CHAPTER 4

REARTICULATING UBUNTU AS A VIABLE FRAMEWORK FOR THE REALISATION OF LEGAL CAPACITY IN SUB-SAHARAN AFRICA

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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 nothing 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 Protocol[1] 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 capacity[12] 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 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 Oyaro '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.