

African Disability Rights Yearbook 2018

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 2018

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EDITORIAL

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

Section A of this volume features six articles by: Heléne Combrinck on criminal incapacity and psychosocial disability in South African law; Willene Holness and Sarah Rule on legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in Kwazulu-Natal; Felicity Kayumba Kalunga and Chipso Mushota Nkhata critique of the case of *Gordon Maddox Mwewa and Others v Attorney General and Another*; Louis Oyaro on ubuntu as a viable framework for realisation of legal capacity in sub-Saharan Africa; Robyn White and Dianah Msipa on reasonable accommodations for people with communication disabilities; and Azubike Onuora-Oguno on the role of non-state actors in promoting access to justice of persons with disability.

The majority of articles in this section emanate from papers which were presented at the conference on the right to legal capacity and access to justice for persons with disabilities that was convened by the Centre for Human Rights in November of 2017. The papers were subsequently reworked for publication in the Yearbook.

Section B contains reports on five new set of countries thus adding to the stock of countries that were reported on in previous volumes of the Yearbook: The country reports in this volume are: Bénin by Marianne Séverin, Union des Comores by Youssouf Ali Mdahoma, Mauritania by Kedibone Chembe and Babatunde Fagbayibo; Rwanda by Olwethu Sipuka and the Gambia by Satang Nabaneh

Section C contains two commentaries by Benyam Dawit Mezmur on the rights of persons with albinism through the lens of *X v United Republic of Tanzania* and Ngozi Chuma Umeh on progress towards inclusive primary education in selected West African countries.

The 2018 volume ends with a book review of *The Routledge Handbook of Disability Law and Human Rights* edited by Peter Blanck and Eilíónoir Flynn. The book is reviewed by Heléne Combrinck.

The financial assistance of the Open Society Institute Budapest Foundation (OSI) a Hungarian charitable foundation within the Open Society Foundations (OSF), in particular the Higher Education Support Project (HESP) is gratefully acknowledged.

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SECTION A: ARTICLES

RATHER BAD THAN MAD? A RECONSIDERATION OF CRIMINAL INCAPACITY AND PSYCHOSOCIAL DISABILITY IN SOUTH AFRICAN LAW IN LIGHT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Helène Combrinck*

Summary

Article 12(2) of the Convention on the Rights of Persons with Disabilities requires the recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Such acknowledgment implies that state parties to the Convention, including South Africa, will have to reassess their existing legal provisions relating to legal capacity. These legal measures typically include a rule to the effect that where a person accused of a criminal offence lacks criminal capacity as a result of an intellectual or psychosocial disability, he or she cannot be held liable in criminal law (often referred to as the 'insanity defence'). This article examines the potential influence of the recognition of universal legal capacity in the CRPD on the insanity defence, with specific emphasis on the current position in South African law. It commences with an overview of the normative content of article 12 of the CRPD as it relates to the notion of criminal capacity and also considers the interpretations of this provision as proposed by academic commentators. These interpretations may be described as, first, an abolitionist position (calling for both the elimination of the insanity defence and the concomitant mandatory committal of the accused to forensic psychiatric institutions) and, second, an integrationist position (suggesting the development of disability-neutral rules on criminal capacity). A third approach strongly argues in favour of retaining the insanity defence while at the same time reconsidering the institutionalisation of an accused person following an acquittal based on this defence. The present South African legislative dispensation regarding criminal capacity is subsequently examined and measured against the CRPD. The article concludes with a number of observations in view of potential law reform.

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H Combrinck 'Rather bad than mad? A reconsideration of criminal incapacity and psychosocial disability in South African law in light of the Convention on the Rights of Persons with Disabilities' (2018) 6 *African Disability Rights Yearbook* 3-26 <http://doi.org/10.29053/2413-7138/2018/v6a1>

1 Introduction

The guarantee of ‘universal legal capacity’ in article 12 of the Convention on the Rights of Persons with Disabilities¹ (CRPD) requires state parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. In most jurisdictions this implies a far-reaching overhaul of existing laws.² South Africa, as party to the Convention,³ is no exception in this regard.

Certain aspects of universal legal capacity, such as the development of supported decision-making mechanisms⁴ in line with article 12(3), already have generated a burgeoning body of literature,⁵ especially in light of the interpretive guidelines adopted by the Committee on the Rights of Persons with Disabilities (CRPD Committee). However, one issue that has drawn less attention from academic commentators (and, arguably, from the CRPD Committee itself), is the implications of the CRPD for the concept of ‘fitness of an accused⁶ person to stand trial’ as well as for the so-called ‘insanity defence’.⁷

The notion of fitness to stand trial generally refers to the ability of the accused, at the time of the criminal trial, to follow the proceedings, to instruct her legal representative and offer a proper defence.⁸ Criminal capacity, on the other hand, relates to the question of whether the accused had the ‘mental elements’ necessary to be held responsible,⁹ such as the ability to appreciate the wrongfulness of her actions at the time of the

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

2 See eg CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 para 7.

3 South Africa ratified the CRPD and its Optional Protocol on 3 April 2008 and 3 May 2008, respectively.

4 See sec 2.3.2 below.

5 See eg L Series ‘Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights’ (2015) 5 *European Yearbook of Disability* 4; AS Kanter *The development of human rights under international law* (2015) 265; P Gooding ‘Navigating the “flashing amber lights” of the right to legal capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to major concerns’ (2015) 15 *Human Rights Law Review* 67-70; L Series et al ‘Legal capacity: A global analysis of reform trends’ in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* (2017) 137. This by no means is an exhaustive list.

6 Exact terminological consonance is not readily achieved across jurisdictions. Eg, in South African law the term ‘defendant’ (used in the US in the context of criminal proceedings) is limited to civil law. ‘Accused’, therefore, is used here to avoid confusion.

7 As indicated by the phrase itself, this defence usually is associated with psychosocial disability. For an explanation of the term ‘psychosocial disability’, see World Network of Users and Survivors of Psychiatry *Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 9. With regard to the insanity defence generally, see ML Perlin *A prescription for dignity: Rethinking criminal justice and mental disability law* (2013) 165.

8 E du Toit et al *Commentary on the Criminal Procedure Act* (2017) ch13 8.

9 P Bartlett ‘The United Nations Convention on the Rights of Persons with Disabilities and mental health law’ (2012) *Modern Law Review* 775.

commission of the offence.¹⁰ Both constructs therefore rely on an assessment of the accused's mental capacity (albeit at different stages).¹¹

A further common element is that in many criminal justice systems, upon a finding of unfitness to stand trial or of criminal incapacity, the court must order a special disposition in respect of the accused. This may include detention until the accused is fit to stand trial; indefinite detention (accompanied by involuntary treatment) in a psychiatric hospital; or diversion to mental health care services. The perceived 'dangerousness' of the accused (to herself or others) often provides the rationale for such special measures.

The insanity defence has been called into question for its non-compliance with article 12 of the CRPD, specifically in respect of the disregard of the principle of universal legal capacity. The CRPD Committee further has expressed the view that systems of special disposition, which typically permit the detention of persons with psychosocial disabilities based on their disability, constitute a violation of article 14 of the Convention,¹² which explicitly states that the existence of a disability under no circumstances justifies a deprivation of liberty.¹³

The article accordingly interrogates the implications for the insanity defence¹⁴ of the recognition of universal legal capacity and the prohibition of disability-based deprivations of liberty. It first provides a brief overview of article 12, with reference to the drafting process and the contents of the article. It then more closely examines the notion of 'legal capacity' and also considers the interpretive guidance provided by the CRPD Committee in General Comment 1, adopted in 2014.¹⁵ The article further considers different interpretations of the relevant provisions by selected academic commentators. It next turns to the *status quo* in South Africa in respect of criminal incapacity as a result of psychosocial disability, and attempts to measure the applicable provisions against guidelines provided under the CRPD. Ultimately, the article does not seek to propose definitive solutions, but rather to explore the 'borderlines' around the insanity defence (in Perlin's words),¹⁶ thereby providing a basis for future debate.

10 See discussion in sec 4.2 below.

11 The two concepts may also overlap in instances where the accused lacks both the ability to stand trial and criminal capacity.

12 Art 14 sets out the right to liberty and security of persons with disabilities.

13 Art 14(1)(b).

14 The scope of the article does not permit an in-depth exploration of unfitness to stand trial.

15 CRPD Committee (n 2).

16 Perlin argues that the insanity defence provides insight into perceptions on social, political and behavioural issues that go beyond the question of individual criminal liability. For example, it clarifies views about the relationship between mental health and the law; ML Perlin "The borderline which separated you from me": The insanity defence, the authoritarian spirit, the fear of faking and the culture of punishment' (1997) 82 *Iowa Law Review* 1377-1378.

2 Article 12 of the Convention on the Rights of Persons with Disabilities

2.1 Background

Article 12 has been described as being ‘at the core’ of the Convention¹⁷ – an embodiment of the paradigm shift¹⁸ inherent in this document.¹⁹ The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity which must be upheld for persons with disabilities on an equal basis with others.²⁰

Not surprisingly, the recognition of legal capacity of persons with disabilities emerged as one of the most controversial areas of debate during the preparatory negotiations of the CRPD.²¹ A particularly thorny question was whether the term ‘legal capacity’ should be understood to include both the capacity to be a holder²² of rights and the capacity to be an actor under the law.²³ The first component, referred to as ‘legal standing’,²⁴ entails being viewed as a person before the law,²⁵ which in turn entitles the person to full protection of her rights by the legal system.²⁶ The second component, known as ‘legal agency’, is the capacity to act on or exercise these rights,²⁷ which involves the recognition of the person as an agent with the power to engage in transactions and create, modify or

17 Centre for Disability Law and Policy NUI Galway (CDLP) *Submission on legal capacity to the Oireachtas Committee on Justice, Defence and Equality* (2011) 5.

18 See Glen for a discussion of the origin of the term ‘paradigm shift’; KB Glen ‘Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond’ (2012) 44 *Columbia Human Rights Law Review* 96-97.

19 S Trömel ‘A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities’ in G Quinn, L Waddington & E Flynn (eds) *European yearbook of disability law* (2009) 125.

20 CRPD Committee (n 2) para 8.

21 Trömel (n 19) 126.

22 Eg, the capacity to own property; Council of Europe (COE) Commissioner for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (2012) CommDH/IssuePaper (2012) 2 7. See also generally A Dhanda ‘Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?’ (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 439-440 442-444; RD Dinerstein ‘Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision-making’ (2012) 19 *Human Rights Brief* 8.

23 CRPD Committee (n 2) para 12.

24 Also known as ‘passive legal capacity’. See C de Bhailis & E Flynn ‘Recognising legal capacity: Commentary and analysis of article 12 CRPD’ (2017) *International Journal of Law in Context* 10.

25 CRPD Committee (n 2) para 14.

26 As above.

27 Eg, the power to dispose of one’s property and claim one’s rights before a court; COE Commissioner for Human Rights (n 22) 7. This is also known as ‘active legal capacity’.

end legal relationships.²⁸ It is this latter component that is frequently denied or diminished in the case of persons with disabilities.²⁹

Certain delegates to the CRPD negotiations were in favour of a more limited understanding of legal capacity, and attempts accordingly were made to reduce the provisions in article 12 to 'legal standing' only,³⁰ which would have lowered the standard of human rights protection in the Convention.³¹ While the final document as adopted is free of such limitations, it is worth noting that several of the reservations and interpretive declarations subsequently entered by state parties specifically relate to the interpretation of article 12.³²

Kanter observes that the history of the drafting process reflects fundamental differences about the 'very nature of human rights'.³³ Significantly, the 'battles of meaning'³⁴ that arose during the negotiations have continued beyond the adoption of the Convention itself and can still be discerned, for example, in responses to General Comment 1 of the CRPD Committee.³⁵

2.2 Brief overview of contents

Article 12(1) first reaffirms that all persons with disabilities have the right to 'recognition everywhere as persons before the law'. According to the CRPD Committee, this provision guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.³⁶ This naturally leads to article 12(2), which states that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. The formulation of 'on an equal basis with others', which also appears in several other articles in the

28 J Peay 'Mental incapacity and criminal liability: Redrawing the fault lines?' (2015) *International Journal of Law and Psychiatry* 12.

29 CRPD Committee (n 2) para 14.

30 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 596.

31 During the negotiations, efforts were accordingly made to qualify the meaning of 'legal capacity' by means of a footnote to the main text. These attempts ultimately proved unsuccessful. For an overview of this history, see Trömel (n 19) 126-128; Lawson (n 30) 595; Kanter (n 5) 251-258; De Bhailis & Flynn (n 24) 9.

32 See eg the declarations and reservations entered by Australia, Venezuela, Canada, Egypt, Estonia and Poland, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 15 September 2017). Kanter provides a detailed discussion (n 5) 259-263).

33 Kanter (n 5) 257.

34 A Dhanda 'From duality to indivisibility: Mental health care and human rights' (2016) 32 *South African Journal on Human Rights* 438.

35 See also T Minkowitz 'Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond' (2014) 23 *Griffith Law Review* 443.

36 CRPD Committee (n 2) para 11.

CRPD,³⁷ indicates that the basis of article 12(2) is to be found in equality and non-discrimination.

The unequivocal point of departure here is that all persons with disabilities have full legal capacity, in the sense of both legal standing and legal agency, on an equal basis with others.³⁸ Significantly, this premise is neither conditional ('all persons have legal capacity *provided that they have the capacity to ...*') nor presumptive ('*all persons are presumed to have legal capacity until proved otherwise*').³⁹

Article 12(3) recognises that state parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. The approach required in terms of the CRPD is that instead of denying persons with disabilities their legal capacity, states must rather provide access to the support necessary to make decisions that have a legal effect.⁴⁰ 'Support' is a broad term encompassing both informal and formal support arrangements, of varying types and intensity.⁴¹

Article 12(4) provides that 'appropriate and effective safeguards' must be included in systems supporting the exercise of legal capacity.⁴² These safeguards must ensure that measures relating to the exercise of legal capacity are proportional and personalised and apply for the shortest time possible. Regular review by a competent, independent and impartial authority or judicial body is also highlighted.

Finally, article 12(5) requires state parties to take all 'appropriate and effective' measures to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others.⁴³ The traditional denial of legal capacity regarding matters of finance and property must now instead be replaced with support to exercise legal capacity, in accordance with article 12(3).⁴⁴

2.3 Interpretation of article 12: General Comment 1

In 2014 the CRPD Committee adopted a General Comment on article 12, aimed at examining the general obligations arising from the different aspects of this article.⁴⁵ Such general comments by treaty-monitoring

37 See *inter alia* arts 1, 2, 7, 9, 10, 13 & 14 of the CRPD.

38 CRPD Committee (n 2) para 14.

39 See H Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) *African Disability Rights Yearbook* 86 (emphasis added).

40 CRPD Committee (n 2) para 16.

41 See CRPD Committee (n 2) para 17 for examples.

42 CRPD Committee (n 2) para 20.

43 CRPD Committee (n 2) para 23.

44 As above.

45 CRPD Committee (n 2) para 3.

bodies are not binding interpretations of the Convention,⁴⁶ but are nevertheless considered as particularly persuasive interpretations of international law.

Although the content of General Comment 1 is far-ranging, this section will look at one of the aspects most relevant to criminal incapacity, namely, the de-linking of legal capacity from mental capacity. This becomes especially significant when one notes that the comment itself does not directly address criminal capacity as such.⁴⁷

2.3.1 Separation of legal capacity and mental capacity

According to the CRPD Committee it must be clearly understood that legal capacity and mental capacity are separate concepts.⁴⁸ Legal capacity, on the one hand, consists of the ability to hold rights and duties and to exercise those rights and duties. Mental capacity, on the other, refers to decision-making skills, which naturally differ from one person to another, depending on many factors such as environmental and social factors. Mental capacity⁴⁹ is not, as is commonly presented, an 'objective, scientific and naturally occurring phenomenon'.⁵⁰ Instead, it is dependent on many factors, including social and political contexts.⁵¹

Article 12 makes it clear that 'unsoundness of mind' and other discriminatory labels are not legitimate reasons for the denial of legal capacity.⁵² Under this article perceived or actual deficits in mental capacity may not be employed to justify a negation of legal capacity.⁵³ The CRPD Committee observed that in most of the state party reports that it had examined, the concepts of mental and legal capacity had been merged so that where a person is considered to have impaired decision-making

46 P Alston 'The historical origins of the concept of "General Comments" in human rights law' in LB de Chazournes & VG Debas (eds) *The international legal system in quest of equity and universality: Liber Amicorum Georges Abi-Saab* (2001) 763 cited in H Steiner et al *International human rights in context* (2007) 873-876. See also ML Perlin "'God said to Abraham/Kill me a son": Why the insanity defence and the incompetency status are compatible with and required by the Convention on the Rights of Persons with Disabilities and basic principles of therapeutic jurisprudence' (2017) 54 *American Criminal Law Review* 479.

47 General Comment 1 indirectly refers to the inter-connection between legal capacity and access to justice (art 13), which entails that in order to enforce their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with equal standing in courts and tribunals (para 38).

48 General Comment 1 para 13.

49 De Bhailis & Flynn (n 24) 10 point out that the term 'mental' capacity is used to refer to a 'combination of cognitive ability, impairment and a person's extent of understanding of the consequences of their actions'. An example of the use of mental capacity as a means to assess and deny legal capacity is found in legislation that establishes a test of mental capacity as the necessary precondition for making certain legally-binding decisions, such as decisions about consent to medical treatment.

50 CRPD Committee (n 2) para 14.

51 As above.

52 CRPD Committee (n 2) para 13.

53 As above.

skills (often because of a cognitive or psychosocial disability), his or her legal capacity is removed as a result thereof.⁵⁴

Considering the three established methods for assessment of legal capacity, namely, the status approach,⁵⁵ the outcome approach⁵⁶ and the functional approach,⁵⁷ the Committee points out that all three approaches regard a person's disability and/or decision-making skills as legitimate grounds for denying legal capacity and 'lowering his or her status as a person before the law'.⁵⁸ Such discriminatory disavowal of legal capacity is not permitted under article 12.⁵⁹ Importantly, the provision of support to exercise legal capacity should not depend on mental capacity assessments. Instead, the Committee recommends that 'new, non-discriminatory indicators of support needs' are necessary.⁶⁰

2.3.2 Responses to General Comment 1: Unfinished business?

The CRPD Committee in General Comment 1 takes a robust and principled stance in respect of contentious areas such as supported decision making and involuntary treatment. For example, it confirms that the human rights-based model of disability demands a shift from the framework of substitute decision making (which includes practices such as guardianship) to one that is based on supported decision making.⁶¹ The Committee accordingly discerns an obligation on state parties to replace substitute decision-making regimes by support for decision making that respects the person's autonomy, will and preferences.⁶²

54 CRPD Committee (n 2) para 15.

55 The status approach assumes that a person lacks legal capacity when she is labelled, eg, as having a psychosocial disability (regardless of the person's individual capacities). G Quinn *Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD* (2010) 12; COE Commissioner for Human Rights (n 22) 8.

56 The outcome approach is based on the premise that a person who makes a 'bad' or unreasonable decision (eg, a person with a psychosocial disability refusing treatment) should lose the right to continue making decisions. COE Commissioner for Human Rights (n 22); CDLP (n 17) 10.

57 This involves the consideration of legal capacity on an issue-specific basis. Eg, a person might not be able to make decisions of a financial nature but might be considered to have capacity to consent to an intimate relationship; CDLP (n 17). Legislation based on the functional approach typically requires that the person must be able to use, weigh and retain the information necessary to make the decision, to understand the consequences of their decision and to communicate her decision to others. De Bhailis & Flynn (n 24) 11.

58 CRPD Committee (n 2) para 15.

59 Weller explains that tests for mental capacity offend against the prohibition of indirect discrimination because they will have a disproportionate impact on people with cognitive impairment. P Weller 'Legal capacity and access to justice: The right to participation in the CRPD' (2016) *Laws* 5.

60 CRPD Committee (n 2) para 29(i).

61 The principled approach that systems of substitute decision making should yield to supported decision making can be traced back to the CRPD negotiations: See De Bhailis & Flynn (n 24) 8.

62 CRPD Committee (n 2) paras 26 & 28.

Despite this clear pronouncement, there still appears to be some lingering questions as to whether substitute decision-making systems are permitted under the CRPD. For example, Freeman et al suggest that the ‘universal presumption of legal capacity’ and the pre-eminence of supported decision making cannot be absolute and that exceptions have to be considered.⁶³

Similarly, despite the Committee’s clear normative directives, disparate views remain on the permissibility of involuntary treatment. For example, Szmukler et al suggest that ‘very few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves’.⁶⁴

General Comment 1 thus exposes the fault lines between those who accept the premise of ‘universal legal capacity with support’, irrespective of whether the person requires more intensive support,⁶⁵ and those who would reserve an exception (albeit limited) in respect of persons who are regarded as unable to act, even with the benefit of support – who are, in the words of Slobogin, ‘too impaired to allow them to make a decision’.⁶⁶ These tensions and divisions also become apparent when considering criminal capacity and psychosocial disability, as will be shown below.

63 MC Freeman et al ‘Reversing hard-won victories in the name of human rights: A critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities’ (2015) *The Lancet* 2 (however, see Dhandu’s response to Freeman et al (n 34). See also D Bilchitz ‘Dignity, fundamental rights and legal capacity: Moving beyond the paradigm set by the General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities’ (2016) 32 *South African Journal on Human Rights*; J Dawson ‘A realistic approach to assessing mental health laws’ compliance with the UNCRPD’ (2015) 40 *International Journal of Law and Psychiatry* 70; M Browning, C Bigby & J Douglas ‘Supported decision-making: Understanding how its conceptual link to legal capacity is influencing the development of practice’ (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities*, cited in De Bhailis and Flynn (n 24) 5, disagreeing that support is a viable option for everyone. They posit that it is not ‘realistic’ for individuals with profound or multiple disabilities to be supported to exercise their legal capacity.

64 G Szmukler, R Daw & F Callard ‘Mental health law and the UN Convention on the Rights of Persons with Disabilities’ (2014) 37 *International Journal of Law and Psychiatry* 248–250. (The authors, however, do concede that any criteria for involuntary treatment under the CRPD must be non-discriminatory and ‘disability-neutral’.) See also A Plumb ‘UN Convention on the Rights of Persons with Disabilities: Out of the frying pan into the fire? Mental health service users and survivors aligning with the disability movement’ in H Spandler et al (eds) *Madness, distress and the politics of disablement* (2015) 190.

65 See Preamble to CRPD para (j).

66 C Slobogin ‘Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defence, civil commitment, and competency law’ (2016) 40 *Law and Psychology Review* 316. Slobogin (301) also disagrees with the CRPD position that even people with very severe impairments should be entitled to make their own decisions.

3 Criminal capacity and the Convention on the Rights of Persons with Disabilities

3.1 Guidance from the CRPD Committee

As explained above, the insanity defence is not directly addressed in General Comment 1 itself. However, the implications of universal legal capacity for this defence were considered as early as 2009 in the thematic report of the Office of the High Commissioner for Human Rights (OHCHR), which states:⁶⁷

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.

This interpretation subsequently has been developed by the CRPD Committee's adoption in 2015 of guidelines to provide clarification on article 14 of the Convention.⁶⁸ These guidelines do not address the recognition (or not) of the insanity defence as such, but do speak to dispositions of detention following an insanity-based acquittal.

The Committee points out that, according to article 14, no exceptions are allowed in terms of which persons may be detained on the grounds of their actual or perceived impairment. The legislation of several state parties still provides for the detention of persons with disabilities on the grounds of their actual or perceived impairment, provided that there are other reasons for their detention, such as the fact that they are deemed dangerous to themselves or others.⁶⁹ Such legislative provisions are incompatible with article 14, are discriminatory in nature and amount to an arbitrary deprivation of liberty.⁷⁰ This prohibition also holds implications for involuntary treatment in the course of the deprivation of liberty: The Article 14 Guidelines note that treatment should be based on the free and informed consent of the person concerned.⁷¹

As far as declarations that persons with disabilities are incapable of being found criminally responsible and the concomitant detention of such

67 OHCHR *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities* UN Doc A/HCR/10/48 dated 26 January 2009 para 47.

68 CRPD Committee *Guidelines on article 14 of the CRPD: The right to liberty and security of persons with disabilities* (2015) (Article 14 Guidelines).

69 Article 14 Guidelines (n 68) para 6.

70 As above.

71 Article 14 Guidelines (n 68) paras 11-12.

persons are concerned, the Committee notes that these practices are contrary to article 14, since they deprive the person of the right to due process and safeguards applicable to every accused person.⁷² State parties accordingly are enjoined to remove such declarations of criminal incapacity from their criminal justice systems.⁷³

The Committee also deals with security measures (such as involuntary treatment in institutions) imposed on persons found not responsible due to criminal incapacity⁷⁴ and recommends the elimination of such measures. Similarly, it is concerned about security measures that involve indefinite deprivation of liberty and the absence of regular rights guarantees in the criminal justice system.⁷⁵

When it comes to the deprivation of liberty in criminal proceedings, the Committee recommends that this should apply only as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.⁷⁶ Specifically, diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to participate in mental health services, but should instead be provided on the basis of the individual's free and informed consent.⁷⁷

The Committee's views, as expressed in General Comment 1 and the Article 14 Guidelines, have drawn divergent responses from academic commentators. In the next section the opinions of three authors, canvassing a range of considerations, are examined.⁷⁸

3.2 Interpretation by commentators

3.2.1 *The abolitionist position: Elimination of the insanity defence*

Minkowitz regards all measures by which persons with disabilities are treated unequally in legal proceedings, including the insanity defence, as well as a disposition to forensic psychiatric institutions, as disability-based discrimination and, accordingly argues for the elimination of such measures.⁷⁹

She first relies on a direct reading of the recognition in article 12(2) of equal legal capacity *in all aspects of life*, which clearly has to include criminal

72 Article 14 Guidelines para 16.

73 As above.

74 Article 14 Guidelines (n 68) para 20.

75 As above.

76 Article 14 Guidelines (n 68) para 21.

77 As above.

78 An extensive examination of the full body of work of these authors is beyond the scope of this article.

79 Minkowitz (n 35) 434.

matters. Furthermore, if persons with disabilities have the legal capacity to act *on an equal basis with others*, this capacity logically extends to all circumstances ‘where decisions have consequences’, which implies legal responsibility for those consequences on an equal basis with others.⁸⁰ She also notes that the rejection by the CRPD Committee in General Comment 1 of attaching legal or practical consequences to the assessment of mental capacity, logically precludes the use of mental capacity assessments to negate criminal responsibility.⁸¹

A denial of criminal responsibility based on mental incapacity as an evaluative concept constitutes disability-based discrimination and impairs the right to equal recognition before the law by giving legal effect to such incapacity and stigmatising the particular individual as well as all persons with psychosocial and intellectual disabilities.⁸²

She finds further support in article 14(1) of the CRPD, which (as noted above) provides that the existence of a disability in in no case may justify a deprivation of liberty. Mental health detention, which by definition is premised on apparent psychosocial disability or a psychiatric diagnosis, can never be disability-neutral and, therefore, always violates article 14(1).⁸³

Minkowitz develops a proposal for ‘inclusive design of criminal responsibility’.⁸⁴ As a starting point the court must, as part of the finding of intent (that is, the subjective element of a criminal offence) consider the perceptions, beliefs and world view of the accused with respect to her actions at the time of the relevant act, to the extent that such evidence is available.⁸⁵ However, this does not amount to an assessment of mental capacity, but rather is an ‘open-ended inquiry into ... contextualising factors that can help to make sense of a person’s actions’.⁸⁶ If there is a lack of proof of criminal intent or any other element of the crime, the result would be an acquittal or a reduction of the degree of culpability without reference to mental capacity.⁸⁷

In terms of this proposal there would be no insanity defence or concept of mental incapacity.⁸⁸ At the same time an acquittal or conviction would not result in detention in a forensic mental health institution or other special security-related measure. If the accused is found guilty, she would serve her sentence in an ordinary place of detention, under the same

80 Minkowitz 445.

81 As above.

82 Minkowitz 455-456.

83 Minkowitz 451.

84 Minkowitz 454.

85 Minkowitz 456.

86 Minkowitz 457.

87 As above.

88 Minkowitz (n 35) 458.

conditions as others, subject to reasonable accommodation and in compliance with the other principles of the CRPD.⁸⁹

3.3.2 *The integrationist position: Developing disability-neutral rules*

As a response to the ‘tough normative and practical questions’⁹⁰ presented by the CRPD, Slobogin proposes a three-fold model based on the punitive, preventive and protective approaches to deprivation of liberty.⁹¹ These three approaches can briefly be explained as follows.

The goal of the *punitive* approach, which focuses on culpability, is to punish people for the harm they have caused.⁹² The deprivation of individual liberty, therefore, is permitted if the person has caused harm to another person or their property in a culpable manner. The *preventive* approach aims to prevent harm to others and, therefore, focuses on perceived dangerousness.⁹³ This approach to liberty deprivation is permitted only when the benefits of such deprivation outweigh the harm caused. The goals of the *protective* model include the promotion of autonomy and the protection of dignity through self-determination.⁹⁴ Examples are guardianship and hospitalisation of an accused person to ‘improve’ their ability to participate in the criminal proceedings.⁹⁵

Slobogin then explores how the aims of the CRPD may be accomplished in respect of each model.⁹⁶ Regarding punishment he posits that the CRPD Committee’s call for elimination of a ‘special’ defence of insanity is in line with his integrationist approach to criminal law, which holds that persons with psychosocial disabilities may rely on any of the defences that are available to accused persons generally.⁹⁷

Slobogin distinguishes a general trend (in the United States (US) and other countries) towards a more subjective approach to culpability, which entails that the accused’s blameworthiness is assessed according to her actual desires and beliefs, rather than with reference to what a reasonable person would have desired or believed.⁹⁸ For example, virtually all

89 As above.

90 Slobogin (n 66) 300. Eg, the tensions between the state’s obligation to protect individuals from serious harm and the apparent prohibition by the CRPD of measures for preventive detention and treatment of persons with psychosocial disabilities who are perceived to be dangerous; Slobogin (n 66) 299-300.

91 Slobogin (n 66) 301.

92 Slobogin 302.

93 As above.

94 As above.

95 Slobogin (n 66) 303.

96 Due to the specific focus of this article – and Slobogin’s own concession that his proposal for protective detention may not be ‘entirely consonant with the CRPD’ (n 66 319) – the third aspect of protection will not be addressed here.

97 Slobogin (n 66) 304.

98 Slobogin 302.

criminal offences in the Model Penal Code⁹⁹ require proof that the accused ‘purposefully or knowingly’ caused the harmful conduct,¹⁰⁰ which exemplifies this trend towards the subjectification of *mens rea*. The defences of self-defence, provocation and duress likewise are subjectified under the Code; for example, the use of deadly force is permitted where the actor (subjectively) believes that this is immediately necessary to protect herself against unlawful force.¹⁰¹

Slobogin explains that granting people with psychosocial disability a ‘special defence’ stigmatises¹⁰² and marginalises them. The category of ‘criminal insanity’ also perpetuates the deleterious myth that people with psychosocial disabilities are particularly dangerous or lack self-control. Maintaining that compared to an acquittal by reason of insanity, exoneration on the grounds of lack of intent, self-defence, or duress is far less tainting,¹⁰³ he accordingly formulates a ‘disability-neutral’ defence’, which would apply equally to all persons, irrespective of psychosocial disability. One potentially contentious aspect of this defence is that it would not be available where the ‘impairments’ that led to the accused’s erroneous beliefs resulted from the accused’s purposeful avoidance of treatment.¹⁰⁴

In respect of the prevention model, Slobogin reiterates that the detention of persons with psychosocial disabilities on the grounds of ‘dangerousness’ is viewed as discriminatory and in violation of the prohibition of disability-based deprivation of liberty in terms of the CRPD. The legal basis for such deprivation accordingly must be de-linked from disability and be neutrally defined so as to apply to everyone on an equal basis.¹⁰⁵ He thus argues for a general prohibition of preventive detention or other measures aimed at protecting others. However, this would be subject to one exception, namely, cases where the criminal justice system cannot function as a preventive mechanism because first, it lacks jurisdiction (for example, where the accused has been acquitted or has completed serving her sentence) and, second, because the person is ‘truly undeterrable’.¹⁰⁶

The notion of undeterrability would include two categories of people with psychosocial disabilities: those who cause harm in the delusional belief that they are not committing a crime; and those ‘with urges so strong’

99 This Code was promulgated by the American Law Institute in the 1960s and adopted, at least in part, in several US states.

100 Slobogin (n 66) 305. Alternatively, the accused was required to have been reckless with respect to the harmful conduct.

101 Slobogin (n 66) 306.

102 See also Peay (n 28) 27.

103 Slobogin (n 66) 309.

104 Slobogin 306. He explains that this is in line with the well-accepted principle that causing the conditions of one’s excuse precludes full exculpation (307).

105 Slobogin (n 66) 310.

106 Slobogin 310-311.

that they tend to commit crime despite a high risk of apprehension and punishment. These two groups are unaware of the possibility of punishment and thus are truly undeterrable.¹⁰⁷ In order to demonstrate that this formulation of undeterrability is disability-neutral, Slobogin identifies two other categories of people that would be regarded as undeterrable, namely, persons with contagious diseases and 'enemy combatants'.¹⁰⁸

3.3.3 *The third position: Retaining the insanity defence*

In a strongly-worded article Perlin takes the position that to deprive persons with psychosocial disabilities¹⁰⁹ of the right to plead insanity demeans any notion of dignity.¹¹⁰ He believes that the insanity defence plays a critical role in a fundamentally-fair criminal justice system; discarding it would violate the most basic principles of due process¹¹¹ as well as the fundamental notion that only people who are responsible for their actions should be punished.¹¹² The exculpation of some individuals based on their mental state is essential to a mature and coherent system of criminal law.¹¹³ Therefore, he is of the opinion that the proposed abolition of this defence is 'wrongheaded, counterproductive and likely a violation of due process'.¹¹⁴

In respect of Slobogin's proposals for recasting the insanity defence, Perlin is of the opinion that the revised disability-neutral version still amounts to the insanity defence; it is just not characterised as such.¹¹⁵ He is also sceptical of the clause providing that the defence should not be available to an accused person who caused her own mental state (for example, by refusal of treatment).¹¹⁶ He expresses concern that this proviso will be used 'broadly and bluntly' to suppress the right to refuse involuntary administration of antipsychotic medication (which is otherwise protected by the CRPD and domestic law).¹¹⁷

Perlin also responds to Minkowitz's position. As a preliminary point he is in agreement with her that the insanity defence, as currently utilised, often is legally and socially stigmatising; that acquittals on the grounds of insanity often do not result in release from custody; and that persons found not guilty by reason of insanity often are held in forensic facilities for far

107 Slobogin 311.

108 As above.

109 Perlin's article refers to 'mental disability'; the context indicates that this denotes psychosocial disability. The latter term is retained here for consistency.

110 Perlin (n 46) 487.

111 Perlin 491.

112 Perlin 494.

113 Perlin 504.

114 Perlin 496.

115 Perlin 499.

116 Perlin 502.

117 As above.

longer than is warranted by the underlying criminal offences with which they were originally charged.¹¹⁸ However, these realities do not justify the abolition of the insanity defence: The abuses (correctly) listed by Minkowitz are not caused by the defence in itself, but rather by the administration of the system of ‘post-insanity-defence-acquittal’ case dispositions and institutionalisation; hence, this is where the attention should instead be focused.¹¹⁹

For Perlin the major question is what will happen to this ‘cadre of defendants’ in the absence of an insanity defence. He predicts that the immediate result of the abolition of the insanity defence would be the long-term incarceration of this group in prisons that are known to be dangerous and life-threatening to them.¹²⁰

Ultimately he finds no demand for the abolition of the insanity defence in the CRPD (including article 14).¹²¹ Instead, he believes that when the CRPD is read as a whole (together with other international human rights instruments requiring fair trials), it in fact calls for its retention.

3.3.4 *Discussion*

Although the views of the three authors as presented here appear to diverge in several respects, at the same time there are significant points of agreement. First, one cannot fault Minkowitz for her reading of articles 12 and 14, as underpinned by General Comment 1 and the Article 14 Guidelines (although Perlin clearly disagrees).

Regarding the disposition of the accused following an acquittal: Again, Minkowitz’s view that this should not be followed by detention in a forensic mental health system (or other involuntary measure) is in line with the CRPD Committee’s interpretation. However, the notion that persons with psychosocial disabilities who are convicted of criminal offences should serve their sentences under the same conditions as others indeed raises the major concerns pointed out by Perlin. This may well be an instance where formal equality (treating all convicted persons in the same way) may have to yield to considerations of substantive equality that takes account of material differences.

Minkowitz’s proposal for inclusive design of criminal responsibility in many respects resembles Slobogin’s integrationist approach. The focus on the subjective elements of intent, requiring an assessment of the accused’s blameworthiness according to her actual beliefs and desires, rather than a ‘reasonable person’ standard, combined with a subjective approach to

118 Perlin 504.

119 As above.

120 Perlin (n 46) 505.

121 Perlin 518.

established defences such as self-defence and duress, certainly holds promise for developing a 'disability-neutral defence' that moves away from the insanity defence.¹²² Furthermore, the question of whether this defence should be available where the state of mind of the accused is the result of failure to comply with treatment should be resolved. (Perlin's reservations in this regard are well-founded.)

In terms of preventive detention, Slobogin suggests a narrow, disability-neutral allowance, based predominantly on the notion of undeterrability. Apart from any other concerns (such as the construction of 'undeterrability'), the purported neutrality of this proposal is dubious. Although its formulation would also include certain persons without psychosocial disabilities, such as 'enemy combatants', such a measure would disproportionately affect persons with psychosocial disabilities, thus offending against the prohibition of indirect discrimination.¹²³

4 South African law

Against this background the following section briefly examines certain aspects of the current South African legal position. First, the general principle regarding legal capacity is set out, followed by the statutory provisions dealing with criminal incapacity based on psychosocial disability. The implementation of section 78 is then briefly considered and, in conclusion, the current position is evaluated against the considerations outlined in section 3 above.

4.1 General principles

In terms of South African law generally, every person above 18 years of age may exercise legal capacity to its fullest extent, which means that she may by herself and without the assistance or consent of any other person exercise all the rights and become subject to all the duties associated with being a 'person'.¹²⁴ However, the legal capacity of persons that are 'insane or mentally disordered' is limited.¹²⁵ These limitations, as they relate to criminal capacity, are dealt with in section 78 of the Criminal Procedure Act 51 of 1977 (CPA). Section 78 will be examined briefly by looking at the substantive issue of criminal incapacity due to mental illness¹²⁶ as well

122 However, difficulties may arise where the offence is framed in terms of negligence.

123 Minkowitz (n 35) 439.

124 See JC Bekker 'The law and older persons' in B Clark *Family law service* (2017); W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 332.

125 Terminology in the original text.

126 Due to its use in the CPA, the term 'mental illness' is employed in this section for purposes of clarity. It should, however, be noted that mental illness is not the conceptual equivalent of 'psychosocial disability'.

as the prescribed disposition by the court on finding that the accused lacks criminal capacity.

4.2. Statutory provisions

In South African law the point of departure is that criminal capacity, which is regarded as the basis of (and general precondition for) culpability,¹²⁷ may be excluded by a number of grounds, including youthfulness,¹²⁸ intoxication and mental illness. In respect of the latter the test to determine the accused's criminal capacity is set out in section 78(1) of the CPA. This section provides that a person committing an offence, while at the time suffering from a 'mental disorder or intellectual disability'¹²⁹ which makes her incapable (a) of appreciating the wrongfulness of her act; or (b) of acting in accordance with such an appreciation, will not be 'criminally responsible'.

The defence of criminal incapacity due to mental illness usually is raised on behalf of an accused at the beginning of the trial (at the stage of pleading to the charges). Where incapacity is alleged, the accused must be dealt with in terms of section 79 of the CPA, which regulates the process of inquiry into the accused's (in)capacity and the subsequent process of reporting to the court.¹³⁰

Upon completion of the prescribed inquiry and submission of the experts' reports¹³¹ in terms of section 79, the court must make a finding regarding the accused's criminal capacity.¹³² If the court finds that the accused committed the act in question and that she at the time of commission lacked criminal capacity, she must be found not guilty by reason of mental illness.¹³³ For purposes of the criminal prosecution, the matter ends there: The accused has been found not guilty and cannot again be charged with the same offence. However, this is not the end for the accused: The court must now direct an outcome, depending on the nature of the charges against the accused.

127 Culpability, also sometimes referred to as *mens rea*, means that there must, in the eyes of the law, be grounds for blaming the accused personally for her unlawful conduct; C Snyman *Criminal law* (2014) 156. South African criminal law recognises two forms of culpability, namely, intention and negligence.

128 See sec 7 of the Child Justice Act 75 of 2008.

129 This provision previously referred to 'mental defect'; however, in 2017 the term was replaced by 'intellectual disability'.

130 For purposes of this inquiry, the court may commit the accused to a psychiatric hospital or to any other designated place for a period not exceeding 30 days (sec 79(2)(a)).

131 Sec 79 sets out the composition of the panel that has to conduct the inquiry (which varies based on the seriousness of the offence) and stipulates what must be contained in the report. Where the accused is charged with a more serious offence, the panel must consist of three psychiatrists and the court has the discretion to also appoint a clinical psychologist (sec 79(1)(b)).

132 Sec 78(6).

133 Or intellectual disability, as the case may be (sec 78(6)).

First, if the accused has been charged with murder, culpable homicide, rape or compelled rape,¹³⁴ or a charge involving serious violence, or if the court considers it necessary in the public interest, the court may order her detention in a psychiatric hospital.¹³⁵ This is subject to the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act (MHCA).¹³⁶ The court may alternatively order that the accused be detained in a designated health establishment as if she was an involuntary mental health care user as set out in section 37 of the MHCA,¹³⁷ be released with or without conditions; or referred to a children's court, in the case of a child.¹³⁸

Second, where the accused is charged with an offence other than the ones listed above, that is, a less serious offence, the court may order that the accused be detained as an involuntary mental health case user (as above); released with or without conditions; or referred to a children's court.¹³⁹

Importantly, for proceedings in terms of sections 77(1)¹⁴⁰ and 78(2) the court may order that the accused be provided with the services of a legal representative,¹⁴¹ if the court is of the opinion that substantial injustice would otherwise result.¹⁴²

4.3 Determination of criminal capacity in terms of section 78

In order to establish the criminal capacity of the accused, the court must as a point of departure determine whether the accused had been suffering from a mental illness. If so, the second step is to establish the impact of such mental illness at the time of the commission of the offence. Notably, the CPA does not provide a definition for mental illness (or intellectual

134 As set out in secs 3 & 4 of the Criminal Law (Sexual Offences) Amendment Act 32 of 2007.

135 Sec 78(6)(a)(i)(aa). Alternatively, the court may order temporary detention in a correctional health facility pending the availability of a placement in a psychiatric hospital, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to herself or to members of the public (sec 78(6)(a)(i)(bb)).

136 Act 17 of 2002. The accused therefore becomes a so-called 'state patient' in terms of MHCA. Among other implications, this means that she may indefinitely be detained in a designated health establishment and may only be discharged (released) from detention by order of a judge in chambers.

137 An 'involuntary mental health care user' in terms of the MHCA is a person incapable of making informed decisions due to her mental health status, who refuses health intervention but requires such services for her own protection or for the protection of others. Sec 37 provides for the periodic review of the mental health status of an involuntary mental health care user, which must include the consideration of whether the mental health care user is likely to inflict serious harm to herself or other people (sec 37(2)(b)).

138 Sec 78(6)(a)(i) of the CPA.

139 Sec 78(6)(a)(ii).

140 Sec 77 deals with the fitness of the accused to stand trial.

141 In terms of sec 22 of the Legal Aid South Africa Act 39 of 2014.

142 Sec 77(1A) of the CPA.

disability). The MHCA, on the other hand, defines ‘mental illness’ in terms of a positive diagnosis, made by an authorised mental health care practitioner on the basis of accepted diagnostic criteria, of a ‘mental health-related illness’.¹⁴³ However, this definition is not conclusive in respect of a criminal trial: The fact that the accused has been diagnosed with a mental illness in terms of the MHCA does not mean that he is also ‘mentally ill’ for purposes of the CPA.¹⁴⁴

Due to this lack of a definition of ‘mental illness’ in the CPA, psychiatric evidence is regarded as indispensable in the determination of criminal capacity. This was confirmed in *S v Mabena*,¹⁴⁵ where the Supreme Court of Appeal explained that a lay court cannot diagnose a ‘mental illness’ without guidance by expert psychiatric witnesses.¹⁴⁶ Having said that, the final decision as to the accused’s criminal capacity, including the assessment of the experts’ reports and other evidence, lies with the court.¹⁴⁷

4.4 Evaluation

For purposes of this discussion, it is helpful to return to the two aspects of the insanity defence, namely, the finding of criminal incapacity (and hence acquittal) in respect of the accused due to mental illness, and the subsequent disposition by the court.

In terms of the finding that the accused lacks criminal capacity it should be noted that the grounds for excluding criminal capacity under South African criminal law extend beyond mental illness to also include youthfulness and intoxication. The special measures relating to the inquiry into the accused’s criminal capacity as set out in the CPA (namely, the referral for observation and the reports by experts), however, are applicable only to persons with a mental illness. Similarly, the disposition measures following a finding of not guilty by reason of mental illness only operate here. Accordingly, this constitutes differential treatment of accused persons with psychosocial disabilities. However, such differentiation does

143 Sec 1 of the MHCA. This Act also defines ‘severe and profound intellectual disability’.

144 J le Roux & GP Stevens ‘Pathological criminal incapacity and the conceptual interface between law and medicine’ (2012) 25 *South African Journal of Criminal Justice* 50.

145 2007 (1) SACR 482 (SCA) para 16.

146 As above. The Court points out that an inquiry into the mental state of an accused person without such guidance is bound to be ‘directionless and futile’. See also *S v Chauke* 2016 (1) SACR 408 (SCA) para 17. Kaliski, however pours cold water on this enthusiasm for assistance from psychiatry in assessing criminal capacity, noting, first, the fluidity of psychiatric diagnoses and, second, his misgivings about an ‘appreciation of wrongfulness’ as determinant of criminal responsibility; S Kaliski ‘Does the insanity defence lead to an abuse of human rights?’ (2012) 15 *African Journal of Psychiatry* 85.

147 Du Toit et al (n 8) C13 40.

not in itself necessarily amount to 'unfair discrimination' as understood in South African constitutional jurisprudence.¹⁴⁸

The measurement against the South African Constitution becomes necessary at this point because of the fact that the CRPD has not yet been formally 'incorporated' into South African law as required in terms of section 231 of the Constitution. However, courts are required to consider the Convention as an interpretive aid when interpreting the Bill of Rights.¹⁴⁹ The judgment of the Constitutional Court in *De Vos NO v Minister of Justice and Constitutional Development*¹⁵⁰ exemplifies such invocation of the CRPD.¹⁵¹

In addition to the discrimination-based argument alluded to above, it should be noted that the assessment of criminal incapacity arising from mental illness under section 78 of the CPA in essence is a functional test (resting on proof of incapacity to appreciate the wrongfulness of an act or to act in accordance with such an appreciation). It also amounts to the conflation between legal capacity and mental capacity cautioned against by the CRPD Committee in that the accused person's legal capacity is 'removed' because of a finding that her decision making was impaired at the time of the offence.¹⁵² These considerations further complicate the insanity defence in its current form.

Significantly, in terms of South African criminal law, the test for intention is *subjective*, which means that the accused's individual characteristics, personal beliefs, background and psychological disposition may be taken into account in determining whether or not she had the required intention.¹⁵³ Intention, therefore, may be excluded, for example, by so-called 'putative private defence' (where the accused erroneously

148 Sec 9(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) prohibits unfair discrimination based on a number of grounds, including disability. For a discussion of the interpretation of this provision, see generally I Currie & J de Waal *The Bill of Rights handbook* (2013) 215-227.

149 Sec 39(1)(b) Constitution.

150 2015 (2) SACR 217 (CC). This matter dealt with the disposition of two accused persons following a finding of 'unfitness to stand trial' in terms of sec 77(6). The previous version of this subsection, prior to amendment in 2017, allowed the court a narrower range of options for disposition and specifically excluded the release of the accused (with or without conditions). The difficulty that arose here was that the two accused persons were diagnosed with intellectual disabilities, and the expert opinion was that their (in)ability to stand trial would not 'improve' upon detention in a prison or psychiatric hospital. The Constitutional Court ultimately held that the provisions limiting the court's options were inconsistent with art 12 of the Constitution (the right to liberty and security of the person) as read with art 14 of the CRPD. This resulted in the subsequent amendment of the CPA by the Criminal Procedure Amendment Act 4 of 2017.

151 Paras 29-30, 58.

152 See sec 2.3.1 above.

153 The test for negligence, on the other hand, is *objective*: The conduct of the accused is measured by the standard of what a reasonable person in the accused's position would have done under the same circumstances. Negligence usually is regarded as the less serious or blameworthy form of culpability.

believes that an unlawful attack is being directed at her, and she therefore acts to ward off this attack). Since unlawfulness is determined objectively, her defensive act would be unlawful – because in reality there was no attack against her – but her honest mistake as to the existence of an attack may exclude intention.¹⁵⁴

Such a mistake does not need to be reasonable: The inquiry concerns the accused's 'true state of mind' and her conception of the circumstances, and not whether the reasonable person in the accused's position would have made the same mistake.¹⁵⁵ This subjective construction of intent theoretically opens the door for the consideration of a disability-neutral defence, such as mistake, on the part of the accused, since the source and reasonableness of such mistake would not be at issue.

With regard to the second aspect, namely, disposition of the accused on conclusion of the criminal case, Kaliski points out the anomaly that (former) accused persons committed to the forensic mental health system following an acquittal by reason of mental illness, often face indefinite detention while convicted offenders may serve only a part of their sentence based on remittances for good behaviour and other concessions.¹⁵⁶

Noting the 'largely failed enterprise of risk assessment', Kaliski also questions the concept of 'dangerousness' associated with mental illness and the assumption that indefinite detention at least addresses the risk of future violence.¹⁵⁷ ('Dangerousness' comes into play in the court's determination of whether detention as a state patient in a psychiatric hospital is required 'in the public interest.'¹⁵⁸)

Were the South African courts to follow the principled view of the CRPD Committee that disability-based detention violates the right to liberty of persons with psychosocial disabilities under article 14, this would cast a dark shadow over the current provisions of section 78(6). It should, however, be noted that a rights violation may be justified under the 'limitations clause' (section 36) of the Constitution, and it is conceivable that a court would weigh up the detainee's right to liberty against the state's duty to protect the public from harm.¹⁵⁹

154 See *S v De Oliveira* [1993] 2 All SA 415 (A) 419. The court may however consider the reasonableness of the accused's conduct in determining whether she did indeed have an honest belief that she was being attacked.

155 As above.

156 Kaliski (n 146) 83.

157 Kaliski 85.

158 The term 'public interest' is not defined in the CPA; however, it is conceivable that the potential 'dangerousness' of the accused would play a role here.

159 It was held in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 57 that the state's duty under sec 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights includes the right of the public to have its safety and

Finally, one aspect that needs further consideration is the provision of support, in terms of article 12(3), where the accused's criminal capacity is at issue (although this arguably relates more to situations where the accused may be unfit to stand trial).¹⁶⁰ Section 77(1B) of the CPA, which permits the court to order the appointment of a legal representative for the accused, is a good starting point. However, at present such appointment is discretionary whereas, it is argued here, it should be mandatory in all cases where the fitness to stand trial or criminal capacity of the accused is in dispute.¹⁶¹ Other analogies of support may be drawn from the current arrangements regarding the role of a *curator ad litem*.¹⁶²

5 Conclusion

Peay correctly observes that thinking through the implications of the CRPD for criminal liability is not easy.¹⁶³ This in part is due to the fact that the CRPD has introduced dramatic changes into areas of law 'that had previously been thought settled'.¹⁶⁴ As outlined above, this certainly includes the insanity defence.

It is encouraging that the South African government has committed itself to a review of civil and criminal legislation, including the inquiry into an accused person's criminal capacity in criminal proceedings, in light of article 12 of the CRPD.¹⁶⁵ It is argued here that close consultation with and the active involvement of persons with disabilities¹⁶⁶ (especially those with psychosocial disabilities and forensic detainees)¹⁶⁷ will be essential in any consideration of law reform measures.

security protected. The court in the De Vos judgment took specific note of this aspect (para 35). At the same time, however, it may be said that persons with disabilities should not bear 'the burden of society's demand for preventive detention'; Minkowitz (n 35) 456.

160 See in this regard Minkowitz (n 35) 446-447.

161 In *S v Matu* 2012 (1) SACR 68 (ECB) para 28 the court noted that where the accused is charged with an offence involving serious violence, and is hence potentially subject to the more restrictive disposition orders required under sec 77(6)(a)(i), 'legal assistance is not only desirable but necessary'. Although the judgment related to unfitness to stand trial, it is argued here that it similarly applies in cases of criminal incapacity based on mental illness.

162 A *curator ad litem* is traditionally appointed by the court to supplement a person's 'lack of capacity to litigate'; South African Law Reform Commission (SALRC) *Discussion Paper 105: Assisted decision-making of adults with impaired decision-making capacity* (2004) 51. For a more detailed discussion of the functions of a *curator ad litem*, see SALRC (above) 102-103.

163 Peay (n 28) 33.

164 Minkowitz (n 35) 435.

165 South Africa *Initial Report to the Committee on the Rights of Persons with Disabilities* (2015) UN Doc CRPD/C/ZAF/1 dated 24 November 2015 para 125. This commitment has been further concretised in the White Paper on the Rights of Persons with Disabilities (2015) 64.

166 As required in terms of art 4(3) of the CRPD.

167 See M Sabatello 'Where have the rights of forensic patients gone?' (2015) *American Society of International Law Proceedings* 78, pointing out the invisibility of 'forensic patients' during the drafting process and subsequent to the adoption of the CRPD.

Petersen expresses doubt as to whether legislatures would ever accept proposals for the complete abolition of the insanity defence¹⁶⁸ and, therefore, cautions that it may be more practical to consider reforms to current defences and to provide stronger safeguards (including more regular reviews of the disability-related detention of accused persons).¹⁶⁹ One has to agree that the abolition of the insanity defence would be hard to 'sell' in the current South African context.¹⁷⁰

However, this does not obviate the need to develop practicable (and politically-feasible) alternatives to guide incisive domestic law reform.¹⁷¹ This is especially true in relation to 'an entirely novel approach for which there is often no precedent elsewhere'.¹⁷² Such recommendations are essential in order for the reassurances in the CRPD to ultimately transcend from the aspirational to the tangible.

168 See also Kaliski (n 146) 87.

169 CJ Petersen 'Addressing violations of human rights in forensic psychiatric institutions: Philosophical and strategic debates' (2015) *American Society of International Law Proceedings* 82-83.

170 South African courts may also find certain of the more drastic proposals somewhat startling, such as Minkowitz's suggestion that expert opinions by mental health professionals based on assessment and diagnosis should be disallowed (n 35) 458, especially in light of the strong judicial reliance in South Africa on such expert evidence in the determination of criminal capacity. This of course raises questions around the hegemony of so-called 'scientific' and 'medical knowledge', which cannot be resolved here.

171 O Lewis & A Campbell 'Violence and abuse against people with disabilities: A comparison of the approaches of the European Court of Human Rights and the United Nations Committee on the Rights of Persons with Disabilities' (2017) *International Journal of Law and Psychiatry* 57.

172 Sabatello (n 167) 56.

LEGAL CAPACITY OF PARTIES WITH
INTELLECTUAL, PSYCHO-SOCIAL AND
COMMUNICATION DISABILITIES IN
TRADITIONAL COURTS IN
KWAZULU-NATAL

Willene Holness and Sarah Rule***

Summary

According to the Committee on the Rights of Persons with Disabilities, article 12 of the Convention on the Rights of Persons with Disabilities specifies that all people everywhere have a right to equal recognition before the law and that there are no circumstances in which this right may be limited. However, General Comment 1 of the CRPD Committee indicates that globally persons with cognitive and psycho-social disabilities are frequently denied legal capacity. This article sets out to explore the current situation and legal imperatives regarding the legal capacity of persons with intellectual, psycho-social or communication disabilities in traditional courts in KwaZulu-Natal. Traditional courts operate in some rural areas of South Africa and are presided over by a chief and a traditional council. These traditional courts are the closest and cheapest dispute resolution forum in rural areas and utilise restorative justice principles. The legal test for mental and legal capacity in formal courts is not applied in traditional courts. This article reports on research conducted by an NGO in KwaZulu-Natal that found evidence of negative attitudes and a lack of knowledge regarding accessibility and reasonable accommodation among traditional leaders. In these courts, persons with disabilities are not accepted as equal before the law. In some proceedings in traditional courts, an adult with a disability (male or female) is treated as a minor and is required to be represented by a parent or a male member of the family without a disability. A short summary of pertinent aspects of the Traditional Courts Bill indicates the scope for improvement in relation to full participation and equality before the law. We submit that South Africa's implementation of the relevant international and regional law obligations

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under the CRPD and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities is found wanting, including a lack of appropriate training of traditional court personnel and a lack of awareness of the equal recognition of legal capacity among families supporting persons with disabilities.

1 Introduction

According to the Committee on the Rights of Persons with Disabilities (CRPD Committee), the Convention on the Rights of Persons with Disabilities (CRPD) specifies that

the right to equal recognition before the law is operative 'everywhere'. In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.¹

The Committee specifically notes that the denial of legal capacity of persons with cognitive (intellectual) and psycho-social disabilities occurs disproportionately worldwide.²

In South Africa, persons with disabilities face multiple and intersecting discrimination – on the basis of their disability, accentuated by their sex or gender and sexual orientation, and economic status.³ Persons with disabilities are furthermore treated differently based on the nature of their disability.⁴ For example, persons with psycho-social disabilities (also referred to as mental illness) can be dehumanised to the point of ostracism due to the stigma attached to the impairment.⁵ This is the case within communities, and also within the legal system.

The vestiges of discrimination against persons with psycho-social, communication and intellectual disabilities, in particular on the basis of race, have continued long after colonialism and apartheid officially ended.⁶ Remote geographic locations and illogical demarcations of traditional areas perpetuate isolation. Discrimination faced by persons with disabilities has been considered a 'social-spatial process that isolates and restricts them to the home, where household-level social relations

1 CRPD Committee General Comment para 5.

2 CRPD Committee (n 1) para 9.

3 I Grobbelaar-Du Plessis 'African women with disabilities: The victims of multi-layered discrimination' (2007) 22 *South African Public Law* 405.

4 MA Sukhai & CE Mohler *Creating a culture of accessibility in science* (2016) 18-20.

5 F Mahomed 'Stigma on the basis of psychosocial disability: A structural human rights violation' (2016) 32 *South African Journal on Human Rights* 496.

6 AR Chapman & LS Rubenstein *Human rights and health: The legacy of apartheid* (1998) 95.

determine [their] access to structurally determined life opportunities'.⁷ This reality plays out in urban-rural divides in South Africa.

Zulu culture historically links disability to ancestral beliefs and 'the lack of sufficient immunity and strength to combat against the harming influence of supernatural powers'.⁸ Also, 'cultural beliefs about disability ... easily translate into pity, overprotection and the exclusion of disabled people from opportunities to realise their individual capabilities'.⁹ Isolation is experienced by persons with disabilities due to exclusion and segregation from community life.¹⁰ This in turn impacts on the ability to actualise opportunities to access not only community services and community life, but also legal dispute resolution mechanisms.

The closest and least costly dispute resolution forum in rural areas are the chief's and headmen's courts (traditional courts).¹¹ What are known as 'traditional courts' today have had many guises under colonialism and apartheid and, similarly, 'traditional authorities' or 'traditional communities' are politically loaded terms devised after decades of flux in the governance of African peoples in South Africa.¹² Traditional courts are comprised of a chief (*inkosi*), headmen or women (*izinduna*) and members of the traditional council.

A traditional council is a council established under the Traditional Leadership Government Framework Act 41 of 2003 (TLGF Act) for a period of five years, with members 'selected' by the senior traditional leader in terms of the community's customs, and other members of the community democratically 'elected' and constituting 40 per cent of the council.¹³ The first group thus refers to the *inkosi* and *izinduna* of the particular community; while the second group includes elected community members. The legislation requires one-third of the members of the council to be women.¹⁴

7 A Gartrell & E Hoban "'Locked in space": Rurality and the politics of location' in S Grech & K Soldatic (eds) *Disability in the global south: The critical handbook* (2016) 348.

8 J Hanass-Hancock 'Invisible: The notion of disability in the context of HIV/AIDS in KwaZulu-Natal, South Africa' unpublished PHD thesis, University of Berlin, 2008 127.

9 E Munsaka & H Charnley "'We do not have chiefs who are disabled": Disability, development and culture in a continuing complex emergency' (2013) 28 *Disability and Society* 767.

10 P Modiba et al 'Profile of community mental health service needs in the Moretele district (North West Province) in South Africa' (2001) 4 *Journal of Mental Health Policy* 189; C Wa Munyi 'Past and present perceptions towards disability: A historical perspective' (2012) 32 *Disability Studies Quarterly* 1.

11 Traditional courts in South Africa are also known as tribal courts and customary courts or indigenous courts.

12 For a historical account of the Zulu nation's traditional leadership from arrival in South Africa, settlements in the 18th century through to 1994, see GF Houston & T Mbele *KwaZulu-Natal History of Traditional Leadership Project: Final Report* (2011) 1.

13 Secs 3(2)(a) & (c) TLGF Act.

14 Sec 3(2)(b) TLGF Act.

A traditional community is recognised as such by the legislation if the community is subject to a system of traditional leadership in terms of the community's customs and observe a system of customary law.¹⁵ The community is tasked with transforming and adapting its customary law and customs to comply with the Bill of Rights principles, especially through the prevention of unfair discrimination, the promotion of equality and progressive advancement of gender representation in the succession to traditional leadership positions.¹⁶ A similar provision for advancing the representation of persons with disabilities has not been made.

Rural community members may prefer traditional courts to formal courts because of their simplicity, as well as language and familiar procedures.¹⁷ The status of these courts, however, are dispute resolution forums not recognised as part of the magistracy or judiciary, yet as 'other courts', as argued by some commentators,¹⁸ or rather 'independent and impartial tribunal[s]' should they not be considered to have the status of 'courts'.¹⁹ Only 'chiefs or headmen'²⁰ duly appointed as such by the government are officially empowered with judicial authority in South African law.²¹ This is because two provisions of the Black Administration Act have not been repealed – those dealing with the civil and criminal jurisdiction of traditional courts.²² Since 2005 the drafting of 'replacement legislation' for the racist Black Administration Act has been on the table.²³ Despite pre-democratic meddling in customary law institutions through legislative intervention, and now post-democratic attempts to regulate traditional courts, the institution remains 'resilient'.²⁴ However, Rautenbach indicates that a gap between law and customary practice remains, indicating a need for empirical research to determine the 'true position' of traditional courts in rural South Africa.

15 Sec 2(a) TLGF Act.

16 Sec 2(3) TLGF Act.

17 SALRC 'The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders' Discussion Paper 82 Project 90 (1999) paras 2.1.1 to 2.1.5.

18 J de Waal, I Currie & G Erasmus *Bill of Rights handbook* (2001) 570 and 576 under sec 166(e) of the Constitution: 'The courts are ... any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.' Compare J Brickhill & A Friedman 'Access to courts' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2011) OS 11097 Ch59-5.

19 TW Bennett *Customary law in South Africa* (2008) 147.

20 Chiefs are known in isiZulu as *amakhosi* (plural) and *inkosi* (singular). Headmen are also known as 'wardheads' and in isiZulu *izinduna* (plural) and *induna* (singular).

21 The TLGF Act 41 of 2003 recognises traditional communities and leadership.

22 Secs 12 & 20 of the Black Administration Act 38 of 1927.

23 E Knoetze 'Value (x 2) + fine = damages? Notes on the imposition of sanctions by the courts of chiefs (senior traditional leaders) and headmen' (2014) *Obiter* 604; C Himonga & R Manjoo 'The challenges of formalisation, regulation, and reform of traditional courts in South Africa' (2009) 3 *Malawi Law Journal* 157. See further, the Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2012.

24 C Rautenbach 'South Africa: Legal recognition of traditional courts: Legal pluralism in action' in TJ Kötter et al (eds) *Non-state justice institutions and the law: Decision-making at the interface* (2015) 144.

A number of constitutional protections against unfair discrimination and the promotion of substantive equality and access to justice means that persons with disabilities have the same rights as non-disabled persons to have their disputes heard in procedurally and substantively fair ways in all courts in South Africa, including traditional courts. According to the Constitution of the Republic of South Africa, 1996, everyone is entitled to 'have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.²⁵

The notion of persons with disabilities, particularly those with intellectual, psycho-social or communication impairments, representing themselves in traditional courts has not been considered in the literature, or by the South African Human Rights Commission (SAHRC),²⁶ nor in recent law reform initiatives, particularly the Traditional Courts Bill of 2016.²⁷ Literature on the challenges in accessing justice faced by persons with disabilities has been sporadic. Therefore, this article sets out to explore the current situation and legal imperatives regarding the legal capacity of persons with intellectual, psycho-social or communication disabilities in traditional courts in KwaZulu-Natal.

The second part outlines the context of dispute resolution under traditional courts, and legal capacity in customary law. The third part highlights the reality of legal capacity and the denial of access to justice for persons with disabilities in traditional communities of KwaZulu-Natal, and compares the approaches to legal capacity in traditional and formal courts. A short summary of pertinent aspects of the Traditional Courts Bill is included. In part four, we argue that the South African state's implementation of the relevant international law obligations are not evident, including a lack of appropriate training of traditional court personnel and a lack of awareness of the equal recognition of legal capacity among families supporting persons with disabilities. Part 5 examines the provisions of the new African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol) relating to traditional justice and equality before the law. Part 6 is the conclusion.

25 Sec 34 of the Constitution of the Republic of South Africa, 1996.

26 Glaringly, the only reference to disability by the SAHRC in its submission on the Traditional Courts Bill of 2012 was that 'disability-friendly' language should be used such as 'persons with disabilities'. South African Human Rights Commission *SAHRC Submission to the National Council of Provinces*, 15 February 2012 (2012) para 76 <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202012.pdf> (accessed 15 November 2017).

27 Traditional Courts Bill (B2016) introduced in the National Assembly with explanatory summary of Bill published in *Government Gazette* 40487 of 9 December 2016.

2 Background

2.1 Traditional courts and dispute resolution

In traditional communities dispute resolution usually starts at family level, and if this fails to be resolved satisfactorily, the headman or woman will attempt to resolve the dispute (at ward level – *isigodi*). Should the parties be dissatisfied with the outcome, the matter is referred to the traditional court (*enkantolo Enkosi*) where the chief will ‘preside’ and come to a decision, in consultation with the headmen and women and councillors of the traditional council.²⁸ Any appeals or reviews of the traditional court’s order is referred to the magistrate’s courts according to its geographical jurisdiction, with appeals being heard *de novo*.²⁹ The rehearing is done simply because ‘no adequate record of proceedings is kept due to lack of resources and the fact that members of chiefs’ courts are not legally trained’.³⁰

When it comes to proceedings in the traditional courts, the customary law applicable in the specific area³¹ applies, as well as the rules of courts of chiefs and headmen in civil matters³² relating to evidence and procedure. Under the Constitution, customary law is placed on parity with the common law, but it has been argued that the reality is an ‘indirect’ entrenchment of the subordinate status of customary law compared to common law.³³

The jurisdiction of the traditional courts generally excludes ‘blood crimes’ such as sexual assault and rape, as well as assault and murder, and land disputes.³⁴ By and large, neighbourly disputes may be heard around nuisances caused by livestock, petty disputes and defamatory conduct by community members and, in some instances, petty crimes. Civil cases require customary law to be applied (common law is excluded) while criminal cases require customary law to be applied, but also includes some common law and statutory offences.³⁵ It should be noted that land disputes are in fact heard by the traditional courts and have been cited as the main types of dispute occurring in KwaZulu-Natal³⁶ despite their

28 Bennett (n <XREF>) 167.

29 SALRC (n <XREF>) 11-12.

30 SALRC (n 17) 12. If a case is not appealed, it is enforceable as the case is then *res judicata* (*Tsautsi v Nene* 1952 NAC (S) 73).

31 Secs 12(1) & 20(1) Black Administration Act.

32 Rules of Court of Chiefs and Headmen R2082 of 1967. Compare Rules 10-13 of the Amakhosi and Iziphakanyiswa Civil Court Rules (KwaZulu) GN 12 of 1992.

33 N Ntlama ‘The application of section 8(3) of the Constitution in the development of customary law values in South Africa’s new constitutional dispensation’ (2012) 15 *Potchefstroom Electronic Law Journal* 38.

34 The latter due to its supposed ‘administrative’ nature. See secs 67 and 68 of the Black Areas Land Regulations Proclamation R188 of 1969; and the Land Regulations (Amendment) Proclamation R23 of 1993.

35 Sec 20 Black Administration Act.

ostensibly 'administrative' nature. The jurisdiction of the traditional courts is highly contentious, and has yet to be aligned with constitutional norms: It is still regulated by the offensive Black Administration Act 38 of 1927 until such time as the law reform process under the Traditional Courts Bill has been completed.

The traditional courts utilise restorative justice principles³⁷ in resolving disputes and are (in theory at least) open to all black (African) community members born of or affiliated with the ward³⁸ of a particular headman or woman and traditional council (of the 'presiding' chief). Restorative justice in the African traditional justice processes shares three key values with modern restorative justice processes, namely, an aim for reconciliation and restoration of peace and harmony between the parties and in the community (social equilibrium); the promotion of a normative system that regards recognition of both rights and duties as vital aspects; and dignity and respect.³⁹ The restoration of relationships, whether within the community or a particular group in an effort to keep the peace and promote harmony, takes precedence over the personal interests of the parties to the dispute.⁴⁰

Nhlapo explains that the modern idea of 'accountability' being linked to justice drives the state (through elected representatives) to maintain order among people who are most likely strangers, whereas smaller societies prioritise the restoration of relationships (people who know each other and are likely kin) over the abstract notion of justice.⁴¹ Broadly, African indigenous justice is considered a victim-centred process, where his or her needs are recognised to include 'information, validation, social support and vindication'.⁴² For persons with disabilities these needs are

36 CREATE *Baseline study: Impendulo Project in eight traditional courts in uThungulu and Umgungundlovu Districts* (2017) (copy with authors).

37 N Ntlama & T Ndima 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) 4 *International Journal of African Renaissance Studies* 6; M Schoeman 'A philosophical view of social transformation through restorative justice teachings: A case study of traditional leaders in Ixopo, South Africa' (2012) 13 *Phronimon* 27; C Rautenbach 'Therapeutic jurisprudence in the customary courts of South Africa (traditional authority courts as therapeutic agents): Notes and comments' (2005) 21 *South African Journal on Human Rights* 323.

38 Ward in isiZulu is *isigodi*.

39 A Skelton 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' unpublished LLD thesis, University of Pretoria, 2005 239-248. Compare A Skelton & M Batley *Charting progress, mapping the future: restorative justice in South Africa* (2006) Restorative Justice Centre 116.

40 JF Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies* 182.

41 T Nhlapo 'Homicide in traditional African societies: Customary law and the question of accountability' (2017) 17 *African Human Rights Law Journal* 34.

42 O Elechi 'Human rights and the African indigenous justice system' (2004) unpublished paper presented at the 18th Conference of the International Society for the Reform of Criminal Law, Montreal, Canada, 8-12 August 2004 cited in A Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' (2007) *Acta Juridica* 232.

self-evidently of great import in showing respect and upholding their dignity and equality.

2.2 Legal capacity in customary law

The idea of what ‘constitutes the self’ correlates with how disability is perceived. Some anthropological studies have shown that in many African contexts, disruption to a person’s physical or mental capacity is attributed to ‘wronged relationships’ with other people, nature, ancestors or God,⁴³ and that ‘competence’ is part of social relations within the community, and not attributed to individuals (as in Western law or understanding).⁴⁴ This means that Western ideas on competence and autonomy are conceived differently by indigenous communities.⁴⁵

How to reconcile these differences in order to promote access to justice is an important consideration, particularly since importing Western models of thinking into African contexts may not be the best fit.⁴⁶ McKenzie, for example, has argued that self-representation is not as relevant in African philosophies of care and community since Western ideals of autonomy and independence of persons with disabilities from their family are not supported. In fact, self-representation (speaking for your own needs) may go against *ubuntu*.⁴⁷ Yet, *ubuntu* also includes aspects such as interdependence and responsibility, not only the notion of solidarity.⁴⁸ A relationship of dependency (for self-care or perhaps support in decision making), in the words of Kittay, need not be seen as a ‘limitation’ but as a ‘resource’.⁴⁹ However, such a positive view also necessitates the concession that dependence can be socially constructed in such a way that it is ‘unnecessary and stultifying’ particularly through oppressive institutions and practices. Interdependence between a person

43 P de Vlioger ‘(In)competence in America in comparative perspective’ in R Jenkins (ed) *Questions of competence: Culture, classification and intellectual disability* (1998) 54.

44 SR Whyte ‘Slow cookers and madmen: Competence of heart and head in rural Uganda’ in R Jenkins (ed) *Questions of competence: Culture, classification and intellectual disability* (1998) 154.

45 J Staples & N Mehrotra ‘Disability studies: Developments in anthropology’ in Grech & Soldatic (n 7) 41.

46 Compare S Grech ‘Recolonising debates or perpetuated coloniality? Decentring the spaces of disability, development and community in the global South’ (2011) 15 *International Journal of Inclusive Education* 87; H Meekosha & K Soldatic ‘Human Rights and the Global South: the case of disability’ (2011) 32 *Third World Quarterly* 1383; K Soldatic & S Grech ‘Transnationalising disability studies: Rights, justice and impairment’ (2014) 32 *Disability Studies Quarterly* 1.

47 J McKenzie ‘Disability activism and participation’ in T Lorenzo (ed) *Disability Catalyst Africa Series 1* (2011) 13.

48 C Himonga ‘The right to health in an African cultural context: The role of *ubuntu* in the realisation of the right to health with special reference to South Africa’ (2013) 57 *Journal of African Law* 176-179. Compare C Himonga, S Taylor & A Pope ‘Reflections on judicial views of *ubuntu*’ (2013) 16 *Potchefstroom Electronic Law Journal* 418; C Himonga ‘Exploring the concept of *ubuntu* in the South African legal system’ in U Kischel & C Kirschner (eds) *Ideologie und Weltanschauung im Recht* (2012) 8-9.

49 EF Kittay ‘The ethics of care, dependence, and disability’ (2011) 24 *Ratio Juris* 49.

with a disability and a family member or caregiver can be positive, but where there are negative ramifications, the *individual* with the disability should be entitled to redress in a traditional court.

Further to notions of 'competence' is the historical perspective which remains relevant in South Africa as the insidious effects of colonialism and apartheid⁵⁰ continue to plague traditional communities. For example, Swartz points out the essentialist argument that black persons did not need to have 'equal access to mental health care' as their cultural beliefs made it irrelevant.⁵¹ Those in power decided for persons with disabilities what they did or did not 'believe and want'.⁵² Also, at a particular time in the apartheid history black persons could not be considered 'mentally retarded', consequently with no protections granted to black persons with intellectual disabilities.⁵³

In both the formal and informal legal systems, the 'perceived attributes or consequences that people associate with the disability (which vary across disability type) ... influence acceptance'.⁵⁴ If perceived attributes of a psycho-social disability includes 'peril'⁵⁵ or dangerousness, for example, then the person will be avoided and their legal capacity questioned, depriving them of personhood. Where formal legal systems and, to a degree, informal legal systems give credence to 'unsound mind' stereotypes, persons with psycho-social disabilities continue to be discriminated against.⁵⁶ Similarly, if persons with intellectual disabilities are not believed to be credible, and barriers to effective communication with persons with communication disabilities are encountered by traditional court personnel, then equal recognition of their legal capacity hangs in the balance.

The legal test for mental and legal capacity in formal courts is not applied in traditional courts, nor are any other practices or rules developed to deal with the competency to provide evidence by complainants, defendants, perpetrators or other witnesses with disabilities in the traditional courts. That being said, liability for delicts and criminal conduct

50 L Swartz 'The reproduction of racism in South African mental health care' (1991) 21 *South African Journal of Psychology* 240.

51 L Swartz *Culture and mental health: A Southern African view* (1998) 1.

52 D Goodley & L Swartz 'The place of disability' in Grech & Soldatic (n 7) 76.

53 S Lea & D Foster (eds) *Perspectives on mental handicap in South Africa* (1990) cited in Goodley & Swartz (n 52) 76.

54 ME McLaughlin, MP Bell Donna & Y Stringer 'Stigma and acceptance of persons with disabilities: Understudied aspects of workforce diversity' (2004) 29 *Group and Organisation Management* 308.

55 Peril is one of the dimensions of psycho-social disability considered to evoke feelings of fright and unpredictability. See PW Corrigan et al 'Three strategies for changing attributions about severe mental illness' (2001) 27 *Schizophrenia Bulletin* 187; DB Feldman & CS Crandall 'Dimensions of mental illness stigma: What about mental illness causes social rejection' (2007) 26 *Journal of Social and Clinical Psychology* 137.

56 P Mwanyisa 'Of stereotypes and the 'unsound mind' clauses' *AfricLaw: Advancing the rule and role of law in Africa* (2015) <https://africlaw.com/2015/10/02/of-stereotypes-and-the-unsound-mind-clauses/#more-1003> (accessed 20 October 2015).

in customary law, generally speaking, do not only lie with the person who is considered to be 'insane', but is also shared by the head of the family as accessory liability.⁵⁷ What this means is that the head of the family can sue or be sued (defend the action) on behalf of the family (of which the individual is a part) as a proxy so to speak. With regard to contractual liability, 'mental illness' may be considered a ground for legal incapacity in customary law.⁵⁸

The denial of legal capacity can result in restrictions on decision making in the community. This is effectively based on the paternalistic assumption that some persons with disabilities do not have the capacity to exercise their rights responsibly and to make their own choices.⁵⁹ Where persons with disabilities may wish to obtain a resolution to disputes, even on the European continent, 'many did not know about their rights, did not know how or with whom to file complaints or feared that complaints would worsen their situation'.⁶⁰

3 Current situation with regard to legal capacity and access to justice

CREATE, a non-governmental organisation (NGO) in KwaZulu-Natal, has conducted research and training in the province on traditional leaders' attitudes and knowledge of the rights of persons with disabilities, including in the traditional courts, since 2012. Findings reveal that there are pervasive beliefs and stigmatising stereotypes about the ability of persons with disabilities to represent themselves in traditional courts (without a family member).⁶¹ There are erroneous beliefs held by traditional leaders that persons with disabilities do not have disputes that require resolution because their families are 'adequately' caring for their needs,⁶² and these leaders generally lack information about the need for accessibility, reasonable accommodation (procedural) and support measure requirements in court proceedings.⁶³ Findings further indicate that persons with disabilities experience isolation, segregation and stigma in their

57 JMT Labuschagne, JC Bekker & CC Boonzaaier 'Legal capacity of mentally ill persons in African societies' (2003) 36 *Comparative and International Law of Southern Africa* 115.

58 H Whelton *Die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophutatswana* unpublished LLD thesis, University of South Africa, 1991 107 cited in Labuschagne et al (n 57) 116.

59 European Union Agency for Fundamental Rights *Legal capacity of persons with intellectual disabilities and persons with mental health problems* (2013) 18. Compare European Union Agency *Choice and control: The right to independent living experiences of persons with intellectual disabilities and persons with mental health problems in nine EU member states* (2012) 42.

60 European Union Agency (2012) (n 59) 42.

61 CREATE *Summary of research on traditional courts and people with disabilities* (2013) Presentation to the House of Traditional Leaders, uThungulu District. (Copy with the authors).

62 CREATE (n 36).

63 As above.

communities; are excluded from participating in community meetings; lack the means to access justice through, for example, transport barriers; are precluded from reporting family disputes due to perceptions of possible repercussions for their relationships of dependency; and by and large do not report relevant disputes to traditional leaders – with a negligible uptake of dispute resolution in the traditional courts.⁶⁴

As traditional dispute resolution begins in the family, it is already at this level that some persons with disabilities experience a lack of access to justice. In research conducted by CREATE in one municipality of KwaZulu-Natal, a municipal official stated in relation to cases for the traditional court that ‘nobody even wanted to take them [people with disabilities] to the *induna*. They were kept indoors.’⁶⁵ It is likely that cases involving persons with disabilities in that municipality did not even reach the traditional courts. Similarly, one woman with a communication impairment explained.⁶⁶

I tried to report a case of my boyfriend who did not want to support the child. The *induna* did not attend to me. They thought I was drunk because of my speech problem.

Thus the *induna* effectively stopped the process of access to justice for this woman.

A key aspect of discrimination against persons with disabilities in the traditional courts investigated by CREATE is the fact that persons with disabilities are not accepted as equal before the law. In some proceedings in traditional courts, an adult with a disability (male or female) is treated as a minor and is required to be represented by a parent or a male member of the family without a disability.⁶⁷

Persons with disabilities in the initial study conducted by CREATE identified negative attitudes of traditional leaders and clerks of the traditional courts as a barrier to their being able to access justice. In addition, several persons with disabilities, especially those with communication impairments, claimed that a lack of patience on the part of the court clerks and the *izinduna* also constituted discrimination and affected their ability to access justice.⁶⁸ Inaccessibility of the court

64 As above.

65 CREATE *Disability inclusion: Possibilities and progress: A case study in uMfolozi Local Municipality, KwaZulu-Natal, South Africa* (2014) 31.

66 V John ‘Traditional leaders ‘scared’ of disabled people’ *Mail & Guardian* 12 November 2015 <https://mg.co.za/article/2015-11-13-traditional-leaders-scared-of-disabled-people#.VkYljr8lp1E.gmail> (accessed 2 November 2017).

67 As above.

68 CREATE (n 65).

buildings, waiting areas and toilets also affects access to justice for persons with disabilities in the traditional courts.⁶⁹

The traditional leaders who participated in CREATE's research on traditional courts in 2012 indicated a particular fear of working with people with communication impairments: 'I am scared of Deaf people because if I do not understand, they will hit me.'⁷⁰ In more recent interviews with other traditional leaders, the language they used to refer to persons with psycho-social impairments was discriminatory, 'a person who is tormented, who is mad'.⁷¹

3.1 Barriers to access to justice

Barriers to accessing justice include pervasive beliefs, stereotypes and stigma faced and resultant discrimination experienced by persons with disabilities, particularly where communication is difficult and/or cognitive capacity is questioned by families and caregivers, community members and traditional council members.⁷² These barriers translate into a situation of low reporting to the traditional courts of disputes by persons with these disabilities⁷³ and, where reporting does occur, the dispute resolution process is marred by a lack of appreciation of the need to recognise the right to self-representation, self-determination, as well as the need for reasonable accommodation measures to ensure equal participation in the dispute resolution process.⁷⁴

Barriers such as inaccessible transport and public buildings and a lack of assistive devices, as well as low employment and unequal access to education and inadequate sanitation restrict the opportunities for persons with disabilities to exercise legal capacity in legal proceedings,⁷⁵ including in traditional courts.

Persons with intellectual disabilities suffer stigma and self-stigma⁷⁶ that in one South African study was found to correlate with ethnicity.⁷⁷

69 CREATE *Baseline evaluation: Khulumani Sekuyisikhathi Collective: Participatory action for socio-economic rights* (2017) (Copy with authors).

70 CREATE presentation Legal Resources Centre cited in John (n 66).

71 CREATE (n 36).

72 Traditional courts' staff are the headmen/women in each village under the chief's area of jurisdiction, as well as the chief; together they comprise the traditional council. This is explained in more detail in part 3.

73 CREATE (n 36).

74 As above.

75 Compare J Lord & M Stein 'Prospects and practices for CRPD implementation in Africa' (2013) 1 *African Disability Rights Yearbook* 110-111.

76 E Kock et al 'Cross-cultural validation of a measure of felt stigma in people with intellectual disabilities' (2012) 25 *Journal of Applied Research in Intellectual Disabilities* 11.

77 A Ali et al 'Ethnicity and self-reported experiences of stigma in adults with intellectual disability in Cape Town, South Africa' (2015) 59 *Journal of Intellectual Disability Research* 530.

Black participants with intellectual disabilities reported higher incidences of physical attacks and 'being stared at' by community members, yet they also were more likely to report their feelings of being 'the same as other people'. Meer and Combrinck found that the stigmatisation of persons with intellectual disabilities includes perceptions that they are 'less valuable' and lack credibility.⁷⁸ This study examined what barriers women with psycho-social and intellectual disabilities who experienced gender-based violence faced when interacting with the criminal justice system. One important factor is the association of intellectual disability with the supernatural – witchcraft, curses, ancestral or demon possession.⁷⁹ A KwaZulu-Natal participant explained that 'in Zulu mythology intellectual disabilities are seen as the result of not having followed customs and being cursed by ancestors, and as portending bad luck'.⁸⁰ The authors recommended *inter alia* that service providers in criminal justice 'dispel stigma and react to the vulnerability of women with intellectual disabilities' to gender based violence.⁸¹ In Traditional courts there is at times a reticence to hear matters where a person with an intellectual disability is a party to a dispute.

Persons with communication disabilities have experienced many barriers in the formal court system, which have been well documented by researchers.⁸² For example, Deaf persons or persons who are hard of hearing (accused or complainants) in the criminal justice system are often unable to provide statements or provide accurate statements because of the absence of a skilled interpreter. Simply having a skilled court interpreter available to translate for a sign language user may not be sufficient. Without the existence of adequate norms and standards of practice to guide court interpreters in formal courts, Lebesse argues, access to justice and linguistic rights are violated.⁸³ CREATE's research findings indicate that bar one instance, the traditional council members did not know how to obtain the services of a sign language interpreter and, furthermore, funding for such services, were they to be obtained, generally was not available.⁸⁴

78 T Meer & H Combrinck 'Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence' (2015) 29 *Agenda* 14.

79 Meer & Combrinck (n 78) 18. Compare C Brooke-Sumner, C Lund & I Petersen 'Perceptions of psychosocial disability amongst psychiatric service users and caregivers in South Africa' (2014) 3 *African Journal on Disability* 146.

80 Meer & Combrinck (n 78) 18.

81 Meer & Combrinck (n 78) 22.

82 H Dalgut & R Morgan 'Barriers to justice: Violations of the rights of deaf and hard of hearing people in the South African justice system' (2003) 18 *South African Journal on Human Rights* 30.

83 S Lebesse 'Do justice to court interpreters in South Africa' (2014) 43 *Stellenbosch Papers in Linguistics Plus* 183.

84 CREATE (n 36).

In another study, White et al⁸⁵ cite recent research revealing that persons with little to no functional speech (LNFS) are particularly vulnerable to being victims of crime, and their rights are infringed during the legal justice system due to restricted communication skills that are aggravated by little understanding of what to do to help a person with LNFS⁸⁶. The controversial legal test for competency to testify (discussed below)⁸⁷ can also violate their rights. White et al recommend that for persons with LNFS, an 'Alternative and Augmentative Communication Resource Tool Kit' should be developed to assist professionals in the justice system to enable full participation by persons with LNFS in providing testimony.⁸⁸

Research around the experiences of persons with psycho-social disabilities in formal courts in South Africa is limited. It abounds on the legal aspects of fitness to stand trial,⁸⁹ insanity defences⁹⁰ and involuntary confinement for criminal accused,⁹¹ but little has been written on the barriers they may experience in accessing the criminal and civil legal system. This cohort has limited access to legal services and they may have a high dependence on others (carers or family members) to assist them to report a crime or bring a civil claim.⁹²

It can therefore be said that persons with disabilities, particularly those with intellectual, psycho-social and communication disabilities, often face insurmountable obstacles to equal participation in the criminal⁹³ and civil justice systems.

- 85 R White, J Bornman & E Johnson 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal* 1.
- 86 DN Bryen & CH Wickman 'Ending the silence of people with little or no functional speech: Testifying in court' (2011) 31 *Disability Studies Quarterly* 1.
- 87 The legal test requires a person to be able to convey his or her testimony in an understandable way. The meaning of 'understandable' differs from person to person where someone has a communication impairment.
- 88 White, Bornman & Johnson (n 85) 10.
- 89 M Swanepoel 'Legal aspects with regard to mentally ill offenders in South Africa' (2015) 18 *Potchefstroom Electronic Law Journal* 3238; T Schutte & U Subramaney "'Single" v "panel" appointed forensic mental observations: Is the referral process ethically justifiable?' (2013) 6 *South African Journal on Bioethics and Law* 64.
- 90 PM Joubert & CW van Zyl 'Behaviour that underpins non-pathological criminal incapacity and automatism: Toward clarity for psychiatric testimony' (2016) *International Journal of Law and Psychiatry* 10.
- 91 N Haysom, M Strous & L Vogelmann 'The mad Mrs Rochester revisited: The involuntary confinement of the mentally ill in South Africa' (1990) 6 *South African Journal on Human Rights* 341; S Ramlall, J Chipps & M Mars 'Impact of the South African Mental Health Care Act No 17 of 2002 on regional and district hospitals designated for mental health care in KwaZulu-Natal' (2010) 100 *South African Medical Journal* 667.
- 92 Compare A Gray, S Forell & S Clarke 'Cognitive impairment, legal need and access to justice' (2009) 10 *Justice Issues* 3.
- 93 W Holness 'Arrested, detained and accused persons' in A Govindjee (ed) *Introduction to human rights law* (2016) 241.

3.2 Legal capacity in formal courts

Legal capacity comprises a capacity to have rights on an equal basis with others (known as passive capacity), and a capacity to act and have one's actions recognised by the law (known as active capacity).⁹⁴ In a common law legal system such as ours, these two aspects are conflated into the notion of 'competency' referring to the capacity to stand before a court of law and to make one's own decisions.⁹⁵ Mental capacity has in practice been considered a precondition to the recognition of 'legal' capacity.

Broadly speaking, legal capacity refers to the ability to represent oneself in a legal dispute; to obtain legal representation; to enter into contracts; to attract liability (delictually and criminally); to be considered fit to stand trial in a criminal matter; and to be competent to provide testimony in civil and criminal courts. The basic understanding is that 'the accused must be present both in mind and body' for him or her to participate meaningfully in criminal proceedings'.⁹⁶ Accordingly,

if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79 of the Criminal Procedure Act.⁹⁷

This refers to the trialability of the case.

Criminal capacity (or responsibility or liability) instead deals with the person's 'mental' capacity at the time of the commission of the alleged offence.⁹⁸ This provision entails the following:⁹⁹

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

94 A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

95 J Parry & EY Drogin *Mental disability law, evidence and testimony A comprehensive reference manual for lawyers, judges and mental disability professionals* (2007) 7.

96 F Cassim 'The accused person's competency to stand trial: A comparative perspective' (2004) 45 *Codicillus* 17, relying on the interpretation by the court in *Pachcourie v Additional Magistrate, Ladysmith & Another* 1978 (3) SA 986 (N).

97 Sec 77(1) of the Criminal Procedure Act (as amended by Act 4 of 2017).

98 Sec 78 of the Criminal Procedure Act. J Grant 'Chapter 13: Accused: Capacity to understand proceedings: Mental illness and criminal responsibility (ss 77-79)' in E du Toit et al (eds) *Commentary on the Criminal Procedure Act* (2017) RS 59 13-8.

99 Sec 78(1) of the CPA (as amended by Act 4 of 2017).

Where an allegation of either being unfit to stand trial or not being criminally responsible is made due to ‘mental illness or intellectual disability’, an inquiry procedure is followed.¹⁰⁰ This procedure requires a panel to be appointed, which includes medical professionals such as psychiatrists and clinical psychologists, in varying circumstances.¹⁰¹

As a starting point, ‘[e]very person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities’.¹⁰² It is crucial that an accused person should be provided with legal representation (with legal aid) where the court ‘is of the opinion that substantial injustice would otherwise result’.¹⁰³

In civil proceedings, legal capacity has been linked to the question as to whether or not the person has a ‘consenting mind’. Holness has explained that this means that ‘legal capacity cannot be acquired by a person if, due to that person’s mental condition, he or she does not understand or appreciate the nature and consequences of the juristic act’, which in turn means that

legal transactions entered into by persons with impaired capacity are void *ab initio* (and therefore cannot be ratified whether the other party was aware of the mental incapacity or not).¹⁰⁴

The default position is that everyone has full legal capacity, but ‘insane or mentally disordered persons have limited legal capacity’.¹⁰⁵ Where a declaration of unsoundness of mind is made, a rebuttable presumption of incapacity is created.¹⁰⁶

The common law *curatorship* as well as the legislative process for administratorship under the Mental Health Care Act 17 of 2002 both serve to substitute decision making and self-representation of the person who is declared as ‘lacking’ legal capacity with that of a professional (whether a *curator bonis*, *ad litem*, *personae* or an administrator, depending on the context). Holness has considered the legal reform initiatives on supported decision making, but noted that the *status quo* of curatorship and administratorship is likely to continue even if and when new legislation for ‘supported’ decision making is enacted.¹⁰⁷

100 Secs 77(1) & 78(2) of the CPA (as amended by Act 4 of 2017).

101 Sec 79 of the CPA (as amended by Act 4 of 2017).

102 Sec 78(1A) of the CPA (as amended by Act 4 of 2017).

103 Sec 77(1A) of the CPA (as amended by Act 39 of 2014).

104 W Holness ‘Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality’ (2014) 30 *South African Journal on Human Rights* 332.

105 R Kruger ‘Division F’ in B Clarke (ed) *Family law service* (2016) F11.

106 Rule 57 of the Uniform Court Rules.

107 Holness (n 104) 344.

In formal civil and criminal courts, a witness is competent, qualified and able¹⁰⁸ to provide evidence if he or she can do so lawfully. Some witnesses are excluded as such.¹⁰⁹ Persons with psycho-social disabilities (referred to in legislation as ‘mental illness’ or ‘lunacy or insanity’) or intellectual disabilities (referred to in some legislation as ‘mental illness’ or ‘idiocy’) are generally considered incompetent in our law.¹¹⁰ This legal test in our law is described as follows:¹¹¹

It must appear to the trial court or be proved that the witness suffers from –

- (a) a mental illness; or
- (b) that he or she labours under imbecility of mind due to intoxication or drugs or the like; and
- (c) it must also be established that as a *direct result* of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason.

Evidence of the ‘incompetence’ of the witness is presented to the court, and an investigation follows to determine whether the witness is ‘deprived of the proper use of his or her reason’ as a result of the incompetence.¹¹² Such investigation can also be done on the basis of the court’s own observations of the witness.¹¹³ De Vos further explains that the exclusion here is

directed at a certain degree of mental illness or imbecility of mind, which deprives the witness of the *ability to communicate properly* in regard to the subject matter in question. Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him *to convey his observations in an understandable way to the court*, will be a competent witness.¹¹⁴

108 A Bellangère (ed) *The law of evidence in South Africa: Basic principles* (2013) 102.

109 Sec 8 of the Civil Proceedings Evidence Act 25 of 1965 and secs 192 and 206 of the Criminal Procedure Act 51 of 1977.

110 Sec 9 of the Civil Proceedings Evidence Act, 1965: ‘No person appearing or proved to be afflicted with idiocy, lunacy or insanity, or to be labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.’ Sec 194A of the Criminal Procedure Act, 1977 (as amended by Act 8 of 2017): ‘For purposes of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, the court may, when it deems it necessary in the interests of justice and with due consideration to the circumstances of the witness, and on such terms and conditions as the court may decide, order that the witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.’

111 Bellangère (n 108) 104 (our emphasis).

112 *S v Kato* 2005 (1) SACR 522 (SCA) para 10. (The SCA’s approach is preferred to the one in *S v Mnguni* 2014 (2) SACR 595 (GP).)

113 *S v Zenzile* 1992 (1) SACR 444 (C) 446G. Compare *S v Malcolm* 1999 (1) SACR 49 (SE) 53a.

114 WL de Vos ‘The competence and compellability of witnesses’ in PJ Schwikkard & SE van der Merwe (eds) *Principles of evidence* (2016) 452 (our emphasis).

The ability to effectively communicate with the court, therefore, is a key requirement for the competence of witnesses. Interpreters are utilised for those with communication impairments,¹¹⁵ but in some instances witnesses are found to be incompetent to testify due to speech impairments (for example where the person was paralysed from the neck down due to a stroke and accordingly unable to speak).¹¹⁶ ‘Gesture language’ may be used to present oral evidence by a so-called ‘deaf and speechless’ person.¹¹⁷ Msipa has argued that in criminal proceedings ‘the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony’.¹¹⁸ The implication of this proposal is that courts would have to provide the kinds of accommodation needed: such as qualified interpreters (for instance, speech therapists), develop Augmentative and Alternative Communication guides, and train lawyers and judicial officers on how to effectively communicate with and elicit testimony from a person with an intellectual, communication or psycho-social disability rather than dispose of testimony on the basis of ‘incompetence’.

Often medical professionals, mostly psychiatrists, are called upon to provide expert testimony as to the ‘mental capacity’ of a particular person, whether in civil or criminal proceedings. There are ethical considerations when incapacity or incompetence of a person with psycho-social or intellectual disability in legal proceedings is averred, including the consideration that the expert could be a ‘hired gun’ in terms of promoting the client’s case.¹¹⁹ This is an adversarial approach to dispute resolution.

3.3 Comparison of legal capacity in formal and traditional courts

The common law concept of legal capacity is not extended to customary law, nor its practice in communities. However, CREATE’s research findings indicate that the *de facto* deprivation of legal capacity through pervasive stigma, segregation and, therefore, exclusion from community life and dispute resolution processes, does occur.¹²⁰

Whilst the legislature and formal courts have developed rules to divine the ‘mental’ capacity of a person, traditional courts have no such rules or

115 *R v Ranikolo* 1954 (3) SA 255(O) and *The State v Naidoo* 1962 (2) SA 625 (A).

116 *Master of the High Court v Deedat & Others* 1999 (11) BCLR 1285 (N).

117 Sec 161(2) of the Criminal Procedure Act.

118 D Msipa ‘How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe’ (2015) 3 *African Disability Rights Yearbook* 89.

119 P Stevens ‘Ethical issues pertaining to forensic assessments in mental capacity proceedings: Reflections from South Africa’ (2017) 24 *Psychiatry, Psychology and Law* 628.

120 CREATE (n 36).

procedures. Expert testimony with regard to legal capacity in traditional courts is unheard of.¹²¹ It is more likely that the participants in the traditional court will decide a person's 'capacity' or lack thereof to act in proceedings affecting them, whether the family members at the family level dispute resolution, the *induna* at *isigodi* level, or the *inkosi* at the traditional court level. Indeed, the undeniable role that family and caregivers play in providing informal support can impact on what perception of capacity is created by such a supporter when interacting with traditional leaders 'on behalf of' the person with the disability.

While we are not calling for the participation of expert witnesses in traditional courts, we do question the ability of any person (including informal support provided by family members or caregivers) to determine the capacity of a person with a disability in traditional court proceedings. Further, we question the provision of support that may be needed (as well as promoting safeguards from abuse) without specific training in the recognition of legal capacity and the provision of appropriate support measures. People in rural communities often rely on traditional healers for mental health. One challenge of this practice is that traditional healers rely on the opinions or reports of family members as to the healing process of the person with the psycho-social illness.¹²² This raises red flags with regard to a potentially undue influence when a person with a psycho-social disability is 'supported' by a family member in traditional court proceedings.

The relationship between traditional healers' understanding of psycho-social disability (its causes, treatment and the prevention thereof)¹²³ and their perception of a person's mental capacity and traditional court members' perceptions of legal capacity has not yet been explored in research. However, mental health literacy among traditional healers has been called for.¹²⁴ We would also argue for social context training of traditional healers on disability in line with the emphasis of the CRPD and the African Disability Protocol on equal recognition before the law and legal capacity on an equal basis with others.

121 As above.

122 MJ Sehoana & S Laher 'Pedi psychologists' perceptions of working with mental illness in the Pedi community in Limpopo, South Africa: The need to incorporate indigenous knowledge in diagnosis and treatment' (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 236; J Mufamadi & T Sodi 'Notions of mental illness by Vhavenda traditional healers in Limpopo Province, South Africa' (2010) 9 *Indilinga African Journal of Indigenous Knowledge Systems* 262.

123 M Madzhe, TM Mashamba & FJ Takalani 'African traditional healers' perception and diagnosis of mental illness' (2014) 1 *African Journal for Physical, Health Education, Recreation and Dance* 319.

124 KR Sorsdahl et al 'Explanatory models of mental disorders and treatment practices among traditional healers in Mpumalanga, South Africa' (2010) 13 *African Journal of Psychiatry* 290.

Ultimately, without adequate data on experiences by persons with disabilities who do participate in traditional courts, as opposed to current baseline research indicating low reporting and participation,¹²⁵ it will be difficult to develop appropriate guidelines for traditional councils on how to promote equality, legal capacity and access to justice. Further research and monitoring are required, as are meaningful consultation and participation by persons with disabilities in developing such guidelines.

3.4 Traditional courts' law reform

The Traditional Courts Bill (B-2016) was released for comment on 9 December 2016 and is now known as the Traditional Courts Bill (B1-2017).¹²⁶ This most recent incarnation is woefully inadequate when it comes to the prohibition of discrimination and provision of reasonable accommodation measures for persons with disabilities. Below is a brief summary of some pertinent aspects of the Bill and a critique thereof.

3.4.1 Participation

The 2016 Bill appears to take steps towards ensuring that courts will 'facilitate the full, voluntary and meaningful participation of all members in the community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution' in its objectives.¹²⁷ This in part was to placate opposition to the Bill on the basis of the prohibition against opting-out in previous versions of the Bill, which made dispute resolution in the traditional courts compulsory for persons belonging to traditional communities.

Further to this, cognisance of systemic unfair discrimination and inequalities or attitudes preclude 'meaningful and voluntary participation in traditional court proceedings by any person or group of persons, particularly in respect of ... disability' is one of the guiding principles of application of the Bill.¹²⁸ The absence of 'full' participation in this clause is disturbing. Submissions on the Bill included the identification of a lack of systems or procedures to ensure substantive participation of various categories of persons, including persons with disabilities, requiring stronger provisions to give effect to this imperative.¹²⁹ The denial of equal

125 CREATE (note 36).

126 The Traditional Courts Bill of 2016 was introduced in the National Assembly with an explanatory summary of the Bill published in *Government Gazette* 40487 of 9 December 2016.

127 Clause 2(f) TCB.

128 Clause 3(2)(b)) TCB.

129 N Ngamlana 'The Traditional Courts Bill: Examining the gaps' (2012) 14 *Local Government Bulletin* 16 17, referring to the submissions made by the Community Law Centre on the 2012 Bill.

recognition before the law is all too easy if explicit reference to equality before the law is not made in the legislation.

Although the Bill allows for 'opting out' from the traditional court adjudication and to choose rather to utilise adjudication in ordinary courts, just as for women, such a desire to exercise a choice of forum may be prevented by 'overt community pressure or lack of resources'.¹³⁰ According to previous findings by Holness and Rule, the possibility of 'opting out' to use an ordinary court may also be limited for persons with disabilities due to the cultural practice of requiring to receive 'permission' from traditional leaders or, in the case of a married woman with a disability, 'permission' may be required from her in-laws.¹³¹ Such cultural practices should be abolished.

3.4.2 Prohibition of discrimination

It appears that the drafters carefully considered the need to prohibit discrimination against a number of 'vulnerable' groups, including persons with disabilities. However, the terminology utilised is paternalistic and disempowering for parties with disabilities who are to be 'treated in a manner that takes into account their vulnerability'.¹³² While 'vulnerability' truly is a part of being human and in fact is a universal attribute for all of us at some stage of our lives, cloaking someone as 'vulnerable' should not be a mask for paternalism. This is exceedingly possible when the label of 'vulnerability' emphasises what persons with disabilities 'lack' in comparison to able-bodied persons, and the 'dangers' that they face.¹³³ Such paternalism is to be avoided with the human rights approach preferred by the CRPD.¹³⁴ The emphasis on vulnerability does not promote 'equal recognition before the law' regardless of disability or mental capacity.

No mention of reasonable accommodation is made in the Bill as a measure to avoid discrimination, and this is contrary to the requirements of article 13 of the CRPD, as discussed below. While the venue and time of the proceedings are to be 'accessible to members of the community in question',¹³⁵ research conducted by CREATE¹³⁶ reveals that accessibility

130 J Williams & J Klusener 'The Traditional Courts Bill: A woman's perspective' (2013) 29 *South African Journal on Human Rights* 292.

131 W Holness & S Rule 'Barriers to advocacy and litigation in the Equality Courts' (2014) 17 *Potchefstroom Electronic Law Journal* 1913.

132 Clause 7(3)(a)(iii) TCB.

133 J Herring *Vulnerable adults and the law* (2016) 36.

134 United Nations General Assembly 'Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies' (2015) *Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/31/30* 30 November 2013 para 4.

135 Clause 7(1) TCB.

136 CREATE (n 36).

of court buildings at best is uneven. Further, traditional leaders do not know what measures of accommodation to provide bar calling the matter of the person with the disability to be heard first.¹³⁷

We recommend that the Bill, therefore, should delete references to ‘vulnerable’ persons. The Bill should include a reference to the denial of reasonable accommodation as a form of discrimination on the basis of disability.¹³⁸

3.4.3 *Protective and promotional measures*

The Bill requires measures to be put in place

to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity.¹³⁹

The cabinet minister responsible for the administration of justice (the Minister of Justice) is to report annually to Parliament on the measures taken.¹⁴⁰ While this is welcomed, the administration of traditional courts has historically fallen under the Department of Cooperative Governance and Traditional Affairs (COGTA), and this anachronistic situation needs to be resolved. Further, whilst the Commission for Gender Equality, according to this Bill, is to report annually to Parliament on the participation of women and the promotion of gender equality in traditional courts,¹⁴¹ no corresponding requirement is placed on the SAHRC in relation to persons with disabilities. Serious political will is required for provisions under the Traditional Courts Bill ‘to promote and protect vulnerable persons’ to be enacted. The reality is that measures to promote equality are dependent on adequate budgetary allocations.

A schedule to the Bill specifically prohibits conduct that tends to

denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer’s disease;

discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;

discriminate against persons with albinism.¹⁴²

137 As above.

138 Art 2 CRPD.

139 Clause 5(3)(a)(ii) TCB.

140 Clause 5(3)(iii) TCB.

141 Clause 5(3)(b) TCB.

142 Schedule 2 *Prohibited conduct which infringes on the dignity, equality and freedom of persons* (under clause 3(3) of the Bill) (c) to (e).

Such prohibition sends a strong message about such practices. The language used, however, is problematic, in particular the use of terms such as ‘elderly persons who suffer from mental health conditions’ and ‘persons who are mentally or physically infirm or disabled’. These three ‘groups’ identified indeed are likely to face discrimination in court proceedings. Persons with communication disabilities, however, also require specific and explicit protection to recognise their legal capacity on an equal basis with others. It is preferable to distinguish between psycho-social and intellectual impairments in terminology utilised. Unfortunately, these examples of conduct are not specific or broad enough to cover all disabilities. The list of illustrated conduct in particular sectors appended to the Schedule of the Promotion of Equality and Prohibition of Unfair Discrimination Act is instructive,¹⁴³ and a similar relevant list will be helpful for traditional council members, as well as persons with disabilities and the community at large.

The Bill will need strong regulations or guiding principles, including training for traditional councils on how to ensure that they do not perpetuate such conduct, even unintentionally. Further, the Bill must avoid using offensive terms to describe impairments and rather utilise appropriate terminology.

3.4.4 Interpreters

The Bill requires that proceedings and records are in ‘the language most widely spoken in the area’¹⁴⁴ and also makes provision for an interpreter if any party does not understand the language used.¹⁴⁵ These clauses refer to the vernacular language, for example isiZulu. The reference to ‘interpreter’ here appears to be a ‘translator’ from one language to another, for example, isiZulu to Sesotho. There is thus no explicit provision for sign language interpretation or augmentative communication methods. This is a serious flaw that will have to be remedied with explicit provision in the Bill for sign language interpretation or augmentative communication where needed.

3.4.5 Training

Regulations are to be drafted on the training of traditional leaders and persons designated by traditional leaders to convene traditional courts.¹⁴⁶ Such regulations should include equal recognition of persons with

143 Schedule 1 to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

144 Clause 7(9) TCB.

145 Clause 7(10) TCB.

146 Clause 17(1)(j).

disabilities before the law and the attendant consequences for provision of support and reasonable accommodation.

4 International law obligations

While this article has focused on legal capacity and access to justice in customary law specifically in South Africa, these issues need to be seen in the context of South Africa's international law obligations. This section will focus on the CRPD and the country's obligations as a signatory of the Convention.

The Division of Social Policy and Development of the United Nations (UN) has recognised 'informal' justice systems such as traditional courts and stressed that both formal (ordinary) courts and informal (traditional) courts 'must be accessible and inclusive of persons with disabilities in all contexts'.¹⁴⁷ However, the Toolkit, devised to give guidance on how courts on the African continent can transform inaccessible and unaccommodating procedures and remove barriers to equal participation in access to justice, specifically focuses on formal courts. The CRPD, as discussed below, provides some guidelines on how the recognition of legal capacity and procedural accommodation in formal court systems should promote equality and access to justice.

The CRPD contains a basket of rights that promote access to justice for persons with disabilities in traditional courts, including the right to equal recognition before the law; the right to legal capacity recognised on an equal basis with others (and attendant support measures where needed); the need for awareness raising to dispel myths and undo pervasive stigma and discrimination; and the need for the traditional court system to be accessible.

4.1 Legal capacity

The CRPD does not refer to mental capacity, but it is explained by the CRPD Committee in their General Comment on legal capacity as follows:¹⁴⁸

Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.

147 United Nations Division of Social Policy and Development *Toolkit on Disability for Africa: Access to justice for persons with disabilities* (undated) Module 8 <http://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> (accessed 1 September 2017).

148 CRPD Committee (n 1) para 13.

The Committee further explains that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.¹⁴⁹ Legal capacity is explained as referring to legal standing and legal agency of a person.¹⁵⁰

State parties to the CRPD are expected to recognise that persons with disabilities have legal capacity on an equal basis with others in *all* aspects of life,¹⁵¹ but that support may be needed in making certain decisions, and provision of such support should adhere to safeguards¹⁵² because the support is effectively a ‘restriction’ on legal capacity.¹⁵³ Three aspects of the CRPD’s understanding of legal capacity bears mention, namely, (a) possession of legal capacity; (b) the exercise of legal capacity; and (c) equal protection and benefit of the law.¹⁵⁴

As possessor of legal capacity, the person is a bearer of rights and responsibilities. Articles 12(1) and (2) acknowledge this aspect respectively: State parties are to recognise that ‘persons with disabilities have the right to recognition everywhere as persons before the law’, and ‘that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.

The exercise of legal capacity *may* require support from others: Article 12(3) imposes on state parties the duty to ‘take appropriate measures to provide access by persons with disabilities with the support they may require in exercising their legal capacity’. This provision is entirely in line with African notions of communitarianism as it requires that a system of societal support is set up, recognising the interdependence of people requiring that we pursue our lives in ‘conjunction with’ others.¹⁵⁵ To restate this duty: Where a person with a disability needs support to make a decision, this support should be provided, including reasonable accommodation to assist the person in understanding the decision.¹⁵⁶ Such accommodation may allow different ways of providing information about the decision, such as sign language, alternative communication, ‘pacing, repetition and a trusted source for information’.¹⁵⁷ Support may

149 As above.

150 As above.

151 Art 12 CRPD.

152 Art 12(4) CRPD.

153 Holness (n 104) 315.

154 Compare A Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?’ (2007) 34 *Syracuse Journal of Law and Commerce* 597.

155 O Lewis ‘Advancing legal capacity jurisprudence’ (2011) 6 *European Human Rights Law Review* 704.

156 Centre for Disability Law and Policy *Essential principles: Irish legal capacity law* (2012) 4 <https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Legal-Capacity-Essential-Principles.pdf> (accessed 1 September 2014).

157 As above.

be required through the help of an advocate (peer or citizen advocacy, self-advocacy or even state provided advocates).¹⁵⁸

Such support must contain safeguards that protect against harm and abuse.¹⁵⁹

State parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity *respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.* These safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

If support is provided to a person in exercising their legal capacity, whether informally or formally by a relative, friend, paralegal, attorney or any other person, the support is circumscribed by these requirements. This would include instances where a person with a disability exercises their legal capacity with support in a traditional court.

In a traditional justice system based on community participation and where support is usually provided by a relative, often with a vested interest in decisions relating to the daily life of the person with a disability (for example, household reliance on income from the disability grant), undue influence can be a real concern. Yet, a trusted support person, whether a family or community member, who 'values the autonomy and choice of the individual' can provide support with decision making, as long as it is not 'imposed and the person must always be free to reject offers of support or to end the support relationship at any time.'¹⁶⁰

How to imbue the safeguards of article 12 in the decision making of persons with intellectual or psycho-social disabilities will need to be taught to family members and caregivers of persons with disabilities, as well as stakeholders in legal processes (including traditional courts). As Werner explains, ultimately, 'true choice' means that persons who 'support' the persons with the disability should 'focus less on the outcome and more on the process of decision-making' and 'accept that people with [intellectual disabilities] should be allowed to make mistakes as learning opportunities'.¹⁶¹

158 As above.

159 Art 12(4) CRPD (our emphasis).

160 A Arstein-Kerslake & E Flynn 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law' (2016) 20 *The International Journal of Human Rights* 478.

161 S Werner 'Individuals with intellectual disabilities: A review of the literature on decision-making since the Convention on the Rights of People with Disabilities (CRPD)' (2012) 34 *Public Health Reviews* 26.

Provision of support may in some instances require reasonable accommodation in the exercise of legal capacity. However, the CRPD Committee made it clear that the right to receive support if needed is not contingent on undue burden (or unjustifiable hardship, the defence that applies to the provision of reasonable accommodation) and access to support is an immediate obligation resting on state parties.¹⁶² Here, relevant training of the clerks of the court, persons with disabilities and their families, as well as the *izinduna* and *amakhosi* is vital.

4.2 Access to justice

With regard to access to justice, article 13 of the CRPD requires that state parties

shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages

and

shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.¹⁶³

The Committee unequivocally states that '[i]n order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with equal standing in courts and tribunals'.¹⁶⁴ As such, we submit, traditional courts must explicitly recognise rural persons with disabilities subscribing to customary law as having legal standing, equal to non-disabled community members.

With the recognition of legal standing comes the requirement for reasonable accommodation where needed. Article 13 should therefore be read with articles 12(1) and (2) in particular. The recognition of the legal capacity to provide testimony in 'judicial, administrative and other legal proceedings' is guaranteed for persons with disabilities under the CRPD which, if necessary, may require the provision of support to exercise such capacity, whether the person is a complainant, witness or alleged perpetrator.¹⁶⁵ The kinds of accommodation may include the recognition of diverse communication methods; procedural accommodation; the

162 CRPD Committee (n 1) para 34.

163 Arts 13(1) & (2) CRPD.

164 CRPD Committee (n 1) para 38.

165 CRPD Committee para 39.

provision of sign language interpretation; and other assistive methods.¹⁶⁶ While some of these measures (accommodations) are already employed in some formal courts in South Africa, there is no evidence of this being provided in traditional courts. Kayess and Fogarty explain that since article 12 only deals with one aspect of equality before the law, namely, legal capacity, article 13 was specifically drafted to ameliorate disabling 'legal procedures, rules, and practices' requiring states 'to make adjustments to legal procedure and rules of evidence to ensure effective access to justice for persons with disability on an equal basis with others'.¹⁶⁷ Hence, these two articles should be read together when legal capacity is exercised in legal proceedings.

Access to legal representation in proceedings affecting them has historically been denied to persons with disabilities.¹⁶⁸ The CRPD, however, requires access to legal representation on an equal basis with non-disabled persons, especially where interference with legal capacity is concerned.¹⁶⁹ Further, persons with disabilities may not be denied the right to defend their rights in court.¹⁷⁰ The CRPD and the General Comment on article 12 (and with reference to article 13), therefore, cannot be any clearer on this. The Traditional Courts Bill¹⁷¹ prohibits legal representation¹⁷² in traditional courts. Considering the persuasiveness of literature on the need for 'advocates', ombudsmen or support persons to assist persons with disabilities with decision making in matters affecting them,¹⁷³ we would argue that paralegals may be well suited to fulfil this role in traditional court proceedings.

In order to promote recognition of legal capacity on an equal basis with others, the CRPD requires state parties to provide 'appropriate training' for personnel or stakeholders involved in the administration of justice.¹⁷⁴ Within the traditional courts administration of justice would necessarily include by implication *izinduna*, *amakhosi*, *amphoyisa enkosi*

166 Reasonable accommodation is individualised: 'For example, accommodating a person with an intellectual disability may involve recognition and inclusion of support people. In contrast, accommodating an individual with an acquired brain injury may involve allowing more time to process information.' L Kerzner 'Paving the way to full realisation of the CRPD's rights to legal capacity and supported decision-making: A Canadian perspective' *In from the margins: New foundations for personhood and legal capacity in the 21st century* (2011) 68.

167 R Kayess & B Fogarty 'The rights and dignity of persons with disabilities: A United Nations Convention' (2007) 32 *Alternative Law Journal* 22.

168 S Ortoleva 'Inaccessible justice: Persons with disabilities and the legal system' (2016) 17 *International Law Society of America, Journal of International and Comparative Law* 286.

169 CRPD Committee (n 1) para 38.

170 As above.

171 Traditional Courts Bill (B2016) introduced in the National Assembly with explanatory summary of Bill published in *Government Gazette* 40487 of 9 December 2016.

172 Clause 7(4)(b) TCB.

173 CRPD Committee (n 1) para 15. E Flynn 'Making human rights meaningful for people with disabilities: Advocacy, access to justice and equality before the law' (2013) 17 *International Journal of Human Rights* 491; Arstein-Kerslake & Flynn (n 145) 476.

174 Art 13(2) CRPD.

(traditional police acting as sheriff, messenger and enforcer of court orders) and *imibuzo yoMabhalane weNkantolo yeSizwe* (the clerk of the court). The Committee has stressed the need for 'first responders' to legal disputes or complaints to be trained and for awareness raising 'to recognise persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons'.¹⁷⁵ In traditional communities the *induna* is likely to be the first person to whom an incident is reported after the family conciliation has failed.

The Committee explicitly refers to the need for the judiciary to 'be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing'.¹⁷⁶ While *izinduna* and *amakhosi* in their courts respectively may not be 'judicial officers' as such, the role they fulfil in the traditional courts mean that they are the very heart of dispute resolution. Dedicated training and awareness raising for *amakhosi* and *izinduna* is sorely needed on this score, particularly since the training of the justice personnel in traditional and formal courts vary considerably.¹⁷⁷ Recent law reform efforts envisage the establishment of a Legal Services Ombud with wide powers to ensure the integrity of the legal profession and to deal with complaints by the public against legal practitioners¹⁷⁸ (which would not include traditional court personnel). The training of traditional leaders has included a capacity-building programme on leadership and good governance between 2011 and 2015,¹⁷⁹ aiming to include the protection of human rights in traditional communities. The programme content included a curriculum *inter alia* on criminal and civil law and interpretation of policies, human rights, conflict and dispute resolution, and presiding over traditional courts.¹⁸⁰ However, the rights of persons with disabilities are absent from the curricula. One recommendation from an evaluation of this programme is that traditional councillors should also be trained and thus enable *amakhosi* to introduce new practices learnt from the training intervention more easily within the council.¹⁸¹ In its 2009 policy, which paved the way for the law reform process on the Traditional Courts Bill, the Department of Justice advanced that it would provide the capacity and resources necessary for the judicial

175 CRPD Committee (n 1) para 39.

176 As above.

177 To be admitted as an attorney requires the completion of a Bachelor of Laws degree; community service in a law clinic or articles of clerkship in a law firm; practical legal training; the completion of board examinations; and a formal court admission process; Attorneys Act 53 of 1979 (as amended); Legal Practice Act 28 of 2014; Rules for the Attorneys Profession (2016) in GN 2 of 2016 in *Government Gazette* 39740 of 26 February 2016.

178 Ch 5 of the Legal Practice Act 28 of 2014.

179 COGTA *Evaluation of the UKZN Leadership and Good Governance Capacity Building Programme for Amakhosi* (2016) Evaluation Unit 3 <http://www.kzncogta.gov.za/wp-content/uploads/2017/09/Impact-assessment-on-Capacity-Building-of-Amakhosi.pdf> (accessed 15 December 2017).

180 COGTA (n 179) 18.

181 COGTA (n 179) 9.

functions of traditional leaders, towards training and administrative support.¹⁸² This gap remains and needs to be addressed.

As the traditional council as well as community members participate in the dispute resolution process, these community members *also* require conscientising on legal capacity and, therefore, legal agency of persons with disabilities. Indeed, the Division of Social Policy and Development of the UN has recommended

Community level awareness raising on disability and for empowerment of communities to support their members, including persons with disabilities, in obtaining access to justice; this includes for example ensuring that persons with disabilities enjoy equal access to legal aid services and legal literacy programmes, implementation of campaigns against stigma and stereotyping, and provision of human rights training for key service providers.¹⁸³

Such awareness-raising campaigns should, therefore, be provided to all members of the traditional council as well as community members, and should include family members and caregivers of persons with disabilities. The latter is vital because of the possibility of family members acting as 'gatekeepers', stopping persons with disabilities from accessing assistance to resolve a dispute where they may be implicated themselves or have a vested interest. The duty of awareness raising rests on the Department of Justice from the perspective of the requisite knowledge on these key legal and rights aspects. On the other hand, COGTA may also have expertise of the workings of traditional leadership and so contribute to awareness raising, particularly as the provincial and local houses of traditional leadership are administered by it. Importantly, the community members with disabilities should be consulted in the design of such awareness training.

5 Regional law obligations

Here we briefly discuss the African Disability Protocol. The African Charter has one 'exclusive' provision with regard to persons with disabilities, that 'the aged and the disabled shall also have rights to special measures of protection in keeping with their physical or moral needs'.¹⁸⁴ This provision is 'wholly in keeping with the medical model of disability,

182 Department of Justice *Policy Framework on the Traditional Justice System under the Constitution* (2009) para 6.6.

183 United Nations Division of Social Policy and Development *Toolkit on Disability for Africa* (n 132) 28. Similarly, the Committee has argued for awareness raising (art 8 of the CRPD) for authorities and others, to create 'open, enabling and inclusive communities' through the elimination of stereotypes, ableism and misconceptions' that prevent independent living and community inclusion. CRPD Committee General Comment 5: Article 19: Right to independent living (2017) CRPD/C/GC/5 para 78.

184 Art 18(4) African Charter.

rather than as holders of human rights'.¹⁸⁵ Some commentators have argued that the absence of disability as a ground for protection against unfair discrimination is problematic.¹⁸⁶

Kamga argued that a separate African treaty was necessary in part because of the emphasis on individualism in the CRPD, while the African continent is steeped in communalism.¹⁸⁷ Viljoen and Biegon dismissed this argument on the basis that the CRPD does stress community living and supports.¹⁸⁸ While this argument is persuasive, the communitarianism inherent in African customary law and world view can be considered to be at odds with 'autonomy' and recognition of persons with disabilities as self-advocates with the right to represent themselves in disputes affecting them. Balancing the notion of equal recognition before the law for persons with disabilities, whether seen as individual autonomous beings in the 'Western' sense, or members of the community in the 'African' sense, is not necessarily mutually exclusive.

Rather, we would argue, as have authors before us,¹⁸⁹ that recognising the citizenship of persons with disabilities requires valuing their personal autonomy or independence. Such valuation of autonomy and freedom to make their own decisions and choices concerning their lives is not intended to conflict with the communitarian ethos of customary law, but is rather a move away from charitable/social welfare and medical approaches to disability that regard persons with disabilities as objects of dependency¹⁹⁰ and charity in Western and African traditional communities.

Combrinck and Mute explain how the Working Group on Older Persons and People with Disabilities in Africa, who advised the African Commission on adopting a disability protocol, found that issues that 'received no traction in the CRPD despite being of concern in Africa' needed to be clarified to give effect to Africa's 'specificities and

185 F Abbay 'Disability rights in Africa: Towards a citizenship approach' Doctor of Civil Law thesis, McGill University, 2012 138.

186 Abbay (n 185) 139.

187 SA Kamga 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 226.

188 F Viljoen & J Biegon 'The feasibility and desirability of an African disability rights treaty: Further norm-elaboration or firmer norm-implementation?' (2014) 30 *South African Journal on Human Rights* 354, referring to art 19 of the CRPD.

189 Abbay (n 185) 56; E Flynn 'Making human rights meaningful for people with disabilities: Advocacy, access to justice and equality before the law' (2013) 17 *The International Journal of Human Rights* 494.

190 Compare World Health Organisation & World Bank *World Report on Disability* (2011) 27, http://www.who.int/disabilities/world_report/2011/report.pdf (accessed 1 December 2017); S Susuman, R Blignaut & S Lougue 'Understanding issues of people living with disabilities in South Africa' (2014) 49 *Journal of Asian and African Studies* 562-563; E van Pletzen, M Booyens & T Lorenzo 'An exploratory analysis of community-based disability workers' potential to alleviate poverty and promote social inclusion of people with disabilities in three Southern African countries' (2014) 29 *Disability and Society* 1535.

realities'.¹⁹¹ This includes the provisions on protection against use of traditional forms of justice to deny persons with disabilities access to appropriate and effective justice, and the support that may be required to enjoy legal capacity requires safeguards and should not amount to substituted decision making. The African Disability Protocol includes a lengthy clause on equal recognition before the law, recognition of legal capacity and safeguards.¹⁹²

Most welcome is the clause that requires state parties to 'ensure that traditional forms of justice shall not be used to deny persons with disabilities their right to access appropriate and effective justice'.¹⁹³ This is an unambiguous statement recognising the vital role of traditional courts that is absent in the generalised statements in the CRPD in article 13, as well as by the CRPD Committee in their General Comment on legal capacity.

The groundwork has therefore been laid on the African continent for tackling the insidious effects of ignorance, lack of understanding and lack of prioritisation of the rights of persons with disabilities to legal capacity being recognised on an equal basis with others. While literature on access to justice in customary courts and under customary law in African countries elaborate on mechanisms to address discrimination,¹⁹⁴ there is a dearth of literature on *persons with disabilities'* utilisation of customary courts,¹⁹⁵ including on the issue of autonomy and legal capacity.¹⁹⁶

191 H Combrinck & LM Mute 'Developments regarding disability rights during 2013: The African Charter and African Commission on Human and Peoples' Rights' (2014) 2 *African Disability Rights Yearbook* 309.

192 Art 8 Draft African Protocol.

193 Art 9 Draft African Protocol.

194 CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 166 (Botswana); C Lwanga-Ntale 'Chronic poverty and disability in Uganda' (2003) Paper presented at the 'Staying Poor: Chronic Poverty and Development Policy' conference, Manchester, cited in NE Groce, J London & MA Stein 'Inheritance, poverty, and disability' (2014) 29 *Disability and Society* 1560 (Uganda); MA Abdurraheem-Mustapha 'Rights of people with disability in Nigeria: Attitude and commitment' (2016) 24 *African Journal in International and Comparative Law* 439 (formal courts in Nigeria); J DeGabriele & J Handmaker 'Justice for the people: Strengthening primary justice in Malawi' (2005) 5 *African Human Rights Law Journal* 148 (Malawi); W Waliuya 'Protecting the rights of persons with disabilities: A perspective from Zambia' in *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia* (2015) 102 (formal courts in Zambia).

195 Notable exceptions are JN Jobodwana 'Courts of chiefs and human rights: Comparative African perspectives' (2000) 15 *South African Public Law* 26; DB Dennison 'The status, rights and treatment of persons with disabilities within customary legal frameworks in Uganda: A study of Mukono District' PhD thesis, University of Cape Town, 2017 (Uganda); AS Steinforth *Troubled minds: On the cultural construction of mental disorder and normality in Southern Malawi* (2008) 65 (Malawi).

196 Notable exceptions are Kenya, L Mute 'Moving from the norm to practice: Towards ensuring legal capacity for persons with disabilities in Kenya' (2012) *Equal Rights Review* 139; E Kamundia 'Choice, support and inclusion: Implementing Article 19 of the Convention on the Rights of Persons with Disabilities in Kenya' (2013) 1 *African Disability Rights Yearbook* 49.

6 Concluding observations

Traditional courts in KwaZulu-Natal have not been used to their full potential.¹⁹⁷ Yet, traditional courts have the potential to be the very sites where the voices of community members with disabilities are heard in relation to dispute resolution and resource allocation. Traditional councils can ensure the equal and effective citizenship of persons with disabilities if they dismantle barriers to equal recognition before the (customary) law and promote full and meaningful access to justice.

Our courts, employing a purposive approach to interpretation of legislation,¹⁹⁸ have acknowledged the need to consider the 'contextual realities and power relations' of persons, including under customary law, 'by asking whether people are able, in practice, to enforce their rights'.¹⁹⁹ CREATE's research has shown that this has not been the case for persons with disabilities in a number of districts of KwaZulu-Natal.²⁰⁰

Traditional courts, as CREATE's research shows, mostly employ the status approach to legal capacity, derived from labelling an individual as disabled and focusing on the impairment or diagnosis without seeing the person as a person before the law, ignoring 'actual decision-making skills'.²⁰¹ New ways of supporting the exercise of legal capacity in the context of traditional courts are needed.

The Traditional Courts Bill law reform process must, therefore, pertinently include all persons' equal recognition before the law, including persons with disabilities. However, the Bill currently falls short in a number of respects.

Persons with psycho-social, intellectual and communication impairments may require support through reasonable accommodation measures in court proceedings that can only be provided if it can be imagined. This imagination will come from the participation by persons with disabilities in the law reform process in the traditional courts who will attest to their lived experiences in trying and failing to access justice.

197 RN Ndlela, JM Green & PS Reddy 'From traditional courts to traditional administration centres: A review of the KwaZulu-Natal experiences' (2006) 25 *Politeia* 235.

198 *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC) paras 21, 25, 28 & 31; *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) paras 22-23.

199 A Claassens 'Contested power and apartheid tribal boundaries: The implications of 'living customary law' for indigenous accountability mechanisms' (2011) *Acta Juridica* 177. Compare *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*; *Hlantalala v Head of the Western Transvaal Regional Authority & Others* 1998 (3) SA 262 (TK); *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC); and *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC).

200 CREATE (nn 61 & 36).

201 C de Bhailis & E Flynn 'Recognising legal capacity: Commentary and analysis of article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6.

PROTECTION OF THE RIGHTS OF
PERSONS WITH MENTAL DISABILITIES
TO LIBERTY AND INFORMED CONSENT
TO TREATMENT: A CRITIQUE OF
*GORDON MADDOX MWEWA & OTHERS
V ATTORNEY-GENERAL & ANOTHER*

Felicity Kayumba Kalunga and Chipo Mushota Nkhata***

Summary

This article appraises the judgment of the High Court of Zambia in the case of Gordon Maddox Mwewa & Others v Attorney-General & Another. The discussion of the judgment concerns the Court's interpretation of the right of persons with disabilities to protection from involuntary detention and to informed consent to treatment. The judgment is analysed against international human rights standards on the rights of persons with disabilities to human dignity, informed consent to treatment, liberty and security of the person contained in the Convention on the Rights of Persons with Disabilities and international and comparative human rights jurisprudence on these rights. The authors argue that the Zambian High Court failed to properly apply constitutional principles on limitation of rights when it declined to declare unconstitutional Zambia's Mental Disorders Act, which allows involuntary detention and forced treatment of persons with mental disabilities.

1 Introduction

This article appraises the judgment of the High Court of Zambia in the case of *Gordon Maddox Mwewa & Others v Attorney-General & Another* (Mwewa case)¹ delivered by the High Court of Zambia on 9 October 2017. The article appraises the judgment against international standards on the rights of persons with mental disabilities to protection from involuntary detention and medical treatment. The international standards on the rights

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1 2017/HP/204 (unreported).

FK Kalunga & CM Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & Others v Attorney-General & Another*' (2018) 6 *African Disability Rights Yearbook* 60-81 <http://doi.org/10.29053/2413-7138/2018/v6a3>

of persons with disabilities are set out mainly in the Convention on the Rights of Persons with Disabilities (CRPD). The article also uses international human rights and comparative jurisprudence and commentary on treaties concerning the right to liberty and protection from torture and inhuman or degrading treatment. The scope of the article has been motivated by the Court's application of interpretive principles on the limitation of rights to discern the content of the rights in a Zambian context.

The CRPD is the most comprehensive and authoritative human rights instrument that explicitly guarantees the rights of all persons with disabilities. Zambia has ratified the CRPD and, to a large extent, domesticated it using the Persons with Disabilities Act 2 of 2012. Zambia follows a dualist approach to international law. Ratified international instruments are not directly applicable to Zambia until they have been given effect through domestication by legislation or any other enforceable means.² Zambian courts, however, have used international law instruments that are not domesticated as persuasive authority.³ The High Court in *Sara Longwe v Intercontinental Hotel*⁴ extended the applicability of international law to Zambia by stating that the ratification of international and human rights instruments by the state without any reservation was clear testimony of the state's willingness to be bound by the provisions of the ratified instruments. On this basis, if an issue that is not covered by local legislation comes before a court, the court in its resolution of the dispute would 'take judicial notice of the treaty or convention'.

Zambia amended its Constitution in 2016 by enacting the Constitution of Zambia (Amendment) Act 2 of 2016. The amendment of the Constitution saw the repeal and replacement of most parts of the Constitution apart from Part III which contains the Bill of Rights. Article 128 of the amended Constitution also entrusted the Constitutional Court with original and final jurisdiction to hear matters relating to the violation of the Constitution, subject to article 28 which gives exclusive jurisdiction to the High Court in relation to matters arising out of the Bill of Rights. Two other important provisions that were introduced in the amendment that are important for this article are the inclusion of disability in the definition of discrimination in article 266 and the inclusion of section 8 which lists national values and principles to include human dignity, equality and non-discrimination. Article 9 of the Constitution states that the national values and principles shall apply in the interpretation of the Constitution and the law. Article 1 of the Constitution provides that the

2 Sec 2 of Zambia's Ratification of International Agreements Act 34 of 2016. The Act confirms the position stated by case law before its enactment; see *Zambia Sugar PLC v Fellow Nanzaluka* Supreme Court Appeal 82 of 2001, where it was held that international instruments on any law, although ratified and assented to by the state, cannot be applied unless they have been domesticated.

3 *Attorney-General v Roy Clarke* (2008) 1 ZR 38.

4 1992/HP/765 (HC).

Constitution is the supreme law of the land and that any other law that is inconsistent with the provisions of the Constitution is void to the extent of the inconsistency.

The CRPD, the Constitution of Zambia and the Persons with Disabilities Act of Zambia Act 6 of 2012 when read together provide for the right to dignity and freedom from cruel, inhuman and degrading treatment, the right to personal liberty, equal protection of the law and freedom from discrimination, all of which are violated when a person with a psychosocial or other mental condition is forcibly detained or treated without informed consent. Such treatment is commonplace in countries where guardianship laws still apply to persons with mental disabilities.

The seemingly conducive legal framework applicable to persons with disabilities in Zambia is tainted by the continued existence and use of the Mental Disorders Act. This Act is a typical example of guardianship laws that were enacted to create an exclusive and oppressive system of treatment and detention of persons with mental disabilities. The Act created and sustained a system whereby the dignity and worth of persons with mental disabilities were negated, rendering them non-existent and, as such, deemed to be incapable of meaningfully participating in determining their health outcomes. The ethos of the Mental Disorders Act therefore is contrary to that of the Persons with Disabilities Act, the amended Constitution of Zambia 2016 and the CRPD. It is on this basis, amongst others, that the continued existence of the Mental Disorders Act, Chapter 305 of the Laws of Zambia was challenged in the *Mwewa* case.

The article begins by giving an overview of the *Mwewa* case followed by a brief discussion of legal provisions on mental health in Zambia. It thereafter examines jurisprudence on the constitutional limitation of human rights. It proceeds to set out the normative content of the rights to legal capacity, and protection from torture, cruel, inhuman or degrading treatment and right to liberty of persons with disabilities. This is followed by an appraisal of the High Court judgment in the *Mwewa* case against the international standards and principles of constitutional limitation. It concludes that the Court misconstrued the principles of limitation of rights when it failed to declare Zambia's Mental Disorders Act unconstitutional on grounds of infringement of the petitioners' rights to legal capacity, protection from torture, cruel, inhuman and degrading treatment and the right to liberty.

2 *Gordon Maddox Mwewa & Others v Attorney-General & Others*

The petitioners in this case approached the High Court pursuant to article 28 of the Constitution alleging the violation of various of their rights protected by the Constitution. They alleged that Zambia's Mental

Disorders Act⁵ was unconstitutional and interfered with the implementation of the Persons with Disabilities Act.⁶ The petitioners prayed for an order to declare the Mental Disorders Act unconstitutional. They also prayed for declaratory relief to protect persons with mental disabilities from unlawful detention and violations of their rights, including the right to informed consent to medical treatment and admission to medical facilities. Notwithstanding the provisions of article 128 of the Constitution of Zambia, which authorises the Constitutional Court to determine matters related to violations or contraventions of the Constitution, the matter was commenced in the High Court as it retains the authority to determine challenges relating to violation of human rights. There was no challenge to the jurisdiction of the High Court to determine the matter, although the Court confirmed that it had jurisdiction to rule on the 'validity of constitutional references under article 28 of the Constitution'.⁷

The petitioners presented evidence by affidavit testifying of personal experiences of involuntary admission and treatment in medical facilities without being offered the protection of the law. They also testified to poor living conditions in medical facilities, inadequate food and clothing and instances of physical violence by hospital attendants and fellow patients. In addition to testimony of personal experience, the third petitioner, in his representative capacity as executive director of the Mental Health Users Network of Zambia, also submitted in evidence reports of research which the organisation had conducted showing the poor living conditions and treatment of persons with mental disabilities generally.

The Attorney-General did not file any answer in opposition to the petition nor did he submit any evidence on behalf of the government of the Republic of Zambia, but was permitted to file written arguments in court. The second respondent, the Zambia Agency for Persons with Disabilities (ZAPD), did not oppose the substantive allegations of the petition although it objected to the petitioners' prayer that the Court should order ZAPD to monitor the enforcement of the judgment of the Court, a part of the case which is not relevant to this article. In the absence of an answer or evidence in opposition, the matter was determined on written evidence and submissions by counsel without trial.

5 Ch 305 of the Laws of Zambia. The Mental Disorders Act was enacted in 1949 and last amended in 1965. Its long title reads: 'An Act to provide for the care of persons suffering from mental disorder or mental defect; to provide for the custody of their persons and the administration of their estates; and to provide for matters incidental to or connected with the foregoing.'

6 Act 6 of 2012.

7 *Mwewa* case (n 1) judgment 21.

2.1 Issues raised and arguments before the court

The Petitioners alleged that the Mental Disorders Act unjustifiably violated their constitutional rights, including the right to dignity under article 8; the right to liberty under article 13; protection from torture and inhuman or degrading treatment under article 15; and freedom from discrimination under articles 23 and 255 read together respectively.

On the protection of the right to dignity, the petitioners argued that the Mental Disorders Act violated their right to dignity in its use of derogatory terms to describe mental disability. They argued that section 5 of the Mental Disorders Act, which refers to persons with mental disabilities as 'mentally disordered or defective persons' and classifies mental disabilities using derogatory terms, in particular, 'idiot', 'imbecile', 'feeble-minded' and 'moral imbecile', violated their right to dignity. They argued that the right to dignity of persons with disabilities is recognised by section 4(a) of the Persons with Disabilities Act which mirrors the provisions of article 3 of the CRPD.⁸ Counsel also relied on article 23 of the Constitution of Zambia which provides for the right to protection against discrimination. On this basis they prayed for an order to declare unconstitutional section 5 of the Mental Disorders Act which refers to persons with disabilities in dehumanising terms.⁹ The petitioners also argued that section 5 of the Mental Disorders Act was unconstitutional. The Attorney-General conceded on the point that the Mental Disorders Act was enacted in 1949 when such derogatory language might have been acceptable.¹⁰

The High Court found section 5 of the Act which classifies mental illness in derogatory terms unconstitutional. The judge stated that the words in their ordinary meaning were 'offensive, derogatory and discriminatory'. However, the Court declined to declare the entire Mental Disorders Act unconstitutional. On the use of article 8 to establish the right to human dignity, the Court stated that

national values and principles ... cannot be taken as a forceful embodiment in measuring the compliance of the Mental Disorders Act to the Constitution because as aspirations, they do not attach any immediate obligation on the government to implement them.

On the right to liberty, the petitioners argued that the Mental Disorders Act violated their right to liberty which is guaranteed by article 13 of the Zambian Constitution. The right to liberty in article 13 of the Constitution is not absolute and is subject to limitations. The relevant part of article 13 provides:

8 *Mwewa* case judgment 10.

9 *Mwewa* case judgment 11.

10 *Mwewa* case judgment 28.

- (1) No person shall be deprived of his personal liberty except as may be authorised by law in any of the following cases:

...

- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of this care or treatment or the protection of the community.

The petitioners argued that the legal regime established under the Mental Disorders Act did not fall within the lawful limitation of the right to liberty of the person under article 13(1)(h) as it is manifestly unjust, contrary to other provisions of the Constitution and in any event impliedly repealed by the Persons with Disabilities Act.¹¹ On the implied repeal by the Persons with Disabilities Act, counsel for the petitioners relied on the provisions of section 3 of the Persons with Disabilities Act which provides:

Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as provided under this Act or any other matter specified or prescribed under this Act with respect to persons with disabilities, the provisions of this Act shall prevail to the extent of the inconsistency.

The petitioners took issue with section 6 of the Mental Disorders Act which provides for the detention of a person in an institution or other place subject to a warrant or order of the Minister, a judge or magistrate. Further, section 8 of the Act empowers any officer to apprehend a person presumed to be 'mentally disordered' or 'defective' without a warrant and to convey them to a hospital, prison or other place for observation. Section 9 provides for reauthorisation by a magistrate to detain a person apprehended pursuant to section 8. Section 10 does not require the affected person to be present at an inquiry or to make representations, even if the magistrate is empowered to interrogate such person. According to section 11 a magistrate is obliged and empowered to make an adjudication order for the detention of a person who the magistrate believes to be 'mentally disordered or defective' in addition to various other factors. These factors include if the person is 'not under proper, care, treatment or control'; if the person has 'acted in a manner offensive to public decency'; or if 'any person having care, treatment or control of the person consents'. In terms of section 13 of the Act persons subject to adjudication orders are subjected to 'control orders' for their 'control, care or detention'. The person subject to adjudication and control orders is not required to be present or granted the right to make representations. There is neither a provision for the mandatory regular review of control orders nor any explicit procedure to initiate a review of the control order by a person subject to the order, except for the limited right of appeal to the High Court in terms of section 30.

11 *Mwewa* case judgment 13.

The Attorney-General argued that there was no violation of rights instanced by the Mental Disorders Act as it covered a specific disability, namely, mental disability, which should be distinguished from the general provisions of the Persons with Disabilities Act. The Attorney-General also argued that it was a well-established principle of interpretation of law that a general law yields to a specific law where the law operates in the same field on the same subject.¹² Therefore, the Persons with Disabilities Act did not repeal the Mental Disorders Act. The Attorney-General also defended the provisions of sections 6 to 12 of the Mental Disorders Act as containing sufficient procedural safeguards, including the requirement of a warrant of arrest and the institution of an inquiry, to determine the mental condition of a person.¹³

The Court held that it had a duty to test the reasonableness of a constitutional limitation 'by exposing it to principles of fairness'.¹⁴ After making this statement, the Court proceeded to state that sections 6, 8, 9, 30 and 31 of the Mental Disorders Act were regulatory in that they provide for the procedure of detention of persons with mental disabilities. The Court further noted that in certain circumstances the admission 'can be quite involuntary as affected persons are detained either at the behest of family members, members of the public or law enforcement agencies'.¹⁵ The judge agreed that there could be an infringement of the rights of affected persons. She then applied what she called 'the principle of proportionality' in which she considered the need to strike a balance between the need for the detention of a person with a mental disability and the protection of the rights of the affected person. She then proceeded to find that this was a medical question which she did not have the expertise to resolve.¹⁶ The Court nonetheless held that the aforementioned provisions of the Mental Disorders Act do not violate the right to liberty of persons with mental disabilities, but rather provide a 'platform under which issues of control, review, admission and detention can be addressed by a thorough review of the Mental Disorders Act'.¹⁷

Regarding the right to informed consent to treatment, the petitioners based their arguments on the right to dignity and liberty, the prohibition of torture and inhuman or degrading treatment and protection from discrimination. They also relied on the denial of informed consent as established in their various affidavits in support of the petition, which showed that the informed consent of persons with mental disabilities was not always sought. The Court held that the issue was more complex than it appeared and, as such, she could not declare the Mental Disorders Act

12 *Mwewa* case judgment 16.

13 *Mwewa* case judgment 17.

14 *Mwewa* case judgment 32.

15 *Mwewa* case judgment 33.

16 As above.

17 *Mwewa* case judgment 36.

unconstitutional based only on the evidence of the petitioners. The *verbatim* words of the Court are reproduced in the critique section below.

On the whole, the Court declined to declare the Mental Disorders Act unconstitutional on grounds that it violates the petitioners' rights to freedom from torture and inhuman or degrading treatment, the right to liberty, and the rights to dignity, legal capacity and informed consent to treatment. The dicta of the Court are analysed in later sections of the article. Before this analysis it is important to understand the principles of constitutional interpretation as established by Zambian case law and interpretation of statutes in Zambia.

3 Constitutional interpretation in Zambia

Zambia's legal system is based on the English common law system. This is part of the colonial legacy of Zambia. It has a written Constitution which is supreme to other written law, customary law and practice.¹⁸ According to article 1(1) of the Constitution 'any written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency'.

In *Patel v Attorney-General*¹⁹ the High Court dealt with the issue of determining who bears the burden of proving whether a law or action taken under the authority of a law violates the Constitution. The Court held that once a petitioner proves that the law or action complained of violates their constitutional rights, the burden of proof shifts to the state to prove that the law or action complained of is 'necessary or expedient' or 'reasonably required' under the Constitution. The Court in this case was asked to make a determination on the scope of rights under sections 18, 19 and 22 of the then Zambian Constitution. Section 18 provided for protection against the compulsory acquisition of one's property; section 19 guaranteed protection against unlawful search; and section 22 guaranteed the right to freedom of expression. The applicant (Patel) alleged an infringement of his rights in sections 19 and 22 of the Constitution when a customs officer, purporting to exercise powers under the Exchange Control Regulations of 1966, opened his mail and sought to prosecute him for 'preparing to make a payment outside Zambia' contrary to the said regulations. The applicant's rights under section 18 of the Constitution could be limited pursuant to a law that is shown to be 'reasonably justifiable in a democratic state'. Sections 19 and 22 of the Constitution could be limited by a law which makes provision 'that is reasonably

18 Art 1(1) of the Constitution of the Republic of Zambia, Schedule to Chapter of the Laws of Zambia as amended by Constitution of Zambia (Amendment) Act 2 of 2016.

19 (1968) ZR 99.

required in the interests of defence, public safety, public order, public morality or public health', among others.²⁰

The Court held that the test of proving whether or not an Act was 'reasonably required' was an objective one and the burden of proof rests with the state. The Court stated that the facts upon which a law may be 'necessary or expedient' or 'reasonably required' 'are peculiarly within the knowledge of the government and this is a further reason why I think that the onus of proving their existence should be placed on the state'.²¹ After having pronounced itself on the burden of proof, the Court stated:²²

Having said this, I should observe that, notwithstanding the learned Attorney-General's submission concerning the burden of proof, he has filed evidence of the facts upon which he relies and he has addressed argument to me in support thereof, so I do not think he will find himself at any disadvantage by reason of my decision on this point.

This case demonstrates the importance of submitting evidence in support of a law that the state seeks to support as falling within the limitations to rights contained in the Constitution.

In *The People v Bright Mwape and Fred M'membe*²³ the applicants were charged with defamation of the President pursuant to section 69 of the Penal Code, Chapter 87 of the Laws of Zambia. Section 69 of the Penal Code provides:

Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.

The applicants challenged section 69 of the Penal Code as being unconstitutional as it conflicted with article 20 of the Constitution of Zambia which guarantees the applicants' freedom of expression. The right to freedom of expression in article 20 is limited by article 20(3) which permits acts done under a law that is 'reasonably required in the interests of defence, public safety, public order, public morality or public health'. It also requires such limitation to be shown to be 'reasonably justifiable in a democratic society'.

In determining the issue of burden of proof, the High Court upheld the principle in *Patel*,²⁴ where it was established that the person who alleges that his or her rights have been violated by legislation has the obligation to

20 *Patel v Attorney-General* (n 19) 107.

21 *Patel v Attorney-General* 118.

22 *Patel v Attorney-General* (n 19).

23 (1995) SJ HPR/36/94.

24 *Patel v Attorney-General* (n 19).

prove that his or her rights have been infringed and that the infringing law does not fall within the limitations permitted by the Constitution. The state has the burden of proving that the law purporting to limit the constitutional rights is reasonably required and justifiable in a democratic society. The Court also stated that the required standard of proof in matters alleging constitutional invalidity is proof on a balance of probabilities. The Court declined to follow the Attorney-General's argument of presumption of constitutionality which would have the effect of shifting the burden of justifying a limitation of rights to the applicant. This case was decided without any facts of evidence being placed on the court record by the applicant. The Court stated that notwithstanding the lack of facts or evidence, the matter was properly before the court as the challenge was brought as a referral from the lower court pursuant to article 28 of the Constitution. The Court stated that it proceeded to determine the case in the absence of factual evidence because article 28 of the Constitution did not prescribe the method by which cases should be referred to the High Court from the lower court, although there was sufficient authority on how issues should be framed.²⁵ Based on the written submissions of the parties, which the court extensively referenced in the judgment, it was held that the applicants had failed to satisfy the Court on a balance of probabilities that section 69 of the Penal Code was not reasonably justifiable in a democratic state.²⁶

The case of *The People v Bright Mwape and Fred M'membe* emphasises the required standard of proof in a constitutional limitation of rights, namely, proof on a balance of probabilities. It also affirms the finding in *Patel* that the state bears the burden of proving on a balance of probabilities that the law purporting to limit the rights of an applicant falls within the limitations permitted by the Constitution. The case also establishes that the standard of proof in a constitutional limitation challenge can be discharged without evidence of facts. The case was brought before the High Court by way of a constitutional challenge under article 28 of the Constitution. There is no definitive authority on whether the standard of proof would be satisfied on written submission in a matter that is commenced by way of petition under article 28 of the Constitution, as was the case in *Mwewa*.

In *Christine Mulundika & 7 Others v The Attorney-General*²⁷ the petitioners challenged the constitutionality of the Public Order Act, Chapter 104 of the Laws of Zambia. In particular, the petitioner challenged section 5(4) of the Act which requires any person who wishes to hold a peaceful assembly to obtain a permit from the police. The failure to obtain a permit when holding a peaceful assembly was criminalised by section 7 of the Public Order Act. The petitioners challenged the provisions requiring a permit and the criminalisation of its failure as being a contravention of their rights

25 *The People v Bright Mwape and Fred M'membe* (n 24)

26 *The People v Bright Mwape and Fred M'membe* (n 24)

27 SCZ Appeal No 25 of 1995 (SJ)

to freedom of expression and to assembly and association, guaranteed by articles 20 and 21 of the Constitution of Zambia respectively. Article 21(2) of the Zambian Constitution limits freedom of assembly and association as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health

...

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

In construing the provisions of the Public Order Act, the Supreme Court held that the provisions of the Act were not reasonably justifiable in a democratic society. This is because the requirement of seeking prior permission to hold a peaceful assembly was an obvious hindrance to the fundamental freedoms of association, assembly and expression protected by the Constitution. The Court also held that rights have to be regulated and not denied. Since the regulating officer had authority to issue the permit, the Act gave the regulating authority the power to deny the enjoyment of rights, which was unjustifiable in a democratic society. In the second place the Supreme Court found the provisions of the Public Order Act, which required a permit to hold peaceful assemblies, unconstitutional in as far as they did not provide effective control over the exercise of power to grant or refuse a permit. The Supreme Court stated that 'fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms'.²⁸

The Supreme Court in this case set the standard that a law limiting fundamental rights in a democratic society should meet. This standard goes beyond the evidential burden to include a broader test of lawfulness and constitutionality. This is another case that was decided based on written submissions. The Court held the provisions to be arbitrary in that it gave the power to determine what is 'reasonably necessary' to the police officer dealing with the application. The fact that the Act gave a wide discretion to the police officer determining the application was held to be arbitrary and, as such, unconstitutional. Therefore, a law that gives wide a discretion to an administrator to the extent of denying rights as opposed to regulating rights cannot be said to be reasonably justifiable in a democratic state. These determinations were made after recognising the normative

28 *Mulundika case* (n 28) para 12

content of the freedom of expression against which the provisions of the Public Order Act were analysed.

From the above discourse, courts have established that in an application alleging an infringement of rights guaranteed by the Constitution, an applicant bears the burden of proving that the act complained of is discriminatory and does not fall within the limitations provided by the Constitution. The state bears the burden of proving that any legislation purporting to limit rights falls within the limitation provided by the Constitution and is not arbitrary so as to deny a right as opposed to regulating it. This burden of proof in both instances is satisfied on a balance of probabilities. Courts have been able to make these determinations based on evidence presented by the parties and, in some instances, on written submissions. There does not appear to be a clear precedent on whether the standard of proof is discharged on written submission in a matter that is commenced by petition under article 28 as all the cases discussed above, in which the court relied on written arguments, were referred to the High Court from the lower courts.

4 Construction of statutes in Zambia

The interpretation of legislation is regulated by the Interpretation and General Provisions Act.²⁹ Section 2 of this Act states that its provisions apply to all written law unless a contrary intention appears in the Interpretation and General Provisions Act or the written law concerned. Section 16 of the Interpretation and General Provisions Act provides that '[w]here one written law amends another written law, the amending law shall so far as it is consistent with the tenor thereof, be construed as one with the amended written law'.

This means that a later statute which amends an earlier statute would be construed as one with the amended statute provided the construction of such statute as one is not inconsistent with the tenor of the amended statute. Further, being a common law legal system, courts are also guided by the rules of construction of statutes as developed by the English common law when interpreting statutes.

5 Normative content of the right to human dignity, liberty and security of the person and the right to health as they relate to persons with disabilities

Persons with disabilities do not enjoy rights over and above those that apply to persons without disabilities. However, in recognising the special

29 Ch 2 of the Laws of Zambia.

vulnerabilities of persons with disabilities as well as the historical and systemic discrimination that persons with disabilities have suffered, the CRPD seeks to secure the full and equal enjoyment of all human rights and fundamental freedoms for all persons with disabilities.³⁰ Zambia ratified the CRPD in February 2010 and has partially domesticated it through the enactment of the Persons with Disabilities Act of 2012.

This section explains the normative content of the right to human dignity, the right to liberty and security of the person and the right to protection against torture and inhuman or degrading treatment as they are applied to persons with mental disabilities. The interpretation of rights has been drawn from communications before the Human Rights Committee, the African Commission on Human and Peoples' Rights (African Commission) and selected reports of UN Special Rapporteurs with mandates on the specific rights, which are used as persuasive authority by Zambian courts.

5.1 Human dignity

The CRPD couches the right to human dignity as 'dignity and respect of bodily integrity and autonomy' of persons with disabilities. Persons with mental disabilities are entitled to human dignity and respect when seeking or being offered medical treatment, in the same fashion as is accorded to persons without disabilities.³¹ In *Purohit & Another v The Gambia*³² the African Commission held:

Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect the right.

Any inhumane and degrading treatment that a person with disabilities may be subjected to as they receive health care services violates not only their right to dignity but also their right to health. Persons with disabilities, and in particular persons with mental disabilities, are entitled to make informed decisions on whether they should be admitted to a health institution and whether they accept the medical treatment being offered. Persons with mental disabilities in Zambia often suffer the ignominy of preventing them from making even the most basic decisions concerning their lives, often with serious implications for the enjoyment of their health rights. The violation of the right to health occurs when health professionals refuse to recognise the inherent right of persons with mental disabilities to make decisions concerning their health. Such treatment by health

30 Art 1 CRPD.

31 Art 25(d) CRPD.

32 (2003) AHRLR 96 (ACHPR 2003) para 57

professionals, which denies them legal capacity and consequently violates the health rights of persons with mental disabilities, amounts to inhumane and degrading treatment of persons with mental disabilities.

5.2 Right to health and the denial of informed consent to medical treatment

The CRPD is instructive on the health rights of persons with disabilities, including persons with mental disabilities. Article 25 of the CRPD states:

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.

Article 25 of the CRPD guarantees the right to the highest attainable standard of health in similar terms as the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, article 25 of the CRPD goes further to specify what the right entails in the case of persons with disabilities. The right to health, which is of particular relevance to this article, entails that persons with mental disabilities are entitled to the highest attainable standard of health free from discrimination on the basis of their disability. The right to health of persons with mental disabilities thus also imposes an obligation to provide the same quality of care by health professionals. Such quality of care entitles persons with mental disabilities to make informed choices about their treatment, including admission to hospitals for such treatment.

The right to health is further enhanced by article 19 and the right to live in the community with support, in particular the right to community support services and access to community services (including medical services) on a basis of equality with others. This means that persons with disabilities have a right to disability support and to access health care at primary and all other care levels in the same way as everyone else. Access to health care at every level works as a preventive resource to curb crises so that people are treated before their condition reaches a critical stage. This would prevent many mental health users from needing hospitalisation and reduce the rates of chronic and acute mental health issues in society.

Article 12 of the CRPD recognises the right to equality before the law of all persons with disabilities. This includes the right to legal capacity, which is the recognition of the right by a person with disabilities to make decisions concerning their own lives. The United Nations (UN) Committee on the Rights of Persons with Disabilities has stated that the denial of legal capacity to persons with disabilities and their detention in health facilities without their informed consent constitute a violation of

their rights, including the right to liberty protected in articles 12 and 14 of the CRPD.³³

5.3 Right to liberty and security of the person

Article 14 of the CRPD proscribes the unlawful or arbitrary deprivation of liberty of persons with disabilities. It further states that ‘the existence of a disability shall in no case justify a deprivation of liberty’.³⁴ Article 15 further stipulates that any deprivation of liberty of persons with disabilities is to be done in conformity with the law and that the existence of a disability should not under any circumstances justify a deprivation of liberty. The article demands a limitation of the right to liberty to be done in accordance with the law. Further, disability should not be a reason for depriving a person of their liberty. A law that is discriminatory in its application therefore would not be reasonably justifiable in far as it is applied on the ground of disability.

The fundamental rights to liberty and security of the person are important in relation to respect for a person’s dignity as well as their health. The Human Rights Committee emphasised not only what these rights entail but also to whom they apply, namely, ‘everyone’ (every human being). The UN Committee on the Rights of Persons with Disabilities further prepared Guidelines on Article 14 of the CRPD.³⁵ The Guidelines describe the rights to liberty and security of the person as ‘the most precious rights to which everyone is entitled’. It further states:³⁶

In particular, all persons with disabilities, and especially persons with mental disabilities or psychosocial disabilities, are entitled to liberty pursuant to article 14 of the Convention ... article 14 of the Convention is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise.

The right to health cannot be fully enjoyed if a person is coerced into receiving treatment. Thus, forced detention and forced treatment violate the fundamental rights to liberty and security.

33 UN Committee on the Rights of Persons with Disabilities General Comment 1 of 2014 on article 12: Equal Recognition before the law, 19 May 2014, CRPD/C/GC/1 paras 1 & 11.

34 Art 14.

35 UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, September 2015.

36 Paras 3-4 of the Guidelines (n 35).

6 Critique of the Court's judgment

This section critically analyses the judgment of the High Court of Zambia in the *Mwewa* case against the normative content of the rights to human dignity, health and informed consent to treatment and liberty of the person. It also critically analyses the Court's interpretation of the relationship between the Mental Disorders Act of 1949 and the Persons with Disabilities Act of 2012 in respect of the rights of persons with mental disabilities, in response to the argument that the Mental Disorders Act had been tacitly repealed by the Persons with Disabilities Act.

6.1 Human dignity

In the *Mwewa* case the petitioners alleged that the Mental Disorders Act violated their right to human dignity. The claim of a right to dignity was founded on article 8 of the Zambian Constitution which falls outside the Bill of Rights. Article 8 of the Constitution contains national values and principles. Article 8(d) states in that 'national values and principles are ... human dignity, equity, social justice, equality and non-discrimination'. The petitioners argued that the denial of legal capacity and informed consent to treatment violated their right to legal capacity which is recognised by article 8 of the Constitution.

In addressing this claim the High Court stated that while it is granted that constitutional values and principles influence the aspirations of society in the interpretation and application of the law, they cannot be taken as a forceful embodiment for measuring compliance with the Mental Disorders Act. This is so because as aspirations they do not attach any immediate obligation on the government to implement them.

The Court did not go further to apply its mind to the provisions of article 9 of the Constitution which states that the national values and principles shall apply to the interpretation of the Constitution and the law. Further, article 118 of the Constitution lists the principles by which courts should be guided. Article 118(f) states that 'the values and principles of this Constitution shall be protected and promoted'. Courts therefore have a positive obligation to promote and protect the values of the Constitution in interpreting the provisions of the Constitution and other laws. The Court thus failed to apply its mind to the principle of human dignity in construing the individual rights the petitioners alleged to have been violated pursuant to the Mental Disorders Act and raised in the petition as mandated by article 9 of the Constitution.

6.2 Right to health and denial of informed consent to medical treatment

The petitioners in the *Mwewa* case argued that the practice of subjecting them to treatment without their informed consent denied them their right to legal capacity in matters concerning their health, thereby violating the right to health of persons with mental disabilities. With regard to the assertion that the Mental Disorders Act violates the right to informed consent to medical treatment for persons with mental disabilities, the Court stated:³⁷

I find that the issue raised in this claim is novel. It seeks to allow persons suffering from mental disabilities the right to informed consent to medical treatment. I take judicial notice that [there] are different types of mental disabilities and some might be more severe than others. It is not in every case that an affected person might be able to appreciate the severity of their illness so as to voluntarily give consent to medical treatment. However, in cases where patients have minor conditions, such persons should be allowed to consent to medical treatment. By saying so, I do not hold that the Mental Disorders Act is unconstitutional because it removes the right to informed consent to medical treatment. I can only hold to the contrary if there was medical evidence adduced to assist me in making an informed finding. In my view, this issue is more complex than it appears and I cannot on the basis of the petition as the only evidence make a finding. This claim accordingly fails.

By framing the issue of a denial of rights as a medical question, the Court in this case seems to give an arbitrary discretion to medical practitioners to determine the circumstances upon which medical treatment may be given without consent which, as argued by the petitioners, resulted in an infringement of their rights. By leaving this determination solely in the hands of medical practitioners without any objective or lawful guidelines, the Court failed to apply the test of constitutionality established in *Mulundika*,³⁸ where it was held that to pass the constitutional limitation test, a law has to be lawful in that it should not be arbitrary or give a wide discretion to the administrator so as to deny the right as opposed to merely regulating it.

The Court by its finding further refused to recognise that persons with mental disabilities are entitled to enjoy the right to informed consent. This finding could have been made, even in the absence of medical or any other evidence, on the basis purely of sections 4, 6, 8 and 27 of the Persons with Disabilities Act as well as the provisions of the CRPD. The Court failed to apply the standard established in the aforementioned precedent on the standard of proof for constitutional challenges. In the absence of evidence and convincing arguments by the Attorney-General on this issue, an

37 *Mwewa* case (n 1) judgment 40.

38 *Mulundika* (n 28).

obvious legal question was couched as a medical question without stating why the petitioners' evidence was insufficient for the Court to make a ruling. The Court's reference to the severity of the condition of the person with a disability denotes an acceptance of the ethos of the Mental Disorders Act which believes that certain categories of persons with disabilities are unable to make informed decisions concerning their health or other aspects of their lives. Even persons with severe mental conditions are not constantly in a state of crisis and should be able to give informed consent to medical treatment. However, one may also argue that by the Court's reference to the severity of a mental condition, it rather meant that a person who is not in a state of mental crisis is capable of giving informed consent. This would rightly mean that even a person with a severe mental condition can give informed consent when not in crisis. The CRPD recognises that such a person's consent to treatment should be sought by medical practitioners in the same way they seek consent from persons without disabilities. Reasonable accommodation, however, would have to be made to facilitate medical treatment for persons with mental disabilities who give advance orders or instructions regarding their treatment options. What is interesting is the way in which, in one part of the judgment, the Court states that if a person with a mental disability is able to give consent to treatment, the authorities are bound to give effect to their wishes. However, in another part of the judgment the Court finds the issue of informed consent by persons with mental disabilities to be a novel issue about which she is reluctant to make a ruling in favour of the petitioners without evidence from a medical practitioner. As noted above, the Court did not indicate why the evidence submitted by the petitioners was insufficient for this purpose or why they were not given the benefit of the doubt.

It should be noted that the Court's finding that persons with 'severe' forms of mental disability may not appreciate the severity of their illness in order to voluntarily give consent to medical treatment is erroneous. This is because, as stated above, even a person with a severe form of mental disability is not always in a state of mental crisis. Their condition can be explained to them and they can give advance orders on how to be treated when they are in a crisis or they can nominate a person of their choice to make treatment choices or decisions on their behalf when in a crisis. This is based on the principle of the 'will and preference' of persons with disabilities and not on the principle of 'the best interests of persons with disabilities' as espoused in the CRPD and the Persons with Disabilities Act.

6.3 Right to liberty and security of the person

In the *Mwewa* case the petitioners contended that the Mental Disorders Act violated their rights and those of other persons with mental disabilities to liberty and security of the person. The petitioners argued that the Mental

Disorders Act violated the right of persons with disabilities to liberty and security of the person by permitting the detention of persons with mental disabilities to prisons and medical institutions on grounds of their disability and without providing proper safeguards. They also argued and tendered evidence to the effect that the Mental Disorders Act unconstitutionally and unlawfully permitted disability-based detention and involuntary admission to prisons and medical institutions, thereby violating their rights. Counsel for the petitioners argued that the Mental Disorders Act did not fall within the lawful limitation of the right to liberty permitted under article 13(1)(h) of the Constitution which authorises a limitation of the right to liberty as authorised by law. Counsel argued that the Mental Disorders Act was not a valid law for purposes of limitation as it is manifestly unjust and lacks legal certainty as there is no accepted definition, criteria or methodology for determining whether someone is of unsound mind.³⁹

In determining the petition, the High Court held that the Mental Disorders Act did not violate the right to liberty and security of persons with mental disabilities as established by the Constitution. The Court stated that in determining whether the Mental Disorders Act violates the right to liberty and security of the person of persons with disabilities, it has a duty to test whether a restriction is reasonable by exposing it to the principles of fairness. In this regard sections 6, 8, 9, 30 and 31 of the Mental Disorders Act, which sanction involuntary detention and forced treatment of persons with mental disabilities, were found to be regulatory in that they state the procedure on detention and admission of persons with mental disabilities.

The High Court found that the Mental Disorders Act did not contravene the right to liberty guaranteed by article 13 of the Constitution of Zambia. However, the Court failed to properly apply the principles of limitation of rights. The Court stated that it had the responsibility of establishing whether or not the rights had been infringed by testing the alleged violations against principles of fairness. While conceding that the provisions of the Mental Disorders Act, which provide for the involuntary detention of persons with disabilities, could amount to an infringement of the petitioners' rights, the Court proceeded to consider what she termed 'the principle of proportionality'.⁴⁰ In expounding this principle, the Court stated:⁴¹

By this I mean to say that there needs to be a balance between the competing considerations on detention and admission to mental health institutions which appear to be involuntary on the one hand and the affected persons (*sic*) rights. In my view, there may be instances where it is necessary for the family,

39 *Mwewa* case judgment 13.

40 *Mwewa* case judgment 33.

41 As above.

community or law enforcement agencies to have a mental patient admitted without their consent especially where they suffer from severe disabilities or where it is obvious that an affected person is not capable of making an appropriate decision for their care and treatment. The decision to determine the detention or admission of mental patients to prisons or medical institutions is a medical question, and cannot be determined by this Court.

The Court failed to apply the established principles and guidelines on the limitation of rights. The Court instead devised its own 'principle of proportionality' which failed to properly construe the normative content of the rights to liberty and security of the person of persons with disabilities. Furthermore, even after conceding that the Mental Disorders Act lacked certainty on the definition and criteria of and the methodology for determining whether a person is of unsound mind or not, the Court relied on this lack of certainty to deny persons with disabilities protection from involuntary detentions. The Court further found that the decision whether or not a mental patient should be admitted to a prison or medical institution is a medical and not a legal issue. In so stating, the Court conflated the question of legal capacity with mental capacity. Contrary to the court's finding, the question of whether or not a person is capable of giving informed consent to treatment is a legal rather than a medical one. The Court's findings appear to have been made without due regard to the plethora of authority on the legal capacity of persons with mental disabilities to make decisions regarding their admission and treatment.

The Court's findings seem to represent or be influenced by the historical guardianship laws that were enacted to indiscriminately arrest, detain and take other action against persons with mental disabilities, allegedly 'in their best interests' and 'that of society'. They represent the charity model of addressing the plight of persons with disabilities. The Court also refused to rely on the undisputed evidence of the petitioners regarding the effect of the Mental Disorders Act on their rights to liberty and security of the person. This is in contravention of the principle that places the burden of proving that the restrictions are justifiable in a democratic state on the state.

6.4 Tacit repeal by the Persons with Disabilities Act

In the *Mwewa* case the petitioners contended, in the alternative to the constitutionality argument, that the Mental Disorders Act of 1949 had been tacitly repealed by the Persons with Disabilities Act, a later Act of 2012 which contains contradictory provisions and is based on a rights-based approach to disability. The Court held:

In a constitutional democracy like ours, all laws flow from the Constitution and all other laws rank *pari passu*. A subordinate piece of legislation such as the Persons with Disabilities Act cannot therefore void or repeal the Mental

Disorders Act. In other words, provisions of the Persons with Disabilities Act cannot be the basis for impeaching the Mental Disorders Act.

The Court found that the Mental Disorders Act had not been tacitly repealed notwithstanding its noting that the Act was an archaic piece of law that required a thorough review.⁴²

The Court failed to give effect to section 3 of the Persons with Disabilities Act, which contains the following superiority clause:

Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of person with disabilities as provided in this Act ... the provisions of this Act shall prevail to the extent of the inconsistency.

Notwithstanding the refusal to declare the Mental Disorders Act unconstitutional, the proper construction would have been to construe the various provisions the Mental Disorders Act together with the Persons with Disabilities Act as though they had been amended by the latter Act. The Court therefore misconstrued principles of statutory construction stated in the Interpretation and General Provisions Act. According to principles of statutory construction, in the case of a latter statute regulating the same conduct, the latter statute has the effect of amending the former statute.

7 Conclusion

Persons with mental disabilities are human beings with same rights and dignity as any other human being. They are entitled to the protection of their dignity, liberty, security of the person, freedom from torture and inhumane or degrading treatment and freedom from discrimination on account of their mental disability. This means that they are entitled to fully and willingly participate in deciding whether they want to be admitted to a health facility for treatment and the type of treatment they prefer. They are entitled to make informed decisions on matters affecting their mental health, among others.

An analysis of the *Mwewa* case demonstrates that the High Court did not fully apply the rights-based approach in its interpretation, and that its approach to constitutional interpretation was also in some ways faulty. It also shows that the Court did not properly apply the principles of limitation and interpretation of rights when interpreting the petitioners' rights to liberty and security of the person and human dignity.

42 *Mwewa* case judgment 48.

The article sought to analyse the judgment of the Zambian High Court in the *Mwewa* case in relation to the rights of person with mental disabilities. The authors of this article were the advocates for the petitioners in this matter.

Louis O Oyaro*

Summary

As a right, legal capacity is central to the realisation of an 'equal status' for all persons with disabilities. Its attainment is fundamental to the aspirations of the UN Convention of the Rights of Persons with Disabilities. Unfortunately, indicators over the past years reveal that realisation of legal capacity has not been straightforward. Furthermore, depending on one's perspective, the CRPD itself does not offer much in terms of specificity on tangible implementation strategies; instead, it leaves wide room for flexibility of realisation approaches. This chapter posits that rearticulating the traditional African concept of ubuntu holds real potential for local acceptance and recognition of legal capacity in favour persons with disabilities in sub-Saharan Africa. Admittedly, and although conceptually contentious in itself as an African personhood philosophy, this chapter argues that there is space for legal capacity to prosper within a rearticulated framework of ubuntu. Its resonance with an inclusive society, community of solidarity and support implies its potential as a real local strategy, not only for legal capacity, but equally for all other disability rights.

1 Introduction

Essentially, this chapter situates around the promise of ubuntu in the realisation of legal capacity in Africa. It focuses on crosscutting similarities in the conceptualisation of the person generally in sub-Saharan African

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communities, but it neither makes any claim to nor offers empirical specifics. It appreciates that academic scholarship on ubuntu is still developing and at times even fractious. To mitigate, the chapter identifies across-the-board agreeable tenets, and cites literature on ubuntu only in as far as they are relevant to legal capacity and its realisation. Notwithstanding its diminished suggestive role, the chapter considers its effort an essential first step towards a more localised (and issue-specific) study. It is worth noting that its focus on sub-Saharan Africa principally implies Eastern and Southern Africa. Hence, the chapter's coverage of parts of West Africa is limited to available references. Crucially, it is mindful of the non-homogenous nature of African societies and concepts.

Fundamentally, the adoption and entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol¹ are a significant step towards inclusion of persons with disabilities in Africa.² The CRPD adopts a rights-based approach to disability by (i) its distinction of impairment from disability; (ii) its attribution of attitudinal and environmental barriers as being the main causes of disability; and (iii) its emphasis on freedoms and removal of barriers.³ Rightly so, it articulates that the denial of accessible environments and reasonable accommodation to persons with disabilities constitutes a form of discrimination.⁴ With its underlying theme being equality for persons with disabilities on an 'equal basis with others', the CRPD does not create new rights, but rather reinterprets existing rights and how they can apply to persons with disabilities.⁵

Despite the above, widespread skepticism remains towards specific rights guaranteed under the CRPD, including among many African states. Perhaps foremost among these is the right to equal legal recognition before the law of persons with disabilities, or the right to legal capacity (as it is commonly referred to in this chapter). Even at conceptualisation level, legal capacity was one of the most intensely contested provisions during the drafting process of the CRPD.⁶ Fortunately, it prevailed and eventually appeared as article 12 in the final text of the Convention.

1 United Nations Convention on the Rights of Persons with Disabilities, 2008.

2 R Kayess & P French 'Out of the darkness into the light: Introducing the Convention on the Rights of Persons with Disabilities' (2008) *Human Rights Law Review* 3.

3 Preamble para (e) CRPD (n 1).

4 Arts 2 & 9 CRPD.

5 MA Stein & JE Lord 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' in OM Arnardotir & G Quinn (eds) 'The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives' (2008).

6 CRPD Negotiation Archives, <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html> (accessed 12 January 2015).

As a result, for the first time the right to legal capacity is recognised in favour of persons with disabilities – a stark contrast to old decision-making regimes entirely based on ‘best interests’ and substitute decision-making and/or guardianship. Primarily, legal capacity incorporates the right to act, and the right to enforce or defend one’s legal capacity when so challenged under the law.⁷ Legal capacity under the CRPD prescribes safeguarded support as enablers to the enjoyment of legal capacity. The provision seeks to maintain at all times one’s legal capacity. By its enduring feature, the right to legal capacity has the potential to be an effective Trojan horse for *across the board* realisation of other rights guaranteed under the CRPD and, in effect, to act as a real foundation for sustained individual agency, inclusion and identity of persons with disabilities as equal members of and contributors to society.

Unfortunately, more than a decade after the adoption of the CRPD, and despite the CRPD Committee’s early General Comment 1 on legal capacity, there still is relatively slow progress in the realisation of the right among a number of state parties. In addition, its appreciation remains largely misunderstood and detached from many local realities. In sub-Saharan Africa there has been varying, but ultimately low, acceptance of the right to legal capacity, and especially so for persons with cognitive, intellectual and psychological disabilities.

Against the above reality, this chapter endorses the re-articulation of ubuntu – a core concept of African personhood – as a tangible strategy for the realisation and appreciation of the right to legal capacity in sub-Saharan Africa. Admittedly, underpinnings of the concept of ubuntu have historically been used to undermine certain groups in African society, most notably women,⁸ and even persons with disabilities, although the latter have been less reported compared to the former. Notwithstanding, this chapter maintains that understanding personhood in the context of ubuntu is an important, even necessary, step towards the realisation of legal capacity in the region. Identifying complimentary similarities between ubuntu and legal capacity, as enshrined in the CRPD, may offer the best strategy for realisation and African domestication of the latter. Opportunity is enhanced in light of the fact that cultural institutions in sub-Saharan Africa are relatively thriving, more visible, and are often gate keepers of societal perceptions.

Consequently, the chapter is broken down into two core parts. The first part contains three headings focusing on presenting context on legal capacity prior to and after CRPD. Also, in this section the relationship

7 A Dhanda ‘Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar of the future’ (2006-2007) 34 *Syracuse International Law and Commercial Journal* 440.

8 M Manyonganise ‘Oppressive and liberative: A Zimbabwean woman’s reflection on ubuntu’ (2015) 36 *Verbum et Ecclesia* 1.

between legal capacity and personhood is explored. The second part discusses the realities of legal capacity in sub-Saharan Africa generally. The ensuing discussion introduces the African communal concept of ubuntu, incorporating arguments supporting its utilisation as a viable framework for the local realisation of legal capacity. It is worth noting that the chapter's endorsement of ubuntu is not unhinged. It acknowledges the historical legacy of ubuntu to persons with disabilities and calls for a re-articulation of the concept. Its support for ubuntu only goes as far as presenting an opportunity for the realisation of legal capacity. It is of the view that ubuntu constitutes a necessary strategic option for legal capacity activists in the region.

2 Legal capacity prior to the Disability Convention

Historically, persons with disabilities generally have been easy targets of legal incapacity. That said, legal incapacity has disproportionately been applied against persons with cognitive, intellectual or psychosocial disabilities, with the manifestation of the above automatically triggering questions regarding one's legal capacity. The *status approach*, *outcome approach* and the *functional test* were (and still are) frequently employed to attribute legal incapacity to individuals.⁹ Common manifestations of the above include mental health laws that permit guardianship and, in some cases (not uncommon), forced and/or involuntary institutionalisation and *treatment*.¹⁰ It should be noted that these approaches are still widely followed in many states, including those that have ratified the CRPD.

Briefly, according to the *status approach*, 'once it is established that any individual is a person with a disability, the law presumes a lack of capacity'.¹¹ This approach relies heavily on medical experts' reports and, in most cases, judicial intervention serves only to ensure that the label of legal incapacity is not arrived at without *due process*. On the other hand, under the *outcome approach*, the decision on one's legal capacity is made on the basis of the outcome of the results of their decisions. Where a person with a disability makes a *bad decision*, such individual loses their legal capacity¹² while, according to the *functional test*, 'disability alone does not result in a finding of incompetence'.¹³ One is only considered legally incapable if by virtue of their disability they are incapable of understanding

9 Dhanda (n 7) 431.

10 United Nations Committee on the Rights of Persons with Disabilities (RPD Committee), General Comment 1, 11th session (31 March-11 April) Document CRPD/C/GC/1.

11 As above.

12 Centre for Disability Law and Policy, NUI Galway 'Submission on legal capacity to the Oireachtas Committee on Justice, Defence and Equality' (2011) 10.

13 Dhanda (n 7) 431.

or performing specific tasks. The *functional test* is also based on assessment of mental capacity as a pre-requisite to denial of legal capacity.¹⁴

Irrespective, under all the above three approaches the consequences (which often eventually lead to the stripping of one's legal capacity) are the same.¹⁵ As already noted, the manifestation of a cognitive, intellectual or psychosocial disability is taken as a legitimate threshold to deny one his or her legal capacity, effectively obscuring their status before the law.¹⁶ Where one is adjudged (by a court, tribunal or mandated authority) to be legally incapable, such person loses their right to make legally-binding decisions regarding their affairs, and instead such powers are conferred to a guardian. In reality, one's decision-making power is taken away, often in all areas, implying an infinitely expansive reach of the authority of an appointed guardian over an individual's life, including in relatively trivial day-to-day decisions. Additionally, the above is particularly problematic especially since it often (i) creates an environment susceptible to abuse; (ii) ranks one individual lesser than another; and (iii) often encourages resistance which in turn often justifies further violation. Perplexingly, the best interest principle is used to underpin and legalise substitute decision making regimes.

Not surprisingly, some have equated substitute decision making to 'civil death', where one surrenders their agency to another, that is, to the guardian.¹⁷ Worse still, the real underlying concern with substitute decision making is its impact on the personhood of the individual so affected. To explore this further, it is crucial in the first place to understand the meaning of and relationship between legal capacity and personhood.

3 Relationship between legal capacity and personhood

Legal capacity is 'a legal construct' that 'can be described as a person's power or possibility to act within the framework of the legal system'.¹⁸ Legal capacity 'facilitates freedom' and 'protects individuals against unwanted interventions'.¹⁹ To illustrate, it may be regarded as a shield to fend off unpermitted invasion by others, and as a sword to enable one to make decisions and have them respected.²⁰ On the other hand,

14 RPD Committee (n 10).

15 As above.

16 ERPD Committee (n 10) para 15.

17 G Quinn 'Rethinking personhood: New direction in legal capacity law and policy: An ideas paper' (2011), Appendix 5 of Centre for Disability Law and Policy (n 12).

18 Office of the United Nations Commissioner for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disability* (2012) 7.

19 As above.

20 Quinn (n 17) 54.

personhood is a broader concept when compared to legal capacity.²¹ It stretches outside the precincts of legal provisions. It marks one's recognition as a 'subject' and 'beneficiary' of the law and the political system.²² In fact, it is on the basis of this assumption that current legitimate political systems are built. In these settings, citizens at the very least are regarded as 'atomised moral agents realising themselves in civil society' and the state as one that intervenes *the least*, optimising the chances of enjoyment of personal freedoms.²³ Personhood guarantees that an individual is a unit of moral agency; is a subject and not an object; is autonomous and has legal capacity.

Consequently, in reality 'the war over legal capacity is a proxy war over personhood'.²⁴ In addition, attempts to take away the rights to inherent legal status entitlements of specific categories of people are equated to making them non-persons.²⁵ In extreme cases, Kittay hypothesises that such reasoning makes it acceptable to kill these non-persons, so labelled, 'not one of us' – an analogy sadly true in certain cases.²⁶ In a practical sense, these notions are particularly disproportionate since they are based on the flawed assumptions of rationality, stability, and the effective cognitive ability of individuals *at all times*. Truth is, most people make their decisions based on emotion and sometimes even irrational preferences. Thus, it is unjust and disproportionate to set the decision-making bar higher for a specific group compared to others. In any event, we all should have the right to make our own mistakes.²⁷

Central to this chapter, the concept of personhood has gained considerable traction in disability rights theory, and specifically as a viable strategy for the realisation of the right to legal capacity. It endorses respect for the right to active citizenship and autonomy of all persons, as agents of society, and suggests that the above are crucial prerequisites for a functioning, productive and democratic society. Simply put, attacks on an individual's personhood (read legal capacity) undermine society as a whole. As a model, the personhood approach appeals to a more systemic natural appreciation of legal capacity.

21 Quinn 47.

22 Quinn 53.

23 As above.

24 Quinn (n 17) 54.

25 EV Kittay 'The personal is philosophical is political: A philosopher and a mother of a cognitively disabled sends notes from the battlefield' (2009) 40 *Metaphilosophy LLC and Blackwell Publishing* 610.

26 Kittay (n 25) 608.

27 G Quinn 'Personhood and legal capacity perspectives on the paradigm shift in article 12 CRPD' HPOD Conference, Harvard Law School, 20 February 2010 in Centre for Disability Law and Policy (n 12) 10.

4 The paradigm shift in article 12 of the Disability Convention

Essentially, articles 12(1) and (2) of the CRPD stipulates that:

- (1) State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- (2) State parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

The CRPD enjoins member states to recognise the right to legal capacity for *all* persons with disabilities ‘on an equal basis with others in *all* aspects of life’. In effect, one’s legal capacity should not be taken away on *any* grounds, and ‘every human being is respected as a person possessing legal capacity’.²⁸ By virtue of the above provisions, persons with disabilities are not merely holders but also actors in the enjoyment and protection of their rights to legal capacity.²⁹ The CRPD ‘moves away from thinking of people in terms of deficits and the lack to make decisions towards augmenting individuals’ capabilities’.³⁰

In expanding on the above provision, General Comment 1 by the CRPD Committee makes a distinction between legal capacity- the right to hold rights and duties, and mental capacity, that is, the decision-making skills of an individual.³¹ It notes that ‘[m]ental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon’.³² Instead, it is contingent on a number of factors and varies from one person to another.³³ In order to overcome challenges related to decision-making challenges, the General Comment stresses that member states should prioritise access to support.³⁴ These measures of support must provide for appropriate and effective safeguards. Crucially, they must not amount to substitute decision making. It is emphasised here that the need for support does not in itself warrant a denial of legal capacity,³⁵ and that at no time must mental capacity be used as justification for denying legal capacity to persons with disabilities.³⁶

The CRPD obligates member states to undertake legislative and administrative reforms to curb the continued violation of persons with disabilities in this regard. The nature of these obligations is positive, that

28 RPD Committee (n 10) paras 1 & 2.

29 RPD Committee para 11.

30 Centre for Disability Law and Policy (n 12) 5.

31 RPD Committee (n 10) para 13.

32 RPD Committee para 14.

33 RPD Committee paras 13 & 14.

34 RPD Committee paras 16 & 17.

35 Centre for Disability Law and Policy (n 12) 12.

36 RPD Committee (n 10) paras 13 & 14.

is, requiring the undertaking by states of certain steps, for example the provision of and ensuring access to appropriate support, and negative in the sense that member states should abolish existing laws, policies and practices that present a barrier to the recognition of persons with disabilities before the law. Additionally, states should prevent private entities and individuals from infringing on the rights guaranteed under this provision.

Nevertheless, the CRPD's provisions on support are more descriptive than prescriptive. What is stated is that forms of necessary support should 'respect the rights, will and preferences' of the individual,³⁷ and that they include both formal and informal arrangements.³⁸ Depending on one's perspective, there is not much in terms of specificity on tangible implementation strategies; instead there is wide room for flexibility of realisation approaches. On the ground, there is still relatively slow progress in terms of the realisation of legal capacity among a number of state parties. Coupled with this, its appreciation remains largely misunderstood and detached from local realities. Specific to sub-Saharan Africa, there has been varying, but ultimately low, acceptance of the right to legal capacity, and especially so for persons with intellectual and psychological disabilities.

5 Realities of legal capacity in sub-Saharan Africa

The stranglehold of negative cultural perceptions and stigma against persons with disabilities is widely perverse in sub-Saharan Africa – sadly, a phenomenon prevalent in many regions around the globe as well. Specific to legal capacity, respective CRPD legal and policy reforms are yet to be put in place. The majority of CRPD member states maintain substitute decision-making regimes, with one's legal capacity taken away singularly on the basis of medical diagnosis; and minimal to no attempts are made to ensure appropriate support.³⁹ Primarily on the receiving end of the above are persons with cognitive, intellectual and psychosocial disabilities who are instead subjected to interventions almost singularly inspired by deficit-based alternatives, including *treatment*.⁴⁰ Worse, perhaps, is the situation that legal capacity as a right remains largely misunderstood and, in other cases, is actively resisted on paternalistic grounds.

37 RPD Committee para 4.

38 Art 3(d) CPRD

39 See <http://www.irinnews.org/report/98680/rethinking-mental-health-in-africa> (accessed 9 January 2017).

40 As above.

To illustrate this, according to a 2014 report by the Mental Disability Advocacy Centre (MDAC) on legal capacity in Kenya, it was noted:⁴¹

Ingrained social prejudices against people with disabilities leads to significant restrictions being placed on their independence and autonomy on a daily basis. Stereotypes of people with mental disability are reflected in a legislative framework which systematically denies them legal recognition.

Furthermore, according to the Kenyan Mental Health Act relatives, members of the community and the police can have one admitted to a mental institution without any recourse to the formal courts.⁴² In Uganda, the colonial 1938 Mental Treatment Act, revised in 1964, is still the main instrument used in remedying conditions of ‘unsound mind’. By virtue of the Act courts can declare one to be of unsound mind and have them instantly and indefinitely involuntarily detained.⁴³ It should be noted that Kenya and Uganda are both state parties to the CRPD.

With reference to informal intervention, according to a 2012 Human Rights Watch (HRW) report on Ghana, thousands of persons with cognitive, intellectual and psychosocial disabilities are detained against their will in spiritual healing centres, popularly known as prayer camps. While there, their families hope that they will be *made better* through a combination of religious prayer, fasting and sacrifice. According to the same report, persons detained in these camps undergo untold suffering and violations. For example, patients are often tied up, chained to trees, or left to bake in the sun for hours on end as part of the healing process.⁴⁴ Even when kept at home, the effects on an individual’s personhood are often the same; and such persons are often hidden from public view for life.⁴⁵

In addition, the gap between legal capacity standards and local realities is such that, even on the rare occasions of advancement in legislation and policy, comprehensive reform is hardly realised. An examination of the renowned case of *Purohit* reveals that despite isolated progress made by the African Commission on Human and Peoples’ Rights (African Commission) in this regard, this case represents only a single symbolic victory – a mere citation with very limited impact.⁴⁶ Briefly, the case was a communication to the African Commission by two mental health advocates submitted on behalf of patients detained at Campama, a

41 Mental Disability Advocacy Centre (MDAC) ‘The right to legal capacity in Kenya’ (March 2014 Report) 5.

42 Ch 248, secs 10, 14 & 16 Kenya, Mental Health Act.

43 Ch 270, secs 1, 5, 7 & 9 Laws of Uganda, Mental Treatment Act.

44 Human Rights Watch ‘Like a death sentence: Abuses against persons with mental disabilities in Ghana’ (2012), <http://www.hrw.org/sites/default/files/reports/ghana1012webwcover.pdf> (accessed 9 January 2017).

45 A Oton ‘Africa, disability and mental illness: When will we evolve?’ Blog, http://www.huffingtonpost.com/atim-oton/mental-health-in-africa_b_1237540.html (accessed 9 January 2017).

46 *Purohit & Another v The Gambia* (2009) AHRLR 75 (ACHPR 2009).

psychiatric unit of the Royal Victoria Hospital in The Gambia. Their complaint, among others, was that the national Lunatics Detention Act of The Gambia violated articles 2, 3 and 5 of the African Charter on Human and Peoples' Rights (African Charter) and, specifically, the right to non-discrimination, equal recognition before the law and the respect for inherent human dignity respectively. They further argued that the said Act provided for immediate detention without proper safeguards and a right to appeal.

In its progressive decision, and finding in favour of the applicants, the African Commission noted:⁴⁷

Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises ... while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided under the Charter.

The African Commission further observed:⁴⁸

Mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being mentally disabled persons ... have a right to enjoy a decent life, as normal and as full as possible, a right which lies at the heart of the right to human dignity.

Although this communication was made under the African Charter, it nonetheless encompassed issues directly relevant to legal capacity and was a celebrated victory for the latter. Unfortunately, more than 16 years later the aspirations expressed by the African Commission 'remains a distant hope for so many people with mental disabilities'.⁴⁹

The above are only flashpoints on legal capacity realities in sub-Saharan Africa. Countless other examples are created daily in other countries, hence highlighting the challenge to realisation and, at the same time, the crucial need for awareness raising and new strategies for the implementation of legal capacity. Ultimately, and as correctly remarked by Hammerbag (then Council of Europe Commissioner on Human Rights), it is vital to remember that

[a] basic principle of human rights is that the agreed norms apply to every human being without distinction. However, the international human right norms have been denied to persons with disabilities. It was this failure which

47 As above.

48 As above.

49 P Bartlett & V Hmazic 'Reforming mental disability law in Africa: Practical tips and suggestions' (2010) 4.

prompted member states of the United Nations to adopt the Convention on the Rights of Persons with Disabilities, which emphasises that people with all types of disabilities are entitled to the full range of human rights on an equal basis with others. The aim is to promote their inclusion and participation in society. When we deny some individuals of their right to represent themselves we contradict these standards.⁵⁰

6 Ubuntu as an African communal concept of personhood

To begin with, this chapter acknowledges the existence of diversities in the manifestation of ubuntu among different African societies. It is cognisant of the risk of simplified generalisations. Although being outside its scope, the chapter notes that the theoretical development of the African philosophy of the *self* (personhood) only occurred recently, and that the friction between its normative underpinnings and practical manifestation is ongoing. It accepts the limitations of ubuntu, in terms of its potential conflict with contemporary libertarian notions of individual rights, but only agrees with it to extent to which it can be used to promote rights, in this case legal capacity.

Synonyms of the term ubuntu include humanity; Africanness; humanism; and 'the process of becoming an ethical human being'.⁵¹ Ubuntu resonates with the universal values of human worth and emphasises the connectedness of human society.⁵² It mandates sensitivity to the needs of others through care, respect, empathy, consideration and kindness.⁵³ Crucially, and in reference to its communal approach to personhood, ubuntu is premised on the precedence of community interests over the individual. In reiterating this common view, Archbishop Emeritus Desmond Tutu recalls that 'a person is a person through other people'.⁵⁴ Put another way, 'I am human because I belong'.⁵⁵ This has semblance with Mbiti's version on African communalism, and especially in the slogan 'I am because we are, and since we are, therefore I am'.⁵⁶

50 T Hammerbag 'Persons with disability should be assisted and not deprived of their individual human rights' in Centre for Disability Law and Policy (n 12) 9.

51 JLB Eliastam 'Exploring *ubuntu* discourse in South Africa: Loss, liminality and hope (2015) 36 *Verbum et Ecclesia* 1427.

52 As above.

53 As above.

54 DM Tutu *No future without forgiveness* (1999).

55 As above.

56 J Mbiti *African religions and philosophies* (1970) 141.

It thus follows that despite varying manifestations, it is predominantly accepted under ubuntu that a 'man is defined by reference to the environing community'.⁵⁷ This appreciation presupposes the community before the individual or alternatively collective good over individual interests. By inference, the strength of a community is the total strength of its individual citizens, hence the community is only as strong as its citizens and *vice versa*. Therefore, although community welfare takes precedence, the individual's role as a contributing unit to this process is vital and uncontested. It is little wonder that terms such as support, solidarity, sensitivity, care and togetherness are closely associated with ubuntu.

A key area of contention regarding ubuntu relates to its potential exclusive application.⁵⁸ In many African societies the enjoyment of personhood under ubuntu has to be earned or attained, or one has to be deserving or qualify for its receipt. A common practice in many communities is that the individual has to undergo a process of initiation, incorporation and acceptance by the community to which they seek to belong. Once accepted, the individual has the opportunity to build his personhood by 'participation in communal life through the discharge of the various obligations defined by one's station'.⁵⁹ Thus in most cases 'the older an individual gets, the more of a person he becomes'.⁶⁰ With specific reference to justice, or interpretively legal capacity, Ifeanyi observes that this African conception of attaining personhood shows similarities with Rawls's definition of the same in his book *A theory of justice*, where he notes that 'those who are capable of a sense of justice are owed the duties of justice'.⁶¹ Rawls states that

[e]qual justice is owed to those who have the capacity to take part in, and to act in accordance with the public understanding of the initial situation. One should observe that moral personality is here defined as a potentiality that is ordinarily realised in due course.⁶²

In short, according to the above 'an individual comes to deserve of the duties of justice only through the possession of a capacity for moral personality'.⁶³ For this reason, Chimuka argues that ubuntu excludes certain human beings and may 'easily pass for an essentialist conception of identity'.⁶⁴ For instance, as a result of its exclusionary legacy, feminists are cautious in their support of ubuntu. This skepticism is warranted especially since ubuntu, at least in the way that it has been practised, is at fault

57 IA Menkiti 'Person and the community in African traditional thought', <http://courseweb.stthomas.edu/sjlaumakis/Reading%203-AFRICAN%20VIEW.pdf> (accessed 16 December 2016).

58

59 Menkiti (n 60) 176.

60 Menkiti 173.

61 As above.

62 J Rawls *A theory of justice* (1971).

63 Menkiti (n 60) 176.

64 As above.

because of the discrimination and domination against women in many predominantly patriarchal African societies. Noteworthy, its discriminatory reach extends to persons with disabilities.

Admittedly, at first glance ubuntu as a communal concept seemingly is inconsistent with the notion of individual rights, let alone the legal capacity of persons with disabilities. It should be remembered that human rights, generally, are specifically owed to individuals. Individuals are the primary rights holders, so that the person is the main subject whose rights ought to be recognised, respected and protected. The question, therefore, is whether a system that assigns priority to the community and is potentially exclusionary can adequately ground individual rights.

It should at this point be clarified that this work does not attempt to trivialise the historical denial of rights to specific groups under ubuntu, and specifically the legal capacity of persons with disabilities, and their discrimination in many African societies. It also is not a whitewashing of the fact that persons with cognitive, intellectual and psychosocial disabilities or, as is often stated, persons with *mental illness*, were (and currently are) deemed *prima facie* by society not to qualify as holders of rights and beneficiaries of personhood. One hypothesis, perhaps leading to the above, was that, in the context of subsistence rural societies, these persons were often adjudged as not meeting the responsibilities of being contributing members of society. Gradually, with the societal forging of the *perfect individual* based on able-bodiedness, dehumanisation along with the consequent stripping of their personhood became the result. It is not surprising that in many African societies the manifestation of *mental illness* is often negatively perceived. In fact, in many communities it was – is – often seen as an attack from the outside forces on the individual with the intention of disrupting the community.⁶⁵ Its manifestation was – is – often attributed to punishment for past wrongs by ancestral spirits and sometimes to witchcraft. As a result, at the very best most forms of intervention involved traditional healing, ritual cleansing and the appeasement of spirits,⁶⁶ with minimal or often no regard being given to individual will and preference.

With the above in mind, the assumption that ubuntu as an African communitarian concept is forever at odds with individual rights and autonomy, and the fact that both cannot mutually prosper may not be as watertight. In reality, continued confrontation between the two may instead result in distraction, as evidenced by a host of rights initiatives in the African continent today. Rather, understanding, identifying similarities, and rearticulating local concepts is necessary for the meaningful realisation of individual rights, including the right to legal

65 JMT Labuschagne, JC Bekker & CC Boonzaaier 'Legal capacity of mentally-ill persons in Africa' (2003) 36 *Comparative and International Law Journal of Southern Africa* 106.

66 As above.

capacity. Importantly, owing to their effectiveness as a social engineering tool, traditional and cultural pillars ought to form a key stakeholder in the disability rights struggle.

In the second place, as alluded to earlier, there indeed is space for respect for individual rights to thrive. As micro-units that contribute to the collective wellbeing of society, it is of paramount importance that the 'self' is safeguarded. The emphasis of ubuntu on tenets such as a strong community, solidarity, sensitivity, care and support is premised on strong individuals in an inclusive and caring society. Importantly, this is also in line with the language adopted in the CRPD, specifically the Convention's endorsement of independent living and the need for support, generally, and supported decision making with respect to legal capacity. It is within this window that a good case for legal capacity of persons with disabilities can potentially be made. Inclusion in society should be driven by the fact that encouraging their recognition before the law facilitates stronger communities and fosters inclusive and sustainable development, as a result of the participation of all in the economic market. It is worth noting that communities will eventually be able to tap into the untapped potential of historically invisible groups such as persons with disabilities. Doing so will inadvertently increase the productive population while greatly reducing dependency and poverty generally.

Of course, arguments may arise that this protection will only be guaranteed to protect community interests. But does formal intention to uphold individual rights really matter in this instance? Fact is that African regional rights systems are built around 'peoples and human rights'.⁶⁷ Equally, the goal of the collective good is also enshrined in many national rights instruments in the region. Furthermore, it might be useful to recall that as human beings, we are social beings and that we are largely influenced in our decision making by factors around us, even when it comes to the exercise of our freedoms. It is for reasons such as these that we should rethink how to strategise the realisation of individual rights on the African continent. This will go some way towards resolving perceptions of inherent *badness* of many African traditional concepts and beliefs. In so stating, it is conceded that attaining the optimal place between African communitarian ubuntu, legal capacity and individual rights generally still requires much more effort and study.

7 Ubuntu as a matter of strategy for realising legal capacity in the region

Simply emphasising individual rights and state obligations may not always lead to realisation. It is equally crucial to appreciate the context, the

67 African Charter on Human and Peoples' Rights (1981).

positioning of one's message, and to appeal, in the most effective manner, to key actors in the realisation of rights process. Realising legal capacity in many sub-Saharan states is likely to fail if advocates do not develop an appreciation of the terrain and opportunities they are dealing with. Active efforts should be made to reach out to existing traditional and political structures. It is clarified that this is neither an effort to romanticise ubuntu, nor is it aimed at overstating its role in post-colonial *modern* sub-Saharan Africa. The fact, however, is that cultural concepts and institutions still have relative influence in defining individual rights.

Specifically, by hinging the discussion on communal strength as a derivative from individual input, the potential of selling legal capacity as a safeguarder of contributing agents/actors and individuals in society is tangible. Accordingly, themed advocacy messages highlighting the above intersectionalities and shared benefits bode well for real opportunities for acceptable realisation. It bridges the gap and significantly has the potential to lead to a systemic change in attitude towards disability in the region. This approach brings on board networks spanning outside known conventional disability rights coalitions and includes often ignored but important realisation players, in the name of traditional institutions, which basically inform communal attitudes and perceptions. As is presently the position, and even historically, attitudinal barriers have constituted a formidable barrier to disability and fueled widespread violations of the individual rights of persons with disabilities in general. In effect, this approach brings the disability rights discourse to the same table with the real power players in its realisation.

In addition, approaching the debate based on a thorough appreciation of contextual institutions creates an opportunity for demystification of historical rationalities and justifiers of legal incapacity labels, hence presenting real possibilities for reforging the debate in favour of persons with disabilities. Even in the face of possible friction, the potential for constructive debate to stir communal progress and identity on legal capacity is too immense to ignore. Such pilot steps are particularly relevant since there still is an apparent lack of appropriate case studies and best practices in the realisation of legal capacity, not only in sub-Saharan Africa but across the globe.

For all it may seem, confronting legal capacity through the lens of traditional perceptions of personhood may actually lead to more good. Granted, fears associated with potential compromise and the adulteration of standards may subsist, but this may perhaps constitute the best alternative for the real domestication of especially contentious human rights provisions generally. As such, the rigors which may result from diverging opinions should instead be regarded as a constructive, necessary and evolving process. It may encourage a more organic and natural development of rights as opposed to the language of mandates that are often a detached set of standards. Similarities may be drawn from current

efforts to adopt a specialised African Disability Rights Protocol (since adopted by the African Union (AU) as of January 2018). One of the key arguments for the Protocol is that 'litigating and lobbying on the rights of persons with disabilities will be easier if Africa had its own instrument on the rights of persons with disabilities'.⁶⁸ Indeed, according to the guidelines of the very first draft African Disability Protocol, 'the Protocol seeks to provide an African context to the rights of persons with disabilities'.⁶⁹

Similarly, specific provisions of the CRPD have already been subjected to local and regional African sieving, foremost among which is the provision on independent living in the CRPD which has slowly been repackaged as (*independent*) *community living* among a growing number of African disability rights scholars. Without further digression, adding the communal element to the naming of the concept 'independent living' is potentially more regionally acceptable, even without the adulteration of the principles set out in the CRPD. It is thus in this same vein that in discussions about ubuntu, communal personhood may hold the real key to the realisation of legal capacity in the region. This is especially relevant for legal capacity since its standards are attuned to societal acceptance, with community living and supports favoured over institutionalisation options.

On a positive note, there is clear evidence of commitment towards disability rights among African states. Discussions on and the eventual adoption of the African Disability Rights Protocol, coupled with growing interest in disability rights studies in the region, are a just testament to the above progress. Nevertheless, as African states, collectively and individually, seek to forge their identities on international disability standards, it should be recalled that regional developments relating to disability rights should not be seen in isolation of the universal picture of the development of human rights. As suggested by Quinn, new international standards for persons with disabilities should be regarded as

the latest iteration of a long-extended essay at international level of the theory of justice ... I think the next way to approach the Disability Convention is to treat it as an expression of the deeper theory of justice.⁷⁰

68 L Mute 'Concept on the list of issues to guide preparation of a Protocol on the Rights of Persons with Disabilities in Africa', quoted in LO Oyaró 'Africa at crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30 *American International Law Review*.

69 First draft Protocol of the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Draft II, 14 March 2014, http://www.achpr.org/news/2014/04/d121#_Toc382911846 (accessed 2 January 2017).

70 Quinn (n 17) 52.

8 Conclusion

Article 12 of the CRPD on legal capacity presents perhaps one of the boldest statements in relation to the rights of persons with disabilities. The said article obligates member states to recognise persons with disabilities as holders of and actors in the right to legal capacity. Admittedly, bringing about the change envisaged by this provision on legal capacity for persons with disabilities in Africa is no easy feat. Regardless, one strategy that may be explored involves an examination of the relationship between legal capacity and ubuntu, and the potential effect African regional concepts can have on intervening strategies.

Rearticulating ubuntu as an African communal concept has the potential to play a central strategic role in the development of an African-specific architecture for the realisation of legal capacity. An important aspect to this insight is that the development of strategies to realise legal capacity should reflect an appreciation of regional traditional realities, and that disability rights should be regarded as part of mainstream human rights development. These adaptations should not be considered a compromise of international standards, but rather a recognition of regional factors and a process by which a comprehensive approach to realising international human rights can be devised.

Consequently, the main recommendation here requires a rethinking of the relationship between ubuntu, legal capacity and human rights. Despite the existence of many other factors, historical cultural norms continue to largely shape attitudes towards persons with disabilities generally in sub-Saharan Africa. Considering that the African Disability Protocol itself aspires to appeal to local contexts, it is crucial that a bridge as opposed to a chasm be incorporated in regional policies, interventions and regional instruments with the aim of reducing the gap between human rights standards and local realities. This assertion does not suggest a watering down of standards but rather the use of a less confrontational but more productive natural, *attitudinal changing* approach. The approach involves constructive negotiation between rights standards and traditional concepts such as ubuntu including with traditional cultural institutions in respective national and local jurisdictions. Making a case for the legal capacity of persons with disabilities generally, through the pillars of African traditions, will go a long way towards ensuring systemic, effective and eventually comprehensive realisation of the right in the region. It may in fact be the best strategy for realising all other human rights standards in the region.

IMPLEMENTING ARTICLE 13 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN SOUTH AFRICA: REASONABLE ACCOMMODATIONS FOR PERSONS WITH COMMUNICATION DISABILITIES

Robyn White and Dianah Msipa***

Summary

Research has revealed that persons with communication disabilities are at high risk of becoming victims of crime and are often repeat victims. Most people who are victims of crime turn to the criminal justice system for recourse by reporting the crime to the police and testifying in a criminal trial against the accused perpetrator. However, persons with communication disabilities may find accessing and participating effectively in the criminal justice system difficult. This is because participation in the criminal justice system is predominantly through oral testimony and, more often than not, people with communication difficulties are not offered the correct support to enable them to participate effectively in the criminal justice system. Article 13 of the Convention on the Rights of Persons with Disabilities guarantees the right of persons with disabilities to access justice on an equal basis with others through the provision of 'procedural and age-appropriate accommodations'. With South Africa as the jurisdictional focus, this chapter will use the human rights model for disability to demonstrate that all persons with communication disabilities can and should participate in the criminal justice system on an equal basis with others. The article will proceed to suggest specific accommodations which may be made in South African courts to give effect to South Africa's obligations under article 13 of the CRPD to ensure effective access to justice for persons with communication disabilities.

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1 Introduction

Research has revealed that persons with disabilities are particularly at high risk of experiencing various forms of violence and are often repeat victims.¹ Two studies funded by the World Health Organisation (WHO) recently confirmed the prevalence and risk of violence against adults and children with disabilities.² Data extrapolated from 21 557 adults with disabilities shows that 33.3 per cent had reported that they had experienced violence in the 12 months prior to participating in the study.³ Of these people, 24 per cent had psychosocial disabilities; 6.1 per cent had intellectual disabilities; and 3.2 per cent did not disclose the type of disability they have.⁴ In another study, data obtained from 18 000 children with disabilities demonstrated that 20 per cent of these children, which is a staggering one in five children with disabilities, experienced physical violence, and 14 per cent had been sexually abused.⁵ People who experience crime often turn to the criminal justice system for redress. In most countries, including South Africa, this ability to turn to the law for protection and redress is a right protected and guaranteed by law. The Constitution of the Republic of South Africa, (the Constitution) guarantees to every citizen the right to equality before the law.⁶ It states that everyone is 'equal before the law and has the right to equal protection and benefit of the law'.⁷ Furthermore, section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, including disability.⁸ By implication, therefore, persons with disabilities are entitled to the protection and full benefit of the law on an equal basis with others, at least in theory. However, in practice this is not the case. Persons with disabilities face numerous barriers to accessing justice, such as environmental barriers, attitudinal barriers, communication barriers and legal barriers.⁹ Persons with communication disabilities, in particular, have difficulty accessing justice on an equal basis with others. This is because adversarial criminal justice systems, such as

1 R White, J Bornman & E Johnson 'Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications' (2015) 16 *Child Abuse Research: A South African Journal (CARSA)* 1.

2 K Hughes et al 'Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies' (2012) *Lancet* doi: 10.1016/SO410-6736(11)61851-5.

3 As above.

4 As above.

5 L Jones et al 'Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies' (2012) *Lancet*. doi: 10.1016/SO140-6736(12)60692-8.

6 Constitution of the Republic of South Africa, 1996 (as set out in sec 9(1)).

7 As above.

8 See also I Grobbelaar-Du Plessis & S van Eck 'Protection of disabled employees in South Africa: An analysis of the Constitution and labour legislation' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 231.

9 J Bornman et al 'Identifying barriers in the South African criminal justice system: Implications for individuals with severe communication disability' (2016) *Acta Criminologica: Southern African Journal of Criminology* 291.

that in South Africa, require witnesses to appear in court in person and give oral testimony in front of the accused perpetrator.¹⁰ The South African Criminal Procedure Act requires witnesses to testify *viva voce* in court, meaning that they are required to testify orally.¹¹ This requirement presents difficulties for persons with communication disabilities because, as the term suggests, persons with communication disabilities have difficulties communicating orally.

Communication disabilities, sometimes known as speech, language and communication needs, or communication difficulties, refer to persons who experience difficulty with one or more aspects of communication.¹² Persons with communication disabilities have difficulties with speech, language or the ability to understand or all three.¹³ Communication disabilities may be present from birth, arising from a type of disability, such as intellectual disability.¹⁴ These disabilities may also develop at any stage during a person's life, due to, for example, a person suffering a stroke.¹⁵ They may be short-term or lifelong.¹⁶ Persons with communication disabilities can experience difficulties such as fully understanding what is being said to them, expressing themselves through speech, concentrating for long periods of time and remembering information they have been given, to mention a few.¹⁷ As a result of these difficulties, persons with communication disabilities may have difficulty participating effectively in the criminal justice system, and if they are not properly supported, they may fail to access justice on an equal basis with others.

Access to justice is a right protected under international law. Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) provides for the right of access to justice.¹⁸ It requires states parties to 'ensure effective access to justice for persons with disabilities on an equal basis with others'.¹⁹ Although the CRPD is recognised as the first international human rights instrument containing a substantive right of access to justice, the right existed prior to the coming into force of the

10 PM Bekker et al *Criminal procedure handbook* (1994) 14.

11 Criminal Procedure Act 51 of 1977, sec 161.

12 P McConnell & J Talbot *Mental health and learning disabilities in the criminal courts: Information for magistrates, district judges and court staff* (2013) 20.

13 As above.

14 As above.

15 As above.

16 As above.

17 J Talbot 'Effective communication' (2017) unpublished conference paper 3.

18 The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. The CRPD is an international disability treaty and strengthened legal framework that was inspired by international laws in recognising the rights of persons with disabilities (United Nations, 2006). The CRPD is also quoted as the highest international standard to promote and protect the human rights of persons with disabilities. However, the purpose of this Convention is not merely to promote and protect but also to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The CRPD has been signed and ratified by 46 African states, South Africa being one of these.

19 Art 13(1) CRPD.

CRPD in 2008.²⁰ In international human rights law the right is usually termed as the right to an effective remedy.²¹ However, it was included in the CRPD as a substantive right because it was a response to the 'specific rights experience of persons with disabilities', that is, it was a recognition of the fact that persons with disabilities face numerous barriers to accessing justice.²² However, the significance of the CRPD goes beyond the mere fact that it provides for the right to access justice. It is also significant as it contains a paradigm shift from the medical model of disability where disability was seen as innate in the individual, and persons with disabilities were viewed as objects of charity²³ to the human rights model, according to which persons with disabilities are recognised as the holders of rights.²⁴ Robinson puts it succinctly when she states that 'disability is a rights issue first and a medical matter second'.²⁵ The human rights model is important because of its emphasis on the fact that persons with disabilities are holders of rights and that impairment is not to be used as a justification for a denial or restriction of rights.²⁶ In other words, persons with communication disabilities have a right to access justice on an equal basis with others, and the fact that they may have difficulty communicating in what might be called the 'conventional' way does not mean that they cannot or should not participate in the criminal justice process.

The next logical question then is how persons with communication disabilities can access justice on an equal basis with others. The answer is found in article 13 of the CRPD. In order to ensure access to justice by all persons with disabilities, the CRPD requires the provision of procedural and age-appropriate accommodations as well as the training of those working in the field of administration of justice.²⁷ There are laws in the South African legal framework that provide for various accommodations, such as the Criminal Procedure Act 51 of 1977; the Children's Act 38 of 2005; and the Child Justice Act 75 of 2008; to mention but a few.²⁸ However, it is argued that these Acts are inadequate in ensuring effective access to justice for persons with communication disabilities due to three limitations. The first is a limitation relating to the type of accommodations

20 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2010-2011) 17 *Comparative and International Law Journal of Southern Africa* 281 at 292.

21 See eg International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 2(3)(a) (entered into force 23 March 1976) (ICCPR).

22 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494 at 512.

23 MH Rioux & F Valentine 'Does theory matter? Exploring the nexus between disability, human rights, and public policy' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 267.

24 T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35.

25 M Robinson 'Foreword' in SS Herr et al (eds) *The human rights of persons with intellectual disabilities: Different but equal* (2003) vii.

26 Degener (n 24).

27 Arts 13(1) & (2) CRPD.

28 The accommodations provided for in these laws are discussed in detail in sec 3 of this chapter.

provided for in these laws; the second is a limitation in relation to the people who may take advantage of the accommodations provided for in the legislation. The third and final limitation is the failure to provide for the training of criminal justice personnel. The failure to adequately accommodate persons with communication disabilities in the criminal justice system amounts to a denial or, at the very least, a restriction of the right of persons with communication disabilities to access justice on an equal basis with others.

This chapter will be divided into three parts. The first part deals with the concept of accommodation. The second part demonstrates the inadequacy of the South African legal framework in providing for accommodations which would enable persons with communication disabilities to effectively participate in the criminal justice process. The third part provides recommendations for ways in which persons with communication disabilities can be properly accommodated in the South African criminal justice system.

2 Right not privilege: The duty to reasonably accommodate

In the criminal justice context, the provision of accommodations is a right for persons with disabilities and a duty for criminal justice personnel.²⁹ This is in line with the human rights model of disability.³⁰ Article 13 of the CRPD states that equal access to justice for persons with disabilities is to be achieved through the provision of 'procedural and age-appropriate accommodations'.³¹ The concept of accommodations appears in the CRPD much earlier than article 13. It appears in article 2 of the CRPD which contains a definition for the term 'reasonable accommodation.' The CRPD defines reasonable accommodation as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.³²

Put simply, the term 'accommodations' refers to any modification to usual practice. There is a requirement in article 2 of the CRPD for accommodations to be reasonable in the sense that the provision of the accommodations should not impose an undue or disproportionate burden.

29 Arts 13(1) & (2) CRPD.

30 Degener (n 24).

31 The term 'accommodations' is used throughout this chapter to refer to 'procedural and age-appropriate accommodations.' According to art 13 of the CRPD, equal access to justice is also to be achieved through the training of all personnel involved in the administration of criminal justice.

32 Art 2 CRPD.

The principle of reasonable accommodations existed before the entry into force of the CRPD in 2008.³³ In the *Hamilton v Jamaica* decision, the Human Rights Committee made use of the concept of reasonable accommodations prior to the entry into effect of the CRPD.³⁴ The Committee held that Jamaica's failure to detain a prisoner with paralyzed legs in premises that were adapted to meet his needs arising from the disability was a breach of the prohibition in the International Covenant on Civil and Political Rights (ICCPR) against the inhumane treatment of detainees.³⁵ The European Court of Human Rights in *Price v UK*³⁶ also recognised the duty on states to provide reasonable accommodations when they held that the detention of the applicant, who was four limb-deficient, in premises not adapted to meet her needs amounted to degrading treatment in contravention of the European Convention on Human Rights (European Convention).³⁷ The concept of reasonable accommodations was borrowed from labour law jurisprudence and 'indicates a form of relaxation aimed at combating discrimination caused by the strict application of a norm'.³⁸

Reasonable accommodations are aimed at ensuring that persons with disabilities can participate in all aspects of society, including in the criminal justice process on an equal basis with others.³⁹ The purpose of providing accommodations to persons with communication disabilities in the criminal justice system is to 'facilitate their effective role as direct and indirect participants'.⁴⁰ In the criminal justice context, accommodations are intended to equalise participation as opposed to relaxing the rules of criminal procedure and evidence.⁴¹ Primor and Lerner put it aptly when they summarised it as 'accommodation not alleviation'.⁴² They go on to state that

[t]he object of making proceedings accessible is not to ease the process for persons with disabilities nor improve his or her well-being during the police inquiry or trial. Rather, it is to enable him/her to participate fully in these proceedings without having restrictions or limitations placed due to the disability.⁴³

33 See eg the Americans with Disabilities Act of 1990 (as amended).

34 *Hamilton v Jamaica* Communication 616/1995, views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

35 Art 10 ICCPR (n 10).

36 *Price v UK* App 33394/96 (2001) 34 EHRR 1285.

37 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5 (entered into force 3 September 1953) art 3.

38 G Bouchard & C Taylor 'Building the future: A time for reconciliation abridged report' (Gouvernement du Quebec) 23.

39 Art 2 CRPD.

40 Art 13(1) CRPD.

41 S Primor & N Lerner 'The rights of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process' *Bizchut, The Israel Human Rights Centre for People with Disabilities* 7.

42 As above.

43 As above.

The provision of reasonable accommodations is a duty. This is demonstrated by the fact that the CRPD regards the denial of reasonable accommodations as discrimination.⁴⁴ In other words, if one fails to accommodate a person with a disability, they will have effectively discriminated against that person on the basis of disability. Furthermore, article 5(3) of the CRPD requires states to provide reasonable accommodation. It states that parties 'shall take all appropriate steps to ensure that reasonable accommodation is provided'.⁴⁵

Despite the provision of reasonable accommodation being a duty on states and a right of persons with communication disabilities, this duty is not without limits, hence the term 'reasonable' accommodation. State parties are only required to provide accommodations where doing so does not cause a 'disproportionate or undue burden'.⁴⁶ Kallehaug is of the view that the question of whether a burden is disproportionate or undue turns upon who the holder of the duty is.⁴⁷ For example, if it is the government or a public authority which bears the duty to accommodate, then 'the burden will have to be extremely heavy before it can be considered disproportionate or undue'.⁴⁸ Reasonable accommodation is important as it affects the enjoyment of other rights, as illustrated by the following extract:⁴⁹

The right to education ... would be meaningless for children with sensory impairments, such as blindness or deafness, without some provision for information and communication to be made accessible to them ... The right to work would be effectively nullified for many disabled people if employers were entitled to treat them in exactly the same way as their non-disabled colleagues without any obligation to consider adapting timetables, physical features or equipment to accommodate their needs.

In the context of the criminal justice system, an opportunity to testify in court would not mean as much to a person with communication disabilities in the absence of accommodations to enable them to effectively communicate. Even though persons with communication disabilities need to be accommodated in the criminal justice system, such accommodations 'cannot be at the expense of the essential rights of the other parties to the proceedings'.⁵⁰ Primor and Lerner go on to explain this point as follows

Thus if a rule or procedure might prevent a person with disabilities from efficiently participating in the process, then that aspect of the procedure

44 Art 2 CRPD.

45 Art 5(3) CRPD.

46 Art 2 CRPD.

47 H Kallehaug 'General themes relevant to the implementation of the UN Disability Convention into domestic law: Who is responsible for the implementation and how should it be performed?' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 3 at 211.

48 As above.

49 A Lawson *Disability and equality law in Britain: The role of reasonable adjustment* (2008) 24.

50 Primor & Lerner (n 41) 7.

should be made accessible, but the substantial rule of law and the delicate balance between the interests of both parties therein remain unchanged. For example, cross-examination of a witness by the defense attorney cannot normally be waived ...

Furthermore, the spectrum of communication disabilities is broad and different individuals will need different types of support.⁵¹ Therefore, it is important that the support or accommodations be provided on a case-by-case basis based on the needs of a particular individual.⁵² Accommodations in the criminal justice system should also be independent and should not be made on behalf of the defence or the prosecution and should normally be provided at each stage of the proceedings, that is, at both the investigation and trial stages.⁵³

3 Legal framework in South Africa regarding accommodations: Limitations

There are laws in South Africa which make provision for accommodations. It is important to highlight right from the outset that the accommodations provided for in South African law are not specifically aimed at persons with disabilities, with the exception of three provisions. The first is section 42(8)(d) of the Children's Act,⁵⁴ which requires proceedings involving children to be held in a room that is 'accessible to disabled persons and persons with special needs'.⁵⁵ This provision may benefit a child with a communication disability who needs to be accommodated, depending on how it is interpreted. However, since the provision makes reference to accessibility, it may be of more benefit to persons with physical disabilities who have difficulties accessing inaccessible buildings. The second provision dealing specifically with disability is section 161(2) of the Criminal Procedure Act.⁵⁶ This provision requires witnesses to testify *viva voce* (orally). It states that *viva voce* shall in the case of a 'deaf and dumb' witness 'be deemed to include gesture'.⁵⁷ The third provision is found in the Children's Act which provides for appropriate questioning techniques for 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication'.⁵⁸ Apart from these three provisions, the rest of the provisions in South African law are not specifically intended for persons with disabilities. These provisions have the following limitations.

51 Primor & Lerner (n 41) 8.

52 As above.

53 As above.

54 Children's Act 38 of 2005.

55 As above.

56 Criminal Procedure Act 51 of 1977.

57 Sec 161 (2) Criminal Procedure Act.

58 Sec 52 (2) (a) (ii) Children's Act.

3.1 Limitation in relation to the type of accommodations that may be provided

There are many accommodations that can be made for persons with disabilities in the context of the criminal justice system. These accommodations fall into two main types, namely, accommodations involving the environment and accommodations to do with communication.⁵⁹

3.1.1 Accommodations involving the environment

The environment in which a person gives their testimony is very important as it can either negatively or positively affect 'testimony-related anxiety'.⁶⁰ Testifying in court has been proved to have the potential to cause 'psychological stress and traumatisation', particularly for complainants or victim witnesses.⁶¹ An intimidating setup or environment may serve to increase the anxiety that a witness with communication disabilities might experience and, in turn, affect the way in which they narrate their account. Conversely, a comfortable, friendly environment may make a witness less anxious and better able to narrate their account. Accommodations, therefore, should be made to the environment in which the witness gives their account. There are several accommodations which may be made to the environment. These include:

- conducting interviews outside the police station and without uniforms.⁶²
- having a support person present during interview or trial. A trusted person such as a friend or a family member may accompany the witness to provide him or her with moral support. This person does not say anything or play any part in the proceedings. Their role is simply to provide moral and emotional support to the witness.⁶³
- conducting witness preparation before the court date. Witness preparation is normally carried out by the prosecutor in the criminal matter and involves measures such as visiting the court in advance in order to ensure that the witness becomes familiar with the setting in the courtroom, and reminding the witness of the account they gave at the police station during the recording of their statement by the police. Witness preparation is carried out in order to ensure that a witness becomes as familiar as possible

59 D Msipa 'Manual on accommodations' (unpublished).

60 T Menaker & RJ Cramer 'The victim as witness: Strategies for increasing credibility among rape victim-witnesses in court' (2012) 20 *Journal of Forensic Psychology Practice* 424 at 427.

61 Menaker & Cramer (n 60) 426.

62 In 2005 Israel enacted an Act dealing specifically with the provision of accommodations in the justice system. It is instructive to look at some of the provisions in this Act. See Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities) 2005 (Israeli Act) sec 22(4).

63 See eg the Israeli Act (n 62) sec 22(8).

with the setting and procedures in court before testifying. This can reduce the amount of anxiety of the witness on the day of the trial.⁶⁴

- giving evidence via closed-circuit television. Usually this is used for witnesses who may be traumatised by giving evidence in front of the accused person. Therefore, the accommodation that would be made for such a person is allowing them to testify in a separate room via closed-circuit television cameras. The accused person would still have the opportunity to watch and hear the witness testify.
- taking extra breaks - Some people may tire easily and may not be able to concentrate for long periods of time. The accommodation that would be needed for such a witness is simply allowing them to take extra breaks so that they can refresh themselves.
- describing the room, introducing the people in the room and describing the process which the witness will go through in court.
- having as few disturbances as possible.
- changing the seating arrangement in court by having everyone sit in a circle, for example.

3.1.2 *Accommodations to do with communication*

These are accommodations to the language the witness uses and, unlike accommodations to the environment, they touch on the actual content of the witness's evidence. In other words, they have to do with the manner in which a person understands the questions put to them and how they convey their account. Section 22(7) of the Israeli Act provides for this when it makes provision for the use of Augmentative and Alternative Communication (AAC), which includes people's assistance, 'computerised aids, communication panels, photos, symbols, letters or words'.⁶⁵ The Israeli Act also provides for the use of a special advisor to give advice on such things as phrasing, simplifying questions, and giving warnings concerning potential harm to the witness.⁶⁶ Persons with communication disabilities usually need accommodations in order to participate effectively in criminal proceedings. Specific categories of persons who may require support in order to communicate include persons with intellectual disabilities, persons with physical disabilities and persons with neurological conditions or persons who are deaf. The following accommodations to do with communication may be made:

- Witnesses who have difficulties relating the time when an event occurred may be accommodated by asking questions that help the court to understand time in the same way that the witness understands time. For example, a woman who lived in an institution for most of her life was raped by one of the staff members at six o'clock in the morning. During

64 Menaker & Cramer (n 62) 425.

65 AAC is discussed in detail in sec 4 below.

66 Sec 22(9) Israeli Act.

her testimony, she said that the incident occurred at six o'clock in the evening. The court accommodated her by attempting to understand how her time was ordered in the institution. A series of appropriate questions revealed that the witness ordered her time according to the staff shifts. The night shift began at night but ended at six o'clock in the morning. It was discovered that what she meant by six o'clock at night was six o'clock in the morning but during the night shift. Therefore, there were no inconsistencies in her testimony in relation to time.⁶⁷

- Witnesses who have difficulties with the concept of dates can be accommodated by asking questions which use temporal milestones which the witness can understand and which can also be verified by others.⁶⁸ For example, the court might ask whether the incident occurred before or after a public holiday or the person's birthday, or some other temporal milestone.
- Witnesses who have difficulty explaining where an event took place can be asked to go to the place where it occurred and to point out exactly where the incident occurred. Questions such as 'where was the table in relation to where you were standing' may not be helpful for persons with communication disabilities.⁶⁹
- Witnesses with limited language skills may be accommodated through the use of anatomically correct dolls.⁷⁰
- Witnesses may also be accommodated through the use of pictures;⁷¹ and through the use of the alphabet on a letter board.⁷²

Reasonable accommodations should be provided on a case-by-case basis.⁷³ The types of accommodations that are made for a particular witness depend on the support needs of the person. It is possible for one witness to require more than one accommodation. It is also possible for the same witness to require both types of accommodations in order to ensure effective participation in the proceedings. For example, despite the fact that a person with an intellectual disability may communicate verbally, they may find it easier and be more competent in demonstrating what happened, using tools such as dolls, figures, drawings, and so forth. In other words, they can communicate by using a combination of speech, gestures, and Augmentative and Alternative Communication (AAC). Those who do not communicate verbally at all may use AAC, including symbols, communication boards, charts, and so forth.⁷⁴

67 Primor & Lerner (n 41) 10.

68 As above.

69 As above.

70 As above.

71 See eg the Israeli Act, sec 22(7).

72 As above.

73 Primor & Lerner (n 41) 5.

74 See sec 4 below for a discussion on AAC.

3.1.3 Demonstrating the limitation in South African legislation

Legislation in South Africa generally makes provision for accommodations to the environment with the exception of one provision which deals with an accommodation to do with communication. This focus on accommodations involving the environment may be problematic for persons with communication disabilities who may need more accommodations to do with communication in order for them to participate effectively in the criminal justice process. The following are the accommodations to the environment found in South African legislation:

The Child Justice Act provides that the ‘assessment of a child may take place in any suitable place identified by the probation officer, which may include a room at a police station, a magistrates’ court, the offices of the Department of Social Development or a One-Stop Child Justice Centre’.⁷⁵ The Child Justice Act also requires the place chosen to be as ‘conducive to privacy’ as possible.⁷⁶ The Children’s Act requires proceedings involving children to be held in a room which is:

- ‘furnished and designed in a manner aimed at putting children at ease’;⁷⁷
- ‘conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court’.⁷⁸

Section 56 of the Children’s Act requires the proceedings to take place *in camera* as opposed to open court. There is also a requirement that proceedings be conducted in an informal manner.⁷⁹ The Children’s Act also requires that children be questioned through an intermediary.⁸⁰

The Criminal Procedure Act also contains accommodations to the environment. The Act requires the proceedings to be held *in camera*, that is, not in open court, in circumstances where the court considers that harm may result to any person who is not the accused.⁸¹ The Criminal Procedure Act also makes provision for holding proceedings via closed-circuit television.⁸² The Act also provides for the giving of evidence through intermediaries.⁸³ This accommodation, however, is only available to witnesses under the biological or mental age of 18 years.⁸⁴ Section 170A(3)(a) states that where the court appoints an intermediary, the proceedings may take place in a venue which is ‘informally arranged to set

75 Child Justice Act 75 of 2008, sec 37(1).

76 Sec 37(2) Child Justice Act.

77 Sec 42(8)(a) Children’s Act 38 of 2005.

78 Sec 42(8)(b) Children’s Act.

79 Sec 60(3) Children’s Act.

80 Sec 61(2) Children’s Act.

81 Sec 153(2) Criminal Procedure Act 51 of 1977.

82 Sec 158(2)(a) Criminal Procedure Act.

83 Sec 170A Criminal Procedure Act.

84 Sec 170A(1) Criminal Procedure Act.

that witness at ease' or which is 'so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness'.⁸⁵ Furthermore, the Act requires proceedings to take place in a venue 'which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices ... during his or her testimony'.⁸⁶

The Children's Act is the only Act containing an accommodation to do with communication. The Act permits the making of 'necessary changes required by the context' to the rules.⁸⁷ These rules 'must be designed to avoid adversarial procedures' and include rules concerning appropriate questioning techniques for 'children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication'.⁸⁸

With the exception of the provision in the Children's Act dealing with accommodations to do with communication, all the other accommodations provided for in South African legislation are accommodations involving the environment. This means that the South African legislative framework may not adequately cater for persons with communication disabilities as they are particularly in need of accommodation to do with communication in order for them to participate effectively in the criminal justice system.

3.2 Limitation in relation to the people who may take advantage of the accommodations contained in South African legislation

The accommodations provided for in South African legislation are also limited in terms of the people who may take advantage of them. All the accommodations contained in the Child Justice Act and the Children's Act may only be used by children, not adults. This means that adults with disabilities are unable to take advantage of the accommodations contained in these Acts. The Criminal Procedure Act is not an act intended to apply to a certain age group. However, it does limit the people who can make use of intermediaries by age. Only those people who have the mental or biological age of 18 years and below can make use of intermediaries. The rest of the accommodations contained in the Criminal Procedure Act may be used by persons of all ages. Nevertheless, persons with communication disabilities will remain inadequately accommodated as the other accommodations relate to the environment.

85 Sec 170A(3)(b) Criminal Procedure Act.

86 Sec 170A(3)(c) Criminal Procedure Act.

87 Sec 52(1) Children's Act.

88 Sec 52(2)(a)(ii) Children's Act.

3.3 Failure to make provision for the training of personnel responsible for the administration of justice

The provision of accommodations is not the only way in which persons with communication disabilities can be empowered to access justice on an equal basis with others. In addition to the provision of accommodations, the CRPD requires that personnel working in the administration of justice, including police officers, prosecutors, magistrates, prison officers, and so forth, be provided with appropriate training in disability issues.⁸⁹ The CRPD states that in order to help ensure effective access to justice for persons with disabilities, states parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.⁹⁰ One might ask why the training of judicial officers is important to ensure that persons with disabilities can effectively participate in the criminal justice system. The importance of such training is evident when one considers the manner in which the credibility of witnesses is assessed in the adversarial criminal justice process. A witness's credibility is assessed by closely observing the witness's demeanour while in the witness stand.⁹¹ Presiding officers pay attention to the witness's verbal and non-verbal communication.⁹² However, the demeanour of some persons with communication disabilities should not be interpreted in the same manner that one would interpret the demeanour of non-disabled witnesses.⁹³ For example, a lack of eye contact usually is viewed as a sign that the witness is dishonest and is hiding something, but for witnesses with disabilities, avoiding someone's gaze may be associated with the disability and, therefore, cannot be interpreted in the same way. Therefore, it is very important to train judicial personnel because through training, there will be an acknowledgment that access to justice concerns a relationship between people, the witness and the judicial officers.⁹⁴ The relationship is not on par since the person in a position of power (the judicial officer) also needs to be considered. Attitudinal barriers and perceptions on the part of judicial officers may jeopardise the witness's effective interaction with the criminal justice system.⁹⁵ The thematic study on Violence against Women and Girls with Disabilities expressed concern that there were no systematic programmes in place to train judges, lawyers and law enforcement officials on the rights of women and girls with

89 Art 13(2) CRPD.

90 As above.

91 N Ziv 'Witnesses with mental disabilities: Accommodations and the search for truth' (2007) 27 *Disability Studies Quarterly*, <http://www.ds-q.org/article/view/51/51> (accessed August 2017).

92 As above.

93 As above.

94 S Stefan 'Silencing the different voice: Competence, feminist theory and law' (1992-1993) 47 *University of Miami Law Review* 763 at 788.

95 As above.

disabilities and effective ways to communicate with them.⁹⁶ The South African legislative framework currently contains no provision for such training, and this is another factor which may negatively impact on the right of persons with communication disabilities to access justice.

4 Mapping the way forward for South Africa: Recommendations for accommodations which may be made

For persons with communication disabilities to be properly accommodated in the criminal justice system in South Africa, a combination of accommodations needs to be made available to them. This section provides suggestions for the accommodations that may be made in South Africa to ensure that persons with communication disabilities access justice on an equal basis with others.

4.1 Reasonable accommodation and Augmentative and Alternative Communication

Augmentative and Alternative Communication (AAC) involves the use of other means of communication beyond the use of verbal communication alone to enable persons with significant communication difficulties, for example individuals with autism spectrum disorder (ASD), cerebral palsy and motor neuron disease (MND), amongst others, to successfully share information.⁹⁷ The goal of AAC is to enable persons with communication disabilities to effectively engage in a variety of interactions and to participate in activities of their choice. Sharing information, as is done during testimony in court, is one of the purposes of communication interactions.⁹⁸ AAC can furthermore be divided into two categories of unaided and aided communication.

4.1.1 Unaided communication

Unaided systems require persons to use only their bodies to convey their messages, such as using a formal sign language, such as the South African Sign Language (SASL), natural gestures, facial expressions and vocalisations.⁹⁹ These systems can be divided into systems that have linguistic features, such as SASL, and systems with non-linguistic features,

96 Report of the UN High Commissioner for Human Rights *Thematic Study on the Issue of Violence Against Women and Girls and Disability* UNGAOR, 20th sess, Supp 2 and 3, UN Doc A/HRC/20/5 (2012) para 43.

97 DR Beukelman & P Mirenda *Augmentative and alternative communication: Supporting children and adults with complex communication needs* (2013).

98 As above.

99 As above.

such as vocalisations and common gestures.¹⁰⁰ It is important to note that in South African courts, persons with communication disabilities have been allowed to use communication strategies such as informal signs and gestures to testify in court.¹⁰¹ However, for many persons with communication disabilities due to significant physical disabilities, the use of unaided communication systems (including SASL) is not a possibility.

4.1.2 Aided communication

Aided systems may be defined as systems that require external assistance to produce a message, and also fall on a continuum of linguistic features similar to unaided systems, ranging from symbol sets on the one end (without linguistic features) to symbol systems (with linguistic features).¹⁰² Traditional orthography (for example, letters of the alphabet) is an example of a symbol system. Literate individuals with a communication disability could generate their own messages using the alphabet, but this would not assist the majority of persons with communication disabilities to access the criminal justice system, due to the high illiteracy rates in the South African population.¹⁰³ Braille is another example of a tactile symbol system for reading and writing which is typically used by persons with visual disabilities, but this also requires the individual to be literate and, hence, the theoretical argument reverts to the issue of illiteracy of individuals with disabilities.¹⁰⁴ Bliss symbols are also an example of a symbol system as it is a conceptually-based graphic symbol system with linguistic rules.¹⁰⁵ It has successfully been used in a South African court case but unfortunately is not commonly used in South Africa.¹⁰⁶ On the other side of the aided continuum, symbol sets consist of a predetermined number of symbols with low abstractness and limited linguistic features. The difference between symbol sets and symbol systems is that symbol sets consist of a defined number of symbols that have no rules for expansion or generating new messages, such as Picture Communication Symbols (PCS) or *Bildstöd*.¹⁰⁷ Therefore, messages can only be compiled by selecting symbols from the pre-selected set without generating a new message.¹⁰⁸

100 J Bornman & K Tonsing 'Augmentative and alternative communication' in E Landsberg et al (eds) *Addressing barriers to learning: A South African perspective* (2015) 186-210.

101 *R v Ranikolo* 1954 (3) SA 255 (0).

102 Bornman & Tonsing (n 100).

103 NE Groce & P Bakshi 'Illiteracy among adults with disabilities in the developing world: An unexplored area of concern' (2009) *Leonard Cheshire Disability and Inclusive Development Centre* 1.

104 Beukelman & Mirenda (n 97).

105 As above.

106 F Toefy 'Communication board used in South African courts' (1994) 12 *Communicating Together* 19.

107 Bildstod is a website that can be accessed to create picture-based material for information and communication. Bildstod.se is a free resource created by DART – Centre for AAC and AT in the project KomHIT in Sweden, financially supported by the Swedish Inheritance Fund.

108 Beukelman & Mirenda (n 97).

This is in stark contrast to symbol systems (for instance, traditional orthography or Braille) that have the capacity to allow for maximum communication and enable individuals to compose their own messages.

Apart from illiterate persons who could benefit from the use of graphic symbol sets, so could pre-literate persons. Pre-literate persons (individuals who are young or who might not yet have been exposed to literacy and who might still acquire literacy skills) often use graphic symbols that do not require literacy skills. Unfortunately, most of the commonly-used graphic symbol collections are symbol sets and thus do not have a linguistic basis and do not initiate generative systems. Vocabulary from these sets needs to be preselected. It is important for pre-literate individuals with communication disabilities to have access to alternative means to represent messages and concepts to communication.¹⁰⁹ Therefore, an aided AAC system that uses a graphic symbol set such as PCS or *Bilstöd* could possibly be a viable option in the criminal justice system. It could thus assist both illiterate and pre-literate persons with communication disabilities to participate with others in their environment as the meaning of many of the symbols and line drawings is easy to understand.¹¹⁰ However, pre-selected vocabulary also has specific implications in the court system, since the vocabulary will be selected from a pre-determined symbol set and will not be generated, as would have been possible when a symbol system such as traditional orthography or Braille had been used. However, this implication could be solved by adding multiple choices and categories in the pre-determined symbol set.¹¹¹

The vocabulary required to access the court system could, therefore, be selected and represented in the form of pictures or graphics symbols that could be displayed as a communication board or book, or programmed into a specific speech-generating device such as a tablet with specific AAC software.¹¹²

109 K Drager et al 'Effects of AAC interventions on communication and language for young children with complex communication needs' (2010) 3 *Journal of Paediatric Rehabilitation Medicine* 303-310, <https://doi.org/10.3233/PRM-2010-0141> (accessed 21 July 2017).

110 S Dada et al 'The iconicity of picture communication symbols for children with English additional language and mild intellectual disability' (2013) 29 *Augmentative and Alternative Communication* 360, <https://doi.org/10.3109/07434618.2013.849753> (accessed 10 August 2017).

111 White, Bornman & Johnson (n 1) 1-14.

112 J Caron et al 'Operational demands of AAC mobile technology applications on programming vocabulary and engagement during professional and child interactions' (2016) 32 *Augmentative and Alternative Communication* 12, <https://doi.org/10.3109/07434618.2015.1126636> (accessed 8 August 2017).

4.2 Assistive technology

Aided AAC systems range from low technology (for example symbol-based communication boards, writing, and partner-assisted scanning) to high-technology systems such as speech-generating devices.¹¹³ Low technology is an inexpensive, paper-based and easily obtainable communication system.¹¹⁴ High technology systems include both AAC dedicated devices (developed specifically for communication purposes), such as the TOBII eye-controlled speech generating device, as well as non-dedicated devices such as the iPad or other tablets, which can be used for communication purposes when programmed with specific communication software and applications.¹¹⁵ Both dedicated and non-dedicated systems require pre-selected vocabulary that will be included in the display, hence the vocabulary selection is always viewed as an important consideration in the process of AAC implementation.¹¹⁶ Assistive technology plays a major role in assisting persons with communication disabilities in communicating, since graphic symbols can be displayed through technology.¹¹⁷ The rapid expansion of technology has created many new possibilities for persons with communication disabilities. The use of both low-technology and high-technology systems with graphic symbols to assist persons with communication disabilities to access the criminal justice system still needs to be advocated more, as many individuals with disabilities in the South African context are pre-literate or illiterate due to limited formal schooling and need alternative communication methods to tell their story.¹¹⁸

4.3 Expert testimony

An important accommodation which should be provided to enable persons with communication disabilities to participate in legal proceedings on an equal basis with others is the use of expert witnesses who have specialist knowledge on AAC.¹¹⁹ In their testimony, the AAC expert could explain

113 Beukelman & Mirenda (n 97).

114 As above.

115 D McNaughton & J Light 'The iPad and mobile technology revolution: Benefits and challenges for individuals who require augmentative and alternative communication' (2013) 29 *Augmentative and Alternative Communication* 107, <https://doi.org/10.3109/07434618.2013.784930> (accessed 8 August 2017).

116 White, Bornman & Johnson (n 1).

117 J Caron et al 'Operational demands of AAC mobile technology applications on programming vocabulary and engagement during professional and child interactions' (2016) 32 *Augmentative and Alternative Communication* 12, <https://doi.org/10.3109/07434618.2015.1126636> (accessed 25 Oct 2017).

118 D Donohue & J Bornman 'The challenges of realising inclusive education in South Africa' (2014) 34 *South African Journal of Education* 1, <https://doi.org/10.15700/201412071114> (accessed 21 August 2017).

119 J Beqiraj, L McNamara & V Wicks 'Access to justice for persons with communication disabilities: From international principles to practice (2017) *International Bar Association*.

to the judge or presiding officer the role of AAC and how the witness with a communication disability will use AAC to testify.¹²⁰

4.4 Strategies to help persons with communication disabilities

This section describes ways in which to help enable effective communication for individuals who have communication disabilities, including those with intellectual and cognitive disabilities. What follows is an introduction and is not exhaustive.

4.4.1 Attention and concentration

Persons with communication disabilities may experience attention and concentration difficulties, especially in stressful situations such as giving testimony in court.¹²¹ Concentration difficulties may contribute to the person with a communication disability to be unable to fully participate or engage in the legal proceedings.¹²² The following strategies may assist a person with a communication disability in terms of their attention and concentration:

- Taking regular breaks and conducting various meetings and interviews in a comfortable environment may help to reduce stress and support effective communication.¹²³
- Having a familiar communication partner present, who is not involved in the legal case, such as a family member or close friend, may help the individual feel at ease and supported. Feeling comfortable and supported can help reduce anxiety levels and make it easier for individuals with communication disabilities to understand what is being asked of them.¹²⁴
- Attempting to reduce background noise and distractions as this can have a negative impact on the individual's concentration, especially if they are using alternative methods of communication (for example a communication device).¹²⁵

4.4.2 Vocabulary and concepts

Persons with communication disabilities may find it difficult to express themselves due to a limited vocabulary. Identifying vocabulary under certain categories such as 'who', 'what', 'when', 'where', 'how' and

120 As above.

121 Bornman et al (n 9).

122 As above.

123 R White, J Bornman & E Johnson 'From silence to justice: Implications for persons with little or no functional speech accessing the criminal justice system' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology* 19

124 As above.

125 Beukelman & Mirenda (n 97).

'emotions' could assist individuals to participate in the legal proceedings, such as by giving testimony.¹²⁶ Individuals with communication disabilities may also struggle with abstract concepts such as colours and time.¹²⁷ This means that they may not be able to explain or answer questions about when the crime took place or what colour clothing the perpetrator was wearing. It is important to try to simplify conceptual questions, for example, questions such as 'did the event occur after or before or after your birthday', or 'before or after church' or 'was it day or night'. These questions are more concrete and intelligible.¹²⁸

4.4.3 Expressive and receptive language skills

It is important during the legal proceedings to assist an individual with a communication disability with their expressive and receptive language skills. Receptive language is the ability to understand words and language and expressive language is the ability to use words and language. Below are a few strategies to assist a person with a communication disability with their expressive and receptive language skills:

- It is important to always address the person with a communication disability by name and wait for the individual to make eye contact, after which one can assume to have the attention of the individual.¹²⁹
- Before the start of the any legal proceedings or giving testimony in court, it should be explained to the person with a communication disability the process that is about to take place and why they are needed to participate in the legal proceedings and give testimony.¹³⁰
- Simple and common words should be used and legal jargon avoided. If one does use legal terminology such as bail, intimidation or conviction, the person with a communication disability should be asked whether they understand and, if not, it should be explained to them.¹³¹
- Short and simple sentences should be used that focus on one specific question or topic.¹³²
- The individual with a communication disability should regularly be asked whether they understand or whether they need further explanation, and whether they need to take a break.¹³³

126 White, Bornman & Johnson (n 1) 1.

127 As above.

128 J McAfee 'Assisting victims and witnesses with disabilities in the criminal justice system: A curriculum for law enforcement personnel (2002) The Institute of Disabilities: The Pennsylvania State University.

129 Beukelman & Mirenda (n 97).

130 J Bornman 'Accessing justice via key role players: A view from South Africa' in DN Bryen & J Bornman (eds) *Stop violence against people with disabilities! An international resource* (2014) 41-76.

131 White, Bornman & Johnson (n 1).

132 As above.

133 White, Bornman & Johnson (n 123).

- A person with a communication disability needs time to communicate their message or answer especially when using a communication board or device. Be patient and slow down the pace of the questions. This process may be lengthy, but if interruptions occur, the individual's thought processes may be disrupted, and the question may have to be repeated.¹³⁴
- Appropriate questioning techniques should be used, for example, asking yes/no questions or closed-ended questions such as 'did the event occur in the evening'.¹³⁵ As mentioned previously, it is important to use AAC strategies such as communication boards or devices with pre-selected vocabulary if the person with a communication disability is having difficulty in using oral speech.¹³⁶

4.4.4 Visual communication aids

Persons with communication disabilities often find it difficult to express themselves orally, and visual communication aids can assist these individuals to communicate and participate effectively.¹³⁷ Strategies such as drawings and a communication tool called 'Talking Mats' can be used.

- Drawings: The person with a communication disability may be able to draw what they are unable to say or express through speech. Large sheets of paper often encourage these individuals to draw, and drawings may include where the event occurred (bedroom, church) or who the perpetrator was.¹³⁸
- Talking Mats: Talking Mats is an interactive communication resource that uses three sets of picture communication symbols – topics, options and a visual scale (to allow individuals to indicate their feelings about each option) – and a space on which to display them. Talking Mats can allow the person with a communication disability to indicate when they are experiencing high levels of emotion such as anxiety or stress during the legal proceedings. Once the topic is chosen, for example, 'thoughts and feelings', the individual is given the options one at a time and asked to think about what they feel about each option. They can then place the symbol under the appropriate visual scale symbol to indicate what they feel.¹³⁹ Research has identified Talking Mats as an effective tool for communication and to help the individual with a communication disability to express their thoughts, furthermore the visual resource can help the individual to reflect and express what is important to them at a specific time for example, during the legal proceedings.¹⁴⁰

134 As above.

135 As above.

136 White, Bornman & Johnson (n 1).

137 White, Bornman & Johnson (n 123).

138 Bornman (n 130).

139 J Murphy 'Talking mats: Speech and language research in practice' (1998) *Speech and language therapy in practice* 14.

140 L Cameron & R Matthews 'More than pictures: developing an accessible resource' (2017) *Tizard Learning Disability Review* 22.

5 Conclusion

Persons with communication disabilities experience many barriers to effectively participating in the criminal justice system. In the absence of appropriate accommodations, their ability to effectively participate in the criminal justice system may be seriously impaired. The CRPD bestows on all persons with disabilities the right to access justice on an equal basis with others. According to the CRPD, access to justice is to be achieved in two ways, namely, by the provision of accommodations and the training of judicial personnel. South African legislation does provide some accommodations, but their impact is reduced because of the fact that many provisions apply only to children and many are accommodations relating to the environment. There is only one provision dealing with accommodations to do with communication. This greatly disadvantages persons with communication disabilities in South Africa. The South African legislation also fails to make provision for the training of judicial personnel, and this further disadvantages persons with communication disabilities. According to the human rights model, access to justice is a right which persons with communication disabilities must enjoy. Therefore, there is a need to ensure that South African legislation, as a priority, provides accommodations for persons with communication disabilities and provides training for judicial officers in order to ensure that persons with communication disabilities in South Africa can access justice on an equal basis with others.

LEAVING THE WOODS TO SEE THE
TREES: LOCATING AND REFOCUSING
THE ACTIVITIES OF NON-STATE
ACTORS TOWARDS THE EFFECTIVE
PROMOTION OF ACCESS TO JUSTICE
OF PERSONS WITH DISABILITIES

Azubike Onuora-Oguno*

Summary

The article conceptualises the place of non-state actors in international law and the important roles they ought to play if functioning well. It argues that most non-state actors remain underutilised in the realisation of their mandates or objectives that they are created to achieve. It has been argued that this possibly is premised on the paucity of human rights education, knowledge of international human rights instruments and their application in national laws. Considering the wide range of perceptions of non-state actors the article examines the emergence of law clinics in several Nigerian universities as non-state actors. It argues that the lack of engagement and adequate training of law clinics in enhancing access to justice of persons with disabilities as envisaged in article 13(2) of the Convention on the Rights of Persons with Disabilities is responsible for the underutilisation of law clinics as non-state actors. In addition, the article advances the argument that the continued poor engagement is also linked to a lack of appreciation and understanding of the relevant human rights instruments, especially with respect to the CRPD. Consequently, the article construes non-state actors as effectively being in the woods (human rights discourse) but unable to effectively see the trees (enhancement of access to justice of persons with disability). The article adopts a restricted quantitative methodological approach to collect and analyse data (knowledge and perception) by engaging in informal unstructured interviews with law clinic coordinators and students in Nigeria as it pertains to the question of access to justice of persons with disabilities. The article proposes that law clinics should be effectively positioned to make a greater impact on access to justice of persons with disabilities. To achieve this the article proposes the development of quality human rights education to enhance, among other things, the understanding and perception of the disability concept, access to justice, and an appreciation of relevant human rights instruments.

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A Onuora-Oguno 'Leaving the woods to see the trees: Locating and refocusing the activities of non-state actors towards the effective promotion of access to justice of persons with disabilities' (2018) 6 *African Disability Rights Yearbook* 121-138 <http://doi.org/10.29053/2413-7138/2018/v6a6>

1 Introduction

The challenges that face people living with disabilities are not in doubt. The obvious disadvantages range from discrimination to a lack of reasonable accommodation. Persons with disabilities remain at the lower rung of societal disadvantages. In the discourse about persons with disabilities the various forms commonly discussed are disabilities such as hearing impairment, sight and mobility. The limited or low discourses of challenges of persons with mental disabilities suggest that persons with mental disabilities in most circumstances are not countenanced within the general theoretical discourse.¹

The concept of non-state actors generally in international law suggests the involvement of groups that engage in either war or other obnoxious activities in and outside a state.² Non-state actors also engage in business activities that impact the realisation of human rights in society. For instance, the International Monetary Fund (IMF) and other international institutions are also argued to be subject to international law regulations.³ In early times the question as to liability of non-state actors has led to much debate. It is argued in several quarters that non-state actors as subjects of international law should also be part of treaty making and negotiations.⁴ On the other hand, the extent to which states should be held responsible and accountable for the acts of non-state actors is another unresolved aspect in international law. The article advances the concept of non-state actors to include the activities of non-governmental organisations (NGOs) and the extent to which they should engage in the question of access to justice.

Access to justice generally deals with the ability of an aggrieved individual to obtain reprieve for any form of injustice. It deals with both substantial and actual access to the architecture of the rule of law in a state.⁵ A major factor affecting persons with mental disabilities is the perception and assumption that these persons lack the ability to make decisions for themselves. According to Ofuani, the challenge this may present is surmountable by relying on the provisions of article 12 of the

1 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 75 *Modern Law Review* 778.

2 KS Gleditschy et al 'International conventions and non-state actors: Selection, signalling, and reputation effects' (2016) *Journal of Conflict Resolution* <http://eprints.lse.ac.uk/id/eprint/66556> (accessed 5 September 2017).

3 See generally A Clapham *Human rights obligations of non-state actors* (2006).

4 MH Zarei & S Azari 'The status of non-state actors under the international rule of law: A search for global justice' (2015) *Rethinking International Law and Justice* 233.

5 United Nations 'Toolkit on disability in Africa: Access to justice for persons with disabilities' <https://www.un.org/development/desa/technical-cooperation/2016/11/18/toolkit-on-disability-for-africa/> (accessed 27 August 2017).

Convention on the Rights of Persons with Disabilities (CRPD).⁶ It therefore is imperative to interrogate the veracity of this claim. Assuming this position to be true, the questions arises as to what efforts are effectively put in place to aid the realisation of access to justice of persons in this category.

An emerging concept in human rights advocacy and education is the growing influence of law clinics. Law clinics more often are located in law schools and have contributed immensely to the growth in driving the human rights concerns of people.⁷ Law clinics generally have been noted to support the work of the United Nations (UN) and regional human rights entities in several human rights discourses.⁸ The effectiveness of the law clinics generally has been adjudged as being excellent, but this not ignoring the fact that several areas of impact still loom large. The basis on which they are properly placed but unable to achieve more than they have done could be traceable to the issues of limited knowledge. Based on this, it might be safe to suggest that the law clinics are well located within the woods of human rights discourse but remain unable to see the trees. The article will set out to ground the discourse of access to justice of persons with mental disabilities and the role law clinics can play in enhancing this. The article is structured in five parts, dealing with the introduction; the conceptualisation of non-state actors as agents of international law application; and a discourse on applicable international instruments that deal with access to justice and mental disability. In addition, the position of the law clinics and the impact they are capable of having are discussed in light of collated data. The article finally makes recommendations and draws conclusions.

2 Access to justice and international law

In conceptualising the term ‘access to justice’, it is important to underscore the key components of the concept. In the first place the term ‘justice’, as most social phenomena, defies a definite definition. What might be called justice to A invariably could not mean justice to B. For instance, in the field of transitional justice a debate remains about which should be projected, justice or peace.⁹ While many scholars will advocate peace, some advocate justice. However, a seemingly acceptable premise is to appreciate that whichever approach is followed, the position of the victim must be

6 A Ofuani ‘Protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities’ (2017) 17 *African Human Rights Law Journal* 550.

7 See Generally MM Qafisheh ‘Clinical legal education in Palestine: A clinical case under military occupation’ (2015) *Clinical Legal Education in Asia* 113.

8 The Clinics at the Centre for Human Rights University of Pretoria are good examples of this. The author has in the past served as coordinator for some of the clinics.

9 See generally N Biggar (ed) *Burying the past: Making peace and doing justice after civil conflict* (2003).

appreciated and protected.¹⁰ Another important component of the justice concept is the representation of fairness, accountability and equity. These notions also are not devoid of the challenges facing the concept of justice. With this challenge in mind, Lord Denning, as he then was, advocated in the popular case of *UAC v Macfoy*¹¹ that justice must not only be done but must be seen to be done. Justice, broadly, covers criminal justice, civil justice and administrative justice, and can be exerted either via reliance on established systems or via self-help. The article deals more with the formal system of justice in line with state creations and the rule of law. The question of access mainly deals with the process through which individuals are able to access state-created structures in the quest to find justice when they feel aggrieved. Issues affecting access to justice are identified as a lack of funds, language barriers and institutional bureaucracies.

In international law the concern about the concept of access to justice can be traced back to the Universal Declaration of Human Rights (Universal Declaration).¹² This instrument sets out the twin tenets of a fair hearing, known as a person being heard in his case and a person not been a judge in his own matter. These two principles were further enunciated in the International Covenant on Civil and Political Rights (ICCPR).¹³ While these provisions deal with access to justice of accused persons in the criminal justice system, the same principles invariably can be extended to other bases of the pursuit of justice. At the regional level the African Charter on Human and Peoples' Rights (African Charter) also provides that no individual is to be prevented from having access to justice.¹⁴ The African Commission on Human and Peoples' Rights (African Commission) also has developed a guide to access to justice, namely, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.¹⁵ All the instruments enumerated above generally have provisions that are non-specific to access to justice for persons with disabilities.

10 See generally G Ortiz-Barreda, C Vives-Cases & D Gil-González 'Worldwide violence against women legislation: An equity approach' (2011) 100 *Health Policy* 125; LE Powers & O Mary 'Violence and abuse against people with disabilities: Experiences, barriers and prevention strategies' (2004) *Portland: Oregon Health and Science University Center on Self-Determination*.

11 Appeal 67 of 1960, <http://www.nigeria-law.org/LawReporting/1961/Benjamin%20Leonard%20MacFoy%20v%20United%20Africa%20Company%20Ltd.htm> (accessed 5 September 2017).

12 Universal Declaration of Human Rights. Arts 10-13 specifically speak to the provisions of access to justice.

13 Art 14 Universal Declaration.

14 Art 17 Universal Declaration.

15 http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf (accessed 5 November 2018).

However, despite the perceived shortcomings mentioned above, it is important to commend the provision of the Sustainable Development Goal (SDG) that seeks to ensure a just, peaceful and inclusive society.¹⁶ Interestingly, for the realisation of the goal, the need to ensure that strong institutions are built is underscored. In this respect the position buttresses the need to ensure the establishment of law clinics as institutions capable of driving this aspiration.

The challenges facing persons with disabilities in every facet of society formed a core concern for the international community and subsequently heralded the entry into force of the CRPD. The Convention's core interest was to ensure that persons with disabilities are not sidelined in their day-to-day living. The CRPD particularly makes provision for the right of access to justice of persons with disabilities, which is discussed in the next section of the article. As a follow-up to the CRPD, it was important to ensure that the pursuit of justice was done on an equal footing. To this effect, it has been noted that 'equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights'.¹⁷ Accessibility is as important as equality. It is argued that a fair hearing, as advanced in international law, cannot be possible where equality is denied. The importance of access is stressed in General Comment 9 which provides definite and specific parameters for grounding accessibility to justice of persons with disabilities.¹⁸

2.1 Access to justice for persons with mental disabilities

Understanding the challenges affecting persons with disabilities generally would be a good basis to proceed on before narrowing in on the specific situation of persons with mental disabilities. It is emphasised that, generally, persons with disabilities remain the most widely discriminated against in several areas of society.¹⁹ Due to both the medical and social construction of the concept of disability, several persons with disabilities have been dehumanised and made to look less human than non-disabled persons.²⁰ The medical construction of disability focuses on the individual with such a disability and does not in any way attempt to alleviate the

16 <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions.html> (accessed 5 November 2018).

17 See General Comment on Article 12 on equal recognition before the law, prepared pursuant to Rule 47, paras 1 and 2 of the Committee's Rules of Procedure (CRPD/C/4/2) and para 54 of the Committee's Working Methods (CRPD/C/5/4).

18 See General Comment on Article 9 on accessibility prepared pursuant to Rule 47, paras 1 and 2 of the Committee's Rules of Procedure (CRPD/C/4/2) and para 54 of the Committee's Working Methods (CRPD/C/5/4).

19 H Hahn 'Introduction: Disability policy and the problem of discrimination' (1985) 293 Sage Journals]; NE Groce 'Adolescents and youth with disability: Issues and challenges' (2004) 15 *Asia Pacific Disability Rehabilitation Journal* 13.

20 S Peters 'Is there a disability culture? A syncretisation of three possible world views' (2000) 15 *Disability AND Society* 583; JM Camilleri 'Disability: a personal odyssey' (1999) 14 *Disability and Society* 845.

limitations presented by the environment. Conversely, the social model of disability attempts to reconstruct the limiting barriers, but places a great responsibility on an individual when a disability does not present in clear and certain forms.²¹ Ranging from the right to reasonable accommodation to the right to education, persons with disabilities have harrowing experiences. These persons are exploited in all spheres, from economic to educational.²² In certain circumstances persons with disabilities may be either maimed or killed.²³ In this category of serious violations are persons with mental disabilities who suffer the most with issues pertaining to their dignity.²⁴ A person with a mental disability may suffer name-calling and may have to face assumptions that they are unable to make decisions, coupled with an inability to access justice. The obligation placed on the state to ensure capacity building and knowledge dissemination regarding the importance of ensuring accessibility as a means of realising access to justice of persons with disabilities should be embraced by all major stakeholders.²⁵

In curbing the challenges of persons with disabilities the CRPD, particularly in article 13, attempts to alleviate the challenge of access to justice of persons with disabilities. In this attempt, the CRPD focuses on the role of government; the question of direct and indirect participation; enhanced and targeted positive measures to alleviate discrimination; and ensure adequate promotional and educational approaches to increasing the human rights experiences of persons with disabilities.

A perusal of the intent of article 13 reveals that the responsibility to enhance the human rights of persons of disabilities is enhanced by ensuring adequate training of institutions involved in access to justice. Bearing in mind that human rights obligations are of both horizontal and vertical application, the article focuses on the role of non-state actors in giving flesh to the aspirations of the CRPD.

Section 36(1) of the Nigerian Constitution of 1999 is the basis for access to justice in the country. It provides for the basic tenets of fair

21 See generally 'The social and medical model of disability' <https://www2.le.ac.uk/offices/accessibility/staff/accessabilitytutors/information-for-accessability-tutors/the-social-and-medical-model-of-disability> (accessed 20 March 2018).

22 N Stein 'A society disabled: State of the right to education for people with disabilities in China' (2014) 47 *New York University Journal of International Law and Politics* 501.

23 This challenge currently is very common among persons with albinism in several cities in Africa. See generally MP Mostert 'Stigma as barrier to the implementation of the Convention on the Rights of Persons with Disabilities in Africa' (2016) *African Disability Rights Yearbook* 3.

24 LÓ Gostin & G Lance 'The human rights of persons with mental disabilities: A global perspective on the application of human rights principles to mental health' (2009) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435443 (accessed 1 August 2017).

25 See generally General Comment on Article 12: Equal recognition before the law CRPD/C/11/4 <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (accessed 5 November 2018).

hearing and the removal of all forms of impediments that will hinder the pursuit of justice by any individual. As part of realising access to justice, the Nigerian Legal Aid initiative is put in place to aid any individual who is unable to obtain legal services, mainly in criminal matters. Several justice sector reform initiatives have also been put in place to ensure that no one is denied access to justice.²⁶

Despite these initiatives, access to justice in Nigeria remains confronted by a number of challenges, among which is citizens' limited knowledge of their rights. According to Okogbule.²⁷

There is a wide gulf between official pronouncements of respect for human rights and their actual implementation. The explanation for this appears to be that there still exists a number of substantive and procedural obstacles or impediments that not only inhibit the actual implementation of such measures but preclude the masses in general from having access to justice in Nigeria.

In this regard the inability of law clinics, as shown in the article, to engage in issues concerning persons with disabilities attest to the position above and the need to ensure a shift away from this. The place of legal education in enhancing access to justice is described as one that is key and pivotal and should not be ignored.²⁸ It is therefore premised on the above the next sections of the article discuss the importance of law clinics in realising access to justice, particularly as it pertains to persons with disabilities. In this regard the non-state actors examined in the article are the law clinics that are housed in law schools in Nigerian universities. The importance of this focus is the fact that law clinics have the potential of driving the desired enhancement of access to justice of persons with mental disabilities.

3 Law clinics as non-state actors and scope of operations

Law clinics in Nigeria are anchored on the Legal Aid project of the country to make justice accessible to every citizen, especially the indigent.²⁹ The legal aid clinics are creations of the state through legislation. The major legislation on legal aid in Nigeria is the Legal Aid Act 2011. The main aim of this Act is to provide for the establishment of legal aid and an access to

26 'Impact assessment of justice sector reforms in three Nigerian states' https://www.unodc.org/documents/nigeria/.../Impact_of_Justice_Sector_Reform.pdf, <http://www.justice.gov.ng/index.php/justice-sector-reform> (accessed 5 November 2018).

27 NS Okogbule 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) *Sur Revista Internacional de Direitos Humanos* 100.

28 CIN Emelie 'Legal education and access to justice in Nigeria' <http://www.internationalpolicybrief.org/images/2017/APRIL/RJH/ARTICLE12.pdf> (accessed 5 November 2018).

29 This position is not unique to Nigeria. See generally FS Bloch 'Access to justice and the global clinical movement' (2008) 28 *Washington University Journal of Law and Policy* 111.

justice fund into which financial assistance would be made available to the Council on behalf of indigent citizens to prosecute their claims in accordance with the Constitution, and further to empower the existing Legal Aid Council to provide justice in certain matters or proceedings involving persons with inadequate resources, in accordance with the provisions of the Act.³⁰

The Legal Aid Act also establishes the Legal Aid Council which is mainly responsible for promoting access to justice in the Nigerian legal system. However, the legal aid clinics at Nigerian universities have also been recognised as legal aid providers under the 2011 Legal Aid Act.³¹ According to a guide published by the Network of University Legal Aid Institutions (NULAI), the legal aid clinics at Nigerian universities at the time of this research stood at 18.³² These law clinics are guided by the policies of NULAI,³³ an NGO established in October 2003 as a non-profit organisation dedicated to generating sufficient interest in the legal education sector and the promotion of legal education, access to justice and human rights.³⁴

NULAI thus far has pioneered the establishment of 14 law clinics at universities across Nigeria, while influencing the establishment of several others.³⁵ In this article, the focus will be placed on three law clinics at three Nigerian universities, namely, Abia State University; the University of Abuja; and the University of Ilorin. Law clinics examined are hosted in government institutions. It is important to restate the premises of conceptualising law clinics as non-state actors, premised on the basis of the status they are able to assume as NGOs. The impact of these three law clinics will be examined in relation to the CRPD. The reason behind the examination of these three law clinics is primarily premised on the fact that they are among the first generation of law clinics; represent law clinics in different geo-political zones in Nigerian law faculties, and because of the author's personal knowledge and interactions.

Legal education in Nigeria has the sole responsibility of educating individuals that are motivated towards the law profession. A historical view of the legal education curriculum in Nigeria suggests one that was highly laden with the British style of education (considering the colonial history of Nigeria). It entailed a structure that was lecture-based and that prepared students for theoretical examinations to become qualified lawyers. At the successful completion of his educational training a candidate is admitted as both solicitor and advocate of the Nigerian

30 See Explanatory Memorandum for the Legal Aid Act, 2011.

31 Sec 17 of the Legal Aid Act, 2011.

32 *Compendium of campus-based law clinics in Nigeria*, published by Network of University Legal Aid Institutions (NULAI Nigeria) 2014, www.nulai.org (accessed 30 July 2017).

33 As above.

34 NULAI Nigeria 2011 Annual Report 2.

35 As above.

Supreme Court. The educational training is structured in two major folds: first, five years of university education and, second, one year at the Nigerian Law School.

Considering the deteriorating quality in the nature of lawyers produced, the system of over-reliance on the theoretical framework of legal education took was under scrutiny in the country.³⁶ The high rate of rejection of poor and incompetent lawyers produced by the legal education framework necessitated a review of the process.³⁷ In a bid to follow the global trend, the system of law clinics was adopted in major law schools in Nigeria.³⁸ One of the core bases that gave credence to the embracing of law clinics is hinged on the fact that legal education should basically enhance human knowledge and societal interaction of the lawyer.³⁹ Another important basis was the need to ensure a grasp of means of advocacy to drive the basic tenets of human rights. According to Wilson, law clinics are originally configured to ensure that the justice model of the law is practically imbibed.⁴⁰ Scholars such as Ojukwu and Egbewole advocate the importance of clinical legal education as a major means of ensuring an integrative approach to learning, community engagement, access to the rule of law and demystification of the challenges often identified with access to justice.⁴¹ According to Omoragbon, law clinics came into being in Nigeria as from 2004 and were conceptualised to function as a bridge to the challenge of access to justice, particularly in light of the high cost of legal services.⁴²

According to Zarei and Safari, the allusion to the concept of non-state actors mostly is inclined towards the activities of armed groups.⁴³ However, broadening the scope of the concept of non-state actors, it includes 'actors that include private sector, social partners, trade unions

36 See generally <http://thenationonline.ng.net/50-years-of-legal-education-in-nigeria-a-critique/> (accessed 23 March 2018).

37 AO Popoola 'Restructuring legal education in Nigeria' <http://www.aelx.com/media/MFA/THE%20PROBLEMS%20OF%20LEGAL%20EDUCATION%20IN%20NIGERIA.pdf> (accessed 6 September 2017).

38 'Development of clinical legal education in Nigeria' <http://www.nulai.org/index.php/blog/83-cle> (accessed 7 September 2017).

39 SL Buhai & K Ved 'The role of law schools in educating judges to increase access to justice' (2011) 24 *Pacific McGeorge Global Business and Development Law Journal* 161.

40 RJ Wilson 'Training for justice: The global reach of clinical legal education' New York Law School Clinical Research Institute Research Paper Series 07/08 9 *elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1595&context=psilr* (accessed 20 July 2017).

41 E Ojukwu, S Erugo & C Adekoya *Clinical legal education curriculum lessons and materials* (2013) 7-8; WO Egbewole 'Clinical legal education and the future of legal training' Paper presented at the University of Cape Coast, Ghana, February 2014.

42 KM Omoragbon 'Celebrating a decade of clinical legal education in Nigeria: It is not yet Uhuru!' <http://northumbrialawblog.wordpress.com/2012/08/07/celebrating-a-decade-of-clinical-legal-education-in-nigeria-it-is-not-yet-uhuru/> (accessed 14 February 2014).

43 Zarei & Azari (n 4) 233.

and civil society organisations' and, in this case, the law clinics at Nigerian universities. Article 6 of the Cotonou Agreement⁴⁴ provides for the expansive interpretation of the actions and status of non-state actors. Private entities such as civil society organisations have had their status settled as non-state actors on different occasions, including acting as *amici curiae* before treaty bodies and supra-national judicial bodies. It is argued that the underlying theme of a body to be recognised as a non-state actor primarily is being an organisation, a legal personality and independent from government activities and supervision.

Building on this, it is assumed that the nature of law clinics in Nigeria would safely place them within in the ambit of non-state actors. For instance, the law clinic at the University of Ilorin was established on the premise of rendering *pro bono* services to communities in the vicinity; embarking on advocacy initiatives and contributing to the promotion of human rights of indigent citizens generally.⁴⁵ Despite the wide scope of the operations of the law clinics, the level of their efficiency has come under heavy criticism and will be analysed in the next section.

3.1 Within the woods and yet not seeing the trees: Factors limiting the efficiency of law clinics

Generally, the metaphor of seeing the woods from the trees is advanced by Freris and Laschefski.⁴⁶ The two authors laud the need for and importance of efficiently engaging the economic advantage presented by the flourishing Amazon forest. However, they bemoan the inability to fully utilise the presented opportunity due to several factors, especially illegal logging and corruption. In the context of this article, the metaphor is construed from the perspective of law clinics having the potential to advance the cause of human rights generally. It is the general assumption that the activities of law clinics in Nigeria still are in the early stages. However, it is important to examine the scope of their operations with a view to ascertaining the extent of their efficiency thus far and possible room for improvement.

Primarily, the law clinics, as stated, are well situated within the confines of contributing extensively to the issues of human rights discourse in Nigeria, particularly on building the jurisprudence of disability rights and the access to justice of persons with mental disabilities. To ascertain the challenges and factors that blur the vision of law clinics from effectively

44 See https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en (accessed 6 September 2017); http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf (accessed 6 September 2017).

45 The author was one of the three lecturers that drafted the scope of activities of the Law Clinic.

46 F Nicole & K Laschefski *The ecologist* (2001) 31.

seeing the trees from the woods, three law clinics were selected⁴⁷ with the sole purpose of ascertaining the extent of knowledge regarding the CRPD and disability rights generally. Preliminary findings identify some general challenges which are discussed below.

3.1.1 Poor knowledge and appreciation of relevant laws

The functioning and application of international law generally is not particularly encouraging. A cue from the challenges faced in the implementation of international treaties shows that legal practitioners generally are more inclined to apply municipal laws than international law. In several areas of law, such as environmental rights, the right to health and the right to education, more interest is shown in the functions of municipal laws. The perception is that lawyers generally are unaware of the development of international law in these areas. Consequently, areas such as disability rights, which encompass the right to inclusive education and the protection of the rights of persons with albinism, have remained low on the scale.

At the University of Ilorin, for instance, the law clinic's core focus from inception has been on prisons. Current advocacy on the right of persons with disabilities revealed an embarrassing lack of knowledge on the part of students on the application of the CRPD and construing disability law generally. Academically, the module attracts a two-credit load and in some circumstance attracts a poor attitude and approach to the academic aspect. However, it is noted that the University attaches great importance to the module, ensuring that it is a compulsory and required module. This *lacuna* in knowledge extends also to the judiciary, as the traditional approach to litigation of emerging areas of laws. These continue to affect areas such as inclusive education, maternal health and socio-economic rights generally.

3.1.2 Lack of institutional framework

Apart from the poor knowledge and appreciation of the relevant laws, another major inhibitor is the lack of institutional framework. Judicial institutions and structures in Nigeria still face the challenge of reasonable accommodation. This challenge also is obvious at universities, with access to facilities that are disability-friendly remaining lacking. The curriculum content of education, language and social construction continue to place heavy restrictions on the institutions that are meant to drive the knowledge of disability laws generally.

47 The selection of the clinics to be studied was carried out by a simple random sampling selection influenced by the author's access to both coordinators and students working on the different law clinics.

For instance, in the Nigerian law school there is an absence of sign language interpreters for students with hearing impairments. The basic education teaching style of teachers is still laden with nursery rhymes and jingles that discriminate and dehumanise the human dignity of individuals with some form of disability.⁴⁸ On the front of mental disability and access to justice, there is an absence of knowledge of the legal framework of the CRPD and particularly the aspirations of article 13. Interaction with a few academics revealed a large vacuum in this area, illustrating why the activities of the law clinics are mainly focused on the traditional civil and political rights. It is noted that the choice of cases undertaken by the clinics often is influenced by the knowledge and interest of the clinicians. Apart from institutional support that is lacking, the lack of motivation is another factor.

3.1.3 *Lack of motivation*

Motivation and passion are the core bases that drive any human rights advocacy initiative. In the University of Ilorin clinical legal education is an integral part of the moot and mock advocacy module. The absence of a specific curriculum on disability rights results in there being a reliance on the course facilitator to include these aspects of disability rights.

Facilitators and coordinators see this as an extra burden on their finances and time that could be used for other initiatives. The students engage with personal funds to carry out a few select activities, and are easily burnt out in the course of the semester. The import of this is that rigorous engagement on the various projects that would aid data gathering or access is largely hampered by the economic burden of the implementation of such projects.

3.2 **A case-by-case overview of the selected law clinics**

The information relayed here was gathered either via telephonic interviews or personal interactions with the respective law clinics.

3.2.1 *Abia State University Law Clinic*

The Abia State University (ABSU) Law Clinic was established in 2005 as one of four pilot clinics under the Network of University Legal Aid Institutions (NULAI) with support from the Open Society Justice Initiative (OSJI).⁴⁹ However, it should be noted that the support received

48 See generally A Ogbuotobo *Ejiofor Okocha* – Portion Music PC 003; AC Onuora-Oguno ‘Nigerian stand-up comedians and differently abled persons from a human rights lens’ <http://ohrh.law.ox.ac.uk/nigerian-standup-comedians-and-differently-abled-persons-from-a-human-rights-lens/> (accessed 30 October 2018).

49 NULAI Nigeria (n 32).

in this regard is an isolated situation, as other law clinics do not receive same support. The objectives of the law clinic as of its establishment were to provide free legal aid and advisory services to the underserved members of the University community and its environs and also to provide a platform for the students to acquire the requisite skills and exposure to real-life cases in order to help them develop their lawyering skills.⁵⁰

The ABSU Law Clinic focuses on four areas:

- (a) community human rights education;
- (b) child rights education at primary and secondary schools;
- (c) freedom of information community education and support; and
- (d) prison pre-trial detainee unit.

In the execution of its focus, the ABSU Clinic since 2005 has served over 400 individual clients, especially under its access to justice for prison pre-trial detainees and community human rights education projects. Under the prison pre-trial unit the law clinic works with the Umuahia, Okigwe and Aba Prisons to improve access to justice for detainees that cannot afford to appoint lawyers. The Clinic has secured the release of over 50 detainees. Notable cases include the release of a detainee after seven years of pre-trial detention. The accused was charged with armed robbery when he was 16 years of age. Another was the release of Mr CA after eight years of pre-trial detention.

The Clinic conducted an anti-sexual harassment and human rights enlightenment campaign in five secondary schools, namely, the Federal Government Girls College *Umuahia*; International Secondary *Uturu*; Fatima Technical Secondary School *Isiukwuato*; Girls Senior Secondary School *Umuahia*; and the Federal Government College *Okigwe*.

The Clinic also launched its Freedom of Information Unit in 2013, starting with educating the faculty and students on the Freedom of Information Act. It was confirmed that the clinic had no activity covering the enhancement of access to justice of persons with disabilities in line with the CRPD.⁵¹ It was emphasised that the ABSU Law Clinic's efforts were rather directed towards pre-trial detention matters, the training of students in advocacy contests and the freedom of information awareness project.

50 As above.

51 In a telephonic interview conducted with the coordinator of the ABSU Law Clinic, Dr Sam Erugo, on 4 September 2017.

3.2.2 University of Ilorin Legal Aid Clinic

According to a report,⁵² the process of the establishment of the University of Ilorin Legal Aid Clinic began in November 2011 and the Clinic became fully operational in February 2012 with approval by the Faculty Board. The objectives of the Law Clinic at its establishment were to train students using clinical methods, thereby preparing them for practice as soon as they graduated; to provide *pro bono* services to the indigent people within the Ilorin metropolis; and to create awareness about people's rights and responsibilities at Ilorin.

The focus areas of the law clinic are:

- (a) prison/pre-trial detainees: The University of Ilorin Legal Aid Clinic specialises in prison/pre-trial detainees and members of the Clinic have paid advocacy visits to the prisons and other relevant institutions in the Ilorin metropolis.
- (b) community outreaches on freedom of information;
- (c) alternative dispute resolution (ADR); and
- (d) legal advice on sundry issues.

In the execution of its focus, in 2012 the Clinic coordinators and clinicians visited the Mandala prison for the counselling and interviewing of clients. After the interviews and counselling sessions, approximately 10 cases were signed on for action by the Clinic. In 2013 advocacy visits were paid to the Director of Public Prosecutions and the Legal Aid Council, among others. Students from outside the Faculty approached the Clinic for legal advice and were competently advised. In 2014 the Clinic visited the Chief Justice of Kwara State and the Controller of Prisons, Kwara, to appraise them of the existence of the Clinic as well as its activities. Another visit was paid to the Okekura Maximum Security Prison where students interviewed and counselled awaiting-trial inmates. Approximately 15 cases were eventually signed on, some of which are presently being prosecuted by the Clinic.

In a telephonic interview with the former Clinic leader of the University of Ilorin Law Clinic, Oke Ridwan, on 4 September 2017, he advised that the University of Ilorin Law Clinic did not offer any general assistance specifically to persons with disabilities in line with the CRPD. He emphasised that the Clinic usually offered legal aid on specific cases dealing with prison decongestion and aiding access to justice of individuals on pre-trial detention.

52 NULAI Nigeria (n 32).

3.2.2 University of Abuja Legal Aid Clinic

According to a report,⁵³ the University of Abuja Clinic was established in 2008 after the University had won the Third National Client Interviewing and Counselling Skills competition. The objectives of the Law Clinic since its establishment were to provide legal aid for indigent members of the community; to advocate access to justice and human rights; to serve as a laboratory where students learn through real legal practice; to provide an opportunity for law students to appreciate the social justice perspective of law; to expose students to new areas of law and vital professional skills; and to serve as an avenue for capacity building for both staff and students of the Faculty.

The focus areas of the UNIABUJA law clinic are:

- (a) community human rights education (street law projects);
- (b) child rights education at primary and secondary schools;
- (c) freedom of information community education and support;
- (d) prison pre-trial detainee projects; and
- (e) public safety projects.

In the execution of these focus points, since 2009 the University of Abuja law Clinic reports that every year approximately 2 000 persons receive basic legal education on their rights and ways in which to enforce these rights. Outreach programmes are organised on a quarterly basis at primary and secondary schools in Gwagwalada to sensitise the young minds about their rights as children in a 'catch-them-young initiative'. Outreach is also conducted to market women and commercial motorcycle associations to educate them on their rights.

The Clinic also provided access to justice to more than 100 pre-trial detainees in Kuje Prison, of which 60 were released between November 2013 and March 2014.⁵⁴ The Clinic also carries out a community mediation project to educate community leaders on how to resolve disputes by adopting modern mediation strategies.

In a telephonic interview with the Clinic head of the University of Abuja legal Aid Clinic, Ms Basil Chioma, on 4 September 2017, she observed that there were no provisions for the execution of the objectives

⁵³ As above.

⁵⁴ For further information into the recent activities of the University of Abuja Law Clinic, see generally <https://www.juridipedia.com/NG/Abuja/464049326959651/University-of-Abuja-Law-Clinic> (accessed 5 November 2018); <http://www.gaje.org/wp-content/uploads/2014/10/UNIVERSITY-OF-ABUJA-LAW-CLINIC-PROGRAM-AN-OVERVIEW.pdf> (accessed 5 November 2018).

of the Legal Aid Clinic in line with the CRPD. She emphasised that there had been no case of providing access to justice for persons with disabilities.

Having examined the three case studies, it is established that the law clinics have had an impact on the Nigerian system. However, there is no confusion about the fact that they have no knowledge of their utility in the expansive human rights discourse, especially in respect of the rights of persons with disabilities.

It is important to note that in a clinical legal education curriculum⁵⁵ published by NULAI in 2013, a brief note was made of disabilities in relation to access to justice. However, no further elaborations were made, and it has been consistently absent from the NGO's agenda and annual reports. This clearly denotes a state of ignorance of the essence of article 13 in the achievement of the goals of legal aid clinics in Nigeria.

4 Law clinics and diverse engagement: Other perspectives

From the foregoing it is important to briefly mention the need to ensure that law clinics are actively engaged with developing trends in society with a view to contributing to the realisation of the respect for the rule of law and human rights. In the author's view, Nigerian law clinics would benefit tremendously from the experience of other climes in the engagement of law clinics in diverse activities.

Consequently, it is noted that the role of law clinics cannot be overemphasised, Quigley makes the point that the continued education of law clinicians is germane in ensuring that social injustices are confronted.⁵⁶ This position supports the argument of the author about the need to ensure proper capacity building for law clinics in Nigeria on issues of disability, and particularly on access to justice of persons with mental disabilities. This approach could be likened to what Karin and Runge describe as an integrated approach.⁵⁷ The need for Nigerian law clinics to embrace a multidimensional approach to clinic education is important as this would enable the clinics to advance beyond the traditional engagement with the civil and political rights advocacy which seems to be the sole focus of the clinics. If the awareness level of the rights of persons with disabilities to access justice is to be enhanced, the role of the law

55 Ojukwu, Erugo & Adekoya (n 41).

56 F Quigley 'Seizing the disorienting moment: Adult learning theory and the teaching of social justice in law school clinics' (1995-1996) 2 *Clinical Law Review* 37.

57 ML Karin & RR Runge 'Toward integrated law clinics that train social change advocates' (2010) 17 *Clinical Law Review* 563.

clinics is crucial, and they must be engaged especially in low focus areas such as the rights of persons with disabilities.⁵⁸ To overcome the challenges identified in the operation of the law clinics and also inculcate a deeper appreciation of the challenges of persons with disabilities, interaction with clinicians is encouraged as this would enhance both the passion of the clinicians and the quest to seek a deeper understanding of the legal framework that has the potential of providing respite.⁵⁹

5 Repositioning the law clinics to see the trees: Enhancing access to justice of persons with mental disabilities

Having established that law clinics have the potential to effectively engage the question of access to justice, it is important to reposition the law clinics to enhance the lived experiences of persons with disabilities with respect to access to justice. An important means of repositioning the law clinics would be the following:

- (i) to enhance knowledge of applicable treaties;
- (ii) to strengthen the institutional framework; and
- (iii) to find a sufficient basis to motivate both the students and the coordinators.

In the first instance, enhancing the knowledge of the participants in the activities of the law clinics, there is a need to engage in the human rights education of all major stakeholders. This position is gleaned from experiences emanating from such programmes available to clinicians in other jurisdictions. In addition, the curricula of the human rights scope of most law schools in Nigeria need to be reviewed with a particular focus on disability laws. In addition, a dedicated effort needs to be focused on the continuing legal education framework of the Nigeria Bar Association to ensure that lawyers and judges appreciate the importance and impact of international law on municipal laws. The application of decisions of treaty-monitoring bodies and other supra-national judicial bodies also needs to be appreciated and effectively applied to the relevant cases that require the jurisprudence.

58 PA Massey & SA Rosenbaum 'Disability matters: Toward a law school clinical model for serving youth with special education needs' (2004) 11 *Clinical Law Review* 271. In addition, for a further advantage of having law schools enhance capacity in other areas that need legal rights intervention, see generally JR Wettach 'Law school clinic as a partner in a medical-legal partnership' (2007) 75 *Tennessee Law Review* 305.

59 This model is argued to have been successful in Asia and should be explored by African law clinics. See generally D McQuoid-Mason 'Law clinics at African universities: An overview of the service delivery component with passing references to experiences in South and South-East Asia' (2008) https://scholar.ufs.ac.za/bitstream/handle/11660/7833/juridic_v33_specialissue_a1.pdf?sequence=3&isAllowed=y (accessed 5 November 2018).

Second, the need to ensure that institutional frameworks are strengthened cannot be ignored. Apart from the judicial institutions, the need to strengthen the legal institutions that oversee the scope of legal education in Nigeria is very important. In advocating institutional strengthening, infrastructural repositioning as well as policy reformulation are singled out. Apart from the challenges of reasonable accommodation that should be eliminated, it is important to have policies that are specific to enhancing the experiences of persons with disabilities, with particular reference to access to justice of persons with mental disabilities.

Third, it is important to enhance the motivation of both students and coordinators of the law clinics. The funding of the activities of the law clinics must as a matter of urgency come effectively within the scope of funding by law schools. It no doubt is a reality that the credit assigned to courses at universities provides some motivation. However, it is important to ensure that the students concentrate wholly on the academic and practical aspect of the running of the law clinics and not get involved in attempting to be part of the funding of their activities.

6 Conclusions

Having established that NGOs also fall within the ambit of non-state actors and that they have a very important role to play in the human rights discourse, it has become imperative to examine the activities of law clinics in Nigeria. Law clinics generally are seen as NGOs and should by their composition and legal status be agents of change in the human rights advocacy.

The question of access to justice is very important in every facet of human rights, and its denial goes against the basic tenets of human rights treaties. Identified in the course of the research is the fact that persons with disabilities are more vulnerable, added to the further disadvantage of persons with mental disabilities.

As far as the role of law clinics in advancing the course of access to justice is concerned, it was found that while the law clinics in the select law schools were busy and engaged, their scope of operations was limited in certain areas. Identified factors that could possibly affect the efficiency of the clinics include limited knowledge, and institutional and motivational shortcomings.

In summary, law clinics were effectively identified to be well positioned to make a significant impact on reducing the inability of persons with disabilities to access justice. However, this can be achieved only by improving the capacity and knowledge of the clinicians.

SECTION B: COUNTRY REPORTS

RÉPUBLIQUE DE BÉNIN

Marianne Séverin*

Summary

The Beninese population is 10 008 749. Persons with disabilities are 92 495 (1,02 per cent) of the total population). The most prevalent forms of disabilities include visual, hearing disabilities, cerebral driving impairment, motor disabilities, intellectual disabilities and psychosocial disabilities. Benin has signed and ratified both the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as well as its Optional protocol. However, it has yet to submit its country report as required by the CRPD. The Constitution of Benin directly as well as indirectly provides for the rights of persons with disabilities under its equality clause. Several pieces of legislation directly address disability. The key ones are laws on the protection and promotion of the rights of persons with disabilities and the prevention of disabilities. The Constitutional Court of Benin has considered disability rights in two cases. In one case it found that failure to accommodate a visually impaired job applicant by not providing an examination in braille was discriminatory and in violation of the constitutional right to equality. In another case, it rejected a claim of a job advertisement that required applicants to 'enjoy a good physical condition and good health' was discriminatory as to violate the constitutional right to equality. Benin has policies that directly address persons with disabilities, including the National Policy of Protection and Integration of Disabled People (2012-2021) and paragraph 5 of Law 98-004 which regulates the rehabilitation and the employment of persons with disabilities. It also has a programme for accommodating learners with disabilities in ordinary schools. Other than ordinary courts or tribunals, Benin has no official body which specifically addresses the violation of the rights of persons with disabilities. It has a National Human Rights Commission but the Commission is yet to be operational. Several organisations

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represent the rights of persons with disabilities in Benin, under the umbrella of the Federation of Associations of Disabled People in Benin. At government level, the Ministry of Social Affairs and Micro-finance oversees organs of state that serve persons with disabilities, special schools, and vocational training centres. Persons with disabilities encounter multiple levels of exclusion and discrimination across sectors. Attitudinal beliefs that stem from superstition are still prevalent. There is a lack of access to public buildings, public transport, education, vocational training, health care, and employment. Benin needs to accelerate the implementation of laws that foster disability rights. Also, it needs more reliable data on persons with disabilities.

1 Les indicateurs démographiques

1.1 Quelle est la population totale de la République du Bénin?

Selon le dernier Recensement Général de la Population et de l'Habitat (RGPH) de 2013, la population béninoise est évaluée à 10 008 749 habitants.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en République du Bénin. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées en République du Bénin?

La République du Bénin n'a effectué aucun recensement spécifique de la population des personnes en situation de handicap. Cependant dans le cadre d'un recensement national mené en 2013 par l'Institut National de la Statistique et de l'Analyse Economique (INSAE) – RGPH-4-, dépendant du Ministère du Développement, de l'Analyse Economique et de la Prospective. (ministère ayant changé de dénomination pour Ministère du Plan et du Développement), le nombre et le pourcentage des personnes handicapées ont été prises en compte par zones urbaine et rurale, par départements (12) et selon les formes de handicap. Aucune définition de la personne handicapée n'a été donnée dans le document final.²

1 Institut National de la Statistique et de l'Analyse Economique (INSAE), Ministère du Développement, de l'Analyse Economique et de la Prospective, Rapport Final, RGPH4.pdf, 2015. Institut National de la Statistique et de l'Analyse Economique (INSAE), Principaux indicateurs sociodémographiques et économiques (RGPH-4, 2013), février 2016).

2 INSAE), Principaux Indicateurs socio-démocratiques et économiques (RGPH-4, 2013), mai 2013, <http://www.insae-bj.org/recensement-population.html>. Selon la Fédération des Associations de Personnes Handicapées du Bénin (FAPHB), ces données officielles sont encore très loin de la réalité [Interview menée le 8 janvier 2018].

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République du Bénin

Selon le RGPH-4, 2013, sur l'ensemble de la population de 10 008 749 habitants, sont recensés 92 495 personnes en situation de handicap dans la République du Bénin, soit 1,02% de la population totale.³

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République du Bénin?

Aucun recensement n'a été mené sur le nombre total et le pourcentage de femmes en situation de handicap en République du Bénin.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République du Bénin?

Aucun recensement récent au niveau national n'a été mené sur le nombre total et le pourcentage d'enfants en situation de handicap en République du Bénin. Cependant, le document de Politique Nationale de Protection et d'Intégration des Personnes Handicapées (PNPIPH) – 2012-2021 – donne les statistiques suivantes, selon le Troisième Recensement Général de la Population et de l'Habitation (RGPH3) de 2002:⁴ les enfants en situation de handicap de moins de 10 ans représentent 11,6% de la population totale (6 769 914 habitants recensés).

1.6 Quelles sont les formes de handicap les plus répandues en République du Bénin?

Il ressort du recensement que les formes de handicap les plus répandues sont respectivement le handicap visuel (37,4%), suivi du handicap auditif (18%), du handicap moteur cérébral (16,9%), du handicap moteur (16,4%), et pour finir des handicaps intellectuel (6,5%) et psychosociaux (5%).

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République du Bénin? La République du Bénin a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). La République du Bénin a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

La République du Bénin a signé la Convention Relative aux Personnes Handicapées (CRDPH), ainsi que le Protocole facultatif se rapportant à la CRDPH

3 Institut National de la Statistique et de l'Analyse Economique (INSAE), Principaux indicateurs sociodémographiques et économiques (RGPH-4, 2013), février 2016), p. 7. Le tableau ne faisant pas état de statistiques, ces dernières ont été calculées par nos soins en tenant compte du nombre total des personnes en situation de handicap soit 92 495.

4 République du Bénin Institut National de la Statistique et de l'Analyse Economique disponible sur www.insae-bj.org/recensement-population.html [consulté le 24/02/2018].

le 8 février 2008. Les CRDPH et Protocole ont été ratifiés le 5 juillet 2012.⁵ Lors de l'adhésion à cette convention, la République du Bénin n'a formulé aucune réserve, ni introduit une quelconque déclaration interprétative.

2.2 Si la République du Bénin a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? La République du Bénin a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Conformément à l'Art. 35 de la CDPH, la République du Bénin était tenue de soumettre son rapport initial dans un délais de deux ans, soit à la date du 05 juillet 2014.⁶ La République du Bénin n'a soumis aucun rapport, le vote de la Loi portant protection et promotion des Droits des Personnes Handicapées n'ayant été voté au Parlement Béninois que le 13 avril 2017. Cependant le processus d'élaboration du rapport a été lancé en 2017, et est conduit par le Ministère de la Justice et de la Législation; ce processus avance lentement. Pour pallier cette lenteur, la Fédération des Associations des Personnes Handicapées Bénin (FAPHB), quant à elle, entend soumettre un rapport alternatif.

2.3 Si la République du Bénin a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport de la République du Bénin. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées du Bénin?

Non le Benin n'a pas soumis son rapport.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, la République du Bénin a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de la République du Bénin? Si oui, quels étaient les effets de ces observations ou recommandations?

• **Comité contre la torture**

Dans sa liste des points à traiter avant rédaction du rapport (LOIPR) publié le 19 janvier 2010, le Comité ne mentionne pas spécifiquement les Droits des personnes en situation de handicap. Dans son Rapport, la République du Bénin fait mention spécifique des droits des personnes en situation de handicap, sur la

5 Nations Unies Collections des Traités https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=fr, [consulté le 24/02/2018].

6 Nations Unies Droits de l'Homme- Haut-Commissariat http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR[consulté le 24/02/2018].

question de l'Amélioration du cadre normatif au plan national. Il a été rapporté d'importantes améliorations par la Loi n° 2011-17 du 23 août 2011 portant autorisation de ratification de la Convention relative aux droits des personnes handicapées et de son protocole facultatif.⁷ Le Code de l'enfant prévoit la protection des enfants handicapés et des enfants malades. La République du Bénin demande à être accompagné et appuyé dans ses efforts visant à assurer une meilleure sensibilisation, prévention et sanction des actes et attitudes qui s'assimilent à la torture et autres peines ou traitements cruels, inhumains ou dégradants, afin que l'homme, la personne handicapée ne soit pas victimes de tels actes, et que tous les droits affirmés par la Convention de lutte contre la torture et autres peines ou traitements cruels, inhumains ou dégradants soient pleinement réalisés.⁸

- **Comité des droits de l'homme**

La République du Bénin a fait mention spécifique du Droit des personnes handicapées dans son rapport publié le 3 novembre 2013, en faisant mention de l'adoption de la loi n° 2011-17 du 23 août 2011 portant autorisation de ratification de la Convention relative aux droits des personnes handicapées et de son Protocole facultatif.⁹ Le Comité des Droits de l'Homme dans ses observations finales salue la ratification de la Convention relative aux droits des personnes handicapées et son Protocole facultatif, en juillet 2012.¹⁰

- **Comité pour l'élimination de la discrimination à l'égard des femmes**

La République du Bénin ne fait pas mention spécifique, dans son rapport publié le 20 mars 2012, des Droits des personnes en situation de handicap.¹¹ Dans la liste des points à traiter, publié le 18 mars 2013 – corrigé le 1^{er} mai 2013 – le comité ne fait pas mention spécifique des Droits des personnes en situation de handicap.¹² Cependant, la République du Bénin dans sa réponse à la liste des points à traiter fait mention de la promotion de la scolarisation des enfants en situation de handicap.¹³

- **Comité de droits économiques, sociaux et culturels**

La République du Bénin a fait mention spécifique, dans son rapport publié le 29 mars 2007, du Droit des personnes en situation de handicap.¹⁴ L'Etat béninois a pris des mesures pour favoriser cette catégorie de travailleurs notamment par les mesures législatives. Les articles 31 et suivants de la Loi no 98-004 du 27 janvier 1998 prévoient les mesures en faveur des personnes handicapées. Selon ces dispositions, les personnes handicapées dont leur qualité est définie, ne doivent faire l'objet d'aucune discrimination et leurs employeurs bénéficient des conditions

7 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie établi au titre de LOIPR, CAT/C/BEN/3, 07/02/2018, p.9) [Consulté le 24/02/2018] (Comme ci-dessus).

8 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie établi au titre de LOIPR, CAT/C/BEN/3, 02/02/2018, p.31) [Consulté le 24/02/2018] (Comme ci-dessus) 31.

9 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie, CCPR/C/BEN/2, 03/11/2013, p. 7) [Consulté le 24/02/2018] (Comme ci-dessus) 7.

10 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR [Observations finales, CCPR/BEN/CO/2, 22/11/2015, p. 2] [Consulté le 24/02/2018] (Comme ci-dessus) 2.

11 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie, CEDAW/C/BEN/4, 20/03/2012) [consulté le 24/02/2018].

12 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Liste des points à traiter, CEDAW/C/BEN/Q/4 – CEDAW/C/BEN/Q/4/Corr.1 – 18/03/2013 – 01/05/2013) [consulté le 24/02/2018].

13 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Réponse à la liste des points à traiter, CEDAW/C/BEN/Q/4/Add.1, 07/08/2013, p. 10) [consulté le 24/02/2018] (Comme ci-dessus).

14 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie, E/C.12/BEN/2, 29/03/2007) [consulté le 24/02/2018].

particulières. Or le décret devant rendre applicables lesdites conditions particulières n'a toujours pas été pris à ce jour. Ainsi, ces mesures spécifiques prévues par les articles 31 à 34 du code du travail béninois restent inapplicables. Le Conseil économique et social demande à l'Etat béninois, dans sa liste des points à traiter s'il envisage l'adoption d'une loi spécifique visant à interdire la discrimination à l'égard des personnes handicapées et à introduire des obligations légales garantissant l'accès des personnes handicapées aux bâtiments.¹⁵ Dans sa réponse à la liste des points à traiter, la République du Bénin précise que suite à l'adoption de la Constitution, du 11 décembre 1990 qui énonce à l'Art. 26, « l'État assure à tous, l'égalité devant la loi sans distinction d'origine, de race, de sexe, de religion, de position sociale ... , il veille sur les handicapés ... ». Enfin, le comité constate, lors de l'adoption des observations finales, avec préoccupation, l'absence d'une loi spécifique interdisant la discrimination à l'égard des personnes handicapées et introduisant des obligations légales garantissant l'accès des personnes handicapées aux bâtiments.¹⁶

- **Comité des droits de l'enfant**

Dans son rapport la République du Bénin mentionne spécifiquement les droits des personnes en situation de handicap, le Gouvernement du Bénin apporte des éléments de réponses aux préoccupations du Comité sur les infanticides rituels d'enfants.¹⁷ Le Bénin mène des campagnes contre les châtiments corporels contre les enfants handicapés. Selon la loi sur la Santé et le bien-être (Art. 6, 18, par. 3, 23, 24, 26 et 27; par. 1 à 3) le Bénin enquête sur les personnes handicapées.

La Déclaration de la République du Bénin, soumise le 20 janvier 2016, mentionne spécifiquement les droits des personnes en situation de handicap.¹⁸

- **Commission africaine des Droits de l'Homme et des Peuples**

Dans le 42^{ème} Rapport d'activités de la Commission africaine des Droits de l'Homme et des Peuple, présenté conformément à l'Art. 54 de la Charte Africaine des Droits de l'Homme et des Peuples, lors de la 60^{ème} Session ordinaire, l'état de présentation des Rapports montrait que le Bénin fait parti des 17 pays ayant plus de 3 rapports en retard.

- **Examen Périodique Universel¹⁹**

La République du Bénin a mentionné dans son rapport son adhésion à la Convention Relative aux Droits des Personnes Handicapées et le Protocole facultatif s'y rapportant, et le vote de la Loi du 13 avril 2017 portant protection et promotion des Droits des Personnes Handicapées. Plusieurs Etats examinateurs ont salué l'adhésion de la République du Bénin à la Convention Relative aux Droits des Personnes Handicapées, ainsi que le vote de la loi portant promotion et protection des droits des personnes handicapées. Cependant, le Monténégro s'est fait l'écho des préoccupations exprimées par le Comité des Droits de l'enfant A/HRC/37/10 8 GE.17-23482 au sujet de l'exclusion des enfants handicapés. Aux termes des conclusions et/ou recommandations examinés et ayant recueilli son adhésion, le Bénin s'engage à adopter les politiques nécessaires pour que les enfants handicapés bénéficient de l'égalité des chances en matière d'éducation et veiller à

15 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Liste des points à traiter, E/C.12/BEN/Q/2 – III. Points se rapportant aux dispositifs générales du Pacte (Act. 1^{er} à 5) Art. 2.2 : Non-discrimination -, 24/09/2007, pp. 3-4).

16 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Observations finales, E/C.12/BEN/CO/2, 09/06/2008, p.3).

17 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BEN&Lang=FR (Rapport de l'Etat partie CRC/BEN/3-5, 29 juillet 2013, p.6) [consulté le 24/02/2018].

18 Système de diffusion électronique des documents de l'ONU <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/037/16/PDF/G1603716.pdf?OpenElement>, 18p. [Consulté le 24/02/2018]

19 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/001/44/PDF/G1800144.pdf?OpenElement> [Consulté le 24/02/2018] (Comme ci-dessus).

ce qu'ils soient pleinement intégrés dans le système scolaire et ne fassent l'objet d'aucune forme de discrimination (Etat de Palestine); à faire en sorte que les enfants handicapés aient accès aux soins de santé et lutter contre la stigmatisation et les préjugés dont ils sont victimes (Timor-Leste); accélérer la promulgation de la Loi relative à la promotion et à la protection des droits des personnes handicapées (Zimbabwe).

2.5 Y avait-il un quelconque effet interne sur le système légal de la République du Bénin après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

La ratification de la Convention Relative aux Droits des Personnes Handicapées (CRDPH) et du Protocol facultatif, par le Bénin, le 5 juillet 2012, a eu pour effet immédiat, l'adoption de la Politique Nationale de Promotion et d'Intégration des Personnes Handicapées (2012-2021), puis ensuite la Loi n°2017-06 du 13 avril 2017 portant Protection et Promotion des Droits des Personnes Handicapées.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous votre système légal? Si oui y a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Selon l'Art. 145 de la Constitution de la République du Bénin, 11 décembre 1990, « les traités de paix, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient les lois internes de l'Etat, ceux comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés qu'en vertu d'une loi ». « Si la Cour Constitutionnelle saisie par le Président de la République par le Président de l'Assemblée Nationale a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de le ratifier ne peut intervenir qu'après la révision de la Constitution » (Art. 146). Selon l'Art. 147, « les traités ou accords régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque accord ou traité, de son application par l'autre partie ».

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

La ratification de la CDPH vaut son incorporation dans la législation béninoise ; une procédure particulière ne semblait pas nécessaire. En fait, à la suite d'un long processus de concertation entre le gouvernement et les ONGs, Associations des personnes handicapées et autres, il a été adopté une loi spécifique pour la protection des personnes handicapées le 13 avril 2017 qui a été promulguée le 30 septembre 2017.

3 Constitution

3.1 La constitution de la République du Bénin contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution de la République du Bénin contient une disposition concernant directement le handicap. Selon l'Art. 26 l'homme et la femme sont égaux en droit. L'Etat protège la famille et particulièrement la mère et l'enfant. « Il veille sur les handicapés et les personnes âgées ».

3.2 La constitution de la République du Bénin contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

La Constitution du 11 décembre 1990 proclame dans son préambule son adhésion aux idéaux des principes, droits et devoirs établis dans la Charte de l'Organisation des Nations Unies, la Déclaration Universelle des Droits de l'Homme, les Conventions et Pactes internationaux relatifs aux Droits de l'Homme, l'Acte constitutif de l'Union Africaine, la Charte Africaine des Droits de l'Homme et des Peuples (CADHP). L'Art. 8 de la Constitution affirme que « la personne humaine est sacrée et inviolable. L'Etat a l'obligation absolue de la respecter et de la protéger. Il lui garantit un plein épanouissement. A cet effet, il assure à ses citoyens l'égal accès à la santé, à l'éducation, à la culture, à la formation professionnelle et à l'emploi ».

4 Législation

4.1 La République du Bénin a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

La République du Bénin a une législation concernant directement le handicap. La Loi n° 2017-06 du 13 avril 2017 portant protection et promotion des droits des personnes handicapées,²⁰ garantit la prévention du handicap à travers une politique nationale de santé; donne droit aux titulaires à une « carte d'égalités des chances ». Des sanctions sont prévues pour toute violation des droits des personnes handicapées. Le droit à l'emploi est également inscrit en faveur des personnes handicapées, tout comme celui à l'accessibilité. La loi permet aux personnes handicapées de jouir pleinement de leur droit de citoyens. Enfin, la loi prône le droit à la vie de l'enfant handicapé.

20 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/Loi-N%C2%B0-2017-06/> [Consulté le 24/02/2018].

- **Loi 2013-06 du 25 novembre 2013 portant Code électoral.**²¹

Art. 86 – « Tout électeur atteint d'infirmité ou d'incapacité physique certaine, le mettant dans l'impossibilité de plier et de glisser son bulletin dans l'urne, est autorisé à se faire assister d'une personne de son choix ».

- **Loi 2010-33 du 07 janvier 2011 portant règles générales pour les élections en République du Bénin.**²²

L'Act. 68 – « Tout électeur atteint d'infirmité ou d'incapacité physique certaine, le mettant dans l'impossibilité de plier et de glisser son bulletin dans l'urne, est autorisé à se faire assister d'une personne de son choix ».

- **Loi 2009-10 du 13 mai 2009 portant organisation du Recensement Electoral National Approfondi (RENA) et Etablissement de la Liste Electorale Permanente Informatisée (LEPI).**²³

Art. 33 – De l'établissement de la carte d'électeur. Les personnes qui portent un handicap au niveau d'un ou plusieurs doigts bénéficient d'une carte d'électeur spéciale revêtue de leur photo numérique.

- **Loi 2007-02 du 26 mars 2007 portant modification des dispositions des Art. 10, 89, 93, 94, 95 et 101 de la Loi 98-019 du 21 mars 2003 portant Code de la Sécurité Sociale en République du Bénin.**²⁴

Art. 94 nouveau (1^{er} alinéa et 5^{ème} alinéa) – 1^{er} alinéa: « L'assuré en activité qui devient invalide avant d'atteindre l'âge de 60 ans a droit à une pension d'invalidité ».

- **Loi 2002-07 du 24 août 2004 portant Code des personnes et de la famille.**²⁵

« Les personnes majeures dont les facultés mentales et corporelles sont altérées par une maladie, une infirmité ou un affaiblissement dû à l'âge » sont soumises à une tutelle ou curatelle.

- **Loi n° 98-004 du 27 janvier 1998 portant Code du travail - Paragraphe 5 – De l'emploi des personnes handicapées.**²⁶

Les Articles 31 à 34 concernent l'emploi des personnes en situation de handicap, leur non-discrimination en matière d'emploi, l'exonération de la part patronale de l'impôt progressif sur les traitements, salaires, pensions et rentes viagères et de la mise en place la création d'une Commission nationale d'identification des personnes handicapées à l'emploi par des décrets du conseil national du travail prévu par le code, déterminent en tant que de besoin, les modalités d'application des présentes dispositions. Enfin y sont énoncés le principe de l'égalité des chances au travail, à l'emploi et à la rémunération.

21 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/LOI-N%C2%B0-2013-06/> [Consulté le 24/02/2018].

22 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/LOI-N%C2%B0-2010-33/> [Consulté le 24/02/2018].

23 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/LOI-N%C2%B0-2009-10/> [Consulté le 24/02/2018].

24 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/LOI-N%C2%B0-2010-10/> [Consulté le 24/02/2018].

25 Secrétariat General du Gouvernement de la République du Benin <https://sgg.gouv.bj/view/documentheque/LOI-N%C2%B0-2002-07/> [Consulté le 24/02/2018].

26 Secrétariat General du Gouvernement de la République du Benin <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/49604/77451/F89020835/BEN-49604.pdf> [Consulté le 24/02/2018].

4.2 La République du Bénin a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

La République du Bénin a une législation concernant indirectement le handicap. Au Bénin, toute législation est guidée par le principe de l'égalité de tous et s'applique à tous incluant les personnes handicapées.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) de la République du Bénin ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

En dehors des cours ou tribunaux ordinaires, la Cour Constitutionnelle du Bénin statue sur la violation des droits des personnes handicapées, lorsqu'elle en est saisie. Mme Géronime TOKPO, ancienne présidente de la Fédération des Associations des Personnes Handicapées au Bénin (FAPHB) a saisi la Cour Constitutionnelle le 8 juin 2011 pour inconstitutionnalité du rejet de son dossier de candidature au concours des Auditeurs de Justice pour un poste non ouvert en écriture braille. Madame TOKPO, représentée par Maître Joseph DJOGBENOU, a saisi la Cour Constitutionnelle le 8 juin 2011 (enregistrement à son Secrétariat le 9 juin sous le numéro 1442/065/REC) pour inconstitutionnalité du rejet de son dossier de candidature au concours des Auditeurs de Justice pour poste non ouvert à l'écriture braille. Madame TOKPO a perdu la vue suite à une maladie mal traitée quelques minutes après sa naissance, suite à une erreur médicale survenue durant les premiers soins de la nouvelle-née qu'elle était. En dépit de cet handicap, la requérante a toujours fait de brillantes études, scolaires, puis universitaires dans le but de poursuivre une carrière judiciaire au plus haut niveau. Pour cela, elle a déposé le 16 mai 2011 à la direction départementale du Ministère du Travail et de la Fonction publique, un dossier dans les mêmes conditions que les autres candidats. Elle y a ajouté une demande d'autorisation de composer en braille. Son dossier a été rejeté pour « poste non ouvert pour les épreuves de braille ». Cette décision contrevient aux Art. 26 Alinéa 1, 33, 36 8 de la Constitution, d'autant plus que Mme TOKPO « jouit des aptitudes physiques et l'équilibre mental et psychique prévus par les Art. 25 et 27 de la Loi n° 2011-35 portant statut de la magistrature ». La Cour Constitutionnelle a statué que « le traitement infligé à Mme Géronime TOKPO est discriminatoire ». « La présente décision a été notifiée à Géronime TOKPO, à Madame la Ministre de la Fonction Publique, à Maître Joseph DJOGBENOU et publié au Journal Officiel ».²⁷

Antérieur au cas de Madame Géronime TOKPO, celui de Monsieur Sylvain HINNOUHO AKLE qui a saisi la Cour Constitutionnelle le 20 septembre 1999 (enregistrement à son Secrétariat le 22 octobre 1999 sous le numéro 1950/0109/REC). Lors d'un communiqué radio (N° 033), le Ministre de la Fonction publique,

²⁷ Nous remercions Mme Géronime TOKPO pour la mise à disposition du document « Décision DCC 12-06 du 3 mai 2012 ». Quelque temps après notre étude de terrain auprès de Mme TOKPO nous avons été informés du décès de cette dernière.

du Travail et de la Réforme administrative, en date du 4 juin 1999, relatif au recrutement de deux cent quarante et un (241) agents permanents de l'Etat, il a été fixé comme condition d'accès à la Fonction publique ou à l'attribution d'une bourse et secours d'études à l'étranger que le candidat devait « jouir d'une bonne condition physique ... Etre indemne de toute affection poliomyélitique, tuberculeuse ... Ou être définitivement guéri ». En saisissant la Cour Constitutionnelle, Monsieur Sylvain HINNOUHO AKLE a soutenu que le pouvoir exécutif, en s'exprimant ainsi avait « créé une division au sein de la population en se basant sur des critères plus ou moins subjectifs ; qu'il avait failli à sa principale mission de faire assurer aux citoyens l'égal accès à la santé, à l'éducation, à la culture ..., à la formation professionnelle, à l'emploi; à sa légitime mission d'assurer à tous l'égalité devant la loi ... à sa mission humanitaire de veiller sur les handicapés ... ». En menant une lecture croisée et combinée, à partir des dispositions des Art. 8, 26 30, 36 de la Constitution béninoise et 18 Alinéa 4 de la Charte africaine des droits de l'homme et des peuples, en matière de droit de la Fonction publique, le requérant a considéré que l'Etat béninois portait discrimination à l'égard des personnes ne situation de handicap dans le recrutement de ladite Fonction publique.

La Cour Constitutionnelle a débouté le requérant en affirmant que le communiqué radio du Ministère de la Fonction publique, du Travail et de la Réforme administrative, en date du 04 juin 1999, n'était en rien contraire à la Constitution. En effet, l'Art. 98 énonce que « sont du domaine de la loi des règles concernant ... Le statut général de la Fonction publique ... la loi déterminant les principes fondamentaux ... du Droit du travail ... ». En outre la Cour Constitutionnelle a fait également valoir que la Charte africaine des droits de l'homme et des peuples, en son Art. 18 alinéa 4 met en exergue que « les personnes âgées et handicapées ont également le droit à des mesures spécifiques de protection en rapport avec leurs besoins physiques ou moraux ».

En résumé, le communiqué radio, dénoncé par Monsieur Sylvain HINNOUHO AKLE, rappelait juste les conditions générales d'accès à la Fonction publique et donc ne visaient aucunement les personnes en situation de handicap. Par conséquent, le communiqué radio ne violait pas l'Art. 26 de la Constitution béninoise, et n'était pas discriminatoire envers les personnes handicapées.

La décision de la Cour Constitutionnelle a été notifiée à Monsieur Sylvain HINNOUHO AKLE, au ministre de la Fonction publique, du Travail et de la Réforme administrative et publiée au *Journal Officiel* le 1^{er} mars 2001.²⁸

6 Politiques et programmes

6.1 La République du Bénin a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

La République du Bénin a des politiques et des programmes qui englobent directement le handicap:

28 Document « Décision DCC 01-005 du 11 janvier 2011 » http://www.cour-constitutionnelle-benin.org/doss_decisions/01015.pdf [Consulté le 9 avril 2018].

La Politique Nationale de Protection et d'Intégration des Personnes Handicapées (PNPIPH) (2012-2021). L'adoption de la PNPIPH se « fonde essentiellement sur la détermination [du pays] à œuvrer pour l'avènement d'une société démocratique respectueuse des Droits de l'Homme et libertés fondamentales pour un développement économique et sociale durable ». La PNPIPH respecte des « dispositions de la Constitution du 11 décembre 1991, Par. 5 de la Loi 98-004 portant Code du Travail, la Convention 159 du BIT concernant la réadaptation professionnelle et l'emploi des personnes handicapées et de la Convention des Nations Unies relative aux Droits des Personnes Handicapées du 13 décembre 2006 ». Les principes de la PNPIPH reposent sur: a) le respect de l'égalité entre homme et femme, sur la responsabilité de l'Etat de protéger la famille et plus particulièrement la mère et l'enfant et de veiller sur les personnes handicapées et les personnes âgées ; b) le sacré et l'inviolabilité de la personne humaine ; c) le droit à la vie, à la liberté, à la sécurité et à l'intégrité de toute personne humaine d) le droit à l'éducation de tous les enfants. Enfin, les principes de la PNPIPH sont en adéquations avec les résolutions ou recommandations internationales, en matière de Droits de l'Homme, dont la CRDPH.

Programme National de Réadaptation à Base Communautaire (RBC) qui a permis d'éduquer les enfants handicapés dans les écoles ordinaires, en tenant compte de leurs besoins éducatifs spéciaux. Les catégories de handicap sur lesquelles le Programme s'investit le mieux dans le cadre de cette approche sont: le handicap moteur, le handicap mental, l'infirmité motrice d'origine cérébrale, le handicap visuel léger et le handicap auditif. Il s'agit d'une approche qui mérite d'être généralisée sur l'étendue du territoire national.

6.2 La République du Bénin a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

La République du Bénin a des politiques et des programmes qui englobent indirectement le handicap:

Alafia 2025 fait suite à la réalisation d'une Etude Nationale de Perspective à Long Terme, qui a abouti à l'adoption, en 2000, d'une vision à long terme de la promotion d'une protection sociale au Bénin. La République du Bénin devenant en 2025 « un pays-phare, un pays bien gouverné, uni et de paix, à économie prospère et compétitive, de rayonnement culturel et de bien-être social ».²⁹

Le Régime d'Assurance Maladie Universelle (RAMU). La Loi 2015-42 portant institution du RAMU en République du Bénin vise à améliorer le système national de couverture maladie en intégrant en autres, les populations économiques faibles selon les Art. 1 et 7.

29 <http://library.fes.de/pdf-files/bueros/benin/10691.pdf>, p. 23 [Consulté le 24/02/2018].

7 Organismes en charge des personnes handicapées

- 7.1 En dehors des cours ou tribunaux ordinaires, la République du Bénin a-t-elle un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

Non, en dehors des cours ou tribunaux ordinaires, la République du Bénin ne dispose pas d'un organisme officiel qui s'intéresse spécifiquement à la violation des droits des personnes handicapées.

- 7.2 En dehors des cours ou tribunaux ordinaires, la République du Bénin a-t-il un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

La Cour Constitutionnelle du Bénin statue sur la violation des droits des personnes handicapées, lorsqu'elle en est saisie. Aux termes des dispositions de l'Art. 114 de la Loi n° 90-32 du 11 décembre 1990 portant Constitution de la République du Bénin, la Cour constitutionnelle est la plus haute juridiction de l'Etat en matière constitutionnelle. Elle est juge de la Constitutionnalité de la loi et elle garantit les droits fondamentaux de la personne humaine et les libertés publiques. Les attributions dévolues à la Cour constitutionnelle l'amènent à statuer obligatoirement notamment sur « la constitutionnalité des lois et des actes réglementaires censés porté atteinte aux droits fondamentaux de la personne humaine et aux libertés publics et en générale, sur la violation des droits de la personne humaine ».

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 La République du Bénin est-elle doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de la République du Bénin n'a jamais abordé des questions relatives aux droits des personnes handicapées.**

La République du Bénin a créé la Commission Béninoise des Droits de l'Homme (CBDH), en 2013 pendant elle n'est toujours pas opérationnelle.³⁰

30 Système de diffusion électronique des documents de l'ONU <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/001/44/PDF/G1800144.pdf?OpenElement>, pp. 13-14 [Consulté le 24/02/2018].

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en République du Bénin des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Il existe des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées en République du Bénin. Elles sont environ 200, mais seules une trentaine sont effectives sur le terrain. Au vu du grand nombre, il ne sera donné que quelques exemples (certaines étant plus dynamiques que d'autres):

- L'Association pour la Promotion et l'Intégration Sociale des Aveugles et Amblépopes du Bénin (APISAAB), qui s'engage sur les questions d'éducation, de formation professionnelle, l'accès à l'emploi des personnes déficientes visuelles.
- L'Organisation des Femmes Aveugles du Bénin (OFAB) qui se bat pour la promotion et la valorisation des potentialités des femmes déficientes visuelles.
- La Chrisalide qui est une association qui s'occupe de la prise en charge des personnes déficientes intellectuelles.
- L'Association Miwasdagbé qui prend en charge et éduque les enfants déficients intellectuels (RBC).
- L'Organisation Non-Gouvernementale le Cercle des Oliviers travaille sur la prise en charge et l'accompagnement scolaire de tout type d'enfants en situation de handicap, sur l'éducation inclusive.
- L'Association pour la Promotion de l'Emploi des Sourds (APES), qui prône l'éducation des enfants sourds, la formation professionnelle des adultes sourds.
- Le Lion Handisport, qui promeut l'handisport.
- L'Handi-Music-Plus (HMP), qui travaille sur la formation et la promotion des artistes – en l'occurrence des musiciens en situation de handicap.
- Assistance aux Jeunes Handicapées du Bénin (AJHB) qui promeut le bien-être social des toutes les personnes vulnérables, telles que les orphelins et enfants vulnérables (dont les enfants abandonnés) et plus particulièrement les enfants handicapés.
- Groupe d'Action des Journalistes pour la défense des droits des personnes handicapées au Bénin (GRAJ-PH) qui est engagé aux côtés des personnes handicapées pour défendre leurs droits dans la société.
- Creuset pour l'insertion Professionnelle des Personnes Handicapées (COiPH), dont le domaine d'intervention est la défense des droits des enfants handicapés, l'appareillage et l'aide technique, l'orthophonie et la prise en charge/soin du trouble du langage.
- Association des Femmes Handicapées du Bénin (AFHB) qui agit sur la scolarisation des enfants handicapés et des femmes handicapées.
- Association des Handicapés pour la Lutte contre la Mendicité (AHLM) qui travaille pour une meilleure intégration socio-économique des personnes handicapées.
- Syndicat National des Travailleurs Handicapés du Bénin – Défense et promotion des Droits des travailleurs handicapés dans l'administration et défense de l'insertion socioprofessionnelle des handicapés diplômés.

9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Depuis 1992 et après sa restructuration en 2015, les OPH sont réunies au sein de la Fédération des Associations des Personnes Handicapées Bénin (FAPHB) au niveau national, puis au niveau département sous forme de réseaux départementaux.

Depuis le 22 mai 1992, et après restructuration en avril 2015, les Organisations des Personnes Handicapées (OPH) sont représentées au sein de la Fédération des Associations des Personnes Handicapées au Bénin (FAPHB) et sont réparties en 6 réseaux départementaux (actuellement au nombre de 6 mais bientôt 12 pour se conformer au nouveau découpage adopté par le Bénin) et enfin au niveau communal, avec environ 200 organisations.³¹

9.3 Si la République du Bénin a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

C'est à l'initiative du Gouvernement du Bénin que la FAPHB et autres organisations et associations de la Société civile ont été réunies afin de donner leurs points de vue sur l'élaboration de la loi sur la protection et promotion des droits des personnes handicapées. Les acteurs de la société civile, dont la FAPHB, ont proposé certaines mesures, comme par exemple, l'imposition de quotas dans la fonction publique en faveur des personnes handicapées; mesure n'ayant pas été retenue car ayant été considérée comme anticonstitutionnel. Lors du vote de la Loi 2017-06, la FAPHB et autres organisations et associations étaient présentes. Ces dernières restent toujours mobilisées pour une accélération de la prise des décrets d'application. La FAPHB est également présente et active dans les commissions des Affaires sociales et au sein d'Ateliers sous-régionaux.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Les OPH à travers la FAPHB mènent des actions de plaidoyer, de sensibilisations à travers différents projets sur tout le territoire national en s'appuyant sur les réseaux départementaux. C'est grâce à cette mobilisation qu'il y a vote et promulgation de la Loi 2017-06 du 13 avril 2017 portant Protection et Promotion des Droits des Personnes Handicapées en République du Bénin.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

Les premiers obstacles rencontrés par les OPH lors de l'engagement dans la mise en œuvre ont été la non prise en compte de mesures proposées au gouvernement du Béninois à la suite des concertations qui ont abouti au vote et promulgation de la Loi 2017-06. Les seconds obstacles concernent les OPH elles-mêmes. Le nombre d'OPH sur tout le territoire béninois est trop important et régulièrement pose le problème de leadership, de manque de moyens financiers et matériels. Et de

31 Selon les estimations de la FAPHB seules une trentaine d'associations/organisations seraient effectives.

professionnalisme. Certaines OPH n'existent que sur le papier ou/et ont été créées comme palliatif à un chômage endémique chez les personnes en situation de handicap. Pour finir, la FAPHB a durant une vingtaine d'années été léthargique jusqu'en 2015 au moment de sa restructuration.

9.6 Y a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

La FAPHB est très proactive et engagée auprès des ministères les plus concernés et au niveau local auprès des communes.

9.7 Y a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

La Loi 2017-06 du 13 avril 2017 portant protection et promotion des droits des personnes handicapées est un aboutissement positif grâce à l'implication des OPH dans le processus de mise en œuvre de la CRDPH.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

La diminution du nombre d'OPH et leur spécialisation en fonction des handicaps serait une première étape. La seconde étape serait la professionnalisation de ces OPH avec la formation des membres directeurs à la gestion et au développement d'une association/organisation ainsi qu'au techniques de lobbying auprès des pouvoirs publics afin de faire aboutir les projets. L'Etat pourrait également être un acteur favorisant les OPH sur des critères rigoureux en matière de subvention d'organisations/associations de la société civile. Le renforcement de la communication au niveau national et local et plus particulièrement dans les zones reculées sur le territoire est une stratégie dans un contexte de vulgarisation des Convention et lois en faveur de la promotion et protection des personnes handicapées. Cette vulgarisation étant particulièrement utile dans les zones reculées sur le territoire béninois.

9.9 Y a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Les OPH au travers de la FAPHB devraient être représentées dans les organes en charge de la mise en œuvre des instruments internationaux ou régionaux, et plus particulièrement parties prenantes dans la rédaction et la présentation du rapport conformément à l'Art. 35 de la CDPH qui aurait dû être soumis depuis le 5 juillet 2014. La FAPHB pourrait accompagner et faire pression auprès du Gouvernement du Bénin.

9.10 Y a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Il n'existe aucun Institut de Recherche spécifique au Bénin qui travaille sur les Droits des personnes handicapées. Les Instituts qui pourraient s'y intéresser n'abordent que les aspects de prévention médicale des déficiences.

10 Branches gouvernementales

10.1 Avez-vous de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Il existe une direction spécifiquement chargée de promouvoir et protéger les droits et le bien-être des personnes handicapées. Cette branche dépend du Ministère des Affaires Sociales et de la Micro Finance. La direction a changé de nom à plusieurs reprises ; autrefois Direction de la Réadaptation et de l'Intégration des Personnes Handicapées, elle est aujourd'hui la Direction des Personnes Handicapées et des Personnes Agées (DPHPA). La DPHPA a sous sa responsabilité les structures étatiques d'encadrement des personnes handicapées, les écoles spécialisées, les centres de formation professionnelle. Entre 2010 et 2016, il a existé le Fond d'Appui à la Réadaptation et à l'Intégration des Personnes Handicapées. Celui-ci a été intégré dans le Fonds d'Appui à la Solidarité Nationale.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en République du Bénin? (Exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet La Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

Les défis contemporains auxquels sont confrontés les personnes handicapées au Bénin sont l'accès à un emploi autonomisant, la très grande majorité des personnes handicapées du pays étant au chômage. En outre, il n'existe pas de mesures spécifiques favorables au recrutement des personnes handicapées tant dans la Fonction publique que dans le Secteur privé. L'accès au crédit est également un large problème pour les personnes handicapées. L'accessibilité aux infrastructures ouvertes au publiques, à la communication dans des formes appropriées sont toujours des contraintes pour les personnes handicapées. Les enfants handicapés ne bénéficient pas de plein droit à une éducation inclusive, et sont malheureusement

toujours victimes de pratiques rituelles néfastes dans certaines régions du Bénin. Enfin, l'extrême pauvreté frappe plus encore les personnes en situation de handicap.

11.2 Comment la République du Bénin répond-t-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérées?

Après ratification de la CRDPH, la République du Bénin a adopté deux documents importants:

- La Politique Nationale de Promotion et d'Intégration des Personnes Handicapées (2012-2021);
- La Loi 2017-06 du 13 avril 2017 portant protection et promotion des droits des personnes handicapées en République du Bénin.

Ces documents définissent les stratégies et approches en réponse aux besoins des personnes handicapées, dans tous les domaines. Malheureusement, la politique et législation en faveur des personnes handicapées au Bénin ne sont toujours pas pleinement effectives sur le terrain afin d'avoir un impact positif sur la vie des personnes handicapées. En effet, l'accès aux bâtiments publics (Art. 45), au transport public (Art. 47, 48 et 49), à l'éducation (Art. 30-35), à la formation professionnelle (Art. 36).³² En dépit d'une reconnaissance légale du droit à l'emploi (Art. 37-43), les personnes handicapées ne bénéficient toujours de mesures spécifiques qui leurs seraient favorables. La pratique de l'Handisport est timidement accompagné par l'Etat, en dépit des Art. 59, 60 et 61. L'Accès à la justice reste toujours un immense problème. Enfin, l'accès aux soins de santé conformément aux Art. 21 et 22 est un autre challenge pour les personnes handicapées.

11.3 La République du Bénin accorde-t-il des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Le Fonds d'Appui à la Solidarité Nationale apporte des appuis ponctuels de diverses formes (bourses d'étude, aides techniques, etc.) à quelques personnes handicapées. Cependant, la Loi 2017-06 a prévu certaines allocations et subventions (Art. 18, 19, 23 et 28). Dans l'attente de l'adoption de différents décrets d'application de la loi – dont la budgétisation par le Ministère des Finances, rien n'est encore effectif.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc.) de la République du Bénin?

Toute personne handicapée a le droit de participer à la vie politique au Bénin comme le droit de vote garanti par les Art. 63, 64 et 65 de la Loi 2017-06. Cependant, les personnes handicapées au Bénin manifestent très peu d'intérêt à la vie politique. Ceci s'expliquant par de nombreux obstacles comme:

- l'inadaptation du système électoral due au manque d'infrastructures, à la document adéquate (bulletins électoraux), la communication électorale non accessible, etc.
- l'Art. 44 de la Constitution du 11 décembre 1990 qui discriminante envers les personnes handicapées puisque stipule que « nul ne peut être candidat aux fonctions

32 Il n'existe que quelques écoles spécialisées sur tout le territoire et uniquement deux centres de formation professionnelle pour les personnes handicapées.

de Président de la République s'il ne « jouit pas d'un état complet de bien-être physique et mental dûment constaté par un collège de trois médecins assermentés désignés par la Cour Constitutionnelle ».

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapées.** La Loi 2017-06 du 13 avril 2017 portant Protection et Promotion des Droits des Personnes Handicapées, la République du Bénin dans son Art. 4 préconise l'égalité entre les hommes et les femmes.

- **Enfants handicapés.** La Loi 2017-06 du 13 avril 2017 portant Protection et Promotion des Droits des Personnes Handicapées, la République du Bénin préconise le respect du développement des capacités de l'enfant handicapé et le respect du droit des enfants handicapés à préserver leur identité (Art.4). L'éducation doit être gratuite et inclusive en milieu ordinaire pour les enfants et adolescents handicapés dans les établissements scolaires publics (Art. 30). L'enfant né avec une déficience à droit à la vie et est déclaré à l'Etat civil (Art. 44). Les enfants handicapés doivent bénéficier, tout au long de leur scolarité de soutiens adaptés (Art. 35).

- **Prisonniers souffrant de déficience mentale.** Aucune mention n'est faite des prisonniers souffrant de déficiences mentales dans la Loi 2017-06 du 13 avril 2017. D'ailleurs, les personnes déficientes intellectuelles ne bénéficient toujours pas de tout leurs droits. En outre, il n'existe toujours pas au Bénin, une école spécifique d'Etat qui pourrait s'occuper de la formation de cette catégorie de personnes. Seules les OPH ou les ONGs s'occupent de ces personnes déficientes intellectuelles.

12 Perspective future

12.1 Y a-t-il des mesures spécifiques débattus ou prises en compte présentement en République du Bénin au sujet les personnes handicapées?

La mesure la plus importante débattue au sein des OPH est la prise rapide des décrets d'application de la Loi 2017-06 du 13 avril 2017 afin de renforcer la prise en charge des personnes handicapées et promouvoir l'épanouissement des personnes handicapées.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en République du Bénin? Pourquoi?

Outre la l'accélération de la mise en œuvre sur le terrain des décrets d'application en faveur des personnes handicapées selon la Loi 2017-06 portant Protection et Promotion des Droits des Personnes Handicapées, la République du Bénin aurait tout intérêt à se munir d'un recensement spécifique des personnes handicapées fiable, tenant compte en particulier des femmes handicapées et des enfants handicapés.

La prise en compte de la dimension « Genre » dans ce recensement spécifique des personnes handicapées pourrait permettre une meilleure évaluation des

violences envers les femmes handicapées et de mener ainsi une politique effective de prévention sur l'ensemble du territoire béninois.

Le recensement des enfants et jeunes handicapés peut aussi participer à une meilleure politique d'éducation et formation inclusives dans les établissements scolaires et de formations publics. En vertu de la lutte contre toute forme de violence, torture envers les enfants handicapés, une enquête sur l'ensemble du territoire et plus particulièrement dans les zones reculées du Bénin pourrait aider à la sensibilisation et changement de mentalité sur les enfants en situation de handicap et une meilleure prise en charge – matériel et financière - à la fois des enfants et de leur famille.

L'accélération du processus de mise en place de la Commission Béninoise des Droits de l'Homme et son autonomie matérielle et financière, doit également s'accompagner, non pas uniquement d'une nomination des défenseurs des droits de l'enfant et des droits des femmes, mais également d'un représentant des droits des personnes handicapées.

Un recensement fiable des personnes handicapées au chômage, avec ou sans diplôme peut accompagner un programme politique en faveur de l'emploi des personnes handicapées et une sensibilisation du droit au travail des personnes handicapées.

Une évaluation de l'ensemble des bâtiments publics, ou non, non conformes au droit à l'accessibilité aux personnes handicapées peut permettre une meilleure politique et programme chiffrés sur l'ensemble du territoire.

Outre l'engagement des OPH, la création d'un centre de recherche sur la question des droits des personnes handicapées peut participer à une meilleure compréhension et une meilleure sensibilisation à la fois des populations mais également de tout membres des autorités gouvernementales garants de la Constitution et du Respect des droits des personnes handicapées.

UNION DES COMORES

Yousseuf Ali Mdahoma*

Summary

According to a household survey, the Comorian population is 805 153 and persons with disabilities are 21 430 (3,7 per cent) of the population. The most prevalent forms of disabilities include intellectual disabilities, motor disabilities and hearing disabilities. Comoros has signed and ratified both the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. The Constitution of Comoros does not have provisions that directly address disability. However, the right of persons with disabilities to equality is implied in the constitutional right to equality which is guaranteed to everyone. Several pieces of legislation directly address disability. The key ones are: Law n° 14-037 of 22 December 2014 on the protection and promotion of the rights of persons with disabilities; Law n° 95-013 of 24 June 1995 on the protection of persons with disabilities; and the Law of 2006 which protects every person who has a disability or is susceptible to disability. Courts have yet to consider disability rights. Comoros has several policies that directly address disability, including its national strategy on the protection of children with disabilities. Other than ordinary courts or tribunals, there is no official body that specifically addresses the violation of the rights of people with disabilities. Comoros has a National Human Rights Commission and a Human Rights Federation which promote the realisation of disability rights. There are several disabled peoples' organisations and civil society organisations that represent and advocate for the rights and welfare of persons with disabilities. At government level, the Ministry of National Education and the Ministry of Health, Solidarity, Social Welfare and Gender are focal ministries for promoting the rights of persons with disabilities. In addition, the Ministry of Employment and Work promotes disability rights in sport and recreation. Persons with disabilities experience exclusion and marginalisation across sectors, including access to health care, public buildings, public transport, education, vocational training, and employment. Comoros needs to accelerate and strengthen the implementation of disability rights.

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1 Les indicateurs démographiques

1.1 Quelle est la population totale de l'Union des Comores?

Selon le dernier Recensement Général de la Population et de l'Habitat de 2003 (projection 2016), la population comorienne est évaluée à 805 153 habitants.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en Union des Comores. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes vivant avec handicap en Union des Comores?

Selon l'article 156² du chapitre 4 -la protection des personnes vivant avec handicap et des personnes âgées.

« Est considérée comme personne vivant avec handicap toute personne atteinte d'une infirmité physique, sensorielle ou mentale permanente, isolément ou en association. »

L'assemblée comorienne a adopté une loi sur la promotion et la protection des droits des personnes handicapées, le 22 décembre 2014, qui définit également le handicap dans son article premier: « par personne handicapée, on entend toutes les personnes qui présentent des incapacités physiques, mentales, intellectuelles, ou sensorielles durables dont l'interaction avec diverses barrières peut porter atteintes à leur pleine et effective participation à la société sur la base de l'égalité. »

La technique de collecte de l'information sur les personnes vivant avec handicap lors du recensement Général de la Population et de l'habitat (RGPH2003) en septembre 2003 a consisté à poser systématiquement les questions suivantes à toutes personnes recensées: *[NOM] est-il/elle handicapé(e)? Et P13 – quel(s) handicap(s) et leurs causes respectives?*

1.3 Quel est le nombre total et le pourcentage des personnes vivant avec handicap en Union des Comores?

Le Recensement Général de la Population et de l'habitat de 2003 a permis de dénombrier 21430 personnes vivant avec un handicap sur une population totale de 575.660 habitants aux Comores soit 3,7% de l'effectif total de la population résidente.

1.4 Quel est le nombre total et le pourcentage des femmes vivant avec handicap aux Comores?

Selon les résultats de l'échantillon du Recensement Général de la population et de l'Habitat (RGPH2003) réalisé en septembre 2003, elle est presque également

1 D'après le site web <https://www.populationdata.net/pays/comores/amp/> (consulté le 10/01/2018).

2 Document: <http://www.droit-afrique.com/upload/doc/comores/Comores-Code-1995-santepublique.pdf> Source: Extrait du tableau 2.14, page 27, RGPH 91, Volume II: Analyse des données, Tome 2. Etat et structure de la population. Site web : <https://www.comores-online.com/mwezinet/sante/santepartheme/handicap.htm> (consulté le 10/01/2018).

répartie entre les deux sexes: 10778 hommes (50,3%) et 10653 femmes (49,7%). La proportion de la population des personnes vivant avec handicap est concentrée en milieu rural où vivent 14773 personnes soit 68,9% contre 6657 personnes soit 31,1% en milieu urbain.

Tableau: Répartition en % de la population handicapée selon le milieu de résidence et le sexe en 2003 aux Comores.

Milieu de résidence	Total		Sexe			
			Hommes		Femmes	
	Effectif	%	Effectif	%	Effectif	%
Urbain	6 657	31,1	3 110	28,9	3 547	33,3
Rural	14 773	68,9	7 667	71,1	7 105	66,7
Total	21 430	100	10 778	100	10 653	100

1.5 Quel est le nombre total et le pourcentage des enfants vivant avec handicap aux Comores?

Selon le recensement de 2003, 6,9% des handicapés recensés ont moins de 6 ans et 12,4% des handicapés recensés sont ceux âgés de 6-14 ans.

1.6 Quelles sont les formes de handicaps les plus répandues aux Comores?

Il ressort du 3^e recensement général de la population et de l'habitant aux Comores, d'après le contenu du questionnaire du RGPH3 en 2003, que les formes de handicaps les plus répandues sont respectivement le handicap mental (39,9% des cas de handicap), suivi du handicap membres inférieurs (17,7%), handicap sourd(e) (8,7%). Il faudrait souligner que les enquêteurs ont évalué les autres handicaps à 43,7%, sans lister ces autres formes. La prévalence moyenne est de 0,6%. Handicap International fait remarquer cependant que cette liste n'est pas exhaustive en raison de nombreux freins culturels ou bien par pudeur, par honte ou ignorance.

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) aux Comores? Les Comores ont-elles signé et ratifié la CDPH? Fournir le(s) date(s). Comores ont-elles signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

L'Union des Comores a signé la loi sur la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) le 26 septembre 2007, l'a adoptée au parlement comorien le 13 décembre 2011 puis ratifiée le 16 juin 2016 par le gouvernement comorien. Le protocole facultatif (appelé additionnel pour le cas des Comores) est adopté à l'assemblée nationale le 28 mai 2015.

2.2 Si l'Union des Comores a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? L'Union des Comores a-t-elle soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Comme la ratification est très récente le 16 juin 2016, n'y pas eu un véritable suivi notamment sur le traitement et la soumission du rapport. En outre, la politique relative au handicap n'est pas une priorité dans le programme du pays. Malgré les consultations des structures (branches) telles que Ministère des Affaires étrangères, Ministère de Fonction publique spécialement le bureau de la Délégation des Droits de l'Homme, il était impossible d'avoir les raisons de la non soumission du rapport.

2.3 Si l'Union des Comores a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport de l'Union des Comores. Y'avait-il des effets internes découlant du processus de rapport lié aux questions handicapées de l'Union des Comores?

L'Union des Comores n'a pas encore soumis son rapport.

2.4 En établissant un rapport sous divers autres instruments des Nations Unies, la Charte Africaine des Droits de l'Homme et des Peuples ou la Charte Africaine relative aux Droits et au bien-être de l'Enfant, l'Union des Comores a-t-elle également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinentes, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de l'Union des Comores? Si oui, quels étaient les effets de ces observations ou recommandations?

En effet, l'Union des Comores a fait mention du droit des personnes vivant avec handicap dans les rapports soumis aux organes de traités des Nations unies et de l'Union Africaine.

• **Comité de droits civils et politiques**

Le Gouvernement intègre dans son action les politiques publiques en faveur des personnes vivant avec handicap. La Convention des Nations Unies relative aux droits des personnes vivant avec handicap et son Protocole facultatif sont en cours de ratification. Une réflexion est en cours pour adapter certaines infrastructures au handicap. Un fond a été créé pour venir en aide aux personnes vivant avec handicap. Il n'y a pas de discrimination à l'égard des personnes vivant avec handicap.

Les Maldives ont félicité les Comores d'avoir adhéré au Statut de Rome de la Cour pénale internationale et d'avoir ratifié la Convention relative aux droits des personnes vivant avec handicap. Elles ont reconnu les difficultés rencontrées pour résoudre certaines questions relatives aux droits de l'homme et noté qu'il importait

de renforcer le système judiciaire et la formation de la police afin que les groupes vulnérables puissent mieux exercer leurs droits fondamentaux.

La Chine a félicité les Comores d'avoir renforcé les droits des femmes, des enfants et des personnes handicapées et de s'être engagées à améliorer l'exercice des droits relatifs à la santé et à l'éducation ainsi que des autres droits sociaux et culturels.

L'Éthiopie a félicité les Comores de l'adoption d'une politique nationale des droits de l'homme, qui conforterait les efforts déployés pour promouvoir et protéger ces droits. Elle a noté avec satisfaction la ratification de la Convention relative aux droits des personnes vivant avec handicap.

• **Comité des droits de l'enfant**

La CNDHL recommande de mettre en œuvre le Plan Intermédiaire de l'Éducation (PIE), en veillant à favoriser l'accès des enfants vivants avec handicap à l'éducation. Il a recommandé aux Comores d'accroître leurs efforts pour garantir la mise en œuvre du principe de non-discrimination et de remédier à la discrimination dont peuvent continuer d'être victimes tous les groupes vulnérables.

• **Projet de Rapport du groupe de travail sur l'examen périodique universel**

Le Gouvernement comorien a précisé que la discrimination à l'encontre des personnes souffrant d'un handicap n'était pas un problème aux Comores, car la tradition islamique était très tolérante à ce sujet. Le fait que le Président de l'île de Ngazidja fût un albinos a ainsi été cité en exemple.

• **Comité contre la torture**

Le Comité des droits de l'enfant s'est inquiété de ce que le châtement corporel au sein de la famille soit une pratique socialement et juridiquement acceptée, en particulier pour les garçons. Le recours aux châtements corporels dans les écoles coraniques a aussi été condamné. Le Comité a recommandé aux Comores de prendre des mesures efficaces pour prévenir et combattre les sévices et les mauvais traitements infligés aux enfants au sein de la famille, à l'école et dans d'autres institutions, ainsi qu'au sein de la société dans son ensemble. De plus, des programmes éducatifs devraient être mis en place pour lutter contre l'attitude traditionnelle de la société à ce sujet. Le Comité a recommandé en particulier à l'État parti d'interdire expressément, dans le cadre de sa législation, le recours aux châtements corporels dans la famille et à l'école. Présentement aux Comores, dans les établissements coraniques rénovés et dans les établissements scolaires, une initiative est prise de ne plus punir un enfant.

2.5 Y'avait-il un quelconque effet interne sur le système légal de l'Union des Comores après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Il n'a pas encore été constaté ou observé des effets produits après la ratification de la CDPH, le 16 juin 2016. Le pays aurait dû commencer par la modification de la Constitution ; cela n'a pas encore été fait.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous votre système légal? Si oui y a-t-il des cas où les cours et tribunaux appliquent directement les dispositions du traité international?

Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Union, ceux qui

modifient les dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent sur des cessions, échanges ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi. Ils ne prennent effet qu'après avoir été ratifiés ou approuvés. Si la Cour Constitutionnelle, saisie par le Président de l'Union, par le Président de l'Assemblée de l'Union ou par les Chefs des Exécutifs insulaires, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de la ratifier ou de l'approuver ne peut intervenir qu'après la révision de la Constitution.

Les traités ou accords régulièrement ratifiés ou approuvés ont dès leur publication une autorité supérieure à celle des lois de l'Union et des îles, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.³

Autrement dit, l'Union des Comores souscrit au dualisme. C'est à dire que la ratification d'un traité nécessite sa domestication pour avoir force de loi. Et, c'est après cette domestication que les cours et tribunaux peuvent l'appliquer.

2.7 En référence au 2.4 ci-dessus, la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH ou tout autre instrument international ratifié, en tout ou en partie, a-t-il été incorporé textuellement dans la législation nationale? Fournir les détails.

Non. Comme précédemment, j'ai demandé des renseignements auprès des structures (branches) suivantes mais en vain ; Ministère des Affaires Etrangère, Ministère de Fonction Publique, spécialement le bureau de la Délégation des Droits de l'Homme.

3 Constitution

3.1 La constitution de l'Union des Comores contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La constitution de l'Union des Comores ne contient aucune disposition concernant directement le handicap. Après lecture de la constitution, le terme handicap ne figure pas ouvertement dans les textes constitutionnels.

3.2 La constitution de l'Union des Comores contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

Oui. Son préambule prescrit le droit à l'égalité de tous, incluant des personnes vivant avec handicap.

3 Article 10 de RECUEIL DES TEXTES LEGISLATIFS D'ORDRE GENERAL, 1979 - 30 Septembre 2005, TOME I.)

Le droit à l'emploi éducation etc ... pour tous sont aussi garantis par le préambule.

4 Législation

4.1 L'Union des Comores a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

Il existe la loi 14-037 du 22 décembre 2014 relative à la promotion et à la protection des personnes vivant avec handicap, votée par l'Assemblée de l'Union et ratifié par le Décret N°15-059/PR du 02/05/2015.

- **Comores Code de la santé publique et de l'action sociale pour le bien-être de la population. Loi n°95-013 du 24 juin 1995. Chapitre 4 - La protection des handicapés et des personnes âgées.**

L'article 159 de cette loi prévoit;

- Les modalités des soins, de réadaptation et de réinsertion professionnelle des handicapés ainsi que les programmes d'action en faveur des personnes âgées sont fixés par voie réglementaire.

D'après le code du travail, la loi de 2006 protège toute personne handicapée ou susceptible d'être handicapée, disant que ce dernier a totalement le droit de travail. Sous condition disant s'il est apte à travailler sur une fonction donnée.

4.2 L'Union des Comores a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

- **La Loi n°04-006 du 10 novembre 2004 relative au Statut général des fonctionnaires.**

L'article 31 inclut parmi les conditions d'intégration dans la fonction Publique comorienne, la 3^e condition qui est basée sur le handicap, disant: « (...) remplir les conditions d'aptitudes, physique et mentale, exigées pour l'exercice de la fonction; un handicap physique ne peut être pris en considération pour l'accès à la Fonction Publique si ce handicap n'affecte pas les capacités, intellectuelle, morale et mentale de l'intéressé (...) »

Cette loi demeure en partie discriminatoire pour les personnes en situation de handicap. Ici on exige des capacités correspondantes à la fonction attribuée. Si ces aptitudes physiques n'atteignent pas ces exigences, elle ne peut pas être intégrée à la fonction publique. Mais il n'y a pas des dispositions stipulant que la fonction publique peut adapter certaines fonctions pour faciliter l'accès de cette partie de citoyens.

- **Code de la santé publique et de l'action sociale pour le bien-être de la population**

Le chapitre 4 consacré à **La protection des handicapés et des personnes âgées**, possédant l'article 156, montre qui est considéré handicapé: « Est considérée comme personne handicapée toute personne atteinte d'une infirmité physique, sensorielle ou mentale permanente, isolément ou en association ».

L'article 158 montre la protection des personnes handicapées dans le domaine de la santé publique et de services sociaux comme étant un droit et une obligation de tout citoyen et de la société dans son ensemble.

5 Décisions des cours et tribunaux

5.1 Les cours ou tribunaux de l'Union des Comores ont-ils jamais statué sur une question relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits ; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Non.

6 Politiques et programmes

6.1 L'Union des Comores a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

- La politique nationale de solidarité et son plan d'action,
- La politique nationale de protection sociale et son plan d'action,
- La stratégie nationale de protection des enfants vulnérables et la politique nationale de protection des enfants ainsi que son plan d'action englobent des programmes touchant directement ces personnes vivant avec handicap.

6.2 L'Union des Comores a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

La stratégie nationale pour l'éducation de base des Enfants Vivant avec Handicap (EVH) 2017-2026 a pour objectif de permettre à tous les enfants handicapés, la libre jouissance de leurs droits fondamentaux en matière d'éducation. C'est dans ce cadre que lors du Forum mondial de l'éducation en 2015, des ministres de l'éducation, ont adopté la Déclaration d'Incheon. Ils s'engagent à réaliser un agenda de l'éducation unique, actualisé, ambitieux et qui ne laisse personne pour compte afin d'atteindre l'Objectif de Développement Durable (ODD 4) qui vise à « assurer à tous une éducation équitable, inclusive et de qualité et des possibilités d'apprentissage tout au long de la vie ».

En Union des Comores, les données actuelles démontrent que le nombre d'élèves du préélémentaire jusqu'au collège est de 179 099 dont 967, soit 0,5% sont des enfants en situation de handicap.

Selon le Plan Intérimaire de l'Education (PIE) 2013-2015 (2013), parmi les EVH identifiés dans l'enseignement de base, certains sont malvoyants et d'autres sont malentendants (« sourd, muet, sourd-muet »).

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, l'Union des Comores a-t-elle un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes vivant avec handicap? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

En dehors des juridictions ordinaires, il n'existe pas à ce jour en Union des Comores d'organisme officiel s'intéressant spécifiquement aux violations de personnes vivant avec handicap.

7.2 En dehors des cours ou tribunaux ordinaires, l'Union des Comores a-t-elle un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes vivant avec handicap s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

La Commission Nationale des Droits de L'Homme et des Libertés (CNDHL) est une institution nationale des Droits de l'Homme mise en place le 2 octobre 2012 en vertu de la Loi N°11-028/AU du 23 décembre 2011, promulguée par décret N°12-042/PR du 18 février 2012. Elle est autonome, neutre et dotée de la personnalité juridique. Elle jouit de l'autonomie administrative, technique et financière et de l'indépendance d'action.

La FCDH (Fédération Comorienne des Droits de l'Homme), qui est une ONG nationale avec une branche dans chaque île, mène des actions de promotion et de protection des personnes vulnérables dont les personnes vivant avec handicap.

Les activités principales de la CNDHL consistent à:

- Promouvoir les droits humains par l'éducation, la formation et la sensibilisation.
- Protéger les droits de l'homme en apportant assistance, conseil et orientation aux victimes de violation des droits de l'homme et de libertés fondamentales d'une part et d'autre part, en influant sur la ratification des instruments juridiques internationaux; participer à l'élaboration des lois et des projets/programmes ayant trait aux droits humains, en donnant son avis sur tout projet de texte ayant une incidence avec les Droits de l'Homme, en effectuant des médiations, en étant en justice et enfin en apportant un appui/conseil au Gouvernement sur toutes les questions relatives au Droit International des Droits de l'Homme

Défendre les droits humains par la dénonciation, l'alerte et la publication de rapports.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 L'Union Des Comores est-elle dotée d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes vivant avec handicap? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de l'Union Des Comores n'a jamais abordé des questions relatives aux droits des personnes vivant avec handicap.**

La Commission Nationale des Droits de l'Homme et des Libertés (CNDHL) est une institution nationale des Droits de l'Homme mise en place le 2 octobre 2012 en vertu de la Loi N°11-028/AU du 23 décembre 2011, promulguée par décret N°12-042/PR du 18 février 2012. Elle est autonome, neutre et dotée de la personnalité juridique. Elle jouit de l'autonomie administrative, technique et financière et de l'indépendance d'action.

La CNDHL est dotée d'un mandat de promotion et de protection des droits de l'homme en vertu de la Loi N°11-028/AU du 23 décembre 2011 instituant la CNDHL. La CNDH est également en charge du suivi de la mise en œuvre des instruments de Droits de l'Homme ratifiés par l'Union Des Comores. Le CNDHL travaille avec le Ministère des affaires islamiques pour la dotation d'une pension trimestrielle équivalent à 10.000 FC (équivalant 28\$) par personne. Un recensement a été réalisé par la Direction Générale des Affaires Islamiques en 2012, afin de réactualiser la liste des personnes handicapées devant bénéficier cette subvention.

A ce jour, la CNDHL n'a pas reçu de plaintes concernant de violation de droits de personnes handicapées.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

- 9.1 Avez-vous en Union des Comores des organisations qui représentent et défendent les droits et le bien-être des personnes vivant avec handicap? Si oui énumérez chaque organisation et décrivez ses activités.**

• **L'Association SHIWÉ.**

Elle a été créée le 5 novembre 1991 et son siège social est situé dans la capitale du pays, à Moroni. SHIWE est une association à but non lucratif. Parmi ses activités:

- Regrouper les personnes vivant avec handicap autour de projets communs et d'activités de loisirs et de développement de leurs conditions de vie.
- Rendre les personnes vivant avec handicap le plus autonomes possibles.

- Sensibiliser les populations et les institutions sur les problèmes et la vie des personnes vivants avec handicap.
- Participer aux jeux paralympiques de l'océan indien.

Les personnes vivant avec handicap comoriennes sont sorties vainqueurs en avril 1992 d'une compétition qui a eu lieu sur l'île de la Réunion et rassemblant des Réunionnais, des Français de Mayotte et de la Guadeloupe, des Mauriciens, et des Comoriens. Ces derniers ont remporté 15 médailles d'or, 8 médailles d'argent, 2 médailles de bronze et 5 coupes.

De juin 1992 à juin 1993 SHIWE a monté une équipe de football composée de personne vivant avec handicap. Cette équipe a effectué des tournées sur la Grande Comore pour sensibiliser les populations et dans l'objectif de rassembler les personnes vivant avec handicap.

Chaque année, de 1992 à 1995, l'association a participé aux défilés et aux manifestations des journées de commémoration de l'indépendance du 6 juillet.

En mai 1993, SHIWE a participé à l'organisation de la journée de la francophonie.

En Juin 1993, l'association a inauguré son programme de réinsertion socioprofessionnelle en envoyant en formation des handicapés: 4 en ateliers de menuiserie, 2 en atelier de soudure, 1 à l'école ménagère, 1 en secrétariat, 1 en cordonnerie.

Participation de SHIWE à un séminaire à Kampala, en Uganda, ayant pour thème « Le leadership et le développement des personnes handicapées », qui s'est déroulé du 28 mars au 3 avril 1993.

En août 1994, 2 handicapés ont participé aux jeux de la francophonie à Paris.

SHIWE a envoyé en novembre 1994 une personne vivant avec handicap à Madagascar pour y suivre une formation en électro-froid.

De 1993 à 1995, trois personnes vivant avec handicap ont bénéficié d'une formation en artisanat, dans le cadre d'un projet artisanal proposé par Handicap International et financé par le Centre Canadien d'Etude et de Coopération Internationale (C.E.C.I.).

L'association SHIWE a pris en charge, en 1998, les soins de 32 personnes indigentes vivant avec handicap. Elle a mis en place, avec le soutien du Secrétariat d'Etat à la Solidarité Nationale, un projet de microfinance au profit de personnes handicapées. Au courant du mois de juin 1996, l'association reçoit une dotation en produits alimentaires provenant du Programme Alimentaire Mondial (P.A.M.) dont ont bénéficié 1838 handicapés. En 1998 l'association participe aux jeux des îles de l'océan indien à la Réunion. SHIWE obtient en 1998 qu'une personne vivant avec handicap soit recrutée à la fonction publique pour occuper au Commissariat des affaires sociales le poste de représentant et chargé d'affaires des personnes handicapées.⁴

- **La FAHAC (Fédération des Associations des personnes Handicapées des Comores).**

Elle est créée en 2004 et reconstituée en octobre 2016 en assemblée générale élective. Elle a pour mission principale de « regrouper l'ensemble des associations

4 Pour toute ces informations voir, <https://www.comores-online.com/mwezinet/sante/aidevdtsanit/shiwe/shiwe.htm>. (consulté le 14/02/2018).

et personnes handicapées comoriennes pour la promotion et la protection de leurs droits, reconnus dans la CDPH et les textes de lois nationaux ».

Extraits du statut: « La FAHAC affirme son statut d'association familiale, c'est-à-dire qui rassemble des personnes handicapées, leurs parents et amis et des bénévoles, pour:

- Créer et gérer des établissements et services adaptés qui permettent aux personnes handicapées d'accéder au mieux, dans la mesure de leurs capacités, à une vie citoyenne;
- Défendre les droits de ces personnes et leur permettre de disposer d'une solution d'accueil et d'accompagnement et qu'elles soient intégrées dans la société;
- Défendre les droits des familles pour que la survenue du handicap ne soit pas synonyme d'exclusion sociale.

La Fédération a pour buts de:

- Accompagner la personne handicapée tout au long de son parcours de vie;
- Agir en faveur de l'intégration, de la participation et de la citoyenneté des personnes handicapées;
- Accueillir, informer et accompagner les familles des personnes handicapées;
- Développer l'action associative en faveur de la cause des personnes handicapées;
- Promouvoir, épanouir la personne handicapée et de l'insérer dans la vie sociale.

La Fédération est apolitique et non confessionnelle. CONTACT: fahac2016gmail.com

• **Le Bureau Horizon Handicap Comores (HHC, voir la page Facebook)**

L'idée d'installer ce Bureau, portant le pseudonyme « Horizon Handicap Comores-SARL », vient à la suite d'un constat fait sur le terrain comorien, notamment l'inexistence sur le territoire national de dispositif ou structure qui a pour mission de trouver des réponses sociales, paramédicales, durables, aux besoins spécifiques des personnes en situation de handicap.

Le Bureau « Horizon Handicap Comores » promeut, à cet effet, de proposer des solutions à court, moyens et long terme, au bénéfice de cette partie de la population, en travaillant de concert avec les autorités du pays, les organismes ou partenaires au développement, les organisations de la société civile nationales et internationales ainsi que les parents des personnes handicapées comoriennes.

Le gérant est Ismaël Saïd, diplômé d'un Master2 sur les situations de handicap et la participation sociales, à l'EHESP, en France.

• **AHAM (Association des Handicapés de Mohéli-Comores)**

Elle est affiliée à la fédération FAHAC. Située dans la petite île de l'archipel des Comores. Elle est l'unique association regroupant l'ensemble des personnes handicapées de Mohéli.

Parmi ses activités:

- Regrouper les personnes handicapées dans un même cadre et trouver des réponses appropriées à leurs besoins respectifs;
- Concevoir et gérer des projets inclusifs;

Projets en perspectives:

L'AHAM gère un projet qui bien qu'étant en souffrance pourrait promettre une réussite dans leurs vies au quotidien. Il s'agit d'actions portant sur: la « création des activités génératrices des revenus: restauration, coutures, cordonneries, centre informatique, formations) ».

- **L'association MAYESHA de l'île d'ANJOUAN**

Elle est affiliée à la fédération également.

Elle a les mêmes objectifs et poursuit presque les mêmes buts et activités que les autres associations des autres îles.

9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Oui, Il existe une coordination nationale des associations

9.3 Si l'Union des Comores a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes vivant avec handicap dans le processus de mise en œuvre?

Les OPH sont parfois invités à des conférences et des séminaires organisés par le gouvernement afin de donner leurs points de vue lors. Elle travaille en collaboration avec l'association Réseaux Amani. Aucune action de mise en œuvre n'est encore concrétisée.

L'union des Comores, n'implique généralement pas les personnes handicapées comme acteurs mais plutôt comme des témoins. Ce qui ne favorise aucunement l'aspect « inclusion » devant promouvoir la participation active des personnes handicapées dans les programmes du pays.

9.4 Quels genres d'actions les OPH ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

Le nouveau Président de la FAHAC, et en sa qualité de gérant du bureau HHC, a eu à s'entretenir avec quelques structures gouvernementales sur les questions portant sur le handicap. Au terme des discussions, il vient de proposer le plan d'action devant servir à la fois les associations et les instances agissant dans le domaine du handicap:

I. Proposition d'un chronogramme de quelques activités pour l'année 2018-2021⁵

Période	Intitulé des activités	Chargé de l'exécution
Semestre 1	A1: appuyer la promulgation de la loi sur la promotion des droits et la protection sociale de la personne handicapée comorienne, du 22 décembre 2014	Commissariat national du genre et solidarité
	A2: faire la promotion de cette loi à travers les médias et la société	La fédération des associations des personnes handicapées comoriennes
	A3: sensibiliser les parents et tuteurs des personnes handicapées sur les droits et la prise en compte de leurs enfants victimes des maltraitements	La Direction de la solidarité et la FAHAC
Semestre 2	A4: accompagner la stratégie nationale de scolarisation des enfants en situation de handicap aux Comores.	Les services de protection de l'enfant de chaque île et la FAHAC
	A5: Recenser les personnes handicapées, identifier leurs typologies de handicap et besoins en termes de compensations	Le Bureau d'étude Horizon- Handicap-Comores
	A6: proposer des études sur l'Education, l'accessibilité, l'emploi, la santé des personnes handicapées.	Le Bureau d'étude Horizon-Handicap-Comores
Semestre 3	A7: Proposer un projet sur l'Allocation Adulte Handicapé (AAH);	Le Bureau d'étude Horizon- Handicap-Comores
	A8: Créer une mutuelle de santé au service des personnes handicapées comoriennes;	Commissariat national et HHC
	A9: Concevoir des micros emplois adaptés et générateurs des revenus aux bénéfices des personnes handicapées.	Le Bureau d'étude Horizon -Handicap-Comores
Semestre 4	A10: Evaluation des actions réalisées (résultats, effets et impacts).	La FAHAC et le commissariat

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

L'association SHIWÉ et « Fédération des Associations des Personnes Handicapées » et les adhérents sont en majorité des personnes vulnérables sans qualification professionnelle. Elles n'ont pas les capacités techniques pour monter un projet et mobiliser des fonds de la part des partenaires au développement. Il y a très peu de personnes handicapées diplômées.

Parmi les obstacles:

5 Signé: Le Président de la FAHAC, ISMAEL SAID qui a contribué à la revue de ce rapport.

- La méconnaissance des aspects sociaux du handicap. Le handicap étant perçu généralement comme une maladie dont les solutions se trouvent dans des établissements sanitaires. Cette perception est bien ancrée dans les esprits de beaucoup de comoriens.
- Manque de professionnels dans le champ du handicap aux Comores. Les personnes en situation de handicap sont donc confrontées à tous ces problèmes, notamment pour faire comprendre à la société que le handicap vient de changer de paradigmes. Le handicap n'est plus uniquement un problème biomédical mais aussi un problème lié à l'organisation de l'environnement social, physique ... Cette dimension sociale de handicap n'est pas mise en avant.
- Le manque de financeurs pour les projets sur le handicap;
- Les manques d'ouvrages sur la question du handicap.

9.6 Y a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Non.

9.7 Y a-t-il des résultats spécifiques concernant une mise en œuvre prospère et/ou une reconnaissance appropriée des droits des personnes handicapées résultant de l'implication des OPH dans le processus de mise en œuvre?

Non.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?

En premier lieu, la documentation aux Comores est un grand défi d'une manière générale, plus précisément si cela concerne les OPH. Durant les recherches sur ce projet, il n'y a aucun bureau gouvernemental qui ait pu donner plus d'une réponse à ce formulaire. De ce fait, la mise en place d'une plateforme de documentation pour les droits et initiatives des OPH est primordiale.

Le manque de siège social est un obstacle majeur. Même si l'association SHIWÉ (ce qui est également le cas de toutes les autres associations) possède un siège celui-ci est en dégradation.

Le renforcement des capacités est également un aspect qui a été identifié; la plupart personnes comoriennes vivant avec handicap n'ont pas eu accès à l'éducation occidentale.

Enfin, les OPH doivent mettre en place une campagne permanente dans l'objectif d'influencer les pouvoirs publics pour accomplir leurs projets.

Il serait souhaitable que les personnes vivant avec un handicap bénéficient de formation d'alphabétisation pour certains, mais aussi de l'apprentissage et de la formation professionnelle, particulièrement les jeunes vivant avec un handicap qui ont abandonné l'école ou sont non scolarisés.

9.9 Y a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Les OPH devraient avoir des personnes en situation de handicap dans les syndicats afin de promouvoir et protéger leurs droits.

Les OPH doivent être représentés dans les organes en charge du suivi et de la mise en œuvre d'instruments de Droits de l'Homme ratifiés par l'Union de Comores notamment, le Comité de rédaction et de soumission de rapports aux organes de traités et la Commission Nationale des Droits de l'Homme.

Et pour finir, les OPH mériteraient une branche gouvernementale dédiée aux droits et à l'insertion de personnes handicapées à la vie active. Pour ce dernier point, il existe déjà des services qui devraient s'occuper de ses personnes mais qui ne sont pas opérationnels. Il faut créer les voies et moyens pour les opérationnaliser

Il faut aussi l'intégration d'un département handicap dans l'un des ministères de l'Union des Comores dont le responsable soit une personne vivant avec un handicap, qualifiée sur le champ social du handicap.

9.10 Y'a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?

Le centre national de documentation et de recherche scientifique de l'Union des Comores (CNDRS) est en pleine rénovation; la réponse est donc non (temporellement). Toutefois, ce centre mène déjà des actions allant dans le sens du développement des programmes d'appui aux personnes vivant avec un handicap.

Ce centre a également conduit la définition, l'élaboration et la validation de la stratégie nationale de scolarisation des enfants vivant avec handicap. A nos jours aux Comores, il n'y a pas d'institut de recherche basé sur le travail des droits des personnes vivant avec un handicap.

Sur ce point, je propose de nous appuyer à intégrer à l'université des Comores un module portant sur le handicap et/ou un service référent handicap au sein des établissements universitaires des Comores

10 Branches gouvernementales

10.1 Avez-vous des branches gouvernementales spécifiquement chargées de promouvoir et protéger les droits et le bien-être des personnes vivant avec handicap? Si oui, décrivez les activités de cette (ces) branche(s).

Le Ministère de l'Education Nationale a mis en place un projet pour permettre aux enfants vivant avec handicap l'accès à l'éducation.

Le Ministère des affaires islamiques a initié, depuis plusieurs années, des mécanismes de remise de cash transfert aux personnes vivant avec un handicap à travers le trésor public.

Le Ministère de la santé, de la solidarité, de la protection sociale et de la promotion du genre dispose d'un service chargé de la promotion et de la protection des personnes vivant avec handicap et les vieillards. Ce service initie quelques projets en aide aux personnes vivant avec handicap, même si parfois, les donateurs ne répondent pas aux appels.

Le Ministère de l'Emploi et du Travail chargé du sport et des loisirs, est celui qui a initié le projet de loi sur la promotion et la protection des personnes vivant avec handicap. La fédération de personnes vivant avec handicap dirigée par Mr Chahalane, joue un rôle de plus en plus prépondérant dans l'insertion des personnes vivant avec handicap dans le sport en initiant des compétitions des sports divers pour les personnes vivant avec handicap. Cependant, il n'y a pas une branche gouvernementale spécifiquement chargée de promouvoir et protéger les droits et le bien-être des personnes vivant avec handicap. Il serait souhaitable que toutes ces institutions se coordonnent pour un meilleur rendement pour les bénéficiaires.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes vivant avec handicap en Union des Comores? (exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes vivant avec handicap telles que les personnes atteintes d'albinisme. A cet effet la Tanzanie est aux avant-postes.) Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes vivant avec handicap.

L'Union des Comores ne pratique pas d'acte causant préjudices aux personnes handicapées. Sauf en cas de manque de thérapies. En effet, l'accès aux soins des personnes ayant un handicap mental constitue un défi majeur compte tenu du manque de personnel qualifié en psychiatrie. Pour une population estimée à environ un million de personnes, il y a 2 médecins psychiatre. Cela est devenu un défi majeur, mais à ce jour des voix s'élèvent pour trouver des solutions dans ce domaine. Les familles de ces personnes souffrant de déficience mentale seraient encourager à se tourner vers les thérapies traditionnelles. Il est également fréquent de voir des personnes souffrant de troubles psychiques, vivant reclus et enchaînés dans leur chambre.

La plupart des familles considèrent leurs enfants handicapés comme des personnes incapables de poursuivre des études scolaires. Cependant, ces familles-là n'envoient pas n'ont plus leurs enfants handicapés à l'hôpital. Ce problème de discrimination ne se situe pas seulement dans la cellule familiale proche, mais aussi chez une majorité d'individus qui considèrent la personne handicapée comme « folle », voir ne respectent pas ses droits en tant qu'humain.

Il y a aussi un manque des médecins spécialisés dans la rééducation et la réadaptation fonctionnelle. Les personnes handicapées vivent en grande partie dans la mendicité. Elles descendent dans les rues les jours de vendredis pour mendier dans les boutiques et auprès des passants. Ceci démontre l'atteinte à la dignité de la personne handicapée dans l'Union des Comores.

11.2 Comment l'Union des Comores répond-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

- **L'accès aux bâtiments publics**

Les bâtiments publics disposant de rampes d'accès pour les fauteuils roulants sont quasi inexistant aux Comores. Toutefois, toutes les écoles publiques construites ces deux dernières années disposent des rampes d'accès aux personnes vivant avec un handicap.

- **L'accès au transport public**

En Union des Comores, le système de transport public est inexistant. Le système de transport en commun en vigueur se limite aux bus et minibus appartenant à des particuliers travaillant à leur propre compte. Ces derniers choisissent à leur guise leur itinéraire en fonction de sa rentabilité. Les chauffeurs de bus et minibus circulant dans la capitale ne pratiquent aucune discrimination de transport pour les personnes handicapées. Cependant, ils ne sont pas équipés de rampe d'accès pour les fauteuils roulants. Ils font de leur mieux pour aider ces personnes handicapées.

- **L'accès à l'éducation**

Les données actuelles démontrent que le nombre d'élèves du préélémentaire jusqu'au collège est de 179 099 dont 967 – soit 0,5% – sont des enfants en situation de handicap. Selon le Plan Intérimaire de l'Éducation (PIE) 2013-2015 (2013), parmi les Enfants vivant avec un handicap, identifiés dans l'enseignement de base, certains sont malvoyants et d'autres sont malentendants (« sourd, muet, sourd-muet »).

Au regard des données existantes, il convient de constater que l'Union des Comores accuse un grand retard dans le domaine de la scolarisation des enfants vivant avec handicap, et plusieurs raisons peuvent expliquer une telle défaillance.

Le PIE 2013-2015 et le Plan de Transition du Secteur de l'Éducation (PTSE) 2018-2020 précisent qu'au sein du système éducatif comorien, il n'existe pas de dispositifs spécifiques mis en place pour la prise en charge des enfants vivant avec handicap. De plus, beaucoup d'études révèlent qu'à l'école, les enfants vivant avec handicap ne reçoivent ni le soutien, ni l'aide dont ils ont besoin pour vaincre les obstacles qui les empêchent de participer pleinement à leurs apprentissages.

Les enseignants utilisent souvent des méthodes pédagogiques traditionnelles qui ne prennent pas en considération les besoins particuliers de certains enfants vivant avec handicap. On constate aussi le manque de matériels spécifiques aux enfants en situation de handicap et l'absence généralisée de supports et d'outils pédagogiques adaptés à l'apprentissage pour ces personnes. Cette situation entraîne non seulement un accroissement du taux de redoublements, mais aussi des taux importants d'abandons scolaires, ou de non-scolarisation. D'où la nécessité absolue de la mise en œuvre de la loi sur la protection et la promotion des personnes vivant avec handicap.

- **L'accès à la formation professionnelle**

D'après le secrétaire de l'association SHIWÉ, Ali M'MADI, « l'Etat n'a mis aucune structure pour nous aider nous handicapés à l'accès à la formation professionnelle ». ⁶ Il n'y a pas non plus de politique d'insertion professionnelle des personnes handicapées.

- **L'accès à l'emploi**

6 Cette déclaration a été faite suite à une interview, qui a eu lieu au Siège de l'association SHIWÉ le 05/12/2017.

Il n'existe pas de restriction sur l'emploi des personnes vivant avec handicap. Ceux qui arrivent à obtenir un diplôme sont recrutés au même titre que les autres personnes au moment où il y a un recrutement public.

• **L'accès à la fonction publique**

Selon l'article 31 du Statut général des fonctionnaires,⁷ peut être intégrée dans la fonction Publique comorienne toute personne qui remplit les conditions suivantes:

- a) Etre citoyen(ne) comorien(ne) à titre originaire ou naturalisé;
- b) Jouir de ses droits civiques et être de bonne moralité;
- c) Remplir les conditions d'aptitudes, physique et mentale, exigées pour l'exercice de la fonction. Un handicap physique ne peut pas être pris en considération pour l'accès à un poste public seulement s'il n'a pas la formation exigée pour le poste; son handicap n'affecte en rien.
- d) Etre reconnu, soit indemne de toute affection incompatible avec l'exercice des fonctions publiques, soit définitivement guéri;
- e) Etre âgé de 18 ans au moins et de 40 ans au plus

Malgré cette inclusion légale des personnes vivant avec handicap, ces dernières sont généralement exclues à cause du manque d'éducation ou formation nécessaire pour accéder à la fonction publique.

• **L'accès à la justice**

Les personnes handicapées appartiennent à la frange de la population vivant dans la précarité. Ainsi, l'accès effectif de personnes handicapées à la justice mérite une attention particulière. Outre, l'accessibilité des tribunaux, l'aide juridictionnelle permettra aux personnes handicapées de saisir plus souvent les juridictions internes. L'aide juridictionnelle était limité auparavant aux affaires criminelles, il aura fallu attendre la loi de 2011 qui permet aux justiciables sans revenu de bénéficier d'une prise en charge partielle ou totale par l'Etat des honoraires d'avocats ou d'huissiers, à tous les stades de procédures et ce, devant toutes les juridictions.

En pratique, la procédure d'obtention de l'aide judiciaire est trop longue dans la mesure où le justiciable désirant bénéficier de l'aide judiciaire doit adresser une demande au Bureau d'aide judiciaire, dirigé par le Président de la Cour Suprême ou par un haut magistrat nommé par lui.

• **Accès aux soins de santé**

L'article, 6 des missions de service public,⁸ prévoit la protection de la santé de la population, et particulièrement des catégories de population courant des risques spécifiques telles que la femme enceinte, la mère et l'enfant, le jeune en milieu scolaire, le travailleur sur son lieu de travail, la personne vivant avec handicap et la personne âgée ; le soin et l'assistance au blessé, au malade, à la personne avec handicap, à la personne âgée, et d'une manière générale à toute personne dont l'état physique ou mental met dans l'impossibilité momentanée prolongée de subvenir à ses besoins ou de maintenir son autonomie, quels que soient son sexe, sa région, son ile natale ou son statut social.

Toutefois, il n'y a pas de prise en charge sanitaire réglementée pour une personne en situation de handicap.

7 Loi n°04-006 du 10 novembre 2004.

8 Loi sur LE SERVICE PUBLIC RELEVANT DE LA POLITIQUE NATIONALE DE LA SANTE.

11.3 L'Union des Comores accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes vivant avec handicap?

Des efforts sont mis en œuvre par le ministère des affaires islamiques pour la dotation d'une pension trimestrielle de 10.000 FC (équivalant 28\$) par personne/ par trimestre, étant précisé que toutes les personnes handicapées ne sont pas bénéficiaires de cette indemnité.

« Quelques actions ponctuelles de distribution de denrées de première nécessité sont destinées aux personnes handicapées surtout pendant le mois du Ramadan mais il arrive que des erreurs d'inclusion et d'exclusion de bénéficiaires soient constatées ici et là », a déclaré Mr Ali M'MADI, secrétaire général de l'association des personnes handicapées SHIWE. Et il a ajouté que même les tonnes de dattes venant de l'Arabie Saoudite sont partagées inégalement entre ceux qui sont bien placés avant les personnes handicapées et orphelines.⁹

Toutefois, il n'y a ni Allocation Adulte Handicapé, ni Prestations financières, ni assistance sociale.

11.4 Les personnes vivant avec handicap ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant, etc.) de l'Union des Comores?

Les personnes vivant avec handicap qui sont des représentations politiques et leadership sont très nombreuses aux Comores. Prenons l'exemple d'un ancien Président de la Grande île connu sous le nom de Mohamed ABDŌUL WAHABI, ainsi que par exemple, le ministre de la défense, l'ancien président par intérim ou des enseignants du supérieur.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapées**

L'Assemblée Fédérale, Loi N° 94-013/AF

Autorisant le Président de la République Fédérale Islamique des Comores (Nom de l'Union des Comores avant 2002) à ratifier la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes conclue à New York le 18 décembre 1979. Délibérée et adoptée en séance du 7 Juin 1994, le président de l'assemblée MOHAMED SAID A. MCHANGAMA.

La discrimination dont souffre les personnes vivant avec handicap affecte les femmes doublement.

- **Enfants handicapés**

La stratégie nationale sur la protection des enfants les plus vulnérables aux Comores, réalisée en 2004, affirme que les personnes qui souffrent d'un handicap mental, qui représentent près de 14,5% des handicapés, sont rejetés et maltraités par la population et parfois leur propre famille. Certains sillonnent les rues et font l'objet de brimades et de vexations morales.

9 Interview avec Mr Ali., le 05 /12/2017.

La législation comorienne accorde une attention particulière à l'enfant. Ainsi, la loi relative à la protection de l'enfance dispose dans son premier article que « *l'enfant occupe au sein de la famille une place privilégiée* ». La notion d'intérêt supérieur de l'enfant fait partie du paysage juridique depuis plusieurs décennies. Une attention est accordée à ce principe par les tribunaux, les autorités administratives, les organes législatifs.

Avant même d'apparaître dans la législation, cette notion était utilisée dans la motivation des décisions judiciaires. Par ailleurs, les magistrats évitent l'incarcération des mineurs, en l'absence de conditions de détention respectant les normes internationales dans les lieux de détention. En revanche, dans certains domaines, il est fait peu d'égard à l'intérêt supérieur de l'enfant. Il s'agit notamment de l'enregistrement des naissances (ce phénomène est en baisse), du calendrier vaccinal qui n'est pas toujours suivi, des arrangements familiaux dans les cas d'abus sexuel, et du manque de suivi thérapeutique pour les enfants victimes de maltraitance.

Les enfants porteurs d'handicap connaissent un retard dans plusieurs domaines pour leur prise en charge et leurs protections effectives, bien qu'il y ait des avancées importantes qui vont dans l'amélioration de ces enfants.

12 Perspective future

12.1 Y a-t-il des mesures spécifiques débattues ou prises en compte présentement en Union des Comores au sujet les personnes handicapées?

En 2003, le Gouvernement de l'Union des Comores avec l'appui financier de l'UNICEF a réalisé une investigation sur la situation réelle de la vie quotidienne des personnes handicapées afin de définir une politique juste en faveur de l'amélioration des conditions de vie des handicapés. Cette investigation a été réalisée par Ahmed Djoumoi, Statisticien-Démographe et Djamaliddine Mohamed, Spécialiste en IEC. Cinq (5) principaux problèmes touchant les handicapés ont été identifiés:

- Une offre de soins et de prise en charge insuffisante;
- Une exclusion de la population handicapée du système éducatif;
- La difficulté d'insertion des handicapés dans le milieu du travail;
- La demande croissante des handicapés;
- Le manque d'organisation des personnes handicapées.

Les politiques nationales de solidarité et de protection sociale ainsi que leurs plans d'actions ont proposé et développé des programmes et activités spécifiques pour les personnes vivant avec handicap qu'il faut réellement rendre opérationnelles.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en Union des Comores? Pourquoi?

J'aurais aimé voir aux Comores les déclarations qui suivent:

- (1) en premier lieu, le respect des droits, notamment les articles suivants:
 - Le code du travail (article 120)

- Le code de la santé publique (articles 142, 147, 157, 160)
 - Le code pénal (article 328)
 - Le code de l'information (article 6)
 - La loi portant orientation sur l'éducation (article 73)
 - La loi portant cadre général du système de santé (article 6)
 - La loi relative à l'apprentissage.
 - La loi cadre sur la protection sociale, qui attend sa promulgation
 - L'opérationnalisation de la loi 14-037 sur la protection et la promotion des personnes vivant avec handicap et promulguée par le décret 15-059/PR du 02/05/2015
 - L'opérationnalisation de la loi 17-012/AU relative à la couverture sanitaire universelle et promulgué par le Décret 17-105/PR du 05/10/2017
- (2) en deuxième lieu, l'accès aux services sociaux de base:
- Améliorer les conditions d'accès aux services de santé:
 - Réduire au minimum les coûts des soins de santé ou les rendre gratuits pour les personnes vivant avec handicap.
 - Faciliter la réforme des services de protection sociale, notamment la Caisse Nationale de prévoyance sociale.
 - Opérationnalisation de la loi sur la promotion et la protection des personnes vivant avec handicap et mise en place de l'assurance maladie généralisée qui est censée voir le jour d'ici la fin de l'année. Mise à l'échelle des programmes de filets sociaux au profit des vulnérables dont les personnes vivant avec handicap
- **Améliorer l'accès à l'éducation primaire, obligatoire, gratuite et adaptée :**
 - La gratuité des fournitures scolaires;
 - L'adaptation de l'enseignement aux élèves qui souffrent de handicap;
 - L'aide financière aux études pour les familles les plus démunies avec l'institution d'une aide scolaire lors de la rentrée et la mise en œuvre du régime des prestations familiales conformément aux dispositions de l'arrêté 56-111 du 19 septembre 1956;
 - Et l'adaptation de l'enseignement aux élèves qui souffrent de handicap.
 - Opérationnalisation de la loi sur les personnes vivant avec handicap et la loi cadre sur la protection sociale adoptée en juin 2017 mais qui n'est pas promulguée.
 - **Mettre en place des structures de protection:**
 - La création d'un Centre National de Recherche sur les Droits de Personnes. Handicapées et renforcement de capacité professionnelle pour les handicapés.

Pour finir, en cas de subvention ou d'une donation:

- Donner aux personnes vivant avec handicap eux même le plein droit de partager leur bien sans intervention d'un quelconque représentant politique non handicapé.
- Assurer la satisfaction et la bonne gestion de ressources dédiées aux handicapés.
- Et lutter contre la corruption et le détournement de biens des personnes vivant avec handicap.

Aux Comores, l'accès à certaines zones sont inaccessible aussi bien pour des personnes en bonne santé et bien portant que pour ces personnes en situation de handicap. Il y a des zones enclavées auxquelles sont confrontées les personnes qui ont tout de même les capacités et le courage pour y accéder.

En outre, j'aimerais que les autorités comoriennes:¹⁰

- Traduisent la CDPH et les textes nationaux de handicap en actions sur le terrain;
- Changent les perceptions sur la manière de concevoir le handicap et dépassent tout stéréotype compromettant les droits des personnes handicapées;

10 Le Président de la FAHAC, ISMAEL SAID qui a contribué à la revue de ce rapport

- Mettent sur pied une institution en charge de la promotion et la protection des droits des personnes handicapées et doter de tous les moyens nécessaires pour son fonctionnement;
- Reprennent les relations partenariales avec Handicap International afin de permettre les OSCs d'agir sur le handicap d'en faire bénéficier leurs prestations;
- Introduisent un département handicap à l'université des Comores, afin de faciliter les recherches sur les questionnements de handicap;

Fasent appel à des organismes d'assistance sociale pour secourir les personnes handicapées et leurs familles encore démunies.

MAURITANIA

Kedibone Chembe and Babatunde Fagbayibo***

1 Population indicators

1.1 What is the total population of Mauritania?

According to the 2017 World Population Prospect report,¹ Mauritania has a total population of 4 420 000 people.

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

A general census is used to obtain data on the prevalence of disability in Mauritania. The census questionnaire consists of a set of questions meant to solicit information about the household, including questions about disability, its causes and nature.² In the 2013 census the following criteria were used in determining the class of persons with disabilities: motor disability; visual; deaf or mute; poly-handicap; physical; mental; and other disabilities.³

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

According to the Initial Report, based on the International Convention on the Rights of Persons with Disabilities (CRPD), submitted by Mauritania in 2017, approximately 33 920 of its inhabitants (that is, 0.96 per cent of the population)

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1 UN Population Division *World population prospects: 2017 revision population database* https://esa.un.org/unpd/wpp/publications/Files/WPP2017_DataBooklet.pdf (accessed 3 March 2018).

2 Mauritania Office National de la Statistique (ONS) 'Recensement general de la population et de l'habitat, 2013' http://www.ons.mr/images/RGPH2013/Chapitre13_Femmes_fr.pdf (accessed 3 March 2018) (translated version).

3 As above.

were reported to have one or the other form of disability.⁴ However, this calculation is based on the 2013 population figures of 3 537 368 inhabitants.

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

According to the 2017 Initial Report, there are 15 450 women with disabilities in Mauritania (which is about 3,5 per cent of its population based on the 2013 population figures of 3 537 368 inhabitants).

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

Children specifically below the age of 15 years represent 18,4 per cent of the total number of persons living with a disability (based on the 2013 population figures) in Mauritania.⁵

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

According to the 2013 General Census, the most prevalent form of disability is 'motor disability' with one in three people having this type of disability.⁶ The number of persons with disabilities disaggregated by types of disability and gender as per the 2013 Census include:

- motor disability – 5 093 (33 per cent female); 6 343 (34,3 per cent male);
- deaf/mute impairment – 2 234 (14,5 per cent female); 2 558 (13,8 per cent male);
- visual impairment – 3 149 (20,4 per cent female); 3 704 (20,1 per cent male);
- mental impairment – 1 845 (11,9 per cent female); 2 613 (14,1 per cent male);
- poly-handicap – 1 226 (7,9 per cent female); 1 331 (7,2 per cent male);
- others – 1 903 (12,3 per cent female); 1 921 (10,4 per cent male).

2 Mauritania's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in Mauritania? Did Mauritania sign and ratify the CRPD? Provide the date(s).

Mauritania only acceded to the CRPD on 3 April 2012.⁷

4 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMRT%2f1&Lang=en (accessed 1 March 2018) (translated version).

5 Mauritania Office National de la Statistique (n 2).

6 As above.

7 United Nations Treaty Collection 'Ratification status for CRPD' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV15&chapter=4&clang=_n (accessed 28 December 2017).

- 2.2 If Mauritania has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Mauritania 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?**

Mauritania's country report was due in May 2014. However, the report was only submitted in January 2017.⁸ The *Un Comité interministériel technique* (a technical interministerial committee) is tasked with drafting reports and conducting follow-up of the implementation of the recommendations of the treaty bodies and the Universal Periodic Review (UPR).

Although Mauritania has already submitted its state report to the UN Committee, the report is yet to be considered.⁹

- 2.3 While reporting under various other United Nation's instruments, or under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Mauritania 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 instruments¹⁰

Below is a summary of Mauritania's reporting under UN instruments:

- (a) *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)***

Prior to the submission of the 2017 periodic report, Mauritania submitted its initial report,¹¹ and the February 2012 combined second and third periodic report to the Committee on the Elimination of Discrimination against Women (CEDAW Committee).¹² In these reports Mauritania reported on the issues of social security

8 Office of the High Commissioner for Human Rights 'Reporting status for Mauritania' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MRT&Lang=EN (accessed 12 February 2018).

9 Office of the High Commissioner for Human Rights 'CRPD future sessions' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1204&Lang=en (accessed 18 February 2018). See also http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=22 (accessed 18 February 2018).

10 Office of the High Commissioner for Human Rights 'Ratification, Reporting and Documentation for Mauritania' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx (accessed 18 February 2018).

11 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CEDAW/C/MRT/1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMRT%2f1&Lang=en (accessed 22 February 2018).

12 Office of the High Commissioner for Human Rights 'Mauritania: Combined second and third periodic reports, CEDAW/C/MRT/2-3' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/413/87/PDF/G1341387.pdf?OpenElement> (accessed 22 February 2018).

funds,¹³ and legislative measures undertaken for purposes of persons with disabilities.¹⁴

In October 2017 a follow-up report was submitted that contains an update on the measures taken by the government of Mauritania to implement recommendations of the Concluding Observations of the CEDAW Committee and provisions of CEDAW.¹⁵ In terms of this report the following actions have been taken by Mauritania:

- promotion and protection of the rights of the child and persons with disabilities;
- cash transfer services for children with multiple disabilities, and financing of income-generating activities for hundreds of persons with disabilities; and
- improvement of functional independence of persons with disabilities through the free distribution of technical aids.

The report is yet to be considered.

(b) *International Convention on the Elimination of all Forms of Racial Discrimination (CRPD)*

Mauritania submitted two reports prior to the 2017 report. The reports are the initial state report and the second, third, fourth and fifth periodic reports,¹⁶ and the seventh periodic report submitted to the Committee on the Elimination of Racial Discrimination (CERD Committee). Mauritania reported on the issue of the National Social Security Fund and the Civil Servants' Pension Fund schemes. No recommendations were made pertaining to disability in the Concluding Observations of the Committee.

In February 2017 Mauritania submitted its eighth to fourteenth periodic reports to the CERD Committee.¹⁷ In this report Mauritania highlighted national mechanisms adopted by the Ministry of Social Affairs, Children and the Family, the dissemination of the CRPD and measures taken to promote the rights of women, children, and persons with disabilities.

The CERD Committee has not yet considered the eighth to fourteenth periodic reports and, as such, there are no actioned recommendations during this reporting period.

13 Office of the High Commissioner for Human Rights 'Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Initial Report of the Islamic Republic of Mauritania adopted at its thirty-eighth session from 14 May-1 June 2007' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMRT%2fCO%2f1&Lang=en (accessed 22 February 2018).

14 Office of the High Commissioner for Human Rights 'Mauritania: Combined second and third periodic reports, CEDAW/C/MRT/2-3' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/413/87/PDF/G1341387.pdf?OpenElement> (accessed 22 February 2018).

15 Office of the High Commissioner for Human Rights 'Mauritania: Addendum of follow-up report to the Concluding Observations on the combined second and third periodic reports, CEDAW/C/MRT/CO/2-3/Add.1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMRT%2fCO%2f2-3%2fAdd.1&Lang=en (accessed 22 February 2018).

16 Office of the High Commissioner for Human Rights 'Mauritania: Initial report and the second, third, fourth and fifth periodic reports, CERD/C/330/Add.1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2f330%2fAdd.1&Lang=en (accessed 22 February 2018).

17 Office of the High Commissioner for Human Rights 'Mauritania: Eighth to fourteenth periodic reports, CERD/C/MRT/8-14' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fMRT%2f8-14&Lang=en (accessed 22 February 2018).

(c) *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

In August 2009 Mauritania submitted its initial state report to the ESCR Committee.¹⁸ In the report Mauritania addressed issues of pension funds and highlighted the following:

- Blindness is considered one of the most common disabilities, particularly among the disadvantaged groups of the population. The two principal causes of blindness are cataracts and trachoma. Half of the cataracts are treated by traditional means. Trachoma is rife, especially in the central and northern parts of the country.
- Victims of work-related accidents who suffer a permanent partial disability are entitled to an incapacity pension if they are at least 15 per cent incapacitated. Depending on the degree of incapacity, the amount of the permanent partial incapacity pension is proportional to the pension to which the claimants would have been entitled in case of permanent total incapacity. The incapacity pension is paid in a lump sum if the degree of incapacity is less than 15 per cent. The sum is calculated by tripling the total amount of the pension, which must correspond to the victim's degree of incapacity.
- Where social protection is concerned, the national health and social policy must cover the funding of health care for the majority of the impoverished and marginalised. Social measures must improve the targeting, guidance and inclusion of vulnerable children and the care and inclusion of persons with disabilities.

In the Concluding Observations, no recommendations were made pertaining to the initial state report in relation to disability issues.

(d) *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

In October 2015 Mauritania submitted its initial state report to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁹ In this report Mauritania was requested to submit its response on the role and responsibilities of recruiters and their possible joint responsibility with the employer for claims and liabilities that may arise in connection with the implementation of the employment contract, including salaries and disability, death and repatriation allowances. However, Mauritania has not responded to this question, as evidenced by the initial report.

(e) *Convention on the Rights of the Child (CRC)*

Mauritania submitted two reports prior to submitting the January 2017 report. The reports were the initial state report of January 2000 and the November 2007 second periodic report submitted to the CRC Committee. In these reports Mauritania discussed measures adopted to address issues of disability pertaining to children based on legislative, policy measures and programmes initiatives. The Mauritanian government also highlighted shortcomings in terms of education.

In its Concluding Observations to Mauritania on both reports, the CRC Committee made the following recommendations:

- to develop a system of data collection and indicators consistent with the CRC;

18 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, E/C.12/MRT/1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fMRT%2f1&Lang=en (accessed 22 February 2018).

19 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CMW/C/MRT/1' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/271/03/PDF/G1527103.pdf?OpenElement> (accessed 22 February 2018).

- to ensure that the situation of children with disabilities is adequately monitored in order to effectively assess their situation and needs; and;
- to allocate resources for programmes dealing with issues of disability.

The Committee was also concerned about the occurrence of discrimination against children with disabilities, among other factors, and that measures adopted were insufficient in order to extend the coverage of assistance and rehabilitation of all children with disabilities, particularly in rural and remote areas.

In January 2017 Mauritania submitted its combined third to fifth periodic reports to the CRC Committee.²⁰ These reports outline the country's implementation of the Convention and highlights the progress made and the problems that still hamper the effective fulfilment of some obligations under the Convention. These include:

- The responsibilities of the Ministry of Social Affairs, Children and the Family include the advancement of women and their integration in the development process, and the promotion and protection of the rights of the child, persons with disabilities and older persons.
- There is the establishment of several organisations of persons with disabilities.
- The Centre for the Protection and Social Integration of Children, the Centre for Early Childhood Training and the Centre for Training and Inclusion of Children with Disabilities have been receiving increased allocations to their budgets.
- With a view to promoting and protecting the rights of women, children and persons with disabilities, Mauritania has strengthened its commitment by ratifying the relevant international conventions; adopting the regulations to implement the Order on Protection and Promotion of Persons with Disabilities.
- There is a penalty of 15 years' imprisonment for torture repeatedly committed against the child, or in cases where such abuse leads to
- mutilation or permanent disability.

The Concluding Observations are yet to be finalised.²¹

(f) UN Universal Periodic Review

Mauritania was last reviewed by the Human Rights Council Universal Periodic Review on 3 November 2015. The state reported that since the 2010 review, in 2012 it acceded to the CRPD and its Optional Protocol and provided training on these instruments to organisations dealing with disabilities. Furthermore, it reported that the government had established regional councils to deal with child protection issues that affect children with disabilities. In the recommendations formulated under the interactive dialogue and later adopted by the Human Rights Council, Mauritania's accession to the CRPD was welcomed.²²

Regional Instruments

- **African Charter on Human and Peoples' Rights**

In its October 2001 report under the African Charter on Human and Peoples' Rights (African Charter), Mauritania reports that it has taken legislative measures

20 Office of the High Commissioner for Human Rights 'Mauritania: third to fifth periodic reports, CRC/C/MRT/3-5' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMRT%2f3-5&Lang=en (accessed 24 February 2018).

21 Office of the High Commissioner for Human Rights 'Reporting status for Mauritania' (n 8).

22 Office of the High Commissioner for Human Rights 'Human Rights Council – Universal Periodic Review' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/069/27/PDF/G1606927.pdf?OpenElement> (accessed 24 February 2018).

towards protecting the rights of persons with disabilities.²³ In its Concluding Observations to Mauritania, the African Commission on Human and Peoples' Rights (African Commission) remained concerned that there are inadequate measures in place to address the special needs of vulnerable and minority groups such as the nomadic tribes, the elderly and persons with disabilities. However, the African Commission's recommendations on disability are not substantive.²⁴

In March 2017 Mauritania submitted its tenth to fourteenth report to the African Commission.²⁵ The reports outline measures taken to implement the provisions of the African Charter. These are the following:

- Public authorities have adopted a multi-sectoral approach in dealing with issues of disability. This approach has ensured the participation of persons with disabilities in cultural life.
- In order to address challenges relating to the application of the Protocol, Mauritania has
- implemented human rights promotion strategies, which were integrated, as a priority, into the post-2015-2030 agenda with the assistance of Technical and Financial Partners (TFPs). In this respect, support was provided to the Office of the Commissioner for Human Rights and Humanitarian Action, the National Human Rights Commission, the Office of the Ombudsman, national courts and civil society organisations. One of the planned reforms for the implementation of the Protocol will focus on protecting the rights of persons with disabilities.

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

The Mauritanian Constitution of 1991, as amended in 2006 and in 2012, enshrines in article 80 the principle that international treaties which have been duly ratified and promulgated have primacy over domestic legislation.

Mauritanian legislators have enacted several important laws aimed at aligning legislation with the provisions of relevant international human rights treaties. For instance, the CRPD has been fully domesticated in Mauritania through the enactment of Order 2006.043 of 23 November 2006 on Promotion and Protection of Persons with Disabilities and its two implementing decrees.²⁶

Case law

There are no cases where Mauritanian courts have had to consider the question of domestication of international law in its national legal system.

23 African Commission on Human and Peoples' Rights 'Mauritania: Initial report, 1986-2001' <http://www.achpr.org/states/mauritania/reports/1st-1986-2001/> (accessed 23 February 2018).

24 African Commission on Human and Peoples' Rights 'Concluding Observations of the African Commission on Human and Peoples' Rights on the Initial Report of the Islamic Republic of Mauritania adopted at its 31st ordinary session held at Pretoria, South Africa, 2-16 May 2002' http://www.achpr.org/files/sessions/31st/conc-obs/1st-1986-2001/achpr31_conc_staterrep1_mauritania_2002_eng.pdf (accessed 18 February 2018).

25 African Commission on Human and Peoples' Rights 'Mauritania: Tenth to fourteenth periodic report, 1986-2001' <http://www.achpr.org/states/mauritania/reports/10th-14th-2006-2014/> (accessed 23 February 2018).

26 Office of the High Commissioner for Human Rights 'Mauritania: Third to fifth periodic reports' (n 19) 8.

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

Order 2006.043 of 23 November 2006 on Promotion and Protection of Persons with Disabilities and its two implementing decrees were adopted after acceding to the CRPD. These concern the multi-partner council tasked with the advancement of persons with disabilities. The legislation further provides for the definition of disability (see 4.1).²⁷

3 Constitution

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

The Mauritanian Constitution contains no specific provisions addressing disability.²⁸

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

The Constitution contains no provisions that indirectly refer to disability, except for the general inclusion of the right to equality.²⁹

4 Legislation

4.1 Does Mauritania have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- **Order 2006.043 on Promotion and Protection of Persons with Disabilities and its two implementing decrees³⁰**

The Ordinance 2006-043 on the Protection and Promotion of the Rights of Persons with Disabilities directly addresses issues related to disability. Decree 2013-129/PM/ sets out measures to prevent disabilities and in article 7 defines the disabled person as 'any person who is unable to complete one or more activities of everyday life, as a result of permanent or occasional impairment of his mental or motor sensory functions of congenital or acquired origin'.

²⁷ As above.

²⁸ Mauritania's Constitution of 1991 with Amendments through 2012 https://www.constituteproject.org/constitution/Mauritania_2012.pdf (accessed 27 February 2018) (translated version).

²⁹ The Preamble and art 1 of Constitution of Mauritania (n 28).

³⁰ Office of the High Commissioner for Human Rights 'Mauritania: Third to fifth periodic reports' (n 19).

The Ordinance makes provision for special treatment of this group of persons. For instance, article 6 of the Ordinance on the Promotion and Protection of Persons with Disabilities requires that appropriate measures be taken to enable persons with disabilities to access and benefit from the general system of operation of society. According to article 24 of the Ordinance, local authorities and public and private bodies open to the public must adapt, in their area and according to international accessibility criteria, the buildings, roads, sidewalks, outdoor spaces, means of transport and communication. The latter should be done to enable persons with disabilities to access these areas, to move about, to use their services, and to benefit from their services.³¹

- **Civil Service Act 093-009**

This Act provides civil servants with old-age pensions and, if necessary, a lifetime disability annuity, as provided for under the retirement system of the civil service pension fund, once they have accumulated 35 years of service after the age of 18, or when they reach the age of 60.³²

- **Decree 009.98**

In order to comply with international standards, the Mauritanian government adopted Decree 009.98 of 10 October 1998. This Decree sets out the responsibilities of the Ministry of Health and Social Affairs and entrusts this Ministry with several tasks related to child health and survival. These tasks include the advancement of disabled persons.³³

- **Act 2015.033 on the Prohibition of Torture**³⁴

The Act on the Prohibition of Torture provides penalties regarding disability. Subjecting a child to torture or barbarous acts is punishable by six years' imprisonment. However, the penalty becomes 15 years' imprisonment if torture is repeatedly committed against the child or if it leads to mutilation or permanent disability.

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

Other legal mechanisms that indirectly address different forms of disability include the Personal Status Code, which prohibits early marriage; the Act making basic education compulsory from the age of six years; the Ordinance on the judicial protection of children; and the Decree on alternatives to detention for children in conflict with the law.³⁵

31 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

32 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CEDAW/C/MRT/1' (n 11).

33 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f8%2fAdd.42&Lang=en (accessed 1 March 2018).

34 Office of the High Commissioner for Human Rights 'Mauritania: Eighth to fourteenth periodic reports, CERD/C/MRT/8-14' (n 16).

35 Office of the High Commissioner for Human Rights 'Mauritania: Combined second and third periodic reports, CEDAW/C/MRT/2-3' (n 13).

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in Mauritania 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.

Nothing exists in this regard.

6 Policies and programmes

6.1 Does Mauritania have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability

- **Primary health-care policy**

This policy deals with health-related issues of disabled persons. The policy identifies disabled persons as priority targets. It is aimed at making essential quality care available and accessible to the majority of the population that need it, particularly disabled persons.³⁶

- **National Social Security Fund (CNSS)**

The Ministry of Civil Service and Labour manages the social security system in Mauritania. The Fund plays an important role in the social welfare area by providing disability benefits in the event of an accident at work or an occupational disease. In 1998 there were more than 3 300 disability allowances. This fund is inclusive of the old age and disability pensions and benefits paid in the event of death, with over 6 000 new disability cases expected every year.³⁷

- **National Orthopaedics and Rehabilitation Centre**

The National Orthopaedics and Rehabilitation Centre is composed of a team of physiotherapists and specialised doctors and its orthopaedic, physiotherapy and follow-up services enable it to provide rehabilitation and surgical operations for persons with physical disabilities. As from 2017 the Centre annually conducts 10 000 consultations, administers 4 000 physiotherapy sessions and provides 100 surgical operations. The Ministry of Social Affairs, Children and the Family is responsible for funding the hospitalisation, surgical operations and medical evacuation of children with disabilities who come from poor families. Those parents that are under the national social security system receive partial reimbursement of these costs by the Budget and Accounts Department of the National Social Security Fund.³⁸

36 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

37 Office of the High Commissioner for Human Rights 'Mauritania: Initial report and the second, third, fourth and fifth periodic reports, CERD/C/330/Add.1' (n 15).

38 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32). Office of the High Commissioner for Human Rights 'Mauritania: Addendum of follow-up report to the Concluding Observations on the combined second and third periodic reports' (n 14).

- **The social safety net programmes for the most vulnerable social groups**

The social safety net programmes involve the implementation of several projects and initiatives such as the Emel programme, school canteens and cash transfers. Cash transfers are utilised to care for and support destitute patients living with chronic diseases; promotes and protects the rights of children and persons with disabilities through financing of income-generating activities for hundreds of persons with disabilities; and to improve the functional independence of persons with disabilities through the free distribution of technical aids.³⁹

- **Directorate for Persons with Disabilities**

The Directorate for Persons with Disabilities was established by the Ministry of Social Affairs, Children and the Family. Numerous benefits for disabled children have emanated from work undertaken by the Directorate. This is evidenced by the fact that 337 deaf-mute children were enrolled in school; 300 wheelchairs and 800 crutches have been provided; and 400 white sticks or canes provided. Furthermore, 110 children with multiple disabilities have received care, with 38 individual micro-projects benefiting persons with various types of disabilities; including 18 micro-projects with 16 individual and two collective benefiting persons with various types of disability; and 58 micro-projects with 36 individual and 22 collective launched by associations for the benefit of their members. There are also 100 unemployed graduates with disabilities recruited by the civil service; 53 persons with various types of disability have received financial assistance; 200 housing plots were allocated to persons in need of housing; 103 persons with disabilities were assisted in Aleg, Kaédi, Kiffa and Néma; and 50 association officers trained in mounting and managing projects.⁴⁰

- **Service for the disabled within the Department of Social Affairs of the Ministry of Health and Social Affairs**

The government has established a service for the disabled in the Department of Social Affairs of the Ministry of Health and Social Affairs that deals with four categories of disabled persons: the blind, the deaf and dumb, the motor and mentally-disabled, and persons cured of leprosy. The service coordinates assistance for the disabled with a number of local non-governmental organisations (NGOs).⁴¹

- **Community-based rehabilitation programme**

In dealing with disabled children the Department of Social Affairs has adopted a strategy for their integration and development. The strategy involves a community-based rehabilitation (CBR) programme. The purpose of this programme is to enable disabled children to locally find the basic essential services they need to become autonomous and lead a full and decent life. Measures have thus been taken to provide access to education, training and health services. In addition, the CBR programme undertakes *ad hoc* measures to help the parents of disabled children in need to provide for their schooling and health care.⁴²

- **National Child Protection Strategy**

The National Child Protection Strategy makes provision for several activities aimed at protecting children with disabilities.⁴³

39 Office of the High Commissioner for Human Rights 'Mauritania: Addendum of follow-up report to the Concluding Observations on the combined second and third periodic reports' (n 14).

40 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

41 As above.

42 As above.

43 As above.

- **Poverty reduction strategy framework**

The poverty reduction strategy framework is aimed at ensuring that safety nets are available and accessible for the most deprived groups, which include 'children in situations of difficulty and those with physical and mental disabilities'.⁴⁴

- **Joint Decision 096/MSAS/MEN**

The Ministry of Health and Social Affairs and Ministry of National Education through Joint Decision 096/MSAS/MEN of 13 June 1985 set up an experimental basic education school for blind children. The school was upgraded to an institute to cater not only for the blind but also for the deaf and dumb. The Ministries involved are tasked with seconding teachers to this establishment.⁴⁵

6.2 Does Mauritania have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **Mauritania-UNICEF cooperation programme**

The Mauritania-UNICEF cooperation programme is aimed at promoting an environment conducive to the protection of children, in particular the most vulnerable children. Training has been provided to several journalists who in turn take part in awareness-raising campaigns. The civil society cyber forum and the platform of non-state actors provide a framework for consultation and dialogue between NGOs and the government.⁴⁶

- **National Human Rights Action Plan 2012-2020**

In October 2012 a National Human Rights Action Plan was launched by the Prime Minister's office.⁴⁷ The Action Plan sets out goals and objectives that, amongst other objectives, include reinforcing international co-operation on human rights; strengthening the national human rights framework; protecting and safeguarding civil and political rights; and protecting and securing the rights of vulnerable persons, including persons with disabilities.⁴⁸

7 Disability bodies

7.1 Other than the ordinary courts and tribunals, does Mauritania have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.

- **The National Council for Children**

The National Council for Children is an advisory body that has been set up to assist the state Secretariat. It is presided over by an adviser to the Prime Minister and is composed of representatives of the chief ministries concerned with children's issues, as well as representatives of major organisations of civil society. Its

44 As above.

45 As above.

46 Office of the High Commissioner for Human Rights 'Mauritania: Third to fifth periodic reports, CRC/C/MRT/3-5' (n 19).

47 Office of the High Commissioner for Human Rights 'Human Rights Council – Mauritania's National Report, A/HRC/WG.6/17/MUS/1' <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=52679d304&skip=0&query=legislation&coi=MRT&querysi=disability&searchin=fulltext&sort=relevance> (accessed 2 March 2018).

48 As above.

functions include proposing measures to protect children from neglect, exploitation and the different forms of handicap and to strengthen the capacity of families to meet the needs of their children. In addition, the Council proposes measures to promote the care of disabled children and/or delinquent or abandoned children, and to strengthen the role of development associations in taking care of such children and furthering their education and training in cooperation with the departments concerned. The Council holds sessions bi-annually and submits a report at the end of each year to the Secretariat of State for the Status of Women in which it assesses the situation of children and puts forward proposals for their advancement.⁴⁹

• **The Ministry of Social Affairs, Children, and the Family (MASEF)**

The Ministry of Social Affairs, Children, and the Family (MASEF) is an institution tasked with monitoring and coordinating state policy on the promotion and protection of the rights of persons with disabilities.⁵⁰ It includes a central management that is dedicated only to disabled persons. The missions of the department include coordination and implementation of legislation; developing and implementing strategies of protection; developing and executing programmes of rehabilitation and reintegration; supporting professional training; and setting up a database on disabled people.⁵¹ MASEF is also accessible to persons with disabilities to file complaints. In 2014 MASEF received two complaints, four fewer than in 2013. In addition, MASEF oversees social reintegration programmes for persons with disabilities.⁵²

7.2 Other than the ordinary courts or tribunals, does Mauritania have any official body that, though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

See question 8 below.

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

8.1 Does Mauritania have a Human Rights Commission or an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission or the Ombudsman or Public Protector of Mauritania has ever addressed issues relating to the rights of persons with disabilities.

- Mauritania has the National Commission of Human Rights. This institution was established pursuant to article 97 of the Mauritanian Constitution. The Commission

49 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

50 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

51 As above.

52 Bureau of Democracy, Human Rights and Labour 'Country Reports on Human Rights Practices for 2014: Mauritania' <https://www.state.gov/j/drl/rls/hrrpt/2014humanrightsreport/index.htm#wrapper> (accessed 2 March 2018).

is an independent advisory body with observation, early warning and mediation functions that assesses compliance with human rights. The Commission can provide, at the request of the government or on its own initiative, an advisory opinion on general or specific issues, relating to the promotion and the protection of human rights to respect for individual and collective freedoms.⁵³ The Commission is also responsible for dealing with reported violations of human rights and must take all the appropriate steps, in cooperation and coordination with the competent authorities.⁵⁴

- The Mauritania Commissioner for Human Rights, Poverty Alleviation and Integration, established by Decree 089/98 of 2 July 1998,⁵⁵ is the result of government's efforts to ensure the enjoyment of rights and the exercise of freedoms and improving the living conditions of the population in general and of the poorest, in particular. The programmes and policies falling under the mandate of the Office of the Commissioner include promoting and protecting human rights, and combating poverty and providing employment for members of vulnerable groups, which includes persons with disabilities.⁵⁶ The Office of the Commissioner has also been involved in both rural and urban areas to set up safety nets to assist in the integration of disabled persons seeking work.⁵⁷

The National Commission for Human Rights, Humanitarian Action and Civil Society, established under Decree 247-2008/PM, is administratively and financially autonomous.⁵⁸ In terms of the Decree, the Commission's mandate involves drafting and implementing the national policy for the promotion, defence and protection of human rights through the promotion and dissemination of information on human rights, and the protection and defence of human rights.⁵⁹ The Commission also drafts and implements action plans and programmes for vulnerable social groups in order to better promote and protect their rights. In addition, the Commission is tasked with investigating cases of violations of human rights and humanitarian law that are submitted to it by other institutions, including the National Human Rights Commission.⁶⁰

53 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

54 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, E/C.12/MRT/1' (n 17).

55 Office of the High Commissioner for Human Rights 'Mauritania: Initial report and the second, third, fourth and fifth periodic reports, CERD/C/421/Add.1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2f421%2fAdd.1&Lang=en (accessed 2 March 2018).

56 As above.

57 As above.

58 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, E/C.12/MRT/1' (n 17).

59 As above.

60 As above.

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

9.1 Does Mauritania have organisations that represent and advocate the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

Mauritania does have organisations or associations that represent and advocate the rights and welfare of persons with disabilities.⁶¹ These associations are the following:

- **Association promotion et enseignement des aveugles**

This is the Promotion and Teaching of the Blind Association and the grant received by the association was MRO 600 000.

- **Association Mauritanienne des déficients auditifs et de la voix**

This is the Hearing Aids and Voice of the Weak Mauritanian Association, and it received a grant of MRO 1 700 000.

- **Association Nationale des aveugles de Mauritanie**

This is the National Association of the Blind of Mauritania, and it received a grant of MRO 2 383 000.

- **Association mauritanienne des handicapés de la lèpre**

This is the Mauritanian Association of the Handicapped and Leprosy, and it received a grant of MRO 779 500.

- **Assistance des nécessiteux**

This is the Assistance to the Needy Association, and it received a grant of MRO 20 000.

- **Association des femmes handicapées pour la solidarité**

This is the Association of Women with Disabilities for Solidarity and it received a grant of MRO 790 000.

- **Regroupement Mauritanien des femmes handicapées**

This association deals with women with disabilities, and it received a grant of MRO 812 055.

- **Association des diplômés handicapés**

This is the Association of Disabled Graduates, and it received a grant of MRO 992 911.

- **Association Mauritanienne Assistance des Handicapés**

This is an association that provides assistance to the disabled, and it received a grant of MRO 3 641 020.

- **Association mauritanienne des hémophiles**

This is the Mauritanian Association of Haemophiliacs, and it received a grant of MRO 150 000.

61 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, E/C.12/MRT/1' (n 17).

- **Association mauritanienne pour l'insertion des aveugles**

This is the Mauritanian Association for the Integration of the Blind, and it received a grant of MRO 728 000.

- **Association mauritanienne secours des lépreux**

This is an association that assists with the care of lepers, and it received a grant of MRO 200 000.

- **Association développement social en Mauritanie**

This is the Mauritanian Association of Social Development, and it received a grant of MRO 2 050 000.

- **Assistance des handicapés pour le développement**

This association deals with the provision of assistance to disabled persons for the purposes of their development, and it received a grant of MRO 150 000.

- **Forum des sourds**

This is the Forum of the Deaf, and it received a grant of MRO 2 830 000.

- **Association des jeunes handicapés aveugles**

This is an association of blind disabled youth, and it received a grant of MRO 553 500.

- **Organisation communautaire pour la promotion des handicapés**

This is a community organisation for the promotion of disabled persons, and it received a grant of MRO 400 000.

- **Organisation insertion des albinos**

This is an organisation for the integration of persons with albinism into society, and it received a grant of MRO 150 000.

- **Association mauritanienne pour le secours de l'enfant handicapé**

This is the Mauritanian association for the rescue of disabled children, and it received a grant of MRO 460 000.

- **Association mauritanienne pour la Promotion des Handicapés moteurs**

The association promotes the interests of disabled persons, and it received a grant of MRO 1 163 000.

- **Secours des handicapés**

The association deals with the relief of people with disabilities, and it received a grant of MRO 150 000.

- **Association volonté et développement**

This is the willingness and development association and it received a grant of MRO 690 000.

- **Association appui à l'éducation des enfants sourds muets et handicapés**

This is an association that provides support for the education of deaf, dumb and disabled children, and it received a grant of MRO 510 000.

- **Association Aziza**

This association received a grant of MRO 150 000.

- **Association mauritanienne pour la santé et les handicapés**

This is the Mauritanian Association for Health and the Disabled, and it received a grant of MRO 150 000.

- **Association mauritanienne des femmes handicapées**

This is the Mauritanian Association of Women with Disabilities, and it received a grant of MRO 600 000.

- **Association mauritanienne pour l'insertion des enfants handicapés à l'école**

This is the Mauritanian Association for the Integration of Children with Disabilities at School, and it received a grant of MRO 784 000.

- **Association ressortissants des mahadras**

This is the National Association of the Mahadras and it received a grant of MRO 200 000.

- **RBC Handicapés**

This is the RBC disabled association, and it received a grant of MRO 150 000.

- **Association développement des personnes handicapées**

This is the association that promotes the development of people with disabilities and it received a grant of MRO 200 000.

- **Association Besma**

This association received a grant of MRO 576 400.

- **Association Elmoustakbel**

This association received a grant of MRO 150 000.

- **Association secours enfants**

This is a child relief association and it received a grant of MRO 150 000.

- **FEMANPH**

The Mauritanian Federation of National Associations of People with Disabilities (Fédération Mauritanienne des Associations Nationales de Personnes Handicapées) has 45 associations, with 18 specifically focusing on disability and eight specialising in other themes, such as education. The association received a grant of MRO 6 640 000.

- **FEMHANDIS**

The Mauritanian Federation of Sports for the Disabled (Federación Mauritana de Deportes para las Personas Discapacitadas) received a grant MRO 500 000.

- **Association mauritanienne pour l'Intégration et la Réhabilitation des Enfants et Adolescents Déficients Intellectuels (AMIREADI)**

This is the Mauritanian Association for the Integration and Rehabilitation of Children and Adolescents with Intellectual Disabilities. The association received a grant of MRO 6 443 355. On the International Day of Persons Living with Disabilities, 3 December 2015, the United Nations High Commissioner for Refugees in collaboration with its partners Association pour la Lutte contre la Pauvreté et le sous-développement (ALPD) and AMIREADI held a 'questions and answers' session for the urban refugees committee and the representatives of refugees living with disabilities in Nouakchott.⁶² The session was aimed at strengthening the inclusion of persons with disabilities and promote their full and equal enjoyment of rights and freedoms in Mauritania. It also gave urban refugees

62 United Nations High Commissioner for Refugees 'UNHCR Operational Update – Mauritania' <https://www.humanitarianresponse.info/system/files/documents/files/unhcrmauritania-operationalupdate-december20151.pdf> (accessed 2 March 2018).

living with disabilities an opportunity to discuss gaps and gather information about existing services for people with disabilities in Mauritania.⁶³

9.2 In the country's region are DPOs organised/coordinated at national and/or regional level?

More than 6 028 NGOs operate nationally in Mauritania and 57 of them operate internationally.⁶⁴ The civil society cyber forum and the platform of non-state actors, as stated in question 6.2 above, provide the framework for consultation and dialogue between NGOs and the government.

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

The involvement of NGOs in the implementation of disability rights takes place through several measures. One measure is through the activities of the Multi-Sectoral National Council for the Promotion of People with Disabilities, a Council that assists the Ministry of Social Affairs, Childhood and the Family in terms of coordination and technical control of different interventions. Such interventions include the rehabilitation and integration of persons with disabilities. In carrying out its duties, the Council may appeal to any person or organisation whose participation it deems useful. The implication of this is that the Council may request to work with relevant NGOs in achieving its objectives.⁶⁵

Another measure is through the activities of the Interdepartmental Technical Committee. This Committee is responsible for the development of the state reports relating to international legal instruments, and one of the key requirements is that before it finalises or validates the report, it must take into account the recommendations of the civil society and parliamentary bodies (see 9.5 below).⁶⁶

The Department of Social Affairs of the Ministry of Health and Social Affairs also involves a number of local NGOs in implementing its mandate (refer to question 6.1 for further discussion).

The National Council for Children is also composed of representatives of major organisations of civil society (refer to question 7.1 for further discussion).

Finally, the dissemination of human rights instruments such as the CRPD ratified by Mauritania involves sustained awareness campaigns carried out by NGOs.⁶⁷ That may explain why the NGOs working in the field of human rights have budgets allocated to them annually (see question 9.1 above for the 2015 budget allocations to various associations).

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

In Mauritania, several civil society organisations are active in issues concerning persons with disabilities. Each organisation usually focuses on a specific type of

63 As above.

64 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

65 As above.

66 As above.

67 As above.

disability (see question 9.1 above for a list of various associations dealing with issues of disability). These associations deal with persons with disabilities generally although, to the extent that their resources allow, they also engage in targeted advocacy for children with disabilities.⁶⁸

For instance, the Association for Social Development in Mauritania has opened a workshop that makes tricycles and wheelchairs for women and children living with permanent physical disabilities. Another NGO, *Terre des Hommes*, covers the costs of treatment and medical evacuation for some children with disabilities upon request by the parents.⁶⁹

Another NGO, The Health and Development of Women and Children with Disabilities, with support from the Commission for Human Rights, launched a programme focused on reintegrating women and children back into active life following a study that was conducted on street begging by persons with disabilities.⁷⁰ The study had identified 110 individuals engaging in this activity, some of them being children. The NGO has also offered financial assistance to 25 unemployed graduates with disabilities.⁷¹ In addition, it has supported vocational training for blind persons, thereby providing them with an alternative to street begging.⁷²

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

The identified barriers include the lack of human and financial resources, and low specialisation of actors dealing with human rights issues.⁷³

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

Mauritania has numerous NGOs that are hands-on in tackling matters concerning persons with disabilities. A ‘best practice model’ by far is the willingness of Mauritians to fund NGOs that actively partake in the promotion of the human rights of persons with disabilities. This not only assists the NGOs, but also motivates them to continue assisting government. For instance, in 2015 a total amount of MRO 38 743741 was allocated to 37 associations. Another ‘best practice model’ is the involvement of NGOs in the process of drafting reports. Recommendations by civil society usually are taken into account during this process (see question 9.3 above). Even though the recommendations are non-binding on the inter-departmental committee, they certainly assist the committee in identifying gaps and challenges pertaining to issues relating to persons with disabilities since they work at grass roots level.

68 Office of the High Commissioner for Human Rights ‘Mauritania: Initial report, CRPD/C/MRT/1’ (n 4).

69 Office of the High Commissioner for Human Rights ‘Mauritania: Third to fifth periodic reports, CRC/C/MRT/3-5’ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMRT%2f3-5&Lang=en (accessed 24 February 2018).

70 As above.

71 As above.

72 As above.

73 Office of the High Commissioner for Human Rights ‘Mauritania: Initial report, CRPD/C/MRT/1’ (n 4).

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

See questions 9.4 above.

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

The research has shown areas for capacity building and support in relation to research (see question 9.5 and question 9.6 below).

9.9 Are there recommendations that come out of your research as to how DPOs might be more comprehensively empowered to take a leading role in the implementation processes of international or regional instruments?

Yes.

- proactive targeting of DPOs by the Multi-Sectoral National Council throughout the implementation of the 2016-2020 action plan;
- continuous capacity building of DPOs on the CRPD by government agencies involved with reporting and implementing measures on the rights of disabled persons;
- broad collaboration amongst DPOs and between DPOs and other governmental organisations tasked with dealing with human rights of persons with disabilities;
- resourcing DPOs to conduct research that can provide evidence based information; and
- organising a specific national survey on persons with disabilities in order to have reliable and comprehensive data on this vulnerable segment of the population.

9.10 Are there specific research institutes in the region where Mauritania is situated that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

None.

10 Government departments

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

See question 7.1 for a discussion on the Ministry of Social Affairs, Children and the Family (MASEF) and question 8.1 for a discussion on the National Commission

for Human Rights, Humanitarian Action and Civil Society. In addition to these institutions, the Mauritanian government also put in place the MultiSectoral National Council that is also responsible for promoting and protecting the rights of persons with disabilities.

The Multi-Sectoral Council is entrusted with assisting the Ministry of Social Affairs, Childhood and the Family in terms of coordination and technical control of different interventions to the rehabilitation and integration of persons with disabilities.⁷⁴ Apart from assisting, the National Council can give an opinion on issues relating to the promotion of people with disabilities and the prevention of disability submitted by the Department.⁷⁵ In accordance with its mission of the promotion of persons with disabilities, the Council has developed a five-year action plan (2016-2020) that revolves around several areas concerning persons with disabilities.⁷⁶ In terms of the Council's May 2016 report on the 2016-2020 action plan, the allocated budget for implementation purposes is MRO 1 049 750 000.⁷⁷

11 Main human rights concerns of people with disabilities in Mauritania

11.1 Contemporary challenges of persons with disabilities in Mauritania (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs.

There are no reports of governmental or societal discrimination against persons with disabilities in Mauritania.

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**

In Mauritania's initial report of January 2001 to the CRC Committee, government reported that the National Council for Children was tasked with proposing measures to protect children from neglect and ways to strengthen the capacity of families to meet the needs of their children.⁷⁸ In order to cater for the latter objective, the Department of Social Affairs adopted a strategy known as the Community-Based Rehabilitation Programme. This programme aims at helping the parents of disabled children in need to provide for their schooling and health care, and to enable disabled children to find locally the basic essential services they need in order to become autonomous and lead a full and decent life.⁷⁹ However, the Committee in its Concluding Observations to Mauritania, while noting the community-based rehabilitation programme, expressed concerns about the large number of children with disabilities who remain institutionalised, and the general

74 As above.

75 As above.

76 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (translated version).

77 As above.

78 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

79 As above.

lack of resources and specialised staff for these children and the absence of support for their families.⁸⁰

- **Access to social security**

The competence to regulate issues of social security is the exclusive function of the legislature in terms of article 57 of the Mauritanian Constitution. The legislature promulgated the Labour Code and the Act establishing the Civil Pension Fund.⁸¹ For purposes of implementing these laws, the government established various social security systems. These systems are managed by the National Social Security Fund for civil servants (see question 6.1 above); the health insurance managed by the National Health Insurance Fund for civil servants, military personnel and parliamentarians; and the National Occupational Health Office that is tasked with promoting and maintaining the physical, mental and social welfare of workers. Children that are dependants of persons insured under one of these systems benefit from social security.⁸²

In its February 2012 combined second and third periodic report to the CEDAW Committee, the Mauritanian government reported that a woman duly certified as permanently totally incapacitated is entitled to a total disability pension equivalent to 85 per cent of the average monthly wage, increased by 50 per cent if she requires the assistance of a third party. A woman who is permanently partially incapacitated due to an industrial accident is entitled to a disability pension if she is at least 15 per cent disabled. Depending on the degree of disability, the amount of the permanent partial disability pension is proportional to the pension to which the victim would have been entitled had she been totally incapacitated. Where the degree of disability is less than 15 per cent, a lump sum benefit is paid.⁸³

- **Access to public buildings**

Article 24 of Order 2006.043 requires the state, local governments and public and private institutions to take measures that ensure that buildings are accessible to persons with disabilities (see 4.1 for a discussion).⁸⁴ In terms of the decree, a building is deemed accessible to persons with disabilities if they can enter, move easily, and benefit from all the functions offered by the building or the designed installations.⁸⁵

In terms of the Council's May 2016 Report on the 2016-2020 action plan, most existing public buildings such as mosques, schools, health centres, hospitals, departments, fields, and houses of shows, are not accessible to people with reduced mobility.⁸⁶ However, projects exist aimed at constructing ramp access, disabled-friendly office doors, bathrooms and sidewalks for buildings in Nouakchott and in the Wilaya. The estimated budget allocated for the implementation of this plan is MRO 40 000 000.⁸⁷

80 Office of the High Commissioner for Human Rights 'Mauritania: Concluding Observations on the initial report at its 723rd and 724th meetings, CRC/C/15/Add.159' [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.159&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=_CRC%2fC%2f15%2fAdd.159&Lang=en) (accessed 3 March 2018).

81 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

82 Office of the High Commissioner for Human Rights 'Mauritania: Third to fifth periodic reports, CRC/C/MRT/3.5' (n 19).

83 Office of the High Commissioner for Human Rights 'Mauritania: Combined second and third periodic reports, CEDAW/C/MRT/2-3' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/413/87/PDF/G1341387.pdf?OpenElement> (accessed 22 February 2018).

84 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

85 As above.

86 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (n 79).

87 As above.

- **Access to public transport**

As in the case of access to public buildings, article 24 of Order 2006.043 requires government to provide means of public transportation to the disabled person.⁸⁸

It was reported in the 2016-2010 action plan that decent access for persons with disabilities to the public means of transport is not available. However, government has planned campaigns for the promotion of accessibility for people with disabilities to transportation with an emphasis on ease of access and security for the disabled. An estimated budget of 3 000 000 has been allocated to achieve this.⁸⁹

Awareness campaigns on access to buildings and transport targeting the different actors concerned by the issue of accessibility have been allocated an estimated budget of MRO 10 000 000.⁹⁰

- **Access to education**

Act 2001-054 of 19 July 2001 makes primary education mandatory and establishes the relevant rules, as well as the penalties applicable in the case of a failure to respect these rules. Article 1 of the Act makes primary education mandatory for all Mauritanian children 'of both sexes, between 6 and 14 years of age, for a period of at least six years'.

From the Mauritanian initial report to the CRC Committee, measures have been taken to provide access to education, training and health services to children with disabilities.⁹¹ In addition, the community-based rehabilitation programme undertakes *ad hoc* measures to help the parents of disabled children in need to provide for their schooling and health care.⁹² The latter was supplemented by a Joint decision 096/MSAS/MEN of 13 June 1985 of the Ministry of Health and Social Affairs and Ministry of National Education, which set up an experimental basic education school for blind children (see question 6.1 above). The Mauritanian government in the same report notes some shortcomings in terms of education. These include low school enrolment rates among girls as compared to boys; sharp regional disparities in school enrolment; the mother and child situation; and assistance to the disabled and to children in difficulties.⁹³

The government has also set up a centre of training and social promotion of children with disabilities in line with Decree 142/2014. The centre's missions include the training of children with special educational needs in relation to a disability or disabling illness, and the training of trainers in sign language and Braille writing. The centre is also involved with the development of modules for teaching and management of children with disabilities; the strengthening of the capacities of teachers for integrated education; and the initiation of parents of blind children to Braille writing.⁹⁴

With all the efforts listed above, the levels of education of disabled people are as follows: Nearly one in two persons with disabilities is without education; only 12,9 per cent have undergone primary education; only 6,7 per cent have a general

88 As above.

89 As above.

90 As above.

91 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

92 As above, Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRC/C/8/Add.42' (n 32).

93 Same as above.

94 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

secondary education; and 56,07 per cent of women living with disabilities have no level of education compared to 44,09 per cent among men.⁹⁵

In terms of the 2016-2010 implementation action plan, there are teaching materials adapted to the needs of 1 500 children with sensory, visual and intellectual disabilities; 200 teachers have received training; and 24 specialised teaching classes have been established.⁹⁶

- **Access to vocational training**

Article 4 of Act 98-007 of 20 January 1998 on technical and vocational training stipulates that technical and vocational training is the responsibility of the state. The state guarantees equal access for all vocational training. Special arrangements must be made for disabled persons.

In 1996 the Association for the Mentally Handicapped opened a training centre for mentally-handicapped children and adolescents. The activities in the centre include child guidance, plastic arts, sewing and embroidery, cookery and activities involving psychomotor skills. There are 32 mentally-handicapped young people comprising eight girls and 24 boys at the Centre.⁹⁷ Training is provided by six specialised Mauritanian educators.

The 2016 report on the 2016-2020 action plan revealed that persons with disabilities face numerous problems in vocational training such as the lack of training facilities available. An integrated vocational training complex that is accessible to different categories of disability has been built and equipped, with an estimated budget of MRO 60 000 000,. Ten existing training centres are available and there are five supported initiatives with an estimated budget of MRO 10 000 000.⁹⁸

- **Access to employment**

The Mauritanian government adopted Decree 2015/062 relating to the recruitment of 5 per cent quota of people with disabilities, with the aim of guaranteeing equal access to employment opportunities. The government has recruited more than 100 unemployed graduates of persons with disabilities in the public service and has created a Multi-Sectoral Council for the promotion of persons with disabilities.⁹⁹ Despite these recruitments, the majority of people with disabilities are self-employed (59,7 per cent). A further breakdown reveals that disabled persons are mostly temporary private employees (14,8 per cent) or public employees (13 per cent). The lowest proportions are found among caregivers (3,8 per cent), employers (3,5 per cent) and apprentices (0,6 per cent).¹⁰⁰ Technical and vocational training plays an important role as it prepares pupils for employment and the furthering of their technical or vocational education.

The 2016-2020 implementation action plan report outlined challenges regarding employment faced by persons with disabilities. The majority of persons with disabilities face discrimination in employment, and work stations are not equipped with proper offices and doors, measures that are central to their needs. In addition, they do not have access to credit, a factor that is essential for facilitating

95 As above.

96 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (n 79).

97 As above.

98 As above.

99 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

100 As above.

their integration into active life.¹⁰¹ To address these issues, government organised open days on the employment of persons with disabilities in Mauritania, resulting in the sensitisation of 200 public and private operators.¹⁰²

- **Access to recreation and sport**

There are associations dealing with sport issues pertaining to persons with disabilities. These associations are governed by Law 64.098 of 9 June 1964 amended by Law 73.007 of 23 June 1973 and by Law 73.157 of 2 July 1973.¹⁰³ On request, the associations can benefit from tax exemptions on equipment to carry out their activities, based on a declaration that demonstrates the public usefulness of such equipment.¹⁰⁴

The 2016-2020 implementation action plan report indicates the following as gaps: a lack of sports infrastructure; a lack of technical staff and specialised equipment in the field of sports for persons with disabilities and recreation; and a lack of means for the operation and management of the disability sport federation.¹⁰⁵ To address these challenges an estimated budget of MRO 10 000 000 was allocated for training supervisors for the development of different sports for persons with disabilities. The Multi-Sector National Council managed to organise 10 cultural activities and 10 leisure activities that were carried out for the benefit of persons with disabilities. In terms of organising sport competitions, with an estimated budget of MRO 6 000 000 the Council managed to organise 20 supported national competitions.¹⁰⁶ For purposes of organising specific equipment for persons with disabilities for the different sports, the estimated budget allocated for this purpose was MRO 20 000 000.¹⁰⁷

- **Access to justice**

Article 6 of the Ordinance on the promotion and the protection of persons with disabilities requires the Mauritanian government to take appropriate measures to enable persons with disabilities access to the general system for the operation of the society. Within this framework, the Department of Justice has organised several workshops for the training of civil servants in the justice sector in order to equip them with the skills to assist persons with disabilities with easier access to the justice system. In addition to physical access, intellectual access is also made available through the offices of litigants who provide their services to persons with disabilities. The aspect of financial access is also taken into account, allowing each person suffering from a disability and who is destitute to benefit from legal aid.¹⁰⁸

The Department of Justice periodically organises information seminars and awareness campaigns for all public servants working in the field of justice including court officials and the police. The CRPD and other relevant laws are made available to the target audience.¹⁰⁹

Persons with disabilities are provided with legal aid during and after a trial in the execution of decisions by the courts. They also receive legal assistance in civil

101 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (n 79) ; Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

102 As above.

103 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

104 As above.

105 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (n 79).

106 As above.

107 As above.

108 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CRPD/C/MRT/1' (n 4).

109 As above.

matters at any stage of the process, whether appearing in court as a plaintiff or defendant. Persons with disabilities are also granted assistance in terms of costs.¹¹⁰ Legal aid is also granted for the execution of judgments and for the exercise of the right to appeal.¹¹¹

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Mauritania?

Article 3 of the Mauritanian Constitution provides:

The suffrage can be direct or indirect, in the conditions specified by the law. It is always universal, equal, and secret. All the citizens of the Republic, of majority of both sexes, enjoying their civil and political rights, are electors. The law favours the equal access of women and of men to the electoral mandate and elective functions.

Although article 3 applies to everyone, persons with disabilities do not benefit from this provision in terms of their right to vote, to self-represent and to access political and administrative responsibilities of the country. In terms of the 2016-2020 plan of action, persons with disabilities do not have access to voting stations; the ballots are not codified in Braille in order to accommodate persons with visual impairments to enable them to also vote in secret; and there is a lack of legal representation for persons with intellectual disabilities.¹¹²

The Multi-Sector National Council has an estimated budget of MRO 6 000 000 for organising workshops to create awareness of politicians on self-representation and highlight the participation of people with disabilities. In this regard three workshops have been organised.¹¹³

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in Mauritania?

With regard to education and other social services, see question 11.2 above.

With regard to discussions on health, see question 6.1 above.

In terms of the 2016-2020 action plan, the Multi-Sector National Council reported that control programmes on blindness, mental health, a national orthopaedic and functional rehabilitation centre, and the granting of a cash transfer for taking charge of the health of children with multiple disabilities have been put in place.¹¹⁴ However, gaps were also highlighted. These include a lack of support specific to persons with disabilities, and a lack of access of women to reproductive health care.

To breach these gaps, the following measures were undertaken as outlined in the 2016-2020 action plan:

- An estimated budget of MRO 5 000 000 was allocated for purposes of conducting training sessions for doctors and nurses for the better management of the Hemophilia disease, through which 50 doctors and 100 nurses were trained.¹¹⁵

110 As above.

111 As above.

112 Conseil National Multisectoriel charge de la promotion des personnes handicapées 'Plan quinquennal pour la promotion des personnes handicapées 2016/2020' (n 79).

113 As above.

114 As above.

- An amount of MRO 20 000 000 was allocated for the training of specialists in the field of manufacturing devices and technical assistance for motor-disabled and visually-impaired persons. Consequently, 20 prosthetics and 20 technical wheelchairs, canes and crutches were manufactured.
- An estimated amount of MRO 30 000 000 was made available for the purposes of training physiotherapists for the rehabilitation of disabled persons, and 20 physiotherapists have been trained.
- The estimated amount of MRO 4 000 000 was also allocated for holding campaigns for women's free access to reproductive health care.¹¹⁶
- Persons with disabilities receive free prosthetics and orthotics.
- For the training of speech therapists and prosthetics for hearing disabilities, an estimated amount of MRO 20 000 000 was allocated, and 10 speech pathologists together with 10 prosthetists have been trained.

11.5 Specific categories experiencing particular issues/ vulnerability:

- **Women with disabilities**

In its combined second and third periodic report to the CEDAW Committee, the Mauritanian government stated that women's poverty takes on different forms. Problems related to a lack of employment or lack of ownership of factors of production relating to land and livestock resulted in health problems such as disability or a lack of access to medical care.¹¹⁷

In their 2017 initial report on CRPD, it was stated that 56,07 per cent of women living with disabilities have no level of education compared to 44,09 per cent among men.

- **Children with disabilities**

For gaps regarding children with disabilities, see question 11.2.

- **Other (for example, indigenous peoples)**

In October 2015 Mauritania submitted its initial state report to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹¹⁸ Prior to submitting its initial report, the Mauritanian government was presented with a list of issues to address in the report. These included the role and responsibilities of recruiters and their possible joint responsibility with the employer for claims and liabilities that may arise in connection with the implementation of the employment contract, including salaries and disability, death and repatriation allowances.¹¹⁹ However, Mauritania has not responded to this question, as evidenced by the initial report.

115 As above.

116 As above.

117 Office of the High Commissioner for Human Rights 'Mauritania: Combined second and third periodic reports, CEDAW/C/MRT/2-3' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/413/87/PDF/G1341387.pdf?OpenElement> (accessed 22 February 2018).

118 Office of the High Commissioner for Human Rights 'Mauritania: Initial report, CMW/C/MRT/1' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/271/03/PDF/G1527103.pdf?OpenElement> (accessed 22 February 2018).

119 Office of the High Commissioner for Human Rights 'List of issues prior to the submission of the initial report of Mauritania, CMW/C/MRT/QPR/1' http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CMW%2FC%2fMRT%2fQPR%2f1&Lang=en (accessed 4 March 2018).

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Mauritania at the moment?

Refer to question 11 above. In addition, the Multi-Sector National Council highlighted the issue of general census in Mauritania by noting that the official statistics of the general 2013 census highlights that 0,96 per cent of the entire population are persons with disabilities. However, according to the Council for this census, no specific survey was conducted regarding persons with disabilities. Therefore, the Council stated the importance of organising a specific national survey on persons with disabilities in order to have reliable and comprehensive data on this population.

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

Government has undertaken the following laws:

- the adoption of Order 2006/043 relative to the promotion and protection of persons with disabilities;
- the ratification in 2012 of the International Convention on the Rights of Persons with Disabilities;
- the adoption in 2015 of Decree 2015/062, which relates to the recruitment quota for disabled persons (5 per cent);
- Act 2015.033 on the Prohibition of Torture, which stipulates a penalty of 15 years' imprisonment for acts of torture against a child, especially if it leads to mutilation or permanent disability.

However, a number of reforms still need to be undertaken in order to ensure that persons with disabilities enjoy quality access to available rights in Mauritania. These include:

- The quota for employment has to be increased. The current 5 per cent is too small to make any effective impact on reducing the levels of unemployment among persons living with disabilities in Mauritania. It is suggested that this figure be raised incrementally every five years. The enabling legislation to this effect should also apply to the private sector in this respect.
- There is a need for enabling laws that make the construction of disabled-friendly facilities (ramps, lifts, and so forth) mandatory in public buildings.
- Laws governing the conduct of census have to be amended to allow for organising specific national surveys of persons living with disabilities. The purpose of this is to have comprehensive data and an understanding of the issues affecting this vulnerable segment of the population.
- National education policies and legislation should be further enabled to encourage the training of special needs teachers. In this respect, bursaries and scholarships should be made available to interested candidates, with financial incentives provided for employed educators in this field.
- The government should make more resources available for social welfare grants to persons living with disabilities.
- Civil society should be well integrated into government processes around the drafting and implementation of policies on persons living with disabilities. This should include their mandatory inclusion in the activities of government departments tasked with reporting to international bodies and other national

activities. This will also require a statutory provision that stipulates financial and capacity development programmes for civil society.

- There is a need for the development of national programmes that provide specific assistance to schools and NGOs operating in rural areas that are involved in educating and providing special care for the disabled.

RWANDA

Olwethu Sipuka

1 Population indicators

1.1 What is the total population of Rwanda?

According to the fourth Rwanda Population and Housing Census, Rwanda has a total of 10 515 973 inhabitants.¹

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

The fourth Rwanda Population and Housing Census was used to obtain data on the prevalence of disability in Rwanda. The census questionnaire was used to collect data. This questionnaire contained a set of questions meant to obtain information about households with certain types of disability. Disabilities included impairments of sight, hearing, speaking, walking/climbing, learning/concentrating, as well as other disabilities.²

1.3 What is the total number and percentage of people with disabilities in Rwanda?

According to the fourth Rwanda Population and Housing Census (2012), 446 453 persons aged five years and over were reported to have disabilities.³

1 National Institute of Statistics of Rwanda (NISR) <http://www.statistics.gov.rw/survey-period/fourth-population-and-housing-census-2012> (accessed 15 February 2018).

2 As above.

3 As above.

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

According to the fourth Rwanda Population and Housing Census, there are 225 303 women (4,8 per cent) with disabilities in Rwanda.

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

No statistics were available on children with disabilities. The available statistics reflect data of persons aged five years and over.

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

The most common type of disability in Rwanda is that of walking or climbing, with a prevalence rate of 3 per cent among the population aged five years and over. The other forms of disability with the number of residents are as follows:⁴

- sight – 57 213
- hearing – 33 471
- speech – 16 256
- walking/climbing – 220 130
- learning/concentrating – 84 133
- other disabilities – 66 696
- types not stated – 1 967

2 Angola's international obligations

2.1 What is the status of the United Nation Convention on the Rights of People with Disabilities (CRPD) in Rwanda? Did Rwanda sign and ratify the CRPD? Provide the date(s).

Rwanda ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) on 15 December 2008.⁵

⁴ As above.

⁵ The Republic of Rwanda. 'Initial Report of Rwanda on the Implementation of the Convention on the Rights of Persons with Disabilities'. (2015) http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/Initial_report_UNCRPD_-_Final_Version_08th_April_2015.pdf (accessed 16 February 2018).

- 2.2 If Rwanda has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Rwanda 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?**

Rwanda's first report was due on 15 January 2011. The Ministry of Justice was responsible for the submission of the report. The Ministry has a department of International Justice and Judicial Cooperation which was tasked to lead the report-drafting process. Rwanda did submit its report, but the report has not yet been considered. This depends on the agenda of the Committee on the Rights of Persons with Disabilities.

- 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 Rwanda 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?**

Rwanda has acceded to, ratified or approved several key international and regional instruments on human rights and their additional protocols, in particular the Universal Declaration of Human Rights (Universal Declaration); the African Charter on Human and Peoples' Rights (African Charter); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention on Rights of the Child (CRC); and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).⁶

International instruments

- **Convention on the Rights of the Child**

Rwanda submitted its third and fourth periodic reports to the CRC Committee in June 2013. Regarding the rights of children, the Committee commended Rwanda for adopting Law 54/2011 of 14 December 2011 relating to the Rights and Protection of the Child; Law 22/2011 of 28 June 2011 establishing the National Commission for Children; and Law 01/2007 of 20 January 2007 relating to the protection of the rights of disabled persons in general; The Hague 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in March 2012; Law 13/2009 of 27 May 2009 regulating labour in Rwanda and its subsequent regulations, namely, Ministerial Order 06 of 13 July 2010 containing a list of the worst forms of child labour.

Based on the recommendation by the Committee, some guiding documents were drawn up, such as the development of bio-psychosocial guidelines for residential centres of persons with disabilities (December 2017); development of

6 As above.

mental health guidelines for persons living in centres (February 2017) and the establishment of the competence-based curriculum for mental disability in 2017.

- **International Covenant on Economic, Social and Cultural Rights**

Rwanda submitted its second and fourth periodic reports on the implementation of the ICESCR to the ESCR Committee in May 2013. As far as the rights of persons with disabilities are concerned, the Committee noted with appreciation the adoption of Law 01/2007 of 20 January 2007 regarding the protection of persons with disabilities by the Republic of Rwanda; and also welcomed the ratification of the CRPD on 15 December 2008; and the Optional Protocol to Convention on the Rights of Persons with Disabilities on 15 December 2008.⁷ The Committee recommended that Rwanda should implement effective measures to increase employment in favour of persons with disabilities.⁸ This is effected through the National Employment Programme (NEP) where 1 288 persons with disabilities underwent vocational training whereafter they are supported to obtain start-up kits and start-up loans. A Ministerial Order was enacted in 2009 which determines modalities for easy access to employment for persons with disabilities.⁹

- **UN Universal Periodic Review (UPR)**

The review of Rwanda was conducted at the second meeting on 24 January 2011. The report mentioned some key issues which included access to education and health, and respect for women, children and persons with disabilities. Rwanda was commended for the progress made towards access to education and health, respect for women and children and persons with disabilities. The country was encouraged to take further initiatives towards protecting the rights of marginalised and vulnerable groups and ending gender-based violence.¹⁰

Regional instruments

- **African Charter on Human and Peoples' Rights**

Rwanda signed the African Charter on 11 November and ratified it on 17 May 1983. The eighth periodic report was submitted to the Secretariat of the African Commission on 14 August.¹¹

Regarding the impact of the recommendations, Rwanda welcomed the recommendations by the relevant committees and committed itself to implementing these. Rwanda is currently in the process of finalising its periodic reports on the CEC and the African Charter on the Rights and Welfare of the Child (African Children's Charter). Both reports highlight steps made in improving the rights of children with disabilities.

7 ESCR Committee Concluding Observations on the 2nd to 4th periodic reports of Rwanda, adopted by the Committee at its 50th session, 29 April-17 May 2013: Committee on Economic, Social and Cultural Rights, 10 June 2013, E/C.12/RWA/CO/2-4, <http://www.refworld.org/docid/52d54c834.html> (accessed 21 February 2018).

8 As above.

9 As above.

10 United Nations General Assembly Report of the Working Group on the Universal Periodic Review, 14 March 2011, <https://reliefweb.int/sites/reliefweb.int/files/resources/G1111793.pdf> (accessed 18 February 2018).

11 African Union African Commission on Human and Peoples' Rights' Consideration of Reports submitted by State Parties under Article 62 of the African Charter on Human and Peoples' Rights http://www.chr.up.ac.za/images/files/documents/ahrdd/rwanda/rwanda_concluding_observations_recommendations_2002_2004.pdf (accessed 18 February 2018).

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

Rwanda has ratified and domesticated most international and regional instruments, including the CRPD and its Optional Protocol. Rwanda is a monist state; article 190 of the Constitution of Rwanda (revised in 2015) adopted the monist approach which entails that an international treaty provision becomes part of domestic law upon ratification.¹²

The Rwandan context is influenced by the adverse effects of the 1994 genocide against the Tutsi, which resulted in many additional persons with disabilities as well as persons with mental health challenges.

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

Rwanda is a monist state with the result that once international human rights instruments are duly ratified they become part and parcel of municipal law. Furthermore, Rwanda has enacted several domestic laws to implement ratified human rights instruments, such as Law 01/2007 of 20 January 2007, relating to the protection of disabled persons in general, and Law 02/2007 on the protection of former war combatants with disabilities. These laws were passed after ratification of the CRPD.

3 Constitution

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

The Rwandan Constitution of 2003, revised in 2015, contains provisions that directly address disability:

Article 51:

Welfare of persons with disabilities and other needy persons.

The state has the duty to establish special measures facilitating the education of persons with disabilities.

The state also has the duty, within its means, to undertake special actions aimed at the welfare of persons with disabilities.

The state also has the duty, within the limits of its means, to undertake special actions aimed at the welfare of the indigent, the elderly and other vulnerable groups.

¹² J Sikulibo 'Access to justice and the international law standard' LLM dissertation, University of Cape Town, 2009 https://www.memoireonline.com/06/10/3554/m_Access-to-justice-and-the-international-law-standards6.html (accessed 18 February 2018).

Article 75:

Composition of the Chamber of Deputies and election of its members.

The Chamber of Deputies is composed of 80 deputies. They originate and are elected from the following categories: one deputy elected by the National Council of Persons with Disabilities.

Article 139:

National commissions, specialised organs, national councils and public institutions.

The national commissions, specialised organs and national councils entrusted with the responsibility to help in resolving important issues facing the country are the following:

National Councils:

- (a) National Women Council
- (b) National Youth Council
- (c) National Council of Persons with Disabilities.

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

The Constitution of Rwanda contains provisions that indirectly address disability with reference to 'persons affected by genocide, without discrimination or any other form of discrimination, right to life' in the following articles:

Article 16

Protection from discrimination

All Rwandans are born and remain equal in rights and freedoms. Discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.

Article 20

Right to education

Every Rwandan has the right to education. Freedom of learning and teaching is guaranteed in accordance with conditions determined by law. Primary education is compulsory and free in public schools. Conditions for free primary education in schools subsidised by the government are determined by law. A law also determines the organisation of education.' Nonetheless, there is no mention of the disabled people in the revised Constitution.

Article 50

Welfare of needy survivors of the genocide against Tutsi.

The state, within the limits of its means and in accordance with the law, has the duty to undertake special actions aimed at the welfare of the needy survivors of the genocide against Tutsi.

4 Legislation

4.1 Does Rwanda have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

The rights of persons with disabilities are protected by the Constitution along with those of all other Rwandan citizens. The rights of persons with disabilities are further protected by the National Law 01/2007 on the protection of persons with disabilities in general; Law 02/2007 on the protection of former war combatants with disabilities; Law 27 of 2001 relating to the rights and protection of the child against violence; and Law 3/2011 of 10 February 2011 determining the responsibilities, organisation and functioning of the National Council of Persons with Disabilities.

- **Law 01/2007 of 20 January 2007, relating to the protection of disabled persons in general and Law 02/2007 on the protection of former war combatants with disabilities**

This legislation deals with the rights of persons with disabilities in matters related to education, health, employment, culture, entertainment and sports, transport and communication and access to infrastructure. This law is aimed at protecting and promoting the rights of persons with disabilities.¹³

- **Law 3/2011 of 10 February 2011 determining the responsibilities, organisation and functioning of the National Council of Persons with Disabilities**

The National Council of Persons with Disabilities (NCPD) is an independent public institution established by the state. The Council functions for all Rwandans with disabilities and consists of three organs, namely, the General Assembly; the Executive Secretariat; and the Executive Committee, which is represented from cell level to national level by elected persons with disabilities. The NCPD is a public and independent institution with legal personality, and both financial and administrative autonomy. It is a forum for advocacy and social mobilisation on issues affecting persons with disabilities in order to build their capacity and ensure their participation in national development. The Council assists the government in implementing programmes and policies that benefit persons with disabilities. It therefore has an advocacy, implementing and monitoring role. The NCPD has elected representatives of persons with disabilities on all level¹⁴s.

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

- **Law 27 of 2001 Relating to the Rights and Protection of the Child Against Violence**

This Act promotes the protection and promotion of children's rights, including children with disabilities. The Law covers a wide range of children's rights: a

13 J Mattingly J & P Suubi 'A study on children with disabilities and their right to education: Republic of Rwanda' (2015) Education Trust <https://www.unicef.org/esaro/Rwanda-children-with-disabilities-UNICEF-EDT-2016.pdf> (accessed 19 February 2018).

14 National Council of Persons with Disabilities Act of 2011.

child's responsibilities; crimes against children and their penalties; the crimes of rape and the use of a child for dehumanising acts; and the criminalisation of forced marriage of a child below the age of 21 years.¹⁵

• **Organic Law 01/2012/OL of 2 May 2012 Instituting the Panel Code**

Article 165 (Exemption from criminal liability for abortion) provides:

There is no criminal liability for a woman who commits abortion and a medical doctor who helps a woman to abort if one of the following conditions is met:

- (1) when a woman has become pregnant as a result of rape;
- (2) when a woman has been subjected to forced marriage;
- (3) when a woman has become pregnant due to incest in the second degree;
- (4) when the continuation of pregnancy seriously jeopardises the health of the unborn baby or that of the pregnant woman.

The exemption from criminal liability under items 1, 2 and 3 of Paragraph One of this article shall be permitted only if the woman who seeks abortion submits to the doctor an order issued by the competent court recognising one of the cases under these items, or when this is proven to the court by a person charged of abortion. The court where the complaint is filed shall hear and make a decision as a matter of urgency.

This article addresses the situation where a person with a disability fell pregnant through rape or forced marriage, and found herself committing the crime of abortion in Rwanda.

• **Organic Law 10/2013/OL of 11 July 2013 Governing Political Organisations and Politicians**

The Act provides that any Rwandan who is at least 18 years old has the right to join a political organisation. However, judges, prosecutors, members of the Rwanda Defense Force, members of the Rwanda National Police and members of the National Intelligence and Security Service may not be members of political organisations. Nobody is allowed to be a member of more than one political organisation at the same time.

5 Decisions of courts and tribunals

5.1 **Have the courts (or tribunals) in Rwanda 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.**

Courts and tribunals play an important role in the promotion and protection of human rights through rendered judgments. However, no case law is recorded.

15 Children's Rights and Protection Against Violence Act 27 of 2001 http://www.chr.up.ac.za/undp/domestic/docs/legislation_06.PDF (accessed 19 February 2018).

6 Policies and programmes

6.1 Does Rwanda have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability

- **Special Needs Education Policy (2007)**

In 2013 this policy was reviewed and renamed the Special Needs and Inclusive Education Policy. The policy focuses on children with special educational needs and those with disabilities.¹⁶ The policy promotes the inclusive education model, since most children with special educational needs and disabilities fail to enrol in specialised schools due to distance, health issues and financial challenges.

- **Social Protection Policy**

The purpose of the revised social protection policy is to reduce vulnerability in general, and vulnerability of poor and marginalised people, in particular; to promote sustainable economic and social development by the reduction of social risk and coordination of saving activities; and the protection of vulnerable groups in the short, medium and long terms. The main beneficiary groups of social protection are survivors of the genocide against the Tutsi; orphans; children in difficult situations; widows; people living with HIV/AIDS; youths from broken families; demobilised ex-combatants; persons with disabilities; repatriated people; refugees; older people; disaster victims; and historically-marginalised groups.¹⁷

This policy implements the programmes that cater for vulnerable persons, including persons with disabilities. The programmes are the following: Vision 2020 Umurenge Programme (VUP); Genocide Survivors Support and Assistance Fund (FARG); Rwanda Demobilisation and Reintegration Commission (RDRC); the VUP Direct Support and Public Works programmes; and the FARG emergency assistance and subsistence allowances for disabled ex-combatants.

- **Economic Development and Poverty Reduction Strategy (EDPRS2) 2013-2018**

Persons with disabilities form part of the group of vulnerable people targeted by EDPRS2. The mission of EDPRS2 is to ensure that all poor and vulnerable people are guaranteed a minimum income and access to core public services and that those who can work are provided with the means to escape poverty. This provides a safety net that is delivered through cash transfers in the Vision 2020 Umurenge Programme (VUP), direct support programmes and public works programmes.

- **Family Policy and Policy on Protection of Orphans and Other Vulnerable Children**

The Family Policy was developed in 2005 and revised in 2013. This policy deals with the support and promotion of the family, with the emphasis on child rearing and the education and socialisation of children. The policy also addresses problems

16 The Republic of Rwanda 'Special Education and Inclusive Education Strategic Plan 2011-2015' (2011) Ministry of Education http://www.hiproweb.org/fileadmin/cdroms/Inclusive_Education_2014/StrategicPlanIERwanda20112015.pdf (accessed 19 February 2018).

17 The Republic of Rwanda. 'Initial Report of Rwanda on the Implementation of the Convention on the Rights of Persons with Disabilities'. (2015). http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/Initial_report_UNCRPD_-_Final_Version_08th_April_2015.pdf (accessed 3 May 2018).

arising within families, such as domestic violence against spouses or child abuse. The policy on the protection of orphans and other vulnerable children defines orientations for the promotion of the rights of children with disabilities, namely:

- access to physical rehabilitation services;
- early prevention of disabilities among young children;
- access to formal and informal education;
- the promotion of community systems that enable children with disabilities to remain in the family and receive necessary family and community support with all other citizens.

• Ministerial Orders

In 2009 the government of Rwanda adopted several Ministerial Orders relating to the measures to facilitate communication, travel, education, sport and leisure, medical care and employment for persons with disabilities¹⁹. Some Ministerial Orders that protect the rights of the persons with disabilities are the following:

- (1) Ministerial Order 01/2009 of 19 June 2009 determining the modalities of facilitating persons with disabilities to practise and follow cultural, entertainment and sports activities;
- (2) Ministerial Order 20/18 of 27 July 2009 determining the modalities of classifying persons with disabilities into basic categories based on the degree of disability;
- (3) Ministerial Order 02/cab.m/09 of 27 July 2009 determining the modalities of facilitating persons with disabilities on necessary travels in the country;
- (4) Ministerial Order 20/18 of 27 July 2009 determining the modalities of classifying persons with disabilities into basic categories based on the degree of disability.
- (5) Ministerial Order 20/19 of 27 July 2009 determining the modalities of facilitating persons with disabilities access medical care;
- (6) Ministerial Order 03/19.19 of 27 July 2009 determining the modalities of facilitating persons with disabilities to easily access employment;
- (7) Ministerial Order 01/09/MININFOR of 10 August 2009 determining the modalities of facilitating persons with disabilities matters relating to communication.

6.2 Does Rwanda have policies or programmes that indirectly address disability? If so, list each policy and explain how the policy addresses disability.

National Policy against Gender-Based Violence

The Gender-Based Violence Policy does not directly protect children including those with disabilities, but indirectly affects children whose parents or guardians suffer gender-related abuse at home or the work place. This type of abuse can also affect the children emotionally or psychologically.²⁰

18 As above.

19 The Republic of Rwanda, Ministerial Orders (2009).

20 The Republic of Rwanda National Policy against Gender-Based Violence http://www.migeprof.gov.rw/fileadmin/_migrated/content_uploads/GBV_Policy-2_1_.pdf (accessed 11 December 2018).

7 Disability bodies

- 7.1 Other than the ordinary courts and tribunals, does Rwanda have any official body that specifically addresses violations of the rights of people with disabilities? If so, describe the body, its functions and its powers.**

The main responsibilities of the National Council of Persons with Disabilities (NCPD) include the mobilisation and representation of persons with disabilities; lobbying for rights of persons with disabilities; and encouraging them to participate in national development programmes. The NCPD also promotes the rights of persons with disabilities and monitor the respect for laws protecting persons with disabilities. The NCPD has an urgent need to build capacity and work for participation of persons with disabilities in national development.²¹

- 7.2 Other than the ordinary courts or tribunals, does Rwanda have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

Rwanda has the Office of the Ombudsman and National Commission for Human Rights with the overall mandate of investigating and addressing violations of rights, including the rights of persons with disabilities. For more details, see question 8 below.

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

- 8.1 Does Rwanda have a Human Rights Commission or an Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission or the Ombudsman or Public Protector of Rwanda has ever addressed issues relating to the rights of persons with disabilities.**

There is a National Commission for Human Rights (NCHR) in Rwanda, which is an independent public institution provided for by the Constitution. The NCHR functions in compliance with the Paris principles, and is composed of seven commissioners nominated from different categories of Rwandan society, including civil society. The NCHR's main mission is to promote and protect human rights; to educate and sensitise the public on human rights; to provide advice and draft laws related to human rights on request; and to integrate these in national legislation related to the rights of the child, women, persons with disabilities,

²¹ Republic of Rwanda 'Laws published in 2011' http://www.parliament.gov.rw/uploads/tx_publications/Published_Laws_in_2011.pdf (accessed 16 February 2018).

people living with HIV/AIDS, refugees, migrant workers and members of their families, and the elderly.²²

The office of the Ombudsman is also an independent institution established by the Constitution. The functions of the office of the Ombudsman is to prevent and fight injustice, corruption, and offences related to public and private administration. Furthermore, this office conduct sensitisation and public awareness activities in various institutions to urge them to find solutions to complaints from the population, including petitions lodged by persons with disabilities.²³

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

9.1 Does Rwanda have organisations that represent and advocate the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.

There are organisations in Rwanda that represent and advocate the rights and welfare of persons with disabilities. They are the following:

- **Association Générale des Handicapés du Rwanda (AGHR)**

AGHR, established in December 1979, is one of Rwanda's oldest organisations for people with disabilities. AGHR is a cross-disability organisation of disabled people which defends, protects and promotes the human rights and social and economic well-being of persons with disabilities.²⁴

- **Collectif Tubakunde**

This is an organisation involved in children with intellectual impairments, focusing on improving the standards of special education and health care for children with intellectual impairments.²⁵

- **National Organisation of User and Survivors of Psychiatry in Rwanda (NOUSPR)**

NOUSPR's mandate is to provide a voice to all people with psychosocial disabilities in Rwanda. This organisation was established in 2007. It is part of a worldwide movement, called the World Network of Users and Survivors of Psychiatry, which advocates the rights of people with psychosocial disabilities as provided for in the CRPD.

- **National Paralympic Committee (NPC)**

The NPC was established in 2001, and its mandate is to promote and co-ordinate sports for persons with disabilities. The NPC is made up of associations and sport clubs with people with disabilities as members.²⁶

22 The Republic of Rwanda Initial Report (n 17).

23 As above.

24 Sida 'Disability rights in Rwanda' December 2014 <https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-rwanda.pdf> (accessed 19 February 2018).

25 As above.

26 As above.

- **Rwanda Union of the Blind (RUB)**

The RUB was formed in 1994. RUB on behalf of its members advocates equal rights for people with visual impairments. In 2014 RUB received an international reward for its work.²⁷

- **Rwanda National Association of Deaf Women (RNADW)**

RNADW was created in 2005 by a group of deaf women to advocate their rights.²⁸

- **Rwanda National Union of the Deaf (RNUD)**

RNUD is organisation which brings together all categories of deaf people to address their social, economic, cultural and political needs. RNUD was established in 1989 by deaf people with the aim of uniting themselves, raising awareness of the issues or concerns and ways of addressing these concerns.²⁹

- **Troup of Handicap Persons Twuzuzanye (THT)**

In September 2007 THT was formed by a group of persons with disabilities in order to advocate and communicate changed behaviour towards disability through sport and socio-cultural activities.³⁰

- **Umuryango Nyarwanda w'Abagore Bafite Ubumuga**

Umuryango Nyarwanda w'Abagore Bafite Ubumuga, known as UNABU, was created in 2004 by and for girls and women with disabilities. Its focus is on ensuring that 'women with disabilities enjoy equal and equitable opportunities and actively participate in the country's development'. UNABU's mission is to empower women with disabilities to become agents of change, to demand their rights and to affirm their dignity as human beings.

9.2 In the countries in Rwanda's region (East Africa) are DPOs organised/ coordinated at national and/or regional level?

The National Union of Disabilities Organisations of Rwanda (NUDOR) was formed in 2010, and serves as a platform for its 13-member organisation. NUDOR's key activity is advocacy to ensure the realisation of equal rights, opportunities and participation for persons with disabilities, ensuring access to quality and appropriate education for all children with disabilities so that they may lead successful and fulfilled lives.³¹

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

Rwanda has ensured involvement of DPOs in the process of implementation of the CRPD. Disability issues on a national level are handled by the Ministry of Local Government, through the NCPD as its affiliated institution. The Ministry of Local Government serves as a focal point for the National Council of Persons with Disabilities.

Since 2012 the Disability Coordination Forum has been established by NCPD and it meets on a quarterly basis.

27 As above.

28 As above.

29 As above.

30 As above.

31 NUDOR 'National Union of Disabilities of Organisations of Rwanda' <http://www.rencp.org/about/member-organizations-1/nudor-national-union-of-disabilities-organizations-of-rwanda/> (accessed 17 February 2018).

The Ministry of Education is responsible for implementing the policy on inclusive education.

The Ministry of Health is responsible for providing healthcare services to persons with disabilities. However, accessibility remains limited due to long distances to the nearest health facility, an insufficient number of health workers, negative attitudes and the costs involved.³²

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

The National Council of Persons with Disabilities, was created by the Constitution on 3 June 2003 and it was established by Law 03/2011 of 10 February 2011, determining its responsibilities, organisation and functioning. It is a forum for advocacy and social mobilisation on issues affecting persons with disabilities in order to build their capacity and ensure their participation in national development. In response, civil society organised itself into an umbrella organisation, the National Union of Disability Organisations of Rwanda (NUDOR), to serve as a coordinating and representative body for the movement and to build the capacity of member organisations.³³

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

- Lack of expertise, capacity and skills among DPOs.
- Limited knowledge about coordination and collaboration amongst the groups.
- Lack of awareness among people with disabilities of their rights; hence there is a need to capacitate DPOs on the knowledge of human rights.
- There is a need to sensitise the authorities especially at grass roots level about the rights and abilities of persons with disabilities.
- Poor monitoring of programmes implemented by DPOs in the rural areas.

9.6 Are there specific instances that provide ‘best-practice’³⁴ models’ for ensuring proper involvement of DPOs?

The establishment of the National Council of Persons with Disabilities provided DPOs with a platform for advocacy, the promotion of the rights of the persons with disabilities and involvement in the formulation and implementation of laws. The presence of the NCPD members at grassroots and national levels also enables civil society organisations such as NUDOR to collaborate and relate with them at different levels to advocate the rights of persons with disabilities.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

See questions 9.4 and 9.6 above.

32 The Republic of Rwanda Initial Report (n 17).

33 Sida (n 24).

34 As above.

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

The research has shown that there is a need for capacity building and support for DPOs. See question 9.5 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?

- Coordination and collaboration: DPOs should be equipped with skills for coordination, collaboration and monitoring their programmes or projects.
- Capacity of DPOs on legislation, namely, the CRPD, The Rwanda Disability Law 01/2007 and the Rwanda Constitution of 2003 (revised in 2015).
- Research: DPOs are to be equipped with skills and resources to conduct their own research on persons with disabilities, including children under five years of age.

9.10 Are there specific research institutes in the region where Rwanda is situated (East Africa) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

No.

10 Government departments

10.1 Does Rwanda 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).

Under the Ministry of Local Government, the National Council of Persons with Disabilities is the public institution in charge of promoting and protecting the rights of persons with disabilities. Its main activities are advocacy and inclusion.

See question 9.3 above for more details.

11 Main human rights concerns of people with disabilities in Angola

11.1 Contemporary challenges of persons with disabilities in Rwanda (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs.

Some people in Rwanda have a negative mind-set and social attitudes towards persons with disabilities. Their potential and abilities sometimes are not recognised. Children with disabilities are seen as a source of shame and a curse, and are often hidden by their parents. Women with disabilities find it difficult to get married and they are more vulnerable to sexual abuse. They also suffer discrimination in the area of employment, particularly as far as economic empowerment, owning property and obtaining loans from banks are concerned.

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 are laws and policies aimed at addressing the challenge of access to accommodation by persons with disabilities. This includes Law 01/2007 of 20 January 2007, relating to Protection of Disabled Persons in General. Article 5 provides that '[a] disabled person has the right to live in the family in the same conditions as others'.³⁵ Article 16 of the law protecting disabled and former war combatants states that government has the responsibility of providing a residential home to the disabled war combatant who is in the first and second category if he or she cannot secure one.

The house should be constructed taking into consideration his or her disability and should be located near basic infrastructures such as roads, schools and health centres.

- **Access to social security**

Article 50 of the Constitution states that '[t]he state, within the limits of its means and in accordance with the law, has the duty to undertake special actions aimed at the welfare of the needy survivors of the genocide against Tutsi'. Article 51 further states that '[t]he state has the duty to establish special measures facilitating the education of persons with disabilities. The state also has the duty, within its means, to undertake special actions aimed at the welfare of persons with disabilities.'

The government also has a large-scale development programme (Vision 2020 Umurenge Programme (VUP)) for targeted vulnerable groups. The direct financial support is provided to households with no adults able to participate in public works, including those of the elderly, child-headed households, households with chronically sick persons, lactating mothers and persons with disabilities.³⁶

35 The Republic of Rwanda Initial Report (n 17).

36 As above.

- **Access to public buildings**

Law 01/2007 of 20 January 2007 relating to protection of disabled persons in general provides that all buildings must be equipped with the necessary facilities to enable persons with disabilities have access to services therein. In particular, a public or private building meant to provide services to the public must provide passage ways for persons with disabilities so as to have easy access to services offered.³⁷ On the ground, much more needs to be done to operationalise this law.

- **Access to public transport**

Law 01/2007 of 20 January 2007 relating to the protection of disabled persons in general provides that the state must adopt an appropriate programme to facilitate persons with disabilities in general to board public transport vehicles by requiring public transport vehicle owners to reserve seats and entrance doors for persons with disabilities.³⁸ Again, the practical implementation of this law remains a challenge.

- **Access to education**

Article 11 of Law 01/2007 OF 20 January 2007 relating to the protection of disabled persons in general provides that '[a] disabled person has the right to appropriate education in respect of the nature of his or her disability'.³⁹ Article 10 of Law 27 of 2001 relating to the rights and protection of the child against violence also provides that the child has a right to education.⁴⁰ Although much has been achieved, more effort is needed to secure inclusive education.

- **Access to vocational training**

There is a pilot programme under the National Employment Programme, NCPD, which supports persons with disabilities to enrol in Technical and Vocational Education Training (TVE/T) for short courses at two centres. This is aimed at persons with hearing and visual impairments.⁴¹

- **Access to employment**

Article 30 of the Constitution provides that '[e]veryone has the right to free choice of employment. All individuals, without any form of discrimination, have the right to equal pay for equal work.' This is the principle, but many persons with disabilities remain on the margin.

- **Access to recreation and sport**

Article 21 of Law 01/2007 OF 20 January 2007 relating to the protection of disabled persons in general provides that '[c]entres that cater for the disabled persons and educational institutions in general, are required to have special grounds meant for culture, entertainment and sports and trained tutors'. Disabled persons are entitled to join specialised associations related to sports, culture and entertainment⁴². An order of the Minister in charge of sports must determine the modalities of facilitating the disabled persons in matters related to participation in activities of culture, entertainment and sports.⁴³

- **Access to justice**

Article 29 of the Constitution guarantees that '[a]ll persons are equal before the law. They are entitled to equal protection of the law.' Article 8 of Law 01/2007 of 20 January 2007 relating to the protection of disabled persons in general guarantees

37 As above.

38 The Republic of Rwanda Initial Report (n 17).

39 As above.

40 As above.

41 Republic of Rwanda 'A study on children with disabilities and their right to education: Republic of Rwanda' Education Development Trust 2016, <https://www.unicef.org/esaro/Rwanda-children-with-disabilities-UNICEF-EDT-2016.pdf> (accessed 17 February 2018).

42 The Republic of Rwanda Initial Report (n 17).

43 As above.

that a person with a disability shall have the right to legal representation like any other person in the courts of law. The state must determine the modalities of providing legal aid to needy disabled persons who are not able to secure legal representation. Various organs are to facilitate disabled persons in the acquisition of the required services at any time it is considered necessary.⁴⁴

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Rwanda?

Persons with disabilities have the right to vote like any other Rwandan, and the right to be elected in an administrative organ at village, district, provincial as well as national levels.⁴⁵

They are also represented in Parliament.

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in your country?

See question 11.2 above for education and other social services.

Articles 14 and 15 of Law 01/2007 of 20 January 2007 relating to the protection of disabled persons in general provides that the government shall facilitate a disabled person to receive medical care and prosthesis and orthosis appliances where required. The government also has an obligation to provide medical care to a needy disabled person and also provide prosthesis and orthosis appliances if required.⁴⁶

11.5 Specific categories experiencing particular issues/ vulnerability:

• Women with disabilities

Girls and women with disabilities are marginalised on the basis of sex and their health status, and as a result are denied assets such as land. In most cases they find it difficult to get married and are vulnerable to sexual abuse. They are at risk of sexual and gender-based violence, especially at a younger age. They normally face social barriers such as stigma, discrimination and isolation.

• Children with disabilities

Rwanda has several legislations about the rights of children and children with disabilities. This notwithstanding, children with disabilities still face challenges with regard to access to education, transport and health facilities. Most children with disabilities have to walk long distances to get to school, especially if there is no money for transport. It is very expensive for their parents and it takes a lot of time for them to accompany their children to and from school.

• Other (for example, indigenous peoples)

The prevalence of HIV among persons with physical disabilities is reported to be higher than that of the rest of the Rwandese population. However, further research needs to be conducted with regard to other categories of disability.⁴⁷

44 As above.

45 As above.

46 As above.

47 JB Munyimana et al 'Prevalence of HIV among people with physical disabilities in Rwanda' (2014) 60 *Central African Journal of Medicine* 62-69.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

Rwanda is promoting an inclusive education model, the Special Needs Education Policy, for children with disabilities, especially learners with visual, hearing and intellectual impairments.

Persons with disabilities are encouraged to cast their votes in September to exercise their right to vote. With regard to access to free primary education, the parents who deny them their right to access education and hide them might be charged by the state.

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

Law 01/2007 of 20 January 2007 relating to the protection of disabled persons in general should more detailed about gender. The legislation should consider different needs of male and female persons with disabilities.

THE GAMBIA

*Satang Nabaneh**

1 Population indicators

1.1 What is the total population of your country?

The total population according to the 2013 national census was estimated at 1 857 181 inhabitants with an average annual growth rate of 3,1 per cent.¹ The results indicate that women make up 50,5 per cent of the population and males 49,5 per cent.²

1.2 Methodology used to obtain the statistical data on the prevalence of disability in your country. What criteria are used to determine who falls within the class of persons with disabilities in your country?

In the 2013 census persons with disabilities were defined as those who were unable to perform, or were restricted in the performance of specific tasks or activities due to a loss of function of any part of the body or mind because of impairment or malformation.³ Information was collected on the following disabilities: visual; hearing; speech; physical; mental illness; epilepsy; and learning difficulties.⁴ Only disabilities that had lasted for more than six months were included.⁵ In both the 2003 and 2013 censuses questions relating to disability were restricted to normal households and persons aged two years and over.⁶

1.3 Total number and percentage of people with disabilities in your country

The Gambia has not conducted any recent national disability survey. The last survey was done in 1998, revealing that the overall disability prevalence rate was

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1 Gambia Bureau of Statistics (GBOS) 'The Gambia 2013 Population and Housing Census Preliminary Results' (2013) 6.

2 As above, 8.

3 GBOS 2013 'Population and Housing Census: National disability report' (2013) vi.

4 As above.

5 As above.

6 GBOS (n 3) 1.

1,6 per cent of the population. This gives a national prevalence rate by gender of 17,4 and 13,9 per 1 000 of the population for males and females respectively.⁷

The overall prevalence of disability in The Gambia according to the 2013 Population and Housing Census results is 1,2 per cent compared to 2,4 per cent in 2003. Compared to 2003, this demonstrates a 50 per cent decline in the prevalence of disability.⁸ The census report found incidences of disability to be higher in rural than in urban areas.⁹

1.4 Total number and percentage of women with disabilities in your country

The prevalence in 2013 in the case of males is 1,3 per cent compared to 1,2 per cent for females.¹⁰ Among females the incidence of disability is highest among those aged 30 to 34 years, followed by those aged 40 to 44 and those aged 25 to 29. In the age group 15 to 19 years, the proportions increase by age reaching a maximum at age 30 to 34 when women are at the peak of their reproductive life.¹¹

1.5 Total number and percentage of with children with disabilities in your country

The child disability rate in the 1998 National Disability Survey was 9,9 per 1 000, constituting 30,8 per cent of the disabled population in The Gambia. The disability prevalence rate for boys and girls was 11,2 and 8,5 per 1 000 respectively.¹² On the contrary, the 2013 census registered a disability prevalence of 0,4 per cent or four out of every 1 000 children.¹³ The majority of the children with disabilities were males, accounting for 54,2 per cent, and females for 45,8 per cent.¹⁴ Data according to place of residence shows that in urban areas male children with disabilities constituted 50,2 per cent and females 49,8 per cent.¹⁵

1.6 Most prevalent forms of disability and/or peculiarities to disability in your country

The available data on persons with disabilities is outdated and there is a need to put in place identification and assessment mechanisms. However, the three major disabilities identified were visual impairments, physical disabilities and hearing impairments.

It can be observed that visual impairment was the most prevalent disability (0,9 per cent) in 2003 which in 2013 decreased to 0,3 per cent.¹⁶ The prevalence of physical disability decreased slightly from 0,5 per cent in 2003 to 0,4 per cent in 2013, while that of hearing impairment declined from 0,4 to 0,2 per cent over the same period.¹⁷ In the case of hearing difficulties and seizures females account for a

7 National Disability Survey (1998) 10 <http://www.gbos.gov.gm/uploads/survey/NATIONAL%20DISABILITY%20SURVEY.pdf> (accessed 5 March 2018).

8 GBOS 2013 (n 3) 3.

9 GBOS 2013 7-8.

10 GBOS 2013 3.

11 GBOS 2013 4.

12 National Disability Survey (n 7) 12.

13 The children age cohort started from persons aged 2 to 17 years.

14 GBOS 2013 (n 3) 10.

15 GBOS 2013 11.

16 This could be attributed to the success of the National Eye Care Programme.

17 GBOS 2013 (n 3) 3.

relatively higher proportion (17,4 per cent and 5,5 per cent respectively) compared to males (16,0 per cent and 3,9 per cent respectively).¹⁸

Among children with disabilities, hearing difficulties was the most common type of disability.¹⁹ More than one-quarter (25,9 per cent) of children with disabilities had hearing difficulties. The second most prevalent disability among children was physical disability (25,7 per cent): 'Seeing' or problems with vision accounted for 16,3 per cent while speech difficulties ('speaking') accounted for 13,7 per cent. The proportion of children with 'strange behaviour' was approximately 8 per cent while 5,5 per cent experienced seizures.²⁰

2 The Gambia's international obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in your country? Did your country sign and ratify the CRPD? Provide the date(s).

The Gambia ratified the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on 7 July 2015.

2.2 If your country have signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for submission of the report? Did your country submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?

In accordance with article 35 of the CRPD, states must initially report within two years of accepting the Convention and thereafter every four years. The Gambia, having ratified the Convention in 2015, was supposed to submit its initial report in 2017. To date no report has been submitted to the Committee on the Rights of Persons with Disabilities (CRPD Committee).

18 GBOS 2013 8.

19 GBOS 2013 12.

20 GBOS '2013 Population and Housing Census: The children report' (2013) 6.

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 your country 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?

The Gambia's notoriety for non-reporting to human rights treaty bodies, especially at the African level, is well known.²¹ At the African regional level The Gambia submitted its initial report (1986-1992) on the African Charter on Human and Peoples' Rights (African Charter) in 1992.²² In accordance with article 62 of the African Charter, state parties are required to submit periodic report every two years. The Gambia's first periodic report was submitted in 1994 for the years 1992-1994, and no further reports have been submitted to the African Commission on Human and Peoples' Rights (African Commission).²³ Since its ratification of the African Charter on the Rights and Welfare of the Child (African Children's Charter)²⁴ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),²⁵ The Gambia has never submitted any initial or periodic report.

However, the government has been giving more priority to reporting under the UN human rights system than the African system. With respect to The Gambia's combined fourth and fifth periodic reports in 2015 the CEDAW Committee raised concerns about the fact that women and girls with disabilities have limited access to inclusive education, employment, health care and participation in political and public life.²⁶ It recommended that the state domesticates the CRPD which should provide for the use of temporary special measures.

The Committee on the Rights of the Child (CRC Committee) in its Concluding Observations on the combined second and third periodic reports of The Gambia in 2015, while commending measures taken by the country on the rights of children with disabilities, remained concerned regarding the high level of discrimination against and stigmatisation of children with disabilities.²⁷ The Committee urged the state to 'strengthen awareness-raising programmes, including campaigns, for the community at large, aimed at combating discrimination against and stigmatisation of children with disabilities'. It further encouraged the inclusion

21 S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 87-88.

22 'Report of The Gambia in accordance with article 62 of the African Charter on Human and Peoples' Rights' http://www.achpr.org/files/sessions/12th/state-reports/1st-1986-1992/staterep1_gambia_1992_eng.pdf (accessed 15 February 2018).

23 Periodic Report, ACHPR/PR/GAM/XVI http://www.achpr.org/files/sessions/16th/state-reports/1st-1992-1994/staterep1_gambia_1994_eng.pdf (accessed 15 February 2018).

24 Ratified on 14 December 2000.

25 The Gambia ratified the African Women's Protocol on 25 May 2005 with blanket reservations on article 5 (elimination of harmful practices), article 6 (marriage), article 7 (separation, divorce and annulment of marriage) and article 4 (health and reproductive rights). The reservations were withdrawn in June 2006.

26 CEDAW Committee 'Concluding Observations on the combined fourth and fifth periodic reports of The Gambia' CEDAW/C/GMB/CO/4-5 (2015) para 43.

27 CRC Committee 'Concluding Observations on the combined second and third periodic reports of The Gambia' (CRC/C/GAM/CO/2-3) para 58.

of children with disabilities in society and in the mainstream educational system, including by making schools more accessible.²⁸

The Human Rights Council during the Universal Periodic Review (UPR) report on The Gambia recommended that it concludes the ongoing consultations regarding the draft Disability Bill to be adopted at the earliest possible time.²⁹ This is yet to materialise.

2.4 Was there any domestic effect on your country'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 your country's legislature to incorporate it into the legal system before the instrument can have force in your country's domestic law? Have the courts of your country ever considered this question? If so, cite the case(s).

The Gambia, as in the case of many common law countries, follows a dualist approach to treaty implementation. In order to ensure enforceability, ratified international and regional instruments need to be incorporated into national law. After ratification of an instrument, an Act of the National Assembly is enacted in order for that particular law to have force locally.³⁰ The Constitution has no specific provision regulating the relationship between international law and The Gambia's national law and the application of such.³¹ The question of domestication has not been considered by the courts in the country.

As at April 2018 the CRPD had not yet been domesticated in The Gambia, although the government has noted its plans to domesticate it into law (a Disability Bill).³² The objective of the draft Bill is to ensure the full and effective, social and political participation of persons with disabilities.³³ Once enacted, the law will also establish a National Council for persons with disabilities.

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

As mentioned above, the CRPD had not been domesticated. Other domesticated international instruments include:³⁴

- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³⁵ and the African Women's Protocol which were given force of law

28 CRC Committee (n 27) para 59.

29 See Human Rights Council 'Draft report of the Working Group on the Universal Periodic Review: Gambia' A/HRC/WG.6/20/L.3 (2014).

30 S Nabaneh 'Women's political participation and representation in The Gambia: One step forward or two back?' (2013) commissioned by TANGO.

31 Nabaneh (n 21) 77-78.

32 The National Development Plan (2018-2021) 60.

33 The Gambia Federation of the Disabled with support from the International Reproduction Institute (IRI) and Education for All Campaign Network – The Gambia (EFANET), in consultation with the members of the National Assembly drafted a Bill to meet the needs of persons with disabilities. The Bill has since 2012 been in the process. It was validated in October 2017. See 'Disability Bill to improve lives of physically challenged' *The Point* 25 October 2017 <http://thepoint.gm/africa/gambia/article/disability-bill-to-improve-lives-of-physically-challenged> (accessed 10 April 2018).

34 See Nabaneh (n 21) 81-82.

35 Ratified on 16 April 1993.

nationally when in April 2010 the Women's Act was passed and signed into law by the President on 28 May 2010;

- the Children's Act 2005 which was promulgated to ensure the effective enforcement of the Convention on the Rights of the Child (CRC)³⁶ and the African Children's Charter;³⁷
- the Trafficking in Persons Act 2017, a domesticated legislation of the Palermo Protocols.

3 Constitution

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

Section 31 the 1997 Constitution of The Gambia specifically provides for the protection and rights of persons with disabilities. It states:

- (1) The right of the disabled and handicapped to respect and human dignity shall be recognised by the State and society.
- (2) Disabled persons shall be entitled to protection against exploitation and to protection against discrimination, in particular as regards access to health services, education and employment.
- (3) In any judicial proceedings in which a disabled person is a party, the procedure shall take his or her condition into account.

Section 33 recognises the equality of all persons before the law and further includes disability as a ground of discrimination.

Section 216(2) under social objectives provides for the establishment of policies that protect the rights and freedoms of the disabled, the aged, children and other vulnerable members of society to ensure just and equitable social opportunities.³⁸

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

The constitutional catalogue of rights and freedoms are provided for in chapter IV. These include the right to life (section 18); the right to personal liberty (section 19); protection from slavery and forced labour (section 20); protection from inhuman treatment (section 21); protection from deprivation of property (section 22); the right to privacy (section 23); freedom of speech, conscience, assembly, association, and movement (section 25); political rights (section 26); the right to marry (section 27); the rights of women (section 28); the rights of children (section 29); the right to education (section 30); rights of the disabled (section 31); the right to culture (section 32); and protection from discrimination (section 33).

Section 17 provides that all persons are entitled to their fundamental human rights and freedoms. Disability could be read into 'other status'. The Constitution

36 Ratified on 9 August 1990.

37 Ratified on 14 December 2000.

38 This section is found under State Directive Principles and, thus, is not justiciable.

does not mention the kinds of disabilities protected, particularly as regards access to health services and education.

4 Legislation

4.1 Does your country have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Notwithstanding the abovementioned constitutional provisions, a comprehensive law for persons with disabilities is yet to be enacted.

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

- **Women's Act**³⁹

Section 54 of the Women's Act provides special protection to women with disabilities. It states:

The government shall take appropriate measures to:

- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training, as well as, their participation in decision-making; and
- (b) ensure the rights of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

- **Children's Act**

In addition to recognising and guaranteeing the rights of all children in The Gambia, section 12 of the Children's Act 2005 stipulates that children in need of special protection, including children with disabilities, have the right to 'any such measure that is appropriate to his or her physical, economic, emotional and mental needs'. However, children with disabilities do not feature strongly in the Act.

5 Decisions of courts and tribunals

5.1 Have the courts (or tribunals) in your country ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

There is no data on decisions made by the judiciary in The Gambia in respect of an issue or issues relating to disability.

39 See Women's Act 2010 <https://www.lawhubgambia.com/womens-rights/> (accessed 10 February 2018).

However, one communication came before the African Commission: *Purohit & Another v The Gambia*.⁴⁰ The complainants alleged that in the Lunatics Detention Act (the principle instrument governing mental health) there is no definition of a lunatic, and that there are no provisions or requirements establishing safeguards during the diagnosis, certification and detention of such a patient.⁴¹ It was further alleged that the psychiatric unit was overcrowded, and that there was no requirement of consent to treatment or subsequent review of continued treatment.⁴² The Gambia was found in violation of articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4) of the African Charter relating to non-discrimination; equality before the law; dignity; the right to have one's cause heard; the right to participate in decision-making; the right to enjoyment of the highest attainable state of physical and mental health; and the right to special measures of protection.

The African Commission recommended that The Gambia repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter and international standards and norms for the protection of mentally-ill or disabled person as soon as possible; to create a body to review the cases of all persons detained under the Lunatics Detention Act; and to make appropriate recommendations for their treatment or release pending the first recommendation. It was also recommended that the state provide adequate medical and material care for persons suffering mental health problems in the territory of The Gambia. As a way to follow up on progress in implementing the decision, it was recommended that when submitting its next periodic report, The Gambia report back to the African Commission on the measures taken to comply with the recommendations of the Commission.

This case has been given no exposure by the government and is only known in non-governmental organisation (NGO) circles. Starting with the last recommendation, The Gambia has not since 1994 submitted any report to the African Commission.⁴³

6 Policies and programmes

6.1 Does your country have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.

- **Integrated National Disability Policy (2009-2018)**

The Integrated National Disability Policy upholds the rights of adults and children with disabilities. It is aimed at promoting equal opportunities, rights and full participation of persons with disabilities in an enabling environment. The policy further aims to improve the living conditions of persons with disabilities by empowering them in society. Specific actions to be taken include advocacy; the strengthening of health care; development and implementation of regulations; improving accessible transportation; and the promotion of research on disability and related issues.

40 (2003) AHRLR 96 (ACHPR 2003).

41 *Purohit* (n 41) para 4.

42 *Purohit* para 5.

43 Nabanch (n 21) 88-89.

- **Draft Mental Health Policy (2007)**

The Draft Mental Health Policy aims to reform and modernise the Lunatics Detention Act of 1917 to bring it in line with the provision regarding a human rights-based approach to mental health care. It upholds the principles of 'equitableness to quality mental health care to children, women, the aged, migrants, and refugees'. Its objectives include promoting and improving the quality of mental health service provision; data collection on disability; awareness-creation at all levels; and research on disability. The policy and subsequent mental health law has not been adopted or formulated by the National Assembly.

- **National Health Policy (2012-2020)**

The National Health Policy (NHP) aims at promoting and protecting the health of the population through the equitable provision of quality health care.⁴⁴ The NHP recognises the needs of persons with disabilities in reducing morbidity and mortality to contribute significantly to the quality of life in the population.⁴⁵ This includes setting up a national plan of action for the prevention of disability and the rehabilitation of persons with disabilities in accordance with the United Nations Standards Rules on Equalisation of Opportunities for Persons with Disabilities by 2013.

- **The National Development Plan (2018-2021)**

The National Development Plan (NDP)'s outcome 4.9 is on enhancing inclusiveness and participation of persons with disabilities in the National Development Agenda through a three-pronged approach.⁴⁶ first, strengthening the policy framework on disability matters which focuses on the review and adoption of the National Integrated Disability Policy and the enactment of the Persons with Disabilities Bill; second, the social and economic empowerment of persons with disabilities which will mainstream these persons in programmes and projects with the overall goal of economic empowerment and financial independence; third, the provision of inclusive rehabilitation and habitation programmes and services for persons with disabilities. This will focus on decentralised rehabilitation services for persons with disabilities and specialised training to ensure service delivery at the community level. The government will also seek partnerships to strengthen the rehabilitation centres through the provision of equipment, tools, systems, and processes that improve effectiveness and efficiency.

6.2 Does your country have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **The Gender and Women's Empowerment Policy (2010-2020)**

The National Gender and Empowerment Policy framework serves as a comprehensive guide to the attainment of gender equity and equality through its implementation plan. It sets indicators to assist in gender mainstreaming from a human rights-based approach in planning, programming and implementation processes by sectoral departments, partners and other stakeholders. Its goal is to mainstream gender in all national and sectoral policies, programmes, plans and budgets to achieve gender equity and equality and women's empowerment in the development process. One of its objectives is to enhance the performance of women as decision makers, which includes information and training for women, the youth and persons with disabilities to participate in leadership positions.

44 Ministries of Basic and Secondary Education and Higher Education Research Science and Technology 'Education Sector Policy 2016-2030' (2016) 6.

45 Education Sector Policy (n 45) 16.

46 National Development Plan DP (n 32) 60-61.

- **Education Sector Policy (2016-2030)**

The Education Sector Policy (ESP) provides strategic direction for the provision of basic education that is non-discriminatory and takes disability into account.⁴⁷ The policy places the emphasis on inclusiveness regarding special needs education. It is committed to providing support and equipment to enable pupils with mild disabilities to effectively participate in mainstream education.⁴⁸

7 Disability bodies

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

There are no bodies other than courts that specifically address violations of the rights of persons with disabilities.

The Office of the Ombudsman was established under section 163 of the Constitution with powers defined in the same section. The 1997 Ombudsman Act set up the office of the Ombudsman as an independent public institution. Section 163(1) of the 1997 Constitution and sections 3(1) and (2) of the Ombudsman Act 1997 outline the functions of the Ombudsman, including investigating complaints of injustice and corruption; the abuse of power; maladministration; mismanagement; discrimination; and the unfair treatment of any person by a public officer in the exercise of official duties. The Office of the Ombudsman had established a National Human Rights Unit that has been addressing issues of disability as part of their mandate, for instance, for persons with disabilities to receive priority access to polling booths on election days.

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 your country? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission or the Ombudsman or Public Protector of your country has ever addressed issues relating to the rights of persons with disabilities.

The new political dispensation after 22 years of authoritarian rule is evident in the enactment of laws and policies focused on human rights. On 13 December 2017 the National Assembly passed the National Human Rights Commission (NHRC) Act.⁴⁹ On 13 January 2018 the President assented to the Act. The NHRC Act establishes a Commission for the promotion and protection of human rights in The

47 Ministry of Basic Education and Secondary Education and Higher Education, Research and Technology 'Education Sector Policy 2016-2030' (2016) 2-3.

48 Education Sector Policy (n 48) 14.

Gambia. The NHRC is authorised to investigate and consider complaints of human rights violations in The Gambia, including violations by private persons and entities. The Commission is yet to be established.

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

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

The Gambia Association of the Physically Disabled (GAPD), a registered national NGO, was established in 1993. GAPD aims to promote the avoidance of physical disabilities and the positive advocacy for equal opportunities, rights and lobbying institutions for the enhanced participation and integration for people with disabilities in The Gambia and in all strata of society. The Association also advocates educational sponsorship for children of disabled persons as well as children with disabilities. The Association works in partnership with the Department of Social Welfare (DSW) and other international NGOs operating in The Gambia.

In 1995 the Gambia Association of the Hard of Hearing, formed in 1992, was renamed Gambia Association of the Deaf and Hard of Hearing (GADHOH). GADHOH cooperates with Ministries and agencies of the government of The Gambia and seeks to improve the lives of disabled people. The Association is linked to national and international organisations in the furtherance of its work. They also provide educational services.

The Gambia Organisation of the Visually Impaired (GOVI) was established in 1991 following an amalgamation of The Gambia Society for the Blind and The Gambia Association of the Blind. GOVI, a national organisation for visually-impaired persons, is recognised and registered by the Gambian government. GOVI undertakes a number of activities to help uplift the status of the blind and visually-impaired in The Gambia. The main aim of GOVI is the prevention of blindness; the rehabilitation of the visually-impaired; and the active promotion of the rights to equal opportunities and full participation in all spheres of national development and at all levels for the blind and visually-impaired.

The Gambia Epilepsy Association (GEA) aims to improve the quality of life for epilepsy sufferers and their carers via equal opportunities, self-sufficiency, supervised medication and counselling.

The Gambian Physical Disability Sports Association (GODSA) is a civil society organisation that represents young, physically-challenged people and is committed to advocating recreational programmes and facilities.

The National Union of Disabled Youths (NUDY) is a registered organisation representing disabled Gambian youths. NUDY works to ensure the empowerment of young people.

49 See NHRC Act <https://www.lawhubgambia.com/national-human-rights-act/> (accessed 15 February 2018).

The Gambia Organisation for Learning Difficulties (GOLD) offers short-term stays for children with learning problems. Hart House gives parents and care providers respite from caring for their children and to exchange ideas and progress reports. The respite home covers the developmental stage of children and helps them attain their highest potential by providing a number of sets of stimulating learning and play activities.

The Rural Support Organisation for the Disabled (RSOD) is a village-focused NGO. It was established because most DPOs were concentrated in the western half of The Gambia and those in rural areas were not represented by their own associations. The organisation campaigns for people with disabilities to gain access to public health services, general amenities and medical treatment.

Since the 1950s Sightsavers – The Gambia has been testing and treating people with eye diseases such as cataracts. The organisation also provides spectacles for those who need these and they help to set up new vision centres in the country, which are publicised through radio shows, billboards and posters.

9.2 In the countries in your region, are DPOs organised/coordinated at a national and/or regional level?

The Gambia Federation of the Disabled (GFD) is the national umbrella body for disability. GFD has eight DPOs registered under it. It was formed by the Disabled Peoples Organisations and its history of formation dates back to the early 1990s. The GFD advocates the promotion, protection and empowerment of persons with disabilities and encourages, supports and monitors activities by stakeholders in the disability sector that improve the living conditions of the disabled. Eight DPOs are registered with GFD.

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

Gambian DPOs have a working relationship with the Department of Social Welfare relating to issues of persons with disabilities. This has ensured interaction with the disability sector and government.

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

The Gambia Federation of the Disabled (GFD) actively participates in lobbying for the domestication of the CRPD. The GFD with support from partners and with members of the National Assembly drafted a disability Bill which is yet to be enacted.

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

The main barrier is the lack of political will in light of the fact that the process with respect to the Disability Bill started six years ago. Other barriers include funding for DPOs intersecting with the societal stigmatising view of disability issues.

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

No.

9.7 Are there any specific outcomes regarding successful implementation and/or improved recognition of the rights of persons with disabilities that resulted from the engagement of DPOs in the implementation process?

The ratification of the CRPD itself may be seen as an important milestone for the protection and recognition of the rights of persons with disabilities. This was due to the lobbying and engagement of DPOs in the ratification process. However, the non-domestication of the CRPD limits the full realisation of the rights provided in the CRPD.

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?

Awareness and understanding of laws impede the extent to which DPOs can adequately engage with the implementation process. Funding and capacity building also remain a challenge.

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?

Training on human rights instruments and processes in general for DPOs is critical. The focus should also be on funding and building capacity in order to ensure effective engagement of DPOs with the implementation process in the future. Specific areas of capacity building and support should include proposal development, fundraising, lobbying and advocacy with policy makers, legislators and other relevant stakeholders.

9.10 Are there specific research institutes in your region that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

There are currently no specific research institutes in The Gambia that work on the rights of persons with disabilities, which have facilitated the involvement of DPOs in the process.

10 Government departments

10.1 Do you have 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 Department of Social Welfare (DSW) of the Ministry of Health is responsible for protecting the rights of persons with disabilities. The DSW's Disability Unit works with GOVI and the School for the Deaf and Blind to help educate children with disabilities and to develop relevant skills. The department also works with international donors to supply wheelchairs and technical aid to some persons with disabilities. Several NGOs have sought to improve awareness of the rights of persons with disabilities and encouraged their participation in sports and other physical activities. However, according to the UNICEF and Ministry of Basic and Secondary Education (MOBSE) national disability study focusing on children with disabilities, the disability unit does not maintain comprehensive records.⁵⁰ The main challenges faced by the Disability Unit are limited financial and human resources to be able to serve every part of the country effectively. The Disability Unit has limited presence in rural areas.⁵¹

11 Main human rights concerns of people with disabilities in The Gambia

11.1 Contemporary challenges of persons with disabilities in your country

Discrimination and stigmatisation of persons with disabilities are a manifestation of inequality and a reflection of social and religious norms.⁵² It serves as both a cause and consequence of poverty. Other challenges include a lack of access to education and lack of infrastructure for persons with disabilities. These persons are very vulnerable in The Gambia due to superstition and the widespread prevalence of negative attitudes in society, ignorance about disability issues and neglect.⁵³

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

Generally, no information exists regarding systematic data collection on discriminatory actions against people by reason of disability.

50 UNICEF/MOBSE 'National disability study report' (2013) 16.

51 UNICEF/MOBSE (n 51) 40.

52 See YM Bah & L Sidibeh 'Disability and integration: Gambian experience study report' (xx).

53 See the Integrated National Disability Policy (2009-2018).

- **Access to social security**

There is scant evidence of social security services directed at persons with disabilities in The Gambia which makes life very difficult for them. Some end up begging on the streets. Some parents of children with disabilities are given micro-credit loans to boost their incomes.⁵⁴ Major challenges relating to social protection services include the absence or lack of a social protection policy environment; a central coordinating body for social protection programmes; a lack of quality data for programming; inadequate financial, material and human capacity and competing interests mean that all people in need of protection are not always reached.

- **Access to public transport and buildings**

There is no explicit legal guarantee of access to air travel and other transportation, nor any requirement to provide for access to buildings for persons with disabilities. Very few public buildings in the country are accessible to persons with disabilities.⁵⁵ The majority of these persons live in rural areas and have a limited ability to move from their home to seek medical care or other services in cities due to transport costs. There generally is limited and inadequate access to premises and facilities, including schools.⁵⁶

- **Access to education**

Disability is a hindrance to enrolment and the retention of both girls and boys in schools, as they still face socio-cultural and physical barriers. While the situation is improving in the case of children with mild visual and hearing impairments, children with mental, learning and multiple disabilities and those afflicted with epilepsy still face socio-cultural and physical barriers.⁵⁷ The few persons with disabilities that attend school face challenges throughout their schooling because of the lack of appropriate infrastructure and the lack of knowledge on how to give access to this group. Even after acquiring an education, it is very difficult for them to obtain employment. This is due to their disability and the fact that most people view disability as an inability to do anything. There also are inadequate special facilities and services to enhance the educational environment of children with disabilities in mainstream schools.⁵⁸

- **Access to health services**

Access to health services is also a challenge because of the inclusive service provision at health service points in the country. Health personnel are not oriented on special needs of persons with disabilities. They are treated the same as other people at service points. Access to service points is also impeded by mobility and infrastructural constraints as rehabilitation services are not available in most communities in remote areas.

- **Access to employment and vocational training**

Most Gambians living with disabilities are marginalised due to the stigma attached to disability. From childhood persons with disabilities are treated differently. As a result, they have no way of obtaining gainful employment to enable them to live independently. The majority of persons with disabilities take up begging for alms as a means of survival. In its National Development Plan, the Barrow government recognises the need to integrate and mainstream people with disabilities in all youth and sports initiatives as a means of economic empowerment and financial

54 Sight Savers International provides financial support so that GOVI can offer additional micro-credit loans to people with disabilities.

55 US Department of State 'The Gambia 2016 Human Rights Report' (2016) 26.

56 CRC Committee (n 27) para 9.

57 National Development Plan (n 32) 239.

58 See UNICEF/Government of The Gambia 'Disabled children in mainstream schools survey' (2000).

independence. The strategy to be employed includes engaging with representative bodies for persons with disabilities in programme formulation, implementation and monitoring.⁵⁹ In partnership with civil society organisations, the government's theory of change for empowering youths with disabilities will be anchored on vocational training, combating stigma and discrimination, financial inclusion and strengthening organisations working to strengthen organisational development for disability support institutions.

- **Access to recreation and sport**

The Ministry of Youth and Sports has been working towards creating an enabling environment for young people to engage in sporting and recreational events, with a specific focus on promoting the involvement and participation of youths with disabilities. They have taken part in international paralympic games competitions.

- **Access to justice**

There is no specific programme to support access to justice for persons with disabilities. They face numerous obstacles in exercising their right to access justice. These obstacles include poverty and an inability to afford legal fees, inaccessible buildings and transport and a lack of awareness of their rights.

Legal aid is provided through the National Agency for Legal Aid (NALA). The Legal Aid Act 2008 not only continues to provide legal aid for children and persons charged with offences punishable with death and life imprisonment, but it has also widened the scope of legal aid to include persons who earn not more than the minimum wage specified by the state. This minimum wage standard will act as the poverty line, therefore giving all persons who earn below such amount the right to legal aid in any cases in which they may be involved, both civil and criminal. This assistance can take the form of legal advice or full legal representation.

The Female Lawyers Association–Gambia (FLAG) also provides free legal aid services to women. Women and girls with disabilities can benefit from their *pro bono* assistance.

11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in your country?

Persons with disabilities have a right to take part in political life in The Gambia. The Constitution provides for the right of everyone to exercise suffrage and vote to choose one's representative. A person with a disability currently is a member of the National Assembly nominated by President Barrow.

11.4 Are people with disabilities' socio-economic rights, including right to health, education and other social services protected and realised in your country?

The right to basic education is guaranteed in the Constitution. Socio-economic rights, including the right to health, are not justiciable. The realisation of the socio-economic rights of persons with disabilities requires an interaction of policies in numerous sectors, institutions and policies.

59 National Development Plan (n 32) 85.

11.5 Specific categories experiencing particular issues/vulnerability:

- **Women with disabilities**

Disability is a sensitive issue in The Gambia.⁶⁰ Negative attitudes, stigma and discrimination are the major challenges that face women with disabilities in their homes and communities. Women with disabilities continue to have limited access to inclusive education, health, employment and participation in political and public life.⁶¹

- **Children with disabilities**

Children with disabilities continue to face discrimination in society, and their access to structures and facilities, including schools, remains inadequate or limited.⁶² These children may be seen on the streets or accompanying adult beggars, even though the Children's Act 2005 regards such children as in need of care and protection.

In addition, these children face stigmatising attitudes towards themselves and their mothers. Societies in The Gambia believe that disability is a 'curse' for the mother's sin; a sacrifice for wealth in the family; or a punishment for wickedness.⁶³

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in your country at the moment?

The vision of the National Development Plan of the new democratic government includes transforming The Gambia into a country that where a caring and nurturing environment exists PWDs. In committing itself to ensuring the promotion and protection of the rights of PWDs, government pledges to strengthen policy and legal framework including the adoption of the draft National Integrated Disability Policy and the enactment of the Persons with Disabilities Bill.⁶⁴

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

The enactment of the disability law to ensure the full protection and realisation of the rights of persons with disabilities. Additionally, there is need for support and strengthening of DPOs in enhancing their capacities as organisations engaged in disability.

60 GBOS '2013 Population and Housing Census: The gender report' (2013) 36.

61 CEDAW Committee (n 26) para 42.

62 See UNICEF/MOBSE (n 51).

63 UNICEF/MOBSE 17.

64 NDP (n 41) 71-72.

SECTION C: REGIONAL DEVELOPMENTS

**Disability rights in the African regional human rights system
during 2017**

REGIONAL DEVELOPMENTS

A STEP TO ZERO ATTACKS: REFLECTIONS ON THE RIGHTS OF PERSONS WITH ALBINISM THROUGH THE LENS OF *X v UNITED REPUBLIC OF TANZANIA*

Benyam Dawit Mezmur*

Summary

No fewer than 25 African countries have been identified where attacks on and killings of persons with albinism have in recent years been perpetrated. These attacks and killings raise multiple human rights questions. The communication of X v United Republic of Tanzania decided by the Committee on the Rights of Persons with Disabilities concerned a complaint by a person with albinism, who was attacked. Issues such as ratione materia; remedies; legal aid; delays in solving cases; being equal before and under the law, and equal and effective legal protection of the law; torture and re-victimisation; as well as protection of the integrity of the person are the thematic issues covered in the article. In conclusion, the implications of the Mr X decision and how it should reverberate beyond the borders of Tanzania are addressed.

1 Introduction

Human rights violations perpetrated against persons with albinism have recently received increased attention, among others, in the form of media reports, studies,¹ and country visits by human rights mechanisms. The

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1 See eg International Bar Association *Waiting to disappear*: *International and regional standards for the protection and promotion of the human rights of persons with albinism* (2017); '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.

human rights situation of persons with albinism has also been considered at the United Nations (UN) level. For instance, in 2015 the Human Rights Council appointed an Independent Expert on the Enjoyment of Human Rights by Persons with Albinism (Independent Expert).²

No fewer than 25 African countries have been identified where attacks on and killings of persons with albinism have in recent years been perpetrated.³ In this respect, the United Republic of Tanzania stands out, and it has even been referred to as ‘ground zero’ of the crisis of trafficking in persons with albinism.⁴ The reasons why Tanzania is distinctive include, first, the relatively high number of persons with albinism in this country⁵ and, second, the disturbing number of attacks and killings reported here.⁶ Third, while the government of Tanzania and other stakeholders have undertaken a number of initiatives to prevent and address the violations, the attacks have continued.

Various human rights mechanisms have engaged with the Tanzanian government on the rights of persons with albinism. For instance, after the consideration of its combined third to fifth periodic report under the Convention on the Rights of the Child (CRC) in 2015, the CRC Committee recommended a number of measures aimed at preventing and addressing violations of the rights of children with albinism.⁷ A similar recommendation is contained in the Concluding Observations issued by the CEDAW Committee in 2016.⁸

Moreover, the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) as well as the Independent Expert have conducted missions to Tanzania in 2015 and 2017 respectively.⁹ In 2017 the Committee that monitors the implementation of the Convention on the Rights of Persons with Disabilities (CRPD), the CRPD Committee, in its decision on an

2 Res A/HRC/RES/28/6, 10 April 2015.

3 International Bar Association (n 1) 20.

4 MP Mostert & MM Weich ‘Albinism in Africa: A proposed conceptual framework to understand and effectively address a continental crisis’ (2017) 5 *African Disability Rights Yearbook* 102.

5 See ‘Report of the Independent Expert on the enjoyment of human rights by persons with albinism on her mission to the United Republic of Tanzania’ (2017) UN Doc A/HRC/37/57/Add.1 para 15.

6 BBC News ‘UN’s Navi Pillay condemns Tanzania attacks on albinos’ 5 March 2013 <https://www.bbc.com/news/world-africa-21675536> (accessed 21 August 2018).

7 The state party was urged *inter alia* to expedite the investigation and prosecution of all cases of violence involving children with albinism so that no perpetrator can escape with impunity, and to provide the victims with rehabilitation and redress; ‘Concluding Observations Tanzania’ (2015) UN Doc CRC/C/TZA/CO/3-5 para 3.

8 ‘Concluding Observations Tanzania’ (2016) UN Doc CEDAW/TZA/CO/7-8 (2016) para 42.

9 See African Children’s Committee ‘Report on investigative mission on the situation of children with albinism in temporary holding shelters – Tanzania’ (2016); Report of the Independent Expert (n 5).

individual communication¹⁰ in *X v United Republic of Tanzania*¹¹ found violations of the CRPD¹² against the government of Tanzania in the context of the rights of persons with albinism.

After this introduction, a brief overview of the *X v United Republic of Tanzania* communication is provided, followed by a discussion of certain of the admissibility considerations. Subsequently, selected elements of the merits of the case are scrutinised. The conclusion highlights the possible implications of the case beyond Tanzania.

2 *X v United Republic of Tanzania: A brief overview*

The communication of *X v United Republic of Tanzania*¹³ concerned a complaint by a person with albinism, Mr X, who was attacked with clubs by two strangers while collecting firewood.¹⁴ Once he had been rendered unconscious, the two strangers hacked off half of his left arm. The attack took place on 10 April 2010 and was reported to the police.¹⁵ Even though he had been a farmer before the attack, Mr X no longer is self-sufficient.

Mr X argued that his rights under the CRPD, in particular article 5 on equality and non-discrimination, had been violated. He reasoned that he had been discriminated against as a result of his albinism and that ‘the violence and the non-access to justice that he has suffered are generalised practices against people with albinism’.¹⁶ He further contended that his rights under article 15 to freedom from torture or cruel, inhuman or degrading treatment or punishment had been violated because the state party failed to take effective measures to protect him from the attacks and physical and mental abuse by non-state actors.¹⁷ The author also relied on article 17 on the protection of the integrity of the person ‘since he was exposed to barbaric forms of suffering’.¹⁸

10 Submitted in terms of the Optional Protocol to CRPD GA Res A/RES/61/06 Annex II, adopted on 13 December 2006, entered into force on 3 May 2008.

11 *X v United Republic of Tanzania* Communication 22/2014. The decision was adopted on 31 August 2017 (UN Doc CRPD/C/18/D/22/2014.)

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

13 *X v Tanzania* (n 11).

14 Para 2.2 of the decision.

15 There appears to be an inconsistency in the decision in respect of the date on which the case was reported to the police. See in this regard fn 2 and para 7.3.

16 Para 3.1 of the decision.

17 Para 3.2 of the decision.

18 Paras 3.1 to 3.3 of the decision.

Mr X, through his counsel, submitted that the communication should benefit from the exception to the requirement that all available domestic remedies must have been exhausted.¹⁹ First, counsel lamented that the relevant authorities had instituted no investigation.²⁰ Second, because a private prosecution is not possible in Tanzania, it was submitted that there was no remedy in the domestic criminal law.²¹ As far as civil remedies are concerned, the CRPD Committee was informed that such litigation must be initiated through submission of an application to the High Court of the place of residence of the victim.²² In this instance, the High Court closest to Mr X's place of residence was approximately 300 kilometers away, which had a financially prohibitive effect.²³ The author furthermore cited a similar case where a constitutional petition brought by persons with albinism as victims had been unduly prolonged (since 2009) as a result of intermittent changes to the panel of judges.²⁴

The state party marshalled a number of arguments to motivate why the complaint did not comply with the requirement of exhaustion of domestic remedies.²⁵ It provided information that a criminal case had been opened and that the trial of a suspect in the attack on the author had commenced.²⁶ However, the author testified in court that the accused person was not among his attackers and as a result the prosecutor subsequently withdrew the case. The state noted that '[t]he investigation of the attack against the applicant is ongoing'.²⁷

The state further averred that the possibility for private prosecutions existed under section 99 of the Criminal Procedure Act, Cap 20.²⁸ Another option available to the author was to submit a human rights application before the courts under the Basic Rights and Duties Enforcement Act (Basic Rights Act).

As far as the author's limited financial resources were concerned, the state contended that Mr X should have approached a 'number of legal aid centres and non-governmental organisations assisting indigents',²⁹ alternatively, the same advocate who brought this communication in Geneva should have assisted him in filing a constitutional case in Tanzania.³⁰

19 According to art 2(d) of the Optional Protocol, instances where the application of domestic remedies is unreasonably prolonged or unlikely to bring effective relief constitute an exception to the exhaustion of local remedies rule.

20 Para 2.4 of the decision.

21 As above.

22 Para 2.5 of the decision.

23 As above.

24 Para 2.6 of the decision.

25 Paras 4.1 to 4.5 of the decision.

26 Para 4.1 of the decision.

27 Para 4.2 of the decision.

28 Para 4.3 of the decision.

29 Para 4.4 of the decision.

30 As above.

The Committee, finding in favour of the author and essentially dismissing all the state's arguments on admissibility, noted two points. First, the primary responsibility to prosecute, investigate and punish is that of the state, and this is a non-delegable duty.³¹ Second, a civil claim and an award of compensation alone cannot be seen as an effective remedy. Moreover, given the unpredictable duration of similar cases under the Basic Rights Act, the Committee felt that it would be unreasonable to require the author to initiate additional proceedings.³² On the merits, the Committee agreed with the author on the alleged violations of articles 5, 15, and 17 (read with article 4) of the CRPD.

3 Considerations regarding admissibility

As mentioned above, the state relied on several arguments regarding inadmissibility, but the CRPD Committee was not swayed. This section examines certain of the issues in this matter associated with admissibility.

3.1 *Ratione materiae*

The question of whether persons with albinism fall within the definition or description of persons with disabilities is not a settled issue. For instance, in South Africa a debate has taken place about the applicability to persons with albinism of the Employment Equity Act of 1998.³³ Moreover, there are examples of conflicting statements by individuals with albinism as well as their representative organisations on whether they prefer to be considered a person with a disability.³⁴

While the *ratione materiae* competence of the CRPD Committee had not been questioned, the Committee nonetheless assigns a full paragraph to clarify why persons with albinism resort under the description of 'persons with disabilities' set out in article 1 of the CRPD.³⁵ This deliberative approach taken by the Committee to reflect on why it believes it has such competence is commendable.³⁶

31 Para 7.3 of the decision.

32 Para 7.4 of the decision.

33 See CG Ngwenya & JL Pretorius 'Conceiving disability, and applying the constitutional test for fairness and justifiability: A commentary on *IMATU v City of Cape Town*' (2007) 28 *Industrial Law Journal* 747.

34 See eg M Mswela 'Does albinism fit within the legal definition of disability in the employment context: A comparative analysis of the judicial interpretation of disability under the SA and the US non-discrimination laws' (2017) 21 *Potchefstroom Electronic Law Journal* 1 at 3.

35 Para 7.6 of the decision.

36 Para 7.5 of the decision.

3.2 Exhaustion of local remedies

The requirement to exhaust available domestic remedies before approaching an international process is a relatively well-settled rule of international law.³⁷ Other UN treaty bodies as well as regional bodies and courts also require this.³⁸

The approach adopted by the CRPD Committee, discussed below, resonates with that applied by similar treaty bodies. For example, the Human Rights Committee (HRC) has explained that

in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are *de facto* available to an author.³⁹

3.2.1 Unreasonable delay in the application of domestic remedies

The concept of ‘unreasonable delay’ as a basis for an exception⁴⁰ to the requirement to exhaust local remedies is open to interpretation. What could be considered as prolonged in one context could be seen as a reasonable delay in another, and different domestic considerations and other possible variations are inevitable.

However, attempts to invoke economic or administrative reasons for the unreasonable delay of a case are often considered to be unconvincing by treaty bodies.⁴¹ For instance, in a number of cases, prime among which are *Bernard Lubuto v Zambia*⁴² and *Lalith Rajapakse v Sri Lanka*,⁴³ the Human Rights Committee (HRC) did not accept the economic situation of the state party (being a developing country) or administrative constraints (a heavy work load at the High Court) to be acceptable reasons for the unreasonable delay of cases.

In the present instance, the CRPD Committee gave adequate weight to the fact that other persons with albinism who had been victimised and

37 See eg judgment of the International Court of Justice in the *Interhandel case (Switzerland v the United States)*, 21 March 1959.

38 See eg art 41(1)(c) of ICCPR and arts 2 & 5(2)(b) of the First Optional Protocol; arts 50 & 56(5) of the African Charter on Human and Peoples’ Rights; art 46 of the American Convention on Human Rights.

39 HRC Communication 1403/2005, *Gilberg v Germany*, views adopted 25 July 2006, para 6.5 (citing some of its previous jurisprudence).

40 Art 2(d) Optional Protocol (n 10).

41 The unreasonable delay may also infringe on the right to a fair trial entrenched in art 14 of ICCPR.

42 Communication 390/1990, 31 October 1990, UN Doc CCPR/C/55/D/390/1990/Rev.1.

43 Communication 1250/2004, 14 July 2006, UN Doc CCPR/C/87/D/1250/2004.

who had brought a case in March 2009 were still waiting to be heard at the time of the adoption of the decision by the Committee in 2017.⁴⁴ This constituted a delay of eight years. Moreover, the difficulties faced by the High Court in composing a bench of three judges to decide on the merits of each application submitted under the Basic Rights Act would be difficult to justify. After all, it has been held that it is not merely an overall delay, but also a delay between various stages of the domestic court process⁴⁵ (for example, from arrest to preliminary investigation, to trial, and to appeal, respectively) that could constitute unreasonable delay. It therefore is not surprising that the Committee concluded that it did not find it reasonable to expect Mr X 'to initiate additional proceedings of unpredictable duration' under the Basic Rights Act.⁴⁶

3.2.2 Remedies unlikely to bring effective relief

The second component of the exception to the requirement of exhausting domestic remedies is that the latter is not expected where the domestic remedies are unlikely to bring effective relief.⁴⁷ An appraisal of the effectiveness and availability of domestic remedies should not be done solely by looking into the formal remedies available in the domestic legal system. The CRPD Committee also has to take realistic account of the general legal, political, as well as social context in which these remedies may operate. For instance, the Tanzanian government has mostly been uncooperative towards calls by the Universal Periodic Review to address the challenges faced by persons with albinism in Tanzania.⁴⁸ It may be argued that the recommendations of treaty bodies regarding the shortcomings in the investigation and prosecution of perpetrators of attacks, as outlined above,⁴⁹ have similarly had limited effect. It then begs the question whether the recurrence of rights violations committed against persons with albinism in Tanzania has risen to a threshold where one may conclude that there is official tolerance by the state authorities which is of such a nature as to make domestic proceedings futile or ineffective.⁵⁰

The main contention of the complainant, Mr X, was that he had been denied a remedy as the relevant authorities had not exercised due diligence in investigating and prosecuting the alleged perpetrators. In such a situation, the remedy being sought can only provide redress in respect of the applicant's complaints and offer a reasonable prospect of success through the criminal justice process. As a result, the argument on the part

44 Para 7.4 of the decision.

45 See eg *Fillastre v Bolivia* Communication 336/1988, para 5.2, where the HRC held that the three years it took at the first instance had constituted 'unreasonably prolonged'.

46 Para 7.4 of the decision.

47 Art 2(d) Optional Protocol (n 10).

48 International Bar Association (n 1) 22.

49 Part I above.

50 See judgment of the European Court of Human Rights in *Ireland v the United Kingdom*, 18 January 1978, Series A 25, 64 para 159.

of the state that the complainant should pursue civil proceedings or additional proceedings before the High Court under the Basic Rights Act could not stand.⁵¹

3.2.3 *Legal aid*

The availability as well as effectiveness of legal aid and the link to the exhaustion of local remedies are significant.⁵² In the case of Mr X, the state party challenged the assertion that the complainant did not have the financial resources to institute a civil case. It contended that there were a number of legal aid service providers, including non-governmental organisations (NGOs), that assist indigent persons to bring cases to court in Tanzania.⁵³

This argument potentially raises a number of issues. First, the extent to which there is an obligation⁵⁴ in international human rights law to provide legal aid to victims or witnesses, especially in civil cases, needs to be clarified.⁵⁵ Second, it is not only the availability of a legal aid scheme that could be the subject of an inquiry, but also its accessibility and efficiency.⁵⁶

An additional consideration requiring reflection in the provision of legal aid to persons in marginalised positions, including persons with albinism, is the manner in which a means test for legal aid is applied. For instance, it is argued that where family members may be complicit in attacks (or have another conflict of interest), a means test based on the total household income should not be applicable.⁵⁷ Rather, the criteria should focus only on the income of the person applying for legal aid.

The challenges that Tanzania faces in providing legal aid and legal assistance have been brought into the spotlight in a recent case decided by the African Court on Human and Peoples' Rights (African Court). The African Court's sixth merits judgment involved 10 Kenyans who underwent an extra-legal rendition from Mozambique to Tanzania, allegedly for having been involved in robbing a bank in Tanzania. The African Court weighed, along with the seriousness of the offence the

51 Para 7.4 of the decision.

52 The issue has been interrogated not only within the UN human right system, but also within the regional human rights systems.

53 Para 4.4 of the decision.

54 Whether the CRPD Committee has clearly outlined its position on the provision of legal aid as an *obligation* emanating from the CRPD is open to debate.

55 According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle G (Legal Aid and Legal Assistance), an accused person or a party to a civil case has the right to have free legal assistance where the interests of justice so require and the person lacks the means to pay for it.

56 See art 13(1) of the CRPD, which calls for '*effective* access to justice for persons with disabilities on an equal basis with others' (my emphasis).

57 See UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, (A/67/458) (2012) Guidelines 1(f), 7, 48(a), (c) & (d).

accused were charged with, Tanzania's obligations under the African Charter on Human and Peoples' Rights (African Charter), but also other instruments such as the International Covenant on Civil and Political Rights (ICCPR). It found a violation of article 7(1)(c) of the African Charter as 'the applicants were entitled to legal aid at all stages of the proceedings' and such assistance was not provided.⁵⁸

It is not clear why the CRPD Committee did not reflect on the state's arguments regarding legal aid. This omission means that the opportunity to interrogate and clarify some of the issues raised above unfortunately has been missed for now.

4 Reflections on the merits of the case

4.1 Being equal before and under the law, and equal and effective legal protection of the law

Article 5(1) of the CRPD emphasises that all persons are equal before and under the law. They are also entitled, without any discrimination, to the equal protection and benefit of the law. Article 5(2) imposes far-reaching positive obligations on the state to prohibit disability-based discrimination and to guarantee to persons with disabilities equal and effective legal protection against discrimination. The main elements tying Mr X's case to article 5 are the following: attacks for body parts exceptionally affecting persons with albinism; the absence of the effective investigation and prosecution of Mr X's attackers; and the impunity that prevails more than eight years after the criminal attack.⁵⁹ The CRPD Committee found a violation of article 5 of CRPD and concluded that the author had been a victim of direct discrimination based on his disability. Since direct discrimination includes 'detrimental acts or omissions based on prohibited grounds',⁶⁰ the characterisation of Mr X's treatment as 'direct discrimination' is appropriate.

The Committee further observed that the dereliction of duty on the part of the state to prevent and punish such acts put the victim and other persons with albinism 'in a situation of particular vulnerability'⁶¹ which prevents them from living in society on an equal basis with others.⁶²

58 African Court, *Onyango & Others v Tanzania*, App 006/2013, Judgment of 18 March 2016, paras 181 & 182.

59 Paras 8.2 to 8.3 of the decision.

60 CRPD Committee General Comment 6 on equality and non-discrimination' (2018) UN Doc CRPD/C/GC/6 para 18(a).

61 Para 8.4 of the decision.

62 As above. The Committee decried the lack of support provided by the state party to the author after the loss of his arm 'to enable him to live independently'.

4.2 Torture, re-victimisation, and effective investigation

Mr X argued that the attack against him constituted torture. However, the CRPD Committee, referring to the definition of torture in article 1 of the Convention against Torture (CAT), expressed the view that since the violence against the author was perpetrated by private individuals, these acts did not amount to ‘acts of torture’.⁶³

However, this is not where the matter ends. The Committee underscored, with reference to ICCPR,⁶⁴ the principle that the state obligation⁶⁵ to prevent and punish the acts in article 15 of the CRPD applies to acts committed by both state and non-state actors.⁶⁶

Furthermore, the Committee viewed the personal toll exacted on the author by the state party’s failure to ensure the speedy and effective prosecution of the suspected perpetrators as re-victimisation, which amounts to psychological torture and/or ill-treatment of Mr X. Based on these reasons, a violation of article 15 of the CRPD therefore was still found.⁶⁷ It may be posited that the CRPD Committee should have paid closer attention to the link between the psychological torture and/or ill-treatment experienced by the author and the failure on the part of the state to provide him with information on the status of the investigation.

4.3 Protecting the integrity of the person

Article 17 captioned ‘Protecting the integrity of the person’ states that ‘[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others’. Its drafting history suggests that it is intimately associated with article 12 (legal capacity) and article 15 (torture), and issues such as forced interventions and consent, forced sterilisations, corrective surgeries and harmful practices.⁶⁸

Among others, the CRPD Committee found the failure by the state to prevent acts of violence suffered by the complainant as a violation of article 17 read together with article 4. While article 4 on ‘General obligations’ is the second-longest provision in the CRPD, the obligation to take ‘other measures for the implementation of the rights recognised in the present

63 Para 8.5 of the decision.

64 See HRC General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 13.

65 See art 15(2).

66 Para 8.6 of the decision.

67 As above.

68 M Keys ‘Article 17: Protecting the integrity of the person’ in VD Fina, R Cera & G Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 327-330.

Convention',⁶⁹ to address discrimination,⁷⁰ and the obligation 'to ensure that public authorities and institutions act in conformity with the present Convention',⁷¹ seem more suited to the case at hand. The application of article 17 to the case of Mr X outside of the usual general issues (consent, forced sterilisation, and so forth) that have in the past been applied by the CRPD Committee is also a welcome move which protects the physical and mental integrity of persons with albinism.

5 Concluding remarks

A number of issues emanating from the case of Mr X may be the subject of debate. These include the Committee's statement that 'generally speaking, the state party has not adopted *any* measures to prevent this form of violence against persons with albinism and to protect them therefrom'.⁷² For instance, the government has established the National Committee on Violence against Women, Children and People with Albinism.⁷³

On a positive note, the time it took to deal with the communication from the time of submission to the decision is commendable. The communication was submitted on 23 June 2014 (initial submission) and the decision is dated 18 August 2017, a little over three years. Maintaining this level of relative efficiency in the future may be a challenge, especially with the growing number of pending communications before the CRPD Committee.⁷⁴

The government of Tanzania has in recent years displayed an increased willingness to cooperate with international and regional mechanisms on the issue of the rights of persons with albinism. For example, the African Children's Committee's mission in 2015 was facilitated by the government, and the 2017 visit of the Independent Expert took place at the invitation of the government.⁷⁵ Part of the litmus test for this improved commitment on the part of the government will be the extent and urgency of its implementation of the CRPD Committee's recommendations⁷⁶ in the communication of Mr X.

The implications of the Mr X decision should reverberate beyond the borders of Tanzania. In particular, the African state parties to the CRPD

69 See art 4(a).

70 See arts 4(b) and (e).

71 See art 4(d).

72 Para 8.4 of the decision (my emphasis).

73 The CEDAW Committee welcomed this in its 2016 Concluding Observations on Tanzania's periodic report; CEDAW (n 8) para 5(a).

74 CRPD Committee, 'Table of pending cases' <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx> (accessed 21 August 2018).

75 Part I above.

76 See para 9(a) of the decision for the Committee's recommendation in respect of the author and 9(b) for its general recommendations.

should draw from the jurisprudence in the case of Mr X to ensure that they adopt all appropriate legislative, administrative and other measures for the promotion and protection of the rights of persons with albinism. After all, success in part depends on the extent to and urgency with which the world manages to bring the no fewer than 25 African countries where attacks on persons with albinism have in recent years been perpetrated to zero.

REGIONAL DEVELOPMENTS

PROGRESS TOWARDS INCLUSIVE PRIMARY EDUCATION IN SELECTED WEST AFRICAN COUNTRIES

*Ngozi Chuma Umeh**

Summary

Using Nigeria, Ghana and Sierra Leone as the main case study, this commentary discusses developments on inclusive education in the West African Region. It evaluates the extent to which domestic legislation and policy framework in the three West African countries complies with the normative standards set in article 24 of Convention on Rights of Persons with Disabilities (CRPD) the commentary observes that none of the legislative and policy frameworks in the three West African States completely meets the standards set in article 24 of the CRPD or the newly adopted Protocol to the African Charter on Human Peoples' Rights on the Rights of Persons with Disabilities.

1 Introduction

A number of countries in West Africa have in recent years ratified the Convention on the Rights of Persons with Disabilities (CRPD)¹ as well as international, regional and sub-regional human rights treaties asserting various aspects of the right to education of children with disabilities. While this is a positive development, the question arises as to whether these commitments have been translated into tangible progress in respect of the

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1 Convention on the Rights of Persons with Disabilities GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008. Information from the United Nations (UN) treaty collection indicates that 17 out of 18 West African countries have signed and ratified the CRPD as at 28 March 2018 – see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 28 March 2018).

review of existing legislative and policy frameworks at domestic level.²

Article 24 of CRPD enjoins state parties to ensure inclusive education for persons with disabilities at all levels without discrimination and on the basis of equal opportunity.³ Under article 24(2), five key state obligations relating to the realisation of the right to inclusive education may be identified, such as the duty to ensure that children with disabilities are not excluded from free and compulsory primary education on the ground of disability.⁴ The state responsibility to provide reasonable accommodation⁵ is also highlighted.⁶

The Committee on the Rights of Persons with Disabilities (RPD Committee) has adopted a General Comment on the right to inclusive education to guide further understanding of this right.⁷ According to the Committee, article 24(2)(a) *inter alia* requires the prohibition of the exclusion of persons with disabilities from the general education system that may occur, for example, through legislative provisions limiting their inclusion based on disability.⁸ Elaborating on the duty to provide reasonable accommodation, the Committee further states that policies committing to reasonable accommodation must be adopted at all education levels.⁹

In the African region, the international normative framework is expanded by the African Charter on Human and Peoples' Rights (African Charter).¹⁰ This instrument sets out a number of provisions relevant to the right to education of children with disabilities. First, it guarantees freedom from discrimination¹¹ as well as the right to education;¹² second, it pays specific attention to the rights of the child¹³ and persons with disabilities.¹⁴

2 In terms of art 4(1)(b) of the CRPD, states parties undertake to take all appropriate legislative and other measures to modify or abolish existing laws and practices constituting discrimination against persons with disabilities.

3 (n 1) art 24(1).

4 (n 1) art 24(2)(a).

5 See definition of 'reasonable accommodation' in art 2 of the CRPD: read with the definition of disability-based discrimination (also in art 2) it confirms that a denial of reasonable accommodation constitutes discrimination on the basis of disability. See also art 5(3) of the CRPD, which further addresses the duty to provide reasonable accommodation.

6 CRPD (n 1) art 24(2)(c).

7 CRPD Committee General Comment 4 (2016) *Art 24: Right to inclusive education*, 2 September 2016, CRPD/C/GC/4.

8 (n 7) para 18.

9 (n 7) para 28.

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

11 Art 2. Although this article does not list disability among the prohibited grounds of discrimination, it includes the phrase 'or other status'. This has been read by the African Commission on Human and Peoples' Rights to encapsulate analogous grounds such as disability – *Purohit & Moore v Gambia* (2003) AHRLR 96 (ACHPR 2003).

12 African Charter, art 17(1).

13 Art 18(3).

14 Art 18(4).

The African Charter on the Rights and Welfare of the Child¹⁵ (African Children's Charter) similarly provides for the right to education¹⁶ of children with disabilities as well as special measures relating to children with disabilities.¹⁷

At the sub-regional level the Revised Economic Community of West African States (ECOWAS) Treaty recognises the promotion and protection of human rights in line with the African Charter as one of its fundamental principles.¹⁸ Significantly, the ECOWAS Court of Justice has held that the right to education, as guaranteed in article 17(1) of the African Charter, is justiciable before this Court (despite the fact that it may not be justiciable at the domestic level – in this instance Nigeria).¹⁹

Against this background, this commentary examines the legislative and policy frameworks relating to inclusive education of children with disabilities in three West African countries, namely, Nigeria, Ghana and Sierra Leone, in order to establish whether these frameworks have been adjusted to conform to the CRPD. Such an inquiry becomes especially pertinent when one considers that several of the enactments in question predate the adoption of the Convention.²⁰

All three countries have ratified CRPD²¹ and also have national laws on education, children's rights and the rights of persons with disabilities (Nigeria being an exception regarding the latter). The three countries follow a similar dualist approach to international law, which means that international treaties ratified by the country concerned must be enacted as national legislation to acquire the force of domestic law.²²

This commentary, which focuses on primary²³ education, will be limited to the two key obligations outlined above, namely, ensuring that children with disabilities are not excluded from free and compulsory

15 African Charter on the Rights and Welfare of the Child was adopted July 1990, OAU Doc.CAB/LEG/ 24.9/49 (entered into force 29 November 1999).

16 African Children's Charter, arts 11(3)(e) and 13. A discussion of these provisions is beyond the scope of this commentary.

17 African Children's Charter, art 13(1).

18 Revised ECOWAS Treaty 1993, art 4(g). See also art 56(2).

19 *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission* (No ECW/CCJ/APP/0808), 27 October 2009, para 20. See also discussion of the Nigerian Constitution in Part 2 below.

20 For example, Ghana's Persons with Disability Act 715 of 2006 and Sierra Leone's Education Act 2 of 2004 (discussed below in Parts 3 and 4 respectively).

21 Dates of ratification are as follows: Nigeria on 24 September 2010; Ghana on 31 July 2012; Sierra Leone on 4 October 2010. Nigeria and Ghana ratified the Optional Protocol to the Convention on the same dates; Sierra Leone is yet to ratify it.

22 Constitution of the Federal Republic of Nigeria, 1999, as amended (Nigerian Constitution) sec 12; Constitution of the Republic of Ghana, 1992, as amended (Ghanaian Constitution) sec 75(2); Constitution of Sierra Leone Act 6 of 1991, as amended (Sierra Leone Constitution) proviso to sec 40(4).

23 UN Committee on Economic, Social and Cultural Rights General Comment No 13 (1999) *Art 13: The right to education*, 8 December 1999, E/C.12/1999/10 para 9.

primary education²⁴ and providing reasonable accommodation in the context of education.²⁵

In terms of structure, the commentary is divided into five parts, including the introduction. The second, third and fourth parts examine the relevant legislation and policies in Nigeria, Ghana and Sierra Leone respectively, with a view to assessing state compliance with the normative standards outlined above. The final part is the conclusion.

2 Legislative and policy framework: Nigeria²⁶

2.1 Ensuring that children with disabilities are not excluded from compulsory free primary education

2.1.1 *Nigerian Constitution*

The Nigerian Constitution does not explicitly recognise the right to education.²⁷ Instead, section 18(1) requires the Nigerian government to direct its policy towards ensuring equal and adequate education opportunities at all levels.²⁸ Furthermore, the government must ‘as and when practicable’ provide free, compulsory and universal primary education.²⁹

The Constitution does provide for the right to freedom from discrimination as a justiciable right.³⁰ It sets out a closed³¹ list of so-called ‘prohibited grounds’. It is worth noting that this list does not include disability.

24 CRPD, art 24(2)(a). This does not imply that these two aspects are the only indicators of compliance with art 24; however, a more comprehensive analysis is beyond the scope of this commentary.

25 CRPD, art 24(2)(c).

26 For a more comprehensive overview of Nigerian legislation and policies relevant to disability, see NC Umeh and R Adeola ‘Country report: Nigeria’ (2013) *African Disability Rights Yearbook* 277-290.

27 Nigerian Constitution (n 22) sec 18(1).

28 The provisions regarding education, set out in sec 18, resort under Chapter II on Fundamental Objectives and Directive Principles of State Policy. By virtue of sec 6(6)(c) of the Constitution the right to education is therefore regarded as unenforceable in Nigerian courts.

29 Nigerian Constitution (n 22) sec 18(3)(a).

30 Nigerian Constitution (n 22) sec 42.

31 ‘Closed’ implies that the list does not permit expansion as would have been the case if it contained the phrase ‘or other status’ or words to that effect.

2.1.2 *African Charter (Ratification and Enforcement) Act*

The purpose of this Act³² is to give effect to the African Charter in Nigerian domestic law. This enables one to advance the argument that the prohibition of discrimination in the African Charter (which has been understood to include disability-based discrimination),³³ as well as the assurance of the right to education,³⁴ accordingly also form part of Nigerian law.

2.1.3 *Child Rights Act*

Section 15 of the Child Rights Act, 2003³⁵ stipulates that every child in Nigeria has the right to ‘free, compulsory and universal basic education’, and confirms that it is the duty of the government to provide such education.³⁶ Persons, authorities and institutions caring for children ‘in need of special protection measures’³⁷ are required to make an effort, within available resources, to provide the assistance and facilities necessary for their education and preparation for employment.³⁸

Despite these encouraging provisions, children with intellectual³⁹ disabilities are expressly excluded from the domain of section 15.⁴⁰ This exclusion does not resonate with the principles of CRPD (especially article 24), and demonstrates that the Act cannot be regarded as ensuring full legal protection for children with disabilities.⁴¹

2.1.4 *Compulsory, Free Universal Basic Education Act*

Section 2(1) of the UBE Act, 2004,⁴² the principal Nigerian legal instrument regarding education, imposes the duty on the government to provide free, compulsory and universal basic education for every child of primary and junior secondary school age⁴³ and specifically includes

32 African Charter (Ratification and Enforcement) Act of 1983, Chapter A9 Laws of the Federation of Nigeria 2004.

33 Art 2 - see (n 11)

34 African Charter (n 10) art 17(1).

35 Child’s Rights Act of 2003, Cap C50 Laws of the Federation of Nigeria 2010.

36 Sec 15(1).

37 Sec 16(1).

38 Sec 16(2).

39 The Act uses the term ‘mental disabilities’.

40 Child’s Rights Act (n 35) sec 15(7).

41 In addition to the exclusion of children with intellectual disabilities in the Act itself, the Act furthermore has not yet been enacted in all states as required under the provisions on concurrent legislative powers in the Nigerian Constitution (Second Schedule, Part II). See eg M Ifijeh ‘UNICEF calls for adoption of Child Rights Acts in all states’ *This Day* 1 June 2017 <https://www.thisdaylive.com/index.php/2017/06/01/unicef-calls-for-adoption-of-child-rights-acts-in-all-states/> (accessed 31 August 2018).

42 Compulsory, Free Universal Basic Education Act of 2004 (UBE Act).

43 Sec 2(1).

children with disabilities.⁴⁴ The substance of the Act, however, does not make reference to inclusive education. Instead, children with disabilities are expected to benefit from the entirety of the rights to free and compulsory primary education on the same basis as children without disabilities.

2.1.5 *National Policy on Education (NPE)*

The present NPE 2013⁴⁵ includes a dedicated section on ‘special needs education’.⁴⁶ The policy states that persons with special educational needs must be provided with inclusive education in mainstream⁴⁷ schools.⁴⁸ On the other hand, persons with such needs ‘who cannot benefit from inclusive education’⁴⁹ are limited to special schools. At the same time, the NPE states that the aims of special needs education include the provision of access to education for all persons, in an inclusive setting, and equalisation of educational opportunities.⁵⁰ Notably, the NPE does not expressly prohibit the exclusion of children with disabilities from compulsory free primary education, despite the fact that the document was revised in 2013, that is, after Nigeria had ratified CRPD.

2.2 **Obligation to provide reasonable accommodation**⁵¹

2.2.1 *African Charter (Ratification and Enforcement) Act*

The African Charter (understandably, given the date of its adoption) does not mention the term ‘reasonable accommodation’, but does stipulate that persons with disabilities are entitled to ‘special measures of protection’ in relation to their needs.⁵² Due to the effect of this Act, this entitlement has been introduced into Nigerian law.⁵³ Such protective measures may (arguably) include providing reasonable accommodation in the context of education.

44 Sec 15(1).

45 Federal Republic of Nigeria *National Policy on Education* 6th ed (2013).

46 Sec 7.

47 The phrase used in the NPE is ‘schools which normal persons attend’.

48 Para 118.

49 As above.

50 Paras 119(a) and (b).

51 In the interests of brevity, legislation and policies that do not make any reference to reasonable accommodation (or measures that may amount to such accommodation) have not been listed here. The same approach is followed in Parts 3 and 4.

52 Art 18(4) African Charter.

53 African Charter (Ratification and Enforcement) Act, 1983

2.2.2 National Policy on Education

The NPE requires the Nigerian government to provide the funding, services and facilities necessary to ensure that persons with special education needs have 'easy access to quality education',⁵⁴ which could similarly be construed as an obligation in respect of reasonable accommodation. The specific examples listed in the policy, which include text books in Braille, wheelchairs, computer technology and protective clothing and sunglasses,⁵⁵ are reminiscent of 'typical' reasonable accommodation measures, even if the term is not expressly used.

3 Ghana⁵⁶

3.1 Ensuring that children with disabilities are not excluded from compulsory free primary education

3.1.1 Ghanaian Constitution

The Ghanaian Constitution of 1992 safeguards the right to equal educational opportunities and facilities.⁵⁷ Basic education is stated to be free, compulsory and available to all.⁵⁸ Article 29 of the Constitution further specifies that persons with disabilities must be protected against all treatment of a discriminatory nature.⁵⁹ However, disability again is not listed among the prohibited grounds of discrimination.⁶⁰

3.1.2 Persons with Disability Act

The Persons with Disability Act of 2006⁶¹ goes beyond the Constitution in that it explicitly prohibits disability-based discrimination.⁶² It also provides for the right to compulsory⁶³ free education for persons with disabilities,⁶⁴ except where a child with a disability has been assessed by

54 NPE (n 45) para 122.

55 Paras 122(i), (iv) & (vii) respectively.

56 For a more comprehensive overview of Ghanaian legislation and policies relevant to disability, see EA Gyamfi 'Country report: Ghana' (2013) *African Disability Rights Yearbook* 221.

57 The Ghanaian Constitution (n 22) art 25(1) emphasise the full realisation of the right to education of all persons under Ch 5 group of rights recognised as fundamental rights.

58 Art 25(1)(a).

59 Art 29(4).

60 Art 17(2). As in the case of the Nigerian Constitution, the list of prohibited grounds is a 'closed' one see 31.

61 Act 715 of 2006. The Act was assented to on 9 August 2006 and thus predates the adoption of CRPD on 13 December 2006.

62 Sec 4(1).

63 Secs 16(1) & (2).

64 Sec 18(1).

the Ministry of Education to be someone who ‘clearly requires’ being in a special school.⁶⁵

3.1.3 *Education Act, 2008*

Ghana’s Education Act, 2008⁶⁶ endorses the principle of free and compulsory basic education.⁶⁷ It also addresses inclusive education, which is defined as entailing that all persons attending educational institutions are entitled to equal access to learning, achievement and the pursuit of excellence in all aspects of their education.⁶⁸ The specific measures set out in section 5 are addressed below.

3.1.4 *Inclusive Education Policy, 2015*

Ghana’s Inclusive Education Policy (IEP), 2015⁶⁹ *inter alia* seeks to redefine the delivery and management of educational services in order to respond to the diverse needs of all learners within the frameworks of Universal Design for Learning⁷⁰ and Child Friendly Schools.⁷¹ One of the guiding principles underpinning this policy is that no child may be excluded from education based *inter alia* on disability.⁷²

3.2 **Obligation to provide reasonable accommodation**

3.2.1 *Persons with Disability Act*

Article 17 of the Act, 2006⁷³ directs the Minister of Education to designate schools or institutions in each region to provide the facilities and equipment necessary ‘to enable persons with disability to fully benefit from the school or institution’. While this provision is encouraging, it stops short of articulating the concept of reasonable accommodation as envisaged in CRPD.

65 Sec 20(1).

66 Act 778 of 2008

67 Sec 2(2).

68 Sec 5 (4).

69 Government of Ghana, Ministry of Education *Inclusive Education Policy* (2015).

70 Universal Design for Learning (UDL), which is aimed at making learning accessible to more learners in inclusionary programmes, entails that with modifications of *inter alia* teaching and learning materials and methods of communication, a much wider range of learners can be included in regular classroom instruction: IEP Annex 2.

71 See Annex 2 for definition.

72 Sec 3.0.

73 Persons with Disability Act, 2006

3.2.2 Education Act

Ghana's Education Act of 2008⁷⁴ recognises that institutions delivering education to children with disabilities⁷⁵ must improve on existing infrastructure and provide additional facilities where necessary.⁷⁶ Parents must request appropriate educational facilities (where these are not already in place); this is made subject to the availability of resources.⁷⁷ Furthermore, designs for schools should be 'user-friendly for children with special needs'.⁷⁸ Although this is a positive prerequisite, the impression is created (especially when read with the following subsection)⁷⁹ that the 'design' referred to here is limited to buildings and infrastructure. Although the Act does not make reference to reasonable accommodation, this provision may be seen as a move in this direction.

3.2.3 Inclusive Education Policy

The policy objectives of the IEP, 2015 include the promotion of Universal Design for Learning.⁸⁰ One of the strategies framed to achieve this is to make the relevant equipment and assistive devices available to children with disabilities to enable them to access quality education.

Although a definition of 'accommodations' is included in the IEP,⁸¹ the document's policy objectives and strategies do not mention 'reasonable accommodation' as such. The duty to provide reasonable accommodation could nevertheless (potentially) be inferred from other measures, as listed above.

74 Education Act (n 66).

75 The Act uses the term 'special needs'.

76 Sec 5(2).

77 Sec (5)(3).

78 Sec 5(1).

79 Sec 5(2) eg refers to improving existing infrastructure.

80 Sec 4.2 (Policy Objective 2).

81 See IEP Annex 1.

4 Sierra Leone⁸²

4.1 Ensuring that children with disabilities are not excluded from compulsory free primary education

4.1.1 Sierra Leone Constitution

In terms of the Sierra Leone Constitution,⁸³ the government must ensure that all citizens enjoy equal rights and adequate educational opportunities at all levels. This includes providing educational facilities at all levels so that all citizens have the opportunity to be educated to the best of their abilities.⁸⁴ In addition, the rights of vulnerable groups, such as children, women and the disabled, should be safeguarded.⁸⁵ The government's educational policy must be directed towards free compulsory basic education at primary and junior secondary school levels.⁸⁶ However, as is the case with the Nigerian Constitution,⁸⁷ these provisions are framed as fundamental principles of state policy, which are expressly declared non-justiciable and unenforceable by section 14 of the Sierra Leone Constitution. Although the right to non-discrimination is included as an enforceable right, disability is not specified as a prohibited ground of discrimination.⁸⁸

4.1.2 Education Act

Sierra Leone's Education Act, 2004⁸⁹ provides that all its citizens have the right to basic education,⁹⁰ which is compulsory.⁹¹ It further stipulates that basic education must be free in government-assisted primary and junior secondary schools (to the extent specified by the Minister of Education).⁹² Importantly, the principle of non-discrimination is emphasised, with disability explicitly listed as a prohibited ground.⁹³

82 For a more comprehensive overview of legislation and policies in Sierra Leone relevant to disability, see R Adeola 'Country report: Sierra Leone' (2015) *African Disability Rights Yearbook* 225.

83 Sierra Leone Constitution 1992 (n 22), sec 9(1).

84 Sec 9(1)(a).

85 Sec 9(1)(b).

86 Sec 9(2)(b).

87 See Part 2 above.

88 Sec 27(3). The list of grounds is a closed one.

89 No. 2 of 2004

90 'Formal basic education' consists of six years of primary and three years of junior secondary schooling; sec 3(1).

91 Sec 3(2).

92 Sec 3(3).

93 Secs 4(1) & (2).

4.1.3 *Child Rights Act, 2007*

The Child Rights Act, of 2007⁹⁴ stipulates that children with disabilities have the right to 'special care, education and training' wherever possible to develop their maximum potential and be self-reliant.⁹⁵ Reference is not made to the duty to ensure that children with disabilities are not excluded from the general education system.

4.1.4 *Persons with Disability Act*

Significantly, the Persons with Disability Act of 2011⁹⁶ provide that persons with disabilities may not be denied admission to or expelled from educational institutions by reason only of disability.⁹⁷ The right to free education of persons with disabilities nonetheless appears to be limited to tertiary education.⁹⁸

4.1.5 *Education Sector Plan (ESP)*

The Education Sector Plan (ESP) 2018-2020⁹⁹ acknowledges that inclusive education for 'children with special needs' in mainstream schools is still a new phenomenon in Sierra Leone.¹⁰⁰ In addition to inaccessible structures, a lack of appropriate facilities, teaching and learning materials and trained teachers to meet the needs of children with disabilities prevails.¹⁰¹ In order to address these shortcomings, the Ministry of Education, Science and Technology is currently in the process of developing an inclusive education policy.¹⁰²

While it could be argued that children with disabilities may benefit from the generalised outcomes formulated in the ESP (for example, Strategic Outcome 1.1 entails that all children will enter school and complete primary education),¹⁰³ it is regrettable that the ESP does not specifically address the exclusion of children with disabilities from education.

94 Act 7 of 2007

95 Sec 30(2).

96 Act 3 of 2011.

97 Sec 15(1).

98 Sec 14(1).

99 Ministry of Education, Science and Technology *Education Sector Plan: Getting it right – Service Delivery, Integrity and Learning in Sierra Leone(2018-2020)*.

100 ESP (n 95) 37.

101 ESP 22.

102 ESP 74.

103 ESP 27 - Strategic Outcome 1.1.

4.2 Obligation to provide reasonable accommodation

4.2.1 Sierra Leone Constitution

The Constitution requires the government to provide the necessary structures, finance and supportive facilities for education (generally).¹⁰⁴ This provision, however, hollowed out, first by the fact that it is framed as a principle of state policy and, second, by the addition of the qualification 'as and when practicable'.

4.2.3 Persons with Disabilities Act

This Act requires the government to ensure the structural adaptation of educational institutions to make them 'easily accessible' to persons with disabilities,¹⁰⁵ and every school is tasked with providing facilities for learning by persons with disabilities.¹⁰⁶ Furthermore, educational institutions must take into account the special needs of persons with disabilities with respect to the use of school facilities, physical education requirements and similar considerations.¹⁰⁷ While these provisions could be construed as an obligation to provide reasonable accommodation and/or individualised support, neither concept is expressly mentioned.

4.2.4 Education Sector Plan (2018-2010)

Under Strategic Outcome 1.6 of the ESP, which entails the improvement of school infrastructure, the ESP undertakes to *inter alia* address the lack of classrooms to accommodate all students and the lack of 'ramps for children with special needs'.¹⁰⁸ Specifically, Intervention 1.6b resolves to ensure that by 2020 at least 15 per cent of existing schools have ramps for students with disabilities. This commitment is commendable, but does raise the concern that inclusive education is conceptualised narrowly to relate to accessibility of the built environment only. It is also problematic that the ESP does not include a reference to 'reasonable accommodation' as such.

5 Conclusion

As this brief survey shows, none of the legislative and policy frameworks in the three West African jurisdictions comprehensively lives up to the expectations arising from articles 24(2)(a) and (c) of CRPD. In respect of constitutional provisions, the shortcomings range from the omission of

104 Sierra Leone Constitution 1992 (n 22), sec 9(1)(c).

105 Act 3 of 2011, sec 14(2).

106 Sec 14(3).

107 Sec 15(2).

108 ESP (n 95) 36.

disability as a listed ground in the general prohibition of discrimination (all three constitutions) to the framing of the right to education as a non-justiciable directive of state policy (Nigeria and Sierra Leone). Significantly, the non-discrimination clauses in the constitutions examined are not conceptually linked to a denial of reasonable accommodation as a form of disability-based discrimination.¹⁰⁹

As far as the dedicated laws on education, children's rights and the rights of persons with disabilities are concerned, it can be said that there is no single piece of legislation across the three countries which alone or in combination meets the standards set by article 24(2). Where legislation does include entitlements to education, this often is qualified by phrases such as 'within available resources'¹¹⁰ and 'wherever possible'.¹¹¹ While these inadequacies are (to some extent) explicable in the case of legislation enacted before the adoption of CRPD, it is disconcerting that omissions still occur, for example, in Sierra Leone's disability-specific legislation of 2011.¹¹²

In terms of policy, all three jurisdictions have certain constructive policy statements, such as the recognition that 'special needs education' should aim to provide access to education for all persons with disabilities in an inclusive setting¹¹³ and the prohibition of exclusion of children with disabilities from the general education system.¹¹⁴ One may observe that Ghana has made the most progress in the form of an inclusive education policy which not only acknowledges CRPD as underpinning framework,¹¹⁵ but also draws on key concepts from the Convention, such as universal design.¹¹⁶ On the other hand, Sierra Leone, which is yet to finalise its inclusive education policy, may be lagging behind.

What is glaringly missing in all three jurisdictions is a commitment to the provision of reasonable accommodation. As indicated above,¹¹⁷ such an undertaking, at least at policy level, is essential for conforming to CRPD. Instead, duties regarding reasonable accommodation may have to be construed from general and vague phrases such as 'easy access to quality education',¹¹⁸ and 'user-friendly [school designs] for children with special needs'.¹¹⁹

109 As highlighted earlier – see n 9.

110 Child Rights Act, Nigeria (n 35) sec 16(2).

111 Child Rights Act, Sierra Leone (n 90) sec 30(2).

112 See discussion in para 4.1.4 above.

113 National Policy on Education, Nigeria (n 45) para 119(a). See also discussion in para 2.1.5 above.

114 Inclusive Education Policy, Ghana (n 68) sec 3.0.

115 Inclusive Education Policy Annex 3.

116 See art 2 of the CRPD for a definition of 'universal design'.

117 See Part 1 above.

118 National Policy on Education, Nigeria (n 45) para 122. See also discussion in para 2.2.2 above.

119 Education Act of 2008, Ghana (n 65) sec 5(1). See also discussion in para 3.2.4 above.

This does not imply that no progress has been made. For example, Sierra Leone recently launched a free education programme, which will benefit 1,5 million children.¹²⁰ This announcement is significant, given the confirmation in the country's Education Sector Policy that the group of children most at risk of being left out of education due to unaffordable school fees includes children with disabilities.¹²¹

It is also promising that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol),¹²² adopted by the African Union Assembly of Heads of State and Government on 29 January 2018, is not only aligned with article 24 of the CRPD, but in certain instances also expands state duties regarding the right to education, for example, by requiring state parties to ensure that multi-disciplinary assessments are undertaken to determine appropriate reasonable accommodation and support measures for learners with disabilities.¹²³

It is hoped that, once in operation, the combined weight of CRPD and the African Disability Protocol will generate sufficient political will at national level for governments to take the practical steps necessary to realise the right to inclusive education of children with disabilities not only in West Africa, but in the broader African context as well.

120 AR Thomas 'Sierra Leone launches free school education' *Sierra Leone Telegraph* 19 August 2018, <https://www.thesierraleonetelegraph.com/sierra-leone-launches-free-school-education/> (accessed 23 August 2018).

121 Education Sector Policy, Sierra Leone (n 95) 27.

122 Office of the UN High Commissioner for Human Rights 'African states affirm the rights of persons with disabilities in a new landmark protocol' 15 February 2018. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22661&LangID=E> (accessed 23 August 2018).

123 Art 14(3)(g).

BOOK REVIEW

PETER BLANCK & EILÍÓNOIR FLYNN (EDS)
THE ROUTLEDGE HANDBOOK OF DISABILITY LAW
AND HUMAN RIGHTS (2017)

*Helène Combrinck**

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1 Introduction

One of the numerous benefits (possibly unanticipated) of the adoption of the Convention on the Rights of Persons with Disabilities (CRPD)¹ 12 years ago has been the burgeoning international scholarship on disability rights that has since emerged. Recent years have seen the publication of a number of innovative texts on the CRPD as well as on disability rights more broadly.² The *Routledge handbook of disability law and human rights (Handbook)*, edited by Peter Blanck and Eilíónoir Flynn, is a commendable addition to these ranks.

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

2 Examples include O Arnardóttir & G Quinn (eds) *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009); MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011); M Sabatello & M Schulze *Human rights and disability advocacy* (2014); AS Kanter *The development of disability rights under international law: From charity to human rights* (2015); V Della Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017); C O'Mahony & G Quinn *Disability law and policy: An analysis of the UN Convention* (2017); I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2018).

The editors explain at the outset that the *Handbook* aims to acquaint the next generation of disability rights and other scholars with the critical ideas that have directed the growth of law and policy over the past several decades.³ Significantly, the volume brings together a number of well-established experts as well as newer authors working in the field of disability rights and related disciplines.

The *Handbook* consists of three components, examining the theoretical underpinnings of disability law, ongoing debates and emerging fields respectively. For ease of reference, each of these parts will in turn be discussed below. The review concludes with some observations regarding the significance of the volume.

2 Overview of contents

2.1 Part 1: Theoretical underpinnings of disability law

The initial part of the *Handbook* focuses on the 'classical theories guiding the evolution of disability rights law in different regions of the world'.⁴ The first chapter, co-authored by Lawson and Priestley, presents the concept of the social model of disability and explores the key questions this model poses for disability law and policy.⁵ The authors briefly recount the history of the social model and also outline certain of the controversies accompanying this model, most notably the uneasy relationship between 'impairment' and 'disability'.⁶ They argue that the social model provides a helpful lens through which to analyse, on the one hand, legal rules and principles that disadvantage and oppress persons with disabilities and, on the other, the potential of law as a mechanism for resisting disabling barriers.⁷ Given the potential for law to be enriched by disability studies, they ultimately call for greater engagement by legal scholarship with the social model of disability and its concomitant debates.⁸

The contribution by Lawson and Priestley logically leads to a subsequent⁹ chapter by Degener, which considers the human rights model of disability as one possible alternative to the social model.¹⁰ Importantly,

3 P Blanck & E Flynn 'Introduction' in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* xv.

4 As above.

5 A Lawson & M Priestley 'The social model of disability: Questions for law and legal scholarship' in Blanck & Flynn (n 3) 3-15.

6 Lawson & Priestley (n 5) 7-9.

7 Lawson & Priestley 14.

8 Lawson & Priestley 15.

9 This review does not follow the sequence of chapters as they appear in part 1 of the *Handbook*.

10 Degener points out that her argument is not ultimately aimed at discarding the social model, but rather at expanding it; T Degener 'A human rights model of disability' in Blanck & Flynn (n 3) 48.

Degener's examination of the human rights model is grounded in her experience as a long-standing member and current Chairperson of the Committee on the Rights of Persons with Disabilities (CRPD Committee), and in this sense it provides readers with a first-hand view of the challenges encountered in putting the Convention into practice.

Degener notes as a starting point that the renowned 'paradigm shift' from the medical to the social model has often been hailed as the CRPD's primary accomplishment.¹¹ While conceding that the social model was the predominant framework shaping the drafting process, Degener offers the interesting insight that the Convention as adopted 'codifies the human rights model of disability', thereby surpassing the social model.¹²

The chapter then distinguishes between the social model and the human rights model with reference to six supporting arguments. For example, it is explained that unlike the social model which has been criticised for overlooking impairment, the human rights model acknowledges the life circumstances associated with impairment.¹³ In this regard, Degener points out that the 'diversity principle'¹⁴ encapsulated in article 3 of the CRPD constitutes a significant addition to human rights theory.¹⁵ This is due to its implicit acknowledgment that impairment should not be regarded as a deficit or a factor that detracts from human dignity.¹⁶ The CRPD instead 'values impairment as part of human diversity and human dignity'.¹⁷ According to the author, it is at this point that the human rights model goes beyond the social model.¹⁸

The third chapter in part 1 considers the current status, and uncertain future, of the European welfare state.¹⁹ Hvinden describes the origins of the welfare state and also explains the factors giving rise to more recent austerity measures. Interestingly, the author does not find evidence of a general shift towards austerity measures for persons with disabilities in Europe since the onset of the international financial crisis in 2008, with the United Kingdom (UK) the only country among those examined exhibiting a clear trend towards a lower level of spending on disability benefits.²⁰ This

11 Degener (n 10) 33. She observes that most state parties to CRPD are still caught up in the medical model and lack an understanding of the new model; Degener (n 10) 32.

12 Degener (n 10) 33.

13 Degener 38.

14 Art 3(d) lists 'respect for difference and acceptance of persons with disabilities as part of human diversity and humanity' as one of the central principles of the CRPD.

15 Degener (n 10) 40.

16 As above.

17 As above.

18 As above.

19 B Hvinden 'Beyond the welfare state: What next for the European social model?' in Blanck & Flynn (n 3) 16-30.

20 Hvinden (n 19) 22.

result is in line with the report²¹ issued by the CRPD Committee in October 2016 pursuant to its inquiry into the UK in terms of the Optional Protocol to the CRPD.²²

While Hvinden's chapter is generally helpful in understanding recent trends in disability policies in the European context, it also results in the detection of a *lacuna* in this part (and indeed, much of the volume as a whole, as is argued below), namely, the omission of a 'Global South' perspective.²³ It is suggested here that, for example, an examination²⁴ of the current global hegemony of neoliberalism and the implications this holds for disability law and policy would have been a beneficial contribution to the first part of the *Handbook*.²⁵

2.2 Part 2: Ongoing debates around disability law

The objective of the second part of the *Handbook* is to examine key conflicts and tensions in disability rights law 'which continue to be debated throughout the globe'.²⁶ The contributions here look at, amongst others, inclusion in education;²⁷ equality of opportunity in employment;²⁸ access to justice;²⁹ and social and political participation.³⁰ In line with the general aims of the *Handbook*, the chapters in this part not only set out the applicable normative provisions (for example, of the CRPD), but also contextualise these norms by setting out aspects such as the historical

21 CRPD Committee 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland: Report of the Committee' (2016) UN Doc CRPD/C/15/R.2/Rev.1, 6 October 2016.

22 Optional Protocol to CRPD GA Res A/RES/61/06 Annex II, adopted on 13 December 2006, entered into force on 3 May 2008. Art 6 of the Optional Protocol provides for the CRPD Committee to institute an inquiry upon receiving reliable information indicating grave or systemic rights violations by a state party. In this instance the Committee examined the cumulative impact of legislation and policies adopted by the UK entailing a significant reduction of social benefits (paras 1-2). The Committee found that there was reliable evidence that the threshold of grave or systematic violations of rights had been met (para 113).

23 This review adopts the description of 'North/South' terminology proposed by Meekosha: Countries in the Global South 'are, broadly, those historically conquered or controlled by modern imperial powers, leaving a continuing legacy of poverty, economic exploitation and dependence'. The Global North, on the other hand, refers to the centres of the global economy in Western Europe and North America; H Meekosha 'Decolonising disability: Thinking and acting globally' (2011) 26 *Disability and Society* 669.

24 See in this regard K Soldatic 'Surplus: Neoliberalism and disability and precarity' in B Watermeyer et al (eds) *The Palgrave handbook of disability and citizenship in the Global South* (2019) 13-26.

25 See also comments below regarding Keogh's equality analysis.

26 'Introduction' in Blanck & Flynn (n 3) xv.

27 R Kayess & J Green 'Today's lesson is on diversity' in Blanck & Flynn (n 3) 53-71.

28 L Waddington et al 'Equality of opportunity in employment: Disability rights and active labour market policies' in Blanck & Flynn (n 3) 72-87.

29 A Lawson 'Disabled people and access to justice: From disablement to enablement?' in Blanck & Flynn (n 3) 88-104.

30 L Schur 'Towards inclusion: Political and social participation of people with disabilities' in Blanck & Flynn (n 3) 118-133.

background or major points of contention. For example, the chapter by Waddington et al situates the challenge of achieving full participation in employment by persons with disabilities within fundamental questions such as the equal right to work³¹ and the significance of '(in)ability to work' in traditional notions of disability.³²

Lawson's chapter, which conceptually follows on the chapter by Lawson and Priestley in part 1, similarly provides a framework for her discussion of the enabling potential of article 13 of the CRPD. In order to orient the reader, she explores the different meanings of the term 'access to justice'³³ and systematically describes the barriers encountered in accessing justice with reference to three stages, namely, before, during and after legal proceedings.³⁴

This chapter on access to justice neatly segues into an instructive contribution by Cojocariu,³⁵ who provides a practitioner's perspective on procedural accommodations aimed at ensuring effective access of people with mental disabilities³⁶ to the European Court of Human Rights (European Court). The first part of the chapter examines the notion of '*de facto* representation' which was for the first time introduced in the case of *Câmpeanu v Romania*.³⁷ This matter arose from an application lodged with the Court by the Centre for Legal Resources (CLR)³⁸ following the death of Valentin Câmpeanu, an HIV positive man with intellectual disabilities of Roma descent, under extremely harsh institutional conditions. One of the aspects to be resolved in considering the admissibility of the application was the legal standing of the CLR before the Court.³⁹

The general rules regarding legal standing of individuals before the European Court stipulate that usually only living individuals ('direct victims') may validly lodge an application.⁴⁰ In cases where the direct victims have died or disappeared, close relatives (regarded as 'indirect

31 Waddington et al (n 28) 73.

32 Waddington et al 73-74.

33 Lawson (n 29) 88-90.

34 Lawson 91-97.

35 C Cojocariu 'Hit and miss: Procedural accommodations ensuring the effective access of people with mental disabilities to the European Court of Human Rights' in Blanck & Flynn (n 3) 105.

36 The author explains that this term refers to persons with psychosocial disabilities and persons with intellectual disabilities. It is also used in this review for clarity.

37 *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], Case 47848/08 (2014) (*Câmpeanu v Romania*).

38 The Centrul de Recurs Juridice (CLR) is a non-governmental organisation (NGO) operating in Romania, which conducts human rights monitoring and advocacy, with a particular emphasis on violations of the rights of persons with mental disabilities in institutions. See <http://www.crj.ro/en/about-crj/what-we-do/> (accessed 1 December 2018).

39 *Câmpeanu v Romania* (n 37) para 80.

40 See art 34 of the European Convention on Human Rights. It is interesting to note how the matter of *locus standi* is dealt with by other regional human rights bodies. Eg, the Inter-American Commission on Human Rights (Inter-American Commission) permits

victims') are by way of exception permitted to initiate proceedings regarding the violation of the right to life as guaranteed in article 2 of the European Convention. In the *Câmpeanu* case, the European Court declined to recognise the CLR as an 'indirect victim' due to the organisation's lack of personal interest or sufficiently close link with the deceased.⁴¹ However, the Court was prepared to designate the CLR as a '*de facto* representative', basing this concession on the exceptional circumstances of the case as well as the serious nature of the allegations.⁴²

Cojocariu welcomes the introduction of the notion of '*de facto* representation', noting that by acknowledging the special circumstances of people with mental disabilities, this approach may open up options for cases that may previously have been regarded as inadmissible.⁴³ At the same time, this development is attenuated by the Court's assertion that the outcome here constituted an exception to established jurisprudence justified by the unique circumstances of the case.⁴⁴ This disclaimer thus limits the potential for broader applicability of this accommodation.

The author further identifies problematic aspects of the Court's practice in dealing with unrepresented applicants with mental disabilities⁴⁵ and, in addition, cautions that the amendment in recent years of certain procedural requirements poses a risk of disproportionate disadvantage to, for example, persons in institutions with mental disabilities.⁴⁶

2.3 Part 3: New and emerging fields in disability law

The final part of the *Handbook* investigates 'leading edge developments' in disability law and policy.⁴⁷ In addition to the chapters summarised below, the topics covered here include the right to independent living;⁴⁸ the accessibility and usability of web content (with specific reference to people with cognitive disabilities);⁴⁹ disability and ageing;⁵⁰ and government policies relating to families of children with disabilities.⁵¹ These issues reflect present-day realities such as demographic trends towards ageing

the submission of petitions by NGOs that are not 'direct victims' of rights violations; see art 44 of the American Convention on Human Rights, read with art 23 of the Rules of Procedure of the Inter-American Commission (2002).

41 *Câmpeanu v Romania* (n 37) para 107.

42 *Câmpeanu v Romania* para 112.

43 Cojocariu (n 35) 108.

44 As above.

45 Cojocariu (n 35) 108-115.

46 Cojocariu 115-117.

47 'Introduction' in Blanck & Flynn (n 3) 135.

48 C Brennan 'Article 19 and the Nordic experience of independent living and personal assistance' in Blanck & Flynn (n 3) 156-165.

49 P Blanck 'eQuality: The right to the web' in Blanck & Flynn (n 3) 166.

50 E Flynn 'Disability and ageing' in Blanck & Flynn (n 3) 195.

51 A Rimmerman & M Soffer 'Disability family policy and the United Nations Convention on the Rights of Persons with Disabilities (CRPD): The case of Israel' in Blanck & Flynn (n 3) 242.

populations and the uncertainties brought about by the so-called 'information age'.

Series et al consider recent developments relating to the right to equal recognition before the law as set out in article 12 of the CRPD.⁵² The authors give an overview of the interpretive guidance provided by the CRPD Committee in the form of General Comment 1. This is followed by a discussion of nascent law reform initiatives in Africa, with a specific emphasis on advances in Kenya and Zambia. The authors similarly track progress in the UK. Importantly, they call for further research and scholarship to examine national systems to discover whether these are impermissible substituted decision making according to the General Comment.⁵³

Against the backdrop of rapid progress in the availability and use of genetic-testing technologies, De Paor considers the potential implications of this advancement for persons with disabilities.⁵⁴ She observes that these new testing technologies, which may identify predispositions to disease prior to the onset of symptoms, thus drawing attention to the possibility of future disabilities, may also result in new layers of discrimination against persons with disabilities.⁵⁵

The author convincingly argues that the abuse of genetic information may result in the creation of an 'underclass' of persons deemed to be genetically unwanted in society.⁵⁶ The new genetic technologies have the potential to 'idealise the perfect person', thus devaluing the lives of persons with disabilities and persons with future or putative disabilities.⁵⁷ This in turn invokes the inexcusable past of eugenic policies.⁵⁸ She accordingly identifies a clear need to regulate the use of genetic information and genetic testing.⁵⁹

Keogh's chapter on inclusive development aid, which relates to article 32 of the CRPD,⁶⁰ puts forward the argument that in order to build on progress already made in disability-inclusive development, it is important

52 L Series et al 'Legal capacity: A global analysis of reform trends' in Blanck & Flynn (n 3) 137.

53 In the South African context, Holness's incisive analysis of current decision-making regimes is an example of such an investigation; see W Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) 30 *South African Journal on Human Rights* 313.

54 A de Paor 'Disability and genetics: New forms of discrimination?' in Blanck & Flynn (n 3) 211.

55 De Paor (n 54) 212.

56 De Paor 220.

57 De Paor 221.

58 De Paor 220-222.

59 De Paor 227.

60 M Keogh 'Inclusive development aid' in Blanck & Flynn (eds) 228. Although this topic has not been emphasised to a great extent in disability rights scholarship, it has enjoyed attention in development studies: See eg C McClain-Nhlapo 'Epilogue: A decade of implementing the UN Convention on the Rights of Persons with Disabilities' (2016) 1

to look at how equality for persons with disabilities is understood.⁶¹ While recognising that such an inquiry 'is not an easy task', the author does provide guidance on the different meanings of equality, with specific reference to the CRPD.⁶²

Keogh emphasises that discrimination experienced by persons with disabilities is multidimensional in that it may differ based on socio-economic, cultural and political environments, and also due to divergent individual characteristics.⁶³ The challenge for development actors, according to Keogh, is to take account of the diversity of persons with disabilities and to evaluate these compound levels of discrimination.⁶⁴ She consequently offers the notion of intersectionality as an analytical tool which addresses multiple discrimination⁶⁵ and also demonstrates the potential utility of an intersectional approach for persons with disabilities in the development context.⁶⁶

It is noteworthy that the CRPD Committee in its General Comment on women and girls with disabilities similarly employs the notion of 'multiple and intersecting forms of discrimination'.⁶⁷ Keogh's equality analysis, while not extensive, also contributes an essential component of the broader theoretical framework underpinning the *Handbook*.⁶⁸

3 Significance of the *Handbook*

It is evident from the overview above that the *Handbook* offers a rich and multidimensional collection of viewpoints on contemporary disability law. It captures a particular moment in time, reflecting both the events leading up to this point and looking ahead to future developments. The *Handbook* notably includes discussions of certain of the rights that proved most contentious in the drafting of the CRPD, and while it may not yet be possible to formulate definitive answers, the authors do not shy away from asking 'difficult' questions. In this way, one anticipates that the *Handbook* will also provide guidance in identifying areas for future research.

Third World Thematics 425-429; L Swartz & M MacLachlan 'From the local to the global: The many contexts of disability and international development' in M MacLachlan & L Swartz (eds) *Disability and international development: Towards inclusive global health* (2009) 1.

61 Keogh (n 60) 229.

62 Keogh 234-235.

63 Keogh 233.

64 Keogh 234.

65 Keogh 236.

66 Keogh 238-240.

67 CRPD Committee General Comment 3 (2016) on women and girls with disabilities UN Doc CRPD/C/GC/3 25 November 2016 paras 2, 3 & 16. See also SM Manning et al 'Uneasy intersections: Critical understandings of gender and disability in global development' (2016) 1 *Third World Thematics* 292.

68 It could be argued that a more in-depth discussion of equality and non-discrimination would have been a valuable addition to the theoretical overview in part 1 of the *Handbook*.

As indicated above, one point of concern does emerge, namely, the omission of Global South perspectives. The chapter by Series et al, which includes a specific section on legal capacity law reform in Africa, is a welcome exception. Keogh's chapter, dealing with inclusive development cooperation, also (inevitably) makes reference to the Global South and developing countries. However, one would have preferred the discussion to have moved beyond a conceptualisation of countries in the Global South as recipients primarily of development aid.

Despite this aspect, it can be said that the *Handbook* impresses: It is well-structured and the recurrence of themes such as the construction of disability as a (valued) aspect of human diversity serves to draw wide-ranging contributions together into a coherent unit. It is predicted that the *Handbook* will become an indispensable item in the resource collection of disability rights scholars.