

# African Disability Rights Yearbook 2021

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 2021

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## **THIS YEARBOOK SHOULD BE CITED AS (2021) 9 ADRY**

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# EDITORIAL

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

Section A of this volume features eight articles by: Yvette Basson on equality for women with disabilities in South Africa and the implementation of Articles 5 and 6 of the Convention on the Rights of Persons with Disabilities; Mildred Bekink on the protection of disabled child victims within the South African criminal justice system; Ebenezer Durojaye and Robert Doya Nanima on the realisation of the right to health of persons with disabilities in the COVID-19 era; Paul Ochieng Juma and Beryl Orao on the impact of global and regional jurisprudence on the right to health of persons with disabilities in Kenyan courts; Adetokunbo Johnson on the voiceless woman and protecting intersectional identity under section 42 of the Nigerian Constitution; Jorge Manhique on ensuring participation and ownership of development programmes for persons with disabilities in Mozambique; Khetsiwe Masuku, Juan Bornman and Ensa Johnson on exploring barriers to access to healthcare for persons with disabilities in Eswatini; and Neel Raamandarsingh Purmah on inclusive education for learners with disabilities in Mauritius.

Section B contains four country reports by: Dagnachew B Wakene, Priscilla Yoon and Tsion Mengistu on Ethiopia; Marianne Séverin on Guinée; Gerard Emmanuel Kamdem Kamga on Algeria and SA Ngubane and JN Zongozzi on Sudan.

Section C on regional developments contains two commentaries by: Eilionóir Flynn on the rights of older persons with disabilities in the Protocol to the African Charter on Human and Peoples' Rights; and Sheryl Reimer-Kirkham, Ikponwosa Ero, Innocentia Mgijima-Konopi, Emma Strobell and Barbara Astle on mothering and albinism.

The 2021 volume ends with a book review of *Mental Health, Legal Capacity and Human Rights* (2021) authored by Michael Ashley Stein, Faraaz Mahomed, Vikram Patel and Charlene Sunkel. The book is reviewed by Paul Ochieng Juma.

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## **SECTION A: ARTICLES**



# 1 TOWARDS EQUALITY FOR WOMEN WITH DISABILITIES IN SOUTH AFRICA: THE IMPLEMENTATION OF ARTICLES 5 AND 6 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Yvette Basson\*

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## Summary

*The United Nations Convention on the Rights of Persons with Disabilities provides for various rights that must be prioritised by states parties which have signed and ratified it, with particular emphasis on the right to equality. The CRPD was signed and ratified by South Africa, and as such has become binding and requires implementation into the domestic legislation of the country. Article 5 of the CRPD provides generally for the principles of equality and non-discrimination of persons with disabilities. Article 6 then furthers this concept specifically for women with disabilities. The aim of this article is to determine whether the current legislative measures in place in South Africa, to realise the right to equality of women with disabilities, are compliant with international law. To this end, articles 5 and 6 of the CRPD along with the General Comments released by the Committee on the Rights of Persons with Disabilities will be analysed.*

## 1 Introduction

2021 marks the 15th anniversary of the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>1</sup> The CRPD was adopted as a result of the recognition of the unique nature of the obstacles faced by persons with disabilities in achieving equality with their non-disabled peers. The introduction of the CRPD in 2006 resulted in a heightened awareness of the adequacy of measures aimed at reducing the level of marginalisation experienced by persons with disabilities. The founding principle of the CRPD is the creation of conditions under which

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

Y Basson 'Towards equality for women with disabilities in South Africa: The implementation of articles 5 and 6 of the Convention on the Rights of Persons with Disabilities' (2021) 9 *African Disability Rights Yearbook* 3-22

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persons with disabilities can participate equally in society, despite their individual disability.

The socio-economic rights of marginalised and previously disadvantaged persons have been prioritised by the South African government since the transition to democracy and the introduction of the Constitution of the Republic of South Africa, 1996. Examples of persons who have (and still are) experiencing the consequences of systemic discrimination include women, black people and persons with disabilities.<sup>2</sup> Legislation, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), has been enacted to provide clear guidelines on how the rights of these marginalised groups are to be advanced. Over the years, there has also been significant jurisprudence on this subject, with a focus on the right to equality of marginalised groups. Well-known examples of such cases include *Hoffmann v South African Airways*<sup>3</sup> and *National Coalition for Gay and Lesbian Equality v Minister of Justice*.<sup>4</sup> The prohibition of unfair discrimination in South Africa is extensive, and significant progress has been made on this front. However, one marginalised group continues to find itself on the outskirts of this prioritisation of socio-economic rights to which it is entitled, namely persons with disabilities and more specifically women with disabilities.

Statistics show that women with disabilities in South Africa remain extremely disadvantaged in many respects, ranging from inadequate medical care to facing a lack of suitable employment opportunities.<sup>5</sup> The compilation of statistics relating to women with disabilities is impacted by the lack of priority shown to this group, since the gathering of such statistical information is inadequate.<sup>6</sup> Women with disabilities experience lower levels of employment<sup>7</sup> and education<sup>8</sup> than women without disabilities and men with disabilities, and higher levels of poverty<sup>9</sup> than these peer groups which means that the constitutional imperative of substantive equality is not a reality for women with disabilities. This is a clear indication that women with disabilities in South Africa are not experiencing full and equal participation in society. The ongoing

2 This is not a numerus clausus. See sec 9(3) of the Constitution of the Republic of South Africa, 1996.

3 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

4 *National Coalition for and Lesbian Equality and Another v Minister of Justice* 2000 (2) SA 1 (CC).

5 'Initial reports of state parties due in 2009: South Africa' (26 November 2014) 59; World Health Organisation 'World Report on Disability' (2011) 237.

6 Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse & Western Cape Network on Violence Against Women 'South African Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women – Submitted to the CEDAW Committee's 48th Session, 17 January-4 February 2011' (2011) 67.

7 Commission for Employment Equity 'Annual Report 2019-2020' (2019) 17.

8 Statistics South Africa 'Marginalised groups indicator report' (2018) 96.

9 Commission for Employment Equity (n 7) 44.

marginalisation of women with disabilities must be addressed to achieve the ideal of full and equal participation in society for women with disabilities in South Africa.

The CRPD provides for various rights that must be prioritised by states parties which have signed and ratified it, with particular emphasis on the right to equality.<sup>10</sup> The CRPD was signed and ratified by South Africa,<sup>11</sup> and as such has become binding and requires implementation into the domestic legislation of the country.<sup>12</sup> Article 5 of the CRPD provides generally for the principles of equality and non-discrimination of persons with disabilities. Article 6 then furthers this concept specifically for women with disabilities. The aim of this article is to determine whether the current legislative measures in place in South Africa to realise the right to equality of women with disabilities are compliant with international law. To this end, articles 5 and 6 of the CRPD along with the General Comments released by the Committee on the Rights of Persons with Disabilities<sup>13</sup> will be analysed. Thereafter, a set of indicators will be distilled from this analysis to use as a yardstick against which to measure the legislative provision for women with disabilities in South Africa. If there are any lacunae in this legislation, recommendations will be made as to how these can be remedied.

## **2 Article 5 of the CRPD**

Article 5 of the CRPD was included to express the importance of equality and non-discrimination for women with disabilities.<sup>14</sup> These concepts are described as being at the heart of the CRPD.<sup>15</sup> The Committee on the Rights of Persons with Disabilities (the Committee) noted some concern over the use of outdated approaches to disability.<sup>16</sup> The medical model of disability in particular has become outdated, in that it considers disability a matter of medicine and welfare.<sup>17</sup> The focus, in terms of the medical model, is on the 'treatment' and 'assistance' of women with disabilities by others and, as such, creates the impression that women with disabilities

10 Preamble to the CRPD.

11 South Africa signed and ratified the CRPD on 30 March 2007 and 30 November 2007 respectively. See 'United Nations Treaty Collection' [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) (accessed 16 March 2021).

12 Art 6 of the CRPD.

13 The Committee on the Rights of Persons with Disabilities was created in terms of art 34 of the CRPD and is tasked with, inter alia, compiling General Comments on articles of the CRPD to provide clarity as to what is required of states parties to the CRPD.

14 While the original text of art 5 refers to 'persons with disabilities', for ease of reading this article will substitute that phrase for 'women with disabilities', since the former includes the latter.

15 Sec 7 of the UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment on article 6: Women with disabilities (2015) UN Doc CRPD/C/14/R.1 dated 22 May 2015.

16 Sec 2 of General Comment 6.

17 Office of the President 'Integrated National Disability Strategy White Paper' (1997) 13.

induce feelings of sympathy and are not ‘complete’ human beings as a result of their particular medical condition.<sup>18</sup> This effectively diminishes a woman with a disability’s free exercise of her inherent rights, since she is seen as needing assistance to care for herself,<sup>19</sup> which is in direct contrast with the approach taken in terms of the human rights model. According to this approach, women with disabilities are considered full rights holders and the emphasis is on the person, instead of their medical condition.<sup>20</sup> It is the human rights model which is preferred by the Committee and which has informed the content of article 5.<sup>21</sup>

## 2.1 Article 5(1)

Article 5(1) requires the recognition by states parties ‘that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’. This is an unequivocal statement that women with disabilities have the same rights as women without disabilities. The concept of equality before the law is not new and has been included in various international instruments predating the CRPD,<sup>22</sup> but article 5(1) is the first time that this equality has been stated in the context of the rights of persons with disabilities.<sup>23</sup> This statement is particularly important for women with disabilities considering that women all over the world have historically been disenfranchised and been unable to exercise the same rights as men.<sup>24</sup> Article 5(1) thus confirms and emphasises the entitlement of women with disabilities to all the same rights and freedoms as their peers. In considering the issue of equality, the intersectionality between disability, gender and race must be acknowledged. This is particularly relevant for a country like South Africa, where the lingering effects and practical consequences of systemic racism are still felt.<sup>25</sup> The impact of race on the availability of resources and opportunities for women with disabilities is a substantial obstacle to full and equal participation in society.

18 I Grobbelaar-Du Plessis ‘Gestremdeheidsreg: ’n Internasionaalregtelike en regsver-gelykende analise’ LLD thesis, University of Pretoria, 2010 at 32.

19 Quinn G & Degener T *Human Rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

20 Sec 8 of General Comment 6.

21 Sec 9 of General Comment 6.

22 Equality before the law has been included in inter alia the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A(III) on 10 December 1948 and the International Covenant on Civil and Political Rights adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966.

23 Sec 8 of General Comment 6.

24 A Cornwall ‘Women’s empowerment: What works?’ (2016) 28 *Journal of International Development* 342 at 345.

25 National Planning Commission ‘National Development Plan 2030: Our future – Make it work’ (2012) 24.

Equality before the law means that women with disabilities must not be discriminated against in any legislation or by the judiciary,<sup>26</sup> while equality under the law means that women with disabilities are free to use the law for their personal benefit.<sup>27</sup> The full legal capacity of women with disabilities is thus expressly recognised in this section of article 5. From this, it is evident that states parties must recognise in some way the fact that women with disabilities have the equal protection and benefit of the law. When measuring compliance with article 5(1), it is submitted that one must therefore ask 'does the State Party recognise that women with disabilities have the equal benefit and protection of the law?'

## **2.2 Article 5(2)**

According to article 5(2): 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'. This section can be split into two concepts for ease of explanation, as can be seen below. Both are peremptory, since the CRPD provides that states parties 'shall' take both measures that follow in the section.

The first concept in article 5(2) creates an obligation on states to prohibit all discrimination based on disability. This places a positive duty on states to prohibit all forms of discrimination not only against women with disabilities, but also persons associated with them.<sup>28</sup> The Committee recognises four specific forms of discrimination that must be prohibited, namely direct discrimination, indirect discrimination, denial of reasonable accommodation and harassment.<sup>29</sup> This means that any attempt to prohibit discrimination against women with disabilities must be framed in such a way that each of these types of discrimination are clearly prohibited.

The second concept in article 5(2) requires that '[e]qual and effective legal protection' against 'discrimination on all grounds' be implemented. The express inclusion of the phrase 'legal protection' makes it clear that states must enact anti-discrimination legislation.<sup>30</sup> The article then refers to the prohibition of discrimination on 'all grounds'. This section alludes to the fact that discrimination does not always occur based on a single ground, but that it can be compounded by the interaction of different grounds with each other.<sup>31</sup> This 'multiple discrimination' creates a unique set of circumstances which result in aggravated discrimination being experienced.<sup>32</sup> This is clearly the case with women with disabilities, where

26 Sec 14 of General Comment 6.

27 As above.

28 Sec 17 of General Comment 6.

29 Sec 18 of General Comment 6.

30 Sec 22 of General Comment 6.

31 Sec 19 of General Comment 6.

32 As above.

gender and disability operate and interact and create additional barriers to equal benefit of the law. As mentioned above, the intersection of race, gender and disability must be taken into consideration when attempting to remedy systemic marginalisation experienced by women with disabilities. In the context of article 5(2), the intersection of race, gender and disability must be addressed when considering the legislation that states must implement to prohibit discrimination against women with disabilities. The legislation that states are compelled to enact must thus be comprehensive to offset the compounding effect of grounds of discrimination

Having considered article 5(2), it is submitted that the questions one must ask to gauge whether a state has been compliant are: 'has the state taken legislative measures to facilitate equal protection of and benefit under the law?'; and 'has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination against women with disabilities on all grounds?'. The latter investigation should take into consideration the impact of multiple discrimination as well.

### 2.3 Article 5(3)

Article 5(3) reads: 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'. Reasonable accommodation is defined as the

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.<sup>33</sup>

Reasonable accommodation is an integral part of the elimination of discrimination against women with disabilities.<sup>34</sup> Examples of reasonable accommodation include modifying equipment, rescheduling work, and making facilities and information accessible. There is no *numerus clausus* of examples since reasonable accommodation is implemented on an individual basis, in response to an individual's needs or requests.<sup>35</sup>

According to the Committee, reasonable accommodation is an *ex nunc* duty.<sup>36</sup> This means that reasonable accommodation must be provided when the women with a disability wants to exercise her rights.<sup>37</sup> The

33 Art 2 of the CRPD.

34 Sec 17 of the UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment 3 (2016), article 6: Women and girls with disabilities (2016) UN Doc CRPD/C/GC/3 dated 2 September 2016.

35 Sec 23 of General Comment 6.

36 Sec 24 of General Comment 6.

37 Sec 15 of General Comment 3.

denial of reasonable accommodation may result in unfair discrimination, although the CRPD does not require that the provision of reasonable accommodation be disproportionate or unduly burdensome on the person receiving the request.<sup>38</sup> In other words, a request for reasonable accommodation does not need to be met if the provider would be bound by an excessive or unjustifiable burden through complying with such a request. In determining whether a request is disproportionate or unduly burdensome, a case-by-case determination must be made as to whether the requested reasonable accommodation is proportional to the ends it aims to achieve.<sup>39</sup> Examples of factors to consider include the financial cost, health and safety requirements and the impact on other persons. Again, this is not a *numerus clausus* because of the individual nature of reasonable accommodation requests.

Article 5(3) creates an obligation on the state to not only implement reasonable accommodation itself, but also to ensure that reasonable accommodation is provided by others. When determining whether a state has been compliant with this obligation, the question that should be asked is 'has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?'

## 2.4 Article 5(4)

The last subsection of article 5 deals with the issue of specific measures taken to achieve de facto equality for women with disabilities.<sup>40</sup> Such specific measures may include policies or legislation that appear to be unfair in that they unduly favour women with disabilities. However, these specific measures will not be considered as unfair discrimination, and this is clearly stated in article 5(4) of the CRPD. This section aims to promote measures that may be used by states to advance the rights of women with disabilities, such as targeted recruitment and hiring procedures and the reallocation of resources for better access.<sup>41</sup> The use of positive measures to achieve equality for women with disabilities may appear to provide additional advantages to women with disabilities but are not considered unfairly discriminatory since these measures target a marginalised group.<sup>42</sup> Article 5(4) therefore does not create any additional obligations for states and there is thus no need to consider whether states are compliant with it or not. It is, however, important to note that article 5(4) echoes article 5(2) in that states must use positive or affirmative measures to achieve equality for women with disabilities.

38 Sec 18(c) of General Comment 6.

39 Sec 17(d) of General Comment 3.

40 Sec 17 of General Comment 6.

41 Sec 28 of General Comment 6.

42 As above.

### 3 Article 6 of the CRPD

Article 6 deals specifically with the rights of women with disabilities within the broader context of the CRPD. It has been described as a ‘cross cutting’ article, which means that states must take into consideration the rights of women with disabilities when implementing each of the other articles in the CRPD.<sup>43</sup> Historically, the intersectionality of disability and gender has been neglected in international law.<sup>44</sup> Essentially this means that international laws dealing with gender have not properly addressed disability, and vice versa. In addition, the issue of multiple discrimination was not previously addressed in international law and article 6 of the CRPD is a direct response to this invisibility of women with disabilities in international law.<sup>45</sup>

#### 3.1 Article 6(1)

Article 6(1) provides that:

States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

The first part of article 6(1) consists of a direct acknowledgement of the intersection of different grounds of discrimination. This echoes the latter part of article 5(2) which requires that discrimination on ‘all grounds’ should be prohibited. The intent of these articles is clear – states cannot deny the existence or effect of the multiple discrimination experienced by women with disabilities.

Article 6(1) reasserts that women with disabilities experience discrimination on multiple grounds, and then requires that states take specific action to negate the effect of this multiple discrimination. The latter half of article 6(1) requires that states take measures to ensure the full and equal enjoyment of all human rights and freedoms by women with disabilities. Unlike article 5 which requires legislative provisions to be enacted, the kind of measures taken by states is not specified in article 6(1). This means that the measures taken are not limited to legislation but can include policies and programmes, as long as these further the desired outcome of full and equal participation in society.<sup>46</sup>

43 Sec 28 of General Comment 3.

44 Sec 3 of General Comment 3.

45 As above.

46 Sec 62 of General Comment 6.

Article 6(1) is similar to article 5(2) in that both subsections require measures to be taken to ensure that women with disabilities enjoy the same rights as others. However, there are two points of distinction. Article 6(1) requires measures to be taken that are not limited to legislation, which is different to the obligation created in article 5(2). Article 6(1) further requires that measures be put in place to enjoy equal rights and freedoms, which is substantially broader than the ‘full and equal protection of the law’ required by article 5(2). There will by necessity be overlap in these two articles, but the implication of article 6(1) is clear: states must put in place measures beyond the enactment of legislation to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms.<sup>47</sup> This then forms the basis of the question that must be asked when measuring compliance with article 6(1), which is concerned with whether the state has adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms.

### **3.2 Article 6(2)**

Article 6(2) provides some clarity as to the nature and purpose of the measures that must be taken by states to ensure full and equal participation in society of women with disabilities. The subsections read that:

States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

This subsection overlaps with the obligations to enact legislation aimed towards ensuring full and equal participation in society for women with disabilities, since it requires states to take ‘appropriate measures’ to ensure a particular set of outcomes. The ‘appropriate measures’ referred to in this subsection includes legislation and policies, as well as targeted programmes aimed at advancing the rights of women with disabilities.<sup>48</sup>

The duty to ensure the ‘full development, advancement and empowerment of women with disabilities’ clarifies the goals that these appropriate measures must aim to achieve. While article 5 and article 6(1) mostly refer to legislative intervention by states, it is submitted that article 6(2) applies to effecting the social change necessary to ensure the full and equal participation in society of women with disabilities. The full and equal enjoyment of rights and freedoms of women with disabilities is largely informed by social norms and attitudes towards gender and

47 Sec 12 of General Comment 3.

48 Sec 16 of General Comment 3.

disability.<sup>49</sup> A woman with a disability who lives in a society where women and persons with disabilities are systemically disenfranchised and diminished will have much greater barriers to overcome to achieve full and equal participation in such a society.<sup>50</sup> States are therefore compelled to take measures that aim at empowering these women and advancing and developing their social, economic and political status.<sup>51</sup> These measures must contribute towards the goal of achieving full and equal participation in society of women with disabilities.

The question of whether these measures are ‘appropriate’ as required in article 6(1) is one that can only be answered on a country-by-country basis.<sup>52</sup> Since perceptions of gender and disability vary so broadly across the world, what may be considered an appropriate measure in one country may be wholly inappropriate in another.<sup>53</sup> The obligations created in article 6(2) must therefore be applied to each state without implicitly comparing its approach to the approach of other states. Since article 6(1) requires action that is very similar to article 6(2), the questions for gauging compliance are similar as well. The question that one should ask to determine whether a state is compliant with article 6(2) is whether a state has taken measures to develop, advance and empower women with disabilities and whether these measures are appropriate for the state in question.

#### 4 Indicators for compliance with articles 5 and 6

The above analysis of articles 5 and 6 of the CRPD is the first of its kind and has consequently led to the generation of 6 indicators for compliance which have not been previously clarified. To determine whether a state is compliant with its duties in terms of these two articles, the following questions must be asked:

- (1) Does the state party recognise that women with disabilities have the equal benefit and protection of the law?
- (2) Has the state taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities?
- (3) Has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination against women with disabilities on all grounds?

49 World Health Organisation ‘Intimate partner violence’ [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;jsessionid=5A8C7ADC004F42B33F9D5336AAAAD110?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=5A8C7ADC004F42B33F9D5336AAAAD110?sequence=1) (accessed 1 October 2020).

50 United Nations Development Programme ‘Human development report 2019’ (2019) 147.

51 Sec 21 of General Comment 3.

52 Sec 20 of General Comment 3.

53 L Grönvik ‘Defining disability: Effects of disability concepts on research outcomes’ (2009) 12 *International Journal of Social Research Methodology* 1 at 3.

- (4) Has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?
- (5) Has the state adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms?
- (6) Has the state taken measures to develop, advance and empower women with disabilities and, if yes, are these measures appropriate for the state in question?

It is important to note that neither article 5 nor article 6 provide for 'adequate' or 'extensive' measures to be implemented in respect of women with disabilities, but only require that these measures be appropriate. Whether measures are appropriate is an altogether different question to whether they are adequate. It is submitted that the adequacy (or otherwise) of these measures would be measured when examining the extent of implementation of other rights in the CRPD. As mentioned above, article 6 must be taken into consideration in relation to all the other provisions of the CRPD. For example, the right to an adequate standard of living requires a qualitative analysis of the resources available to women with disabilities. This effectively means that the measures put in place in terms of articles 5 and 6 can be qualitatively assessed when assessing the implementation of other rights in the CRPD. What is clear from the language used in articles 5 and 6 is that the state party is required to implement extensive and comprehensive measures to eliminate discrimination against women with disabilities and promote full and equal participation in society.

## **5 Is South Africa compliant with articles 5 and 6 of the CRPD?**

As mentioned above, South Africa has signed and ratified the CRPD and its Optional Protocol and is therefore bound by its provisions. The CRPD monitoring process consists of states submitting a periodical Country Report to the Committee, which then makes Concluding Observations on that report.<sup>54</sup> After these Concluding Observations have been made, the state party is left to its own devices in implementing the recommendations made by the Committee, since these are not binding on the state party.<sup>55</sup> While the nature of the enforcement of the provisions of the CRPD is beyond the scope of this article, the Country Report and corresponding Concluding Observations are a source of information on the measures South Africa has taken to realise the rights in the CRPD. In the following

54 United Nations Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (accessed 4 April 2021).

55 Office of the High Commissioner for Human Rights 'Concluding Observations' <https://www2.ohchr.org/english/bodies/treaty/glossary.htm> (accessed 4 April 2021).

paragraphs, each of the indicator questions will be applied to South Africa's measures to implement articles 5 and 6 of the CRPD.

### **5.1 Does South Africa recognise that women with disabilities have equal benefit and protection of the law?**

South Africa has one of the most progressive Constitutions in the world. As a result of the legacy of apartheid in the form of systemic discrimination, great importance was placed on the right to equality in the Constitution. The equality clause, section 9 of the Constitution, is of particular importance for women with disabilities, since it underpins several laws related to improving the socio-economic position of women with disabilities in South Africa. Section 9 aims to protect not only society as a whole, but in particular those members of society who are deemed to require extra protection in order to ensure that their basic rights are not limited or infringed unjustifiably.<sup>56</sup> Section 9(1) provides that 'everyone is equal before the law and deserves the equal protection of the law'.

Section 9(1) is an outright acknowledgment that 'everyone' is entitled to equality before the law and that 'everyone' deserves the equal protection of the law. This 'everyone' must be interpreted generously<sup>57</sup> and it stands to reason that this 'everyone' includes women with disabilities, especially in the light of the sections that follow which prohibit discrimination on gender, sex and disability among others. South Africa does therefore recognise that women with disabilities are entitled to the equal benefit and protection of the law.

### **5.2 Has South Africa taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities?**

Other than the Constitution, the primary legislation dealing with equality and unfair discrimination is the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which was enacted to give effect to section 9 of the Constitution.<sup>58</sup> The aims of PEPUDA include 'the equal enjoyment of all rights and freedoms by every person' and 'the promotion of equality'. While PEPUDA does not expressly mention women with disabilities, this does not mean that women with disabilities are excluded from the provisions of PEPUDA.<sup>59</sup> Section 6 of PEPUDA echoes section

56 K Govender 'Power and constraints in the Constitution of the Republic of South Africa 1996' (2013) 13 *African Human Rights Law Journal* 82 at 84.

57 *S v Zuma* 1995 (2) SA 642 (CC) para 14. See also *S v Mhlungu* 1995 (3) SA 391 (CC) para 8.

58 Sec 2(a) of PEPUDA.

59 Y Wiid 'The right to social security of persons with disabilities in South Africa' LLD thesis, University of the Western Cape, 2015 at 83.

9(3) of the Constitution and provides that '[n]either the State nor any person may unfairly discriminate against any person'. The phrase 'any person' includes women and persons with disabilities. Women with disabilities are therefore entitled to the protection of PEPUDA generally, as well as the targeted protection of sections 8 and 9. It is submitted that any interpretation of PEPUDA that leads to the exclusion of women with disabilities from its scope of application would be contrary to the spirit and purport of PEPUDA.

Between the equality clause in the Constitution and the provisions relating to women with disabilities in PEPUDA, it is submitted that South Africa has taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities.

### **5.3 Has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination (including multiple discrimination) against women with disabilities on all grounds?**

Section 9(3) of the Constitution provides that:

[T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, *gender, sex*, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.<sup>60</sup>

Disability is expressly included in section 9(3), and a person may therefore not be discriminated against because of their disability. Similarly, sex and gender are also grounds upon which unfair discrimination may not take place. The drafters of the Constitution clearly recognised that persons with disabilities and women require legislative and other measures to ensure their full and equal participation in society.<sup>61</sup> There is also a direct recognition that discrimination can be based on 'one or more grounds'. There is thus an acknowledgement from that state that multiple discrimination exists, although the intersection of disability and gender is not expressly mentioned.

In addition to the recognition of the existence of multiple discrimination, section 9(3) also includes a prohibition on two forms of discrimination. Direct and indirect discrimination based on gender, sex and disability are expressly prohibited although the compounding effect of more than two concomitant grounds is not mentioned. Nonetheless, the

60 My emphasis.

61 This is reflected in section 9(2) of the Constitution which provides for the use of affirmative action measures in respect of these groups of persons.

Constitution should be considered the legislative spearhead in prohibiting all forms discrimination against women with disabilities on all grounds.

The primary legislation dealing with unfair discrimination is PEPUDA, as discussed briefly above. The blanket prohibition of unfair discrimination in section 6 of PEPUDA is expanded upon in sections 7-9, where unfair discrimination on specific grounds is emphasised. Sections 8 and 9 prohibit unfair discrimination on the grounds of gender and disability, respectively. These sections list examples of conduct that will be considered unfair discrimination when aimed at either women or persons with disabilities. Examples include denial of access to opportunities, gender-based violence, denying any enabling facility and failing to eliminate obstacles that unfairly limit persons with disabilities from enjoying equal opportunities. By necessity, there is some overlap between these sections in the context of women with disabilities.<sup>62</sup> Multiple discrimination is therefore acknowledged in PEPUDA. The definition of discrimination in section 1 includes the phrase 'on one or more grounds', which indicates that the legislature intended to include multiple discrimination in the scope of application of PEPUDA. It is submitted that this acknowledgment that multiple discrimination exists is not sufficient to meet the requirement that states must take measures to prohibit discrimination on all grounds. The issue of multiple discrimination must be explained, and examples should be given, so that multiple discrimination can be identified, and the effects of multiple discrimination can be eliminated.

In 2016, the Department of Social Development released the first South African policy document on the rights of persons with disabilities in the form of a white paper.<sup>63</sup> The purpose of a white paper is to inform the drafting of future legislation, and so the release of a white paper relating to persons with disabilities can be considered an indication that legislation may be forthcoming. The White Paper on the Rights of Persons with Disabilities (the White Paper) is described as a 'call to action for government, civil society and the private sector to work together to ensure the socio-economic inclusion of persons with disabilities'.<sup>64</sup> Two of the pillars of the White Paper are to promote and support the empowerment of women with disabilities and to protect the rights of persons at risk of compounded marginalisation.<sup>65</sup> The White Paper then outlines how these pillars are to be achieved. These will be discussed below, when enquiring as to which policies and programmes have been put in place by the state,

62 Examples of this overlap include the elimination of gender-based violence and pregnancy related resources.

63 Department of Social Development 'White Paper on the rights of persons with disabilities' (2016) GG No 39792 9 March 2016.

64 White Paper (n 63) 7.

65 White Paper (n 63) 9.

since no legislation has yet been drafted as a result of the adoption of the White Paper.

Upon examination of the legislation currently in force, it becomes clear that women with disabilities are included in equality legislation only by implication. There is no legislation that is aimed at the right to equality of women with disabilities. In fact, South Africa does not have disability specific legislation at all. Disability is included in different statutes in a piecemeal fashion, which leads to a fragmented legal framework on the rights of women with disabilities. There is also no legislation which expressly provides that women with disabilities experience multiple discrimination, and no indication of how such discrimination is meant to be eliminated. Both the Constitution and PEPUDA acknowledge the existence of multiple discrimination, but neither provide guidance on how this is to be dealt with.

It is submitted that the CRPD requires more from a state party than inclusion in existing statutes by implication. There should be a clear legislative directive on the elimination of unfair discrimination against women with disabilities, and such a directive is currently lacking in South African legislation. This means that South Africa has not taken comprehensive legislative measures to eliminate all forms of discrimination against women with disabilities on all grounds and is not compliant with article 5 of the CRPD.

#### **5.4 Has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?**

There are two pieces of legislation in South Africa that aim to ensure the provision of reasonable accommodation. The first is PEPUDA and the other is the Employment Equity Act (EEA).<sup>66</sup> PEPUDA provides for reasonable accommodation more generally, whilst the EEA applies to reasonable accommodation in the workplace.

Section 25(1)(c)(iii) of PEPUDA provides that the state must develop codes of practice relating to equality, including codes on reasonable accommodation. The only other mention of reasonable accommodation in PEPUDA provides that the Equality Court may make an order compelling the implementation of reasonable accommodation.<sup>67</sup> PEPUDA is silent on the exact types of reasonable accommodation and how these are to be implemented. PEPUDA does, however, place a clear obligation on the state to develop a code (or codes) on reasonable accommodation.

66 Employment Equity Act 55 of 1998.

67 Section 21(2)(i) of PEPUDA.

One such code has been adopted, namely the Code of Good Practice on Key Aspects of Disability in the Workplace (the Code of Good Practice).<sup>68</sup> This Code of Good Practice only finds application in the workplace, which means it applies only to persons with disabilities who are employed or who are applying for employment.<sup>69</sup> The scope of application is thus quite narrow. The Code of Good Practice provides that '[e]mployers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job'.<sup>70</sup> Further, employers are not required to provide reasonable accommodation if doing so would create unjustifiable hardship on the business of the employer.<sup>71</sup> This closely resembles the language used in article 5(3) of the CRPD.

The lack of legislation and policy documents dealing with reasonable accommodation outside of the workplace is concerning. By way of example, there are no clear obligations or guidelines in implementing reasonable accommodation in schools, which has an impact on the right of access to education.<sup>72</sup> Considering that there is a need for reasonable accommodation and an obligation to ensure same in terms of the CRPD, it cannot be said that the narrowly focused Code of Good Practice is sufficient to meet this obligation. The state therefore needs to address this lack of legislation to remedy the current non-compliance with the CRPD.

The only nationally applicable policy relating to reasonable accommodation for persons with disabilities is the National Disability Rights Policy (NDRP).<sup>73</sup> The NDRP still grapples with elementary issues such as the definition of disability and the medical and social models of disability.<sup>74</sup> Many of these issues have been dealt with expressly in the CRPD. It is submitted that these issues have largely been settled and dedicating further time to these is unnecessary. There should be more focus on the practical implementation of the policy goals instead of theoretical discussions. The NDRP provides extensively for the provision of reasonable accommodation in many spheres of life, including access to information, planning and public consultation processes and education.<sup>75</sup> However, the NDRP is not a binding document and does not create obligations on national or local government or other individuals to ensure the provision of reasonable accommodation.

68 Employment Equity Act Code of Good Practice on the Employment of Persons with Disabilities (2015) GG No 39383 of 9 November 2015.

69 Item 6.3 of the Code of Good Practice.

70 Sec 6.1 of the Code of Good Practice.

71 Sec 6.11 of the Code of Good Practice.

72 The only reference to reasonable accommodation for schools is in the South African Schools Act 84 of 1996, which provides that schools must be accessible.

73 Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014).

74 Draft White Paper (n 73) 18.

75 Draft White Paper (n 73) 44.

The 2016 White Paper on the Rights of Persons with Disabilities<sup>76</sup> provides that reasonable accommodation is an area of concern and that substantial change is necessary on this front. The White Paper then goes on to list a very clear and extensive number of examples of reasonable accommodation.<sup>77</sup> This list is a good indication of the types of action persons may take to provide reasonable accommodation. Again, though, the White Paper is not binding since it has not passed through the full legislative process. Until such time as the White Paper becomes actual law, there is no incentive to implement its provisions nor are there penalties for non-compliance. The same is true of the NDRP. Unfortunately, these two documents are effectively toothless since neither of them create actual obligations in the sphere of reasonable accommodation.

It is also important to note that neither the Code of Good Practice, NDRP or the White Paper provide for reasonable accommodation specifically of women with disabilities. There is thus no inclusion of gender specific measures to ensure reasonable accommodation. This omission must be addressed in order to comply with articles 5(3) and 6 of the CRPD.

### **5.5 Has the state adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms?**

In 2019, the erstwhile Department of Women was amalgamated with elements of other government departments, to form the Department of Women, Youth and Persons with Disabilities.<sup>78</sup> According to its website,

[t]he mission of the Department of Women, Youth and Persons with Disabilities is to accelerate socio-economic transformation and implementation of the empowerment and participation of women, youth and persons with disabilities through oversight, monitoring, evaluation and influencing policy.<sup>79</sup>

This is a substantial and broad mandate. The efforts and resources of the Department must thus be split between three marginalised groups: women, youth and persons with disabilities.

There is no evidence of seminars, awareness campaigns, policies or any other programmes having been adopted by this Department since its creation in 2019.<sup>80</sup> In fact, there is currently no working website for this

76 White Paper (n 63).

77 White Paper (n 63) 16.

78 National Government of South Africa 'Department of Women, Youth and Persons with Disabilities' <https://nationalgovernment.co.za/units/view/31/departement-of-women-youth-and-persons-with-disabilities-dwypd> (accessed 22 March 2021).

79 As above.

80 As above.

Department.<sup>81</sup> It is submitted that this Department needs to be more intentional about focusing on the rights of women with disabilities, since it is currently neglecting this aspect of its mandate. This criticism may appear harsh at first glance. An examination of the activities of this Department since its inception shows that emphasis has been primarily on the effect of COVID-19 on women, youth and persons with disabilities.<sup>82</sup> However, the COVID-19 pandemic can and should not be used as an excuse for the lack of progress made for the advancement of women with disabilities. Considering that women with disabilities are historically more disadvantaged because of the intersection of gender and disability, measures to ensure that women with disabilities enjoy their full rights and freedoms during the pandemic should have been prioritised. This has not been the case, and the activities of the Department have largely been confined to the realm of releasing statements on current events.<sup>83</sup> Other than the Department of Women, Youth and Persons with Disabilities, there is no dedicated state department that is tasked with adopting policies or programmes aimed at the full enjoyment of rights and freedoms of women with disabilities.

There are currently no policies, white papers or programmes in place that deal specifically with the rights of women with disabilities. It appears as though women with disabilities are becoming invisible in the broader context of the rights of persons with disabilities and other marginalised groups. There are two general disability related policies, namely the NDRP and the White Paper as introduced above. Both provide that the rights of women with disabilities must be prioritised in order to ensure the enjoyment of all rights and freedoms. The sections of these documents dealing with the rights of women with disabilities are scattered throughout the documents, and there is no dedicated section dealing with the rights of women with disabilities in greater detail. This piecemeal inclusion of the rights of women with disabilities leads to the impression that these rights have not been paid due consideration. Since women with disabilities have been recognised as a historically neglected and invisible group,<sup>84</sup> it is submitted that this fragmented approach is no longer sufficient and that specific, contextualised policies relating to the rights of women with disabilities must be developed by the state.

81 The website [www.women.gov.za](http://www.women.gov.za) returns an error message when accessed.

82 South African Government 'Department of Women, Youth and Persons with Disabilities' <https://www.gov.za/taxonomy/term/881> (accessed 22 March 2021).

83 As above.

84 Sec 3 of General Comment 3.

## **5.6 Has the state has taken measures to develop, advance and empower women with disabilities and, if yes, are these measures appropriate for the state in question?**

In the only Country Report submitted by South Africa on the status of implementation of the rights of women with disabilities, it is stated that:

Women with disabilities are affirmed through a range of targeted programmes and events by a number of government departments, although it recognised that improved co-ordination and targeting of these efforts will significantly strengthen impact.<sup>85</sup>

Since both the CRPD and the Constitution are transformative instruments, mere affirmation of women with disabilities is not sufficient. The rights of women with disabilities must be prioritised and action must be taken to ensure the equal enjoyment of rights and freedoms.

As mentioned above, the Department of Women, Youth and Persons with Disabilities is not active in its mandate to advance the rights of women with disabilities. The only two nationally applicable policy documents that include the rights of women with disabilities are not binding on national or local government. It is therefore submitted that the South African government is not currently taking measures to develop, advance and empower women with disabilities. Women with disabilities are treated as an afterthought in many instances, and this can no longer be accepted if transformative equality for these women is to be achieved.

## **6 Recommendations**

The application of the indicators for compliance with articles 5 and 6 of the CRPD to South Africa results in a rather bleak picture being drawn. Women with disabilities are not currently being treated as a priority in either legislation or policy. There appears to be no real attempt to implement programmes and policies to develop, advance and empower women with disabilities in South Africa. Out of the 6 indicators distilled from articles 5 and 6, South Africa is non-compliant in four of them. Put bluntly, this is not good enough. What, then, is the solution?

It is submitted that the primary instrument for change would be legislation aimed at realising the rights of women with disabilities. South Africa currently has no disability specific legislation, and disability is dealt with in a piecemeal fashion throughout different pieces of legislation. The time is therefore ripe to introduce disability specific legislation that devotes sufficient attention to the rights of women with disabilities. Such a

85 Initial report (n 5) 68.

consolidation of the provisions relating to women with disabilities would not only clarify their rights, but national legislation is binding on all spheres of government and private individuals. A comprehensive and dedicated 'Disabilities Act' would be a critical tool in realising the right to equality of women with disabilities.

There are precedents for legislation aimed at promoting and protecting the rights of vulnerable groups. Older persons and children as groups both have legislation dedicated to their rights. The Older Persons Act 13 of 2006 and the Children's Act 38 of 2005 were enacted over 15 years ago. Why, then, have women with disabilities been neglected by the legislature for so long, especially in light of the signature and ratification of the CRPD, also 15 years ago? Enacting national legislation would also provide a sense of urgency to the prioritisation of the rights of women with disabilities.

The existing policy framework (as it is) could be used as a guideline when compiling new legislation, and the drafters need not start with a blank slate. Importantly, if such legislative processes were to be started now, women with disabilities could be consulted as to the contents of the legislation. Such participation is imperative in the movement towards full and equal participation in society,<sup>86</sup> since the direct needs of the subjects of the legislation would then be addressed.

The Department of Women, Youth and Persons with Disabilities is currently underutilised. Resources from this department need to be dedicated to prioritising the rights of women with disabilities, which is stated as one of the Department's duties. Education and awareness campaigns can be spearheaded by this Department in conjunction with non-governmental and non-profit organisations which often work at the grass-roots level to reach the most vulnerable members of a group.

The South African government needs to re-commit to implementing the provisions of the CRPD. As mentioned previously, there has only been one Country Report submitted on the status of the implementation of the CRPD in South Africa. This sends a clear message that such implementation is not a priority to the government. The lack of any further report points to neglecting the rights of persons with disabilities generally. There is also no way to gauge whether the Concluding Observations of the Committee have been applied. The overall impression is that the rights of women with disabilities is not a priority for the South African government. This invisibility is arguably the single biggest barrier to full and equal participation of women with disabilities in South Africa and must therefore be remedied as a matter of urgency.

86 Part (y) of the Preamble to the CRPD.

## THE PROTECTION OF DISABLED CHILD VICTIMS WITHIN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: SHINING A LIGHT ON THE INVISIBLE AND FORGOTTEN VICTIMS OF CRIME

Mildred Bekink\*

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### Summary

*It is estimated that one billion people or 15 per cent of the world's population experience some form of disability. While the estimates of children with disabilities vary substantially depending on the definition and measure of disability, it is estimated that 150 to 200 million children under the age of 18 experience some form of disability. Research has, moreover, revealed that persons with disabilities fall in the group with the highest risk of experiencing abuse and violence. Globally, children with disabilities are three to four times more likely to experience violence compared to children without disabilities. This is also true for South African disabled children. In South Africa, socio-economic circumstances such as poverty and a lack of institutional facilities for physically abused children contribute to the vulnerability and victimisation of disabled children. Coupled with this is the difficulty in identifying abuse among disabled children. When crimes committed against disabled children are reported, prosecution and conviction rates are low. Reasons for the unsuccessful adjudication of such crimes include the difficulty in investigating cases, the isolation and communication difficulties of some victims, and the negative stereotypes and prejudices that contribute to discrimination against these vulnerable victims. On top of that, the police and judiciary tend to treat disabled children as unreliable or incompetent witnesses. These children are often further victimised by the very system put in place to protect them. In many ways, disabled children are often the forgotten or invisible victims of crime. In light of this precarious situation, this contribution explores whether the South African legislative framework provides sufficient protection for disabled child victims within the criminal justice system. The international documents affording disabled child*

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victims protection are evaluated first; thereafter, the South African legislative framework is assessed to determine its compliance with international and regional standards. Recommendations for improvements are made.

## 1 Introduction

It is estimated that one billion people or 15 per cent of the world's population experience some form of disability. While the estimates of children with disabilities vary substantially depending on the definition and measure of disability, it is estimated that 150 to 200 million children under the age of 18 experience some form of disability. Of these children, 93 million aged between 0 and 14 experience moderate or severe disability, while 13 million of them experience severe difficulties.<sup>1</sup> Research has, moreover, revealed that persons with disabilities fall in the group with the highest risk of experiencing abuse and violence, with the likelihood of disabled persons suffering from crime being much higher than that of the general population.<sup>2</sup> This is also true for disabled children that face a wholly different environment than the one non-disabled children live in.<sup>3</sup> Globally, children with disabilities are three to four times more likely to experience violence compared to children without disabilities.<sup>4</sup> While violence against disabled children is endemic in both the developed and developing world, the WHO estimates that 80 per cent of children with disabilities reside in developing countries and come from low-or middle-income households.<sup>5</sup>

No official statistics about the nature and extent of violence against disabled children in South Africa currently exist because the South African Police do not disaggregate their statistics according to disability. Nonetheless, a recent South African study estimates that South African children with disabilities are 1.5 to 2.1 times more at risk of sexual abuse than their non-disabled peers.<sup>6</sup> A growing body of international and national literature suggests that South African disabled children

1 WHO *Disability and Health* (WHO 2020) <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> (accessed 4 September 2021).

2 K Hughes et al 'Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies' (2012) 379 *The Lancet* P1621 [https://doi.org/10.1016/S0140-6736\(11\)61851-5](https://doi.org/10.1016/S0140-6736(11)61851-5) (accessed 12 January 2021).

3 L Jones et al 'Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies' (2012) 380 *The Lancet* P899 [https://doi.org/10.1016/S0140-6736\(12\)60692-8](https://doi.org/10.1016/S0140-6736(12)60692-8) (accessed 12 January 2021).

4 WHO *WHO global disability action plan 2014-2021: Better health for all people with disabilities* (2015).

5 WHO (n 1).

6 L Artz et al *Optimus Study South Africa: Technical report sexual victimisation of children in South Africa* (2015); MN Christoffersen 'Violent crime against children with disabilities: A nationwide prospective birth cohort-study' (2019) 98 *Child Abuse and Neglect* 1 at 2; Centre for Child Law, University of Pretoria 'Advocacy brief: Advancing the rights of children with disabilities' (2017) 5-6 <https://centreforchildlaw.co.za/wp-content/uploads/2019/03/3Final-CCL-Advocacy-Brief-Rights-of-Children-with-Disabilities.pdf> (accessed 5 September 2021).

experience violence at similar or higher rates than the general population and, consequently, find themselves in an unenviable position.

A great deal of the violence and abuse directed against disabled children stems from factors that are more prevalent in the lives of non-disabled children. Paramount among these factors is long-term institutionalisation, which exposes many disabled children to physical neglect, physical violence, sexual violence and abuse amongst others.<sup>7</sup> Social, cultural, economic, physical and psychological factors also contribute to a climate in which disabled children become victims of crime.<sup>8</sup> Many of them fall victim to physical, mental and sexual abuse at home and at school as well as in private and public institutions. This may stem from the fact that abusers perceive disabled children as easy targets. Their limited mobility, inability to escape violence, and/or communicate their experiences make them easy targets. For disabled girls the picture is even bleaker. Research indicates that disabled girls are at a greater risk of violence, injury, abuse, neglect, maltreatment and exploitation than disabled boys.<sup>9</sup>

In South Africa, socio-economic circumstances such as poverty and very limited support in the care and protection system for physically abused children contribute to the vulnerability and victimisation of disabled children.<sup>10</sup> Coupled with this is the difficulty in identifying abuse among disabled children. If disabled children are accommodated in a care and protection institution such as a residential institution, they find themselves exposed to potential harsh physical restrictions and violence. Several studies indicate that up to 85 per cent of criminal abuse in residential institutions is never reported.<sup>11</sup> When crimes committed against disabled children are reported, prosecution and conviction rates are low. Reasons for the unsuccessful adjudication of such crimes include the difficulty in investigating cases, a lack of special skills and training required for investigating these cases, the isolation and communication difficulties of some victims, and the negative stereotypes and prejudices that contribute to discrimination against these vulnerable victims.<sup>12</sup> On top of that, the police and judiciary tend to treat disabled children as unreliable

7 I Bantekas et al (ed) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 1 at 199.

8 AE Heslink-Louw, K Booysen & A Neethling 'Disabled children as invisible and forgotten victims of crime' (2003) 16 *Acta Criminologica* 165 at 169.

9 M Sabatello 'Children with disabilities: A critical appraisal' in M Freeman (eds) *The future of children's rights* (2014) 327-330; Child Welfare Information Gateway 'The risk and prevention of maltreatment of children with disabilities' (2012) <https://www.childwelfare.gov/pubPDFs/focus.pdf> (accessed 12 Jan 2020).

10 Centre for Child law (n 6) 5-6.

11 Heslink-Louw, Booysen & Neethling (n 8) 175.

12 Heslink-Louw, Booysen & Neethling (n 8) 175-176.

or incompetent witnesses. Within the sphere of disability,<sup>13</sup> children with communication disabilities are perceived as even more so because of their inability to verbalise victimisation.<sup>14</sup> These children are often further victimised by the very system put in place to protect them. In many ways, disabled children are often the forgotten or invisible victims of crime.

In light of this precarious situation, this contribution sets out to explore whether the South African legislative framework provides sufficient protection for disabled child victims within the criminal justice system. The international documents affording disabled child victims protection will be evaluated first; thereafter, the South African legislative framework will be assessed to determine its compliance with international and regional standards.

## 2 International instruments

### 2.1 The United Nations Convention on the Rights of the Child

The 1989 United Nations Convention on the Rights of the Child (CRC) is regarded a landmark instrument in the advancement of children's rights because it outlines the basic human rights of children. Recognising the vulnerability of children and the absence of provisions for and protection of children's rights, the CRC acknowledges children as not only human rights bearers but also human beings who need special protection.<sup>15</sup> The CRC endorses their right to life, survival and development (article 6), and upholds their right to protection from all forms of physical or mental violence, abuse, neglect, maltreatment or exploitation (article 19). South Africa ratified the CRC on 16 June 1995.<sup>16</sup>

The CRC was also the first human rights treaty to focus on the rights of disabled children by prohibiting discrimination against children on the basis of their disability.<sup>17</sup> In this regard, article 2 of the CRC imposes an obligation on state parties to respect and ensure the rights afforded to *each*

13 Committee on the Rights of the Child, General Comment 9 (2006): The rights of children with disabilities (2007) UN Doc CRC/C/GC/9, dated 27 February 2007 at para 7, defines persons with disabilities as: 'persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

14 Heslink-Louw, Booysen & Neethling (n 8) 175-176; RM White et al 'Transformative equality: Court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* 651 at 652.

15 BD Mezmur *The United Nations Convention on the Rights of the Child* in T Boezaart (ed) *Child law in South Africa* (2017) 403.

16 UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, UN Doc E/CN.4/RES/1990/74 (1990) [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV11&chapter=4&clang=_en) (accessed 10 January 2021).

17 CRC Committee (n 13) para 2.

child without discrimination of any kind, including discrimination on the basis of disability.<sup>18</sup> As the CRC applies to all children without exception, disabled children have the same fundamental rights as all other children.<sup>19</sup> It explicitly recognises the additional support that disabled children need to realise their rights by dedicating an entire article to disabled children. Article 23 of the CRC calls upon state parties to recognise that a 'mentally or physically disabled child should enjoy a full and decent life, in conditions which ensured dignity, promote self-reliance and facilitate the child's active participation in the community'.<sup>20</sup> It also requires state parties to recognise the right of the child with a disability to have effective access to special care and assistance, emphasising education, training, healthcare services, rehabilitation services, preparation for employment, and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. These must be provided free of charge.<sup>21</sup> Article 23(4) deals with international cooperation with the aim of improving state parties' capabilities and skills and widening their experience. Particular account must be taken of the needs of developing countries.<sup>22</sup>

While, on the face of it, article 23 provides enhanced protection for disabled children, it has been the object of much criticism.<sup>23</sup> The criticism stems from the fact that article 23 does not afford children with disabilities an absolute right to assistance and care. Their right is subject to conditions such as the availability of resources, the eligibility of the child, and whether the child has applied for such care and assistance. Some commentators are hence of the opinion that the other provisions of the CRC provide more assurance for the vindication of the rights of disabled children than article 23.<sup>24</sup> It has even been argued that the CRC fails to improve the rights of children with disabilities.<sup>25</sup> Freeman points out that the rights of disabled children are continuously violated even more than before. According to Freeman, the only difference is that, since the CRC's adoption, the violations receive public attention.<sup>26</sup> Sabatello suggests that, as the focus

18 My emphasis.

19 T Boezaart 'The Children's Act: A valuable tool in realizing the rights of children with disabilities' (2011) 74 *Journal of Contemporary Roman Dutch Law* 264 at 265; Sabatello (n 9) 328.; S Mephram 'Disabled children: The right to feel safe' (2010) 16 *Child Care Practice* 19 at 20.

20 Art 23(1) of the CRC.

21 See art 23(2) & (3) of the CRC.

22 See art 23(4) of the CRC.

23 Boezaart (n 19 above) 266; Sabatello (n 9) 331; U Kilkelly 'Disability and children: The Convention on the Rights of the Child' in G Quin & T Degener (eds) *The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 192-193.

24 Kilkelly (n 23) 193; H Combrink 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 300 at 307.

25 Bantekas (n 7) 201; Sabatello (n 9) 331-333.

26 As above.

of article 23 is on welfare rights, it may have given the wrong impression that a needs-based approach to the care of disabled children is the aspect that has to be addressed. This may also explain why the shift to the recognition of children as active bearers of rights since the adoption of the CRC, has seemingly failed disabled children.<sup>27</sup>

State parties to the CRC are required to submit an initial report followed by periodic reports to the United Nations Committee on the Rights of the Child (the Committee), indicating the measures taken to give effect to the rights embodied in the CRC.<sup>28</sup> Already in 1997 the Committee expressed concern about state parties' disregard for article 23. The Committee reported being perturbed at the widespread discriminatory attitudes towards disabled children as well as the negative effects of budgetary reductions on the availability of services for these children.<sup>29</sup>

In an effort to assist state parties to fulfil their obligations with regard to disabled children, the Committee issued General Comment 9 in 2006 on the rights of children with disabilities. The Committee reiterated that state parties needed to do more to meet the needs of children with disabilities.<sup>30</sup> It noted that significant obstacles still prevented children with disabilities to fully enjoy their rights as enshrined in the CRC, and emphasised that these barriers were not because of children's disabilities but rather because of a combination of social, cultural, attitudinal and physical obstacles they encounter in their daily lives.<sup>31</sup>

South Africa submitted its first country report within two years of ratification of the CRC. In January 2000 the Committee issued its concluding observations and comments on South Africa's first report.<sup>32</sup> The Committee welcomed the then new Constitution of the Republic of South Africa, 1996 and in particular section 28 that guarantees children a number of specific rights and freedoms also provided for under the CRC.<sup>33</sup> The Committee further observed that the principle of non-discrimination was strongly reflected in the South African Constitution and national legislation.<sup>34</sup> However, the Committee expressed concern that insufficient measures had been adopted to ensure that all children are guaranteed access to services. Of particular concern were certain vulnerable groups of

27 As above.

28 Art 44 of the CRC.

29 R Hodgkin & P Novell *Implementation handbook of the Convention on the Rights of the Child* (UNICEF) (2007) 322.

30 CRC Committee (n 13) para 1.

31 CRC Committee (n 13) para 5.

32 UN Committee on the Rights of the Child (CRC), Concluding Observations: South Africa (22 February 2000) UN Doc CRC/C/15/Add.122 (2000) <https://www.refworld.org/docid/3ae6afc8c.html> (accessed 27 January 2021).

33 CRC Committee (n 32) para 3.

34 As above.

children, including children with disabilities and especially those with learning disabilities.<sup>35</sup> The Committee accordingly recommended that South Africa increased its efforts to ensure full compliance with article 2 of the Convention.<sup>36</sup> The Committee also expressed concern about the high level of violence against and abuse of children. It recommended that actions of violence and abuse be properly investigated according to a child-friendly judicial procedure, that sanctions be applied to perpetrators, and that support services be rendered to children in legal proceedings.<sup>37</sup>

The Committee considered the second periodic report of South Africa at its meeting held in September 2016 and issued its concluding observations and comments on the report. These included comments on the progress made by South Africa in terms of the CRC as well as on that of the United Nations Convention on the Rights of Persons with Disabilities.<sup>38</sup>

The Committee welcomed the progress achieved by South Africa since its last review. It commended the adoption of legislation and institutional and policy measures related to children's rights, including the Children's Act<sup>39</sup> and the Child Justice Act,<sup>40</sup> which conform, to a large extent, to the principles of the Convention.<sup>41</sup> As in its first report, the Committee reiterated its concern with the extremely high prevalence of violence against children<sup>42</sup> and urged South Africa to develop, adopt and implement a comprehensive national strategy to prevent and address all forms of violence against children. When children have been the victims of violence, the necessary support should be offered.<sup>43</sup> With regard to the Convention on the Rights of Persons with Disabilities, the Committee indicated that, while it welcomed South Africa's ratification of the Convention on the Rights of Persons with Disabilities, the 'multiple layers of discrimination and exclusion faced by the majority of [South African] children with disabilities' were cause for concern. This included a lack of data on child disabilities; comprehensive laws and policies to realise the rights of children with disabilities; effective multi-sectoral coordination; as well as the provision of reasonable accommodation.<sup>44</sup>

Although the CRC has been criticised for not improving the rights of disabled children as indicated above, as the first human rights instrument

35 As above.

36 As above.

37 CRC Committee (n 32) para 27.

38 Committee on the Rights of the Child (CRC), Concluding Observations on the second periodic report of South Africa (27 October 2016) UN Doc CRC/C/ZAF/CO/2 (2016) <https://www.refworld.org/docid/587ce86b4.html> (accessed 27 January 2021).

39 Children's Act 38 of 2005.

40 Child Justice Act 75 of 2008.

41 CRC Committee (n 38) para 3-5.

42 CRC Committee (n 38) para 33.

43 CRC Committee (n 38) para 34.

44 CRC Committee (n 38) para 43.

to explicitly reference children with disabilities, it set the tone for subsequent international documents on the rights of children with disabilities and, as such, is of significant value.

## 2.2 The Convention on the Rights of Persons with Disabilities

On 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) which came into force on 3 May 2008.<sup>45</sup> The CRPD was ratified by South Africa on 30 November 2007.<sup>46</sup> The CRPD is the first international instrument that deals specifically with the rights of persons with disabilities and represents a response to the international community's long history of discrimination, exclusion and dehumanisation of persons with disabilities.<sup>47</sup> The concept of inclusion is central to the Convention.<sup>48</sup> The CRPD does not create new rights for persons with disabilities, but rather clarifies the obligations and legal duties of member states to ensure the equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, including the promotion of their intrinsic dignity.<sup>49</sup> The CRPD complements existing international treaties and, as far as children with disabilities are concerned, elaborates on the provisions of article 23 of the CRC.<sup>50</sup> The CRPD also reaffirms the CRC's principles of non-discrimination, the best interests of the child as a primary consideration, and the child's right to express his or her views.<sup>51</sup> Although the Convention applies to all persons with disabilities, the rights and needs of children with disabilities occupy an important place throughout the CRPD.<sup>52</sup> The Preamble, for example, recognises that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children while article 3(h) incorporates a substantive principle: respect for the evolving capacities of children with disabilities. Article 7 of the CRPD focuses solely on disabled children and states as follows:

45 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, (24 January 2007) UN Doc A/RES/61/106 (2007) <https://www.refworld.org/docid/45f973632.html> (accessed 12 January 2021).

46 As above.

47 Foreword to the 'UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol' (2007) <https://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> (accessed 20 January 2020).

48 Sabatello (n 9) 333.

49 See para (a) of the Preamble & art 1 of the CRPD.

50 Boezaart (n 19) 268.

51 See arts 3, 12 & 5 of the CRS; art 7 of CRPD; see also W Vandenhoe, GE Türkelli & S Lembrechts *Children's rights: A commentary on the Convention of the Rights of the Child and Protocols* (2019) 248.

52 See, for example, art 1 and 7 of the CRPD; see also F Bhabha 'Disability rights in South Africa: Concepts, interpretation and the transformation imperative' (2009) 25 *South African Journal of Human Rights* 218.

- (1) States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
- (2) In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
- (3) States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 7 of the CRPD builds on article 23 of the CRC in the sense that resource constraints and progressive realisation are absent from article 7. States must commit 'all necessary resources' in order to realise the rights in article 7. This addresses some of the criticism directed against article 23.<sup>53</sup> Bantekas et al highlight that article 7 sets out a new paradigm for the realisation of child disability rights. This is significant given that poverty is one of the causes of the violation of disabled children's rights.<sup>54</sup>

The CRPD, like the CRC, recognises that in all matters relating to children with disabilities, the best interests of the child shall be a primary consideration.<sup>55</sup> The best-interests principle in paragraph 2 of article 7 is broader than its counterpart in article 23 of the CRC. Article 23 relates to family relationships and legal capacity, whereas article 7 refers to 'all actions concerning children'. In this regard, the best interests of the disabled child must necessarily encompass *all policies and actions* adopted at state and sub-state level and not just court judgments in the narrow family-law sense.<sup>56</sup>

Paragraph 3 of article 7 of the CRPD emphasises that children have the right to express their views and that such views shall be taken into consideration in accordance with the age and maturity of the disabled child. This wording is in contrast to that of article 12(1) of the CRC, according to which only children that are 'capable of forming [their] views' have a right to express these freely subject to their age and maturity. Article 3 has thus removed one of the limitations concerning disabled children. In effect, paragraph 3 affirms that all disabled children are capable of forming some type or degree of view on matters that affect them, whether directly or through supported decision-making. Such views are to be considered by judicial and administrative authorities. In contrast to the CRC, the CRPD obliges states to, *at all times*, allow the disabled child to be heard.<sup>57</sup> This is

53 See para 2.1 above.

54 Bantekas (n 7) 206.

55 B Byrne 'Minding the gap? Children with disabilities and the UN Convention on the Rights of Persons with Disabilities' in M Freeman (ed) *Law and childhood studies: Current legal issues* (2012) 428.

56 Bantekas (n 7) 221 (my emphasis).

57 Bantekas (n 7) 225 (my emphasis).

of great significance to disabled child witnesses who are often regarded as incapable of expressing their views.

Of further importance is the fact that the CRPD requires states to provide not only age-appropriate support to disabled children, but also disability support to ensure that the right of disabled children to have their views heard and respected, is realised.<sup>58</sup> While non-disabled children simply require age-appropriate assistance to have their views heard, disabled children may also require disability-appropriate assistance. Disability-appropriate assistance is crucial for children with cognitive and intellectual impairments. Because they are unable to express their views vocally, they can easily be ignored in the process affecting them. An effective policy should, therefore, ensure that intellectually impaired children are provided with the means, technological or otherwise to have their views heard by the court or decision-makers. This is critical for the child witness. Bantekas et al point out that though this will require additional resources, this right is not resource constrained but obligatory.<sup>59</sup>

Alarmed by the incidents of violence against children with disabilities, the CRPD furthermore requires that states adopt the appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both in and outside the home, from all forms of exploitation, violence and abuse. Child-focused legislation and policies must further be implemented to ensure appropriate legal redress of instances of exploitation, violence, and abuse against persons with disabilities.<sup>60</sup>

In terms of the Convention, state parties are required to submit an initial report followed by periodic reports to the United Nation's Committee on the Rights of Persons with Disabilities (the Committee on the CRPD) including measures that were taken to implement the provisions of the CRPD.<sup>61</sup> South Africa submitted its first report to the Committee on the CRPD which was considered at its meeting held on 28 and 29 August 2018.<sup>62</sup> The Committee on the CRPD made concluding observations and recommendations on South Africa's first report on 7 September 2018.<sup>63</sup> The Committee on the CRPD recognised the efforts made by the South African government, particularly the adoption of a comprehensive White Paper on the rights of persons with disabilities. However, the Committee on the CRPD expressed concern about the fact that it had remained a White Paper and had not resulted in specialised

58 Sabatello (n 9) 335; Byrne (n 55) 430.

59 Bantekas (n 7) 227.

60 See art 16 of the CRPD.

61 See art 35 of the CRPD.

62 South Africa's Initial Country Report on the Rights of Persons with Disabilities <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (accessed on 15 January 2021).

63 As above.

legislation that would enable persons with disabilities to seek legal redress.<sup>64</sup> With regard to children, the Committee on the CRPD expressed deep concern about children with disabilities' right to education. Of particular concern was the violence against and abuse and bullying of children with disabilities in school hostels.<sup>65</sup> In addition, concern was expressed about the situation of girls, particularly black girls, who suffer intersectional discrimination on the basis of disability, gender and race, and faced violence on a regular basis.<sup>66</sup> The Committee on the CRPD hence called for, inter alia, the development, adoption and implementation of legislation and concrete measures to ensure that children with disabilities are protected from violence and that perpetrators are sanctioned.<sup>67</sup>

The CRPD has been hailed as impressive and ground breaking with regard to the rights of persons with disabilities, including that of disabled children.<sup>68</sup> As for African countries, Van Reenen and Combrinck point out that though disability rights in Africa have developed at a much slower pace than in other jurisdictions, the ratification of the CRPD offers new opportunities for African states to reconsider their national law relating to disability.<sup>69</sup> However, commentators warn that the CRPD's value lies in its implementation, which will likely be neither easy nor fast. Sabatello warns that it requires significant political will on both national and international level.<sup>70</sup> The relatively speedy negotiations resulting in the rapid signature and ratification of the CRPD by member states signify wide political support of the treaty. This is certainly cause for optimism. State parties are, nonetheless, urged to learn from their CRC mistakes when they implement or amend existing legislative and other measures. Otherwise, instead of raising awareness of the rights of children with disabilities and preventing their violation, they will, once again, only lend greater visibility to the abusers of these rights.<sup>71</sup>

### **3 Regional instruments**

From a rights-of-children-with-disabilities perspective, the African human rights framework consists of the African Charter on the Rights and the Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

64 South Africa's Initial Country Report (n 62) para 3.

65 As above.

66 South Africa's Initial Country Report (n 62) para 8.

67 As above.

68 Sabatello (n 9) 340 & 343.

69 R Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons in Africa: Progress after 5 years' (2011) 14 *SUR International Journal of Human Rights* 133.

70 Sabatello (n 9) 347.

71 Sabatello (n 9) 347; see also para 2.1 above.

### 3.1 The African Charter on the Rights and Welfare of the Child

South Africa, as a member state of the African Union, is also a part to the ACRWC adopted in 1990.<sup>72</sup> The Charter came into force only on 29 November 1999.<sup>73</sup> Boezaart rightly regrets the fact that this valuable document, which enhances the rights of children on the continent, has taken so long to gain the recognition of African countries it deserves.<sup>74</sup> South Africa ratified the ACRWC on 7 January 2000.

Article 3 of the ACRWC sets out the principles of non-discrimination and is the counterpart of article 2 of the CRC. Unlike the CRC, the ACRWC unfortunately does not list disability as a prohibited ground for discrimination and thus misses the opportunity to reaffirm the rights of children with disabilities.<sup>75</sup> However, with reference to Gose, Combrinck maintains that, because the first part of the article refers to ‘every child’, it is doubtful that this omission implies that discrimination against children with disabilities is allowed.<sup>76</sup> Article 4(1) explains the best-interest-of-the-child principle in strong terms as ‘the’ primary consideration as opposed to ‘a’ primary consideration in the CRC. Sloth-Nielsen points out that the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) stated that the provision could not be interpreted to mean that any other concern or consideration was inevitably trumped. The scope of the application of the best interests principle is thus similar to the scope of the application of the CRC.<sup>77</sup>

Article 7 affords the child the right to express his or her views in all matters and to disseminate his or her opinions, subject to such restrictions as prescribed by law. Article 4(2) provides for child participation in all judicial or administrative proceedings affecting the child. Numerous initiatives have been undertaken to further the participation of African children. But a recent study of initiatives in Ethiopia, Kenya, Rwanda, Sudan, South Sudan, Somalia, Tanzania and Uganda concluded that despite policies and laws that guarantee child participation as well as important initiatives in this regard, giving effect to this right is still a novel and uncoordinated reality.<sup>78</sup> Sloth-Nielsen argues that translating the concept into practice remains a key challenge.<sup>79</sup>

72 Organisation of African Unity, African Charter on the Rights and Welfare of the Child (11 July 1990) OAU Doc.CAB/LEG/24.9/49 (1990).

73 J Sloth-Nielsen ‘The African Charter on the Rights and Welfare of the Child’ in Boezaart (ed) *Child law in South Africa* (2017) 426.

74 Boezaart (n 19) 270.

75 Combrinck (n 24) 310.

76 As above.

77 Sloth-Nielsen (n 73 above) 432.

78 African Child Policy Forum *A study on child participation in Eastern Africa* (2015) iii.

79 Sloth-Nielsen (n 73) 433.

Article 13 confers rights on children with disabilities.<sup>80</sup> In this regard, article 13 largely resembles article 23 of the CRC, although in less detail.<sup>81</sup> Both instruments subject the rights of children with disabilities to the availability of resources. The criticism levelled against the CRC that it does not afford disabled children an absolute right to assistance and care<sup>82</sup> also applies under the ACRWC. Unlike assistance in article 23(2) of the CRC, assistance under the ACRWC is not subject to the circumstances of the parent or caregiver of the child. Commentators postulate that this may translate into a higher level of protection for the child as only the circumstances of the child, and not that of the child and the parents, need to be taken into account for assistance to be rendered.<sup>83</sup> Article 13 contains an additional provision not found in article 23 of the CRC, namely to bolster the mobility of children with disabilities and their access to public institutions and facilities. This paragraph is particularly noteworthy with respect to public prosecutions and disabled children's right to participation in the process as victims and witnesses as well as to their accessibility to court buildings.<sup>84</sup>

A range of other obligations are imposed on state parties in respect of the protection of children with disabilities such as the right to be protected against child abuse and torture;<sup>85</sup> harmful social and cultural practices,<sup>86</sup> and sexual exploitation.<sup>87</sup> These rights are of particular importance for child victims.

As a regional document, the ACRWC contributes to the evolving body of international human rights principles on the rights of children with disabilities and may be used by African courts as an interpretive aid.<sup>88</sup> Regrettably, the direct operation of the ACRWC has been weakened by well-known shortcomings in its implementation mechanisms.<sup>89</sup>

80 Note that the article refers to 'handicapped' children in its heading.

81 Combrinck (n 24) 311.

82 See para 2.1 above.

83 Combrinck (n 24) 311.

84 As above.

85 Art 16 of the ACRWC.

86 Art 21 of the ACRWC.

87 Art 27 of the ACRWC.

88 DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; T Davel 'The African Children's Charter on the Rights and Welfare of the Child, family law and children's rights' (2002) *De Jure* 281. See, for example, the case of *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) when the court referred to art 21(1)(b) in the context of discrimination on the basis of sex and the case of *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) when the court cited the ACRWC with regard to the best-interests-of-the-child principle.

89 Combrinck (n 24) 312.

### 3.2 The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa

In January 2018 the African Commission on Human and Peoples' Rights adopted the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Disability Protocol). At the time of writing this contribution, only nine out of 55 African countries have ratified the Protocol. South Africa ratified it on 29 April 2019.<sup>90</sup>

The Disability Protocol addresses the rights of child victims with disabilities in a number of ways. It acknowledges the harmful practices that persons with disabilities (including children) often face as well as the multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect, and abuse that women and girls with disabilities face.<sup>91</sup> It also requires state parties to take all appropriate steps to ensure, respect and promote, and protect and fulfil the rights and dignity of persons with disabilities.<sup>92</sup> In addition, it prohibits discrimination, including disability-related discrimination,<sup>93</sup> as well as any disability-related harmful practices.<sup>94</sup> It also sets out the right to equality, equal recognition before the law, and access to justice.<sup>95</sup> In this regard, children with disabilities are also entitled to procedural, age- and gender-appropriate accommodations to ensure their effective participation in court proceedings.<sup>96</sup>

Article 28 addresses the rights of children with disabilities. Like the CRC and the CRPD, it recognises that children with disabilities should have full enjoyment of all human rights on an equal basis with other children. It reaffirms the principle of the best interests of the child as the primary consideration (in the same terms as the ACRWC) as well as the child's right to participation and to be heard. It also enjoins state parties to ensure that children with disabilities are provided with age- and gender-

90 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 15 January 2021). For a discussion on the debate as to whether a regional Protocol is necessary and how it will complement the CRPD, refer to SAD Kamga 'A call for a Protocol to the African Charter on Human and People's Rights on the rights of persons with disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219.

91 Preamble to the AU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018) (Disability Protocol).

92 See art 4 of the Disability Protocol.

93 See art 5 of the Disability Protocol.

94 See art 11 of the Disability Protocol.

95 See arts 6, 7 & 13 of the Disability Protocol.

96 See art 13(1) of the Disability Protocol.

appropriate assistance to realise their rights and are protected from exploitation, violence and abuse both within and outside the home.<sup>97</sup>

Like the ACRWC, the Disability Protocol may contribute to the evolving body of international human rights principles on the rights of children with disabilities. The theme of inclusion contained in the CRPD<sup>98</sup> is strongly carried forward in the two African regional instruments. The concept of protection against violence is prominent in them too. Both contain articles dedicated to the rights of disabled children with reference to non-discrimination and violence. It also guarantees children with disabilities who have been the victims of violence the right of access to justice and particular assistance in realising their rights if so required. As with the ACRWC, concerns have been raised about the effectiveness of an African Protocol on Disability given the weak enforcement mechanisms of the African Charter on Human and Peoples' Rights.<sup>99</sup> If the current number of signatories to the Protocol is an indication of its success, these concerns may be justifiable.

Although South Africa ratified the CRPD, it has not yet adopted legislation to enact provisions of this document.<sup>100</sup> It also has not adopted legislation that applies to children with disabilities (including child victims with disabilities). Admittedly, some laws do provide for the protection of child victims with disabilities such as the Constitution, the Children's Act 38 of 2005 and the Criminal Procedure Act 51 of 1977. In the following section, the focus is on the South African legislative framework. Its compliance with international and regional standards relating to the protection of child victims with disabilities will be evaluated.

## **4 South African legislative framework**

### **4.1 The Constitution of the Republic of South Africa**

The Constitution contains an extensive Bill of Rights that guarantees everyone, and thus also children,<sup>101</sup> the right to equality (including prohibition of unfair discrimination based on a number of grounds such as age, gender and disability),<sup>102</sup> to dignity,<sup>103</sup> as well as the right to be free

97 See art 28 of the Disability Protocol.

98 See para 2.2 above.

99 Kamba (n 90).

100 Note that the South African Law Reform Commission has begun the process of investigating the domestication of the CRPD *Issue paper 39: Project 148 – Domestication of the United Nations Convention on the Rights of Persons With Disabilities* (2020) <https://www.justice.gov.za/salrc/ipapers/ip39-prj148-UNCRPD.pdf> (accessed 4 September 2021).

101 Except for those rights that are expressly restricted to adults such as the right to vote and to seek public office. See sec 19(3)(a) and (b) of the Constitution.

102 Sec 9 of the Constitution.

103 Sec 10 of the Constitution.

from any form of violence from either public or private sources.<sup>104</sup> It also guarantees everyone, inter alia, the right to freedom of expression.<sup>105</sup>

Section 28 or the child clause in the Bill of Rights affords specific protection to children. It grants children the right to a name and a nationality from birth;<sup>106</sup> to family care or parental care or to appropriate alternative care when removed from the family environment;<sup>107</sup> to be protected from maltreatment, neglect, abuse or degradation;<sup>108</sup> as well as the right to the fact that a child's best interests are of paramount importance in every matter concerning the child.<sup>109</sup> In other words, the Constitution recognises that children are particularly vulnerable to violation of their rights and, therefore, are in need of unique and distinct protection. Section 28 gives effect to the recognition of this vulnerability and embodies a dedicated commitment to the realisation of children's rights.<sup>110</sup>

Perusal of section 28 reveals that it does not favour the child victim with a specific right to protection as a victim. Nor does it provide for the rights of children with disabilities. Nevertheless, the right not to be subjected to neglect, abuse, or degradation, as set out in section 28(1)(d), as well as the right that a child's best interests should be of paramount importance in every matter concerning the child is of particular importance to the disabled child victim.

In section 7(2) of the Constitution, the state is required to respect, protect, promote and fulfil the rights contained in the Bill of Rights. Furthermore, the Constitution states in section 39(1) that courts, when interpreting a right in the Bill of Rights, must consider international law. This includes international treaties such as the CRC, ACRWC and the CRPD.

These provisions and especially the constitutional guarantee to dignity and freedom from all forms of violence, coupled with the child's-best-interests principle, have led to the development of a progressive body of South African case law dealing with the protection of child victims.<sup>111</sup> For example, in the case of *DPP v Minister of Justice and Constitutional*

104 Sec 12 of the Constitution.

105 Sec 16 of the Constitution.

106 Sec 28(1)(a) of the Constitution.

107 Sec 28(1)(b) of the Constitution.

108 Sec 28(1)(d) of the Constitution.

109 Sec 28(2) of the Constitution.

110 A Skelton 'Constitutional protection of children's rights' in Boezaart (ed) *Child law in South Africa* (2017) 327.

111 See, for example, *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC); *Director of Public Prosecutions v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) (*DPP v Minister of Justice and Constitutional Development*); *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC); *Centre for Child Law v Media 24* 2020 (1) SACR 469 (CC).

*Development*, the Constitutional Court remarked as follows with regard to the protection of child victims:

Each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion. In my view these considerations should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in s 28(2) of the Constitution.

The Constitution thus lays a strong foundation for disabled child victims to be viewed as unique and valuable human beings who deserve to be treated with respect and compassion in a court of law and that in all matters their best interests should be of paramount importance.<sup>112</sup>

This stance has been confirmed in the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>113</sup> which provides that no one should be discriminated against on the grounds of disability and that 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons' amounts to unfair discrimination.<sup>114</sup> It thus confirms that a child victim with disabilities may not be discriminated against in a court of law because of the child's inability to, for example, communicate. Courts should provide such a child with accommodations to communicate and testify in court.<sup>115</sup>

Apart from the Constitution, South Africa has also passed legislation that accommodates child victims with disabilities who have to testify in criminal proceedings about atrocities committed against them, thus allowing them equal participation in legal proceedings. This legislation includes the Criminal Procedure Act,<sup>116</sup> the Children's Act,<sup>117</sup> and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.<sup>118</sup>

## **4.2 The Criminal Procedure Act**

The Criminal Procedure Act (CPA) contains a number of provisions which are of particular relevance to disabled child victims. These include sections 161(2), 164 and 170A of the CPA.

112 See M Bekink 'The constitutional protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa' (2019) for a detailed discussion on the constitutional protection afforded to child victims and child witnesses within the South African criminal justice system <https://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774> at 1-50 (accessed 4 September 2021)

113 Act 4 of 2000.

114 Sec 9 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

115 White (n 14) 653.

116 Act 51 of 1977.

117 Act 38 of 2005.

118 Act 32 of 2007.

Section 161 of the CPA provides that witnesses in criminal proceedings must give evidence *viva voce* (orally). The CPA has made some allowances in section 161(2) for witnesses who are unable to communicate in the normal way.<sup>119</sup> A witness who is unable to speak such as a deaf-and-dumb witness, may communicate by sign language, through an interpreter, or may write down his or her answers, which are then read out.<sup>120</sup> The law thus does not necessarily require a witness to speak, but requires a witness to communicate with the court. In the case of a child witness, section 161(2) states that evidence shall be deemed to include 'demonstrations, gestures or any other form of non-verbal expression'.<sup>121</sup> The rationale for the qualification of section 161(1) by section 161(2) is to make provision for the fact that children often nod or shake their heads or make gestures when answering questions. Allowance is thus made for children who have an insufficient vocabulary to describe certain acts or who are too embarrassed to use words of a sexual nature. Although not specifically stated in the Act, the wording of section 161(2) is wide enough to permit children to point to certain parts of their bodies, imitate actions, and use anatomically correct dolls for purposes of demonstration.<sup>122</sup> Hence, the witness must be allowed to give evidence in their *own words, in their own way and at their own speed*.<sup>123</sup> This is of particular importance when the witness is less knowledgeable or sophisticated<sup>124</sup> or may be a disabled child.<sup>125</sup>

In the case of *S v Roux*,<sup>126</sup> the court held that it was not the intention of the legislature to set out a *numerus clausus* in section 161(2) of what would constitute *viva voce* evidence, but that the courts have, over the years, adopted a wide interpretation of said concept. It was further held that criminal courts should not create obstacles to evidence by witnesses who

119 Subsec 2 was substituted by sec 1 of Act 135 of 1991 and came into force on 30 July 1993.

120 WA Joubert et al *The Law of South Africa: Vol 9 – Evidence* (2005) para 774.

121 Sec 161(2) of the CPA. Note that the Criminal and Related Matters Amendment Bill (B17-2020) <https://www.parliament.gov.za/bill/2292541> (accessed 5 September 2021) in clause 7 thereof proposes to broaden the scope even further by making allowance through a proposed amendment of sec 161 of the Act for 'a witness under the age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition which inhibits the ability of that of a witness to give his or her evidence *viva voce*, be deemed to include demonstrations, gestures or any other form of non-verbal expression'. A disabled child will accordingly qualify under both provisions. Clause 7 further substitutes the description of a 'deaf and dumb' witness for the description of a witness 'lacking the sense of hearing or ability to speak'.

122 R Songca 'The reliability of anatomically correct dolls in child abuse cases' (1993) *South African Journal of Criminal Justice* 83. See also para 3.7 and 4.7 of the Department of Justice and Constitutional Development *Report on the Re-Establishment of Sexual Offences Courts* (2013) for a discussion on the use of anatomically correct dolls and the proposed standards for their usage.

123 My emphasis.

124 *S v Hendriks* 1974 (2) PH H91 (C).

125 Ministry of Justice, Welsh Assembly Government 'Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures' (August 2013) <http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf> (accessed 11 January 2021).

126 *S v Roux* 2007 (1) SACR 379 (C).

could not give their evidence in the usual manner by narrowly interpreting legislation or legal principles. The purpose of the section is to prevent the exclusion of evidence simply because it is not understandable to the court if an alternative method exists to render it comprehensible. In the *Roux* case, the complainant in an indecent-assault case was a ten-year-old boy with Down's syndrome. Although he was able to speak, his sentences and words were incomprehensible to the court. Because a speech therapist was able to interpret his communication, the court subsequently held that there was no reason why the complainant could not testify with the assistance of the speech therapist.<sup>127</sup> White, Bornman and Johnson suggest that communication may be even further improved by developing and making a Disability Resource Toolkit<sup>128</sup> available in court when child victims with disabilities, including little or no functional speech, testify.<sup>129</sup> They point out that this toolkit has been successfully used in Israel during testimony in court.<sup>130</sup>

As a general rule, all witnesses are required to give evidence under oath.<sup>131</sup> However, section 164 of the CPA provides that if the presiding officer is of the opinion that the child does not have a sufficient understanding of the nature and import of an oath, the child may be allowed to give evidence without taking the oath, provided that the child is admonished by the presiding officer to speak the truth. Section 164 thus determines that in order to find application, a finding that the witness does not understand the nature or import of the oath has to be made. The presiding officer then has to determine whether the child is competent to give unsworn testimony in terms of section 164 of the CPA, namely whether the child can distinguish between truths and lies. In terms of section 164, a child may be a competent witness even if he or she does not understand the nature of the oath, provided that the child has been admonished by the court to speak the truth.<sup>132</sup>

This test has been the subject of much criticism. Schwikkard<sup>133</sup> argues that the above-mentioned competency test amounts to a presumption of incompetence as the evidence of children is only permissible once children have been found to be competent witnesses. She correctly contends that no such presumption applies to convicted perjurers or other persons convicted of crimes involving elements of dishonesty. She affirms that this may lead

127 *Roux* (n 126) 383 *fj*.

128 These toolkits include approximately 1 000 picture symbols, different kinds of letter cards, a user manual, and a portable computer with alternative and augmentative communication software.

129 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 at 29.

130 As above.

131 Sec 162 of the CPA.

132 *S v BM* 2012 (2) SACR 507 (FB).

133 PJ Schwikkard 'The abused child: a few rules of evidence considered' (1996) *Acta Juridica* 148 at 149.

to reliable testimony being excluded and that it may inhibit effective prosecution. While the evidence of adults falling into the aforementioned categories would be admissible even if it is fraught with lies, inaccuracies and improbabilities, children's evidence would not be admissible. If adults' evidence is found to be unreliable, it would be rejected.<sup>134</sup> White and Msipa point out, and correctly so, that this amounts to differential treatment of witnesses who are admonished or warned by the court.<sup>135</sup> Combrinck argues that this may, in practice, constitute a disproportionate barrier to the introduction of the evidence of witnesses with intellectual disabilities, which is in opposition to the provisions of article 12 of the CRPD.<sup>136</sup>

I support Erasmus's<sup>137</sup> suggestion that this presumption of incompetence may, despite research findings to the contrary, be attributed to the perception that young children are, as a rule, untruthful. Yet there is no evidence that children are more prone to lies than adults.<sup>138</sup> Ovens et al point out, with reference to Quinn,<sup>139</sup> that 'children do lie, just as adults do lie' but that 'often children make statements that are not factually accurate, but they are not "lies" because the child lacks the intention to wilfully mislead or deceive'.<sup>140</sup>

Schwikkard, furthermore, calls attention to the fact that truth and the duty to tell the truth are abstract notions that young children may not understand or be able to explain, but that this does not mean that children cannot give a reliable account of the events in question. She advocates that children should be allowed to testify and stresses that in assessing credibility, the court will give little weight to the fact that a witness took the oath or was admonished to tell the truth. It will rather consider factors such as coherence under cross-examination, evidence of surrounding circumstances, and demeanour.<sup>141</sup> Such an approach is supported as it will not only comply with article 12 of the CRPD but also accommodate disabled children's special needs and contribute to their successful participation in the process.

134 As above.

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

136 H Combrinck 'Promise of protection? Article 16 of the Convention on the Rights of Persons with Disabilities and gender-based violence in South Africa' (2017) 53 *International Journal of Law and Psychiatry* 59 at 64.

137 D Erasmus "'The truth, the whole truth or nothing...'" Is the competency inquiry applicable to child witnesses an evidentiary barrier to truth finding?' 2010 *Speculum Juris* 103 at 109.

138 As above.

139 MK Quinn 'The credibility of children's allegations of sexual abuse' (1988) 6 *Behavioral Science and the Law* 181 at 185.

140 M Ovens, D Lamprechts & J Prinsloo 'Child witnesses in the criminal justice system' (2001) 14 *Acta Criminologica* 25 at 29.

141 Schwikkard (n 133) 149.

Section 170A of the CPA allows for the appointment of an intermediary if the witness is under the biological or mental age of 18 years and if the court believes that the witness will be exposed to undue mental stress or suffering if he or she testifies in an open court in criminal proceedings.<sup>142</sup> Once an intermediary has been appointed, no examination, cross-examination, or re-examination of the child, except by the court, may take place other than through the intermediary.<sup>143</sup>

The criteria for the appointment of an intermediary, namely if the court believes that the witness will be exposed to 'undue mental stress or suffering' if he or she testifies in an open court, has been the subject of much criticism.<sup>144</sup> The aforementioned phrase is not defined in the Act nor have any guidelines been laid down by the legislature. In earlier research it has been highlighted that the concepts included in the phrase, such as undue mental stress and suffering are by their very nature extremely vague and complex to give content to.<sup>145</sup> Uncertainty also exists as to how acute the mental stress or suffering must be to qualify as undue. In this research it is pointed out that the absence of a clear definition is problematic as it may lead to inconsistent application and consequential injustices.<sup>146</sup> It is precisely for this reason that various commentators have advocated for legislative change that caters for the appointment of an intermediary without the need to show 'undue mental stress or suffering', save where cogent reasons not to appoint an intermediary exists.<sup>147</sup>

In this regard cognisance should be taken of the proposed changes to section 170A(1) as set out in clause 8 of the Criminal and Related Matters Amendment Bill.<sup>148</sup> Clause 8 extends the intermediary service to witnesses who suffers from a physical, psychological, mental or emotional conditions and to older persons as defined in the Older Persons Act 13 of 2006. The amendment further provides that the court may order the use of an intermediary, if it appears to the court that the proceedings would expose the witness to *undue psychological or emotional stress, trauma or suffering* if he or she testifies at such proceedings.<sup>149</sup> Though the proposed

142 The intermediary services are currently only available to a child victim and child witness in criminal proceedings. Clause 1 and 18 of the Criminal and Related Matters Amendment Bill (B17-2020) <https://www.parliament.gov.za/bill/2292541> (accessed 5 September 2021) aims to extend the intermediary services to proceedings other than criminal proceedings through the insertion of new sections namely, sections 51A, 51B and 51C in the Magistrates' Courts Act 32 of 1944 and sections 37A, 37B in the Superior Courts Act 10 of 2013.

143 Sec 170 (2)(a) of the CPA.

144 M Bekink 'Defining the phrase "undue mental stress and suffering" in terms of section 170A of the Criminal Procedure Act 51 of 1977' (2014) *Child Abuse Research: A South African Journal* 39 at 40.

145 As above.

146 As above.

147 Bekink (n 144) 40; Schwikkard (n 133) 159; K Müller and M Tait 'Little witnesses: A suggestion for improving the lot of children in court' (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 241 at 256.

148 The Criminal and Related Matters Amendment Bill.

149 Own emphasis.

legislative changes regrettably do not make allowance for an unconditional application of the use of an intermediary the pre-requisition for its application namely undue psychological or emotional stress, trauma or suffering may prove to be less vague and complex than the current requirements.

An intermediary is a person qualified to facilitate communication between the court and a child in a manner that is not only age-appropriate but also understandable to a child. The intermediary takes the child's cognitive and developmental abilities into account when conveying the meaning and contents of the court's questions to the child and acts as a 'barrier or shield' between the formal justice system and the child.<sup>150</sup> An intermediary is allowed to convey questions in terms that are more accessible to child witnesses and thus also to child witnesses with disabilities, provided that the general purport of the questions is maintained.<sup>151</sup>

If an intermediary is appointed, the court will usually allow for the witness to testify from a separate room that is informally arranged to set the child at ease.<sup>152</sup> The court and the parties must, however, be able to see and hear the child witness and the intermediary. This is usually done through a closed-circuit television system (CCTV). If a CCTV is used, a video camera is mounted on a wall of the room and videotapes both the child witness and the intermediary while the child gives testimony. The intermediary is provided with earphones which enable him or her to follow the proceedings in the courtroom and relay the questions to the child. The child witness's answers are captured on the live video link and relayed to the courtroom. The courtroom is equipped with a television monitor on which the parties to the proceedings and members of the court are able to view the child and the intermediary and hear them speak.<sup>153</sup>

The intermediary system thus has the advantage of being more child-friendly and the child witness does not run the risk of coming face to face with the alleged perpetrator. In addition, the child witness is exposed to neither the complicated language often used during cross-examination nor the hostile or intimidating style of cross-examination. This system is of particular value to not only the normal child victim but also the child victim who has a communication and/or intellectual disability.<sup>154</sup>

In terms of section 170A of the CPA, the appointment of an intermediary is subject to the discretion of the trial court (the judicial presiding officer). The judicial presiding officer has to determine whether

150 *DPP* (n 111) para 96.

151 Sec 170(2)(b) of the CPA.

152 *DPP* (n 111) para 97.

153 Müller & Tait (n 147) 243.

154 Combrinck (n 136) 64.

the services of an intermediary are required based on the possibility of undue mental stress or suffering if a child testifies during the proceedings. This test or threshold for eligibility has been criticised for being too vague, too stringent and for excluding many who might benefit from it, such as a victim with little stress but serious communication difficulties.<sup>155</sup>

According to Schwikkard, the result of this discretion is that children testifying through intermediaries are viewed as the exception rather than the norm.<sup>156</sup> Some commentators are rightly of the opinion that section 170A would be more effective if subsection (1) were amended to require a court to use an intermediary in all cases when a child is required to testify. The court should be excused from doing so only when it is clear that the child would not be traumatised or when it is impossible to do so.<sup>157</sup>

Research has indicated both nationally and internationally that the use of an intermediary is regarded as a best practice for children with communication disabilities. In addition, it has reduced the trauma experienced by children with communication disabilities.<sup>158</sup> The appointment of an intermediary as a standard practice not only for children in general, but also for disabled children in particular, is advocated.

Concern about the availability of intermediaries has been expressed.<sup>159</sup> The relevant role players within the criminal justice system are hence urged to continue to realise and prioritise the importance of the role of intermediaries and to put in place measures to address the unavailability of intermediaries.

### 4.3 The Children's Act 38 of 2005

The Children's Act, which applies to all children including disabled child victims, also contains appropriate measures to accommodate disabled children through the care and protection system. As it stands the provisions of the Children's Act do not apply to criminal courts and may therefore unfortunately not be of assistance to child witnesses who have to testify in criminal proceedings. It is, however, interesting to note that in the case of *S v Ndwandwe*,<sup>160</sup> the High Court applied section 63 of the Child

155 See *S v Mokoena* 2008 (2) SACR 216 (T) para 79: Müller & Tait (n 147) 247-248.

156 Schwikkard (n 133) 148 & 159;

157 CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251 at 257; Bekink (n 112).

158 White, Bornman & Johnson (n 129) 21-22. Note, however, that the authors contend that intermediaries may require additional training to communicate with victims with little or no functional speech.

159 A van der Merwe 'Children as victims and witnesses' in Boezaart (ed) *Child law in South Africa* (2017) 653 at 667-668. Bekink (n 112) 288; Centre for Child Law, University of Pretoria 'Making room: Facilitating the testimony of child witnesses and victims' (2015) 8-10.

Justice Act<sup>161</sup> that applies to child accused to child witnesses. The court was of the view that although the section caters for child accused and not for child witnesses, there is no reason why child witnesses should not be afforded the protection of section 63 of the Child Justice Act. It is, therefore, submitted that the criminal courts may afford disabled child victims the protection afforded to them in terms of the Children's Act.

In this regard, section 42(8)(d) of the Children's Act requires that proceedings involving children be held in an informal atmosphere appropriate to the nature of the proceedings and in a room that is 'accessible to disabled persons and persons with special needs'. This provision may thus benefit children with disabilities who need to be accommodated. However, White and Msipa point out that since this provision refers to accessibility, it may be more beneficial to children with physical disabilities than to those with intellectual disabilities.<sup>162</sup>

In addition, the Children's Act makes certain communication accommodations in section 52 thereof. The Act permits necessary changes to the court rules required by the context. These rules must be designed to avoid the adversarial procedures and include rules concerning appropriate questioning techniques for children with intellectual or psychiatric difficulties or with hearing or other physical disabilities that impede communication.<sup>163</sup>

These provisions are welcomed since they provide a legal framework for the obligatory drafting of rules of court to protect children from the traumatising procedures normally associated with courts of law. It also takes account of children's individual capacities, difficulties and disabilities.<sup>164</sup> Sections 42 and 52, furthermore, support article 13 of the CRPD by requiring some form of age-appropriate and procedural accommodation for children with disabilities that have to appear in court.

#### **4.4 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007**

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SOA) identifies special crimes against children and persons with mental disabilities including sexual exploitation,<sup>165</sup> sexual grooming<sup>166</sup> and the exposure to or display of pornography;<sup>167</sup> thus giving recognition

160 *S v Ndwandwe* (AR99/12) [2012] ZAKZPHC 47 (6 August 2012) para 15.

161 Child Justice Act 75 of 2008.

162 White and Msipa (n 135) 106.

163 Sec 52(2) of the Children's Act.

164 J Gallinetti 'The children's court' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 4-9.

165 Sec 17 and 23 of the SOA.

166 Sec 18 and 24 of the SOA.

167 Sec 19 & 25 of the SOA.

to their vulnerability and particular need for protection. Children with disabilities are protected in terms of the SOA according to their status as both 'children' and 'persons with mental disabilities'.<sup>168</sup> In the latter case, this will depend on whether the child has a mental disability.

To determine mental disability, the SOA also provides a definition of the concept of a person with mental disability, namely 'a person affected by any mental disability, including any disorder or disability of the mind' to the extent that such a person, at the time of the alleged commission of the offence in question, was:<sup>169</sup>

- (a) Unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.

It should be noted that the SOA refers to mental disability only. This may be attributed to the principle of consent relating to sexual conduct.<sup>170</sup> A person with a physical disability is still able to consent and to understand the consequence of the consent. The National Director of Public Prosecutions has issued a set of directives to prosecutors in terms of section 66 of the SOA to assist them in their onus of proof that a complainant is mentally disabled and unable to consent to a sexual act.<sup>171</sup> In this regard, expert evidence has to be lead. An expert-opinion report by either a social worker, psychologist or a psychiatrist is generally obtained.<sup>172</sup> Combrinck argues that, in the case of intellectual disability, the formal assessment of the level of functioning required in terms of the definition should be conducted by a psychologist.<sup>173</sup> These directives, furthermore, require of public prosecutors to adopt, amongst other things, a victim-centred approach; to give priority to the emotional and psychological well-being of the complainant; to make every effort to reduce secondary traumatisation; and to make additional efforts in this regard in respect of children or mentally disabled complainants.<sup>174</sup> In the case of children, their age,

168 Note that for purposes of the SOA, a child is defined as: (a) a person under the age of 18 years or (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years.

169 Sec 1 of the SOA.

170 *S v Chindrize* 2015 (1) SACR 364 (GP).

171 National Director of Public Prosecutions 'Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and related matters) Amendment Act, 2007 (Act 32 of 2007)' (2010) para B.10. [https://www.npa.gov.za/sites/default/files/Library/Sexual%20Offences%20Directive%20tabled%20in%20Parliament%2023%20September%202010%20final\\_0.pdf](https://www.npa.gov.za/sites/default/files/Library/Sexual%20Offences%20Directive%20tabled%20in%20Parliament%2023%20September%202010%20final_0.pdf) (accessed 10 January 2021).

172 As above.

173 Combrinck (n 136) 63.

174 National Director of Public Prosecutions (n 171) para B.2.

developmental stage, and level of maturity should also be taken into account.<sup>175</sup>

It is submitted that the sections on children and the mentally disabled in the SOA are sound and ensure that the most vulnerable members of our society are more exhaustively protected. The cataloguing of the range of sexual crimes committed against children and persons with mental disabilities because of their innocence, ignorance, or special vulnerabilities, is a progressive legislative measure. Their inclusion in the Criminal Procedure Act by way of the SOA may minimise the secondary victimisation and traumatising of victims of sexual offences, including disabled child victims.

In addition to the existing provisions of the SOA, cognisance should be taken of the proposed amendments to the SOA through the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, 2020<sup>176</sup> that if implemented, will further the protection afforded to victims of sexual offences. The Bill *inter alia* aims to amend Chapter 6 of the principal Act, so to expand the list of persons who are to be protected to include other vulnerable persons, namely women under the age of 25 years of age, and *persons with physical, mental or intellectual disabilities* and persons over 60 years of age who, for example receive community-based care and support services.<sup>177</sup> The Bill in practical terms aims to extend the list by inserting a definition of a ‘person who is vulnerable’<sup>178</sup> in section 40 of the principal Act and by replacing the phrase ‘child or a person who is mentally disabled’ where it appears with ‘person who is vulnerable’. Children with disabilities will in terms of the proposed amendments be protected in terms of the amended SOA according to their status as both

175 National Director of Public Prosecutions (n 171) para B.3.

176 The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (2020) <https://www.gov.za/documents/criminal-law-sexual-offences-and-related-matters-amendment-act-amendment-bill-b16-2020-19> (accessed 5 September 2021).

177 My emphasis.

178 In terms of clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (n 176)) a ‘person who is vulnerable’ means:

- ‘(a) child;
- (b) female under the age of 25 years;
- (c) person who is being cared for or sheltered in a facility that provides services to victims of crime;
- (d) person with a physical, intellectual or mental disability and who –
  - (i) receives community-based care and support services, other than from a family member, for;
  - (ii) lives in a building, structure or facility used primarily as a residence, for; or
  - (iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or mental disabilities; or
- (e) person who is 60 years of age or older and who –
  - (i) receives community-based care and support services, other than from a family member, for;
  - (ii) lives in a building, structure or facility used primarily as a residence, for; or
  - (iii) is cared for in a facility providing 24-hour care to, such persons.’

'children' and as 'persons who are vulnerable'. The provisions of the amended SOA will then no longer be restricted to mental disability only but will be applicable to persons with physical, mental or intellectual disabilities and who, for example receive community-based care and support services, thereby enhancing the protection afforded to children with disabilities. The proposed amendments are accordingly much welcomed.

## **5 Conclusion**

Children with disabilities who are the victims of crime experience several barriers to effectively participate in the criminal justice system and, consequently, need protection and support. This is also acknowledged in the international instruments pertaining to children such as the CRC, CRPD and the ACRWC, that bestow on disabled child victims the right to protection and access to justice on an equal basis with others. By ratifying these documents, South Africa, as a state party, not only expressed its commitment to the principles contained in them, but is also compelled to abide by these principles. South Africa must, *inter alia*, ensure that no discrimination against child victims on the basis of their disability or age occurs; that child victims are able to participate freely in any criminal proceedings affecting them; and that their best interests are vigorously protected.

As indicated in the analysis above,<sup>179</sup> the South African Constitution conforms to these notions by guaranteeing disabled child victims the right to equality and dignity; to be free from violence; to freedom of expression; and to have their best interests regarded as of paramount importance in every matter concerning them. To give further effect to these rights, accommodations have been made by way of national legislation such as the CPA and the SOA. This includes the right to communicate in criminal proceedings in non-conventional ways such as demonstrations, gestures, or other forms of non-verbal expressions; to make use of intermediaries; and to testify from a separate room with the use of CCTV or other electronic equipment. With these safeguards, the CPA aims to prevent secondary traumatisation in matters where disabled child victims are required to participate, thus facilitating age-appropriate and procedural accommodations as called for by the CRC and the CRPD. Because children with mental disabilities are easy targets for sexual predators, the SOA, by identifying specific crimes against children and persons with mental disabilities, is responsive in addressing this scourge.<sup>180</sup>

179 See para 4.1 above.

180 See para 4.2 and 4.4 above.

The impact of these accommodations is, however, reduced because of persistent problems such as the availability of intermediaries.<sup>181</sup> Measures should be put in place to address the unavailability of intermediaries. The use of intermediaries is further clouded by the fact that the appointment of intermediaries under section 170A of the CPA is subject to the discretion of the trial court. This has resulted in the exclusion of many child victims, including disabled child victims, who might benefit from the help of an intermediary.<sup>182</sup> Research has indicated both nationally and internationally that the use of an intermediary is regarded as a best practice for children with communication disabilities and has reduced the trauma they experience.<sup>183</sup> The appointment of an intermediary as a standard practice not only for children in general, but also for disabled children in particular is accordingly advocated.

As indicated above, the CRPD requires of state parties to adopt specialised legislation for disabled persons, including child focused legislation, to ensure appropriate legal redress of instances of the abuse and exploitation of or violence against persons with disabilities.<sup>184</sup> Although a White Paper has been developed by South Africa, it remained just that. As pointed out above, the CPRD's value lies in its implementation, which is not an easy and fast-track process.<sup>185</sup> Specialised legislation may aid in this process and lead to standard setting, more consistency, and legal priority.<sup>186</sup>

A further cause for concern is the lack of information on violence against children with disabilities. This was also pointed out by the Committee of the CRC in its comments on South Africa's second periodic report to it. The Committee also expressed concern over the multiple layers of discrimination and exclusion faced by the majority of South African children with disabilities.<sup>187</sup> The data should include the child victim's sex, gender, age and disability as well as the relationship between the perpetrator and the child victim.

Conversely, as pointed out by Combrinck, it would be naïve to assume that a legal framework alone will be efficient in addressing violence directed against disabled victims, including child victims.<sup>188</sup> Nonetheless,

181 A van der Merwe 'Children as victims and witnesses' in Boezaart (ed) *Child law in South Africa* (2017) 653 at 667-668. Bekink (n 112) 288.

182 See *S v Mokoena* 2008 (2) SACR 216 (T) para 79: Müller and Tait (n 147) 247-248.

183 White, Bornman & Johnson (n 129) 21-22. Note, however, that the authors highlight that intermediaries may require additional training to communicate with victims with little or no functional speech.

184 See para 2.2 above.

185 As above.

186 SD Kamga 'Disability rights in South Africa: Prospects for their realization under the White Paper on the Rights of Persons with Disabilities' (2016) 32 *South African Journal on Human Rights* 569.

187 See para 2.1 above.

188 Combrinck (n 136) 67.

it is an essential first step in terms of both article 23 of the CRC and article 7 of the CRPD in ensuring that disabled child victims receive the necessary support and protection they richly deserve.

## THE REALISATION OF THE RIGHT TO HEALTH OF PERSONS WITH DISABILITIES IN THE COVID-19 ERA: EVALUATING SOUTH AFRICA'S (NON)INCLUSIVE RESPONSE

*Ebenezer Durojaye\* & Robert Doya Nanima\*\**

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### Summary

*Several international and regional human rights instruments guarantee the right to health of individuals including persons with disabilities and marginalised groups. Emerging reports from international organisations and the Committee on the Rights of Persons with Disabilities reiterate the obligations of state parties to ensure the enjoyment of healthcare services for persons with disabilities. The outbreak of the Covid-19 pandemic in South Africa and the subsequent national lockdown has led to the questioning of the national responses in the context of the right to the health of persons with disabilities. In this regard, this contribution uses a desktop-research based approach to engage three questions. First, the extent of government's inclusion or participation of organisations that (especially) represent the interests of persons with disabilities in the response plans. Secondly, the accessibility of information for persons with disabilities, and thirdly, the accessibility to healthcare and other essential services. A conclusion and recommendations follow.*

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## 1 Introduction

Global statistics indicate that over 1 billion people or 15 per cent of the World's population have some form of disability.<sup>1</sup> Approximately 80 per cent of these people are in developing countries.<sup>2</sup> In South Africa, there are approximately 2.8 million persons with disabilities (PWDs), accounting for about 7.4 per cent of the entire population.<sup>3</sup> This excludes PWDs who are institutionalised and children with disabilities under 5 years of age.<sup>4</sup> According to the Community Survey 2016, PWDs suffer social inequalities whereby 36 per cent are of low socio-economic status.<sup>5</sup> In terms of race desegregation, the PWDs in the white or Indian/Asian population are within the upper wealth quintile (86.8 per cent and 71.9 per cent respectively). The Black African PWDs represent 44.7 per cent in the lower quintile in comparison to the less than 5 per cent among the coloured, Indian/Asian and white population groups. There is a need to establish the desegregation during the Covid-19 pandemic to establish the numbers of PWDs based on age, race and gender. At the time of preparing this contribution, the authors were not aware of any detailed desegregation following the 2016 study.

From the outset, 'disability' has often been understood as a physical notion, coupled with a modesty that extends to mental contexts.<sup>6</sup> For the purposes of this presentation, disability should be looked at in a wider perspective that covers physical, intellectual or sensory impairment, medical conditions or mental illness, which may be permanent or transitory.<sup>7</sup> While it is recognised that the Convention on the Rights of Persons with Disabilities (CRPD) avoids a definition of disability or PWDs, this paper adopts the position of the Protocol to the Africa Charter on the Rights of Persons with Disabilities, which describes a person with disabilities to include

1 World Bank 'Disability inclusion overview' <https://bit.ly/319Qw3v> (accessed 8 November 2020); N Kostanjsek et al 'Counting disability: Global and national estimation' (2013) 35 *Disability and Rehabilitation* 1065 at 1069.

2 UN Department of Economic and Social Affairs – Disability 'Factsheet on persons with disabilities' <https://bit.ly/2I7VTCl> (accessed 8 November 2020); S Grech 'Disability and development: Critical connections, gaps and contradictions' in D Hendrych (ed) *Disability in the Global South* (2016) 3-19.

3 Republic of South Africa, Department of Women, Youth & Persons with Disabilities 'Disability statistics' [www.women.gov.za/images/FACT-SHEET---Disability-Statistics.pdf](http://www.women.gov.za/images/FACT-SHEET---Disability-Statistics.pdf) (accessed 7 November 2020).

4 As above.

5 As above.

6 V Larocca, J Fraser-Thomas & R Bassett-Gunter "Even if someone has a physical disability, they can still participate" Youth with physical disabilities' motivational physical activity message preferences' (2020) 13 *Disability and Health Journal* 100845.

7 See the definition in the UN General Assembly, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1993) UN Doc A/RES/48/96 dated 20 December 1993, Introduction at para 17. See also CESCR General Comment 5: Persons with Disabilities (1994) UN Doc E/1995/22 dated 9 December 1994, para 3.

those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.<sup>8</sup>

This definition is broad enough to cover various aspects that go beyond the usual and narrow concepts of physical and mental disabilities. In this vein, several international and regional human rights instruments guarantee the right to health of individuals. Various international human rights instruments have thematically dealt with the issues of disabilities. These include the Convention on the Rights of the Child,<sup>9</sup> the African Charter on Human and Peoples' Rights,<sup>10</sup> the African Charter on the Rights and Welfare of the Child,<sup>11</sup> the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,<sup>12</sup> the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa,<sup>13</sup> and the CRPD.<sup>14</sup> This has greatly informed the widely accepted belief that the rights of PWDs must be protected and promoted through general, as well as specially designed, laws, policies and programmes.<sup>15</sup> South Africa is a party to most of these instruments and as such is bound to engage its obligations to the letter.<sup>16</sup>

This contribution argues that the outbreak of the COVID-19 pandemic in South Africa and the subsequent national lockdown has led to the questioning of the national responses in the context of the right to the health of PWDs. Following the statement of the problem and the setting of the scene regarding the rights of PWDs, the contribution discusses the extent of the government's inclusion or participation of organisations that (especially) represent the interests of PWDs in the response plans. This is followed by a discussion of the accessibility of information for PWDs, and accessibility to healthcare and other essential services. A conclusion and recommendations follow.

8 AU, Protocol to the Africa Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018) (African Disability Protocol), art 1 <https://bit.ly/3liLvGb> (accessed 10 November 2020).

9 UN General Assembly, Convention on the Rights of the Child (1989) United Nations, Treaty Series, vol 1577 3, (20 November 1989), art 23.

10 African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, art 18(4).

11 Organisation of African Unity (OAU), The African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), art 13.

12 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Document A-52, art 18.

13 Available at <https://bit.ly/3fRISY> (accessed 25 May 2021).

14 Art 25.

15 Para 6 of General Comment 5 (n 7).

16 For a list of instruments to which South Africa is a party, see 'General measures of implementation – Chapter 3' <https://bit.ly/3g0RAWn> (accessed 26 May 2021).

## 2 Statement of the problem

Despite the high figures of PWDs in South Africa, there is a missing link in the desegregation of the persons affected by COVID-19. The disconnect is that the COVID-19 statistics in South Africa are silent on desegregation on account of race, age, sex and forms of disabilities of infected PWDs. This missing link has affected the responses by the government to PWDs. With an emphasis on the right to healthcare, this disconnect identifies the need to question the responses by the government to ensure the enjoyment of the right to health of PWDs during the pandemic. It offers a chance to question the practical aspects of the regulations in relation to the health of PWDs.

It should be noted that the Committee on the Rights of Persons with Disabilities (the Committee) has expressed concerns about the 2018 report of South Africa. In this regard, the Committee highlighted the absence of meaningful consultation and effective participation mechanisms to ensure that the views, opinions and concerns of PWDs are engaged in policy formulation, including decision-making processes, by public authorities both at the national and local levels.<sup>17</sup> As indicated earlier, a holistic description of PWDs (that includes persons with physical, mental, psychosocial, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others) has to be used.

## 3 Setting the scene: The right to health of PWDs

The realisation of the right to health is informed by the extent to which the requisite services are available, accessible, acceptable and of good quality.<sup>18</sup> Without prejudice to these four elements that inform the right to health generally, the context of PWDs is informed by eight major principles underlying the Convention on the Rights of Persons with Disabilities (CRPD) and implementation of obligations within a state.<sup>19</sup> These include the respect for inherent dignity; the principle of non-discrimination; participation and inclusion in society; respect for difference; and acceptance of PWDs.<sup>20</sup> Other principles include equality of opportunity; accessibility; equality between men and women; and the

17 Para 6 of South Africa's Initial Report to the CRPD Committee (2018).

18 UN CESCR, General Comment 14: The right to the highest attainable standard of health (Art 12) (2000) UN Doc E/C.12/2000/4 dated 11 August 2000, para 12(a)-(d).

19 UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution/adopted by the General Assembly (2007) UN Doc A/RES/61/106 dated 24 January 2007, art 3.

20 Art 3(a)-(d) of the CRPD (n 19).

respect for the evolving capacities of children with disabilities and their right to the preservation of their identities.<sup>21</sup>

This contribution by design examines three principles, namely: accessibility; equality and non-discrimination; and participation of PWDs in matters that concern them. While the selected principles inform the holistic enjoyment of the right to health of PWDs,<sup>22</sup> it is reiterated that this is by no means an exhaustive list but rather furtherance of the discussion herein.

### 3.1 Normative content of the right to health of PWDs

The International Covenant on Economic, Social and Cultural Rights (ICECSR) provides for the right to health.<sup>23</sup> Article 12 of the ICECSR calls on states to establish an expansive public health system which embraces the fulfilment of the socio-economic rights based on the provision of civil and political rights.<sup>24</sup> Further insights are evident in General Comment 14 of the ICECSR that elucidates on the expansive interpretation of the right to health.<sup>25</sup> This General Comment solidifies the public health underpinnings of the right to health to include the need to ensure that both the public and private providers of health services and facilities uphold the principle of non-discrimination in relation to persons with disabilities.<sup>26</sup> The protection of the right to health has to be in the bounds of the highest attainable standard of health conducive to living a life in dignity.<sup>27</sup> The Committee of Economic, Social and Cultural Rights further observes that the enjoyment of the right to health is dependent on other rights such as privacy, dignity, life and non-discrimination.<sup>28</sup> It also reasons that states are obligated to ensure access to healthcare services for all on a non-discriminatory basis, with regard to the needs of vulnerable and marginalised groups in society.<sup>29</sup> States have to realise available, accessible, acceptable and quality healthcare services for everyone.<sup>30</sup> The obligations extend to respect, protection and fulfilment of the enjoyment of the right to health. A state will be in breach of its duty to respect the right to health if it fails to adopt a legislative framework on the right to health.

21 Art 3(e)-(h) of the CRPD (n 19).

22 Art 3 of the CRPD (n 19).

23 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, 3, art 12.

24 See art 12(2)(d) of the ICECSR (n 23 above). It provides that: 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

25 General Comment 14 (n 18).

26 Para 26 of General Comment 14 (n 18). See also para 34 of ICECSR General Comment 5 (n 15).

27 Para 1 of General Comment 14 (n 18).

28 Para 12 of General Comment 14 (n 18).

29 As above.

30 As above.

The CRPD offers various definitions that underscore the protection of PWDs. The requisite article provides that discrimination refers to

distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>31</sup>

To this end, there is a need to apply the principle of non-discrimination in a manner that does not affect the holistic enjoyment of rights generally by PWDs. Further discussion on the CRPD is provided below. The Convention on the Elimination of all forms of Discrimination against Women adds its voice to discrimination and provides for non-discrimination against women in areas of healthcare,<sup>32</sup> discrimination on the basis of sex,<sup>33</sup> and participation of women in matters that concern them.<sup>34</sup>

There are regional human instruments in Africa that speak to the protection of the rights of PWDs. First, the African Charter on Human and Peoples' Rights provides for the right to freedom from discrimination,<sup>35</sup> duty on persons to respect others without discrimination,<sup>36</sup> participation in government,<sup>37</sup> right to equal access to public property and services in the country,<sup>38</sup> and the right to health.<sup>39</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) extenuates this right to health and reproductive rights for women and children,<sup>40</sup> accessible health services,<sup>41</sup> participation in political and decision-making processes,<sup>42</sup> and protection of women with disabilities.<sup>43</sup> Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol) calls for the need for accessibility of the services to PWDs,<sup>44</sup> and lays down various principles on the protection of PWDs.

31 Art 2 of the CRPD (n 19).

32 Art 12 of the CRPD (n 19).

33 Art 1 of the CRPD (n 19).

34 Art 11 of the CRPD (n 19).

35 Art 2 of the ACPHR (n 10).

36 Art 28 of the ACPHR (n 10).

37 Art 13 of the ACPHR (n 10).

38 Art 13 of the ACPHR (n 10).

39 Art 16 of the ACPHR (n 10).

40 AU, Protocol to the ACPHR on the Rights of Women in Africa (Maputo Protocol) dated 11 July 2003, art 14 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 10 November 2021).

41 Art 14(2)(a) of the Maputo Protocol (n 40).

42 Art 9 of the Maputo Protocol (n 40).

43 Art 23 of the Maputo Protocol (n 40).

44 Art 15 of the African Disability Protocol (n 8).

These include the best interests of the child, reasonable accommodation,<sup>45</sup> the right to health,<sup>46</sup> and non-discrimination.<sup>47</sup>

South Africa's obligations under the aforesaid international and regional instruments require it to take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of PWDs.<sup>48</sup> These persons may become victims of exploitation or violence (or abuse) that results from the provision of protection services.<sup>49</sup> One may argue that the enjoyment of the rights of PWDs in times of public health emergencies is not provided for by the CRPD, based on the wording that

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, *humanitarian emergencies and the occurrence of natural disasters*.<sup>50</sup>

This is partly because public health emergencies may be manmade.<sup>51</sup> This potentially dangerous predicament is solved by the requirement in article 25 that calls on states parties to

take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and *population-based public health programmes*.<sup>52</sup>

The provision of these public health programmes, it is argued, may be public health interventions employed at a time of public health emergencies. To this end, rules governing derogations and limitations from rights would come to the fore. The International Covenant on Civil and Political Rights allows a state to derogate from its obligations as informed by the exigencies of the situation.<sup>53</sup> Furthermore, the measures need not be inconsistent with other international law obligations like the

45 Art 3 of the African Disability Protocol (n 8).

46 Art 17 of the African Disability Protocol (n 8).

47 As above.

48 For a list of instruments to which South Africa is a party, see 'General measures of implementation' (n 16).

49 Art 16(4) of the CRPD (n 19).

50 Art 11 of the CRPD (n 19) (our emphasis).

51 J Leaning & D Guha-Sapir 'Natural disasters, armed conflict, and public health' (2013) 369 *New England Journal of Medicine* 1836.

52 Art 25 of the CRPD (n 19) (our emphasis).

53 Art 4(1) of the ICCPR. See CCPR, General Comment 29: Article 4: Derogations during a state of emergency (2001) UN Doc CCPR/C/21/Rev.1/Add.11 dated 31 August 2001, paras 4-6.

prohibition of torture,<sup>54</sup> and the right against discrimination.<sup>55</sup> Concerning Public health emergencies, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights guide states on engaging restrictions to dealing with human rights in instances of public health emergencies.<sup>56</sup>

Before taking leave of this matter, it should be noted that the Constitution of the Republic of South Africa, 1996 provides for specific rights that underscore the promotion and protection of other rights such as equality before the law,<sup>57</sup> human dignity,<sup>58</sup> life,<sup>59</sup> privacy,<sup>60</sup> and healthcare.<sup>61</sup> On this basis, this paper now considers the three important issues of accessibility, equality and participation.

### **3.2 Accessibility**

Accessibility is a condition precedent for PWDs to live independently and participate fully and equally in society.<sup>62</sup> This is because PWDs need access to the physical environment, transportation, information and communication and other facilities and services open or provided to the public. PWDs are effectively denied opportunities to participate in their communities when accessibility is denied.<sup>63</sup> Accessibility further includes adequate access to buildings for PWDs.<sup>64</sup> Critical to ensuring inherent dignity is the provision of access to services,<sup>65</sup> that leads to the subsequent recognition of the right to the inherent dignity of a person based on his or her worth as a human being.<sup>66</sup> In the context of the right to health, the essential elements of health like accessibility, and others that include availability, acceptability and the quality of healthcare speak to inherent

54 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, 85, art 2.

55 See Art 4(1) of the ICCPR (n 32). See paras 8 and 13 generally of CCPR General Comment 29 (n 53).

56 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984) UN Doc E/CN.4/1985/4, dated 28 September 1984.

57 Sec 9 of the Constitution of the Republic of South Africa, 1996.

58 Sec 10.

59 Sec 11.

60 Sec 14.

61 Sec 27.

62 See art 9 of the CRPD (n 19). See also CRPD Committee, General Comment 2 (2014) on article 9: Accessibility, (2014) UN Doc CRPD/C/GC/2 dated 22 May 2014, para 1.

63 Para 1 of General Comment 2 of 2014 (n 62). The right to accessibility is underscored in art 25(c) of the International Covenant on Civil and Political Rights that accords the right to access to public services.

64 Para 12(b) of General Comment 14 (n 18).

65 Arts 3(f) and 9 of the See CRPD.

66 Art 3 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); preambular paras 1 and 2 and arts 12, 13 of the ICESCR (n 23); paras 1, 3 and 25 of General Comment 14 (n 18); art 25(d) of the CRPD (n 19); preambular para 2 and art 5 of the ACHPR (n 10); and arts 11(5), 13(1), 17(1), 20(1)(c) and 21(1) of the ACRWC (n 11).

dignity.<sup>67</sup> Physical acceptability engrains inherent dignity in the provision of health facilities for all sections of the population including the vulnerable or marginalised groups like persons with disabilities.<sup>68</sup> Anything to the contrary would most likely amount to discrimination against persons with disabilities.

Accessibility also speaks to the nature and proximity of health services. Regarding nature, the enjoyment should be informed by: access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; and appropriate treatment.<sup>69</sup> Concerning proximity, these services have to be readily available for PWDs – in the context of this contribution – at the community levels.<sup>70</sup> As such, it is expected that the rehabilitation services provided to PWDs would enable them to reach and sustain their optimum level of independence and functioning.<sup>71</sup> The right to accessibility obliges states to apply universal design to goods, facilities, services, products and technologies to allow all persons, including PWDs, easy access.<sup>72</sup> According to the Committee on the CRPD, the duty of states parties to implement accessibility is unconditional, and states parties may not excuse themselves from meeting their obligations by claiming that it is financially burdensome to do so.<sup>73</sup> This is even more imperative during the COVID-19 era.

### 3.3 Equality and non-discrimination

The CRPD observes that some domestic laws and policies do not acknowledge PWDs as full subjects of rights and rights holders.<sup>74</sup> It is observed that attitudinal barriers remain the greatest obstacle to the enjoyment of the right to health of PWDs. This often leads to limited access to healthcare in contexts including physical and mental conditions that inhibit the enjoyment of the right to health.<sup>75</sup> In the wider scheme of things, discrimination based on disability refers to any distinction, exclusion or restriction based on a disability that impairs or nullifies the ‘recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.<sup>76</sup>

67 Para 12(a)-(e) and 13 of General Comment 14 (n 18 above).

68 Para 12(b) of General Comment 14 (n 18).

69 Para 17 of General Comment 14 (n 18).

70 As above.

71 Para 34 of General Comment 5 (n 15).

72 Para 15 of the CRPD.

73 Para 25 of the CRPD.

74 Para 2 of UN Committee on the Rights of Persons with Disabilities, General Comment 6 on equality and non-discrimination (2018) UN Doc CRPD/C/GC/6 dated 26 April 2018.

75 See arts 2(2) and 3 of the ICESCR (n 23); Para 18 of General Comment 14 (n 18).

76 See art 2 of the CRPD.

As such, the yardstick is to what extent access to healthcare is informed by other reasons on account of the status of the person and whether this can be justified.<sup>77</sup> The protection from discrimination extends to all persons including infants and children with disabilities through the call to states to accord them the opportunity to enjoy a fulfilling and decent life and to participate within their community.<sup>78</sup> The protection also calls on states to refrain from any action that discriminates against PWDs.<sup>79</sup>

The CRPD adopts the concept of reasonable accommodation in addressing discriminatory practices against PWDs in all endeavours of life. Reasonable accommodation means transforming or refashioning the world in such a manner that recognises that persons with disabilities have the same rights as everyone. It means dismantling those social barriers erected for persons with disabilities. Discrimination is any attitude or practice that maintains these barriers. Failure to provide reasonable accommodation is one way of maintaining such barriers and is therefore discrimination. The Committee has held in one of its decisions that failure on the part of a state to investigate and punish acts of violence perpetrated against persons with albinism amounted to discrimination in contravention of the CRPD.<sup>80</sup>

In the context of regulations handed down to mitigate the spread of the COVID-19 pandemic, it is expected that they [do not] exacerbate or lead to the violation of the rights of PWDs. With regard to the right to health, jurisprudence from the Committee on CRPD urges States to

prohibit and prevent discriminatory denial of health services to persons with disabilities and to provide gender-sensitive health services, including sexual and reproductive health rights. States parties must also address forms of discrimination that violate the right of persons with disabilities that impede their right to health through violations of the right to receive health care on the basis of free and informed consent, or that make facilities or information inaccessible.<sup>81</sup>

A case that best highlights discriminatory practices against PWDs in the healthcare setting is the *Eldridge* case.<sup>82</sup> In that case, the court held that failure to provide facilities for sign language interpretation that would

77 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, para 21.

78 Para 22 of General Comment 14 (n 18). See also para 34 of General Comment 5 (n 15). Rule 2, para 3 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (n 7). See preambular paras (d) & (h) and art 25(f) of the CRPD (n 19).

79 Para 30 of General Comment 6 (n 77).

80 *Y v Republic United of Tanzania* Communication 023/2014 (Views adopted on 31 August 2018).

81 Para 66 of General Comment 6 (n 77). See also Committee on the Rights of Persons with Disabilities General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014, para 41.

82 *Eldridge v British Columbia (Attorney-General)* (1977) 151 DLR (4th) 577.

assist hearing-impaired patients to communicate with health service providers in the same way as unimpaired patients constituted discrimination in violation of the Canadian Charter on Rights and Freedoms. According to the Court, the adverse effects of discrimination are relevant in the context of PWDs. This case is illustrative of how a substantive equality approach can mitigate the negative effects of discriminatory practices against PWDs in the realisation of access to healthcare services, especially during COVID-19. It would seem that the position in *Eldridge* case has now been codified in article 17(f) of the African Disability Protocol, which enjoins states to take measures to facilitate access to healthcare services for PWDs by: 'Ensuring that healthcare services are provided using accessible formats and that communication between service providers and persons with disabilities is effective'.<sup>83</sup>

It suffices to note that the requirement to steer clear of non-discrimination is not a duty of only the government but private health providers as well.<sup>84</sup> This is in line with the requirement that the persons providing the service must maintain full respect for the rights and dignity of PWDs.<sup>85</sup>

### 3.4 Participation

The CRPD provides for the participation of PWDs in matters that concern them.<sup>86</sup> It is expected that the active and informed participation of everyone in decisions that affect their lives and rights informs the human rights-based approach to public decision-making processes, and ensures good governance and social accountability.<sup>87</sup> This is against the background that the extent of participation of PWDs in matters that concern them illustrates the extent of their inclusion by states.<sup>88</sup> As such, states are called on to guarantee and support the participation of PWDs through organisations of PWDs.<sup>89</sup> The participation of PWDs in matters affecting their lives, particularly in the context of healthcare is crucial to upholding their rights to dignity and equality.

83 As above.

84 In para 26 of General Comment 14 (n 18), the Committee stresses that both the public health sector and the private providers of health services must comply with the principle of non-discrimination in relation to persons with disabilities.

85 Para 34 of General Comment 5 (n 15). See preambular para (h) of the CRPD (n 19).

86 Art 3(c) of the CRPD (n 19), provides for the principle of the full and effective participation and inclusion of PWDs in society.

87 Committee on the Rights of Persons with Disabilities, General Comment 7 on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention (2018) UN Doc CRPD/C/GC/7 dated 9 November 2018, para 2.

88 Para 3 of General Comment 7 (n 87).

89 Para 94(g) of General Comment 7 (n 87).

In light of the foregoing principles and guidance from international law, it should be recalled that the Constitution of the Republic of South Africa recognises the peculiar position of PWDs. It provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>90</sup> Besides, the state has to refrain from unfair discrimination against anyone on various grounds including disability.<sup>91</sup> On this basis, the right to healthcare is underscored to be available to everyone.<sup>92</sup>

## 4 Contextualising the COVID-19 pandemic

The origins and chronology of the outbreak of the COVID-19 pandemic are well-documented and need not be repeated here.<sup>93</sup> Since then, this virus has spread to 219 countries, affected over 167 million people and resulted in over 3.4 million deaths.<sup>94</sup> At the time of writing, the United States had reported close to 33 million cases and over 587 000 deaths, while India reported 27 million infections and over 300 000 fatalities.<sup>95</sup> South Africa had 1.6 million positively confirmed cases and over 55 000 deaths.<sup>96</sup> The greatest fear is in the steps that have to be taken to engage the third wave. It should be noted that the desegregation of these figures does not show the extent to which PWDs are affected. This anomaly is extended to data that is not desegregated based on age, sex or race. While the authors are alive to the critical positioning of these elements, it is argued that the best way to plan for the effected persons is to soar above these elements and seek to engage with how to best help the affected individuals.

In consonance with other countries, South Africa imposed lockdowns to ensure social distancing. Its lockdown restrictions have been gradually eased through a five-level tier system under the regulations promulgated under the Disaster Management Act.<sup>97</sup> It is not in doubt that various rights like the right to movement and accessibility of services like health and education have been greatly affected. The right to life in the context of ensuring livelihood, human dignity, health and education has also been curtailed.<sup>98</sup> The state remains obliged to promote and protect the rights of

90 Sec 9(1) of the Constitution.

91 Sec 9(3) of the Constitution.

92 Secs 27(1)(a), 28(1)(c) and (f)(ii) of the Constitution.

93 C Huang et al 'Clinical features of patients infected with 2019 novel coronavirus in Wuhan, China' (2020) 395 *The Lancet* 497.

94 WHO 'Coronavirus Disease (COVID-19) Dashboard' <https://covid19.who.int> (accessed 25 May 2021).

95 As above.

96 WHO 'South Africa' <https://bit.ly/38t8YAP> (accessed 25 May 2021). See also Department of Health 'Covid-19: Online resource & news portal' <https://bit.ly/2YsURX1> (accessed 25 May 2021).

97 Disaster Management Act 57 of 2002.

98 This has led to untold hardships on all PWDs.

people within its territories to ensure the continued enjoyment of their rights like health, education, housing, and food and nutrition.<sup>99</sup>

In a joint statement, the UN Committee on the Rights of Persons with Disabilities advised states on how to protect the rights of PWDs.<sup>100</sup> It called on states parties to take all possible measures to ensure the protection and safety of PWDs in the national response to situations of risk and humanitarian emergencies.<sup>101</sup> The measures have to speak to the protection of their access to the highest attainable standard of health without discrimination, general wellbeing and prevention of infectious diseases, and to protect against negative attitudes, isolation, and stigmatisation that may arise during the crisis.<sup>102</sup> Furthermore, the Committee advised on the use of the SDG 2030 Agenda to safeguard the rights and well-being of persons with disabilities.<sup>103</sup> States are called on further to accelerate measures of deinstitutionalisation of PWDs from all types of institutions<sup>104</sup> and to adopt measures to appropriately respond to the COVID-19 pandemic, through inclusion and the effective participation of PWDs.<sup>105</sup> These measures are also corroborated by a report by the International Commission for Jurists, which states that while persons with disabilities encounter different challenges relating to the enjoyment of the right to health, the situation is compounded by the outbreak of COVID 19 pandemic.<sup>106</sup> The UN Special Rapporteur on the Rights of Persons with Disabilities has noted that:

Owing to high levels of poverty, discrimination, violence and social exclusion, as well as significant barriers in access to health-care services, persons with disabilities, are at higher risk of developing ill-health than the general population and, therefore, more likely to require and use health-care services.<sup>107</sup>

99 See Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (Covid-19) pandemic and economic, social and cultural rights' E/C.12/2020/1 (6 May 2020). See also African Charter on Human and Peoples' Rights 'Press statement on human rights based effective response to the novel COVID-19 virus in Africa' <https://bit.ly/3n4FLA6> (accessed 2 October 2020).

100 UN Office of the High Commissioner 'Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility' <https://bit.ly/2Ik0n8E> (accessed 2 November 2020).

101 Para 2 of the Joint Statement (n 100).

102 As above.

103 Para 4 of the Joint Statement (n 100).

104 Para 5 of the Joint Statement (n 100).

105 As above.

106 International Commission of Jurists (ICJ) 'Living like people who die slowly: The need for right to health compliant COVID-19 responses' (2020) <https://bit.ly/38lNMws> (accessed 2 November 2020).

107 UN General Assembly 'Rights of persons with disabilities: Note by the Secretary-General to the General Assembly on the report of the Special Rapporteur on the rights of persons with disabilities' Catalina Devandas-Aguilar, submitted in accordance with Human Rights Council resolution 35/6 <https://bit.ly/32FId8H> (accessed 2 May 2021).

The Committee on CRPD has affirmed the obligations of states to ensure the right to equality and non-discrimination in the enjoyment of healthcare services for PWDs.<sup>108</sup> The Committee on Economic, Social and Cultural Rights has noted that PWDs must be provided the same level of medical care within the same system as other members of society.<sup>109</sup>

To this end, the question to which the paper now turns is to what extent the national responses speak to the protection of PWDs. In a bid to evaluate their access to the highest attainable standard of health, and to protect against negative attitudes, isolation, and stigmatisation, the three principles of accessibility, equality and non-discrimination and participation will be engaged.

## **5 The extent of the government's inclusion or participation of organisations**

The concept of inclusion is birthed out of the Sustainable Development Goals that are informed by the aphorism 'leaving no one behind'.<sup>110</sup> Various specific developments have taken place since then. For instance, the United Nations proposed that all the preparedness and responses of states have to be inclusive of and accessible to all persons including women with disabilities and include accessibility for all persons, including women with disabilities.<sup>111</sup>

Following the adoption of the COVID-19 Regulations under the Disaster Management Act, the Department of Social Development adopted measures to cushion the effects of COVID-19 on vulnerable persons. Regarding PWDs, measures were introduced to support them by allowing caregivers to continue assisting them to do their shopping and to access their social grants.<sup>112</sup> It should be noted that this relief was evident in regulations and the authors are not aware of any other specific or thematic regulations that have been made under the Disaster Management Act to deal with specific aspects of PWDs. This is the identification of the lack of inclusion that follows the lack of participation of the PWDs or their organisations in the enactment of the regulations concerning the COVID-19 era. Involving marginalised and disadvantaged groups in decision-

108 General Comment 6 (n 74).

109 Para 34 of General Comment 5 (n 7).

110 UN Department of Economic and Social Affairs 'Sustainable Development Goals' <https://sdgs.un.org/goals/> (accessed 8 November 2020).

111 As above.

112 SA Government 'Disability – Coronavirus COVID-19' <https://www.gov.za/covid-19/individuals-and-households/disability-coronavirus-covid-19> (accessed 8 November 2020).

making in matters that affect their lives is not only empowering but also upholds their dignity.<sup>113</sup>

Participation has been a contested issue that has continually come up in courts of law. In the *Doctors for Life International*, the Constitutional Court held that concerning participation in the enactment of legislation, Parliament and the National Council of Provinces have to ensure that provincial interests are taken into consideration in the national law-making process through the facilitation of public involvement as long as it is reasonable to do so.<sup>114</sup> It was indeed unreasonable to conduct in-depth facilitation during the lockdown.<sup>115</sup> The Court added that the participation by the public continuously provides vitality to the functioning of representative democracy through the encouragement of citizen in the country to be actively involved in public affairs.<sup>116</sup> It should be recalled, however, that the government was able to put in place a team to advise the presidency on the COVID-19 pandemic, after the declaration of the state of disaster and the adoption of the various regulations. Surely, it did not need much effort to add organisations representing PWDs. The establishment of the National Command Council to influence decisions on the regulations adopted to mitigate the spread of COVID-19 should have engaged organisations of PWDs to ensure a certain iota of participation.<sup>117</sup>

The extent of consultation or public participation by the Minister of Cooperatives and Traditional Affairs before handing down the regulations under the Disaster Management Act under the DMA was greatly limited. In *De Beer*, the Court noted that the making of regulations and the issuing of directives by the Minister in terms of the DMA are subject to a specific limitation-enactment after consultation with 'the responsible Cabinet member', responsible for each specific functional area of jurisdiction.<sup>118</sup> The making of the regulations are informed by the need to take necessary measures to assist and protect the public, provide relief to the public, and protect property.<sup>119</sup> There was no participation of the masses let alone PWDs or institutions that support this cause.<sup>120</sup> The only logical aspect of the regulations that speaks to the plight of persons with disabilities

113 See 'Report of the UN Special Rapporteur on extreme poverty and human rights (Magdalena Carmona) on the right to participation of persons living in poverty' HRC/23/6 (11 March 2013).

114 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 29.

115 This was reiterated in *Reyno Da Wid De Beer v the Minister of Cooperative Governance and Traditional Affairs* Gauteng High Court Constitutional Application 21542 of 2020, para 5.3.

116 *Doctors For Life* (n 114) para 115.

117 For a detailed engagement of the National Command Council, see JA Singh 'How South Africa's Ministerial Advisory Committee on COVID-19 can be optimised' (2020) 110 *South African Medical Journal* 439.

118 *De Beer* (n 115) para 6.1. See also sec 27(2) of the Disaster Management Act.

119 Sec 27(2) of the Disaster Management Act.

120 As above.

indicates that the major and outstanding reference to them related to the provision of the social and disability grant which would continually be paid.<sup>121</sup> Other than this aspect (which was not informed by participation), there are no direct thematic regulations that are adopted to particularly deal with the challenges of persons with disabilities. The danger in this lack of engagement continues to prevent the country from obtaining logical answers to pressing problems like gender-based violence involving PWDs and CWDs. In this regard, the UN Special Rapporteur on extreme poverty and human rights has noted:

[T]he main aim of human rights is transforming power dynamics between individuals in society, in order to challenge oppression, subvert the subordination and marginalization of certain groups and individuals, and promote individual agency, autonomy and respect of the inherent dignity of every human being.<sup>122</sup>

The lack of a counter-intuitive approach was evident in the non-recognition of the evolving capacities of children who would have communicated their views on how to be helped in the era of COVID-19. One may also argue that it was a missed opportunity at obtaining clarity for PWDs from specific organisations.

As noted earlier, accessibility to the physical environment, transportation, information and communication and to other facilities and services aids PWDs to live independently and participate fully and equally in society.<sup>123</sup> It is not in doubt that most public health centres and hospitals provide for access for PWDs. Global results by the COVID-19 Disability Rights Monitors states that this accessibility is greatly limited to urban hospitals. It is stated that accessible transport is limited especially from rural areas to hospitals and clinics.<sup>124</sup> In areas where there is accessibility success, it is devoid of access concerning the provision of quality services for persons with emotional disabilities.<sup>125</sup> Furthermore, earlier research that was carried out before the lockdown indicates that access to healthcare in rural areas starts as a barrier to persons without disabilities, before the narrative of their effect on PWDs.<sup>126</sup>

121 These Regulations, initially referred to as the Directions published in Government Gazette 43258, Government Notice R480 of 29 April 2020 as amended by Government Notices R.608 of 28 May 2020, R.714 of 25 June 2020, R.763 of 12 July 2020, R.846 of 31 July 2020, R.891 of 17 August 2020, R.999 of 18 September 2020, R.1011 of 20 September 2020, R.1053 of 1 October 2020 and R.1104 of 21 October 2020, have reiterated that the temporary disability grant will continue to be paid until 31 December 2020.

122 Para 15 of the Report of UN Special Rapporteur on extreme poverty and human rights (n 113).

123 Art 9 of the CRPD (n 19); see also para 1 of General Comment 2 (n 62).

124 'COVID-19 disability rights monitor' <https://www.covid-drm.org/country/ZA> (accessed 8 November 2020).

125 'South Africa's Voluntary National Review (VNR) Report' (2019) 43.

126 J Trani et al 'Stigma of persons with disabilities in South Africa: Uncovering pathways from discrimination to depression and low self-esteem' (2020) 265 *Social Science & Medicine* 113449.

In the context of the right to health, South Africa has recognised in its Voluntary National Review Report that the main challenges are the lack of access to healthcare, especially in rural areas.<sup>127</sup> With specific reference to the right to health, there is a limitation in terms of enjoying healthcare from care providers.

## 6 Accessibility of information for PWDs

As indicated earlier, there is no desegregated data on the numbers of PWDs who have been affected by COVID-19 in South Africa. This makes it a problem as far as one does not know the magnitude of the support that is required by this vulnerable group. As a result, the greatest challenge lies in the lack of information that can be disseminated. It should be noted that access to information constitutes an integral part of the right to health. Without proper information, people in general and PWDs in particular may not be able to protect themselves. Access to information is greatly tilted to persons with specific disabilities. It is argued that a person who can read sign language is among the few PWDs who may benefit from information from the state. This has been a crucial aspect of the dissemination of information. However, the United Nations state that only 28 per cent of PWDs globally have access to benefits.<sup>128</sup> To this end, a study in South Africa shows that rehabilitation services, like physiotherapy, occupational therapy, speech therapy and hearing therapy were only available to 28 per cent of the PWDs.<sup>129</sup> Desegregation of the forms of disability in South Africa includes sight, hearing, communication, physical and mental disability as well as difficulty in self-care.<sup>130</sup> As such attempts to deal with disabilities have to speak to all these categories. In this regard, the African Disability Protocol urges states to ensure access to information for PWDs by: 'Ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies'.<sup>131</sup> As illustrated by the *Eldridge* case, the state is obligated to ensure access to health-related information to PWDs to enable them to enjoy their right to health.

127 South Africa's Voluntary National Review (n 125).

128 UN Department of Economic and Social Affairs 'Disability and Development Report: Realizing the Sustainable Development Goals by, for and with persons with disabilities' (2018) <https://bit.ly/36fGZSh> (accessed 25 May 2021).

129 Disability and Development Report (n 128) 52.

130 Statistics SA 'Census 2011: Profile of persons with disabilities in South Africa' <https://bit.ly/2I8xTip> (accessed 8 November 2020).

131 Art 24(d) of the African Disability Protocol (n 8).

## 7 Accessibility of healthcare and other essential services

Statistics show 6 per cent of PWDs in South Africa lack access to healthcare facilities;<sup>132</sup> 30 per cent of students with disabilities report that schools are not accessible; and 17 per cent of women with disabilities have experienced violence because of their disabilities.<sup>133</sup> The closest that the government has come concerning the provision of support has been through the adoption of particular COVID-19 policy responses to guide healthcare workers. The policy documents of accessibility to healthcare do not engage the position of PWDs, and secondly, they take on a medial rather than a human-rights based approach.<sup>134</sup> While the former focuses on treatment following a medical condition, the human rights-based approach uses human rights standards to realise the rights of an individual.<sup>135</sup> It is premised on the notion that every individual must be treated with respect.<sup>136</sup> This approach emphasises the safeguard of the interests of marginalised and disadvantaged groups in society through respect for dignity, non-discrimination and equality, participation, accountability, access to information and transparency.<sup>137</sup>

To this end, under the National Infection Prevention and Control Strategic Framework,<sup>138</sup> health workers are guided on how to ensure patient safety through the use of the built-in environments, water, sanitation, environmental cleaning and healthcare waste management.<sup>139</sup> While this is commendable, it only speaks to help the patients who are in the healthcare setting, there is no regard to those who are in other settings like in their home or in institutions where the persons who care for them are expected to provide the same or higher level of support.

Furthermore, there is a lack of emphasis on the extent of support that is deliberately channelled to PWDs. If anything, the document mentions PWDs once - namely, the need to have at least one toilet for PWDs.<sup>140</sup> As such, while this information albeit insufficient is available for the healthcare workers, it is not provided for PWDs to place them in a position

132 Disability and Development Report (n 128) 57.

133 Disability and Development Report (n 128) 114.

134 While the medical approach may speak to the provision of support, a human rights-based approach calls on the use of preventive measures as means to protect and promote the right to health of PWDs.

135 UNICEF 'Human rights-based approach to programming' (2020) <https://uni.cf/39HKAdB> (accessed 8 November 2020).

136 As above.

137 As above.

138 Department of Health 'National infection prevention and control strategic framework' (March 2020) <https://www.nicd.ac.za/wp-content/uploads/2020/04/National-Infection-Prevention-and-Control-Strategic-Framework-March-2020-1.pdf> (accessed 25 May 2021).

139 National infection prevention and control strategic framework (n 138) 31.

140 National infection prevention and control strategic framework (n 138) 33.

to know their rights and be able to enforce them. It is argued that this omission rather exacerbates an institutionalised model of discrimination that is seen in the silence of the national response mechanism on the guidance to health workers and the reiteration of the rights of PWDs.

Another critical response mechanism is the Allocation of Scarce Critical Care Resources during the COVID-19 Public Health Emergency in South Africa.<sup>141</sup> This resource provides for the guide the triage of critically ill patients if a public health emergency creates demand for critical care resources like ventilators and critical care beds.<sup>142</sup> This is a welcome development and critical to the provision of healthcare to the critically ill, including PWDs. As mentioned earlier, this is informed by the perspective that a person has to be critically ill to benefit from scarce critical care resources. The rhetorical questions that come to the fore are: what about the use of preventive measures that culminate in a possible avoidance of this problem? What about the deliberate use of the scarce resources for the provision of support to the PWDs in their various settings, and above all, to what extent is this information available to them? The heightened danger in the application of this response mechanism lies in the health decisions that are based on discrimination informed by aspects such as age and the value of life. To this end, the use of the clinical Frailty Scale to determine who gets support may effectively limit support to PWDs.<sup>143</sup> None of these documents speaks directly to disability. Accessibility speaks to the availability of collected data and how its dissemination presents barriers that affect PWDs. The unpacking of accessibility to health services is informed by the extent to which PWDs have received treatment.

## 8 Conclusion

The paper has highlighted some of the challenges facing PWDs in the realisation of their right to health during the COVID-19 pandemic. First, the preparation of the Declaration and the Regulations under the Disaster Management Act are limited to specific ministerial powers. This is because the intent is to control the emergency for a limited period. This position greatly influenced the extent to which any form of participation would be engaged. There has been no inclusion of participation of organisations of

141 Critical Care Society of South Africa 'Allocation of scarce critical care resources during the COVID-19 public health emergency in South Africa' (2 April 2020) <https://bit.ly/3lcVvAC> (accessed 25 May 2021).

142 Critical Care Society of South Africa (n 141). For a detailed discussion on triaging persons with disabilities in a time of Covid-19 in South Africa, see EL McKinney, V McKinney & L Swartz 'COVID-19, disability and the context of healthcare triage in South Africa: Notes in a time of pandemic' (2020) 9 *African Journal of Disability* 766.

143 Critical Care Society of South Africa (n 141) 5-9. Other instructive policy documents that may be looked at include the National Health Laboratory Service 'Coronavirus disease 2019 (COVID-19): Quick reference for clinical health care workers' (25 May 2020).

PWDs in the adoption of measures. In instances where there has been inclusion and participation, it is not readily available. The available measures to provide information and services reveal the use of a rather medical-oriented approach that engages in treatment rather than a human rights-based approach that takes on preventive, promotional and protective measures.

The accessibility of information for PWDs, and subsequent access to healthcare and other essential services is limited to specific calibres of PWDs. While some of the support provided like the social and the temporary disability grants is crucial, a deliberate participatory approach needs to be adopted. Matters of discrimination based on decisions that follow who should receive treatment continue to trickle in, exacerbating the already vulnerable position of the PWDs. The failure to engage the PWDs or the institutions that support their cause shows a lack of inclusive engagement, a lack of participation. This greatly affects the accessibility of information and services.

It is highly probable that the data on the COVID-19 infections has details on the age, sex, race and forms of disability, though the non-disclosure of the same is informed by other reasons. Nevertheless, it is imperative that this information is given to offer a clear picture of the effect on COVID-19 on the PWDs. The interventions by government have to be in tandem with the figures on the desegregation of PWDs so as to ensure participation and the desired accessibility of information and services. It is proposed that a multi-disciplinary empirical study that tests this conceptual framework against human-rights based theories be done to test the argument and sub-claims in a qualitative or quantitative study.

A re-evaluation of the process of adopting regulations for periods of emergencies should be revisited to inculcate a human rights-based approach as the mode of protecting the rights of PWDs. Concerning shadow or alternate reports by NGOs to the Committee of the RPD, this should be submitted to evaluate the extent to which SA as a state party has engaged the protection of PWDs in the COVID-19 pandemic.

## TO WHAT EXTENT IS GLOBAL AND REGIONAL JURISPRUDENCE ON THE RIGHT TO HEALTH FOR PERSONS WITH DISABILITIES REFLECTED IN KENYAN COURTS?

*Paul Ochieng Juma\* & Beryl Orao\*\**

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### Summary

*The integration of international jurisprudence into the interpretation of the right to health of persons with disabilities by domestic courts is an important way of enhancing protection of the right at the national level. However, it is not always that decisions of international human rights bodies will find their way into domestic courts. This article maps the extent of engagement of Kenyan courts with international and regional jurisprudence on the right to health of persons with disabilities. It analyses the approach taken by Kenyan courts to determine whether it aligns with the principles espoused in the cases decided at the international and regional level. The article singles out two communications or cases that were decided by the Committee on the Rights of Persons with Disabilities and one case that was decided by the African Commission on Human and Peoples' Rights and assesses the extent to which Kenyan courts have given effect to its obligations under the Convention on the Rights of Persons with Disabilities. The paper concludes that global and regional jurisprudence on the right to health for persons with disabilities is rarely used by Kenyan courts to interpret persons with disabilities' rights. The paper recommends that Kenyan courts should entertain and apply a broad range of international and regional jurisprudence when interpreting the normative content of the right to health of persons with disabilities and corresponding state obligations.*

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## 1 Introduction

Generally, the domestic effect of international human rights jurisprudence on individual countries is to limit state behaviour. The right to health of persons with disabilities has been interpreted in different ways in both the international and regional realms. The main human rights institution tasked with the protection of persons with disabilities' right to health at the global level is the United Nations Convention on the Rights of Persons with Disabilities Committee (CRPD Committee).<sup>1</sup> At the regional level, the main mechanisms used to guarantee the right to health of persons with disabilities are the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child.

This article analyses the extent of engagement of Kenyan courts with international and regional jurisprudence on the right to health of persons with disabilities. It begins by briefly setting out the scope of the right to health under the Convention on the Right of Persons with Disabilities (CRPD).<sup>2</sup> This is followed by an analysis of three global cases on the right to health of persons with disabilities. These are the CRPD Committee's views in *Munir Al Adam and ADHRB v Saudi Arabia (Munir)*,<sup>3</sup> *HM v Sweden (HM)*<sup>4</sup> and the African Commission's decision in *Purohit v The Gambia (Purohit)*.<sup>5</sup> The paper then considers the jurisprudence of Kenyan courts on persons with disabilities' right to health and determines to what extent they apply international jurisprudence.

## 2 The place of international law

International law may be linked to the Foucauldian notion of productive power. According to Michael Foucault:<sup>6</sup>

- 1 UN Human Rights: Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx#:~:text=The%20Committee%20on%20the%20Rights%20of%20Persons%20with,Committee%20on%20how%20the%20rights%20are%20being%20implemented> (accessed 15 October 2021).
- 2 UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD), resolution/adopted by the General Assembly on 24 January 2007, A/RES/61/106 (2007).
- 3 *Munir Al Adam and ADHRB v Saudi Arabia*, Communication 38/2016, CRPD Committee (20 September 2018) UN Doc CRPD/C/20/D/38/2016 (2018).
- 4 *HM v Sweden*, Communication 3/2011, CRPD Committee (19 April 2012) U Doc CRPD/C/7/D/3/2011 (2012).
- 5 *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003).
- 6 TE Aalberts 'Book review: Leonard M Hammer *A Foucauldian approach to international law: Descriptive thoughts for normative issues* Aldershot: Ashgate, 2007' (2008) 19 *European Journal of International Law* 859 <https://academic.oup.com/ejil/article/19/4/870/349387> (accessed 24 April 2021).

The law [as a social phenomenon] is not solely a preventive mechanism but maintains some form of creative and productive aspect ... [I]t not [only] singularly control[s] individuals but produces particular subjects and in turn is the result of these particular subjects.

It means that international law may be justified in several ways. First, it has been rationalised as a form of government; whereby legal norms and legal entities are characterised not in opposition to state power but rather as a means for government by dominant states.<sup>7</sup> Secondly, it highlights the significance of collective thought as a means of identifying the ‘rule of law’ not in opposition to politics but rather as a powerful ordering rationality and hence a means for government.<sup>8</sup> Lastly, it can be used to check state power and provide even-handed accountability.<sup>9</sup>

The Constitution of Kenya 2010 (2010 Constitution) transformed Kenya from a dualist state to a monist state. Under the monist approach, Kenya’s legal system regards both international and national law as part of a single legal order. Therefore, Kenyan courts can directly apply international human rights law when interpreting domestic laws. Nevertheless, the status of international law in the hierarchy of Kenyan laws has received varying interpretations by Kenyan courts. One argument is that international law forms part of Kenyan law and where there is a conflict between statute and obligations under international law, the latter takes precedent.<sup>10</sup> The alternative argument, which has a significant impact on the application of international jurisprudence, is that international laws rank below the 2010 Constitution, statutes and decisions of domestic courts. This was stated in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority*<sup>11</sup> by the Supreme Court of Kenya. The implication of this decision is that progressive interpretations of obligations under international law by international treaty bodies may be of no consequence in the Kenyan legal system if they conflict with statutes or domestic judicial decisions.

The 2010 Constitution makes provision for persons with disabilities’ right to health which is enshrined under article 43(1)(a) and provides for the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare. This paper argues that in Kenya the impact of international human rights jurisprudence in relation to health for persons with disabilities is negligible. The Kenyan

7 NM Rajkovic “‘Global law’ and governmentality: Reconceptualising the “rule of law” as rule “through” law’ (2010) 18 *European Journal of International Relations* 29 at 32.

8 As above.

9 As above.

10 See for example, *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, where the High Court of Kenya found a statute that permitted the imprisonment of civil debtors to be in conflict with Kenya’s obligations under the International Covenant on Civil and Political Rights.

11 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, paras 130-132.

legal process which is tasked with the function of interacting, interpreting and internalising international law into the domestic system has largely ignored both international and regional jurisprudence when interpreting persons with disabilities' right to health.

### **3 Legal framework on the right to health under the CRPD**

Both outside and inside the courtroom, the CRPD has proved to be a uniquely powerful tool in advancing persons with disabilities' right to health. Kenya ratified the CRPD on 19 May 2008 and as a result is bound by its provisions. The state cannot invoke its domestic laws as a justification for a failure to meet its treaty obligations under the CRPD.<sup>12</sup>

The CRPD provisions call for states parties to take all appropriate measures to promote persons with disabilities' right to health. Article 25 addresses a number of the issues relevant to the jurisprudence reviewed in this study. It requires states to recognise the right of persons with disabilities to the highest attainable standards of health and further requires them to take measures to ensure that persons with disabilities have access to appropriate health services. It provides, in part, that states parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons....;
- (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities...;
- (c) Provide these health services as close as possible to people's own communities, including in rural areas;
- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent...;
- (e) Prohibit discrimination against persons with disabilities in the provision of health insurance....;

Like other international law provisions, article 25 is widely viewed as having normative force independent of its embodiment in national laws.<sup>13</sup> States parties' national courts should invoke article 25 of the CRPD to urge the relevant states to comply with their human rights treaty commitments on persons with disabilities' right to health.<sup>14</sup> In Kenya, the judiciary when

12 P Apiko 'Understanding the East African Court of Justice: The hard road to independent institutions and human rights jurisdiction' *European Center for Development Policy Management* (2017) 12.

13 W Sandholtz 'How domestic courts use international law' (2015) 38 *Fordham International Law Journal* 595 at 606.

14 Sandholtz (n 13) 607.

engaging in rights review is legally authorised to look to international law and jurisprudence for guidance provided it is consistent with the 2010 Constitution.<sup>15</sup> Therefore, it is important for the courts to advance persons with disabilities' right to health within the parameters of article 25 of the CRPD.

## 4 Global jurisprudence on right to health of persons with disabilities

The CRPD Committee has for nearly two decades reviewed states parties' efforts to implement the CRPD, looking at whether national laws, policies and practices align with international standards. As of August 2020, the CRPD Committee had made decisions or adopted views in 34 individual communications.<sup>16</sup> Two of those, *Munir* and *HM* are discussed in this paper. The African Commission's decision in *Purohit* is also discussed. These decisions are useful because they promote uniformity in the application of international rules on persons with disabilities' right to health.<sup>17</sup>

### 4.1 Munir

#### 4.1.1 Facts of the case and findings of the Committee

The author, Munir Al Adam, was a 23-year-old Saudi man with a partial hearing impairment acquired in childhood.<sup>18</sup> On 8 April 2012, Saudi security agents arrested him and took him to a police station where he was tortured.<sup>19</sup> As a result, the pre-existing hearing impairment worsened.<sup>20</sup> The author requested medical assistance but his requests were ignored for four months after which he was taken to a military hospital for a routine health check.<sup>21</sup> The doctor who examined him recommended urgent surgery on the author's affected ear in order to prevent permanent hearing loss. The author was, however, not treated for another six months, by which time his impairment had worsened so much that surgery could no longer fix the problem.<sup>22</sup>

In his submission to the CRPD Committee, the author claimed that the torture he went through while in detention worsened his disability.<sup>23</sup>

15 Art 2(4) of the 2010 Constitution.

16 OHCHR 'Jurisprudence database' <https://juris.ohchr.org/search/results/1?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0> (accessed 7 November 2020).

17 Sandholtz (n 13) 613.

18 *Munir* (n 3) para 1.1.

19 *Munir* (n 3) para 2.1.

20 *Munir* (n 3) para 2.2.

21 *Munir* (n 3) para 2.3.

22 As above.

He therefore alleged a violation of his rights under articles 15, 16 and 25(b).<sup>24</sup> As regards the alleged violation of article 25, the Committee noted that article 25(b) of the Convention requires states parties to 'provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities'.<sup>25</sup> The Committee further stated that states parties have a special responsibility to uphold human rights when prison authorities exercise significant power over persons with disabilities who have been deprived of their liberty.<sup>26</sup> In *Munir*, the Saudi authorities did not enable him to access the surgery he needed to prevent complete loss of hearing despite having been informed by a doctor of the need for an urgent intervention. The Committee found that the state party violated article 25(b) of the CRPD.<sup>27</sup>

#### 4.1.2 Analysis

The decision of the CRPD Committee in *Munir* was an affirmation of the positive obligation of states parties to the CRPD to address the health needs of persons with disabilities in a manner that not only addresses their immediate health requirements, but also prevents further disabilities. In addition to recognising the absolute prohibition of torture and ill-treatment, the CRPD Committee emphasised that in relation to persons with disabilities in custody, states have a *special* responsibility to uphold their human rights. The use of the term 'special' suggests a more compelling level of responsibility required of states. This acts as an added layer of protection for persons with disabilities. Hence, states will be held to a higher standard of accountability should a person with disabilities' disability worsen as a result of the failure of the state to intervene early enough.

While this case relates to the health needs of a person with disability in custody, similar standards would apply to persons with disabilities generally since article 25(b) contemplates early identification and intervention for all persons with disabilities to prevent further disabilities. Certainly, given the inequality of resources amongst states, a question may be raised about holding less-resourced states to a standard considered 'impossible'. One factor that would be taken into account is whether the state knew or ought to have known that a persons with disabilities' condition could worsen unless an early intervention is made. Secondly, it would be necessary to consider what reasonable steps a state took to accommodate the health needs of the person with disability to ensure that

23 *Munir* (n 3) para 3.2.

24 *Munir* (n 3) paras 3.2-3.3.

25 *Munir* (n 3) para 11.6.

26 As above.

27 As above.

their rights are realised. The duty of reasonable accommodation is expressly provided for under the CRPD as a vital factor in enabling persons with disabilities to enjoy and exercise their rights on an equal basis with others.<sup>28</sup> Reasonable accommodation is an incidental right which means that it is essential in realising other existing rights.<sup>29</sup> Policies, practices and premises should be reasonably adjusted in order to ensure the health of persons with disabilities. It is important to ask the question whether persons with disabilities have greater difficulty in accessing health services that the rest of the population can easily access. States parties to the CRPD are under the obligation to consider the particular circumstances and needs of persons with disabilities in order to identify, intervene and offer appropriate services designed to minimise and prevent further disabilities. If that is not the case, then, in accordance with the reasoning in *Munir* a state can be said to be in breach of its obligations under both articles 2 and 25(b) of the CRPD.

## 4.2 HM

### 4.2.1 Facts of the case and findings of the Committee

HM had Ehlers-Danlos Syndrome, a disorder that severely interfered with her mobility.<sup>30</sup> Due to her fragility, she could not be safely transported to hospital, and her specialists recommended hydrotherapy, which would improve the quality of her life.<sup>31</sup> HM applied to the local authorities for permission to extend her house in order to build an indoor pool for use during hydrotherapy but was denied permission on the ground that a part of the extension would be situated on land where building is not permitted.<sup>32</sup> An appeal to the County Council was rejected but a further appeal to an Administrative Court was successful, with the court finding that HM's interests should be given priority over the public interest to have the land used in accordance with the County Council's development plan.<sup>33</sup>

The County Council appealed to the Administrative Court of Appeal which overturned the decision of the Administrative Court.<sup>34</sup> An appeal by HM to the Supreme Administrative Court of Stockholm was unsuccessful.<sup>35</sup> The CRPD Committee had to consider whether the CRPD had priority over Sweden's Planning and Building Act, whose neutral

28 Art 2 of the CRPD.

29 D Ferri 'Reasonable accommodation as a gateway to the equal enjoyment of human rights: From New York to Strasbourg' (2018) 6 *Social Inclusion* 40 at 43.

30 *HM* (n 4) para 2.1.

31 *HM* (n 4) para 2.2.

32 *HM* (n 4) paras 2.3-2.4.

33 *HM* (n 4) paras 2.4-2.5.

34 *HM* (n 4) para 2.6.

35 *HM* (n 4) para 2.7.

application by Swedish authorities had, according to HM, infringed her right to equal opportunity for rehabilitation and improved health.<sup>36</sup>

The CRPD Committee noted that applying the Planning and Building Act equally to all, without having regard to the particular circumstances of some individuals with peculiar needs, could lead to discriminatory outcomes for persons with disabilities.<sup>37</sup> It also recalled that according to article 2(3) of the CRPD, the denial of reasonable accommodation is a form of discrimination.<sup>38</sup> Having regard to the meaning of reasonable accommodation under article 2(4) of the CRPD, the Committee concluded that Sweden had failed to provide reasonable accommodation to HM.<sup>39</sup> In relation to the claim for violation of HM's right to health, the Committee noted that Sweden failed to take into account HM's unique circumstances and her disability-related needs when the authorities denied HM the permission to deviate from the development, and that the refusal was '... disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disability, to the health care and rehabilitation required for her specific health condition'.<sup>40</sup>

#### **4.2.2 Analysis**

*HM* is a progressive decision which demonstrates the length the Committee is prepared to go to, to give effect to the right to health of persons with disabilities. The CRPD Committee addressed how a neutral application of laws may have discriminatory consequences for certain vulnerable groups such as persons' with disabilities. It recalled that the meaning of 'discrimination on the basis of disability' under the CRPD is

any distinction, exclusion or restriction on the basis of disability which has the *purpose* or *effect* of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.<sup>41</sup>

Essentially, discrimination on the basis of disability may be direct or indirect. In *HM*'s case, the discrimination was indirect since the Swedish authorities' strict interpretation of the Planning and Building Act failed to take into account the significant challenges *HM* had. On the face of it, and as argued by Sweden, the Planning and Building Act applied to everyone equally, whether the person has a disability or not. However, the effects of the neutral application of the law defeated the objects of the principle of reasonable accommodation as envisaged in the CRPD.

36 *HM* (n 4) paras 3.4, 5.2.

37 *HM* (n 4) para 8.2.

38 *HM* (n 4) para 8.4.

39 *HM* (n 4) paras 8.4-8.5.

40 *HM* (n 4) para 8.8.

41 *HM* (n 4) para 8.3.

This decision affirmed that equality must be substantive. According to Du Plessis and Nienaber, in relation to persons with disabilities, substantive equality means that ‘...the physical and social environment must be adjusted to accommodate them, so ensuring equality of outcomes’.<sup>42</sup> Thus, authorities must ensure that persons with disabilities suffer no disadvantage from legislative, governmental, or other action because of their disability. They should not be discriminated against on the basis of their disability. In HM’s case, since her health and the quality of her life depended greatly on the construction of the hydrotherapy pool within her home, it behooved the local authorities to fully accommodate her needs, even if that meant easing the application of planning regulations. Only by doing so would HM have been in a position to enjoy her rights on an equal basis with others.

### 4.3 Purohit

#### 4.3.1 *Facts of the case and findings of the African Commission*

The complainants were mental health advocates who submitted a complaint to the African Commission on behalf of patients of a psychiatric unit of the Royal Victoria Hospital in the Gambia.<sup>43</sup> Among other complaints, they alleged that the principal mental health law then in force in the Gambia, namely, the Lunatics Detention Act (LDA) did not define a ‘lunatic’, nor did it contain any safeguards concerning the diagnosis, certification and detention of patients.<sup>44</sup> Generally, ‘lunatics’ is a derogatory term that has been used historically to refer to persons with psychosocial disabilities. They also alleged that the psychiatric unit was overcrowded and there was no requirement of consent to treatment.<sup>45</sup>

On the question of the definition of a ‘lunatic’ and the practice of detention of mental health patients, the African Commission found the LDA to be incompatible with articles 2 and 3 of the African Charter.<sup>46</sup> The African Commission also considered Gambia’s argument that a decision to institutionalise a patient could be reviewed and took note of the fact that legal aid could only be provided to persons charged with capital offences. The Commission observed that in practice, the right of review could only be exercised by the wealthy and therefore the LDA did not comply with articles 2 and 3 on equal protection of the law and non-discrimination.<sup>47</sup>

42 I Grobbelaar-du Plessis & A Nienaber ‘Disability and reasonable accommodation: *HM v Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities)’ (2014) 30 *South African Journal on Human Rights* 366 at 376.

43 *Purohit* (n 5) para 1.

44 *Purohit* (n 5) para 4.

45 *Purohit* (n 5) para 5.

46 *Purohit* (n 5) paras 53-54.

47 *Purohit* (n 5) para 53.

### **4.3.2 Analysis**

The *Purohit* decision affirmed the right to health of persons with mental disabilities. The African Commission not only recognised the torture and inhuman treatment faced by persons with mental disabilities in places of detention but it also highlighted the extent to which mental health needs were generally neglected. In relation to the question of discrimination in access to health services for persons with mental disabilities, the African Commission affirmed that the right to health

is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and ... includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.<sup>48</sup>

The African Commission also stated that the freedom from discrimination is a non-derogable right. The Commission further urged the Gambia

to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.<sup>49</sup>

The Commission did recognise that resources may be a challenge for some African states. However, it emphasised that the utilisation of the available resources should not be done in a discriminatory manner. For example, a state should not be heard to argue that they do not have resources to ensure access to mental health services by persons with mental disabilities yet the rest of its population can easily access other health services.

## **5 Approaches and application of international jurisprudence on the right to health by Kenyan courts**

In accordance with article 1 of the CRPD, Kenya has an obligation to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'. This obligation is to be discharged through various organs of the state, including the judiciary. In this regard, when interpreting rights under the CRPD, Kenyan courts should adopt the interpretation that best favours the realisation of the rights of persons with disabilities. Kenya has not ratified the Optional Protocol to the CRPD, hence its citizens cannot submit individual complaints with the CRPD Committee. Therefore, the application of international jurisprudence by Kenya's courts is an

48 *Purohit* (n 5) para 80.

49 *Purohit* (n 5) para 84.

important means through which the CRPD Committee's interpretation of rights under the CRPD can be felt at the domestic level. However, a review of various cases on the right to health of persons with disabilities decided by Kenyan courts reveals that the influence of international jurisprudence is extremely limited. What follows is an examination of three approaches in which international human rights jurisprudence, and particularly on persons with disabilities' right to health, is applied in Kenya.

## 6 Avoidance approach

The avoidance approach refers to the use of certain judge-made doctrines in order to relieve domestic courts of the duty to enforce norms of international law in some politically sensitive situations.<sup>50</sup> There are different avoidance techniques used by the courts especially when dealing with economic and social rights.<sup>51</sup> It may take various forms, for instance when a court of law declines to entertain a matter by denying cert or dismissing a writ or refusing an appeal.<sup>52</sup> A matter may also be decided on other grounds while avoiding a hotly contested issue or simply choosing to deal with an apparently more straightforward legal argument.<sup>53</sup> The avoidance approach to international human rights jurisprudence on persons with disabilities' right to health largely manifests itself in Kenya's courts. Using the avoidance approach, national courts have rejected the application of international and regional jurisprudence on persons with disabilities' right to health as will be seen in the Kenyan cases that follows.<sup>54</sup> However, the main problem with the avoidance approach, particularly in Kenya's legal system is that it greatly hinders the effectiveness of article 25 of the CRPD. This approach relies solely on domestic legal concepts without reference to international jurisprudence.<sup>55</sup> The judgment in *Kenya Society for the Mentally Handicapped*<sup>56</sup> (*Kenya Society*) which was delivered on 18 December 2012 serves as an example.

In *Kenya Society*, the petitioner accused state authorities of violating the rights of persons with disabilities by discriminating against them in terms of the provision of support and services.<sup>57</sup> The petitioner alleged that persons with disabilities' right to health was violated by the state's failure to implement various policies under the national health programme aimed

50 E Benvenisti 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts' (1993) 4 *European Journal of International Law* 159 at 169.

51 KG Young 'The avoidance of substance in constitutional rights' (2015) 5 *Constitutional Court Review* 233 <http://www.saflii.org/za/journals/CCR/2015/8.pdf> (accessed 7 September 2021).

52 As above.

53 As above.

54 Benvenisti (n 50) 161.

55 Benvenisti (n 50) 162.

56 *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General* [2012] eKLR.

57 *Kenya Society* (n 56) 2.

at preventing disability and early identification of disability of persons with mental or intellectual disability.<sup>58</sup> Further, it was alleged that the state's failure to establish sufficient, reliable and comprehensive structures to promote adequate provision of mental healthcare in public health institutions violated persons with disabilities' right to health. The state responded by outlining in general terms the measures which it had taken to ameliorate the position of persons with disabilities. The Court dismissed the petitioner's claims with much sympathy. In doing that, the Court stated that it is not its function to prescribe certain policies but to ensure that policies followed by the state meet constitutional standards and that the state meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms of a party who comes before the Court.<sup>59</sup> That view fails to provide the people with any recourse in situations where state authorities decline to make the relevant policies and laws to observe, respect, promote, protect and fulfil fundamental rights and freedoms of the people.

The *Kenya Society* verdict was followed in the High Court case of *Matthew Okwanda*<sup>60</sup> which was delivered on 17 May 2013. Although *Matthew* was not about disability, it is relevant because the Court employed the reasoning in *Kenya Society* and failed to uphold the petitioner's right to health. In *Matthew Okwanda*, the High Court dismissed the petitioner's application to have the state provide him with reasonable care and assistance after being diagnosed with diabetes mellitus, an illness that requires proper care, diet and medication.<sup>61</sup>

By the time these decisions were made, the CRPD Committee had already adopted views in the *HM* and therefore the respective courts could have relied on the reasoning in *HM* to aid in its interpretation of Kenya's obligations in relation to persons with disabilities' right to health. The African Commission's decision in *Purohit* had also been made and it would have been particularly useful for the Court in the *Kenya Society* case. That the Court in *Kenya Society* argued that it was not its duty to prescribe policies is an indication of the Court's avoidance approach. The Court was in fact called upon to address a failure by the state to implement its own policies, a failure which had led to discrimination against mental health patients in the sense that they could not access healthcare services on an equal basis with others. Had the court considered the reasoning of the CRPD Committee in *HM* and the African Commission's reasoning in *Purohit*, it would possibly have made a decision that better protects the rights of persons with mental disabilities. The Court's argument was an abdication of its duty to enforce the constitutional standards it was referring to. The 2010 Constitution prohibits discrimination on the ground

58 As above.

59 *Kenya Society* (n 56) 7.

60 *Matthew Okwanda v Minister of Health and Medical Services* [2013] eKLR.

61 *Matthew Okwanda* (n 60) 7.

of disability, and it also guarantees the right to health for all. Therefore, if persons with mental disabilities cannot access health services specific to their disabilities, then it means the constitutional standards are not being met and the judiciary should intervene, as the African Commission and the CRPD Committee did. The Court in the *Matthew case* could have also paid greater attention to the particular circumstances of the petitioner in the case, as was done by the CRPD Committee in *HM*.

The *Munir case* emphasised the obligation of states to ensure that persons with disabilities have access to health services, including early identification and intervention to prevent further disabilities. This decision is also important in the context of both the *Kenya Society* case and the *Matthew case*. Persons with mental disabilities usually have varying degrees of disorders whose effects may be mitigated by early intervention. In the absence of appropriate health care services, their conditions are bound to worsen. The Court in both *Society* and *Matthew* should have followed international law to hold the Kenyan government accountable for its failure to ensure the right to health of persons with disabilities. The decisions in *Society* and *Matthew* unintentionally established the avoidance approach towards international jurisprudence on persons with disabilities right to health.

However, there are some progressive cases that have given prominence to the CRPD but not related to health. In *Juliet Mwangeli Muema v Smollan Kenya Limited*<sup>62</sup> the Employment Court found that the respondent had violated articles 5 and 27 of the CRPD when it failed to install or provide the claimant with a screen reader, voice command, or any other technology to help her overcome her disability. The claimant was suffering from low vision caused by a genetic condition known as retinitis pigmentosa. In this case, the court used the CRPD against a private entity in order to ensure the labour rights of a person with disability.

## 6.1 Lack of political goodwill

The 2010 Constitution adheres to a monist approach which requires the application of international and domestic law as part of the same legal system.<sup>63</sup> However, in practice the application of international law in Kenya is dualistic and requires international law to be incorporated into domestic law to be applicable.<sup>64</sup> Laws and policies are formulated by the state.<sup>65</sup> The court's duty is to ensure that the state's policies meet

62 *Juliet Mwangeli Muema v Smollan Kenya Limited* [2019] eKLR.

63 JN Maina 'Do articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?' (2013) 13 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=251670613](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=251670613) (accessed 5 October 2020).

64 *Matthew* (n 60) 7.

65 *Kenya Society* (n 56) 7.

constitutional standards.<sup>66</sup> The court is also mandated to ensure that the state meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms of the people of Kenya.<sup>67</sup> Without the will of the legislature, the executive and the judiciary, opportunities for national courts to address questions of persons with disabilities' rights in accordance with international law and jurisprudence are very limited.

## 6.2 Lack of awareness

Better education in international law is key in ensuring persons with disabilities' right to health.<sup>68</sup> There is need for both state and non-state actors to study regional and international decisions on persons with disabilities' right to health.<sup>69</sup> Judges when interpreting Kenya's Bill of Rights should not only consider international law, but also specifically research international jurisprudence on the relevant rights. Landmark decisions such as *HM* and *Purohit* should be used to promote persons with disabilities' right to health in similar situations and identify ways to enhance their protection further through legislation and governmental action.<sup>70</sup>

## 6.3 Economic constraints

Although Kenya is one of Africa's strongest economies, it is still beleaguered with several challenges, including poverty, inequality and vulnerability of the economy to internal and external factors.<sup>71</sup> Applying international human rights jurisprudence may require great financial commitment which the Kenyan economy cannot sustain. Therefore, courts will not insist on the state's duty to fulfill its mandate where the state proves that it lacks adequate funds to provide for persons with disabilities' right to health.<sup>72</sup>

## 7 Alignment approach

The alignment approach uses international human rights jurisprudence to effect change in the national legal system.<sup>73</sup> According to Rao, national

66 *Matthew* (n 60) 7.

67 As above.

68 *Benvenisti* (n 50) 161.

69 UN Women 'Academic paper gender equality and women's empowerment: Constitutional jurisprudence' New York (2017) 10.

70 As above.

71 The World Bank 'Country overview: Kenya' <https://www.worldbank.org/en/country/kenya/overview> (accessed 7 November 2020).

72 *Kenya Society* (n 56) 5.

73 *Benvenisti* (n 50) 160.

courts should ‘act more as agents and instruments for the unity and integrity of international law than as sources of its fragmentation’.<sup>74</sup> This article argues that national legal systems should be aligned with international human rights jurisprudence. With regards to the cases of *Munir*, *HM* and *Purohit*, their invocation in Kenya’s national courts will lead to the expansion of judicial constitutional review of persons with disabilities’ right to health.<sup>75</sup> This is in line with the presumption that legislation should be construed to avoid a conflict with international law.<sup>76</sup> As seen in *Kenya Society* and *Matthew*, national courts in Kenya are to a very limited extent conscious of the need to align national jurisprudence on persons with disabilities’ right to health with the well-established norms as developed by the CRPD committee. The decisions puts in place restraints that inhibit the full application of international law by national courts.

## 8 Contesting approach

The CRPD is very much a living legal instrument. In this regard, the contesting approach aims to ensure that national courts offer strong, effective means to ensure that persons with disabilities’ rights progress from laudable aspirations to binding obligations.<sup>77</sup> The contesting approach in this instance occurs when the court departs from the decision of an international tribunal.<sup>78</sup> There are several factors that justify national courts departing from the international precedents on certain occasions.<sup>79</sup> For instance, where international jurisprudence undermines the dynamic and evolving nature of the treaty or where the particular international jurisprudence is wrong or less protective than that of a state’s constitution.<sup>80</sup> Such an approach threatens the uniformity of interpretation of the CRPD and could seriously hinder the evolutionary process of national jurisprudence which would achieve international conformity in the interpretation of the CRPD.<sup>81</sup> In *Kenya Society* and *Matthew*, no reasons were given regarding why the High Court failed to apply the CRPD Committee’s jurisprudence on persons with disabilities right to health which was absolutely relevant.

74 As above.

75 Sandholtz (n 13) 608.

76 P Geary ‘CRC in court: The case law of the Convention on the Rights of the Child’ CRIN (2012) 54.

77 Geary (n 76) 4.

78 AE Dulitzky ‘An Inter-American Constitutional Court? The invention of the conventionality control by the Inter-American Court of Human Rights’ (2015) 50 *Texas International Law Journal* 77.

79 As above.

80 As above.

81 CA Ford ‘Judicial discretion in international jurisprudence: Article 38(1)(c) and “general principles of law”’ (1994) 5 *Duke Journal of Comparative & International Law* 35 at 37.

## 9 Conclusion and recommendations

Kenyan courts need to become part of the 'international judiciary' when dealing with and interpreting persons with disabilities' right to health.<sup>82</sup> It means that Kenyan judges should consider applying international human rights jurisprudence in order to reinforce the state's obligations under article 25 of the CRPD.<sup>83</sup> The CRPD Committee has already made decisions which have influenced the development of persons with disabilities right to health. Therefore, the international human rights jurisprudence on article 25 of the CRPD has the potential to increase the effectiveness of the Kenyan legal system. The best use of the CRPD's jurisprudence in Kenya would be through mainstreaming it. This would be the most effectual way to incorporate international human rights jurisprudence and for this, the Kenyan legal system would fare better.

In line with the alignment approach, national courts may adopt the 'wine and bottle' method when applying international human rights jurisprudence. The wine would be the international human rights jurisprudence on persons with disabilities right to health. On the other hand, the bottles in this case would be Kenya's legal landscape or structure. It means that Kenyan courts can use global and regional jurisprudence to modify national law and to have local decisions fit the doctrines which have been established by international tribunals. International human rights jurisprudence would therefore be used to fill the spaces left by the legislature. In other words, the CRPD's jurisprudence will be used to change the 'game' rather than changing the 'players'.

According to Hedley Bull, 'order in social life is very closely connected with the conformity of human behaviour to [normative] rules of conduct, if not necessarily to [binding] rules of law'.<sup>84</sup> Simply put, international human rights jurisprudence should be applied by national courts not because it is binding but because it is useful.<sup>85</sup> Therefore, there is need for mainstreaming international human rights jurisprudence in Kenya's national legal order.<sup>86</sup> The mainstreaming process would involve examining the provisions of national jurisprudence (bottles) to see if they are compatible with international human rights jurisprudence. The wine would be the international human rights jurisprudence. This would involve analysing existing national provisions on the right to health and determining if it is indeed possible to adapt the doctrines of global and regional human rights jurisprudence and expect them to function accordingly.

82 Dulitzky (n 78) 81.

83 UN Women (n 69) 10.

84 T Schultz & N Ridi 'Comity and international courts and tribunals' (2018) 50 *Cornell International Law Journal* 578 at 581.

85 Sandholtz (n 13) 598.

86 Schultz & Ridi (n 84) 581.

# CHAPTER 5

## THE VOICELESS WOMAN: PROTECTING THE INTERSECTIONAL IDENTITY UNDER SECTION 42 OF NIGERIA'S CONSTITUTION

*Adetokunbo Johnson\**

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### Summary

*This paper asks: Is intersectional discrimination experienced by women with disabilities or 'disabled' women recognised under section 42 of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution as amended)? This question is essential for two reasons. First, by asking this question, attention is drawn to the unacknowledged intersectional discrimination experienced daily by 'disabled women'. Academic writings and research on disability issues have gained momentum in Nigeria. Nevertheless, most research has paid little attention to the plight and the intersectional discrimination encountered by the 'disabled Nigerian woman'. Consequently, the question is whether the human rights of 'disabled' women are adequately protected in Nigeria, where there is a lack of acknowledgement of this kind of discrimination. Second, I explore the prohibited grounds for discrimination encapsulated in section 42 of the Nigerian Constitution. I argue that the listed or related 'grounds' perspective adopted by this anti-discrimination section is limited because it fails to accommodate the multiple and intersecting forms of oppression that 'disabled' Nigerian women encounter. More importantly, I discuss the decision of *Uzoukwu v Ezeonu* to demonstrate a possible threefold analysis and implications of a narrow and restrictive interpretation of the section for disabled Nigerian women.*

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# 1 Introduction

This paper interrogates how section 42 of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution as amended) addresses intersectional encounters of 'disabled'<sup>1</sup> women or women with disabilities. This interrogation is vital for two reasons. First, I draw attention to the voicelessness of women with disabilities because of the unacknowledged intersectional discrimination they experience in the country. Second, I explore how section 42 of the Nigerian Constitution, as amended, has approached intersectional discrimination by analysing the prohibited grounds for discrimination encapsulated in the section. More importantly, I discuss the decision of *Uzoukwu v Ezeonu*<sup>2</sup> to demonstrate three possible implications of a narrow and restrictive interpretation of the anti-discrimination section for disabled Nigerian women. This analysis underscores how discrimination based on a recognised ground or characteristic is limited in capturing the intersectional discrimination<sup>3</sup> encountered by disabled Nigerian women.

In terms of structure, this paper has six sections. Section one is the introduction. Section two attempts to answer the question: who qualifies as a woman with disabilities or a 'disabled' Nigerian woman? Section three defines intersectional discrimination, particularly concerning 'disabled' Nigerian women. This definition lays a good background for section four. Section four offers a brief analysis of the prohibited characteristics and grounds for discrimination encapsulated in section 42 and the implications of using a perspective that focuses on individual characteristics and grounds in protecting 'disabled' Nigerian women. This analysis exposes the limits of section 42 of Nigeria's Constitution as amended and its approach to 'disabled' women's intersectional discrimination experience.

Section five discusses how two international human rights treaties approach intersectional discrimination. This discussion focuses on the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) and the African Charter on Human and Peoples' Rights (African Charter) for two reasons. First, the CRPD adopted in 2006 is the first legal and human rights treaty applicable to persons with

1 I use the term 'disabled women' and 'women with disabilities' interchangeably in this article. I use the term 'disabled' women to demonstrate and reveal a potential intersectional insight and meaning to disability where a woman in Nigeria is not necessarily 'disabled' solely by her body or society as the term 'women with disabilities' seems to suggest. See A Johnson 'Hush woman! The complex "disabled" woman in Nigeria's legal and human rights framework: A deconstruction' (2020) 8 *African Disability Rights Yearbook* 4.

2 *Uzoukwu v Ezeonu* [1991] 6 NWLR (pt 200) 708.

3 The argument that a *grounds' approach* is limited in capturing intersectional discrimination is not necessarily a new one. However, what is arguably new is the focus on how section 42 of the Nigerian Constitution tackles the intersectional discrimination experienced by the disabled Nigerian woman.

disabilities globally.<sup>4</sup> Second, the African Charter is a regional human rights treaty adopted in 1981 and forms part of Nigeria's local law.<sup>5</sup> Section six offers conclusive arguments.

### 1.1 Providing context: Intersectional discrimination against women with disabilities in Nigeria

A woman with disabilities is subjected to discrimination at a greater severity in Nigeria.<sup>6</sup> The discrimination encountered by women with disabilities can be linked to deeply rooted sexist, social, cultural and religious beliefs, stereotypes and misconceptions about womanhood and disability prevalent in Nigeria and most African countries.<sup>7</sup> Referring to African countries generally, Grobbelaar-du Plessis confirms how the discrimination and violence that women with disabilities experience links to patriarchal tendencies that discriminate against them.<sup>8</sup> Popular negative stereotypes usually associated with women with disabilities, namely 'sick, helpless, childlike, dependent, in need of care and incompetent', increase this discrimination.<sup>9</sup> These negative stereotypes bear a striking resemblance to the traditional ones usually associated with women without disabilities as 'dependent, passive and needy'.<sup>10</sup> False beliefs, assumptions and misconceptions also reinforce the negative stereotypes ascribed to women with disabilities in Africa. One common misconception is the idea that women with disabilities are either asexual<sup>11</sup> or hypersexual.<sup>12</sup>

With these misconceptions, women with disabilities in most African countries are considered unsuitable for marriage and motherhood.<sup>13</sup> Yet,

4 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution/adopted by the General Assembly (24 January 2007) UN Doc A/RES/61/106 (2007), adopted by the UN General Assembly on 13 December 2006 and came into force on 3 May 2008.

5 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1990.

6 See generally: GE Afolayan 'Contemporary representations of disability and interpersonal relationships of disabled women in south-western Nigeria' (2015) 29 *Agenda* 54 at 58. E Etieyibo & O Omiegbe 'Religion, culture and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 192. CJ Eleweke & J Ebenso 'Barriers to accessing services by people with disabilities in Nigeria: Insights from a qualitative study' (2016) 6 *Journal of Educational and Social Research* 113 at 118.

7 GI Grobbelaar-du Plessis 'African women with disabilities: The victims of multilayered discrimination' (2007) 22 *South African Public Law* 405 at 406.

8 Grobbelaar-du Plessis (n 7) 408.

9 Grobbelaar-du Plessis (n 7) 406.

10 As above.

11 Afolayan (n 6) 58.

12 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: Empowering women for gender equity* 1.

13 Grobbelaar-du Plessis (n 7) 410; J Morris *Feminism, gender and disability* (1998) 8. Morris shares evidence that shows disabled women get married and have children which dispels this misconception.

although paradoxically labelled asexual, women with disabilities are increasingly susceptible to suffer sexual violence.<sup>14</sup> This paradox is evident in Nigeria. Narratives describe how men are hypocritically willing to have sexual relations with women with disabilities in private but unwilling to be publicly associated with them.<sup>15</sup> Such actions reinforce the increased levels of negative attitudes and violence targeted at women with disabilities that are socially acceptable and commonplace.<sup>16</sup> Literature documents how women with disabilities are twice as likely to suffer increased gender-based violence,<sup>17</sup> including sexual violence<sup>18</sup> and state-sanctioned violence such as forced sterilisation,<sup>19</sup> coerced abortion<sup>20</sup> and tend to be victims of ritual killings.<sup>21</sup>

Consequently, literature that connects the severity of discrimination to the intersection between gender and disability is accurate.<sup>22</sup> The woman with disabilities is uncomfortably seated at the intersection of gender and disability identity categories while rendered voiceless. Despite the foregoing, the truth is that the plight of and the intersectional discrimination encountered by the Nigerian woman with disabilities has been mostly unacknowledged, downplayed and trivialised. Therefore, the significance of the question raised in this paper becomes clear.

## 2 Who is the woman with disabilities or 'disabled' Nigerian woman?

In this section, I attempt to answer the question: Who is the woman with disabilities or the 'disabled' Nigerian woman? Understanding disability is essential, considering the linkage between how the term is understood and the legal responses in Nigeria. In other words, if there is no proper understanding of who the disabled Nigerian woman is, it will be difficult, if not impossible, to protect her.

14 Afolayan (n 6) 58.

15 NSRP & Inclusive Friends 'What violence means to us: Women with disabilities speak' (2015) <http://www.nsrp-nigeria.org/wp-content/uploads/2015/09/What-Violence-Means-to-us-Women-with-Disabilities-Speak.pdf> (accessed 12 May 2021).

16 IO Smith 'Towards a human rights convention on persons with disabilities: Problems and prospects' (2002) 43 *Amicus Curiae* 8 at 9.

17 L Hershey 'Pursuing an agenda beyond barriers: Women with disabilities' (1996) 24 *Women's Studies Quarterly* 61; See also, S Kamga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope?' Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities 2011, Center for Women Policy Studies (February 2011) 9 at 12.

18 Afolayan (n 6) 58.

19 AI 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.

20 Ofuani (n 19) 554.

21 E Etieyibo & O Omiegbe 'Religion, culture, and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 3.

22 S Ortoleva 'Women with disabilities: The forgotten peace builders' (2010-2011) 33 *Loy of Los Angeles International and Comparative Law Review* 96.

Admittedly, there are no easy answers to this question. This difficulty is perhaps because the question is ambiguous and contentious. For instance, is *the disabled Nigerian woman born or made or both?* To understand who qualifies as the disabled Nigerian woman, I begin by unpacking and underscoring the ambiguities that such a question invokes.

## 2.1 Understanding disability: Who is the disabled woman in Nigeria?

The ambiguity that characterises the definition and understanding of disability has been widely documented and is undeniable.<sup>23</sup> By not explicitly defining disability, the CRPD drafters, for instance, amplify and confirm the ambiguity of the term.<sup>24</sup>

When writing about women with disabilities or the ‘disabled’ woman in Nigeria, there is a misleading assumption that there is clarity on who this woman is. For instance, when defining disability and determining who qualifies as a woman with disabilities, the concept of disability has been dominated by assuming that she is ‘born’ exemplified by the controversial medical versus social contentions.<sup>25</sup> Underlying this contention is whether a Nigerian woman is ‘*disabled by her body or society*’.<sup>26</sup> Bearing these contentions in mind, I outline three interrelated definitions and understandings of who qualifies as a ‘disabled’ Nigerian woman as documented by research.

First, when referred to as the woman with disabilities, this woman is usually portrayed as a victim of a flawed body or mind.<sup>27</sup> This portrayal, for instance, traces disability in Nigeria to biology and medicine.<sup>28</sup> The International Classification of Impairments, Disabilities and Handicaps (the ICIDH) developed by the World Health Organisation (WHO) in 1980 inspires this portrayal.<sup>29</sup> The ICIDH reasoning associates disability with a threefold understanding, namely: impairment, handicap and disability.<sup>30</sup> Understood from this perspective, a triple interrelated definition of

23 Preamble to the CRPD.

24 As above.

25 R Connell ‘Southern bodies and disability: Re-thinking concepts’ (2011) 32 *Third World Quarterly* 1369 at 1370.

26 VI Umeasiegbu & DA Harley ‘Education as a tool for social justice and psychological wellbeing for women with disabilities in a developing country: The challenges and prospects in Nigeria’ (2014) 14 *The African Symposium* 121.

27 BA Areheart ‘When disability isn’t “just right”: The entrenchment of the medical model of disability and the *Goldilocks* dilemma’ (2008) 83 *Indiana Law Journal* 181 at 185-186.

28 TB Abang ‘Disablement, disability and the Nigerian society’ (1988) 3 *Disability, Handicap & Society* 71 at 72.

29 World Health Organisation *International classification of impairments, disabilities and handicaps: A manual of classification relating to the consequences of disease* (1980).

30 As above.

disability is evident: disability as a product of a medical diagnosis,<sup>31</sup> a personal tragedy,<sup>32</sup> and an affliction caused by an impairment that requires a form of treatment and cure.<sup>33</sup> From this perspective, one can immediately assume that being 'disabled' has something to do with and is limited to having a form of impairment. A traditional impairment-based approach of identifying disability in Nigeria is, therefore, apparent. This traditional impairment-based approach of identifying disability, according to Silvers, is where disability relates to being physically, sensorily, or cognitively impaired.<sup>34</sup> Yet, this kind of impairment-based approach to identifying disability has been widely criticised, mainly for failing to acknowledge society's role in disablement.<sup>35</sup>

Second, when viewed as a woman with disabilities, the woman is portrayed as a victim of a flawed society.<sup>36</sup> Although the CRPD drafters do not explicitly define disability, its social dimensions are acknowledged.<sup>37</sup> With article 1, the CRPD's drafters seemed to suggest that although an individual might be physically, sensorily, or cognitively impaired, disability does not occur until society's lack of access hinders the individual's wheelchair-enhanced body.<sup>38</sup> Thus, with this reasoning, the woman is believed to be 'disabled by her society'.<sup>39</sup> However, this position has suffered criticism: for misconstruing disability as something that does not necessarily involve the body but is a consequence of social oppression.<sup>40</sup>

31 BA Areheart 'Disability trouble' (2011) 29 *Yale Law and Policy Review* 348 at 349. See also, Areheart (n 27) 185-186.

32 DFID 'Scoping study: Disability issues in Nigeria' (2008) [www.ucl.ac.uk/lcccr/downloads/scopingstudies/dfid\\_nigeriaireport](http://www.ucl.ac.uk/lcccr/downloads/scopingstudies/dfid_nigeriaireport) (accessed 12 February 2021); K Olaiya 'Commodifying the "sacred", beatifying the "abnormal": Nollywood and the representation of disability' (2013) 7 *The Global South* 137 at 139.

33 H Ndlovu 'African beliefs concerning people with disabilities: Implications for theological education' (2016) 20 *Journal of Disability and Religion* 29 at 31.

34 A Silvers 'Reprising women's disability: Feminist identity strategy and disability rights' (1998) 13 *Berkeley Journal of Gender Law and Justice* 81 at 92.

35 Areheart (n 31) 349.

36 This point is often made by scholars who argue for the social understanding of disability. For more information on the social understanding of disability. For example, T Shakespeare & N Watson 'The social model of disability: An outdated ideology' (2002) 2 *Research in Social Science and Disability* 9 at 12.

37 Preamble to the CRPD.

38 Art 1 of the CRPD. See also, A Schriempf '(Re)fusing the amputated body: An interactionist bridge for feminism and disability' (2001) 16 *Hypatia* 53 at 59.

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

40 Kayess & French (n 39) 5.

Third, the 'disabled' woman is not necessarily disabled solely by her body or society.<sup>41</sup> This portrayal traces disability to the *Mercier* understanding.<sup>42</sup> Here, a disability could be the consequence of a 'physical limitation, a sickness, a social construct, a perceived limitation or a combination of these factors'.<sup>43</sup> In *Mercier*, the Court found that 'a person may have no limitations in everyday activities other than those created by prejudice and stereotypes'.<sup>44</sup> This understanding provokes contemporary and historical interpretations.

First, a Nigerian woman can be disabled because she has a form of impairment. Second, a woman who has no limitation or any form of impairment may be considered 'disabled' because her rights are limited and truncated. These truncated rights could be simply because of the prejudice associated with being a woman. This kind of reasoning is not farfetched. Tracing the original meaning and understanding of disability, Silvers, for instance, mentions how to be 'disabled' historically related to when certain groups of persons, particularly women, were given limited and truncated rights.<sup>45</sup> Insight shows how historically, to be labelled 'disabled' had served as a convenient means to justify inequality and discrimination.<sup>46</sup> To say that a person is 'disabled' meant that the person was undeserving and consequently deprived of the law's protection. This deduction is obvious from Silvers' point that labelling persons with physical, sensory, or cognitive impairments as 'the disabled' also paints the picture that they are ineligible to be equally protected by the law.<sup>47</sup> Her point suggests that a woman can be considered 'disabled' not only because she has physical, sensory, or cognitive impairments but also because law and tradition deem her incompetent.<sup>48</sup>

Using the example of citizenship in the United States, Baynton cites how historically, women were considered 'disabled' to disqualify, exclude and deny their voting rights.<sup>49</sup> He explained how, compared to the male standard, women's presumed physical, mental and psychological defects and deficits were often portrayed in a disabling manner. For example, women expressing emotions and feelings of hysteria was considered irrational and used as an excuse to disqualify them from acquiring

41 See generally scholarship that make this same argument include JS Beaudry 'The vanishing body of disability law: Power and the making of the impaired subject' (2018) 31 *Canadian Journal of Family Law* 7 at 46. Johnson (n 1) 4.

42 For more information on the *Mercier* case and its potentially intersectional insight, see: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* [2000] 1 SCR 665 (*Mercier*). Johnson (n 1) 4.

43 Beaudry (n 41) 46.

44 *Mercier* (n 42).

45 Silvers (n 34) 92.

46 D Baynton 'Disability and the justification of inequality in American history' in DC Baynton, PK Longmore & L Umansky *The new disability history* (2001) 33.

47 Silvers (n 34) 92.

48 As above.

49 Baynton (n 46) 33.

citizenship.<sup>50</sup> Consequently, women similar to persons with impairments suffered discrimination because of the 'disability' attributed to them.

Unfortunately, the above situation is not purely historical but has a contemporary basis for Nigerian women today.<sup>51</sup> As scholarship proves, the reality is that Nigerian women are still subject to limited and truncated rights.<sup>52</sup> This situation inevitably introduces the thought that Nigerian women can be considered 'disabled'. As suggested elsewhere by the author, claiming that a Nigerian woman is 'disabled' does not necessarily indicate that all Nigerian women might have physical and mobility impairment.<sup>53</sup> The inference is that even though Nigerian women might not necessarily have any physical, sensory, or cognitive impairments that entitle them to the 'disability' label as used today, the label is earned by prejudice towards women. This prejudice is evident in limited and truncated rights and unequal legal protection in Nigeria.

Nonetheless, these three interrelated definitions and understandings of who qualifies as a 'disabled' Nigerian woman discussed above possibly bring to the fore the futility of the question. The insight proves that the question might be potentially unanswerable or as confusing as questions about any identity category.<sup>54</sup> Thus, it just might be enough to admit that a woman is disabled if she accepts that she is.

## 2.2 Who is the disabled Nigerian woman? Intersections of gender and disability

The disabled woman is in a dilemma. This dilemma occurs because mainstream feminist and disability perspectives have ignored the multiple and intersecting identities that a disabled woman embodies in defining who she is.<sup>55</sup> On the one hand, in determining who the disabled woman is, disability narratives tend to focus solely on the disability identity category. This situation means that disabled women tend to be defined exclusively by their disability to the detriment of other identities that they possess. The consequence of such a narrow definition that focuses solely on the disability identity category for disabled women is evident.

50 As above.

51 The patriarchal nature of Nigerian society has been well documented in scholarship. See for example, GA Makama 'Patriarchy and gender inequality in Nigeria: The way forward' (2013) 9 *European Scientific Journal* 115. E Durojaye 'Woman but not human: Widowhood practices and human rights violations in Nigeria' (2013) 27 *International Journal of Law, Policy and the Family* 176 at 198. NO Odiaka 'The concept of gender justice and women's rights in Nigeria: Addressing the missing link' (2013) 2 *Afe Babalola University: Journal of Sustainable Development Law and Policy* 191.

52 As above.

53 Johnson (n 1) 21.

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

55 N Begum 'Disabled women and the feminist agenda' (1992) 40 *Feminist Review* 70.

First, with a definition that focuses solely on the disability identity category, preference is usually accorded to men with disabilities. This preference stems from a patriarchal culture and masculine hegemony, which bestows certain privileges on men with disabilities in Nigeria.<sup>56</sup> Several commentators trace this male preference to ‘white middle-class men in wheelchairs’ who introduced the social understandings of disability.<sup>57</sup> This argument could explain the disregard for the sex/gender identity category and the resultant disregard of women’s specific concerns.

Second, a narrow definition hinged on the disability identity category alone disregards the specific experiences of women with disabilities. This disregard occurs because the disabled women’s experience tends to be lumped together as part of the experiences of a perceived homogenous disability group in Nigeria.<sup>58</sup> Yet, the truth is that persons with disabilities are not homogenous. One could speculate that regarding persons with disabilities as a homogeneous group is tied to a concern that raising the gendered nature of disability could divide and weaken the strength of the dominant disability narrative.<sup>59</sup> This situation could explain why existing research regards ‘gender’ in the dominant disability narrative and ‘disability’ in the dominant gender narrative as irrelevant, resulting in genderless and gender-blind research.<sup>60</sup> Such an approach fails to acknowledge the unique experiences and realities that women with disabilities face, resulting in the complete disregard of their experiences and lived realities

Third, a narrow definition that relies solely on the disability identity category assumes a consensus on how the disability identity is defined, disregarding the ambiguities that the term invokes.

On the other hand, the feminist movement tends to focus solely on the sex/gender identity category to the detriment of the disability identity. The consequence of such a narrow definition that focuses on gender as the sole identity category is significant. By such definition, other characteristics and identities such as disability, race, class etc, that disabled women embody are overlooked. This disregard happens where the emphasis is on ableism and powerful images of womanhood.<sup>61</sup> Literature has compared the invisibility of women with disabilities to a ‘glass wall’ that needs breaking.

56 Johnson (n 1 above) 7.

57 Areheart (n 27 above) 185 & 186.

58 Afolayan (n 11 above) 55.

59 E Kim ‘Minority politics in Korea: Disability, interraciality, and gender’ in D Cooper et al (eds) *Intersectionality and beyond: Law, power and the politics of location* (2009) 61.

60 T Emmett & E Alant ‘Women and disability: Exploring the interface of multiple disadvantage’ (2006) 23 *Development Southern Africa* 445.

61 MP Kumar & SE Anuradha “‘Nonconformity incarnate’: Women with disabilities, “gendered” law and the problem of recognition’ (2009) 44 *Economic and Political Weekly* 37.

Similarly, a narrow definition of disabled women that relies on gender as the sole identity category assumes a stable and 'universal woman' experience and disregards the ambiguities that the concept of womanhood invokes. Nonetheless, this argument does not deny recent efforts by feminists to debunk dominant cultural narratives about disability in the quest for change.<sup>62</sup> Feminists have started to explore how the social understanding of disability and feminism can be synergic to tackle disability-based discrimination.<sup>63</sup> However, the challenge with feminist disability narratives becomes the tendency to essentialise disability in a way that suggests a false universal experience of gendered disability.<sup>64</sup>

From the above, the dilemma of disabled women who sits at the intersection of both gender and disability identity categories, therefore, becomes evident. The dominant disability and feminist narratives fail to fully address the multiple and intersecting identities that disabled women embody. This dilemma occurs because these two narratives wrongly assume that identity categories of sex/gender and disability are stable and can be fragmented or separated.

### 3 The disabled Nigerian woman and intersectional discrimination

Crenshaw introduced the term 'intersectionality'.<sup>65</sup> In her earliest work, she used the term to describe the unique discriminatory experiences of African American women that the United States' anti-discrimination law did not anticipate.<sup>66</sup> She provides a threefold insight as follows.<sup>67</sup>

First, she rejects the idea that there is a universal woman experience of discrimination. Using African American women as an example, her insight teaches how individuals such as the disabled women with multiple and intersecting identities can be discriminated against based on several grounds or characteristics simultaneously rather than one or two separate grounds.<sup>68</sup> Although the emphasis in her study is on two categories, namely race and gender, she does not discount the fact that there are other categories of identities, such as sexuality, disability, ethnicity and class.<sup>69</sup> However, scholars have pointed out a bias to categories of identities, such

62 Ngwena (n 54) 613. C Ngwena 'Developing juridical method for overcoming status subordination in disablism: The place of transformative epistemologies' (2014) 30 *South African Journal on Human Rights* 275 at 278.

63 Ngwena (n 62) 278.

64 A Clutterbuck 'Rethinking baker: A critical race feminist theory of disability' (2015) 20 *Appeal* 51 at 59.

65 K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139 at 151.

66 Crenshaw (n 65) 151.

67 As above.

68 Crenshaw (n 65) 149.

as race, gender, sexuality, and class, to the detriment of other identities such as disability and age.<sup>70</sup>

Crenshaw used the experiences of African American women to illustrate how when both race and gender intersect, they create discrimination that is greater than the sum of its parts.<sup>71</sup> An intersectional lens draws attention to women's encounters, such as the disabled woman who sits at the intersection of more than one identity category. The disabled woman, because of her multiple and intersecting identities, therefore, experiences intersectional discrimination. Consequently, using Crenshaw's guidance, it is possible to speculate that intersectional discrimination happens when women with disabilities experience discrimination based on their gender and disability, which cumulatively result in oppression that is far greater than if the two identity categories of gender and disability were considered separately

Second, Crenshaw used the experiences of African American women to draw attention to a significant flaw in anti-discrimination law. This flaw forces women with multiple and intersecting identities and the resultant discrimination to depend on a law that adopts a single-issue approach.<sup>72</sup>

Like many countries globally, Nigeria adopts a liberal singular focus to its anti-discrimination legal and human rights framework.<sup>73</sup> Yet, precisely because one cannot be sure on what ground a disabled woman has suffered discrimination, the inadequacies of a law that relies on a single issue to protect individuals, particularly women with multiple identity categories, become evident. The need to shift from the conservative notion that discrimination can be understood only from one viewpoint to the realisation that discrimination against any individual can be based on several individual identities is apparent.

Third, using the experiences of African American women, Crenshaw's insight draws attention to how power relationships and structures work in ways that include and exclude some women.

The outcome of *Mahlangu v Minister of Labour*<sup>74</sup> provides some guidance on intersectional discrimination. The experience of a domestic worker who encountered multiple intersecting grounds of discrimination in the workplace was the subject of this recent South African

69 K Crenshaw 'Mapping the margins: Intersectionality, identity politics and violence against women of color' (1991) 43 *Stanford Law Review* 1241.

70 H Meekosha & R Shuttleworth 'What is so "critical" about critical disability studies' (2009) 15 *Australian Journal of Human Rights* 47 at 62.

71 Crenshaw (n 65) 149.

72 As above.

73 E Durojaye & Y Owwoeye "'Equally unequal or unequally equal": Adopting a substantive equality approach to gender discrimination in Nigeria' (2017) 17 *International Journal of Discrimination and the Law* 73.

74 *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC).

Constitutional Court case. Here, the Constitutional Court employed an intersectional lens to address the constitutional dilemma that section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) presented.<sup>75</sup> In the case, the Constitutional Court employed 'an intersectional approach to discrimination' and acknowledged the unique vulnerabilities of the complainant with multiple grounds of discrimination. The case involved a domestic worker who drowned in her employer's swimming pool while discharging her duties. Following the victim's death, her daughter, financially dependent on her mother, approached the Department of Labour seeking compensation. Unfortunately, her unemployment compensation application for her loss was denied because *domestic workers, primarily black women*, were not covered under the COIDA.<sup>76</sup>

Although a South African case, a threefold lesson can be drawn with respect to the disabled woman in Nigeria. First, similar to disabled women in Nigeria, the case demonstrates the susceptibility of domestic workers to intersectional discrimination because of the intersecting identities they embody. In reaching its decision, for instance, the Constitutional Court noted how the marginalisation of domestic workers rests on the intersecting and multiple grounds of race, class, gender and other grounds.<sup>77</sup> Moreover, drawing heavily on the intersectional lens, the court explored the structural and dynamic consequences of the interaction between these multiple forms and grounds of discrimination.

Second, as evident in the case, domestic workers who are mostly poor black women in South Africa are excluded from the definition of an employee in the COIDA perhaps because of their intersecting identities as black, woman and poor. Additionally, a parallel can be drawn with the situation of disabled women in Nigeria with the non-existent and, in some cases, narrow definitions of disability that either accommodate men with disabilities alone or the meaning of disability that is defined solely in the medical sense in Nigeria.

An example is the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (2018 Disability Act).<sup>78</sup> Section 1 of the 2018 Disability Act provides that 'a person with disability shall not be discriminated against on the ground of *his* disability by any person or an institution in any manner or circumstance whatsoever'.<sup>79</sup> The use of the male pronoun '*his*' creates doubts as to whether women with disabilities are included in the protection. This kind of narrow definition of disability potentially hinders and limits legal protection for disabled women.<sup>80</sup>

75 As above.

76 *Mahlangu* (n 74) para 3, 6 & 8.

77 *Mahlangu* (n 74) para 65.

78 2018 Disability Act (emphasis added).

79 Section 1 of the 2018 Disability Act (emphasis added).

80 Similar arguments made in Johnson (n 1) 14.

Third, one can assume that the same way that domestic workers were invisible and excluded from the COIDA because of their multiple and intersecting identities, disabled women in Nigeria also possess multiple and intersecting identities that potentially render them invisible to the law.

Having established the disabled Nigerian woman's intersectional identity, the argument presented in the next section demonstrates how the lived multidimensional and intersectional realities of disabled women pose distinct challenges to Nigeria's liberal vision of law. Therefore, in the next section, I argue that Nigerian law, by its liberal singular focus, is limited in protecting women, primarily when they, similar to disabled women, encounter intersectional discrimination because of their multiple and intersecting identities.

#### **4 Recognising intersectional discrimination: The formal approach to (non) discrimination in Nigeria**

Non-discrimination and equality are the two foundations of law and, specifically, human rights.<sup>81</sup> Equality is the outcome of the right to non-discrimination and the direct opposite of any unfair treatment encountered based on specific unique features.<sup>82</sup> Most, if not all, human rights documents acknowledge this definition. The Nigerian Constitution, as amended, is no exception. Its Preamble outlines the Nigerian Constitution's authority and superiority as the supreme law of the land by which everyone is bound.<sup>83</sup> As the supreme law, the Nigerian Constitution includes provisions on non-discrimination and equality. However, unlike other constitutions and international human rights treaties, there is no clear definition of discrimination in the Nigerian Constitution.<sup>84</sup>

With this lack of a definition of discrimination, it is unsurprising that there is no clear and consistent approach to understanding and interpreting section 42 of the Nigerian Constitution.<sup>85</sup> The lack of discrimination definition provides an avenue and leeway for inconsistencies and confusion on interpretations of discriminatory actions.

81 RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) 80 *American Political Science Review* 801 at 802; J Donnelly 'Human rights and human dignity: An analytic critique of non-western conceptions of human rights' (1982) 76 *American Political Science Review* 303.

82 Durojaye & Owoye (n 73) 73.

83 The Nigerian Constitution. The Preamble of the document underscores its supremacy over all the laws in the land.

84 Durojaye & Owoye (n 73) 80. The South African Constitution provides a consistent definition of 'discrimination' unlike Nigeria's Constitution.

85 Durojaye & Owoye (n 73) 78.

Appropriate interpretation of discriminatory actions should ideally answer three main questions raised by Durojaye and Owoeye.<sup>86</sup> First, what should the starting point be in determining whether unfair discrimination has occurred? Second, when will an act amount to unfair discrimination under the Nigerian Constitution? Third, what determines whether there has been a violation of section 42 of the Nigerian Constitution? Unfortunately, precedence from court decisions proves an unwillingness by the Nigerian courts and the Supreme Court as the highest court of the land to offer a clear and consistent approach to interpreting section 42, even where there has been ample opportunity to do so.<sup>87</sup> Consequently, where the discrimination is not adequately articulated, appropriate resolutions and remedies might be difficult for the woman who encounters discrimination, much less a disabled woman with a tendency to face intersectional discrimination.

Nonetheless, in trying to understand the right to non-discrimination in Nigeria, scholars agree that there is a leaning and inclination towards liberal or formal roots. Durojaye and Owoeye attest to how the Nigerian courts, in making their decisions, still rely significantly on a formal or liberal perspective in explaining and interpreting section 42.<sup>88</sup> In elaborating upon what a formal or liberal perspective on equality signifies, Cain suggests that, as a principle of justice, formal equality easily manifests in a situation where *like cases, are treated alike*.<sup>89</sup> The opposite is also true in that unlike cases are then treated differently or in an unlike fashion.<sup>90</sup> Therefore, a liberal or human rights understanding of equality is rooted in an Aristotelian philosophy, which emphasises that likes must be treated alike. In contrast, *unlikes should be treated in an unlike fashion*.<sup>91</sup>

Specifically, section 42 of the Nigerian Constitution refers to the right to non-discrimination for all citizens, ostensibly including disabled women. It states the following:

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not by reason only that he is such a person: a. be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions, or political opinions are not made subject; or b. be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any

86 As above.

87 As above.

88 E Chegwe 'A gender critique of liberal feminism and its impact on Nigerian law' (2014) 14 *International Journal Discrimination and the Law* 66.

89 PA Cain 'Feminism and the limits of equality' (1989) 24 *Georgia Law Review* 803 at 818.

90 As above.

91 MA Freeman, C Chinkin & B Rudolf *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A commentary* (2012) 53.

privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.

- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.<sup>92</sup>

Scholarship has made a threefold assumption concerning the right to this non-discrimination section.<sup>93</sup> Durojaye and Owoeye argue as follows:<sup>94</sup> One is the understanding and interpretation that likes should be treated in a like or similar fashion. Undeniably, this confirms the narrow, restrictive and formal approach to discrimination. Second is the well-documented gender insensitivity reinforced by section 42. This insensitivity is exemplified in the pronoun usage 'he', exposing the patriarchal tendencies inherent in the section.<sup>95</sup> Third, there is a notion of a distinction between the public and private domains. This distinction manifests in the *Uzoukwu v Ezeonu*<sup>96</sup> case, where the Nigerian Court of Appeal limited the prohibited acts of discrimination to only those of public actors.<sup>97</sup> Such limits ignore Nigerian women's reality that demonstrates that private actors often perpetuate discriminatory acts.<sup>98</sup> Arguably, these threefold assumptions and understanding do not necessarily contemplate the intersectional encounters of the disabled woman.<sup>99</sup>

#### 4.1 Recognising intersectional discrimination: The prohibited grounds in section 42 of Nigeria's Constitution

The significance of the oft-cited case of *Uzoukwu v Ezeonu*<sup>100</sup> lies in its approach to the right to non-discrimination as encapsulated in section 42 of the Nigerian Constitution. In *Uzoukwu*,<sup>101</sup> the Nigerian Court of Appeal, concerning the right to non-discrimination in section 42, referred to the idea that a violation of this section can be applied only where the discrimination falls within the protected grounds. The court mentions that the section cannot be invoked if there are other reasons why a person is discriminated against in addition to the protected grounds. In other words, the decision states that an infringement of section 42 happens only where the discrimination falls within the protected grounds. Therefore, the question that needs answers is what this narrow and restrictive

92 Sec 42 of the The Nigerian Constitution.

93 Durojaye & Owoeye (n 73) 73.

94 As above.

95 Chegwe (n 88) 69.

96 *Uzoukwu v Ezeonu* (n 2) 798.

97 As above.

98 Durojaye & Owoeye (n 73) 77.

99 Arguably, threefold liberal strand ie universality; atomism and public/private distinction are inherent in Nigeria's liberal legal and human rights framework. With such a legal mindset, the intersectional encounters of the disabled woman are difficult to contemplate.

100 *Uzoukwu v Ezeonu* (n 2) 798.

101 As above.

interpretation of discrimination used by *Uzoukwu*<sup>102</sup> implies for the disabled Nigerian woman. It is possible to speculate a threefold analysis as follows.

#### 4.1.1 *Recognising intersectional discrimination: Disability as a missing ground in section 42 of Nigeria's Constitution*

Section 42 of the Nigerian Constitution and its interpretation indicates that non-discrimination in the Nigerian context has been narrowly defined solely based on the listed grounds. These grounds include the *individual's membership of a particular community, ethnic group, place of origin, sex, religion and political opinion*.<sup>103</sup> Thus, disability is missing as a prohibited ground of discrimination.<sup>104</sup> Because of this omission, the Nigerian Constitution, unlike several constitutions in Africa, fails to protect and makes human rights implementation for persons with disabilities difficult.<sup>105</sup> What this could mean is that while section 42 of the Nigerian Constitution ostensibly guarantees the right to non-discrimination to all its citizens,<sup>106</sup> at the same time, it anticipates that these citizens must have specific characteristics before they can qualify for protection from discrimination.<sup>107</sup> In other words, an individual deserves protection only to the extent that the individual embodies certain recognised traits.

The word 'only' in section 42(1) supports this claim. The term 'only' as used in the section suggests that discrimination is forbidden only on the sole basis of the listed grounds.<sup>108</sup> It means that before the section's infringement, it must be clearly shown that the discrimination occurred because of one of the listed grounds.<sup>109</sup> Additionally, it could imply that there should be a recognised correlation between the causes of discrimination and the prohibited grounds before an unfair discriminatory act can be deemed to have occurred. Simply put, there must be a connection in the anti-discrimination law between the cause of the discrimination and the aftermath by using the listed grounds.

102 *Uzoukwu v Ezeonu* (n 2) 798. The court made other assumptions, such as: the discrimination must be on the basis of law; the discrimination must be seen as an act of government or its agencies; that the discrimination complained against does not apply to other Nigerians.

103 Sec 42 of the Nigerian Constitution.

104 As above. See generally scholarship that also mentions this omission. For example, I Imam & MA Abdulraheem-Mustapha 'Rights of people with disability in Nigeria: Attitude and commitment' (2016) 24 *African Journal of International and Comparative Law* 439 at 440. See also, NC Umeh 'Reading disability into the non-discrimination clause of the Nigerian Constitution' (2016) 4 *African Disability Rights Yearbook* 53 at 73.

105 Imam & Abdulraheem-Mustapha (n 104) 442.

106 The Nigerian Constitution secs 14, 15(2), 16(d), 17(2)(a) and (b) can be read to protect to protect all citizens including disabled women.

107 Umeh (n 104) 73.

108 Durojaye & Owoeye (n 73)77.

109 As above.

The above problem is evident in the outcome of *Simeon Ilemona Akubo v Diamond Bank*.<sup>110</sup> In this case, the judge argued that the claimant could not claim that discrimination had occurred because of the non-recognition of disability as a discrete ground for non-discrimination in Nigeria. In other words, the judge's opinion confirms the narrow interpretation that if discrimination occurs on any ground other than those explicitly mentioned in section 42, discrimination cannot be said to have occurred. The assertion is also evident in *Festus Odafe v Attorney-General of the Federation*.<sup>111</sup> This case involved the realisation of the rights of persons living with HIV-AIDS (PLWHA). As argued elsewhere, the court applied a narrow and restrictive interpretation.<sup>112</sup> The Court reasoned that 'the applicants did not qualify for freedom from discrimination because health status is not a ground covered in the section'.<sup>113</sup> Such a restrictive understanding and closed, one-dimensional, perspective makes it more difficult for the law to recognise the disabled woman's intersectional discrimination. Intersectional discrimination might occur based on two or more intersecting grounds, particularly when one ground, such as disability, is not even recognised.

We can speculate about the implications of this outcome for a disabled Nigerian woman. She can only be said to be discriminated against if she can prove that an act of discrimination was committed or falls within the characteristics in the protected list in isolation. In a case of discrimination, this situation means that it would be sex/gender that would be considered separately, leaving behind her disability.

Nevertheless, Durojaye and Owoeye argue that section 42's interpretation should be purposive.<sup>114</sup> This approach could find support in the European Court of Human Rights case of *Glor v Switzerland*.<sup>115</sup> In this case, the Court held that even though disability is not explicitly mentioned, the grounds on which discrimination is forbidden under the European Convention on Human Rights are not exhaustive. In other words, the Convention includes disability as a prohibited ground. In addition, the progressive ruling in *Simeon Ilemona Akubo v First City Monument Bank*,<sup>116</sup> with similar facts but a different outcome where the judge relied on foreign jurisprudence, can be used to support this claim.

Consequently, bearing in mind this purposive reasoning, the phrase 'the circumstances of his birth' in section 42(2) has been interpreted to

110 *Simeon Ilemona Akubo v Diamond Bank* (Suit ID/763M/2010)

; See also, Umeh (n 104) 70-72.

111 *Festus Odafe v Attorney General* (Suit FHC/PH/CS/680/2003); (2004) AHRLR 205 (NgHC 2004). Similar arguments made in Johnson (n 1) 11.

112 Johnson (n 1) 11.

113 *Odafe* (n 111)

114 Durojaye & Owoeye (n 73 above) 76. Johnson (n 1) 11.

115 *Glor v Switzerland* (Application No 13444/04) ECtHR (30 April 2009).

116 *Simeon Ilemona Akubo* (n 110).

include disability.<sup>117</sup> However, as argued elsewhere, even if disability can be read into this phrase as suggested, disability portrayed in this way limits disability to merely a consequence of the circumstances of birth, when it is clear from *Mercier's* definition that disability cannot be limited in this way.<sup>118</sup> Additionally, the use of 'his' in the phrase is distracting because it confirms the gender bias and insensitivity in the section. With such insensitivity and gender bias, it is challenging to read sex discrimination, much less the reading of intersectional discrimination based on the intersecting grounds of sex/gender and disability.<sup>119</sup> Therefore, section 42(2)'s reference does not represent a reading of an intersectional approach to non-discrimination for disabled women.

Nevertheless, it is challenging to overlook *Simeon Ilemona Akubo v First City Monument Bank's* progressive ruling.<sup>120</sup> It is plausible that the progressive order was an exception rather than the rule made because the judge relied on foreign jurisprudence. Unlike the South African Constitution, there is no specific obligation in the Nigerian Constitution that demands deference to international law.<sup>121</sup>

Similarly, the omission of open-ended phrases like 'other status' reveals how an intersectional lens is underdeveloped in Nigeria's anti-discrimination law. A cursory look at section 42 supports this claim. Unlike non-discrimination provisions in most human rights instruments, section 42 does not include the phrase 'other status'.<sup>122</sup> Although grounds of (non)discrimination are usually listed in international instruments, they make room for other emerging grounds by including the 'other status' phrase.<sup>123</sup> The 'other status' phrase has been interpreted broadly by some treaty monitoring bodies to ensure that potential and new categories of prohibited grounds of discrimination are accommodated and systematically considered.<sup>124</sup> This interpretation includes recognising the combination and intersectionality of grounds as possibly another protected ground against discrimination. Therefore, scholarship finds that this oversight evident in section 42 contradicts and directly opposes international instruments.<sup>125</sup> Thus, the absence of such open-ended phrases like 'other status' leads to a limited perception of identity. Such limited perception ensures that the intersectional individual, such as the disabled woman, who cannot place herself neatly into one of the listed and

117 Ofuani (n 19 above) 553. Johnson (n 1) 11-12.

118 *Mercier* (n 42 above).

119 Johnson (n 1) 11-12.

120 *Simeon Ilemona Akubo* (n 110).

121 Sec 233 of the South African Constitution requires courts to defer to international law when making decisions.

122 Sec 42 of the Nigerian Constitution.

123 I Truscan & J Bourke-Martignon 'International human rights law and intersectional discrimination' (2016) 16 *Equal Rights Review* 103 at 109.

124 As above.

125 E Durojaye 'Substantive equality and maternal mortality in Nigeria' (2012) 44 *Journal of Legal Pluralism and Unofficial Law* 103 at 111.

accepted grounds or categories, finds herself voiceless and unprotected by Nigerian anti-discrimination law.

Moreover, the absence of disability from the list of protected grounds in section 42 of the Nigerian Constitution is quite revealing. It makes one question how the characteristics that should and (should not) be included in its list of grounds are determined. This question is relevant because the selection of grounds mirrors, according to Iyer, the dominant narrative about which social features are pertinent (and which are not) when distinguishing between individuals.<sup>126</sup> This question is apparent in Nigerian anti-discrimination law. It appears to be unacceptable to mistreat individuals on the grounds of sex, ethnic group and religion, but acceptable to differentiate on the grounds of gender and/or disability. Therefore, this situation suggests that what is included or excluded in the protected list of categories of Nigeria's anti-discrimination law is a matter of politics. Iyer succinctly summarises the argument that I make: once a list of characteristics has been set out in legislation, the list itself begins to appear neutral and permanent. It becomes part of the way things are; it seems as though everyone would agree with this list and no other, for all time.<sup>127</sup>

Finally, unlike section 42 of the Nigerian Constitution, several African countries like South Africa are beginning to adopt constitutions that recognise multiple and intersecting discrimination following constitutional review and amendments. For example, section 9(3) of the Constitution of the Republic of South Africa, 1996 forbids unfair discrimination on one or more of the listed grounds.<sup>128</sup> Such progressive provision creatively interprets and incorporates intersecting grounds into anti-discrimination laws, which is difficult with an archaic provision like section 42.

#### ***4.1.2 Recognising intersectional discrimination: Disability as a (non)additive ground under section 42 of Nigeria's Constitution***

Recently, disability has been recognised as a prohibited ground of discrimination in Nigeria. Accordingly, on 23 January 2019, the Nigerian Government enacted the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act).<sup>129</sup> Section 1 of the Disability Act stipulates that 'a person with disability shall not be discriminated against on the ground of his disability by any person or an institution in any

126 N Iyer 'Categorical denials: Equality rights and the shaping of social identity' (1993) 19 *Queens Law Journal* 179 at 187.

127 As above.

128 Sec 9(3) of the South African Constitution provides that; 'Neither the state nor any person can unfairly discriminate against someone, either directly or indirectly. It is against the law to discriminate against anyone on any of the following grounds: race and colour, sexual orientation, marital status, gender, pregnancy, age, disability, ethnic origin, culture, language, religion and birth'.

129 Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Disability Act).

manner or circumstance whatsoever'. Although from this provision, disability is now one of the protected grounds of non-discrimination, a twofold issue is evident. First, the traditional impairment-based approach of identifying disability evident in the Disability Act is limiting. It is limiting because it restricts the understanding of disability to functional abilities when insight from the *Mercier* understanding suggests that this is not necessarily the case. Second, the court's reference in *Uzoukwu*<sup>130</sup> that section 42 cannot be invoked if, in addition to protected grounds, there are other reasons why a person has been discriminated against is interesting.<sup>131</sup> Upon a cursory look at this reasoning, one can speculate that the court indicates that it cannot address additive thinking about discrimination. In other words, the court cannot handle the disabled woman's sex discrimination and then, on top of that, deal with another reason, which could be disability-based discrimination.

We can speculate about the implications of this. First, although disability is now a recognised prohibited ground of discrimination in Nigeria, it is possible to assume that the one-dimensional legal approach to interpreting the section still reinforces a medical or functional impairment approach to disability. Moreover, this one-dimensional legal approach leaves no room for other interpretations of disability, such as the one invoked in *Mercier*. As a result, this understanding does not consider the multiple, complex and intersectional discrimination that disabled women encounter in Nigeria.

Additionally, the Nigerian legal approach to disability as an identity perspective perceives the disabled woman's identity as singular, unitary and stable. This perception could explain why, once a woman is considered disabled in Nigeria, she is de-sexed.<sup>132</sup> As far as Nigerian law is concerned, this de-sexing means disabled women are either disabled or women and cannot be both at the same time. Yet, identifying only a single ground of discrimination will not adequately represent the lived realities of disabled women since it is usually not clear on which ground the discrimination occurred, whether based on sex/gender or disability or both. Thus, where discrimination is not adequately articulated, appropriate resolutions and remedies become a challenge for disabled women. The limits of the law in speaking to her lived, and intersectional reality is therefore apparent.

Similarly, although Nigeria's Disability Act now recognises disability as a prohibited ground of discrimination, it exposes and makes the invisibility and voicelessness of the disabled woman more apparent. The Disability Act's lack of reference to disabled women illustrates this point.

130 *Uzoukwu v Ezeonu* (n 2) 798.

131 As above.

132 T Shakespeare 'Disability, identity and difference' in C Barnes & G Mercer (eds) *Exploring the divide* (1996) 94.

The mere enactment of the Disability Act has proven the tendency of Nigerian anti-discrimination law to categorise and compartmentalise, which does not necessarily tell the entire story for the disabled woman. The woman cannot neatly categorise or compartmentalise herself to fit into the discrete grounds of discrimination that the new Disability Act has neatly laid out for her. This compartmentalisation is challenging because even if it is assumed that only one ground of discrimination seems relevant, it is nearly impossible to prove that a disabled woman was discriminated against solely because of her disability. If disabled women are oppressed because of disability, they are also oppressed because they are women and vice versa. For example, disabled Nigerian women are much more than a ground. The truth is that disabled women are more than several grounds. Disabled women are people who may be inter-subjectively formed and defined, but who is also more than that.<sup>133</sup> A disabled woman in Nigeria cannot encounter gender discrimination other than as a person with a disability. At the same time, the woman cannot experience disability discrimination other than as a woman.

Further, although disability is now recognised as a prohibited ground of discrimination in the Disability Act, complications emerge from Nigeria's federal legal structure. For instance, in this federal structure, each state in Nigeria has the legislative powers to enact its laws. This legislative power means that states can decide whether to pass their laws regarding disability or domesticate and take on board this newly enacted disability law. Yet, at the same time, states can choose to do neither. These complications make an intersectional analysis difficult, if not impossible, to achieve.

#### **4.1.3 *Recognising intersectional discrimination: Disability as a non-interactive and contextualised ground under section 42 of Nigeria's Constitution***

The court's reasoning in *Uzoukwu*<sup>134</sup> that section 42 can be infringed only where the discrimination falls within the protected grounds makes an unreasonable assumption. This assumption is that discrimination occurs solely based on prohibited grounds. The problem is evident in *Simeon Ilemona Akubo*.<sup>135</sup> In this case, the judge focused on abstract categories and generalisations rather than on a contextualised approach to discrimination that underlies specific experiences and consequences. For instance, the judge identified the respondent's actions (Diamond Bank) as lacking initiative, untactful and insensitive. Yet, the judge still reasoned as follows:

133 Clutterbuck (n 64) 59.

134 *Uzoukwu v Ezeonu* (n 2) 798.

135 *Simeon Ilemona Akubo* (n 110).

'I am very doubtful that it can be reasonably be regarded as one offending the applicant's right to human dignity or discrimination.'<sup>136</sup>

Specifically, the judge's reference to human dignity in the above case is interesting, considering Pothier's claim that the actual limitation of non-discrimination for disabled claimants might not necessarily stem from the requirement of grounds but its impact discrimination, that is, a human dignity element.<sup>137</sup> Unfortunately, the problem with this is that human dignity is a malleable term that can be made to mean anything the judge wants it to mean.<sup>138</sup> Therefore, there is justification in asking what human dignity or its absence means for the judge. One can easily speculate that the judge's reasoning stems from a narrow understanding of discrimination far removed from reality. Yet, as shown from the *Mercier*<sup>139</sup> understanding, discrimination does not necessarily occur because of the characteristics of disabled women, for instance, disability or sex, but because of what society thinks disabled women represent as individuals who do not necessarily fit into Nigerian society.

Perhaps this is why disabled women continue to encounter discrimination in Nigerian society. Take, for example, the rape of a disabled woman whose case was not taken seriously.<sup>140</sup> The narrative indicates that a disabled woman suffers discrimination because of how society treats her and not necessarily because of any inherent characteristic. The negative attitude that disabled women are not expected to have sex and to have children, yet they can be raped fuels discrimination. From the scenario, it is possible to speculate on two things. First, when disabled women are raped, it is not only because they are women but also because they are both disabled and women simultaneously.

Consequently, the lived encounters of disabled women show that discrimination does not always occur due to the acts of one person against disabled women based on an individual ground. Second, the implication is that disabled women have most likely been discriminated against because Nigerian society thinks she does not fit in and not because of any identifiable grounds. This point is reinforced by the fact that in the cited rape case above, the police did not take the rape seriously – even the family members did not want to pursue it.<sup>141</sup> Nigerian society's general approach appears to be that if a disabled woman is raped, she should be grateful that

136 Umeh (n 104 above) 70-72.

137 D Pothier 'Connecting grounds of discrimination to real people's real experiences' (2001) 13 *Canadian Journal of Women and Law* 37 at 56.

138 Pothier (n 137) 56. The malleability of human dignity is also clearly evident in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

139 *Mercier* (n 42).

140 The narrative of the woman in a wheelchair that was raped was taken from Eleweke & Ebenso (n 6) 118.

141 Eleweke & J Ebenso (n 6) 118.

someone wanted to have sex with her.<sup>142</sup> From this misleading perception, one can infer that the discrimination that disabled Nigerian women encounters stem from complex structural, systemic and institutional factors instead of inherent characteristics or grounds.

Therefore, we can speculate about the uphill battle that disabled women will face in translating the complexities of the discrimination she has suffered into the discrete, protected categories Nigerian anti-discrimination law recognises. This monolithic legal mindset dictates that related forms of oppression, such as sexism and disability, become mutually exclusive grounds and categories. Such an approach of Nigerian anti-discrimination law means it is almost impossible for an individual to claim discrimination based on simultaneous and intersecting grounds such as sex/gender and disability. Thus, Nigerian law's approach renders disabled women at the intersection of several identity categories voiceless.

In making the above point, I draw inspiration from the Supreme Court of Canada's reasoning in *Egan v Canada*.<sup>143</sup> The Supreme Court of Canada confirmed that discrimination would never be entirely tackled if the focus continues to be on abstract grounds, categories and generalisations, rather than on specific consequences or the aftermath of the discrimination. The court emphasised that:

When the focus is on the grounds for the distinction instead of the impact of the distinction, there is the danger of undertaking an analysis that is distanced and desensitised from real people's real experiences ... More often than not, disadvantage arises from the way in which society treats particular individuals rather than from any characteristic inherent in those individuals.<sup>144</sup>

The importance of *Egan v Canada* lies in its striking reasoning concerning Nigeria's anti-discrimination law. Referring to *Egan*, where the focus is on grounds as exemplified in Nigerian anti-discrimination law rather than on the impact of the discrimination, it cannot speak to lived experiences. The narrow approach to discrimination emphasises the characteristics of a disabled woman rather than society's treatment of her.

With no recorded court cases dealing with disabled women,<sup>145</sup> lessons can be drawn from the *Mojekwu* case in Nigeria.<sup>146</sup> The complainant's point was that he was entitled to inherit property under a Kola tenancy land tenure system as the only surviving male relative. The complainant claimed the property was his because of the *Oli-Ekpe* tradition,<sup>147</sup> which prevents daughters in a household from inheriting their father's property.

142 As above.

143 *Egan v Canada* [1995] 2 SCR 513.

144 As above.

145 Umeh (n 104 above) 73.

146 *Mojekwu v Mojekwu* (1997) 7 NWLR (pt 512) 283 (CA).

147 Durojaye & Owwoeye (n 73) 76.

One of the issues that were brought before the Court of Appeal was whether this tradition was discriminatory. The court held that this tradition was discriminatory on the grounds of sex. Although this case is widely celebrated as progressive and successful, it exposes Nigeria's anti-discrimination law's narrow and restrictive stance. The case was won based on procedural matters and legal technicalities, that is discrimination on the grounds of sex is unconstitutional without investigating and overlooking the underlying social inequality and oppression of Igbo women, which are at the root of the case. Pothier makes the exact point: Even where cases are won and expected to engender some kind of social change, what happens instead is that these moments play a role in naturalising the status quo by magnifying one form of legally recognisable and prohibited discrimination.<sup>148</sup>

The most relevant point here is the court's failure to identify the intersectional positioning of the women that suffered discrimination. In other words, how did sex interact with culture and ethnicity to cause discrimination? This means that the result is still unsatisfactory because it has failed to reflect upon and recognise the woman's lived realities and the extent of the oppression encountered. This argument is validated by Durojaye and Owoeye's description of how the court was preoccupied mainly with ensuring that men and women are treated equally in customary law, without having regard to the consequences of differential treatment.<sup>149</sup> The court still relied on a formal perspective on equality without clearly reflecting on women's lived encounters subjected to discrimination daily.

The example clearly shows that Nigerian law does not entirely resolve sexism and ableism because it focuses on observable legally forbidden discrimination and the relatively isolated acts of individuals – the kind that commentators have described as narrow acts of 'objective discrimination'.<sup>150</sup> It is, therefore, crucial to reiterate how discrimination cannot be resolved entirely if the focus remains on abstract and isolated categories rather than specific consequences.<sup>151</sup> The danger of exploring the grounds for the distinction instead of examining the impact and aftermath of the distinction is that it does not reflect the lived realities and sensitivity to the actual experiences of disabled women.

148 Pothier (n 137 above) 56.

149 Durojaye & Owoeye (n 73)76.

150 Pothier (n 137 above) 56.

151 P Uccellari 'Multiple discrimination: How law can reflect reality' (2008)1 *Equal Rights Review* 24.

## 5 Recognising intersectional discrimination: Disability as an intersectional ground under international law

This section looks at how intersectional discrimination is approached by two international human rights treaties: the CRPD and the African Charter on Human and Peoples' Rights (African Charter).

### 5.1 The Convention on the Rights of Persons with Disabilities (CRPD)

Unlike previous human rights treaties, the CRPD is the first human rights treaty to recognise the intersectional discrimination that disabled women face daily explicitly.<sup>152</sup> Literature abounds that supports this assertion.<sup>153</sup> In its Preamble, for example, the CRPD drafters acknowledged

the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination based on race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.<sup>154</sup>

Further, the CRPD forbids discrimination against disabled people 'on all grounds'.

Specifically, General Comment 3 issued by the Committee on the Rights of Persons with Disabilities (CRPD Committee) recognises intersectional discrimination faced by disabled women and girls.<sup>155</sup> The CRPD Committee explained the susceptibility of disabled women and girls to intersectional discrimination because of their multidimensional identities.

However, although it is clear that the CRPD considers the intersectional discrimination experienced by disabled women, Ribet points out that this intersectional consideration is weak. For her, the

152 Preamble and art 6 of the CRPD.

153 G de Beco 'Intersectionality and disability in international human rights law' (2020) 24 *The International Journal of Human Rights* 593 at 596. G Beco 'Protecting the invisible: An intersectional approach to international human rights law' (2017) 17 *Human Rights Law Review* 633 at 638.

154 Preamble of the CRPD.

155 CRPD Committee General Comment 3: Article 6: Women and girls with disabilities (2016) UN Doc CRPD/C/GC/3 dated 2 September 2016 para 5. It recognises that disabled women themselves are not homogenous.

intersectional lens adopted by the CRPD Committee is weak because it is a response to law's essentialist identity tendencies alone.<sup>156</sup>

The Nigerian government ratified the CRPD and its Optional Protocol.<sup>157</sup> Its ratification makes it safe to assume the government has expressed commitment to protect disabled women and girls from intersectional discrimination in Nigeria. However, this commitment can be rightly questioned. These doubts are valid given that since the ratification of the instrument, Nigeria is yet to domesticate the CRPD into local law and fulfil its reporting obligations. Furthermore, there is no provision in the Nigerian Constitution like section 233 of the South African Constitution, allowing courts to defer to international law when making decisions.

## 5.2 The African Charter on Human and Peoples' Rights (African Charter)

Nigeria ratified the African Charter in 1983.<sup>158</sup> Unlike the CRPD, the African Charter is part of Nigerian local law by the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.<sup>159</sup> By this domestication, some commentators have pointed to *Abacha v Fawehinmi*<sup>160</sup> to argue that this Treaty can be enforced in the same way as Chapter 4 of the Nigerian Constitution. For instance, in that case, the Supreme Court, the highest court of the land, had decided that the African Charter, having been domesticated into local law, could be used by Nigerian courts to apply and grant remedies to human rights infringements under the instrument. This judgment makes the rights under the Treaty justiciable.<sup>161</sup>

If the previous argument is to be trusted, it makes sense to briefly analyse how the African Charter approaches the intersectional encounters of the disabled Nigerian woman. Article 2 of the African Charter, for instance, provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any

156 B Ribet 'Emergent disability and the limits of equality: A critical reading of the UN Convention on the Rights of Persons with Disabilities' (2011) 14 *Yale Human Rights and Development Law Journal* 155 at 159 & 178.

157 Nigeria signed and ratified both the Convention and its Optional Protocol on 30 March 2007 and 24 September 2010 respectively.

158 ACHPR 'Ratification table' <https://www.achpr.org/ratificationtable?id=49> (accessed 20 September 2021).

159 African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act, 1990.

160 *Abacha vs. Fawehinmi* Case SC45/1997 (2000) 6 NWLR 228, Nigeria Supreme Court (28 April 2000).

161 I Ikimi 'Development of the human rights of women in cultural milieu' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 58.

kind such as ... sex.... or other status ... Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.<sup>162</sup>

This provision is significant. It stipulates that rights are to be enjoyed without any distinction of any kind, such as sex. Simply put, the provision can be interpreted to mean that Nigeria must ensure that all individuals, including women with disabilities, are equal before the law and that discrimination against women because of their sex/gender is forbidden. In addition, with the *other status*<sup>163</sup> phrasing, although 'disability' is not explicitly mentioned in the prohibited list, it has been included implicitly. Thus, it is possible to speculate that the African Charter has allowed some form of intersectional analysis as the phrasing; *other status* provides for a degree of leeway to accommodate new forms of discrimination that could include intersectional discrimination.<sup>164</sup>

Another article that deals specifically with equality and non-discrimination of women is article 18(3). It provides that Nigeria as a state party shall prohibit every form of discrimination against women – and the child.<sup>165</sup> Article 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'<sup>166</sup>

This article is significant because it represents the first time the 'disabled' is mentioned in the Treaty. Unfortunately, since it does not define disability, there is an assumption that there is a consensus understanding of the 'disabled'. Section two shows that this is misleading as disability is still a highly contested and fluid term. In addition, this provision accords the 'disabled' *special measures of protection*. It is possible to speculate that the disabled are viewed from what Oyaro refers to as a rudimentary medical understanding of disability from the language choice.<sup>167</sup> As he explains, the use of the language '*special care*' and '*special measures of protection*' in the article indicates a medical understanding of disability almost to the exclusion of inherent rights.<sup>168</sup> By this article, the specific and intersectional encounters of the woman who could be disabled in multiple ways other than just the medical sense are obscured from view. It is not just about the obscurity of her encounters, but she practically disappears, and her intersectional encounters, unvoiced. Finally, the article also glaringly lumps the needs of the aged and the disabled together to suggest that one can only be disabled when one is aged, or one cannot be aged without being disabled.

162 Art 2 of the African Charter.

163 As above (emphasis added).

164 Truscan & Bourke-Martignon (n 123) 109.

165 Art 18(3) of the African Charter.

166 Art 18(4) of the African Charter.

167 LO Oyaro 'Africa at crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30 *American University International Law Review* 347.

168 As above.

Nonetheless, it is essential to note that the intersectional discrimination of disabled women is likely to remain unrecognised. This situation is likely to occur because the African Charter's domestication hardly holds any promise if critics, pointing to the same case of *Abacha*, argue that the supremacy of the Nigerian Constitution and particularly section 42 is to be upheld over every other law, including international treaties.<sup>169</sup>

## 6 Conclusion

The above analysis demonstrates the problems that Nigeria's formalistic perspective has presented for disabled women. Because it focuses on the prohibited grounds of discrimination, section 42 is limited to addressing and responding adequately to the complex and intersectional forms of oppression and discrimination that disabled women encounter. The anti-discrimination section's problem is its failure to recognise the disabled woman's intersecting grounds of discrimination. I have demonstrated that disability is overlooked in the Nigerian Constitution or reduced to a liberal conception of discrimination, where acknowledging discrimination is only a matter of recognising difference. The argument developed in the paper shows that although disability has now been recognised as a ground for non-discrimination in Nigeria, an approach that focuses on grounds will reinforce the poor use and representation of identities relative to the complexity of identities and experiences.

Therefore, the question is whether Nigeria's anti-discrimination law has any value at all. Nigeria's legal approach is not necessarily useless,<sup>170</sup> but it becomes a problem when used in a formalistic manner that Nigeria adopts. Without a careful understanding of the grounds in anti-discrimination law, an analysis of discrimination is limited. An understanding of the dynamics of the grounds is needed to foster a relational understanding of discrimination. This position is consistent with Pothier's point that an understanding of the variety of ways in which discrimination functions will lead to the emergence of a more complex and comprehensive appreciation of equality.<sup>171</sup>

169 D Peters 'The domestication of international human rights instruments and constitutional litigation in Nigeria' (2000) 18 *Netherlands Quarterly of Human Rights* 357.

170 In another article, I discuss Nigeria's anti-discrimination law fully and how it protects disabled women. The scope of this paper is limited to an analysis of sec 42 of Nigeria's 1999 Constitution.

171 Pothier (n 137 above) 56.

Some suggestions can be made from the preceding arguments for developing an intersectional analysis concerning the right to non-discrimination in section 42. First, significant research supports the idea that intersectional discrimination should be a separate analogous category on its own. The Supreme Court of Canada's decision in *Law v Canada*<sup>172</sup> supports this claim. The significance of the *Law* case lies in its reasoning, as suggested by Aylward. In her analysis, she notes that an intersectional discrimination claim by disabled women and their sexual assault and rape encounters could be expressed as a distinct form of discrimination based on stereotypes about disabled women's sexuality.<sup>173</sup> According to her, for intersectional claims, the starting point should be a discourse of the various forms of discrimination, followed by an intersectional analysis of the particular form(s) present in the case at hand, rather than as additions to the discrimination encountered by heterosexual, non-disabled, middle-class women, for example.<sup>174</sup>

In the Nigerian context, an intersectional analysis helps formulate an anti-discrimination law that addresses the reality of different women's lives while helping the courts produce a suitable solution in the circumstances. An intersectional analysis also assists with an increased understanding and revelation of oppression in Nigerian society, its underlying roots and the roles individual Nigerians could play in perpetuating oppression. The counter-argument to this suggestion might be that it still relies on categories, which have been challenged. However, the critical thing to note is that while there is still value in categorisation, disabled women do not fit into rigid categories. Therefore, the categorisation needs to be fluid, open-ended and allowed to intersect. Thus, the list of grounds in section 42 must become more open-ended in a manner that pays attention to the fact that discrimination can occur based on more than one ground and can occur based on several intersecting grounds.

Finally, part of the crucial attention to grounds/characteristics involves recognising the importance of the intersection of grounds/characteristics and resisting the legal bias that concentrates on a single ground/characteristic. Such tendency will lead to falling into the traps of categorisation and compartmentalisation. Moreover, intersecting grounds bring to the fore the idea that discrimination can occur in multiple directions simultaneously.

172 CA Aylward 'Intersectionality: Crossing the theoretical and praxis divide' (2010) 1 *Journal of Critical Race Inquiry* 40.

173 As above.

174 Aylward (n 172) 40-41.

# CHAPTER 6

## ‘THE DEVIL IS IN THE DETAILS’: ENSURING PARTICIPATION AND OWNERSHIP OF DEVELOPMENT PROGRAMMES FOR PERSONS WITH DISABILITIES IN MOZAMBIQUE

Jorge Manhique\*

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### Summary

*In recent years, the issue of ownership of development cooperation programmes has gained centre stage among donors and recipient governments. This interest has been driven by a concern shared among donor and recipient countries for making aid more effective. Previous research on disability and development has exposed the precarious conditions under which persons with disabilities live, revealing the systemic inequalities between those with and without disability. This research supported the case for increased funding for persons with disabilities through international cooperation, aimed specially at the poorest regions of the world. Nonetheless, we know from previous research that international cooperation may produce perverse results by weakening democratic processes in recipient countries. Still unexplored in the literature of disability and development are the conditions necessary for international cooperation to support the flourishing of a democratic culture in recipient countries. The present paper contributes to this important debate by examining the extent to which those programmes support a dialogue between civil society organisations (CSOs) in general (particularly organisations for persons with disabilities) and state institutions. Primarily, this paper focuses on two ongoing projects in the domain of gender-based violence and social protection, both funded by the European Union (EU) and implemented in Mozambique. The paper draws upon the perspective of the key stakeholders involved in the implementation of those programmes, through semi-structured interviews, to highlight the centrality of the political economy analysis and data disaggregation to ensuring participation and ownership of development programmes by persons with disabilities in Mozambique.*

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# 1 Introduction

Previous research on disability and development has exposed the precarious conditions under which persons with disabilities live, exposing the systemic disadvantage between those with and without disability,<sup>1</sup> a phenomenon termed the ‘disability and development gap’ by Groce and colleagues.<sup>2</sup> These studies were instrumental in raising awareness, among development actors, of the plight of persons with disabilities all over the world, with a particular focus on the so-called Global South, where an estimate of 80 per cent of people with disabilities live. Further research complemented and reinforced these conclusions, pointing to gaps in funding to disability issues, and revealing, for instance, that less than 0.5 per cent of all Official Development Assistance (ODA), between 2014 and 2018 (\$3.2 billion) was aimed at disability inclusion,<sup>3</sup> and only 3 per cent of OECD human rights funding went to disability rights issues in 2017.<sup>4</sup> Additional research in the area has exposed the fact that persons with disabilities are traditionally excluded from the design and implementation of development programmes.<sup>5</sup>

One of the guiding principles in international cooperation is the ownership of development programmes.<sup>6</sup> However, in practice, international cooperation can produce perverse results. For instance, studies that assessed the participation of persons with disabilities in national Poverty Reduction Strategy Papers (PRSPs) suggest that their involvement was limited, and in general they remained invisible.<sup>7</sup> While in theory the PRSP process aimed to enhance ownership participation and

- 1 N Groce et al ‘Bridging the gap examining disability and development in four African countries’ (2018) <https://reliefweb.int/report/world/bridging-gap-examining-disability-and-development-four-african-countries-0> (accessed 10 May 2021); UN Department of Economic and Social Affairs ‘Realization of the rights of persons with disabilities by, for and with persons with disabilities, UN flagship report on disability and development’ (2018) [www.un.org/development/desa/disabilities/publication-disability-sdgs.html](http://www.un.org/development/desa/disabilities/publication-disability-sdgs.html) (accessed 10 May 2021).
- 2 N Groce & M Kett ‘The disability and development gap’ Leonard Cheshire Disability and Inclusive Development Centre Working Paper Series: No 21 (2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3385372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385372) (accessed 15 May 2021).
- 3 D Walton ‘Fact sheet: Disability-inclusive ODA: Aid data on donors, channels, recipients’ (3 July 2020) <https://devinit.org/resources/disability-inclusive-oda-aid-data-donors-channels-recipients/> (accessed 12 May 2021).
- 4 CANDID & HRFN ‘Advancing human rights: Annual review of Global foundations grantmaking – 2018 key findings’ (2021) [www.issuelab.org/resources/38475/38475.pdf](http://www.issuelab.org/resources/38475/38475.pdf) (accessed 24 May 2021).
- 5 International Disability Alliance ‘Preliminary results of the first Global Survey – December 2018 to January 2019’ (2019) [www.internationaldisabilityalliance.org/global-survey-preliminary-results-2019](http://www.internationaldisabilityalliance.org/global-survey-preliminary-results-2019) (accessed 28 May 2021).
- 6 OECD ‘Paris Declaration on Aid Effectiveness’ (2005) [www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm](http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm) (accessed 30 December 2021).
- 7 A Dube ‘Participation of disabled people in the PRSP/PEAP process in Uganda’ (2005) *Disability Knowledge and Research Programme* <https://gsdrc.org/document-library/participation-of-disabled-people-in-the-prsppeap-process-in-uganda/> (accessed 24 May 2021).

accountability, its design and implementation suggest that governments were more concerned with satisfying donor requirements and deadlines than genuinely committed to meaningful involvement and accountability towards their citizens.<sup>8</sup> In this respect, international cooperation may contribute to the democratic deficit.<sup>9</sup> Conversely, development agencies can leverage their influence by establishing bridges between civil society organisations construed more broadly, and the recipient government. The history of the PRSP process in Africa and Asia evinces examples of development agencies acting as facilitators, by bringing together government and local civil society organisations (CSOs) including OPDs to work alongside.<sup>10</sup> As such, it is important to question the very nature of international development cooperation programmes and discuss explicitly the type of cooperation and conditions that support the development of a democratic culture. The present paper contributes to this important debate by examining the extent to which those programmes support dialogue between CSOs in general, and DPOs in particular, with state institutions.

This paper proceeds as follows. The first section presents the context of the emergence of ownership, emphasising its importance in ensuring aid effectiveness. Additionally, it discusses the centrality of participation in ensuring ownership. The second section, focusing on the General Comment 7 of the Committee on the Rights of Persons with Disabilities (the Committee), articulates specific state party obligations to closely consult and actively involve persons with disabilities in decision-making processes related to the Convention, and clarifies the role of international cooperation. Critically, the section presents a framework for the inclusion and participation of persons with disabilities, which informs this paper. The third section presents and discusses the findings. The paper concludes by highlighting its contribution to the debate on aid effectiveness, ownership and participation within the field of disability and development.

## **2 Aid effectiveness: From Rome to Accra**

Aid effectiveness has gained centre stage over the past 15 years since the adoption of the Paris Declaration on Aid Effectiveness in 2005. Preoccupation with aid effectiveness grew from the realisation that aid is heavily driven by donors, resulting in deficiencies in the way it is delivered.

8 TN Mwendwa et al 'Mainstreaming the rights of persons with disabilities in national development frameworks' (2009) 21 *Journal of International Development* 662.

9 See, for instance, a report commissioned by the UK Department for International Development. It found that international development cooperation bolstered the influence of donors to the 'detriment of Parliament and CSO', therefore undermining government accountability towards its citizens. E Macamo 'Political governance in Mozambique: Final report' (June 2006) [www.open.ac.uk/technology/mozambique/sites/www.open.ac.uk.technology.mozambique/files/pics/d70313.pdf](http://www.open.ac.uk/technology/mozambique/sites/www.open.ac.uk.technology.mozambique/files/pics/d70313.pdf) (accessed 30 December 2021).

10 D Fritz et al 'Making poverty reduction inclusive: Experiences from Cambodia, Tanzania and Vietnam' (2009) 21 *Journal of International Development* 673.

Chief among these hindrances is the fact that aid programmes were poorly designed for the local context, competing donor agendas in a single country, leading to limited impact of development efforts.<sup>11</sup>

At the turn of the millennium, in the framework of the Millennium Development Goals (MDGs), donor and recipient countries came together to address the issue of aid effectiveness, that is, how to maximise the impact of aid in recipient countries. For the first time in Rome in 2003, developing countries, donor countries, and the heads of multilateral and bilateral development institutions, came together in the framework of the Development Assistance Committee (DAC) to outline the principles of aid effectiveness.<sup>12</sup> The Rome Declaration paved the way to the 2005 Paris Declaration on Aid Effectiveness. The Paris Declaration is built around five core principles, namely: Ownership, Alignment, Harmonisation, Managing for Development Results, and Mutual Accountability.<sup>13</sup> Each principle is operationalised by a set of indicators (12 in total).<sup>14</sup> Thus, the principle of Ownership, arguably the cardinal principle of aid effectiveness, states that:

**OWNERSHIP ...**

Partner Countries Exercise Effective Leadership over their Development Policies, and Strategies and Co-Ordinate Development Actions

14. **Partner countries** commit to:

- Exercise leadership in developing and implementing their national development strategies through broad consultative processes.
- Translate these national development strategies into prioritised results-oriented operational programmes as expressed in medium-term expenditure frameworks and annual budgets (Indicator 1).
- Take the lead in co-ordinating aid at all levels in conjunction with other development resources in dialogue with donors and encouraging the participation of civil society and the private sector.

15. **Donors** commit to:

- Respect partner country leadership and help strengthen their capacity to exercise it.<sup>15</sup>

The Rome and Paris Declarations succeeded in galvanising both donors and recipient countries to introduce reforms aimed to make the aid industry more effective. For instance, recipient countries embarked on a process to draft national development plans or PRSPs, one of indicators of ownership according to the Paris Declaration. The PRSP was employed in

low-income countries to operationalise the MDGs, constituting a condition for those countries to qualify for debt relief.<sup>16</sup> The aim of PRSP

11 T Carothers 'The deeper struggle over country ownership' in OECD *A governance practitioners' notebook: Alternative ideas and approaches* (2015).

12 OECD 'Rome Declaration on Harmonisation' (2003).

13 Paris Declaration on Aid Effectiveness (n 6).

14 See section III of the Paris Declaration on Aid Effectiveness (n 6).

15 Paris Declaration on Aid Effectiveness (n 6).

was to foster local ownership of development programmes; participation of local actors, specifically groups in a vulnerable situation; and accountability and transparency, through a functional and capable governance system.<sup>17</sup> Despite the new dynamics created by the new discourse on aid effectiveness, critics pointed out the excessive focus on procedures to promote ‘harmonization and alignment’ between donors and recipient countries.<sup>18</sup> While acknowledging its importance, its critics maintain that the excessive focus on procedure may overlook the fact that ‘aid Effectiveness is a political issue’.<sup>19</sup> In this connection, due prominence must be granted to ‘the factors on both sides of the aid relationship that can work against more effective delivery and put in place incentives that support it’.<sup>20</sup>

Furthermore, others have criticised the assumptions contained in the blueprint of the Paris Declaration. Faust argues that the ‘vision’ that supports the Paris Declaration ‘ignores the political, iterative [competitive] and experimental character of governance endogenous to democratic settings, which leave little room for encompassing ownership with regard to far-reaching policy reforms’.<sup>21</sup> Instead, he argues, the focus must be on ‘procedural ownership – a consensus about core institutional features of democracy and individual rights regarding the basic institutions that guide the political process’.<sup>22</sup> However, while stable democracies might be in better position to achieve ‘encompassing ownership’ – the ability to reach consensus of policy content – most emerging democracies (a description that characterises the bulk of recipient countries) are still struggling to set up and agree on the rules of the game.<sup>23</sup>

As ownership, participation in the design and implementation of development programmes has emerged as a crucial principle of aid effectiveness<sup>24</sup> and process indicator of ownership. This stems from the belief that ‘aid will be most effective if its ultimate beneficiaries are

16 The Heavily Indebted Poor Countries (HIPC) Initiative was launched in 1996 by the International Monetary Fund and World Bank ‘with the aim of ensuring that no poor country faces a debt burden it cannot manage’; see IMF ‘Factsheet: Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative’ (23 March 2021) [www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative](http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative) (accessed 10 May 2021).

17 M Elkins et al ‘Are Poverty Reduction Strategy Papers associated with reductions in poverty and improvements in well-being?’ (2018) 54 *The Journal of Development Studies* 377.

18 UN Economic and Social Council ‘Background study for the development cooperation forum: Towards strengthened framework for aid effectiveness’ (April 2008).

19 AK Paksi ‘Aid effectiveness agenda and the politics of ownership in donor-recipient relationships’ (2019) 3 *Islamic World and Politics* 537.

20 UN Economic and Social Council (n 19).

21 J Faust ‘Policy experiments, democratic ownership and development assistance’ (2010) 28 *Development Policy Review* 515.

22 Faust (n 22) 526.

23 As above.

24 F Zimmermann ‘Ownership in practice’ Report of informal experts’ workshop, Paris: OECD (September 2007).

consulted and engaged in defining its priorities'.<sup>25</sup> Critics have pointed out that the process that led to the Paris Declaration was 'state centric', did not engage the 'full range of stakeholders', notably CSOs.<sup>26</sup> Critically, they pointed out that the ownership indicator, 'which requires countries to have "operational development strategies"', was linked to the World Bank's assessment of countries' PRSPs, a process which 'had been accused of taking a tokenistic approach to civil society engagement'.<sup>27</sup>

This lack of inclusiveness has reverberated at the national level, where CSOs grew increasingly sceptic about the process of drafting the national development plans. Accordingly, critics contend that the process was still primarily driven by donors, and less by a genuine motivation to meaningfully include the most marginalised groups.<sup>28</sup> Empirical evidence corroborates the lack of facilitating conditions in recipient countries, namely, limited technical capacity among OPDs to influence the process, tight timelines for consultation, lack of coordination among government departments, and clarity about responsibilities to implement disability policy.<sup>29</sup>

The Accra Agenda for Action (2008) attempted to redress some of these critical issues in at least two ways. First, the Accra Agenda for Action sought to 'broaden country-level policy dialogue on development' by explicitly calling on recipient governments to work more closely with parliaments, local authorities and CSOs in preparing, implementing and monitoring national development policies and plans.<sup>30</sup> Concertedly, the Accra Agenda called for donors' commitment to support efforts to increase the capacity of development actors (mentioned above) including 'research institutes, media and the private sector – to take an active role in fostering dialogue on development policy'.<sup>31</sup> Second, the Accra Agenda for Action emphasised the need to create 'strong institutions, systems, and local expertise', as the necessary conditions to enable recipient countries to 'fully own and manage their development processes'.<sup>32</sup>

The Accra Agenda for Action introduced several additional commitments. Crucially, it enjoined both recipient and donor's countries to 'ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability'.<sup>33</sup> The latter commitment provides the

25 Zimmermann (n 25) 6.

26 UN Economic and Social Council (n 19).

27 Zimmermann (n 25).

28 Dube (n 7).

29 K Dube 'Causes and effects of claims for rights: Why mainstreaming in Africa matters' in M Berghs, T Chatika & K Dube (eds) *The Routledge handbook of disability activism* (2020) 435-450.

30 OECD 'Accra Agenda for Action' (2008) para 13(a).

31 Accra Agenda for Action (n 31) para 13(b).

32 Accra Agenda for Action (n 31) para 14.

basis for mainstreaming disability issues in development cooperation programmes. In this connection, the CRPD provides further guidance in relation to the inclusion and participation of persons with disabilities in international cooperation programmes (article 32), as discussed in the next section.

### **3 Inclusion and participation of persons with disabilities in international cooperation**

The present section articulates the obligations attached to specific state parties to closely consult and actively involve persons with disabilities in decision-making processes as related to the Convention, and clarifies the role of international cooperation. Outlined below is the relevant framework, formulated on the basis of General Comment 7 of the Committee (GC7),<sup>34</sup> to ensure that persons with disabilities are meaningfully consulted and actively participate in public decision-making process.

Although article 4(3) and the GC7 deal primarily with the inclusion of persons with disabilities at the national level, I argue that their remit extends to the context of international cooperation (see article 32). In this respect, the focus is on the extent to which international cooperation supports the given framework, and ultimately the realisation of objectives of the Convention (article 32(1)). Accordingly, in reading GC7, four main pillars can be identified.<sup>35</sup>

First, state parties must create an enabling legal framework, conducive to the inclusion and participation of persons with disabilities. As such, state parties must draft and approve laws that enable persons with disabilities to create, register and run their own association; moreover, the legal framework must safeguard the rights of associations to represent their constituency, in the design, implementation, monitoring and evaluation of policies and laws. The relevant laws must also ensure that organisations of persons with disabilities have access to funding from different sources, without compromising their autonomy in deciding their advocacy agenda.<sup>36</sup> Moreover, the laws must bind state authorities to consult and actively involve persons with disabilities, including women, girls and

33 Accra Agenda for Action (n 31) para 13(c).

34 CRPD Committee General Comment 7 on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention (2018) UN Doc CRPD/C/GC/7 dated 9 November 2018.

35 General Comment 7 presents a complex framework, which includes state party obligations, as well as specific operational guidance and exemplification to ensure inclusion and participation of persons with disabilities. The list presented in this paper is not exhaustive. Rather, I propose identifying its main elements clustered into viable categories to fit the framework of the present paper.

36 Para 61(e) of General Comment 7.

children with disabilities. Lastly, the law must grant persons with disabilities seats in institutionalised bodies, including temporary ones, at the local and national level.<sup>37</sup>

Second, state parties are enjoined to prohibit practices likely to discriminate against the rights of persons with disabilities to be closely consulted and actively involved in the decision-making processes related to the Convention.<sup>38</sup> State parties must adopt and implement legal and regulatory frameworks and procedures to ensure full and equal involvement of persons with disabilities, through their representative organisations, in public decision-making processes;<sup>39</sup> and must put in place measures (through policy and other legal means) ensuring that persons with disabilities are not deterred from participating, and are adequately consulted by third parties (family members, service providers, etc).<sup>40</sup> The latter requirement entails, among other consequences, the raising of awareness in the general public concerning the rights and capabilities of persons with disabilities to participate. It also entails that OPDs must be trained to increase their advocacy competences and human rights knowledge.<sup>41</sup> Moreover, state parties must provide necessary accommodation and support to ensure all persons with disabilities, including women, girls and children with disabilities, are able to participate in the design and implementation of laws and policies and other decision-making processes that affect their lives. This includes, for instance, the provision of sign language and braille for those with hearing and visual impairment, as well as disability and age assistance. At the heart of this dimension is the concept of inclusive equality elaborated by the CRPD Committee in its General Comment 6. Accordingly, inclusive equality embraces a substantive model of equality, which 'seeks to address structural and indirect discrimination and takes into account power relations'.<sup>42</sup> The concept of inclusive equality encompasses:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity.<sup>43</sup>

Third, state parties must ensure that the venues where consultation processes take place are inclusive and accessible to persons with

37 Para 54 of General Comment 7.

38 Para 51 of General Comment 7.

39 Para 53 of General Comment 7.

40 Para 52 of General Comment 7.

41 Para 60 of General Comment 7.

42 Para 10 of CRPD Committee General Comment 6 (2018) on equality and non-discrimination (2018) UN Doc CRPD/C/GC/6 dated 26 April 2018.

43 Para 11 of General Comment 6.

disabilities. As mentioned above, the consultation process must enable meaningful engagement with established groups, as well as marginalised groups who might not be formally organised. Therefore, state parties must adopt creative strategies to reach out to diverse constituencies of persons with disabilities, including marginalised groups, not merely relying on traditional generic and online consultations. In circumstances where the unavailability of transport might prevent persons with disabilities from participating, state parties must provide financial support to cover those and other consultation expenses.<sup>44</sup> Moreover, state parties must provide ‘meeting assistance and support’ to persons with psychosocial and intellectual disabilities to be able to participate substantially.<sup>45</sup> Finally, state parties must ensure access to information (CRPD article 9 and 21, as a pre-condition for participation) in accessible formats, including through Information and Communication Technology for persons with disabilities.<sup>46</sup>

Fourth, it is important to ensure the transparency and accountability of consultation processes. The first requirement includes the allocation of sufficient time for consultation, considering that many of the organisations of persons with disabilities have limited human, material and financial capacities. Moreover, state parties are exhorted to engage in good faith with organisations of persons with disabilities, according to the demands of mutual respect and giving due weight to their contribution.<sup>47</sup> Critically, public consultations with OPDs should ‘aim to reach collective agreement’ [that] ‘respond[s] to the diversity of persons with disabilities’.<sup>48</sup> Finally, it is important to ensure proper accountability. As such, the law must create mechanisms that enable persons with disabilities to seek redress and challenge decisions adopted without their meaningful involvement. This includes both administrative and judicial mechanisms, which must be embedded in ‘the legal frameworks governing the consultation and involvement of organisations of persons with disabilities, and national anti-discrimination legislation, at all levels of decision-making’.<sup>49</sup> Moreover, these mechanisms must also compel state parties and other entities to explain the rationale of certain decisions, and the extent to which the views of person with disabilities were considered.<sup>50</sup>

The figure presented below sums up the framework from a CRPD perspective. In this framework, the role of international cooperation is construed more broadly, according to the extent to which it supports the goals and purposes of the Convention. On a narrower construal, it shows the extent to which the different dimensions are enabled to operate

44 Para 46 of General Comment 7.

45 As above.

46 Para 45 of General Comment 7.

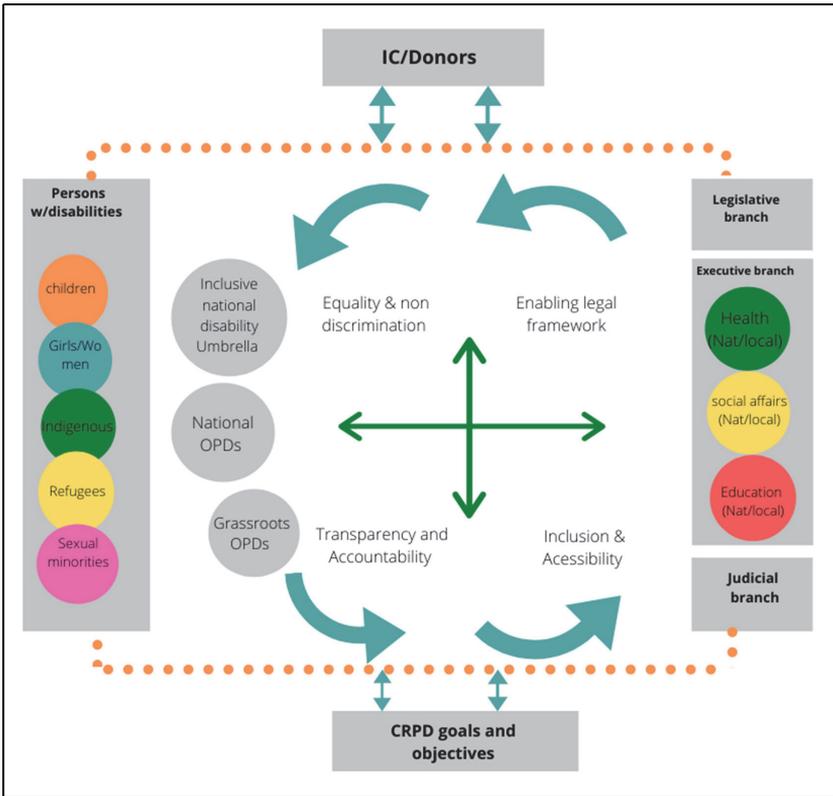
47 Para 48 of General Comment 7.

48 Para 47 of General Comment 7.

49 Para 65 of General Comment 7.

50 Para 48 of General Comment 7.

independently, highlighting their articulation into a system intended to ensure the meaningful participation of persons with disabilities in development programmes.



**Figure 1: Framework on the inclusion and participation of persons with disabilities in international development cooperation.<sup>51</sup>**

The inner circle represents the first level of analysis, depicting the relationship between state institutions and persons with disabilities through their representative organisations. When necessary, state institutions may directly engage persons with disabilities to ensure diversity (illustrated by the dotted lines). Here, disability identity intersects

51 Adapted from: A Cote 'The unsteady path – Towards meaningful participation of organisations of persons with disabilities in the implementation of the CRPD and SDGs' (2020) & the CRPD Committee General Comment 7.

with other identities (shown by the left column). The four pillars or dimensions of participation that enable this relationship to occur are presented at the centre of the circle (Enabling legal framework; Equality and non-discrimination; Inclusion and Access; and Transparency and Accountability). The second level represents inputs from international cooperation programmes, with the view to ensuring that the process runs smoothly at the national level, therefore contributing to strengthening the four pillars, and ultimately to the achievement of the CRPD goals and objectives.

It is important to reiterate that the figure above encapsulates a bare-bones theoretical version of the framework, which, although inspired from the General Comment 7 and CRPD jurisprudence, does not attempt to be exhaustive. In practice, however, the framework is far more complex. As noted in article 32(1) of the CRPD, international cooperation may include a range of stakeholders, such as ‘international and regional organisations’, but also UN agencies and the private sector. The latter actors (and not state institutions) may be the ones who implement development programmes, and are therefore responsible for ensuring inclusion and participation for those with disabilities. Nevertheless, regardless of the practical circumstances of implementation, the four dimensions highlighted above create the necessary regulatory framework for the inclusion and participation of persons with disabilities in development cooperation programmes. The present paper, therefore, presupposes the normative framework outlined in Figure 1.

## **4 Programme characterisation**

This paper is subsumed under my ongoing PhD research project focusing on the inclusion and participation of persons with disabilities in international cooperation development programmes. Primarily, the research focuses on two EU funded development projects in the domain of gender-based violence (the Spotlight Initiative) and social protection in Mozambique.

The Spotlight Initiative is a multiyear programme covering 28 countries across five regions of the globe.<sup>52</sup> Mozambique is one of the beneficiary countries in the African region. The African programme focuses on ‘sexual and gender-based violence (SGBV), early marriage (with linkages to the eradication of harmful practices) and sexual and reproductive health rights (SRHR)’.<sup>53</sup> The programme is implemented by five UN Agencies<sup>54</sup> in collaboration with government agencies and CSOs. In Mozambique, the programme covers three provinces, namely Gaza,

52 Africa (8), Asia (4), Caribbean (6), Latin America (6) and Pacific (4) <https://spotlightinitiative.org> (accessed 14 April 2021).

53 Spotlight Initiative ‘Country programme: Mozambique’ (2018).

Nampula and Manica. It is also implemented at central level (capital), covering, principally, related legislative work. With EU seed funding totalling 500 million euros for a period of four years (2019-2022), the Spotlight Initiative is thought to be the 'largest global effort to end all forms of violence against women and girls'.<sup>55</sup>

The second project, *Monitoria Comunitária Independente (MCI) ao Programa de Subsídio Social Básico (PSSB)* is a five-year project (2018-2023), implemented by a consortium led by *Plataforma da Sociedade Civil Moçambicana para Proteção Social (PSCM-PS)*.<sup>56</sup> The project's objective is to improve the quality and impact of social protection programmes, and promote their transparency through awareness raising, access to information, and active citizen participation in the accountability of social protection programmes, with emphasis on the PSSB. The project has three interrelated components: a Citizen Report, where beneficiaries of PSSB express their views of how the programme is being implemented; Focal Groups, where the main concerns raised by citizens are discussed; and an Action plan, which consists of discussion forums where citizens' concerns are presented to local leaders and service providers. With funding of 2.5 million euros from the EU through the Support Programme of Non-State Actors (PANNE II), the project is implemented in six provinces and a total of ten districts.<sup>57</sup>

These projects have an explicit commitment to the foundational principle of 'leaving no one behind' (LNOB) in common, meaning 'ending extreme poverty in all its forms, and reducing inequalities among both individuals and groups'.<sup>58</sup> To operationalise this commitment, 'explicit and pro-active attempts are needed to ensure populations at risk of being left behind are included from the start'.<sup>59</sup>

## 5 Research approach and methodology

As indicated above, the present paper is part of an on-going PhD research project. The preliminary data in this article was collected through semi-structured interviews. Purposive sampling was used to recruit research participants. Stakeholders involved in the implementation of programmes

54 United Nations Children Fund (UNICEF); United Nations Development Programme (UNDP); United Nations Women (UNW); and United Nations Population Fund (UNFPA).

55 Spotlight Initiative <https://spotlightinitiative.org> (accessed 14 April 2021).

56 The consortium includes the Forum of Mozambican Association of the Disabled (FAMOD); Associação dos Aposentados de Moçambique (APOSEMO); Ação para o Desenvolvimento Comunitário (ASADEC); CEPICI; and APITE.

57 Niassa province: Districts of Lago and Mandimba; Cabo Delgado; Metunge; Montepuez; Tete; Chiuta, Angonia; Sofala; Caia; Muanza; Inhambane; Jangamo; and Inhambane Céu.

58 E Stuart & E Samman 'Defining "leave no one behind"' (2017).

59 As above.

under review were recruited through email invitation to participate in the study. Those include EU Delegation representatives in Mozambique, UN agencies, a network of local CSOs implementing the projects, and government officials. In addition, representative of OPDs were also recruited to participate as research informants (the table below shows in detail the demographic of research informants). Stakeholders were asked to reflect on the strengths and challenges of the programmes under review, including factors affecting the inclusion and participation of persons with disabilities, and the extent to which those programmes contribute to support dialogue between CSOs in general (and DPOs in particular) with state institutions. By 'state institutions', we mean all parts of the executive, legislature and judiciary. In total, 24 interviews were reviewed for this paper. All research informants were anonymised, to deter immediate or potential risks. The quotations appearing in this paper reflect patterns emerging from data, rather than individual responses. In addition to interviews, this paper draws from CRPD jurisprudence, as well as documents pertaining to the programmes under review (programme reports, budget reports, etc).

<b>Informants identified as:</b>	
Women	16
Men	8
Age Group	
18-34	5
35-44	10
45-54	7
55-64	2
Entity/type of informant	
OPD leaders	7
PwD <sup>a</sup> not affiliated in OPDs	5
UN Agencies	5
Donors	2
Mainstream CSOs	4
Government official(s)	1

a. Stands for Persons with Disabilities.

## 6 Findings

The data analysed to date reveals several factors that limit the participation of people with disabilities, preventing them from owning the policies and laws that development cooperation programmes aim to influence. These obstacles are clustered around two major themes; to which I now turn.

### 6.1 The institutional framework

Freedom of association and assembly are constitutionally guaranteed in Mozambique. The exercise of the right to assembly is subject to prior notification to authorities, a loophole which the government has taken advantage of to misinterpret the rights as contingent upon authorisation, and effectively 'disallow protesters on the basis of errors in the organizers' official applications'.<sup>60</sup> While most NGOs can operate without significant legal restrictions, human rights defenders and members of groups perceived as critical of the government policies are systemically the target of severe intimidation. Journalists and researchers are harassed, intimidated, arrested, and detained for reporting on the conflict in Cabo Delgado - a region in the north of the country, which has been targeted by terrorist groups since 2017.<sup>61</sup> OPD leaders have reported difficulties in obtaining legal registration, owing to the high fees involved. While the exact fee is dependent on the size of the organisation statute, one of the leaders interviewed mentioned that his organisation must pay the equivalent of 300 USD. The lack of registration impairs OPDs' ability to operate and obtain funding, additionally affecting small and community-based organisations.

While disability issues are not, as yet, perceived as sensitive issues, OPDs are relatively willing to challenge government policies. Nevertheless, the general climate of intimidation, the lack of legal frameworks enabling CSO groups to participate in public policies debate, and the limited access to information (impacting disproportionately those with hearing impairment), make it difficult for OPDs to participate in and own development programmes, public policies and legislative processes, even when a commitment to LNOB exists. The ongoing process of drafting the Law on the Rights of Persons with Disabilities in Mozambique illustrates this predicament.

60 Freedom House 'Report freedom in the world 2021: Mozambique' <https://freedomhouse.org/country/mozambique/freedom-world/2021> (accessed 4 January 2022).

61 US State Department '2020 Country reports on human rights practices: Mozambique' [www.state.gov/reports/2020-country-reports-on-human-rights-practices/mozambique/](https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mozambique/) (accessed 4 January 2022).

In 2014, the government launched the process of drafting the Law on the Promotion and Protection of the Rights of Persons with Disabilities (the Disability Law), with the aim of domesticating the CRPD. For this purpose, a technical committee was established, tasked with the formulation of a legal draft. The Forum of the Mozambican Association of Persons with Disabilities (FAMOD) was initially invited to be part of the Technical Committee in representation of OPDs. After an initial consultation with OPDs that took place in 2014, the process moved on, without gathering significant input from persons with disabilities. A draft of the Disability Law was considered and approved by the Cabinet in May 2017 and forwarded to Parliament for final approval. However, FAMOD sought to halt the process, on the basis that the proposed law had significant gaps, including limited inclusion and participation of person with disabilities in its diversity.<sup>62</sup> Eventually, Parliament sent back the proposal to its proponent for review, a process which is still underway.

Owing to this intractable situation, CSO groups demand clear procedure and rules to govern public policy making. For instance, the former representative of the Mozambican Bar Association called for a ‘law of laws’ to be passed:

[T]hat is, a law that more clearly defines the process of drafting laws, which ... clearly defines the way in which civil society participates in the process, establishes a mandatory period in which proposals must be available to the public for consultation and contributions, and imposes the obligation to explain the rationale of policy choices. Only then will the recipients of the laws [the citizens] be able to own them [policies].<sup>63</sup>

## **6.2 Programme design**

The review of programmes, documents and related materials (project reports, attendance sheets, budget reports, etc.), as well as the stakeholders’ interviews, suggest that, despite the commitment to ‘leave no one behind’ (LNOB), there is nothing in those programmes to ensure the fulfilment of this principal commitment. For instance, the programmes under review do not address the manner in which the problems identified, affect persons with disabilities, including women, girls and children. Nor do they demonstrate how the proposed actions will address the problems faced by persons with disabilities. As a result, there are no specific indicators or budget lines for support and accommodation, and the monitoring and evaluation tools do not reflect the disability dimension. The stakeholders involved in the implementation of the Spotlight Initiative (UN agencies

62 Westminster Foundation for Democracy ‘Towards inclusive policies for persons with disabilities in Mozambique’ (2019).

63 Cerimónia de Abertura do Ano Judicial 2019 – Intervenção do Bastonário, Flávio Menete [www.oam.org.mz/cerimonia-de-abertura-do-ano-judicial-2019-intervencao-do-bastonario-flavio-menete/](http://www.oam.org.mz/cerimonia-de-abertura-do-ano-judicial-2019-intervencao-do-bastonario-flavio-menete/) (accessed 14 April 2021).

and CSOs) do recognise these serious limitations. Yet they explain these deficiencies by stressing that the main donor (the EU) did not emphasise disability issues in the call for proposals:

UN agencies are usually good in complying with donors' conditions. So, I think that these issues [disability inclusion] were not highlighted in the EU call. Rather the emphasis was on GBV.<sup>64</sup>

Irrespective of donor requirements, UN agencies have an institutional obligation to ensure disability inclusion. The UN Disability Inclusion Strategy provides guidance to agencies within the UN system to advance disability rights, as promoted in the CRPD and other agreed international legal and policy commitment.<sup>65</sup> When asked how the UN Disability Strategy informs the implementation of the Spotlight Initiative, the stakeholder demonstrated a basic unfamiliarity with the Strategy.

These findings also show how political commitments turn out to be empty buzzwords, devoid of meaningful and tangible measurable content. The following statement (from one research informant) clarifies this point:

The problem is that LNOB is just a commitment and not a target ... yes it would be good if it was a target. But in the real world, it would be difficult to materialize in a project with two years of implementation ... So, what I'm saying is, yes, but we would have to leave something out.<sup>66</sup>

This statement illustrates, moreover, the difficulties of designing and implementing a programme aimed at including all the perceived marginalised communities, in a context where both expertise and resources are limited. For instance, the Spotlight Initiative is dominated by women and feminist organisations with relatively little expertise on disability rights. They tend to work together to the exclusion of other population groups. When asked about how the leading organisation went on to form a consortium to implement the Spotlight Initiative, their response was 'because they have been working on the same issue and know each other for long time'.<sup>67</sup> In this relation, it is difficult for outsiders – OPDs who are traditionally marginalised – to be invited to join such a platform.

The governance and implementation structure of both programmes include representatives of groups considered marginalised. The Spotlight Initiative has at the governance level (National Civil Society Reference Group) a woman with disability, who was deliberately recruited to represent persons with disabilities (representatives of other groups, such as

64 Interview with a UN Agency Official.

65 UN Disability Inclusion Strategy, UN Chief Executives Board for Coordination (10 May 2019) UN Doc CEB/2019/1/Add.6 (2019).

66 Response from a UN Agency Official.

67 Response from women's rights organisation implementing the Spotlight Initiative.

LGBTIQ, were also recruited). These representatives, among others, are tasked to provide advice on their areas of expertise. The presence of a person with disability in the Reference Group is frequently presented as evidence of the programme's commitment to disability inclusion and LNOB. Yet in practice, her appointment amounts to tokenism representation, as the person is limited in what she can do to further disability inclusion, given the lack of awareness, resources, and space to advance the cause.

This holds true of the MCI project, also. Despite having a FAMOD delegation as its implementing partner in Niassa province, persons with disabilities are not adequately represented within the committees. Among eight existing committees in Niassa province, only one has a member who identifies himself as person with disability – the Mepapa Committee. There are several reasons for this disproportional lack of representation. First, the Committees were originally established by the District Services for Women Health and Social Action as Children's Protection Committees; and others were established as Water Committees (Comités de Agua). The Children's Committees were originally tasked with addressing issues of early and forced marriages, attending to children in a vulnerable situation, among others, while the Water Committees were tasked with addressing issues of Water Sanitation and Hygiene (WASH). Membership of these Committees 'was volunteer based ... there was no precondition attached, except that there must be representative of children', as observed by one representative of the District Social Services, reflecting on the Children's Committee. The MCI project capitalised on the existing structures – instead of creating new committees – and expanded them (to avoid duplication) to include aspects of social protection. Yet in doing so, the project did not pay sufficient attention to the configuration of these committees, so that their members remain largely the same, and persons with disabilities are seen only as beneficiaries that 'must be taken care of',<sup>68</sup> not as active participants in project implementation. Second, there is a lack of understanding of social protection from a disability rights perspective among Committee members who were trained only on aspects of PSSB – eligibility criteria, and target group, among others. Finally, MCI does not collect disaggregated data on disability, making it difficult to know objectively which groups of persons with disabilities are beneficiaries and participate in the project implementation.

Although implemented by local CSOs, there is no specific role for OPDs in the implementation of the Spotlight Initiative. Implementing organisations were recruited through a call for proposals put forward by UN Women. The requirement and the process itself proved to be exclusionary towards most local organisations, including those with

68 Response from a member of the Social Protection Committee in Mandimba district.

disabilities. To begin with, the call was published in English, and the proposal also had to be submitted in English (the official language in Mozambique is Portuguese). Moreover, the proponents had to be legally registered to be eligible.<sup>69</sup> There was a possibility to apply as a consortium, and indeed at least one group - led by Women and Law in Southern Africa (WLSA Mozambique) – applied, which enabled small organisations, including community-based organisations, to participate. Yet, owing to the fact that the guidance arising from the call for proposals did not go far enough to address issues of disability representation (as it did in relation to community-based organisation), coupled with the putative proponents' lack of awareness, the consortiums did not include OPDs. As result there is no OPDs among the implementing organisations belonging to the Spotlight Initiative. Stakeholders recognise this gap in stating that there ought to have been, in the call for proposals,

specific indication to include representative organisations of persons with disabilities, because what happens in the implementation is that because there is so many things to consider in the project of this nature, these issues [disability] are usually excluded.<sup>70</sup>

Owing to these factors, both projects under review here failed to address existing unequal power relations not only within the disability movement, but more generally. For instance, persons with physical disability, largely ex-combatants with disabilities, or land-mines survivors, are likely to be the beneficiaries of the PSSB. As observed by a representative of Instituto Nacional de Acção Social (INAS), 'Niassa is a land of ex-combatants'. Ex-combatants with disability are relatively privileged within the disability community, because they have received specific protection and benefits, derived from their contribution in the colonial and civil wars. Thus, those who participate are individuals of relatively greater privilege in the community. Even a person with a disability, who is member of the Committee, is on that Committee because he is as local leader. As he puts it, 'I had to be part of the Committee because I'm a local leader, which means I have to know what is being discussed and represent the community'.

## 7 Discussion

Both projects achieved impressive results. Over the past three years (except for 2020), the MCI project contributed to consecutive increases of subsidies to PSSB, raising the share of GDP, from 0.3 in 2015 to 0.7 in

69 UN Women 'Call for proposal EVAWG MZ 2019/001 on ending violence against women and girls' (2019).

70 Response from an official working for a UN agency.

2019, and increasing the number of beneficiaries with disabilities from 4 per cent in 2014 to 5.3 per cent in 2019.<sup>71</sup> Moreover, the project established local and national forums where government, donors and CSOs came together to discuss social protection issues. Likewise, the Spotlight Initiative, ‘strengthened partnerships with civil society government institutions and the EU Delegation, bringing these diverse stakeholders together’ at provincial and national level, as well as facilitated ‘consultations that led to the passage of key legislation such as law on child marriage’.<sup>72</sup>

These developments have contributed to ownership of the law on child marriage by some groups, mainly women and feminist organisations who directly participate in the project implementation (in the case of the Spotlight Initiative). Conversely, because representative organisations of person with disabilities are not included in the project implementation, they are likely to be left out of ownership of the policies and laws that the projects seek to influence. Although there is no desegregated collected data on this phenomenon, both programmes include certain persons with disabilities mostly as beneficiaries.<sup>73</sup> However, it seems that only those that require minimum or no accommodation are more likely to participate, as one informant put it:

Communication is a major obstacle to work with person with visual and hearing impairments ... We are working with the Ministry to develop some material in braille and sign language in the scope of GBV prevention ... now, people with albinism, [physical disability] in principle, are easy to communicate with ... whereas a person with intellectual disability is difficult to know how to interact with them.<sup>74</sup>

Three things need to be considered to ensure participation of persons with disabilities, and ultimately ownership of the very laws and policies that these programmes seek to influence. First, the findings highlight, on one hand, the centrality of a political economic analysis in development cooperation and ownership, as highlighted in relevant literature.<sup>75</sup> For instance, the political economy analysis of the CSO is apt to single out the fact that given the history of exclusion of and stigma towards disability, the disability movement is still somehow disconnected from the mainstream CSOs. It is apt likewise to point to the heterogeneity and internal divergence within the disability movement, and to the fact that there are

71 INAS ‘Relatório Anual 2019’ (2020) & Oxford Management Policy & OIT ‘Avaliação da Estratégia de Segurança Social Básica: Documento de síntese’ (2014).

72 Spotlight Initiative ‘Mozambique annual narrative report’ (2019).

73 Some informants have reported working with persons with disabilities and have used photos of some activities as evidence, although they were unable to provide desegregated data on disability.

74 Response from an official working for a UN Agency.

75 Faust (n 22); and Zimmermann (n 25).

groups that are more marginalised than others.<sup>76</sup> This critical realisation might have led (in the contexts under discussion) to specific strategies and incentives to engage persons with disabilities through their representative organisations or other means. The lack of these crucial insights perpetuates the domination of mainstream groups who are more organised and claim to ‘speak for those without voice’.<sup>77</sup> In this sense, development programmes perpetuate, rather than challenge, the status quo by not addressing power relations within CSOs and society more broadly.

Second, these findings highlight the centrality of data disaggregation if the development community is to take seriously the commitment to LNOB. LNOB needs to be more than a simple nominal commitment. There must be concrete activities and indicators on disability, and a system of monitoring and evaluation able to capture and make sense of the collected data.

Third, there is the need to move beyond awareness of disability to more concrete actions aiming to support disability inclusion in practice. This includes setting up mechanisms and tools to support disability inclusion. This may involve rethinking the typical framework of personnel working in traditional development agencies by including disability focal points, with the aim of bringing in the expertise needed on these issues. Typically, these professionals are ‘highly qualified ... trusted and valued by both international agencies and national authorities, and act as important interlocutors between international and national policy elites, and as gatekeepers to both’.<sup>78</sup> More importantly, it is essential that development agencies and mainstream CSOs open themselves up to engage with persons with disabilities and their representative organisations, as they are the prime sources of knowledge on disability. Fortunately, the new EU Disability Strategy 2021-27 seems to be moving in the right direction, although the details are yet to be pinned down. For instance, through this Strategy, the EU commits ‘to support CSOs to ensure that representatives of persons with disabilities can participate in all relevant processes through specific and inclusive structured dialogues, at EU, partner countries and global level’.<sup>79</sup> But as the age-old wisdom has it, the devil is in the details – as ever, something that in theory seems simple, might in reality be far more complex.

76 Westminster Foundation for Democracy ‘Towards social, economic and inclusive policies for people with disability in Mozambique’ (2020).

77 Response from an official working for a UN Agency.

78 P Kamruzzaman ‘Understanding the role of national development experts in development ethnography’ (2017) 35 *Development Policy Review* 39.

79 European Commission ‘Union of equality: Strategy for the rights of persons with disabilities 2021-2030’ (2021) <https://ec.europa.eu/social/main.jsp?catId=1484> (accessed 4 January 2022).

## **8 Conclusion**

This paper seeks to examine the extent to which development cooperation programmes contribute to supporting the dialogue between CSOs in general, and DPOs in particular, with state institutions, as an indication of the level of ownership by persons with disabilities of these programmes, or the policies and laws they seek to influence. The findings suggest that the programmes under review do promote greater collaboration between CSOs and state institutions, therefore contributing to the ownership of those programmes, policies and laws that these programmes seek to influence. However, despite the existence of a commitment to LNOB, persons with disabilities continue to be excluded, mostly seen as mere beneficiaries, and not as active participants fully able to contribute to the public debate.

The preliminary analysis of the data enabled the identification of two sets of issues that place conditions on the participation of those with disabilities, preventing them of owning the very policies and laws that development cooperation programme aim to influence. This includes the lack of proper legal frameworks and the programme design, which is severely deficient from a disability rights perspective. The findings corroborate previous research that acknowledges the centrality of data and political economy analysis in the practice of participation and ownership. The interest and value of the present paper reside in its contribution of a theoretical framework, based on the CRPD, to understand inclusion and participation of person with disabilities – a key indicator of ownership of development programmes, and ultimately of aid effectiveness.

## ACCESS TO HEALTHCARE FOR PERSONS WITH DISABILITIES IN ESWATINI: A TRIADIC EXPLORATION OF BARRIERS

*Khetsiwe P Masuku, \* Juan Bornman\*\* & Ensa Johnson\*\*\**

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### Summary

*Eswatini ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol in 2012, subsequently developing the National Disability Policy. Regardless of this ratification and the best intentions of the National Disability Policy, healthcare disparities still exist between persons with and without disabilities. This study aims to describe the barriers experienced by persons with disabilities when accessing healthcare services by focussing on the accounts of persons with disabilities themselves, caregivers of persons with disabilities and healthcare professionals. A further aim was to propose recommendations to address these identified barriers. A qualitative case study approach utilising focus groups was employed. Participants for the three focus groups were purposively selected. Data was analysed using a framework approach, employing Nvivo 1.5 qualitative analysis software. Findings revealed that access to healthcare for persons with disabilities was a challenge in Eswatini due to the unavailability of resources in the form of rehabilitation healthcare practitioners and assistive devices; lack of reasonable accommodation especially for persons with visual and communication impairments; stigma and discrimination; transportation costs as a result of the distance of healthcare services; and the lack of social support grants. Recommendations from this study propose an urgent need for*

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*Eswatini to be deliberate in implementing initiatives such as disability conscientisation programmes to address stigma and discrimination and to create an awareness of especially communication and visual disabilities. Intersectoral involvement, community engagement projects as well as addressing policy gaps are essential if Eswatini intends to mitigate these barriers.*

## 1 Introduction

Persons with disabilities account for approximately 15 per cent of the global population with almost 80 per cent of all persons with disabilities living in low-and-middle income countries (LMICs).<sup>1</sup> In Eswatini the prevalence of disability is 16 per cent.<sup>2</sup> Women constitute the majority of persons with disabilities in Eswatini as they make up 58 per cent of the population of persons with disabilities. In total, 82 per cent of persons with disabilities in Eswatini reside in rural areas. Despite having the same healthcare needs as persons without disabilities, persons with disabilities may require additional healthcare as a result of their impairments or the consequences of their impairments.<sup>3</sup> However, access to healthcare continues to be a challenge for this population.<sup>4</sup> As a result, persons with disabilities experience unmet healthcare needs.<sup>5</sup> LMICs such as Eswatini account for the majority of persons with disabilities who experience unmet healthcare needs.<sup>6</sup> These unmet healthcare needs are further compounded in persons with disabilities who reside in rural areas, engulfed by poverty and who have limited access to information, education and healthcare.<sup>7</sup>

Access to healthcare is a broad and complex phenomenon with no single generally acceptable definition.<sup>8</sup> Hence it is unsurprising that various scholars interpret access to healthcare differently. It could be argued that the interpretation of access to healthcare is also influenced by context. For the purpose of this study, access to healthcare is defined using Peters et al's four dimensions framework, as it was developed within the

1 World Health Organisation 'World Report on Disability' (2011) 2.

2 Deputy Prime Minister's Office 'Swaziland National Disability Policy' (2013) 12; S Mavundla 'Country report: Swaziland' (2015) 3 *African Disability Rights Yearbook* 245 at 247.

3 See generally T Shakespeare et al 'Access to healthcare for persons with disabilities' (2018) [www.ohchr.org/documents/Issues/Disability/StandardHealth/BackgroundDoc\\_EGM\\_Righttohealth](http://www.ohchr.org/documents/Issues/Disability/StandardHealth/BackgroundDoc_EGM_Righttohealth) (accessed 12 November 2020).

4 See generally JAK Harrison et al 'Access to healthcare for people with disabilities in rural Malawi: What are the barriers?' (2020) 20 *BMC Public Health* 833.

5 Shakespeare et al (n 3).

6 World Health Organisation 'Human rights and health' (2017) <https://www.who.int/en/news-room/fact-sheets/detail/human-rights-and-health> (accessed 27 December 2021).

7 J Neille & C Penn 'Beyond physical access: A qualitative analysis into the barriers to policy implementation and service provision experienced by persons with disabilities living in a rural context' (2015) 15 *Rural and Remote Health* 3332.

8 See generally B Jacobs et al 'Addressing access barriers to health services: an analytical framework for selecting appropriate interventions in low-income Asian Countries' (2012) 27 *Health Policy and Planning* 288.

LMIC context. In Peters et al's<sup>9</sup> framework it is proposed that access to healthcare is the judicious use of amenities according to the needs of the individual and that access encompasses four dimensions, namely availability, acceptability, financial accessibility and geographical accessibility. Peters et al<sup>10</sup> further emphasise that quality of care is a fundamental element of each of the four dimensions of their framework.

## 2 Evolution of healthcare rights through human rights frameworks

Access to basic healthcare is an essential and non-progressive human right that every living human being should enjoy throughout their lifespan, regardless of race, gender, religion, political beliefs, economic and social conditions.<sup>11</sup> This declaration by the World Health Organisation therefore creates a legal obligation for global, regional and national structures to ensure that the right to healthcare for everyone – most importantly those who have been previously excluded from such services – is protected and upheld. It was thus inevitable that the focus on access as a human rights' issue would be actioned through the development of copious global policies and conventions. For example, in the eighties, the United Nations<sup>12</sup> through the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities declared that disability should be approached from a human rights perspective. Subsequently, access to healthcare for all African citizens is advocated for and emphasised in several articles of the African Charter on Human and People's Rights on the Rights of Persons with Disabilities.<sup>13</sup> Articles 15 and 16 of the Draft Protocol of the African Charter on Human and People's Rights<sup>14</sup> provide for access to healthcare and rehabilitation for persons with disabilities. It is also declared in the draft protocol of the African Charter on Human and People's Rights that, every person with a disability has the right to healthcare and it further mandates states to ensure that appropriate and effective measures are put in place to ensure that persons with disabilities have access to these services on an equal basis with others.<sup>15</sup>

9 DH Peters et al 'Poverty and access to health care in developing countries' (2008) 1136 *Annals of the New York Academy of Sciences* 161.

10 Peters et al (n 9) 167.

11 World Health Organisation (n 1).

12 UN Department of Economic and Social Affairs 'Standard rules on the equalisation of opportunities for persons with disabilities' (1993) <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html> (accessed 27 December 2021).

13 African Union 'Draft Protocol on the African Charter of Human and People's Rights' adopted by the Organisation of African Unity on 27 June 1981, entered into force 21 October 1986.

14 African Charter of Human and People's Rights (n 13).

15 As above.

The development of the Convention of the Rights of Persons with Disabilities (CRPD) in 2006<sup>16</sup> was a momentous landmark in the recognition of human rights for persons with disabilities globally. The CRPD is arguably the most important international human rights' document ever ratified on behalf of persons with disabilities.<sup>17</sup> This is partly because the CRPD outlines and delineates the complete array of human rights that apply to all human beings and centres them in the context of the core existence of persons with disabilities.<sup>18</sup> The purpose of the CRPD is to 'promote, protect and ensure the full enjoyment of all human rights and fundamental freedoms by persons with disabilities and to further promote respect for their inherent dignity'.<sup>19</sup> Articles 25 and 26 pertain to the rights of access to health and rehabilitation for persons with disabilities respectively.<sup>20</sup>

### 3 Healthcare rights framework in Eswatini

Eswatini ratified the CRPD and its Optional Protocol in 2012.<sup>21</sup> To enforce the CRPD, Eswatini developed the National Disability Policy of Eswatini in 2013.<sup>22</sup> Subsequently, the National Disability Bill of Rights and the National Disability Plan of Action were developed in 2014 and 2015 respectively.<sup>23</sup> It is important to mention that to date, the National Disability Bill of Rights is yet to be passed as law which has direct implications for the implementation of the National Disability Policy.<sup>24</sup>

Access to healthcare for persons with disabilities is specifically addressed in sections 4.9 and 4.10 of Eswatini's National Disability Policy.<sup>25</sup> In an analysis of the National Disability Policy,<sup>26</sup> it was established that the policy document had promised access to healthcare to persons with disabilities at primary, secondary and tertiary levels of care. A detailed analysis and findings on the policy analysis is described in Masuku et al.<sup>27</sup> In particular, the policy is committed to ensure the availability of free comprehensive healthcare, assistive devices, rehabilitation and counselling by qualified healthcare personnel at all

16 UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) UN Doc A/RES/61/106 (24 January 2007) <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 27 December 2021).

17 See generally M Perlin 'International human rights and institutional forensic psychiatry: The core issues' (2016) *American Psychological Association* 9.

18 As above.

19 Arts 25 & 26 of the CRPD.

20 As above.

21 Mavundla (n 2).

22 Mavundla (n 2) 255.

23 Mavundla (n 2) 264.

24 As above.

25 Deputy Prime Minister's Office (n 2) 41-44.

26 KP Masuku et al 'Analysing Eswatini's national disability policy reforms: Access to healthcare implications for citizens with disabilities' (2020) (accepted).

27 As above.

levels of state healthcare to persons with disabilities and their families, with reference to affordable healthcare in private healthcare facilities.<sup>28</sup> In the National Disability Policy, specific emphasis was placed on the availability of sexual and reproductive health services for persons with disabilities because historically persons with disabilities in Eswatini have not had access to information and accessibility to services which would enable them to make informed decisions on their sexuality and reproductive health.<sup>29</sup> Community awareness and community mobilisation regarding health promotion to prevent disabilities was further promised in the National Disability Policy. Acceptability was also pledged in the National Disability Policy through advocating for accommodating persons with disabilities such as making alternative communication methods such as sign language available, providing health information in accessible formats and ensuring physical access, for example, wheelchair ramps to buildings.

Prior to Eswatini's ratification of the CRPD, the protection of the rights of every citizen of the country was committed to in the Constitution of the Kingdom of Eswatini.<sup>30</sup> Section 30 of the Constitution particularly focuses on the upholding of the rights of persons with disabilities. Moreover, in section 60 the provision of basic healthcare for every citizen of the country was committed to.<sup>31</sup> Although Eswatini's Constitution does not necessarily make specific reference to access to healthcare for persons with disabilities, it does, however, commit to establishing laws that will ensure that persons with disabilities live productive and meaningful lives in Eswatini.<sup>32</sup>

There is evidence to suggest that globally, there are compliance challenges with the mandates of the CRPD as domestic laws and policies developed and implemented by signatory states in an attempt of domesticating the CRPD, are often not transferred into practice. Ultimately, the vision of the CRPD for persons with disabilities is currently not fulfilled in Eswatini. This challenge is not unique to Eswatini, as other LMICs such as South Africa<sup>33</sup> and Malawi<sup>34</sup> are also struggling with achieving access to healthcare for persons with disabilities. There has been a call for global research targeted towards the CRPD implementation process in LMICs.<sup>35</sup> The results of the lack of implementation of disability

28 Deputy Prime Minister's Office (n2).

29 As above.

30 Constitution of the Kingdom of Swaziland, 1996 (as set out in sec 29 (20) of the Citation of Constitutional Law Act 2006)

31 Sec 60 of the Constitution of the Kingdom of Swaziland.

32 Sec 30 of the Constitution of the Kingdom of Swaziland.

33 See generally M Hussey, M MacLachlan & G Mji 'Barriers to the implementation of the health and rehabilitation articles of the United Nations Convention on the Rights of Persons with Disabilities in South Africa' (2017) 6 *International Journal of Health Policy and Management* 207.

34 Harrison et al (n 4).

35 See generally B O'Hare, D Devakumar & S Allen 'Using international human rights law to improve child health in low income countries: A framework for healthcare professionals' (2016) 16 *BMC International Health and Human Rights* 11.

legal frameworks in LMICs are observed in healthcare challenges. Therefore, despite the ratification of the CRPD, healthcare accessibility remains a challenge for persons with disabilities in Eswatini. To our knowledge, the experiences of persons with disabilities when accessing healthcare services in Eswatini from their own perspective, have not been previously explored. As such, it is important to determine how persons with disabilities, caregivers of persons with disabilities and healthcare professionals experience the access to healthcare for people with disabilities in Eswatini in order to create a triadic understanding of the barriers faced by persons with disabilities.

## 4 Methods

Consistent with the aim of determining the experiences of persons with disabilities when they access healthcare services in Eswatini, a qualitative case study research design was employed.<sup>36</sup> Three focus groups comprising of participants from a range of backgrounds and with varied experiences of disability – specifically in relation to healthcare – were utilised. Focus groups were deemed appropriate to achieve the aim as it encourages engagement, explanations and reasoning about the subject at hand. In this case, access to healthcare for persons with disability, bringing both agreements and differences to the fore.<sup>37</sup> The current study was approved by the Research Ethics Committee of the Faculty of Humanities, University of Pretoria (reference GW20160721HS). The research team comprised of the first author and a MSc student (research fieldworker) who had training in qualitative methods and has experience of living and working in Eswatini.

### 4.1 Participants

Participants were eligible to participate in the study if they were 18 years and older, were either persons with disabilities, caregivers of persons with disabilities or healthcare professionals who had knowledge and/or experience with healthcare access for persons with disabilities. Participants were purposively recruited from three different groups, namely persons with disabilities, caregivers of persons with disabilities and healthcare professionals to allow for a diversity of views (Table 1). Moreover, these diverse groups were purposely selected as it was believed that their experiences, understanding and interpretation of access to healthcare for persons with disabilities may differ. In total, 25 participants (15 females and 10 males) with a mean age of 40.6 years (range 30-50 years) were recruited to participate in one of the three focus groups (see Table 1). The

36 K Hammarberg, M Kirkman & S de Lacey 'Qualitative research methods: When to use them and how to judge them' (2016) 31 *Human Reproduction* 498.

37 R Barbour *Doing focus groups* (2008).

first focus group comprised of five persons with disabilities; the second group comprised of six caregivers of persons with disabilities who cared for and accompanied persons with disabilities to healthcare facilities; and the third group of 14 healthcare professionals who treated persons with disabilities on a day to day basis at healthcare facilities. In order to accommodate the large number of healthcare professionals, two separate, but similar focus groups were conducted. The research team which conducted the focus groups were not acquainted with any of the participants.

*Table 1: Characteristics of focus group participants*

Focus Group (Sample)	Total N	Gender	Mean age years (range)	Years of experience with disability	Focus group 1 and 2 - Type of Disability; Focus Group 3 - Profession
Persons with disabilities	5	3 Males; 2 Females	44.6 (40-50)	1=50 years; 1=35 years; 1=20 years; 1=19 years; and 1=18 years	3=Visual disability 2=Physical disability
Caregivers of persons with disabilities	6	2 Males; 4 Females	41.8 (35-50)	1=15 years; 1=10 years; 1=8years; 2=7 years; and 1=5 years	3=Physical disability 2=Communication disability 1=Intellectual disability
Healthcare professionals	14	3 Males; 11 Females	38.7 (30-54)	2=0-5 years 3=6-10 years 3=11-15 years 3=16-20 years 3=20-25 years	3=Occupational Therapists 2=Speech Therapists and Audiologists 3=Physiotherapists 1=Social Worker 1=Orthopeadic technician 3=Medical officers 1=Nurse

## 4.2 Recruitment

After ethics approval and permission from the relevant authorities were obtained, persons with disabilities and caregivers of persons with disabilities were recruited using the data base of the national disability organisation and healthcare professionals via a public tertiary state hospital. The study information letter which included an invitation for

participants to take part in the study, was shared with the president of the national disability organisation as well as the director of health and the superintendent of the hospital. Potential participants then directly contacted the research assistant telephonically to indicate their interest to participate in the study.

### **4.3 Procedure**

The focus groups with persons with disabilities and caregivers of persons with disabilities were conducted at a dedicated space at the Mbabane National Library, while the focus group with healthcare professionals was conducted in the hospital boardroom. The first author acted as the moderator and facilitated each of the focus groups. Each group began with the participants' completion of a consent form and a demographic questionnaire. Participants were then issued name tags and given an option to use a pseudonym. The moderator welcomed participants and introduced herself and the research fieldworker. Participants were asked to introduce themselves. The researcher gave a detailed background of the study and explained the purpose of the focus groups. The rules of the discussion were outlined and agreed upon by all participants. The researcher used a self-developed focus group script, asking one question at a time. Each participant was afforded an opportunity to respond. The research fieldworker used a project chart to highlight key discussion points. After the discussion of each question, the researcher captured and summarised the main points and asked participants to confirm the correctness of their responses (namely, member checking). After all the questions had been completed and participants agreed that they had nothing further to add, the moderator thanked the participants for their time and constructive participation and the focus groups ended. Transport and lunch stipends were provided to the two groups of participants comprising of persons with disabilities and caregivers of persons with disabilities, while lunch was offered to the healthcare professional participants. A focus group procedural checklist was followed for all groups to ensure procedural reliability. Reliability was checked by the research fieldworker and was found to be 98 per cent across all three focus groups. Each focus group lasted approximately one hour (ranging between 51.43 minutes and 125 minutes). Focus groups were audio-recorded and transcribed verbatim by the first author and checked by the research fieldworker.

#### 4.4 Data analysis

A framework approach to data analysis was employed in this study,<sup>38</sup> using NVivo 1.5 qualitative data analysis software to manage the data and to label and explore themes.<sup>39</sup> In accordance with the framework approach, the data analysis steps proposed by Gale et al<sup>40</sup> were employed to identify, analyse and report on patterns that existed within the data, ultimately described as themes. The first step involved the first author familiarising herself with the data through replaying and re-reading the transcripts to immerse herself in the data. In the second step, the transcripts were subjected to line by line collaborative coding by the first and last author in order to identify patterns in the data. Ultimately a code book was developed. The third step involved searching for themes by combining codes with similar contents. The fourth step entailed refining themes and further dividing them into sub-themes, with excerpts from participants to support the themes. The fifth step involved relabelling themes using short phrases. A theme was accepted if it had several quotes from the data to support it. The final step involved mapping the themes obtained from the data onto the Peters et al<sup>41</sup> access to healthcare framework, namely: availability, acceptability, geographical accessibility and financial accessibility.

#### 4.5 Rigour

This study applied the trustworthiness strategies proposed by Shenton,<sup>42</sup> namely credibility, transferability, dependability and confirmability. Furthermore, to ensure trustworthiness, triangulation of data from three data sources was used and member checking was done by going through participants' responses after each question to check for accuracy of reporting. Collaborative coding also ensured credibility as did peer scrutiny via online and onsite PhD forums as well as through a conference presentation where a part of the findings of the study was presented. Trustworthiness was further ensured through providing an in-depth description of the study methodology, which is also available through an audit trail and a detailed reflection journal as well as through representation of a specific inclusion and exclusion criteria facilitated transferability. The three groups recruited from diverse backgrounds ensured that multiple perspectives were obtained.

38 NK Gale et al 'Using the framework method for the analysis of qualitative data in multi-disciplinary health research' (2013) 13 *BMC Medical Research Methodology* 117.

39 C Brandão 'P Bazeley & K Jackson *Qualitative data analysis with NVivo* (2nd ed)' (2015) 12 *Qualitative Research in Psychology* 492.

40 Gale et al (n 38).

41 Peters et al (n 9).

42 AK Shenton 'Strategies for ensuring trustworthiness in qualitative research projects' (2004) 22 *Education for Information* 63 at 73.

## **5 Findings**

The findings and discussion of the study are presented according to the four dimensions of the access to healthcare framework as described by Peters et al.<sup>43</sup> The specific themes conceptualised under each of the four dimensions are discussed below.

### **5.1 Availability of healthcare services as a barrier**

Two different themes which are related to availability were conceptualised. They are discussed separately.

#### ***5.1.1 Availability of assistive devices***

In Eswatini, there appears to be inconsistency with the issuing and maintenance of assistive devices. With the lack of a budget dedicated to the procurement and maintenance of assistive devices by state hospitals, persons with disabilities acquired assistive devices from various sources. Assistive devices were received from donations arranged by community members, donations from non-governmental organisations and sometimes from the national health fund (the Phalala fund), as explained by Caregiver #3: 'I eventually got courage to speak up [at a community meeting] and I got help because they gave me a wheelchair, even though the wheelchair is not in use now'. Healthcare professional #2 stated: '[P]ersons with disabilities do receive assistance from the Phalala fund to get prosthetic limbs from South Africa once-off. The challenge comes when the prosthetics need to be repaired'. However, Healthcare Professional #11 painted a bleaker picture: 'There are no assistive devices and other communication aids'.

#### ***5.1.2 Availability of rehabilitation facilities and healthcare professionals***

The distribution of healthcare professionals varied across the different healthcare facilities, with the majority of comprehensive healthcare services located in tertiary hospitals. The location of rehabilitation services in referral hospitals presented with access challenges due to the fact that referral hospitals are situated in major cities, far removed from the rural areas where the majority of persons with disabilities reside. Healthcare Professional #6 explained it as follows: 'Mbabane is probably the only hospital that has all the health services together under one roof, if you would go to hospitals in the periphery, you would find maybe medical and nursing with a physio being the only rehabilitation professional'. Caregiver #4 expressed the same concern: 'They [healthcare professionals] say that

43 Peters et al (n 9).

they have these services, but the problem is that these services are centralised to referral hospitals, yet the people who need these services are [on] the outskirts of town and it's not easy for them to come through to town'.

Of specific concern was the reported shortage of rehabilitation services due to the general shortage of professionals in this sector as highlighted by Healthcare Professional #11: 'There is a limited number of allied professionals especially speech language therapists'. Healthcare Professional #6 attributed this to the fact that rehabilitation posts are not prioritised or budgeted for: 'Basically, there is no budget line allocated towards rehab services and this facility has to find a way of making or being able to procure stuff for their department'.

## **5.2 Acceptability of persons with disabilities in healthcare facilities as a barrier**

Only one theme, namely the lack of reasonable accommodation was conceptualised under the construct acceptability.

### ***5.2.1 Lack of reasonable accommodation***

Although it appears as if the Department of Healthcare in Eswatini has made significant strides in making physical access to healthcare facilities through the enactment of wheelchair ramps and wider waiting area passages, this was not consistent across all healthcare facilities. Person with Disabilities #3 explains: 'At the dispensary, there is a step that makes it difficult for [a] person on a wheelchair to get closer to the medicine counter when one wants to collect medication. When I get my medication sometimes, I need to shout for the attention of the person at [the] dispensary window'.

Communication and health information consideration were also lagging behind. As a result, persons with communication and visual difficulties still experience challenges when consulting with healthcare professionals as well as when they attempt to make sense of health information given to them as can be seen in the following statements from 2 respective participants: 'When you get to the dispensary, sometimes you find that the tablets that are given to you have instructions that are not written in braille' (Person with Disability #1); and '[t]hey just give you the medication without asking and knowing whether you can read or not or whether you understand what is written on the pills or not' (Person with Disability #2). Healthcare Professional #3 was also aware of this fact: 'There are no braille signs for the visually impaired to be able to navigate around the facility'.

Furthermore, Healthcare Professional #6 noted similar challenges for deaf persons: 'There are nurses and some of us here that have been trained in sign language, but the challenge, I am sure my colleagues will agree with me, that you attend the sign language training, but when you come back you do not use it and then lose it'.

Discrimination was the challenge most frequently mentioned by participants across all three groups. Stigma and discrimination seemed to be prevalent within families of persons with disabilities and their communities, mostly as a result of how communities understand disability and its causes. Healthcare professionals could be seen as an extension of the community that still views disability from a negative perspective. Furthermore, some healthcare professionals harbour negative stereotypes which ultimately influence how they treat persons with disabilities in healthcare facilities, as explained by Healthcare Professional #10: 'Lack of knowledge of all disability conditions amongst us', and Healthcare Professional #11: 'Lack of awareness and experience of healthcare workers/professionals with persons with disabilities'.

Participants particularly mentioned self stigma, wherein caregivers of children with disabilities hid their children away from their communities for fear of judgement as evident in the following statement by Caregiver #4: 'Some of us hide our children with disabilities because we don't want our communities and community health workers to know about them. They lock the children in the houses'. Caregiver #1 confirmed barriers related to stigma: 'So, you don't want people to know that you had the bad luck of having a disability or having a child with a disability so because you don't want the community to know, you just hide the child'.

Participants also mentioned that persons with disabilities were excluded by healthcare professionals from certain health programmes, especially those related to sexual and reproductive healthcare as mentioned by Caregiver #4 in the following statement: 'Even if you do get there [hospital], there is now the struggle with attitude. They will ask you "Mummy how many children do you have?" You will say that this is my fourth. They will tell you that the reason why you ended up with a child with a disability is because you kept giving birth'. Person with Disability #5 further confirmed this finding: 'Yes, the nurse will ask you what you were doing when you fell pregnant. You feel embarrassed because you feel like nothing, like you have committed a sin'.

### **5.3 Financial accessibility of healthcare services as a barrier**

Inconsistency in the allocation of social support grants was the theme conceptualised under financial accessibility.

### **5.3.1 Inconsistency in allocation of social support grants**

Persons with disabilities often depend on social support grants which they normally receive on a monthly basis for their livelihood. In Eswatini, the allocation of social support grants is not a consistent standard procedure as is the case in other LMIC countries. It was reported by participants that some persons with disabilities were receiving social support grants while others did not. In cases where persons with disabilities were receiving these grants, they did not receive the grants consistently. Caregiver #1 explained it as follows: 'We [persons with disabilities] have been placed under the public assistance [social grant] as a by the way, because it has always been a secret and not everyone has been aware of it. It [social grant] has been a hidden thing and the criteria for receiving is still not clear'.

Apart from the inconsistency of the provision of social grants, there was also a lack of clarity on whether or not healthcare services were free for persons with disabilities despite being promised as such in the National Disability Policy. This was explained by Healthcare Professional #5 in the following statement: 'Persons with disabilities would not pay for health services, I heard that the ministry would provide free healthcare services'. Healthcare Professional #6 also confirmed this: 'Free health services for persons with disabilities has not yet been implemented'.

As a result, persons with disabilities experience financial challenges when accessing healthcare as can be seen in the following statements from Caregiver #5 and Healthcare Professional #11: 'Because we live under difficult financial conditions, we don't have the money to go up and down to and from the hospital because as a mother I also have other children to look after' (Caregiver #5); 'Inaccessibility to public transport, such as having to pay extra for wheelchairs, or paying for the person accompanying the disabled person' (Healthcare Professional #11).

## **5.4 Geographical accessibility of healthcare services as a barrier**

Transportation needs was the theme conceptualised under geographical accessibility.

### **5.4.1 Transportation needs**

Due to specific impairments experienced by persons with physical disabilities which render them unable to walk to healthcare facilities, the majority of participants reported the need for transportation to access healthcare. Furthermore, participants stated that rehabilitation healthcare services in primary and community healthcare were not easily accessible to them as most were far from their place of residence as reported by

Caregiver #5 in the following statement: 'You will go to the hospital and after assessing your child, they will tell you to come once or twice a month for review, but because the hospital is far you can't keep appointments'.

It was also mentioned that outreach services were not available to persons with disabilities. Transportation is costly for persons with physical disabilities because they have to pay transport for themselves and for their caregivers. Furthermore, they have to pay extra for their wheelchairs to be transported. Negative attitudes of public transport drivers unfortunately do not make the process of taking public transportation easier for persons with disabilities and their families. The following statements from Caregiver #5 explain this more clearly: 'As mothers, these children become heavy and it becomes a challenge to have to carry them on your back. Especially when you have one with cerebral palsy such as mine'; and 'Because even with the wheelchairs, you have to leave it at home sometimes because it causes a problem on the bus. You have this insensitive bus conductor complaining about your wheelchair'.

## 6 Discussion

This study aimed to describe the barriers experienced by persons with disabilities when they access healthcare services from a triadic perspective and also aimed to propose recommendations to address these identified barriers. Findings from this study indicate that, despite it having been eight years since the inception of the National Disability Policy of Eswatini, persons with disabilities still experience substantial barriers that hinder them from accessing healthcare services adequately. A large scale study conducted by Eide et al<sup>44</sup> in four LMICs, namely Sudan, Namibia, Malawi and South Africa with the aim of identifying the magnitude and impact of specific barriers for persons with disabilities to accessing healthcare, obtained similar findings to those of the current study. Eide et al<sup>45</sup> specifically revealed that 10-40 per cent of persons with disabilities do not get to access general healthcare when they need it.

Findings from the study at hand reveal that barriers to accessing healthcare in Eswatini were as a result of the unavailability of healthcare resources – in particular human resources and assistive devices. Human resources, specifically, rehabilitation healthcare professionals such as occupational therapists, speech language therapists, audiologists, physiotherapists and social workers do not have a dedicated budget for their posts. As a result, Eswatini has a limited number of rehabilitation professionals, with the majority of services located in referral hospitals which are in larger towns which are situated far away from rural areas

44 AH Eide et al 'Perceived barriers for accessing health services among individuals with disabilities in four African countries' (2015) 10 *Plos One* e0125915.

45 Eide et al (n 44).

where many persons with disabilities reside – a finding also reported by Bright et al.<sup>46</sup> In 2011, the World Health Organisation reported that only a small percentage of persons with disabilities had access to basic rehabilitation services when they needed them, a finding confirmed by the research of Sherry<sup>47</sup> and Hussey et al,<sup>48</sup> respectively. It is concerning that a decade later similar experiences are still being reported by persons with disabilities. Health rehabilitation is regarded as an important prerequisite for access to all other rights.<sup>49</sup> Therefore, the significant contribution of rehabilitation healthcare professionals in addressing and overcoming participation barriers through different interventions which can be focussed on the environment, and on individuals and/or their families, cannot be over emphasised.<sup>50</sup>

Consistent with findings from studies conducted in similar LMIC contexts such as Malawi, South Africa, Namibia and Sudan by Eide et al,<sup>51</sup> Harrison et al,<sup>52</sup> and Matter and Eide,<sup>53</sup> the findings from the current study also revealed that Eswatini did not have a dedicated budget for the issuing and maintenance of assistive devices. As such, persons with disabilities have no option but to seek assistive devices from community members or from non-governmental organisations. A national fund called ‘Phalala fund’ was mentioned as having been instrumental in assisting with assistive devices. However, it was stated that these assistive devices referred to are devices such as prosthetics which could only be obtained in South Africa. Where devices were obtained through this fund, maintaining them remained a constant challenge due to the lack of a dedicated budget for this purpose.

The accommodation of persons with physical disabilities with the provision of wheelchair ramps and the widening of waiting area spaces – even though this was not the case for all hospitals – was noted in Eswatini. Regrettably, findings revealed that the needs of persons with communication, hearing or visual impairments were not accommodated when accessing healthcare in Eswatini. This could be attributed to the fact that communication disorders, including hearing impairments, are viewed as invisible disabilities.<sup>54</sup> In a South African audit, Hanass-Hancock and

46 T Bright et al ‘A systematic review of strategies to increase access to health services among children in low and middle income countries’ (2017) 17 *BMC Health Services Research* 252.

47 K Sherry ‘Disability and rehabilitation: Essential considerations for equitable accessible and poverty-reducing healthcare in South Africa’ (2014) 1 *South African Health Review*.

48 Hussey, MacLachlan & Mji (n 33).

49 Sherry (n 47).

50 As above.

51 Eide et al (n 44).

52 As above.

53 RA Matter & AH Eide ‘Access to assistive technology in two Southern African countries’ (2018) 18 *BMC Health Services Research* 792.

54 N Tye-Murray *Foundations of aural rehabilitation: Children, adults and their family members* (2009).

Alli<sup>55</sup> confirmed these findings where it transpired that half of the facilities in South Africa's KwaZulu-Natal province had essential features such as ramps, doors and toilets that provided wheelchair access, but almost none provided information in braille or offered sign language interpretation. The lack of reasonable accommodation for these populations, not only impacted on persons with disabilities' right to access healthcare with autonomy, dignity, privacy and confidentiality, but also had the potential to have life-threatening consequences especially where instructions pertaining to medication were not adequately explained to persons with disabilities in understandable ways. It is not possible to address a person's right to healthcare without considering the important role of language in fulfilling this right.<sup>56</sup> Therefore, it is proposed that healthcare information should be provided in a simplified format and where necessary with visual support or in an auditory format. These findings are echoed in studies conducted by Masuku et al,<sup>57</sup> and Orrie and Motsphi.<sup>58</sup>

With regard to geographical accessibility, there was a general dissatisfaction with the distance of healthcare services in Eswatini, especially the concentration of rehabilitation services in referral hospitals situated in major towns. This finding is supported by Bright et al,<sup>59</sup> who revealed that in LMIC's such as Eswatini, healthcare facilities were mostly situated in urban areas making it difficult and expensive for most people especially those residing in rural areas to access these services. Transportation to healthcare facilities from where persons with disabilities reside, to the facility is thus inevitable. The further the distance is from the healthcare facility, the higher the transportation fare for public transport. As confirmed by Hussey et al,<sup>60</sup> the distance to healthcare facilities does impact on persons with disabilities' financial accessibility of these services. The negative attitudes of public transport drivers towards persons with disabilities further compounded transportation difficulties. In a study titled "“You must carry your wheelchair” – Barriers to accessing healthcare in a South African rural area', the challenges of transportation as they relate to both cost and attitudes was also stressed.<sup>61</sup>

55 J Hanass-Hancock et al "“These are not luxuries, it is essential for access to life”": Disability related out-of-pocket costs as a driver of economic vulnerability in South Africa' (2017) 6 *African Journal of Disability* 280

56 HJ Haricharan et al 'Can we talk about the right to healthcare without language? A critique of key international human rights law, drawing on the experiences of a Deaf woman in Cape Town, South Africa' (2013) 28 *Disability and Society* 54.

57 KP Masuku, N Moroe & D van der Merwe "“The world is not only for hearing people – It's for all people”": The experiences of women who are deaf or hard of hearing in accessing healthcare services in Johannesburg, South Africa' (2021) 10 *African Journal of Disability* 1.

58 S Orrie & TS Motsphi 'Challenges experienced by healthcare workers in managing patients with hearing impairment at a primary health care setting: A descriptive study' (2018) 60 *Official Journal of the South African Academy of Family Practice / Primary Care* 39.

59 Bright et al (n 46).

60 Hussey, MacLachlan & Mji (n 33).

61 R Vergunst et al "“You must carry your wheelchair” - Barriers to accessing healthcare in a South African rural area' (2015) 8 *Global Health Action*.

The fact that, globally, persons with disabilities still do not experience the same access to work opportunities, could lead to a large proportion of them being unemployed.<sup>62</sup> With a national unemployment rate of 41 per cent and a poverty rate of 63 per cent in Eswatini,<sup>63</sup> the unemployment rate for persons with disabilities in Eswatini is further compounded. This therefore implies a need for social support from the state to support persons with disability financially in their quest to access healthcare services. However, it was found in the current study that there is an inconsistency with the allocation of social support grants in Eswatini, with some persons with disabilities receiving social support and some not. One of the participants mentioned that the social grant: 'Has always been a secret and not everyone has been aware of it' (Caregiver #4). Where social support grants were received, they were not on a month-to-month basis. This inconsistency of providing social support grants in Eswatini is contrary to findings from other countries. For example, in South Africa grants are allocated to persons with disabilities to improve their financial situation.<sup>64</sup> Although social grants may be offered to persons with disabilities in other countries, it is also important to keep in mind that these grants may not be sufficient, considering that in some cases it may be the only source of income as a result of high unemployment and poverty.<sup>65</sup>

To conclude this discussion, the South African Human Rights Commission (SAHRC)<sup>66</sup> argues that discrimination remains the biggest disability. The statement of the SAHRC also rings true for Eswatini as negative beliefs and stereotypes about the causes of disability continue to perpetuate stigma and discrimination of persons with disabilities when they access healthcare services. Stigma and discrimination are experienced at a personal and a community level as well as at healthcare facilities. Negative attitudes from healthcare professionals, in part because of the lack of knowledge on disability, was confirmed by Eide<sup>67</sup> as well as in a study by Hussey et al,<sup>68</sup> where all participants cited stigma and negative perceptions towards persons with disabilities in South African society as being the major underlying barrier to health and rehabilitation. Trani et al<sup>69</sup> argued that negative stereotypes regarding disability and towards persons with disabilities by healthcare professionals and members of the community, for example public transport providers, stemmed from socialisation and cultural factors resulting in how they treated persons with

62 S Bonaccio et al 'The participation of people with disabilities in the workplace across the employment cycle: Employer concerns and research evidence' (2020) 35 *Journal of Business and Psychology* 135.

63 United Nations Office for the Coordination of Humanitarian Affairs (2020) *Annual Report*.

64 Sherry (n 47).

65 Hanass-Hancock (n 55).

66 Sherry (n 47).

67 Eide et al (n 44).

68 Hussey, MacLachlan & Mji (n 33).

69 JF Trani, E Ballard & J Pena 'Stigma, social exclusion and mental distress of persons with disabilities in Afghanistan' (2016) 153 *Social Science and Medicine* 258.

disabilities. It is therefore important to propose some recommendations to address access for persons with disabilities in Eswatini.

## 7 Recommendations

Three overarching recommendations are made to address the challenges mentioned in this study.

### 7.1 Addressing stigma and discrimination

Whether conscious or sub-conscious, stigma and shame are the core catalysts in societies that impede persons with disabilities' ability to access their rights, including their right to basic healthcare. Stigma and shame regarding disabilities are rooted in the manner in which our cultures and contexts have socialised individuals to perceive disability and ultimately view persons with disabilities and how the community judge what they are capable and incapable of. It tends to manifest itself in the way in which persons with disabilities are viewed and how their value in society is perceived by others. Stigma ranges from the subtle forms of rejection that persons with disabilities experience – sometimes from their own families, such as being hidden from the public eye – to more crude forms of discrimination experienced within communities – such as exclusion from opportunities enjoyed by persons and families without disabilities. As alluded to earlier in this study, healthcare professionals are socialised in holding similar beliefs to those of communities, which results in the perpetuation of stigma and discrimination in healthcare facilities too. Ndlovu<sup>70</sup> terms the African view of disability as 'ambivalent' in that it depicts disability and persons with disabilities in both a positive and negative light. On the one end, disability is portrayed as burdensome and as a result of an affliction, a punishment, an embodiment of sin, as the works of witchcraft and/or as ancestral anger. While on the other end the African principle of Ubuntu that encapsulates 'humanness' dictates that everyone, regardless of social standing should be treated with the dignity that they deserve.<sup>71</sup> Initiatives to address access to healthcare for persons with disabilities therefore cannot be done independently of addressing stigma and discrimination.

There is a need for disability conscientisation amongst communities in Eswatini, if attitudes and perceptions about disabilities are to change. Programmes aimed at conscientising communities on disability rights need to be implemented at community level. Communities need to be made aware of the rights of persons with disabilities. At a healthcare level,

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

71 As above.

healthcare practitioners need to be trained on disability rights with specific reference to healthcare rights. Likewise, McConkey et al<sup>72</sup> recommend that communities should be educated to understand what causes disability, how to assist persons with disabilities and also highlights that persons without disability should spend time with persons with disabilities, in order for them to realise how similar they are – so called ‘heart knowledge’.

Figure 1 is an example of access to healthcare guidelines that were developed to highlight the core rights to healthcare for persons for disabilities in Eswatini.<sup>73</sup> These guidelines were developed for display in healthcare settings to empower persons with disabilities on their right to access healthcare.

72 R McConkey et al ‘Promoting better health for persons with intellectual disabilities through community-based inclusive development’ (2018) *Disabilities Innovations Africa Series 6*.

73 Masuku et al (n 26).

Figure 1: Access to healthcare guidelines from Masuku et al<sup>74</sup>

**ACCESS TO HEALTHCARE FOR PERSONS WITH DISABILITIES IN ESWATINI**

# Do you have a disability?

10 tips to access your rights to healthcare

- 1** Go to **any hospital** when you feel sick or need therapy.
- 2** Get your hospital treatment **for free**.
- 3** Tell the staff at the help desk about your disability and that you **need assistance**.
- 4** Skip the **queue**.
- 5** Expect to be treated **respectfully**.
- 6** Ask for health information in pictures, braille or sign language.
- 7** Take part in **any** health programs.
- 8** Get a wheelchair, a hearing aid or a walking aid **for free**.
- 9** Ask hospital staff to fix your wheelchair, hearing aid or walking aid **for free**.
- 10** Remember that hospital staff must **support** you.

Masuku, 2020.

74 K Masuku 'Access to healthcare for persons with disabilities in Eswatini' PhD thesis, University of Pretoria, 2020.

## 7.2 Intersectoral involvement addressing the social determinants of healthcare

Persons with disabilities are amongst the poorest in most LMIC,<sup>75</sup> yet social influences play a significant part in perpetuating poor and decreased quality of healthcare services. Access to healthcare for persons with disabilities across the lifespan is a systemic challenge that is influenced by social determinants of health. It therefore becomes imperative to address social determinants such as access to early life experiences, education, employment, social support, shelter, employment security and community engagement for persons with disabilities<sup>76</sup> if healthcare is to be an achievable goal.

Addressing social determinants of healthcare implies the need for an intersectoral involvement as it cannot be the responsibility of the Department of Healthcare or the Department of Social Development alone. For example, to address the geographical and financial accessibility barriers brought about by the location of rehabilitation services in referral hospitals, the government of Eswatini may want to consider a service delivery model whereby such services are brought closer to communities. The principles of community-based rehabilitation propose that persons with disabilities are able to receive healthcare and rehabilitation services within their communities.<sup>77</sup> The World Health Organisation defines community based healthcare workers as members of the very same community who are trained by the department of health in this case, rehabilitation healthcare professionals to provide basic rehabilitation techniques. As such, healthcare professionals may conduct community and home visits, while at the same time train community based healthcare workers and families on how to conduct basic rehabilitation or how to implement home programmes in between their visits. Strengthening community programmes might mitigate some of the challenges related to geographical and financial accessibility, while at the same time improve attitudes of community members towards disability and persons with disabilities. This strategy has been implemented in certain parts of South Africa in order to address the shortage of healthcare workers. Mulumba et al<sup>78</sup> posit that community participation is not only a human right, but an essential underlying determinant for realising the right to access health.

75 McConkey et al (n 72).

76 O'Hare, Devakumar & Allen (n 35).

77 Sherry (n 47).

78 M Mulumba et al 'Perceptions and experiences of access to public healthcare by people with disabilities and older people in Uganda' (2014) 13 *International Journal of Equity Health* 76.

### **7.3 Addressing policy shortcomings**

It is imperative to determine and communicate the shortcomings of the National Disability Policy of Eswatini in systematic research studies, so that these findings can be considered during the policy evaluation stages. A policy brief was developed to communicate the fact that the policy document has not considered the role of geographical access to services,<sup>79</sup> as this is significant in whether persons with disabilities access healthcare or not. The lack of clarity of policy on whether or not the policy was implemented has also been brought to the attention of policy makers. Policy makers have been urged to consider fast tracking the passing of the National Disability Bill of Rights as law. The National Disability Bill of Rights is an integral part of the implementation of the national disability policy. By implementing the bill, the state government of Eswatini would in essence, be committing itself to the realisation of disability rights, including the basic right to healthcare.

## **8 Conclusion**

The right to healthcare is acknowledged in various international and regional human rights instruments and laws. Eswatini being a signatory to most of these human rights instruments, the CRPD in particular, has committed to the realisation of the right to healthcare. Eswatini's commitment to the right to healthcare was discernible through the development of the National Disability Policy, the National Disability Bill of Rights and the National Disability Plan of Action. Regardless of the development of these local instruments, the right to healthcare for persons with disabilities in Eswatini is yet to be realised as noticeable in the challenges that persons with disabilities still experience when they attempt to access healthcare.

Human rights legislation serves no purpose if states do not commit to implementing these laws. Eswatini needs to recommit to the process of implementation of the National Disability Policy as there is evidence of significant gaps in the process, particularly related to human, skills and financial resources. The passing of the National Disability Bill of Action is key to the process and should thus be prioritised. Policy implementation should be done in the context of social determinants of health.

The implementation of disability legislation should be done parallel to disability conscientisation, starting at community level. Eswatini should therefore be deliberate in adopting programmes aimed at dismantling negative stereotypes regarding disabilities within communities.

79 Masuku (n 74).

## INCLUSIVE EDUCATION FOR LEARNERS WITH DISABILITIES IN MAURITIUS: THE 'RIGHTS' WAY FORWARD

*Neel Raamandarsingh Purmah\**

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### Summary

*It has become increasingly evident that progress towards inclusion in the realm of education for learners with disabilities in the small island nation of Mauritius has been inexplicably inconsistent, and so-called inclusive policies advocated by successive governments have had little tangible effects in practice. In order to break free from the chains of this segregationist approach, where the education of disabled learners developed in parallel to that of their non-disabled peers, a radical overhaul of our approach to education is warranted. Towards that end, adopting a rights-based approach to inclusive education can have profound implications for students with disabilities when they are provided with the same educational opportunities within mainstream settings on an equal basis with others. It is not the disabled student who should adapt to the school system, but rather it is for education providers to adapt to the particular needs of learners with disabilities.*

*This paper opens with a description of the education system of Mauritius before moving to a historical analysis of special educational needs in the country. The discussion will then turn to the salient features of inclusive education as conceived under international law. The final part will identify examples of good practices and provide recommendations to promote education opportunities for learners with disabilities in Mauritius, in particular to underline the legislative and policy measures that Mauritius can adopt with a view to ensuring that persons with mental or physical impairments can benefit from access to an inclusive and quality education on an equal basis with others; raise awareness as to the challenges that persons with disabilities are confronted with in both the public and private education systems; and assess to what extent inclusive education can prove to be beneficial to the Mauritian society and economy.*

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## 1 Introduction

The education system for learners with disabilities in Mauritius has long been predicated on segregation. It is an unfortunate reality that disabled learners are not provided with equal access to all levels of education and vocational training which can ensure their full participation and inclusion in society. A close reflection on the nature of the education system in Mauritius reveals that there has been a litany of failures in the implementation of the right to an inclusive and quality education for children and adults with disabilities. Policies formulated under successive governments have clouded one's perspective entirely about the negative consequences they have spawned on the robustness of the national educational structure. It is jarring to learners with disabilities in Mauritius who have been thrust into a world where they cannot enjoy the full extent of their right to an education on an equal footing with learners without disabilities. The 'inclusive education' advocated by policy-makers in Mauritius is regrettably not a child-centred pedagogy which enables learners with disabilities to be educated alongside their non-disabled peers. The term 'inclusive' has in reality been employed as a smokescreen to camouflage the perpetuation of a separate system of education for learners with disabilities.

In the light of this, it is important to address these inadequacies by adopting a human rights-based approach to the provision of education for learners with disabilities in Mauritius. It is all the more crucial to depart from the medico-social model of disability which places the burden on learners with disabilities to adapt to the mainstream education system. If they cannot adapt, they are placed in integrated or segregated settings by virtue of their impairment, sometimes at their own cost, when education should in fact be freely accessible as a fundamental right to every child in a country that values democratic ideals above all. The human rights-based approach to education recognises that children with disabilities are first and foremost rights-holders, whose individual rights and liberties should be respected on an equal basis with their non-disabled counterparts. It follows that their right to equal and quality education can hardly be overemphasised in the fight for disability justice.

While much ink has been spilled over the issue of education of students with special needs, there is still a need to assess the impact of human rights standards in the implementation of inclusive education.<sup>1</sup> A human rights perspective in view of achieving systemic reforms to education will not only ensure that the right to education of learners with disabilities is being

1 See G Chung Kim Chung & C Dalais 'Inclusive Education: A Mauritian approach to the inherent rights of the child' in M Garcia et al (eds) *Africa's future, Africa's challenge: Early childhood care and development in Sub-Saharan Africa* (2008); S Grech & K Soldatic (eds) *Disability in the global south: The critical handbook* (2016); N Phasha et al (eds) *Inclusive education in African contexts: A critical reader* (2017).

safeguarded, but will equally have a positive impact on their other fundamental rights. Insofar as it is not in contention that education helps to reduce inequalities, it is incumbent upon policy-makers and society at large to extend access to the mainstream education system to all people with disabilities, irrespective of any additional financial burden this entails for educational providers. If an inclusive education model is implemented effectively, this will have far-reaching impacts on the empowerment and promotion of the social, economic and political inclusion of persons with disabilities within Mauritian society.

This paper opens with a description of the education system in Mauritius before moving to a historical analysis of special educational needs in the small island nation of Mauritius. The discussion will then shed light on the salient features of inclusive education as conceived under international human rights law. The final part will identify examples of good practices and provide recommendations to promote education opportunities for learners with disabilities in Mauritius. The main recommendations are as follows: the legislative and policy measures that Mauritius can adopt with a view to ensuring that persons with mental or physical impairments can benefit from access to an inclusive and quality education on an equal basis with others; raising awareness as to the challenges that persons with disabilities are confronted with in the general public education system and society; and assessing to what extent inclusive education can prove to be beneficial to the Mauritian society and economy as a whole.

## 2 The education system in Mauritius

The education system in Mauritius is based on the British system as a result of colonial occupation from 1810 up to 1968, when the country became independent. The Education Act was enacted in 1957 to cater for matters relating to education in Mauritius.<sup>2</sup> The structure of the education system is divided into pre-primary, primary, secondary and tertiary levels.<sup>3</sup> Primary education has always been freely provided. Early on in post-independent Mauritius, the authorities pushed for reforms toward making education free and accessible to those in secondary educational

2 Government of Mauritius, Education Act 1957 [https://supremecourt.govmu.org/HighlightDoc/THE%20EDUCATION%20ACT%201957\[1\].pdf](https://supremecourt.govmu.org/HighlightDoc/THE%20EDUCATION%20ACT%201957[1].pdf) (accessed 19 May 2021).

3 See The Ministry of Education, Culture and Human Resources 'National report of Mauritius: The development of education' (2008) [http://www.ibe.unesco.org/fileadmin/user\\_upload/archive/National\\_Reports/ICE\\_2008/mauritius\\_NR08.pdf](http://www.ibe.unesco.org/fileadmin/user_upload/archive/National_Reports/ICE_2008/mauritius_NR08.pdf) (accessed 19 May 2021); AR Foondun 'Private tuition in Mauritius: The mad race for a place in a "five-star" secondary school' IIEP research and studies programme: Increasing and improving the quality of basic education Monograph 8 (1992) <https://unesdoc.unesco.org/ark:/48223/pf0000092320/PDF/92320eng.pdf.multi> (accessed 19 May 2021) (See Chapter II for a thorough description of the education system in post-independent Mauritius).

institutions. Fees were as a result abolished for secondary schools and post-secondary schools in 1977 and 1988 respectively. Fast forward a few decades and there were subsequent amendments in 2004 to the Education Act and to the Education Regulations of 1957 in view of making education free and compulsory up to the age of 16 with the introduction of the 11-year schooling system.<sup>4</sup>

The education system has, however, experienced significant systemic reforms in recent years. The Nine-Year Continuous Basic Education was introduced in 2015 in order to establish a comprehensive basic education cycle aimed at providing the core competencies for empowering students with knowledge and promoting access to high levels of achievement.<sup>5</sup> It was a missed opportunity to work towards real inclusion for students with disabilities in the mainstream education system. One specific objective of this reform was to '[p]rovide learning opportunities to all students, including those with special education needs, for them to attain high levels of achievement according to their abilities and strengths'.<sup>6</sup> However, this objective had the effect of perpetuating a parallel education system for children without disabilities and those with special educational needs. Another significant reform related to post-secondary studies which since January 2019 is free for students who opt to study at a public tertiary education institution.<sup>7</sup> The education playing field is however skewed from the outset for learners with disabilities, which renders it much more difficult for most of them to access higher education at a later stage in their academic life. The few scholarships available for students with disabilities do not moreover bring any significant game-changing results to their integration in society.

According to official statistics as at March 2020, there were 319 schools providing primary education (221 public schools; 53 run by religious education authorities; and 45 privately-funded schools).<sup>8</sup> With respect to secondary education, there are 179 schools in all (69 state-run; 110 privately-run). For tertiary level, the statistics are presented in terms of enrolment: as at December 2019 the total number of students was 49 205 (including full-timers, part-timers, and distance education). Of significance

4 See website of The Ministry of Education of Mauritius for the various amendments <https://education.govmu.org/Pages/Legislations/Legislations.aspx> (accessed 19 May 2021).

5 The Ministry of Education of Mauritius 'Inspiring every child: Nine year schooling' <https://education.govmu.org/Documents/educationsector/nys/Documents/NYCBE%20Booklet.pdf> (accessed 19 May 2021).

6 Ministry of Education (n 5) 8.

7 The Ministry of Education and Human Resources, Tertiary Education and Scientific Research 'Free education in tertiary education institutions' (2019) <https://education.govmu.org/Documents/educationsector/Documents/2019/Communique%20250119.pdf> (accessed 19 May 2021).

8 Statistics Mauritius 'Detailed statistics relating to education in the pre-primary, primary, secondary and post-secondary sectors' (2020) [https://statsmauritius.govmu.org/Documents/Statistics/ESI/2020/EI1543/Edu\\_Yr20.pdf](https://statsmauritius.govmu.org/Documents/Statistics/ESI/2020/EI1543/Edu_Yr20.pdf) (accessed 19 May 2021).

is the number of Special Education Needs schools, which amounted to 71 in total as at March 2020 (21 state-run; 50 in all mostly run by non-governmental organisations and a few by a religious authority).<sup>9</sup> The non-governmental organisations which run these specialised schools typically receive aid from the government in order to ensure better training and capacity-building for their staff. It should be highlighted, moreover, that there are reasonable accommodation measures that have been implemented for learners with disabilities such as providing them with additional time in national exams or retrofitting of schools with ramps in order to facilitate access to classrooms or restrooms. But these are the bare minimum required in terms of making it easier for all persons with disabilities to be included in the education system. And these measures are aimed mostly at students with a physical disability.

Insofar as training of special educators is concerned, a plethora of courses have been developed by the Mauritius Institute of Education operating under the aegis of the Ministry of Education and which engages in educational research, curriculum development and teacher education.<sup>10</sup> The Mauritius Institute of Education has designed specific courses for the professional development of staff and instructors, including a Postgraduate Diploma in Special Education for lecturers of the Institute, educational psychologists and educational social workers; a Certificate in Special Education for teachers working in specialised schools for students with disabilities; a Teacher's Diploma in Special Education Needs for primary school teachers who have to look after students with mild forms of disabilities in mainstream schools; a Teacher's License in Special Education Needs for instructors already working in specialised schools; and a Foundation Course for instructors and staffs in specific specialised schools run by non-governmental organisations.

The List of Indicative Priority Fields of Study 2017/2019 recognises that education is one of the most important avenues through which social equality for learners with disabilities can be achieved in Mauritius.<sup>11</sup> The list explicitly refers to the priority of Special Education Needs training courses at both undergraduate and postgraduate levels. These courses focus on developing teaching strategies for effective management of learners with disabilities in class. On that account, the training of education teachers is avowed as instrumental in building the strengths, skills and competencies of these students. Yet, seismic shifts in the education sector in the past decade have failed to take into proper consideration the real aspirations of learners with disabilities.

9 As above.

10 The Mauritius Institute of Education website <http://portal.mie.ac.mu/> (accessed 19 May 2021).

11 The Tertiary Education Commission 'List of indicative priority fields of study 2017/2019' (January 2017) [http://www.tec.mu/pdf\\_downloads/pubrep/LIPFS\\_070317.pdf](http://www.tec.mu/pdf_downloads/pubrep/LIPFS_070317.pdf) (accessed 19 May 2021).

As will be explored later, the lack of a human rights perspective on the process is hampering the robustness of the whole educational structure. The approach adopted by education providers in Mauritius excludes most learners with disabilities from the mainstream education system. It can be highlighted at this juncture that learners with special education needs are more at risk of being denied the same educational opportunities than their non-disabled peers when they are placed in segregated settings.<sup>12</sup> This eventually results in their exclusion from society. But in an attempt to have a fuller picture of the educational structure of Mauritius, a discussion is required of the parallel regime for special educational needs that was engineered specifically for learners with disabilities.

### **3 In need of special education needs schools**

In the early 1950s, Chief Justice Earl Warren, then at the helm of the US Supreme Court, initiated a radical change in American society by rallying other Supreme Court Justices to declare unconstitutional state laws which had the object of racially segregating students in public schools.<sup>13</sup> In these same years, however, a segregationist policy approach was endorsed by Mauritian authorities in order to prevent access to mainstream schools to learners with disabilities with the creation of Specialised Government Schools. This notwithstanding the fact that 'Education for All' was the slogan of the then ruling party.<sup>14</sup> It would appear that the main characteristic that defined Mauritian society at that time was that the creation of specific schools that could satisfy the individual needs of persons with similar disabilities could be an equaliser in the education field insofar as success in the mainstream education system was excessively challenging for those with a disability. This is reflected in the establishment of the School for the Blind by the Society for the Welfare of the Blind in 1946, the School for the Deaf by the Society for the Welfare of the Deaf in 1965, and the School for Educationally Sub-Normal Children founded by the Mauritius Mental Health Association.<sup>15</sup>

At the turn of the millennium, novel ideas about how to better guarantee access to education for persons with disabilities were starting to emerge in the policy-making arena. This led to the publication of a policy

12 HL Wang 'Should all students with special educational needs (SEN) be included in mainstream education provision? A critical analysis' (2009) 2 *International Education Studies* 154.

13 *Brown v Board of Education of Topeka* 347 US 483 (1954).

14 Think Mauritius 'Rethinking the education system in Mauritius' (14 March 2019) 9 <https://www.thinkmauritius.mu/documents/rethinking-education-system.pdf> (accessed 19 May 2021).

15 See The Ministry of Social Security, National Solidarity and Senior Citizens Welfare & Reform Institutions 'National policy paper & action plan on disability: Valuing people with disabilities' (2007) <https://www.mindbank.info/item/2675> (accessed 19 May 2021).

document entitled ‘Special Education Needs and Inclusive Education in Mauritius’ that was eventually embraced by the Ministry of Education and Human Resources in 2006 as a response to the growing need of giving effect to the special educational needs of children with disabilities.<sup>16</sup> This policy and strategy document laid emphasis on the necessity of empowering young learners with disabilities to develop their full potential with the ultimate positive import that they become fully-fledged members of society, and accordingly contribute to the socio-economic wellbeing of the nation. Inclusive educational settings for children with disabilities was an ideal that was promoted in the document as a *sine qua non* condition for effective participation in socio-economic activities. Yet, there was a patent disregard to what really amounted to inclusion inasmuch as the understanding was that ‘children with special education needs should be included as far as possible within the general education environment commonly referred to as inclusive education’.<sup>17</sup> The terms ‘as far as possible’ in the policy document has in practice been instrumentalised as a weapon in the arsenal of educational providers to limit as much as possible access to the general education system for learners with severe disabilities who could not conceivably adapt to the mainstream system without appropriate reasonable accommodation or financial and other support measures. While the rationale behind this policy document was to include children with disabilities into the educational system, it did not adequately capture the essence of what inclusion meant.

In its Initial Report submitted to the Committee on the Rights of Persons with Disabilities (the CRPD Committee) on the measures taken to give effect to state obligations under the Convention on the Rights of Persons with Disabilities (the Convention or the CRPD) and the progress made pursuant to article 35 of the CRPD, the State of Mauritius recognised that the 2006 policy adopted a three-pronged approach in order to provide access to education through a plethora of options for learners with disabilities.<sup>18</sup> The first approach related to integration of learners with mild disabilities in mainstream schools; the second approach pertained to having separate classrooms for children with severe disabilities in mainstream schools; and the third approach related to having specialised schools for children who cannot be integrated in the mainstream education system by virtue of their specific educational needs. In the Education and Human Resources Strategy Plan 2008-2020, one of the strategic goals

16 The Ministry of Education and Human Resources ‘Special education needs and inclusive education in Mauritius: The policy and strategy document’ (2006) <https://education.govmu.org/Documents/educationsector/Documents/Special%20Education%20Needs/sen.pdf> (accessed 19 May 2021).

17 The Ministry of Education and Human Resources (n 16) sec 3.3.

18 Initial Report of Mauritius, CRPD Committee (11 August 2014), UN Doc CRPD/C/MUS/1 (2014) para 207.

identified by the Ministry of Education and Human Resources was to '[e]ncourage and support the inclusion of children with special needs'.<sup>19</sup> This was touted as necessary towards their inclusion in the mainstream national education system. And it was reiterated that

the [special educational needs] policy guidelines and strategic framework move forward immediately along specifically defined goals for each year so that by 2020 all children with disabilities in Mauritius will be enjoying access to relevant high-quality education.<sup>20</sup>

In 2020, the situation has remained unchanged and there is still confusion about the concepts of 'integration' and 'inclusion' which will be more fully examined in the next section.

The CRPD Committee has expressed serious concerns in its Concluding Observations on the Initial Report of Mauritius adopted at its 225th meeting on 1 September 2015 about the slow implementation of the 2006 policy on inclusive education with the consequence of 'the education system remaining mostly segregated and many children with disabilities being completely deprived of any form of education'.<sup>21</sup> Another international human rights treaty body, the Committee on the Rights of the Child, has advanced similar reservations in its Concluding Observations on the Combined Third to Fifth Periodic Reports of Mauritius at its 1983rd meeting on 30 January 2015 insofar as the medical model of disability was still perpetuated, with the continuous integration of young disabled learners in the education system based on their specific disability instead of eliminating the physical, socio-economic and cultural barriers that prevent their full inclusion in schools and participation in society.<sup>22</sup> In addition, this Committee criticised Mauritian authorities for their lack of adequate measures to move towards a truly inclusive model of education for children with disabilities, with unfitting overreliance on civil society organisations to provide specialised services to learners with disabilities, when this burden should in fact be on the state.

19 The Ministry of Education, Culture and Human Resources 'Education and human resources strategy plan 2008-2020' (October 2009) <https://education.govmu.org/Documents/Documents/Publications/EHRSP%202008-2020.pdf> (accessed 19 May 2021).

20 Education and human resources strategy plan 2008-2020 (n 19) para 208.

21 Concluding Observations on Initial Report of Mauritius, CRPD Committee (30 September 2015) UN Doc CRPD/C/MUS/CO/1 (2015).

22 Concluding Observations on the Combined Third to Fifth Periodic Reports of Mauritius, CRC Committee (27 February 2015) UN Doc CRC/C/MUS/CO/3-5 (2015).

These critical reviews from human rights treaty bodies can perhaps explain why the Government of Mauritius has in 2017 embraced another policy framework and strategy document entitled 'Inclusive Education for Children and Youth with Special Needs in Mauritius: Concept to Reality'.<sup>23</sup> The intended purpose of this national strategic document was to achieve inclusion by creating and providing a conducive environment to all learners in order to ensure equal access to quality education and training. Of particular importance was the application of this new operative framework envisioned to mark a shift to a rights-based model for learners with disabilities. On paper, the policies were a blueprint to be emulated by any active agent for positive change: they placed the spotlight on the fact that injustices and discrimination that have been perpetrated against learners with disabilities over decades cannot be fixed with tinkering or half-measures, as a result of which a paradigm shift was imperative towards the rights-based model recognising that learners with disabilities are rights-holders. In reality, however, the integrated approach to education was maintained insofar as there was mention in the strategic document of the establishment of a regulatory institution in order to guarantee good governance and effective oversight in the special education needs sector. This culminated in yet another law that was not in conformity with internationally accepted benchmarks regarding inclusive education.

The Special Education Needs Authority Act 2018 was enacted to cater for the setting up of a centralised regulatory framework for learners with special education needs.<sup>24</sup> The status quo of keeping to specialised schools for disabled students was thus cemented by this 2018 legislation in view of centralising the process regarding curriculum development and assessment for Special Education Needs schools. What is more striking is the reference in section 5(j) of this Act which stipulates that one of the functions of the Authority is to 'promote inclusive practices to facilitate [an] inclusive learning environment'.<sup>25</sup> The very nature and purport of this statute is at odds with the aforementioned section. Indeed, it only pays lip service to the concept of inclusion. As Professor Parsuramen, Founder and President of the Mauritian non-governmental organisation Global Rainbow Foundation, puts it:

[T]he ongoing admission of learners with disabilities in special education needs schools and now the design and implementation of a curriculum for same in the Special Education Needs Authority (SENA) Act definitely do not

23 The Ministry of Education and Human Resources 'Inclusive education for children and youth with special needs in Mauritius: Concept to reality' (27 October 2017) [https://education.govmu.org/Documents/educationsector/Documents/Special%20Education%20Needs/Salient%20Features%20Startegy%20Doc%20\(1\).pdf](https://education.govmu.org/Documents/educationsector/Documents/Special%20Education%20Needs/Salient%20Features%20Startegy%20Doc%20(1).pdf) (accessed 19 May 2021).

24 Special Education Needs Authority Act 2018 <https://mauritiusassembly.govmu.org/Documents/Acts/2018/act1818.pdf> (accessed 19 May 2021).

25 Sec 5(j) of the Special Education Needs Authority Act.

correspond to the commitment of Mauritius to implement an inclusive mainstream education system alongside special education needs institutions.<sup>26</sup>

Having taken the rigorous view that children with severe forms of disabilities – in particular those with severe mental or psychosocial impairments who are institutionalised against their will – cannot be integrated in the mainstream education system, authorities lacking the requisite political will quietly sat on the fence instead of actually fighting for a complete model of inclusion in this new legislation. On the face of it, guaranteeing education for learners with disabilities was the core objective of this law, be that in segregated or integrated settings. But this finally leads to the segregation of learners with disabilities from a very young age.

Another dimension of this law that has assumed enormous proportions in terms of discrimination against children with disabilities is that the onus is placed on children with disabilities to integrate the mainstream school system. Wherever the student cannot integrate the mainstream system, the Act empowers the Authority to devise and implement plans to facilitate the early identification and assessment of persons with special educational needs as well as the setting up of a database of persons with special educational needs. ‘Special education needs’ is defined as ‘the needs of a person with disability which makes learning harder for him than another person of the same age’.<sup>27</sup> This in itself is seething with discriminatory undertones and is quite restrictive in scope. It fails to recognise the multiple and intersectional forms of discrimination that persons with disabilities may be subjected to, without reference to inclusiveness in that regard.

A striking example of the disingenuous use of the term inclusion relates to when a former Minister of Social Security, National Solidarity and Reform Institutions explained during parliamentary debates that the ambition was to move towards an inclusive education and ‘that our educational institutions should be ready to accommodate children with disabilities in the mainstream education system’. But in the same breath, the Minister indicated that ‘the Ministry of Education is in the process of creating more special integrated units in the mainstream education institution in an attempt to [enable] children with disabilities to benefit for an inclusive education’.<sup>28</sup> The problem regarding inclusion must consequently take into consideration semantics insofar as confusion of terms may lead to confused thinking. The accurate meaning that can be

26 A Parsuramen ‘Pathway to integration or segregation’ *L’Express* (Mauritius) 21 December 2018 <https://www.lexpress.mu/idee/344808/pathway-integration-or-segregation> (accessed 19 May 2021).

27 Special Education Needs Authority Act.

28 Republic of Mauritius Parliamentary Debates, Sixth National Assembly: First Session 16 of 2016 (12 July 2016) 15 <https://mauritiusassembly.govmu.org/Documents/Hansard/2016/hansard1616.pdf> (accessed 19 May 2021).

ascribed to inclusive education under international human rights law will be explored in the following section.

## 4 The meaning of inclusive education

According to the Guidelines of the United Nations Educational, Scientific and Cultural Organisation, 'inclusive education' can be defined as:

[A] process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.<sup>29</sup>

The history and development of inclusive education have been extensively researched and analysed elsewhere and this article will not delve into the intricate details thereof.<sup>30</sup> Suffice to highlight that inclusive education should ideally be viewed through the lens of the CRPD. The Convention is the first international treaty which codifies in a single document all the human rights of persons with disabilities. It rejects the charitable and medical models of disability, and goes further than the social model of disability in favour of a human rights model.<sup>31</sup> The human rights model acknowledges that disabled individuals are first and foremost right-holders and that this entails the protection, promotion and respect of their rights on an equal footing with others. A rights-based approach thus requires that the normative contents of the Convention are applied to the areas which have a considerable impact on the inclusive education of learners with disabilities.

Article 24 of the CRPD on the right to education does not *per se* provide a definition for inclusive education. Article 24(2)(b) of the CPRD states that, in the realisation of the right to education, states parties should guarantee that persons with disabilities 'can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live'. It follows that states parties have a positive obligation to impose an inclusive education system at all levels and lifelong learning without discrimination and on the basis of equal opportunity. This signals the end of the exclusion of persons with disabilities from the general education system. Education providers are

29 UNESCO 'Guidelines for inclusion: Ensuring access to education for all' (2005) para 13.

30 K Ballard (ed) *Inclusive education: International voices on disability and justice* (1999); G Thomas & M Vaughan *Inclusive education: Readings and reflections* (2004); R Slee *The irregular school: Exclusion, schooling and inclusive education* (2011).

31 T Degener 'A human rights model of disability' in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* (2017).

required to ensure that laws and policies incorporating disability-based discrimination against learners with disabilities are gradually scrapped and that reasonable accommodation measures are put in place to assist learners with disabilities towards that end. Crucially, article 24(2)(a) of the CRPD recognises that in view of realising the right to education for persons with disabilities, access to the general education system must not be denied on the basis of their impairment. It is not easy to establish a clear-cut definition for 'inclusive education' from a literal interpretation of article 24 of the CRPD. But the Committee has remedied this textual defect in its General Comment on article 24 of the CRPD by stating that inclusive education is to be understood as:

- (a) A fundamental human right of all learners. Notably, education is the right of the individual learner and not, in the case of children, the right of a parent or caregiver. Parental responsibilities in this regard are subordinate to the rights of the child;
- (b) A principle that values the well-being of all students, respects their inherent dignity and autonomy, and acknowledges individuals' requirements and their ability to effectively be included in and contribute to society;
- (c) A means of realizing other human rights. It is the primary means by which persons with disabilities can lift themselves out of poverty, obtain the means to participate fully in their communities and be safeguarded from exploitation. It is also the primary means of achieving inclusive societies;
- (d) The result of a process of continuing and proactive commitment to eliminating barriers impeding the right to education, together with changes to culture, policy and practice of regular schools to accommodate and effectively include all students.<sup>32</sup>

It has further been observed that the CRPD has 'reinforced the clause of non-exclusion from any educational level on the basis of disabilities'.<sup>33</sup> By virtue of the postulation that economic, social and cultural rights can only be progressively realised, it is deemed reasonable that inclusive education policies cannot be implemented overnight. As a procedural obligation on state parties to international human rights instruments, progressive realisation requires the implementation of several measures in order to make effective the right of its intended beneficiaries.<sup>34</sup> It entails effort and commitment from states parties to guarantee that there is an expeditious and effective move towards the full realisation of economic, social and cultural rights.<sup>35</sup> In the context of international disability law, article 4(2) of the CRPD states in no uncertain terms that while economic, social and

32 CRPD Committee, General Comment 4: Article 24: Right to inclusive education (2016) UN Doc CRPD/C/GC/4 dated 2 September 2016, para 10 (footnote omitted).

33 MS Cisternas Reyes 'Inclusive education: Perspectives from the UN Committee on the Rights of Persons with Disabilities' in G de Beco, S Quinlivan & JE Lord (eds) *The right to inclusive education in international human rights law* (2019) 408.

34 O De Schutter *International human rights law: Cases, materials, commentary* (2014) 530.

35 CESCR, General Comment 3: Article 2(1): The nature of state parties obligations (1990) UN Doc E/1991/23 dated 14 December 1990 para 9.

cultural rights should be implemented subject to the maximum available resources of states parties, this should be done ‘with a view to achieving progressively the full realisation of these rights’. In other words, there is a positive obligation upon states parties to design a framework conducive to the proper implementation of the CRPD even if this is carried out incrementally.

Progressive realisation does not minimise the obligation of states to redefine budgetary allocations that should not only aim at special education measures, but more importantly dismantle a segregationist education system in order to build a more inclusive one over time. The CRPD Committee has clamoured for states parties ‘to achieve a transfer of resources from segregated to inclusive environments.’<sup>36</sup> This means that there should be a clear plan for the transition to an inclusive model. While the outcome in achieving inclusion is assuredly an integral part of the realisation of this right, it should be highlighted that there is a crucial need to consider more thoroughly the process leading to the outcome; in other words, more emphasis should be placed on the transformation of education systems.<sup>37</sup> Realisation of the right to inclusive education dovetails in both a detailed scrutinisation of policies adopted and the budget allotted toward that end. It follows that a law providing for the rights of persons with disabilities may be ineffective and will never translate into reality without proper policies aimed at giving effect to these rights. For instance, the state of Mauritius allocates significant resources to NGOs involved in the provision of special education to disabled students. If these resources were instead redirected toward building inclusive models of education in the mainstream school environment with the critical help of NGOs, it is highly likely that students with disabilities will be able to develop the life skills necessary in order to be included into the community when they grow up to become adults. All of this would not be possible without a proper legal framework that along with adequate public resources ‘play a key role in ensuring equal access to education also through the adoption of positive and special measures in line with Article 24 of the CRPD’.<sup>38</sup>

Article 24 of the CRPD enshrines not only the value of inclusion but also of quality in education. Inclusion and quality are ‘integral, indissoluble parts of the right to education of all individuals, both being universal in character’ which is directly proportional insofar as true inclusion only exists when quality education is available to each and every student.<sup>39</sup> What can be gleaned from this elaborate definition of ‘inclusive

36 Para 68 of General Comment 4 (n 32).

37 G de Beco ‘Progressive realization and the right to inclusive education’ in G de Beco et al (eds) *The right to inclusive education in international human rights law* (2019) 211.

38 V Della Fina ‘Article 24: Education’ in V Della Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 466.

39 Cisternas Reyes (n 33) 421.

education' from the CRPD Committee is that inclusion is first and foremost a process that involves the identification and elimination of barriers in the general education system in order to ensure that all students - irrespective of their disabilities or other socio-economic status - must have the same opportunity to access the education system. It follows that inclusion is

a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences.<sup>40</sup>

The concept of inclusiveness has been contrasted with differing concepts such as exclusion, segregation and, in particular, integration. Even if the line between integration and inclusion is somewhat blurred, they are in reality distinct from each other. On the one hand, integration can be described as the process 'of placing persons with disabilities in existing mainstream educational institutions with the understanding that they can adjust to the standardized requirements of such institutions'.<sup>41</sup> The integration approach thus focuses 'solely on enhancing the ability of the student to comply with the established standards'.<sup>42</sup> On the other hand, inclusion is a process which recognises:

- (a) [T]he obligation to eliminate barriers that restrict or ban participation, and
- (b) the need to change culture, policy and practice of the mainstream schools to accommodate the needs of all students, including those with impairments.<sup>43</sup>

This offers a better window into the reality of integration being modelled on an assimilationist approach to require learners with disabilities to adapt and fit into the existing arrangements of the general education system. In effect, the general education system cannot be altered to a more inclusive one if the consequences of integration are to assimilate children with disabilities into the mainstream education system without providing them with the required level of support in terms of reasonable accommodation. As an example, a visually-impaired student could benefit from the same education in a mainstream setting. Yet, without the provision of notes in braille format or a braille machine, the student will not be able to learn on an equal basis with his or her non-visually-impaired peers in the general classroom. The CRPD Committee has stated in no uncertain terms that

40 Para 11 of General Comment 4 (n 32).

41 As above.

42 'Thematic study on the right of persons with disabilities to education' OHCHR (18 December 2013) UN Doc A/HRC/25/29 (2013) para 4.

43 Thematic study (n 42) para 7.

article 24 of the CRPD does not allow for sustaining two systems of education: a general education system; and a parallel and special education system.<sup>44</sup> In the inclusive approach, the focus is on each individual disabled learner since educational planning must be suited for each learner with disabilities. What is certain is that inclusive education requires structural and systemic changes to the educational system and challenging teaching practices in view of accelerating the rate at which learners with disabilities can develop the acquisition of new skills and abilities in a mainstream school environment. The most important aspect regarding inclusive education revolves around the notion that it is not only access to existing facilities in the general education that must be given prominence, but the learning environment itself must be redesigned to support the learning process and other related needs of children with disabilities.

It should be pointed out that the drafters of the CRPD intended for inclusiveness to be an end in itself.<sup>45</sup> The means to that end was still inconclusive, thus leaving unclear the scope of where inclusion must take place.<sup>46</sup> This implies that article 24 of the CRPD does not explicitly place an onerous obligation on states parties to refrain from setting up special schools for learners with disabilities. But when Mauritius ratified the CRPD on 8 January 2010, it placed *inter alia* a reservation on article 24(2)(b) of the CRPD on the right to inclusive education of people with disabilities. The argument advanced for this reservation was that inclusive education will be progressively realised alongside special education.<sup>47</sup> It follows that Mauritius in fact recognised that the normative contents of that particular article are based on an inclusive model of education where learners with disabilities have the same opportunities in the mainstream education on an equal basis with others. While Mauritius had initially adopted an integration approach, it has recently tried to turn the tide as there is now a move - albeit at a snail's pace - towards an inclusive approach as demonstrated by the policy documents which have been endorsed by the government over recent years. But perennation of segregation will remain unchallenged unless radical policy changes are brought forward in a bid to promote and protect the right to an equal and quality education for people with disabilities in Mauritius.

44 Para 40 of General Comment 4 (n 32).

45 R Kayess 'Drafting article 24 of the Convention on the Rights of Persons with Disabilities' in G de Beco et al (eds) *The right to inclusive education in international human rights law* (2019) 122.

46 G de Beco 'Comprehensive legal analysis of article 24 of the Convention on the Rights of Persons with Disabilities' in G de Beco et al (eds) *The right to inclusive education in international human rights law* (2019) 66.

47 Initial Report of Mauritius (n 18).

## 5 Challenging the status quo for real inclusion

The education system in Mauritius has failed to take an enduring whole-of-society approach towards fostering the inclusion and proper assimilation of persons with disabilities into the community. Disabled children are segregated from the very beginning of their education. This segregationist approach to education for learners with disabilities in Mauritius has meant that children with disabilities are denied the opportunity to be placed in the same setting as their non-disabled counterparts. This translates into additional barriers for non-disabled persons to appreciate that impairments are not an anomaly in the anatomy of the human body but also as part and parcel of the human condition insofar as imperfections in the human mind and body are what account for the uniqueness of each individual. Segregation is a discriminatory practice against both children with disabilities and their non-disabled peers. On the one hand, children with disabilities are treated differently on the basis of their disability insofar as it is believed that their physical and mental impairments are a barrier to their effective inclusion into the 'normal' and general education system. On the other hand, children without disabilities are denied the opportunity from a young age to appreciate that children with impairments are not so much out of the ordinary.

Children with disabilities are not disabled because of their respective impairments, but instead by the way they are treated by society. As underlined in the CRPD, they are disabled as a result of the environmental and attitudinal barriers that hinder their full and effective participation in the community on an equal footing with their non-disabled counterparts.<sup>48</sup> These barriers are reflected in the law and policies related to education, employment and health that deny equal opportunity for disabled persons in the enjoyment of their fundamental rights. Environmental barriers may include physical obstacles regarding access to public buildings such as schools, transportation and other facilities. Attitudinal barriers encompass the mistaken perception that disabled children must constantly be treated differently by virtue of their impairment. This reinforces the negative stereotype that children with disabilities are less intellectually or physically competent than their non-disabled counterparts.

In relation to special education needs students, there is a negative impact associated with how these children develop low self-esteem and how their life opportunities are more often than not profoundly shaped by the experience of segregated education.<sup>49</sup> Children with disabilities are thus caught in an intricate web of causal chains, giving them the wrong impression that they should underestimate their abilities, as a result of

48 Preamble 5 of the CRPD.

49 LM Dunn 'Special education for the mildly retarded: Is much of it justifiable?' (1968) 35 *Exceptional Children* 5.

which they seldom have the impetus to expect, aspire and achieve more in terms of education. The policies adopted by successive governments in relation to the education of learners with disabilities have been nothing but an elaborate façade. What then are the policies and other measures that can be implemented to move from an education system that amplifies oppression and inequality toward a more inclusive one for learners with disabilities in Mauritius?

### 5.1 Specific legislative and policy measures

Sections 3 and 16 of the Constitution of Mauritius of 1968 are the operative provisions on discrimination. However, disability is not listed as a ground for discrimination.<sup>50</sup> There have been calls for decades to amend the Constitution in order to enshrine disability as a basis for discrimination, but after many public debates, it has unfortunately been left in limbo.<sup>51</sup> The Minister of Social Integration, Social Security and National Solidarity has recently declared that sections 3 and 16 of the Constitution of Mauritius will have to be amended first in view of ensuring that the fundamental rights and freedoms of Mauritian citizens with disabilities are fully respected.<sup>52</sup> This is characteristic of decision-making in Mauritius: an unwonted attitude to initiate radical changes that takes into consideration the aspirations, rights and will of the people insofar as this never materialises. A key recommendation is therefore for the state of Mauritius to amend the Constitution in view of bringing it into line with internationally accepted standards relating to the protection of persons with disabilities from discrimination. Accordingly, it is crucial to amend the Constitution before enacting any comprehensive law relating to disability discrimination.

If there is another thing that characterises the law-making process in Mauritius, it is related to the discrimination embedded in the laws already in place. There are a number of laws that directly or tangentially deal with the educational rights (or lack thereof) of persons with disabilities. More often than not, these laws are applied to their full extent so much so that Mauritian citizens with disabilities are treated as second-class citizens. One such law, the Equal Opportunities Act 2008, provides in its section

50 Disability is not a recognised ground for discrimination under the Constitution of Mauritius: Section 3 of the Constitution on Fundamental Rights and Freedoms of the Individual provides: 'It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex'; Sec 16 on Protection from Discrimination provides: 'In this section, "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed ...'.

51 See A Budoo & RA Mahadew 'Mauritius' (2014) 2 *African Disability Rights Yearbook* 227.

52 Republic of Mauritius Parliamentary Debates 'Seventh National Assembly – First Session 27 of 2020' (28 July 2020) 48 <https://mauritiusassembly.govmu.org/Documents/Hansard/2020/hansard272020.pdf> (accessed 19 May 2021).

17(3), that an educational institution may discriminate against learners with disabilities who require special services or facilities to participate or to derive substantial benefit from the educational program of the institution, or even when learners with disabilities could not participate in the program or derive a substantial benefit thereof after these services have been provided.<sup>53</sup> Further, as examined above, the Special Education Needs Authority Act 2018 cemented specialised schools as a main pillar of the education system in Mauritius. These laws should subsequently be amended at the same time that the Constitution is being amended to ensure that no derogation on the right to education of learners with disabilities is permissible and that discrimination in the education sector on the basis of disability is purely and simply proscribed.

Another key recommendation for policy-makers to consider would consequently be the enactment of a law designed specifically to protect and promote the rights and interests of persons with disabilities in Mauritius. Since Mauritius ratified the CRPD in 2010, there has been an awakening of national consciousness on the need to enact a comprehensive disability law. Mauritius being a dualist state, the rights contained in the CRPD do not have any direct legal effect unless they are incorporated into a national legislation.<sup>54</sup> But it is worth stressing that a comprehensive law on the rights and freedoms of Mauritians with disabilities can only be effective when the necessary preconditions are met for the promotion and protection of these rights and freedoms. Put differently, if the Constitution itself does not recognise disability as a ground for discrimination, it follows that a subsequent law providing for protection against disability-based discrimination may be stifled in a constitutional void. Yet, successive governments have all been complicit in perpetuating the present state of affairs by consistently and utterly failing to articulate an alternative vision for the constitutional and legal entrenchment of the rights of persons with disabilities, which could have positive effects in terms of empowerment and inclusion for the latter in Mauritian society. The law should thus explicitly provide for the right to education of learners with disabilities to be included in the mainstream education system.

Moreover, the elaboration of national action plans is vital in marking a decisive alteration for current institutions and societal initiatives to be imbued with a rights-based philosophy so as to enable persons with disabilities to be treated as people who can exercise their civil and political as well as socio-economic rights on an equal footing with others. The CRPD Committee has stressed the importance of 'comprehensive and co-ordinated legislative and policy framework for inclusive education must be

53 Equal Opportunities Act 2008 <http://eoc.govmu.org/English/Downloads/Documents/EQUAL%20OPPORTUNITIES%20ACT.pdf> (accessed 19 May 2021).

54 A Budoo & RA Mahadew 'The golden jubilee of the Mauritian Bill of Rights: A milestone to celebrate or time for reflections?' in M Addaney, MG Nyarko & E Boshoff *Governance, human rights, and political transformation in Africa* (2020) 91.

introduced, together with a clear and adequate time frame for implementation'.<sup>55</sup> These measures should not be introduced in a vacuum, without considering exactly how the goals should be attained in order to improve accessibility, expanding support provision and fostering awareness-raising. The promise of national action plans in the realisation of the rights of persons with disabilities cannot be converted into reality without a planning exercise that sufficiently addresses immediate and consistent actions toward the larger goal of empowering persons with disabilities with an appropriate education. It would be desirable to incorporate any national action plan regarding inclusive education into the overall scheme designed for education in the country. Under the guise of inclusive education, the 2017 action plan touched upon earlier in this article did nothing to improve a more inclusive model of education in the general education system nor was there any real inclusive education in the classroom for those who were integrated in the mainstream education system. Without plans designed to provide proper support provisions and teacher training for including students with disabilities into the mainstream education system, the vision of inclusion will remain an unattainable goal.

It follows that current laws and policies that fail to take a rights-based approach to the inclusion of learners with disabilities into the general education system require a sweeping review from top-down processes. In other words, it is incumbent upon state actors to propose laws and policies that give effect to the right of inclusive education as developed under international human rights law for learners with disabilities in Mauritius. This would not mean that civil society organisations will become less meaningful and less relevant to the needs of learners with disabilities in Mauritius. Much to the contrary, NGOs can still play a significant role in the success of including every child in the general education system, to the maximum extent possible. The solutions are simple but there is a patent lack of political will to implement straightforward and unchallenging policies. One simple policy would be to reallocate budgets currently earmarked to special education to guarantee that special educators are trained to be assistants in mainstream schools. Considering the local context, it would be rather difficult and impractical to prevent employees of NGOs from being involved in the education of learners with disabilities. There should be recognition of their prior knowledge in the field that is transferable to their potential role as inclusive education teachers into the general education system. The first step would be to ensure that mainstream schools accommodate students with disabilities irrespective of their physical or intellectual impairments. A second step would then be to train teachers on how to handle students with disabilities in class. NGOs would therefore have a well-defined role in supporting children with disabilities in the mainstream classroom.

55 Para 61 of General Comment 4 (n 31).

In relation to the development of specific transitional measures from the parallel special education model to a more inclusive one, Mauritius can seek inspiration from the US experience in relation to free and appropriate public education for disabled students. Individualised Education Plans (IEPs), although mandated under special education law, are a perfect example of inclusive education planning. As a written document prepared for a named student which specifies the learning goals that are to be achieved by the student over a set period of time, and the teaching strategies, resources and supports necessary to achieve those goals, the IEP is a key instrument that is tailored to the specific needs of the disabled student.<sup>56</sup> IEPs have the potential to ensure that the unique needs of every student with disabilities is fulfilled in order for them to reach their full academic potential, while developing life skills within an environment that provide them with an appropriate education and equal opportunities to succeed in life. It is important, however, for the IEPs to identify learning goals and objectives as well as the services necessary in smoothing the learning process for the student.

## **5.2 Awareness-raising and public education**

It has been observed earlier that there is a manifest disregard for what amounts to inclusive education under the CRPD notwithstanding the fact that more than a decade has passed since Mauritius ratified the Convention. Insofar as Mauritius maintains the reservation it placed on article 24(2)(b) of the CRPD, which caters specifically for the right to inclusive education of persons with disabilities, it will not be surprising to attest that the status quo will remain unchallenged. This is why it is of utmost importance that civil society organisations, and disabled persons organisations in particular, take it upon themselves to challenge the siloed thinking that in the third decade of this new millennium needs to be actively resisted in order for persons with disabilities to get in the driving seat to reclaim their inherent dignity as human beings. Particular attention should also be paid to awareness-raising of personnel within the education system. Closely related to the issue of awareness-raising is that of categorisation processes that represent a significant hurdle in accepting and adopting inclusive learning environments. If students with disabilities are to be truly included in the general education system, 'this cannot involve special education thought and practice'.<sup>57</sup> In categorising and naming students as special, the wrong perception that these students are different from others is perpetuated in the mind of the reasonable person

56 See L. Kupper (ed) 'A guide to the individualized education' Programme Office of Special Education and Rehabilitative Services, US Department of Education (July 2000) <https://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf> (accessed 19 May 2021).

57 K Ballard 'Children and disability: Special or included?' (2004) 10 *Waikato Journal of Education* 318.

so much so that these students are not valued in present mainstream schools and society.<sup>58</sup>

As correctly expressed, ‘upholding a segregated education system would be in clear contradiction with the prohibition of discrimination, and would resuscitate the principle of ‘separate but equal’ for a particular group of disabled people.’<sup>59</sup> However, considering the local context of the deeply entrenched system of special education in Mauritius, it would be unrealistic to expect the dismantlement of this deeply prejudicial system overnight. In other words, it would not be possible to close all special education schools at once. That would paradoxically have the unintended effect of discriminating against children with disabilities who are currently placed in special education schools inasmuch as they would no longer be in a position to receive an education. Children with disabilities are already subjected to negative stereotypes and stigma attached to their supposed unsuitability to the mainstream education system. The most significant obstacle to inclusion of learners with disabilities in mainstream education lies at the systemic level, as a culmination of decades of policies and structures that has shaped an attitude and disposition resistant to change.<sup>60</sup> Awareness-raising therefore becomes an important tool in enabling a paradigm shift in the mindset of people to accept incremental changes leading ultimately to the desegregation of special schools in view of including all learners with disabilities in a single education system.

While the Sustainable Development Goal 4 of the UN Department of Economic and Social Affairs aims to ensure access to all levels of education and vocational training with regard to the most vulnerable persons by the year 2030, it may in reality be highly difficult to enable every child with disabilities to participate in the mainstream education system.<sup>61</sup> For students who have severe forms of intellectual, behavioural and psychosocial impairments, the provision of reasonable accommodation and support measures may not effectively enable them to receive quality education on an equal basis with their non-disabled counterparts. It should be noted that, as mentioned earlier, article 24 of the CRPD does not expressly prohibit states from resorting to special schools on this matter. Nor does it require states to adopt special schools for students with severe forms of impairments. States parties to the CRPD thus have leeway in prolonging recourse to special education for learners with disabilities. Raising awareness on segregation in the education system can however enable contemporary society to start looking at special education in a less favourable light.

58 As above.

59 De Beco (n 46) 87.

60 UNICEF Innocenti Research Centre ‘Promoting the rights of children with disabilities’ (2007) 33 [http://www.un.org/esa/socdev/unyin/documents/children\\_disability\\_rights.pdf](http://www.un.org/esa/socdev/unyin/documents/children_disability_rights.pdf) (accessed 19 May 2021).

61 UN Department of Economic and Social Affairs ‘Sustainable Goal 4’ <https://sdgs.un.org/goals/goal4> (accessed 19 May 2021).

The barriers erected by society in not recognising and respecting the rights of all learners to participate in the public-school education system are unlikely to be dismantled unless profoundly- and culturally-rooted perceptions of disability are addressed in any meaningful way. It is of crucial importance to reshape attitudinal and cultural barriers that hinder the participation of persons with disabilities in the general education system.<sup>62</sup> If negative perceptions regarding persons with disabilities are to be reviewed, there is an urgent need to craft an inclusive vision which promotes understanding of how persons with disabilities have the right to participate in the socio-economic affairs of the country. Awareness-raising in terms of identification of the various means and reasons for accessing the education system may lead to better and more far-reaching outcomes for children with disabilities. Insofar as a radical shift is not fashioned in the general psyche of the population about the acceptance of persons with disabilities in all aspects of social, economic and cultural life, it will be a near impossible task to develop an inclusive society that takes the aspirations and needs of every citizen on the basis of access to equal opportunities, and in particular in the realm of education.

Acceptance of the role of persons with disabilities within the socio-economic activities of the country can become a reality if awareness-raising campaigns are not only directed to those in society who are deeply concerned about the chronic and systemic deficiencies to which persons with disabilities are subjected to, but directed in particular to multiple audiences who are not necessarily aware of the weight of suffering associated with being a disabled person in a blinkered society. Awareness-raising campaigns must thus focus on how to breakdown stereotypes and stigma associated with persons with disabilities. In the context of education, this means that these campaigns should explicitly target children and teachers in the general education system in view of generating a radical shift in the mindset of people toward better understanding and acceptance of those with disabilities. As has been observed, the development of more inclusive educational environments 'confronts traditional discriminatory attitudes towards disabled people within society and facilitates a fundamental shift in social perspectives'.<sup>63</sup>

The way forward in empowering learners with disabilities to exercise their right to education on an equal basis is in the adoption of incremental processes in doing away with the special education system. Negative perceptions on the inability of learners with disabilities to successfully integrate the general education system cannot be altered overnight. It is only by educating the population about the rights-based philosophy

62 F Polat 'Inclusion in education: A step towards social justice' (2011) 31 *International Journal of Educational Development* 50.

63 M Shevlin 'Moving toward schools for all: Examining the concept of educational inclusion for disabled children and young people' in G de Beco et al (eds) *The right to inclusive education in international human rights law* (2019) 108.

espoused in the Convention that it will be possible to generate more inclusive ways of thinking about difference and making an effective contribution toward the upliftment of the educational potential of disabled learners. There should thus be a gradual transition to an inclusive model of education while enabling special education to operate until it is completely phased out from the current education system. The role of campaigning is instrumental in that regard.

### 5.3 Socio-economic benefit of inclusive education

It is beyond doubt that Mauritius has more to gain by using the enormous untapped potential of its disabled population, with the spillover effect of creating prosperity by providing equal opportunity and access to wealth for people with disabilities. Specialised and separate education systems 'often provide a lower standard of education and decrease their pupils' future chances of life'.<sup>64</sup> There is thus an economic argument that can be raised to convince policy-makers leery of the costs associated with the financial burden that veering toward an inclusive education system could impose on the state. This argument does not rest on the premise that inclusive education will be immensely beneficial to society in the long term. Yet, both UNICEF and the OECD have ascertained that inclusive education systems are less costly than segregated school systems.<sup>65</sup> The extensive funding of special education schools will arguably never achieve the desired outcome of an inclusive model of education for all students alike. It is incumbent upon policy-makers to invest into more inclusive models of education for learners with disabilities in Mauritius. However, if these funds are redirected in view of implementing the right to inclusive education for students with disabilities in the mainstream education system, it is likely that these funds will be insufficient, for which more investment may be required in the short term. In other words, this will bring additional costs to placing students with disabilities in the general education system. But, while states may not recoup these investments in the near future, it is highly likely that inclusive education will become profitable in the long term.<sup>66</sup>

64 G de Beco 'Transition to inclusive education systems according to the Convention on the Rights of Persons with Disabilities' (2016) 34 *Nordic Journal of Human Rights* 40 at 50.

65 UNICEF *The right of children with disabilities to education: A rights-based approach to inclusive education* (2012) 38-39 [http://www.unicef.org/ceecis/UNICEF\\_Right\\_Children\\_Disabilities\\_En\\_Web.pdf](http://www.unicef.org/ceecis/UNICEF_Right_Children_Disabilities_En_Web.pdf) (accessed 19 May 2021); OECD *Inclusive education at work: Students with disabilities in mainstream schools* (1999) 22 [http://www.oecd-ilibrary.org/education/inclusive-education-at-work\\_9789264180383-en](http://www.oecd-ilibrary.org/education/inclusive-education-at-work_9789264180383-en) (accessed 19 May 2021).

66 De Beco (n 36) 207.

There are clear indications from research around the globe that inclusive educational settings confer both considerable short-term and long-term benefits for learners with and without disabilities.<sup>67</sup> Students with disabilities placed in the mainstream educational settings tend to develop stronger social and academic skills, and are less likely to develop behavioural problems and drop out of school.<sup>68</sup> As the wheel in the machinery of the education system grinds at a faster pace with the inclusion of all children, students with disabilities are more likely to continue their education to high school, tertiary levels and beyond. These students are thus empowered to contribute to their community when they have the means through employment to live independently. The need to grapple with the disconnect between the general education system and the inherent unequal nature of separate educational facilities will yield to long-term positive results for the socio-economic well-being of the country. It is therefore absolutely necessary to desegregate the parallel special education system into a single inclusive education system for every citizen.

Poverty is closely linked to disability and is both a cause and consequence of disability. The World Bank has maintained that 15 per cent of the world's population have some form of impairment and are more likely to experience the adverse socio-economic disadvantages associated with the discrimination they face on the basis of their disability.<sup>69</sup> One fifth of the poorest people around the globe live on less than one dollar daily. They lack access to basic necessities such as adequate shelter and clean drinking water. This cycle of poverty will not be broken until these people are provided with adequate healthcare and education facilities which are in fact essential amenities for ensuring a decent survival in this context characterised by intense cut-throat competition. The inextricable link between poverty and disability constitutes an autocatalytic process that feeds itself. With these additional challenges, persons with disabilities are caught up in a process that increases and disseminates the scourge of poverty. But access to an inclusive education system can remedy the disparities that have been entrenched in the socio-economic structure of society since independence. Public education can thus act as a bridge to provide disabled students with the foundational tools to enter into the job market and effectively compete on an equal footing with their non-disabled counterparts.

It is important to further consider the long-term effects of special education on society. Insofar as students with disabilities placed in special educational settings are not afforded with the same opportunities for post-secondary and tertiary education, it would be logical to conclude that it

67 T Hehir et al 'A summary of the evidence on inclusive education' (2016) Instituto Alana.

68 As above.

69 World Bank 'Disability inclusion' (1 October 2020) <https://www.worldbank.org/en/topic/disability> (accessed 19 May 2021).

will be much more difficult for them to access the job market when they become an adult. Among the people with disabilities who are 16 years and above in Mauritius as of 2011, 82.8 per cent were economically inactive, out of which 50 per cent of them have given 'disability' as the reason for their unemployment status.<sup>70</sup> The International Labour Organisation explored how the exclusion of persons with disabilities from the labour market has profound negative implications for the economic development of countries around the world.<sup>71</sup> One empirical study has even found that 'the ways to access the job market [are] determined by levels of education among persons with disabilities', with 'lower average education levels [being] one of the specific features inherently related to employment of persons with disabilities'.<sup>72</sup> In yet another study on the economic costs of exclusion of people with disabilities from low and middle income countries, evidence led toward a finding that '[e]xclusion from education may lead to lower employment and earning potential among people with disabilities'.<sup>73</sup> This results in increasing the likelihood of falling into the poverty trap while also limiting national economic growth.<sup>74</sup>

In order to be in a position to measure the progress in the implementation of the right to inclusive education, the use of human rights indicators can be helpful in monitoring the ongoing measures that are implemented over a set period of time. Human rights indicators provide specific and practical tools in the enforcement of human rights and evaluating their implementation. They can be defined as

specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.<sup>75</sup>

70 Statistics Mauritius '2011 housing and population census: Analytical report, volume vii -disability' (June 2015) [https://statsmauritius.govmu.org/Documents/Census\\_and\\_Surveys/HPC/2011/HPC\\_AR\\_Vol7\\_Disability\\_Report\\_Yr11.pdf](https://statsmauritius.govmu.org/Documents/Census_and_Surveys/HPC/2011/HPC_AR_Vol7_Disability_Report_Yr11.pdf) (accessed 19 May 2021).

71 S Buckup 'The price of exclusion: The economic consequences of excluding people with disabilities from the world of work' International Labour Office, Employment Sector, Skills and Employability Department, Employment Working Paper No 43 (14 December 2009) [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_119305.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_119305.pdf) (accessed 19 May 2021).

72 A Cámara et al 'Macroeconomic cost of excluding persons with disabilities from the workforce in Spain' (2020) 10 *IZA Journal of Labor Policy* 1.

73 L Morgon Banks & S Polack 'The economic costs of exclusion and gains of inclusion of people with disabilities: Evidence from low and middle income countries' (2015) International Centre for Evidence in Disability, London School of Hygiene & Tropical Medicine <https://disabilitycentre.lshtm.ac.uk/new-report-economic-costs-exclusion-gains-inclusion-people-disabilities/> (accessed 19 May 2021).

74 As above.

75 OHCHR 'Human rights indicators: A guide to measurement and implementation' UN Doc HR/PUB/12/5 (2012) [https://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](https://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf) (accessed 19 May 2021).

Following the approach devised by the UN High Commissioner for Human Rights, a three-pronged assessment of the structural, process and outcome indicators can help inform the status of implementation and enforcement of the right in question, including the right to inclusive education.<sup>76</sup> With particular regard to inclusive education, the structural indicators could focus on the law, financial planning and observing institutions; the process indicators could focus on accessibility of the education system, support and reasonable accommodation measures available to students, adaptable curricula, teacher training and capacity-building, and awareness-raising campaigns; and the outcome indicators could rely on attendance, completion of studies and drop-out levels, while also taking into consideration the various social and environmental attitudes in general schools.

## **6 Conclusion**

It has become increasingly evident that progress toward inclusion in the realm of education for learners with disabilities in Mauritius has been inexplicably inconsistent, and so-called inclusive policies advocated by successive governments have had little tangible effects in practice. In order to break free from the chains of this segregationist approach where the education of disabled learners developed in parallel to that of their non-disabled peers, a radical overhaul of our approach to education is warranted. Towards that end, adopting a rights-based approach to inclusive education can have profound implications for students with disabilities when they are provided with the same educational opportunities within mainstream settings on an equal basis with others. It is not the disabled student who should adapt to the school system, but rather it is for education providers to adapt to the particular needs of students with disabilities.

The series of measures that have been recommended in this paper require the collective participation of every stakeholder in the provision of education in Mauritius. First, the authorities have to amend the Constitution and discriminatory laws that are acting as a significant barrier for learners with disabilities to be treated as equals under the law. Law-makers should design a comprehensive law that gives effect to the right to inclusive education of disabled learners, setting out the proper framework that will best ensure the transition to an inclusive system. But enacting a new law should be followed by clear action plans setting out clear timelines for the transition to, and implementation of, an inclusive education system. The role of civil society organisations in that process must not be underestimated. Second, this paper has argued that siloed thinking must be challenged by more actively educating the population on the rights of

76 OHCHR (n 75) 93.

persons with disabilities through awareness-raising campaigns. Finally, the economic argument that inclusive education may be socio-economically more beneficial for both the state and for learners with disabilities has been advanced insofar as the current system is not providing genuine remedies for the empowerment of persons with disabilities.

This paper has offered recommendations in view of weeding out the inefficiencies deeply-rooted in the parallel special education system in Mauritius, with the hope of a long-term establishment of a more inclusive model of education. Informed by a rights-based approach whereby learners with disabilities are entitled to their right to education on an equal basis with others, policy-makers have the ethical and moral responsibility to develop an appropriate set of legal and policy tools for these learners to be in a position to vindicate their right to education. Current thinking and practice on the defunct charitable model of disability prevalent in society must be vehemently opposed. Challenging the status quo will have a broad impact on the empowerment and promotion of the social, economic and political inclusion of persons with disabilities within society. Disabled persons should first and foremost be considered as rights-holders, rather than second-class citizens who are the subject of pity and charity. This is the 'rights' way forward.

## **SECTION B: COUNTRY REPORTS**



# RÉPUBLIQUE D'ALGERIE

Gerard Emmanuel Kamdem Kamga\*

## Summary

*As of 1 January 2020 the population of Algeria reached 43.9 million persons. In terms of disability, the country has about 2 million persons living with disabilities; 44 per cent comprise physical disabilities and represent the majority of disabilities in the country.*

*The Republic of Algeria signed the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2009 but had already enacted law no 02/09 of 8 May 2002 pertaining to the protection and promotion of persons with disabilities. One should keep in mind that this law was enacted in 2002 prior to the CRPD that came into being in 2006. In addition, the government of Algeria set up a number of bodies to deal with disability issues in the country. These include, amongst others, the Commission Nationale d'Accessibilité des Personnes Handicapées à l'Environnement Physique, Social, Economique et Culturel; and the Conseil National des Personnes Handicapées. Similarly, there is a Commission Nationale de Promotion et de Protection des Droits de l'Homme (National Commission for the Promotion and Protection of Human Rights) established by law no 16/13 of 3 November 2016. In the same vein, a number of organisations, such as the Algerian Federation of People with Disabilities (Fédération Algérienne de Personnes Handicapées (FAPH)) exists to promote and protect disability rights.*

*Nonetheless, despite a comprehensive set of structures, legislation, initiatives and instruments promoting and protecting their rights, people with disabilities in Algeria are still confronted with various challenges including, amongst others, discrimination and stigmatisation.*

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## 1 Les indicateurs démographiques

### 1.1 Quelle est la population totale d'Algérie?

En Janvier 2020, le Ministre de l'Intérieur, des Collectivités Locales et de l'Aménagement du territoire, indiquait que 'toutes les mesures nécessaires' avaient été prises pour la réalisation courant 2021 du 6e recensement général de la population et de l'habitat (RGPH), et ce 'si la situation sanitaire s'y prête'.<sup>1</sup> Néanmoins, il convient de retenir que la population totale d'Algérie est passée de 43.9 millions le 1er Janvier 2020 contre 43.4 millions le 1er Janvier 2019.<sup>2</sup>

### 1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en Algérie. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées en Algérie?

En Algérie, la loi no 02/09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées avait jeté les bases d'une véritable protection de cette catégorie de personnes. Il est prévue au terme des dispositions de l'article 2 de cette loi que:

la protection et la promotion des personnes handicapées s'étendent, au sens de la présente loi, à toute personne, quels qu'en soient l'âge et le sexe, souffrant d'un ou de plusieurs handicaps d'origine héréditaire, congénitale ou acquis, et limitée dans l'exercice d'une ou de plusieurs activités de base de la vie courante personnelle et sociale, consécutivement à une atteinte de ses fonctions mentales et/ou motrices et/ou organiques sensorielles.

Il est ensuite prévu que ces handicaps seront définis suivant leur nature et leur degré par voie réglementaire.

### 1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République d'Algérie ?

Parlant du nombre total et du pourcentage des personnes handicapées en Algérie, l'Office National des Statistiques renseigne que le pays dénombre environ 2 millions de personnes en situation de handicap. Il est précisé que le handicap moteur est le plus important, soit 44 pour cent des personnes handicapées, suivi du handicap lié à la compréhension et la communication qui est de 32 pour cent et du handicap visuel qui s'élève à 24 pour cent.<sup>3</sup>

1 Le recensement de la population sera réalisé en 2021 si la situation sanitaire s'y prête <https://www.aps.dz/algerie/tag/Population> (consulté le 10 Mars 2021).

2 Algérie en janvier 2020 <http://www.aps.dz/algerie/104918-demographie-43-9-millions-d-habitants-en-algerie-en-janvier-2020> (consulté le 10 Mars 2021).

3 Mise en œuvre de la résolution 26/20 du Conseil des Droits de l'Homme Contribution de la Commission Nationale Consultative de Promotion et de Protection des Droits de l'Homme (CNCPDH) – Algérie – <https://www.ohchr.org>, NHRI, NHRIAlgeriaFRA (consulté le 10 Mars 2021).

#### 1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République d'Algérie?

La réponse à cette question n'est pas précise. Toutefois, la ministre de la solidarité nationale, de la Famille et de la Condition de la Femme a récemment affirmé, que 'le nombre effectif des personnes aux besoins spécifiques en Algérie sera fixé au prochain recensement de la population en 2020.' En effet, invitée à un forum à la Radio nationale, la ministre a fait savoir que le nombre de personnes aux besoins spécifiques en Algérie s'élevait à un million de personnes titulaires d'une carte d'handicap. La ministre a toutefois estimé que la réalité dépasse largement ce chiffre.<sup>4</sup>

#### 1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République d'Algérie?

Les statistiques ne sont pas précises. Néanmoins, il a été indiqué que l'Algérie comptait environ deux millions de personnes handicapées et que le recensement national de 2018, dès que ses résultats seront connus, permettrait de disposer de chiffres plus précis. Dans le même ordre d'idées, il est rappelé que plus de 900 000 personnes en Algérie sont détentrices d'une carte légitimant leur statut de personnes handicapées.<sup>5</sup>

#### 1.6 Quelles sont les formes de handicap les plus répandues en République d'Algérie?

Il ressort d'une enquête nationale à indicateurs multiples réalisée sur un échantillon de ménages algériens des différentes régions du pays qu'en Algérie, le handicap moteur arrive en tête des handicaps recensés avec. Le handicap lié à la compréhension et à la communication se classe à la deuxième position avec une prévalence de 32 pour cent suivi du handicap visuel, 24 pour cent et du handicap de l'ouïe, 0.4 pour cent. Il est indiqué que 2.5 pour cent des sondés souffrent d'un handicap qui diminue leurs activités quotidiennes; une prévalence qui passe de 0.1 pour cent chez les personnes de moins de 20 ans à 2.8 pour cent chez les 20-59 ans, puis à 13.2 pour cent chez les 60 ans et plus.<sup>6</sup> Il ressort également de l'enquête que les sujets de sexe masculin sont plus touchés que ceux de sexe féminin, soit 3.9 pour cent contre 1.1 pour cent respectivement.

L'analyse selon la cause du handicap montre que 28.5 pour cent sont des atteintes congénitales ou héréditaires, 16.7 pour cent des séquelles des accidents ou de blessures, 14.2 pour cent des maladies infectieuses, 12.5 pour cent des effets de vieillesse, 7.9 pour cent des violences psychologiques ou physiques et 2 pour cent des traumatismes d'accouchement.<sup>7</sup> La répartition par âge du taux de population souffrant d'un handicap congénital montre que chez les personnes âgées de 0 à 19 ans, ce type de handicap atteint 65 pour cent, alors qu'il est de 34.1 pour cent chez la population âgée de 20 à 59 ans et de plus de 18 pour cent chez les 60 ans et plus. L'enquête n'a enregistré aucune différence par sexe. Le handicap lié aux accidents

4 Personnes aux besoins spécifiques: le nombre effectif sera connu au recensement de 2020 <https://www.aps.dz/societe/84152-personnes-aux-besoins-specifiques-le-nombre-effectif-sera-connu-au-recensement-de-2020> (consulté le 20 Mars 2021).

5 Le Comité des droits des personnes handicapées examine le rapport initial de l'Algérie <https://www.ohchr.org/fr/NewsEvents/Pages/DisplayNews.aspx?NewsID=23488&LangID=F> (consulté le 10 Mars 2021).

6 Le handicap moteur représente 44 pour cent de l'ensemble des handicaps recensés en Algérie <https://www.djazairss.com/fr/lnr/222826> (consulté le 10 Mars 2021).

7 Comme ci-dessus.

et aux blessures atteint 17.5 pour cent dans la tranche d'âge 60 ans et plus, 16.7 pour cent chez les 20-59 ans et 3.5 pour cent chez les 0-19 ans, souligne l'enquête qui précise que les hommes sont sensiblement plus touchés par ce type de handicap que les femmes. L'examen de l'âge lié au handicap montre que plus de 25 pour cent des handicaps remontent à la naissance, plus de 11 pour cent à la petite enfance (moins de 5 ans), plus de 15 pour cent à la période allant de 5 à 18 ans et plus de 41 pour cent à la période de 19 ans et plus. Pour plus du tiers (37 pour cent) des handicaps, l'âge déclaré se situe entre la naissance et 5 ans. L'enquête révèle une forte présence des handicapés à l'âge de 19 ans et plus au centre (45.2 pour cent) et au sud (33.2 pour cent). Réalisée sur un échantillon de près de 30 000 ménages algériens des différentes régions du pays, l'enquête nationale à indicateurs multiples a notamment porté sur les maladies chroniques et handicaps, la santé maternelle, la santé des enfants et l'éducation.

## 2 Obligations internationales

### 2.1 **Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République d'Algérie? La République d'Algérie a-t-elle signé et ratifié la CDPH? Fournir le(s) date(s). La République d'Algérie a-t-elle signé et ratifié le Protocole facultatif? Fournir le(s) date(s).**

Le gouvernement Algérien a signé la Convention relative aux Droits des Personnes Handicapées le 30 Mars 2007 et l'a ratifié le 4 Décembre 2009. L'État Algérien n'a pas ratifié le Protocole facultatif se rapportant à la Convention.<sup>8</sup>

### 2.2 **Si la République d'Algérie 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 d'Algérie a-t-elle soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?**

Conformément à l'Article 35 de la CDPH, la République d'Algérie était tenue de soumettre son rapport initial dans un délai de deux ans, soit à la date du 4 Décembre 2011 compte tenu du fait que c'est le 4 Décembre 2009 que le pays a ratifié la CDPH. Le gouvernement Algérien a soumis son rapport initial au comité des droits des personnes handicapées en 2015. Il incombe au Ministère de la solidarité nationale, de la famille et de la condition féminine de soumettre le rapport.

<sup>8</sup> Il convient néanmoins de souligner que ces dates diffèrent de celles mentionnées dans le rapport initial de l'Algérie qui évoque plutôt le 12 Mai 2009 comme date de ratification par décret présidentiel no 09-188 publié au Journal Officiel de la République d'Algérie en date du 31 Mai 2009.

**2.3 Si la République d'Algérie 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 d'Algérie. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées d'Algérie?**

Comme précédemment mentionné, l'Algérie a soumis son rapport initial en 2015 et après examen, le comité a émis des observations finales et recommandations suivantes:

Le Comité a relevé la non-ratification du Protocole facultatif se rapportant à la Convention par l'état Algérien. En guise de recommandation, l'État partie a été prié de remédier à cela. En outre, le Comité a également observé que L'Algérie n'a pas encore harmonisé sa législation avec la Convention, notamment sa loi no 02/09 du 8 mai 2002 et son décret exécutif no 14/204 du 15 juillet 2014, qui reposent essentiellement sur le modèle médical du handicap. Le comité a également observé que les différents niveaux d'évaluation du handicap aux fins de l'octroi de prestations et d'autres services continuent d'être axés sur les déficiences.<sup>9</sup>

En guise de recommandations, le Comité a suggéré à l'État Algérien:

- D'incorporer pleinement la Convention dans son ordre juridique interne, d'abroger ou de modifier toute loi contraire à la Convention et discriminatoire à l'égard des personnes handicapées, notamment la loi no 02/09 du 8 mai 2002, et d'harmoniser ses politiques et pratiques avec la Convention;
- D'éliminer les multiples niveaux d'évaluation du handicap et, en consultation avec les organisations de personnes handicapées, de mettre en place une politique et une procédure d'évaluation conformes à l'approche du handicap fondée sur les droits de l'homme qui est consacrée par la Convention.<sup>10</sup>

Par ailleurs, Il y a eu des effets internes découlant du processus de rapport liés aux questions des personnes handicapées en Algérie. Ainsi, la délégation Algérienne qui présentait son rapport initial a observé que le pays avait adopté sa loi relative à la protection et à la promotion des personnes handicapées en 2002, avant même la ratification de la Convention. Cette délégation a également observé que le budget alloué aux activités publiques en faveur des personnes handicapées est de 138.5 milliards de dinars Algériens en 2018 (1 007 milliard d'euros). En plus, la délégation a fait valoir qu'un tiers du produit intérieur brut (PIB) de l'Algérie était consacré aux transferts de solidarité, en particulier en direction des personnes handicapées.<sup>11</sup>

<sup>9</sup> Comité des droits des personnes handicapées. Observations finales concernant le rapport initial de l'Algérie <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslha3TVrYYNygQewmXyBjgrT81Ll19YgiqHEadWXX7z4%2BGKuL.Cw80eCfVp13o83kZRnm9487SAk4PEw7MEVcBsxFf59PYLkgVihY3PbFk6> (consulté le 24 Avril 2021).

<sup>10</sup> L'intégralité des observations et recommandations est disponible sur le lien ci-dessus.

<sup>11</sup> Le Comité des droits des personnes handicapées examine le rapport initial de l'Algérie <https://www.ohchr.org/fr/NewsEvents/Pages/DisplayNews.aspx?NewsID=23488&LangID=F> (consulté le 24 Avril 2021).

**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 d'Algérie a-t-elle également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de la République d'Algérie? Si oui, quels étaient les effets de ces observations ou recommandations?**

La République d'Algérie a effectivement fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents. Ainsi on retrouve plusieurs références dans les cinquième et sixième rapports périodiques de l'Algérie sur la mise en œuvre de la Charte Africaine des Droits de l'Homme et des Peuples couvrant la période 2010-2014, présenté en vertu de l'article 62 de ladite Charte. Dans la troisième partie de ce rapport intitulée « informations portant sur la mise en œuvre par l'Algérie de la Charte Africaine », l'article 18 est dévolue au droit de la famille, des femmes et des personnes âgées ou handicapées à des mesures spécifiques de protection.<sup>12</sup> En outre, en ce qui est de la Revue Périodique Universelle des Nations Unies, le Rapport de l'Etat d'Algérie présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des Droits de l'homme fait mention spécifique du droit des personnes handicapées. Ainsi, le paragraphe 186 de ce rapport dispose que « l'ensemble des administrations publiques accordent une attention particulière aux personnes à besoins spécifiques en leur offrant une assistance particulière qui se décline à travers la réalisation de rampes d'accès pour les handicapés moteurs, la signalisation d'un guichet spécifique destiné à accueillir les personnes vulnérables, la formation des personnels au langage gestuel et la réalisation de manuels scolaires destinés à informer les illettrés, sur leurs droits. » Plusieurs autres fragments à l'instar des paragraphes 12, 65, 96, 147, 149, 150, 160 de ce rapport font référence aux droits des personnes handicapées.<sup>13</sup>

Après l'examen des divers rapports, Il y a eu des observations ou recommandations qui ont été suivi d'effets. Le plus important demeure l'adoption de la loi no 02/09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées; une loi adoptée avant la ratification par le pays de la Convention des Nations Unies relative aux droits des personnes handicapées.

**2.5 Y avait-il un quelconque effet interne sur le système légal de la République d'Algérie 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, par l'Algérie a eu pour effet, la reconnaissance internationale des droits des personnes handicapées dans le pays. Ceci se traduit concrètement par le fait qu'en Algérie, les enfants handicapés, filles comme garçons, bénéficient désormais du

12 Algérie: Cinquième et Sixième rapports périodiques, 2010-2014 [https://www.achpr.org/fr\\_states/staterreport?id=100](https://www.achpr.org/fr_states/staterreport?id=100) (consulté le 10 Juillet 2021).

13 Rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/037/97/PDF/G1703797.pdf?OpenElement> (consulté le 10 Juillet 2021).

droit à l'éducation pour tous dans des conditions d'égalité. Ce faisant, l'Algérie œuvre pour intégrer les enfants ayant des besoins spécifiques dans les salles de classe. Cet ainsi que plus de 32 000 d'entre eux sont désormais intégrés dans les classes ordinaires et plusieurs milliers d'autres sont intégrés partiellement, moyennant des soutiens spécialisés.<sup>14</sup>

**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?**

En vertu des dispositions de l'article 154 de la constitution Algérienne, les traités ratifiés par le Président de la République, dans les conditions fixées par la Constitution, sont supérieurs à la loi. Tenant compte de cette disposition constitutionnelle, l'on peut logiquement envisager que les cours et tribunaux d'Algérie peuvent directement appliquer les dispositions du traité international bien qu'il n'y ait pas d'exemple disponible.

**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.**

Si l'on considère qu'en Algérie, les traités ratifiés par le Président de la République, dans les conditions fixées par la Constitution sont supérieurs à la loi comme mentionné à l'article 54, il en découle logiquement qu'en ratifiant la Convention des Nations Unies relative aux Droits des Personnes Handicapées CDPH en 2009, le gouvernement Algérien incorporait cette Convention dans la législation nationale.

## 3 Constitution

**3.1 La constitution de la République d'Algérie contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.**

La Constitution Algérienne de 1996 révisée en 2020 contient des dispositions directement relatives au handicap. Ainsi, l'article 72 prévoit que L'Etat œuvre à assurer aux personnes vulnérables ayant des besoins spécifiques, leur insertion dans la vie sociale. Dans le même ordre d'idées, l'article 37 mentionne que les citoyens sont égaux devant la loi et ont droit à une égale protection de celle-ci, sans que puisse prévaloir aucune discrimination pour cause de naissance, de race, de sexe, d'opinion ou de toute autre condition ou circonstance personnelle ou sociale. En outre, l'article 35 sur les droits fondamentaux et les libertés garantis par l'Etat, souligne que les institutions de la République ont pour finalité d'assurer l'égalité en

<sup>14</sup> Le Comité des droits des personnes handicapées examine le rapport initial de l'Algérie <https://www.ohchr.org/fr/NewsEvents/Pages/DisplayNews.aspx?NewsID=23488&LangID=F> (consulté le 24 Avril 2021).

droits et en devoirs de tous les citoyens et citoyennes en supprimant les obstacles qui entravent l'épanouissement de la personne humaine et empêchent la participation effective de tous à la vie politique, économique, sociale et culturelle. Une telle disposition fait également référence aux personnes handicapées.

**3.2 La constitution de la République d'Algérie 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 d'Algérie réitère dans son préambule l'attachement du peuple algérien aux Droits de l'Homme tels qu'ils sont définis dans la Déclaration universelle des Droits de l'Homme de 1948 et les traités internationaux ratifiés par l'Algérie. Cette disposition concerne indirectement le handicap tant il est vrai que les textes mentionnés ainsi que la notion de droit de l'homme s'appliquent également aux personnes handicapées. En ce qui sont des traités ratifiés par l'Algérie, la Convention relative aux Droits des Personnes Handicapées ratifiée par le pays en 2009 est un exemple palpable.

## 4 Législation

**4.1 La République d'Algérie a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.**

Il existe effectivement en Algérie plusieurs textes concernant directement le handicap:

- Loi no 02/09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées.
- Décret exécutif no 17/187 du 3 juin 2017 fixant les modalités de prévention du handicap.
- Décret exécutif no 14/214 du 30 juillet 2014 fixant les modalités inhérentes à la réservation des postes de travail, à la détermination de la contribution financière et à l'octroi de subventions pour l'aménagement et l'équipement des postes de travail pour les personnes handicapées.
- Décret exécutif no 08/83 du 4 mars 2008 fixant les conditions de création, l'organisation et le fonctionnement des établissements de travail protégé.
- Décret exécutif no 08/02 du 2 janvier 2008 fixant les conditions de création, l'organisation et le fonctionnement des établissements d'aide par le travail.
- Décret exécutif no 06/455 du 11 décembre 2006 fixant les modalités d'accessibilité des personnes handicapées à l'environnement physique, social, économique et culturel.
- Décret exécutif no 03/333 du 8 octobre 2003 relatif à la Commission de wilayas d'éducation spéciale et de formation professionnelle.
- Décret exécutif no 03/45 du 19 janvier 2003 fixant les modalités d'application des dispositions de l'article 7 de la loi no 02-09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées.
- Décret exécutif no 19/273 du 8 octobre 2019 modifiant le décret exécutif no 03-45 du 19 janvier 2003 fixant les modalités d'application des dispositions de l'article 7 de la loi no 02/09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées.

- Décret exécutif no 05/68 du 30 janvier 2005 fixant le statut type des centres de formation professionnelle et d'apprentissage spécialisés pour personnes handicapées physiques.

**4.2 La République d'Algérie a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.**

On peut dire qu'en Algérie, toute législation est guidée par le principe de l'égalité de tous les citoyens devant la loi y compris les personnes handicapées. Comme précédemment mentionné, le préambule de la Constitution Algérienne réitère son attachement aux Droits de l'Homme tels qu'ils sont définis dans la Déclaration universelle des Droits de l'Homme de 1948 et les traités internationaux ratifiés par l'Algérie.

## 5 Décisions des cours et tribunaux

**5.1 Les cours (ou tribunaux) de la République d'Algérie 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.**

Information non disponible.

## 6 Politiques et programmes

**6.1 La République d'Algérie 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.**

L'on peut retenir qu'en Algérie, les politiques ou programmes qui englobent directement le handicap sont conçus par le Ministère de la Solidarité Nationale, de la Famille et de la Condition de la Femme, à qui incombe cette responsabilité. Une fois élaborées, ce Ministère a également la responsabilité de la mise en œuvre et du suivi de ces politiques, en collaboration avec les parties prenantes. Lors de la présentation de son rapport initial sur les mesures prises pour appliquer les dispositions de la Convention relative aux droits des personnes handicapées devant le Comité des droits des personnes handicapées, l'Algérie a souligné que les politiques publiques veillent à assurer l'accès de toutes les personnes aux bâtiments publics, notamment les bâtiments judiciaires, où les justiciables handicapés bénéficient d'aménagements tels que des systèmes de traduction des jugements en braille, a ajouté la délégation.<sup>15</sup> La délégation Algérienne a également expliqué que

<sup>15</sup> Le Comité des droits des personnes handicapées examine le rapport initial de l'Algérie <https://www.ohchr.org/fr/NewsEvents/Pages/DisplayNews.aspx?NewsID=23488&LangID=F> (Consulté le 24 Avril 2021).

la commission nationale d'accessibilité des personnes handicapées était dotée de trois sous-comités chargés respectivement des transports, des espaces et bâtiments publics, de la communication et de la technologie. Ainsi, il a été adopté une politique pour le logement des personnes handicapées, dont une des mesures consiste à leur réserver des logements au rez-de-chaussée. Au cours de cette présentation, il a également été mentionné le lancement d'un programme d'aménagement et d'équipement des plages ainsi que la collecte d'informations nécessaires pour la rédaction d'un dictionnaire de la langue des signes algérienne.<sup>16</sup> La délégation a en outre présenté d'autres mesures prises par les autorités en faveur de l'accès des personnes handicapées aux services publics. C'est dans ce contexte que le Ministère de l'éducation a rénové et équipé de nombreux ateliers, dortoirs et salles de classe pour les rendre accessibles aux étudiants handicapés. Dans le même ordre d'idées, le Ministère de la culture a réhabilité quelque 155 bibliothèques, ainsi que des théâtres et des cinémas. Il a été ensuite expliqué qu'en Algérie, l'évaluation du handicap se faisait, par des commissions composées de médecins spécialisés qui appliquent des critères uniquement médicaux conformes aux normes de l'Organisation mondiale de la Santé. Chaque demande de prestation pour personne handicapée est évaluée en fonction d'un barème de référence.<sup>17</sup>

## **6.2 La République d'Algérie 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 d'Algérie a effectivement des politiques ou programmes qui englobent indirectement le handicap. Conformément au décret no 13/134 du 10 avril 2013 fixant les attributions du Ministre de la Solidarité Nationale, de la Famille et de la Condition de la Femme, ce ministère a les prérogatives suivantes:

- Proposer et mettre en œuvre, en relation avec les secteurs concernés, des programmes d'action visant à protéger et à promouvoir la famille, la femme, la personne âgée, l'enfant et l'adolescent, notamment ceux en difficulté sociale et/ou économique, ainsi que les programmes de solidarité envers les jeunes;
- Concevoir et mettre en œuvre la politique et la stratégie nationale de protection et de promotion de la famille, dans un cadre intersectoriel;
- Proposer la stratégie nationale de protection et de promotion des personnes handicapées, dans une vision intersectorielle;
- Concevoir les programmes de développement social et coordonner leur mise en œuvre;
- Proposer, mettre en œuvre et contrôler la mise en place des mécanismes et instruments visant la lutte contre la pauvreté, l'exclusion et la marginalisation et la réduction de la précarité sociale, favorisant ainsi la préservation et la consolidation de la cohésion sociale;
- Identifier et mettre en œuvre, en relation avec les institutions de l'Etat, les secteurs concernés et le mouvement associatif, des programmes spécifiquement destinés aux catégories sociales en difficulté ou en situation de vulnérabilité;
- Encourager la promotion et le développement du mouvement associatif à caractère humanitaire et social;
- Contribuer à la mise en œuvre d'actions à caractère humanitaire et social initiées dans les situations de catastrophes, de calamités naturelles et d'urgence sociale;
- Initier et mettre en place le système d'information et de communication relatif aux activités relevant de son domaine de compétence, en fixant les objectifs et établir les stratégies y afférentes;

16 Comme ci-dessus.

17 Comme ci-dessus.

- Assurer la représentation du secteur aux activités déclinées par les organismes régionaux et internationaux ayant compétence dans le domaine de la solidarité nationale, de la famille, de la condition de la femme, de la personne âgée et de l'enfant ainsi que du développement social.<sup>18</sup>

De par la formulation de ces attributions et de par la catégorie des personnes dont elles visent, l'on peut logiquement en déduire que ces politiques concernent aussi bien les personnes non handicapées que celles handicapées.

## 7 Organismes en charge des personnes handicapées

### 7.1 En dehors des cours ou tribunaux ordinaires, la République d'Algérie a-t-elle un organisme officiel qui s'intéresse spécifiquement à la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

En dehors des cours ou tribunaux ordinaires, l'Algérie a effectivement mis en place d'autres organes qui s'intéressent spécifiquement à la violation des droits des personnes handicapées.

- La Commission Nationale d'Accessibilité des Personnes Handicapées à l'Environnement Physique, Social, Economique et Culturel encadré par un décret pris en application des dispositions de l'article 30 de la loi no 02/09 du 25 Safar 1423 correspondant au 8 mai 2002 relative à la protection et à la promotion des personnes handicapées. Cette instance a pour missions le suivi de la mise en œuvre, les programmes relatifs à l'accessibilité des personnes handicapées à l'environnement physique, social, économique et culturel. Parmi les objectifs de cette Commission, l'on doit mentionner l'évaluation de l'état d'avancement des programmes mis en œuvre et les propositions et mesures susceptible d'améliorer l'accessibilité les personnes handicapées à la vie sociale. Les membres de cette commission sont nommés par le ministre chargé de la solidarité nationale pour une durée de 3 années renouvelable. La commission est divisée en trois sous-ensembles chargés respectivement de l'accessibilité à l'environnement de l'accessibilité aux infrastructures et aux moyens de transport et de l'accessibilité aux moyens de communication et d'information. Les rapports de ces sous commissions ensuite soumis à l'examen de la commission nationale en séance plénière afin d'établir un programme de travail, et un rapport annuel sur l'accessibilité les personnes handicapées.<sup>19</sup>
- Le Conseil National des Personnes Handicapées, qui est un organe mis sur pied par décret exécutif no 06/145 du 26 Avril 2006 fixant la composition, les modalités de fonctionnement et les attributions. Au terme des dispositions de l'article 2 de ce décret, le Conseil est un organe consultatif chargé d'étudier et de donner son avis sur toutes les questions relatives à la protection, à la promotion, à l'insertion socio-professionnelle et à l'intégration des personnes handicapées. En ce qui est de ses missions, le même article 2 stipule que le conseil est chargé d'étudier et de proposer notamment:
- Les méthodes et mécanismes d'identification et de maîtrise de l'évolution de la population handicapée par nature de handicap;

18 Réponses Aux Questions Relatives Aux Droits Des Personnes Agées Handicapées <https://www.ohchr.org/Documents/Issues/Disability/OlderPersons/ALGERIA.docx> (consulté le 30 Juin 2021).

19 Installation d'une commission nationale d'accessibilité les personnes handicapées à l'environnement <https://www.algerie360.com/installation-d-une-commission-nationale-d-accessibilite-des-personnes-handicapees-a-lenvironnement/> (consulté le 24 Avril 2021).

- Les programmes d'actions de solidarité nationale et d'insertion socio-professionnelle à mener en faveur des personnes handicapées;
- Les techniques et modalités de normalisation et de standardisation des équipements et appareillages destinées aux personnes handicapées;
- Les aménagements des postes de travail destinés à faciliter l'intégration des personnes handicapées en milieu professionnel;
- Les aménagements destinés à faciliter le cadre de vie et le bien-être des personnes handicapées, notamment en matière de transport, d'habitation et d'accessibilité des lieux publics;
- Les programmes de prévention planifiés et intégrés du handicap par l'information, la sensibilisation et la communication sociale en direction des personnes handicapées,
- Les perspectives de développement coordonnés de la politique de solidarité nationale en faveur des personnes handicapées;
- Le conseil est chargé également d'étudier et de donner son avis sur les avant-projets de textes législatifs et réglementaires en faveur de la protection et de la promotion des personnes handicapées.

Aux termes des dispositions de l'article 4, les membres du conseil sont désignés par arrêté du ministre chargé de la solidarité nationale, pour une durée de trois (3) ans, renouvelable. D'un autre côté, comme mentionné à l'article 8, le conseil élabore annuellement un rapport inhérent à ses activités et à l'évaluation de la politique de protection, de promotion, d'insertion socio-professionnelle et d'intégration des personnes handicapées qu'il soumet au ministre chargé de la solidarité nationale.

**7.2 En dehors des cours ou tribunaux ordinaires, la République d'Algérie a-t-elle un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes handicapées s'y attèle tout de même? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

Information non-disponible.

## **8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)**

**8.1 La République d'Algérie 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 d'Algérie a jamais abordé des questions relatives aux droits des personnes handicapées.**

En Algérie, il existe une Commission Nationale de Promotion et de Protection des Droits de l'Homme créée par le loi no 16/13 du 3 Safar 1438 correspondant au 3 novembre 2016 fixant la composition et les modalités de désignation des membres du Conseil National des Droits de l'Homme ainsi que les règles relatives à son organisation et à son fonctionnement. Comme indiqué à l'article 2 de la loi susmentionnée, la commission est un organisme indépendant qui œuvre à la

promotion et à la protection des droits de l'Homme. Etant entendu que ces droits incluent également ceux des personnes handicapées, l'on peut donc logiquement conclure que les missions de la Commission Nationale de Promotion et de Protection des Droits de l'Homme incluent la protection des droits des personnes handicapées. Quant à savoir si la Commission Nationale de Promotion et de Protection des Droits de l'Homme a jamais abordé des questions relatives aux droits des personnes handicapées, cette information est indisponible.

## 9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

### 9.1 Avez-vous en République d'Algérie des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Il y'a effectivement en Algérie, des organisations qui représentent et défendent les droits et le bien-être des personnes en situation handicapées. Il s'agit par exemple de:

- **L'association Nationale de Soutien aux Personnes Handicapées, El Baraka.** Cette association est reconnue par le ministère de l'intérieur et des collectivités locales notamment par un agrément sous le numéro 22 délivré le 22 décembre 2002 suivis de la conformité sous le no 47 datée du 24 juin 2014 lui accordant la possibilité d'intervenir sur l'ensemble du territoire national.<sup>20</sup>

En guise the mission, El Baraka se veut être un moyen au service des personnes handicapées:

- Par la diffusion de la réglementation en vigueur relative à la personne handicapée, en veillant à son application et à son amélioration;
- Par la lutte contre toute discrimination, marginalisation ou traitement avilissant nuisant au bien-être de la personne handicapée;
- Par l'écoute, l'orientation et l'accompagnement pour la quête de l'autonomie et l'élaboration de projet de vie pour les personnes handicapées;
- La mise en place et la participation aux campagnes, d'éducation, de sensibilisations, d'informations et de préventions visant à réduire les causes invalidantes;
- Par des plaidoyers permettant l'adaptation de l'environnement aux personnes handicapées;
- Par la création et/ou la gestion de centres d'accueil, de sports, de loisirs, de cultures, de rééducation fonctionnelle ou toutes autres structures pouvant être une source d'intérêt pour la personne handicapée;
- Par la mise en action de programmes de parrainages.<sup>21</sup>

20 L'association Nationale de Soutien aux Personnes Handicapées <http://elbaraka.e-monsite.com/pages/qui-sommes-nous/missions-devolues-par-l-assemblee-generale.html> (consulté le 28 Juin 2021).

21 Comme ci-dessus.

## 9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

En Algérie, il existe La Fédération Algérienne des Personnes Handicapées (FAPH) qui se veut un mouvement national militant pour la défense et la promotion des droits et pour une citoyenneté des personnes handicapées à égalité de chances. La FAPH a mis également en place un groupe de travail constitué de la Fédération des Sourds, fédération des parents d'enfants inadaptés mentaux, l'association des éducateurs spécialisés pour non-voyants, association entraide populaire familiale, pour l'élaboration d'un rapport alternatif mettant en exergue les difficultés rencontrées par les personnes Handicapées et faire des propositions pour améliorer leur situation.<sup>22</sup>

En dehors de la FAPH, on dénombre plusieurs autres OPH en Algérie organisées ou coordonnées au niveau national et/ou régional. Il s'agit de:

- Association Culturelle et d'Insertion des Handicapés Moteurs de la wilaya de Bechar;
- Association Nationale de Soutien aux Personnes Handicapées El Baraka;
- DEFY contre les Myopathies Bejaia;
- DEFY Seddouk: Association pour Enfants Inadaptés Mentaux;
- Défis et espoir des personnes en situation de handicap de Jijel;
- Réseau Algérien pour la Défense des Droits des Personnes Handicapées.

## 9.3 Si la République d'Algérie a ratifié la CDPH, comment a-t-elle assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Il est à noter que la République d'Algérie a mis en place un Conseil National des Personnes Handicapées, par décret exécutif no 06/145 du 256 avril 2006; Conseil ayant effectivement été installé en 2014. Aux termes des dispositions du décret susmentionné, ce Conseil est chargé, d'étudier et de proposer des programmes d'action de solidarité nationale et d'insertion socioprofessionnelle à mener en faveur des personnes handicapées, ainsi que de donner son avis sur les avant-projets de textes législatifs et réglementaires en faveur de la protection et de la promotion des personnes handicapées. Le Conseil est composé de représentants des départements ministériels et institutions publiques concernées, de représentants des associations nationales des personnes handicapées et de représentants de parents d'enfants et d'adolescents handicapés.<sup>23</sup>

## 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?

L'on peut mentionner que la Fédération Algérienne des Personnes Handicapées (FAPH) travail sur des projets pilotes ayant valeur de référence avec comme objectif leur appropriation par les pouvoirs publics, les réseaux de la FAPH et les associations des personnes handicapées affiliées à la FAPH. Ces projets sont menés en partenariat avec ses principaux partenaires, notamment les Pouvoirs Publics que sont le Ministère de la Solidarité de la Famille et de la Condition Féminine, le

22 FAPH, Pour l'accès aux droits <https://faphblog.wordpress.com/qui-sommes-nous/> (consulté le 28 Juin 2021).

23 Mise en œuvre de la résolution 26/20 (n 3).

Ministère de la jeunesse et des sports et le Ministère de la Santé ainsi que les Collectivités locales sur tout le territoire national.<sup>24</sup>

**9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?**

De manière générale, les Organisations des Personnes Handicapées en Algérie ne disposent pas de ressources suffisantes pour leur fonctionnement et la mise en œuvre de leurs programmes. Tout ceci contribue à les ralentir dans l'accomplissement de leurs missions.

**9.6 Y a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?**

Information non disponible.

**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?**

Information non disponible.

**9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui nécessitent le développement de capacité et soutien pour les OPH afin d'assurer leur engagement dans la mise en œuvre de la Convention?**

Nous croyons qu'il faille mettre une plus grande pression sur le gouvernement et les pouvoirs publics pour une plus grande promotion et protection des droits des personnes handicapées. Il faut également veiller à ce que les divers problèmes rencontrés aussi bien par les personnes handicapées que les OPH soient résolus.

**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 Fédération Algérienne des Personnes Handicapées devraient se voir offrir plus de moyens financiers et matériels pour l'accomplissement de leurs missions de sensibilisation, représentation, éducation et conscientisation des masses. L'Etat Algérien devrait tenir compte de leur critiques et observations et devraient leur accorder une place plus importante.

24 FAPH, Pour l'accès aux droits, <https://faphblog.wordpress.com/qui-sommes-nous/> (Consulté le 28 Juin 2021).

**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?**

Bien que cela ne soit pas clairement défini, on estime néanmoins que certaines des organisations mentionnées à la question 9.2 ci-dessus devraient d'une façon ou d'une autre, directement ou indirectement travailler sur les droits des personnes handicapées et de ce fait contribuer à faciliter l'implication des OPH dans le processus, y compris la recherche.

## **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).**

En Algérie, il incombe au Ministère de la Solidarité Nationale, de la Famille et de la condition féminine de promouvoir et protéger les droits et le bien-être des personnes handicapées, de la mise en œuvre et du suivi des politiques, en collaboration avec les parties prenantes conformément au décret no 13/134 du 10 avril 2013 fixant les attributions de ce département ministériel. Ses activités ont été décrit au point 6.1 ci-dessus. En plus de cet organe gouvernemental, l'on peut également mentionner la Commission Nationale d'Accessibilité des Personnes Handicapées à l'Environnement Physique, Social, Economique et Culturel encadré par un décret pris en application des dispositions de l'article 30 de la loi no 02/09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées. Cette Commission a pour mission la mise en œuvre des programmes relatifs à l'accessibilité des personnes handicapées à l'environnement physique, social, économique et culturel. Comme autre organe en charge de la promotion et de la protection des droits des personnes handicapées, il y'a le Conseil National des Personnes Handicapées, un organe encadré par le décret no 06/145 du 26 Avril 2006 fixant la composition, les modalités de fonctionnement et les attributions. C'est un organe consultatif chargé d'étudier et de donner son avis sur toutes les questions relatives à la protection, à la promotion, à l'insertion socio-professionnelle et à l'intégration des personnes handicapées. Ses missions sont mentionnées à l'article 2 du décret susmentionné; missions mentionnées au point 7.1 ci-dessus.

## 11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

### 11.1 Quels sont les défis contemporains des personnes handicapées en République d'Algérie? (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 en situation de handicap en Algérie sont multiples. Au cours des entretiens, il ressort qu'il y'a manque de disponibilité et de qualité des appareillages fournis par l'Office National d'Appareillages et d'Accessoires pour Personnes Handicapées (ONAAPH), ce qui a un effet sur la qualité de vie des personnes handicapées.<sup>25</sup> Comme autre obstacle identifié, le montant des allocations financières est insuffisant pour assurer une couverture des besoins fondamentaux des personnes handicapées à favoriser l'accès à une vie indépendante.<sup>26</sup> En outre, mention est faite des lenteurs administratives qui compliquent l'accès aux services de soutien, du manque de sensibilité et de formation de quelques fonctionnaires quant aux questions liées à l'accueil des personnes handicapées dans les services.<sup>27</sup> L'on dénote également l'absence d'une mise en application efficace des dispositions légales notamment celles relatives au quota pour le recrutement de travailleurs handicapés.<sup>28</sup> En plus de ces obstacles, l'on doit noter l'insuffisance et/ou l'inadéquation des réponses existantes, soit au niveau de la prévention, soit au niveau de la prise en charge précoce et de l'accompagnement tout au long de la vie.<sup>29</sup>

### 11.2 Comment la République d'Algérie répond-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

- **Accès aux bâtiments publics**

En Algérie, un décret exécutif no 06/455 du 11 décembre 2006 fixe les modalités d'accessibilité des personnes handicapées à l'environnement physique, social, économique et culturel. De même, une loi du 30 juin 2002 a établi le principe de l'accessibilité des locaux d'habitation neufs. Ce faisant, cette loi encadre les besoins des personnes handicapées en ce qui est de la conception des constructions, ouvrages publiques et privées, les transports et la voirie. Ainsi, le but est de rendre accessibles les infrastructures aux personnes à mobilité réduites notamment les personnes âgées handicapées en prévoyant:

- L'aménagement de rampes douces;

25 P Pinto et al 'Le droit à la protection sociale des personnes handicapées en Algérie' (2016) [https://www.researchgate.net/publication/313742307\\_Le\\_Droit\\_a\\_la\\_Protection\\_Sociale\\_des\\_Personnes\\_Handicapees\\_en\\_Algerie](https://www.researchgate.net/publication/313742307_Le_Droit_a_la_Protection_Sociale_des_Personnes_Handicapees_en_Algerie) (consulté le 30 Juillet 2021).

26 Comme ci-dessus.

27 Comme ci-dessus.

28 Comme ci-dessus.

29 Mise en œuvre de la résolution 26/20 (n 3).

- L'aménagement au niveau des trottoirs et cheminement piétons;
- La mise en place de bandes podotactiles pour les malvoyants depuis leur accès au bâtiment jusqu'à l'embarquement;
- La réservation d'un guichet adapté propre aux personnes handicapées;
- La réservation de sanitaires accessibles aux personnes handicapées;
- La mise en place d'une signalétique adéquate propre aux personnes handicapées;
- La réservation de places de stationnement aux personnes handicapées;
- L'implantation des traverses en arrière des arrêts des Transports en Commun (TC).<sup>30</sup>

Néanmoins, la pratique démontre que les élèves et étudiants handicapés des écoles et centres de formation professionnelle ont encore du mal à accéder aux ouvrages publics/privés.

#### • **Accès au transport public**

Parlant de l'accès au transport en Algérie, un certain nombre d'aménagements au profit des personnes handicapées a été réalisé notamment dans le domaine du Transport Urbain:

#### *Pour le projet Métro:*

- Les dispositions prises pour la prise en charge des personnes à mobilité réduite (PMR) consistent en:
- L'accès du quai vers la rame se fait directement (même niveau) pour permettre l'accessibilité aux PMR;
- Des places réservées aux PMR au niveau des rames ont été prévues avec un espace dégagé pour permettre leur déplacement;
- Des bandes podotactiles ont été réalisées au bord du quai pour signaler sa limite au PMR.<sup>31</sup>

#### *Pour le projet Tramway:*

- Les quais sont totalement accessibles aux PMR;
- Des places réservées aux PMR au niveau des rames ont été prévues avec un espace dégagé pour permettre leur déplacement;
- Des bandes podotactiles ont été réalisées au bord du quai pour signaler sa limite aux PMR et les rampes d'accès vers le quai sont aussi équipées par ce même type de bande.<sup>32</sup>

#### *Pour le transport par bus:*

- Depuis le 1er mars 2011, une circulaire a été diffusée aux organismes en charge du transport en commun, relative à la réservation de places à l'avant du véhicule avec une inscription « place réservée » aux personnes handicapées.
- Des micros bus aménagés pour le transport des personnes handicapées seront affectés dans les hôpitaux spécialisés dans la rééducation fonctionnelle dans la wilaya d'Alger, et financé par la Société nationale pour la recherche, la production, le transport, la transformation et la commercialisation des hydrocarbures (SONATRACH);
- Des bus spéciaux et aménagés dédiés au transport des personnes handicapées qui vont être affectés au niveau du parc de chaque nouvel établissement spécialisé.<sup>33</sup>

30 Réponses (n 18).

31 Comme ci-dessus.

32 Comme ci-dessus.

Au niveau des gares routières: La conception des infrastructures d'accueil et de traitement des voyageurs par route prend en charge l'adaptation de ce genre d'infrastructures aux personnes à mobilité réduite (PMR) qui inclut, outre les handicapés, les malvoyants les personnes âgées, circulant avec poussettes, femmes enceintes, et personnes en difficulté.<sup>34</sup>

#### • **Accès à l'éducation**

En Algérie, la loi no 02/09 du 8 Mai 2002 relative à la protection et à la promotion des personnes handicapées a pour priorité un enseignement obligatoire et une formation professionnelle pour les enfants et adolescents handicapés. Dans le même ordre d'idées, l'article 14 de la loi no 08/04 du 23 janvier 2008 sur l'éducation nationale contient des dispositions particulières aux enfants handicapés ayant des besoins spécifiques. Cette législation rend obligatoire la scolarisation des enfants de 6 à 16 ans et prolonge de deux ans cette période pour les élèves handicapés. La même législation prévoit également la prise en charge des élèves hospitalisés pour une longue durée dans des classes au sein des hôpitaux et centres hospitaliers et celles des enfants atteints d'une déficience sensorielle dans des classes intégrées. Par ailleurs, la loi no 15/12 du 15 juillet 2015 relative à la protection de l'enfant stipule que l'enfant handicapé « jouit du droit à la protection, aux soins, à l'enseignement et à la rééducation qui favorisent son autonomie et à sa participation effective à la vie économique, sociale et culturelle ». Enfin, l'arrêté interministériel du 17 mai 2003 fixe les modalités d'organisation de l'évaluation et des examens scolaires des élèves handicapés sensoriels.<sup>35</sup>

Toutefois, l'on doit également retenir que l'intégration des enfants handicapés dans le système en Algérie connaît un certain nombre d'obstacles:

- La persistance des attitudes négatives des directeurs et des enseignants envers les élèves en situation de handicap, qui estiment que ces élèves retardent la classe et ne disposent pas des capacités nécessaires pour suivre les cours;
- Le manque de formation et de préparation spécifiques des enseignants pour accueillir les enfants en situation de handicap;
- Les problèmes d'accessibilité;
- Des difficultés structurelles, comme le manque de temps disponible pour se consacrer à chaque enfant, la surcharge des cours, le manque de matériels adaptés et d'accompagnateurs qui pourraient aider à mieux prendre en charge l'enfant en situation de handicap dans le système éducatif ordinaire sont aussi à prendre en compte.<sup>36</sup>

#### • **Accès à la formation professionnelle**

Parlant de formation professionnelle des personnes handicapées, les informations sont difficilement accessibles. Mais il est à noter que le Bilan Consolidé du Ministère de la Formation Professionnelle de 2013 faisait état de 2.062 personnes fréquentant des cours de formation, dont 1.209 en formation résidentielle et 853 en formation par apprentissage (réalisée en alternance entre les établissements de formation et les entreprises, artisans et organismes publics où se déroule la formation pratique). Dans le même ordre d'idées, plusieurs instruments législatifs prévoient l'exonération ou la réduction de taxes et d'impôts comme aide à l'intégration socioprofessionnelle des personnes en situation de handicap.<sup>37</sup>

33 Comme ci-dessus.

34 Comme ci-dessus.

35 <https://education-profiles.org/fr/afrique-du-nord-et-asie-occidentale/algerie/~inclusion#Lois,%20plans,%20politiques%20et%20programmes> (Consulté le 30 Juin 2021).

36 Mise en œuvre de la résolution 26/20 (n 3).

37 Comme ci-dessus.

- **Accès à l'emploi**

Dans le même ordre d'idées, en matière d'emploi, le gouvernement a mis sur pied des dispositifs pour encourager la formation et l'inclusion professionnelle des personnes en situation de handicap. Il existe de ce fait des mécanismes de soutien aux formes de travail adaptées ou des avantages fiscaux pour les travailleurs en situation de handicap ainsi que pour les entreprises créées par des organisations de personnes en situation de handicap agréées.<sup>38</sup> L'article 27 de la loi no 02/09 du 8 Mai 2002 sur la protection et la promotion des personnes handicapées prévoit pour tout employeur l'obligation de consacrer 1% des postes de travail aux personnes en situation de handicap dont la qualité de travailleur est reconnue.

- **Accès à la détente et au sport**

En Algérie, il existe une Fédération algérienne handisport (FAH) qui regroupe les athlètes handisports. Généralement, la journée du 3 décembre est célébrée par des festivités organisées sous l'égide de la Fédération algérienne handisport (FAH).

- **Accès aux soins de santé**

En Algérie, l'accès aux soins de santé a été fortement développé de telle sorte que les personnes handicapées et celles âgées semblent bénéficier de soins de qualité. Ainsi:

- L'accès est gratuit aux structures sanitaires publiques et les personnes handicapées bénéficient de l'ensemble des prestations médicales prévues pour la population générale ainsi qu'aux services spécifiques de rééducation et de réadaptation qui se développent pour répondre aux besoins spécifiques des personnes handicapées;
- L'adoption de modes d'organisation de l'offre de soins visant à réduire les disparités territoriales avec le développement des structures de proximité (polycliniques et salles de soins) et des soins primaires de proximité notamment en milieu rural et dans les zones enclavées en relation avec les structures hospitalières pour assurer la continuité des soins;
- La formation initiale et continue des intervenants demeure un levier important pour améliorer la qualité de prise en charge sanitaire et un effort est consenti pour renforcer les effectifs des personnels de santé et l'ouverture de nouvelles filières notamment dans le domaine de la réadaptation;
- Les soins aux catégories vulnérables sont prioritaires et les moyens de leur prise en charge sont assurés pour dispenser des prestations adaptées. La discrimination est contre les principes d'éthique et de déontologie qui ont été consacrés par des législations;
- L'ouverture du centre national d'études, d'information et de documentation sur la famille, la femme et l'enfant, créé par décret no10/155 du 20 juin 2012, dont ses missions s'articulent autour des études, l'exploitation des enquêtes, la collecte des données, la constitution d'une banque de données liées aux domaines de la famille, de la femme et de l'enfance et du handicap.<sup>39</sup>

Dans le même ordre d'idées, les personnes handicapées qui n'exercent aucune activité professionnelle sont considérées comme assurées sociales et donc bénéficient des mêmes prestations en nature de l'assurance maladie que les assurés sociaux valides. En plus des soins de santé, les personnes handicapées bénéficient de la gratuité des produits d'appareillage fournis par l'Office National d'Appareillages et d'Accessoires pour Personnes Handicapées (ONAAPH). Toutefois il n'en demeure pas moins qu'il y'a manque de disponibilité et de qualité des appareillages fournis par l'ONAAPH, ce qui a un effet sur la qualité de vie des personnes handicapées.<sup>40</sup>

38 Comme ci-dessus.

39 Réponses (n 18).

40 Pinto (n 25).

### 11.3 La République d'Algérie accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Il existe en Algérie une panoplie de texte visant à soutenir financièrement les personnes handicapées. Ces textes sont:

- Le décret no 03/45 du 19 janvier 2003 fixant les modalités d'application des dispositions de l'article 7 de la loi no 02-09 du 8 mai 2002 relative à la protection et à la promotion des personnes handicapées, modifié;
- Le décret exécutif no 03/175 du 14 avril 2003 relatif à la commission médicale spécialisée de wilaya et à la commission nationale de recours;
- Le décret exécutif no 06/144 du 26 avril 2006 fixant les modalités du bénéfice des personnes handicapées, de la gratuité du transport et de la réduction de ses tarifs;
- L'arrêté interministériel no 06 du 8 janvier 2001 portant extension de l'indemnité forfaitaire de solidarité (AFS) aux personnes infirmes, vieillards, incurables et aveugles;
- L'arrêté interministériel no 01 du 14 février 2009 portant revalorisation du montant de l'allocation forfaitaire de solidarité (AFS).<sup>41</sup>

Ainsi, en application de ces textes, il est reporté qu'une allocation financière de 4.000 DA/ mois est attribuée à toute personne âgée de plus 18 ans, sans ressources, présentant une invalidité congénitale ou acquise évaluée à 100% entraînant une incapacité totale de travail et une dépendance quasi-totale nécessitant l'aide d'une tierce personne. Au titre de l'exercice 2018, une enveloppe budgétaire d'un montant de 11,764 Milliards DA a été allouée. Ces crédits ont permis à 242.953 personnes handicapées invalides à 100% d'accéder à l'aide consentie. Une allocation forfaitaire de solidarité (AFS) d'un montant de 3000 DA/mois majorée de 120DA/mois par personne à charge dans la limite de trois (3) personnes, est allouée aux personnes handicapées dont le taux d'invalidité est inférieur à 100%. Au titre de l'année 2018, un total de 926.710 personnes étaient bénéficiaires de l'allocation forfaitaire de solidarité (AFS), dont 315.145 personnes âgées.<sup>42</sup>

### 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 d'Algérie?

L'article 5 de la Convention relative aux droits des personnes handicapées ratifié par L'Algérie en 2009 consacre le principe de l'égalité et de la non-discrimination. A cet égard, les principes d'égalité devant la loi et de non-discrimination entre tous les citoyens, y compris les personnes handicapées, sont considérés comme des principes fondamentaux de l'Etat algérien. Ainsi, l'article 35 de la constitution sur les droits fondamentaux et les libertés garantis par l'Etat dispose que « Les institutions de la République ont pour finalité d'assurer l'égalité en droits et en devoirs de tous les citoyens et citoyennes en supprimant les obstacles qui entravent l'épanouissement de la personne humaine et empêchent la participation effective de tous à la vie politique, économique, sociale et culturelle. » Cette disposition s'applique également aux citoyens Algériens handicapés et consacre de façon solennelle leurs droit de participation à la vie politique du pays.

41 Réponses (n 18).

42 Comme ci-dessus.

### 11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

- **Femmes handicapées**

En Algérie, les femmes handicapées, souffrent d'une double discrimination basée à la fois sur le sexe et sur le handicap. Ainsi, sur le plan sanitaire par exemple, l'on remarque que la maladie mentale fait que les hôpitaux psychiatriques peuvent être des lieux dangereux pour les femmes. En effet les femmes et les jeunes filles atteintes de handicaps mentaux sont considérablement plus vulnérables aux violences sexuelles. Sur le plan de l'emploi, l'on Remarque également que les femmes handicapées sont davantage exclues du marché du travail que les hommes handicapés et se voient souvent refuser le droit à la maternité et peuvent être confrontées à la stérilisation forcée.<sup>43</sup>

- **Enfants handicapés**

L'on remarque qu'en Algérie, malgré les dispositions légales, la scolarisation des enfants handicapés relève essentiellement de la bonne volonté individuelle d'un directeur d'école ou d'une équipe d'enseignants.<sup>44</sup> Dans le même ordre d'idée, en ce qui est de l'enseignement supérieur, l'ensemble des universités algériennes sont difficilement accessibles aux étudiants handicapés. Ceci découle de la non-adaptation du système d'enseignement supérieur aux étudiants pouvant avoir des difficultés, mais aussi à l'absence d'une politique volontariste, portée et soutenue par les responsables du secteur de l'enseignement supérieur préparant aux études supérieures à destination des étudiants handicapés.<sup>45</sup> Ensuite, l'impossibilité d'obtenir des aides, telles que les services d'assistance personnelle ou l'aide technique ou humaine constitue un problème supplémentaire lorsqu'une personne souhaite étudier dans une université algérienne.<sup>46</sup>

## 12 Perspective future

### 12.1 Y a-t-il des mesures spécifiques débattues ou prises en compte présentement en Algérie au sujet des personnes handicapées?

Information non disponible

### 12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en Algérie? Pourquoi?

La modernisation de l'enseignement du Droit des Personnes Handicapées dans les grandes écoles et universités d'Algérie est cruciale. La mise sur pied d'un programme de prise de conscience et de formation des fonctionnaires et autres partie prenantes sur les droits des personnes handicapées devrait être une priorité. Ceci permettrait d'éviter à court et moyens termes les lenteurs administratives et la délivrance rapide des services dédiées à cette catégorie de personnes. Il est temps d'irradier la société algérienne des notions de droit de l'Homme en général et des droits des personnes handicapées en particulier. La mise en pratique de la

43 Les droits des personnes handicapées en Algérie. <https://avocatalgerien.com/laffaire-mecili-une-lettre-de-annie-mecili-au-president-de-la-france/> (consulté le 29 Juillet 2021).

44 Comme ci-dessus.

45 Comme ci-dessus.

46 Comme ci-dessus.

Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) est plus que nécessaire. Il est aussi important d'activer des textes de lois votés mais qui attendent toujours un décret d'application. Enfin, les masses doivent être sensibilisées sur le fait que les personnes handicapées demeurent des personnes à part entière et ne sauraient faire l'objet de quelque discrimination ou stigmatisation que ce soit.

# ETHIOPIA

*Dagnachew B Wakene,\* Priscilla Yoon\*\* & Tsion Mengistu\*\*\**

## 1 Population indicators

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

The total population of Ethiopia, as per the last Population and Housing Census (PHC) conducted in 2007, was 73 918 505. Of this, 37 296 657 (50.5 per cent) were males and 36 621 848 (49.5 per cent) were females. The population of the country in the previous censuses of 1984 and 1994 was 39 868 572 and 53 477 265, respectively. The 2007 PHC results show that the population of Ethiopia grew at an average annual rate of 2.6 per cent.

According to the World Bank, Ethiopia's total population in 2019 was 112 078 730, of which 56 069 010 (50.026 per cent) were males and 56 009 720 (49.974 per cent) were females.<sup>1</sup>

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

Censuses are the primary sources of data collection. The 2007 PHC has been done on the following seven thematic areas:

- Population characteristics;
- Educational characteristics;

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1 World Bank 'Population, total: Ethiopia' (2019) <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=ET> (accessed 27 May 2021).

- Economic activity of the population;
- Population dynamics/fertility, mortality and migration;
- Housing and characteristics and living conditions;
- Disability and orphanhood characteristics; and
- The situation of women in Ethiopia.

The disability-related section of the Census asked respondents about their disability status, type of disability, and cause(s) of disability.

In the analyses, different methodological approaches such as rates, ratios, percentages, chi square tests, and various kinds of demographic software were used. More advanced statistical techniques were employed for the in-depth analysis.

### **1.3 What is the total number and percentage of people with disabilities in Ethiopia?**

As per the abovementioned PHC data of 2007, there were a total of 1.09 per cent of persons with disabilities in Ethiopia, out of the total population. However, a World Health Organisation and World Bank report published in 2011 estimates that 17.6 per cent of the population in Ethiopia, which is more than 15 million people, live with some form of disability. As per the Ethiopian National Plan of Action on Disability (2011-2021),<sup>2</sup> prepared by the Ministry of Labour and Social Affairs (MoLSA), the percentage of PWDs indicated by the 2007 Census was widely unaccepted by researchers and disability experts in the country for several reasons, including: the fact that census collectors were not trained with the concept, definitions and rights-based approaches to disability as stipulated in international normative standards; omissions of persons with certain types of disabilities; unwillingness of parents to disclose that they have a child or family member with a disability for fear of societal stigma and prejudice; and exclusion of some geographical areas in surveys due to security reasons.

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

Of the total population counted in the 2007 Census, 805 492 persons or around one per cent of the population were persons with disabilities and there was little variation by sex: 1.15 per cent of males and 1.0 per cent of females had disabilities.

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

There is an acute paucity of disability-focused data in general in Ethiopia, more so when it comes to, inter alia, children and women with disabilities. According to the

2 Ethiopian Ministry of Labour and Social Affairs (MoLSA) 'National plan of action of persons with disabilities (2012-2021)' April 2012, Addis Ababa, at 2 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94528/110953/F-1258023553/ETH94528.pdf> (accessed 27 May 2021).

Situation and Access to Services of Persons with Disabilities in Addis Ababa – a UNICEF report (2019),<sup>3</sup> about 1 per cent of children under the age of 18 in Addis Ababa have a severe disabilities. There is, nonetheless, an evident likelihood that child disability is significantly under-reported.

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

Per the 2007 Census, ‘vision problem’ (30.9 per cent) and ‘non-functional upper body’ (27.4 per cent) are the first and second most prevalent forms of disabilities in Ethiopia, respectively.

## 2 Ethiopia’s international obligations

### 2.1 What is the status of the United Nation’s Convention on the Rights of People with Disabilities (CRPD) in Ethiopia? Did Ethiopia sign and ratify the CRPD? Provide the date(s).

The Government of Ethiopia signed the Convention on March 2008 and ratified the same in July 2010.

### 2.2 If Ethiopia has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Ethiopia 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?

Ethiopia’s initial report to the CRPD Committee was due in 2012 and was submitted in 2013. The report was presented by the Ministry of Labour and Social Affairs (MoLSA), the main points were matters relating to implementation of the Convention and disability issues in Ethiopia. The report was also contributed to by different stakeholders from government offices and organisations of persons with disabilities (OPDs).<sup>4</sup> Likewise, the second report was submitted in 2016. A list of issues, corroborated by Ethiopia’s replies, and Concluding Observations highlighted by the CRPD Committee in light of Ethiopia’s compliance with the Convention are all available at the Committee’s website.<sup>5</sup> A number of

3 UNICEF Ethiopia & MOLSA ‘Ethiopia: Situation and access to services of people with disabilities and homeless people in two sub-cities of Addis Ababa’ (2019) <https://www.unicef-irc.org/publications/pdf/Best%20of%20UNICEF%20Research%202019.pdf> (accessed 27 May 2021).

4 Consideration of reports submitted by states parties under article 35 of the Convention, 19 March 2015.

5 See Committee on the Rights of Persons with Disabilities, Sixteenth Session, List of issues in relation to the initial report of Ethiopia Addendum: Replies of Ethiopia to the list of issues (8 August 2016) UN Doc CRPD/C/ETH/Q/1/Add.1 (2016); Concluding Observations on the Initial Report of Ethiopia, Committee on the Rights of Persons with Disabilities (4 November 2016) UN Doc CRPD/C/ETH/CO/1 (2016) para 7 [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/ETH/CO/1&Lang=En](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/ETH/CO/1&Lang=En) (accessed 27 May 2021).

nongovernmental organisations also submitted their Shadow Reports during these deliberations. See, inter alia, the Advocates for Human Rights report submitted to the CRPD Committee providing information on Ethiopia's adherence with the Convention.<sup>6</sup>

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

In 2014, Ethiopia submitted a periodic country report to the African Commission on Human and Peoples' Rights covering the years 2009 to 2013. The report included information on various measures taken regarding persons with disabilities and ratifications of different international instruments such as the CRPD. The Concluding Observations to this report commended Ethiopia for ratifying various international human rights instruments and establishing institutions to 'help persons with disabilities', but also mentioned human rights instruments Ethiopia has not yet ratified and the continued need to protect vulnerable groups including persons with disabilities.

In 2019, Ethiopia submitted its third-cycle national report for the UN Universal Periodic Review (UPR). The report observed measures taken to protect persons with disabilities, human rights awareness, the CRPD, education for children with disabilities, challenges, and more. Conclusions and recommendations regarding disability included the need to further consolidate mainstreaming disability rights in Ethiopia's national legislation, repealing provisions and articles of the Family Code and Civil Code that condone discrimination based on disability, protecting vulnerable populations and children with disabilities, and more.

**2.4 Was there any domestic effect on Ethiopia'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 Ethiopia's legislature to incorporate it into the legal system before the instrument can have force in Ethiopia's domestic law? Have Ethiopia's courts ever considered this question? If so, cite the case(s).**

Under Ethiopian law, ratification of an international human rights treaty means that the latter is part and parcel of the country's legal framework, having gone through a ratification proclamation by the Federal Parliament. Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), article 9(4) states,

6 Advocates for Human Rights 'Ethiopia's compliance with the Convention on the Rights of Persons with Disabilities: Shadow report Submitted to the 16th Session of the Committee on the Rights of Persons with Disabilities 15 August-2 September 2016' [https://www.theadvocatesforhumanrights.org/uploads/ethiopian\\_-\\_crpd\\_-\\_july\\_2016.pdf](https://www.theadvocatesforhumanrights.org/uploads/ethiopian_-_crpd_-_july_2016.pdf) (accessed 4 November 2016).

'[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land'.

**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, under Ethiopian law, ratification of any binding international agreement means incorporation of that specific agreement as the law of the land. The Ethiopian Parliament then issues a ratification proclamation to this effect. For example, the CRPD ratification proclamation is known as Proclamation 676/2010 on the Ratification of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) by Ethiopia.<sup>7</sup>

### 3 Constitution

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

Yes, the FDRE Constitution, enacted in 1995, includes article 41(5) which sets out the state's responsibility for the provision of necessary rehabilitation and support services for citizens with disabilities.

Article 41(5) reads:

The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.

No other provision of the Constitution explicitly refers to disability and/or persons with disabilities.

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

Article 25 of the Constitution, for example, indirectly addresses disability by stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.

This provision of equality implies that persons with disabilities are included in equal protection of the law, but tacitly without making an explicit reference to

7 See <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/109313/135559/F-1219301009/ETH109313.pdf>.

disability and/or persons with disabilities. One third of the Ethiopian Constitution (articles 14-44, of the total 106 articles) dwells on fundamental rights and freedoms, which can validly be presumed to address persons with disabilities as well, but none mention disability expressly except article 41(5) as stated above. An explicit reference to disability in at least the equality and non-discrimination provision is therefore strongly advised, as the constitutional experience of numerous nations.

## 4 Legislation

### 4.1 Does Ethiopia have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

- **Proclamation 1097/2018**

Proclamation 1097/2018 of the FDRE determines the power, duties, responsibilities and decision-making orders of the executive organs of the FDRE. Regarding persons with disabilities, article 10/4 (Common Powers of Ministries) states that:

Ministries shall have the power and duties to, in its area of jurisdiction, create, within its powers, conditions whereby persons with disabilities, the elderly, segments of society vulnerable to social and economic problems and HIV AIDS positive citizens benefit from equal opportunities and full participation.

In addition, the Proclamation under article 29 lists the powers and duties of the Ministry of Labour and Social Affairs (MoLSA) and stipulates that one of the main responsibilities of the Ministry is to 'enable persons with disabilities benefit from equal opportunities and full participation' in collaboration with concerned bodies (article 29(11)(a)).

- **The Federal Civil Servant Proclamation 1064/2018**

The Federal Civil Servant Proclamation provides for special preference in the recruitment, promotion and deployment of qualified candidates with disabilities. This provision is applicable to government offices only.<sup>8</sup>

- **The Proclamation concerning the Rights to Employment for Persons with Disabilities 568/2008**

This Proclamation, makes null and void any law, practice, custom, attitude and other discriminatory situations that limit equal opportunities for persons with disabilities. It also requires employers to provide appropriate working and training conditions; take all reasonable accommodation measures and affirm active actions, particularly when employing women with disabilities; and assign an assistant to enable a person with disability to perform their work or follow training.<sup>9</sup>

- **The Labour Proclamation 377/2003**

The Labour Proclamation, amended by the Labour Proclamation 494/2006, makes it unlawful for an employer to discriminate against workers on the basis of nationality, sex, religion, political outlook or on any other conditions.<sup>10</sup> Workplace

8 International Labour Organization 'Inclusion of people with disabilities in Ethiopia: Fact sheet' (January 2013).

9 As above.

10 As above.

disablements and the duties of employers thereof are also addressed in this proclamation.

- **Proclamation 624/2009**

Proclamation 624/2009 (Building Proclamation) contains, in article 36(1) and (2), 'Facilities for persons with disabilities'. This law provides for accessibility in the design and construction of any building to ensure suitability persons with physical disabilities.<sup>11</sup> However, it is recommended that this law be revised to include the multiple accessibility concerns of persons with other types of disabilities, apart from those with physical disabilities.

- **The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation 1162/2019**

Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2020 defines hate speech as: 'speech that deliberately promotes hatred, discrimination or attack against a person or a discernible group of identity, based on ethnicity, religion, race, gender or disability'.

- **Directive 41/2015**

This Directive allows citizens with disabilities to import one vehicle for personal use, free of all import taxes, every ten years.

- **Proclamation 676/2010**

This Proclamation ratified the CRPD in Ethiopia.

- **The Marrakesh Treaty**

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (otherwise abbreviated at 'VIP'), was ratified by Ethiopia in February 2020.

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

The Regulation on Value Added Tax 79/2002, provides for tax exemptions for equipment to be used by persons with disabilities (see article 24(7)). The same Regulation also exempts 'workshops for disabled' from Value Added Tax, on condition that employees with disabilities in such workshops constitute more than 60 per cent of the workforce.

Besides these, social security directives and policies do focus on the protection of vulnerable groups such as children, women, persons with disabilities and elderly, the underemployed and others at risk because of social and natural problems. These directives include various programmes and projects such as, but not limited to, rural and urban productive safety nets, livelihood and employment support, social insurance, access to health, education, and other social services.

11 As above.

## 5 Decisions of courts and tribunals

### 5.1 Have the courts (or tribunals) in Ethiopia ever decided on an issue(s) relating to disability? If so, list the cases and provide a summary for each of the cases with the facts, the decision(s) and the reasoning.

There are a number of disability-related civil cases addressed in various chambers of both federal and regional courts of the nation. However, most – if not all – of these cases are inaccessible and not readily available online, except a few decisions passed by the Federal Cassation Court Division – a panel of five to seven judges that looks solely into issues of ‘fundamental errors of law’ and the decisions of which are binding on all lower courts, including courts of regional states.<sup>12</sup> In one case, *Administration Justice Bureau v Mekonen Teklu* (2014), for instance, the plaintiff – a person with visual impairment - invoked Proclamation 568/2008 concerning the employment rights of persons with disabilities wherein the law puts the burden of proof on the employer when a person with disability files suit for a disability-based discrimination in employment. The plaintiff’s claim was that as a prosecutor with visual impairment, he had been discriminated against when his employer cut his pay and transferred him to another position.<sup>13</sup> The Cassation Court nonetheless ruled in favour of the defendant, holding that discrimination clauses under Proclamation 568/2008 could not be invoked by public prosecutors and judges whose cases should be entertained by the Public Prosecutors’ Administration Council established pursuant to Regulation 24/2007.<sup>14</sup> In critiquing this decision, disability rights lawyers argued that the aforementioned Cassation Court ruling ‘lacks coherence and clarity and is full of contradiction’,<sup>15</sup> in that:

The Cassation systematically skipped the meaning of ‘government office’, a term which was fundamental to decide on whom the Proclamation (568/2008) is applicable. The calculated crafting of the Proclamation to include all government offices by departing from the Civil Service Legislation should have been given meaning. The Court’s inference of non-justiciability from the provisions of Proc. 568/2008 is without foundation.<sup>16</sup>

In another milestone case, *Wesen Alemu v Training Institute* (2017), the defendant declined to appoint the plaintiffs who are qualified lawyers with visual impairments as judges and, instead, hired them as public prosecutors against their will. The defendant’s justification for doing so was the ‘long-established’ practice of not appointing the Blind as judges as the post requires the ability to see witnesses and evidence presented by all parties involved in a lawsuit.<sup>17</sup> The plaintiffs then took their case all the way to the House of Federation (which looks into matters related to constitutional interpretation of per article 83 of the FDRE Constitution) claiming violation of their constitutional right to choose their own profession. The

12 Art 2(1) of the Federal Courts Proclamation Reamendment Proclamation 454/2005.

13 *Administration Justice Bureau v Mekonen Teklu* (file 75034) Cassation Decision, vol 14 (Sept 2014).

14 As above.

15 A Wesen ‘The right to be employed: The case of visually impaired persons in Ethiopia’ Thesis submitted in partial fulfillment of the requirements of Master of Laws Degree (LLM) in Human Rights Law, Addis Ababa University, School of Graduate Studies, College of Law and Governance, 2019 at105.

16 As above.

17 *Wesen Alemu v Amhara National Regional State Justice Professionals’ Training and Legal Research Institute* (File 019/08, House of Federation, 12 October 2017).

House decided that the defendant's prohibition of the plaintiffs from being appointed as judges was unconstitutional and that articles 41(5), 25 and 9 of the FDRE Constitution had been violated. The decision also stated that there was no convincing evidence submitted by the defendants which proved the appropriateness of the prohibition and that the nature of the work should be evaluated considering reasonable accommodation, referring to the CRPD which is ratified by Ethiopia, as well as Proclamation 568/2008 and the abovementioned relevant clauses of the Constitution.<sup>18</sup>

## 6 Policies and programmes

### 6.1 Does Ethiopia have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability

- **Growth and Transformation Plan (GTP)**

The Growth and Transformation Plan (GTP) 2010-2015, establishes disability as a cross cutting sector of development where focus is given to preventing disability and to providing education and training, rehabilitation and equal access and opportunities to persons with disabilities.<sup>19</sup>

- **The Ten-Year Perspective Development Plan**

This Plan builds off of its predecessor, the GTP, and addresses disability as a crosscutting theme of development, although it seems to have essentially adopted an approach whereby persons with disabilities are considered recipients of support/assistance rather than active and notable contributors themselves to their country's development endeavours.

- **The National Plan of Action of Persons with Disabilities**

The National Plan of Action of Persons with Disabilities (2012-2021) aims at making Ethiopia an inclusive society. It addresses the needs of persons with disabilities in Ethiopia for comprehensive rehabilitation services, equal opportunities for education, skills training and work, as well as full participation in the life of their families, communities and the nation.<sup>20</sup>

- **Framework Document 2009**

This Document provides for 'Special Needs Education (SNE)' in Technical and Vocational Education and Training (TVET).<sup>21</sup>

### 6.2 Does Ethiopia have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.

- **The National Social Protection Policy of Ethiopia (2012)**

This Policy is a document developed by the Government of Ethiopia to protect citizens from economic and social deprivation. It mainly focuses on the following objectives: protect poor and vulnerable individuals, households, and communities

18 As above.

19 ILO (n 8).

20 As above.

21 As above.

from the adverse effects of shocks and destitution; increase the scope of social insurance; increase access to equitable and quality health, education and social welfare services to build human capital thus breaking the inter-generational transmission of poverty; guarantee a minimum level of employment for the long term unemployed and underemployed; enhance the social status and progressively realise the social and economic rights of the excluded and marginalised; and ensure the different levels of society are taking appropriate responsibility for the implementation of social protection.<sup>22</sup>

## 7 Disability bodies

### 7.1 Other than the ordinary courts and tribunals, does Ethiopia 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.

In recent years, following reforms that ensued as of 2018, a 'Disability Directorate' has been established within auspices of the Ministry of Labour and Social Affairs (MoLSA).

Moreover, the Ethiopian Human Rights Commission – an independent national human rights institution answerable to the Parliament – has, for the first time, set up a Deputy Commissioner's position focused on disability and the elderly in 2021, for which a woman with disability is appointed as Deputy Commissioner.

### 7.2 Other than the ordinary courts or tribunals, does Ethiopia have any official body that though not established to specifically address violations of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.

The Ombudsman, primarily mandated to address issues of maladministration, could be considered an extension of the desire and endeavours to establish independent human rights institutions in Ethiopia. It contributes to rectifying rights' violations by addressing matters of maladministration against, inter alia, persons with disabilities and promotes good governance in any public institution.

22 Ministry of Labour and Social Affairs 'National social protection policy of Ethiopia' (26 March 2012) <http://extwprlegs1.fao.org/docs/pdf/eth189010.pdf> (accessed 27 May 2021).

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

- 8.1 Does Ethiopia 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, Ombudsman or Public Protector of Ethiopia has ever addressed issues relating to the rights of persons with disabilities.**

Yes, as elucidated above, the Ethiopian Human Rights Commission and the Ethiopian Institution of the Ombudsman are both actively engaged in advising on and monitoring issues related to persons with disabilities.

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

- 9.1 Does Ethiopia have organisations that represent and advocate for the rights and welfare of persons with disabilities? If so, list each organisation and describe its activities.**

Persons with disabilities have formed six national and specific disability-focused associations under the umbrella of a Federation of Ethiopian Associations of Persons with Disabilities (FEAPD). These are:

- Federation of Ethiopian Associations of Persons with Disabilities (FEAPD);
- Ethiopian National Association of the Blind (ENAB);
- Ethiopian National Association of Persons with Physical Disabilities (ENAPPD);
- Ethiopian National Association of the Deaf (ENAD);
- Ethiopian National Association of the Deaf-Blind (ENDB);
- Ethiopian National Association of Persons Affected by Leprosy (ENAPAL);
- Ethiopian National Association on Intellectual Disability (ENAID); and
- And regional branches of the above OPDs.

All associations are working on the rights and welfares of their members. They also participate in development activities.<sup>23</sup>

FEAPD has, since 2020, amended its by-laws to accept as full members those organisations of persons with disabilities (OPDs) whose constituencies may have various types of disabilities, other than the single-disability focused organisations.

## 9.2 Are DPOs organised/coordinated at a national and/or regional level?

Yes, OPDs are organised and coordinated both at federal and regional levels. OPDs in some regions, including the Capital Addis Ababa, have also organised themselves at the '*woreda*' (structure lower than regions and sub-cities) level.

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

OPDs participated in the evaluation/monitoring and production of Shadow Reports to the CRPD Committee, and in reports during Voluntary National Reviews (VNRs) of Ethiopia concerning implementation of the Sustainable Development Goals (SDGs), among others. Nevertheless, there is still a major lack of direct representation of persons with disabilities in the legislative, executive and judiciary branches of government.

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

Involvement of organisations of persons with disabilities (OPDs) in decision-making processes in Ethiopia has generally been minimal and mostly visible during commemorations of the International Day of Persons with Disabilities, IDPD, on 3 December. This, however, seems to be changing over the past few years as OPDs are taking part in the formulation of some policies, notably the National Plan of Action on Disability (2011-2021). Moreover, there are numerous instances of partnership projects between local OPDs and international organisations advocating for the rights of persons with disabilities. For instance, an International Labour Organisation (ILO) technical cooperation project, 'Promoting Rights and Opportunities of Persons with Disabilities in Employment through Legislation' (PROPEL), aims at capacitating the Ethiopian government, social partners, and disability advocates to be actively engaged in the implementation of ILO C159<sup>24</sup> and the CRPD. It also enables them to share the Ethiopian experiences in disability rights legislation, inclusion and CRPD implementation with other African countries as an example of good practice of the process of moving towards a disability-inclusive society. Starting with a systematic examination of laws in place to promote employment and training opportunities for people with disabilities in the selected countries of each region, the project sets out to examine the operation of such legislation, identify and strengthen the implementation mechanisms in place and suggest further improvements.<sup>25</sup> All in all, nevertheless, there are still limited interventions by OPDs in mainstream policies, legislative processes and decisions as also pointed out by the CRPD Committee in one of its main Concluding Observations on Ethiopia's compliance of the Convention which reads:

The Committee is further concerned that persons with disabilities and their representative organizations [in Ethiopia] are not systematically consulted in the development of all policies and laws, training and awareness-raising across all sectors.<sup>26</sup>

24 ILO, C159: Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983.

25 As above.

26 Concluding Observations on the Initial Report of Ethiopia (n 5).

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

The principal barrier that OPDs face is systemic/structural exclusion. While OPDs are engaged in the implementation of policies, treaties, proclamations and other directives directly related to disability, they often do not engage with directives that indirectly affect PWDs. For example, despite the fact that poverty is a pivotal issue disproportionately affecting citizens with disabilities in Ethiopia, OPDs were not involved in many of the Poverty Reduction Strategy Processes (PRSPs) until recent years. The country's PRSP documents adopted since 1995 through 2010 did not make any reference to disability and PWDs. It was only in 2010, with the advent of the third PRSP document, known as the Growth and Transformation Plan (GTP), that disability was, for the first time, mentioned in a section talking about 'social welfare'. The exclusion of OPDs and the experiences of PWDs from mainstream policy, legislation, and decision-making processes is detrimental and counterproductive. OPDs must, for multiple reasons, be engaged in the implementation of human rights instruments on a broader level than solely on matters relating directly to disability.

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

It is anticipated that there will be a census in Ethiopia soon. Organisations of persons with disabilities (OPDs), including the Federation of Ethiopian Associations of Persons with Disabilities (FEAPD), CSOs, NGOs and INGOs that are working in the disability area have meticulously discussed, with the Central Statistics Agency (CSA), incorporating the Washington Group Sets of Questions (WGSQ) in the next census. FEAPD took a lead and provided training for CSA staff on disability and WGSQ. Albeit this census has yet to take place, the inclusive and multipartite collaborative process thus far adopted by OPDs, CSOs and the government in order to ensure that disability is well captured in the data collection tools can be mentioned as a best-practice model in its own right.

Furthermore, the recently held General Election of Ethiopia 2021, unlike the preceding elections, has seen an unprecedented participation of citizens with disabilities. For the first time in Ethiopia's election history, disability inclusion was debated by political parties as a core theme and this was televised by major broadcasters. According to the National Electoral Board of Ethiopia (NEBE), a record number of 99 candidates with disabilities have run for both Federal and regional parliaments, of which 76 have won seats. Nevertheless, systemic impediments such as, but not limited to, pervasive inaccessibility of polling stations; communication barriers (particularly for persons with hearing impairments); and stereotypes and misconceptions observed within the leadership of some parties about the active involvement of citizens with disabilities as candidates and voters, were among the continued challenges seen in this year's elections.

### **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?**

After Ethiopia ratified the CRPD, the regional state of South Nations, Nationalities and Peoples (SNNPR) created a task force to monitor the implementation of the CRPD within its jurisdiction. This task force was comprised of 14 sector offices and

six OPDs.<sup>27</sup> The presence of OPDs in such task forces allows for successful monitoring and appropriate responses to the implementation of the CRPD. In Ethiopia, many OPDs and the FEAPD have also been included in the national monitoring committees. Consequently, OPDs were quite involved in the creation of the country's report to the CRPD Committee.

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

Yes, there is a need for OPDs to be mainstreamed into the general legislation, policy-making, and decision-making processes regardless of whether the issue at hand is directly about disability. Ethiopia also has an acute need for adequate data collection and research, including a census, on disability. There is a lack of specific research institutes that work on disability rights or work with OPDs. Further data collection and research will be beneficial for the government, OPDs, and other groups when preparing reports, creating appropriate policies, and addressing the specific needs of PWDs in Ethiopia.

**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?**

The critical question seems to be less of whether or not OPDs have the capacity to take a leading role in implementation processes, but more of whether or not the government and other authority figures acknowledge the need for OPDs in these processes and actively engage with them in order to understand why OPDs are needed in those leadership roles. Changing perceptions of disability within Ethiopia would empower OPDs to further disability rights and advocacy in the country as well.

**9.10 Are there specific research institutes in Ethiopia 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 no specific research institutes that work on the rights of person with disabilities or facilitate the involvement of OPDs, but the Federation of Ethiopian Associations of Persons with Disabilities (FEAPD) and other organisations that are working in the disability arena try to do research, albeit not so comprehensive oftentimes, on the issues of disability and persons with disabilities. The Addis Ababa University's Special Needs Education Department also engages in such research.

27 Ethiopian Ministry of Labour and Social Affairs (n 2) 2.

## 10 Government departments

### 10.1 Does Ethiopia 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).

Yes. At the federal level, the Ministry of Labour and Social Affairs (MoLSA) is the main governmental organ responsible for the provision of social and vocational rehabilitation of people with disabilities. Operating within MoLSA is the Disability Directorate which coordinates disability issues at the federal level as part of its wider mandate to deal with employment and social issues. In the 11 regional states in Ethiopia, there are regional Bureaus for Labour and Social Affairs (BoLSAs). BoLSAs handle all social matters, including disability-related issues, under the policy framework established by MoLSA. Other ministries are expected to take responsibility for mainstreaming disability into their respective areas of work as stated under Proclamation 1097/2018 on 'Definitions of Power of the Executive Organs of the Federal Democratic Republic of Ethiopia'.

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

### 11.1 Contemporary challenges of persons with disabilities in Ethiopia (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).

Discrimination against and mistreatment of persons with disabilities is severe and pervasive in Ethiopia. Children with disabilities are especially vulnerable to abuse; they are often abandoned by one or both parents and, in more remote areas of the country, sometimes exposed to infanticide. Children with disabilities suffer from exploitation and sexual abuse at much higher rates than do their peers. Even when children report abuse, their parents, teachers, and health workers often choose to not take legal action against the abuser. Beyond physical harm, children with disabilities are often denied their right to an education in part due to the belief that they are unable to learn. The government does little to provide for students with disabilities and teachers are often unwilling and untrained to accommodate the students.

The abuse and discrimination experienced by children with disabilities follows them into adulthood. Persons with disabilities have difficulty finding work as they are not protected under Ethiopia's Labour Proclamation. The legislation does not require employers to provide reasonable accommodation for employees with disabilities and allows employers to use a disability as grounds for termination. Some people with disabilities also have difficulty accessing health care as little is done to communicate services and resources to people with sensory disabilities. In the absence of a strong support system, it is often difficult for them to communicate their concerns to their doctors and to have their feelings be understood.

In Ethiopia, the charity approach to disability still prevails, and there is a general tendency to think of persons with disabilities as weak, hopeless and dependent on the goodwill of others.<sup>28</sup> Due to this stigma combined with low accessibility and few economic resources, the great majority of persons with disabilities do not have access to basic health, education, and social services that could help reduce their dependency and facilitate their independent living with a sustainable livelihood.<sup>29</sup>

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

- Ableism, societal ignorance, prejudice and stereotypes;
- Accessibility and reasonable accommodation;
- Access to social security;
- Access to public buildings;
- Access to public transport;
- Access to education;
- Access to vocational training;
- Access to employment;
- Access to recreation and sport; and
- Access to justice.

Despite the availability of different policies and legislations on rights of PWDs, the reality of PWDs is far from the legislation or policies. PWDs still live under the shadow without any access to public services including education, health and transportation.

Poverty also intersects with disability as it is both the cause and consequence of disability. An estimated 95 per cent of all persons with disabilities in the country are living in poverty. Additionally, 84 per cent of the population in Ethiopia live in rural areas so it is like PWDs are also living in rural areas, where access to services are limited and often inaccessible to PWDs. In order to address the needs of the poor, the FDRE has created a Plan for Accelerated and Sustainable Development to End Poverty (PASDEP). This plan, however, did not directly address the needs of PWDs or their families.<sup>30</sup>

**11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Ethiopia?**

Yes. They have the right to participate. However, unlike the constitutions of several African countries and elsewhere, there is neither a constitutional provision nor other laws stipulating parliamentary representation of PWDs in Ethiopia.

28 T Teferra *Disability in Ethiopia: Issues, insights, and implications* (2005).

29 MOLSA (n 2).

30 ILO (n 8).

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

A 2016 report by The Advocates for Human Rights on Ethiopia's compliance with the CRPD noted the problem that Ethiopians with disabilities do not have non-discriminatory access to healthcare. Access to healthcare, proper communication, and training of medical staff are inadequate to address the needs of persons with disabilities. Persons with disabilities also face healthcare discrimination based on political opinion due to kebele (the lowest administrative organ in Ethiopia) officials who can deny services such as referral notes for secondary healthcare in hospitals.

#### **11.5 Specific categories experiencing particular issues/vulnerability.**

- **Women with disabilities**

Female genital mutilation is still practiced in Ethiopia. According to the 2016 Demographic and Health Survey (DHS), 65 per cent of women in the age group between 15 and 49 years are circumcised and the prevalence of female genital mutilation and circumcision increases with age.<sup>31</sup> There are inadequate legal consequences, arrests, research, and data collection on this phenomenon that continues to harm women and children.

Women and girls with disabilities also face gender-based violence and sexual abuse. Girls with disabilities are more likely to suffer physical and sexual abuse than girls without disabilities and 33 per cent of girls with disabilities who have sexual experience report having experienced forced sex.<sup>32</sup> Women and girls with disabilities experience multiple discrimination based on their disability and gender.

- **Children with disabilities**

Children with disabilities face extreme forms of violence, stigma and discrimination, primarily due to misconceptions rooted in cultural beliefs and traditions. Children with disabilities are twice as likely to become victims of violence than their able-bodied peers; fewer than ten per cent of children with disabilities in Africa receive any form of education and only two per cent attend school.<sup>33</sup> There is also a need to make education inclusive for children with disabilities.

## **12 Future perspective**

#### **12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in Ethiopia at the moment?**

Yes, there is ongoing deliberation on issuing a comprehensive Disability Act in Ethiopia. A drafting process of this Act is already underway, involving experts with

31 Austrian Centre for Country of Origin & Asylum Research and Documentation 'Ethiopia: COI Compilation' (November 2019).

32 Advocates for Human Rights (n 6).

33 ACPF 'The African Report on Child Wellbeing 2018: Progress in the child-friendliness of African governments' (2018).

disabilities and OPDs. It is hoped that this legislative piece will serve as a 'one-stop-shop' of all disability-specific laws available in Ethiopia.

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

The 2016 report by The Advocates for Human Rights on Ethiopia's compliance with the CRPD highlighted several problems with Ethiopia's obligations under the CRPD. One of the issues raised was concerns that the 2009 Charities and Societies Proclamation (CSP) constrained civil society in Ethiopia as this law practically disallows receiving funds from international donors for human rights-related activities in the country. The report pointed out how the CSP negatively affects NGOs and domestic associations, including OPDs such as disability-related associations under the FEAPD. It has been recommended that the Ethiopian government repeal the CSP which, as of 2019, is repealed and replaced by Proclamation 1113/2019 that retracted the restrictive clauses in the previous law.

The fact that Ethiopia's current Constitution makes no mention whatsoever of persons with disabilities except under the section dealing with economic and social rights is another major lacuna. Disability should be expressly incorporated at least as a prohibited ground of discrimination in the equality and non-discrimination provisions of the Constitution, as is the case in several African countries. A constitutional clause consolidates the justiciability of disability rights.

To this end therefore, based on our readings, views and practical expertise in the Ethiopian disability sector, the following salient reforms are of paramount urgency:

- Incorporation of a disability-specific substantive provision in the FDRE Constitution that ensures constitutional guarantees on disability rights, as is currently the case with women's rights (article 35) and the rights of children (article 36), for instance;
- Revision of article 25 of the FDRE Constitution so that it explicitly includes disability among other statuses against which discrimination is prohibited;
- Revision of article 54 of the FDRE Constitution so that political representation of citizens with disabilities in the House of Peoples' Representatives would be realised;
- Prepare and adopt comprehensive, stronger and effective disability law that contains details of disability rights, anti-disability discrimination provisions, enforcement mechanisms and institutional set ups mandated to ensure the full implementation of that law;
- Systematically and visibly incorporate disability in all mainstream laws that affect the lives of citizens with disabilities such as health law, education law, and other legislations that are in the pipeline to be promulgated and/or are already in force;
- Undertake research, in consultation with organisations of citizens with disabilities, and plan for disability budgeting;
- Set in place a system upon which each ministry and governmental organ equally plans and allocates budget for disability;
- Adopt the federal government budget proclamation by incorporating a disability-inclusive fiscal planning and budget allocation;
- Carry out national campaigns for accessibility of public and private service providers so that buildings, streets, pavements, communications, etc. will comply with minimum accessibility standards;
- Ensure that accessibility standards consider all types of disabilities such as visual cues for the deaf, tactile and braille signs and so on;
- Establish disability specific transport services; and
- Issue accessibility standards for public information.

Finally, the importance of having up-to-date statistics and data on disability to inform policies and implement the CRPD is not debatable, as clearly stipulated under article 31(1) of the CRPD. It follows that one of the state's obligations under the CRPD is to collect appropriate, disability-disaggregated information, statistics and data. It is indicated earlier in this report that the 2007 National Census was not sternly criticised by disability experts in Ethiopia for its inadequacy in capturing the number of persons with disabilities owing to various factors. Some of these factors included failure to adopt an appropriate definition of the term disability and failure to incorporate appropriate questions that are helpful to identify persons with disabilities in survey questionnaires. The various ministries and sectors also do not have a system of gathering disability data in provision of their services. The Ministry of Education incorporates disability data in its annual abstract which is the best experience for others. Other sectors do not have such practices. In this regard therefore, we recommend:

- Incorporation of the CRPD definition of the term 'persons with disabilities' and formulation of census survey questionnaires in line with international standards; and
- Creating a uniform system upon which various sectors keep disability data in their service deliveries.

# RÉPUBLIQUE DE GUINÉE

Marianne Séverin\*

## Summary

*According to the 2019 statistical yearbook of the National Statistical Institute, the Guinean population is estimated at 12 218 337 inhabitants. According to the third household census published in 2017, 155 885 people have disabilities, that is 1,5 per cent of the total Guinean population. The most prevalent forms of disabilities include mobility and intellectual 'impairments', visual, hearing, speech and albinism.*

*Guinea signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 16 May 2007 and 8 February 2008 respectively. It also signed and ratified the Optional Protocol on 16 May 2007 and 8 February October 2008 respectively. Guinea did not submit its country report, although it was due in March 2010. In Guinea international agreements apply directly in domestic courts, which is the monist approach to international law. As a ratified instrument becomes law immediately, prior to any ratification, the National Assembly passes a law to approve the ratification of an instrument whose constitutionality would have been certified by the Constitutional Court. After ratifying the CRPD, Guinea adopted various measures to foster human rights in general and the rights of persons with disabilities in particular.*

*Article 25 of the Constitution of Guinea directly addresses disability: 'Persons with disabilities are entitled to the assistance and the protection of the State, public authorities and society'. The law sets out the conditions of the assistance and protection to which persons with disabilities are entitled. In addition, the Constitution indirectly addresses disabilities through its preliminary provision on 'principles of fundamental rights' in its articles 18 and 21 which provide for the right of employment for everyone. Finally, in article 30, the Constitution affirms everyone has the right to health and to physical and mental wellbeing.*

*Guinea has numerous pieces of legislation that directly address disability. The key ones are the Decree D/2018/108/PRG/SGG of 13 July 2018, on the protection and promotion of persons with disabilities and the Law on the Protection and Promotion of People with Albinism, 6 April 2021.*

*We did not find any case law in Guinea. However, the policies that directly address persons with disabilities are:*

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- *National Programme for the Inclusion and Empowerment of Persons with Disabilities to promote the full participation of disabled people in economic, social and cultural development by 2020 in the Republic of Guinea.*
- *2016-2020 National Economic and Social Development Plan which indirectly includes disability.*
- *Education and training, with the intermediate objective of improving the access, supply and quality of education and training adapted to the needs of the national economy; and employment of vulnerable groups, the intermediate objective being to promote employment and entrepreneurship of young people, women and people with disabilities.*

*Other than ordinary courts or tribunals, Guinea does not have an official body or any other body that specifically addresses the violation of the rights of persons with disabilities.*

*Guinea has a National Human Rights Commission. Its mandate includes the protection of disability rights.*

*There are numerous organisations that represent and advocate for the rights and welfare of persons with disabilities in Guinea. These include: Guinean Network of Disability Organisations for the Promotion of the International Convention on the Rights of Persons with Disabilities (ROPACIDPH); Action for the Future of People with Disabilities in Guinea Association (AFHAG); Guinea Association for the Training and Social Reintegration of Persons with Disabilities (AGFRIS); National Confederation of Albinos of Guinea (CNAG); and the Foundation for the relief and the social integration of the albino (FONDASIA). These organisations contribute to the promotion of disability rights through awareness-raising. To improve their efficiency, there is a need to improve their capacity through training including on disability rights and financial subventions.*

*In Guinea, the Ministry of the Promotion of Women and Children, and National Directorate of Social Affairs attached to the Ministry of Employment (Decree n°96/PRG/SGG/96) are responsible for promoting and protecting the rights and welfare of persons with disabilities. Generally, they promote and oversee the social inclusion persons with disabilities.*

*People with albinism face very serious violation of their rights; they face marginalisation and violence. Particularly vulnerable in a context of extreme poverty, due to a lack of education, training and unemployment, they are reduced to begging mainly in Conakry (the capital). Myths and untruths abound when it comes to people with albinism. They are perceived as being able to bring good luck, to access wealth, power, or high social position, or given supernatural powers that can solve problems (sentimental, powerlessness etc). Because of these beliefs, they are victims of kidnapping, ritual crimes and face toxic relationships with people who only associate with them out of curiosity.*

*Although there are some good decrees to foster disability rights, it is imperative that they are implemented if they are to make a difference in the protection of disability rights. Children with disabilities should be a priority in terms of inclusive education/training and a real census for children with disabilities should be urgently carried out to address this.*

# 1 Les indicateurs démographiques

## 1.1 Quelle est la population totale de la République de Guinée?

Selon l'annuaire statistique de 2019, de l'Institut Nationale de la Statistique, la population guinéenne est évaluée à 12 218 337 habitants.<sup>1</sup>

## 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 de Guinée?

La République de Guinée a effectué un recensement général de la population des personnes en situation de handicap. Selon le troisième Recensement Général de la Population et de l'Habitation (RGPH-3), publié en 2017, 155 885 personnes en situation de handicap avaient été identifiées, soit 1.5 pour cent de l'effectif total de la population guinéenne. Elles ont été réparties selon le sexe, le lieu de résidence (zones urbaine/rurale), les régions, les tranches d'âge, la religion, la situation matrimoniale, du niveau d'instruction, et autres caractéristiques (ex. activités, catégorie socioprofessionnelle, niveau de vie, branche d'activité).<sup>2</sup> Enfin, chaque personne déclarant être en situation de handicap, a dû mentionner le type de handicap. En cas de plusieurs handicaps, seul le plus important était retenu. Pour finir, la personne en situation de handicap devait se classer en fonction de la classification suivante: « infirmes des membres, inférieurs, infirmes des membres supérieurs, aveugle, muet, sourd/muet, sourd, déficience mentale, bossu, et albinos ».<sup>3</sup>

## 1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République DE Guinée?

Selon l'INS (Institut national de la Statistique, 2017, sur une population totale de 10 503 132 habitants (2014), 1,5 pour cent de personnes en situation de handicaps ont été recensés, soit 155 885.<sup>4</sup>

## 1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République de Guinée?

Sur les 155 885 personnes en situation de handicap, 73 338 sont des femmes, soit 47 pour cent.<sup>5</sup>

1 Institut Nationale de la Statistique (INS) 'Ministère du Plan et de la coopération internationale, Annuaire statistique' (2019) 31 [https://www.stat-guinee.org/images/Documents/Publications/INS/annuelles/annuaire/Annuaire\\_INS\\_2019\\_opt.pdf](https://www.stat-guinee.org/images/Documents/Publications/INS/annuelles/annuaire/Annuaire_INS_2019_opt.pdf) (consulté le 22 septembre 2021).

2 Ministère du Plan et de la coopération internationale (RGPH3), décembre 2017 <https://data.space.princeton.edu/bitstream/88435/dsp01pk02cd514/13/DSGuineaRGPH3personneshandicap.pdf> (consulté le 22 septembre 2021).

3 RGPH3 (n 2).

4 RGPH3 (n 2) 27.

5 RGPH3 (n 2) 27 et à partir du tableau 2.5: Taux de handicap (%) et effectif des handicapées par milieu de résidence et par sexe, 30.

### **1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République de Guinée?**

Le Troisième Recensement Général de la Population et de l'Habitation (RGPH3) – Situation des personnes vivant avec handicap de 2014,<sup>6</sup> prend en compte les enfants de 0 à 17 ans qui sont estimés à 56 063, soit 2.1 pour cent.<sup>7</sup>

### **1.6 Quelles sont les formes de handicap les plus répandues en République de la Guinée?**

Il ressort du recensement (RGPH3) – 2014 que les formes de handicap les plus répandues sont respectivement:

- les handicaps moteurs (44.9 pour cent membres supérieurs et 20 pour cent membres inférieurs);
- handicap intellectuel (12.5 pour cent)
- aveugle (9.8 pour cent);
- sourd-muet (5.1 pour cent);
- malentendant (2.9 pour cent);
- muet (2.9 pour cent);
- l'albinisme (0,7%).

## **2 Obligations internationales**

### **2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République de Guinée? La République de Guinée a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). La République de Guinée a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).**

La République de Guinée a signé la Convention Relative aux Personnes Handicapées (CDPH), ainsi que son Protocole facultatif, le 16 mai 2007. Les CDPH et Protocole facultatif ont été ratifiés le 8 février 2008.<sup>8</sup>

6 RGPH3 (n 2) 34.

7 RGPH3 (n 2) 34.

8 Nations Unies Droits de l'Homme Organes de traités 'Statut de ratification de la Guinée – CRPD' [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=71&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=71&Lang=FR) (consulté le 22 septembre 2021).

**2.2 Si la République de Guinée 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 de Guinée 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 Guinée était tenue de soumettre son rapport initial dans un délais de deux ans, soit à la date du 8 mars 2010.<sup>9</sup> La République de Guinée n'a soumis aucun rapport. La raison de ce retard/absence est due à une transition au pouvoir en 2008 avec ses corollaires de crises politiques récurrentes qui sont intervenues jusqu'en 2010. Le Ministère de l'Action Sociale est responsable de la soumission des rapports.

**2.3 Si la République de Guinée 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 de Guinée. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées de Guinée?**

N/A.

**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 de Guinée a-t-elle également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Etait-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de la République de Guinée? Si oui, quels étaient les effets de ces observations ou recommandations?**

**• Comité contre la torture**

La République de Guinée n'a soumis qu'un rapport initial au titre de l'art 19 de la Convention contre la torture et autres peines ou traitements cruels, inhumains et dégradants, le 6 mai 2014. La République de Guinée a fait mention spécifique du droit des personnes en situations de handicap, plus spécifiquement du handicap physique ou mental de l'enfant, dans l'art 287 de la loi portant Code de l'enfant du 19 août 2008 qui accorde protection spéciale à l'enfant en danger<sup>10</sup> ainsi que dans l'art 300 qui définit l'enfant handicapé, comme tout

enfant qui présente une limitation dans l'exercice d'une ou plusieurs activités de base de la vie courante consécutive à une déficience physique, sensorielle ou mentale d'origine congénitale ou acquise.<sup>11</sup>

9 Comme ci-dessus.

10 Rapport de l'Etat partie, Comité contre la torture (25 juillet 2014) UN Doc CAT/C/GIN/1 (2014) 19 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

11 Comme ci-dessus.

Le Comité contre la torture, au 20 juin 2014, note avec satisfaction, la ratification de la Convention relative aux droits des personnes handicapées et son Protocol facultatif, le 8 février 2008.<sup>12</sup>

• **Comité des droits de l'homme**

La République de Guinée a fait mention spécifique du Droit des personnes handicapées dans son rapport publié le 29 novembre 2017, en faisant mention de la nouvelle loi n° L/2014/072//CNT du 10 janvier 2014 portant Code du travail, en son art 5,<sup>13</sup> consacrant le principe de la non-discrimination dans la sphère de l'emploi et du travail: cette loi interdisant à tout employeur ou son représentant de prendre en considération:

le handicap pour arrêter ses décisions relatives à l'embauche, la conduite et la répartition du travail, la formation professionnelle, l'avancement, la promotion, la rémunération, l'octroi d'avantages sociaux, la discipline ou la rupture du contrat de travail.<sup>14</sup>

Le Comité des droits de l'homme, dans la liste de points concernant le troisième rapport périodique de la Guinée, demande, dans le Cadre constitutionnel et juridique de l'application du Pacte (art 2) sur la non-discrimination, qu'il soit précisé s'il existe une législation complète:

a) apportant une définition et une incrimination claires de la discrimination, directe et indirecte; couvrant une liste complète de motifs de discrimination, y compris l'identité sexuelle et de genre, et le handicap ... D'indiquer les mesures prises pour combattre et pour prévenir les actes de discrimination, de stigmatisation ou de violence à l'encontre: des personnes albinos. Indiquer les mesures destinées à assurer la non-discrimination des personnes handicapées dans tous les domaines, y compris en matière d'éducation et de participation aux affaires publiques.<sup>15</sup>

Soumis le 16 septembre 2018, le rapport conjoint de la Confédération Nationale des Albinos de Guinée (CNAG) et de l'ONG Under the Same Sun, fait état de violence à l'encontre des personnes atteintes d'albinisme, ainsi que leur discrimination et marginalisation. Les enfants atteints d'albinisme sont d'ailleurs reniés par leurs pères biologiques, De nombreuses croyances infondées entourent les personnes atteintes d'albinisme. Sur la question relative au Droit à la vie et la sécurité de la personne, le rapport stipule que l'Etat a failli dans la protection et la prévention des violences contre les personnes atteintes d'albinisme.<sup>16</sup>

• **Comité pour l'élimination de la discrimination à l'égard des femmes**

Conformément à l'art 18 de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la République de Guinée n'a pas rendu son rapport au 1<sup>e</sup> novembre 2018. Dans son rapport publié le 11 janvier 2013, l'Etat

12 Observations finales concernant la Guinée en l'absence de rapport initial, Comité contre la torture (20 June 2014) UN Doc CAT/C/GIN/CO/1 (2014) 2 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

13 Troisième rapport périodique soumis par la Guinée en l'application de l'article 40 du Pacte, attendu en 1994, Comité des Droits de l'Homme (29 novembre 2017), UN Doc CCPR/C/GIN/3 (2017) 11 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR), il a été mentionné art 4 dans le rapport. Il s'agit en fait de l'art 5 du Code du Travail [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/docu\\_ments/legaldocument/wcms\\_301242.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/docu_ments/legaldocument/wcms_301242.pdf) (consulté le 22 septembre 2021).

14 Comité des Droits de l'Homme (n 14) 11.

15 Liste de points concernant le troisième rapport périodique de la Guinée, Comité des Droits de l'Homme (24 mai 2018) UN Doc CCPR/C/GIN/Q/3 (2018) 2 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

16 CGNA 'The civil and political rights of persons with Albinism in the Republic of Guinea' (16 September 2018) 2-3; 4-8 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

partie a fait mention spécifique des Droits des personnes en situation de handicap.<sup>17</sup> En Annexe I – Question du Comité de suivi au Gouvernement. Domaine juridique et législatif:

Adopter et mettre en œuvre une loi spécifique sur les personnes handicapées; notamment les femmes et filles; Ratification de la Convention Internationale sur la protection des personnes handicapées en 2008 et l'adoption d'une loi spécifique sur les personnes handicapées notamment les filles et les femmes .<sup>18</sup>

Dans la liste des questions relatives au rapport unique de la République de Guinée valant septième et huitième rapports périodiques dans le « Groupe des femmes défavorisées », il a été demandé à l'Etat partie de:

donner des informations sur les mesures prises ou envisagées par les autorités pour les groupes de femmes défavorisées dont les femmes handicapées.<sup>19</sup>

Le 3 juin 2014, la République de Guinée, dans sa réponse concernant « les groupes des femmes défavorisées », faisait état de la ratification de la Convention sur la protection des personnes en situation de handicap et d'une « campagne de dissémination de la convention entreprise par la Fédération guinéenne des associations de personnes handicapées. Avait été mise en place une mesure temporaire pour permettre aux personnes en situation de handicap d'accéder à l'emploi public. Enfin un projet de loi sur la protection des personnes en situation de handicap était élaborée.<sup>20</sup> Dans ses observations finales du 14 novembre 2014, le Comité se félicitait de l'adhésion de la République de Guinée à la CDPH et au protocole facultatif s'y rapportant (2008).<sup>21</sup> Sur la question des « Groupes de femmes défavorisées » le Comité s'est dit préoccupé par la situation ... des femmes en situation de handicap, victimes de formes multiples de discrimination:

En ce qui concerne l'accès à la terre, l'éducation, l'emploi, un logement convenable, les soins de santé et les services sociaux. Il déplore l'insuffisance d'informations fournies par l'Etat partie à cet égard.<sup>22</sup>

Le Comité demande à la République de Guinée de faire figurer dans son prochain rapport périodique: « Des informations détaillées, notamment des données ventilées, et tout autre renseignement sur des réalisations et des programmes particuliers relatifs à la situation .... des femmes handicapées ».<sup>23</sup>

• **Comité de droits économiques, sociaux et culturels**

La République de Guinée a fait mention spécifique, dans son rapport soumis le 29 mars 2019, du Droit des personnes en situation de handicap, avec la « Loi L/2018/021/AN du 15 mai 2018 portant protection et promotion des personnes

17 Rapport de l'Etat partie, Comité pour l'élimination de la discrimination à l'égard des femmes (11 janvier 2013) UN Doc CEDAW/C/GIN/7-8 (2013) 13 [https://tbinter.net.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinter.net.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

18 Comité pour l'élimination de la discrimination à l'égard des femmes (n 18) 37-38.

19 Liste des questions relatives au rapport unique de la Guinée valant septième et huitième rapports périodiques, Comité pour l'élimination de la discrimination à l'égard des femmes (9 mars 2014) UN Doc CEDAW/C/GIN/Q/7-8 (2014) 5 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

20 Comité pour l'élimination de la discrimination à l'égard des femmes (n 20) 22.

21 Observations finales concernant les septième et huitième rapports périodiques (présentées en un seul document de la Guinée), Comité pour l'élimination de la discrimination à l'égard des femmes (14 novembre 2014) UN Doc CEDAW/C/GIN/Q/7-8/CO (2014) 2 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

22 Comité pour l'élimination de la discrimination à l'égard des femmes (n 22) 16.

23 Comme ci-dessus.

handicapées » et dans « le cadre de l'application de cette loi, des initiatives comme le programme citoyen sont en cours ».<sup>24</sup>

Le Comité recommande à l'Etat partie:

D'améliorer la collecte, l'analyse et la diffusion de données complètes et comparables, afin de déterminer dans quelle mesure les groupes et personnes défavorisées et marginalisées, notamment ... les personnes handicapées ... jouissent de leurs droits économiques, sociaux et culturelles.<sup>25</sup>

Le Comité prend note de:

L'adoption de la loi n° L/2018/021/AN du 15 mai 2018 portant protection et promotion des personnes handicapées. Il reste néanmoins préoccupé par le fait que les textes d'application de cette loi n'ont pas encore été adoptés, et que l'Art. 23 de la loi n'impose pas explicitement une exigence d'aménagement raisonnable. Le Comité est également préoccupé par le fait que les personnes handicapées sont défavorisées en matière d'accès à l'éducation, à l'emploi, et aux biens et services publics (art 2).<sup>26</sup>

• **Comité des droits de l'enfant**

Dans son rapport valant troisième à sixième rapports périodiques, en application de l'article 44 de la Convention, la Guinée a répondu que:

Il n'y a pas encore une politique nationale et une stratégie spécifique et qui garantissent effectivement aux enfant porteurs de handicap leur dignité, leur autonomie, et leur participation active à la communauté ...; Les services programmes et projets significatifs destinés aux enfants porteurs de handicap sont rares.<sup>27</sup>

Dans ses observations du 28 février 2019, le Comité fait remarquer que:

Eu égard à son observation générale n°9 (2006) sur les droits des enfants handicapés et à ses recommandations précédentes (CRC/C/GIN/CO/2, par. 64), le Comité recommande à l'Etat partie d'adopter une approche du handicap fondée sur les droits de l'Homme, de mettre en œuvre la loi de 2018 sur la protection des personnes handicapées et d'établir une stratégie globale pour l'inclusion des enfants handicapés. Il prie instamment l'Etat partie d'assurer l'éducation inclusive, l'accès aux services de santé, et l'apport d'aménagements raisonnables dans tous les domaines de la vie et à tous les handicaps sensoriels, ainsi qu'élaborer des programmes de sensibilisation pour lutter contre la stigmatisation des enfants handicapés.<sup>28</sup>

L'organisation de la société civile - Coalition des ONGs de protection et promotion des droits de l'Enfant luttant contre la Traite (COLTE/CDE) – dans un rapport soumis au

24 Rapport initial soumis par la Guinée en application des articles 16 et 17 du Pacte, attendu en 1990, Comité des droits économiques, sociaux et culturels (29 mars 2019) UN Doc E/C.12/GIN/1 (2019) 8 & 19 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

25 'Observations finales concernant le rapport initial de la Guinée, Comité des droits économiques, sociaux et culturels (29 mars 2019) UN Doc E/C.12/GIN/CO/1 (2019) 3 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021) (comme ci-dessus)

26 Comité des droits économiques (n 26) 4.

27 Rapport valant troisième à sixième rapports périodiques soumis par la Guinée en application de l'article 44 de la Convention, attendus en 2017-VII. Handicap, soins santé de base et bien-être art. 6, 18 (par 3), 23, 24, 26 et 27 (par. 1 à 3) de la Convention, a) Enfants handicapés, Comité des droits de l'enfant (7 août 2018), UN Doc CRC/C/GIN/3-6 (2018) 21 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

28 Observations finales concernant le rapport valant troisième à sixième rapports périodiques' G. Handicap, soins santé de base et bien-être (art 6, 18 (par. 3), 23, 24, 26 et 27 (par. 1 à 3) et 33. Enfants handicapés, Comité des droits de l'enfant (28 février 2019) UN Doc CRC/C/GIN/CO/3-6 (2019) 9 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

Comité le 7 mai 2018, indique que les enfants en situation de handicap sont discriminés, marginalisés et ne bénéficient pas de services de protection et de soutien adéquat. La COLTE/CDE dénonce le manque, voir l'absence d'aménagements raisonnables en faveur des enfants en situation de handicap. Cependant, l'organisation reconnaît un effort – bien qu'insuffisant – « au niveau de l'éducation, la politique éducative et les réformes des curricula et les installations prenant en compte le cas des enfants en situation de handicap ».<sup>29</sup>

- **Commission africaine des Droits de l'Homme et des Peuples**

Dans le 47<sup>ème</sup> Rapport d'activités de la Commission africaine des Droits de l'Homme et des Peuples, présenté conformément à l'art 54 de la Charte Africaine des Droits de l'Homme et des Peuples, lors de la 65<sup>ème</sup> Session ordinaire, l'état de présentation des Rapports montrait que la Guinée fait partie des 18 pays ayant plus de 3 rapports en retard.<sup>30</sup>

- **Examen Périodique Universel**<sup>31</sup>

La République de Guinée 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 n° L/2018/021/AN du 15 mai 2018 portant protection et promotion des personnes handicapées, promulguée par décret n° D/2018/108//PRG/SGG du 13 juillet 2018,<sup>32</sup> qui assure l'égalité des chances aux personnes en situation de handicap et les protège de toutes les formes de discrimination.<sup>33</sup>

Dans le rapport du groupe de travail sur l'Examen périodique universel du 24 mars 2020 (A/HRC/44/5), il est fait mention de l'élaboration et de l'adoption d'un programme d'inclusion des personnes en situation de handicap.<sup>34</sup> Plusieurs pays (Mexique, Afrique du Sud, Turquie, Brésil, Bulgarie, République islamique, Mauritanie, la Chine) ont salué la Guinée pour ses efforts en faveur de la protection et la promotion des droits des personnes en situation de handicap, dont un travail législatif important en leur faveur et le développement de l'éducation et des soins de santé en faveur des personnes en situation de handicap.<sup>35</sup>

29 COLTE/CDE 'Handicap, soins de santé de base et bien-être (art. 6, 18 (par. 3), 23, 24, 26 et 27 (par. 1 à 3) de la Convention) – d) Enfants handicapés' (7 mai 2018) 16 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

30 Commission Africaine des Droits de l'Homme et des Peuples '47ème Rapport d'activités de la Commission Africaine des Droits de l'Homme et des Peuples' (21 octobre-10 novembre 2019) 5 [https://www.achpr.org/fr\\_activityreports/viewall?id=51](https://www.achpr.org/fr_activityreports/viewall?id=51) (consulté le 22 septembre 2021).

31 Assemblée Générale des Nations Unies 'Rapport du Groupe de travail sur l'Examen périodique universel\* Guinée' A/HRC/44/5 (24 mars 2020) <https://www.ohchr.org/FR/HRBodies/UPR/Pages/GNIndex.aspx> (consulté le 22 septembre 2021).

32 United Nation Assembly 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21\* Guinea' A/HRC/WG.6/35/GIN/1 (11 November 2019) 4 & 7 <https://undocs.org/A/HRC/WG.6/35/GIN/1> (consulté le 22 septembre 2021) Act L/2018/021/AN of 15 May 2018 on Equal Opportunities for Persons with Disabilities, promulgated by Decree D/2018/108/PRG/SGG of 13 July 2018; The Convention on the Rights of Persons with Disabilities.

33 United Nation Assembly, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21\* Guinea' A/HRC/WG.6/35/GIN/1 (11 November 2019) 19, <https://undocs.org/A/HRC/WG.6/35/GIN/1> (consulté le 22 septembre 2021). In line with recommendation 118.192 on paying particular attention to vulnerable social groups such as women, children, persons with disabilities and older persons, ActL/2018/021/AN of 15 May 2018, which was promulgated by Decree D/2018/108/PRG/SGG of 13 July 2018, is intended to ensure equal opportunities for persons with disabilities and to promote their rights and protect them from all forms of discrimination.

34 Assemblée Générale des Nations Unies 'Rapport du Groupe de travail sur l'Examen périodique universel\* Guinée' A/HRC/44/5 (24 mars 2020) 3 <https://undocs.org/fr/A/HRC/44/5> (consulté le 22 septembre 2021).

35 Assemblée Générale des Nations Unies (n 35) 6-8.

Aux termes des conclusions et/ou recommandations, la Mauritanie demande à la Guinée de renforcer les capacités de l'Institution nationale des Droits de l'Homme en faveur notamment des droits des personnes en situation de handicap et de leur pleine inclusion dans la société.<sup>36</sup> Il est également demandé à la Guinée la poursuite de ses mesures en faveur de personnes en situation de handicap (Chine et Soudan).<sup>37</sup> L'Algérie demande l'adoption de textes d'application de Loi n° L/2018/021/AN du 15 mai 2018 et de la mise en place « d'une politique nationale et d'une stratégie spécifique favorisant l'autonomie des personnes en situation de handicap.<sup>38</sup> L'Angola demande une meilleur réadaptation, inclusion et intégration des personnes en situation de handicap.<sup>39</sup> Enfin, la Bulgarie incite à l'adoption d'objectifs spécifiques concernant l'accessibilité des services aux personnes en situation de handicap.<sup>40</sup>

## 2.5 Y'avait-il un quelconque effet interne sur le système légal de la République de Guinée après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

L'article 9n in fine, du Code civil de la Guinée, qui fixe la hiérarchie des normes juridique, qui dit que les conventions, accords et traités internationaux ont une valeur supérieure aux lois et décrets. C'est pourquoi, la ratification de la Convention Relative aux Droits des Personnes Handicapées (CRDPH) et du Protocol facultatif, par la Guinée, le 8 février 2008, a eu pour effet, l'adoption de la Loi n° L/2014/072//CNT du 10 janvier 2014, qui selon l'article 5 du Code du travail, interdit toute discrimination pour cause de handicap.<sup>41</sup> La ratification de CRDPH a également eu pour effet, le vote de la Loi n° L/2018/021/AN du 15 mai 2018 portant protection et promotion des personnes en situation de handicap.<sup>42</sup> Le 6 avril 2021, l'Assemblée nationale a adopté à l'unanimité le texte de loi portant promotion et protection des personnes atteintes d'albinisme.<sup>43</sup>

## 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 148 de la Constitution de la République de Guinée de 2020, « Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient les dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'après autorisation de l'Assemblée Nationale ». « Si la Cour Constitutionnelle saisie par le Président de la République ou un Député, a déclaré

36 Assemblée Générale des Nations Unies (n 35) 15.

37 Assemblée Générale des Nations Unies (n 35) 23-24.

38 Assemblée Générale des Nations Unies (n 35) 24.

39 Comme ci-dessus.

40 Comme ci-dessus.

41 Journal Officiel de la République de Guinée, Loi n°L/2014/072/CNT du 10 janvier 2014 portant Code du travail de la République de Guinée, 1 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_301242.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_301242.pdf) (consulté le 22 septembre 2021).

42 Observations finales concernant le rapport initial de la Guinée, Conseil économique et social des Nations Unies (30 mars 2020) UN Doc E/C.12/GIN/CO/1 (2020) 4 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

43 'Assemblée nationale: Trois textes dont celui portant protection et promotion des albinos en Guinée' *Mediaguinée* 7 avril 2021 <https://mediaguinee.org/assemblee-nationale-trois-textes-dont-celui-portant-protection-et-promotion-des-droits-des-albinos-adoptes/> (consulté le 22 septembre 2021).

qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de le ratifier ou de l'approuver ne peut intervenir qu'après la révision de la Constitution. Une loi autorisant la ratification ou l'approbation d'un engagement international ne peut être promulguée et entrer en vigueur lorsqu'elle a été déclarée non conforme à la Constitution » (art 149). « Les traités ou accords régulièrement approuvés ou ratifiés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve de réciprocité » (art 150).<sup>44</sup>

**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 guinéenne; une procédure particulière ne semblait pas nécessaire. Dix ans après la ratification de la CDPH, a été adoptée une loi spécifique pour la protection et promotion des personnes en situation de handicap (la Loi n° L/2018/021/AN, 15 mai 2018).

### 3 Constitution

**3.1 La constitution de la République de la Guinée 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 de Guinée contient des dispositions directement relatives aux personnes en situation de handicap. Selon l'art 25, les personnes en situation de handicap « ont droit à l'assistance et à la protection de l'Etat, des collectivités publiques et de la société. « La loi fixe les conditions d'assistance et de protection auxquelles ont droit (...) les personnes en situation de handicap ». <sup>45</sup>

**3.2 La constitution de la République de Guinée contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.**

La Constitution de mars 2020, proclame dans son préambule son « attachement aux droits fondamentaux de la personne humaine, tels que consacrés dans la Charte des Nations Unies de 1945, la déclaration universelle des Droits de l'homme de 1948, les Pactes internationaux des Nations Unies de 1966, la Charte Africaine des droits de l'homme et des peuples de 1981 et ses protocoles additionnels, l'Acte constitutif de l'Union Africaine de 2001 ainsi que ceux de la CEDEAO et les textes internationaux en la matière ratifiés par la République de Guinée. Selon l'article 5 la personne humaine est sacrée, les droits de la personne humaine sont inviolables, inaliénables et imprescriptibles et tout individu a le droit au respect de sa dignité et à la reconnaissance de sa personnalité. Toute personne a

44 Constitution de la République de Guinée, XVI, mars 2020 <https://guilaw.com/la-constitution-de-2020/> (consulté le 22 septembre 2021).

45 Comme ci-dessus.

le droit au travail et à une rémunération sans aucune discrimination (art 18). Toute personne a le droit à la santé, et au bien-être physique et mental (art 21). Enfin dans son art 30, la Constitution affirme que l'Etat « doit promouvoir le bien-être des citoyens, protéger et défendre les droits de la personne humaine (...). Il garantit l'égal accès aux emplois.

## 4 Législation

### 4.1 La République de la Guinée a-t-il une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

La République de Guinée a une législation effective concernant directement le handicap.

- La loi du 15 mai 2018 L/2018/021/AN, promulguée par le décret D/2018/108/PRG/SGG du 13 juillet 2018 portant protection et promotion des personnes en situation de handicap de la République Guinée.<sup>46</sup>
- La loi du 6 avril 2021 portant promotion et protection des droits des personnes atteintes d'albinisme. Cette loi a pour vocation de changer le comportement de la population à l'endroit des personnes atteintes d'albinisme, leur accès aux services sociaux de base (santé, éducation, loisirs, inclusion sociale, autonomisation et meilleure protection juridique). Toute personne étant auteur ou complice d'enlèvements de personnes atteintes d'albinisme pour des crimes rituels, est condamnable de 5 à 20 ans de prison.<sup>47</sup>

### 4.2 La République de la Guinée a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

La République de Guinée a une législation concernant indirectement le handicap:

- La loi n° L/2014/072/CNT du 10 janvier 2014, portant Code de travail, en son article 4 consacrant le principe de la non-discrimination dans la sphère de l'emploi et du travail. Cette interdit toute discrimination à « l'embauche, la conduite et la répartition du travail, la formation professionnelle, l'avancement, la promotion, la rémunération, l'octroi d'avantages sociaux, la discipline ou la rupture du contrat de travail » pour cause de handicap.<sup>48</sup>

46 Conseil des Droits de l'Homme 'Rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme\* Guinée' (11 novembre 2019) 5 <https://undocs.org/pdf?symbol=fr/A/HRC/WG.6/35/GIN/1> (consulté le 22 septembre 2021).

47 *Médiaguinée* (n 44).

48 Code du travail de la République de Guinée, Loi N°L/2014/072/CNT du 10 janvier 2014, 4 <https://www.invest.gov.gn/document/code-du-travail> (consulté le 22 septembre 2021).

## 5 Décisions des cours et tribunaux

- 5.1 Les cours (ou tribunaux) de la République de Guinée 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.**

Nous n'avons pas trouvé de décisions de justice portant sur le handicap.

## 6 Politiques et programmes

- 6.1 La République de Guinée a-t-il des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.**

Suite à la promulgation de la loi portant sur la protection et la promotion des personnes en situation de handicap, a été validé, le 16 décembre 2019, le Programme National d'Inclusion et d'Autonomisation des Personnes Handicapées visant à promouvoir une pleine participation des personnes en situation de handicap au développement économique, social et culturel à l'horizon 2020 en République de Guinée.<sup>49</sup> Ce Programme a pour but:

- 1) d'inviter les familles à déclarer les enfants en situation de handicap à l'Etat civil et leur permettre d'accéder à l'éducation générale ou la formation professionnelle;
- 2) de mettre en place des forces appareillages orthophoniques et orthopédiques.
- 3) Avec le PNUD un projet pilote a été créé afin de permettre à des jeunes en situations de handicap d'être formés, coachés et équipés. Le but étant de permettre à ces jeunes de prendre en charge leurs familles pouvant être composées de personnes en situation de handicap ou non. Sur fonds propres l'Etat a donc créé un Centre d'apprentissage de Métiers pour personnes handicapées.<sup>50</sup>

49 'Conakry: Le ministère de l'Action Sociale et ses partenaires pour l'autonomisation des handicapés' *Guineematin.com* 16 décembre 2019 <https://guineematin.com/tag/programme-national-dinclusion-et-dautonomisation-des-personnes-handicapees/> (consulté le 22 septembre 2021). M Saliou Diallo 'Guinée: le PNUD appuie les efforts du Gouvernement pour l'inclusion et l'autonomisation des personnes handicapées' *Guinée Eco* 17 décembre 2019 <https://www.guinee-eco.info/guinee-le-pnud-appuie-les-efforts-du-gouvernement-pour-linclusion-et-lautonomisation-des-personnes-handicapees/> (consulté le 22 septembre 2021).

50 A Bah 'Guinée: l'autonomisation des personnes handicapées dans les pays membres de l'OCI en débats à Conakry' *Guineenews.org* 24 décembre 2019 <https://guineenews.org/guinee-lautonomisation-des-personnes-handicapees-dans-les-pays-membres-de-loci-en-debats-a-conakry/> (consulté le 22 septembre 2021).

**6.2 La République de Guinée a-t-il des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.**

La République de Guinée a eu un Plan National de Développement Economique et Social 2016-2020 qui englobe indirectement le handicap:

- **Education et formation: avec pour objectif intermédiaire d'améliorer l'accès, l'offre et la qualité de l'éducation et de la formation adaptés aux besoins de l'économie nationale:**

D'ici à 2030, éliminer les inégalités entre les sexes dans le domaine de l'éducation et assurer l'égalité d'accès des personnes vulnérables, y compris les personnes handicapées, les autochtones et les enfants en situation vulnérable, à tous les niveaux d'enseignement et de formation professionnelle.<sup>51</sup>

- **Emploi des couches vulnérables: l'objectif intermédiaire étant de promouvoir l'emploi et l'entrepreneuriat des jeunes, des femmes et des personnes en situation de handicap.**

D'ici à 2030, parvenir au plein emploi productif et garantir à toutes les femmes et à tous les hommes, y compris les jeunes et les personnes handicapées, un travail décent et un salaire égal pour un travail de valeur égale.<sup>52</sup>

## **7 Organismes en charge des personnes handicapées**

**7.1 En dehors des cours ou tribunaux ordinaires, la République de Guinée a-t-il un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.**

Non, en dehors des cours ou tribunaux ordinaires, la République de Guinée 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 de Guinée 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 Guinée ne dispose pas d'un organisme officiel qui, bien qu'étant pas spécifiquement en charge de la violation des droits des personnes en situation de handicap s'y attèle.

51 Portail officiel du gouvernement guinéen 'Plan National de Développement Economique et Social 2016-2020' 112 <https://www.gouvernement.gov.gn/index.php/plan-national-de-developpement-economique-et-social-2016-2020#> (consulté le 22 septembre 2021).

52 Comme ci-dessus.

## 8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

- 8.1 La République de Guinée est-elle dotée d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de la République de Guinée n'a jamais abordé des questions relatives aux droits des personnes handicapées.

La République de Guinée est dotée d'une Institution Nationale Indépendante des Droits de l'Homme (INIDH)<sup>53</sup> conformément à la loi organique n° L/08/CNT/2011 du 14 juillet 2011<sup>54</sup> et mise en place en 2014 par décret D/2014/261/PRG/SGG du 30 décembre 2014.<sup>55</sup> La mise en place de l'INIDH et son fonctionnement ne semble pas entièrement effectifs compte tenu du manque de budget adéquate et de personnel suffisant, formé et stable.<sup>56</sup> L'INIDH n'a pas directement abordé des questions relatives aux droits des personnes, cependant y est inscrit dans ses missions l'apport ou la facilitation judiciaire aux victimes des violations des droits humains, en particulier les femmes, les enfants et autres personnes vulnérables.<sup>57</sup>

## 9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

- 9.1 Avez-vous en République de Guinée 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 en République de Guinée des organisations qui représentent et défendent les droits des personnes en situation de handicap:

53 Dans la Constitution de 2020, l'Institution Nationale Indépendante des Droits de l'Homme est devenue l'Institution Nationale Indépendante des Droits Humains (art 140). Constitution de la République de Guinée, XIV, mars 2020, <https://guilaw.com/la-constitution-de-2020/> (consulté le 30 mai 2021).

54 Institution Nationale Indépendante des Droits de l'Homme, Pacte international relatif aux droits civils et politiques (2018) CCPR/C/GIN/CO/3 dated 7 décembre 2018, 2 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGIN%2fCO%2f3&Lang=fr](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGIN%2fCO%2f3&Lang=fr) (consulté le 22 septembre 2021).

55 Assemblée Générale des Nations Unies, Conseil des droits de l'homme 'Rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme\* Guinée' A/HRC/WG.6/35/GIN/1 (11 novembre 2019) 7 <https://undocs.org/pdf?symbol=fr/A/HRC/WG.6/35/GIN/1> (consulté le 22 septembre 2021).

56 Pacte international relatif aux droits civils et politiques (n 55) 2 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGIN%2fCO%2f3&Lang=fr](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGIN%2fCO%2f3&Lang=fr) (consulté le 22 septembre 2021).

57 Institution Nationale Indépendante des Droits de l'Homme (INIDH) 'Activités' <http://inidh.org/#section-practicing-areas> consulté le 22 septembre 2021.

- Réseau Guinéen des Organisations des Personnes Handicapées pour la Promotion de la Convention Internationale sur les Droits des Personnes Handicapées (ROPACIDPH), fondé en 2010. Cette ONG promeut « l'application des Droits fondamentaux des personnes en situation de handicap en général et plus particulièrement la Convention Internationale sur les droits des personnes handicapées ainsi que le renforcement de leurs capacités opérationnelles et institutionnelles ». <sup>58</sup> Le ROPACIDPH a conçu un guide sur les droits des personnes handicapées en république de Guinée et organiser 14 ateliers d'appropriation du guide qui a permis de former plus de 330 cadres des structures déconcentrées et décentralisées du pays. Il a également élaboré le guide sur la prise en compte de la dimension handicap dans le processus électoral en république de Guinée. Il est à l'origine de la loi sur la protection et promotion des personnes handicapées de la République de Guinée.
- Association « Action pour le Futur des personnes handicapées de Guinée » (AFHAG), créée en 2012 pour la réinsertion professionnelle des personnes en situation de handicap et leur sortie de la mendicité. <sup>59</sup>
- Association Guinéenne pour la formation et la réinsertion sociale des personnes handicapées (AGFRIS).
- Confédération Nationale des Albinos de Guinée (CNAG), lutte contre toutes formes de discrimination à l'encontre des personnes atteintes d'albinisme. La CNAG mène des campagnes de sensibilisation auprès des médias, constitue des dossiers de cas de violence contre les personnes atteintes d'albinisme, et est très active dans la mise en œuvre d'activités de la Journée Internationale de sensibilisation sur l'albinisme. Enfin elle travaille également en collaboration avec les institutions gouvernementales. <sup>60</sup>
- Fondation pour le secours et l'insertion sociale des albinos (FONDASIA); créée en 1999, œuvre pour la défense des personnes atteintes d'albinisme contre toute forme de discrimination, de ségrégation et d'abus. En 2017, la FONDASIA travaillait sur un avant-projet de loi sur la protection et la promotion des personnes atteintes d'albinisme en Guinée, dont le droit à la santé, à l'éducation, à l'emploi, et la lutte contre le trafic d'organes et crimes rituels dont sont victimes les personnes atteintes d'albinisme; le 6 avril 2021, le texte de loi est adopté. <sup>61</sup>

## 9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

En République de Guinée, les OPH sont organisées en une Fédération Guinéenne pour la Promotion des Associations des Personnes Handicapées (FEGUIPAH). Créée en 1992, la FEGUIPAH est constituée de 59 associations, coordonnées elles-mêmes par 12 antennes régionales. La FEGUIPAH, qui est effective, appuie le gouvernement guinéen dans la conception et la mise en œuvre de politiques nationales en faveur de la protection et la promotion des droits des personnes en situation de handicap. <sup>62</sup>

58 NGO Branch-United Nations Department of Economic and Social Affairs 'Réseau Guinéen des Organisations des Personnes Handicapées pour la Promotion de la Convention Internationale sur les Droits des Personnes Handicapées (ROPACIDPH)' (2015) <https://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&profileCode=636110&tab=3> (consulté le 22 septembre 2021).

59 'Guinée: La réinsertion des personnes handicapées' *TV5Monde* 4 décembre 2018 <https://information.tv5monde.com/afrique/guinee-la-reinsertion-des-personnes-handicapees-274325> (consulté le 22 septembre 2021).

60 Action on Albinism <https://actiononalbinism.org/fr/page/b8dt441grii2hilq2jz41jor> (consulté le 30 mai 2021).

61 Z Camara 'Guinée: les albinos préparent une loi pour leur protection' <https://www.voaafric.com/a/guinee-les-albinos-preparent-une-loi-qui-les-protgera/3821514.html> (consulté le 22 septembre 2021).

62 V Tchirkov *La Guinée face au handicap. La problématique des déficiences motrices de Conakry* (2012) (E.Book); Nantady Camara 'Guinée: les lois sur la protection des handicapées bafouées' *Guinée Actuelle* 11 décembre 2018 <http://guineeaactuelle.com/guinee-les-lois-sur-la-protection-des-handicapees-bafouees> (consulté le 22 septembre 2021).

En plus de la FEGUIPAH, il y a le Réseau Guinéen des Organisations des Personnes Handicapées pour la Promotion de la Convention Internationale sur les Droits des Personnes Handicapées (ROPACIDPH) composé de 74 associations de personnes handicapées toutes catégories de handicaps confondus sur toute l'étendue du territoire nation qui appui le gouvernement dans la formulation et la mise en œuvre de politiques nationale de promotion et protection ainsi que de programmes d'autonomisation et de textes législatifs et règlementaires spécifiques.

### 9.3 Si la République de Guinée a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

En Guinée, il existe un cadre de concertation permanente entre la Direction nationale de l'Action Sociale et les organisations des personnes handicapées à travers trois (3) organisations faitières que sont la FEGUIPAH, le ROPACIDPH et la fédération handisport. Toutes les initiatives majeures visant la protection et la promotion des personnes handicapées sont discutées au sein de ce cadre de concertation. Les organisations des personnes handicapées sont le plus souvent initiatrices des changements avec l'accompagnement du Gouvernement guinéen. C'est ainsi que par exemple:

- Du 4 au 5 décembre 2018, le Réseau Guinéen des Organisations des Personnes Handicapées pour la Promotion de la Convention Internationale sur les Droits des Personnes Handicapées (ROPACIDPH), en partenariat avec le Haut-Commissariat des Nations Unies aux Droits de l'Homme (HCDH) a organisé un atelier « d'appropriation et de validation technique des textes d'application de la loi portant promotion et protection des personnes en situation de handicap en Guinée.<sup>63</sup>
- Suite à la ratification de la Convention des Droits des Personnes Handicapées, le gouvernement de Guinée s'est appuyé sur une proposition, élaborée par les associations de défense des personnes atteintes d'albinisme, dont la FONDASIA<sup>64</sup>. Le document qui a proposé des droits à la santé, à l'éducation, à l'emploi et a attiré l'attention des autorités sur le trafic d'organes et crime rituels dont sont victimes les personnes atteintes d'albinisme, a été la pierre angulaire de la Loi du 6 avril 2021 qui porte promotion et protection des droits des personnes atteintes d'albinisme.<sup>65</sup>

### 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 FEGUIPAH coopèrent afin d'assurer la diffusion d'informations, d'éducation, de communication et de mobilisation sociale autour de questions portant sur « l'exclusion sociale, les droits des personnes en situation de handicap, l'exploitation des enfants en situation de handicap à travers la mendicité, mais également les maladies sexuellement transmissibles et la planification familiale ». La FEGUIFAH est le pivot pour la coordination des actions des OPH locales (parfois internationales) et représente les personnes en situation de handicap auprès du gouvernement guinéen mais également les Nations Unies.<sup>66</sup>

63 MA Barry 'Guinée: vers la validation des textes d'application de la loi portant protection et promotion des personnes handicapées' *Aminata.com* 5 décembre 2018 <https://aminata.com/guinee-vers-la-validation-des-textes-d-application-de-la-loi-portant-protection-et-promotion-des-personnes-handicapees/> (consulté le 22 septembre 2021).

64 Camara (n 62).

65 *Mediaguinée* (n 44).

66 Tchirkov (n 63).

Le ROPACIDPH, œuvre à la sensibilisation des pouvoirs publics et collectivités décentralisées sur l'inclusion du handicap dans la formulation et la mise en œuvre des politiques et les programmes de développement sociaux, sur la promotion et la protection des droits des personnes en situation de handicap, à l'éducation/formation inclusive, au droit à la santé, à l'emploi, aux loisirs et bien-être des personnes en situation de handicap.<sup>67</sup>

### **9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?**

Dépendant principalement des cotisations, de dons, de legs, ou de subventions, les OPH et plus généralement la Fédération Guinéenne pour la Promotion des Associations des Personnes Handicapées (FEGUIPAH), de nombreux projets portant sur la protection et la promotion socio-économique des personnes en situation de handicap, sont impossibles à mettre en œuvre ou sont abandonnés, d'autant plus que l'État guinée n'offre pas d'aide économique. Ces obstacles financiers sont d'autant plus problématiques que la FEGUIPAH collabore grandement avec les institutions gouvernementales, tels que le Conseil Économique et Social (CES), l'Assemblée Nationale, le Ministère des Affaires sociales, mais également, au niveau international, avec l'Organisation Mondiale des Personnes Handicapées (OMPH), l'Agence de Coopération Internationale des Personnes Handicapées (Canada), de l'Institut Africain de Réadaptation (IAR), de la Fédération Ouest Africaine des Personnes Handicapées (FOAPH), de la Panafricaine des Personnes Handicapées (PANAPH).<sup>68</sup>

### **9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?**

Les organisations faitières principales que sont la FEGUIPAH et le ROPACIDPH jouent un rôle prépondérant auprès des pouvoirs publics. Le ROPACIDPH en particulier joue un rôle consultatif de premier plan auprès des pouvoir publics et des collectivités décentralisées. Le ROPACIDPH met toutes ses compétences à la disposition des pouvoirs publics et des organisations des personnes en situation de handicap et de tous les acteurs guinéens intéressés.

### **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?**

Oui. La loi sur la protection et la promotion des personnes en situation de handicap, le programme national d'autonomisation des personnes en situation de handicap en cours d'exécution ainsi que la Loi du 26 avril 2021 portant promotion et protection des droits des personnes atteintes d'albinisme, sont des exemples concrets de l'implication active et du leadership des OPH.

67 Nations Unies (n 59).

68 Tchirkov (n 63).

**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?**

Au vu de l'engagement et la compétence de certaines OPH dans la promotion et la protection des droits des personnes en situation de handicap en Guinée, elles devraient bénéficier d'un appui institutionnel conséquent de la part l'Etat afin de leur permettre de jouer pleinement leur rôle. En plus de subventions pour leur fonctionnement, elles devraient être appuyées dans le développement de leurs ressources humaines par la formation continue.

**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 devraient être pleinement associées et représentées dans les structures de prises de décision à tous les niveaux parmi leurs membres. Elles devraient également être associées à la soumission des rapports et faire partie des délégations officielles en charge de présenter et défendre ces rapports. Pour finir, elles devraient être consultées tout comme le gouvernement en vue de produire des rapports contradictoires qui permettraient de mettre beaucoup plus en lumière la réalité qui est souvent occultées par le Gouvernements. Par conséquent, La FEGUIPAH et le ROPACIDPH pourraient être parties prenantes dans la rédaction et la présentation du rapport conformément à l'art 35 de la CDPH qui aurait dû être soumis 8 mars 2010, ainsi qu'accompagner et faire pression auprès du gouvernement guinéenne.

**9.10 Y'a-t-il des instituts de recherche spécifiques dans votre région qui travaillent sur les droits des personnes handicapées et qui ont facilité l'implication des OPH dans le processus, y compris la recherche?**

Non pas pour le moment.

## 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).**

Dès 1992, le gouvernement guinéen a créé le Secrétariat d'Etat aux Affaires Sociales à la Promotion Féminine et à l'Enfance, en charge de la promotion et la protection des femmes, des enfants et des groupes vulnérables. En 1994, ce Secrétariat d'Etat devient le Ministère en charge de la Promotion Féminine et de l'Enfance; la Direction Nationale des Affaires Sociales est rattachée au ministère de l'Emploi (Décret N°96/PRG/SGG/96). Par Décret N° 081/PRG/SGG du 7 avril 2014, dans une volonté de renforcer l'épanouissement notamment des personnes en situation de handicap (ainsi que les femmes, les enfants et personnes âgées), est créé le ministère de l'Action Sociale de la Promotion Féminine et de l'Enfance. Ce ministère ayant pour mission de concevoir, d'élaborer et de mettre

en œuvre la politique gouvernementales en matière de promotion féminine et du genre, de protection sociale et de l'enfance<sup>69</sup>. Au sein de ce ministère récemment dénommée Ministère de l'action sociale et de l'enfance, il existe la Direction nationale de l'Action sociale (DNAS) qui a pour mandat entre autres la promotion et le développement de la politique, des programmes et stratégies du gouvernement dans le domaine de la promotion et de la protection des personnes handicapées. Cette Direction nationale comporte au niveau central une Division de l'inclusion et une section chargées de l'autonomisation des personnes en situation de handicap. Au niveau décentralisé, elle supervise et coordonne les activités de 8 Directions régionales de l'Action sociales et de 5 Directions communales de l'action sociale ainsi que 38 Directions Préfectorales de l'Action sociale qui sont ses répondantes aux niveaux régional, communal et Préfectoral.

## 11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

### 11.1 Quels sont les défis contemporains des personnes handicapées en République de Guinée? (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 personnes atteintes d'albinisme sont confrontées à de très grands défis en matière de violation de leurs droits en Guinée. Selon le rapport (septembre 2018) de l'ONG Under the Same Sun, les personnes atteintes d'albinisme font face à de nombreux préjudices, à la marginalisation et à la violence. Population particulièrement vulnérable dans un contexte d'extrême pauvreté, dû au manque d'éducation, de formation et de chômage, les personnes atteintes d'albinisme sont réduites à la mendicité principalement dans la capitale (Conakry). Les mythes et contre-vérités sont légion quand il est question des personnes atteintes d'albinisme en Guinée. En effet, elles sont perçues comme pouvant porter chance, pour accéder à la richesse, au pouvoir, ou position sociale élevée. On leur prête également des pouvoirs surnaturels pouvant régler des problèmes d'ordre sentimental, d'impuissance, etc. Ces croyances ont pour conséquences, que ces personnes atteintes de d'albinisme soient victimes de kidnapping, crimes rituels et confrontées à des relations toxiques avec des personnes ne les fréquentant que par intérêt.<sup>70</sup>

Les autres types de handicaps ne font pas exception à la règle; les personnes présentant des handicaps visuels et moteurs, qui faute d'éducation et de formation professionnelle ainsi que d'opportunités de réinsertion socio – économiques, sont dans l'extrême pauvreté et la misère. Elles vivent dans les rues de la capitale sous les ponts dans des abris de fortune d'où elles sont chassées la plupart du temps.

69 Ministère du Plan et la Coopération Internationale, Institut National de la Statistique & Bureau Central de Recensement 'Troisième recensement général de la population et de l'habitation (RGPH3) – Situation des personnes vivant avec handicap' (décembre 2017) 20 <https://datas.pace.princeton.edu/bitstream/88435/dsp01pk02cd514/13/DSGuineaRGPH3personneshandicap.pdf> (consulté le 22 septembre 2021).

70 CGNA (n 17) 3; 5-8.

## 11.2 Comment la République de Guinée répond-t-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

Pour répondre aux besoins des personnes en situation de handicap, le texte de loi portant promotion et protection des personnes atteintes d'albinisme<sup>71</sup>. En outre, le projet de loi révisée sur la promotion et protection des personnes en situation de handicap, qui sera très prochainement adopté par l'Assemblée nationale, comporte de nombreuses dispositions pour répondre aux besoins essentiels des personnes en situation de handicap, en termes d'accès gratuit aux services d'éducation, de santé, de transport, à l'emploi, aux loisirs ainsi que d'accessibilité, de compensation financières et de facilités variées.<sup>72</sup>

## 11.3 La République de Guinée accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Fonds de Développement Social et de Solidarité (FDSS) apporte un appui ponctuel en faveur des jeunes en situation de handicap. Le FDSS est financé à hauteur de 100 milliards GNF.<sup>73</sup>

## 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 de Guinée?

Oui. Selon le Chapitre VIII de la Loi N° L/2018/021/AN du 15 mai 2018, sur la participation à la vie politique et publique, les partis politiques doivent garantir « la représentation des personnes en situation de handicap dans les diverses instances de délibération et de prise de décisions » (art 42); de garantir leur représentativité à l'Assemblée nationale et dans les conseils communaux, les partis politiques devant inclure une personne handicapée sur leur liste et parmi les dix premières positions (art 43); le gouvernement devant « promouvoir un environnement favorable à la vie politique et politique des personnes handicapées ... » (art 44); « accessibilité aux personnes sourdes aux meetings politiques et campagnes électorales notamment l'interprétation en langue des signes » (art 45); « disponibilité du matériel électoral en formats accessibles, notamment les imprimés en braille, les spots télévisés avec interprétation en langue des signes (art 46); accessibilité des isolements « en comportant des rampes d'accès aux personnes handicapées en fauteuil roulant » (art 47); enfin « l'Etat doit promouvoir une politique nationale de représentation des personnes handicapées dans les structures de prise de décisions à tous les niveaux » (art 48).<sup>74</sup> De plus, selon l'art 17 de la Constitution Guinéenne de 2020, « toute personne a le droit à la liberté de réunion et d'association dans les

71 Z Camara 'La Guinée se dote d'une loi pour la défense des personnes atteintes d'albinisme' *VOA Afrique* 19 avril 2021 <https://www.voaafrique.com/a/la-guinee-se-dote-d-une-loi-pour-la-defense-des-personnes-atteintes-d-albinisme/5856305.html> (consulté le 22 septembre 2021).

72 *Mediaguinée* (n 44).

73 Comité des droits de l'enfant 'Rapport valant troisième à sixième rapports périodiques soumis par la Guinée en application de l'article 44 de la Convention, attendus en 2017' - b) Budget, allocation et gestion de ressources CRC/C/GIN/3-6\* (7 août 2018) 10 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GIN&Lang=FR) (consulté le 22 septembre 2021).

74 Assemblée Nationale de Guinée 'Conakry le 15 Mai 2018. L/2018/021/AN Loi portant Protection et Promotion des Personnes Handicapées En République de Guinée' <https://assembleeguinee.org/index.php/conakry-le-15-mai-2018-l2018021an-loi-portant-protection-et-promotion-des-personnes-handicapees-en> (consulté le 22 septembre 2021).

conditions fixées par la loi»; «chaque citoyen a le devoir de participer aux élections...», selon l'article 29 de la Constitution de 2020.<sup>75</sup>

### 11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité: Enfants en situation de handicap.

Selon le Chapitre VI de la Loi N° L/2018/021/AN du 15 mai 2018, il existe des dispositions particulières concernant les femmes et les enfants en situation de handicap. Les «femmes handicapées doivent bénéficier de toutes les dispositions permettant leur épanouissement spécifique.» (art 33); «conformément aux dispositions de la Convention relative aux Droits de l'Enfant (art 23) et de la CDPH, les enfants handicapés doivent être protégés contre toute forme d'exploitations et de traitement dégradants» (art 34); «les enfants handicapés devant mener une vie pleine et décente, favorisant leur autonomie et l'accès à l'éducation et à la formation et l'intégration à la vie de la communauté» (art 35); «l'obligation pour les parents d'assurer la protection et la promotion de leurs enfants handicapés, ou avec l'assistance de l'État, des collectivités décentralisées et associations...» (art 36).<sup>76</sup>

## 12 Perspective future

### 12.1 Y'a-t-il des mesures spécifiques débattus ou prises en compte présentement en République de Guinée au sujet les personnes handicapées?

Oui, la loi sur la protection et la promotion des personnes handicapées du 15 Mai 1998 comporte des insuffisances par rapport à la CDPH. Aussi il a été question de la révisée afin de palier à ses insuffisances et la rendre conforme entièrement au contenu de la CDPH. Il est aussi question de renforcer les actions de vulgarisation de la CDPH en vue de son appropriation par les autorités politiques et administratives et la population guinéenne y compris l'utilisation des langues nationales en raison de l'illettrisme de la majorité de la population guinéenne.<sup>77</sup>

Débats sur la vulgarisation de la loi du 15 mai 2018 portant égalité des chances en faveur des personnes en situation de handicap (L/2018/021/AN). La vulgarisation de la CDPH devant insuffler une meilleure inclusion des personnes en situation de handicap dans la société guinéenne, en éliminant tous les obstacles auxquels elles doivent faire face; «les personnes handicapées étant sevrées de leurs droits à cause de l'interaction entre leurs déficiences physiques, les barrières comportementales et environnementales qui ... font obstacles à la jouissance de leurs droits sur la base de l'égalité avec tous».

75 Constitution de la République de Guinée, XVI, mars 2020, <https://guilaw.com/la-constitution-de-2020/> (consulté le 22 septembre 2021).

76 Assemblée Nationale de Guinée (n 75).

77 F Bangoura 'Boké-société: Une Conférence-débat pour vulgariser la Loi L021 portant protection et promotion des personnes handicapées' *Kamsarguinée.com* 26 mars 2021 <https://kamsarguinée.com/2021/03/26/boke-societe-une-conference-debat-pour-vulgariser-la-loi-l021-portant-protection-et-promotion-des-personnes-handicapees/> (consulté le 22 septembre 2021).

## **12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en République de Guinée? Pourquoi?**

La République de Guinée se doit accélérer les réformes légales au niveau de la révision de la loi sur la protection et la promotion des personnes du 15 mai 2018; celle-ci comportant des insuffisances par rapport à la CDPH. Cependant, le processus de révision de la dite loi est déjà achevé par l'incorporation entre autres d'un organe veille (Conseil National Indépendant des Personnes Handicapées) et d'un organe de coordination et de suivi des actions en faveur des personnes en situation de handicap (Comité national multisectoriel de coordination et de suivi des actions en faveur des personnes handicapées). La loi révisée devra être adoptée par l'Assemblée nationale et promulguée par le Président de la République. Les Décrets d'application, de ladite loi, signés.

La question des enfants en situation de handicap devrait être une priorité notamment en matière d'éducation/formation inclusive. Pour cela, il est urgent de mener un vrai recensement pour ce groupe vulnérable.

Des campagnes nationales sur tout le territoire, devraient être menées plus d'une fois par an (3 décembre), afin de combattre tous les préjugés, en particulier dans les familles (urbaines et rurales) spécifiquement et dans la société en général. Pour cela, le gouvernement devrait faire voter un budget significatif en faveur des OPH et également de l'Institution nationale des Droits de l'Homme.

Enfin, un centre de recherche sur la question des droits des personnes en situation de handicap devrait être créé.

# SUDAN

SA Ngubane & JN Zongozzi\*

## 1 Population indicators

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

According to the United Nations data Sudan Demographics Profile 2020, Sudan has a total of 43.83 million residents.<sup>1</sup> UN estimates the average growth rate to be 2.4 percent over a period of five years.

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

The Sudan Demographics Profile 2018 was used to obtain data on the prevalence of disability in Sudan. The census questionnaire was used to collect data, this questionnaire had a set of questions meant to obtain information about a household that include types of disability. Types of disability were seeing, hearing, speaking, walking/climbing, learning/concentrating and other disability.<sup>2</sup>

### 1.3 What is the total number and percentage of people with disabilities in Sudan?

According to the fifth Sudan Population and Housing Census, 2008, 1 854 985 persons aged 5 years and above were reported to have a disability.<sup>3</sup>

\* Institute for Open Distance Learning, CEDU, Unisa.

1 'Population of Sudan' <https://fanack.com/sudan/> 'Population of Sudan' <https://fanack.com/sudan/population-of-sudan/> (accessed 14 April 2021).

2 Sudan Demographics Profile 2018.

3 EA Baker Abubaker 'Sudan's experience in the measurement of disability' <https://unstats.un.org/unsd/demographic-social/meetings/2017/oman--disability-measurement-and-statistics/Session%206/Sudan.pdf> (accessed 15 August 2019).

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

According to the Disabled Persons and Disability Rates by States: 2008 Population and Housing Census, there are 899 886 women (47.8 per cent) with disabilities in Sudan.

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

No statistics are available on children with disabilities, the available data shows statistics of persons aged 5 years and above.

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

The most common type of disability in Sudan is mobility impairment, with a prevalence rate of 3 per cent among the population aged 5 and above. The other forms of disabilities with the number of residents are as follows:<sup>4</sup>

- Visual disability: 583 715;
- Blind: 92 468;
- Hearing impairment: 244 462;
- Deaf: 63 034;
- Speech impairment: 73 328;
- Limited use of Leg(s): 336 517;
- Loss of Leg(s): 61 476;
- Limited Use of Arm(s): 105 989;
- Mute: 43 825; and
- Mental disability: 448 451.

## 2 Sudan's international obligations

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

Sudan signed and ratified the UN Convention on the Rights of Persons with Disabilities on 30 March 2007 and 24 April 2009 respectively.<sup>5</sup>

<sup>4</sup> As above.

<sup>5</sup> Consideration of reports submitted by states parties under article 35 of the Convention: Initial reports of States parties due in 2011: Sudan, CRPD (9 September 2015) U Doc CRPD/C/SDN/1 (2015) [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/SDN/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/SDN/1&Lang=en) (accessed 19 August 2019)

**2.2 If Sudan has signed and ratified the CRPD, when was its country report due? Which government department is responsible for submission of the report? Did Sudan submit its report? If so, and if the report has been considered, indicate if there was a domestic effect of this reporting process. If not, what reasons does the relevant government department give for the delay?**

The Republic of Sudan ratified the CRPD and its Optional Protocol on 25 April 2009. The committee received the report that was due in 2011, on September 2014. The National Council for Disabilities was restructured in October 2010. It is their principal authority for planning and monitoring disability policies and programmes at the national level and for coordinating the efforts of the state and civil society organisations, including organisations of persons with disabilities.<sup>5</sup>

**2.3 While reporting under various other United Nation's instruments, or under the African Charter on Human and People's Rights, or the African Charter on the Rights and Welfare of the Child, did Sudan 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?**

Sudan has acceded, ratified or approved many key international and regional instruments on human rights and their additional protocols, in particular the African Charter of Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on Rights of the Child, and the United Nations Convention on Persons with Disabilities.<sup>6</sup>

- **International instruments**

*UN Convention on the Rights of the Child*

Sudan submitted the third and fourth periodic reports to the Committee in 2007. The Committee welcomed the submission of the periodic reports and the written replies to its list of issues (CRC/C/SDN/Q/3-4/Add.1) and appreciated the constructive dialogue with the state party's multi-sectoral delegation. The areas of concern and recommendations from the latest reports, in relation to persons with disabilities, however, outlined the following: (a) the committee was concerned about the lack of centralised data collection system, which is reflected in the lack of updated, disaggregated data on children with disabilities among others. In this regard, establishment of a comprehensive data collection system to ensure that data, disaggregated, inter alia by age, sex, geographical area and socio-economic background, are systematically collected and analyzed; and (b) the committee was also concerned about the absence of a comprehensive regulatory framework to

6 International Justice Resource Center 'Country Factsheet Series' (last updated on 15 September 2017) <https://ijrcenter.org/wp-content/uploads/2017/11/South-Sudan.pdf> (accessed 19 August 2019). United Nations Peacekeeping 'UNMISS welcomes ratification of international human rights covenants in South Sudan' <https://peacekeeping.un.org/en/unmiss-welcomes-ratification-of-international-human-rights-covenants-south-sudan> (accessed 19 August 2019).

mainstream disability in town planning. In addition, the exclusion of children with disabilities in social, educational and other settings was noted. As a result, the committee recommended the mainstreaming of the rights of children with disabilities in both legislation and policy across all areas of children rights.<sup>7</sup>

### *International Covenant on Economic, Social and Cultural Rights*

Sudan submitted the initial periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/1990/5/Add.41) in September 2000. The committee noted the submission that was prepared was in conformity with the revised guidelines of reporting. The concluding observations of the committee, however, does not make any reference to persons with disabilities.<sup>8</sup>

### • Regional instruments

#### *African Charter on Human and Peoples' Rights*

Sudan ratified the African Charter on 18 February 1986. Their 4th and 5th periodic reports on African Charter on Human and People's Rights were submitted in accordance with article 62 of the Charter, in 2008 and 2012 respectively. Their reports stipulate the following regarding the rights of persons with disabilities in line with the Sudanese legislation: a convict with permanent disability threatening his/her life may be released by cancelling the remaining period of their sentence, except in special cases; article 44(1) of the Constitution spells out the rights of equal access to education for people with disabilities without discrimination; and the report also makes reference to article 12(2) of the Constitution that persons with disabilities should not be deprived the right to engage in any profession or work.<sup>9</sup> In its Concluding Observations, the Committee commended Sudan for enacting the 2009 Disabled Persons Act which is intended to contribute to the overall enjoyment of civil, political, economic and social rights of the citizens of Sudan. Nevertheless, the Committee raised concerns that the report does not deal with the rights of older and disabled people. Thus, it was recommended that Sudan should outline how the rights of older and disabled are protected in the next reporting period.<sup>10</sup>

#### *UN Universal Periodic Review (UPR)*

The review of Sudan was held at the 5th meeting on 4 May 2016. The report highlighted certain important issues such as economic empowerment for persons

7 Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Sudan, CRC Committee (2 October 2010) CRC/C/SDN/CO/3-4 (2010) [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/SDN/CO/3-4&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/SDN/CO/3-4&Lang=En) (accessed 19 August 2019).

8 Concluding Observations on the initial periodic report of Sudan, adopted by the Committee at its 53th session, UN Committee on Economic, Social and Cultural Rights (CESCR) (30 August 2000) UN Doc E/C.12/1/Add.48 (2000) <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=category&skip=0&category=COI&publisher=CESCR&querysi=sudan&searchin=fulltext&sort=date> (accessed 19 August 2019).

9 African Union, State Reports and Concluding Observations. The 4th and 5th periodic reports of the Republic of the Sudan in accordance with article 62 of the African Charter on Human and Peoples Rights 2008-2012 <https://www.achpr.org/statertcon> (accessed 19 August 2019).

10 As above.

with disabilities. Sudan was encouraged to strengthen state mechanisms related to the care for vulnerable groups such as women, children and persons with disabilities. It was further encouraged to continue implementing the national strategic plan for education focusing specifically on the right to education for vulnerable groups including persons with disabilities. It was also recommended that Sudan should enhance efforts for the effective implementation of the Convention on the Rights of Persons with Disabilities<sup>11</sup>.

**2.4 Was there any domestic effect on Sudan's legal system after ratifying the international or regional instruments in 2.2 above? Does the international or regional instrument that has been ratified require Sudan's legislature to incorporate it into the legal system before the instrument can have force in Sudan's domestic law? Have Sudan's courts ever considered this question? If so, cite the case(s).**

Sudan has ratified and domesticated most of the international and regional instruments that include the Convention on the Rights of Persons with Disabilities, and its Optional Protocol. In terms of article 4(1)-(2) of the Sudan's Constitution of 2019:

(1) The Republic of Sudan is an independent, sovereign, democratic, parliamentary, pluralist, decentralized state, where rights and duties are based on citizenship without discrimination due to race, religion, culture, sex, color, gender, social or economic status, political opinion, disability, regional affiliation or any other cause. (2) The state is committed to the respect of human dignity and diversity; and is founded on justice, equality and on the guarantee of human rights and fundamental freedoms.

Article 42 of the Constitution states that:

(1) The Bill of Rights is a pact between all the people of Sudan, and between them and their governments at every level. It is in obligation on their part to respect the human rights and fundamental freedoms included in this Charter, and to work to advance them. The Bill of Rights is considered to be the cornerstone of social justice, equality and democracy in Sudan. (2) All rights and freedoms contained in international and regional human rights agreements, pacts, and charters ratified by the Republic of Sudan shall be considered an integral part of this Charter. (3) Legislation shall organize the rights and freedoms contained in this Charter but shall not confiscate them or reduce them. Legislation shall only restrict these freedoms as necessary in a democratic society.

Since the above human right treaties are ratified, they legally oblige Sudan to promote and protect the rights of its people; these rights are not optional but are mandated by international law. Although the Constitution of Sudan makes provisions for courts to uphold these rights, they depend upon pressure by governments and international agencies for implementation as it is failing to promote the rights of most citizens.<sup>12</sup>

11 United Nations General Assembly 'Report of the Working Group on the Universal Periodic Review' (11 July 2016) <https://www.refworld.org/topic,50ffbce51b1,50ffbce5208,57cd5ebf4,0,,SDN.html> (accessed 19 August 2019).

12 Reliefweb 'Sudan: Human rights denied in the South' Report from Refugees International (3 May 2006) <https://reliefweb.int/report/sudan/sudan-human-rights-denied-south> (accessed 19 August 2019).

**2.5 With reference to 2.3 above, has the United Nation's CRPD or any other ratified international instrument been domesticated? Provide details.**

As per article 42(2) relating to the legal status of treaties in the Sudanese Transitional Constitutional Charter 2019, international or regional human rights treaties that are ratified by Sudan are domesticated and given effect to by enacting legislations that organises the rights and freedoms contained in them.

In particular, the CRPD has been domesticated with the promulgation of the National Persons with Disabilities Act 2017 on 24 February 2017, which is fully consistent with the CRPD and covers the rights enshrined therein. Provisions from the Convention have also been incorporated into other laws: 23 pieces of legislation were identified, 12 of which were examined and brought into line with the provisions of the Convention.<sup>13</sup> The Convention on the Rights of the Child (CRC) in particular children with disabilities, was domesticated through the adoption of the Children's Act 2010. Article 36 of this Act prohibits the employment of children including those with disabilities who are under the age of 14.<sup>14</sup>

### 3 Constitution

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

Yes, the Sudan Constitution contains provisions that directly address disability.

Article 62(1) provides: 'Education is a right for every citizen. The state guarantees access thereto without discrimination on the basis of religion, race, ethnicity, gender or disability'.<sup>15</sup>

Article 64 provides:

The state guarantees for handicapped [people with disabilities] persons all the rights and freedoms set forth in this Charter, in particular respect for their human dignity. It makes available appropriate education and work for them, and guarantee their full participation in society.<sup>16</sup>

13 Consideration of reports submitted by parties to the Convention under article 35: List of issues in relation to the initial report of the Sudan: Addendum: Replies of the Sudan to the list of issues, CRPD Committee 6 December 2017) UN Doc CRPD/C/SDN/Q/1/Add.1 (2017) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsshFWwYHBqp81ht8%2F0NCH4mTt14CE6mOmlWWh3RvewBVEBdyccjuVygmNU0o%2Bw%2BzsHxxLv9dMGXSq9GpV%2BH4bftL12YODU%2FgumtkgrWWvpwBNxqvSV61vKFgFHBovlIrIg%3D%3D> (accessed 14 April 2021).

14 As above.

15 Sudan's Constitution of 2019 <https://www.constitute.org> (accessed 14 April 2021).

16 Sec 18 of Sudan's Constitution of 2019.

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

The Constitution of Sudan contains provisions that indirectly address disability with reference to persons with special needs, right to life, life and human dignity, etcetera, in Chapter 14, namely The Bill of Rights and Freedoms. These provisions indirectly address disability in the following ways: article 43 states that:

The State undertakes to protect and strengthen the rights contained in this Charter and to guarantee them for all without discrimination on the basis of race, color, gender, language, religion, political opinion, social status, or other reason.

Article 44 mentions that '[e]very person has a fundamental right to life, dignity, and personal safety, which shall be protected by law. No person may be deprived of life arbitrarily'.

## 4 Legislation

### 4.1 Does Sudan have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

Sudan has enacted two laws specifically in favour of persons with disabilities: the National Persons with Disabilities Act 2017, and a Law concerning the Privileges of War concerning Persons with Disabilities of 1998. Sudan's Constitution of 2019 also makes provision for persons with disabilities. Furthermore, the General Education Act of 1992 provides for equal opportunities in education for persons with disabilities.<sup>17</sup> Sudan also established an Advisory Council for Human Rights in Sudan (National Human Rights Commission Act 2008)<sup>18</sup> as well as the National Council for Persons with Disabilities.

- **The National Persons with Disabilities Act 2017**

This Act replaced the Persons with Disabilities Act of 2009, and the regulations, orders and procedure made thereunder.<sup>19</sup> The National Persons with Disabilities Act 2017 provides for the rights, privileges, facilities and exemptions of persons with disabilities and the implementation thereof. It also provides for amongst others: the establishment of the National Council for Persons with Disabilities, formations and supervision of the General Secretariat.<sup>20</sup>

17 International Labour Office 'Sudan Country Profile: Employment of People with Disabilities: The Impact of Legislation (East Africa)' (March 2004) [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_107841.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_107841.pdf) (accessed 19 August 2019).

18 Sida 'Disability Rights in Sudan and South Sudan' (2004) <https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-sudan-and-south-sudan.pdf> (accessed 19 August 2019).

19 International Labour Office (n 17).

20 Sida (n 18).

- **The General Education Act 1992**

This Act provides for equal education opportunities for disabled people. Under this Act, all children with disabilities are/were entitled to free education from 2002.<sup>21</sup>

- **The National Human Rights Commission Act 2008**

This Act provides for the establishment of the Advisory Council for Human Rights in Sudan, which is an advisory unit to the Sudan government. The unit involves various committees including the Committee on the Rights of Persons with Disabilities. The role of this particular Committee is to raise awareness of the rights of disabled people, make recommendations on existing laws and their suitability to persons with disabilities, as well as conduct research relating to disability policies.<sup>22</sup>

#### 4.2 Does Sudan have legislation that indirectly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

According to the Sudanese Transitional Charter 2019, all people are subject to the rule of law.<sup>23</sup> Furthermore, article 3 of the Charter provides that ‘rights and duties are based on citizenship without discrimination due to race, religion, culture, sex, color, gender, social or economic status, political opinion, disability, regional affiliation or any other cause’. Thus, we can say that since all people – including persons with disabilities – fall under the rule of law, they are therefore, affected by all general laws that are applicable to the Sudanese citizens.

## 5 Decisions of courts and tribunals

### 5.1 Have the courts (or tribunals) in Sudan 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 the protection of human rights through rendered judgments. In Sudan, a number of laws, including articles 4, 41 and 62 of the Constitution of 2019 as well as the National Disability Act, promotes participation in society for persons with disabilities. Some cases relating to disability particularly in employment have been reported in literature. The case of *Adam Mohamed* presented below is an example of how public bodies may be ignoring their obligations under the Constitution, National Disability Act and the Civil Service Act.

- ***Adam Mohamed Hamid v National Civil Service Recruitment Board & Ministry of Electricity and Dams***<sup>24</sup>

Adam Mohamed Hamid graduated from the Faculty of Business Administration at the University of Khartoum in 2006. On 27 March 2009, he applied for one of a

21 As above.

22 As above.

23 Art 4 of the Sudanese Transitional Constitutional Charter of 2019 (STCC).

24 The Equal Rights Trust Country Report Series: 4 ‘In search of confluence: Addressing discrimination and inequality in Sudan’ (October 2014) <https://www.equalrightstrust.org/ertdocumentbank/Sudan%20-%20In%20Search%20of%20Confluence%20-%20Full%20Report.pdf> (accessed 19 August 2019).

number of administrative vacancies advertised by the Ministry of Electricity and Dams (the Ministry). His name appeared in the list of shortlisted applicants prepared by the National Civil Service Recruitment Board (the Board). The Ministry and the Board held an exam for all shortlisted applicants, which Mr Hamid passed.

At the subsequent interview, Mr Hamid was subjected to a number of questions focused on his disability. For example, he was asked whether he is able to use a computer with his disabled hand; he replied that he could. When the list of successful applicants was published, Mr Hamid's name was not included. Mr Hamid concluded that, given the questions he had been asked, his disability could have been one of the factors in the decision not to select him and therefore decided to launch a legal challenge.

On 24 July 2011, Mr Hamid filed a lawsuit before the Constitutional Court against the Board and the Ministry, claiming to have been denied the right to work due to his disability. He based his claim on article 45(1) of the Constitution, which provides that persons with disabilities shall enjoy all the rights and freedoms set out in the Constitution, including, in particular, the right to respect for their human dignity, access to suitable education and employment and full participation in society. Mr Hamid argued that the decision not to appoint him also violated section 24(7) of the National Civil Service Act 2007, which obliges all state bodies to allocate a percentage of not less than 2 per cent of all approved positions to persons with disabilities, taking into consideration the nature and requirements of work and the nature of the disability.

He further argued that the decision violated section 4(2) of the National Disability Act 2009, which obligates the concerned authorities to implement a number of specified rights, privileges, facilities and exemptions, including the right of persons with disabilities to be appointed to jobs in public institutions (section 4(2)(e)) and the right to reasonable accommodation in the work place to respond to the needs of persons with disabilities (section 4(2)(h)).

As of March 2014, the case was pending; the Equal Rights Trust has not been informed of the outcome at the time of publication.

• **Case Law under the National Civil Service Act 2007**

In *Alsier Mustafa Khalfalah v Civil Service Recruitment Committee of Khartoum State*<sup>25</sup> the claimant argued that the Civil Service Recruitment Committee of the State of Khartoum had failed to discharge its obligations under the National Civil Service Act 2007. In 2010, the Committee announced a number of vacancies for teachers at the Ministry of General Education. This was followed shortly afterwards by an Order issued by the Governor of the State of Khartoum, also published in newspapers, instructing the Recruitment Committee to ensure that 5 per cent of the vacancies were filled by persons with disabilities who were otherwise qualified and who met the conditions of recruitment. The Recruitment Committee selected 18 persons with disabilities out of 1 050 persons recruited in total. The claimants, who were unsuccessful in their applications, appealed against the decision of the Recruitment Committee to reject their applications despite the fact that persons with disabilities were allotted 5 per cent of vacancies in the Governor's Order. They argued that the 1.8 per cent of selected candidates with disabilities was far less than the 5 per cent required by the Order.

The claimants' case was dismissed at first instance and on appeal by the High Court (Administrative Circuit). The High Court upheld the decision of the lower

25 As above.

court on the basis that the Governor's Order contradicted the National Civil Service Act 2007 which only requires a quota of 2 per cent for persons with disabilities. Thus, the defendant was not bound by the 5 per cent quota set out in the Governor's Order.

Some have argued that the court wrongly interpreted the National Civil Service Act 2007, which states that 'all units of the states shall allocate not less than 2% of the approved announced vacancies for persons with disabilities'. The 2 per cent figure in the 2007 Act was therefore a minimum and the Governor's Order was not inconsistent with the Act, but instead an attempt to implement the positive action clause in the Act. Additionally, neither the claimants, nor the court, made reference to article 136 of the Constitution, which concerns inclusiveness in the civil service and, in particular, the requirement, set down in article 136(e) of the 'application of affirmative action and job training to achieve targets for equitable representation within a specified time frame'.

## 6 Policies and programmes

### 6.1 Does Sudan have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability

Yes, it does.

- **Five-year higher education disability strategy 2018-2022**

The Sudanese Council of Ministers approved this strategy aimed at empowering persons with disabilities in higher learning institutions and scientific research institutes in 2018. The purpose of the programme is to allow students with disabilities to qualify, integrate into society and play a role in sustainable development. If properly implemented, the strategy will increase access to education and remove other barriers of learning.<sup>26</sup>

- **Social Initiative Programme**

This initiative, which was adopted in 2012 and implemented by the Ministry of Welfare and Social Security and its agencies, including the National Council for the Disabled, aims to reduce poverty. This is an extensive programme and includes support to special groups like rural woman and persons with disabilities.<sup>27</sup>

26 W Sawahel 'Five-year higher education disability strategy approved' *University World News* 19 September 2018 <https://www.universityworldnews.com/post.php?story=20180919111107210> (accessed 19 August 2019).

27 FMA Hassan 'The Sudan Interim Poverty Reduction Strategy Paper Status Report' The World Bank (November 2016) <https://www.researchgate.net/publication/311651834> (accessed 19 August 2019). For materials on law reform in Sudan, see Redress.org <http://www.redress.org/africa/sudan>

**6.2 Does Sudan have policies or programmes that indirectly address disability? If so, list each policy and explain how the policy addresses disability.**

- **National Action Plan for the Protection of Human Rights**

This action plan was launched in June 2013, its content, objectives, human and financial resources are aimed at promoting human rights of Sudanese citizens including people with disabilities. This Action Plan is promulgated on the Constitutional and Legal Framework Article 2.

- **Right to life and prohibition of torture and cruel, inhuman or degrading treatment (article 6 & 7)**

This is a constitutional right that seeks to protect all citizens' right to life.

- **Rights of Persons with Special Needs and the Elderly (article 45)**

This article provides:

The State shall guarantee to persons with special needs the enjoyment of all the rights and freedoms set out in this Constitution; especially respect for their human dignity, access to suitable education, employment and full participation in society. The elderly shall have the right to the respect of their dignity. The State shall provide them with the necessary care and medical services as shall be regulated by law.

- **Khartoum Public Order Act of 1998, the Trade Union Act of 2010, the Press and Publication Act of 2009 and the Voluntary and Humanitarian Work (Organisation) Act of 2006**

These Acts retain provisions that are incompatible with or raise concerns regarding their compatibility with the rights guaranteed under the Covenant, including the right to non-discrimination, the right to form and join trade unions, and the right to health.

## **7 Disability bodies**

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

The National Council for Persons with Disabilities that was restructured in October 2010 has the principal authority for planning and monitoring disability policies and programmes at the national level and for coordinating the efforts of the state and civil society organisations, including organisations of persons with disabilities. By so doing, the Council addresses the violations of the policies on rights of people with disability.

**7.2 Other than the ordinary courts or tribunals, does Sudan 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.**

An institution that deals indirectly with persons with disabilities is the National Human Rights Commission that is mandated to promote and protect human rights (including disability rights).

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

**8.1 Does Sudan have a Human Rights Commission, Ombudsman or Public Protector? If so, does its remit include the promotion and protection of the rights of people with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, Ombudsman or Public Protector has ever addressed issues relating to the rights of persons with disabilities.**

According to the National Commission for Human Rights Act 2009, article 9(1), the National Human Rights Commission is mandated with the task to protect and publicise human rights and monitor the implementation of the rights and freedoms contained in the rights and freedoms charter, including the rights of persons with disabilities.

The National Human Rights Commission (NHRC) oversees the implementation of Office of the Ombudsman which is also an independent institution established by the Constitution. Functions of the office of the Ombudsman are to prevent and fight against injustice, corruption, offences related to public and private administration. Furthermore, this office conducts 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.<sup>28</sup>

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

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

There are various DPOs included in the Action on Disability Development (ADD) international support in Sudan. These include National Union of the Blind, River

Nile Union of the Blind, Kassala Union of the Blind, Khartoum Union of the Blind, Nyala Union of the Blind, National Union of the Deaf, Kassala Union of the Deaf, Wad Medani Union of the Deaf, Red Sea Union of the Deaf, Gadarif Union of the Deaf, Khartoum Union of the Deaf, Juba Union of the Deaf, Nyala Union of the Deaf, National Union of the Disabled, Mayo Union of the Disabled, Gash: Aroma Union of the Disabled, and River Nile Union of the Disabled. Other organisations are discussed below:

- **National Council for Persons with Disabilities in Sudan**

The NCPD is tasked with designing the Strategic Plan for Persons with Disabilities in Sudan. The strategy they develop will be mainstreamed to all government ministries.<sup>29</sup>

- **The Organisation of Women with Disabilities in Sudan**

OWD includes all women with disabilities regardless of their nature of disability. Their goal is to promote social inclusion of women with disabilities in their communities, share best practices in self-development and strengthen their supportive networks.<sup>30</sup>

- **Action on Disability and Development (ADD)**

ADD is an international organisation that works in Sudan and other countries. Its mandate is to partner with disability activists in Africa and Asia to facilitate access to tools, resources and support in order to facilitate quality and sustainable lives for people with disabilities.<sup>31</sup>

## 9.2 In the countries in Sudan's region (Africa) are DPOs organised/coordinated at national and/or regional level?

While there is some level of coordination between DPOs at the national level. However, there is no umbrella organisation of DPOs. National Council for Persons with Disabilities (NCPD) was formed to serve as a civil entity for the national mobilisation of persons with disabilities in Sudan.<sup>32</sup> NCPD's key activity is to ensure that no one is discriminated based on their disability.<sup>33</sup> They also promote the right to education and development opportunity for persons with disabilities.

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

Sudan signed the Convention on the Rights of Persons with Disabilities in 2007 and ratified it in 2009. Sudan also ratified but not signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Ratifying the protocols allows the government to develop the implementation of CRPD at the local level.

29 'Sudan: National Council for Persons with Disabilities underlines importance of integration of disabled persons in community' *AllAfrica* 27 November 2017 <https://allafrica.com/stories/201711280362.html> (accessed 26 August 2019).

30 A Omar 'Women with disabilities, united for their rights in Sudan' <https://bridgingthegap-project.eu/women-disabilities-united-rights-sudan/> (accessed 25 August 2019).

31 ADD 'Empowering disability activists in Africa and Asia' (2019) <https://www.add.org.uk/> (accessed 21 August 2019).

32 NCPD 'National Council for Persons with Disabilities of Sudan' <https://www.sudanvision.net/2019/02/18/person-with-disabilities-organizations-workshop-to-align-sudan-national-general-education-act-with-the-international-convention-on-the-rights-of-persons-with-disabilities/> (accessed 27 August 2019).

33 As above.

This also facilitates alternative decision-making rather than supported decision-making, appropriate care for girls and women with disabilities, forced sexual reproductive health medical interventions, reasonable accommodation, status and use of sign language, and other inclusive approaches towards Sustainable Development Goals.<sup>34</sup> Although Sudan has made attempts to involve DPOs in the implementation process through the establishment of the National Council for Persons with Disabilities to coordinate the efforts of the state and civil society organisations, including organisations of persons with disabilities, it appears that on the ground, DPOs do not have a meaningful involvement.

#### **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 of 3 June 2003 as amended to date, determining its responsibilities, organisation and functioning. It is the 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 NCPD has been calling for the Minister of Education to curb the discrimination of disabled teachers.

In Sudan, disability activists are also involved in developing the CRPD together with other several active national disabled people's organisations to promote disability rights. Most organisations are funded by individuals and charity organisations. There is limited governmental funding of disabled people's organisations. Sudanese disabled people's organisations claim that a national umbrella organisation/federation to take on the responsibility of coordination between local and national organisations is necessary.<sup>35</sup>

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

In addition to lack of information and limited accessibility, in which DPOs are seldom involved or consulted, the following barriers are also present:

- Lack of disability related expertise and skills among DPOs;
- Lack of locally established initiatives;
- Little knowledge of project management amongst the groups;
- Paucity of awareness amongst people with disabilities of their rights; hence the dire need to capacitate DPOs on the knowledge of human rights;
- There is a need for grass roots level-based initiatives on promoting the rights and abilities of people with disabilities; and
- There is minimal monitoring and evaluation of disability related initiatives in both urban and rural areas.

34 M Awad 'Person with Disabilities organizations workshop to align Sudan National General Education Act with the International Convention on the Rights of Persons with Disabilities' (2019). <https://www.sudanvision.net/2019/02/18/person-with-disabilities-organizations-workshop-to-align-sudan-national-general-education-act-with-the-international-convention-on-the-rights-of-persons-with-disabilities/> (accessed 27 August 2019).

35 Sida (n 18).

**9.6 Are there specific instances that provide ‘best-practice models’ for ensuring proper involvement<sup>36</sup> of DPOs?**

The establishment of the National Council of Persons with Disabilities provided the DPOs a platform for advocacy, 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 level also offers the civil society organisations, like National Union of the Blind, River Nile Union of the Blind, Kassala Union of the Blind, and Khartoum Union of the Blind an opportunity to collaborate and relate with them at different levels to advocate for 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?**

There are some success stories resulting from the work of the organisation that seeks to ensure recognition of the rights of women and girls with disabilities together with the National Council of Persons with Disabilities. A concrete example is the case of a woman who asked for help to access the University because the Faculty of Education refused her entry, arguing that she could not be a teacher because her disability prevented her from hearing the students. Faced to this situation, the organisation went to the University to solve the problem and woman was allowed to continue studying.<sup>37</sup>

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

The research has shown that there is a need for capacity building and support for DPOs. See question 9.4 above where areas of potential research are identified.

**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?**

The Sudanese Government should ensure the meaningful involvement of DPOs in the designing, planning and implementation of policies and strategies that address persons with disabilities issues. Some strategies including, inter alia, the following can be adopted:

- Development of implementation strategies to ensure that policies are operationalised;
- Research capacity building for DPOs so they can evaluate the effectiveness of interventions (No research about us, without us);
- DPOs should be capacitated on meaningful collaborations and networks;
- Build capacity to interpret legislation; and

36 Sida (n 18).

37 Omar (n 30).

- Create accessible platforms for DPOs and persons with disabilities in general.

**9.10 Are there specific research institutes in the region where Sudan is situated (North 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 Sudan have a government department or departments that is/are specifically responsible for promoting and protecting the rights and welfare of persons with disabilities? If so, describe the activities of the department(s).**

The Minister of Education and Public Education committed to promote and protect the rights and welfare of persons with disabilities through implementing the inclusive education policy. The Minister of State at the Ministry of Security Social Development committed to supporting projects and issues that aim at improving the livelihood of persons with disabilities in Sudan.

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

**11.1 Contemporary challenges of persons with disabilities in Sudan (for example, in some parts of Africa ritual killing of certain classes of PWDs, such as people with albinism, occurs).**

There have not been any reported killings of people with albinism in Sudan. Though the People with Disabilities Council has reported use of derogatory terms about disability, lack of active public and political participation of persons with disabilities, inadequate access to justice and legal assistance, freedom to marry, voting rights and preparation for independent living.<sup>38</sup>

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

- **Adoption of the human rights-based approach to disability**

Sudan made noticeable progress by enacting the amended Persons with Disabilities Act of 2017 which replaced the medical approach-based Persons with Disabilities

38 Awad (n 34).

Act of 2009.<sup>39</sup> Twenty-three other laws were identified to be aligned with the CRPD. The Medical Insurance Act was studied together with 12 other laws for any human and disability rights violation.<sup>40</sup>

- **Access to all the rights and freedoms in the Constitution**

The Constitution of the Republic of Sudan, article 45 guarantees persons with disabilities all the right and freedoms set out in the Sudanese Constitution; especially respect of their human dignity, access to suitable education, employment and full participation in society.<sup>41</sup>

### **11.3 Do people with disabilities have a right to participation in political life (political representation and leadership) in Sudan?**

Although the Constitution of Sudan attempts to grant every citizen the right to participate in political life, this right is not fully legalised, practiced or implemented. This was evident when looking at the 2015 elections that were held in which persons with disabilities were not able to fully participate as accessibility was a major obstacle. This was partly because persons with psycho-social disabilities were not able to participate in the process at all because of the legal capacity issue. In the Concluding Observations to Sudan's report to the CRPD, certain principal areas of concern were identified. These included the omission of psychosocial disability from the definition of disability in national legislation, in particular in the Persons with Disabilities Act of 2017. The committee raised concerns about the exclusion of persons with intellectual and/or psychosocial disabilities from the election process by establishing 'mental capacity' as a prerequisite for the right to vote. Furthermore, issues of inaccessible voting environment and lack of capacity of election officials to address the needs of voters with disabilities were raised.

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

The Constitution of Sudan, article 19 states: 'The State shall promote public health and guarantee equal access and free primary health care to all citizens'.<sup>42</sup>

The Constitution of Sudan, article 12 stipulates that:

The State shall develop policies and strategies to ensure social justice among all people of the Sudan, through ensuring means of livelihood and opportunities of employment. The State shall also encourage mutual assistance, self-help, co-operation and charity. No qualified person shall be denied access to a profession or employment on the basis of disability; persons with special needs and the elderly shall have the right to participate in social, vocational, creative or recreational activities.<sup>43</sup>

The Constitution of Sudan, article 45 states that:

39 As above.

40 As above.

41 Sudan's Constitution of 2005 [https://www.policinglaw.info/assets/downloads/Constitution\\_of\\_Sudan\\_\(2005\).pdf](https://www.policinglaw.info/assets/downloads/Constitution_of_Sudan_(2005).pdf) (accessed 26 August 2019).

42 As above.

43 Art 12 of Sudan's Constitution of 2019 [https://www.policinglaw.info/assets/downloads/Constitution\\_of\\_Sudan\\_\(2005\).pdf](https://www.policinglaw.info/assets/downloads/Constitution_of_Sudan_(2005).pdf) (accessed 26 August 2019).

The State shall guarantee to persons with special needs the enjoyment of all the right and freedoms set out in this Constitution; especially respect for their human dignity, access to suitable education, employment and full participation in society. The elderly shall have the right to the respect of their dignity. The State shall provide them with the necessary care and medical services as shall be regulated by law.<sup>44</sup>

As shown in the court cases presented in 5.1 above, which involved *Alsier Mustafa Khalfalah v Civil Service Recruitment Committee of Khartoum State*, the claimant argued that the Civil Service Recruitment Committee of the State of Khartoum had failed to discharge its obligations under the National Civil Service Act 2007. Thus, these rights are not adequately implemented in practice. Furthermore, the exclusion of persons with disabilities in the national legislature (see 11.4) is contradictory of the equal right clause.

### 11.5 Specific categories experiencing particular issues/vulnerability.

- **Persons with disabilities**

The Constitution of Sudan, article 87(a) stipulates that a person with ‘physical incapacity’ cannot be a member of National Legislature. This clause deliberately excludes people with disabilities as they are physically incapacitated by disability.

- **Women with disabilities**

Women and girls with disabilities are excluded based on their disability status. They experience barriers of legal, physical, health, employment, skills development and attitudinal nature.<sup>45</sup>

- **Children with disabilities**

Sudan is characterised by displacement, 65 per cent of these are child refugees.<sup>46</sup> The UNICEF report states that 2.6 million of children are in need of assistance. Due to most children suffering acute malnourishment and not receiving adequate healthcare; they tend to acquire different types of disabilities.<sup>47</sup> Sudan has several laws about the rights of children, and children with disabilities. The Constitution of Sudan, article 50 states that: ‘The State shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan’<sup>48</sup>. Although the Constitution grants these rights, we recommend that national DPOs be consulted to gain grassroots perspectives.

## 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?

Sudan is striving to adopt the human rights approach instead of the medical approach to disability. So, there is a need to address the use of derogatory terms in their reports, for example terminologies like ‘hard of hearing’ instead of ‘hearing impairment’. Sudan needs to adopt internationally acceptable terms in the

44 As above.

45 As above.

46 UNICEF ‘Children in Sudan: An overview of the situation of children in Sudan’ <https://www.unicef.org/sudan/children-sudan> (accessed 28 August 2019).

47 As above.

48 Art 12 of Sudan’s Constitution of 2005.

disability sector. There is also a need for Sudan to prioritise disability as a research area.<sup>49</sup>

Persons with disabilities are encouraged to cast their votes to exercise their right to vote, access free primary education, and the parents who deny them the 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 Sudan? Why?**

Sudan needs to adopt a law to enforce the domestication of the Convention. There is a need to adjust laws so that they allow for the persons with disabilities to participate politically. Existing laws which allow for persons with disabilities to be institutionalised indefinitely need to be reviewed. The Constitution of Sudan and the Persons with Disabilities Act should be comprehensive in a manner that is inclusive of all. That is, by defining disability in a holistic way that excludes none. The Sudan Ministry of Education needs to ensure that inclusive education is properly implemented and monitored so that no child with a disability face stigma and discrimination.

49 N Leon 'Understanding disability in Sudan' thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirement of the degree of Master of Arts Interdisciplinary Masters Program in Disability Studies, University of Manitoba, 2012. [https://mspace.lib.umanitoba.ca/jspui\\_org/bitstream/1993/5223/1/Nyerere\\_Leon.pdf](https://mspace.lib.umanitoba.ca/jspui_org/bitstream/1993/5223/1/Nyerere_Leon.pdf) (accessed 28 August 2019).

## **SECTION C: REGIONAL DEVELOPMENTS**

### **Disability rights in the African regional human rights system**

Section C contains 2 commentaries related to disability, the rights of older persons with disabilities in the Protocol to the African Charter on Human and Peoples' Rights: A critical analysis, and mothering and albinism: Recommendations for disability rights in Africa



# REGIONAL DEVELOPMENTS

## THE RIGHTS OF OLDER PERSONS WITH DISABILITIES IN THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A CRITICAL ANALYSIS

*Eilionóir Flynn\**

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### 1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the Protocol) represents a unique opportunity as the first legally binding regional expression of disability rights, adopted after the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD). This paper will highlight how the Protocol addresses the intersection of older age and disability which is missing from the CRPD and other regional instruments and the extent to which it adds value and improves on standards in the CRPD as well as some areas of concern. Finally, the paper will consider what lessons can be drawn from this experience for other regions intending to adopt similar instruments, as well as look into global efforts to develop a new UN Convention on the Rights of Older Persons.

Before delving into an analysis of article 30 of the Protocol, which explicitly sets out the rights of older persons with disabilities, it is important to set the context for this discussion. The Protocol was finalised in 2018 but has not yet entered into force. Ratifications from 15 countries are required for the Protocol to enter into force, and at the time of writing no country has ratified the Protocol.<sup>1</sup> Separately, the African Union adopted a Protocol to the African Charter on Human and Peoples' Rights

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1 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (2018) art 38(1); Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa 'Status list' (18 June 2020).

on the Rights of Older Persons in 2016, which has also not entered into effect, only receiving two ratifications out of the required 15.<sup>2</sup> That Protocol also includes an article on older persons with disabilities.<sup>3</sup> However, that article is less detailed than article 30, and so will not be the main focus of the present discussion; although possible conflicts of interpretation between the two protocols will be addressed as an area of concern.

A full exploration of the drafting history of the 2018 Protocol is beyond the scope of this paper, however, there are some points worth noting as relevant to this discussion. The first is the participation of organisations of persons with disabilities in the drafting process;<sup>4</sup> mirroring to some extent the participatory drafting approach of the CRPD.<sup>5</sup> Second, is the explicit acknowledgement by the drafters of the gaps in rights protection which remained unaddressed in the CRPD, and the need to expand, rather than dilute, the application of universal human rights set out in the CRPD based on experiences in the African context.<sup>6</sup> Finally, the experience of many of the state parties to this Protocol in reporting to the UN Committee on the Rights of Persons with Disabilities on their progress in implementing the CRPD in an African context. These interrelated standpoints and experiences set the context for the rights expressed in the Protocol as a whole and article 30 in particular.

The following section will address the key contributions made by article 30 of the Protocol, with specific reference to the topics of social protection, the intersection of gender, disability and older age, legal capacity, support in the community, violence, abuse and neglect, and sexual and reproductive health. Following this analysis, I reflect on the added value of article 30 and some areas of concern based on the regional context and potentially conflicting statements on rights in the two existing protocols. Finally, I consider the lessons which can be drawn from this experience for other world regions and for the international community as a whole moving towards a new UN Convention on the Rights of Older Persons.

2 AU, Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa (2016) art 26(1); Status List (n 1).

3 Art 13 of the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa.

4 F Mahomed, JE Lord & MA Stein 'Transposing the Convention on the Rights of Persons with Disabilities in Africa: The role of disabled peoples' organisations' (2019) 27 *African Journal of International and Comparative Law* 335.

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

6 O Onazi 'Disability Justice in an African context: The human rights approach' in O Onazi *An African path to disability justice* (2020) 39.

## **2 Key contributions of article 30**

### **2.1 Social protection**

Article 30(2)(a) contains a specific obligation on states to ensure that older persons with disabilities can access social protection programmes on an equal basis with others. This statement is important as it does not mandate states to create new social protection schemes for older persons with disabilities but rather requires states to ensure that old age is not a cut off point for receiving social assistance. This approach is particularly relevant in contexts where persons with disabilities lose their entitlement to specific kinds of social assistance when they age, such as personal assistance;<sup>7</sup> and are automatically transitioned to different funding schemes designed for older (non-disabled) people, which may not include the required type or level of assistance. As more African countries introduce cash transfers and other forms of social protection,<sup>8</sup> this provision is likely to become more significant with time.

### **2.2 Intersection of gender, disability and age**

Article 30(2)(b) requires states to take account of gender and age-related aspects of disability programming and resourcing in implementing the Protocol. This echoes to some extent the provisions of the CRPD, which contains specific articles on disabled women and children respectively,<sup>9</sup> but is even more important in the context of older persons with disabilities, which of course was not the focus of a specific CRPD article. The specific needs of older men, women and non-binary people with disabilities will require particular attention from states, and this provision is a good example of how intersectional identities can be accounted for in an instrument focused on the rights of disabled people.

### **2.3 Legal capacity**

Article 30(2)(c) echoes the earlier commitment to respecting the legal capacity of all persons with disabilities in article 7 of the Protocol and restates the application of this principle to older persons with disabilities. This restatement is particularly relevant in cases where a combination of

7 R Jessen 'Transfer-related experiences of people with spinal cord injury living in low socioeconomic, independent living communities in Johannesburg as seen in the context of relationships of personal assistance – A phenomenological study' Masters thesis, Disability Studies Division, University of Cape Town, 2019.

8 MP Opoku et al 'Extending social protection to persons with disabilities: Exploring the accessibility and the impact of the disability fund on the lives of persons with disabilities in Ghana' (2019) 19 *Global Social Policy* 225.

9 UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) UN Doc A/RES/61/106 (24 January 2007) arts 6 & 7.

older age and disability may be used to justify restrictions or denials of legal capacity, for example with respect to inheritance; which may also have a gendered dimension for widows.<sup>10</sup> It reiterates the obligation on states to provide older persons with disabilities with all the support they may require to exercise their legal capacity on an equal basis with others – which again is important as some supported decision-making systems may exclude older persons (for example, people with dementia) from their remit.<sup>11</sup>

## 2.4 Services in communities

Article 30(2)(d) requires states to provide access to appropriate services to older persons with disabilities that meet their needs within their communities. This also echoes article 14 of the Protocol on the right to live in the community for all disabled people. Again, the restatement is important to ensure that older persons with disabilities are not obliged to leave their communities where they may be both providing and receiving support to their families and wider social networks in order to access services that meet their needs. While the term ‘services’ is not defined in the Protocol, it can be interpreted broadly, reading the Protocol as a whole, to include a wide range of services such as general health services (including physical and mental health), impairment or disability-specific services (including care and support), education, employment, and social services.<sup>12</sup> Again, this obligation recognises that older persons with disabilities may require specific and distinct services that meet their unique needs, while also requiring that any services available to persons with disabilities continue to be provided as that population ages.

## 2.5 Violence, abuse and neglect

Article 30(2)(e) places an obligation on states to protect older persons with disabilities from violence, abuse and neglect. This also echoes existing obligations in the Protocol with regard to prevention and responses to violence, abuse and neglect; including in article 9 (liberty and security of person), article 10 (freedom from torture, or cruel, inhuman or degrading treatment or punishment), article 27 (women and girls with disabilities), and article 28 (children with disabilities). This provision further includes specific recognition of particular forms of violence, abuse and neglect experienced by older persons with disabilities, such as those based on accusations or perceptions of witchcraft, which also incorporates a gender-

10 NE Groce, J London & MA Stein ‘Inheritance, poverty, and disability’ (2014) 29 *Disability & Society* 1554.

11 J Killeen ‘Supported decision-making: Learning from Australia’ (2016) Winston Churchill Memorial Trust [https://www.wcmt.org.uk/sites/default/files/report-documents/Killeen%20J%20Report%202016%20Final\\_1.pdf](https://www.wcmt.org.uk/sites/default/files/report-documents/Killeen%20J%20Report%202016%20Final_1.pdf) (accessed 9 August 2021).

12 Onazi (n 6) 45.

based dimension, as referenced in article 30(2)(b). While violence, abuse and neglect of older persons with disabilities is clearly a global problem, this article recognises regional particularities in how this may be experienced in the African context,<sup>13</sup> and by calling out these harmful practices (which are also prohibited by article 11 of the Protocol), stands as an example of the added value which regional instruments can bring to the application of universal human rights norms to specific contexts.

## **2.6 Sexual and reproductive health**

Finally, article 30(2)(f) requires states to ensure that older persons with disabilities have access to appropriate sexual and reproductive health information and services. This echoes the obligation placed on states to respect the sexual and reproductive rights of all disabled people as expressed throughout the Protocol in article 17 (right to health), article 26 (right to family), article 27 (women and girls with disabilities), and article 29 (youth with disabilities). The restatement of this right as one which applies to older disabled people is particularly important, as this issue is often overlooked issue for this specific population. Read together with the provisions on gender and age, as well as the provisions on violence, exploitation and abuse, this provides a holistic approach to ensuring the protection of the sexual and reproductive rights of older persons with disabilities.

Having considered the content of article 30 in-depth, the following section will further explore the unique contributions of this article of the Protocol and some areas of concern which may need to be addressed during its implementation.

## **3 Expanding the rights of older disabled people: Added value and areas of concern**

As the first example of a legally binding regional instrument that was developed post-CRPD and builds on it, the Protocol demonstrates added value in this field by addressing issues which were omitted from the final text of the CRPD. It provides a useful example of how a more intersectional approach can be taken – at least on the intersections of gender, age and disability<sup>14</sup> – when it comes to understanding and addressing rights violations specifically experienced by older persons with disabilities. However, it is also worth noting that there are other

13 FA Eboiyehi 'Convicted without evidence: Elderly women and witchcraft accusations in contemporary Nigeria' (2017) 18 *Journal of International Women's Studies* 247.

14 E Flynn 'Disability and ageing: Bridging the divide? Social constructions and human rights' in P Blanck & E Flynn (eds) *Routledge handbook of disability law and human rights* (2016) 211.

intersecting identities which are omitted from article 30 of the Protocol, especially membership of the LGBTQI+ community and membership of different ethnic or cultural groups or minorities. Overall, perhaps the most important added value of article 30 and indeed the Protocol as a whole, is its emphasis on regional specificity in naming rights violations experienced by this group and its recognition and prohibition of particular harmful practices which are often targeted at older persons with disabilities.<sup>15</sup> This level of detail is usually not achieved in an international human rights instrument such as those negotiated at the UN, and shows the value of adopting regional instruments, where these are legally binding, and build on the universal rights already established, without diminishing them.

One area of concern, however, is the fact that there appears to be potential conflicts in terms of the expression of rights contained in this 2018 Protocol and the 2016 Protocol on the Rights of Older Persons mentioned in the Introduction. For example, the 2016 Protocol does not recognise as strongly the right of older people to remain living in their communities,<sup>16</sup> compared to the recognition of this right for persons with disabilities, including older persons with disabilities in the 2018 Protocol. It remains to be seen how these potential conflicts can or will be resolved, including by the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. Given the potential for conflicting interpretations by states when implementing both Protocols, it will be important to clarify that the higher level of rights protection offered by the 2018 Protocol should be adopted as the appropriate threshold for identifying rights violations.

Another issue of concern is the low take up of this Protocol in terms of state ratifications, as this will impact on the Protocol's effectiveness as a tool for change at the domestic level. As mentioned in the Introduction, no state has ratified the 2018 Protocol at the time of writing and only two states have ratified the 2016 Protocol. This low level of ratification by states remains a concern – especially given the high levels of involvement of organisations of persons with disabilities in the negotiation and drafting of the Protocol text.

Moreover, there is a trend globally of scepticism towards a proliferation of new binding human rights instruments at the supra-national level.<sup>17</sup> Grassroots advocates are often disappointed that these

15 J Biegon & F Viljoen '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* 345.

16 Art 11 of the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa requires states to ensure that 'residential care is optional and affordable for older persons'; whereas art 30(2)(e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa requires that 'older persons have access to appropriate services that respond to their needs within the community' and art 14 states that 'every person with a disability has the right to live in the community'.

instruments are not effective in generating change at the domestic level in terms of concrete law reforms, or practical changes (including investment in supports and services) which impact on the day to day lives of the marginalised groups affected (including older disabled people). The Protocol itself acknowledges that many of the rights violations experienced by older disabled people are carried out by non-state actors, including individuals, families or community members.<sup>18</sup> Many of these practices are not enshrined in law or policy or regulated by the state directly, and so it is unclear how precisely ratification of the Protocol can assist states to dismantle these practices – apart from providing a reporting mechanism under which states can be held accountable for their actions on these issues, or failure to address them. As with all human rights instruments however, the consequences for states that do not comply with the obligations contained in the Protocol are fairly minimal. Therefore, more action is needed at the domestic level to maintain political pressure on duty-bearers to implement the Protocol in full, including article 30 as it applies to older disabled people.

These unique contributions and issues of concern with article 30 and the Protocol as a whole provide useful insights for other regions seeking to introduce new binding instruments following the entry into force of the CRPD, as well as for advocates working to develop a new UN convention on the rights of older people, which are considered further in the following and final section.

## **4 Conclusion and lessons for further reform**

The negotiation process of the Protocol demonstrates the importance of a grassroots-led approach where the rights-holders are at the forefront in developing the text of any new binding human rights instrument. However, the low take-up in terms of state ratifications also provides an important lesson for future reform efforts; that is, the need to ensure substantial state buy-in during the negotiation process. To do otherwise risks the creation of a very progressive human rights instrument that never enters into force if it does not receive the required number of ratifications. Another valuable insight from this experience is the importance of developing a monitoring framework with each new instrument that is both effective and feasible in ensuring state accountability for progress in implementation.<sup>19</sup> Finally, perhaps the most important lesson from the Protocol itself is that it stands as a very strong example of a binding

17 P Alston 'The populist challenge to human rights' (2017) 9 *Journal of Human Rights Practice* 1.

18 Preamble, arts 1 & 11 of the Protocol.

19 Secretariat of the African Decade 'Architecture for an African disability rights mechanism' (2011) Open Society Foundations; MA Stein & JE Lord 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, lost opportunities, and future potential' (2010) 32 *Human Rights Quarterly* 689.

regional instrument which enhances rather than diminishes the rights contained in the CRPD. This stands in stark contrast with other regional developments post-CRPD, for example the draft Oviedo Protocol in the Council of Europe that actively undermines the CRPD prohibitions on forced psychiatric treatment.<sup>20</sup>

As the UN Open-Ended Working Group moves forward in its work and campaign efforts intensify to secure a new UN Convention on the Rights of Older People,<sup>21</sup> the valuable lessons learned from the experience of creating the Protocol need to be taken on board. Since the process at the UN remains ongoing it may be productive to use this time to reach consensus on some of the issues where conflicting views on rights violations between the rights of older people and the rights of disabled people (including older disabled people) arise – as evidenced by the different positions on community living expressed in the 2016 and 2018 protocols to the African Charter. As with the development of the Protocol, the negotiation of a new UN Convention on the Rights of Older People opens up new opportunities to recognise how universal rights should apply to this group in ways that were not able to be included in previous UN instruments, while expanding on, rather than diluting the rights protections provided in the CRPD. There is much that advocates at the UN can learn from their counterparts in the African region, especially about how to build on the binding instruments within that region to support arguments for how rights could be recognised in a new UN convention.

20 European Disability Forum and Mental Health Europe 'Disability organisations urge Council of Europe to withdraw Additional Protocol of Oviedo Convention' <https://www.withdrawoviedo.info/join> (accessed 9 August 2021).

21 J Childs 'Elder rights are not nesting dolls: An Argument for an International Elder Rights Convention' (2020) 11 *Journal of International Aging Law & Policy* 141.

# REGIONAL DEVELOPMENTS

## MOTHERING AND ALBINISM: RECOMMENDATIONS FOR DISABILITY RIGHTS IN AFRICA

*Sheryl Reimer-Kirkham, \* Ikponwosa Ero, \*\* Innocentia Mgijima-Konopi, \*\*\* Emma Strobell, \*\*\*\* & Barbara Astle\*\*\*\*\**

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### 1 About albinism

Albinism is a relatively rare recessive genetic condition that occurs worldwide in different forms. Oculocutaneous Albinism Type 2 (OCA2) is the most prevalent on the African continent.<sup>1</sup> The prevalence of albinism in Tanzania is cited as 1 in 2 673;<sup>2</sup> in South Africa as 1 in 3 900.<sup>3</sup> Both parents must be carriers of OCA2 for their child to have the condition, of which there is a 1 in 4 chance in each pregnancy.<sup>4</sup> Although both parents must transmit the gene, in various parts of Africa women largely carry the blame for this misunderstood condition.<sup>5</sup> OCA2 results in a striking

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1 JGR Kromberg et al 'Types of albinism in the black Southern Africa population' (2012) 89 *East African Medical Journal* 20 at 21.

2 The United Republic of Tanzania 'Basic demographic and socio-economic profile' (2014) [https://www.tanzania.go.tz/egov\\_uploads/documents/NATIONAL\\_SOCIO-ECONOMIC\\_PROFILE\\_sw.pdf](https://www.tanzania.go.tz/egov_uploads/documents/NATIONAL_SOCIO-ECONOMIC_PROFILE_sw.pdf) (accessed 1 June 2021).

3 JRG Kromberg et al 'Children with oculocutaneous albinism in Africa: Characteristics, challenges and medical care' (2020) 14 *South African Journal of Child Health* 50.

4 JGR Kromberg 'Genetic counseling and albinism' in JGR Kromberg & P Manga (eds) *Albinism in Africa: Historical, geographic, medical, genetic, and psychosocial aspects* (2018) 216.

5 S Reimer-Kirkham et al 'Mothering, albinism and human rights: The disproportionate impact of health-related stigma in Tanzania' (2020) *Foundations of Science* 12-13.

physical appearance, particularly in the African context, where a partial or complete lack of melanin manifests as pale white skin, light hair, and sometimes light eye colouring.<sup>6</sup> Lack of melanin causes a spectrum of visual impairments and heightened risk for developing skin cancer in the absence of meticulous sunscreen use and protective clothing.<sup>7</sup> Concerns encountered by persons with albinism have increasingly been assessed from a human rights lens over the past decade, because of the levels of misunderstanding, discrimination, stigma and violence they endure, including harmful practices. This commentary focuses on the little-researched experiences of mothers impacted by albinism, whether with albinism themselves or with children with albinism.

## 2 Human rights research in Tanzania and South Africa

We draw on an ethnographic study in Tanzania and South Africa<sup>8</sup> on mothers impacted by albinism, conducted by a researcher-advocate-policy network.<sup>9</sup> Phase I of participatory fieldwork, involving sharing circles, in-depth interviews, and participant observation, was completed in Tanzania's Dar es Salaam and Mwanza regions in 2019. Sixty-two participants engaged in the research, of which 17 were mothers of children with albinism, nine were mothers with albinism themselves, and 36 were key stakeholders. During the global pandemic, similar participatory data collection in South Africa (Phase II) has been replaced with virtual fieldwork in collaboration with the local research team. Through virtual platforms such as Zoom and WhatsApp, 13 mothers and key stakeholders have been interviewed as of August 2021. Along with the fieldwork, the researcher-advocate-policy network is active in community engagement, advocacy, and knowledge mobilisation.

6 JGR Kromberg 'Clinical features, types of albinism, and natural history' in JGR Kromberg & P Manga (eds) *Albinism in Africa: Historical, geographic, medical, genetic, and psychosocial aspects* (2018) 28.

7 As above.

8 Research ethics clearance was obtained from the researchers' universities in Canada; in Tanzania from the National Institute of Medical Research (NIMR) and COSTECH (Tanzania Commission for Science and Technology); and in South Africa from the University of Pretoria.

9 Ikponwosa Ero, the inaugural UN Independent Expert on the enjoyment of human rights by persons with albinism, initiated this network with an invitation to Reimer-Kirkham and Astle to conduct research on albinism, human rights, and cultural/spiritual beliefs and practices. Our acknowledgement to network members: [www.motheringandalbinism.com](http://www.motheringandalbinism.com).

### **3 Human rights situation of mothers impacted by albinism: Making the case for a human rights approach**

Our research underscores the need for a human rights approach to address mothers' experiences of discrimination, harmful practices, gender inequality, and lack of access to necessary services.

#### **3.1 Discrimination**

The study has revealed a near-universal experience of multiple and intersecting discrimination for persons with albinism and their families, with mothers bearing a disproportionate burden.<sup>10</sup> Fueled by superstitious beliefs about albinism, mothers in our study faced discrimination along a continuum of severity from verbal insults, to reduced or hindered access to education and health services for their child, social exclusion, intimate partner violence, and abandonment. Discrimination started at the birth of an infant with albinism, from the reactions of healthcare providers, family, and community members, and continued across the life span of the child or mother with albinism. The discrimination was often based on the colouring of their child with albinism. Due to the hypervisibility of persons with albinism in contrast to the dominant Black citizenry in most parts of Africa, judgements and stigmatisation occur quickly. For example, a South African participant recalled her son being called 'golden boy' and 'swine' while a Tanzanian mother with albinism recalled growing up with dehumanising language such as 'white monkey' and 'ghost' (*zeruzeru*). Based on data from Tanzania and South Africa, mothers of children with albinism face multiple and intersecting discrimination on the basis of gender, disability, and race, resulting in reduced quality of life, heightened morbidity (for example, mental health challenges), and deprivation such as unstable incomes, food insecurity, and unstable housing and shelter.<sup>11</sup>

#### **3.2 Harmful practices**

Mothers impacted by albinism report the extraordinary burden of care and surveillance that is required, especially to protect their children from

10 UNGA 'Women and children impacted by albinism' *Report of the Independent Expert on the enjoyment of human rights by persons with albinism*, Ikponwosa Ero A/HRC/43/42 (24 December 2019). This was based on a survey of persons with albinism and their representative organisations as well as government and other CSOs and national human rights institutions.

11 Reimer-Kirkham et al (n 5) 16.

harmful practices.<sup>12</sup> Harmful practices range from utterance of threats, to forceful removal of hair, trafficking in persons and in body parts, mutilation, and murder.<sup>13</sup> In Tanzania, where there has been a relatively high incidence of reported attacks,<sup>14</sup> particularly against children with albinism, many mothers in our study intervened in direct ways, for example, by accompanying their children to school, quitting jobs to be present with their children, and interrupting kidnapping attempts.<sup>15</sup> In South Africa, where there have been fewer reported incidents, mothers of children with albinism in our ongoing study nonetheless describe a constant state of worry and unease.<sup>16</sup>

Harmful practices, particularly those forms that are accusations of witchcraft and ritual attacks, have been identified as a root cause of human rights violations perpetuated against persons with albinism and their families.<sup>17</sup> In relation to harmful practices in general, the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol)<sup>18</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>19</sup> allude to and prohibit harmful practices. The Maputo Protocol lists some measures on how to respond, while the African Disability Protocol has greatly elaborated on the issue. The African Disability Protocol defines harmful practices taking a broad approach including 'behaviour, attitudes and practices based on tradition, culture, religion, superstition or other reasons, which negatively affect the human rights and fundamental freedoms of persons with disabilities or perpetuate discrimination'.<sup>20</sup> This open-ended list means that the Protocol may accommodate any other forms of emerging harmful practices. This is an important factor, given the dynamic and constantly evolving forms that these practices tend to take in the region with regards to persons with

12 Ero et al 'Women human rights defenders: A case of activism of mothers of children with albinism in Tanzania' in *Handbook of Critical Disability Studies in a Globalizing World* (in review) 12-13.

13 UNGA 'Report of the Independent Expert on the enjoyment of human rights by persons with albinism: A preliminary survey on the root causes of attacks and discrimination against persons with albinism' (2016) A/71/255 (29 July 2016) paras 16 and 39-48.

14 UNGA '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) A/HRC/37/57/Add.1 (20 December 2017) para 52.

15 Ero et al (n 12) 12-13.

16 Interviews with South African participants, January 2021.

17 United Nations General Assembly (UNGA) 'Achievements, accomplishments, challenges and the way forward: An overview of work on the mandate' (2020) *Report of the Independent Expert on the enjoyment of human rights by persons with albinism, Ikponwosa Ero* A/HRC/46/32 21 (December 2020) para 65.

18 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted on 1 July 2003, entered into force 25 November 2005.

19 African Union, African Charter on the Rights and Welfare of the Child, adopted July 1990, at 12 and 13.

20 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of People with Disabilities in Africa (2018) 4 [https://au.int/sites/default/files/treaties/36440-treaty-protocol\\_to\\_the\\_achpr\\_on\\_the\\_rights\\_of\\_persons\\_with\\_disabilities\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf) (accessed 1 June 2021).

albinism. Article 11 of the same Protocol includes as harmful practices 'omens', 'witchcraft', 'ritual killings', 'concealment' and 'derogatory language'.<sup>21</sup> It also protects persons with disabilities from 'exploitation, violence and abuse within and outside the home'.<sup>22</sup> The Protocol proscribes negative representations and stereotyping of persons with disabilities, in both traditional and modern cultural activities, and through the media,<sup>23</sup> and affirms the right to live in the community.<sup>24,25</sup> The Convention on the Rights of Persons with Disability (CRPD) in article 8(1)(b) calls on states to combat stereotypes, prejudices and harmful practices relating to persons with disabilities.<sup>26</sup>

### 3.3 Gender equality

For the mothers in our study, gender inequality operated in complex ways in their everyday lives and was sustained by entrenched constructions about masculinity and femininity in the family context. Gender-based violence and abandonment were experienced by many of the mothers in our study. Women were typically blamed for the birth of a child with albinism, with gendered speculations such as infidelity with a white man, or spiritualised interpretations such as albinism occurring as punishment from god(s), spirits or ancestors for an alleged wrongdoing by the mother.<sup>27</sup> The perceived worth of mothers plummeted as they were deemed 'not woman enough',<sup>28</sup> either because they had albinism or because they gave birth to a child with albinism. Gender inequality meant that for many they were left without resources, power, and control, while being burdened with full responsibility for the welfare of their children.<sup>29</sup>

### 3.4 Stigma and access to services

Mothers from Tanzania and South Africa provided multiple accounts of how stigma interfered with their access to health upon having the child with albinism.<sup>30</sup> Mothers were often not informed that their child was a child with a disability; rather the information tended to focus on the mystique of the child, leaving the mother without access to health information and support. There was often limited access to sunscreen to protect their children from skin cancer. Nearly all the support they received was self-generated through informal cooperation through which they

21 The African Disability Protocol (n 20) 9.

22 The African Disability Protocol (n 20) arts 8 and 9(2)(c).

23 The African Disability Protocol (n 20) arts 18 and 25(g).

24 The African Disability Protocol (n 20) arts 10 and 14.

25 The African Disability Protocol (n 20) arts 21, 22 and 31.

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

27 Reimer-Kirkham et al (n 5); UNGA (n 10).

28 Reimer-Kirkham et al (n 5) 9.

29 Reimer-Kirkham et al (n 5 above) 13.

30 Reimer-Kirkham et al (n 5).

nurtured resilience and built viable micro-enterprises, often with support from non-governmental organisations.<sup>31</sup>

#### **4 Using the Convention on the Rights of Persons with Disabilities (CRPD) and African Disability Protocol to address experiences of mothers impacted by albinism**

The CRPD<sup>32</sup> which has been ratified by both Tanzania and South Africa - and its African counterpart, yet to come into force, the African Charter on Human and Peoples' Rights on the Rights of People with Disabilities in Africa (African Disability Protocol) - if applied simultaneously can adequately<sup>33</sup> respond to human rights violations experienced by mothers impacted by albinism.<sup>34</sup> According to the CRPD, state parties have a duty to prohibit 'all discrimination'<sup>35</sup> and this includes 'discrimination by association'<sup>36</sup> affecting mothers of children with disabilities. This warrants formal measures such as 'effective legal remedies and sanctions in civil, administrative and criminal proceedings, including protection from any acts of discrimination carried out by private entities',<sup>37</sup> as well as 'specific measures'.<sup>38</sup> The African Disability Protocol similarly recognises the need for states to protect family members of persons with disabilities from indirect discrimination. Article 5(2)(b)<sup>39</sup> of the Protocol also calls for specific measures in a manner analogous to the CRPD.<sup>40</sup> These treaties recognise the essential role that families, guardians and caregivers play in the lives of persons with disability. Similarly, the CRPD and the African Disability Protocol recognise multiple and intersecting discrimination. The CRPD's preamble recalls the 'difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination'<sup>41</sup> whilst the Protocol expresses concern at the multiple forms of discrimination people with disabilities face.<sup>42</sup>

31 Ero et al (n 12) 7-8.

32 CRPD (n 26).

33 The African Disability Protocol (n 20).

34 African Union 'List of countries which have signed, ratified/acceded to the Protocol to the [African Disability Protocol]' (2020) 1.

35 CRPD (n 26) art 5(2).

36 CRPD Committee, General Comment 6 (2018) on equality and non-discrimination (2018) UN Doc CRPD/C/GC/6 dated 26 April 2018, paras 17 and 18(b).

37 Para 22 of General Comment 6.

38 Para 28 of General Comment 6.

39 African Disability Protocol (n 20) 6.

40 See art 5(4), paras 28 and 29.

41 CRPD (n 26) 2.

42 African Disability Protocol (n 20).

## 5 Unsettled issues

Associated racial discrimination experienced by mothers of children with albinism is often not addressed. The International Convention on the Elimination of Racial Discrimination (CERD) defines racial discrimination as ‘based on any distinction, exclusion, restriction or preference based on’ *inter alia*, colour

which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>43</sup>

The grounds for discrimination listed in article 1 do not need to be combined, and discrimination based on any one of these triggers are not only subject to the Convention, but also all the instruments applicable in the efforts to combat racial discrimination are equally applicable to persons with albinism.<sup>44</sup> Recently there have been calls for the crimes against people with albinism to be considered hate crimes on the basis of colour.<sup>45</sup> The Independent Expert has called for guidance from the CERD on this matter.<sup>46,47</sup>

## 6 Recommendations

### 6.1 The obligation to take specific measures

Multiple and intersecting discrimination for a small, marginalised group that is historically misunderstood, and which faces harmful practices of a particular and ‘stunningly vicious’<sup>48</sup> nature, calls for adoption of specific measures. Specific measures are used in human rights to accelerate equality and provide advantages to a certain (often historically) underrepresented or marginalised group. While the measures are usually temporary, they can be permanent, depending on ‘context and

43 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol 660, p 195, art 1(1), entered into force 4 January 1969, 2.

44 Such as action plans and other measures taken to implement the Durban Declaration and Programme of Action. See Concluding Observations on the combined fourth to eighth periodic reports of South Africa, Committee on the Elimination of Racial Discrimination (5 October 2016) UN Doc CERD/C/ZAF/4-8 (2016) paras 20-21

45 UNGA (n 17 above) 17-19.

46 As above.

47 UNGA ‘Report of the Independent Expert on the enjoyment of human rights by persons with albinism on the expert workshop on witchcraft and human rights’ A/HRC/37/57/Add.2 (2018) para. 28.

48 OHCHR ‘Zeid calls for action after surge in “stunningly vicious attacks” on people with albinism in East Africa’ (2015) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15673&LangID=E> (accessed 1 June 2021) para 2.

circumstances, including by virtue of a particular impairment or the structural barriers of society'.<sup>49</sup>

As state parties to the CRPD, South Africa and Tanzania have a duty to adopt long-term, in-depth, and widespread measures to deal with the multiple and intersecting discrimination experienced by mothers of children with albinism. Such measures include education about the genetics of albinism and the human rights framework, specifically targeting health workers and community leaders, or other custodians of culture at the community level, targeting parents of children with albinism such as support groups for mothers impacted by albinism with the objective of facilitating the implementation of preventive and accountability measures where rights have been violated. Long term, specific measures are more effective at transforming cultural norms and structures that uphold human rights standards.

The need for specific measures was one of the lessons learned from the Millennium Development Goals (MDGs), an international agenda pursued by all member states of the UN, including Tanzania and South Africa. Many of these goals targeted only a percentage of the mainstream population and progress was measured with averages, instead of disaggregated indicators. Consequently, inequalities affecting specific groups and sub-groups were neither measured nor addressed, even though the situation of many of the groups was 'deteriorating'.<sup>50</sup> The Sustainable Development Goals (SDGs) which set out to continue the MDGs, contain a central pledge 'to leave no one behind'.<sup>51</sup>

The objective of leaving no one behind includes a core aim of ending absolute poverty and discrimination by prioritising and fast-tracking action for those furthest behind. Affirmative action should be taken to ensure that 'populations at risk of being left behind are included from the start' and requires 'enabling people and groups who are left behind to progress at a higher rate than those who are better off'.<sup>52</sup>

Fundamentally, leaving no one behind promotes the right to equality and non-discrimination, which is intrinsic to sustainable development. The adoption of specific measures for mothers impacted by albinism is in accordance with international human rights standards and obligations, and is instrumental in the universal pledge of leaving no one behind. The

49 Para 29 of General Comment 6.

50 UNGA 'Enjoyment of human rights by persons with albinism' *Report by the Independent Expert on the enjoyment of human rights by persons with albinism, Ikponwosa Ero A/73/181* (2018) 14.

51 United Nations Sustainable Development Group 'Leave no one behind' <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> (accessed 1 June 2021).

52 E Stuart & E Samman 'Defining "leave no one behind"' (2017) *Overseas Development Institute* 2 and 3.

Regional Action Plan on Albinism<sup>53</sup> is a compendium of specific measures that both Tanzania and South Africa as member states of the African Union have been called upon to adopt at the national level.<sup>54</sup>

## **6.2 Recognition of discrimination by association**

This commentary has implications for disability rights more broadly. First, the multiple and intersecting discrimination experienced by mothers of children with albinism reflect what can be the case for other mothers of children with disabilities. There is often a lack of recognition of multiple and intersecting discrimination or discrimination by association in the region, as well as a lack of effective mechanisms of legal redress and reparation. Those related to people with disabilities need to receive education on their own rights, and how disability rights laws, among others, protect them. As this research continues, there will be a need to conduct a deeper assessment of how member states have dealt with discrimination by association including emerging patterns from international and regional jurisprudence.

Second, because of these intersecting violations, the case of mothers impacted by albinism illustrates the need for multi-level, multi-vector analyses, instruments, and interventions for sustained change; bringing together national, regional, and international attention and intervention. While the multisectoral approach and the mainstreaming of disability rights has been in progress for many years, this process appears to be slower in the countries we have studied. There is a need to invest in mainstreaming disability rights in Tanzania and South Africa, and to assist in the transition of the concept of disability from the socio-cultural approach to the human rights approach.

## **7 Conclusion**

This study on mothering and albinism underscores the importance of immediate ratification and implementation of the Africa Disability Protocol. This is crucial for the protection of people with disabilities, but particularly for people with albinism and their families in Africa, who are often vulnerable to harmful practices. Harmful practices are recognised in the Africa Disability Protocol as forms of human rights violations indefensible by culture or tradition.<sup>55</sup> We have evidence from this study that harmful practices are often culturally entrenched actions that threaten

53 Actiononalbinism.org (accessed 1 June 2021).

54 ACHPR 'Resolution on the regional action plan on albinism in Africa (2017-2021)' ACHPR/Res.373(LX) (2017) 1 <https://www.achpr.org/index.php?url=sessions/resolutions&id=415#:~:text=Endorses%20the%20Regional%20Action%20Plan> (accessed 1 June 2021).

55 N 20, 4, 6 & 9.

the right to life and security of people with albinism and their family members, and constitute significant attitudinal and structural barriers to the transition from the socio-cultural approach to disability to the human rights approach. Overall, the emerging data from our research underscores the role of the Protocol as a strong complement to the CRPD, for the promotion of disability rights in these countries, and arguably in neighbouring countries with analogous concerns. Therefore, we argue for immediate ratification of the Protocol as an essential platform to promote and protect human rights of people with albinism, mothers and other family members, as well as all other people with disabilities.

# BOOK REVIEW

**MICHAEL ASHLEY STEIN, FARAAZ MAHOMED, VIKRAM  
PATEL & CHARLENE SUNKEL *MENTAL  
HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS (2021)***

*Paul Ochieng Juma\**

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## 1 Introduction

### BOOK REVIEW

*Mental health, legal capacity, and human rights (2021)* edited by Michael Ashley Stein, Faraaz Mahomed, Vikram Patel, and Charlene Sunkel examines legal capacity from the perspective of both Global North and Global South countries. The book thoroughly analyses some of the practices that lead to the infringement of the right to legal capacity and the progresses that have been made in various countries in advancing legal capacity. It proposes reform. Although the book only addresses psychosocial disabilities, it is also relevant to intellectual disabilities.

The book reads as a conversation among 26 scholars of disability rights on the feasibility of making the right to legal capacity under article 12 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)<sup>1</sup> a reality for persons with psychosocial disabilities. This review will not refer to all the contributors but will highlight their main perspectives on disability laws during the pre-CRPD era, post-CRPD era, and reforms to ensuring legal capacity. Drawing on insights from these perspectives, the authors envision the adoption of the human rights

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

approach to disability in order to ensure the right to legal capacity for persons with psychosocial disabilities. The human rights model emphasises pragmatic reforms geared towards participation of persons with psychosocial disabilities and practical realisation of the CRPD while considering the different social, cultural, and economic contexts that exist between different states.

The book is divided into four sections and organised into 26 chapters. The introductory<sup>2</sup> section is the opening chapter which is written by the editors and serves as an elegant and stimulating tour d'horizon of the debate that is to follow. The introduction discusses three models of disability - the biomedical, social, and the human rights model. The first<sup>3</sup> section discusses the concept of legal capacity in which the contributors argue for its universality despite opposition from states. This section challenges the biomedical model of disability while calling for a shift to the human rights model which emphasises legal standing and agency as opposed to institutionalisation, treatment, and isolation. Alicia Yamin argues that the right to health and legal capacity are interdependent and indivisible. Focusing on mental health, Benjamin Barsky, Julie Hannah, and Dainius Puras offer pragmatic reforms on the use of non-coercive human rights models of ensuring the health and caring for persons with psychosocial disabilities during the COVID-19 pandemic. Examples of such methods include offering care through videoconferencing, internet forums, phone applications, text messaging, and emails. Promotion of the dignity and humanity of persons with psychosocial disabilities forms part of Tina Minkowitz's contribution towards the interdependence of article 12 of the CRPD and the right to health. The author advocates for non-discriminatory community-based support mechanisms to care instead of forced interventions that leads to psychiatric violence.

Apart from article 12, the book also considers the CRPD Committee's General Comment 1<sup>4</sup> and the different approaches towards the interpretation of legal capacity. One approach is the absolutist approach to legal capacity. This approach advocates for the reduction and potential abolition of coercive mental health practices and substituted decision-making laws. A counter-approach is the fusion of the absolutist with the non-absolutist approach to legal capacity which allows for both the use of supported and substituted decision-making and involuntary commitment in exceptional circumstances. The detention should be reasonable and proportionate to the circumstances or stipulated in the law such as in the Mental Capacity Act 2016 of Northern Ireland.<sup>5</sup> A further approach

2 MA Stein et al (eds) *Mental health, legal capacity, and human rights* (2021) 1-16.

3 Stein et al (n 2) 17-55.

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

5 G Lynch, C Taggart & P Campbell 'Mental Capacity Act (Northern Ireland) 2016' (2017) 41 *BjPsych Bulletin* 353.

focuses on a holistic view to incapacity which extends beyond mental health laws. This approach argues that the concept of incapacity is not limited to mental health laws and should be extended to all laws that have incorporated the binary notions of capacity and incapacity.

In the second section,<sup>6</sup> legal and policy reforms domesticating article 12 of the CRPD are examined more closely. This section shows how supported decision-making is gaining traction in various parts of the world. Alberto Vasquez shares the Peruvian experience and advancement towards the realisation of the right to legal capacity and the barriers impeding its implementation within Peru's national legal framework. Some of the reforms that have been undertaken in Peru include repealing of all restrictions on legal capacity and the abolition of disability-related guardianship laws.

Unlike Peru, many other countries have not been able to achieve any meaningful reforms on legal capacity and substituted decision-making. Writing about Canada, Faisal Bhaba offers insights on the country's efforts to implement supported decision-making procedures and realise article 12 of the CRPD. Lack of uniformity between federal laws and provincial laws has been cited as one of the challenges affecting the realisation of article 12 of the CRPD in Canada. However, in India the situation is different as stated by Pathare and Kapoor. India's domestic legal capacity law ensures uniformity because it extends to both Central and State governments. Law reform in India has not adopted the absolutist approach to legal capacity. It allows clinicians to assess a patient's capacity for purposes of mental health and treatment. Supported decision-making is also provided for, such as through advance directives which allow a person to plan in advance in case they are not able to express their will and preferences in future. Provisions are also made for nominated representatives.

The book highlights reform efforts that are taking place in Africa where the majority of mental health laws still bear the mark of colonialism and continue to legislate involuntary treatment and institutionalisation of persons with psychosocial disabilities. To give an example, Kenya's Mental Health Care Act of 1986.<sup>7</sup> Kenya is in the process of reforming its legal capacity laws through the Mental Health Amendment Bill.<sup>8</sup> However, although the Bill has not been enacted, it contains provisions on

6 Stein et al (n 2) 124-212.

7 DM Ndeti, J Muthike, & ES Nandoya 'Kenya's mental health law' (2017) 14 *BPsyche International* 96.

8 The Mental Health (Amendment) Bill (2020) <http://www.parliament.go.ke/sites/default/files/2021-03/The%20Mental%20Health%20%28Amendment%29%20Bill%202020.pdf> (accessed 2 October 2021).

involuntary admissions of persons with psychosocial disabilities. In Zambia, reforms on legal capacity have been minimal.<sup>9</sup> Persons with mental illness are barred from enjoying legal capacity and prevented from performing functions that require legal capacity. In Ghana, legal capacity may be limited under the law.<sup>10</sup> Ghana's legal system allows for appointment of guardians in certain instances, for instance to manage a person's finances. Involuntary interventions are allowed but with certain procedural safeguards. This section is of particular interest because it allows readers to compare what is contained in the CRPD and what is practiced in reality. Key to this section is its emphasis on accompanying reform efforts with financial resources. A result-based budgeting programme that allows for a sustained increase in resources has proved to be effective in realising the legal capacity of persons with psychosocial disabilities in Peru, for example the education results-based financing.<sup>11</sup>

Piers Gooding, Bhargavi Davar, Michelle Funk, Joel Corcoran, Cindy Hermasma, Steven Manning and Ulrike Jarkestig Berggren discuss the practice of supported decision-making in the context of non-coercive mental healthcare in section three of the book.<sup>12</sup> They offer innovative interventions in ensuring that persons with psychosocial disabilities are able to participate effectively in decision-making processes. Community oriented methods such as the circle of care model in India, the use of personal ombudsman in Sweden, Finland's open dialogue model, United States' lay support and social networks model, and the clubhouse model are approaches geared towards supporting decision-making abilities of persons with psychosocial disabilities and combating social isolation. The contributors also highlight the importance of conducting more research and training for instance, the World Health Organisation's Quality Rights e-training model, in order to combat stigma and remove barriers that limit the promotion and implementation of the right to legal capacity.<sup>13</sup>

The fourth section of the book<sup>14</sup> deals with the lived experiences of persons with psychosocial disabilities. These experiences relate to coercion

9 A Raw 'You only have rights if you are a person: How Zambia is legislating away the rights of persons with psychosocial disabilities' (June 2019) <https://africanlii.org/article/20190620/you-only-have-rights-if-you-are-person-how-zambia-legislating-away-rights-persons> (accessed 2 October 2021).

10 Human Rights Watch 'Like a death sentence: Abuses against persons with mental disabilities in Ghana' (2 October 2012) <https://www.hrw.org/report/2012/10/02/death-sentence/abuses-against-persons-mental-disabilities-ghana> (accessed 2 October 2021).

11 The World Bank 'Results-based financing in education: Peru's incentive program and "performance commitments"' (1 February 2021) <https://www.worldbank.org/en/news/feature/2021/02/01/results-based-financing-in-education-peru-incentive-program-and-performance-commitments> (accessed 2 October 2021).

12 Stein et al (n 2) 213-287.

13 World Health Organisation 'QualityRights materials for training, guidance and transformation' <https://www.who.int/publications/i/item/who-qualityrights-guidance-and-training-tools> (12 November 2019) (accessed 2 October 2021).

14 Stein et al (n 2) 288-412.

in mental health institutions and the importance of peer support systems. Advocacy is suggested as one of the ways of ensuring the capacity of persons with psychosocial disabilities. The importance of collective lived experience is highlighted in the United States of America, Denmark, Kenya, Greece, Canada, Cameroon, Japan and India. It reveals the challenges states parties are facing in the implementation of article 12 of the CRPD. Lack of procedural justice is highlighted as the main challenge facing persons with psychosocial disabilities right to legal capacity. Collective lived experiences also measure the effectiveness of states implementation frameworks and the different supported decision-making models. The aim of this section is to raise awareness and encourage practical reforms to coercion and involuntary admission into mental health institutions.

*Mental health, legal capacity, and human rights* clearly tackles legal capacity from different perspectives. The strength of this book is that it provides for ways of ensuring incremental change in the implementation process of article 12 of the CRPD depending on the circumstances of a particular state. It provides innovative methods of supporting persons with mental disabilities and ensuring their legal capacity which may eventually lead to the elimination of guardianship laws and reduce disability related discrimination. The book has the potential of serving as a primer for anyone new to disability issues and the CRPD. There is no doubt that the CRPD is gradually reforming the legal landscape of legal capacity and supported decision-making. What is clear is that there is no one-size-fits-all approach on the nature of the reforms that should be undertaken. Emphasis should be placed on the different social and economic context of different states.