term 'adequate' is not defined and is open to interpretation when read with article 22 of the CRC, it should be taken to mean, at the very least, that State Parties provide for the child's basic needs.<sup>35</sup> For internally displaced children with disabilities, this means the provision of shelter, healthcare services and education with the utmost dignity and in a way that caters to the child's special needs. Pertinent to this article, the CRC recognises that living conditions, including the conditions of the parents, family unit, community, and broader society, primarily influence the child's ability to develop.<sup>36</sup>

29 Convention on the Rights of the Child, art 2.

30 CRC Committee, General comment 9 (n 11). See also EM Chilemba *The national implementation of international human rights law pertaining to children with disabilities in selected jurisdictions in Africa* LLD thesis, University of the Western Cape, 2014, 38.

31 CRC, art 23, para 1. See also General Comment 9, para 11 which states that State Parties must ensure the inclusion of children with disabilities in society.

32 CRC, art 23, para 2.

33 CRC, art 23, para 3. See also General Comments 9, para 12. See also G Quinn & T Degener 'A survey of international, comparative and regional disability law reform' (2002) 120 *Disability Rights Law and Policy: International and National Perspectives* 120.

34 CRC, art 28.

35 M Candappa 'The right to education and an adequate standard of living: Refugee children in the UK' (2000) 8 *International Journal of Children's Rights* 261 at 263.

36 P Hashima & S Limber 'An adequate standard of living necessary for children's cognitive (mental) development' in A Andrews & N Kaufman (eds) *Implementing the UN Convention on the Rights of the Child: A standard of living adequate for development* (1999) 69-86.



The CRPD is a significant milestone in the international realisation of the rights of persons with disabilities. Similarly to the CRC, albeit more general to persons with disabilities and not specifically for children with disabilities, the CRPD also makes provision for the non-discrimination of persons, and therefore children, based on their disability,<sup>37</sup> and the right to life, survival and development which places an obligation on State Parties to take all necessary steps to protect the right to life of all persons with disabilities, including children with disabilities.<sup>38</sup> Specific protection of children with disabilities to ensure the enjoyment of their rights on an equal basis as other children are also provided in the CRPD.<sup>39</sup> Unlike the CRC, the CRPD provides humanitarian emergencies and obligates State Parties to take all necessary measures to protect persons with disabilities.<sup>40</sup>

Likewise, the African Children's Charter also provides for the non-discrimination of children in the enjoyment of their rights<sup>41</sup> and grants special protection to ensure the dignity, self-reliance, and participation in society of children with disabilities.<sup>42</sup> One of the cardinal principles of the African Children's Charter is equality and non-discrimination, particularly related to children with disabilities.<sup>43</sup> The wording used in the African Children's Charter is more robust than those used in the CRC and CRPD in that the African Children's Charter provides for State Parties to ensure the survival and protection of children, including those with disabilities, to the maximum extent possible.<sup>44</sup> The African Children's Charter makes specific provisions for children with disabilities and obligates State Parties to ensure the child's dignity.<sup>45</sup> In addition, unlike the CRC, the African Children's Charter expressly provides for internally displaced children in article 23(4). This is significant for this article in that other international and domestic laws do not reference internally displaced persons in their provisions for refugees, and therefore, in terms of the African Children's Charter, internally displaced children receive the same protection as refugee children.<sup>46</sup> This protects internally displaced children with disabilities in that State Parties must take appropriate measures to ensure the protection and enjoyment of the rights contained in the African Children's Charter for internally displaced children.<sup>47</sup>

37 CRPD, art 5.

38 CRPD, art 10; See also Chilemba (n 30) 55.

39 CRPD, art 7.

40 CRPD, art 11.

41 African Charter, art 3.

42 African Charter, art 13.

43 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127 at 129.

44 African Charter, art 5.

45 African Charter, art 13.

46 Adeole & Mezmur (n 7) 120.

47 African Charter, art 23.

Protecting the right to a standard of living for internally displaced children with disabilities is closely linked to the CRC, CRPD, and the African Children's Charter provisions. These international agreements emphasise the importance of safeguarding the child's dignity, ensuring non-discrimination based on disability, and taking special care that goes beyond what is provided to other internally displaced persons and children. This special care is essential to address the distinct needs of internally displaced children with disabilities, particularly concerning their shelter, healthcare services, and education. When a state becomes a party to an international convention, it agrees to comply with the rules and standards established in the treaty and to incorporate its provisions into its domestic laws and regulations, where necessary.<sup>48</sup> Accordingly, as a State Party to the CRC, CRPD and African Children's Charter, South Africa is bound by the abovementioned provisions. It must include them in the South African legal framework for protecting a living standard for displaced children with disabilities.<sup>49</sup>

### 3.3 The South African legal framework

The South African Constitution (the Constitution) is one of the most profound and progressive in the world. It is founded on dignity and guarantees everyone, including children, the right to respect and protect their dignity.<sup>50</sup> This founding provision can no doubt be applied to internally displaced children with disabilities who must be treated with the utmost dignity during and after displacement. While children enjoy all the rights in the Constitution's Bill of Rights, children also receive special protection in section 28, which includes special rights specifically for children. For the purpose of this article, these special rights ensure the protection of the child's right to shelter, healthcare services and education, which are closely linked to the child's right to a standard of living.<sup>51</sup> The Constitution also provides for instances where a state of emergency is declared. This applies to the KZN floods, as the flood threatened the nation's lives and was declared a state of emergency by the South African president. This was necessary, under the Constitution, to restore peace and order.<sup>52</sup> For this article, it is essential to note that in instances of a state of

48 See OHCHR 'International human rights law' <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (accessed 30 July 2023).

49 South Africa ratified the CRC on 16 June 1995, the CRPD on 30 November 2007, and the African Children's Charter on 7 January 2000.

50 Constitution of the Republic of South Africa, 1996, secs 1 and 10; see also L Mathebe 'The Constitutional Court of South Africa: Thoughts on its 25-year-long legacy of judicial activism' (2021) 56 *Journal of Asian and African Studies* 18 at 21 <https://doi.org/10.1177/0021909620946848> (accessed 31 October 2022).

51 Constitution, sec 28(1)(c).

52 See sec 37 of the Constitution that provides: 'A state of emergency may be declared only in terms of an Act of Parliament, and only when – (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.'

emergency, the Constitution prohibits any derogation regarding the right to dignity.<sup>53</sup>

Consequently, one of the objectives of the Children's Act, which was assented to in 2006, is to give effect to and supplement the special rights for children in section 28 of the Constitution and the provisions of the CRC and African Charter.<sup>54</sup> The Children's Act contains express provisions for children with disabilities. It provides that in any matter concerning children with disabilities, consideration must be given to the special care required by the child, making it possible for the child to exercise their right to education with recognition of the unique needs of the child and providing the child with conditions that protect and ensure their dignity.<sup>55</sup> An emphasis on ensuring children's satisfaction is seen throughout the Children's Act and demonstrates the importance placed on dignity for children by the legislature.<sup>56</sup>

In addition to the general protection of the rights of children with disabilities, the legal framework in South Africa also includes specific legislation that plays a crucial role in shaping disaster management and risk reduction, focusing on ensuring the well-being and rights of children with disabilities during times of crisis. The country's foundational disaster management legislation is the South African Disaster Management Act (DMA).<sup>57</sup> Its primary objective is to establish a comprehensive and integrated disaster management framework that guides the State in effectively responding to and mitigating the impact of disasters. While the DMA does not explicitly concentrate solely on children with disabilities, it does provide a more inclusive framework that considers the specific needs of vulnerable groups, including children with disabilities.

The DMA adopts an all-encompassing approach to disaster management, ensuring that the needs and rights of all individuals, regardless of age, gender, disability, or other characteristics, are considered. It mandates that disaster management plans and strategies should be inclusive, aiming to make the response and support mechanisms accessible and responsive to the unique challenges faced by vulnerable populations. While the DMA does not explicitly mention children with disabilities, it indirectly emphasises several critical aspects related to them.

Firstly, inclusive disaster preparedness is vital in minimising the impact of disasters. For children with disabilities, this involves ensuring that emergency shelters and relief services are adequately equipped to meet their specific needs. Secondly, the DMA underscores the importance of

53 Constitution, sec 37(5)(c) and Table of Non-Derogable Rights p 18.

54 Children's Act 38 of 2005, Preamble and sec 8(1).

55 Children's Act, sec 11(1)(a)-(c).

56 Children's Act see reference to dignity in sec 6(2)(b), 11(1)(c), 11(2)(b), and 11(c).

57 Disaster Management Act 57 of 2002.

protecting human rights during disasters, safeguarding the rights and dignity of children with disabilities and ensuring their continued access to essential services, healthcare, education, and social support. Thirdly, the DMA calls for coordinated efforts among government departments, municipalities, and stakeholders involved in disaster management. This coordination is especially crucial in effectively addressing the diverse needs of children with disabilities and ensuring that support services remain available during and after disasters. Lastly, the DMA acknowledges that inclusive disaster management necessitates the active involvement of affected communities in decision-making processes. For children with disabilities, this means consulting with their caregivers, support networks, and organisations representing their interests to understand their unique requirements and ensure their voices are considered during disaster planning.

In contrast, the National Disaster Management Framework (NDMF) of South Africa serves as a national guiding document for disaster management.<sup>58</sup> Still, it does not have specific provisions exclusively focused on children with disabilities. Instead, the NDMF outlines the principles, policies, strategies, and actions required to effectively prevent, prepare for, respond to, and recover from disasters and emergencies within the country. Similarly, the provincial disaster management plan<sup>59</sup> and NDMF, like the DMA, strongly emphasise an inclusive approach to disaster management, considering the needs of vulnerable populations, including children with disabilities. While the NDMF also does not explicitly mention children with disabilities, it recognises that certain groups may face unique challenges during disasters and advocates for a comprehensive and integrated disaster management approach that considers the diverse needs of all individuals, regardless of age, gender, disability, or other characteristics. Despite the absence of explicit mention, the NDMF promotes inclusive disaster management planning, targeted support for vulnerable groups, community involvement, and equitable access to disaster management resources and services.

The international human rights law and domestic provisions provide a standard of living for an internally displaced child with disabilities that requires respect for and protection of the child's dignity throughout the displacement period, namely, during and after displacement. It also requires the internally displaced child with disabilities to receive protection and assistance from the State, at a minimum, on an equal basis as other children, but more particularly to receive special care measures from the State. In the protection of a standard of living for internally displaced

58 Government of South Africa National Framework for Disaster Management (2005) available at <https://www.preventionweb.net/publication/south-africa-national-disaster-management-framework-2005> (accessed 4 March 2023).

59 Available at <https://www.kzndard.gov.za/images/Documents/ARDM/Sectoral%20Disaster%20Risk%20Management%20Plan.pdf> (accessed 30 July 2023).

children with disabilities, the special measures taken by the State must account for the special needs of the child and provide shelter, healthcare services and education to the child. However, a significant shortcoming in the legal frameworks related to internally displaced children with disabilities in South Africa is that South Africa has not ratified the Kampala Convention. While the international and domestic frameworks provide general protection of the child's rights during instances of disaster, internal displacement is a nuanced disaster that is on the rise in South Africa. The South African legal framework falls short because there is no specific protection for internally displaced children.

#### **4 Benchmark standards for the protection of a standard of living for internally displaced children with disabilities**

The evaluation of the State's response to protecting a standard of living for internally displaced children with disabilities in KZN draws on the obligations and responsibilities provided by the CRC, CRPD and African Charter. Despite not being bound by the Kampala Convention, these standards are aligned with the Kampala Convention and guiding principles on internal displacement.<sup>60</sup>

Two primary standards have been benchmarked and will be used to evaluate the State's response to determine whether they have met their international obligations and adequately protected the right to a standard of living of internally displaced children with disabilities:

- (i) The dignity of internally displaced children with disabilities must be ensured during and after displacement; and
- (ii) Internally displaced children with disabilities must have access to education, health services and shelter that is appropriate to and meets the child's special needs during and after displacement.

#### **5 The dignity and special measures of protection for internally displaced children with disabilities**

There is no express definition or interpretation of the terms 'dignity' and 'special measures' in the CRC, CRPD or African Charter as these terms relate to children with disabilities. This article investigated the interpretation and meaning of these terms in these international conventions to adequately evaluate the State's response to internally displaced children with disabilities against the benchmark standards.

60 Kampala Convention, art 3(1)(c), art 7(5)(c), art 9(2)(a) and art 9(2)(c).

## 5.1 The dignity of internally displaced children with disabilities

For internally displaced children with disabilities, a connection between dignity and non-discrimination is crucial due to their vulnerable and marginalised circumstances. Internally displaced children with disabilities possess inherent dignity and worth. However, during displacement, they may face significant challenges to their dignity, such as a lack of access to their basic needs, inadequate living conditions, and limited opportunities for education and healthcare. Respecting their dignity means recognising their unique needs and experiences and providing appropriate support and care that upholds their self-respect and ensures their rights are protected during and after displacement.

Similarly, internally displaced children with disabilities are particularly vulnerable to discrimination due to their displaced status and disability. They may encounter barriers in accessing essential services, discrimination in shelter accommodations, and exclusion from educational opportunities and healthcare facilities. Non-discrimination ensures that these children are treated fairly and equally, regardless of their disability or displacement status. It calls for targeted measures and special care to address their needs and ensure they are not further marginalised or excluded from humanitarian assistance and services.

The connection between dignity and non-discrimination for internally displaced children with disabilities means that their rights, well-being, and dignity should be at the forefront of disaster response and management efforts. The State and relevant authorities should take proactive measures to identify and address the unique needs of these children, providing them with accessible and inclusive shelter, healthcare, and educational opportunities. By doing so, they uphold the dignity of internally displaced children with disabilities and work towards creating a more inclusive and caring environment that respects the rights of all internally displaced children, irrespective of their circumstances.

The Committee on the Rights of the Child (CRC Committee) expanded on the interpretation of dignity. It held that protecting and ensuring the dignity of children requires State Parties to identify individual children or groups of children that need special measures to realise their rights.<sup>61</sup> For internally displaced children with disabilities, this would mean that the State must identify and recognise that children with disabilities require special protection measures during and after displacement over and above the measures put in place for other children.

61 UN Committee on the Rights of the Child (CRC), General Comment 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc CRC/GC/2003/5 (2003) para 12.

In addition, applying children's rights on an equal basis does not require children to have access to or identically apply their rights or to be treated identically when enforcing their rights.<sup>62</sup> Instead, the circumstances of individuals or groups of children will determine whether their rights are applied and implemented equally to other children. Therefore, the special measures of protection that should be afforded to internally displaced children with disabilities to ensure their dignity and non-discrimination do not discriminate against other children or result in an unequal application and enforcement of children's rights generally.

Discrimination against internally displaced children with disabilities undermines the child's dignity<sup>63</sup> and ability to benefit from the State's intervention during and after displacement. Furthermore, the CRC Committee has emphasised that discrimination against children with disabilities reduces their quality of life. Children with disabilities require additional and special measures to realise their rights.<sup>64</sup> This is especially applicable to internally displaced children with disabilities where their quality and standard of living and access to other rights such as shelter, healthcare and education will be directly impacted and adversely affected by discrimination during and after displacement. This is supported by the Children's Act, which domesticates the CRC and the African Children's Charter and expressly provides for respecting and protecting the inherent dignity of children, ensuring they are treated equitably and not unfairly discriminated against.<sup>65</sup>

Moreover, the provision to ensure the child's best interests in all matters affecting the child provides that the child's well-being and dignity are considered by the role-players tasked with ensuring their right to a standard of living during and after displacement.<sup>66</sup> In addition, the Children's Act provides specific protection for children with disabilities and provides that children with disabilities must be given opportunities and conditions that promote their dignity and participation.<sup>67</sup> Overall, the South African Children's Act strives to protect and uphold the dignity of displaced children with disabilities by recognising their rights, specific needs, and vulnerabilities. It emphasises their well-being and inclusion in decision-making processes, ensuring they receive appropriate care, protection, and support during displacement.

62 As above.

63 CRC, General Comment 1: Article 29 (1), The aims of education, 17 April 2001, UN Doc CRC/GC/2001/1 (2001) para 10.

64 CRC, General Comment 7 (2005): Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1 (2006) paras 11 and 12.

65 Children's Act, sec 2(a)-(c).

66 Children's Act, sec 7.

67 Children's Act, sec 11.

## 5.2 The meaning of appropriate measures taken to meet the special needs of internally displaced children with disabilities

The African Charter, Kampala Convention and the Guiding Principles on Internal Displacement all refer to ‘appropriate measures’ or ‘special measures’. However, no further explanation or interpretation is provided regarding what this terminology means and requires of State Parties. Therefore, it is necessary to rely on other treaties where similar language is used to interpret its meaning and the obligation created by the term.

The International Covenant on Economic, Social and Cultural Rights uses similar terminology, which the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) said must be interpreted by its full and natural meaning.<sup>68</sup> The ordinary meaning of appropriate measures would be suitable measures or measures that consider and are ‘proper’ in the given circumstances.<sup>69</sup> Placing the ordinary sense of the terminology within the context of internally displaced children with disabilities, the obligation created by the provisions for special or appropriate measures can be interpreted to mean that State Parties must take all possible measures, considering the circumstances of internally displaced children with disabilities, to ensure that these children can enjoy their rights. This would require action by State Parties to ensure that internally displaced children with disabilities have access to shelter, healthcare and education during and after displacement that accommodates the special and unique needs of individual internally displaced children with disabilities over and above what is provided for non-disabled children. In a practical sense, this means, for example, that temporary shelters provided to internally displaced children in wheelchairs must be easily accessible to the child; healthcare services provided to internally displaced children with psychosocial disabilities must be the services of psychiatrists and psychologists; temporary schooling for internally displaced children with intellectual disabilities must be special schooling that caters for intellectual disabilities.

Moreover, the child’s right to life, survival and development is one of the guiding principles for interpreting the CRC and the African Children’s Charter. Thus, it must be included in interpreting the special measures State Parties require for displaced children with disabilities.<sup>70</sup> The CRC Committee has interpreted the child’s development as needing to be understood ‘in its broadest sense as a holistic concept embracing the child’s

68 CESCR, General Comment 3 on Article 2(1): The Nature of State Parties’ Obligations, 14 December 1990, UN Doc E/1991/23 (1990) para 4.

69 Adeole (n 7) 122.

70 M Nowak *A commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development* (2005) 14.



physical, mental, spiritual moral and psychological development'.<sup>71</sup> The child's right to life, survival, and development<sup>72</sup> is closely intertwined with the special measures that State Parties should implement to provide for the special needs of displaced children with disabilities. This is due to the right to life and survival emphasising the obligation of States to protect children from any form of harm or danger. Displaced children with disabilities are often more vulnerable during crises and displacement, at higher risk of facing life-threatening situations.<sup>73</sup> States must implement special measures to ensure the safety and protection of these children, including access to safe shelter, nutrition, and medical care, thereby safeguarding their right to life and survival.

Furthermore, the right to life and development requires State Parties to ensure that all children, including displaced children with disabilities, access essential services necessary for their growth and well-being.<sup>74</sup> This includes access to specialised healthcare, education, and social services tailored to their unique needs. State Parties should provide these services during displacement to enable the development and potential of these children, fulfilling their right to survival and development. Moreover, the right to development includes the right to education. State Parties must provide inclusive and accessible education for displaced children with disabilities, ensuring they have equal opportunities for learning and development. Special measures are essential to address any barriers that may hinder their access to education during displacement, allowing them to reach their full potential.<sup>75</sup> In addition, displacement and disabilities can have adverse psychological effects on children. States should establish special measures to provide psychosocial support for displaced children with disabilities, helping them cope with trauma and stress during crises. This support is crucial for their overall well-being, survival, and development. The right to life, survival, and development also include the right of children to be heard and participate in decisions affecting them. States should involve displaced children with disabilities in decision-making processes concerning their care, support, and well-being. This participation empowers them, ensures their dignity, and facilitates measures catering to their needs. By upholding these rights and implementing specific measures, States can better address the unique

71 UN Committee on the Rights of the Child (CRC), General Comment 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc CRC/GC/2003/5 (2003) paras 12 and 18.

72 CRC, art 6; See also African Children's Charter, art 5.

73 D Nguyen 'The development of four leading principles of the Convention on the Rights of the Child in Vietnam's juvenile justice' (2017) 4 *Bergen Journal of Criminal Law & Criminal Justice* 267 at 272.

74 D Hodgson 'The child's right to life, survival and development' (1994) 2 *The International Journal of Children's Rights* 369 at 385.

75 S Kamga 'COVID-19 and the violation of the right to basic education of learners with disabilities in South Africa: An examination of *Centre for Child Law v Minister of Basic Education*' (2021) 65 *Journal of African Law* 347.

needs of displaced children with disabilities, safeguarding their well-being and promoting their overall development and potential.

Likewise, the Children's Act contains significant provisions pertaining to special measures for meeting the specific needs of displaced children with disabilities. These provisions ensure that these children receive appropriate care, protection, and support, addressing their unique requirements and enhancing their overall well-being. One key aspect of the Children's Act in this regard is the application of the best interests of the child principle. This principle places the child's best interests as the primary consideration in all matters concerning them, including decisions about the care and support provided to displaced children with disabilities.<sup>76</sup> By prioritising their needs and circumstances, the Act ensures appropriate measures are taken to meet their special requirements. The Act also emphasises non-discrimination, prohibiting discrimination against children, including those with disabilities.<sup>77</sup> Displaced children with disabilities should not face discrimination or be denied access to services solely because of their disability status, which promotes equal treatment and protection for all children. Furthermore, the Children's Act recognises every child's right to access appropriate healthcare and social services.<sup>78</sup> This includes displaced children with disabilities, who may require specialised medical care, rehabilitation services, and other support tailored to address their specific needs effectively.

The Act also provides alternative care arrangements for children whose parents or family members cannot care for them. This provision encompasses displaced children with disabilities, who may require specialised care and support in alternative care settings to cater to their unique needs.<sup>79</sup> In addition, the Children's Act acknowledges the right of children to participate in matters that directly affect them.<sup>80</sup> In the context of displaced children with disabilities, this means allowing them to express their views and preferences regarding their care and support. The Act ensures that their voices are heard and considered by involving them in decision-making. By encompassing these provisions, the South African Children's Act strives to protect and enhance the well-being of displaced children with disabilities, emphasising their unique requirements in disaster and displacement.

76 Children's Act, sec 7.

77 Children's Act, sec 2.

78 Children's Act, sec 13.

79 Children's Act, sec 167.

80 Children's Act, sec 7.

## **6 Evaluating the State's response to internally displaced children with disabilities against the benchmark standards**

In his speech on 18 April 2022, South Africa's president Cyril Ramaphosa declared a national state of disaster because of the KZN floods and emphasised that the primary responsibility of the national sphere of government was to coordinate and manage the response to the disaster in collaboration with the provincial and municipal spheres.<sup>81</sup>

With the help of the provincial and municipal governments, the national government planned to address the disaster in three phases. Phase One focused on immediate humanitarian relief to ensure that the basic needs of all displaced persons would be met; Phase Two focused on the rehabilitation of displaced persons by rehoming them and restoring the provision of services offered by the destroyed and damaged public infrastructure; Phase Three focused on the rebuilding of significant infrastructure and houses with a focus on implementing measures to protect residents from disasters of this nature in future.<sup>82</sup>

### **6.1 Shelter**

The immediate need of the displaced families and children affected by the floods was providing shelter. Initially, internally displaced persons were provided shelter in various community halls, receiving mattresses, food, and hygiene packs.<sup>83</sup> However, the State intended to build 4 396 temporary accommodation units by the end of April 2022.<sup>84</sup> Ninety-eight shelters accommodated 8 400 people; 1 700 were children under ten, and 217 were persons with disabilities.<sup>85</sup> Unfortunately, no further breakdown of how many persons with disabilities were children and no specific

81 SA Government (n 3).

82 Discussion of the three-phase plan during Ad Hoc Joint Committee on Flood Disaster Relief and Recovery meeting with the Department of Planning, Monitoring and Evaluation (DPME), the Department of Cooperative Governance and Traditional Affairs (CoGTA), the National Disaster Management Centre (NDMC) and the KwaZulu-Natal (KZN) CoGTA held on 23 May 2022; meeting video and audio available at <https://www.youtube.com/watch?v=0dSw-ZoMry8> (accessed 30 July 2023).

83 'KZN flood victims to get temporary accommodation by weekend' *SA Government News Agency* 25 April 2022 <https://www.sanews.gov.za/south-africa/kzn-flood-victims-get-temporary-accommodation-weekend> (accessed 1 November 2022).

84 B Macupe 'Temporary homes to be built by end of the week for flood victims – Sihle Zikalala' *City Press* 24 April 2022 <https://www.news24.com/citypress/news/temporary-homes-to-be-built-by-end-of-the-week-for-flood-victims-sihle-zikalala-20220424> (accessed 1 November 2022).

85 Social Cluster Media Briefing Statement Outlining the Government's Response to the Disaster Emanating from the Floods in KwaZulu-Natal by the Department of Health (2022) <https://www.health.gov.za/wp-content/uploads/2022/04/CLUSTER-MEDIA-BRIEFING-STATEMENT-FOR-28-APRIL-2022..pdf> (accessed 1 November 2022).

number of children between the ages of ten and 18 was provided. However, even after the first temporary accommodation units were allocated, thousands of internally displaced persons remained in the community hall shelters.<sup>86</sup> By September 2022, one such hall still accommodated more than 100 internally displaced persons, including children who had been there since April 2022.<sup>87</sup> By September, there was less coordination of humanitarian relief, and very little food was given to those in shelters. Internally displaced persons complained to the media about sharing the space and bathroom facilities with hundreds of others, their children being exposed to alcohol abuse, arguments, and altercations between people with no privacy for their families. Parents complained that their children were exposed to inappropriate sexual behaviour, the conditions in the community halls had become unhygienic with minimal cleaning, and it had been extremely cold during the winter months.<sup>88</sup>

The State responded to these complaints and expressed dismay at the inappropriate behaviour of some persons living in the community halls but confirmed that food was still being provided to shelters by the Department of Social Development. However, the Department knew that many people were taking more meals than allocated to them, leaving nothing left for others. The Department of Human Settlements confirmed they were working tirelessly sourcing temporary and permanent accommodation and soon relocating more internally displaced persons. The Department confirmed this and committed to moving all internally displaced persons out of shelters and into accommodation units by December 2022. In addition, the State confirmed that social workers were still providing social services to those in shelters.

In August 2022, the State's Ad Hoc Joint Committee on Flood Disaster Relief and Recovery completed a visit to some shelters in KZN where they found overcrowding and the conditions in the shelters were found to be unacceptable and inhumane.<sup>89</sup> In September 2022, the spokesperson for the Department of Human Settlements and Public Works confirmed that since April, there had been a reduction of 38 per cent of persons in shelters, and 980 families were occupying temporary accommodation units.<sup>90</sup>

86 *SA Government News Agency* (n 83)

87 C Mazibuko 'Life in a community hall is hard for victims of April floods' *Sunday Tribune* 55 September 2022 <https://www.iol.co.za/sunday-tribune/news/life-in-a-community-hall-is-hard-for-victims-of-april-floods-5eed4b00-15fe-465c-9397-0f30edf039e9> (accessed 1 November 2022).

88 As above.

89 'Committee concludes oversight visit to KZN' *SA Government News Agency* 25 August 2022 <https://www.sanews.gov.za/south-africa/committee-concludes-oversight-visit-kzn> (accessed 1 November 2022).

90 Mazibuko (n 87).

## 6.2 Healthcare services

Shortly after the KZN floods occurred, the South African Minister of Health identified vulnerable groups who would be most affected by the floods. The groups identified were children and persons with disabilities.<sup>91</sup> Therefore, children with disabilities are doubly vulnerable due to their minority and special needs. In response, the Department of Women, Youth and Persons with Disabilities facilitated the Women's Economic Assembly rollout to develop a programme of action to assist these vulnerable groups of persons affected by the floods.<sup>92</sup>

Social services were prioritised to assist internally displaced persons with psychosocial healthcare. In doing so, comprehensive assessments of households and individuals were conducted, and services were made available based on the needs established by the assessment.

## 6.3 Education

While schooling continued in the unaffected areas of KZN, more than 630 schools were destroyed or damaged by the KZN floods and attendance in school by internally displaced children after the floods remained problematic. This was prioritised by the State, which acknowledged in April 2022 that they would monitor the schooling of internally displaced children with disabilities and how the KZN floods had affected their education.<sup>93</sup>

In a media briefing, the State confirmed that it was specifically focused on children, generally, who had been displaced from schools.<sup>94</sup> However, in September 2022, hundreds of children in shelters were still not attending school when UNICEF South Africa provided relief through recreational toys and learning materials to these children.<sup>95</sup> Unfortunately, there is no information about how many internally displaced children, who are still unable to access education, are children with disabilities.

91 K Ledwaba 'Government prioritises women and persons with disabilities affected by the KZN floods' *City Press* 28 April 2022 <https://www.news24.com/citypress/news/government-prioritises-women-and-persons-with-disabilities-affected-by-the-kzn-floods-20220428> (accessed 1 November 2022).

92 Social Cluster Media Briefing Statement (n 85) 6.

93 Ledwaba (n 90).

94 Social Cluster Media Briefing Statement (n 85) 2.

95 L Matangira 'Over 1 000 children affected by April floods receive play and learning materials' UNICEF 26 September 2022 <https://www.unicef.org/southafrica/stories/over-1000-children-affected-april-floods-receive-play-and-learning-materials> (accessed 1 November 2022).

#### **6.4 Benchmark standard one: Ensuring the dignity of internally displaced children with disabilities**

For the State to meet benchmark standard one, for the right to a standard of living for internally displaced children with disabilities, it must be established that the dignity of children with disabilities was ensured during and after displacement. For dignity to be ensured, the State must have identified groups of persons that require special measures to ensure the realisation of their rights. The State's response to the recent flooding in KZN and the subsequent internal displacement of children with disabilities has positive and concerning aspects when evaluated against the benchmark standard one.

In the aftermath of the KZN floods, the State's response to the displacement of children with disabilities revealed both positive and concerning aspects. These aspects shed light on the extent to which the dignity and well-being of these vulnerable children were respected and protected during the crisis.

In terms of positive aspects, the State swiftly recognised the immediate need for shelter for families, including those with children having disabilities. Community halls were made available quickly and equipped with essential items such as mattresses, food, and hygiene packs. This initiative aimed to provide a temporary but comfortable solution to meet the displaced children's basic needs. Furthermore, the State demonstrated its commitment to addressing the unique challenges faced by children with disabilities. It identified vulnerable groups, including these children, and prioritised social services and psychosocial healthcare to cater to their specific needs. The comprehensive assessments conducted to tailor services based on individual needs showcased a genuine acknowledgement of the distinctive difficulties children with disabilities might encounter.

However, several concerning aspects emerged from the State's response. Despite their initial efforts, some community hall shelters quickly became overcrowded and unhygienic, undermining the dignity and well-being of internally displaced children by exposing them to inappropriate behaviour and substandard living conditions. A significant concern was the prolonged stay of internally displaced persons, including children, in community hall shelters for months after the floods. This delay in relocation may have further compromised their dignity and well-being, as these shelters were not designed for long-term habitation. Adding to the challenges was the lack of specific data regarding the number of internally displaced children with disabilities, making it difficult to fully comprehend the scope of this vulnerable group's needs and experiences. Moreover, education access remained a challenge for many displaced children, including those with disabilities, due to the destruction of schools. Although the State acknowledged the importance of monitoring

schooling, it did not provide sufficient data on how many of these children faced barriers to education and were being left behind.

While the State's response has shown some positive efforts in addressing the immediate needs of displaced children with disabilities, there were concerning aspects, particularly regarding overcrowded and unhygienic shelters, delays in relocation, and lack of specific data on children with disabilities. These aspects raise concerns about adequately protecting their dignity and well-being during the displacement. To align with the benchmark standard of ensuring the dignity of displaced children with disabilities, the State should focus on improving the living conditions in shelters, expediting relocation to appropriate accommodation, collecting disaggregated data on children with disabilities, and ensuring their access to education and psychosocial support. The State must maintain a child-centred approach, prioritising these vulnerable children's rights and dignity during all disaster response and recovery phases. The effect of the KZN flood and the displacement of children with disabilities is ongoing. The author, therefore, hopes for additional reports and reflections to be available for future research.

## **6.5 Benchmark Standard Two: Special measures taken to ensure access to appropriate shelter, health care services and education**

For the State to meet benchmark standard two, for the right to a standard of living of internally displaced children with disabilities, it must be established that special measures were taken to ensure access to rights that are closely related to a standard of living for children with disabilities, namely, the rights to shelter, healthcare and education. For special measures to be taken, it must be shown that the State has taken all possible measures, considering the circumstances of children with disabilities, to ensure that they have access to shelter, healthcare and education that accommodates their special needs.

### **6.5.1 Shelter**

The State swiftly acknowledged the pressing need for shelter and promptly established community halls as temporary accommodations for those displaced, including children with disabilities. This initiative included the provision of mattresses, food, and hygiene packs, catering to the immediate needs of the affected population. Adding to these efforts, the State embarked on an ambitious plan to erect 4 396 temporary accommodation units, which is evidence of the State's dedication to ameliorating the shelter conditions of those uprooted by the floods.

However, despite the initial resolve, several community hall shelters eventually became breeding grounds for overcrowding and unhygienic conditions. As mentioned under benchmark standard one, the dignity and well-being of displaced children with disabilities were compromised, as they were subjected to inadequate privacy and exposed to unsuitable and inappropriate behaviour, undermining the sanctity of their living conditions. Adding to these concerns, many internally displaced persons, including children, remained in community hall shelters for prolonged periods with no alternative long-term accommodation. Furthermore, the State's response appeared to lack the foresight to ensure that community hall shelters were equipped to accommodate children with disabilities. This oversight was particularly evident in the absence of specialised measures, such as facilities tailored to the needs of children with physical disabilities reliant on assistive devices for mobility. Alarming, no systematic assessment was conducted to ascertain the specific shelter requirements of internally displaced children, highlighting a critical gap in ensuring their well-being.

While strides were made in providing temporary shelter solutions and plans for future accommodations, the issues of overcrowding, unhygienic conditions, and the lack of tailored provisions for children with disabilities marred the otherwise praiseworthy efforts. The prolonged stays in community hall shelters and the dearth of assessments only further underscored the pressing need for more comprehensive and inclusive strategies.

### **6.5.2 Healthcare services**

The State demonstrated an understanding of the vulnerability of children with disabilities affected by the floods. This recognition translated into prioritising social services and psychosocial healthcare to cater to the unique needs of this group. A noteworthy stride was the execution of comprehensive assessments targeting households and individuals, resulting in services that were tailored to their distinct requirements. This proactive approach signified the State's acknowledgement of the specific challenges that children with disabilities face during such situations.

However, certain concerning aspects also surfaced. Notably, there is a lack of explicit information detailing the extent to which healthcare services were specifically tailored to cater to the needs of children with disabilities. This raises questions about the effectiveness and inclusivity of the provided medical care for this vulnerable group. Furthermore, a notable gap emerged in the absence of recent updates regarding the Women's Economic Assembly's initiative. This initiative, set in motion by the Department of Women, Youth and Persons with Disabilities, aimed to establish a programme ensuring the health rights of vulnerable groups, including children with disabilities. Although the Women's Economic



Assembly conducted its annual conference in October 2022, it refrained from furnishing any reports concerning the progress and outcome of its mandate.

The evaluation of the State's healthcare response to internally displaced children with disabilities unveils a mixed landscape. While commendable efforts were evident in recognising vulnerabilities and tailoring services, gaps remain in the form of a lack of specific details on healthcare customisation and the status of initiatives like the Women's Economic Assembly. This nuanced assessment underscores the need for sustained attention to ensure a comprehensive and targeted approach to healthcare for these vulnerable children.

### **6.5.3 Education**

The State displayed an awareness of the significance of monitoring the educational situation of internally displaced children, encompassing those with disabilities. It acknowledged the inherent challenges displaced children with disabilities encountered in maintaining their schooling due to the floods' destruction of educational institutions. Additionally, an encouraging development was the intervention of UNICEF South Africa, which extended relief in the form of recreational toys and learning materials to internally displaced children. This initiative underscored a concerted effort to provide educational support to these children amidst their displacement.

However, the State did not furnish specific data regarding the precise number of internally displaced children with disabilities who faced hindrances in accessing education. This information gap needs to be revised to ensure an accurate assessment of the magnitude of the issue. Furthermore, the lack of details pertaining to targeted measures designed to ensure inclusive and specialised education for children with disabilities during displacement raises concerns about the comprehensiveness of educational provisions for this vulnerable group. Moreover, no data was available to shed light on the persisting lack of educational access for internally displaced children with disabilities due to the lingering impacts of the KZN floods.

While the State's response demonstrated some positive efforts to address the rights to shelter, healthcare, and education for displaced children with disabilities, there are concerning aspects that require improvement. The overcrowded and unhygienic conditions in some community hall shelters, delays in relocation, lack of specific data on children with disabilities, and limited information on targeted measures for inclusive education raise concerns about the adequate fulfilment of these rights during displacement. To meet benchmark standard two, the State should take more targeted and systematic measures to ensure that the

rights to shelter, healthcare, and education are fully and inclusively addressed for children with disabilities during and after displacement. The State should ensure that special measures are implemented to meet the specific needs of children with disabilities and promote their overall standard of living during and after disasters and displacement.

## 7 Conclusion and recommendations

Internal displacement occurs when persons are involuntarily forced to flee from their homes or places of habitual residence but stay within their State's borders to avoid the destructive and harmful effects of natural disasters. This is a recurring human rights issue in South Africa, with internal displacements occurring frequently in various parts of South Africa. However, this article focused on the severe floods that occurred in KZN in April and May 2022, resulting in 40 000 persons becoming internally displaced and requiring urgent intervention and humanitarian support from the State.

This article aimed to evaluate the State's protection of the right to a standard of living for internally displaced children with disabilities in KZN in response to the effect of the recent floods. This was done by developing benchmark standards based on the international obligations for the protection of a standard of living for displaced children with disabilities and then assessing the State's response to the effect of the internal displacement caused by the KZN floods against the benchmark standards to determine if the State's response adequately protects the right to a standard of living of these children.

To develop benchmark standards, the article relied on international and domestic laws related to children with disabilities to determine the obligations created for states by law. In doing so, it was found that a common thread through the international treaties and domestic laws for a standard of living for internally displaced children with disabilities was the protection of the dignity of children and the provision of special measures to meet the need for shelter, healthcare and education of internally displaced children with disabilities during and after displacement.

To meet benchmark standard one, it must be established that the dignity of children with disabilities was ensured during and after displacement. For dignity to be ensured, the State must have identified groups of persons that require special measures to ensure the realisation of their rights. The article found that the South African State recognised children with disabilities as a vulnerable group requiring special measures and close monitoring during and after displacement to ensure that they have access to their rights. To meet benchmark two, it must be established that the State has taken all possible measures, considering the circumstances of children with disabilities, to ensure they have access to

shelter, healthcare and education that accommodates their special needs. There was some acknowledgement of the special healthcare needs of children with disabilities, but this was not done in providing shelter or education to accommodate the special needs of internally displaced children with disabilities.

Without formal reports by the relevant State Departments, it is difficult to establish precisely what was provided to internally displaced children with disabilities and to confirm whether that adequately protects the standard of living of internally displaced children with disabilities. However, the current data indicates that many internally displaced children with disabilities still live in community hall shelters and do not attend a school where they can be stimulated seven months after the KZN floods. It can be inferred that this indicates that despite recognition and respect of the dignity of internally displaced children with disabilities and their need for special measures, the State's response to the effect of the KZN floods does not adequately provide for shelter, health care and education of these children; and therefore, does not sufficiently protect the standard of living of internally displaced children with disabilities.

Based on the assessment of the State's response to the displacement of children with disabilities in KZN, the following recommendations are suggested to improve the protection and implementation of the right to a standard of living of displaced children with disabilities:

- (i) Ratification of the Kampala Convention: The State should ratify and domesticate the Kampala Convention. While internally displaced persons, including children with and without disabilities, are entitled to general protective measures in terms of the international and national legal frameworks in South Africa, there are no specific protective measures and legislation for internal displacement. This is a significant shortcoming in the legal frameworks governing the State as internal displacement is not new to South Africa and continues to occur more frequently, often leaving thousands of already vulnerable citizens even more vulnerable and at risk of human rights violations. Moreover, the ratification and domestication of the Kampala Convention will likely address the other recommendations mentioned below.
- (ii) Targeted Measures for Shelter Accommodation: The State should prioritise identifying and immediately relocating children with disabilities to suitable shelter accommodations that cater to their specific needs. Community hall shelters should have facilities to accommodate children with physical disabilities who require assistive devices. Conducting thorough assessments to determine the shelter needs of internally displaced children, including those with disabilities, is crucial.
- (iii) Urgent Specialised Healthcare Services: The State should ensure the Women's Economic Assembly's mandate to establish a programme for the right to health of vulnerable groups, including children with disabilities, is promptly implemented. Specialised healthcare services that cater to the unique needs of internally displaced children with disabilities

should be provided, and in doing so, the State should collaborate with relevant health authorities and organisations to ensure comprehensive medical and psychosocial support for this vulnerable group.

- (iv) **Inclusive Education Access:** The educational needs of internally displaced children with disabilities should be identified and assessed to provide tailored educational services to these children. Targeted measures to ensure access to inclusive and specialised education for displaced children with disabilities should be urgently developed and implemented. In the interim, the schooling of displaced children with disabilities must be monitored closely, and proactive steps must be taken to ensure the attendance and participation of displaced children with disabilities in educational activities.
- (v) **Coordination and Monitoring:** Coordination among government departments, municipalities, and relevant stakeholders involved in disaster response and management should be improved. Moreover, a comprehensive monitoring system to track the well-being and living conditions of internally displaced children with disabilities, ensuring they receive necessary support during and after displacement, should be developed.
- (vi) **Child Participation and Safeguarding:** Children with disabilities should be involved in decision-making processes that affect their lives, ensuring their voices are heard in disaster planning and response efforts. Targeted measures to protect displaced children, especially those with disabilities, from exploitation and abuse in shelters or temporary accommodation units should be implemented.
- (vii) **Capacity Building and Training:** Training to government officials, social workers, and service providers on disability-inclusive disaster management and response should be provided. This will enhance these role players' understanding of the specific needs of children with disabilities and their ability to provide appropriate support and services during and after displacement.
- (viii) **Data Collection and Reporting:** Accurate and up-to-date data collection on internally displaced children with disabilities, including their numbers, living conditions, and access to services, should be ensured. Regular reports by the role players involved on the progress of interventions and outcomes should be encouraged to promote transparency and accountability in disaster response efforts.
- (ix) **Long-Term Support:** Plans should be implemented to support and rehabilitate internally displaced children with disabilities beyond the immediate crisis. Sustainable solutions for the ongoing well-being and social integration of displaced children with disabilities, considering their specific needs, should be implemented.
- (x) **Strengthen Collaboration with Civil Society:** The State should partner with civil society organisations that specialise in disability rights and inclusive disaster management. Their expertise can enhance the State's efforts to protect and implement the rights of internally displaced children with disabilities.

By implementing these recommendations, the State can significantly improve its protection and implementation of the right to a standard of living for internally displaced children with disabilities in KZN and other regions in South Africa that experience internal displacement. These measures will ensure and promote this vulnerable group's unique needs, dignity and well-being during and after internal displacement.



## ADAPTING PREVENTION AND EARLY INTERVENTION MEASURES AND PARENTING CAPACITY ASSESSMENTS IN NEGLECT CASES INVOLVING PARENTS WITH INTELLECTUAL DISABILITIES IN SOUTH AFRICAN CHILDREN'S COURTS

Willene Holness\*

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### Summary

*The study explored how the South African social services and two Children's Courts (Durban and Pietermaritzburg) meet their international and constitutional obligations in promoting access to justice for mothers with intellectual disabilities and their children. This archival study examined the court records of two Children's Courts from 2010 to 2014. The review of child neglect cases found macro-level exclusions experienced by parents with intellectual and psycho-social disabilities, such as experience of heightened poverty, stereotypical ableist assumptions about parenting with a disability exhibited in social work reports, and few or non-existent supports extended to parents to help them exercise their care responsibilities. Against the background of the findings from review of the court records and international law obligations on the South African state, this paper considers the role of the social worker in relation to offering and monitoring prevention and early intervention (PEI) services to families as one way to avoid more intrusive intervention in family life. The paper also considers adaptations to PEI measures and Parenting Capacity Assessments (where needed), and argues for specialist training to help social workers fulfil their role in supporting these parents. The role of presiding officers in actively monitoring the social workers' provision of PEI as well as measures to enhance the meaningful participation of parents with intellectual disabilities in the court process are identified.*

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## 1 Introduction

Social workers are gatekeepers for social service provisions to families, including persons with disabilities.<sup>1</sup> They may pre-judge parents with intellectual disabilities as being incapable of parenting their children where support services, including prevention and early intervention (PEI) measures and parenting capacity assessments (PCAs), are not adapted to ensure inclusivity, accessibility and reasonable accommodation where needed. Parents with intellectual disabilities are at a disproportionately high risk of their children being permanently removed by child protection authorities for alleged child neglect,<sup>2</sup> on the assumption that they cannot be adequate parents.<sup>3</sup> Women with disabilities are prejudiced because of the perception that they are passive and dependent, and that they are cared for by their children (parentification)<sup>4</sup> – instead of fulfilling their role as caregivers.<sup>5</sup> The assumption is further underpinned by the belief that parents with intellectual disabilities are likely perpetrators of child abuse and neglect.<sup>6</sup> This is so, despite studies that show that ‘disability is not a causal factor in child neglect or parental inadequacy’.<sup>7</sup>

Ableist notions of the inadequacy of parents with intellectual disabilities<sup>8</sup> are partly premised on myths such as they ‘lack sexual agency and desire, and are less sexual than non-disabled people’.<sup>9</sup> These myths violate the sexual reproductive health rights of women with intellectual disabilities, and their right to family life.<sup>10</sup> Eugenic notions are still prevalent in society despite the removal of most of these policies – except for the retention of involuntary sterilisation of persons with intellectual

1 Social Service Professions Act 110 of 1978.

2 T Booth et al ‘Parents with learning difficulties, care proceedings and the family courts: Threshold decisions and the moral matrix’ (2004) 16 *Child and Family Law Quarterly* 409.

3 D McConnell et al *Parents with a disability and the New South Wales Children’s Court* (2000) 2 (accessed 12 January 2016).

4 TY Khafi et al ‘Ethnic differences in the developmental significance of parentification’ (2014) 53 *Family Process* 267 at 268.

5 R Mykitiuk & E Chadha ‘Sites of exclusion: Disabled women’s sexual, reproductive and parenting rights’ (2011) in MH Rioux, LA Baser & M Jones (eds) *Critical perspectives on human rights and disability law* (2011) 157 at 192.

6 D McConnell et al ‘Providing service for parents with intellectual disability: Parent needs and service constraints’ (1997) 22 *Journal of Intellectual and Developmental Disability* 5.

7 M Starke ‘Descriptions of children’s needs and parenthood among mothers with intellectual disability’ (2011) 13 *Scandinavian Journal of Disability Research* 283.

8 SN Proctor *Implicit bias, attributions, and emotions in decisions about parents with intellectual disabilities by child protection workers* unpublished PhD thesis, Pennsylvania State University, 2011.

9 X Hunt et al ‘The sexual and reproductive rights and benefit derived from sexual and reproductive health services of people with physical disabilities in South Africa: Beliefs of non-disabled people’ (2017) 25 *Reproductive Health Matters* 73.

10 UN Committee on the Rights of Persons with Disabilities, General Comment 3: Article 6: Women and girls with disabilities, 2 September 2016, CRPD/GC/3/2016 (2016) para 46.



disabilities in South African law.<sup>11</sup> Control and regulation of the sexuality of persons with intellectual disabilities are still exercised in families and by the state.<sup>12</sup> Social workers are unlikely to ‘consciously discriminate’ against a parent on the basis of their disability, but ‘subconscious bias’ could occur as a result of ignorance about the abilities and competence of the person.<sup>13</sup> Therefore, despite the constitutional prohibition of discrimination,<sup>14</sup> social workers and potentially judicial decision-makers could employ bias in their decision-making about what is in the best interests of a particular child in Children’s Court inquiries.

Mothers with intellectual disabilities are presumed incompetent, as judged by assessments and reports prepared by social workers or psychologists after an investigation into the family’s circumstances.<sup>15</sup> The decision to intervene in the home is premised on the disability of the parent and not on evidence of child abuse or neglect.<sup>16</sup> This disproportionate emphasis on the disability of parents constitutes unfair discrimination.<sup>17</sup> The assessments or reports of parenting capacity therefore carry significant evidentiary weight and are difficult to challenge. The result is that Children’s Courts may ‘rubberstamp’ diagnostic-prognostic assessments.<sup>18</sup>

- 11 W Holness ‘Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities’ (2013) 27 *Agenda* 35 at 36.
- 12 CK Kahonde et al ‘Discourse of needs versus discourse of rights: Family caregivers responding to the sexuality of young South African adults with intellectual disability’ (2019) 21 *Culture, Health & Sexuality* 278 at 283.
- 13 V Ooi & JW Loh ‘Considering the best interests test in the context of disabilities’ (2016) 5 *Oxford University Undergrad Journal* 68.
- 14 Section 9(3) of the Constitution of the Republic of South Africa, 1996. Cf sec 11 of the Children’s Act 38 of 2005.
- 15 C Watkins ‘Beyond status: The Americans with Disabilities Act and the parental rights of people labelled developmentally disabled or mentally retarded’ (1995) 83 *California Law Review* 1415.
- 16 D McConnell & G Llewellyn ‘Disability and discrimination in statutory child protection proceedings’ (2000) 15 *Disability & Society* 883.
- 17 R Hayman ‘Presumptions of justice: Law, politics and the mentally retarded parent’ (1990) 103 *Harvard Law Review* 1201 at 1227.
- 18 G Llewellyn et al ‘Prevalence and outcomes for parents with disabilities and their children in an Australian court sample’ (2003) 27 *Child Abuse and Neglect* 235. Law reform has been proposed in Australia, inter alia, to amend the Family Law Act 1975 (Cth) to: ‘(i) include a rebuttable presumption that disability is not, per se, a barrier to parenting (ii) state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility (iii) give preference to a natural parent in determining who shall have residence and parenting responsibility for a child (iv) provide that where the parent has a disability, before making orders that persons other than natural parents have parental responsibility for a child, the court must be satisfied that: A. appropriate supports have been provided to the family; B. parenting capacity was assessed with supports in place; and C. the parent is unable to adequately parent the child.’ Office of the Public Advocate Submission to the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability: Parents and children with disability (2022) <https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/royal-commission-into-violence-abuse-neglect-and-exploitation-in-disability-care/560-parents-and-child-ren-with-disability-opa-submission-to-drc> (accessed 15 January 2024).

Barriers to accessing justice identified in other jurisdictions include non-recognition of legal capacity,<sup>19</sup> lack of accessible procedures, lack of reasonable accommodation in the court process,<sup>20</sup> and lack of adequate legal representation.<sup>21</sup>

This archival study examined the court records of two Children's Courts in Durban and Pietermaritzburg, South Africa, from 2010 to 2014.<sup>22</sup> The study explored how the South African social services and two Children's Courts meet their international and constitutional obligations in promoting access to justice. The review of 244 child neglect cases found macro-level exclusions experienced by 27 parents with intellectual and psycho-social disabilities, such as experience of heightened poverty, stereotypical ableist assumptions about parenting with a disability exhibited in social work reports, and few or non-existent supports extended to parents to help them exercise their care responsibilities.

In practice, attorneys do not represent parents in these inquisitorial proceedings despite the extension of the right to legal representation to participants in these courts. The reasons for the lack of representation has not yet been studied. The absence of cross-examination of social work reports may prejudice these parents, particularly because of the high probative and evidential weight attached to social workers' reports. The magistrate (also known as the Children's Court Commissioner or the presiding officer) leads witnesses in testimony. It is the magistrate's duty to identify where the rights of a particular person are prejudiced by information appearing in the social worker's report, because the party before the court, usually a parent, must have the opportunity to cross-examine the social worker.<sup>23</sup> The parents' ability to self-represent or advocate and cross-examine reports tendered to court, which assess parenting capacity or evidence of the child or family's circumstances, is impaired without support measures to allow them to do so.

This paper considers the role of the social worker in relation to offering and monitoring PEI services to families as one way to avoid more intrusive intervention in family life. The paper also considers adaptations to PEI measures and PCAs, and the need for specialist training to help social

19 P Weller 'Legal capacity and access to justice: The right to participation in the CRPD' (2016) 5 *Laws* 1 at 2.

20 S Collings et al *Supporting parents with intellectual disability in care and protection proceedings project: Review report* (2017) 1.

21 B Tarleton 'Specialist advocacy services for parents with learning disabilities involved in child protection proceedings' (2008) 36 *British Journal of Learning Disabilities* 133.

22 Permission was obtained from the Chief Magistrate of each Children's Court in terms of sections 66 and 74 of the Children's Act 38 of 2005. Ethical clearance was obtained from the University of Pretoria's Research Ethics Committee on 30 August 2017. The children's identities (and that of their parents) are anonymous and were not revealed in this study as these details were not recorded and random numbers were assigned to case files, and names were not recorded.

23 C Matthias & N Zaal 'The child in need of care and protection' in T Boezaart (2009) *Child law in South Africa* 163 at 171.

workers fulfil their role in supporting these parents. This paper proceeds against the background of an appreciation for the state's duties towards these parents under, inter alia, the United Nations' Convention on the Rights of Persons with Disabilities (CRPD).<sup>24</sup>

## 2 The applicable rights framework under international law

States should recognise the rights of persons with intellectual disabilities: to equality before the law; legal capacity (and to provide supports and safeguards, where needed, to exercise such capacity); to family life; and to access to justice.<sup>25</sup> Equality before the law entails prohibition of discrimination through positive steps, where necessary, to enable *de facto* equality for persons with disabilities. Mothers with intellectual disabilities may suffer intersectional discrimination due to perceptions about how their disability impacts on their parenting and because they are female.<sup>26</sup> Their children may experience associational discrimination.<sup>27</sup> Discrimination on the basis of a parent's disability or that of the child is prohibited in the CRPD, the United Nations' Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (the African Disability Protocol). Both disability-specific treaties emphasise the respect for the family by prohibiting discrimination in relation to family and parenthood.<sup>28</sup> Provision of reasonable accommodation<sup>29</sup> to parents with disabilities in social work practice can alleviate barriers to accessing justice suffered before, during and after statutory interventions.

Recognition of the right to family life requires dealing with discrimination in matters relating to family and parenthood, including the need to take measures to help persons with disabilities perform their child-rearing responsibilities, and an injunction to only separate children from their parents meeting particular criteria.<sup>30</sup> These criteria are: that competent authorities, after judicial review, must determine that such

24 UN General Assembly, Resolution adopted by the General Assembly on 13 December 2006: 61/106. Convention on the Rights of Persons with Disabilities, 24 January 2007, UN Doc A/RES/61/106 (2007).

25 Arts 5, 12, 23 and 13 of the CRPD.

26 Art 6 of the CRPD; CRPD, General Comment 6 (2018) on equality and non-discrimination, 26 April 2018, UN Doc CRPD/C/GC/6 (2018) para 36.

27 Cf arts 5 and 26 of the African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol).

28 Arts 23(1) of the CRPD and 26(2) of the African Disability Protocol.

29 Art 2 of the CRPD. Cf R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99 at 101.

30 Art 23(2) of the CRPD.

separation is needed under relevant laws and is necessary for the best interests of the child, but that children are not to be separated from their parents on the basis of their parents' disability.<sup>31</sup>

Crucially, states should provide families with the necessary support to care for their children, inclusive of relevant social and financial support.<sup>32</sup> Such support should be 'community based, adequate, accessible and available and appropriate to the goal of facilitating [their] child-rearing responsibilities'.<sup>33</sup> For example, referral to and consistent support from speech therapists during the provision of social services and in court may enhance communication by and with parents with intellectual disabilities and improve success outcomes.<sup>34</sup> Provision of actual social services is not the only aspect of support – access to information is too. For example, compilation of a guide for parents with intellectual disabilities in an Easy Read format on what to expect when attending a Children's Court hearing<sup>35</sup> and how to lay a complaint against service providers involved in the court process.<sup>36</sup> The apparent conflict between the parent-child obligation and the state-parent obligation is resolved by separating the two sets of obligations and starting with the premise that parents – disabled or not – objectively owe the same standard of care to their children.<sup>37</sup> However, this may be predicated on the state's obligation to support parents with disabilities in order to meet their care obligations.

Interestingly, South Africa's Initial Report to the Committee on the Rights of Persons with Disabilities (the Committee), did not identify any aspect of *parenting* with a disability. The Committee commented on the state's progress in meeting obligations under article 19 (on living independently and being included in the community).<sup>38</sup> The Committee recommended that the South African state adopt an action plan to develop community support services, including 'personal assistance, grants and

31 Art 23(4) of the CRPD. Cf CRPD (n 26) para 62.

32 CRPD, Concluding Observations on the Initial Report of Italy, 6 October 2016, UN Doc CRPD/C/ITA/CO1 (2016) para 51.

33 J Fiala-Butora 'Article 23: Respect for the home and the family' in I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2019) 648.

34 J Stansfield 'Parents with learning disabilities and speech and language therapy: A service evaluation of referrals and episodes of care' (2011) 40 *British Journal of Learning Disabilities* 170; B Tarleton et al *Finding the right support: A review of issues and positive practice in supporting parents with learning difficulties and their children* (2006) <https://baringfoundation.org.uk/wp-content/uploads/2014/10/Findingrightsupport.pdf> (accessed 1 October 2020).

35 Scottish Children's Reporter Administration *Going to a children's hearing – Easy Read information for parents/carers* (2018) <https://www.scra.gov.uk/wp-content/uploads/2018/04/Going-to-a-Children's-Hearing---Easy-Read.pdf> (accessed 1 October 2020).

36 Scottish Children's Reporter Administration *Making a complaint to the reporter – Easy read information for parents/carers* (2017) <https://www.scra.gov.uk/wp-content/uploads/2017/10/Easy-Read-Complaints.pdf> (accessed 1 October 2020).

37 Ooi & Loh (n 13) 75.

38 Republic of South Africa, Initial Report to the Committee on the Rights of Persons with Disabilities, 24 November 2014, UN Doc CRPD/C/ZAF/1 (2014) para 191ff; CRPD, Concluding Observations: South Africa, 23 October 2013, UN Doc CRPD/C/ZAF/CO/1 (2018).

support to families of children with disabilities and *parents with disabilities ...*' (emphasis added).<sup>39</sup>

While South Africa follows a functional test for legal capacity determination which goes against the CRPD's requirements,<sup>40</sup> in the cases reviewed in this study there is no indication that the Children's Courts pursued this line of inquiry. Diagnostic thresholds are used in functional tests and are considered direct discrimination – as such a threshold treats particular persons, namely those with intellectual or psycho-social disabilities, differently compared to other groups.<sup>41</sup> In childcare proceedings, a parent with an intellectual disability may exercise their legal capacity and may require support in making any decision with legal consequence. This includes being given the opportunity, if necessary with support, to understand the meaning of and consequences arising from legal documents, including a social worker's report; and the provision of testimony about family circumstances and one's ability to care for one's children; and decisions about where children are to be placed should they require alternative care. Multiple decisions are made when participating in legal proceedings and before such proceedings ensue, in relation to how to care for a child and to promote their best interests.

In order to promote access to justice for persons with disabilities, numerous positive steps must be taken by states parties, including provision of procedural accommodation (which is not subject to progressive realisation) and training of those involved in the administration of justice. This is generously interpreted<sup>42</sup> to extend not only to legal personnel such as police, judges, attorneys and prosecutors, but also to social workers and healthcare workers.<sup>43</sup>

### 3 Findings from the archival study

Qualitatively, the data were analysed thematically to show what evidence was led to inform the finding of the magistrate in a particular case, including reports of social workers and other professionals. In 28 per cent of the child neglect cases, parental disability was cited as relevant. Three case studies illustrate the barriers faced by mothers with intellectual disabilities such as: problematic evidential power of uncorroborated social workers' reports on the mother's capacity to parent; the absence of

39 CRPD (n 38) para 35(c).

40 CRPD, General Comment 1 (2014): Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 15.

41 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 75 *Modern Law Review* 752.

42 E Flynn 'Article 13: Access to justice' in I Bantekas et al (eds) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 400.

43 CRPD, Concluding Observations on the initial report of El Salvador, 8 October 2013, UN Doc CRPD/C/SLV/CO/1 (2013) para 30(c).

adequate legal representation; and inaccessible and unaccommodating court proceedings. The social work reports in the case studies exhibited stereotypical generalisations about parenting with an intellectual disability. For example:

- The mother's supposed lack of capacity to change, such as being unable to learn new skills required to be a good enough parent ('unable to learn new skills', 'no prognosis to teach skills to protect the child' and 'not capable of logical reasoning to feed and protect the child').
- Characteristics exhibited by the mother assumed to be universal to persons with intellectual disabilities, such as lack of responsibility or insight ('lack of responsibility, no insight').
- Improvement of the mother's personal circumstances is impossible and remedies for her problems cannot be obtained ('impossible' to solve their problems and have children returned to them; 'prognosis for recovery is poor').
- Categorical statements that intellectual disability equates to incapability or inability to parent ('because of her low intellectual functioning' and the intellectual disability of the mother will 'influence a parent with intellectual [sic] to their children').<sup>44</sup>

The most egregious generalisation is one case where the parent's intellectual disability was relied on for the assertion that she could not adequately care for the children based on the social worker's erroneous reading of the literature which she then cited in her report to court. The court did not question that assertion and may well have relied on this statement. The literature that the social worker cited in fact found the opposite – parents with intellectual disability *can* adequately care for their children if they are provided with support.<sup>45</sup> A more nuanced interpretation of a child's best interests where a parent has a disability that *may*, if not provided with support or adequate support, impact on that child's care, is needed. This is particularly because of the Children's Act's injunction against unfair discrimination against children based on the health status or disability of family members.<sup>46</sup>

None of the cases reviewed included a PCA of the relevant parents. It can be concluded from this small sample that PCAs are obtained in care and contact cases (custody during divorce proceedings for example),<sup>47</sup> and not in maltreatment cases. Reasons may include the cost involved in obtaining these and the lack of appreciation of the need for verifiable

44 These findings are consistent with the ableist criteria established in D McConnell *Disability and discrimination in the child welfare system: Parents with intellectual disabilities* (2009); and T Booth & W Booth *Parents with learning difficulties, child protection and the courts: Report to the Nuffield Foundation* (2004) <https://tbooth.staff.shef.ac.uk/projects/NuffieldReport.pdf> (accessed 16 January 2024).

45 R Mildon, J Matthews & S Gavidia Payne *Understanding and supporting parents with learning difficulties* (2003) 2.

46 Section 6(2)(d) of the Children's Act.

47 But see *H v R* (3450/2017) [2018] ZAECPEHC 19 (8 May 2018).

testimony that the care is inadequate for meeting the child's right to have his or her best interests adhered to.

Purported documentary proof of the diagnosis of the parent's disability or illness (evidence) was attached to social work reports as annexures in four cases. However, these were not clear-cut diagnoses. In one case, the psychiatrist and psychologist reports identified the mother as having an intellectual disability, but the extent of the impairment and adaptive functioning was not made clear. This is the only case where medical professionals' (on mental health) input was obtained. However, neither of these were forensic reports and the professionals did not testify in court. For most cases, the averred disability of the parent was not affirmed with proof of the diagnosis. Usually, where evidence was led of the child's circumstances (particularly documentary evidence such as medical reports corroborating harm suffered by the children), the social worker's averment of applicable childcare and protection grounds and the ultimate findings of the presiding officers were supported – particularly at the original (temporary) removal stage. Diagnostic-prognostic thinking could have resulted from mere averments of such disabilities/illnesses becoming deciding factors in determinations relating to the children's care. Since Children's Court orders are not reportable judgments, and since reasons are not proffered for the statutory outcome, the deliberative decision-making of the presiding officers is unclear.

While intellectual disability as a diagnostic label is generally permanent, the parents' ability to learn and implement parenting skills is a potential positive factor for building their parenting capacity as well as the presence of supports.<sup>48</sup> While in 14 instances the social work reports indicated that parenting skills' programmes as therapeutic interventions would be offered to the mother, in only one case was a parenting skills' programme (an informal one) actually offered to a mother with a psychosocial disability and monitored by the social worker. In that one case, the child was reunified with the parents as a direct result of their engagement with the intervention offered. In no other cases was the social worker's proposal of parenting skills programmes followed up on in subsequent reports, indicating these were offered and the parents' level of involvement therein – and in none were parenting skills offered as a PEI measure.

In four case studies of mothers with intellectual disabilities, it is notable that the social workers were unconcerned about the participation of the mothers in the statutory processes, as they did not identify communication challenges or the need to implement measures to support their communication. Their communication needs may have required support in the interviews conducted by the social workers or during their

48 B Tarleton & D Turney 'Understanding "successful practice/s" with parents with learning difficulties when there are concerns about child neglect: The contribution of social practice theory' (2020) 13 *Child Indicators Research* 387.

court attendance. Court information, including the social workers' reports, was not made available to the parents in Easy Read format. This means that the ability of the parents to absorb the information from the statutory process is indeterminable. Section 63(2)(a) and (b) of the Children's Act mandates cross-examination of a social worker's report if a person is 'prejudiced' by the report. Parents were, however, not meaningfully offered this opportunity.

Linking the data from this study with the literature reviewed, the following can be noted. In other jurisdictions, social services' support was recommended in the form of dedicated (and adapted) programmes such as Head Start.<sup>49</sup> Llewellyn et al's study considered the social workers' and magistrates' perceptions of parenting incapacity, the attorneys' challenges, and the court's decision-making process.<sup>50</sup> The lack of suitable support to these parents is corroborated in this study, as is diagnostic-prognostic decision-making. The small sample size however suggests that these findings should be cautiously interpreted.

McConnell's study on the inevitability of parental failure<sup>51</sup> is partially correct for the findings from this study, considering the review of the evidence offered to the courts in the court files. Self-evidently, this study did not determine the perceptions of the magistrates and social workers in the cases where a parent's disability was identified as relevant. Without empirical data, one cannot decisively state that the magistrates and social workers are biased against parenting with an intellectual disability. However, the cases surveyed show that proof of diagnosis was not obtained in any of the cases, nor was a link with inadequate parenting decisively drawn on clear evidence.

## **4 Adaptions to social work practice**

### **4.1 Adapted PEI measures**

The drafters of the Children's Act foresaw the need to include primary and secondary interventions for children, not only tertiary measures, with the court having a measure of oversight. These services would no longer fall outside of government, having previously only been offered by NGOs, and would be regulated under the legislation.<sup>52</sup> Prevention programmes are aimed at strengthening and building the family's 'capacity and self-reliance to address problems that may or are bound to occur in the family

49 ST Azar et al 'Practices changes in the child protection system to address the needs of parents with cognitive disabilities' (2013) 7 *Journal of Public Child Welfare* 610.

50 McConnell & Llewellyn (n 16) 235.

51 McConnell et al (n 3) 23.

52 Matthias & Zaal (n 23) 293.



environment which ... may lead to statutory intervention'.<sup>53</sup> Early intervention programmes are anticipated to address children identified as 'vulnerable' or 'at risk of harm', in order to prevent removal into alternative care. This would ameliorate any need for court intervention, as these programmes are aimed at 'preserving a child's family structure' and 'avoiding removal of the child from the family environment'.<sup>54</sup> These programmes are to develop the parent's skills and capacity to ensure the well-being and best interests of their children, and to address and prevent neglect and other types of failures in the family environment, in order to better meet children's needs.<sup>55</sup> Parenting skills programmes are an example of a PEI measure. Existing parenting skills programmes in South Africa are generally not adapted for or targeted at parents with intellectual disabilities.<sup>56</sup>

PEI and therapeutic measures mandated by the Children's Act,<sup>57</sup> where they can be implemented to ameliorate or address concerns about the care of children and can enhance their best interests – can positively affect their best interests. Social workers should identify the PEI measures employed for children in their reports to court:

For this information to be of value to the court, the report should at the very least contain information about the nature of programmes provided and the impact of these programmes on the child, parent, care-giver and/or family. This requirement reinforces the need for the court to be able to act proactively, and to be enabled by the relevant information to do so. This provision also enables the court to ensure that social welfare services have made efforts to ensure that children and their parents, care-givers and families have been enabled to seek resolution for their problems before efforts to remove the child are instituted.<sup>58</sup>

The Children's Act also explicitly mandates the participation of children, parents or caregivers and other family, to identify and seek 'solutions' to 'their problems'.<sup>59</sup> Frank argues that this involvement relates to 'application of *all* forms of PEI programmes, including those ordered by the Children's Court'.<sup>60</sup> Their engagement should be solicited in the assessment of the nature of the problems experienced; the development of alternatives in response to these problems; and 'decision-making regarding

53 Sec 143(1)(b) of the Children's Act.

54 Sec 144(1)(i) of the Children's Act.

55 Secs 144(1)(b) and (f) of the Children's Act.

56 W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26 *Stellenbosch Law Review* 318 at 357.

57 Sec 149 of the Children's Act.

58 C Davel & A Skelton *Commentary on the Children's Act* (2010) 8-18.

59 Sec 144(3) of the Children's Act.

60 C Frank (updated by J van Niekerk) 'Chapter 8: Prevention and early intervention' in A Skelton *Commentary on the Children's Act* (2018) RS 9 ch9-p9 ch9-p16.

a course of action'.<sup>61</sup> Matthias and Zaal anticipated that jurisprudence on the interpretation of these provisions would provide further clarity and guidance down the line.<sup>62</sup> Unfortunately, appeals from the Children's Courts to the High Courts are rare. Jurisprudence on PEI services and their scope for change has not developed.

The regulations to the Children's Act include national norms and standards for PEI programmes.<sup>63</sup> These *inter alia*, must 'strengthen and support family structures and build capacity'; 'be aimed at the improvement of the well-being of families and children'; 'be family centred with family members seen as the main focus'; and 'focus on the strengths and capabilities of family members'.<sup>64</sup> The emphasis is clearly on family strengthening and capacitation. The regulations are a good start, but it is not clear to what extent social services self-monitor provision of these services, nor whether the courts are adequately supervising such interventions in the court inquiries which focus, generally, on the most at-risk families. Then there are institutional barriers to full implementation of community and family-based services such as: high case load of social workers; underfunded NGOs providing statutory and non-statutory services; insufficient social workers; and financial capacity constraints in the NGO sector.<sup>65</sup>

A serious flaw in the legislation was identified when the Children's Act was still in the drafting stage: PEI programmes were to fall within the purview of social services only. These services cannot, due to lack of capacity, be provided by social workers alone and must involve a host of stakeholders and providers, including child and youth care workers, community workers, educators, and healthcare workers.<sup>66</sup> This multi-sectoral approach – to be effectively implemented on the scale anticipated – would require adequate resources, including funding.<sup>67</sup> The Children's Act does promote an intersectoral approach through its strategy that involves an array of stakeholders. However, the strategy remains the primary responsibility of the Department of Social Development, with provincial application indicated with a provincial strategy. The funding needed for these programmes is addressed in the legislation, requiring these programmes to comply with the quality espoused in the norms and standards.<sup>68</sup> The legislation prioritises funding for programmes that address poverty-related issues (shelter, food, basic necessities) and

61 As above.

62 n 23, 293.

63 Reg 52 of the General Regulations regarding Children, 2010.

64 Items (1)(a), (b), (e) and (f) of Part IV to Annexure B of the General Regulations regarding Children, 2010.

65 L Landman & A Lombard 'Integration of community development and statutory social work services within the developmental approach' (2006) 42 *Social Work* 1.

66 C Matthias 'Can we legislate for prevention and intervention services for children? An analysis of aspects of the 2002 draft Children's Bill' (2004) 40 *Social Work* 172 at 174.

67 Matthias (n 66) 177.

68 Sec 146(3) of the Children's Act.

programmes for children with disabilities.<sup>69</sup> Services to parents with disabilities are not prioritised. The Committee on the Rights of Persons with Disabilities recommends that South Africa develop and adopt an ‘effective implementation plan’ for PEI programmes – to assist with early identification of disability and to provide support for children *and* adults with disabilities.<sup>70</sup> The Committee stressed that an adequate budget needs to be allocated for these programmes.

Makoae et al<sup>71</sup> looked at the lack of prevention and support to parents at risk of maltreating their children based on reviews of 30 maltreatment cases – each from five Children’s Courts in 2006. They found that the social workers seldom reported in their investigation reports what kind of preventative actions were taken before the statutory intervention in court. A major flaw of some of the reports, according to the authors, was that

they were not comprehensive reports, they did not present the chronology of events and specified social worker interventions appeared to be ad hoc actions that did not reflect continuous relationships with families. Consequently, most of the interventions though not specified for every case under review seemed to be consistent with the nature of risks diagnosed partially. In many instances, social workers left much to be implemented by caregivers who had multiple vulnerabilities including alcohol and drug abuse.<sup>72</sup>

The authors surmised that the poor outcomes for prevention may result from high social worker case-loads, and early interventions involved placing children in places of safety, meaning that it marked the entry into statutory services for these children. Reunification was not the norm, and most children did not return to the care of their biological parents.<sup>73</sup> While Makoae et al’s study indicates some of the risk factors for children of parents that are single mothers, have substance abuse problems, or have psycho-social disabilities – it did not consider children of parents with intellectual disabilities. It is, however, valuable in sketching the systemic failures in providing PEI interventions.

In the US context, Title II of the Americans with Disabilities Act (the ADA),<sup>74</sup> and section 504 of the Rehabilitation Act of 1973,<sup>75</sup> extend to child welfare agencies. Accordingly, full and equal access to their services in relation to inter alia investigations, witness interviews, assessments, removal of children procedures, reunification services, and court hearings (including proceedings to terminate parental rights), is mandated. For example, individualised assessment must be conducted, even where in

69 Sec 146(4)(b) of the Children’s Act.

70 CRPD (n 38) para 13(d).

71 M Makoae et al *Children’s court inquiries in the Western Cape* (2008) HSRC 1 at 67.

72 As above.

73 Makoae et al (n 71) 70.

74 Americans with Disabilities Act PPub L No 101-336, 104 Stat.

75 Sec 504 applies to agencies receiving federal assistance in the form of financial subsidies, for example.

emergency investigations assessments of a child's situation are to be based on facts and objective evidence and not stereotypical notions of parental incapacity of the parent with the disability.<sup>76</sup> Full and equal opportunity to participate is to be ensured, for example through adapting a method of teaching parenting skills (such as a class on feeding and bathing a child) to enable the mother with an intellectual disability to learn the techniques.<sup>77</sup> One of the guidelines of the Technical Assistance Guidelines to the ADA issued to child welfare agencies and courts stipulates that:

To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements.

Title II of the ADA provides that 'no qualified individual with a disability shall be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by any such entity' – 'by reason of the disability'.<sup>78</sup> In Michigan, the services recommended to a mother with an intellectual disability to allow her to benefit from a reunification plan, were not received by her.<sup>79</sup> The termination of her parental rights was therefore deemed premature without reasonable accommodated services offered to her. The court held that the child welfare agency has a duty to provide reasonable accommodations once it is aware that a person has a disability.<sup>80</sup>

Section 63-21-20 of the South Carolina Persons with Disabilities Right to Parent Act requires provision of reasonable accommodations in services rendered to parents with disabilities, including

the reasonable efforts made by the department to avoid removal of the child from the parent or legal guardian, including reasonable efforts made to address the parenting limitations caused by the disability.<sup>81</sup>

76 ADA National Network *Parents with disabilities in child welfare agencies and courts* (2017) <https://adata.org/factsheet/child-welfare> (accessed 30 October 2020).

77 US Department of Health and Human Services and US Department of Justice *Protecting the rights of parents and prospective parents with disabilities: Technical assistance for state and local child welfare agencies and courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act* (2015).

78 42 USC § 12132 (2018).

79 *In re Hicks/Brown* 89 NW2d 637 (Mich 2017).

80 As above.

81 South Carolina Children's Code Chapter 21, 2018, South Carolina Code of Laws Title 63.

Building on the success of the South Carolina legislation, a toolkit for legislators recommends that legislation promoting the rights of parents with disabilities, including intellectual disabilities, define adaptive parenting equipment, strategies and supportive services.<sup>82</sup> For example, parental supports can be understood to be a range of services that allow the parents to ameliorate aspects that affect their parenting responsibilities, such as activities of daily living. Parental supports are defined to include:

Parents may need human support in Activities of Daily Living (ADLs) such as dressing, bathing, walking, transferring, feeding, toileting; Instrumental Activities of Daily Living (IADLs) such as meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone and other media, and getting around and participating in the community; education and training to help develop parenting skills; and parenting activities such as parental care and supervision, subsistence, medical or other care or supervision necessary for child well-being.<sup>83</sup>

Parental supports may include day-care services, respite care and informal support networks from faith-based organisations or community members such as neighbours, childcare assistants or personal assistants and supported housing.<sup>84</sup> Modifications to social services rendered to a parent with a disability may include: increased ‘repetition of information and training’; modified ‘counselling/parenting skills training to provide more concrete hands-on instruction in a natural environment’; provision of ‘in-home parent modelling’; linking the parent with ‘a co-parent or mentor’; and tailoring the ‘parenting education to the needs of the parent’.<sup>85</sup> The norms and standards on PEI programmes under the Children’s Act contain some of these examples. However, these are not adapted for parents with disabilities.

The UK provides for dedicated services to parents under the Care Act of 2014 and its regulations. It requires an assessment of the parents’ needs for support and provision for eligible parents on receiving such assistance – subject to available resources. In *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* the court highlighted the meaning of ‘parenting with support’ as undergirding the approach of professionals and courts as follows:

82 RM Powell & J Rubinstein *Supporting legislation to protect the rights of parents with disabilities and their children: Toolkit for legislators* (2020) <https://heller.brandeis.edu/parents-with-disabilities/pdfs/legislative-toolkit-legislators.pdf> (accessed 1 October 2020).

83 E Lightfoot et al *Guide for creative legislative change: Disability status in termination of parental rights and other child custody statutes* (2007) 4 <https://casew.umn.edu/wp-content/uploads/2013/12/LegislativeChange.pdf> (accessed 1 October 2020).

84 Lightfoot et al (n 83) 10.

85 As above.

Courts must be aware of the distinction between direct and indirect discrimination. Careful consideration must be given to the assessment phase and in the application of the threshold test. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. Joint training needed for adult and children's services.<sup>86</sup>

The social work participants in a study evaluating supports offered to parents with disabilities found that neglect of the children was due to a lack of knowledge of the child's specific needs, which could be remedied through provision of long-term support.<sup>87</sup>

## 4.2 Parenting capacity assessment

Considering that adaptations to obtaining evidence (how social workers go about interviewing parents with intellectual disabilities) and what constitutes evidence of parental capacity is lacking in the South African context, regard should be had for the situation in other jurisdictions such as the United States of America (USA) and European regional case law.

The heavy reliance by judges on evaluations in the USA can reinforce the existing bias of professionals conducting assessments.<sup>88</sup> To counter this, the American Bar Association issued a resolution that states should not remove children or terminate parental rights on the basis of a parent with a disability, unless it can be shown 'supported by clear and convincing evidence – that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, or other reasonable modifications'.<sup>89</sup> The resolution was used to bring about change in South Carolina's legislative protection.<sup>90</sup> However, even this novel solution places emphasis on the disability of the parent. Instead, the harm or risk of harm to the child should be cited as the ground for consideration, not the disability as a 'casual explanation for the likelihood of harm'.<sup>91</sup>

The US National Council on Disability (NCD) drafted a model law to preserve families that include a parent with a disability, as well as a

86 [2006] NIFam 8.

87 B Tarleton & D Turney 'Understanding "successful practice/s" with parents with learning difficulties when there are concerns about child neglect: The contribution of Social Practice Theory' (2020) 13 *Child Indicators Research* 387.

88 JB Kay 'Representing parents with disabilities in child protection proceedings' (2009) 13 *Michigan Child Welfare Law Journal* 27 at 33.

89 ABA *Resolution 114* (2017) [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/attorneys/disabled-parents-and-custody--visitation--and-termination-of-par/](https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/disabled-parents-and-custody--visitation--and-termination-of-par/) (accessed 29 October 2020).

90 L Francis 'Maintaining the legal status of people with intellectual disabilities as parents: The ADA and the CRPD' (2019) 57 *Family Court Review* 21 at 22.

91 Francis (n 90) 23.

proposed amendment to the ADA to ensure the rights of these parents.<sup>92</sup> These draft laws are based on the NCD's comprehensive review of the barriers persons with disabilities face when exercising their right to create and maintain families.<sup>93</sup> The NCD found that persons with disabilities in family courts often encounter evidence regarding their parental fitness, which is developed using inappropriate and unadapted parenting assessments'.<sup>94</sup> The NCD found that this unbalanced evidentiary burden is exacerbated by the lack of resources to provide 'adapted services and adaptive parenting equipment, and to teach adapted parenting techniques'. The NCD recommended that legislation, rules of court, and professional standards require those tasked with assessing parental capacity or a child's circumstances to thoroughly investigate whether these documents comply with: a) disability-sensitive assessment guidelines; and b) the 'need to modify the evaluation process or incorporate parenting adaptations' to provide more 'valid, reliable assessment of a parent's capacities'.<sup>95</sup> These standards should 'require explicit evidentiary support for statements' made 'about a parent's capacity and prohibit the use of speculation and global diagnostic or disability labels' as grounds for intervention.<sup>96</sup> For parents with intellectual disabilities, assessors must use the tools developed to assess their capabilities and needs, and should include existing and natural supports in the assessment.<sup>97</sup> Evaluators using adapted PCAs must be trained in working with parents with disabilities, including on the need for accommodations of disability.<sup>98</sup>

The American Psychological Association (APA) issued guidelines for adapted assessments.<sup>99</sup> These guidelines encourage disability-sensitive approaches to clients with disabilities, but also appropriate and accommodative assessment and intervention measures and protocols. The guidelines receive their impetus from core values from the APA's *Ethical Principles of Psychologists and Code of Conduct* adopted in 2003 and amended in 2016 – namely justice and respect for rights and dignity.<sup>100</sup> Social workers could also benefit from similar guidelines to ensure that their

92 NCD *Rocking the cradle: Ensuring the rights of parents with disabilities and their children* (2012) 369-374 and 375-381.

93 The Americans with Disabilities Act PPub L No 101-336, 104 Stat 327 (1990).

94 NCD (n 92) 311.

95 NCD (n 92) 312.

96 As above.

97 As above.

98 Powell & Rubinstein (n 82).

99 *APA Guidelines for assessment of and intervention with persons with disabilities* (2011) <https://www.apa.org/pi/disability/resources/assessment-disabilities> (accessed 30 October 2020).

100 Principles D and E of the *APA Ethical Principles of Psychologists and Code of Conduct* (2002, updated in 2016, effective 2017) <https://www.apa.org/ethics/code/ethics-code-2017.pdf> (accessed 30 October 2020). See, also, British Psychological Society *Clinical psychologists when assessing parents with learning disabilities* (2011) <https://www.bps.org.uk/sites/www.bps.org.uk/files/Member%20Networks/Faculties/Intellectual%20Disabilities/Good%20Practice%20Guidelines%20for%20Clinical%20Psychologists%20when%20assessing%20Parents%20with%20Learning%20Disabilities%20%282011%29.pdf> (accessed 1 October 2020).

investigation and assessments are appropriate in the disability context and are not discriminatory. Psychologists are also expected to be familiar with laws that support and protect persons with disabilities.<sup>101</sup>

Suitable direction from other jurisdictions on how to adapt assessment, is therefore available to South Africa to ensure that assessments provided by psychologists, social workers and other professionals do not inadvertently discriminate against persons with intellectual disabilities, in particular. Appropriate assessments, where required in neglect cases, should be obtained in all cases, not only in cases where the parent has a disability. The reinforcement of disability prejudice is ever present in the formulation of assessments, as are prejudices against single-parent households, for example. That does not mean that the assessments lose their value from an evidential perspective. Rather, social workers, psychologists and other relevant professionals as well as magistrates (and lawyers) need training on what appropriate assessments are in relation to adaptability for persons with disabilities to remove embedded disability prejudice – whether stated or unstated. Currently, PCAs are not utilised for parents without disabilities as a routine practice. Singling out parents with disabilities to undergo such assessments would be discriminatory.

PCAs are blunt instruments and on their own are not flawless predictors of parenting ability. The validity of these tools considering the historical colonial and current use of these instruments on minorities such as aboriginal parents is questionable.<sup>102</sup> Similarly, the unquestioning reliance on PCAs that rely on ableist stereotypes of parenting would be problematic and discriminatory for parents with disabilities. The Eurocentric bias in relation to family and good parenting should be unmasked and professionals involved in child protection should reflect on their 'knowledge, beliefs and values' to determine what expectations are placed on parents and also to consider how the best interests of a child is considered from the 'Indigenous worldviews'.<sup>103</sup> Similarly, a disability perspective would require considering how the best interests of a child are observed from the worldview of a parent with a disability, including those operating in kinship care frameworks or where outside of this African kinship form, within smaller family unit or as single parents. Such a perspective should aim to dismantle ableist bias embedded in PCAs, including in relation to cultural aspects of parenting that may differ from the social worker, assessor or presiding officer involved.

101 Guideline 4: 'Psychologists strive to learn about federal and state laws that support and protect people with disabilities.'

102 G Lindstrom & PW Choate 'Nistawatsiman: Rethinking assessment of aboriginal parents for child welfare following the Truth and Reconciliation Commission' (2017) 11 *First Peoples Child & Family Review* 45.

103 P Choate, R Bear Chief & D Lindstrom et al 'Sustaining cultural genocide – a look at indigenous children in non-indigenous placement and the place of judicial decision making – a Canadian example' (2021) 10 *Laws* 59.



Curtis argues that judges (in Canada) are essentially gatekeepers for the ‘qualifications of and the quality of assessors’, as the assessors (social worker, psychologist, psychiatrist or similar professional) are unregulated.<sup>104</sup> Curtis posits that judges should critically examine the assessment process to determine the validity and reliability of the opinion offered and should be familiar with the testing process and the fact that the clinical observation of the assessor is an opinion, not a scientific fact.<sup>105</sup>

While over-reliance on assessments occurs elsewhere,<sup>106</sup> in South Africa low utilisation continues and the question is then when they are relied on – is this a critical engagement? The role of the presiding officer is more acute where the parents are unrepresented as the parents may not understand the import of the evidence. Even in cases where the parent is legally represented, the presiding officer’s critical role is imperative as the assessor is the ‘court’s expert’ and not that of the parties.<sup>107</sup>

While PCAs may contravene the full recognition of the legal capacity of persons with disabilities,<sup>108</sup> where they indirectly or directly discriminate against the parent with the disability, some evidence of relevant parenting practice or conduct in relation to how the parent’s conduct and disability or health where relevant may impact on the child’s best interests, is needed in court. The European Court of Human Rights (ECtHR) in *Cința v Romania*,<sup>109</sup> stated that clear evidence is needed where an allegation is put forward that a parent’s mental health (or intellectual disability) impairs their ability to care for their child at a particular time. The ECtHR clarified that psycho-social disability cannot justify differential treatment in maintaining contact with children compared to parents without such a disability.<sup>110</sup> A prima facie case of discrimination based on the mental health of the parent was made out.<sup>111</sup> The ECtHR held that:

The respondent State must also convincingly show that the difference in treatment was not discriminatory, that is to say that the applicant’s contact with his child was not restricted on discriminatory grounds, but rather that his mental illness had indeed impaired his ability to take care of his child or that there were other reasonable grounds for such a restriction.<sup>112</sup>

104 C Curtis ‘Limits of parenting capacity assessments in child protection cases’ (2009) 28 *Canadian Family Law Quarterly* 1 at 16.

105 n 104, 10.

106 Curtis (n 104) 5.

107 Curtis (n 104) 12.

108 Required by art 12 of the CRPD.

109 [2020] ECHR 150 (a divorced father with a psycho-social disability was denied adequate access to and care of his daughter; the ECtHR found articles 8 and 14 of the European Convention on Human Rights were violated – right to family life and discrimination). Cf *Kocherov and Sergeyva v Russia* [2016] ECHR 312; *RP v United Kingdom* [2012] ECHR 179.

110 *Cința* paras 68 and 78.

111 *Cința* para 79.

112 As above.

This kind of evidence may be set out in a PCA as long as the report identifies the actual deficient parenting of the adult concerned as implicating the child's best interests – as opposed to reports where the assessment solely (and discriminatorily) identified the health or disability status of the person as the decisive factor. However, such a PCA would have to, if needed at all, comply with relevant ethical and legal safeguards so as to not violate the parent's rights. Decoupling such an assessment from the legal personhood (capacity) of the disabled parent is required.<sup>113</sup>

A PCA which identifies the support needs of the parent to enable him or her to exercise his or her legal capacity in relation to parenting decision-making, as well as in participation in the court proceedings, would comply with article 12 of the CRPD. The support that these parents may require to enable them to effectively exercise their actual *parenting*, in other words how to care for their children to meet their best interests, should be identified in such assessments.

PCAs then remain a useful tool that should force the professional to engage with what support measures parents may need to fulfil their parenting responsibilities – including parents with disabilities. However, the presiding officer's role as gatekeeper requires adept critical evaluative skills to ensure that the assessment is fair, valid, reliable, admissible, and that the weight attached thereto is appropriate. Since most parties in the Children's Courts are currently unrepresented, the court's active role in evaluating the assessment process is even more vital. Moreover, where the parent has an intellectual disability, the presiding officer must ensure that the parent consented to the PCA and understands the process and content of the assessment. Further research into the utility of PCAs in the South African context of family law proceedings is needed.

### **4.3 Specialised training**

The investigation preceding the court proceedings is potentially the beginning of discriminatory treatment. Accordingly, specialised protocols for investigations of a person with a disability are needed. Here, risk assessments and the conduct of the interview should focus on the person's behaviour, and not on their condition. Legislation should stipulate that: 'Investigations of child maltreatment cases involving people with disabilities shall use a protocol that has been modified based on the individual with disabilities' abilities.'<sup>114</sup>

Social workers should receive social context training to debunk stereotypical attitudes about intellectual disability and parenting that may permeate their investigations and reports to court. They are not adequately

113 CRPD (n 40) paras 15 & 17.

114 Lightfoot et al (n 83) 5.

qualified and trained to conduct PCAs (adapted or not) and sorely need such specialised training as well. A code of ethics is lacking, and the relevance thereof to social workers should also be considered in future research.

Developing appropriate supports and a reliable referral network to provide services to parents with intellectual disabilities, is needed. This should be in line with the Committee's guidance of support that is: 'community based, adequate, accessible and available and appropriate to the goal of facilitating [their] child-rearing responsibilities'.<sup>115</sup> While the primary consideration in childcare matters is the best interests of the child, social workers should remember that service provision is for the benefit of the whole family and family preservation is the main aim – with child removal a last resort. The norms and standards in the Children's Act emphasise family strengthening and capacitation, but not the monitoring and implementation of PEI programmes. Specialised training for social workers and magistrates on the reasons for and how to implement adapted PEI measures for parents with intellectual disabilities, can remedy this gap.

## 5 Conclusion

The denial of the freedom and responsibility to raise their children and stereotypes that pervade statutory proceedings continues to detract from the gains made in recognising the rights of persons with intellectual disabilities to sexual reproductive health, fertility, and to live in the community. This denial continues to be underpinned by the perception of incompetence on the part of persons with intellectual disabilities.

PEI measures must be adapted and be made accessible, with reasonable accommodation offered to parents with intellectual disabilities, where needed. While in theory presiding officers are expected to consider the effectiveness of measures offered by social workers and other stakeholders to parents and families, the cases surveyed in this study reveal that this largely did not happen. Social workers' recommendation of parenting skills to be offered to parents was often not followed up by averments that these programmes or type of counselling were indeed implemented. Presiding officers should be obliged, through legislative amendment, to actively monitor the provision of PEI and therapeutic measures identified by social workers in their reports. In subsequent reports, where a social worker updates the court on the measures offered, specific reporting on these measures (when they were offered, by whom, the level of parental involvement, and monitoring and evaluation of their effectiveness) is needed. This supervision aspect can be strengthened in dedicated training of presiding officers – in relation to these measures. The

115 Fiala-Butora (n 33) 648.

court retains much discretion to ask a social worker to report back on the adequacy of such measures offered. This may then mitigate against the veritable 'shopping list' of measures identified by social workers in their reports, without proper follow through in actual provision of such measures. Multi-sectoral approaches to help parents with disabilities should be aligned with budgetary allocations to involve other professionals such as child and youth care workers and health workers, and disciplines such as speech and occupational therapy.

PCAs should be adapted for the appropriate assessment of persons with intellectual disabilities, if, in fact, they are needed at all. It was argued in line with comparative and international jurisprudence that evidence indicating that parenting is deficient may be set out in a PCA, as long as the report identifies the actual deficient parenting of the adult concerned as implicating the child's best interests – as opposed to reports where the assessment solely (and discriminatorily) identified the health or disability status of the person as the decisive factor. Compliance with the CRPD would be assured if the PCA identifies the support needs of the parent in relation to exercising their legal capacity and supports needed for effective parenting. Here the link with PEI measures is clear – if social workers offer adapted measures as primary and secondary interventions, then the need for tertiary (statutory) intervention is less likely. All stakeholders should receive dedicated training to dispel harmful parenting myths and also on inclusive and non-discriminatory PEI and assessment protocols. Provision of information in Easy Read format and careful explanation of the import of legal documents such as the social work reports, will promote these parents' meaningful participation in accessing justice in Children's Courts.

# CHAPTER 3 GOING BEYOND CHRISTIAN DOCTRINAL DISABILITY DISCOURSES TO EMBRACE HUMAN RIGHTS IN ZIMBABWE

Nomatter Sande\*

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## Summary

*Christian doctrines, practices, beliefs and convictions are tools that are shaping perspectives and provide meaning to disability in most religious settings in Zimbabwe. Most Christian and African Traditional religions in Zimbabwe are not yet open to public discourse about disability and even proactively bringing the needs of persons with disability to the centre of their missional agenda. Disability perspectives and proactive strategies to help persons with disabilities are still trapped within Christian sermonic outlets and few charitable deeds. Besides providing an overall religious disability discourse in Zimbabwe, this article explores options for going beyond Christian doctrinal and/or biblical perspectives to a position of complementing institutional activism enshrined in the 2030 Disability Agenda for Sustainable Development Goals. This article uses disability theology as a lens to understand Christian doctrinal disability discourse. Qualitatively, this article uses document analysis to gather data. This article concludes that religious communities in Zimbabwe should transform to not merely integrate persons with disabilities and provide charity but also focus on inclusion as a human right as advocated by secular stakeholders such as the 2030 Agenda for Sustainable Development Goals (SDGs) and African Union Agenda 2063 especially focusing on creating awareness of disability rights and integrating Zimbabwean laws on disability.*

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# 1 Introduction

Internationally, disability issues are topical. It is common to know, meet or live with persons with disabilities in our communities. Disability transverses lines of identity, gender, age, race and sexual orientation and, disability cuts across disciplines. Communities are encouraged to accept that persons with disabilities are 'humans and impairment is a natural part of the human state'.<sup>1</sup> Therefore, it is critical at the onset to accept that the term disability is broad and complex. This article uses the United Nations Convention on the Rights of Persons with Disabilities (CRPD) definition of disability because it is succinct and broad enough to capture the major aspects of disability. According to the CRPD, individuals with disabilities include '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'.<sup>2</sup> The world over, the number of persons with disabilities exceeds one billion.<sup>3</sup> The statistics show that persons with disabilities constitute 16 per cent of the global population.<sup>4</sup>

Zimbabwe has a population of about 15 million people and about 1.4 million people have some form of disability.<sup>5</sup> Regardless of the large number of persons with disabilities in Zimbabwe, persons with disabilities continue to suffer discrimination.<sup>6</sup> For example, in Zimbabwe, there are negative perceptions about disability to the extent of putting 'women on the receiving end and in a desperate situation such as killing their children for them to be accepted in society'.<sup>7</sup> The problem with disability is that there is a plethora of factors which militate against persons with disabilities. Notable issues include but are not limited to issues of exclusions, stigma and abuse. Besides the negative experiences of persons with disabilities people either do not understand disabilities or have a keen interest to learn more about them. The civic and civil institutions are no exception, they also struggle to comprehend matters of disability. There is evidence to show that most government and relief organisations lack

- 1 J Byzek 'Jesus and the paralytic, the blind and the lame: A Sermon' (2000) <http://www.raggededgemagazine.com/1100/1100cft1.htm> (accessed 3 March 2023).
- 2 Article 2 of the Convention on the Rights of Persons with Disabilities, UN General Assembly A/RES/61/106, Annex I, 13 December 2006.
- 3 WHO & World Bank 'World report on disability' (2011).
- 4 WHO 'Disability' (2023) <https://www.who.int/news-room/fact-sheets/detail/disability-and-health#:~:text=An%20estimated%201.3%20billion%20people%20%E2%80%9393%20or%2016%25%20of%20the%20global,experience%20a%20significant%20disability%20today> (accessed 15 March 2023).
- 5 UNESCO 'Zimbabwe launches National Disability Policy' (2021) <https://www.unesco.org/en/articles/zimbabwe-launches-national-disability-policy> (accessed 10 May 2023).
- 6 K Biri, T Zimunya & J Gwara 'Personhood and disability in Zimbabwe: A philosophical analysis' in S Kabue, J Amanze & C Landman (eds) *Disability in Africa: Resource book for theology and religious studies* (2016) 387.
- 7 F Machingura 'The "Unholy Trinity" against disabled people in Zimbabwe' in T Chataika (ed) *The Routledge handbook of disability in Southern Africa* (2011) 213.

information and knowledge about disabilities.<sup>8</sup> In Zimbabwe, and other places persons with disabilities are considered vulnerable populations and this implies that their human rights need to be protected by law.

Accordingly, I argue in this article that the focus of Christian doctrinal disability perspectives should transform to not merely integrate persons with disabilities and provide charity, but also, focus on inclusion as a human right as advocated by secular stakeholders such as the 2030 Agenda for Sustainable Development Goals (SDGs) and African Union 2063 blueprint especially focusing on creating awareness of disability rights and integrating Zimbabwean laws on disability.

## 2 2030 Agenda for Sustainable Development Goals and the social model of disability

Although, there is promising and growing activism about the need for governments and communities to understand disability,<sup>9</sup> there is still a lack of policies that prioritise human rights and turn into law the lack of inclusion of persons with disabilities. It is worrisome to note that the 'Agenda 2063: The Africa we want' which is strategic planning for the continent for the next 50 years does not explicitly refer to disability.<sup>10</sup> This failure to mention disability in the blueprint contradicts 'the spirit of the SDGs, which clearly and explicitly refer to disability as a key factor to consider in achieving these goals'.<sup>11</sup> One resolution propounded by the 2030 Agenda for Sustainable Development Goals (SDGs) is that persons with disabilities should be included in all spheres of life especially the political, economic and social. The SDGs' 2030 mantra 'leave no one behind' *especially persons with disability* (emphasis added) is commanding and is an eye-opener not only to give human rights to persons with disabilities but also fostering a law for inclusion. Article 1 of the CRPD states that

the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

8 F Smith, E Jolley & E Schmidt 'Disability and disasters: The importance of an inclusive approach to vulnerability and social capital' (2012) [https://www.sistema.protezionecivile.it/allegati/1476\\_Disability\\_and\\_disasters.pdf](https://www.sistema.protezionecivile.it/allegati/1476_Disability_and_disasters.pdf) (accessed 17 May 2023).

9 K Soldatic & S Grech 'Transnationalizing disability studies: Rights, justice and impairment' (2014) 34 *Disability Studies Quarterly*.

10 African Union 'Common African Position (CAP) on the post-2015 development agenda' (2014) <http://www.africa.undp.org/content/rba/en/home/library/reports/poverty-reduction/common-african-position-on-the-post-2015-agenda.html> (accessed 18 December 2023).

11 R Lang, M Schneider & M Kett et al 'Policy development: An analysis of disability inclusion in a selection of African Union policies' (2017) 168 <https://online.library.wiley.com/doi/pdf/10.1111/dpr.12323> (accessed 18 December 2023).

From this statement, the 2030 SDGs can be interpreted as prioritising the human rights of persons with disabilities. With the aspect of human rights at the fore, the 2030 SDGs framed disability to cut across all its goals and targets. A summary of this is visible in the following articles:

- Goal 1 and Goal 2 focus on the relevance of persons with disabilities. Target 1:2 seeks to reduce poverty by at least half the proportion of persons with disabilities. Target 2:1 focuses on providing sufficient food yearly to persons with disabilities.
- Goal 3 targets good health for persons with disabilities.
- Goal 4 ensures that there is inclusive and equitable education for persons with disabilities. Nations should build and upgrade education facilities that proffer effective learning environments for persons with disabilities.
- Goal 10 aims to reduce inequality among countries. Disability is mentioned as one of the 2030 inclusions alongside age, sex, religion, social, ethnicity and other status.
- Goal 17 mentions the issue of global partnership. The purpose is to increase the availability of high-quality data for representing all national contexts. The information about disability is mentioned as vital in this process. As such, this assists persons with disabilities to raise their concerns using their own national governments.

A close analysis of this approach of cutting across all the SDGs to a greater extent is calling for the reorientation of the long-standing social model of disability emerging into the human rights model. The social model of disability explains the socially created disadvantages or marginalisation of persons with disabilities.<sup>12</sup> Accordingly, this article argues that the Christian church in Zimbabwe has social barriers militating against persons with disabilities. The Christian church is an established institution,

in Zimbabwe and many parts of southern Africa, the church is still a strong and revered institution. The church continues to be the primary place where economic, social, psychological and spiritual needs of the people are met.<sup>13</sup>

Christianity commands a large following in Zimbabwe and is known for providing hope to people. An estimated 86 per cent of Zimbabweans are Christians.<sup>14</sup> These descriptions still present the church as a powerful entity in Zimbabwe; hence it is strategic for the church to use the disability human rights approach to provide charity, transform, integrate and include. The human rights model puts persons with disabilities at the

12 M Oliver 'A new model in the social work role in relation to disability' in J Campling (ed) *The handicapped person: A new perspective for social workers* (1981) <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Campling-handicppaed.pdf> (accessed 17 December 2023).

13 N Sande & B Maforo 'Pastoral ministry from the margins: Pastors' wives in Apostolic faith mission in Zimbabwe' (2021) 47 *Studia Historiae Ecclesasticae* 1 at 2.

14 Office of International Religious Freedom '2020 Report on International Religious Freedom: Zimbabwe' (2021) <https://www.state.gov/reports/2020-report-on-international-religious-freedom/zimbabwe/#:~:text=According%20to%20the%202015%20nationwide,than%201%20percent%20is%20Muslim> (accessed 21 May 2023).



centre of all decisions affecting them and most of their problems are in society.<sup>15</sup> The human rights model gained prominence in the CRPD which monitors the efforts of how nations are implementing issues of disabilities. From a strategic perspective, both the human rights model and the CRPD proffer a possibility of developing law and policy which the Christian doctrinal perspective should focus on. To improve discourses about disabilities religious communities should be empowered. Empowerment is a strategy which is used to dismantle and disempower activities by engaging in a collective mobilisation of marginalised groups.<sup>16</sup>

### 3 Disability theology as a theoretical lens

To make sense of the interaction between disability and Christian doctrines, this article uses disability theology as a theoretical lens. Disability theology is emerging as an independent field of inquiry. Be this as it may, as an unfolding relatively new theology, disability theology is still finding space to engage meaningfully with other theologies.<sup>17</sup> Thus, the

notions of disability are categorised in three ways. First, disability is regarded as a stand-alone concept. Second, some people prefer to describe disability as a theology. Third, disability is simply viewed as a religious concept (Christian, Jewish and Islamic).<sup>18</sup>

From a historical perspective,

Disability theologies – as an independent field in theological research – developed in the United States at the end of the last century in a dynamic intellectual context, fuelled by the rich theological thinking of renowned theologians such as Karl Rahner, Karl Barth, Emmanuel Mounier, Stanley Hauerwas and Jürgen Moltmann.<sup>19</sup>

The emergence of the Disability Rights Movement and the Americans with Disability in 1980 influenced the work on disability studies.<sup>20</sup> Like gender studies and women studies, disability studies aimed to proffer space to reflect on the experiences of persons with disabilities. The philosophical premise of disability theology centers on analysing religious practices and

15 G Quinn & T Degener ‘The moral authority for change: Human rights values and the world wide process of disability reform’ in G Quinn & T Degener *Human rights and disability: The current use and future potential of human rights instruments in the context of disability* (2002) 13, 14.

16 M Ledwith *Community development: A critical approach* (2011).

17 C Richie ‘Do not hinder them: Educating children with mental disabilities in the church’ (2015) 20 *International Journal of Children’s Spirituality* (2015).

18 N Sande *African churches ministering “to and with” persons with disabilities: perspectives from Zimbabwe* (2022) 61.

19 T Cooreman-Guittin & AL Ommen ‘Disability theology: A driving force for change?’ (2022) 22 *International Journal for the Study of the Christian Church* 1.

20 As above.

theological teachings focusing on the experiences of persons with disabilities. In general, theological studies are now slowly starting to incorporate research about disability studies in their curriculum. From a disability theology standpoint, it is proper to speak about theologies of disabilities because there are several depending on the doctrines, beliefs, practices and religious convictions. Regardless of the starting point of disability theology, the main goal is to change the church and society to prioritise the plight of persons with disabilities.<sup>21</sup>

This article uses disability theology as a field of enquiry enabling an understanding of the contribution of church doctrines, practices and convictions to the discourse of disability. If theology explores how doctrines are understood, then in the same vein, disability theology proffers reflections on the subject of disability with a bias towards the experiences of persons with disabilities. The starting point of disability theology is observing 'that experiences of impairment (physical, intellectual, psychological, and social) are a significant and relatively unsurprising element of human life, and as such are worthy of theological reflection'.<sup>22</sup> Hence, disability theology has come to refer 'to a variety of perspectives and methods designed to give voice to the rich and diverse theological meanings of the human experience of disability'.<sup>23</sup> A typically grounded theology of disability should be a theology for, with, of and by persons with disabilities.<sup>24</sup> It is important to interpret scriptures in a way that prevents stereotyping persons with disabilities.<sup>25</sup>

Further, disability theology is opening innovative ways to understand and deal with disability issues.<sup>26</sup> For instance, the work by Nancy Eiesland called 'the disabled God'<sup>27</sup> brought a rethinking about the representation of God and how scriptures present a dignified life before God. Besides first looking at how persons with disabilities were accessing places of worship, theologians also began to denounce the way Christian churches' theological anthropology stigmatises persons with disability. The majority of the theologians questioned negative biblical hermeneutics, for instance, the metaphor of blindness is viewed in a negative sense.<sup>28</sup> By focusing on the experiences of persons with disabilities, disability theology affirms that 'what God reveals to us – about Godself and about us – through disability

21 HL Ndlovu 'African beliefs concerning people with disabilities: Implications for theological education' (2016) 20 *Journal of Disability and Religion* 29.

22 JB Creamer 'Disability theology' (2012) 6/7 *Religion Compass* 339.

23 J Swinton 'Disability theology' in I McFarland, D Fergusson & K Kilby et al (eds) *Cambridge dictionary of Christian theology* (2010).

24 TK Christiani *Doing theology: Towards the construction of methods for living with disability* (2009) 28 *Asia Journal of Theology* page at 35.

25 J Gillibrand *Disabled church – disabled society: The implications of Autism for philosophy, theology and politics* (2011).

26 D Vermeer 'The theology of disability – A new way of listening, seeing and belonging' *Catholic Communications* 27 June 2014 [http://www.sydneycatholic.org/news/latestnews/2014/2014627\\_1055.shtml](http://www.sydneycatholic.org/news/latestnews/2014/2014627_1055.shtml) (accessed 9 May 2023).

27 N Eiesland *The disabled God: Towards a liberatory theology of disability* (1994).

28 J Hull *In the beginning there was darkness: A blind person's conversations with the Bible* (2001).

and vulnerability, is a key to understanding God's mystery'.<sup>29</sup> The cross provides a framework to reflect and connect issues of disability to the other main theologies like Christology, pneumatology, hamartiology, anthropology and theodicy.<sup>30</sup> It follows therefore that disability theology's entry of inquiry is challenging the spaces for persons with disabilities in religious settings. More so, disability theology goes on to assert that persons with disabilities must have the same choices as persons without a disability.

#### 4 Prominent problematic scriptures about disability

The Bible which is authoritative in Christian traditions is complex in interpreting disability because besides struggling with personal cultural bias the theologian needs to pay attention to the diverse cultures behind, inside and in front of the texts. In other words, disability 'exclusion is nurtured and perpetuated by negative and discriminatory perspectives on disability, which perspectives are rooted in the Church's interpretation of biblical texts on disability'.<sup>31</sup> A discussion about specific scriptures which need interrogation is critical in this article. There are 46 biblical texts which relate to disability.<sup>32</sup>

Biblical text such as John 9:4 states that 'this happened so that the Power of God could be seen in Him' provoke a lot of discussion towards the meaning and how religious communities may perceive disability. The story of a man born blind and healed is a source of today's challenges regarding disability.<sup>33</sup> The demeanour exhibited by the disciples of Jesus and the broader society in John 9 bears a striking resemblance to the daily challenges faced by Persons with Disabilities (PWDs) in Zimbabwe. Drawing inspiration from Jesus's response to the disciples, there is an opportunity to foster unity and build an inclusive and productive society. The manuscript contends that the creation of wealth and sustainable national development hinges on the involvement of all groups in crucial systems such as transportation planning.

Jesus's approach challenges the prevailing belief that disability is a consequence of prenatal sin or the sins of one's parents, a notion that has led to divisive attitudes within families and communities. The dismissal of the idea that blindness or physical suffering directly results from the

29 Cooreman-Guittin & Ommen (n 19) 2.

30 A Yong *Theology and down syndrome: Reimagining disability in late modernity* (2007).

31 MA Bowa 'The Coronavirus pandemic and persons with disabilities: Towards a liberating reading of the Bible for churches in Southern Africa' in F Sibanda, T Muyambo & E Chitando (eds) *Religion and the Covid-19 Pandemic in Southern Africa* (2022) 187.

32 WV Bryan *In search of freedom: How persons living with disabilities have been disenfranchised from the mainstream of American society and how the search for freedom continues* (2006).

33 MC Coloe, MA Beavis & BE Reid *John 1-10* (1984).

sufferer's sin is a significant departure from the problematic understanding of the time.

The manuscript suggests that Jesus's encounter with a man blind from birth prompted questions about moral responsibility for disability, illness, and the problem of evil. Pharisees and Sadducees, guided by their respective interpretations of the law, expelled disabled individuals, considered born in sin, from their ecclesiastical systems. This echoes the broader theological debate in the book of Ezekiel and Job, where the assumption that the righteous should not suffer is challenged.

Jesus's perspective challenges the notion of perceiving disabled individuals as problems to be solved or cured. Instead, he emphasises that being different is a miraculous expression of God's power. According to Jesus, the blind man's condition serves to proclaim God's divine providence and glory. The manuscript underscores the importance of focusing not on the causes of blindness but on the transformative potential of the individual's current state (John 9:4).

Blindness is portrayed in the Old Testament as an unmitigated evil.<sup>34</sup> In certain instances, blindness is metaphorically used to symbolise the wickedness of Israel and its adversaries. Ancient Israel maintained an attitude that deemed the disabled, including the blind, as unfit to enter the temple, considering them an affront to God's perfection (2 Samuel 5:8b and Lev 21:17-23).<sup>35</sup> According to 1 Samuel 4:4:

The son of Saul, had a son who was crippled in his feet. He was five years old when the news about Saul and Jonathan came from Jezreel; and his nurse took him up, and fled; and, as she fled in her haste, he fell, and became lame. And his name was Mephibosheth.

People were afraid to bring a person with disabilities to King David and this shows how denigrated were persons with disabilities. However, the gesture of King David to invite Mephibosheth to dine with him should be embraced as a sign of inclusion of persons with disabilities.

Besides blindness, physical deformity is viewed negatively in the Bible. According to Deuteronomy 23:1-2 says:

[H]e whose testicles are crushed or whose male member is cut off shall not enter the assembly of the Lord. No bastard shall enter the assembly of the Lord; even to the tenth generation none of his descendants shall enter the assembly of the Lord.

34 MA Beavis 'From the margin to the way: A feminist reading of the story of Bartimaeus' *JFSR* (1998).

35 MM Thompson *John: A Commentary* (2015).

## 5 Overview of disability doctrinal discourses in Zimbabwe

The above section shows that although the Bible is authoritative it has some common critical texts which are difficult to interpret in the context of disability. The church in Zimbabwe is not homogenous making it a good source to explore the diverse impact of doctrines and disability. The reason is that 'some churches in Zimbabwe and other African countries have had a long history of practices that exclude persons with disabilities from their mainstream structures'.<sup>36</sup> In as much as disability is a global issue, the experiences of persons with disabilities are more contextual. Hence, it is important to understand how persons with disabilities live in different places and their challenges are varied,<sup>37</sup> also does the Christian doctrines, beliefs and practices.

The missionary churches commonly known as Mainline churches have strong links and are controlled by the West. Historically, 'the settling of European missionaries in most parts of the country resulted in the conversion of large parts of the population to Christianity'.<sup>38</sup> The missionary churches established in Zimbabwe had been part of the mother churches in the West and this has made in-road for the establishment of education, health and policies. It follows therefore that the meaningful disability strides especially policies made by the mother churches in the West extends to Zimbabwe. For instance, to a greater extent, Mainline church's perspectives about disability are heavily influenced by the policies used in the West.<sup>39</sup> Broadly, mainline churches are implementing disability policies with a positive attitude. There are notable institutions established by mainline churches to cater for the physical needs of persons with disabilities. For example, the Jairos Jiri Association is the largest service provider to persons with disabilities providing skills and community-based rehabilitation projects.<sup>40</sup> The Zimbabwe Council of Churches which is an ecumenical body for several mainline churches has initiatives to meet the needs of persons with disabilities. In 2021, the Zimbabwe Council of Churches conducted a national survey day which

36 FA Bowa 'Representations of disability in the Old Testament and their implication for the nexus between poverty and disability: Lessons for the church in contemporary Zimbabwe' *Old Testament Essays* (2022) 398.

37 L Scoones 'Livelihoods perspectives and rural development' (2009) 36 *Journal of Peasant Studies* 171.

38 J Muderedzi, AH Eide & SH Braathen et al 'Perceptions and treatment of children with cerebral palsy among the Tonga of Binga in Zimbabwe' (2017) 3 *Cogent Social Sciences* 1.

39 Sande (n 18) 73.

40 Jairos Jiri Association <https://thisabilityhub.org.zw/listing/jairos-jiri-association/> (accessed 16 January 2024).

aims to make empirical research to understand the contextual day-to-day challenges of persons with disabilities.<sup>41</sup>

The Zimbabwe Council of churches acknowledges that churches should contribute to health care services and perform humanitarian activities to support persons with disabilities.<sup>42</sup> The report from the World Council of Churches Ecumenical Disability Advocates Networks showed that:

Many participants hailed the initiative, acknowledging that they had been challenged to reflect on their attitudes towards people with disabilities in church and society. At the assembly, the ZCC adopted an Inclusive Policy. The policy presented obligations to churches, society and government to craft policies and assume practices that ensure the inclusion of people with disabilities, women, children, and minorities.<sup>43</sup>

The Dutch Reformed Church in Zimbabwe uses an institutional approach to address the needs of persons with disabilities. In 1939 the church established a primary school for the blind. Later in 1948 the Henry Murray School of Deaf.<sup>44</sup> The Seventh Day Adventist church engages persons with disabilities inside and outside the church. Their mantra is summarised as:

As the church, we are opening our arms wider so that they feel loved and have a shoulder to lean on because that is our duty. It emerged during the interactions that people with disabilities feel neglected by the church. It is our duty to go door to door and ensure that they are included in every aspect of life. We realized that the church plays a critical role in promoting the rights of people with disability. The Bible say every person is fearfully and wonderfully made. Jesus treated everyone equally and dealt with special needs afterwards.<sup>45</sup>

The above mantra demonstrates a holistic approach to interpreting the Bible where there is an emphasis on the church's responsibility and the need to offer support to persons with disabilities.

41 Zimbabwe Council of Churches Statement on Disability <https://www.thechurchnewszim.co.zw/2021/10/zimbabwe-council-of-churches-statement.html> (accessed 16 January 2024).

42 I Sauca 'Greetings from the World Council of Churches (WCC) Geneva to the 8th Biennial Zimbabwe Council of Churches General Assembly' (2020) <https://www.oikoumene.org/resources/documents/greetings-from-the-world-council-of-churches-wcc-geneva-to-the-8th-biennial-zimbabwe-council-of-churches-general-assembly> (accessed 8 March 2023).

43 World Council of Churches 'Inclusion reaches new level at Zimbabwe Council of Churches Assembly' (2020) <https://www.oikoumene.org/news/inclusion-reaches-new-level-at-zimbabwe-council-of-churches-assembly> (accessed 26 April 2023).

44 T Marungudzi 'Special institutions for people living with disabilities in Zimbabwe: A socio-onomatics exegesis' (2016) 4 *Scholars Journal of Arts, Humanities and Social Sciences* 306.

45 F Lupande 'Zimbabwe: Special department opened for the disabled' *The Herald* (Harare) 6 October 2020 <https://www.herald.co.zw/special-department-opened-for-the-disabled/> (accessed 15 January 2024).

African Pentecostals in Zimbabwe to a greater extent still stigmatise persons with disabilities. African Pentecostals believe that healing is a solution to disability. Divine healing is a pivotal trait of Pentecostalism.<sup>46</sup> Christ's work on the cross released the power to give bodily restoration to persons with disabilities. Without contextual hermeneutics, African Pentecostals use a literal and exclusionary interpretation of portions of scriptures which mention the blind, deaf, lame and demon-possessed. Also, demons and evil spirits are believed to cause disability. Exorcism practiced upon persons with disabilities is a form of liberation and freedom. Chasing demons causing disability is a sign of victory over the powers of darkness by the power of God.

Like African Pentecostals, African Initiated Churches believe that disability is not something that simply happens. African Initiated Churches believe that disability is caused by evil spirits, witchcraft and vengeance spirits, angry ancestors and rheumatism.<sup>47</sup> When it comes to gods, African Initiated Churches believe that disabilities 'are associated with evil and punishment by the gods'. It is believed that evil-doing by either an individual or a family has repercussions that result in giving birth to a child with disabilities. Thus, disability is a punishment from the gods and ancestors.

African Initiated Churches in Zimbabwe believe that disability can be cured. Prophets and leaders in African Initiated Churches use prayer, and fasting to minister to persons with disabilities. Other artefacts used are holy water, oil and eggs. These artefacts are used to cleanse the believer. In some instances, prophets tie strings on the hands, knees and ankles to prevent disability. For complex disabilities like mental health problems, prophets use small pebble stones and 21 days of fasting in the mountains. There are fewer differentiations between types of disabilities:

The African community lumps disabled persons together and analyses them in terms of their bodily impairment ... different kinds of disabilities such as mild, moderate, severe or profound disability. One can also look at psychological impairment. There is also psychological hearing impairment, learning disability, autism, Down's syndrome, intellectual disability and so forth.<sup>48</sup>

Most of the disability perceptions are influenced by narratives from the Old Testament. The Hebrew scriptures do not portray persons with disabilities as equal partners.<sup>49</sup> The monarchy is responsible for dividing people into

46 CG Brown 'Introduction: Pentecostalism and the globalization of illness and healing' in CG Brown (ed) *Global Pentecostal and charismatic healing* (2011) 3.

47 F Machingura 'The rights of people with disability from a third world perspective: The Zimbabwean Context' in SS Bagchi & A Das *Human rights and the third world* (2012).

48 MJ Masango 'Neglect of people with disability by the African church' (2019) 75 *HTS Theologies Studies/Theological Studies* 1 at 2.

49 A Rose "'Who causes the blind to see": Disability and quality of religious life' (1997) 12 *Disability and Society* 395.

ethnicity, gender, impairments, and economic status.<sup>50</sup> It is easier to use the Old Testament because most of the culture resonates with the African indigenous culture. The overall discussion shows that both Christian and African Traditional religious doctrine has negative perceptions of disability. This resonates with the religious model of disability which view disability as a sin.<sup>51</sup>

## 6 Appropriating the Christian doctrinal perspectives within SDGs

It is evident from the ongoing discussion that doctrinal and theological perspectives about disability are sources for the interpretation of disability. Inherently, theology impacts the public and the intimate life of believers. Theology permeates social attitudes, political affiliations, and cultural and economic dispositions of believers. Appropriately, this article focuses on how the doctrinal and theological perspectives of disability respond to the 2030 Sustainable Development Goals mantra commanding 'leave no one behind' *especially persons with disability* (emphasis added). The issue of disability is topical cutting across all its goals and targets.

The 2030 Agenda for Sustainable Development is pushing that disability discourses must cut across all sectors. Churches are strong vehicles 'where economic, social, psychological and spiritual needs of people are met'.<sup>52</sup> While the church should keep its head within the biblical narrative, however, it needs to include socio-cultural analyses to achieve social justice for all believers including persons with disabilities. Social values and religious beliefs are sources for both the interpretation and construction of the meaning of disability.<sup>53</sup> Urgent healing needed for persons with disabilities is not about their bodies but the removal of institutionalised social, economic, political and religious barriers.<sup>54</sup> Efficient pastoral ministry is a potential vehicle which the church can use to 'transform persons with disabilities'.<sup>55</sup> Unlike the African Pentecostal quest for bodily restoration, persons with disabilities need food, hospital fees, tuition, and accommodation. The Sustainable Development Goal 1 and Goal 2 focus on the relevance of persons with disabilities. Target 1:2 seeks to reduce poverty by at least half the proportion of persons with disabilities. Target 2:1 focuses on providing sufficient food yearly to persons with disabilities. Poverty is one of the factors that affect persons

50 O Vengeyi 'The interpretation of Biblical texts on disability: Then and now' in S Kabue, J Amanze & C Landman (eds) *Disability in Africa: A resource book for theology and religious studies* (2016).

51 J McClure *Preaching words: 144 key terms in homiletics* (2007).

52 Sande & Maforo (n 13) at 1.

53 G Thomas & A Loxley *Deconstructing special education and constructing education* (2001).

54 A Yong 'Disability and the love of wisdom: De-forming, re-forming, and per-forming philosophy of religion' (2009) 9 *Ars Disputandi* 54.

55 Sande & Maforo (n 13).



with disability. There is an interplay between poverty and impairments.<sup>56</sup> According to the book of James 1:27 'religion that is pure and undefiled before God the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world'. The book of James encourages believers to care for the vulnerable. However, reading this scripture with a disability theology lens shows that it regarded persons with disabilities as an important category of society's vulnerable who should be cared for by believers. Prioritising accommodation is the right step in moving persons with disabilities into communion.<sup>57</sup>

It is possible that churches can contribute to practice inclusion as articulated by the 2030 Sustainable Development Goals about disability. The inclusion of persons with disability shows that churches are participating in God's salvific actions. The effective way for the church to do this is to 'include persons with disabilities in the community and give them space for participation'.<sup>58</sup> Participating together, persons with disability and persons without disability build on the conviction and belief of living equally together. Participating in doctrinal practices affords theological reflection space as believers partake in worship. Corporate worship and participation in rituals help believers to become transformed by utilising practice. One obvious element needing urgency is facilitating the dignity of persons with disability. The African Pentecostal notion of thinking that persons with disability are candidates for divine healing (de)values them making them more vulnerable. Healing is not a bad thing; the problem is its ability to restrict persons with disabilities from accessing worship spaces.<sup>59</sup> Love is transformative, it is more rewarding for persons with disabilities to receive love and compassion than healing gestures. Such an approach is in sync with the 2030 Sustainable Development Goal 3 which is targeting good health for persons with disabilities. It has been noted that the cause of disability is a result of preventable diseases and malnutrition rather than barriers in societies.<sup>60</sup> A tradition of caring is fundamental in the Ubuntu model of disability. The Ubuntu model of disability argues that 'impairment becomes cognitive, sensory, mental, physical (inclusive of biological) and spiritual diversity that can have a multitude of shared meanings that society, as a human collective, constantly (re) make together'.<sup>61</sup>

56 P Coleridge *Disability, liberation and development* (1993).

57 TE Reynolds 'Invoking deep access: Disability beyond inclusion in the church' (2012) 51 *Dialog* 212.

58 N Sande & J Ringson 'Do persons with disability need healing? An African Pentecostal perspective within the selective African Pentecostal churches in Zimbabwe' (2021) 30 *Journal of Pentecostal Theology* 162 at 179.

59 Reynolds (n 57) 221.

60 C Makamure 'Religion and disability: A reflection on the role of Pentecostal churches in curbing marginalisation of people with disabilities in Zimbabwe' (2017) 4 *Boleswa Journal of Theology, Religion and Philosophy* 106.

61 M Bergths 'Practices and discourses of Ubuntu: Implications for an African model of disability?' (2017) 316 *African Journal of Disability* 1 at 2.

Transformed biblical hermeneutics opens a window to explore teachings that focus on how the presence of God brings an experience which makes believers transcend the impairment of bodies. Capitalising on the biblical teachings of submitting to one another promotes the aspects of equality and mutuality. Another opportunity for the church is receiving each other as gifts from God and this goes beyond one's abilities. It is high time the church of God goes beyond interpreting the spiritual gifts of God. According to the book of 1 Corinthians 12:4-11, Paul writes that:

Now there are varieties of gifts, but the same Spirit; 5 and there are varieties of service, but the same Lord; 6 and there are varieties of working, but it is the same God who inspires them all in everyone. 7 To each is given the manifestation of the Spirit for the common good. 8 To one is given through the Spirit the utterance of wisdom, and to another the utterance of knowledge according to the same Spirit, 9 to another faith by the same Spirit, to another gifts of healing by the one Spirit, 10 to another the working of miracles, to another prophecy, to another the ability to distinguish between spirits, to another various kinds of tongues, to another the interpretation of tongues. 11 All these are inspired by one and the same Spirit, who apportions to each one individually as he wills.

While Paul is correct to describe spiritual gifts, however, the 21st-century church needs a gift of equality and diversity. Without over-spiritualising, equality and diversity is the main gift of God the church needs today to accommodate persons with disability. Persons with disabilities are no strangers to God, but co-heirs and part of the kingdom. Conscious recognition of persons with disabilities is an easy way to appreciate and acknowledge the worship contributions of persons with disability. The 2030 Sustainable Development Goal 17 mentions the issue of global partnership. The purpose is to increase the availability of high-quality data for representing all national contexts. The information about disability is mentioned as vital in this process. As such, this assists persons with disabilities to raise their concerns using their national governments. Churches have a responsibility to make sure persons with disabilities' needs are supported within the church and advocate them to the government.

Although Christ's death on the cross is given to all humans, the church has a role in interpreting the anthropological dimension of the wounds of Jesus. The church is good at showing that Jesus's wound represented healing, which is broadly correct. Also, the church has to accept the Jesus wounds and broken leg on the cross from disability perspective. Nancy Eiesland's disability theology that speaks of 'God is disabled' needs a fresh sermon in church pews. From the cross to the resurrected Jesus, the wounds and scars were visible. The resurrected disfigured Jesus is a face of persons with disabilities which needs collective acceptance. Enshrined at the centre of the Christian disability theology is to demonstrate that God favours persons with disability to the extent that Jesus bears the image of

the disabled God.<sup>62</sup> Broadly, the 21st-century church is better placed to accept that our bodies have a limitation. No one should be glorified because they have an able body. It is Jesus who started with an able body and ended up with a disabled body, however, believers accept both forms of Jesus. Without persons with disabilities, the church does not have the full glory of God.<sup>63</sup> Playing down the role of persons with disabilities is reducing the notion that God created man in his image and that everything created was good. The image of God is damaged, and this is pictured by man's broken relationship with God.<sup>64</sup> Disability is part and parcel of life, and anyone can start from being able-bodied and end up with a disabled body. Being able-bodied and disabled bodied shows equality and not flawed humanity.

The barriers created by personal perception or communal doctrinal teaching can be removed by recognising that persons with disabilities are persons. The church should be at the centre of educating both persons with disability and raising awareness to everyone about their plight. Most churches own schools, and it is possible to develop special schools that can help to empower persons with disabilities more than mainstream schools,<sup>65</sup> however, this position is against the inclusion agenda. The 2030 Sustainable Development Goal 4 ensures that there is inclusive and equitable education for persons with disabilities. Nations should build and upgrade education facilities that proffer effective learning environments for persons with disabilities. Emphasising our humanness weakens viewing persons with disability as charitable objects or projects that need to be completed.

Treating persons with disabilities as charity cases creates more problems for them than it provides solutions to their needs. It is an oversight not to think that persons with disabilities are not able to be productive, independent, and autonomous.<sup>66</sup>

For instance, African Pentecostals' focus on divine healing persons with disability indirectly makes persons with disability projects that the church should pray for and complete. Healing persons with disability is synonymous with completing the project by demonstrating the power of God in the church. It is sufficient to say that it is not healing that persons with disability desire but the

62 JN Amanze 'Disability discourse: Imago Dei, teaching theology from a disability perspective' in H Kroesbergen (ed) *Christian identity and justice in a globalised world from a Southern African perspective* (2014).

63 Ecumenical Disabilities Advocates Network 'A church of all and for all: An interim statement' (2003).

64 J Swinton *Spirituality and mental health care* (2001) 59.

65 N Sande 'Pastoral ministry to persons with disabilities: A critical investigation of how the Apostolic Faith Mission (AFM) church can be a safe space for meeting the needs of persons with disabilities (PWD) in Harare, Zimbabwe' PhD thesis, University of KwaZulu-Natal, 2018 (on file with the author).

66 Sande (n 39) 147.

church must focus holistically on both material and the psychosocial needs of persons with disability to create space for fellowship with persons with disability and desist from endlessly chasing after uncertain healings.<sup>67</sup>

By so doing, the believers will have an opportunity to engage with persons with disability and get to know them deeper than focusing on their differences. One way of ascertaining that the church is going beyond disability doctrinal perspectives is seen by welcoming persons with disabilities as family members in God's household. Change of perceptions, engagement and acceptance is a transformation process that shows a willingness to change the status quo. The 2030 Sustainable Development Goal 10 aims to reduce inequality among countries. Disability is mentioned as one of the 2030s inclusions alongside age, sex, religion, social, ethnicity and other status.

## **7 Conclusion**

Different churches in Zimbabwe have varied perspectives about persons with disabilities. Most mainline churches have a positive inclusive approach for persons with disabilities. The inclusion of persons with disabilities is mostly institutionalised where the churches have established schools and vocational training to empower and improve the lives of persons with disabilities. Such an approach is indirectly influenced by their mother churches in the West where the discourses about disability are more positive. Other churches like African Pentecostals and the African Initiated Churches mostly focus on divine healing and curing disabilities influenced by culture. The quest for healing persons with disability has produced stigma and exclusions. The church in Zimbabwe should refine Christian doctrines, practices, beliefs and convictions since they are prominent sources of knowledge about disability to incorporate the 2030 Agenda for the Sustainable Development Goals for disability. The 2030 Agenda for Sustainable Development Goals for disability is calling for the inclusion of persons with disabilities in all spheres of life, the political, social, economic and religious. The focus for religious communities should be on inclusion as a human rights human right as advocated by secular stakeholders especially.

67 Sande & Ringson (n 58) 62.

Yohannes Takele Zewale\*

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## Summary

*As one of the first signatories to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and having ratified it on 7 July 2010, Ethiopia is committed to ensuring the rights and well-being of people with disabilities. Nine years after ratifying the CRPD, in 2019, it issued a new electoral law (Electoral, Political Parties Registration and Election's Code of Conduct Proclamation (Proclamation)). However, this new Electoral Proclamation is not in compliance with the CRPD in terms of polling accessibility, accessible voting procedures, and the removal of disability based voting restrictions. Even worse, in terms of discrimination based on psycho-social and intellectual (mental) disability, the Proclamation contravenes the CRPD to a greater extent than legislation that was passed decades before the coming into force of the CRPD, despite being enacted after its ratification. The primary focus of this article is, therefore, to examine the discrepancy between the voting provisions in the Proclamation and the minimum voting standards set forth in the CRPD. The goal is to demonstrate the gaps in the Proclamation that may prevent persons with disabilities from fully participating in the voting process.*

## 1 Introduction

The right to vote is a fundamental political right recognised by international human rights laws, allowing citizens of a sovereign state to participate in their governance. It was initially recognised in the Universal Declaration of Human Rights (UDHR)<sup>1</sup> and later included in the

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1 The UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> However, neither the ICCPR nor the UDHR was able to address the right to vote in the unique circumstances of people with disabilities.

On the other hand, with a view to restructuring human rights in the context of people with disabilities,<sup>3</sup> the CRPD was adopted by the UN General Assembly in 2006 and took effect in 2008.<sup>4</sup> Many African countries, including Ethiopia, showed initiative by signing the CRPD on the very first day (30 March 2007) when it became available for signature to all States and regional integration organisations.<sup>5</sup> The inclusion of the right to vote in the CRPD, described in article 29 as one form of political participation for people with disabilities, thus presented a valuable opportunity for these developing democracies to ratify the CRPD and utilise its standards in constructing an inclusive voting system.

By ratifying the CRPD in 2010 and incorporating it into its domestic law, Ethiopia established the CRPD as an essential element of its legal framework.<sup>6</sup> Consequently, in 2019, Ethiopia issued a new Electoral Proclamation, which has received considerable praise for its increased disability inclusivity and compliance with the CRPD. However, the Proclamation has not yet been researched to determine the level of inclusion of persons with disabilities in the exercise of the right to vote. In this article, therefore, I will examine the provisions of the Proclamation relating to voting accessibility. I will analyse them against the CRPD standards to determine whether Ethiopia has in fact used the introduction of the CRPD into its domestic law as a golden opportunity to build an inclusive voting system.

The article is composed of four sections. Section 1 serves as an introduction, while section 2 delves into a comprehensive review of the accessible voting standards outlined in article 29 of the CRPD. Section 3 utilises these standards as a reference point to evaluate the voting provisions specified in Ethiopia's Electoral Proclamation. Consequently, section 3 points out the shortcomings found in the Proclamation's provisions relating to the exercise of the voting rights of people with disabilities, highlighting their non-compliance with the CRPD. Finally, the article concludes with section 4, which provides recommendations.

2 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

3 J Lord 'Preamble' in I Bantekas et al (eds) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 12.

4 The UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/ 61/106 (2007) (CRPD).

5 UN Treaty Body Database 'Treaty ratification status' [https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-15&src=IND](https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND) (accessed 30 August 2023).

6 UN Treaty Body Database 'Treaty ratification status of Ethiopia' [https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-15&src=IND](https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND) (accessed 30 March 2023).

## 2 The right to vote and the CRPD: Setting the scene

People with disabilities, who make up 15 per cent of the world's population,<sup>7</sup> have been prevented from exercising the right to political participation, such as the right to vote, due to the accessibility barrier that existed until recently and is still prevalent in many ways.<sup>8</sup> On the other hand, given that it is the only binding convention covering all people with disabilities, the CRPD forbids any discrimination against or exclusion of people with disabilities based on their disability.<sup>9</sup> It states that people with disabilities should enjoy all human rights, including their political rights, on an equal basis with people without disabilities, devoid of being discriminated against due to their disabilities.<sup>10</sup> In particular, article 29 is an article that is intended to overcome the barriers of accessibility that people with disabilities face in connection with voting and other types of political participation.<sup>11</sup>

### 2.1 Exploring article 29: Insights on the right to vote

The relevant section of article 29 is reproduced below. The chapeau and Paragraph 'a' of article 29 therefore read as follows:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- (a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
  - (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
  - (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

7 World Health Organization 'World report on disability' (2011) <https://apps.who.int/iris/handle/10665/44575> (accessed 20 March 2023).

8 C Pyaneandee *International disability law: A practical approach to the United Nations Convention on the Rights of Persons with Disabilities* (2019) 108.

9 JE Lord et al 'Facilitating an equal right to vote for persons with disabilities' (2014) 6 *Journal of Human Rights Practice* 115 at 118.

10 Arts 3(b), 5 and 29 of the CRPD.

11 As above.

- (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

Building on its predecessors the UDHR (article 21) and the ICCPR (article 25), article 29 of the CRPD provides for the right to political participation of persons with disabilities. Of course, one of the guiding principles that permeate the Convention is full and effective participation.<sup>12</sup> Consequently, the right to vote is one of the most important types of political participation. However, the right to vote, unlike those previously recognised by previous human rights instruments, does not exist here in the absence of additional measures tailored to the unique circumstances of people with disabilities. With the right to vote, State Parties are required to ensure that 'voting procedures, facilities, and materials are appropriate, accessible, and easy to understand and use'. They are required to recognise and use alternative voting arrangements, where appropriate. The right for voters with disabilities to be assisted by an assistant of their choice is also widely recognised. Article 29 thus requires member states to establish a system in which people with disabilities can actively participate in politics and other public affairs and ensure that they are able to use their right to vote on an equal basis with others.

The general principles of personal autonomy, non-discrimination, diversity, equal opportunity, inclusion, and participation stated in article 3 are an additional shield against any discrimination and exclusion while exercising the right to vote.<sup>13</sup> Article 5, which prohibits discrimination and exclusion on the basis of disability, stipulates that the necessary accommodation should be provided to people with disabilities when they exercise any of their human rights, including the right to vote.<sup>14</sup> For example, article 29 of the CRPD requires that a person with a disability should be provided with voting accommodation if they face any impediment to voting due to their disability.<sup>15</sup> In addition to the provision of reasonable accommodation for each voter with a disability upon request, article 9 obliges governments to take preliminary accessibility measures before people with disabilities can exercise their right to vote.<sup>16</sup> To put it another way, a reasonable accommodation must be provided to a voter with a disability if the accessibility measures already taken in accordance with article 9 are not found to be sufficient to solve the voter's impediments.<sup>17</sup>

12 For example, arts 3(c) & 4 of the CRPD.

13 Lord et al (n 9) 118-120.

14 Art 5(3) of the CRPD.

15 Art 29(a)(i) and (ii) of the CRPD.

16 Paras 25 and 26 of the Committee on the Rights of Persons with Disabilities, General Comment 2 (2014), Art 9: Accessibility, 11 April 2014, UN Doc CRPD/C/ GC/2 (2014).

17 As above.



As articles 29 and 9 are broad in content, the accessibility measures can range from physical to communicational, from informational to legal.<sup>18</sup> For instance, it is the duty of the governments to ensure that election-related messages, election campaigns, party documents, ballot papers, and others are prepared for the blind and other print-disabled voters in alternative formats.<sup>19</sup> Similarly, in order for voters with hearing impairment to make informed choices about policy options, election messages, party documents, election campaigns, and the like, must be prepared in sign language, and a system must be established that allows a sign language interpreter to be present during voter registration and voting.<sup>20</sup> If election-related technologies are employed, it is the government's duty to ensure that the machine is accessible, that any person with a disability can vote in secrecy and so forth.<sup>21</sup> Not only the location of the polling stations, but also the doors and interiors of the stations, the hallways, the polling booth where a voter can cast his vote secretly, and the height of the writing desk for voters who use a wheelchair, should be totally reachable and accessible.<sup>22</sup> Also, given the variety of disabilities and their severity, it may be practically difficult to make all polling stations 100 per cent accessible, so legally designing alternative voting methods, such as the right to vote by mail, is interpreted as another duty.

## 2.2 The right to vote and legal capacity of persons with disabilities

The right to vote and the right to legal capacity are very closely related. The existence of the former depends on the existence of the latter. Consequently, article 12 recognises that people with disabilities are equal to others before the law, that they have legal capacity, and that they can perform tasks that have legal effects in their capacity.<sup>23</sup> Therefore, since voting is one of the activities that have legal effect, its effectiveness draws on this article.

Unlike the ICCPR,<sup>24</sup> the CRPD does not set special circumstances in which a person with a disability's right to be recognised as a person before the law is denied or his right to vote can be limited. In other words, when articles 12 and 29 are read together, people with disabilities, including

18 R Cera 'Article 29 (Participation in Political and Public Life)' in VD Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 533-534.

19 Lord et al (n 9) 118-120.

20 As above.

21 As above.

22 As above.

23 Art12(1) and (2) of the CRPD.

24 Para 4 of the Human Rights Committee, General Comment 25 (1996), Art 25: The right to participate in public affairs, voting rights and the right of equal access to public service, 27 August 1996, UN Doc CCPR\_C\_21\_Rev.1\_Add.7 (1996).

those with mental disabilities, have the right to vote and be elected on an equal basis with everyone else.

The CRPD Committee also reaffirms that, in its General Comment 1 on article 12, a person's status as a person with a disability, including a mental one, can in no way serve as ground to deny the right to vote provided for in article 29.<sup>25</sup> In *Zsolt Bujdosó v Hungary*, the Committee emphasised that article 29 of the CRPD compels State Parties to ensure the effective and full participation of persons with disabilities in political and public life, on an equal basis with others.<sup>26</sup> This includes guaranteeing their right to vote. The Committee further highlighted that article 29 of the CRPD does not permit any reasonable restrictions or exceptions for any specific group of individuals with disabilities.<sup>27</sup> Consequently, the Committee determined that excluding the right to vote based on perceived or actual mental disabilities, even through individualised assessments, constitutes disability discrimination under article 2 of the CRPD.<sup>28</sup>

Similarly, the Committee expressed its concerns about such restrictions and their impact on the political rights of persons with disabilities in several concluding observations on initial State Party reports.<sup>29</sup> Consequently, it urged State Parties to the CRPD to take necessary measures to eliminate these restrictive practices. Be that as it may, conflating legal capacity with mental capacity, a majority (about 80 per cent) of countries in the world<sup>30</sup> have continued restricting or depriving the right to vote of persons with mental disability simply on the basis of the diagnosis of a disability (status approach), where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach).<sup>31</sup> As I will explore in later section, Ethiopia's situation is not different from that of these countries.

### **2.3 The right to receive voter assistance**

It is also required of State Parties to facilitate the conditions for any voter with a disability to be assisted by an assistant of their choice during voter

25 Paras 7, 13, 31 and 48 of the CRPD Committee, General Comment 1 (2014), Art 12: Equal recognition before the law, 11 April 2014, UN Doc CRPD/C/GC/1 (2014).

26 Communication 4/2011, views adopted on 9 September 2013.

27 Communication 4/2011, para 9.4.

28 As above.

29 Example CRPD Committee, Concluding Observations on the Initial Report of Ethiopia, 3 November 2016, UN Doc CRPD/C/ETH/CO/R.1 (2016) para 64; CRPD Committee, Concluding Observations on the Initial Report of Uganda, 12 May 2016, UN Doc CRPD/C/UGA/CO/1 (2016) para 56; CRPD Committee, Concluding Observations on the Initial Report of Kenya, 30 September 2015, UN Doc CRPD/C/KEN/CO/1 (2015) para 51.

30 D Bhugra et al 'Mental illness and the right to vote: a review of legislation across the world' (2016) 28 *International Review of Psychiatry* 395 at 396-399.

31 Para 29 of General Comment 1.

registration or on voting day.<sup>32</sup> The assistant chosen by the voter may be the one assigned by the government or brought by the voter themselves, depending on the voter's preference.<sup>33</sup> This is an extension of the supported-decision making recognised in article 12 of the CRPD, which presumes that 'all people enjoy legal capacity and governments must take actions to provide people with access to the supports they need and want to make their own life decisions'.<sup>34</sup>

Neither the text of the CRPD nor the Committee in its General Comment 1 on article 12 defines 'supported' decision-making; nor does it introduce an acceptable type thereof, reflecting the fact that there is no single agreed-upon definition of the concept.<sup>35</sup> As Kanter rightly put it, supported decision-making recognises that

all people have the right to make decisions and choices about their own lives, while also acknowledging that, at times, people with disabilities, just like anyone else, may seek and need help from family and friends in making their decisions.<sup>36</sup>

Hence, in supported decision-making, the assistant helps the person come to a decision and/or carry it out on their own, but they are not allowed to make the decision on their behalf.<sup>37</sup> In supported decision-making, the person seeking support is always the primary decision maker.<sup>38</sup> It should be emphasised, however, that regardless of the degree of support required, supported decision-making enables the individual to maintain legal capacity.<sup>39</sup>

Support can be provided in a number of ways and forms.<sup>40</sup> Family members and friends of the person with a disability, organisations of and for persons with disabilities, government employees, private agreement, volunteers, and many other alternatives to substituted decision-making will likely be the appropriate sources of support.<sup>41</sup> It is therefore up to State Parties to develop a variety of models of supported decision-making with special attention to different disability types and local contexts.<sup>42</sup>

32 Cera (n 18) 534-535.

33 As above.

34 D Plessis & J Njau 'Article 29 participation in political and public life' in I Bantekas MA Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 858.

35 T Ryan, A Henderson & W Bonython 'Voting with an unsound mind: A Comparative study of the voting rights of persons with mental disabilities' (2016) 39 *University of New South Wales Law Journal* 1038 at 1042.

36 AS Kanter *The development of disability rights under international law: From charity to human rights* (2015) 266.

37 As above.

38 Ryan, Henderson & Bonython (n 35).

39 As above.

40 NA Kohn 'Supported decision-making: A viable alternative to guardianship' (2016) 117 *Pennsylvania State Law Review* 1111 at 1121.

41 As above.

42 Ryan, Henderson & Bonython (n 35) 1043.

Article 29 of the CRPD addresses the right to vote by all persons with disabilities and the right to be provided with support in exercising the right. No person with a disability, because of their disability type, is discriminated against from enjoying the right to vote.<sup>43</sup> Hence, people with disabilities have an unencumbered right to vote on an equal basis with others, and all the necessary support should be provided for them to exercise their right to vote and access all voting procedures on an equal basis with others.<sup>44</sup> To this end, article 29, para (a)(iii), of the CRPD reiterates the concept of support from the perspective of voting, which has to be allowed, where necessary, to facilitate the exercise of the right to vote.<sup>45</sup> This reiteration is consistent with the idea of supported decision-making under article 12, which, by acknowledging the legal capacity of people with disabilities on an equal footing, calls on State Parties to take the necessary steps to assist people in using that capacity.<sup>46</sup>

A person's support for exercising the right to vote by persons with disabilities must be based on their own will and preferences, not on what the support provider perceives to be in their own best interests.<sup>47</sup> States parties have a duty to take into account the support provider a voter chooses to use in exercising their right to vote and to put safeguards in place to make sure that person follows the individual's will and preferences.<sup>48</sup> The next section will assess the degree of inclusivity of the Ethiopian Electoral Proclamation with regards to voters with disabilities in comparison to these CRPD standards.

### **3 Voting accessibility in Ethiopia's new electoral proclamation: A critical assessment**

As mentioned earlier, Ethiopia is among the first countries to sign and ratify the CRPD. However, it currently lacks a comprehensive disability law similar to Kenya or Uganda's 'Persons with Disabilities Act',<sup>49</sup> which would facilitate the effective implementation of the CRPD. Presently, it only has two smaller laws, namely The Right to Employment of Persons with Disability Proclamation 568 of 2008, and The Exemption of Vehicles' Custom Duty for Persons with Disabilities Directive 41 of 2007, which address specific issues pertaining to disability rights. Except these two

43 Para 44 of General Comment 1.

44 As above.

45 Plessis and Njau (n 34).

46 As above.

47 Articles 12(4) and 29(A)(III) of the CRPD; Cera (n 18) 534-535.

48 As above.

49 Kenya's Persons with Disabilities Act 14 of 2003 and Uganda's Persons with Disabilities Act 3 of 2020.

specific laws, provisions related to people with disabilities are found scattered throughout various proclamations, regulations, and directives.<sup>50</sup>

Scattered provisions that seem to address persons with disabilities can even be found in earlier laws enacted in the 1960s, such as the Civil Code of 1960 (articles 339 to 379, article 2437 and article 1728(3)), which specifically address the issue of legal capacity for certain categories of individuals with disabilities. In a similar vein, recent laws, if not all, also include one or two articles or sub-articles that touch upon disability rights. The Electoral Proclamation, along with its implementing directives, falls under this category of laws.

This Proclamation is one of the laws drafted by the Advisory Council on Justice and Legal Affairs established by Directive 1/2018 under the former Federal Attorney General and current Ministry of Justice, following the coming to power of the current Prime Minister Abiy Ahmed. Compared to previous similar laws, the Proclamation has gone a long way in considering people with disabilities in a number of provisions. It contains more than ten articles that try to address the issue of persons with disabilities in voter registration and voting provisions. The participation of representatives of people with disabilities in the drafting process of the Proclamation, as evidenced by the minutes and explanatory notes of the law, has contributed to this outcome. However, it is important to note that the articles within the Proclamation that pertain to persons with disabilities may not fully encapsulate the intended inclusivity. Therefore, in the following discussion, I will first assess whether accessible polling places and alternative voting arrangements have been fully established and mandated. Secondly, I will investigate whether the right to obtain a voter's assistant is incorporated in alignment with the CRPD. Lastly, I will analyse the removal of disability-based voting restrictions.

### **3.1 Access to polling stations and alternative voting methods**

The Proclamation currently has no provisions in place that specifically address alternative voting arrangements for persons with disabilities. Furthermore, the provisions addressing polling accessibility are insufficient in both number and content. Article 15(1) of the Electoral Proclamation reads: 'The Board shall establish polling stations at locations that take into consideration the special conditions of the disabled and other factors.'

This provision was on which many hopes were placed at the time of drafting, in terms of making polling stations fully accessible for people with

50 In Ethiopia, 'Proclamations' are laws issued by the parliament, while 'Regulations' are issued by the Council of Ministers, and 'Directives' are laws issued by ministerial offices or other enforcing bodies.

disabilities. However, the provision does not meet the minimum standard set by the CRPD.

First, the content of the provision is just about the location of the polling stations and not about their overall accessibility. The purpose of the provision is to allow polling stations to be established on the sides of major roads or to be opened in facilities such as 'Kebeles (the lowest administration point)' that are frequently used by the public. Of course, polling places are usually set up along roads and close to, or within, public institutions, even though the provision does not make it mandatory.

But the biggest barrier for voters with disabilities is not getting to the polling station. The biggest barriers lie at the entrance and interior of the stations. The entrance to the stations may be too rocky and bumpy, with one or more flights of stairs devoid of an elevator, an open canal in the midst, or too narrow to accommodate a wheelchair. Somehow, even if the entrance barrier is overcome, the interior may be rugged, the hallways may be rife with columns and unduly stationary staff; polling booths may not be wheelchair accessible; the voter may not be able to move their wheelchair in it; the ballot-writing desk may exceed the height of the wheelchair user; or the booth may be too narrow for the voter to enter and vote with an assistant. All these barriers are not contemplated by article 15(1).

Second, this provision, apart from looking at accessibility of polling places only in terms of location, seems to be permissive, not mandatory. The phrase, 'take into consideration the special conditions of the disabled' is itself indicative of the non-commitment of the Proclamation. It should have clearly used terms that denote obligations such as, 'guarantee or ensure' instead.

'Accessibility' is one of the principles of the CRPD that has a strong foundation in the Convention.<sup>51</sup> By contrast, the use of the phrase 'take into consideration the special conditions of the disabled' not only dilutes the force of the law to comply with the principle of accessibility, but turns out to be a phrase open to different interpretations.

The Sixth National Election in 2021 served as a clear indication of the inadequacy of this provision. Polling places were found to be inaccessible in many electoral districts, regardless of whether they were urban or rural. Many of these locations required navigating strenuous stairs, crossing dangerous pits, or traversing rugged terrain. Additionally, most voting booths were not suitable for disabled voters to stand alone, let alone with an assistant.

51 Arts 3(f) and 9 of the CRPD.

Fortunately, a non-governmental organisation for persons with disabilities, through a project coordinated by the author, made ten polling places accessible and handed them over to the Electoral Board as samples. However, due to various reasons such as time and budget constraint, the board could not use the samples and replicate this accessibility in other polling places. To make matters worse, since most of the polling places were located in facilities owned by civil societies (both formal and informal), schools, and the like, they did not allow modifications for accessibility purposes. The lack of a strong and binding provision made it difficult to take specific action to address these issues.

Article 15(5) of the Proclamation reads: 'hospitals shall not serve as a place where voter registration and voting take place.'

As per this provision, polling places cannot be located within medical institutions. Indeed, it may not be odd to declare that medical institutions are not used as polling stations. However, there are a number of considerations such as introduction of alternative voting methods that must be taken into account when imposing such a ban on medical institutions.

During voter registration and on election day, thousands of patients spend the night in hospitals.<sup>52</sup> For example, in Ethiopia, where there is a severe shortage of hospital beds, there were 26 725 total hospital beds in March 2021, which is immediately before the sixth national election of June 2021. Within this patient population, it is essential to recognise that individuals with disabilities may be present, necessitating ongoing follow-up for their specific disabilities or seeking treatment for common illnesses. Assuming that all beds were occupied and that all patients were eligible to vote, it implies that the 26 725 patients, including patients with disabilities, were unable to exercise their right to vote, thus creating a de facto disability-based voting restriction.

Equally problematic are the provisions of the Proclamation that make physical presence mandatory for voting and registration. As stated in articles 5(4), 20(1) and 50(1) of the Proclamation, registration and voting can only be done in person. This type of provision excludes from voting hospitalised patients and people with severe disabilities who do not travel far from their homes.

Although the alternative voting method would be a feasible solution, it seems that such methods are not currently permitted in the Proclamation. In many countries that have ratified the CRPD, alternative voting methods are allowed, so in-patients and people with disabilities, irrespective of the type or severity of their disability, can exercise their right

52 Federal Ministry of Health of Ethiopia 'Total number of beds' (March 2021).

to vote on an equal basis with others. Unfortunately, the Proclamation does not provide for such alternative voting arrangements.

Article 17(1) and (2) provides that:

The [Board may decide that] military who live in camps; civil servants and their family members; citizens attending higher learning institutions; internally displaced citizens; incarcerated citizens whose voting rights have not been stripped off ... to allow them to register and vote earlier than the election day ...

Basically, this type of alternative voting method is known as early voting.<sup>53</sup> Other countries use it more widely for voters with disabilities.<sup>54</sup> A voter with a disability may not be able to go to the polling station on the very election day and vote due to the absence of a voting assistant or other reasons related to the disability. In particular, a person with a disability who requires medical attention may have a medical appointment on election day. Many people with disabilities may choose not to vote because of the limitations imposed by their disability, even if they have an incumbent right to vote. With this in mind, early voting is used as one of alternative voting methods for people with disabilities, but it is not designed to serve people with disabilities in the Ethiopia's voting law.

Article 17(3) provides that:

The Board shall conduct a study and submit same to the House of Peoples' Representatives for a decision on a special procedure to enfranchise citizens residing abroad or for those who cannot vote in their residence for other reasons.

The alternative voting method contemplated by this provision is known as absentee voting.<sup>55</sup> This type of alternative method allows voting through methods such as the mail and the Internet. In countries such as the United States, the majority of voters with disabilities cast their votes through this method.<sup>56</sup> However, it is unclear whether the provision in our case also applies to people with disabilities who are living near polling places but cannot reach these due to their severe disabilities.

This provision will be implemented by issuing an implementation directive after the Board has conducted the necessary research and submitted it to Parliament for approval. Since the directive has not been issued yet, it may be a good option to pressurise the board to unequivocally

53 H Wass et al 'Voting while ailing? The effect of voter facilitation instruments on health-related differences in turnout' (2017) 27 *Journal of Elections, Public Opinion and Parties* 503 at 504-508.

54 As above.

55 As above.

56 L Schur, M Ameri & M Adya 'Disability, voter turnout, and polling place accessibility' (2017) 98 *Social Science Quarterly* 1374 at 1375.



include people with disabilities when it will introduce the method of absentee voting.

Moreover, polling stations are usually numerous in nature. They are usually temporary and variable. Worse yet, in many countries, they are not owned or controlled by the election administering institutions, such as the National Electoral Board of Ethiopia.<sup>57</sup> These features present a challenge to countries seeking to simultaneously ensure accessibility across all polling stations. Because of this, other countries have designed alternative methods of voter registration and voting and incorporated them into their voting laws to allow their citizens with disabilities to participate in elections on an equal basis with their citizens without disabilities.

Among these alternative voting methods are curbside voting, proxy voting, absentee voting, homebound voting, and phone voting.<sup>58</sup> None of these alternative voting methods, or other methods not mentioned in this piece, are recognised by the new Electoral Proclamation for voters with disabilities. As a result, it is currently less likely for Ethiopians with disabilities to be able to vote on an equal basis with others, which is against the CRPD.

Ensuring the accessibility of the ballot paper and voting technology is another crucial aspect that enables voters with disabilities to cast their votes effectively, independently, and confidentially. Various ways can ensure ballot paper accessibility, including the use of high-contrast colors between the background and text or employing large fonts and clear fonts to make ballot papers easier to read for voters with visual impairments.<sup>59</sup> Tactile ballot papers can also be created for blind or visually impaired voters, and audio assistance can be provided to help them cast their votes independently by using an audio player to hear instructions and ballot choices.<sup>60</sup> Accessible electronic voting machines such as 'Express Vote' in the United States and online voting systems are other examples.

The Proclamation does not provide provisions for the development of accessible ballot papers or the immediate implementation of accessible voting technology. While it promised the possibility of issuing directives regarding the use of technology for voter registration, voting, and vote counting in the future,<sup>61</sup> it totally lacks provisions that address the accessibility of the ballot paper. At the very least, the Proclamation ought to have included a provision authorising the board to create an accessible

57 See eg United States Government Accountability Office 'Voters with disabilities: Observations on polling place accessibility and related federal guidance' (2017) <https://www.gao.gov/assets/gao-18-4.pdf> (accessed 21 August 2023).

58 Wass et al (n 53) 504.

59 US Electoral Commission 'Ensuring that voting is accessible' <https://www.electoralcommission.org.uk> (accessed 28 August 2023).

60 As above.

61 Arts 29(3) and 51(8) of the Electoral Proclamation.

ballot paper in upcoming elections, as it promised with regards to the use of voting technologies.

The expected directives concerning the use of voting technologies have not been issued yet, before issuing those directives, it's crucial to raise awareness among all involved parties, including the board, and educate them about inclusive and accessible voting technologies. This awareness campaign will enable the board to issue inclusive directives, taking into account accessible voting technology, that adhere to the minimum standards set by the CRPD.

### **3.2 Giving priorities and voter's assistants**

The Proclamation includes a provision granting priority to disabled voters in case of line-ups during voter registration or voting. Furthermore, it states that voters with disabilities are entitled to receive support from a Voters' Assistant whenever needed.

#### Article 52. Voters Who Need Assistance

- (1) The disabled ... shall be given priority during registration as well as voting. 2/ Any voter who needs assistance to put a mark on his ballot paper and insert it into the ballot box has the right to select his own assistant. 3/ Notwithstanding the provision of Sub-Article (1) of this Article, the person selected by the voter requiring assistant shall be of 18 years old or above ...

This provision is an admirable provision in many respects. Depending on the type of disability they have, saving a voter or registrant with a disability from waiting in line will have numerous affirmative effects. On the one hand, there are many people with disabilities whose disabilities do not allow them to stand for extended periods of time. These people will be placed under pressure to relinquish registering or voting when they are kept in a line for several minutes or hours. Priority, on the other hand, encourages volunteers who are driven to genuinely assist the voter or registrant with a disability. As a result, it encourages people to continue lending hands and to quickly reach out to a number of people who seek assistance. By contrast, it is equivalent to telling a volunteer not to offer voluntary assistance if they are instructed to wait for hours with the individual they are assisting.

Using assistance of their choice by voters with disabilities, as described in sub-article 2, is one of the electoral period accommodations emphasised in the CRPD.<sup>62</sup> However, I find this provision problematic in many ways.

62 Article 29(a)(iii) of the CRPD.

The first problem is that sub-article 3 states that the assistant must be at least 18 years of age. Except for those, such as election officers, who are legally bound to execute additional responsibilities, the assistant is solely responsible for providing support and is not involved in any decision-making on the voter's behalf. According to article 12 of the CRPD, supported-decision-making arrangements are necessarily based upon and guided by the individual's will and preference in the context of particular circumstances.<sup>63</sup> Subsequently, the assistant is not to decide or suggest the voter's preference or to analyse the policy beyond facilitating the situation. A voter needs an assistant just to provide him with support against the barriers he encounters in his efforts to exercise his right. It is the voter himself who knows and decides who to vote for. The assistant's job is to provide support under the direction of the voter or to facilitate the conditions for the voter's decision. It is not appropriate to stipulate 18 years of age as a minimum age requirement for this type of support, which does not require the assistant to choose and decide.

Second, establishing a minimum age of 18 to provide assistance could prevent voters with disabilities from seeking assistance from their 16- or 17-year-old children, who could otherwise help them feel more confident about maintaining the secrecy of their vote. Voting is confidential in nature. A person trusts his 16- or 17-year-old child more than their 30-40-year-old social friend. Furthermore, 'trust' of the assistant by the party seeking the assistance serves as the foundation for supported decision-making under article 12(3) of the Convention.<sup>64</sup> Hence, by barring a voter from receiving assistance from their 16- or 17-year-old child solely based on age requirements, they may be deprived of the opportunity to rely on someone they trust deeply to safeguard the secrecy of their vote.

A related problem with this is that there is no provision to prevent a voter's assistant from divulging voting secrets after providing voting assistance. Article 12(4) of the CRPD provides that states parties must provide appropriate and effective safeguards to prevent abuse in supported decision-making.

The voting assistant should be prohibited from disclosing who the voter voted for inside or outside the polling place. Otherwise, the right of a voter with a disability who needs voting assistance to cast a secret ballot will remain at risk.

For example, some countries, such as Uganda, have adopted strong safeguards in their voting laws. According to the Ugandan Parliamentary Elections Act of 2005, a person who assists a blind, illiterate, or other voter with disability to vote shall not communicate at any time to another person

63 P Blanck 'Supported decision-making: emerging paradigm in research, law, and policy' (2021) 34 *Journal of Disability Policy Studies* 3 at 2.

64 Kanter (n 36) 237.

information as to the candidate for whom the assisted voter intends to vote or has voted, or as to the number, if any, on the ballot paper given for the use of that voter.<sup>65</sup> An assistant who contravenes this provision is punishable by a fine not exceeding 24 currency points, imprisonment not exceeding one year, or both.<sup>66</sup>

Given its recent adoption and the lessons it could draw from its preceding counterparts, the Proclamation must have contained provisions similar to those in Uganda's voting laws that prevent voting assistants from divulging the secrecy of votes cast by voters with disabilities. Unfortunately, however, no provision of the Proclamation provides similar protections for voters with disabilities who require assistance.

Thirdly, as argued above, the task of a voter assistant is to provide the support needed for the voter with a disability to exercise his/her right to vote. They are not authorised to make decisions or enter into contracts on behalf of the voter. They are only responsible for providing support at the polling station.

On the contrary, The Ethiopia's Labour Proclamation stipulates that children can be employed from the age of 15.<sup>67</sup> Those minority children who are employed pursuant to this law are here concluding a contract and making an independent decision on behalf of another. Therefore, there is no legal justification for prohibiting a child who, according to the Labour Proclamation, has the capacity to make independent decisions or represent an employer in a contract, from providing support during an election, as it only reflects the inconsistencies in the country's laws.

Fourth, as stated in article 26(4) of the Voting, Counting and Result Declaration Directive 14/2013, one assistant can only assist one voter.<sup>68</sup> This in itself is contrary to the right of using an assistant of one's choice under the CRPD and is a provision that has not been considered very well. According to this provision, two blind couples are forced to use a third party instead of their 20-year-old son. In terms of sharing secrets, maintaining trust, being comfortable with the support, freely requesting what they want, and so on, voters with disabilities may not experience, from third parties, the level of independence and comfort they may get from their own children. However, under this provision, voters with disabilities who are family members cannot exercise their right to vote with the assistance of their mutual sibling, child, or close mutual friend.

65 Art 7(3) of The Uganda's Parliamentary Elections Act of 2005.

66 Art 7(5) of The Uganda's Parliamentary Elections Act of 2005.

67 Art 89 of The Ethiopia's Labour Proclamation 1156 of 2019.

68 There are around 30 directives issued to enforce various provisions of the electoral proclamation. They contain certain provisions related to voting accessibility.

Fifth, according to the Voter Registration Implementation Directive 6/2013, article 22(4), if a voter with a disability needs assistance, the chief election officer must recruit a volunteer from among the voters who came for registration to assist the voter. This provision makes the voter's right to register dependent on the propensity and will of a third party to assist or not to assist. Such a type of discharge of one's duty by a State Party under a human rights convention is unacceptable under any human rights justification.

First, there may not be another registrant at the time of the voter with a disability seeking support. Second, even if there is another registrant, they may not be willing to support it for various reasons. Third, since the source of the support obtained in this way is not a right but a grace, it will inevitably cause a psychological wound to the recipient. Fourth, as per article 26(5) of the Voting, Counting and Result Declaration Directive 14/2013, if the support seeker does not bring his assistant during the voting day, it is only the chief election officer who is required to provide support. No justification can be given as to why the officer who provides support on voting day should not provide the same support during registration. Furthermore, granting the right to choose an assistant akin to the voter with a disability to an election officer or a third party poses concerns and may contradict the CRPD.

### 3.3 Disability-based voting restrictions

The Proclamation has also included several provisions pertaining to individuals with mental disabilities and their capacity to vote. Articles 18(3)(a), 28(1) and 31(1)(f) of the Proclamation stipulate that a person with mental disorder or who is 'insane' (the language used by the Proclamation) does not have the right to vote or be elected. Such a prohibition not only contradicts the CRPD but also causes many problems of interpretation and implementation.

Chapter three of Title II of the Civil Code (a proclamation enacted in 1960) addresses the capacity of, using the law's terminology, 'insane persons and infirm persons'.<sup>69</sup> This chapter is, however, rife with provisions, concepts and terms that directly run afoul of the CRPD.

Although all people with disabilities, including those with mental disabilities, have a complete and unencumbered right to legal capacity, the Committee makes it clear that State Parties unduly conflate the concept of legal capacity with that of mental capacity and deny people with mental disabilities their rights, including the right to vote.<sup>70</sup> The denial may take any of the following forms:

69 Art 339 of the Ethiopia's Civil Code Proclamation 165 of 1960.

70 Para 15 of General Comment 1.

Diagnosis of a disability (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach).<sup>71</sup>

The Civil Code adopts outcome and functional approaches for 'notorious' and 'not notorious' persons with mental disabilities respectively as the principal modes of restricting their right to legal capacity<sup>72</sup> while status approach is adopted as exceptions to the two principal approaches to be employed by court only where their health and their interest so require.<sup>73</sup> All of them are, however, replaced by 'a universal approach' and a 'supported decision-making model', with the latter taking different forms.<sup>74</sup> Furthermore, the Code employs outdated and derogatory terms to refer to persons with various disabilities.<sup>75</sup>

The Proclamation, enacted in 2019, conflicts with the CRPD even more than the Civil Code does. It is more stringent than the Civil Code when it comes to prohibiting individuals with mental disabilities from exercising their right to vote. Worse than the Civil Code, it prohibits persons with mental disabilities from voting or running for office, on the basis of their diagnosis.<sup>76</sup> Only judicial interdiction results in the automatic denial of rights under the Civil Code.<sup>77</sup> According to the Proclamation however, anyone, for example, who is medically diagnosed as mentally ill, has no right to vote or run for office.<sup>78</sup>

The Committee, in its Concluding Observations on the Initial Report of Ethiopia in 2016, recommended that the Ethiopian government take all legislative and other measures to guarantee the political rights of persons with disabilities, in particular persons with mental disabilities, including by removing any restrictions on the exercise of political rights, in law or in practice.<sup>79</sup> However, in its second and third periodic report submitted to the Committee on 9 January 2023, the Ethiopian government reiterated what the Proclamation provides under articles 18(3)(a), 28(1), and 31(1)(f), that persons with mental disabilities are still not able to vote or be voted for if proven unfit by medical evidence.<sup>80</sup>

71 As above.

72 Arts 343 and 347 of Ethiopia's Civil Code.

73 Art 351 of Ethiopia's Civil Code.

74 Paras 8 and 25 of General Comment 1.

75 See for example arts 339-379 of Ethiopia's Civil Code.

76 Arts 18(3)(a), 28(1) and 31(1)(f) of the Electoral Proclamation.

77 Art 351 of Ethiopia's Civil Code.

78 Art 31(1)(f) of the Electoral Proclamation.

79 Concluding Observations on the Initial Report of Ethiopia (n 29).

80 CRPD, Combined Second and Third Report of Ethiopia submitted by Ethiopia under article 35 of the Convention, due in 2020, 9 January 2023, UN Doc CRPD/C/ETH/2-3 (2023) para 54 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FETH%2F2-3&Lang=en#](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FETH%2F2-3&Lang=en#) (accessed 21 August 2023).

Moreover, the Proclamation, worse than the Civil Code, employs outdated and derogatory terms to refer to persons with mental disabilities.<sup>81</sup> The CRPD does not recognise nor accept this denial of right to vote and derogatory terms to refer to persons with disabilities.<sup>82</sup>

The Committee, in its Concluding Observations on the Initial Report of Ethiopia, had recommended that derogatory terms, such as 'insane' as provided by the Civil Code, be avoided when referring to people with disabilities in existing and new laws.<sup>83</sup> Consequently, in its Second and Third Periodic Report of 2023, the Ethiopian government reported that although the civil code has not yet been fully revised due to technical reasons, the use of these derogatory terms to identify people with disabilities has been avoided in current policy documents and legislation.<sup>84</sup> However, as can be seen in articles 18(3)(a), 28(1), and 31(1)(f), the new Electoral Proclamation continues to use derogatory terms such as 'mental disorder' or 'insane' to identify people with mental disabilities.

## 4 Conclusion

Ethiopia currently lacks a comprehensive disability law to aid in the implementation of the CRPD. Nonetheless, it is worth noting that numerous proclamations in the country, if not all, incorporate one or two articles or sub-articles that address disability issues. The Electoral Proclamation is one such law, as it includes over ten articles or sub-articles specifically related to voters with disabilities. The Proclamation regarding the right to vote is thus a step in the right direction for ensuring that people with disabilities have full and equal access to the electoral process. However, there are still many loopholes that need to be addressed in order to fully comply with the CRPD and ensure full inclusion.

Specifically, the Proclamation has no provision requiring polling places to be fully accessible. Moreover, the Proclamation does not guarantee accessible ballot papers or voting technologies. This can create significant barriers for people with disabilities, who may not be able to vote independently or in secret.

Worse yet, alternative voting methods, which are asserted to be the choice of most disabled voters, are totally banned. The voting assistance provisions are poorly thought out and contradictory. This may ultimately lead to a de facto disability-based voting restriction.

81 Arts 28(1) and 31(1)(f) of the Electoral Proclamation.

82 Paras 7, 13, 31 and 48 of General Comment 1.

83 Concluding Observations on the Initial Report of Ethiopia (n 29) para 6.

84 Combined Second and Third Report of Ethiopia (n 80) para 6.

Additionally, some provisions impose disability-based voting restrictions on individuals with mental disabilities, which is discriminatory and violates the CRPD. The Proclamation even employs derogatory terms to refer to persons with disabilities. In order to be in compliance with the CRPD, it is, therefore, necessary to reform voting laws and policies to ensure they are inclusive and do not impose unnecessary barriers for people with disabilities. The reform may include:

- (i) Requiring polling places to be fully accessible;
- (ii) Introducing a variety of alternative voting arrangements;
- (iii) Guaranteeing accessible ballot papers and voting technologies;
- (iv) Removing disability-based voting restrictions;
- (v) Eliminating derogatory terms from voting laws and policies; and
- (vi) Reformulating the provisions of the voter's assistant to align with the will and preferences of the voter.

It is also important to ensure that people with disabilities are involved in the design and implementation of these reforms. This will help to ensure that the reforms are truly inclusive and meet the needs of people with disabilities. By taking these steps, it is possible to ensure that people with disabilities have full and equal access to the electoral process, and that they can participate fully in building process of inclusive democracy, as required by the CRPD.

Finally, this piece is not expected to uncover all the gaps in the Proclamation that violate the CRPD. Instead, it is intended to serve as a catalyst for further research in order to identify and address additional inconsistencies between the Proclamation and the CRPD.





## **SECTION B: COUNTRY REPORTS**



# NIGERIA

*Ngozi Chuma Umeh\**

## 1 Population indicators

### 1.1 What is the total population of Nigeria?

Based on the 2006 Census figures the total population of Nigeria was 140 431 790.<sup>1</sup> In 2019, the projected population of Nigeria stood at 201 135 262.<sup>2</sup> On Friday 28 April 2023, the Nigerian government indefinitely postponed the 2023 Population and Housing Census, which was previously scheduled for 3-7 May 2023.<sup>3</sup> However, the current population of Nigeria is 224 760 252 as of Tuesday, 5 September 2023, based on Worldmeter's elaboration of the latest United Nations data.<sup>4</sup>

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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 household, state and local government area, Table HH (ADD 1), Vol IX, April 2010.

2 Demographic Statistics Bulletin 2020.

3 National Population Commission <https://www.premiumtimesng.com> (accessed 1 September 2023).

4 Available at <https://www.worldometers.info/world-population/nigeria-population/> (accessed 15 August 2023); see also estimates of the latest United Nations data, available at World Population Review <https://worldpopulationreview.com/countries/nigeria-population> (accessed 15 September 2023).

## 1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Nigeria. What criteria are used to determine who falls within the class of persons with disabilities in Nigeria?

Differing methodologies used to obtain statistical data on the prevalence of disability in Nigeria are field interviews (National Census),<sup>5</sup> including self-reporting and questionnaire distribution.<sup>6</sup>

In the Discrimination Against Persons with Disabilities Prohibition Act, 2018, (Disability Act), section 22 provides the criteria to determine who falls within the class of persons with disabilities in Nigeria. Accordingly, the section provides thus:

[T]hat a Person with Disability must obtain a Permanent Certificate of Disability from the National Commission for Persons with Disabilities – section 22(1). However, a Temporary Certificate of disability may be issued by a doctor with approval of the Commission if the doctor suspects disability in the course of treatment of a person who was not a person of disability before – section 22(2). Where this disability however persists for over 180 days, the Commission on the recommendation of the doctor shall issue a Permanent State of Disability – section 22(3).

Persons who unlawfully issue or obtain a certificate of Disability are liable on conviction to a fine of N200 000, or imprisonment for a term of one year or both.<sup>7</sup>

In addition, Nigeria's National Policy on Special Needs Education, and the Guidelines for Implementation 2015, defines persons with special needs as:

[T]hose with various forms of exceptionalities including Visual Impairment, Hearing Impairment, Mental Retardation, (Intellectual Disability/Intellectual Developmental Disability) Physical and Health Impairment, Behavioural Disorders, Communication and Speech Impairment, Learning Disabilities, Multiple Disabilities, at Risk Children, Autism, Albinism and the Gifted and Talented, to mention but a few.<sup>8</sup>

## 1.3 What is the total number and percentage of persons with disabilities in Nigeria?

There is no accurate survey of the disability population in Nigeria and conflicting prevalence rates are provided across different sources, a result of differing methodologies used and variations in data quality. As at May 2022, a Disability Inclusion Consultant, Dr Adebukola Adebayo said 'We are about 30 million persons with disabilities in Nigeria'.<sup>9</sup> In 2020, there are reportedly over 27 million Nigerians living with some form of disabilities.<sup>10</sup> However, before the 2020 report, the Chairman of Nigeria National Population Commission in 2018 stated that the official estimate of persons with disabilities in Nigeria was about 19 million and this

5 National Population Commission (NPC) (2006) Nigeria National Census: Population distribution by sex, state, local government area and senatorial district: 2006 Census Priority Tables (Vol 3).

6 FM Kolawole 'Measurement of disability through sample surveys: Nigeria experiences of the National Bureau of Statistics' Paper presented at the United Nations Regional Meeting on Disability Measurement and Statistics in support of the 2030 Agenda for Sustainable Development and the 2020 World Population and Housing Census Programme for Africa Kampala, Uganda, 15-17 November 2016; Interview with Mr Justice Ike, the Imo State Director of National Population Commission, Imo State Nigeria.

7 This is specified in sec 23 of the Discrimination against Persons with Disabilities Prohibition Act, 2018.

8 National Policy on Special Needs Education in Nigeria: Federal Ministry of Education (2015).

officially puts the percentage of persons with disabilities at 9.6 per cent approximately.<sup>11</sup> Again in 2018, the president of the Network for the Advancement of People with Disabilities stated that no fewer than 27.3 million Nigerians are living with various forms of disabilities.<sup>12</sup> Count Disability Nigeria Coalition said the World Bank/World Health Organisation estimated in 2018 that persons with disabilities accounted for 29 million of Nigeria's population.<sup>13</sup> In 2019 it was reported that the proportion of the entire population of persons with disabilities in Nigeria is 6 per cent and the official projection was about 11 million persons.<sup>14</sup> According to the Nigerian 2006 Census estimates, the total number of persons with disabilities in Nigeria as reported was 3 253 169.<sup>15</sup> With these varying estimates one is not very sure of the extent of disability in Nigeria. There is indeed a historical and current lack of data relating specifically to persons with disabilities in Nigeria. Consequently, Nigeria's National Population is expected to measure and capture disability statistics accurately in the next population and housing census. The creation of a Disability Data Bank for Nigeria, as reported by the Basic Registry and Information System in Nigeria (BRISIN) and media sources<sup>16</sup> would help to ensure adequate and accurate data system in Nigeria.

#### 1.4 What is the total number and percentage of women with disabilities in Nigeria?

According to the Nigerian 2006 Census, the total number of women with disabilities in Nigeria is 1 544 418 and the percentage is 1.1 per cent.<sup>17</sup> However, available literature suggests that this is an underestimation of the actual population of women with disabilities. The World Disability report of 2011 estimates that 20 per cent of women in Nigeria live with disabilities. The Nigerian 2006 Census relied on self-reporting of disability status, which characteristically will underestimate prevalence.<sup>18</sup>

- 9 Adebukola Adebayo Keynote address presented during the maiden edition of Nigeria Diversity and Inclusion conference with the theme: 'Eliminating barriers against inclusive workplaces in the private sector' organised by Nigeria Business Disability Network, NBDN in Lagos, 21 May 2022.
- 10 Available at [https://en.wikipedia.org/wiki/Disability\\_in\\_Nigeria](https://en.wikipedia.org/wiki/Disability_in_Nigeria) (accessed 15 August 2023).
- 11 Stated by Eze Duruiheoma (SAN) Chairman of Nigeria National Population of Nigeria (NPC) at the 73rd UN General Assembly General Discussion of Agenda 28 on social development at the UN headquarters, New York, <https://www.premiumtimesng.com/news/more-news/288954-19-million-nigerians-living-with-disability-official.html> (accessed 10 August 2023).
- 12 Available at <https://www.premiumtimesng.com> (accessed 3 August 2023).
- 13 Daily Trust 'Lack of data worsening persons with disabilities' plight' (12 August 2021).
- 14 Federal Ministry of Water Resources (FMWR), Government of Nigeria, National Bureau of Statistics (NBS) and UNICEF 'Water, sanitation and hygiene: National Outcome Routine Mapping (WASH NORM) 2019: A Report of Findings' (2020).
- 15 Census Priority Table (n 1) 14-15.
- 16 BRISIN International Foundation 'FG moves to create first Disability Data Bank in Nigeria' (30 March 2020) [https://www.ecoi.net/en/file/local/2061263/AsylosARC-Foundation\\_Nigeria-disability-report\\_October-2021.pdf](https://www.ecoi.net/en/file/local/2061263/AsylosARC-Foundation_Nigeria-disability-report_October-2021.pdf) (accessed 3 August 2023).
- 17 'Databank For Nigeria's PLWD' *Daily Trust Newspaper* 20 August 2020 <https://dailytrust.com/databank-for-nigerias-plwd/> (accessed 3 August 2023).
- 18 Census Priority Table (n 1) 20-21.
- 19 See WHO 'Summary world report on disability' (2011). There is a possibility that elderly women may not consider themselves as having a disability, despite having significant difficulties in functioning, because they consider their level of physical activity appropriate for their age. Moreover, some women may be reluctant to report their disability in order to avoid labelling and stigma.

### 1.5 What is the total number and percentage of children with disabilities in Nigeria?

The 2006 Nigerian Census placed the total number of children with disabilities at 1 002 062 and a percentage of 0.71 per cent.<sup>19</sup> This figure is considered grossly underestimated due to self-report methodology. In 2016, the number of children with developmental disabilities in Nigeria was reported to be 2.5 million.<sup>20</sup> This estimate can also be challenged as it significantly excludes children with severe hearing or sight impairment from birth. Also the National President of the Joint National Association of Persons with Disabilities stated in 2016 that Nigeria has about 7 million children with disabilities, which constitutes about 36.8 per cent. Hence it could be concluded that disability-related data on children with disabilities in Nigeria are sparse and unreliable.

### 1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Nigeria?

The prevalence of functional difficulties is higher for women in Nigeria (7.5 per cent) than for men (6.3 per cent).<sup>21</sup> Additionally, functional difficulties are more prevalent among elderly age groups, at 1.9 per cent for ages 15 to 29, 3.7 per cent for ages 30 to 44, 9.7 per cent for ages 45 to 64, and 38.8 per cent for ages 65 and over. Across the six functional domains considered, difficulties with mobility (4 per cent) and seeing (2.8 per cent) are most common.<sup>22</sup>

#### Nigeria: Prevalence of disabilities and difficulties (%)

Group	Any difficulty	Some difficulty	At least a lot of difficulty
All adults	6.92	4.59	2.33
Females	7.52	5.12	2.40
Males	6.29	4.03	2.26
Rural residents	7.38	4.75	2.63
Urban residents	5.80	4.19	1.61
Ages 15 to 29	1.85	1.27	0.58
Ages 30 to 44	3.67	2.54	1.13
Ages 45 to 64	9.71	6.83	2.88
Ages 65 and over	38.75	24.04	14.71
Seeing	2.80	2.16	0.64
Hearing	1.14	0.81	0.32
Mobility	3.95	2.76	1.19
Cognitive	2.13	1.66	0.46
Self-care	1.72	1.15	0.57
Communication	0.98	0.70	0.28

(Tabular Representation) Source: Nigeria 2018 GHSP

19 Census Priority Table (n 1) 40-41.

20 Research sponsored by the Global Research on Developmental Disabilities Collaborators (GRDDC), with the support of the Institute of Health Metrics and Evaluation, United States of America.

21 'Nigeria: Disability data initiative ? An analysis of the 2018 General Household Survey Panel (GHSP)' <https://disabilitydata.ace.fordham.edu/country-briefs/ng/> (accessed 3 August 2023).

22 As above.

## 2 Nigeria's international obligations

### 2.1 What is the status of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) in Nigeria? Did Nigeria sign and ratify the CRPD? Provide the date(s).

Nigeria has signed into law the Discrimination against Persons with Disabilities (Prohibition) Act, 2018.<sup>23</sup> The Federal Government has also signed and ratified both the Convention and its Optional Protocol on 30 March 2007 and 24 September 2010,<sup>24</sup> 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? Did Nigeria submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

The Federal Ministry of Humanitarian Affairs, Disaster Management and Social Development is the lead Ministry and the focal point in Nigeria on matters pertaining to persons with disabilities and is the main government department responsible for the submission of Nigeria's country report.<sup>25</sup> This Ministry works closely with other key departments such as the Federal Ministry of Budget and National Planning and Federal Ministry of Justice. The federal government also has a national coordinating mechanism known as National Working Group on Human Rights Treaty Reporting (NWG).<sup>26</sup> There have been four reporting cycles for the CRPD since their ratification, as required by the United Nations Office of the High Commissioner for Human Rights (OHCHR). Of the four CRPD reporting cycles, Nigeria has only responded to one cycle (Cycle 1: 2012 but reported in 2021). However, this reporting cycle has not been reviewed or received feedback from the OHCHR as only a State Report was submitted. Comparably, Nigeria is expected to submit a State Party report, list of issues (LOI), and information from Civil Society, just like submissions by other state parties to the CRPD. This means the report has not undergone the review process as Nigeria had not reported back to the CRPD on its first cycle which was overdue (October 2012). Not too long ago, Nigeria submitted a State Party Report to the CRPD Committee (March 2021).<sup>27</sup> In terms of the delay regarding submission of Nigeria's country report, available evidence shows that it is because of a lengthy national process.<sup>28</sup>

23 On 23 January 2019, Nigeria's President signed into law the Disability Act.

24 Consolidated findings from the '2010 United States State Department Country Reports on Human Rights practices' [http://www.usicd.org/doc/africa\\_disability\\_references\\_1.pdf](http://www.usicd.org/doc/africa_disability_references_1.pdf) (accessed 15 August 2023).

25 Federal Republic of Nigeria, Initial Report Submitted to the UN Committee on the Rights of Persons With Disabilities in Accordance with Article 35 of the Convention on the Rights of Persons with Disabilities (CRPD), 26 March 2021, UN Doc CRPD/C/NGA/1 (2021) [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&CountryID=127&DocTypeID=29](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&CountryID=127&DocTypeID=29) (accessed 29 November 2023).

26 As above.

27 As above.

28 SJ Thompson 'Disability inclusive development situational analysis for Nigeria' (2020) 4.



**2.3 While reporting under various other United Nations instruments, or under the African Charter on Human and Peoples' Rights, or African Charter on the Rights and Welfare of the Child, did Nigeria also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'Concluding Observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?**

Nigeria in its 6th periodic report, 2015-2016 which was submitted to the Secretariat of the Commission in November 2017, reported specifically on the rights of persons with disabilities concerning implementation of Nigeria's obligation under the African Charter and Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). Similarly, specific reference was made to the rights of persons with disabilities in the periodic report of Nigeria which was submitted to the African Committee of Experts on the Rights and Welfare of the Child. Relevant Concluding Observations were adopted as well.<sup>29</sup>

The African Commission showed concerns about the lack of definitive timelines and prolonged procedures for the ratification and domestication of regional and international human rights instruments in Nigeria. The Commission further recommended that the next report by Nigeria should provide information on measures taken by Nigeria to protect women with disabilities.<sup>30</sup>

ACERWC/the Committee also made recommendations in its Concluding Observations for Nigeria to adopt mechanisms to ensure accountability for actions (including budget allocations and expenditure) undertaken to protect the rights of children with disabilities.<sup>31</sup>

Nigeria's UPR was in November 2018.<sup>32</sup> During the session, the national report submitted, presented Nigeria's National Action Plan for the Promotion and Protection of Human Rights covering 2017 to 2022 to include emerging issues like the protection of the rights of persons with disabilities.<sup>33</sup>

Significantly, Nigeria domesticated the CRPD and currently has legislation that directly addresses disability matters at the national level, namely, the Discrimination against Persons with Disabilities (Prohibition) Act, 2018.<sup>34</sup> It is

29 Civicus 'Nigeria: Adoption of Universal Periodic Review Report, Geneva 15 March, 2019' <https://www.civicus.org/index.php/media-resources/news/united-nations/geneva/3793-nigeria-adoption-of-universal-periodic-review-report> (accessed 15 August 2023).

30 Civicus (n 29); see also Women Enabled *Accountability toolkit: African regional human rights system legal standards on the rights of women and girls with disabilities* (2012) 9; African Commission on Human & Peoples' Rights, *Concluding Observations and Recommendations on the Initial Periodic Report of Nigeria on the Implementation of the African Charter of Human Rights* (2015) 132.

31 *Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Federal Republic of Nigeria on its Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child* (December 2017) 10-11.

32 Available at <https://www.upr-info.org/en/news/31st-session-of-the-universal-periodic-review-2018> (accessed 28 November 2023).

33 HRC, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Nigeria, 27 August 2018, UN Doc A/HRC/WG.6/31/NGA/1 (2018) para 29 (a).

34 On 23 January 2019, the Disability Act was signed into law.

however unfortunate that not much progress has been achieved in terms of implementation of the normative contents of the Act.

**2.4 Was there any domestic effect on Nigeria's legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that had been ratified require Nigeria's legislature to incorporate it into the legal system before the instrument can have force in Nigeria's domestic law? Have the courts of Nigeria ever considered this question? If so, cite the case(s).**

After ratification of the CRPD and its Optional Protocol, Nigeria took further steps to domesticate the Convention. Hence there is currently domestic legislation that directly addresses disability issues. The Discrimination against Persons with Disabilities (Prohibition) Act, 2018, has become part of Nigeria's legal framework on disability rights.

Upon ratification of the ACHPR, the ACRWC, and the CRC, these instruments were incorporated into Nigerian legislation through an Act of the National Assembly (the legislature) in line with the provisions of the Nigerian Constitution.<sup>35</sup> The Constitution provides that no treaty between the federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly. Subsequently, 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 progressively been implementing the ACHPR as the African Charter Ratification and Enforcement Act.<sup>36</sup> This being the case, a careful reading of African Charter Ratification and Enforcement Act manifests recognition of the civil and political as well as socio-economic and cultural rights stipulated in Chapter 2 and 4 of the Nigerian Constitution.

Furthermore, there is the Child's Rights Act which has been adopted by some states in Nigeria. At the time of writing, 34 out of 36 states of Nigeria have adopted the Child's Rights Act as a state law.<sup>37</sup> States that have passed the Child's Rights Act have been encouraged to develop mechanisms for the effective implementation of the legislation in their jurisdictions. Nigeria has through this Act mainstreamed the provisions of the CRC and the ACRWC. Nigeria has yet to domesticate the Maputo Protocol.

It is to be noted that 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 Nigeria's National Assembly. As at the time of writing, the researcher contacted relevant individuals and libraries for court cases falling within the scope of the research question but decided cases were not available.

35 See secs 12(1), (2) & (3) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

36 An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on 19 January 1981 and for proposals connected herewith.

37 According to Pauline Tallen, Minister of Women Affairs, at the 59th edition of the Ministerial Media Briefing organised by the Presidential Communications Team at the Presidential Villa Abuja (25 November 2022) <https://www.thecable.ng/child-rights-act-now-adopted-in-34-states-says-minister> (accessed 28 November 2023).

**2.5 With reference to 2.4 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.**

Nigeria has domesticated the following ratified international instrument: Convention on the Rights of the Child (CRC);<sup>38</sup> the Convention on the Rights of Persons with Disabilities (CRPD),<sup>39</sup> the African Charter on Human and Peoples' Rights (ACHPR),<sup>40</sup> as well as the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>41</sup> Nigeria has also signed the Protocol to the African Charter on Human and Peoples' Right<sup>42</sup> on 13 February 2023 and President Tinubu subsequently executed the instrument of Ratification on 19 October 2023.<sup>43</sup> Here, it is necessary to note that a treaty affecting a matter in the exclusive legislative list of the Federal Government of Nigeria will come into force in Nigeria with an enactment of the National Assembly. If the subject matter of the treaty falls within the concurrent or residual list, the treaty will require the approval of the majority of the State Houses of Assembly.<sup>44</sup>

### 3 Constitution

**3.1 Does the Constitution of Nigeria contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.**

No, the 1999 Constitution of the Federal Republic of Nigeria, does not provide for nor address disability in any way.

**3.2 Does the Constitution of Nigeria contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.**

It could be argued that the right to non-discrimination applies to every citizen of Nigeria, including persons with disabilities.<sup>45</sup> The only mention of the word disability is in section 42(1)(a) and (2) which states that no citizen of Nigeria should be subjected to any form of disability or restrictions to which citizens of Nigeria of

38 Signed and ratified by Nigeria on 19 April 1991.

39 Signed and ratified by Nigeria on 30 March 2007 and 24 September 2010 respectively.

40 Adopted and ratified by Nigeria on 31 August 1982 and 22 June 1998 respectively.

41 Adopted and ratified by Nigeria on 13 July 1999 and 23 July 2001 respectively.

42 The instrument was adopted by the 30th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018.

43 This was aired on Channels TV on 19 October 2023 <https://www.channelstv.com/2023/10/19/tinubu-signs-au-charter-on-disabilities/> (accessed 6 December 2023). See also A Ngalale 'Tinubu signs AU Charter Instrument on the rights of persons with disabilities' *Premium Times* 19 October 2023 <https://www.premiumtimesng.com/news/more-news/635307-tinubu-signs-au-charter-instrument-on-right-of-persons-with-disabilities.html> (accessed 6 December 2023).

44 For further discussion of some challenges presented by this constitutional provision, see C Nwapi 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International & Comparative Law* 38.

45 See the Constitution, sec 42(1).

other communities, ethnic groups are not made subject or be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

## 4 Legislation

### 4.1 Does Nigeria have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.

Nigeria has legislation that directly addresses disability rights at the national level, namely, the Discrimination against Persons with Disabilities (Prohibition) Act, 2018. The Act provides for the full integration of persons with disabilities into the society, establishes the National Commission for People with Disabilities and vests the Commission with responsibilities for their education, healthcare, social, economic and civil rights. The Act sought to reflect the provisions of the Convention on the Rights of Persons with Disabilities. For instance, the definition of disability under the Act aligns with the social model of disability approach. Amongst other provisions, the Act expects the Nigerian government to make provisions for the promotion of awareness regarding the rights, respect, dignity, capabilities, and achievements of persons with disabilities. Using persons with disabilities to solicit for alms is prohibited and any contravention is stipulated to be a criminal offence that is punishable with the payment of fine or imprisonment.<sup>46</sup> The Act also provides for the right to free education without discrimination or segregation for persons with disabilities to secondary school level, and makes it the responsibility of a proposed National Commission (to be established under the Act) to provide assistive learning devices.<sup>47</sup> The Act also provides for the inclusiveness of education which would be accessible to persons with disabilities in all schools and the obligation to provide trained personnel and facilities for the educational development of persons with disabilities.<sup>48</sup>

In summary, the Act makes provisions for the following:

- 1 Prohibition of discrimination and awareness programme.
- 2 Accessibility of physical structures.
- 3 Road transportation.
- 4 Seaports, railways, and airport facilities.
- 5 Liberty: rights to education, health, and first consideration in queues; and accommodations in emergencies.
- 6 Opportunity for employment and participation in politics and public life.
- 7 Establishment of the National Commission for Persons with Disabilities.
- 8 Appointment and duties of the executive secretary and other staff.

About 11 states in Nigeria have been able to pass legislation that address disability – Lagos, Plateau, Jigawa, Bauchi, Ondo, Ogun, Nasarawa, Anambra, Kano, Kogi, and Kwara states.<sup>49</sup> However, the rate of implementation for these laws is very low, with only Lagos and Plateau having structures in place for their implementation, but the extent and adequacy of some state legislation on disability

46 Discrimination Against Persons with Disabilities (Prohibition) Act, 2018, sec 16.

47 Discrimination Act sec 17.

48 Discrimination Act, sec 18.

49 'Nigeria: Children and young persons with disabilities' Report produced with the support of Asylos & Arc foundation and Paul Hamlyn foundation (2021).

is not encouraging. Most states legislation on disability basically adopted the charity model approach to disability. Some states' disability laws came about after the Act was signed into law. Others came into force even before the national Disability Act was signed into law. Currently some states, especially those in the latter category are working to modify their laws in line with the national Disability Act. Plateau state for instance, is in the process of amending the state law on disability.<sup>50</sup> Anambra state has also started the process of implementation of its Disability Law.<sup>51</sup>

**4.2 Does Nigeria have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.**

Nigeria enacted the Child Rights Act, 2003 and the Act guarantees the provision of special protection measures for children in need, including assistance and facilities necessary for education, training, preparation for employment, rehabilitation, and recreational opportunities. Although the Child's Rights Act has been enacted at the federal level,<sup>52</sup> it only becomes effective if the state legislative assemblies also enact it.

The Universal Basic Education Act insists on the compulsory, free and universal basic education of 'disabled children' and defines universal basic education broadly to include early childhood care and education and nine years of formal schooling, non-formal education, skills acquisition programmes and the education of special groups like disabled groups.<sup>53</sup>

The Violence against Persons (Prohibition) Act, 2015 seeks to eliminate violence in private and public life. It prohibits all forms of violence against persons, provides maximum protection and effective remedies for victims and punishment of offenders. The law applies to all people, including those with disabilities, even though they are not particularly mentioned.

50 Agency report 'Plateau Government repeals disability commission act, to enact new law' 11 December 2019 <https://wikkitimes.com/plateau-govt-repeals-disability-commission-act-to-enact-new-law> (accessed 28 November 2023); see also S Anyanwu 'Plateau State establish Disability Trust Fund' Federal Ministry of Information and National Orientation, Federal Republic of Nigeria (17 December 2019) <https://fmino.gov.ng/plateau-state-establish-disability-trust-fund/> (accessed 28 November 2023).

51 'Disability Rights Commission marks one year anniversary in Anambra State' *Nigeria News Digest* 7 August 2023 [https://go.gale.com/ps/i.do?id=GALE%7CA76134155\\_1&sid=sitemap&v=2.1&it=r&p=HRCA&sw=w&userGroupName=anon%7E635ab71d&aty=open-web-entry](https://go.gale.com/ps/i.do?id=GALE%7CA76134155_1&sid=sitemap&v=2.1&it=r&p=HRCA&sw=w&userGroupName=anon%7E635ab71d&aty=open-web-entry) (accessed 3 December 2023); C Onalu et al 'An exploratory study of the situation of persons with disabilities in Nigeria: Practice consideration for social workers' (2023) 21 *Journal of Evidence-Based Social Work*.

52 It is to be noted that Nigeria operates a federal system of government.

53 Nigeria's Compulsory Universal Basic Education Act, secs 2 and 15.

## 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 with the facts, the decision(s) and the reasoning.**

At the time of writing this report, there is no reported court decision on any issue relating to disability.

## 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.**

**Nigeria National Policy on Disability (2018):** This policy guides disability related issues in Nigeria. It provides an opportunity to engage more strategically with community members, development partners, other relevant ministries, departments and agencies to provide appropriate support for full integration of persons with disabilities.

**National Policy on Inclusive Education in Nigeria (2016):** This policy seeks to provide unhindered access to quality education within the general education system and engage the active participation of all learners without discrimination in the same safe school environment. It stipulates how the educational needs of children with disabilities should be mainstreamed. However, implementation seems to have stalled since 2016. A harmonised strategy may be needed to revisit the process. Strong political will, coupled with funding support will be crucial to its proper implementation.

**Nigeria's National Policy on Education:** This national-level policy emphasises inclusive education as a way of realising justice in education as enshrined in the Universal Basic Education Act, 2004. The policy has undergone many revisions since after the first Nigerian Policy on Education that came within 1975-1980.<sup>54</sup> It is considered that the revisions have been necessitated by the need to address obvious gaps in content and to give sufficient consideration to new opportunities, concerns and challenges.<sup>55</sup> Thus, the National Policy recognises the education of persons with disabilities within special needs education and articulates a number of policy statements that aim to promote easy access to educational materials and other assistive devices.<sup>56</sup> Particularly, the national policy aspires towards the provision of equal educational opportunity, inclusive education and designing of appropriate diversified curriculum for all learners with

54 The first edition was in 1977, the second was in 1981, the third was in 1988, the fourth was in 2004. There was also a draft in the 2007 5th edition before the current 6th edition of 2013.

55 Nigeria National Policy on Education, see the preface to the 6th edition of 2013.

56 Nigeria National Policy on Education, sec 7 para 122.

disabilities.<sup>57</sup> It also emphasises the training and retraining of all categories of teachers for effective implementation of inclusive education.<sup>58</sup>

At the same time, the education policy recognises the components of early identification, intervention, nurturance and early child care and education in realising access to inclusive education for learners with disabilities.<sup>59</sup> It strategically puts the teacher/pupil ratio in special schools to 1:10, and in regular schools 1:35.<sup>60</sup> In essence, the national policy can be seen as recognising the diversity of children with disabilities and the need to make provisions in respect of their individual needs.

**National Policy on Albinism in Nigeria 2012 (reviewed 2019):** This policy seeks to guarantee the welfare and rights of persons with albinism. The policy emphasises the importance of advocacy, awareness and consciousness raising. Fostering of the participation, empowerment and facilitation of the passage of a law to establish the National Agency for Albinism and Hypopigmentation in Nigeria, and the promotion of relevant research and data collection is also highlighted.

**National Policy on Special Needs Education in Nigeria (2015):** This policy seeks to provide complete service delivery that encompasses physical, mental, and emotional disabilities in basic education, at home, and the hospital. The aim is to provide qualitative education to all persons with disabilities in all aspects so as to enable them to contribute to national development.

**National Policy on Internally Displaced Persons in Nigeria (2012):** This policy seeks to provide the principles that guide humanitarian assistance and implementation of durable solutions in situations of internal displacement in Nigeria. It is a policy that addresses issues internal displacement and all affected groups, including those with disabilities.

**The Independent National Electoral Commission Framework on Access and Participation of Persons with Disabilities in the Electoral Process (2018):** This strategy considers the inclusion of persons with disabilities in all aspects of the electoral process. There is also an Electoral Act of 2022, which captures provisions regarding persons with disabilities in sections 9(1)(b), 54, and 153 on registration of PWDs, accessibility and support as well as meaning of 'person with disability' respectively.

**National Gender Policy (2006):** This policy brings a gender perspective into all aspects of planning, policy, legislation, and transformation activities in Nigeria. It is meant to address the discriminations between women and men in Nigeria without ignoring the multiple layers of inequality and fundamental differences between them. The policy acknowledges disability as a form of public vulnerability and dedicates a section to it. Given the strong intersectionality between gender and disability, a gender policy is expected to recognise the need for targeting and creating an enabling environment for equitable participation in development for persons with disabilities.<sup>61</sup>

57 Nigeria National Policy on Education, para 119.

58 Nigeria National Policy on Education, para 123.

59 Nigeria National Policy on Education, sec 2 para 20, sec 7 para 121, 123(c).

60 As above.

61 Federal Ministry of Women Affairs & Social Development, National Gender Policy: Situation Analysis/Framework.

**National Policy on Sexual and Reproductive Health and Rights of Persons with Disabilities, with emphasis on Women and Girls (2018):** This framework is generally aimed at ensuring that all sexual and reproductive health programmes reach and serve persons with disabilities. The policy seeks to provide a policy direction to Government, Civil Society Organisations, Development Partners, Media practitioners and the Organised Private Sector, on how to deal with reproductive health concerns of Women and Girls with Disabilities (WGWD).

**National Social Protection Policy (Revised Draft) 2017:** The Social Protection Policy for Nigeria is an umbrella policy framework that incorporates related social agenda paradigms intended to reduce poverty and provide a life of dignity for all citizens. It comprises 16 policy measures to be implemented in eight sectors. Persons with disabilities are targeted specifically in three of its five education and health services sector programmes as well as in one of its four livelihood enhancement and employment sectors. There are no other specific efforts toward disability inclusion in any of the remaining six sectors.

**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.**

Nigeria's National Development Plan (NDP), 2021-2025 is a medium-term blueprint designed to unlock the country's potentials in all sectors of the economy for a sustainable, holistic and inclusive national development, developed by the different facet of the Private Sector, Sub-national Government, Civil Society Organisation (CSO) and facilitated by the Federal Government of Nigeria. This was deliberately done for inclusiveness, participation, and citizen engagement to ensure no one is left behind. The Plan is a successor to the Economic Recovery and Growth Plan (ERGP), 2017-2020, which elapsed in December 2020. The vision of the NDP, 2021-2025 is consistent with the pursuit in the Nigeria Agenda 2050. The Plan also builds on the achievements and lessons learned during the implementation of the ERGP.

## 7 Disability bodies

**7.1 Other than the ordinary courts or tribunals, does Nigeria have any official body that specifically addresses violation of the rights of persons with disabilities? If so, describe the body, its functions, and its powers.**

Currently, the National Commission for Persons with Disabilities, an establishment of the Federal Government of Nigeria pursuant to section 31 of the Disability Act, is the official body that receives complaints of persons with disabilities on the violation of their rights. Before now it used to be the Joint National Association of Persons with Disabilities (JONAPWD). JONAPWD protects persons with disabilities by reporting any form of inhuman treatment persons with disabilities are subjected to, to the government. The Executive Council of JONAPWD is the major channel between the Nigerian government and persons with disabilities in order to protect the rights of persons with disabilities



**7.2 Other than the ordinary courts or tribunals, does Nigeria have any official body that though not established to specifically address violation of the rights of persons 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. The organisation is not officially established to address violations of the rights of persons with disabilities. ASCEND is a socio-political/pressure group with the objective aim of integrating persons with disabilities in society generally, and in politics in particular.<sup>62</sup>

## **8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector**

**8.1 Do you have a Human Rights Commission or an Ombudsman or Public Protector in Nigeria? If so, does its remit include the promotion and protection of the rights of persons 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.**

A National Human Rights Commission exists in Nigeria and the Commission takes care of issues relating to the protection of human rights as guaranteed by the Nigerian Constitution, the African Charter, and other international human rights instruments ratified by Nigeria.

The National Human Rights Commission has engaged with issues relating to the rights of persons with disabilities in Nigeria. For instance, it 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 matters.<sup>63</sup>

The Commission had press conferences in commemoration of the International Day of Persons with disabilities. Workshops and advocacy visits have also been planned for institutions to improve access to persons with disabilities. At its head office at Abuja, the Commission has also provided necessary accommodations, like ramps and lifts with sound and Braille floor numbering for easy access of persons with disabilities.

## **9 Disabled peoples organisations (DPOs) and other civil society organisations**

62 R Lang & L Upah 'Disability scoping study in Nigeria' (2008) 19.

63 Available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Initial-State-Report-Nigeria.pdf> (accessed 3 September 2023).

**9.1 Do you have organisations that represent and advocate for the rights and welfare of persons with disabilities in Nigeria? If so, list each organisation and describe its activities.**

Apart from the JONAPWD and the ASCEND, mentioned in 7.1 & 7.2 above, which are the national umbrella bodies for persons with disabilities, there are other DPOs working at a national, state and local level. Most of these organisations cater for the needs of single impairment groups. Some of these organisations are listed below.<sup>64</sup>

- **The Leprosy Mission:**

Provides medical and vocational rehabilitation services to individuals with leprosy; they have also undertaken public campaigns to educate and inform the public about leprosy.

- **Advocacy for Women with Disabilities Initiatives:**

AWWDI promotes the rights of girls and women with disabilities.

- **Initiative for Disability Inclusion and Diversity:**

Stands as a unified voice for the rights and dignity of women and girls with disabilities and provides social protection.

- **Disability Rights Advocacy Centre (DRAC):**

DRAC is an organisation that works to help integrate persons with disabilities into the society and create a world free from discrimination by raising awareness on the needs and peculiarities of disabled people. The organization focuses on providing support to women and girls as they are often the more vulnerable of the demographic.

- **Deaf Women Aloud Initiative (DWAI):**

This is an organisation that exists to give a voice to the deaf women in Nigeria. DWAI raises awareness among general populations about sensitive issues that affect deaf women and their children.

- **The Spinal Cord Injury Association of Nigeria:**

Provides therapeutic care and support for people with spinal cord injury.

- **Deaf Women Association Nigeria:**

Takes care of women with hearing and communication 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.

- **Lagos Cheshire Home:**

Provides training, workshops and research.

- **Christian Blind Mission:**

Running community-based rehabilitation programmes for persons with disabilities.

64 See also NC Umeh & R Adeola 'Country Reports: Nigeria' (2013) 1 *African Disability Rights Yearbook/Journal* 277 <https://www.adry.up.ac.za/issues/volume-1-2013> (accessed 3 September 2023).

- **The Albinism Foundation:**

The Foundation is principally interested in creating awareness of the social challenges that persons with albinism face in Nigeria.

**9.2 In the countries in West Africa, are DPOs organised/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.<sup>65</sup>

**9.3 If Nigeria has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?**

I would say that inclusion of DPOs is done in designing and planning interventions. Not many interventions have focused on engaging DPOs. Even in instances where there has been engagement, the participation of DPOs is limited in terms of their access to the process and participation in the process. The implications of this are that accommodations and services are designed without the input of the key user. There is also the tendency to take persons with disabilities as a homogenous group, thereby the particular needs of the various disabilities may not be provided for. It also continues to reinforce the exclusion and discrimination of persons with disabilities.<sup>66</sup>

**9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?**

DPOs have tried to ensure participation through advocacy and visits to the relevant government agencies that could influence positively the situation of the rights of persons with disabilities. DPOs have organised capacity building workshops for persons with disabilities. DPOs also promote disability rights and development through research and documentation, advocacy and campaign, training and empowerment programmes, legal aid and disability rights moots. This they have done in collaboration with state and non-state actors.<sup>67</sup>

**9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?**

Lack of aggregated disability data and funds remain the greatest challenges to activities of DPOs. Lack of disability data contributes to the false impression that

65 On Monday 10 October 2022, a Regional Coordination and Training Meeting on the inclusion of persons with disabilities in West Africa was opened in Accra, Ghana; JONAPWD is a recognised umbrella organisation of persons with disabilities in Nigeria.

66 Summarised views of Adeyinka Ige-Onabolu (human rights and development expert), Grace Jerry (Executive Director and Program Officer, Gender at Inclusive Friends) and Theophilus Odaudu Program Officer (Nigeria), Disability Rights Fund and Disability Rights Advocacy Fund.

67 For instance, this can be seen from the activities of the Centre for Citizens with Disabilities (CCD) <https://www.ccdnigeria.org/><https://www.ccdnigeria.org/> (accessed 4 December 2023); Also the Disability Law Advocacy Project (DLAP) of the University of Ilorin has successfully hosted the first-ever National Disability Rights [https://web.facebook.com/200820003265662/posts/the-disability-law-advocacy-project-dlap-of-the-university-of-ilorin-has-success/4315593195121635/?\\_rdc=1&\\_rdr](https://web.facebook.com/200820003265662/posts/the-disability-law-advocacy-project-dlap-of-the-university-of-ilorin-has-success/4315593195121635/?_rdc=1&_rdr) (accessed 4 December 2023).

persons with disabilities are a very small and homogenous group reserved for specialist attention of health and beyond development programmes. According to the UN Expert Group on Disability Data and Statistics, disaggregated data by disability in all areas will be essential to ensure progress is measured and persons with disabilities are not left behind in future mainstream implementation programmes.<sup>68</sup> Other challenges faced by persons with disabilities in engaging with implementation and participating in mainstream include but not limited to:<sup>69</sup>

- The lack of access, which mainly has to do with environmental and institutional barriers, absence of capacity building workshops and seminars.
- Attitude which has to do with the negative perception of disability which has its roots in the medical/charity model of disability.
- Negative intersection between gender and disability which women with disabilities are seriously struggling with.

### **9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement of DPOs?**

Since the National Commission on persons with disabilities was inaugurated most issues around disability are first referred to the Commission, especially if it is coming from the government, and in that process DPOs are usually involved. Again, in various programmes supported by various funders, DPOs in their advocacy work have also established relationships and connections with relevant authorities, and they are usually being consulted before certain intervention decisions are taken. The Albinism Foundation (TAF) for instance works with governments, development agencies in programme areas that have helped to improve the health, education and social wellbeing of persons with albinism in Nigeria; as well as assist and empower them to find their rightful place in society.<sup>70</sup> The Centre for Citizens with Disabilities (CCD) has also done a lot of work which is geared towards the promotion of inclusion, participation, access and mainstreaming of disability rights in Nigeria.<sup>71</sup>

### **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 Disability Act in 2019 is a specific outcome of DPOs engagement in the disability rights advocacy and struggle. In 2019, a policy on sexual health rights of persons with disabilities with particular focus on women and girls was formulated. This policy was designed in full consultation with persons with disabilities and one of the DPOs was involved in the project. Also, when the

68 UN Expert Group on Disability Data and Statistics, *Monitoring and Evaluation: The way forward? A disability inclusive agenda towards 2015 and beyond* (2014).

69 Information generated through telephone interview with David Anyaele, Executive Director Centre for Citizens with Disabilities (CCD).

70 Adaku Onyenaucheya ‘Foundation urges better deal for persons with albinism’ *The Guardian Newspaper* 3 June 2023 <https://guardian.ng/news/foundation-urges-better-deal-for-people-with-albinis> (accessed 3 December 2023); Agency Report ‘Albino Foundation stresses need for government support’ *Independent Newspaper* 13 June 2021 <https://independent.ng/albinism-foundation-stresses-need-for-govt-support/> (accessed 3 December 2023).

71 Some of the activities of the Centre for Citizens with Disabilities can be found on their Facebook page [https://web.facebook.com/CentreForCitizensWithDisabilities/?\\_rdc=1&\\_rdr](https://web.facebook.com/CentreForCitizensWithDisabilities/?_rdc=1&_rdr) (accessed 3 December 2023).

Federal Ministry of Health was trying to do the cost analysis and projecting the allocation for that policy, they also held sessions with different disability groups cutting across different sectors in order to get their input.<sup>72</sup>

**9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?**

Yes, the Nigerian National Disability Act is yet to be reasonably appreciated by the Disability Commission and most DPOs who are expected to implement its content. There is a low level of understanding of the Act. Great effort needs to be made through research and advocacy in order to increase the capacity of members of the Commission and DPOs regarding implementation. Furthermore, issues bordering on intersectional discrimination of women with disabilities needs to be brought to be engaged with.

**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?**

Capacity building for DPOs will assist DPOs with the advocacy and lobbying skills and applying a rights-based approach to disability matters. There should be no coordination gap among DPOs, persons with disabilities and government departments. This will help create an enabling environment to implement the Disability Act.

**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 Independent School of Disability Studies is a research centre in Nigeria that offers courses, research, and consultancy in intellectual and developmental disabilities, learning disabilities, mental health and more. The institute offers tailor-made courses looking to improve the capacity of DPOs around developmental disability, accessibility and inclusion. Other institutions that carry out research and training for interested DPOs are: University of Jos, Plateau State Nigeria; University of Ibadan, Oyo State; Kwara State University, Malete Ilorin; University of Calabar, Cross River State; University of Uyo, Akwaibom State; Bayero University Kano; Kano State; and Federal College of Education (Special), Oyo, Oyo State.

72 See Asylos & Arc Foundation report (n 49).

## 10 Government departments

### 10.1 Do you have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the department(s).

The National Commission for persons with disabilities is an agency that was established in 2020 to monitor, evaluate and realise the government policy objectives concerning persons with disabilities. It is the responsibility of the Commission to liaise with the public and private sectors and other bodies in order to ensure that the peculiar interests of persons with disabilities are taken into consideration in every government policy, programme and activity. The Commission also ensures that research, development and education on disability issues and persons with disabilities are carried out.

The Federal Ministry of Women Affairs and Social Development is the government department that is specifically responsible for promoting and protecting the rights and welfare of persons with disabilities. The Ministry provides basic services and organises seminars and workshops for persons with disabilities. The Department is also responsible for the formulation of policies and programmes for persons with disabilities.

## 11 Main human rights concerns of people with disabilities in Nigeria

### 11.1 Contemporary challenges of persons with disabilities in Nigeria (eg in some parts of Africa is ritual killing of certain classes of PWDs such as persons with albinism occurs).

There is weak enforcement of the existing Act, laws, policies, and programmes on persons with disabilities. The major reason why enforceability and implementation of laws and policies remain weak is that persons with disabilities are not allowed to participate fully and actively from the onset.

The lack of effective approaches and collaborations to the implementation of the provisions of the legal instruments is another contemporary problem. There is lack of commitment on the part of policymakers and those who wield political authority.

Deep-seated negative socio-cultural attitudes and perceptions of persons with disabilities persist.

Disability matters in Nigeria is generally viewed as charity and welfare instead of rights, hence barriers to accessing basic social services and economic opportunities remain. These barriers range from discrimination, exploitation, violence, stigma, inadequate housing, and education to healthcare.

## 11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

- **Access and accommodation:** There is a legal response regarding access and accommodation.<sup>73</sup> Access and accommodations is still a big challenge for persons with disabilities in Nigeria as transport, buildings and airplanes are still fraught with non-friendly infrastructure and policies. A practical example is the case of Dr Chike Okogwu, a person with physical disability. In December 2020, Dr Chike Okogwu was prevented from boarding a Dana airline scheduled for 21h05 from Abuja to Lagos on the excuse that the airline does not fly PWDs at night. Expectedly Dr Chike missed his flight and his medical appointment. Enraged by the airline's insensitivity and nonchalance, Dr Chike destroyed the airlines property and in the process injured its staff. Dr Chike subsequently sued the airline and the airline sued him as well. The matter was eventually settled out of court.<sup>74</sup> This case is only one among many.
- **Access to social security:** There is no legal response in this regard and it is seriously non-existent in Nigeria.
- **Access to public buildings:** There is a legal provision in this regard,<sup>75</sup> but most buildings in Nigeria remain inaccessible to persons with disabilities.
- **Access to public transport:** A legal response exists in this regard,<sup>76</sup> but the reality is that inclusive transportation system for persons with disabilities in Nigeria is lacking.
- **Access to education:** Legally, access to education is recognised.<sup>77</sup> Efforts in this regard are growing however, but a lot is still required if inclusive/quality education for person is to be achieved. There is still discrimination, lack of required accommodation, exclusion and general lack of understanding as to the meaning of inclusive education for persons with disabilities.
- **Access to vocational training:** Vocational training is legally recognised for persons with disabilities.<sup>78</sup> This is usually provided by missionaries and NGOs in Nigeria.
- **Access to employment:** There is a legal recognition in this regard.<sup>79</sup> However employment of persons with disabilities in mainstream sectors has been low, despite the calls to ensure that PWDs are mainstreamed into the government employment circle. The involvement of persons with disabilities in the board of the National Commission of Persons with Disability is a laudable development.<sup>80</sup>
- **Access to recreation and sport:** There is no certainty of any legislation in this regard. Persons with disabilities face a number of barriers to participation in sports. Nigeria has sports activities programmes for persons with disability but there is underrepresentation of persons with disabilities in sports.
- **Access to justice:** This is a huge challenge. Lack of quality education for persons with disabilities is tantamount to ignorance concerning inalienable rights. Lack of needed facilities in terms of reasonable accommodation and assistive devices contribute to very access to justice for persons with disabilities.

73 As stipulated in secs 3-8 of Discrimination Against Persons with Disabilities (Prohibition) Act, 2018.

74 For more details see T Olu 'Chike Okogwu, passenger with disability who sued Dana Air' *The Whistler Newspaper* 1 December 2021 <https://thewhistler.ng/chike-okogwu-passenger-with-disability-who-sued-dana-air-for-n1-billion-drops-lawsuit/> (accessed 20 September 2023).

75 Discrimination Act, secs 3-4.

76 Discrimination Act, secs 9-14.

77 Discrimination Act, secs 17-18.

78 Discrimination Act, sec 20.

79 Discrimination Act, secs 28-29.

80 This can be seen at [https://www.emansion.gov.lr/2press.php?news\\_id=3250%26related=7%26pg=sp](https://www.emansion.gov.lr/2press.php?news_id=3250%26related=7%26pg=sp) (accessed 20 September 2023).

### 11.3 Do persons with disabilities have a right to participation in political life (political representation and leadership) in Nigeria?

People with disabilities have a right to participation in political life in Nigeria.<sup>81</sup> There are however reports that persons with disabilities had inadequate assistive materials during the 2023 elections.<sup>82</sup>

### 11.4 Are persons with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in Nigeria?

Socio-economic rights of persons with disabilities are not constitutionally protected in Nigeria. This means that socio-economic rights, like the right to education or health, are implicitly non-justiciable. The non-justiciability of socio-economic rights in Nigeria is also discernible in section 6(6)(c) of the Nigerian Constitution.<sup>83</sup> But with the existence legislation that derives effect from the Constitution, it can be said that there is sufficient ground to say that socio-economic rights of persons with disabilities are recognised. However social protection for persons with disabilities in Nigeria is still relatively weak. Implementation of socio-economic rights for persons with disabilities is a huge challenge and a lot is required.

### 11.5 Specific categories experiencing issues/vulnerability.

- **Women with disabilities:** Girls and women with any form of disability are generally among the more vulnerable and marginalised of the disability community. Women and girls suffer cultural discrimination and most times sexual and domestic violence. Indeed, systematic inequalities between women and men exist in Nigerian communities.
- **Children with disabilities:** Children with disabilities also experience severe vulnerabilities. Most of the time, children with disabilities are treated as a burden to their families or the community and thus become subject to isolation and violence. Children with disabilities like women are at the risk of sexual abuse and neglect. Some children with disabilities may not even recognise the abuse and might not be able to ask for help, especially when the children depend on their abuser for assistance. Parents or child protection professionals also not have the required skills to properly communicate with the child, or to accurately assess or understand a child with disabilities needs.

81 As provided in sec 30 of the Discrimination Act.

82 As stated in M Abdullahi 'Report: 2023 election shows INEC not committed to assisting PWDs' *The Cable* 14 July 2023 <https://www.thecable.ng/report-2023-election-shows-inec-not-committed-to-assisting-pwds> (accessed 20 November 2023); See also P Onajuobi & Q Yahya 'Voters with disabilities lament poor provisions during 2023 elections' *Campus Reporter* 30 August 2023 <https://campusreporter.africa/voters-with-disabilities-lament-poor-provisions-during-2023-elections/> (accessed 29 November 2023).

83 Under sec 6(6)(c) of the Nigerian Constitution, socio-economic and cultural are unenforceable by any court in Nigeria. This has been interpreted to mean that socio-economic rights shall not by any means be the subject of litigation in any court of law in Nigeria as noted in *Attorney General of Borno v Rev Joshua Adamu* (1996) 1 NWLR (Pt 427) 68. This argument was also presented by Nigeria in the case of *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJ/APP/08/08*.



## 12 Future perspective

### 12.1 Are there any specific measures regarding persons with disabilities being debated or considered in Nigeria at the moment?

The Federal Executive Council (FEC) is making a case for accessibility of public places, schools and insists that new office buildings must accommodate relevant structures that would serve persons with disabilities. There is also a call for Special Loan facilities to Persons with Disabilities through the National Commission for Persons with Disabilities. Campaign for social inclusion and mass distribution of assistive devices are on-going as well<sup>84</sup> and emphasis is on partnerships, collaborations and information sharing.

### 12.2 What legal reforms are being raised? Which legal reforms would you like to see in Nigeria? Why?

The National Disability Act did not specifically address issues around children and women with disabilities. It also does not acknowledge the intersectional identities of persons with disabilities, children and women in particular. The popular opinion is that issues of intersectional discrimination of women and children are not yet adequately represented.<sup>85</sup> The Act also does not adequately make provisions for disability sports. The foregoing are gaps in the legislation, and I hope to see legal reforms in this direction. Persons with disabilities are not a homogenous group, other areas of their identities ought to be acknowledged.

84 'FG to boost support for people living with disabilities' This Day Newspaper 12 August 2021.

85 As stated by Theophilus Odaudu, Programme Officer (Nigeria), Disability Rights Fund and Disability Rights Advocacy; Adeyinka Ige-Onabolu, human rights and development expert; Danlami Umaru Basharu, Director of the Anglo-Nigerian Welfare Association for the Blind in Asylos & Arc Foundation report (n 49) 76-77.

# SOUTH AFRICA

*Ilze Grobbelaar-du Plessis\**

## 1 Population indicators

### 1.1 What is the total population of South Africa?

According to the Census 2011, conducted by Statistics South Africa (StatsSA)<sup>1</sup> more than a decade ago, the total population of South Africa was 51.8 million.<sup>2</sup> The latest census by StatsSA was conducted from March to April 2022,<sup>3</sup> but the official Census 2022 data was not available at the time of writing this country report.<sup>4</sup>

However, StatsSA reported a positive population growth rate by the end of June 2022, despite the devastating impact of COVID-19 globally.<sup>5</sup> StatsSA's mid-year population estimate of 60.6 million did not include inputs from the latest Census conducted from March-April 2022. According to the 2022 World Bank data, the population of South Africa was estimated at 59 893 885.<sup>6</sup>

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- 1 Statistics South Africa (StatsSA), Department of Statistics South Africa, is mandated by the Statistics Act 6 of 1999 to collect data for official statistics and to conduct a census.
- 2 StatsSA 'Statistical release (Revised) Census 2011' <https://www.statssa.gov.za/publications/P03014/P030142011.pdf> (accessed 4 September 2023).
- 3 StatsSA 'Census 2022 #Get Counted' <http://census.statssa.gov.za> (accessed 4 September 2023).
- 4 According to Stats SA's mid-year population estimates of 2022, the results of Census 2022 will be released in 2023, and incorporated into the 2024 mid-year population estimates; R Maluleke 'Mid-year population estimates, 2022' StatsSA <https://www.statssa.gov.za/publications/P0302/MidYear2022.pdf> (accessed 4 September 2023).
- 5 StatsSA 'Department of Statics South Africa' <https://www.statssa.gov.za/?p=15601> (accessed 4 September 2023).
- 6 The World Bank 'Population total – South Africa' <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=ZA> (accessed 4 September 2023).

**1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in South Africa. What criteria are used to determine who falls within the class of persons with disabilities in South Africa?**

Statistical data on the prevalence of disability in South Africa is used from StatsSA, which is mandated to provide government and other stakeholders with official statistics on the demographic, economic and social situation of the country to support planning, monitoring and evaluation of the implementation of programmes and initiatives.<sup>7</sup> In fulfilling its mandate prescribed in the Statistics Act,<sup>8</sup> StatsSA conducted four Censuses in 1996, 2001, 2011, and 2022 respectively.<sup>9</sup> In the Census 2001, measurement of disability was based on the definition from the 1980 World Health Organisation (WHO) International Classification of Impairments, Disabilities and Handicaps (ICIDH). 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.<sup>10</sup> The Census 2001 used the terminology of 'disabled' and the data gathered reflects the prevalence of certain disabilities.<sup>11</sup> Two studies were conducted in preparation for the Census 2011 to test the applicability in South Africa of the Washing Group (WG) Short Set of Questions on Disability. The result of both studies showed that the use of the WG questions led to far higher disability estimates compared to the traditional question of 'do you have a serious disability that prevents your full participation in life activities?'.<sup>12</sup> Subsequently, studies recommended the use of the WG questions for Census 2011.<sup>13</sup> This means that Census 2011 did not only measure severe disabilities, as the term 'difficulty' was used and not the traditional terminology of 'disabled'.<sup>14</sup> Disabilities were defined as 'difficulties encountered in functioning due to impairments or activity limitation, with or without assistive devices'.<sup>15</sup> As a result of the change in approach of asking disability questions, the Census 2011 data were not comparable with previous Censuses.<sup>16</sup> Furthermore, the definition used does not comply either with the Convention on the Rights of Persons with Disabilities (CRPD),<sup>17</sup> ratified by South Africa in 2007, or the White Paper on an Integrated National Disability Strategy (INDS).<sup>18</sup>

7 StatsSA 'Census 2011: Profile of persons with disabilities in South Africa' (2014) Preface <https://www.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed 4 September 2023).

8 Act 6 of 1999.

9 StatsSA (n 7) Preface.

10 CRPD, Initial Report of South Africa, 26 November 2015, UN Doc CRPD/C/ZAF/1 (2015), Disability Statistics, para 2.

11 CRPD (n 10) Disability Statistics para 1.

12 CRPD (n 10) Disability Statistics paras 2, 3 and 4.

13 CRPD (n 10) Disability Statistics para 5.

14 StatsSA (n 2).

15 As above and CRPD (n 10) Disability Statistics para 8.

16 StatsSA (n 2).

17 South Africa signed the United Nation's (UN) Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol on 30 March 2007, and subsequently ratified both on 30 November 2007. The CRPD entered into force on 3 May 2008.

18 CRPD (n 10) Disability Statistics para 8.

Following Census 2011, the 2014 monograph of StatsSA, *Census 2011: Profile of persons with disabilities in South Africa*, provides a comprehensive profile of persons with disabilities in South Africa, exploring key aspects pertaining to its demographics, socio-economic status as well as its health status in terms of functions.<sup>19</sup> Furthermore, differentials and spatial distributions by sex, population group and geographical location profiled bring critical issues pertaining to the well-being of this vulnerable group forth.<sup>20</sup> The report provided statistical evidence relating to the prevalence of disability and characteristics of persons with disabilities at both individual and household levels, based on the Census 2011 data. Two measures were employed to profile disability prevalence and patterns. The measures were i) the levels or degree of difficulty in a specific functional domain, which were based on the six functional domains, namely seeing, hearing, communication, remembering, or concentrating, walking, and self-care; and ii) the disability index.<sup>21</sup>

However, it must be noted that StatsSA indicates that the report did not include statistics on children under the age of five or persons with psychosocial and certain neurological disabilities due to data limitations. The report should therefore not be used for purposes of describing the overall disability prevalence or profile of persons with disabilities in South Africa.<sup>22</sup> In South Africa's Initial Report on the Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) to the CRPD's monitoring body (the Committee on the Rights of Persons with Disabilities (CRPD Committee)),<sup>23</sup> it was noted that the lack of adequate, reliable, relevant, and recent information on the nature and prevalence of disability in South Africa remained a challenge.<sup>24</sup>

### **1.3 What is the total number and percentage of persons with disabilities in South Africa?**

See question 1.2 above. However, StatsSA's in-depth 2014 report on persons with disabilities reported the national disability prevalence rate is 7.5 per cent. According to the report disability positively correlated with age, as persons with disabilities increase with age. More than half (53.2 per cent) of persons aged 85+ reported to have a disability.<sup>25</sup>

### **1.4 What is the total number and percentage of women with disabilities in South Africa?**

See question 1.2 above. StatsSA reported in its 2014 report regarding *Census 2011: Profile of persons with disabilities in South Africa* that disability was more prevalent among females compared to males (8.3 per cent and 6.5 per cent respectively).<sup>26</sup>

19 StatsSA (n 7).

20 As above.

21 StatsSA (n 7) Executive Summary.

22 StatsSA (n 7); and CRPD (n 10) Disability Statistics para 9.

23 Art 35 of the CRPD.

24 CRPD (n 10) Disability Statistics para 1.

25 StatsSA (n 7).

26 As above.

### 1.5 What is the total number and percentage of children with disabilities in South Africa?

See question 1.2 above. The *Census 2011: Profile of persons with disabilities in South Africa* report by Stats SA did not include statistics on children under the age of five or on persons with psychosocial and certain neurological disabilities due to data limitations.<sup>27</sup>

Age group	With disabilities		Without disabilities		Total	
	N	%	N	%	N	%
5-9	447 843	10,8	3 719 835	89,3	4 167 678	100,0
10-14	161 828	4,1	3 802 210	95,9	3 964 038	100,0
15-19	108 738	2,6	4 118 948	97,4	4 227 686	100,0
20-24	99 665	2,4	4 128 757	97,6	4 228 422	100,0
25-29	100 371	2,5	3 906 800	97,5	4 007 171	100,0
30-34	96 274	3,0	3 104 571	97,0	3 200 845	100,0
35-39	108 559	3,8	2 735 168	96,2	2 843 727	100,0
40-44	132 672	5,5	2 283 966	94,5	2 416 638	100,0
45-49	189 774	8,7	1 998 996	91,3	2 188 770	100,0
50-54	225 498	12,2	1 626 667	87,8	1 852 165	100,0
55-59	233 735	15,6	1 268 491	84,4	1 502 226	100,0
60-64	216 572	18,7	942 615	81,3	1 159 187	100,0
65-69	184 428	22,7	627 474	77,3	811 902	100,0
70-74	186 401	29,4	447 044	70,6	633 445	100,0
75-79	148 452	36,6	257 502	63,4	405 954	100,0
80-84	120 001	44,5	149 446	55,5	269 447	100,0
85+	109 319	53,2	96 256	46,8	205 575	100,0
<b>Total</b>	<b>2 870 130</b>	<b>7,5</b>	<b>35 214 746</b>	<b>92,5</b>	<b>38 084 876</b>	<b>100,0</b>

The result in the table<sup>28</sup> above showed slightly higher rates in the 5-9-year-old age group. However, the report warned that caution should be exercised in interpreting these results. It was noted that parents misreported on children by categorising them as either 'unable to do' and/or 'having a lot of difficulty to perform certain functions', when in reality this is an aspect that can be attributed to the child's level of development rather than an impairment.<sup>29</sup>

### 1.6 What are the most prevalent forms of disability and/or peculiarities to disability in South Africa?

According to the *Census 2011: Profile of persons with disabilities in South Africa* report, the prevalence of a specific type of disability shows that 11 per cent of persons aged five years and older had seeing difficulties, 4.2 per cent had cognitive difficulties (remembering or concentrating), 3.6 per cent had hearing difficulties, and about 2 per cent had communication, self-care, and walking difficulties. Therefore, from the Census 2011, seeing difficulties was reported to be the most prevalent difficulty. However, it must be noted that the majority reported mild difficulty (9.3 per cent).<sup>30</sup>

27 As above.

28 As above.

29 As above.

30 As above.

## 2 South Africa's international obligations

### 2.1 What is the status of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in South Africa? Did South Africa sign and ratify the CRPD? Provide the date(s).

South Africa signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol on 30 March 2007 and subsequently ratified both the Convention and the Optional Protocol on 30 November 2007. No reservations to the CRPD or its Option Protocol were recorded.<sup>31</sup>

### 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? Did South Africa submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

The Department of Women, Children and People with Disabilities (DWCPD) was responsible for submitting the report. South Africa's Initial Report was due two years after the CRPD entered into force, which means that it was due by May 2010. However, the first draft country report to the United Nations (UN) on the implementation of the CRPD was released on 26 November 2012 for public comment. The aim was to complete and deposit the first Initial Report to the CRPD Committee by March 2013. At the time, the reason for the delay in submission of the report was due to changes in organisational arrangements with the transition from the Office on Status of Disabled People (OSDP) to the DWCPD. This transition had a negative impact on the finalisation and deposit of the report within the two-year post ratification time specified in the CRPD.<sup>32</sup> The Initial Report was submitted on 26 November 2014 to the CRPD Committee.<sup>33</sup>

The South African government, reported that the INDS in 1997, developed through a widely-consultative process applying the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities, as well as the South African Disability Rights Charter, provided guidelines for mainstreaming of disability across all government departments as legislative and policy reform in the newly-established democratic South Africa took effect.<sup>34</sup> According to the Initial Report, the South African government reported that since the CRPD embodies principles of the South African process which was set in motion in 1994 to advance the progressive realisation of the rights of persons with disabilities as equal citizens, the implementation of the CRPD actually commenced in 1994 and not in 2007.<sup>35</sup>

31 United Nations Human Rights Office of the High Commissioner Status of Ratification 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org> (accessed 9 September 2023).

32 First Draft Country Report for Public Comment, 1.

33 CRPD (n 10).

34 CRPD (n 10) Introduction, para 1(3).

35 CRPD (n 10) Introduction, para 2.

However, the CRPD Committee noted in its Concluding Observation that was adopted in September 2018,<sup>36</sup> that the South African government undertook an audit of its laws and policies to bring them into line with the human rights model of disability, including the comprehensive White Paper on the Rights of Persons with Disabilities of 2015. The White Paper aims to accelerate change and redress with regard to the full inclusion, integration, and equality of persons with disabilities.<sup>37</sup> Furthermore, the interrelatedness of disability and poverty was articulated in South Africa's National Development Plan (NDP), which was adopted in 2012. The NDP recognises that many persons with disabilities are not able to develop their full potential due to a number of barriers that have to be addressed.<sup>38</sup>

**2.3 While reporting under various other United Nations instruments, or under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did South Africa also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'Concluding Observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?**

## UN Instruments

- **Convention on the Rights of the Child (CRC)<sup>39</sup>**

South Africa signed and in 1995 ratified the Convention on the Rights of the Child (CRC). In 1997 South Africa submitted the Initial Report, and in early 2000 the Concluding Observations were adopted. In the Concluding Observations of the monitoring body of the CRC, the Committee on the Rights of the Child (CRC Committee)<sup>40</sup> mentioned in several instances the rights of children with disabilities. Firstly, mention was made of the positive aspect of 'Curriculum 2005', which aimed at facilitating a more inclusive school environment, including programmes to encourage non-discrimination, especially of children with disabilities. However, there were also concerns raised that the data collection mechanism was insufficient for purposes of the areas covered by the CRC. The CRC Committee in particular highlighted data collection mechanisms in relation to all groups of children in order to monitor and evaluate progress achieved and assessments made of the impact of policies adopted with respect to children. The CRC Committee subsequently recommended that the system of data collection had to be reviewed with a view to incorporate all the areas covered by the CRC.<sup>41</sup> The CRC Committee also noted 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

36 CRPD (n 10).

37 CRPD, Concluding Observations on the Initial Report of South Africa, 23 October 2018, UN Doc CRPD/C/ZAF/CO/1 (2018), positive aspects para 3(c).

38 CRPD (n 10) Introduction paras 3-8.

39 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3 (1989) adopted on 20 November 1989 by General Assembly Res 44/25, and entered into force on 2 September 1990 in accordance with article 49.

40 Convention on the Rights of the Child (CRC), Concluding Observations: South Africa, 22 February 2000, UN Doc CRC/C/15/Add.122 (2000).

41 CRC (n 40) para 14.

African legislation, but there are insufficient measures in place to ensure that all children are guaranteed access to education, health, and other social services.<sup>42</sup> 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 its efforts to ensure the proper implementation of the non-discrimination article.<sup>43</sup> Lastly, the CRC Committee raised concerns that the legal protection, facilities, and services for children with disabilities, and particularly mental disabilities, are insufficient. The CRC Committee's recommendations, amongst others, were that 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. Furthermore, the CRC Committee recommended that government seeks technical cooperation for the training of professional staff working with and for children with disabilities from, *inter alia*, the UN Children's Fund (UNICEF) and WHO.<sup>44</sup>

In part 6 of South Africa's Periodic Country Report on the CRC for the period January 1998 to April 2013, the DWCPD provided detailed feedback on the CRC Committee's Concluding Observations.<sup>45</sup> In the CRC Committee's Observations on the second periodic report of South Africa, the Committee welcomed the ratification of the CRPD by South Africa in 2007, as well as the adoption of the Framework and Strategy for Disability and Rehabilitation Services in South Africa 2015-2020. Nevertheless, the CRC Committee remained concerned with: i) the multiple layers of discrimination and exclusion faced by the majority of children with disabilities in South Africa; ii) the lack of accurate and comprehensive data on children with disabilities; iii) insufficient and/or comprehensive law and policy to realise the rights of children with disabilities, with clear baselines, clear time frames, and measurable indicators for the implementation, as well as mechanisms for monitoring implementation; iv) the absence of effective multisectoral coordination within government, in particular in rural areas, to provide integrated services to children with disabilities; and v) the lack of effective provision of reasonable accommodation, such as through the provision of assistive devices and of services in Braille and in sign languages.<sup>46</sup>

The CRC Committee further welcomed the efforts made to provide inclusive education to all children, including children with disabilities, by developing full-service schools. However, the Committee remained concerned and made recommendations regarding the lack of legislation to affirm the right to inclusive basic education for all children with disabilities; ineffective implementation of relevant policies due to acute shortages of staff with expertise on disabilities and insufficient allocations of financial resources; failure to provide free, compulsory primary education to children with disabilities; the large number of children with disabilities who are out of school or are studying in specialised schools or classes, in particular children with psychosocial disabilities; discrimination and violence by teachers and by other students, against children with disabilities; and the low quality of education provided and inadequate curriculum content used for children with disabilities, particularly children with psychosocial disabilities, autism spectrum disorders, and sensory disabilities, which does not equip them with the

42 CRPD (n 40) paras 18 and 34.

43 As above.

44 CRC (n 40) para 32.

45 South Africa's periodic Country Report to the CRC by the Department of Women, Children and People with Disabilities (January 2014) ISBN 978-0-621-41909-2.

46 CRC, Concluding Observations on the Second Periodic Report of South Africa, 27 October 2016, UN Doc CRC/C/ZAF/CO/2 (2016) para 43.



capacity to pursue higher education, employment, and an autonomous life after they have completed their schooling.<sup>47</sup>

• **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**<sup>48</sup>

South Africa signed and in 1995 ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). South Africa's latest Country Report was submitted in May 2019,<sup>49</sup> where the South African government reported to have launched public education initiatives to raise awareness of legal recourse and redress measures available to, amongst others, women with disabilities. They reported that a combination of various communication platforms was utilised such as media; public exhibitions; educational imbizos and government websites to promote the rights of women, children, older persons, persons with disabilities, the Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) community, and other marginalised groups.<sup>50</sup> It was further reported that educational materials are printed in Braille including booklets and the Braille version of the Constitution. Forms prescribed by Regulations for the Domestic Violence Act<sup>51</sup> have been translated into all 11 official languages and distributed to all lower courts in the country. It was further reported that in November 2014 a round-table discussion on 'Equal Access to Justice for Persons with Disabilities' was held.<sup>52</sup> The South African government also reported that it provides annual training interventions on legislation promoting the rights of women and children. Amongst others, intermediaries were trained in information management on cases of sexual offences involving child victims and persons with mental disabilities.<sup>53</sup> Furthermore, the South African Social Security Agency (SASSA) Act,<sup>54</sup> continues to be implemented and provides for income transfer in the form of different kinds of social grants such as a disability grant; a grant for older persons and a war veteran's grant; foster child grant; care dependency grant; child support grant; and a grant-in-aid through direct and unconditional cash transfers. The social grant programme was reported to have resulted in a reduction in poverty levels in vulnerable groups.<sup>55</sup>

In the Concluding Observations of the monitoring body of CEDAW, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), on the fifth periodic report of South Africa,<sup>56</sup> noted with concern the high risk of gender-based violence against women and girls facing intersecting forms of discrimination, such as lesbian, bisexual and transgender women and intersex persons, refugee women, women with disabilities and women and girls with albinism and urged the government raise awareness.<sup>57</sup> Furthermore, the CEDAW Committee recommended that the South African government raise awareness among women, including women belonging to ethnic minorities, women with disabilities, migrant women, and lesbian, bisexual and transgender

47 CRC (n 46) para 45.

48 Adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981 in accordance with article 27(1) of CEDAW.

49 CEDAW, Fifth periodic report submitted by South Africa under Article 1 of the Convention, due in 2015, 28 October 2019, UN Doc CEDAW/C/ZAF/5 (2019).

50 CEDAW (n 49) para 42.

51 Act 14 of 2021.

52 CEDAW (n 49) para 74.

53 CEDAW (n 49) para 86.

54 Act 9 of 2004.

55 CEDAW (n 49) para 173.

56 CEDAW, Concluding observations on the fifth periodic report of South Africa, 23 November 2021, UN Doc CEDAW/C/ZAF/CO/5 (2021).

57 CEDAW (n 56) para 9(d).

women, about the legal remedies available to them in the event of discrimination.<sup>58</sup> The CEDAW Committee recommended that government should provide capacity-building in political leadership and campaigning skills and access to campaign financing for women candidates, including women with disabilities and women with albinism. In this regard, the CEDAW Committee recommended that government raise awareness among political leaders and the public about the fact that the full, equal, free, and democratic participation of women in political and public life on an equal basis with men is required for the full implementation of the CEDAW.<sup>59</sup> The CEDAW Committee noted with concern that girls, in particular girls with disabilities, continue to face gender-based violence and discrimination in the school environment and unsafe transportation to and from schools.<sup>60</sup> The Committee recommended that the South African government ensure that women with disabilities, amongst others, have affordable access to sexual and reproductive health services, including safe abortion and post-abortion services, free from gender-based violence, discrimination, or harassment.<sup>61</sup>

On disadvantaged groups of women, the CEDAW Committee further recommended that the South African government provide information in its next periodic report on the situation of women facing intersecting forms of discrimination, including lesbian, bisexual, and transgender women and intersex persons, migrant, refugee and asylum-seeking women, women living with HIV/AIDS, women with disabilities, and women with albinism, and on measures taken to address such discrimination.<sup>62</sup>

## Regional instruments

- **African Charter on the Human and Peoples' Rights (ACHPR)**

South Africa signed and ratified the African Charter on Human and Peoples' Rights (ACHPR) in 1996 and presented its periodic report in 2005. According to article 18 of the ACHPR, the 'aged and disabled shall also have the rights to special measures of protection in keeping with their physical needs'. In the South African government's first Periodic Report, it was mentioned that South Africa had tried to comply with article 18 of the Charter.<sup>63</sup> The second Periodic Report (combining the third, fourth, fifth, and sixth reports) captured the developments within South Africa on the realisation of the rights guaranteed by the Charter from 2002 to the end of 2013, as well as responses to the Concluding Observations adopted by the African Commission in December 2005.<sup>64</sup> The report included information and data pertaining to disability as captured in the Census 2011; the adoption of the 1997 INDS; the *Job Access Strategy 2006-2010* adopted by Cabinet in 2007; the positive measures to ensure the economic and social needs of persons with

58 CEDAW (n 56) para 24(a).

59 CEDAW (n 56) para 40(c).

60 CEDAW (n 56) para 45.

61 CEDAW (n 56) para 40(c).

62 CEDAW (n 56) para 54(d).

63 CEDAW (n 56) para 60(b).

64 ACHPR and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa to the African Commission on Human and Peoples' Rights [http://www.achpr.org/files/sessions/38th/state-reports/1st-1994-2001/staterep1\\_southafrica\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/38th/state-reports/1st-1994-2001/staterep1_southafrica_2001_eng.pdf) (accessed 11 September 2023).

64 Second Periodic Report under the African Charter on Human and People's Rights (ACHPR) and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (August 2015).

disabilities through the disability grant in terms of the Social Assistance Act,<sup>65</sup> as well as free healthcare.<sup>66</sup>

In the Concluding Observations with recommendations on the combined second Periodic Report under the ACHPR and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa to the African Commission on Human and Peoples' Rights,<sup>67</sup> the Commission commends enactment of legislation to ensure equality in a variety of areas including disabilities,<sup>68</sup> and commends the social policies and other measures taken in favour of vulnerable or designated groups such as the *Policy on Disability*,<sup>69</sup> and the adoption of the *Disability Framework for Local Government 2009-2014*.<sup>70</sup> However, the Commission was concerned about the lack of adequate disaggregated data on, amongst others, disability and other elements that are important in formulating policies for persons with disabilities.<sup>71</sup> The Commission recommended that the South African government should provide adequate disaggregated data in its next Periodic Report on the gender, age, type, and other elements that are important in formulating policies for the disabled.<sup>72</sup>

- **UN Universal Periodic Review (UPR)**

South Africa's human rights record was last reviewed by the UN Human Rights Council's Periodic Review (UPR) Working Group in November 2022 (fourth UPR Review). South Africa's first, second, and third UPR reviews took place in April 2008, May 2012, and May 2017 respectively. These reviews are based on national reports – information provided by the State under review; information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; information provided by other stakeholders including national human rights institutions, regional organisations, and civil society groups.<sup>73</sup>

65 Act 13 of 2004.

66 Second Periodic Report under the ACHPR and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (August 2015), para 439-443, 445-446, 526-534.

67 Concluding Observations and Recommendations on the Combined Second Periodic Report under the ACHPR and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa to the African Commission on Human and Peoples' Rights <https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-south-africa-2nd-periodic-repor> (accessed 11 September 2023).

68 ACHPR and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa to the African Commission on Human and Peoples' Rights <https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-south-africa-2nd-periodic-repor> (accessed on 11 September 2023) para 12(i).

69 Concluding Observations and Recommendations on the Combined Second Periodic Report under the ACHPR and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa to the African Commission on Human and Peoples' Rights, para 18(ii).

70 Concluding Observations and Recommendations on the Combined Second Periodic Report, para 18(iv).

71 Concluding Observations and Recommendations on the Combined Second Periodic Report, para 39.

72 Concluding Observations and Recommendations on the Combined Second Periodic Report, para 55(i).

73 United Nations Human Rights Office of the High Commissioner 'South Africa's human rights record to be examined by Universal Periodic Review' (11 November 2022) <https://www.ohchr.org/en/press-releases/2022/11/south-africas-human-rights-record-be-examined-universal-periodic-review> (accessed 11 September 2023).

South Africa, in the country's national report submitted to the Human Rights Council,<sup>74</sup> responded to 243 recommendations issued during the third cycle review report in 2017.<sup>75</sup> On recommendations regarding economic, social, and cultural rights, the South African government reported that the Social Assistance Amendment Act<sup>76</sup> aims to provide for additional social assistance payments. South Africa spends about R180 billion per year on social grants targeting poor children, the elderly, and those with a disability. In addition to this, during 2020/21, a Special COVID-19 Social Relief package estimated at R55 billion was implemented to assist lower-income households during the pandemic. This included a new grant for those between the ages of 18 and 60 and caregivers' allowance for those receiving a Child Support Grant, who are mostly women. While this was a temporary relief measure, the new grant, with some amendments to improve the gender aspects of the grant, was extended to March 2022; and the government is engaged in ongoing dialogue around the possibility of providing more permanent social assistance for this cohort.<sup>77</sup>

The Human Rights Council Periodic Review Working Group's recommendations were adopted on 9 March 2023.<sup>78</sup> It is worth mentioning that the recommendations by the Working Group regarding the protection of vulnerable groups which include children, persons with disabilities, and LGBTQIA+, were supported or accepted by South Africa.<sup>79</sup>

**2.4 Was there any domestic effect on South Africa's legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that had been ratified require South African legislature to incorporate it into the legal system before the instrument can have force in South Africa's domestic law? Have the courts of South Africa ever considered this question? If so, cite the case(s).**

South Africa is a constitutional democracy. The Constitution of the Republic of South Africa, 1996 (the Constitution) remains the overarching normative framework to transform the South African society. The Constitution includes provisions on the role of international law with regard to the interpretation of the Bill of Rights (Chapter 2 of the Constitution) and statutory interpretation. Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; must consider international law; and may consider foreign law. Furthermore, 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) of the

74 HRC 'National report submitted pursuant to Human Rights Council resolution 5/1 and 16/21' UN Doc A/HRC/WG.6/41/ZAF/1 (24 August 2022).

75 HRC (n 74) Methodological approach: Process for the development of the report, para 1.

76 Act 16 of 2020. The Act amends the Social Assistance Act 13 of 2004, to, amongst others: provide for additional payments linked to social grants; provide for payment of benefits to a child-headed households; provide for social relief of distress in the event of a disaster; repeal the internal reconsideration process; provide for an Independent Tribunal to consider appeals against decisions of the SASSA; and provide for the establishment of the Inspectorate as a government component

77 HRC (n 74) V Economic, social and cultural rights, para 34.

78 HRC 'Report of the Working Group on the Universal Periodic Review of South Africa' UN Doc A/HRC/52/17/Add.1 (9 March 2023).

79 HRC (n 78) para 37.

Constitution, an international agreement *binds* the Republic only after it has been approved by resolution in both houses of the National Legislature (Parliament), which means that it has to be approved by the National Assembly and the National Council of Provinces. The effect is that an international agreement that had been ratified by resolution of Parliament is binding on South Africa on the international plane. Failure to observe the provisions of the international agreement may result in South Africa incurring responsibility towards other signatory states.<sup>80</sup> However, 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. It is clear from the constitutional provision that South Africa follows a dualistic approach and requires the incorporation of international instruments into domestic law when it is enacted into law by national legislation (Act of Parliament).<sup>81</sup> This was confirmed by the Constitutional Court in *Glenister v President of the Republic of South Africa (Glenister)*.<sup>82</sup>

An international agreement that has been ratified by Parliament under section 231(2) (of the Constitution), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations. As this Court held in *AZAPO* '[an] international convention does not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment'.

In *Glenister*, the Constitutional Court confirmed that South Africa requires legislative incorporation of an international agreement in order for the agreement to create rights and obligations under domestic law.<sup>83</sup> The legislative act which incorporates the international agreement, such as the CRPD, into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level, into domestic legislation that binds the State and citizens as a matter of domestic law.<sup>84</sup> For purposes of persons with disabilities living in South Africa, it means that an Act of Parliament has to incorporate the CRPD into domestic law in order to transform the international obligations into domestic legislation that binds the South African government and citizens.<sup>85</sup> Of further importance is section 233 of the Constitution which 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.

South Africa ratified or acceded to many international human rights instruments, and in compliance with International Treaty obligations, presented its country reports to the applicable UN human rights treaty monitoring body. Furthermore, it should be noted that South Africa's human rights record was reviewed by the UPR Working Group's first, second, third and fourth UPR cycle reviews in April 2008, May 2012, May 2017, and November 2022 respectively.<sup>86</sup> In applying its duties and obligations in terms of the international instruments, the

80 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 92.

81 *Glenister* para 92 & 94. However, in the *Government of RSA v Grootboom* 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'.

82 *Glenister* paras 92 and 94.

83 *Glenister* para 94.

84 As above.

85 South African Law Reform Commission (SALRC) Issue Paper 39 on Project 148 *Domestication of the United Nations Convention on the Rights of Persons with Disabilities* (9 December 2021) ISBN: 978-0-621-49276-7.

86 United Nations Human Rights Council 'Universal Periodic Review – South Africa' <https://www.ohchr.org/en/hr-bodies/upr/za-index> (accessed 12 September 2023).

South African government is committed to undertake a series of measures to end discrimination in the South African society,<sup>87</sup> and to address the promotion, protection, and fulfilment of its international human rights obligations.<sup>88</sup> Additional to international human rights instruments, South Africa has ratified regional human rights instruments and submitted reports as part of its compliance with the continental instruments' mechanisms.<sup>89</sup> Most of the international and regional human rights instruments have been reported to either been domesticated through specific legislation, or through already enacted legislation that accommodated the principles contained in the instruments.<sup>90</sup>

**2.5 With reference to 2.4 above, has the United Nations CRPD or any other ratified international instrument been domesticated? Provide details.**

See question 2.4 above. The South African government has worked consistently to ensure gradual improvement in addressing both procedural and substantive gaps in its quest for the promotion, protection, and fulfilment of international human rights obligations.<sup>91</sup> The South African government reported in the second cycle of its periodic review to the UPR Working Group of May 2012 that satisfactory progress was made in the development of legislation in the advancement of human rights protection,<sup>92</sup> and the domestication thereof is reported on during the cycle reviews to the Working Group.<sup>93</sup>

As previously mentioned, South Africa signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol on 30 March 2007. Ratifications of both the Convention and the Optional Protocol followed on 30 November 2007.<sup>94</sup> South Africa submitted its Initial Report under article 35 of the Convention to the CRPD Committee on 26 November 2014. The CRPD Committee welcomed the Initial Report of South Africa, which was prepared in accordance with the Committee's reporting guidelines and thanked the State Party for its written replies to the list of issues prepared by the Committee.<sup>95</sup>

The CRPD Committee then considered the Initial Report of South Africa on 28 and 29 August 2018 and adopted its Concluding Observations to the report on 7 September 2018.<sup>96</sup> However, although South Africa is bound by the reporting obligations,<sup>97</sup> neither the CRPD nor its Optional Protocol has been incorporated into South African law (see para 2.4 above). For this purpose, the Department of Justice and Constitutional Development (DOJ&CD) requested the South African

87 South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism (15 April 2008).

88 HRC 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21' UN Doc A/HRC/WG.6/13/ZAF/1 (7 March 2012), III on promotion and protection mechanisms of human rights, para 21.

89 South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism (15 April 2008).

90 As above.

91 HRC (n 88).

92 HRC (n 88) III on promotion and protection mechanisms of human rights, para 21.

93 United Nations Human Rights Council 'Universal Periodic Review – South Africa' <https://www.ohchr.org/en/hr-bodies/upr/za-index> (accessed 12 September 2023).

94 United Nations Human Rights Office of the High Commissioner Status of Ratification 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org> (accessed 9 September 2023).

95 CRPD (n 10); and CRPD (n 40).

96 CRPD (n 37) paras 1 and 2.

97 Art 35(1) of the CRPD.

Law Reform Commission (SALRC)<sup>98</sup> in May 2018 to investigate the domestication of the CRPD.<sup>99</sup>

The SALRC deals with complex, crosscutting investigations where innovative constitutional reform is necessary or legislative coordination is needed. Often this falls outside the mandate of a specific South African governmental department. Domestication of the CRPD struggled to get off the ground since it was ratified in 2007 and the SALRC was given the mandate to investigate the domestication of the CRPD as stated above. The SALRC follows a three-stage process, where the first stage of the process is the development of an issue paper, which sets out the issues pertaining to the subject of the investigation.<sup>100</sup> The discussion paper is developed during the second stage on the strength of the responses received on the issue paper. This paper, on the strength of the responses, develops a preliminary view and goes out for public consultation. It is important to note that during the third stage of the process, the responses on the discussion paper will result in the formulation of a final view in the form of a report and a draft Bill.<sup>101</sup>

On 9 December 2021, the SALRC published its *Issue Paper 39 on Project 148 on the domestication of the United Nations CRPD*. On the strength of the responses received on the issue paper, the discussion paper is to be developed.<sup>102</sup>

### 3 Constitution

#### 3.1 Does the Constitution of the Republic of South Africa contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.

Section 9 of the Constitution of the Republic of South Africa, 1996 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. Furthermore, section 9 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. Sections 9(3) and 9(4) are the only sections which directly addresses disability in the Constitution.

In South Africa's Initial Report on the implementation of the CRPD to the CRPD Committee, the government also reported on equality and disability.<sup>103</sup> The

98 The SALRC was established by the South African Law Reform Commission Act 19 Of 1973.

99 Executive Summary of the SALRC Issue Paper 39 on Project 148 (n 85).

100 As part of public consultation process, the Issue Paper asks for comments on the issues in the paper to create the scope of what needs law reform.

101 Process of the SALRC in Issue Paper: 39 on Project 148 (n 85) xiii.

102 The SALRC haven't published the Discussion Paper at the time of writing this country report.

103 CRPD (n 10) Disability Statistics paras 28; 31; 42; 43; 45; 46; 47; 49; 50;51; 54; 55; 56; and 70.

SALRC in its December 2021 Issue Paper on the domestication of the CRPD, further provided an in-depth discussion pertaining to section 9 of the Constitution and disability.<sup>104</sup>

**3.2 Does the Constitution of the Republic of South Africa contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.**

The Constitution is the supreme law of the Republic of South Africa<sup>105</sup> and is based on equality of outcomes. The Bill of Rights is contained in Chapter 2 of the Constitution and binds the State and private individuals.<sup>106</sup> However, it should be noted that the rights contained in the Bill of Rights are not absolute and may be limited in terms of the limitation clause in the Bill of Rights.<sup>107</sup> Though the Constitution as a whole 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.<sup>108</sup> However, as most of the rights contained in the Bill of Rights apply to ‘everyone’ (or in some instances ‘every citizen’, ‘every child’, ‘every worker’, ‘every employer’, and ‘every trade union’), most of these rights would also be applicable to and include persons with disabilities. The majority of the rights contained in the Bill of Rights are therefore indirectly applicable to persons with disability. These rights are human dignity (section 10); the right to life (section 11); the right to freedom and security of the person (section 12); the right to freedom of trade, occupation and profession (section 22); labour relations rights (section 23); the right to health care, food, water and social security (section 27); the rights of the child (section 28); and the right to education (section 29). It should therefore be noted that the Constitution provides for the protection of disability as a substantive equality outcome.

## 4 Legislation

**4.1 Does South Africa have legislation that directly addresses issues relating to 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 directly. In this regard see the discussions in questions 2.4 and 2.5 on the domestication of the CRPD.

The Employment Equity Act<sup>109</sup> and the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA),<sup>110</sup> make provision for reasonable accommodation for persons with disabilities. However, there is a need for the protection of persons with disabilities against discrimination and degradation through disability-specific legislation.

104 SALRC Issue Paper: 39 on Project 148 (n 85) paras 2.54-2.78.

105 Sec 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

106 Sec 8 of the Constitution.

107 Sec 36 of the Constitution.

108 Sec 9(4) of the Constitution.

109 Act 55 of 1998.

110 Act 4 of 2000.



**4.2 Does South Africa have legislation that indirectly addresses issues relating to disability? If so, list the main legislation and explain how the legislation relates to disability.**

Apart from the Employment Equity Act<sup>111</sup> and PEPUDA,<sup>112</sup> which amongst others addresses issues pertaining to persons with disabilities, there are other laws that indirectly address issues relating to disability, namely:

• **Accessibility**<sup>113</sup>

Legislation pertaining to access to building, access to housing, a safe working environment, accessibility, equality, land transportation, and access to information:

- National Building Regulations and Building Standard Act 103 of 1977;
- Standards (SANS) PART S – Facilities for Persons with Disabilities;
- Housing Amendment Act 4 of 2001;
- Occupational Health and Safety Act 85 of 1993;
- Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000;
- National Land Transport Transitional Act 5 of 2009;
- National Library of South Africa Act 2 of 1998; and
- South African Library for the Blind Act 91 of 1998.

• **Protection against exploitation, violence and abuse and children's access to justice and protecting children with disabilities from violence and abuse and ensuring their access to the justice system**<sup>114</sup>

The rights of persons and children with disabilities are to be protected against exploitation, violence, and abuse and children's access to justice are protected in sections 7, 9, 10, 12, and 28 of the Constitution. The following laws are relevant, however implementation of some of them might be lacking:

- Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA) Act 13 of 2021;
- Older Persons Act 13 of 2006;
- Domestic Violence Act 116 of 1998;
- Children's Act 38 of 2008; and
- Criminal Procedure Act 51 of 1977.

• **Education**<sup>115</sup>

The right to education is protected in section 29 of the Constitution and mentioned in various laws and policies:

- Integrated National Disability Strategy (INDS);
- Education White Paper 3: Transformation of the Higher Education System;
- National Plan for Higher Education;
- Education White Paper 6: Special Needs Education;

111 Act 55 of 1998.

112 Act 4 of 2000.

113 SALRC Issue Paper: 39 on Project 148 (n 85) paras 6.8-6.11.

114 SALRC Issue Paper 39 on Project 148 (n 85) paras 6.12-6.14.

115 SALRC Issue Paper 39 on Project 148 (n 85) paras 6.15-6.17.

- 2012 Green Paper for Post School Education;
- South African White Paper on Post-school Education and Training; and
- Schools Act 84 of 1996.

- **Health<sup>116</sup>**

Issues surrounding mental health law and health law relating to autonomy, competency, and consent of persons with disabilities are:

- Sterilisation Act 44 of 1998;
- Mental Health Care Act 17 of 2002;
- National Health Act 61 of 2003; and
- Choice on Termination of Pregnancy Act 1 of 2008.

Issues relating to the health rights of children with disabilities are touched upon in terms of section 28 of the Constitution and the National Health Act 61 of 2003.

- **Labour practices<sup>117</sup>**

The right to fair labour practices is protected in section 23 of the Constitution. Laws indirectly applicable to persons with disabilities are:

- Employment Equity Act 55 of 1998 and its Code of Good Practice: Key Aspects on the Employment of People with Disabilities;
- Technical Assistance Guidelines on the Employment of People with Disabilities (TAG);
- Labour Relations Act 66 of 1995, its Code of Good Practice on Dismissal;
- Basic Conditions of Employment Act 75 of 1997;
- Skills Development Act 97 of 1998;
- Skills Development Levies Act 9 of 1999; and
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.

- **Adequate standard of living and social protection<sup>118</sup>**

Sections 9 and 27 of the Constitution are applicable to persons with disabilities, and more particularly the intersection between disability and poverty which has an impact on the lives of persons with disabilities in South Africa. In this regard, the progressive realisation of the rights to access to social security and social assistance should be mentioned, together with the Social Assistance Act 13 of 2004.

- **Political life<sup>119</sup>**

The right to political life is protected in section 19 of the Constitution. The following legislation is applicable to the protection of persons with disabilities and their right to political life:

- Electoral Act 73 of 1998;
- Voter Registration Regulations 1998;
- Regulations on the Accreditation of Voter Education Providers of 1998;
- Regulations on the Accreditation of Observers of 1999; and
- Regulations Concerning the Submission of Lists of Candidates of 2004.

116 SALRC Issue Paper 39 on Project 148 (n 85) paras 6.18 & 6.19.

117 SALRC Issue Paper 39 on Project 148 (n 85) para 6.20.

118 SALRC Issue Paper 39 on Project 148 (n 85) paras 6.21 and 6.22.

119 SALRC Issue Paper 39 on Project 148 (n 85) paras 6.24-6.26.

- **Other legislation**

Other laws that are applicable to persons with disabilities or might have an impact on persons with disabilities are:

- Skills Development Act 97 of 1998;
- Compensation for Injuries and Diseases Act 130 of 1993 (COIDA);
- Road Accident Fund Act 56 of 1996;
- Occupational Health and Safety Act 85 of 1993;
- Mine Health and Safety Act 29 of 1996;
- Preferential Procurement Policy Framework Act 5 of 2000;
- Promotion of Access to Information Act 2 of 2000;
- National Education Policy Act 27 of 1996;
- Broad-based Black Economic Empowerment Act 53 of 2003; and
- National Sport and Recreation Act 110 of 1998.

## 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 with the facts, the decision(s), and the reasoning.

The South African courts place a strong emphasis on substantive equality to redress the inequalities of the past. In *Harksen v Lane*<sup>120</sup> and *Prinsloo v Van der Linde*,<sup>121</sup> the Constitutional Court indicated the place of substantive equality in South Africa by providing criteria to determine unfair discrimination. Essentially these criteria contain the reasonable accommodation necessary to give effect to the application of substantive equality or equality of outcomes for disadvantaged groups and individuals.

In this regard, the Constitutional Court determined in *Prinsloo v Van der Linde*<sup>122</sup> that human dignity constitutes a criterion to determine unfair discrimination. The Court endorses 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.<sup>123</sup>

Furthermore, PEPUDA<sup>124</sup> 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. It is important to note that the onus is on the alleged discriminator to prove in the Equality Courts that the discrimination did not take place. The importance of human dignity was also emphasised in *WH Bosch v The Minister of*

120 1998 (1) 300 (CC).

121 1997 (3) SA 1012 (CC).

122 As above.

123 CRPD (n 10) paras 42-50.

124 Act 4 of 2000.

*Safety and Security & Minister of Public Works*<sup>125</sup> 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 *Bosch*-judgment in 2005 directed that all South African Police Services (SAPS) stations be made accessible for persons with disabilities. In another Equality Court case in Germiston, *Esthe Muller v Minister of Justice and Minister of Public Works*,<sup>126</sup> an out-of-court settlement of 2004 created precedence by directing that all court buildings be made accessible. Both the judgments (*Bosch* and *Muller*) resulted in the creation of a dedicated programme within the Department of Public Works to renovate existing public services buildings.

Similarly, the Equality Court ruled in favour of Lettie Oortman against the St Thomas Aquinas private school when it 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 toilet allocated to her by using a wheelchair'. The South African Human Rights Commission (SAHRC)<sup>127</sup> assisted Oortman and addressed the issues relating to the rights of persons with disabilities in the Mpumalanga Equality Court judgment of *Lettie Hazel Oortman/St Thomas Aquinas Private School and Bernard Langton*.<sup>128</sup> In this case, the Equality Court dealt with the question of whether the school had unfairly discriminated on the prohibited ground of disability, against one of their learners. The court found that the school had not taken all the reasonable steps to accommodate her and did not remove all the 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.<sup>129</sup>

In *Standard Bank Ltd v CCMA*,<sup>130</sup> the Bank employee was dismissed after being injured in a car accident. The Bank failed to accommodate the employee, which renders dismissal 'automatically unfair'.<sup>131</sup> 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 a fair labour practice. Justice Pillay noted that the 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 aim not only to achieve equality but also to restore the dignity of persons with disabilities.<sup>132</sup> In *Smith v Kit Kat Group (Pty) Ltd*,<sup>133</sup> the employee alleged that he was unfairly discriminated against when the employer refused to allow him to resume his duties for 'cosmetically unacceptable' reasons. The employee attempted suicide, which resulted in the disfigurement to his face, as well as impaired speech. The court found that the employer could not rely on cosmetic reasons for the dismissal as he did not occupy a role such as a fashion model. Furthermore, the court observed that

125 Case 25/2005 (9).

126 Case 01/2003.

127 Established in terms of section 184 of the Constitution, a Chapter 9-institution, supporting democracy.

128 December 2010.

129 CRPD (n 10) paras 42-50.

130 [2008] 4 BLLR (LC), paras 356-390.

131 As above.

132 As above.

133 [2016] 12 BLLR 1239 (LC).

the speech impediment was not so severe that the employee would not be able to perform his duties and the view of the court was that minimal accommodation by the employer was required. Furthermore, it is important to note that the employer did not investigate to determine the extent of the impairment, nor did the employer consider whether the employee could be accommodated in another role. This means that the Code of Good Practice on Dismissal was not consulted in this regard.

In *Makana People's Centre v Minister of Health*,<sup>134</sup> the Constitutional Court did not confirm the Gauteng High Court's decision which declared sections of the Mental Health Act,<sup>135</sup> that allow for the involuntary detention of mental health patients, as unconstitutional. Makana People's Centre approached the court in the aftermath of the Life Esidimeni tragedy, where 100 mental health patients died after being moved to incapacitated non-government organisations (NGOs). It was argued that sections 33 and 34 of the Mental Health Act<sup>136</sup> were unconstitutional and invalid, as they did not provide for automatic independent review before or immediately after the involuntary detention of a mental health patient. However, the Constitutional Court held that sections 33 and 34 included steps that involved senior health officials and legal practitioners who were all tasked to ensure the involuntary treatment of a patient was fair and warranted.

## 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.

South Africa's Initial Report to the CRPD Committee identifies a variety of policies,<sup>137</sup> and how the policies address disability. The SALRC, in its issue paper, identified further policies which are:<sup>138</sup>

- National Mental Health Policy Framework and Strategic Plan 2013-2020;
- Disability Framework for Local Government 2015-2020;
- Technical Assistance Guidelines on the Employment of People with Disabilities;
- Framework and Strategy for Disability and Rehabilitation Services in RSA 2015-2020;
- Policy Guidelines for the Licensing of Residential Facilities and/or Day Care Facilities for Persons with Mental Illness and/or Severe or Profound Intellectual Disabilities; and
- Standardisation of Assistive Devices in South Africa: A Guideline for Use in the Public Sector and the National Rehabilitation Policy 2006.

134 2023 (5) SA 1 (CC) 15.

135 Act 17 of 2002.

136 As above.

137 CRPD (n 10).

138 SALRC Issue Paper 39 on Project 148 (n 85) para 3.62.

**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.**

South Africa reported in its Initial Report<sup>139</sup> to the CRPD Committee that apart from the Constitution and PEPUDA various measures have been taken to promote the establishment of a society in which all human beings are guaranteed legal protection against discrimination. Persons with disabilities have been included as a designated group in all affirmative action policies and programmes to redress past discrimination. The Departments of Health, Basic Education, as well as Justice and Constitutional Development, have developed braille public awareness and education materials on key legislation and policies as well as disability services related to, amongst others, the Children's Act,<sup>140</sup> the Domestic Violence Act,<sup>141</sup> and the Maintenance Act.

## 7 Disability bodies

**7.1 Other than the ordinary courts or tribunals, does South Africa have any official body that specifically addresses violations of the rights of persons with disabilities? If so, describe the body, its functions, and its powers.**

There are no other bodies other than courts that specifically address the violation of the rights of persons with disabilities.

**7.2 Other than the ordinary courts or tribunals, does South Africa have any official body that, though not established to specifically address the violation of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions, and its powers.**

The only other bodies addressing the violation of the rights of persons with disabilities are the National Human Rights Institutions discussed in question 8 below.

139 CRPD (n 10) paras 43 and 66.

140 Act 38 of 2005.

141 Act 116 of 1998.

## 8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

**8.1 Do you have a Human Rights Commission or an Ombudsman or Public Protector in South Africa? If so, does its remit include the promotion and protection of the rights of persons with disabilities? If your answer is yes, also indicate whether the Human Rights Commission or the Ombudsman or Public Protector of South Africa has ever addressed issues relating to the rights of persons with disabilities.**

- **Protecting and monitoring human rights and to promote the culture of human rights in South Africa**

South Africa has a South African Human Rights Commission (SAHRC)<sup>142</sup> which has a constitutional mandate (sections 181 and 184 of the Constitution) as an independent body to promote, protect, and monitor the rights of all South Africans. It is, however, acknowledged that capacity challenges within the commission cause significant delays in the effective investigation and finalisation of complaints.<sup>143</sup> The SAHRC is required by the Constitution and PEPUDA to report on, amongst others, the state of equality in the country. The inaugural Equality Report of the SAHRC released in 2012 included two chapters on disability.<sup>144</sup> The first chapter focused on the types of barriers experienced by persons with disabilities which detract from their standing as equal citizens. The second chapter on disability presented quantitative outcomes of a research project conducted to determine the equality challenges experienced by youth with disabilities compared to their able-bodied peers. The study found substantive inequality in outcomes between young persons with disabilities and their able-bodied peers in education, employment, and livelihoods.<sup>145</sup>

In the SAHRC 'Towards a Barrier-free Society Report' published in 2002 a number of recommendations were made. It was noted that legislation governing the accessibility of built environments should focus on improving the preconditions for equal participation and dignity and providing mechanisms for governance, administration, and enforcement. It also recommended an urgent review of the South African legislative framework for accessibility and the built environment in order to reflect constitutional rights; ensure safe, healthy and convenient use for all, and include international standards for universal access.<sup>146</sup> The SAHRC conducted a number of investigations into allegations of human rights violations in mental health facilities over the past few years and has made recommendations in respect of both prevention of recurrence, as well as improvement of conditions in general. Furthermore, the SAHRC monitors the implementation of these recommendations.<sup>147</sup>

142 Sec 184 of the Constitution; Human Rights Commission Act 54 of 1995; CRPD (n 10) para 53.

143 CRPD (n 10) para 53.

144 *South African Human Rights Commission Equality Report Commentaries on Equality: Race, Gender, Disability and LGBTI Issues 2012*, ISBN: 978-0-621-40805-8.

145 CRPD (n 10) para 54.

146 CRPD (n 10) para 71.

147 CRPD (n 10) para 148.

- **National human rights institution**

The SAHRC's constitutional mandate (established in terms of sections 181 and 184 of the Constitution) includes the promotion and protection of the rights of groups which are vulnerable to discrimination, exclusion, and inequality. The SAHRC, as an 'A' status national human rights institution and in line with its constitutional mandate, has the potential to be part of the framework as an independent mechanism to promote, protect, and monitor the implementation of the CRPD. In this regard, the South African government reported to embark on a formal consultative process, which will include civil society, in establishing this monitoring framework as required by article 33(2) of the CRPD.<sup>148</sup>

It must be noted that the CRPD Committee in its Concluding Observations noted that the SAHRC should be empowered as the national independent monitoring mechanism to monitor all institutions and settings in which persons with disabilities are deprived of their rights.<sup>149</sup> The CRPD Committee further recommended that the designation of the SAHRC as an independent monitoring mechanism be expedited. In this regard, the CRPD Committee recommended that sufficient financial resources be allocated to enable the SAHRC to execute its mandate fully.<sup>150</sup>

## 9 Disabled peoples organisations (DPOs) and other civil society organisations

### 9.1 Does South Africa have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

There is a wide range of advocacy and self-help organisations, which includes organisations such as Disabled People South Africa (DPSA), the National Council of and for Persons with Disabilities (NCPD), and Champion of Hope. Single-issue national organisations such as the South African Federation for Mental Health (SAFMH) and Down Syndrome South Africa, to name just a few. There are mainly three different types of disability organisations (DPOs) in South Africa. They are:<sup>151</sup>

- Cross-disability organisations such as NCPD and Champion of Hope, which represent the interests of all persons with disabilities in South Africa.
- Diagnostic-focused organisations which represent a medical diagnostic group such as SAFMH and Down Syndrome South Africa. These DPOs are provincial organisations that assist their members in a particular province, for example Down Syndrome Association of the Western Cape (DPSAWC).
- Population-specific organisations, represent a population group such as children with disabilities, for example, The Sunshine Association.

148 CRPD (n 10) para 409.

149 CRPD (n 37) para 29(c).

150 CRPD (n 37) para 55(b).

151 Disability Info South Africa 'Organisations' [http://disabilityinfosa.co.za/intellectual-impairments/organizations/#Types\\_of\\_Disability\\_Organizations\\_In\\_South\\_Africa](http://disabilityinfosa.co.za/intellectual-impairments/organizations/#Types_of_Disability_Organizations_In_South_Africa) (accessed 14 September 2023).



## 9.2 In the countries in your region, are DPOs organised/coordinated at a national and/or regional level?

See question 9.1 above. The South African government reported in its Initial Report to the CRPD Committee that they recognise the right of persons with disabilities to be represented through organisations *of* persons with disabilities, as well as parents' organisations, rather than through organisations *for* persons with disabilities. Financial support from government to organisations *for* and *of* persons with disabilities at national and provincial levels is predominantly through subsidisation by the Departments of Social Development, Health, and Labour, with a strong bias at this stage towards organisations *for* persons with disabilities, rather than organisations *of* persons with disabilities. Organisations *of* persons with disabilities at local level currently receive virtually no direct financial support from government but have access to funds through the National Development Agency (funded by the Department of Social Development), as well as the National Lottery Distribution Trust Fund which distributed a total of USD 65.2 million between 2008 and 2011 to organisations *of* and *for* persons with disabilities. The government further reported that there is an urgent need to finalise a framework for the creation of an enabling environment for organisations of persons with disabilities to strengthen their capacity to advocate, empower, and monitor the rights of persons with disabilities more effectively.<sup>152</sup>

## 9.3 If South Africa has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?

South Africa, in the drafting process of its first Initial Report to the CRPD Committee, involved organisations *of* and *for* persons with disabilities, including the South African Disability Alliance (SADA). SADA comprises of representatives from 13 national affiliated organisations *of* and *for* persons with disabilities.<sup>153</sup> Verbal and oral submissions by DPOs to the Parliamentary Committee on Women, Children and People with Disabilities were considered. The draft report was released for public comment on 12 November 2012 and was also emailed to stakeholders amongst other, organisations *of* and *for* persons with disabilities at national, provincial, and local levels, and submissions from civil society including submissions from national organisations *of* and *for* persons with disabilities were received.<sup>154</sup> In this regard, the South African government acknowledged the valuable contributions made by these organisations and recognised the role that the disability sector and these organisation in particular, continues to play in promoting and adopting a right-bases approach for persons with disabilities and their families. However, the Initial Report acknowledges the capacity and resource constraints that limited the extent to which DPOs and disability service organisations were able to participate in the development of the report. In this regard, the Initial Report, in particular, refer to the voices of persons with disabilities living in rural areas, in residential and/or institutional care, persons with psychosocial disabilities, as well as children with disabilities.<sup>155</sup>

Furthermore, the SALRC invited DPOs to submit written comments, representations, or requests to the Commission's Issue Paper on the domestication of the CRPD during 2021.<sup>156</sup>

152 CRPD (n 10) paras 343-345.

153 CRPD (n 10) para 15.

154 CRPD (n 10) paras 17, 18 and 19.

155 CRPD (n 10) paras 20 and 21.

156 Preface to the SALRC Issue Paper 39 on Project 148 (n 85).

**9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?**

See questions 9.2 and 9.3 above.

**9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?**

Funds remain the greatest challenge to the activities of DPOs.

See questions 9.2 and 9.3 above.

**9.6 Are there specific instances that provide ‘best-practice models’ for ensuring the proper involvement of DPOs?**

It is difficult to ascertain at this stage if ‘best-practice models’ for ensuring proper involvement of DPOs are in place. However, 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 its Initial Report to the CRPD Committee.<sup>157</sup> Furthermore, as seen from question 9.3 above, the SALRC invited all stakeholders, including DPOs to submit written comments, representations, or requests to the Commission’s Issue Paper on the domestication of the CRPD. Similarly, the SALRC will invite all stakeholders, including DPOs to submit written comments, representations, or requests to the Commission’s Discussion Paper during the public participation process.

**9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?**

See questions 9.3 and 9.6 above.

**9.8 Has your research shown areas for capacity building and support (particularly in relation to research) for DPOs with respect to their engagement with the implementation process?**

See questions 9.2, 9.3 and 9.6 above.

**9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?**

See questions 9.2, 9.3, and 9.6 above. The DPOs must actively engage when the SALRC invites DPOs to submit written comments, representations, or requests to the Commission’s Issue Paper and Discussion Paper on the domestication of the CRPD. Furthermore, DPOs should actively participate in South Africa’s second,

157 See question 9.4 above.

third, and fourth periodic reports which were due by 3 June 2022. These reports have not been finalised at the time of writing this country report.

**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?**

See questions 9.2, 9.3 and 9.6 above. 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. However, it is noted that the SALRC invites DPOs to submit written comments, representations, or requests to the Commission on the domestication of the CRPD.<sup>158</sup>

## 10 Government departments

**10.1 Do you have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).**

The South African government established the Disability Programme within the former Reconstruction and Development Programme (RDP) in the Presidency in 1995, which evolved into the Office on the Status of Disabled Persons (OSDP) in the Presidency in 1997, and finally evolved into the Department of Women, Children and People with Disabilities (DWCPD) in May 2009. The DWCPD incorporated the former OSDP and is responsible for driving government's equity, equality, and empowerment agenda in terms of those living with disabilities. The South African government reported in its Initial Report to the CRPD Committee that the DWCPD is ready to introduce systems into the planning, monitoring, and evaluation system to fast-track systematic implementation of the CRPD across all three spheres of Government (national, provincial, and local spheres) through better monitoring, support, and coordination.<sup>159</sup> It must be noted that government reported that the establishment of the DWCPD, had the unintended consequence of slowing down the transformation agenda in the short term due to the time taken in establishing an administration in the Department. Furthermore, resourcing constraints were reported within the DWCPD.<sup>160</sup> However, the DWCPD is working towards consolidating awareness-raising efforts into a targeted, integrated, and branded programme. South Africa reported that government will be dealing with this aspect in their next periodic report to the CRPD Committee.<sup>161</sup>

158 Preface to the SALRC Issue Paper 39 on Project 148 (n 85).

159 CRPD (n 10) para 41.

160 CRPD (n 10) para 407.

161 CRPD (n 10) para 68.

## 11 Main human rights concerns of people with disabilities in South Africa

### 11.1 Contemporary challenges of persons with disabilities in South Africa (eg in some parts of Africa is ritual killing of certain classes of PWDs such as persons with albinism occurs).

The South African government in its Initial Report to the CRPD Committee reported in detail on the contemporary challenges faced with the implementation of the specific CRPD articles.<sup>162</sup> In this regard, the CRPD Committee in its Concluding Observation, also expressed concerns regarding these challenges and made several recommendations.<sup>163</sup> However, of particular concern is the acknowledgement in the Initial Report that persons with disabilities in general, but particularly those from poor and/or rural communities, as shown in the numerous testimonies, are still exposed to inhumane, degrading, and cruel treatment by people, services, and systems due to the persistent attitudinal, physical, and communication barriers existing in society.<sup>164</sup>

### 11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:

It should be noted that South Africa in its first Initial Report to the CRPD Committee reported on challenges, and its legal responses thereto. Further, the CRPD Committee in its Concluding Observations assessed and responded to these challenges through recommendations. These challenges recorded were:

**Access and accommodation:** See question 5.1 above, and paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD and accessibility reporting on the physical environment, information and communication technology (ICT), and transport. In this regard also consult paragraphs N.177 to N.182 on personal mobility and Q.191 to Q.197 on respect for home and the family.<sup>165</sup>

**Access to social security:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD and accessibility, as well as paragraphs V.317 to V.319 on article 28 of the CRPD, adequate standard of living and social protection.<sup>166</sup>

**Access to public buildings:** See question 5.1 above and paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD reporting on the physical environment.<sup>167</sup>

162 CRPD (n 10).

163 CRPD (n 37).

164 CRPD (n 10) para 145.

165 CRPD (n 10).

166 As above.

167 CRPD (n 10).

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa made recommendations on accessibility, and in particular to step up measures to enforce the National Building Regulations and Building Standards Act,<sup>168</sup> and to monitor progress and reinforce sanctions for lack of compliance with accessibility standards in public and private sector buildings.<sup>169</sup>

**Access to public transport:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD on accessibility and reporting on accessible transport.<sup>170</sup>

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa noted with concern the absence of a clear national strategy on accessibility and public transport in rural areas.<sup>171</sup>

**Access to education:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD and accessibility, as well as paragraphs R.198 to R.260 on article 24 of the CRPD and education.<sup>172</sup>

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa made recommendations to adopt, implement, and oversee inclusive education as the guiding principle of the education system and develop a comprehensive plan to extend it nationally. The CRPD Committee also recommended that efforts should be intensified to allocate sufficient financial and human resources for reasonable accommodations that will enable children with disabilities, to receive inclusive and quality education. Further, the CRPD Committee recommended that South Africa establish an effective and permanent programme for training teachers in inclusive education, including learning sign language, Braille, and Easy Read skills.<sup>173</sup>

**Access to vocational training:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding Article 9 of the CRPD and accessibility, as well as paragraphs R.198 to R.260 on article 24 of the CRPD and education, and paragraphs U.306 to U.313 on article 27 of the CRPD, work and employment.<sup>174</sup>

**Access to employment:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD and accessibility, as well as paragraphs U.288 to U.313 on article 27 of the CRPD, work and employment.<sup>175</sup>

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa recommended that government adopt a strategy to increase productive and decent work and the employment of persons with disabilities in the public and private sectors, including through mechanisms to ensure that reasonable accommodations are provided, and to prevent discrimination against persons with disabilities and their families in the labour market. Furthermore, the CRPD Committee recommended that effective measures are adopted for making the

168 Act 103 of 1977.

169 CRPD (n 10) para 16.

170 CRPD (n 10).

171 CRPD (n 37) para 16.

172 CRPD (n 10).

173 CRPD (n 37) para 40 and 41.

174 CRPD (n 10).

175 As above.

physical environment of workplaces accessible and adapted for persons with disabilities, including reasonable accommodation, especially for persons with motor impairments, and provide training to employers at all levels on respect for the concept of reasonable accommodation.<sup>176</sup>

**Access to recreation and sport:** See paragraphs C.69 to C.115 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD and accessibility, as well as paragraphs X.346 to X.368 on article 30 of the CRPD and participation in recreation and sport.<sup>177</sup>

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa made recommendations that government expedite action to complete the process of revising the Copyright Act<sup>178</sup> and ratifying the Marrakesh Treaty.<sup>179</sup>

**Access to justice:** See paragraphs C.69 to C.115, as well as G.126 to G.135 of South Africa's Initial Report under article 35 of the Convention to the CRPD Committee regarding article 9 of the CRPD on accessibility and access to justice.<sup>180</sup>

The CRPD Committee in its Concluding Observations to the Initial Report of South Africa made recommendations to adopt measures to ensure that all persons with disabilities have access to justice, and information and communication in accessible formats, such as Braille, tactile, Easy Read, and sign language. The CRPD Committee further recommended that government must ensure a systematic training programme for judicial and law enforcement officials, including police and prison officials, on the right of all persons with disabilities to justice, including involving persons with disabilities as judicial officials.<sup>181</sup>

### **11.3 Do persons with disabilities have a right to participate in political life (political representation and leadership) in South Africa?**

Section 19 of the Constitution guarantees the right of *all* citizens to make political choices, form political parties, participate in the activities of political parties, vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, and to stand for public office and, if elected, to hold office.

The South African government reported in detail in South Africa's Initial Report under article 35 of the Convention to the CRPD Committee and more particularly paragraph W.330 on article 29 of the CRPD and participation in political and public life. This included the right to vote and holding public office.<sup>182</sup>

### **11.4 Are persons with disabilities' socio-economic rights, including the right to health, education and other social services protected and realised in South Africa?**

South Africa in its Initial Report under article 35 of the Convention to the CRPD Committee, reported that priority areas for implementation of the CRPD for the period 2009 to 2014 were incorporated into the national priorities of government

176 CRPD (n 37) paras 44-49.

177 As above.

178 Act 98 of 1978.

179 CRPD (n 37) para 48 and 49.

180 CRPD (n 10).

181 CRPD (n 37) paras 24 and 25.

182 CRPD (n 10).

which, amongst others, included education, employment, health, safety and security, as well as, to a lesser extent, rural development.<sup>183</sup> Furthermore, South Africa reported in detail on the implementation of health, education, and social services protected and realised in South Africa.<sup>184</sup>

### 11.5 Specific categories experiencing particular issues/vulnerabilities:

- **Women with disabilities**

South Africa's Initial Report under article 35 of the Convention to the CRPD Committee reported extensively on women with disabilities, protected under article 6 of the Convention. The government confirmed that South Africa remains committed to the attainment of gender equity and equality as it pertains to women and girls with disabilities and as illustrated in the country's extensive legislative and policy framework. South Africa ratified the CEDAW, as well as the SADC Protocol on Gender and Development. However, the government acknowledges that a major concern with regard to disability and gender is the persistent violence against and victimisation of women and children, in particular women and girls with disabilities. Women with disabilities are represented on the Commission on Gender Equality (CGE), established in terms of Chapter 9 of the Constitution. The CGE has a mandate to evaluate government policies, promote public education on gender issues, make recommendations to government for law reform, investigate complaints, and monitor government's compliance with international conventions. Women with disabilities are further affirmed through a range of targeted programmes and events by several government departments. However, government recognised that improved coordination and targeting of these efforts will significantly strengthen impact.<sup>185</sup>

- **Children with disabilities**

South Africa's Initial Report under article 35 of the Convention to the CRPD Committee reported extensively on children with disabilities. Apart from the constitutional protection of children in section 28 of the Constitution, the government reported that 'a child's best interests are of paramount importance in every matter concerning the child'.<sup>186</sup> The rights of a child underlie all decision making with regard to legislation, policies, and programmes in South Africa. The Children's Act<sup>187</sup> further mandates the State to respect, promote, and fulfil the child's rights set out in the Bill of Rights, contained in Chapter 2 of the Constitution. Government also reported that a national strategy for the integration of services to children with disabilities has been developed in consultation with approximately 2 500 stakeholders from national and provincial Departments of Social Development, other key government departments and institutions, as well as stakeholders in the parents, children, and disability sectors.<sup>188</sup>

183 CRPD (n 10) para III. 34.

184 CRPD (n 10) paras R, S, 348 and 375,

185 CRPD (n 10) paras 369 to 374.

186 CRPD (n 10) paras 375-390.

187 Act 38 of 2005.

188 The strategy aims to guide service providers in the implementation of the Children's Act to ensure effective mainstreaming of impairment programmes focusing on early childhood development (ECD), basic education, health, sport, recreation and justice.

## 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?

Addressed in previous questions.

### 12.2 What legal reforms are being raised? Which legal reforms would you like to see in South Africa? Why?

As addressed in previous questions, and also questions 2.4 and 2.5 above, the SALRC was given the mandate to investigate the domestication of the CRPD from the DOJ&CD in May 2018. The SALRC developed an issue paper pertaining to the subject of the investigation.<sup>189</sup> On 9 December 2021, the SALRC published its *Issue Paper 39 on Project 148 on the domestication of the United Nations CRPD*. On the strength of the responses received on the issue paper, the Discussion Paper will be developed.<sup>190</sup> The Discussion Paper, at the time of writing this country report, was in the process of being finalised on the strength of the responses received on the Issue Paper, which develops a preliminary view based on the responses during the public consultation. Responses to the Discussion Paper will likely result in the formulation of a final view in the form of a report and a draft Bill.<sup>191</sup> However, due to the complexity, scope, and interrelated of disability, it is expected that law reform will follow, not only to ensure that South Africa's obligations in terms of the CRPD are fulfilled but also to align other laws in the proposed draft Bill to be enacted by the national legislature.

189 As part of public consultation process, the SALRC Issue Paper asks for comments on the issues in the paper to create the scope of what needs law reform.

190 The SALRC has not published the Discussion Paper at the time of writing this country report.

191 Process of the SALRC in Issue Paper 39 on Project 148 (n 85) xiii.



# TANZANIA

*Peter Josiah Shughuru\**

## 1 Population indicators

### 1.1 What is the total population of Tanzania?

Tanzania is the second largest country geographically and by population in East Africa next to Democratic Republic of the Congo.<sup>1</sup> According to the Population and Housing Census (PHC) 2022, Tanzania has a population of 61 741 120 people contributing to the global human population of 7 954 000 000 by 0.8 per cent.<sup>2</sup> Despite the fact that Tanzania has a history of population counts dating back to 1910, data on disability prevalence is relatively a recent reality.<sup>3</sup>

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1 EAC 'Overview of the EAC' <https://www.eac.int/overview-of-eac> (accessed 26 January 2024). The Democratic Republic of the Congo has an area of 2 345 000 sq. km and 92.9 million human populations whereas Tanzania has an area of 945 090 sq. km and 61.7 million human populations.

2 The United Republic of Tanzania (URT), Ministry of Finance and Planning, Tanzania National Bureau of Statistics and President's Office – Finance and Planning, Office of the Chief Government Statistician, Zanzibar, '2022 Population and Housing Census: Administrative Units Population Distribution Report' (December 2022) vi and 1 respectively.

3 The 2002 Population and Housing Census was the first to determine disability prevalence in Tanzania. Many other statistical analyses followed, which includes Tanzania Disability Survey Report 2008, the National Panel Survey 2008-2009, the 2012 Population and Housing Census, the Integrated Labour Force Survey 2014 – Disability Statistics and 2016 Disability Monograph.

**1.2 Describe the methodology used to obtain the statistical data on the prevalence of disability in Tanzania. What criteria are used to determine who falls within the class of persons with disabilities in Tanzania?**

Like in 2002 and 2012, the 2022 PHC collected data on disability prevalence. However, at the time of writing this report, the census report on disabilities was not yet published by the National Bureau of Statistics (NBS). Nevertheless, as the 2022 PHC established the average annual intercensal population growth rate of 3.2 percent during the 2012-2022 periods, this report will establish current estimations based on the established growth rate and previous surveys, and census reports.<sup>4</sup>

**1.3 What is the total number and percentage of persons with disabilities in Tanzania?**

Until recently, the determination of disabilities in Tanzania was largely based on impairment and not on the abilities of individuals with impairments to participate due to social impediments (social model) or severity of impairment (medical model). For example, the 2002 PHC disability questions were impairment based.<sup>5</sup> It included questions such as: 'Is (name of a person) disabled?' and if the answer was 'yes', respondents were asked to state the type of disability in question.<sup>6</sup> The next PHC which was conducted in 2012 adopted an 'activity limitations and functioning approach' in order to determine disability prevalence in Tanzania.<sup>7</sup> Later, in 2016 the Disability Monograph by NBS, analysed data on 'albinism and difficulties in the domains of seeing, hearing, walking, remembering, self-care, and other difficulties' based on data from 2012 PHC.<sup>8</sup>

The 2010 Persons with Disabilities Act<sup>9</sup> of Tanzania define disability as a 'loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors. This definition is inadequate compared with the model conceptual framework set out by the United Nations Convention on the Rights of Persons with Disabilities (NCRPD).<sup>10</sup> Until the prevailing conceptual misunderstanding is cleared, the criteria used to determine who falls within the class of persons with disabilities in Tanzania will continue to be uncertain and inconsistent.

For the past two decades, disability has been an important variable of population analysis by NBS. Statistics is a union matter as per the Constitution of the United Republic of Tanzania, which means that disability population data on record covers both Mainland Tanzania and the Island of Zanzibar.<sup>11</sup> Therefore, the

4 2022 PHC (n 2) 2.

5 The United Republic of Tanzania, Ministry of Finance and Planning, National Bureau of Statistics and President's Office – Finance and Planning, Office of the Chief Government Statistician, Zanzibar 'Disability Monograph' (January 2016) 2.

6 The United Republic of Tanzania, National Bureau of Statistics and Office of the Chief Government Statistician, Zanzibar, 'Tanzania Disability Survey Report, 2008' (2008) 41.

7 Disability Monograph (n 5) 2.

8 Disability Monograph (n 5) 7.

9 Persons with Disabilities Act 9 of 2010, sec 3.

10 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106 (2007) art 1(2), see also para e of the Preamble thereto.

11 Constitution of the United Republic of Tanzania, 1977, as amended from time to time, First Schedule thereto.

2002 PHC,<sup>12</sup> 2008 Tanzania Disability Survey Report (Disability Survey),<sup>13</sup> the 2012 and 2022 PHCs respectively,<sup>14</sup> all determined data on disability prevalence in the whole country.

The 2002 PHC recorded a population of 676 502 (2 per cent) for persons with disabilities out of the total population in Tanzania.<sup>15</sup> On its part, the 2008 Disability Survey recorded a total population of 2 421 276 which amounted to 7.8 per cent of the total national population. Out of the 2 421 276, 2 366 941 were residents of Mainland Tanzania whereas 54 335 were residents of Tanzania Zanzibar.<sup>16</sup> However, unlike the 2002 PHC, which determined disability prevalence rate from age zero, the 2008 Disability Survey's prevalence rate was based on persons with disabilities population aged seven years and above.<sup>17</sup> The next PHC which was conducted in 2012 recorded a total of 3 157 516 or 9.3 per cent of the total national population.<sup>18</sup> The 2012 PHC recorded the highest disability prevalence rate compared to previous statistics. According to NBS, the significant differences noted was due to limitations including those related to conceptualisation of disabilities and methods applied in data collection, which affected the quality of data collected in previous census.<sup>19</sup>

While the 2022 PHC report on disability is yet to be published, this report estimates a population of 4 326 558 persons with disabilities in Tanzania by 2022 based on the 2012 population record of 3 157 516 persons with disabilities and the 2022 PHC's average annual intercensal population growth rate of 3.2 per cent for the period of 2012-2022.

#### **1.4 What is the total number and percentage of women with disabilities in Tanzania?**

The number of women and girls with disabilities has been reported in population statistics in Tanzania since the 2002 PHC. For example, in 2002, the total number of women and girls with disabilities was reported to be at 305 102.<sup>20</sup>

The 2008 Disability Survey recorded a population of 1 249 757 (7.8 per cent) women with disabilities aged seven years and above, of which 1 221 506 (7.8 per cent) were residents of Mainland Tanzania and 28 251 (5.9 per cent) were residents of Tanzania Zanzibar.<sup>21</sup>

The 2012 PHC recorded a prevalence rate of 1 662 697 (9.4 per cent) for women and girls with disabilities out of 17 688 265 female population aged seven years and above.<sup>22</sup> At the time of writing this report the 2022 census report on disabilities had not yet been published.

12 The United Republic of Tanzania, National Bureau of Statistics 'Tanzania Population and Housing Census 2002: Analytical Report' (2002).

13 2008 Disability Survey (n 6).

14 The United Republic of Tanzania, National Bureau of Statistics and Office of the Chief Government Statistician, Zanzibar 'Population and Housing Census 2012' (2012); and 2022 PHC (n 2).

15 2002 PHC (n 12) 43.

16 2008 Disability Survey (n 6) 42.

17 2008 Disability Survey (n 6) 41.

18 Disability Monograph (n 5) 4.

19 As above.

20 2002 PHC (n 12) 44.

21 2008 Disability Survey (n 6) 43.

22 Disability Monograph (n 5) Table 2.2, 10.

### 1.5 What is the total number and percentage of children with disabilities in Tanzania?

A child in Tanzania is a person below the age of 18 years.<sup>23</sup> Population data for persons with disabilities by age has largely been documented since the 2002 PHC in Tanzania. The 2012 PHC documented disability incidences including on children with disabilities. Only the 2008 Disability Survey Report did not process data about children with disabilities.

The 2002 PHC recorded a total population of 252 311 for persons with disability aged between 0-24 years. Distributed into age range, there were: 30 129 children with disabilities (CWDs) aged 0-4 years, 55 320 CWDs aged 5-9 years, 61 515 CWDs aged 10-14 years, and 105 347 CWDs aged 15-24 years.<sup>24</sup> Based on these data, the higher the age the higher the disability prevalence rate which probably helps explain that many disabilities occur after birth due to reasons including poverty and diseases. This rise is also supported by the 2008 Disability Survey, which documented that majority of PWDs (62.8 per cent) reported the age of onset of their disabilities in adulthood, after 15 years of age and 2.9 per cent reported their age of onset of disabilities after 80 years of age.<sup>25</sup>

The 2012 PHC recorded a population of 1 292 779 persons with disabilities aged 7-21 years. It did not collect data for children with disabilities aged 0-7 years based on Washington Group on Disability's approach which excludes statistics of this age group for its inability to fully explain the difficulties or activity limitations at younger ages.<sup>26</sup> Data were distributed in the following age range: 501 237 (8.3 per cent) CWDs, aged 7-11; 440 613 (8.3 per cent) CWDs, aged 12-16; and 350 929 (8.1 per cent) CWDs aged 17-21 of the total population of children in that age group.

Based on the 2022 PHC average annual intercensal population growth rate of 3.2 per cent for the period of 2012-2022, the current population of CWDs aged 7-21 years in Tanzania may be estimated to have reached a total of 1 771 419 by the year 2022.

### 1.6 What are the most prevalent forms of disability and/or peculiarities to disability in Tanzania?

Based on available data on disability population, there are no serious peculiarities in disability population structure in Tanzania. Significant differences in numbers are notable among disability groups. The 2002 PHC recorded the largest proportion of 47.9 per cent of people with physical impairments followed by persons with intellectual impairment by 16.3 per cent, multiple impairment 13.3 per cent and persons with albinism in the lowest proportion of 1.0 per cent.<sup>27</sup>

According to the Disability Survey Report, 2008, vision and mobility impairments at 3.7 per cent and 3.1 per cent respectively, were the most prevalent forms of disabilities followed by hearing at 1.9 per cent, cognitive at 1.5 per cent and communication impairments at 0.8 per cent in Tanzania for the population aged seven years and above.<sup>28</sup>

23 Law of the Child Act 21 of 2009, sec 4 (1).

24 2002 PHC (n 12) 44.

25 2008 Disability Survey (n 6) 70-71.

26 Disability Monograph (n 5) 18.

27 2002 PHC (n 12) 43.

28 2008 Disability Survey (n 6) 43.

The 2016 Disability Monograph which analysed data based on the 2012 PHC findings, reported disability prevalence on more than six types of disabilities: albinism, seeing, walking, hearing, remembering, self-care and 'other types' of disabilities. Accordingly, vision and mobility/walking impairments at 1.9 per cent and 1.2 per cent respectively were the mostly reported type of disability recorded.<sup>29</sup> Hearing, remembering, selfcare and 'other disabilities' were 1.0 per cent, 0.9 per cent, 0.7 per cent and 0.2 per cent respectively. The lowest prevalence was albinism at 0.04 per cent.<sup>30</sup>

## 2 Tanzania's international obligations

### 2.1 What is the status of the United Nation's Convention on the Rights of Persons with Disabilities (CRPD) in Tanzania? Did Tanzania sign and ratify the CRPD? Provide the date(s).

The UNCRPD and its Optional Protocol are in force in Tanzania since their ratification on 10 November 2009.<sup>31</sup> These are also specifically domesticated in Tanzania. The Persons with Disabilities Act provides that it should be implemented in line with the CRPD.<sup>32</sup>

### 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? Did Tanzania submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

The CRPD came into force on 3 May 2008 in accordance with article 45(1).<sup>33</sup> Tanzania ratified the CRPD on 10 November 2009 and it came into force for Tanzania in December 2009 in accordance with article 45(2).<sup>34</sup> Tanzania's initial report was due for submission within two years, (no later than December 2011) after the Convention entered into force for Tanzania.

Matters of persons with disabilities, at a national level, vest with the Prime Minister's Office – Labour, Youth, Employment and Persons with Disabilities (PMO-LYE and PWDs). This Ministry has never prepared any report on the status of implementation of the UNCRPD by the State. Tanzania's report is therefore significantly overdue.<sup>35</sup> However, based on field information gathered for this report, Tanzania's first State Report is under preparation by the Ministry of Constitution and Legal Affairs (MoCLA) and will, accordingly, be ready for

29 Disability Monography (n 5) 12.

30 As above.

31 Signature and ratification status, United Nations Treaty Collection, status as at: 21-08-2023 09:15:38 EDT, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-15&chapter=4&clang=_en), (accessed 21 August 2023).

32 PWDs Act (n 9) sec 12(1)(k).

33 CRPD (n 10).

34 As above.

35 CRPD, art 36 (2).

submission in the near future.<sup>36</sup> As regards this task, MoCLA plays a coordination role. The central role of data collection, analysis and interpretations lie with PMO-LYE and PWDs due to its technical expertise on the subject.<sup>37</sup> However, when completed, MoCLA will be responsible for the submission of this report.

**2.3 While reporting under various other United Nation's instruments, or under the African Charter on Human and Peoples' Rights, or African Charter on the Rights and Welfare of the Child, did Tanzania also report specifically on the rights of persons with disabilities in its most recent reports? If so, were relevant 'Concluding Observations' adopted? If relevant, were these observations given effect to? Was mention made of disability rights in your state's UN Universal Periodic Review (UPR)? If so, what was the effect of these observations/recommendations?**

In the past, Tanzania has reported about developments on disability rights in some of its reports to international human rights bodies. For example, in the last submission to the Committee on the Rights of the Child and Committee on the Elimination of Discrimination Against Women, the country reported about the ratification of the CRPD and its Optional Protocol, enactment of the Persons with Disabilities Act and Regulations, adoption of the National Strategy on Inclusive Education, the National Disability Mainstreaming Strategy, the Policy on Disability (Zanzibar), and education provisions to children with disabilities.<sup>38</sup>

In the national reports to the Universal Periodic Review (UPR) mechanism, Tanzania reported on different achievements recorded about the rights of persons with disabilities depending on the period under review.<sup>39</sup> In 2011, Tanzania's National UPR Report highlighted advancements achieved in the country's laws, policies and practices.<sup>40</sup> Matters reported include violence against persons with albinism and the measures taken<sup>41</sup> and a voluntary national commitment to submit periodic reports to various treaty bodies including to report under the CRPD.<sup>42</sup> The Report of the UPR Working Group adopted conclusions and recommendations on, among others areas, the strengthening of efforts to protect people with albinism and improve schools and other educational facilities and environments to meet the needs of PWDs.<sup>43</sup>

36 Face-to-face interview with the Director of Disability Unit, Prime Minister's Office - Employment, Labour and Persons with Disabilities, at the Ministry's Head Office in Dodoma, on 10 October 2023.

37 As above.

38 Paras 3(a) & (b), 4(d), 5(a & e), 52, 53, Committee on the Rights of the Child, Concluding Observations on the combined third to fifth periodic reports of the United Republic of Tanzania, 3 March 2015, UN Doc CRC/C/TZA/CO/3-5 (2015); and paras 5(e) and 6 of CEDAW Committee, Concluding Observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania, 9 March 2016, UN Doc CEDAW/C/TZA/CO/7-8 (2016).

39 HRC, Report of the Working Group on the Universal Periodic Review, United Republic of Tanzania, 8 December 2011, UN Doc A/HRC/19/4 (2011), para 1 and para 7; United Republic of Tanzania, National report submitted in accordance with para 5 of the annex to HRC, Human Rights Council Resolution 16/21, 17 August 2021, UN Doc A/HRC/WG.6/39/TZA/1 (2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/225/37/PDF/G2122537.pdf?OpenElement> (accessed 29 August 2023).

40 National UPR Report for United Republic of Tanzania (2021) paras 19 and 20.

41 UPR Report 2021 (n 40) 14 para 64.

42 UPR Report 2021 (n 40) para 50 (a).

43 Report of the Working Group on the Universal Periodic Review for United Republic of Tanzania, para 85, 12-16, 34-42, 90-93.

The next review which was conducted in 2016, dealt with population data of persons with disabilities based on the 2012 PHC.<sup>44</sup> Relevant laws, policies, programmes and strategies advancing the welfare of persons with disabilities in place and those already implemented, review of the National Health Exemption Guidelines to include persons with disabilities, establishment of rehabilitation centres, Tanzania's vote in favour of the UN Resolution to hold annual Persons with Albinism Day, establishment of temporary protection centres for children with albinism and swift investigation and handling of cases involving violence against persons with albinisms were reported.<sup>45</sup> The UPR Working Group's report concluded and recommended on Tanzania's obligation to submit overdue reports under the CRPD and highlighted areas for improvements in education access by children with disabilities.<sup>46</sup>

The third cycle review occurred in 2021. In that year, the country reported about its accession to the Marrakesh Treaty in 2020<sup>47</sup> as a way of promoting and enhancing access to information for persons with visual impairments. The country also reported about legislative amendments to the Local Government Finance Act,<sup>48</sup> National Elections Act,<sup>49</sup> enactment of the Legal Aid Act,<sup>50</sup> education and training of persons with disabilities and review of disability laws in Mainland Tanzania and Zanzibar and the role of organisations of persons with disabilities.<sup>51</sup> The State also re-committed to submit reports to various human rights bodies as a matter of priority.<sup>52</sup> The Report of the Working Group concluded on and recommended acceleration of implementation of the CRPD, seeking technical assistance regarding overdue reports under the CRPD, ensuring meaningful participation of persons with disabilities, non-discrimination of persons with disabilities improving infrastructure accessibility and development of the National Strategy for Inclusive Education.<sup>53</sup>

**2.4 Was there any domestic effect on Tanzania's legal system after ratifying the international or regional instrument in 2.3 above? Does the international or regional instrument that had been ratified require Tanzania's legislature to incorporate it into the legal system before the instrument can have force in Tanzania's domestic law? Have the courts of Tanzania ever considered this question? If so, cite the case(s).**

The National Assembly of Tanzania has a constitutional duty to deliberate upon and ratify all international agreements, the provisions of which require ratification.<sup>54</sup> There are abundant records of parliamentary enactments and

44 National UPR Report for United Republic of Tanzania (2016) 9, para 47.

45 UPR Report (2016) 9, para 50 & 51.

46 UPR Report (2016) paras 134, 118-120.

47 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, TRT/MARRAKESH/001 (2013).

48 Cap 290 R.E. 2019.

49 Cap 343, 2015.

50 Act 14 of 2016.

51 HRC, United Republic of Tanzania, National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21, 17 August 2021, UN Doc A/HRC/WG.6/39/TZA/1 (2021) 0 9-11 and para 5; URT, National UPR Report, 2021 and the Marrakesh Treaty to Facilitate Access of Published Works to Persons who are Blind, Visually Impaired or Otherwise Print Disabled.

52 National UPR Report (n 39) 21, sec v.

53 HRC, Report of the Working Group on the Universal Periodic Review for United Republic of Tanzania, 21 December 2021, UN Doc A/HRC/49/13 (2021) paras 145, 1, 3, 29, 30, 75, 76, 84, 106, 107, 108.

54 URT Constitution (n 11) art 63(3)(e).

adoption of policies because of Tanzania's ratification and/or accession to various international and regional instruments. The 2009 Law of the Child Act and 2010 Persons with Disabilities Act (all referring to specific international instruments) are a few among many domestic measures taken in fulfilment of Tanzania's obligation to international and regional instruments.

**2.5 With reference to 2.4 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.**

The Persons with Disabilities Act was enacted to give effect to provisions of the CRPD. The Act has substantially reproduced the provisions of the CRPD.<sup>55</sup> Under the Act, the National Advisory Council for Persons with Disabilities has been empowered to monitor and evaluate its implementation in relation to the CRPD.<sup>56</sup>

### 3 Constitution

**3.1 Does the Constitution of Tanzania contain provisions that directly address disability? If so, list the provisions and explain how each provision addresses disability.**

Article 11(1) of the Constitution of the United Republic of Tanzania (URT Constitution) is the only provision that directly addresses the rights of persons with disabilities. It calls upon State authorities to make appropriate provisions for the realisation of the right to work, to self-education and social welfare of persons with disabilities.<sup>57</sup> However, this right constitutes one of the various fundamental objectives and directive principles of State Policy, which is not enforceable as per the Constitution.<sup>58</sup> Nevertheless, the binding nature of fundamental objectives and directive principles of State Policy is yet to be determined by the court in Tanzania in addition to the fact that Tanzania's Constitution does not list 'disability' as a prohibited ground of discrimination.<sup>59</sup>

The 2014 constitutional review process heightened the expectations of the people with regards to the future of disability rights in Tanzania. Despite the process being stalled on political grounds, it brought in place a proposed Constitution that would have advanced the rights of persons with disabilities.<sup>60</sup> Chapter five of the proposed Constitution, articles 32-67 recognised disability rights in a number of provisions. In addition to non-discrimination provisions,<sup>61</sup> article 55 of the proposed Constitution was dedicated to disability rights. For example, article 55 made provisions for the rights to respect of dignity, prohibition of disability-based discrimination, oppression and violence, the right to education

55 The Act in totality, substantively give effect to CRPD.

56 PWDs Act (n 9) sec 12.

57 URT Constitution (n 11) art 11(1).

58 URT Constitution (n 11) art 7. According to this provision: 'the provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.'

59 URT Constitution (n 11) art 13(5).

60 The United Republic of Tanzania, Special Constitutional Assembly, Proposed Constitution, 2014.

61 Proposed Constitution (n 60) art 34(5).



based on individual needs, participation in public life, accessibility to physical infrastructure and to information, sign language, braille language, enlarged print materials, the right to employment and to work, health and reproductive health, and rehabilitation and habilitation services.<sup>62</sup> The proposed Constitution also had provisions that empower the President of the United Republic of Tanzania to appoint five persons with disabilities to be members of the parliament.<sup>63</sup>

**3.2 Does the Constitution of Tanzania contain provisions that indirectly address disability? If so, list the provisions and explain how each provision indirectly addresses disability.**

Despite the fact that the Bill of Rights in Tanzania does not have express provisions for rights of persons with disabilities, the fundamental rights, freedoms and duties contained are provisions of general application addressing 'all humans', 'every person', 'all persons' and 'every citizen', which, no doubt, include persons with disabilities.<sup>64</sup>

## 4 Legislation

**4.1 Does Tanzania have legislation that directly addresses disability? If so, list the legislation and explain how the legislation addresses disability.**

There are a growing number of laws in Tanzania that specifically address rights of persons with disabilities apart from the Persons with Disabilities Act. Key among these includes the Law of the Child Act, Employment and Labour Relations Act and the Local Government Finance Act.

The Law of the Child Act, in addition to defining a child with disabilities, also lists disability as a prohibited ground of discrimination. It forbids undignified treatment of children with disabilities, and affords them the right to special care, treatment, facilities for their rehabilitation and equal opportunities to education and training and wherever possible to develop their maximum potential and be self-reliant.<sup>65</sup>

The Employment and Labour Relations Act requires all employers to ensure, in their policies and practices, promotion of equality of opportunities in employment and eliminate discrimination on all ground including specifically 'disabilities'.<sup>66</sup> Termination from employment on ground of disability amounts to unfair termination.<sup>67</sup>

62 Proposed Constitution (n 60) art 55.

63 Proposed Constitution (n 60) art 129(1)(b).

64 All rights' provisions in the Bill of Rights use either of the terms noted.

65 PWDs Act (n 9) sec 3, 5(2), 8(5&6), and 16(1)(p).

66 Employment and Labour Relations Act, 2004, sec 7(1) & (4)(L).

67 Employment and Labour Relations Act (n 66) sec 37(3) (b) (ii).

The Local Government Finance Act, for the first time in 2019, included persons with disabilities as beneficiaries of the local government authority's development funds in addition to Women and Youths who were eligible since 1993.<sup>68</sup> Persons with disabilities are entitled to 20 per cent of 10 per cent of the total internal revenues of respective local government authorities.<sup>69</sup>

Other laws with provisions addressing persons with disabilities, includes the Mental Health Act,<sup>70</sup> Legal Aid Act,<sup>71</sup> Judicature and Application of Laws (Practice and Procedure in Cases Involving Vulnerable Groups) Rules,<sup>72</sup> the Workers' Compensation Act,<sup>73</sup> National Social Security Fund Act,<sup>74</sup> Public Service Social Security Fund Act,<sup>75</sup> and National Elections Act.<sup>76</sup>

## 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 with the facts, the decision(s) and the reasoning.

There is a growing body of cases dealing with disability rights in Tanzania. For example, the High Court adoption case of *John Msungu (Matayo K Kihwelo) v Gabriele Brandolin*.<sup>77</sup> The case was brought under the provisions of the Persons with Disabilities Act 2010, the Judicature and Application of Laws (Practice and Procedure of Cases Involving Vulnerable Groups) Rules, and the Civil Procedure Code.<sup>78</sup> The court granted an application for appointment of next friend for the applicant, a person of 'unsound mind' who was unable to maintain a suit on his or her own behalf and in accordance with the requirement of the law.<sup>79</sup>

At the international level, the CRPD Committee has also determined one Communication against Tanzania. The case of *X v Tanzania*,<sup>80</sup> that dealt with the rights against torture, inhumane and degrading treatment and discrimination against persons with albinism under articles 5, 15, and 17 of the CRPD. The author, a Tanzanian national with albinism had his left arm cut off by strangers due to his condition of albinism. The Committee found that Tanzania's failure to prevent and punish acts of violence against persons with albinism prevented them from living in the society on an equal basis with others based on their disabilities.

68 37A. (1), the Local Government Finance Act (Cap. 290 R.E 2019), see also, R Rugeiyamu 'Local government's failure to recover loans from groups of women, youth, and people with disabilities in Tanzania' (2023) 19 *International Journal of Public Leadership* 210 at 211-212.

69 Registered Groups of Women, Youth and People with Disability Regulations, GN 286 of 5 April 2019.

70 Act 21 of 2008.

71 Act no. 14, 2016.

72 GN 110, 2019.

73 Cap 263, RE 2015.

74 Cap 50 RE 2018.

75 Act 2 of 2018.

76 Cap 343, RE 2015.

77 Miscellaneous Civil Application 553 of 2019, Unreported.

78 PWDs Act (n 9) and GN 110 of 2019, and Cap 33 RE 2022 respectively.

79 As above (n 78) 2.

80 Committee on CRPD, Communication 22/2014. In this case the Committee granted the applicant's request for anonymity and has, for the purpose, named the applicant Mr X.

## 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.

Various national micro and macro policies, plans and strategies address the rights of persons with disabilities. Key among them are the Tanzania Development Vision (2025),<sup>81</sup> the National Strategy for Growth and Reduction of Poverty II (NSGRP II)<sup>82</sup> and the Tanzania Five Year Development Plan.<sup>83</sup>

The Tanzania Development Vision (2025) recognises that Tanzania's development should be people-centred and is explicit that all the people, with and without disabilities should be empowered to effectively participate in all aspects of life.<sup>84</sup>

The National Strategy for Growth and Reduction of Poverty II (NSGRP II)<sup>85</sup> is concerned with improving quality of life and social well-being focusing on the poorest and most vulnerable members of the society and more importantly, expanding 'access of children with disabilities to all levels of education'.<sup>86</sup> This Strategy further focuses on the promotion of inclusive pre-service and in-service training programmes for persons with disabilities.<sup>87</sup>

The Tanzania Five Year Development Plan advocates for interventions in areas of social protection of the vulnerable and disadvantaged such as persons with disabilities by developing their capabilities to lift themselves out of poverty, enhance their productive capacity and increasing their resilience.<sup>88</sup>

Other policies that address the rights of persons with disabilities include, the Education Sector Development Plan,<sup>89</sup> the Education and Training Policy,<sup>90</sup> the Teacher Education Development and Management Strategy,<sup>91</sup> National Strategy

81 Ministry of Finance and Planning, Planning Commission 'Tanzania Development Vision' (2025) <https://www.mof.go.tz/mofdocs/overarch/vision2025.htm> (accessed 13 October 2023).

82 United Republic of Tanzania, Ministry of Finance and Economic Affairs 'National Strategy for Growth and Reduction of Poverty II' (2010) <http://www.tzonline.org/pdf/mkukutalldraft.pdf> (accessed 13 October 2023).

83 United Republic of Tanzania, Ministry of Finance and Planning 'National Five Years Development Plan (2016/2017 - 2020/2021): Nurturing Industrialization for Economic Transformation and Human Development' (2016) [https://mof.go.tz/mofdocs/msemaji/Five%202016\\_17\\_2020\\_21.pdf](https://mof.go.tz/mofdocs/msemaji/Five%202016_17_2020_21.pdf) (accessed 13 October 2023).

84 Tanzania Development Vision 2025, paras 3.1 & 1.2.1.

85 NSGPR II (n 82).

86 NSGPR II (n 82) paras 4.2 (1) & 3.3.2. and XIII of Goal 1.

87 NSGPR II (n 82) para 4.2 (1), and II of Goal 1, 66.

88 NSGPR II (n 82) para 3.5.2 (d).

89 The United Republic of Tanzania, Ministry of Education, Science and Technology 'Education Sector Development Plan (2016/17 - 2020/21)'.

90 The United Republic of Tanzania, Ministry of Education and Vocational Training, 2014. This policy is available in Kiswahili version. *Jamhuri ya Muungano wa Tanzania, Wizara ya Elimu na Mafunzo ya Ufundi, Sera ya Elimu na Mafunzo*, 2014.

91 The United Republic of Tanzania, Ministry of Education, Science and Technology 'Guidelines for Teachers Deployment in Pre-Primary and Primary Schools' (2020).

on Inclusive Education,<sup>92</sup> National Framework for Continuous Professional Development for Practicing Teachers,<sup>93</sup> the National Guideline for Water, Sanitation and Hygiene for Tanzania Schools,<sup>94</sup> the Child Development Policy,<sup>95</sup> and the National Policy on Disability.<sup>96</sup>

## 7 Disability bodies

### 7.1 Other than the ordinary courts or tribunals, does Tanzania have any official body that specifically addresses violation of the rights of persons with disabilities? If so, describe the body, its functions, and its powers.

There are several official institutions in Tanzania with responsibilities to promote and protect the rights of persons with disabilities as noted elsewhere in this report. In addition to the Ministry responsible for persons with disabilities, the National Advisory Council for Persons with Disabilities, which has been created under the Persons with Disabilities Act, has advisory, promotion, protection, monitoring and evaluation mandates over the rights of persons with disabilities in Tanzania.<sup>97</sup> While the Council has been in existence for nearly ten years since 2014, sentiments over lack of independence and potential operational inefficiencies have grown among stakeholders. For example, the secretary of the Council is the Commissioner for Social Welfare of the Ministry of Health.<sup>98</sup> Stakeholders are of the view that the Council's chief should be solely in-charge of the Advisory body. Also, in early 2015, the State transferred matters of Persons with Disabilities from the Ministry of Health to the PMO-LYE and PWDs office under the Director of Persons with Disabilities unit. However, despite relocation of his mandates, the Commissioner for Social Welfare of the Ministry of Health as the secretary to the Council remains in the statute hence causing confusion. Also, important to note is that, to date the Council has not been facilitated with office accommodation and operational staff to carry out its day-to-day activities in accordance with the law.<sup>99</sup> As a result, the Council meets only on the scheduled occasions, which are not convened regularly in accordance with the law due to budgetary limitations.<sup>100</sup>

92 The United Republic of Tanzania, Ministry of Education, Science and Technology 'National Strategy for Inclusive Education, 2021/22-25/2026'.

93 The United Republic of Tanzania, Ministry of Education, Science and Technology 'National Framework for Teachers Continuous Professional Development' (2020).

94 The United Republic of Tanzania, Ministry of Education, Science and Technology 'National Guideline for Water, Sanitation and Hygiene for Tanzania Schools' (2016).

95 The United Republic of Tanzania, Ministry of Community Development, Women Affairs and Children, Dar es Salaam, 1996.

96 The United Republic of Tanzania, Ministry of Labour, Youth Development and Sports 'National Policy on Disability' (2004).

97 PWDs Act (n 9) sec 8 & 12.

98 PWDs Act (n 9) sec 8(3).

99 PWDs Act (n 9) sec 8(3), and 9.

100 PWDs Act (n 9) Rule 2(1) of First Schedule.

## 8 National human rights institutions, Human Rights Commission, Ombudsman or Public Protector

- 8.1 Do you have a Human Rights Commission or an Ombudsman or Public Protector in Tanzania? If so, does its remit include the promotion and protection of the rights of persons with disabilities? If your answer is yes, also indicate whether the Human Rights Commission or the Ombudsman or Public Protector of Tanzania has ever addressed issues relating to the rights of persons with disabilities.**

The Commission for Human Rights and Good Governance (CHRGG) is a constitutional and human rights institution in Tanzania which has been in place since July 2001.<sup>101</sup> The general mandate of the CHRGG is to address any human rights violations in Tanzania. Specific mandates and functions include the protection and promotion of human rights, conducting of inquiries and investigation into matters involving violation of human rights, receiving complaints and if necessary, instituting complaints in courts designed to terminate activities involving violation of human rights.<sup>102</sup> In 2010, following enactment of the Persons with Disabilities Act, the CHRGG introduced a new mandate area, the Special Groups Rights Thematic Area in order to cater for rights of persons with disabilities. Administratively, the head of persons with disabilities Thematic Area manages the Commission's disability unit.<sup>103</sup>

In the recent past, the CHRGG has recorded significant achievements such as managing of the violence against persons with albinism and raising awareness on the rights of persons with disabilities in Tanzania.

## 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 Tanzania? If so, list each organisation and describe its activities.**

The number of registered DPOs in Tanzania is steadily growing. Among these are Tanzania Albinism Society (TAS), a not-for-profit organisation of people with albinism in Tanzania established in 1978. With over 12 000 members, TAS' mission is to advocate for the emancipation of persons with albinism from society's negative attitudes, discrimination, stigma and humiliation, by overcoming barriers that hinder their enjoyment of human rights.<sup>104</sup> The Tanzania League of the Blind

101 URT Constitution (n 49) art 129(1) as amended by Act 3 of 2000, and following enactment of the Commission for Human Rights and Good Governance (CHRGG) Act 7 of 2001, Cap 391.

102 CHRGG Act (n 101) sec 6(1).

103 Telephone interview with the Head of Disability Thematic Area of the Commission for Human Rights and Good Governance on 1 September 2023.

104 Official TAS website <https://www.betterplace.org> (accessed 26 September 2023).

(TLB), registered in 1972 and with 35 245 members, does advocacy, lobbying and awareness rising, information-sharing, facilitating access to education and vocational training and economic empowerment of its members.<sup>105</sup> There are many other DPOs whose functions are indicated in their respective names, such as: Tanzania Association of the Physically Handicap (CHAWATA), Tanzania Association of the Deaf (CHAVITA), Tanzania Association of the Deaf-Blind (TASODEB), Tanzania Association for the Mentally Handicap (Inert), Kilimanjaro Association of the Spinal Cord Injuries (KASI), Psoriasis Association of Tanzania (PSORATA), Tanzania Leprosy Association (COME), Tanzania Users and Survivors Psychiatric Organisation (TUSPO), Association of Spinal Bifida and Hydrocephalous of Tanzania (ASBAHT), and Pearl of People with Down Syndrome Foundation Tanzania.<sup>106</sup>

## **9.2 In the countries in your region, are DPOs organised/coordinated at a national and/or regional level?**

At a national level, the Tanzania Federation of the Disabled Peoples Organisations (TFDPO) commonly known locally as *SHIVYAWATA* is a mouthpiece for matters pertaining to persons with disabilities.<sup>107</sup>

At the regional level, the idea of having East African Federation of the Disabled (EAFOD) has potentials to unite DPOs in East Africa. So far, successes of the African Union of the Blind should provide inspiration for a comprehensive regional federation of DPOs.

## **9.3 If Tanzania has ratified the CRPD, how has it ensured the involvement of DPOs in the implementation process?**

There are adequate records that the government is providing a conducive environment for non-state actors to complement its works in the promotion and protection of human rights of persons with disabilities. Doors are open for registration of DPOs, as such, more than 4 566 Non-Governmental Organisations (NGOs) are registered to promote and protect human rights including those of persons with disabilities.<sup>108</sup> The Legal and Human Rights Centre (LHRC), in particular its 2022 annual report, suggested adequate participation of non-state actors in the UPR process, as an example.<sup>109</sup> Other DPOs also admit to have actively been involved in the preparation of the National Human Rights Action Plan and noted that the process was consultative enough.<sup>110</sup> On interviews, the majority of respondents from selected government departments indicated a satisfactory willingness to engage DPOs in everything that the government does.<sup>111</sup> On the other hand, respondents from DPOs have also showed satisfaction over their engagement by the government in various level of implementation.<sup>112</sup>

105 Official TLB website <https://tlb.or.tz> (accessed 26 September 2023).

106 Information obtained from Federation's website <https://shivyawata.or.tz/?lang=en> (accessed 25 September 2023).

107 See, official website of the federation <https://shivyawata.or.tz/about-us/competencies-and-os/?lang=en>, (accessed 5 September 2023).

108 National UPR Report 2021 (n 39) 5 para 7.

109 Legal and Human Rights Report 'Tanzania Human Rights Report' (2022) 411.

110 Telephone interview with Gidion Kaino Mandes, Director of DOLASED, on 4 October 2023.

111 Face-to-face interview with the Director of Disability Unit, the Prime Minister's Office-Employment, Labour, Youth and Persons with Disabilities and with the Head of Disability Thematic Area of the Commission for Human Rights and Good Governance (CHRGG) on 6 October 2023.

**9.4 What types of actions have DPOs themselves taken to ensure that they are fully embedded in the process of implementation?**

Without active engagement of DPOs much would not have been achieved. DPOs are organised into an umbrella national organisation: the Tanzania Federation of the Disabled Peoples Organisations (*SHIVYAWATA*). The federation and members have served as public educators, advocates and campaigners of human rights, have done investigations on allegations of human rights violation and their documentation, are doing research and helped set standards and procedure where there are vacuum in laws and practices. These have strategically positioned DPOs into a useful partner in the implementation process of the rights of persons with disabilities in Tanzania.

**9.5 What, if any, are the barriers DPOs have faced in engaging with implementation?**

Issues of leadership, lack of funding, lack of permanent office spaces and deficits in DPOs' organisational structures were the most mentioned barriers facing DPOs hence negatively affecting their engagement in the implementation process of the rights of persons with disabilities. Capacity building in Civil Society Organisations' management skills, restoration of government's subsidies for DPOs and revision of constitutive instruments of many DPOs are particularly mentioned as the possible ways to address the situation.<sup>113</sup>

**9.6 Are there specific instances that provide 'best-practice models' for ensuring proper involvement of DPOs?**

At least one respondent was able to mention the uniting of DPOs into the Tanzania Federation of the Disabled Peoples Organisations (*SHIVYAWATA*) as the best approach.<sup>114</sup> In circumstances of financial crises, coalitions may be the option.

**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?**

Persons in the leadership of DPOs attribute their achievements to the ratification of the CRPD and its Optional Protocol and enactment of the Persons with Disabilities Act. Another achievement, as a result of effective DPO engagement in implementation, is the successful transfer of matters of persons with disabilities from the Ministry of Health to that of the Prime Minister's Office – Labour, Youth,

112 Information obtained from six respondents: two from Tanzania Federation of the Disabled Persons Organizations (*SHIVYAWATA*); one Director of Disability Organization for Legal and Social-Economic Development (*DOLASED*); one Director of Disability Unit, the Prime Minister's Office-Employment, Labour, Youth and Persons with Disabilities (*PMO-ELY&PWDs*); one Disability Thematic Unit Coordinator, the Commission for Human Rights and Good Governance (*CHRGG*). All interviews conducted via telephone between 5 September 2023 and 10 October 2023.

113 Interview with the Chairman of the National Council for Persons with Disabilities in Tanzania on 11 October 2023.

114 As above.

Employment and Persons with Disabilities. Their central theme for advocacy was the shift from medical to social approach of disabilities.<sup>115</sup>

**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?**

Based on the review of documents and responses from key informant's interviews, the researcher was able to conclude that there is desperate need for capacity building in leadership and management skills, particularly on substantive areas of implementation monitoring and evaluation.<sup>116</sup> Financial empowerments are also important.

**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 have been in a financial crisis since 2012, when government subsidies were removed.<sup>117</sup> A major implication for this is the growing demand for DPOs' empowerment in areas of fundraising strategies, project designs and management. There is also a lack of technical know-how among DPOs in monitoring and evaluation of implementation of PWDs' rights. These should be considered priority areas for DPOs empowerment.

**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?**

Stakeholders are unaware of any specific disability research institute in East Africa. However, in addition to growing numbers of individual researchers with interest on disability rights, the Comprehensive Community Based Rehabilitation of Tanzania (CCBRT), Under the Same Sun (UTSS) and the Tanzania Federation of the Disabled Peoples Organisations (*SHIVYAWATA*), among others, have established records of social and medical research in disabilities in Tanzania.

115 Face-to-face interview with the Director of Disability Unit, Prime Minister's Office - Employment, Labour and Persons with Disabilities, at the Ministry's Head Office in Dodoma, on 10 October 2023.

116 Interview with the Chairman of the National Council for Persons with Disabilities in Tanzania on 11 October 2023.

117 As above.



## 10 Government departments

### 10.1 Do you have a government department or (departments) that is/are specifically responsible for promoting and protecting the rights and welfare of person with disabilities? If so, describe the activities of the department(s).

Section 8.1 above in this paper explains the promotion and protection mandate of the Tanzania's National Human Rights Institution: the Commission for Human Rights and Good Governance (CHRGG). The Commission has specific promotion and protection mandates of all human rights including the sensitisation of human rights, research and power to take necessary action in order to promote and enhance conciliation and reconciliation. In protecting human rights, the Commission has powers, constitutionally and in legislation, to receive complaints in relation to violation of any human rights, to conduct inquiry on matters relating to infringement of human rights, and 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.

Section 7.1 above in this paper explains the role of the National Advisory Council for Persons with Disabilities. The council is a national advisory institution, which in addition to its advisory mandate, also promote the implementation and the equalization of opportunities for persons with disabilities, advocate for, and promote effective service delivery and collaboration between service providers and persons with disabilities, encourage best practices in the treatment of persons with disabilities in all aspects of life, advise on the enactment of laws and the reviewing of existing laws with a view to complying with the equalisation of opportunities and advise on the impact of policies and programmes designed for equality and full participation of persons with disabilities.

## 11 Main human rights concerns of people with disabilities in Tanzania

### 11.1 Contemporary challenges of persons with disabilities in Tanzania (e.g. in some parts of Africa is ritual killing of certain classes of PWDs such as persons with albinism occurs).

Security threats facing persons with albinism remain the scariest to date. In the recent past Tanzania was in the headlines in respect of ritual killings of persons with albinism. Despite significant improvements, the scourge has not ended to allow persons with albinism live life fully in terms of freedom and equality. For instance, in August 2022, UTSS recorded the most recent incidences where a woman survived attacks and was asked to produce her excrements because she was a person with albinism. In another instance, a man with albinism eventually died

of injuries sustained due to severing of his right hand below the elbow in November 2022.<sup>118</sup>

Another most cited concern is the demand for the operationalisation of the National Fund for Persons with Disabilities. Persons with disabilities and DPOs are pushing hard for operationalisation of the Fund given its potential economic implications on individual persons with disabilities' economic empowerment.

**11.2 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses to:**

- **Accessibility**

Accessibility is both a general principle and substantive right under the Persons with Disabilities Act.<sup>119</sup> Laws in Tanzania are clear on the question of accessibility as described in the next sub-section. However, no comprehensive sector-based audit has been carried out to assess the state of accessibility of persons with disabilities in Tanzania.

- **Accessibility to accommodation and social security**

The author noted extraordinary efforts in accommodating persons with disabilities in all key areas of life ranging from education to health services, access to public buildings and infrastructures, and participation in public affairs. The Persons with Disabilities Act, confers general obligations to ensure reasonable accommodation, by carrying out necessary and appropriate adjustments geared towards ensuring that persons with disabilities exercise all human rights and fundamental freedoms.<sup>120</sup> The author's review of national policies and legislation, noted a tremendous recognition of particular needs of persons with disabilities in their scope of operations. Cases in point may include the National Examination Regulations<sup>121</sup> of the National Examination Council of Tanzania, the Quality Assurance Policy of the University of Dodoma,<sup>122</sup> the School Water, Sanitation, and Hygiene Guideline of the Ministry of Education.<sup>123</sup>

The Education Services Resource Assessment Center (ESRAC) under the Ministry of Education is a good example of reasonable accommodation put in practice in national education system in Tanzania. In addition to screening children with disabilities for placement purposes, ESRAC recommends appropriate accommodation facilities needed for individual child with disability. Obligations to ensure reasonable accommodation are progressively implemented across sectors in Tanzania.

Multiple models of social security are concurrently implemented in Tanzania for persons with disabilities. The contributory social security schemes; the National Social Security Fund (NSSF) Act for private sector and Public Service Social Security Fund (PSSSF) Act, pay particular attention to persons with disabilities through 'invalidity' pensions and grants packages to guarantee income security of

118 Under the Same Sun 'Re: Report on attacks of persons with albinism' (2023) 65-70, <http://underthesamesun.com/Attacks-of-PWA-Extended-09.19.23.pdf> (accessed 6 October 2023).

119 PWDs Act (n 9) sec 4(e) & 35, 44 (a).

120 PWDs Act (n 9) sec 3.

121 GN 509, 2015.

122 The University of Dodoma *Quality assurance policy* 3rd ed (2020).

123 National Guideline for Water, Sanitation and Hygiene for Tanzania Schools (n 94).

insured persons with disabilities who have permanently lost their earning capacity in employment.<sup>124</sup>

The Persons with Disabilities Act is equally specific on the questions of social protection and social support.<sup>125</sup> Obligations for social protection accrues to family members, community support structures, and interventions by state or non-state actors that support individuals, households and communities to prevent, manage and overcome the risks threatening their security and well-being.<sup>126</sup> Provision of social support entails any support or assistance given in order to help a person with disability cope with the situation in a given environment.<sup>127</sup>

- **Access to public buildings, transports, education, vocational training, employment, recreation and sport**

Access to public buildings and transport are specifically guaranteed in law for persons with disabilities.<sup>128</sup> Equally, access to education, vocational training, employment, recreation and sports are guaranteed in various laws and policies of Tanzania.<sup>129</sup> These rights are also guaranteed in various regulations across institutions, as noted above, such as the National Guideline for Water, Sanitation and Hygiene for Tanzania Schools under the Ministry of Education.<sup>130</sup> Despite these policy and legal developments, their effective implementation remains the greatest challenge.

- **Concerns over access to justice**

A recent study by the Bar Association of Tanzania on the state of access to justice for persons with disabilities, noted concerns of non-accommodative practices, such as lack of provisions in the operational guidelines guaranteeing access to sign language services, and denial of assistive devices for persons with disabilities in the custody of police and prison.<sup>131</sup> Many other previous studies have pointed out to similar challenges. Nevertheless, the Report points to the ratification of the CRPD and enactment of the Persons with Disabilities Act as the major achievements in addressing the question of access to justice for persons with disabilities in Tanzania.<sup>132</sup> The task ahead is to strategies and priorities the implementation of these instruments.

- **The state of political participation by persons with disabilities in Tanzania**

A survey by Tanzania Centre for Democracy (TCD) reported that 68 per cent of the mapped areas had no persons with disabilities in leadership positions.<sup>133</sup> A study by Legal and Human Rights Centre pointed out that political participation and leadership remain male dominated while women, youth and persons with disabilities continue to remain under-represented.<sup>134</sup> The Constitution of the United Republic of Tanzania and the Persons with Disabilities Act guarantees political rights in its all dimensions. Despite an inclusive legal framework for

124 National Social Security Fund (NSSF) Act, Cap 50, R.E 2018, secs 21, 28, 29, 30, 37, and Public Service Social Security Fund (PSSSF) Act 2 of 2018.sec 29, 33, 34, 39, 122.

125 PWDs Act (n 9) sec 3.

126 PWDs Act (n 9) sec 3 and 16.

127 PWDs Act (n 9) sec 3.

128 PWDs Act (n 9) sec 35 and 44.

129 PWDs Act (n 9) sec 27, 34 (1) (f), 42 (2), 46 (1) (b).

130 National Guideline for Water, Sanitation and Hygiene for Tanzania Schools (n 94).

131 The Tanganyika Law Society 'Report on the status of implementation of laws and policies governing access to justice by persons with disabilities' (date) 7-8.

132 Tanganyika Law Society (n 131) 7-8.

133 ZS Masanyiwa et al 'Quest for Political Inclusivity: Enablers and Barriers for Political Participation for Persons with Disabilities in Tanzania' (2018) 20 *Rural Planning Journal* 1 at 3 [https://repository.irdp.ac.tz/bitstream/handle/123456789/342/RPJ%20Vol20\\_Issue2\\_5.pdf?sequence=1&isAllowed=y](https://repository.irdp.ac.tz/bitstream/handle/123456789/342/RPJ%20Vol20_Issue2_5.pdf?sequence=1&isAllowed=y) (accessed 10 October 2023).

134 Masanyiwa (n 133) 3.

political participation, persons with disabilities remain politically marginalised in Tanzania.<sup>135</sup> Faulty societal perceptions against persons with disabilities, lack of civic education, inaccessible political infrastructure and information and failure to fully implement available avenues for affirmative actions are particular barriers to political participation by persons with disabilities in Tanzania.

- **Specific categories experiencing particular issues/vulnerability in Tanzania**  
In addition to persons with albinism who suffer, there is also a particular pattern of vulnerability to other forms of violence, including sexual violence, among persons with disabilities of all ages and genders and relatively more widespread among girls and children with disabilities in Tanzania.<sup>136</sup>

## 12 Future perspective

### 12.1 Are there any specific measures regarding persons with disabilities being debated or considered in Tanzania at the moment?

There is ongoing debate about the need to amend the Persons with Disabilities Act 2010 to address its various inefficiencies as pointed out elsewhere in this paper. Also debates over the inadequate implementation of the Persons with Disabilities Act and international and regional instruments which Tanzania ratified is intense. Some stakeholders propose sectorial audits on the implementation of the Act. For example, a comprehensive audit of the implementation of quota system in employment for public and private service is mentioned as a matter of urgency, among others.

### 12.2 What legal reforms are being raised? Which legal reforms would you like to see in Tanzania? Why?

The most cited reforms required include amendment of the Persons with Disabilities Act to address concerns of independence of the National Advisory Council for Persons with Disabilities. Closely related, is the amendment of the Persons with Disabilities Act to allow appointment of an independent Secretary to the National Advisory Council for Persons with Disability to be officer in-charge of day-to-day businesses of the Council.

135 Masanyiwa (n 133) 4.

136 Information is the author's opinion based on knowledge gained from his participation in an evaluation project of the National Plan of Action to End Violence against Women and Children in Tanzania 2017/8-2021/2. At the time of compiling this section, the Evaluation Report was not yet published.



# **SECTION C: REGIONAL DEVELOPMENTS**

## **Disability rights in the African regional human rights system**

Section C contains 2 commentaries related to disability, the first maps ACERWC's work on the rights of children with disabilities (2012-2023), and the second draws and builds on research undertaken by the authors of the report 'People with albinism on the move' (January to July 2022).



# REGIONAL DEVELOPMENTS

## PROGRESS, GAPS AND NEXT STEPS: MAPPING ACERWC'S WORK ON THE RIGHTS OF CHILDREN WITH DISABILITIES (2012-2023)

*MK Ande\* & BD Mezmur\*\**

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### 1 Introduction and background

Children with disabilities in Africa face multiple challenges. To start with, the numbers are staggering. For example, according to UNICEF, one in ten of the 290 million children in Eastern and Southern Africa have functional difficulties.<sup>1</sup> At the same time, the absence of disaggregated data in all four corners of the continent continues to undermine legislative and programmatic interventions to uphold the rights of children with disabilities.

Further, there are multiple areas of law and policy in respect of the rights of children with disabilities in Africa which need attention. For example, while it is commendable that many African countries have adopted comprehensive child laws in Africa, few explicitly cover children with disabilities. A case in point is Malawi where concern has been expressed about the absence of explicit efforts to protect the rights of children with disabilities in the Child Care, Protection and Justice Act of 2010.<sup>2</sup>

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1 UNICEF 'Children with disabilities in Eastern and Southern Africa: A statistical overview of their well-being' (2023) 6.

2 CRPD Committee, Concluding Observations on the Combined Initial and Second Periodic Reports of Malawi, 5 October 2023, UN Doc CRPD/C/MWI/CO/1-2 (2023) para 15(a).



The primary legal framework that regulates the rights of children, including those with disabilities in this region is the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>3</sup> To date, 50 African Union (AU) Member States have ratified the Charter, with only five remaining.<sup>4</sup> This Charter includes a dedicated provision on the rights of children with disabilities under article 13 according to which children with disabilities are entitled to special protection measures and appropriate assistance, aimed at promoting their social integration as well as individual, cultural, and moral development to the fullest extent possible. It goes without saying that all the remaining safeguards guaranteed by the Charter are equally applicable to children with disabilities.

The African Committee of Experts on the Rights and Welfare of the Child (Committee) is the body responsible for overseeing the implementation of the African Children's Charter.<sup>5</sup> The Committee was established in 2001 in accordance with article 32 of the document. Article 42 of the Charter specifies the Committee's functions, which include (amongst others) the promotion and protection of children's rights, monitoring the Charter's implementation, formulating and laying down principles and rules aimed at safeguarding children's rights in Africa, and interpreting the Charter's provisions. To discharge this broad mandate, the Committee engages in a number of activities as outlined in articles 42-45 of the Charter and its Rules of Procedures.<sup>6</sup> These activities include the consideration of State Party Reports on the status of the implementation of the Charter, examination of communications on alleged violations of the Charter, conducting investigations/country visits to assess the implementation of the Charter, developing norms and standards in the form of general comments and guidelines on matters covered by the Charter, and undertaking research and studies on children's rights issues in the Continent.<sup>7</sup>

Over the years, the Committee has undertaken several initiatives with a view to protect and promote the rights of children with disabilities, as well as to monitor the effective implementation of these rights. One notable initiative was dedicating the commemoration of the 2012 Day of

3 The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the Organization of African Unity (OAU) (now African Union (AU) Heads of State and Governments on 11 July 1990 and entered into force on 29 November 1999.

4 ACERWC 'Ratification Table: African Charter on the Rights and Welfare of the Child' <http://www.acerwc.africa/en/member-states/ratifications> (accessed 6 October 2023.) Five Member States have yet to ratify the ACRWC, namely Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan, and Tunisia. Among the ratifying countries, three Member States, namely Egypt, Mauritania, and Sudan, have entered reservations to certain provisions of the Charter.

5 Art 32(1) of the ACRWC.

6 ACERWC 'Revised rules of procedure of the African Committee of Experts on the Rights and Welfare of the Child' (2020) <http://www.acerwc.africa/en/key-documents/working-documents/revised-rules-procedure-african-committee-experts-rights-and> (accessed 14 September 2023).

7 Arts 42-45 of the ACRWC.

the African Child (the DAC) to the theme 'The rights of children with disabilities: The duty to protect, respect, promote and fulfil' which provided a platform to draw attention to the challenges that children with disabilities face and to urge governments to undertake appropriate measures.<sup>8</sup>

This article provides an overview of the Committee's initiatives pertaining to the promotion and protection of the rights of children with disabilities since the 2012 DAC. Since the Committee has not yet been presented with communications (in terms of article 44 of the Charter) specifically addressing the right of children with disabilities, nor adopted a General Comment dedicated to this issue, the assessment of the Committee's efforts concerning the rights of children with disabilities focuses on the aforementioned activities.

## 2 Children with disabilities under ACERWC's special mechanisms

One of the most notable initiatives of the Committee towards the protection and promotion of children with disabilities is the establishment of a Working Group on Children with Disabilities (Working Group).<sup>9</sup> During its 36th ordinary session in December 2020 the Committee resolved to launch four working groups to address challenges in key thematic areas, including the Working Group on Children with Disabilities.<sup>10</sup> The primary objective of the Working Group is to safeguard the rights and well-being of children with disabilities on the continent and ensure their inclusion in all spheres by adopting a child-rights based approach to protect their rights.<sup>11</sup> To this end, the Resolution establishing the Working Group outlines its key roles and responsibilities, such as producing (amongst others) a comprehensive report on the status of children with disabilities in Africa, setting standards, and revising and

8 UNICEF 'Summary report by the UNICEF Liaison Office to the African Union and United Nations Economic Commission for Africa: The Day of the African Child – 16 June 2012. Theme: The rights of children with disabilities: The duty to protect, respect, promote, and fulfil' <https://silو.tips/download/summary-report-by-the-unicef-liaison-office-to-the-african-union-and-united-nati> (accessed 28 September 2023).

9 This Working Group was established in accordance with art 38(1) of the ACRWC and Rule 58 of its revised Rules of Procedure, which allow the Committee to create special mechanisms to execute specific programmes and projects. ACERWC 'Standard of operating procedures for working groups as special mechanisms within the African Committee of Experts on the Rights and Welfare of the Child' adopted on 8 September 2020 <http://www.acerwc.africa/sites/default/files/2022-06/Standard-of-Operating-Procedures-for-the-Working-Groups.pdf> (accessed 27 September 2023).

10 The Working Group is composed of four committee members and four external experts. ACERWC Resolution on the Establishment of a Working Group on Children with Disabilities, 4 December 2020 <http://www.acerwc.africa/sites/default/files/2022-10/RESOLUTION%20ON%20THE%20ESTABLISHMENT%20OF%20A%20WORKING%20GROUP%20ON%20CHILDREN%20WITH%20DISABILITIES.pdf> (accessed 28 September 2023).

11 As above.

operationalising the ACERWC's Strategy for Promoting and Protecting the Rights of Children with Disabilities in Africa.<sup>12</sup>

Since its inception, the Working Group has made significant strides in fulfilling its mandate. Its initiatives include the development of a Resolution 19/2022 on the Situation of Children with Albinism in Africa,<sup>13</sup> Guidelines for Action on the Rights of Children with Disabilities in Africa,<sup>14</sup> and a Continental Study on the Status of Children with Disabilities in Africa.<sup>15</sup> Furthermore, considering the need to integrate emerging issues adversely affecting children with disabilities in the region, the Working Group undertook the task of revising the Strategy for Promoting and Protecting the Rights of Children with Disabilities in Africa (Revised Strategy).<sup>16</sup> It is noteworthy that during its 41st ordinary session, the Committee, cognisant of the persisting challenges faced by children with disabilities, decided to extend the mandate of the Working Group for an additional two years.

### 3 Children with disabilities and ACERWC's development of research and studies

As noted above, the Working Group has conducted a Continental Study on the Status of Children with Disabilities in Africa, the report of which was adopted during the Committee's 41st ordinary session in April to May 2023. The Study focuses on ten African countries representing the five regions of Africa namely: Mauritania, Guinea, Tanzania, Ethiopia, Namibia, Lesotho, Central African Republic, Democratic Republic of the Congo, Algeria, and Egypt.<sup>17</sup> Its primary objectives include examining the adequacy of existing normative frameworks on the rights of children with disabilities in Africa, identifying barriers that hinder children with disabilities from fully exercising their rights, and providing recommendations to Member States, ACERWC, and other relevant

12 As above.

13 ACERWC, Resolution 19/2022 of the ACERWC Working Group on Children with Disabilities on the Situation of Children with Albinism In Africa, adopted on 1 April 2022, during the 39th ordinary session of the ACERWC [https://www.acerwc.africa/sites/default/files/2022-10/Resolution%20No%2019\\_2022%20on%20the%20Situation%20of%20Children%20with%20Albinism%20in%20Africa.pdf](https://www.acerwc.africa/sites/default/files/2022-10/Resolution%20No%2019_2022%20on%20the%20Situation%20of%20Children%20with%20Albinism%20in%20Africa.pdf) (accessed 24 September 2023).

14 ACERWC 'Guidelines for Action on the Rights of Children with Disabilities in Africa' (2022) (on file with authors). The Guidelines were adopted during the 40th ordinary session of the ACERWC, held from 23 November to 1 December 2022.

15 ACERWC 'Continental Study on the Status of Children with Disabilities in Africa' (2023) (on file with authors). The Study was adopted during the ACERWC's 41st ordinary session, held from 28 April to 6 May 2023.

16 ACERWC 'Strategy for Promoting and Protecting the Rights of Children with Disabilities in Africa' (2023) (on file with authors).

17 ACERWC Strategy (n 16) 16.

stakeholders on collaboration and enhancing efforts to promote and protect the right of children with disabilities in Africa.<sup>18</sup>

The study report highlights that children with disabilities in Africa often do not have access to services and resources that are essential for their full development, mainly due to and negative societal attitudes and cultural prejudices.<sup>19</sup> It emphasises that children with disabilities are subjected to various forms of discrimination, including limited access to education and healthcare. This is exacerbated by a lack of reliable and up to date disaggregated data on disability, which in turn impedes the formulation of effective protective strategies.<sup>20</sup> The report further notes that while African States have made various commitments to protect and promote the rights of children with disabilities, the effective implementation of rights for children with disabilities remains a challenge.<sup>21</sup>

The findings further reveal a number of significant gaps, including the lack of clear reference to children with disabilities in most national laws and policies, duplication of efforts and inadequate synergy among stakeholders, a persistent exclusion of children with disabilities from policy development discourses, and a failure to recognise intersectionality.<sup>22</sup> In response to these findings, a series of recommendations were proposed. For example, the study observes that the majority of the case study States rely on institutional care as a way of providing alternative care for children with disabilities. Given the large body of evidence that demonstrates the overrepresentation of children with disabilities in institutional settings across many countries and the negative effects of institutional care on – as well as cases of sexual assault in – these settings, the Study suggests reforming such facilities to ensure the protection of children with disabilities.<sup>23</sup> While these recommendations hold value in recognising the detrimental impact of institutional settings on the overall well-being, a clearer recommendation to gradually transition away from institutionalisation and prioritise family-based alternative care for children with disabilities would have allowed the Committee to fully endorse the global consensus that institutional care adversely affects children's physical, emotional, and social well-being.

18 ACERWC Strategy (n 16) 13-14.

19 ACERWC Continental Study (n 15) 9-13.

20 ACERWC Continental Study (n 15).

21 As above.

22 ACERWC Continental Study (n 15) 5-8.

23 ACERWC Continental Study (n 15) 67.

## 4 Children with disabilities and ACERWC's development of norms and standards

In line with its mandate the Committee, through its Working Group, has developed four sets of standards pertaining to the rights of children with disabilities. However, it should be noted that these standards are not legally binding on States. Nevertheless, they serve to elucidate the nature of States' obligations in respect of the rights of children with disabilities enshrined in the Charter and the accompanying measures required for their effective implementation at the national level.

### 4.1 Strategy for promoting and protecting the rights of children with disabilities in Africa (2023)

The Committee has undertaken a review of the Strategy for Promoting and Protecting the Rights of Children with Disabilities in Africa (Revised Strategy).<sup>24</sup> This Strategy was initially adopted by the Committee in 2014.<sup>25</sup> At its second meeting in March 2022 the Working Group decided to update the content of this Strategy to highlight the progress and challenges encountered in the advancement of the rights of children with disabilities in the African region. The latter include the insufficient implementation of the Committee's recommendations and the urgent need to strengthen the existing protection mechanisms for children with disabilities.<sup>26</sup> It outlines several areas of concern requiring immediate attention from all stakeholders, such as the links between poverty and disability; the rights to education and to health; the right to be heard and to participate; and violence against children with disabilities.<sup>27</sup>

In order to address these concerns, the Strategy proposes a three-fold approach, which emphasises the stages of development, implementation, and monitoring and evaluation for a medium-term plan. For instance, during the implementation phase, the Strategy urges Member States to consider emerging issues such as the COVID-19 pandemic, armed conflicts, climate change and other emergencies in order to protect the rights of children with disabilities in all circumstances.<sup>28</sup> While the recognition of the need to integrate these considerations is commendable, the Strategy could have benefited from a more nuanced approach. For instance, given the heightened vulnerabilities of children with disabilities in Africa to climate change impacts, linking the Revised Strategy with recommendations from the Working Group on Climate Change and

24 ACERWC Strategy (n 16).

25 ACERWC Strategy (n 16).

26 ACERWC Strategy (n 16) 4.

27 ACERWC Strategy (n 16) 5-6.

28 ACERWC Strategy (n 16) 7-8.

Children's Rights would have strengthened the level of guidance given to Member States in this regard.

In the monitoring and evaluation phase, Member States are required to establish robust monitoring mechanisms and include information regarding the implementation of this Strategy in their reports to the Committee. The Committee's ability to follow up on the implementation of the Revised Strategy remains to be seen. Both the initial and revised Strategies stipulate that States are expected to include information on their progress in implementing the Strategy in their periodic reports to the Committee.<sup>29</sup> The Committee, in turn, is responsible for overseeing the status of information included in these reports. The lack of follow-up in respect of the initial Strategy can thus be attributed to non-compliance on the part of both States and the ACERWC, with States failing to report on progress and the Committee failing to demand this information and to scrutinise such progress in its Concluding Observations and Recommendations to States.

#### **4.2 Guidelines for Action on the Rights of Children with Disabilities in Africa (2023)**

A second document introduced by the Working Group is the Guidelines for Action on the Rights of Children with Disabilities in Africa (the Guidelines) which were adopted during the 40th ordinary session of the Committee. The Guidelines were developed to address the widespread exclusion of children with disabilities from mainstream support services (these could include health services and child-friendly spaces, which children with disabilities are unable to access) leading to their marginalisation and hindering the realisation of their rights as outlined in key international frameworks, including the African Children's Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol),<sup>30</sup> the CRC, and the Convention on the Rights of Persons with Disabilities (the CRPD).<sup>31</sup> The Guidelines provide direction to State Parties by elucidating the state obligations flowing from the human rights instruments listed above. The obligations are categorised as protection rights (protection of children with disabilities against amongst others abduction, exploitation, violence, and abuse), social and economic rights (ensuring that children with disabilities have access to quality education and an adequate standard of living), participation rights (such as access to

29 ACERWC (n 16).

30 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa adopted on 29 January 2018 (Not yet in force at the time of writing).

31 The United Nations Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006 and opened for signature in March 2007 (the CRPD).

information, liberty and participation in sports, recreation, and culture), and cross-cutting themes (such as gender equality and addressing intersectional discrimination against children with disabilities).<sup>32</sup>

One area which has been overlooked in this document is guidance to Member States regarding the provision of alternative care of children with disabilities who are temporarily or permanently deprived of their family environment. The findings of the Continental Study indicate that the majority of the States included in the study rely on institutional care to provide alternative care for children with disabilities. In light of this, it appears that the Committee did not fully capitalise on the opportunity to clarify the obligations of Member States under article 25 of the Charter in the context of children with disabilities. In addition, as the Guidelines integrate and link obligations enshrined in the African Disability Protocol and the CRPD, the Committee could have used this as an opportunity to take a position on a number of issues not explicitly covered by the Charter, such as reconciling the issue of foetal impairment as a ground for abortion with reproductive rights, among others.<sup>33</sup>

#### **4.3 Resolution 19/2022 of the ACERWC Working Group on Children with Disabilities on the Situation of Children with Albinism in Africa (2022)**

The Committee, through its Working Group, has issued Resolution 19/2022 on the Situation of Children with Albinism in Africa, which acknowledges that this group of children face threats such as ritual killing and maiming, and the lack or inadequacy of measures aimed at improving their quality of life.<sup>34</sup> In this Resolution, the Committee notes with concern that these issues persist despite its recommendations to State Parties. The Resolution outlines a broad range of recommendations to State Parties including undertaking awareness-raising activities to 'dispel myths and harmful beliefs' that perpetuate discrimination against children with albinism and adopting enhanced social protection measure, and an intersectoral approach involving the justice, health and education sectors.

<sup>32</sup> ACERWC Guidelines (n 14) 22-37

<sup>33</sup> For instance, the CRPD Committee has declared disability-selective abortion incompatible with the CRPD. However, the prevailing approach taken by most human rights bodies has been to adopt a liberal stance on abortion to protect women's rights. The lack of consensus among United Nations (UN) treaty bodies was most evident in the comment submitted by the CRPD Committee in response to the Human Rights Committee's draft General Comment 36, which emphasised that laws explicitly allowing abortions on grounds of impairment are in violation of arts 4,5,8 of the CRPD. CRPD Committee Comments on the draft General Comment 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> (accessed 5 December 2023).

<sup>34</sup> n 13.

Civil society organisations (CSOs) are urged to assist State Parties in their efforts.

#### **4.4 Statement of the ACERWC's Working Group on Children with Disabilities in Africa on the International Day of Persons with Disabilities (2022)**

On 3 December 2022, the Working Group joined the global community in commemorating the International Day of Persons with Disabilities under the theme 'Transformative Solutions for Inclusive Development: The Role of Innovation in Fuelling an Accessible and Equitable World'. In line with this theme, the Working Group issued a Statement to emphasise that despite Africa experiencing 'significant growth in the development and utilisation of technologies in recent years', gaps remain for children with disabilities in accessing such innovative solutions.<sup>35</sup> The Statement also highlights the other factors contributing to widening these gaps, such as lack of access to the internet and assistive technology. In this regard, the Committee called on African Union (AU) Member States and other relevant stakeholders to amongst others take all appropriate measures to identify, remove, and prevent existing online and offline barriers.

### **5 ACERWC's conduct of missions on the situations of children with albinism**

As part of its promotion and protective mandate, the Committee is authorised to collect and document information, to commission inter-disciplinary assessments of situations on African problems in the fields of children's rights in Africa, and to organise meetings.<sup>36</sup> In addition to its promotion and protective mandate, the Committee also has an explicit investigative mandate under article 45 of the African Children's Charter. The Committee may undertake, for example, fact finding and investigation missions, follow-up missions, and advocacy missions.<sup>37</sup> In relation to the subject at hand, the Committee has undertaken crucial investigative missions that demonstrate the potential of this mechanism for the implementation of the rights of children with disabilities, especially those with albinism. In particular, the Committee has conducted investigative missions on two separate occasions to examine the situation of children with albinism. The first of these missions took place in the

35 ACERWC 'Statement of the African Committee of Experts on the Rights and Welfare of the Child – Working Group on Children with Disabilities in Africa on the International Day of Persons with Disabilities' (2022) <http://www.acerwc.africa/en/article/activity/statement-african-committee-experts-rights-and-welfare-child-working-group> (accessed on 5 December 2023).

36 Art 42(a)(i) of the ACRWC.

37 The ACERWC's Investigative Missions can be accessed at <http://www.acerwc.africa/en/missions/investigation-missions> (accessed 6 February 2024).



Republic of Tanzania in August 2015,<sup>38</sup> while the second one took place in Malawi in August 2022.<sup>39</sup>

The decision to undertake the investigative mission to Tanzania was prompted by a request received in 2013 from a CSO regarding the conditions of children with albinism who were at the time in temporary holding shelters in the country.<sup>40</sup> During the course of the mission, the Committee sought to obtain direct insight into the circumstances surrounding the removal of children from families and communities, and their placement in these facilities. The resultant report contains recommendations to the State Party for immediate, mid- and long-term measures such as combating the violence against children with albinism on a broader societal scale and ending the institutionalisation of children with albinism.<sup>41</sup> The findings of the report have played a pivotal role in the advocacy efforts aimed at safeguarding children and adults with albinism. The findings have also influenced the Working Group's Resolution, as evidenced by the Resolution's reference to the particular investigative mission in its Preamble.<sup>42</sup>

The Committee's investigative mission to Tanzania holds significant relevance due to the exceptional circumstances surrounding persons/children with albinism in the State Party. Tanzania is dubbed 'ground zero' for the crisis of albinism-related human trafficking.<sup>43</sup> The mission was further warranted in light of the large number of persons with albinism in the country and the alarming prevalence of reported attacks and killings.

Following a similar thread, the Committee undertook an investigative mission to the Republic of Malawi in August 2022 to assess the situation of children with albinism there.<sup>44</sup> In its findings the Committee, while acknowledging the State Party's efforts to protect children with albinism in the country, identified certain areas of concern, including a lack of

38 ACERWC 'Report on Investigative Mission on the situation of children with albinism in temporary holding shelters – Tanzania' (2016) [http://www.acerwc.africa/sites/default/files/2023-02/Investigative\\_Mission\\_on\\_the\\_Situation\\_of\\_Children\\_with\\_Albinism\\_pages.pdf](http://www.acerwc.africa/sites/default/files/2023-02/Investigative_Mission_on_the_Situation_of_Children_with_Albinism_pages.pdf) (accessed 1 October 2023).

39 ACERWC 'Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) – Working Group on Children with Disabilities in Africa on the fact-finding mission on the situation of children with albinism in the Republic of Malawi and status of implementation of the ACERWC's Decision on Communication 004/Com/001/2014 submitted by the IHRDA against the Republic of Malawi' (2022) [http://www.acerwc.africa/sites/default/files/2023-02/17.23\\_Final%20Report%20on%20the%20fact-finding%20mission%20in%20the%20Republic%20of%20Malawi%20%281%29.pdf](http://www.acerwc.africa/sites/default/files/2023-02/17.23_Final%20Report%20on%20the%20fact-finding%20mission%20in%20the%20Republic%20of%20Malawi%20%281%29.pdf) (accessed 28 September 2023).

40 ACERWC (n 38).

41 ACERWC (n 38) 29-31.

42 ACERWC (n 13).

43 BD Mezmur 'A step to zero attacks: Reflections on the rights of persons with albinism through *X v United Republic of Tanzania*' (2018) 6 *African Disability Rights Yearbook* 251.

44 ACERWC (n 39).

reporting of the abduction, and killings of children with albinism, as well as the lack of accountability for perpetrators of such attacks.<sup>45</sup>

While the Charter does not make explicit reference to the protection of children with albinism, the aforementioned initiatives are a clear indication of the Committee's recognition of their increased vulnerability to various forms of rights violations and its commitment to address these. The significance of these missions is underscored by the reported attacks on and killings of persons with albinism in at least 25 African countries.<sup>46</sup>

The Committee's reports on these missions bear significance not only for Tanzania and Malawi, but also for other African nations facing comparable challenges. It is imperative for these countries to implement the relevant recommendations within their own contexts. Furthermore, the Committee's approach for safeguarding the rights of children with albinism extends beyond prohibiting attacks and ritual killings. A comprehensive approach is adopted, as demonstrated by several of the recommendations addressing aspects such as conducting skin care screening and treatment, facilitating ophthalmological examinations, distribution of skin care products and the provision of adaptive and assistive devices to all children with albinism.<sup>47</sup>

The Committee's efforts in this regard are consistent with the wider initiatives at the African Union level aimed at improving the degree of protection provided to persons/children with albinism across the continent. The African Disability Protocol, for instance, expresses concern at the maiming and killing of persons with albinism, and prohibits harmful practices, including witchcraft, abandonment, concealment, and ritual killings. The adoption of the Regional Action Plan for 2017 to 2021 (RAP) is another initiative. Although this document was spearheaded by the UN Independent Expert on Albinism, the ACERWC was one of the AU organs that actively informed its development by contributing specific and

45 ACERWC 'Press release: Fact-finding mission in the Republic of Malawi to assess the situation of children with albinism' (4 February 2022) <http://www.acerwc.africa/en/article/press-release/press-release-fact-finding-mission-republic-malawi-assess-situati-on-children> (accessed 3 October 2023).

46 International Bar Association "'Waiting to disappear": International and regional standards for the protection and promotion of the human rights of persons with albinism' (2017) <https://www.refworld.org/pdfid/5a5f59da4.pdf> (accessed 27 September 2023); UN Human Rights Council 'Report of the Human Rights Council Advisory Committee on the study on the situation of human rights of persons living [sic] with albinism', 10 February 2015, UN Doc A/HRC/28/75 (2015) <https://www.refworld.org/docid/54f47ef94.html> (accessed 30 October 2023).

47 ACERWC (n 39).

concrete measures to promote and protect the rights of individuals with albinism.<sup>48</sup>

## 6 Children with disabilities under the Africa's Agenda for Children: Fostering an Africa Fit for Children 2040

A further important initiative of the Committee is the inclusion of aspects related to the rights of children with disabilities in Africa's Agenda for Children: Fostering an Africa Fit for Children 2040 (Agenda 2040). Agenda 2040, developed by the Committee in 2015 was prompted by a meeting convened to commemorate the 25th anniversary of the African Children's Charter to examine the state of children in Africa during the previous 25 years. The Agenda emanates from the outcomes of the conference but serves to elaborate Agenda 2063's vision in the context of children. It sets out ten aspirations to be achieved by 2040 and outlines steps that African governments should take to ensure the protection of the rights of children in Africa.<sup>49</sup>

The Agenda acknowledges the specific vulnerabilities of children with disabilities, including the neglect, mistreatment, and social exclusion that they face in African societies,<sup>50</sup> and their low enrolment rates in education.<sup>51</sup> While all ten aspirations are relevant to children with disabilities, specific aspiration targets make explicit reference to children with disabilities. For instance, one of the specific targets for Aspiration 6 is for education facilities to be 'disability-sensitive' and inclusive for all by 2020.<sup>52</sup>

The report on the assessment of the first phase of implementation (2016-2020) reveals that the implementation of the Agenda's aspirations

48 OHCHR 'Albinism in Africa' <https://www.ohchr.org/en/special-procedures/ie-albinism/albinism-africa> (accessed 19 September 2023). The African Union Executive Council endorsed the RAP as a continent-wide policy known as the Plan of Action to End Attacks and Other Human Rights Violations Targeting Persons with Albinism in Africa (2021-2031) and its Implementation Matrix in 2019.

49 The ten aspirations of Agenda 2040 are as follows: 'Aspiration 1: The African Children's Charter, as supervised by the African Children's Committee, provides an effective continental framework for advancing children's rights Aspiration 2: An effective child-friendly national legislative, policy and institutional framework is in place in all Member States Aspiration 3: Every child's birth and other vital statistics are registered Aspiration 4: Every child survives and has a healthy childhood Aspiration 5: Every child grows up well-nourished and with access to the basic necessities of life Aspiration 6: Every child benefits fully from quality education Aspiration 7: Every child is protected against violence, exploitation, neglect and abuse Aspiration 8: Children benefit from a child-sensitive criminal system Aspiration 9: Every child is free from the impact of armed conflicts and other disasters or emergency situations Aspiration 10: African children's views matter.'

50 Agenda 2040 at 21.

51 As above.

52 Agenda 2040 at 58.

remains imperfect, including those related to children with disabilities.<sup>53</sup> For example, the Agenda's objective of ensuring inclusive education for students with disabilities,<sup>54</sup> as well as targets aimed at ensuring that every child, including those with disabilities enjoy access to the basic necessities of life, have not been met by Member States.<sup>55</sup> Despite these findings, the key recommendations set out in this report for the next monitoring phase under each Aspiration do not include specific measures to address the gaps in implementation of the Agenda's disability-specific targets.

## **7 Conclusions and recommendations**

Since dedicating the 2012 DAC to the theme 'The Rights of Children with Disabilities: The Duty to Protect, Respect, Promote, and Fulfil', a trend pertaining to the rights of children with disabilities has emerged developments in the work of the Committee. These developments reveal a strong commitment to strengthening the level of protection afforded to children with disabilities under the African Children's Charter. In particular, the establishment of a Working Group solely dedicated to safeguarding the rights of children with disabilities through a child-rights based approach and the subsequent activities of the Working Group are commendable advancements. The Committee's efforts towards addressing the specific challenges faced by children with albinism through its various mechanisms are also noteworthy. Nonetheless, the monitoring of implementing these developments require renewed commitment from the Committee itself, State Parties, CSOs, and other stakeholders.

Moreover, the Committee has other underutilised mechanisms, such as its Communication Procedure, which have not yet been tested in advancing the rights of children with disabilities. The reasons for this underutilisation need further research. The Committee also needs to adopt a holistic approach in its efforts to address the multifaceted challenges encountered by children with disabilities and elaborate on the full spectrum of obligations outlined in the Charter and other relevant instrument within this context. Some issues requiring the Committee's firm stance in this regard may include the institutionalisation of children with disabilities and settling the debate surrounding foetal abortion on the grounds of disability (as set out above), as well as substitute and supported decision making.

Furthermore, the emphasis placed on physical and sensory functioning in the activities of the ACERWC, with limited attention to

53 ACERWC 'Agenda 2040: Fostering an Africa Fit for Children: Assessment of the first phase of implementation' (2016-2020) [http://www.acerwc.africa/sites/default/files/2022-10/Agenda2040-Assessment%20of%20the%20first%20phase%20of%20imple mentation%202016-2020\\_0.pdf](http://www.acerwc.africa/sites/default/files/2022-10/Agenda2040-Assessment%20of%20the%20first%20phase%20of%20imple mentation%202016-2020_0.pdf) (accessed 18 September 2023).

54 ACERWC (n 53) 100-101.

55 ACERWC (n 53) 88.

psychosocial functioning, needs a closer look. In addition, the work done within the framework of the Sustainable Development Goals has assisted in data collection as well as in bolstering the synergy between development and disability. This can be tapped into more in the State Party reporting process.

As shown by the analysis above of recent activities, the Committee and its Working Group play a pivotal role in guiding State Parties to fulfil their obligations under the Charter. These developments provide a crucial framework for outlining the roles and responsibilities of various relevant stakeholders in ensuring the protection and promotion of the rights of children with disabilities in the African context.

# REGIONAL DEVELOPMENTS

## REFUGEES WITH ALBINISM IN AFRICA

*Innocentia Mgijima-Konopi\* & Muluka-Anne Miti-Drummond\*\**

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### 1 Introduction

In June 2022 the Office of the UN Independent Expert on the enjoyment of human rights by persons with albinism published a report entitled 'People with albinism on the move'.<sup>1</sup> This report highlighted the human rights situation of persons with albinism who are migrants, refugees, asylum seekers, migrant workers, and internally displaced persons (IDPs). It drew attention to the invisibility of this group in migration literature and the aggravated forms of discrimination and human rights violations that are often experienced by this group in migration contexts.

This commentary draws from and builds on research undertaken between January and July 2022 by the authors for the above report. While the UN report covers a broad category of migrants with albinism and has a global focus, this commentary solely focuses on refugees with albinism in refugee and settlement camps in Africa. According to the UNHCR, 'Refugee camps are a form of settlement in which refugees or IDPs reside and receive centralised protection, humanitarian assistance, and other services from host governments and humanitarian actors.' A defining characteristic of camps is that they often limit the rights of refugees, including their freedom of movement and right to choose where to live or work, cultivate land and restrict their access to protection and services.

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1 UN General Assembly 'People with albinism on the move – Report of the Independent Expert on the enjoyment of human rights by persons with albinism' UN Doc A/77/199 (2022)

While the term refugee camp is often used interchangeably with refugee settlement, the latter is often seen as providing greater freedom of movement; more integration into local communities for refugees including for income-generating activities; and general greater enjoyment of rights.

The commentary makes use mainly of documented experiences of refugees in Uganda, Malawi, and Kenya to paint a picture of the human rights challenges experienced by refugees with albinism in Africa in refugee camps and settlements and outlines the regional and international legal framework that can be used to strengthen protection of their rights.

## **2 International and regional human rights framework for the protection of refugees with albinism**

### **2.1 Refugee status determination**

#### **2.1.1 Refugee status determination under international law**

The Universal Declaration on Human Rights recognises the right of everyone to, ‘seek and to enjoy in other countries asylum from persecution’.<sup>2</sup> Under the United Nations Convention relating to the Status of Refugees<sup>3</sup> and its Protocol (UN Refugee Conventions)<sup>4</sup> a person may seek asylum if,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [they are] outside the country of [their] nationality and [are] unable or, owing to such fear, [are] unwilling to avail [themselves] of the protection of that country.<sup>5</sup>

While the UN Refugee Conventions were not initially interpreted as guaranteeing the right to asylum for persons with albinism fleeing persecution, there is a growing body of literature now confirming such a right.

2 Art 14 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 23 November 2022).

3 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol 189, p 137 <https://www.refworld.org/docid/3be01b964.html> (accessed 23 November 2022).

4 UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol 606, p 267 <https://www.refworld.org/docid/3ae6b3ae4.html> (accessed 23 November 2022).

5 Convention Relating to the Status of Refugees (n 3) art 1(2).

The United Nations High Commissioner for Refugees (UNHCR) has interpreted 'persecution' within the context of the Conventions to include persecution by non-state actors.<sup>6</sup> It has further clarified:

Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.<sup>7</sup>

Therefore, the physical attacks against persons with albinism, as well as serious discriminatory acts may constitute persecution if carried out by State actors, or where the State is unwilling or unable to effectively protect them from it. Being subjected to stigma and discrimination, even in the absence of an attack, was recognised as a ground for granting asylum in the case of a Nigerian child with albinism seeking asylum in the UK.<sup>8</sup>

In relation to the enumerated grounds for persecution, albinism has been found to meet the 'protected characteristics' approach to membership of a social group, which requires, 'an immutable characteristic or ... a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it'.<sup>9</sup> It has also been seen to meet the 'social perception' approach, requiring a group to share a common characteristic which makes them a cognizable group or sets them apart from society at large.<sup>10</sup> In the case of *Makatengkeng v Alberto R Gonzales, Attorney General*, for example, a US court held that, '[a]lbinism is an immutable characteristic that [one] is incapable of changing. It clearly identifies [one] on sight'.<sup>11</sup> This position has also been adopted by the European Asylum Support Office<sup>12</sup> and several cases internationally where persons with

6 UN High Commissioner for Refugees (UNHCR) *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees* (April 2019) HCR/1P/4/ENG/REV. 4, para 35 <https://www.refworld.org/docid/5cb474b27.html> (accessed 23 November 2022).

7 UNHCR (n 6) 23.

8 *JA (child – risk of persecution) Nigeria* [2016] UKUT 00560 (IAC), para 8, 24 and 26 <https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-560> (accessed 23 November 2022).

9 UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection 2: Membership of a particular social group' within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002) HCR/GIP/02/02, para 6, <https://www.refworld.org/docid/3d36f23f4.html> (accessed 24 November 2022).

10 UNHCR (n 9) para 7.

11 *Makatengkeng v Alberto R Gonzales, Attorney General* No 06-1630, United States Court of Appeals for the Eighth Circuit, 3 August 2007 [https://www.refworld.org/cases,USA\\_CA\\_8\\_5492b47e4.html](https://www.refworld.org/cases,USA_CA_8_5492b47e4.html) (accessed 3 March 2020).

12 EASO Practical Guides Series *EASO Guidance on membership of a particular social group* (March 2020) 26 <https://euaa.europa.eu/sites/default/files/EASO-Guidance-on%20MPSG-EN.pdf> (accessed 23 November 2022).



albinism have been granted refugee status.<sup>13</sup> Persons with albinism fleeing serious discrimination or attacks therefore may qualify for refugee status under the UN Refugee Conventions.

### 2.1.2 *The right to refugee status under African regional law*

At the African regional level, seeking and obtaining refugee status is explicitly mentioned as a right.<sup>14</sup> The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)<sup>15</sup> provides the same definition of a refugee as provided under the UN Conventions.<sup>16</sup> Given this, it would be logical to assume that the same interpretation of refugees discussed above, which recognises that persons with albinism could qualify as refugees, would also apply under the OAU Refugee Convention.

In addition, the OAU Refugee Convention contains what has become known as the expanded definition of refugee. This provision defines a refugee as,

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

There is little accessible jurisprudence on how this definition has been interpreted. However, section 3 of South Africa's Refugees Act 130 of 1998 provides a very similar definition.<sup>17</sup> Jurisprudence from South African courts has provided that for a person to qualify as a refugee under this article, there must be: (a) proof of the existence of objectively ascertainable circumstances in the person's country of origin (namely, external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order); and (b) a causal link between the circumstances

13 According to the International Bar Association's Human Rights Institute, 'Cases of persons with albinism who have been granted asylum have been documented in Belgium, Canada, France, Ireland, Israel, New Zealand, Spain, Tunisia, the UK and the United States'. International Bar Association's Human Rights Institute 'Waiting to disappear: International and Regional Standards for the Protection and Promotion of the Human Rights of Persons with Albinism' (June 2017) 25.

14 Art 12(3) of the African Charter on Human and Peoples' Rights provides: 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.'

15 Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), 10 September 1969, 1001 UNTS 45 <https://www.refworld.org/docid/3ae6b36018.html> (accessed 23 February 2023).

16 OAU (n 14) art I.1.

17 Section 3(b) of the Refugees Act 130 of 1998 defines a refugee as 'a person [who] – owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'.

and the reason why the asylum-seeker fled his home country.<sup>18</sup> What remains to be seen is whether African courts would see attacks against persons with albinism as events seriously disturbing public order for the purposes of granting asylum under this article.

Although it is clear from various sources, including from our research, that there are refugees with albinism in Africa,<sup>19</sup> the authors were unable to obtain clarity regarding the grounds on which they had been granted refugee status, or how the articles of the OAU Refugee Convention had been applied in the process.

## 2.2 The right to non-refoulement of persons with albinism fleeing attacks

The UN Refugee Conventions<sup>20</sup> and the OAU Refugee Convention<sup>21</sup> provide for the right of refugees not to be returned to territories where their life or freedom would be threatened. The OAU Convention goes further to extend this right to asylum seekers. In addition, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>22</sup> prohibits the return of any persons to a state where they are in danger of being subjected to torture.<sup>23</sup> In relation to this, it is worth noting that the Committee against Torture has recognised that attacks against persons with albinism may amount to torture.<sup>24</sup> In essence, these provisions prohibit the refoulement of persons with albinism fleeing attacks in their home countries, whether or not they have been granted refugee status in the host country.

18 See for example, *Radjabu v Chairperson of the Standing Committee for Refugee Affairs* [2015] 1 All SA 100 (WCC); and *Lumumba v Refugee Appeal Board* (17170/2006) [2007] ZAGPHC 218 (21 September 2007) <http://www.saflii.org/za/cases/ZAGPHC/2007/218.html> (accessed 29 January 2024).

19 Under the Same Sun documented the case of a woman from Cote D'Ivoire granted refugee status in Tunisia. See 'Reported attacks of persons with albinism – Most recent attacks included by under the same sun (UTSS) Canada & Tanzania' *Under the Same Sun* 1 May 2019 at 9 <http://www.underthesamesun.com/> (accessed 29 January 2024).

20 Art 33(1) provides: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

21 Art II.3 provides: 'No person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article I, paragraphs 1 and 2.'

22 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, 85 <https://www.refworld.org/docid/3ae6b3a94.html> (accessed 23 November 2022).

23 Convention against Torture (n 21) art 3(1) provides: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

24 Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding Observations on the second periodic report of Burundi, 12 December 2014, UN Doc CAT/C/BDI/CO/2 (2014) para 12; Committee on the

### 2.3 Other rights of refugees with albinism

According to the UN Refugee Conventions, refugees have the same rights as nationals in relation to religion, access to courts, access to elementary education, and social protections.<sup>25</sup> They, however, appear to limit the rights of refugees in relation to property, employment, freedom of association, access to housing and access to higher education.<sup>26</sup> It cannot be denied though that refugees have the right to the full exercise of non-derogable rights such as, the right to life, not to be subjected to cruel, inhuman, or degrading treatment or punishment, and recognition as a person before the law.<sup>27</sup> In addition, both the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are clear that children who are refugees have all the rights contained in international instruments.<sup>28</sup> Furthermore, contrary to the position of the UN Refugee Conventions, the Fact Sheet on human rights and refugees, developed by the UN Office of the High Commissioner for Human Rights (OHCHR) provides, 'Asylum seekers and refugees are entitled to all the rights and fundamental freedoms that are spelled out in international human rights instruments'.<sup>29</sup>

It is also worth highlighting that under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), women refugees, which includes those with albinism, have the right to participate in decisions making structures and all levels of structures for the management of camps and settlements.<sup>30</sup>

Rights of the Child, Concluding Observations on the second periodic report of the Central African Republic, 8 March 2017, UN Doc CRC/C/CAF/CO/2 (2017) paras 44-45; and Report of the Independent Expert on the Enjoyment of Rights by Persons with Albinism 'Applicable international human rights standards and related obligations addressing the issues faced by persons with albinism' UN Doc A/72/131 (14 July 2017) paras 33-36.

25 Arts 4, 16, 22(1), 23 and 24(b) respectively.

26 Arts 13, 17 and 18, 21, and 22(2).

27 Art 4(2) of the International Covenant on Civil and Political Rights provides: 'No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.'

28 Arts 22(1) of the UN Convention on the Rights of the Child and 23(1) of the African Charter on the Rights and Welfare of the Child call for refugee children to receive appropriate protection and humanitarian assistance in the enjoyment of their rights set out in the respective instruments and other international human rights and humanitarian instruments to which the States are Parties.

29 OHCHR 'Fact Sheet 20: Human rights and refugees' (July 1993) 5 <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet20en.pdf> (accessed 29 January 2024).

30 Art 10(2)(b) of the African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 <https://www.refworld.org/docid/3f4b139d4.html> (accessed 23 November 2022).

In relation to refugees with albinism, the Convention on the Rights of Persons with Disabilities, and the African Protocol on the Rights of Persons with Disabilities in Africa<sup>31</sup> both require states to take all necessary measures to ensure the protection and safety of refugees with disabilities,<sup>32</sup> including from any attacks in their host countries. Furthermore, given that the UN Human Rights Committee<sup>33</sup> has clarified, '[t]he obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life',<sup>34</sup> it can be inferred that states must also take steps to prevent the death of persons with albinism from skin cancer.

### **3 Refugees with albinism in Africa: Profile, drivers of migration and experiences**

#### **3.1 The emerging data on refugees with disabilities and albinism**

The United Nations High Commissioner for Refugees (UNHCR) 2021 Global Report puts the number of refugees in Africa at the end of 2021 at around 6 989 067 million.<sup>35</sup> The ongoing conflicts in Somalia, Democratic Republic of Congo, South Sudan, Cameroon, amongst other factors, have contributed to the increase in the number of refugees on the continent.<sup>36</sup> The majority of these refugees are hosted in the East and Horn of Africa and the Great Lakes region mostly in Uganda (1.5 million), Sudan (1.1 million) and Ethiopia (821 300). The UNHCR has started using the Washington Group Short Set of Questions on Disability to identify persons with disabilities in the refugee population during their data collection and needs assessment processes.<sup>37</sup> Whilst these efforts have not yet yielded comprehensive statistical data on the prevalence of disability within the refugee population in Africa, the data that is starting to emerge provides important insights on the increased representation of persons with disability in this group. The 2020 UNHCR analysis of refugee vulnerability in Uganda for instance found that 25 per cent of refugees

31 At the time of writing the Protocol was still not yet in force as it had not yet attained the required number of 15 ratifications.

32 Arts 11 and 12 respectively.

33 The body that is responsible for interpreting the provisions of the International Covenant on Civil and Political Rights.

34 HCR, General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life,\* 30 October 2018, UN Doc CCPR/C/GC/36 (2018) para 7 [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf) (accessed 29 January 2024).

35 UNHCR 'Global Report 2021: The stories behind the numbers' (2021) 10.

36 UN 'Peace and security: From the field: story of an aid worker trying to survive in Gaza' (28 January 2024) <https://news.un.org/en/news/topic/peace-and-security> (accessed 29 January 2024).

37 UNHCR 'Working with persons with disabilities in forced displacement: Need to know guidance' (2019) 14.

experience a mild disability, 6.4 per cent a severe disability and 0.7 per cent a profound disability.<sup>38</sup> The Southern Africa UNHCR office presented during the 2023 'Annual Disability Rights Conference' that based on the data they have been collecting 0.6 per cent or 7 142 of the 1 071 782 of the registered population of refugees in Southern Africa has a profound disability.

The available data is rarely disaggregated according to albinism. What is known about refugees with albinism is derived from localised data collected by civil society and humanitarian organisations providing services to persons with albinism in refugee camps.<sup>39</sup> Recent reports have shown that there were at least 73 persons with albinism in one of the refugee camps in East Africa and 56 in another, 30 of whom were children.<sup>40</sup> It would appear from these sources that Uganda, Malawi and South Africa and Kenya host the largest number of refugees with albinism in Africa.

### 3.2 Profile and drivers of migration of refugees with albinism in Africa

There are a number of published first-hand accounts by persons with albinism and their families on their experiences in refugee camps in Africa.<sup>41</sup> Personal accounts have been written by persons with albinism and their families based at the following refugee camps and settlements, amongst others: Nakivale Refugee Settlement in Isingiro District in Western Uganda; Dzaleka refugee camp in Malawi; Kajaga refugee transit camp in Burundi; Rwamwanja Settlement camp in Uganda; Kakuma refugee camp in Kenya; and Nyarugusu Camp in Tanzania.

38 Office of the Prime Minister et al 'Uganda: Analysis of refugee vulnerability in Uganda: Working Paper 2020' (2020) at 16 20. Uganda hosts more refugees than any other country in Africa. At the time of the writing of the report it hosted more than 1.4 million this could explain the higher concentration of persons with disabilities recorded.

39 People with albinism on the move (n 1 ) 23. G Mbatha-Raw 'Uncovering the lives of the refugees inside Uganda's Rwamwanja Settlement' *British Vogue* 12 June 2019 <https://www.vogue.co.uk/article/albinism-awareness> (accessed 3 March 2023).

40 People with albinism on the move (n 1 ) 23.

41 RP Larubi 'A living hell the plight hopelessness of refugee albinos inside Nakivale Camp' (2018) <https://softpower.ug/a-living-hell-the-plight-hopelessness-of-refugee-albinos-inside-nakivale-camp/> (accessed 29 January 2024); S Larson 'Magic, mutilation, and murder: A case for granting asylum to Tanzanian nationals with albinism' (2011) 2 *Pace International Law Review Online Companion* 1 at 2; M Seepersaud 'The plight of Tanzanian persons with albinism: A case for international refugee and asylum procedure reform' (2017) 32 *Emory International Law Review* 115; AD Ikuomola "'We thought we will be safe here": Narratives of Tanzanian Albinos in Kenya and South-Africa' (2015) 9 *African Research Review* 37; Reliefweb 'Through albino eyes. The plight of albino people in Africa's Great Lakes region and a Red Cross response' (2009); J Bota "'A harvest' in Malawi: The position of albinism in refugee law' Masters' thesis, University of Cape Town, 2020; 'Joy, a refugee with albinism, fights against discrimination' *InfoMigrants* 23 June 2020 <https://www.infomigrants.net/en/post/25554/joy-a-refugee-with-albinism-fights-against-discrimination> (accessed 29 January 2024); P Chikwela 'Malawi: Refugees with albinism find succour in camp' (2015)

Thematic analysis of these accounts, corroboratory reports by humanitarian organisations working on the ground and recent submissions made to the UN Independent expert on albinism in response to her call for input on human rights challenges of people with albinism on the move shows that refugees with albinism are mainly from the Democratic Republic of Congo, United Republic of Tanzania, Burundi, Mali, Somalia, Ethiopia, Rwanda, Malawi and Cameroon.<sup>42</sup> Refugees with albinism like most others often stay in refugee camps or settlements for lengthy periods of time in excess of seven years.

Persons with albinism and their families mainly seek refuge outside their country due to fear of or experiences of extreme forms of persecution, discrimination, marginalisation, perversive social exclusion, isolation, stigma, grave physical attacks, abduction, ritual rape and other harmful practices.<sup>43</sup> Violent attacks against persons with albinism have been recorded in more than 30 African countries since 2006 and are still ongoing in parts of the continent with the most recent report being in Zambia in March 2022.<sup>44</sup> These attacks and the ensuing sense of insecurity they create are one of the primary motivations behind persons with albinism in Africa and their families leaving their countries and seeking refuge in other countries.<sup>45</sup> Another commonly cited reason for migrating by persons with albinism is aggravated forms of discrimination by their communities as a result of deep-rooted misconceptions of the condition.<sup>46</sup> The vulnerability of persons with albinism to attacks and other human rights violations also appears to increase during volatile periods such as wars, civil unrests and

<https://reliefweb.int/report/malawi/malawi-refugees-albinism-find-succour-camp> (accessed 29 January 2024); B Ntwari 'UNHCR helps young Congolese albino on the run from witchcraft' UNHCR (14 October 2013) <https://www.unhcr.org/news/stories/2013/10/525be9c89/unhcr-helps-young-congolese-albino-run-witchcraft.html> (accessed 29 January 2023); S Nalubega 'Refugees with albinism brave the scorching sun and mud for a living' *The Lutheran World Federation* 15 November 2017 <https://uganda.lutheranworld.org/content/refugees-albinism-brave-scorching-sun-and-mud-living-106> (accessed 29 January 2024); Mbatha-Raw (n 39); S Peter 'Albino refugees: The unheard, need to be heard!!!' <https://www.linkedin.com/pulse/albino-refugees-unheard-need-heard-ebonga-simon-peter-ebonga-/>; Resilience Action 'Differently Abled-Refugees Living With Albinism' (17 June 2022) <https://www.resilienceaction.net/post/differently-abled-refugees-living-with-albinism> (accessed 30 January 2024).

42 Independent Expert on the Rights of Persons with Albinism 'Call for input | Special procedures: Human rights challenges of people with albinism on the move' <https://www.ohchr.org/en/calls-for-input/2022/human-rights-challenges-people-albinism-move> (accessed 30 January 2024).

43 As above.

44 I Ero et al 'People with albinism worldwide: A human rights perspective' (13 June 2021) [https://www.ohchr.org/sites/default/files/Documents/Issues/Albinism/Albinism\\_Worldwide\\_Report2021\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Albinism/Albinism_Worldwide_Report2021_EN.pdf) (accessed 3 December 2022); 'Reported Attacks of Persons with Albinism (PWA) – 1 Page Summary Date of report: January 12, 2023' <https://underthesamesun.com/sites/default/files/Attacks%20of%20PWA%20-%201%20page%20%286%29.pdf> (accessed 30 January 2024).

45 PC Aguirregabiria 'Interview with François Akilimani, young Albino from DRC' *JRS* 19 March 2022 <https://ear.jrs.net/en/story/interview-with-francois-akilimani-young-albino-from-drc/> (accessed 7 March 2023).

46 IBA "'Waiting to disappear" International and regional standards for the protection and promotion of the human rights of persons with albinism (June 2017).

natural disasters.<sup>47</sup> In other cases, persons with albinism and their families leave their countries in order to try and access critical healthcare services mainly skin cancer treatment which they are unable to access in their country of origin.

### 3.3 Experiences of refugees with albinism in refugee camps in Africa: Human rights concerns

There are several human rights challenges experienced by refugees with albinism and their families, of which, the most cited are discussed below.

The discrimination against persons with albinism and their families rooted in harmful erroneous superstitions and beliefs about the condition often persists in refugee camps and settlements.<sup>48</sup> Refugees with albinism in camps and settlement often report being called derogatory names, being harassed, bullied, and segregated by fellow residents.<sup>49</sup>

Continued insecurity and threats of physical attacks from within and outside the camps are a grave concern for refugees with albinism forcing some refugees to relocate several times and others to opt to return to their countries of origin despite the persecution experienced there.<sup>50</sup> Refugees with albinism are seen as 'soft targets' and are hence disproportionately subjected to the burglaries, sexual assault, violence, and possibly trafficking which are a huge concern for many refugee camps.<sup>51</sup> There have also been disturbing anecdotal reports of persons with albinism disappearing from refugee camps under suspicious circumstances and reports of attempted kidnappings.<sup>52</sup>

Refugees with albinism often struggle to access sunscreen, protective clothing, dermatology services, sun behaviour protective information and other goods and health services they require related to their skin care

47 People with albinism on the move (n 1 above).

48 A Ikuomola "“We thought we will be safe here”": Narratives of Tanzanian albinos in Kenya and South Africa' (2015) 9 *African Research Review* 37; L Masina 'UN Resettles Albino Refugees Due to Threats in Malawi' *VOA* 12 June 2017 <https://www.voanews.com/a/un-resettles-albino-refugees-threats-malawi/3897282.html> (accessed 12 September 2022).

49 Online Key Informant Interviews with refugees in Nakivale and Rwamwanja settlement camps.

50 n 41 above; B Dachs 'Albino refugees warned to avoid certain areas in Malawi' *Catholic News Service* 2016 <https://www.archbalt.org/albino-refugees-warned-to-avoid-certain-areas-in-malawi/?print=print> (accessed 28 November 2022); Chikwela (n 41); 'Albino refugees resettled in North America due to continued attacks' *The Namibian* 14 June 2017 <https://www.namibian.com.na/165724/archive-read/Albino-refugees-resettled-in-North-America-due-to> (7 March 2022)

51 n 41 above; P Ngunde 'UNODC and Malawi launch new measures to combat human trafficking among refugees' (March 2021) <https://www.unodc.org/unodc/en/human-trafficking/Webstories2021/trafficking-in-refugee-camp-malawi.html> (accessed 27 March 2022).

52 People with albinism on the move (n 1) 13.

increasing their chances of getting skin cancer.<sup>53</sup> Where such health goods and services are provided it is often by civil society organisations and humanitarian organisations sometimes in partnership with UNHCR.<sup>54</sup> This has often led to inconsistencies and interruptions in access to these services and inferior services being rendered. Some refugees in camps have raised complaints about the quality of some of the sunscreen provided which does not contain the right levels of SPF for the particular climate. In situations where refugees develop precancerous lesions and moles because of sustained exposure to the sun, the overburdened and low resourced clinics in many refugee camps are unable to provide relevant treatment. Ophthalmological and optometric services are also rarely provided with many refugees with albinism never having had the opportunity to get their eyesight checked since getting to the refugee camp. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) made similar finding with regards to child refugees with albinism in Malawi following a fact-finding mission to the country in 2022. ACERWC pointed out that children with albinism particularly those in rural and remote areas and refugee camps in Malawi experience challenges with regards to accessing ophthalmologists and dermatologists.<sup>55</sup>

According to the refugees interviewed by the authors, the monetary allowance provided to refugees with albinism was for the greater part not adequate to maintain an adequate standard of living, resulting in many living in abject poverty.<sup>56</sup> This allowance often did not take into consideration the additional expenses incurred by persons with albinism because of their condition such as purchasing sunscreen and protective clothing.

Where refugees are allowed to work within or outside the camps, they struggle to earn a livelihood as many employers are reluctant to employ persons with albinism. When they do find employment, it is outdoor work that puts their health at risk.

The lack of recognition of refugees with albinism as a particularly vulnerable group in need of additional protection has been highlighted in many accounts. Humanitarian agencies working in the camp do not always address the specific issues related to albinism nor appreciate the vulnerability of this group, resulting in reasonable accommodation not

53 Mbatha-Raw (n 39).

54 Chikwela (n 41); People with albinism on the move (n 1) 12.

55 Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) –Working Group on Children with Disabilities in Africa – On the Fact-Finding Mission on the Situation of Children with Albinism in The Republic of Malawi and Status of Implementation of ACERWC'S Decision on Communication No 004/Com/001/2014 Submitted by the IHRDA against the Republic of Malawi 29-31 August 2022 at 15.

56 People with albinism on the move (n 1 above) 13-14.



always being provided when required and programmes targeting this group not being implemented.

Child refugees with albinism form a particularly vulnerable group. Their right to education is often compromised with many not attending school at all and a number dropping out due to bullying and failure to provide reasonable accommodation, including assistive devices such as monocular or magnifying glasses.<sup>57</sup>

Whilst more research still needs to be done, the pattern that emerges is that persons with albinism and their families who flee their countries to seek refuge in other African states are not guaranteed they will have a better life from the one that they have fled. Many persons with albinism who have been forced to flee their countries continue to suffer discrimination, are vulnerable to attacks and denied access to social services, education and healthcare in the refugee camps.

## 4 Conclusion

There is a dearth of research on refugees with albinism in Africa. The growing jurisprudence shows that persons with albinism fleeing their countries due to serious discrimination or attacks against those with albinism in their country may qualify as refugees. Although, as this commentary has shown, there are a number of refugees with albinism in Africa, there is not enough information to determine whether they have been granted asylum on the basis of their albinism or the general situation of unrest in the countries where most the refugees come from.<sup>58</sup> While international laws and standards show that refugees with albinism are entitled to all the rights contained in international human rights treaties, the rights of refugees with albinism appear to have been largely neglected in camps across the region. This commentary puts a spotlight on the human rights situation of this group and shows the international and regional framework which if applied to the context of refugees with albinism can provide invaluable protection and address some of the human rights concerns raised.

<sup>57</sup> Larubi (n 41).

<sup>58</sup> Information provided to the authors by regional UNHCR officer.

# BOOK REVIEW

T CHATAIKA (ED) *THE ROUTLEDGE HANDBOOK OF DISABILITY IN SOUTHERN AFRICA* (2019)

Yvette Basson\*

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(Routledge, 2020) 386 pages, ISBN: 9780367580599

## 1 Introduction

It may be argued that the legislative foundation of disability rights in Southern Africa has improved significantly in the last decade. Many Southern African countries have signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD),<sup>1</sup> and the adoption of the African Disability Protocol<sup>2</sup> by the African Union in 2018 was a significant step towards achieving equality for persons with disabilities in Africa. The lived experiences of persons with disabilities in Southern Africa and the continued barriers to the inclusion of persons with disabilities in various spheres of life tell a somewhat different story.

To date, there has been a dearth of works emphasising the daily life of persons with disabilities living in the Global South.<sup>3</sup> While legislative and policy developments are necessary, one cannot ignore the fact that societal attitudes towards persons with disabilities cannot be legislated away. An emphasis on investigating the real-life position of persons with disabilities in the Global South is therefore critical.

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

2 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (29 January 2018).

3 One of the notable exceptions is S Grech (ed) *The critical handbook disability in the Global South* (2016).

The *Routledge handbook of disability in Southern Africa* is a cross-cutting, interdisciplinary volume which aims to provide insight into the lived experience of disability in the Global South. The *Handbook* presents the reader with a wide array of material, from first-hand accounts from persons with disabilities to theoretical perspectives and the exegesis of inclusion of persons with disabilities in various spheres of life in Southern Africa.

The *Handbook* is arranged into themes, and the work therein follows these themes in their subject matter. These themes are: disability inclusion, ICT and sustainable development; access to education; religion, gender and parenthood; tourism, sports and accessibility; and narratives from disability activists on societal attitudes towards disability, media advocacy, accessible housing and social exclusion. Each of these themes covers a topic which has historically proved problematic for persons with disabilities in Southern Africa.

The overarching theme and purpose of the *Handbook* is to highlight the need for inclusion of persons with disabilities in all aspects of life. A clear need for the prioritisation of persons with disabilities when making decisions on education, tourism, sports, and many other aspects of life becomes apparent upon a reading of the *Handbook*. Each chapter in turn highlights aspects of the broader themes and elucidates the challenges and successes experienced in these.

## 2 Overview

Within the broad themes named above, the *Handbook* is divided into seven parts, each of which contain a number of chapters. These chapters are written to further the understanding of the broader theme within a specific Southern African country or region.

Part 1: 'Disability inclusion and sustainable development' is arguably the roadmap to the rest of the *Handbook*. Part 1 touches on key issues such as the history of the compilation of the *Handbook*, the use of certain terminology and ultimately focuses on disability inclusion and the promotion of sustainable development. Tsitsi Chataika writes in Chapter 1 that the chapters in the *Handbook* are 'extraordinary opportunities to make general observations about the field and to stress, rank, order or otherwise analyse various perspectives that are most important to understanding the subject matter at hand'. Each subsequent chapter is therefore not meant to be a comprehensive discussion of the subject matter, but rather to initiate conversations and highlight areas for improvement.

In Chapter 2, Mari Koistinen considers the mainstreaming of disability based on studies conducted in Malawi and Mozambique in developmental projects by Non-Governmental Organisations (NGOs),

which were spearheaded by the Disability Partnership Finland (DPF). The argument is made that disability is a developmental issue, and the author emphasises certain issues that have been found to be critical in mainstreaming disability in the aforementioned countries. An example of such an issue is the provision of training on the rights of persons with disabilities.

Similarly, Nkhasi Sefuthi and Masekana Sekoankoetla reflect on the development of a National Disability Mainstreaming Plan in Lesotho. Chapter 3 provides a historical perspective of the position of persons with disabilities in Lesotho and then the historical process of developing the National Plan. This process, and the concomitant challenges and successes, can be used by other countries and fora which are attempting to mainstream disability through the implementation of a national policy.

Nehemiah Chivakandikva, in Chapter 4, identifies how the power and agency of youth with disabilities can be grown through the use of participatory theatre. Theatre for Development (TfD) is an important tool in developing characteristics such as creativity, self-esteem and civic mindedness. The author then interrogates the lack of TfD discourse in Zimbabwe, and the consequences of such for youth with disabilities in Zimbabwe.

Chapter 5 considers the development and implementation of policies aimed at the social inclusion of persons with disabilities during conflict transformation. Rebecca Irvine draws on the experiences of South Africa, Mozambique, Zimbabwe and Angola in conflict transformation and how these processes have informed the relationship between persons with disabilities and sustainable communities. Countries having undergone conflict transformation present a unique opportunity for change and to address historic inequalities.

In the final chapter in Part 1, Chapter 6, Jorge Manhique and Anthony Giannoumis discuss the experience of persons with disabilities in Mozambique when using information and communication technology (ICT). Accessibility of this technology is established as a condition for enjoying all substantive rights as set out in the CRPD. The use of ICT is thus discussed in the context of the implementation of the CRPD in Mozambique with support from empirical data obtained from key stakeholders in ICT.

The *Handbook* builds on the issues of inclusion and sustainability in Part 2: 'Access to education'. The authors of the chapters in this part discuss various issues related to access to education of persons with disabilities, including early childhood development, primary education and secondary education. Christine Peta reflects on the outcomes of an ongoing study of women with disabilities in Zimbabwe and their access to early childhood education in Chapter 7. The author considers the access to

early childhood education of 15 women with disabilities and the consequences of a lack of such access on outcomes in later life.

The inclusion of Deaf children into mainstream and special schooling in Zimbabwe is analysed in Chapter 8 by Martin Musengi and Barbra Nyangairi. The schooling experience of 18 Deaf school-leavers is shared, with particular emphasis on which schools were inclusive of children with disabilities. The training of teachers and the availability of teaching materials is discussed insofar as it affects the participation of Deaf children in learning activities.

The role of the International Classification of Functioning (ICF) in the promotion of inclusive education in Zambia forms the focus of Chapter 9. A group of researchers (Gloria Azalde, Jacob RS Malungo, Nchimunya Nkombo, Sarah Banda, Ravi Paul, Chibesa Musamba and Arne H Eide) analysed the data collected in the Zambia National Disability Study and concludes that the ICF can create opportunities for children with disabilities to reach their full potential through the creation of enabling environments in schools.

In Chapter 10, Sitshengisiwe Gweme and Tsitsi Chataika consider the implementation of the special class model in three randomly selected primary schools in Hwange, Zimbabwe. The selection criteria for the special class model are dyslexia and dyscalculia. The attitudes towards these special learning difficulties and the lack of understanding of these criteria are examined and the impact on access to the special class model is interrogated.

Part 3: 'Inclusion in higher education'. The continued exclusion of persons with disabilities from higher education in Southern Africa is emphasised in this part of the *Handbook*. To this end, Knowledge Matshedisho considers the policies and provision of support to students with disabilities in Southern Africa. Chapter 11 emphasises the difficulties in accessing higher education and the exclusive nature thereof. The international and national disability rights templates are considered in the context of disability and access to higher education.

Chapter 12 shows the level of inclusion of persons with disabilities in higher and further education institutions in South Africa. Anlia Pretorius, Diane Bell and Tanya Healey focus on the lived experience of students with disabilities in higher education. In particular, the argument is made for a framework relating to inclusivity and accessibility that can be implemented in the higher and further education sector.

Part 4: 'Disability, employment, entrepreneurship and community based rehabilitation' emphasises the importance of sustainable development in employment and entrepreneurship issues related to persons with disabilities. Chapter 13 explores the impact of community-

based rehabilitation (CBR) for inclusive social development in Southern Africa. Kayi Ntinda, Elias Mpofu, Helen Dunbar-Krige, Messiah Makuane and Veronica Umeasiegbu consider the experience of several Southern African countries in implementing CBR and the consequent impact on full participation of persons with disabilities in society.

The employment options for persons with disabilities are explored in Chapter 14. John Charema considers the impact of a range of institutions and factors which influence the employment of persons with disabilities in Southern Africa and draws lessons on these based on specific examples from Southern African countries. The issues of employment and social discrimination are also explored, and the role that self-employment and entrepreneurship can play in alleviating these challenges.

Phillipa Mutswanga, in Chapter 15 considers the empowerment of Deaf persons through guidance and counselling on their socio-economic potential. Mutswanga identifies disparities between the chosen educational subjects and the expressed vocational desires of 50 Deaf students and uses a framework to identify these disparities.

Part 5: 'Religion, gender and parenthood' focuses on these socially loaded issues in the *Handbook*. The intersection of religion, gender and parenthood with disability are explored within the context of inclusive sustainable development. The impact of Judaeo-Christian and African traditional religio-cultural practices on persons with disabilities in Zimbabwe is explored by Francis Machingura in Chapter 16.

In Chapter 17, Elina Lehtomäki, Mari-Anne Okkolin and Magreth Matonya consider the intersection of gender and disability in the development of education in Tanzania. The authors argue that the intersection of gender and disability in the development of inclusive education policies requires renewed attention on a global scale. The analysis of gender and disability could then inform policies related to education and equity in Southern Africa.

The concept of intersectionality is further explored by Tafadzwa Rugoho and France Maphosa in Chapter 18. The authors examine the reasons for the continued marginalisation of women with disabilities in Zimbabwe. The implementation of laws and policies relating to gender and disability is interrogated by the authors, who identify certain areas in which women with disabilities in Zimbabwe can achieve better self-representation.

Chapter 19, by Joanne Neille, identifies the challenges faced in the identity formation of rural based persons with various disabilities when seeking to exercise their sexuality, intimate partner experiences and parenthood, including pregnancy experiences. The findings of this empirical study with 30 participants from South Africa include the

existence of both contextual and stereotypical beliefs about the sexuality of persons with disabilities and a higher risk of experiencing violence. The implementation of human rights policies and how these in practice translate contextual beliefs on sexuality, intimacy and parenthood is questioned.

Part 6: 'Tourism, sports and accessibility'. Within Part 6, the need to increase accessibility to sports is discussed, as is the continued discrimination against persons with disabilities in the tourism industry. Chapter 20 provides insight into the disability policies implemented in the tourism industry in Southern Africa. Oliver Chikuta and Forbes Kabote refer to policies from Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe and the implementation of legal frameworks related to persons with disabilities in tourism in each.

Bhekuzulu Khumalo, Johan van Heerden and Thomas Skalko analyse a survey conducted on wheelchair basketball facilities in Zimbabwe in Chapter 21. The authors used an assessment tool designed to set standards for accessibility of buildings by persons with disabilities. Eleven wheelchair basketball facilities were inspected. The authors then make recommendations based on these inspections which deal primarily with the inclusion of persons with disabilities when designing such facilities.

The issue of access to assistive devices for children with posture support needs is discussed by Margaret Linegar, Megan Giljam, Shona McDonald and Ronique Walters in Chapter 22. The need for a holistic approach to mobility needs and the implementation of such an approach in South Africa is discussed. The authors put forward the argument that the use of an appropriate wheelchair is a fundamental right and is fundamental to the well-being of a person with a mobility impairment.

Part 7: 'Narratives from disability activists' is the culmination of the *Handbook*. Each of the following chapters provides the lived experience of a person who is deeply involved in the disability rights movement in various capacities. These narratives range from the story of a life lived as a person with a disability (by Irene Sithole in Chapter 23) to the establishment of a television programme aimed at disability advocacy in Zimbabwe (in Chapter 24, by Lovemore Chidemo, Agness Chindimba and Lincoln Matongo). The importance of accessible housing for persons with disabilities is emphasised by disability advocate Edmore Masendeke in Chapter 25. The author gives scope to the right to live independently as enshrined in article 19 of the CPRD.

The story of evolution from legal practitioner to disability rights activist is told by Abraham Mateta in Chapter 26. The author is a blind person, and he shares his own experience as a person with a disability who is an activist. Another deeply personal story is shared by Rachel Kachaje

in Chapter 27. Therein, the author details how her Christian faith has informed and guided her life, included becoming disabled and living a purpose-driven life as a woman with a disability in Malawi.

The conclusion of the *Handbook* is found Chapter 28, where the editor draws together the lessons, best practices, challenges and opportunities highlighted by the authors. Tsitsi Chataika expresses the hope that readers are challenged by the content of the *Handbook* and are inspired to engage in their own disability rights advocacy in the future.

### 3 Conclusion

In many instances when disability rights discourse is published, it is bogged down by legalese or politically loaded language. While such writing has its place, this *Handbook* provides a much more accessible and, often, emotive glimpse into the need for inclusion of persons with disabilities in all aspects of society. The overwhelming impression is one of authenticity and empathy, without being condescending or treating persons with disabilities as 'lesser than'.

The authors are honest and realistic about the existing challenges and ongoing marginalisation facing persons with disabilities, without falling into the pessimistic trap that nothing can be changed. The works in the *Handbook* provide a plethora of talking points for all manner of interested parties, inter alia, policymakers, legislators, academics, politicians, activists, and healthcare professionals. The *Handbook* makes an important and significant contribution to disability rights discourse that includes the lived experiences of persons with disabilities. It can therefore be said that the *Handbook* is essential reading for any person involved in disability activism in Southern Africa.

The authors and editor are to be commended on a well-conceived, topical discussion on disability rights discourse in the Global South.