

African Disability Rights Yearbook 2022

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.



African Disability Rights Yearbook 2022



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TABLE OF CONTENTS

	EDITORIAL	v
	SECTION A: ARTICLES	
1	The need to go beyond ratifying the Marrakesh VIP Treaty: the case of Ethiopia <i>Yohannes Takele Zewale</i>	3
2	A critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation: a case study of Kenya's legal framework <i>Shirley Genga & Meryl du Plessis</i>	17
3	Imperatives of securing equitable access to healthcare services for persons with disabilities in Nigeria <i>Uzoma Prince-Oparaku & Ngozi Chuma-Umeh</i>	41
4	Advance directives in mental health: A solution that legitimatises the problem? <i>Alexious E Silombela Kamangila</i>	62
5	Criteria for law reform on comprehensive sexuality education for children with disabilities in South Africa <i>Thina Mthembu & Willene Holness</i>	78
6	Reservation on the CRPD from a Mauritian perspective <i>Zahra Hosanee</i>	110
	SECTION B: COUNTRY REPORTS	
	Republique du Burkina Faso <i>Soka Armelle Ngoutane Peyou</i>	141
	Republique du Cap-Vert <i>Serge Marcellin Tengho</i>	168
	Republique of the Seychelles <i>Gerard Emmanuel Kamdem Kamga</i>	187
	The Federal Republic of Somalia <i>Marianne Severin</i>	202
	SECTION C: REGIONAL DEVELOPMENTS	
	The Marrakesh Treaty and African copyright laws: Lessons for the African Region from <i>Blind SA v</i> <i>Minister of Trade, Industry and Competition</i> <i>Paul Ochieng Juma</i>	231

Recognising the testimonial competence of persons with intellectual and psychosocial disabilities in Southern Africa: Lessons from Lesotho	243
<i>Dianah Msipa</i>	

BOOK REVIEW

Chalotte Glintborg and Manuel L De La Mata (eds) <i>Identity construction and illness narratives in persons with disabilities</i> (2021)	253
<i>Faith Njahîra Wangari</i>	

EDITORIAL

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

Section A of this volume features six articles by: Yohannes Takele Zewale on the need to go beyond ratifying the Marrakesh VIP Treaty; Shirley Genga and Meryl du Plessis on a critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation; Prince-Oparaku Uzoma and Ngozi Chuma-Umeh on imperatives of securing equitable access to healthcare services for persons with disabilities in Nigeria; Alexious E Silombela Kamangila on advance directives in mental health; Thina Mthembu and Willene Holness on criteria for law reform on comprehensive sexuality education for children with disabilities in South Africa; and Zahra Hosanee on reservation on the CRPD from a Mauritian perspective.

Section B contains four country reports by: Soka Armelle Ngoutane Peyou on Burkina Faso; Serge Marcellin Tengho on Cape Verde; Gerard Emmanuel Kamdem Kanga on Seychelles and Marianne Severin on Somalia.

Section C on regional developments contains two commentaries by: Paul Ochieng Juma on the Marrakesh Treaty and African copyright laws; and Dianah Msipa on recognising the testimonial competence of persons with intellectual and psychosocial disabilities in Southern Africa.

The 2022 volume ends with a book review of *Identity construction and illness narratives in persons with disabilities* (2021) which is edited by Charlotte Glintborg and Manuel L de la Mata. The book is reviewed by Faith Njahîra Wangarî.

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

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SECTION A: ARTICLES

THE NEED TO GO BEYOND RATIFYING THE MARRAKESH VIP TREATY: THE CASE OF ETHIOPIA

Yohannes Takele Zewale*

Summary

Ethiopia, a home for over four million persons with visual impairment ratified the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh VIP Treaty) on 13 March 2020. However, the Treaty cannot succeed in Ethiopia without an additional legislative measure to meet its humanitarian and social development goals and benefit persons with visual impairment. First, the existing Copyright Proclamation 410 of 2004 (Proclamation) is incompatible, in many respects, with the Marrakesh VIP Treaty. Second, there are literary and artistic works that neither the Marrakesh VIP Treaty nor the Proclamation covers in their scope of application. The main purpose of this research is, therefore, to assess the compatibility of the Proclamation with the Marrakesh VIP Treaty and to show the distance Ethiopia needs to go beyond ratifying the Treaty.

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1 Introduction

Persons with visual impairment¹ comprise nearly 4 per cent of the world's population. Based on the WHO global data on visual impairments in 2019, the estimated number of persons with visual impairments in the world is 285 million, with 39 million blind and 246 million having low vision.² Likewise, according to the 2006 survey of the Ministry of Health of Ethiopia (MOHE) and other stakeholders working on visual impairment, the number of persons with visual impairment living in Ethiopia was estimated to be 4 million.³ This was nearly five per cent of the country's total population.

Persons with visual impairment have the right to access, on an equal basis with others, works protected by copyright and related rights. They have the right to the provision, in a timely manner and without additional cost, of all information in the public domain in formats that are accessible to them, such as Braille, audio, large print, and electronic text.⁴ Likewise, they have the right to the provision of adapted equipment and access software to enable persons with visual impairment to access the Internet and other information, whether it is electronically stored or not.⁵ Until recently, however, their right to information and communication was not given the required attention.

A person with visual impairment living in a developed country with a high standard of living has, for example, only one out of every 20 books available to him or her.⁶ In the least-developed countries, however, the availability of published books to a visually impaired person drops to only one book out of every 100.⁷

- 1 American Foundation for the Blind 'Low vision and legal blindness terms and descriptions' <https://www.afb.org/blindness-and-low-vision/eye-conditions/low-vision-and-legal-blindness-terms-and-descriptions> (accessed 22 March 2022). "Visual impairment" is a general term that describes a wide range of visual function, from low vision through total blindness.' 'Low vision is [functionally defined as] uncorrectable vision loss that interferes with daily activities while total blindness is the complete lack of light perception and form perception, and is recorded as "NLP", an abbreviation for "no light perception."' "
- 2 World Health Organisation 'World report on vision' (2019) <https://www.who.int/publications/i/item/9789241516570> (accessed 21 March 2022).
- 3 Federal Ministry of Health of Ethiopia 'National survey on blindness, low vision and Trachoma in Ethiopia' (2006) http://www.pbunion.org/Countriesurveyresults/Ethiopia/Ethiopian_National_Blindness_and_trachoma_survey.pdf (accessed 21 March 2022).
- 4 World Blind Union 'Manifesto for a United Nations Convention on the Rights of People with Disabilities: "Equal rights and full inclusion as world citizens"' <https://www.un.org/esa/socdev/enable/rights/wgcontrib-wbu.htm> (accessed 22 February 2022).
- 5 As above.
- 6 J Sullivan 'Study on copyright limitations and exceptions for the visually impaired' (2007) https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696 (accessed 21 February 2022).
- 7 As above.

The situation in Ethiopia may be even worse due to the low literacy rate among persons with visual impairment, the absence of access-promoting copyright laws, and the lack of well-developed assistive technology supporting local languages. The fact that Ethiopia is a signatory and ratifier of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁸ has not contributed to the respect of the right of persons with visual impairment to access information, probably because of the Treaty's own loophole to safeguard this very right for persons with visual impairment. Recently, however, in ratifying the Marrakesh VIP Treaty, we can say that Ethiopia has moved one step forward to ensure information access for persons with visual impairment.⁹

This article examines the gap between the Ethiopian Copyright Proclamation and the Marrakesh VIP Treaty regarding the right of persons with visual impairment to access information. The article has four sections. Section 1 is the introduction. In section 2, I will briefly discuss the right of persons with visual impairments to access information in the CRPD and the World Intellectual Property Organisation (WIPO) international copyright treaties. Section 3 shows the primary reasons why Ethiopia must do more than just ratify the Marrakesh VIP Treaty. Section 4 is the conclusion.

2 Reviewing the CRPD and WIPO copyright treaties: Setting the scene

Since the right to access information is one of the basic human rights, it is not surprising that it is clearly included in the CRPD.¹⁰ Different WIPO copyright treaties have also given copyright limitations and exceptions (L&Es), also known as the three-step test, to promote access to information for all. However, both the CRPD and the WIPO copyright treaties have rarely succeeded in realising the right of persons with visual impairments to access information in an alternative format. This failure led to the creation of the Marrakesh VIP Treaty – one of the WIPO-administered international copyright treaties.

8 UN Treaty Body Database 'Treaty ratification status of Ethiopia' https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-15&src=IND (accessed 30 September 2022).

9 A Proclamation to Ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, and Print Disabled 1191 of 2020.

10 Art 21 of the UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106 (2007) (CRPD).

2.1 The UNCRPD

The CRPD is the first comprehensive international human rights treaty to realise the rights of persons with disabilities, the genus of which also includes persons with visual impairment. It adds new requirements for state parties to previous human rights treaties to promote, protect, and fulfil the rights of persons with disabilities on an equal footing with others. Moreover, with respect to political, cultural, and national/community life, it protects for persons with disabilities ‘the freedom to seek, receive, and impart information and ideas on an equal basis with others and through all forms of communication of their choice’.¹¹

The CRPD requires state parties to ensure the provision of ‘information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost’.¹² It also requires state parties to facilitate ‘the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes, and formats of communication of their choice by persons with disabilities in official interactions’.¹³ Moreover, states are obligated to take all appropriate measures ‘urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities’.¹⁴

The CRPD further obligates states to ensure, without discrimination and on the basis of equal opportunity, ‘an inclusive education system at all levels and lifelong learning’.¹⁵ It also states that ‘cultural materials, such as television programs, films, theatre, and other cultural activities’, as well as ‘cultural performances or services, such as theatres, museums, cinemas, libraries, and tourist services’, must be accessible to persons with visual impairment.¹⁶ Finally, it requires states to ensure that persons with disabilities enjoy the right to be informed and to participate in elections, public administration, public affairs, and decision-making processes.¹⁷

11 As above.

12 Article 21(a) of the CRPD.

13 Article 21(b) of the CRPD.

14 Article 21(c) of the CRPD.

15 Article 24 of the CRPD.

16 Article 30 of the CRPD.

17 Article 29 of the CRPD.

However, the CRPD is not comprehensive enough in this respect as it, through article 21 on 'Freedom of expression and opinion and access to information', mandates state parties only to encourage and urge mass media and private entities to make their services accessible respectively.¹⁸ On the scope of paragraphs (c) and (d) of article 21, it is obvious that the Convention uses wording that is more elastic concerning private entities compared with paragraphs (a) and (b) of the same article concerning states.¹⁹ The terms 'urge' and 'encourage' make it unclear how the state is to act in relation to private entities to ensure that the rights of persons with disabilities are exercised on an equal basis with others.²⁰

In addition, the CRPD is not too specialised to deal in-depth with the technical facets of copyright law. It is not expected that this general law, which deals with the numerous rights of persons with disabilities generally, will dig into the technical details of copyright and address the right of persons with visual impairments to access information. It could thus be argued that relying solely on the CRPD is unlikely to overcome the informational accessibility barriers encountered by persons with visual impairment.

2.2 Earlier WIPO international copyright treaties

The 1967 Stockholm revision to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) introduced to international copyright law the existing L&Es for exempting from illegality an otherwise rights-infringing reproduction of a person's work.²¹ Accordingly, L&Es are granted if the following three requirements are satisfied:

- there must be a specific special case;
- there must not be conflict with the normal exploitation of a work; and
- the L&Es must not unreasonably prejudice the legitimate interests of the author.²²

According to a report to WIPO on existing L&Es, a reading of the Berne Convention that provides for sufficient production of materials to meet the needs of persons with visual impairment appears possible, but it is likely that unambiguous drafting is required to comply with the conditions.²³ According to the report, an L&Es provision for the rights of persons with

18 R Cera 'Article 21 (freedom of expression and opinion, and access to information)' in VD Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A commentary* (2017) 395.

19 As above.

20 As above.

21 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 828 UNTS 221.

22 As above.

23 Sullivan (n 6).

visual impairment would likely only work if the use under the exemption does not conflict with the rights holder's existing and potential future markets, or otherwise create economic competition with the rights holder.²⁴ Moreover, prominent rights holders have strongly opposed non-market solutions, such as a treaty-based mandatory copyright exemption for persons with visual impairment, even where the market has failed to develop solutions in any meaningful way.²⁵ Thus, the Berne Convention, including through its revisions, was not able to facilitate the right to access information by persons with visual impairment.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) similarly offers limited opportunities for exempted use of copyrighted material for the public interest. Article 15(1) of the Convention provides treaty-specific exemptions, allowing states to create national exemptions for four types of uses: 'private use; brief excerpted use for news reporting; ephemeral fixation of broadcast organisation material by that organisation and for its own use only; and scientific and teaching use'. The latter three exceptions, by their terms, do not provide access for persons with visual impairment, and the 'private use' exception suggests non-public use incompatible with the general right to access information by persons with visual impairment.²⁶ Furthermore, its scope is too narrow, encompassing only performances, phonograms, and broadcasts to address the rights of persons with visual impairment to access many other literary and artistic works.

Relatively speaking, because of their recency, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) were expected to guarantee the right much better than the Berne and Rome Conventions. However, the L&Es in both the WPPT and the WCT are not different from the three-step test from the Berne Convention.

Article 1(4) of the WCT unequivocally states that 'contracting parties shall comply with articles 1 to 21 and the Appendix of the Berne Convention'. Furthermore, the reproduction right, as set out in article 9 of the Berne Convention, and the exceptions permitted thereunder, applies fully in the digital environment, particularly to the use of works in digital form.

The WCT, however, confines its L&Es to the rights of public distribution, rental, and communication of literary and artistic works in digital form.²⁷ As a result, by limiting its L&Es to the public distribution, rental, and communication of literary and artistic works, the WCT falls short of fully

24 As above.

25 A Scheinwald 'Who could possibly be against a treaty for the blind?' (2012) 22 *Fordham Intellectual Property, Media and Entertainment Law Journal* 445 at 446.

26 As above.

27 See articles 6-10 of the WIPO Copyright Treaty (1996) (WCT).

addressing the right of persons with visual impairment to information in accessible formats better than the Berne Convention.²⁸

The WPPT updates the copyright protections and limitations established in the Rome Convention. It does not require compliance with the preceding Treaty, in this case, the Rome Convention.²⁹ However, this does not improve the realisation of the right to access information by persons with visual impairment, as the only exemption in the WPPT is the same-kind test, which, as noted in the case of the Rome Convention, does not address this problem.

Furthermore, the three-step test is not a mandatory test: states are free to reject copyright L&Es for persons with visual impairments or any other population, regardless of whether those L&Es are statutory or policy-based.³⁰ Thus, although some commentators believe that the three-step test can in fact be the vehicle of meaningful assistance to persons with visual impairment, multilateral IP treaties only minimally support the right of persons with visual impairment to access information in born-accessible or alternative publications.³¹ Due to all these failures to realise the right of persons with visual impairments to access information, the Marrakesh VIP Treaty was adopted in 2013 and came into effect in 2016.³²

2.3 The Marrakesh VIP Treaty

The Marrakesh VIP Treaty is the most recent addition to the collection of international copyright treaties overseen by WIPO. Its major objective is to provide a set of legally required restrictions and exceptions for the benefit of its beneficiaries, who are mostly but not exclusively persons with visual impairment.³³ It has a clear humanitarian and social development goal.³⁴

The Treaty calls for the introduction of a uniform set of L&Es to copyright laws by contracting parties to allow for the reproduction, dissemination, and availability of published works in forms made accessible to beneficiaries and the exchange of those works across international borders.³⁵ Published works refer to ‘works in the form of text,

28 As above.

29 Article 1(2) & (3) of the WIPO Performances and Phonograms Treaty (1996) (WPPT).

30 Scheinwald (n 25) 447.

31 As above.

32 See Preamble & article 3 of the Marrakesh VIP Treaty.

33 Article 3 of the Marrakesh VIP Treaty.

34 World Intellectual Property Organisation ‘Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled’ https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html (accessed 28 September 2022).

35 Articles 3-11 of the Marrakesh VIP Treaty.

notation, and/or associated illustrations, as well as audio books, whether published or otherwise made publicly available in any media'.³⁶

Another important feature of the Treaty is the concept of 'authorised entities', which refers to the organisations in charge of making works available, distributing them to beneficiaries, and carrying out cross-border exchange of such works.³⁷ 'Authorised entities' are either specifically authorised or 'recognized' by the government as entities that provide many functions, including education and information access to beneficiary persons.³⁸ They have the duty to establish and follow their own practices in several areas, including establishing that the persons they serve are beneficiary persons, providing services only to those persons, discouraging unauthorised uses of copies, and maintaining 'due care' in handling copies of works.³⁹

The Treaty provides specific rules for both domestic and cross-border L&Es. First, it calls for state parties to stipulate L&Es to domestic copyright law for beneficiary persons.⁴⁰ Such L&Es govern the rights to reproduce, distribute, and make works publicly available.

Authorised entities may create accessible format copies for a non-profit, which can be distributed through non-commercial lending or electronic communication.⁴¹ The prerequisites for this activity include having legal access to the work; making only the changes necessary to make the work accessible; and providing the copies only for use by beneficiaries.⁴² Beneficiary persons may also make a personal use copy where they have lawful access to an accessible format copy of a work.⁴³

Second, the Treaty mandates that, under certain restrictions, contracting parties must permit the import and export of copies in accessible formats (referred to as cross-border exchange of works).⁴⁴ In other words, when an accessible format copy may be made in accordance with national law, that accessible copy may also be imported to another contracting party without the rightsholder's authorisation. In terms of exportation, an authorised entity may distribute or make accessible format copies available to a beneficiary person or another authorised entity in another contracting party. As long as they adhere to their three-step obligations, the Treaty gives contracting parties the discretion to execute

36 Article 2(a) of the Marrakesh VIP Treaty.

37 Articles 2 (c), 4 (2) & 5 of the Marrakesh VIP Treaty.

38 Article 2 (c) of the Marrakesh VIP Treaty.

39 As above.

40 Article 4 of the Marrakesh VIP Treaty.

41 Article 4(2)(a) of the Marrakesh VIP Treaty.

42 As above.

43 Article 4(2)(b) of the Marrakesh VIP Treaty.

44 Articles 5 & 6 of the Marrakesh VIP Treaty.

its terms while taking into consideration their own legal frameworks and customs, including determinations on ‘fair practices, transactions, or uses’.

However, it cannot be said that the Marrakesh Treaty is a panacea for the problems associated with the right to access information for persons with visual impairment, particularly in least-developed countries that are hardly regarded as an important destination for the development and market of assistive technology. Because the Treaty does not address works without copyright protection, non-copyrightable works may remain inaccessible to persons with visual impairment. Hence, for countries like Ethiopia, it may be necessary to go beyond ratifying the Treaty.

3 Factors to move beyond ratifying the Marrakesh VIP Treaty

Under the Ethiopian copyright Proclamation 410/2004,⁴⁵ copyright L&Es are provided under articles 9 through 19. However, except in relation to the exclusive right of reproduction under article 9(2)(e), the Proclamation does not attempt to incorporate the L&Es. Even worse, the L&Es – although incorporated in respect of the exclusive right of reproduction – has been recognised as missing its major component, ‘special case’. The scope of the law is even too limited to be in compliance with the Marrakesh VIP Treaty. This is in addition to the coverage gaps that the two laws have in common. This and other legal gaps, as illustrated in the paragraphs that follow, call for additional legislative action in addition to ratifying the Marrakesh VIP Treaty.

3.1 Reproduction for personal purposes

The first paragraph of article 9(1) of the Proclamation reads:

The owner of copyright cannot forbid the private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes.

This provision allows a user of copyright material to reproduce a copy of the work without being constrained by copyright considerations. However, only physical persons who are owners of the original copy are allowed to benefit from this L&E provision. Authorised entities – introduced under article 2(c) of Marrakesh VIP Treaty – cannot reproduce published works in accessible format, although they are the owners of the original copy. This means, as beneficiaries of this L&E are physical persons only, authorised entities such as the Ethiopian National Association for the Blind or universities cannot reproduce published works

45 Copyright and Neighboring Rights Protection Proclamation 410 of 2004.

in alternative formats for private consumption by persons with visual impairment.

3.2 Incomplete recognition of the L&Es

Article 11 of the Marrakesh VIP Treaty, in setting general obligations of contracting parties on L&Es, reiterates the three-step test as provided by its preceding WIPO copyright treaties. Accordingly, it states:

Contracting parties may provide for limitations of or exceptions to the rights granted to authors in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

On the contrary, article 9(2)(e) of the proclamation reads:

The provision permitting private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes does not extend to reproduction which would conflict with or unreasonable harm the normal exploitation of the work or the legitimate interest of the author.

This provision has not included the three-step test in its fullest sense as stated under article 11 of the Treaty; that is, of the three components of the test – the limitation should be limited to certain special cases, it should not conflict with the normal exploitation of the work, and it should not unreasonably prejudice the legitimate interests of the author – the first one, ‘special case’, has been removed. On the other hand, there is no question that persons with visual impairment constitute a ‘special case’ under the first limb of the three-step test. However, with the element of ‘special case’ removed from the three-step test, persons with visual impairment cannot claim, whenever legally challenged, the protection extended by this first component. This makes the proclamation directly run afoul of the Marrakesh VIP Treaty.

3.3 Limited application of the L&Es

According to article 4(1)(a) of the Marrakesh VIP Treaty:

Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public ... to facilitate the availability of works in accessible format copies for beneficiary persons.

As can be understood from this provision, L&Es are not limited to the right of production. It must also be extended to include the right of distribution, and/or making them available to the general public.

On the other hand, as provided under article 9(2)(e) of the Proclamation, the L&Es, aside from incomplete recognition, are limited to the right of reproduction. They do not cover the rights of authors to distribute works and make them available to the public.

Such a narrow scope of L&Es application cannot achieve the desired result of ending or at least reducing the book-famine among persons with visual impairment. It renders concepts of the Marrakesh VIP Treaty such as authorised entities, cross-border exchanges, and the importation and exportation of accessible books inapplicable. It must instead extend its effect – beyond the right of reproduction – to the right of distribution and of making works available to the public, which are core areas of focus for the Marrakesh VIP Treaty – as provided under articles 4(1)(a), (2) and (5). Otherwise, any L&Es provision may hardly serve, while limiting itself to the right of reproduction, to promote the right to access information by persons with visual impairment.

3.4 Limited coverage of works

Pursuant to article 2(a) of Marrakesh VIP Treaty, ‘work’ means ‘literary and artistic works ... in the form of text, notation and/or related illustrations, [and audio books] whether published or otherwise made publicly available in any media’.

As seen from this provision, the Marrakesh Treaty covers works published in paper or electronic copy, online or offline, audio or any other means. The way they are published does not excuse their inaccessibility. The Proclamation, however, reflects a position contrary to this.

Article 3 provides that the Proclamation applies to works published in hard copy. In other words, the Proclamation does not apply to literary and artistic works in electronic copy, audio, online or otherwise published. Thus, the L&Es embodied in the Proclamation, even to the extent of their weakness, do not apply to works published outside of paper. This would make the Proclamation inconsistent with the Treaty, which also covers ‘works lawfully made available to the public in different ways other than paper’.

3.5 Computer and mobile applications

Pursuant to articles 9(2)(d) and 14 of the Proclamation, ‘The provision permitting’ private reproduction of a published work in a single copy by a physical person exclusively for his own personal purposes does not extend to reproduction of a computer program except ... ‘single copy reproduction, or adaptation of a computer program’.

In Ethiopia, a computer application is, regardless of its technical quality, a copyrightable subject-matter. Article 2(30) of the Proclamation states: “‘Work’ means a production in the literary, scientific, and artistic fields. It includes ... books, booklets, articles in reviews and newspapers, computer programs.’ As the listing is illustrative, the definition can also include ‘mobile applications’.

Induced by the fact that computer and mobile applications are becoming popular in the market, nowadays, many authors are showing a high tendency to turn their books into applications to sell in the major app stores, including Google Play, iTunes, and Amazon. The applications may not be, however, screen-reader friendly.

On the other hand, although applications are protected subject-matters under article 3 of the Proclamation, the L&E to the right of reproduction under article 9(2)(e) does not apply to an application developer, excepted by article 9(2)(d), to make his work screen-reader friendly; nor permits, without authorisation by the right holder, reverse-engineering or the writing of ‘add-ons’ or ‘scripts’ to modify and make applications screen-reader friendly. What is worse is that the Marrakesh VIP Treaty does not cover literary and artistic works turned into computer or mobile applications in its definition of ‘works’. It is surprising that the Marrakesh VIP Treaty left out computer applications while its predecessor, the WCT, protects computer applications as literary works within the meaning of article 2 of the Berne Convention.⁴⁶

3.6 Public domain works

Some works, albeit ‘public domain’, may be as important as the copyright-protected ones for persons with visual impairment; hence, whether they are accessible matters a lot. Under article 5(b) of the Proclamation, any official text of a legislative, administrative, or legal nature, as well as official translations thereof, is, for example, non-copyrightable subject-matter.

In addition, a plethora of other literary and artistic works are physically and digitally published and freely available for the public these days. Many of them are, however, inaccessible, if they are written in local languages.

Highly advanced products of assistive technology do not support local languages. For example, the most popular screen-reading software developed by Freedom Scientific, Jaws, is a software solution that allows persons with visual impairment to OCR and read written materials. It does not, however, support the languages of the least developed countries,

⁴⁶ Article 4 of the WCT.

perhaps due to the low market opportunity. Hence, if a work, despite being in the public domain, is written in local languages and published in an inaccessible format, persons with visual impairment cannot use JAWS or similar other software to OCR and read that work. It is, however, possible to publish those works, from the outset, as born-accessible. Be that as it may, the Proclamation, being a copyright proclamation, does not cover public domain works and obliges publishers or authors to make such works publicly accessible. This is worsened by the fact that Ethiopia does not yet have a comprehensive anti-discrimination law for persons with visual impairment to challenge discrimination and claim the work in an alternative format. Similarly, the Marrakesh VIP Treaty does not cover 'works', despite literary and artistic, if they are public domain works. This calls for measures beyond ratifying the Marrakesh VIP Treaty.

4 Conclusion

People may not hesitate to conclude that persons with visual impairments have the right to access information. And just like persons with normal sight, persons with visual impairment who want to read may want to do so for a variety of reasons, for example, as part of an educational activity, for leisure or to obtain information. There are many reasons why a person may not be able to read a book. For instance, the text may not have been made available to the public; the reader cannot afford to buy the work; they have no access to a library from which they might borrow the work because the local library has not acquired the work; or the work is in a language that the person does not understand. Persons with visual impairment, on the other hand, may be unable to read a work due to the lack of works in accessible formats.

As regards making works available in accessible format, there are no specific provisions in the CRPD and the WIPO copyright treaties which specifically provide for L&Es for the benefit of persons with visual impairment. The Marrakesh VIP Treaty has thus come into the picture with a view to filling this gap. Ethiopia has recently ratified this Treaty on 13 March 2020.

However, mere ratification of the Treaty cannot guarantee the right to information for persons with visual impairments. The Treaty is not even comprehensive enough to cover as many literary works as possible. Likewise, the Proclamation does not provide sufficient room for the rights of persons with visual impairments to access information. As a result, despite ratification of the Marrakesh VIP Treaty, Ethiopians with visual impairment continue to face challenges because of the lack of an 'access' law that promotes the availability of works in a suitable format.

Amending the Proclamation to be in compliance with the Marrakesh VIP Treaty is thus necessary in order to facilitate, in addition to what the

Treaty provides, the availability of work for persons with visual impairments on an equal footing with others. However, in the absence of a comprehensive anti-discrimination law and in the absence of attention paid to the local languages by assistive technology companies, the ratification of the Marrakesh Treaty will not bring any solution by itself. Thus, due to the abundance of works not covered by the existing copyright law and even by the Treaty itself, a legislative measure should also be taken with a view to making non-copyrightable works accessible for persons with visual impairment.

A CRITICAL ANALYSIS OF THE DUTY
TO PROVIDE REASONABLE
ACCOMMODATION FOR EMPLOYEES
WITH PSYCHOSOCIAL CONDITIONS
AS AN EMPLOYMENT
ANTI-DISCRIMINATION OBLIGATION:
A CASE STUDY OF
KENYA'S LEGAL FRAMEWORK

Shirley Genga* & Meryl du Plessis**

Summary

This article examines whether Kenya adequately protects employees with psychosocial conditions from discrimination, specifically the unjustified denial of reasonable accommodation by an employer. To determine this, it will consider the rights of employees with psychosocial disabilities in employment and the concomitant duties that are imposed on state parties and employers when it comes to the provision of reasonable accommodation under the UN Convention on the Rights of Persons with Disabilities (CRPD). Thereafter, the national disability anti-discrimination legal framework in Kenya that protects employees with psychosocial conditions from discrimination in employment will be discussed, looking specifically at the denial of reasonable accommodation as a form of discrimination. To begin with, it will delve into the place of the CRPD under Kenyan law, as this is necessary in order to understand when and how the CRPD applies under Kenya's law, and the resulting legal implications. Besides that, the Constitution and specific anti-discrimination legislation that provides legal responses to an employee with psychosocial disabilities who is denied reasonable accommodation in employment will be critically analysed. Finally, the article evaluates whether the available legal framework provides adequate protection to persons with psychosocial disabilities from discrimination in employment.

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1 Introduction

In 2017 the World Health Organisation (WHO) estimated that one in five people at the workplace experience a psychosocial condition (mental health condition or mental illness),¹ worldwide.² According to growing evidence worldwide, mental illness is a major contributor to the burden of disease and disability.³ Five of the ten leading causes of disability are mental health conditions.⁴

Mental ill health is a universal phenomenon that cuts across different social and cultural divides.⁵ It is as relevant in high-income countries as it is in low-income countries.⁶ Although mental health has become a national health priority in some countries, it is still an overlooked issue in most African countries.⁷ In fact, 64 per cent of African countries do not have any mental health legislation or fail to adequately promote the rights of persons with mental illnesses.⁸ In Kenya, the rights of persons with psychosocial conditions are often ignored or given little attention. This is fuelled by the misconceptions people have about such conditions.

One in 20 Kenyans would prefer to take their family member with a psychosocial condition to a faith healer or medicine man rather than seeking medical intervention.⁹ This is fuelled by the fact that psychosocial conditions are believed to be as a result of a familial defect or witchcraft.¹⁰

- 1 Psychosocial conditions refer to mental health conditions that trigger legal protection, regardless of whether they qualify as disabilities or not. Further, for the purposes of this research they include mental health conditions that are recognised clinically in one of, or both the American Psychiatric Association's Diagnostic and Statistical Manual 5th Edition (DSM V) and the 11th Revision of the WHO's *International classification of diseases* (ICD-11). See American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (2013); World Health Organisation *International classification of diseases* 11 ed (2019). While ICD-11 was adopted in 2019, it only came into effect on 1 January 2022.
- 2 PAHO & WHO 'World Mental Health Day, 10 October 2017: Mental Health in the workplace' (2017) https://www.paho.org/hq/index.php?option=com_content&view=article&id=13739%3Aworld-mental-health-day-2017&catid=9485%3Amental-health-day&Itemid=42130&lang=en (accessed 9 October 2022).
- 3 G Harnois & P Gabriel 'Mental health and work: Impact, issues and good practices' (2000) 1.
- 4 As above.
- 5 D Bhugra et al 'The future of Psychiatry Commission – Authors' reply' (2018) 5 *The Lancet Psychiatry* 775; N Drew et al 'Human rights violations of people with mental and psychosocial disabilities: An unresolved global crisis' (2011) 378 *The Lancet* 1664.
- 6 K Mathias et al 'Multiple barriers to participation for people with psychosocial disability in Dehradun district, North India: A cross-sectional study' (2018) 8 *BMJ Open* 1.
- 7 GCE Obame 'Developing mental health laws in Ghana, Kenya, and Zambia' (2017) 15 *Columbia Social Work Review* 1.
- 8 As above.
- 9 Obame (n 7) 39.
- 10 Kenya National Commission on Human Rights 'Silenced minds: The systematic neglect of the mental health system in Kenya: A human rights audit of the mental health system in Kenya' (November 2011) 38 http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf (accessed 8 October 2022).

Many are also of the view that persons who self-identify or are diagnosed with mental health conditions as a result of alcohol or substance abuse are responsible for their own illness.¹¹ Besides that, there is not only a lack of awareness on mental health, but deep-rooted stigma and discrimination against persons with mental illness.¹² Consequently, persons with psychosocial conditions are assumed to be less competent and unable to live productive lives.¹³

Notably, the most current national survey was in 2019 and it found that Kenya has a national disability rate of 2.2 per cent.¹⁴ However, it failed to capture psychosocial disabilities as a disability category.¹⁵ A 2017 WHO report on the 'prevalence of depression and anxiety disorders in Africa estimated that Kenya had 1.9 million persons who are clinically depressed', which constitutes 4.4 per cent of the total population.¹⁶ It also indicated that there are '1.3 million cases of anxiety disorders', which constituted 3.1 per cent of the total population at the end of 2016.¹⁷ Worth noting, however, is that it is common for mental health cases to go unreported and undiagnosed, thus such figures give just a glimpse of the prevalence of mental health conditions in Kenya.¹⁸

There is no available accurate data on the employment of persons with psychosocial disabilities in Kenya.¹⁹ As a result, it is not possible to get a

11 As above.

12 As above.

13 As above.

14 It adopted the Washington Group short set of questions on disability in data collection. Questions on the six domains of disability (visual, hearing, mobility, cognition, selfcare and communication) were asked of persons aged five years and above while that of albinism was administered to everyone. See Kenya National Bureau of Statistics '2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics' (February 2020) 12 and 394; E Owino 'Status of disability in Kenya: Statistics from the 2019 census' (6 May 2020) 1.

15 As above.

16 World Health Organisation 'Depression and other common mental disorders: Global health estimates' (2017) 17 http://www.who.int/mental_health/management/depression/prevalence_global_health_estimates/en/ (accessed 20 May 2022).

17 As above.

18 M Mwoka 'Mental health in Kenya: The unspoken agenda global health' *Next Generation Network* 7 November 2017 <http://ghnetwork.org/article/mental-health-in-kenya-the-unspoken-agenda> (accessed 26 May 2022).

19 Psychosocial disability will be used to refer to psychosocial conditions which qualify as a disability according to the definition of disability provided within relevant anti-discrimination legal frameworks. Notably, The CRPD's reference to 'mental' impairment in art 1 includes persons with psychosocial disabilities. Although psychosocial disability can and has been used interchangeably with mental disability, the preferred terminology is 'persons with psychosocial disabilities' – in line with the social model of disability and the recognition that disability is an evolving concept in line with the preambular paragraph (e) of the CRPD. See W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510; G Szmukler, R Daw & F Callard 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37 *International Journal of Law and Psychiatry* 245; T Minkowitz 'Abolishing mental health laws to comply with the Convention on the Rights of Persons with Disabilities' in B McSherry & P Weller (eds) *Rethinking rights-based mental health laws* (2010) 154. Notably, not all psychosocial conditions qualify as a disability.

holistic view of the prevalence of psychosocial conditions in Kenya, or of access to and maintenance of employment. Statistics on disability are not always available and this is part of the overall challenges of planning, implementing and monitoring mental health and anti-discrimination policies.

Further, mental health challenges impact workplaces through increasing absenteeism, reduced productivity, and increased healthcare costs.²⁰ Many mental health conditions may affect the cognitive functioning of an affected person. These include: attention, concentration, memory, reasoning, and the problem-solving ability of affected persons.²¹ The comparative difficulties psychosocial ill health presents in terms of expectations of conduct and accommodation needs, means that employers must be creative in order to find solutions for accommodating persons with psychosocial conditions.²² Many employers are not willing or able to rise to this challenge.

Disclosure of a psychosocial disability is not usually met with empathy and support by employers and colleagues.²³ There is often a lack of understanding, ignorance, stigma and prejudice.²⁴ Employees with mental health conditions may find that once they disclose their conditions or their conditions become known in other ways, 'they experience discrimination from co-workers, feel socially marginalised, have to cope with negative comments from workmates, and have to return to positions of reduced responsibility'.²⁵ In addition, employers often make the assumption that persons with psychosocial disabilities not only require greater supervision, but are untrustworthy, unable to use initiative, and not able to deal appropriately with members of the public.²⁶ As a result of interpersonal and other related social difficulties, persons with psychosocial disabilities are often unable to thrive in and successfully maintain employment.²⁷ Nevertheless, it is worth noting that research suggests that providing reasonable accommodation is an effective and pragmatic means through

20 Holness (n 19) 510.

21 NE Khalema & J Shankar 'Perspectives on employment integration, mental illness and disability, and workplace health' (2014) 2014 *Advances in Public Health* 1.

22 As above.

23 Holness (n 19) 510-511.

24 Holness (n 19) 510-511; S Genga 'The link between the right to live independently and to be included in the community for persons with psychosocial disability, and the right to work and employment: A critical analysis of Kenyan law' (2020) 8 *African Disability Rights Yearbook* 101 at 107.

25 P Schnabel 'Protecting and including vulnerable people in times of economic crisis' in A Baumann & M Muijen (eds) *Mental health and well-being at the workplace – Protection and inclusion in challenging times* (2010) 9.

26 Holness (19) 511.

27 As above.

which support can be offered to help employees with psychosocial conditions maintain employment.²⁸

2 Reasonable accommodation and employees with psychosocial disabilities

Reasonable accommodation duties require different treatment for people whose circumstances are relevantly different, in this case employees with psychosocial disabilities.²⁹ The CRPD defines reasonable accommodation as:

Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.³⁰

This definition makes it clear that accommodations involve the removal of specific disadvantages in order to ensure equality for disabled individuals.³¹ It was

developed to address the issue of impairment and to acknowledge the need of persons with disabilities to be treated in a different way than persons without disabilities in order to make rights 'real' for the former group.³²

However, the concern of reasonable accommodation is not to confer advantage but to remove disadvantage.³³

Importantly, it may be useful to make the distinction between reasonable accommodation and direct discrimination, accessibility and special measures from the outset. Both indirect discrimination and reasonable accommodation are similar in that they both go beyond the demands of formal equality and address the disadvantage which results from apparently neutral requirements and practices. Further, they both 'require recognition of material difference and a corresponding adaption of practice'.³⁴ However, the similarities end there. While indirect discrimination is concerned with the impact on a group of persons in general, reasonable accommodation has to be tailored to suit the needs of

28 D Ferri & A Lawson 'Reasonable accommodation for disabled people in employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway' (2016) 50.

29 As above.

30 Article 2 of the CRPD.

31 Ferri & Lawson (n 28) 48.

32 S Ferraina 'Analysis of the legal meaning of Article 27 of the UN CRPD: Key challenges for adapted work settings' (14 March 2012) 15; Ferri & Lawson (n 28) 48.

33 Ferri & Lawson (n 28) 49.

34 A Lawson *Disability and equality law in Britain* (2008) 186.

a particular disabled person.³⁵ It is also important to differentiate between reasonable accommodation and accessibility. While reasonable accommodation is an individual right with individual implications, accessibility is a group right.³⁶ In addition, while accessibility is an ex-ante duty, the duty to provide reasonable accommodation is an ex-nunc duty.³⁷ That means that accessibility is anticipatory in nature. Basically, it is built into systems and processes without regard to the need of a particular person with a disability, but persons with disability in general.³⁸ In contrast, reasonable accommodation as an ex-nunc duty is only provided from the moment that a person with a disability wants to exercise his or her rights.³⁹ Also, although accessibility duties are required to be implemented gradually, but unconditionally; reasonable accommodation duties, as highlighted above, are immediately realisable, but conditional in the sense that they are subject to the limitation of the ‘undue’ or ‘disproportionate’ burden.⁴⁰

Due to the gradual realisation of accessibility in the built environment, public transportation and information and communication services, reasonable accommodation may be used as a means to provide access to an individual in the meantime, as it is an immediate duty.⁴¹ Furthermore, in some instances, accessibility may be used as a means to remove a barrier, thereby negating the need for individual accommodations.⁴² Nevertheless, it is worth noting that the distinction between accessibility and reasonable accommodation is not always easily made.⁴³

Finally, reasonable accommodation should not be confused with specific measures,⁴⁴ which include affirmative action measures.⁴⁵ Even though both concepts are similar in that they aim at achieving the de facto equality⁴⁶ of persons with disabilities,⁴⁷ reasonable accommodation is a non-discrimination duty, whereas specific measures implies a preferential treatment of persons with disabilities over others to address historic and systemic exclusion from the benefits of exercising rights.⁴⁸ It involves adopting or ‘maintaining certain advantages in favour of an

35 MC du Plessis *Access to work for disabled persons in South Africa: A rights critique* (2017) 100.

36 Ferri & Lawson (n 28) 7.

37 Ferri & Lawson (n 28) 24; para 24 of the CRPD Committee, General Comment 6 (2018), Art 5: Equality and Non-Discrimination, 26 April 2018, UN Doc CRPD/C/GC/6 (2018).

38 As above.

39 As above.

40 Paragraph 42 of General Comment 6; art 2 of the CRPD.

41 As above.

42 Ferri & Lawson (n 28) 49.

43 Ferri & Lawson (n 28) 95 and 96.

44 Article 5(4) of the CRPD.

45 Paragraph 28 of General Comment 6.

46 Ferri & Lawson (n 28) 96.

47 As above.

48 Paragraph 25 of General Comment 6.

underrepresented or marginalised group'.⁴⁹ They can be temporary in nature, or permanent, depending on context and circumstances, including by virtue of a particular impairment or the structural barriers in society.⁵⁰ Examples of positive discrimination include quotas, reduced entry requirements or qualifications, reservations of professions, supported employment,⁵¹ affirmative action measures,⁵² support programmes for students with disabilities in tertiary education,⁵³ targeted recruitment, advancement and empowerment measures, as well as respite care and technological aids.⁵⁴

Similarly, although reasonable accommodation and the provision of support may overlap in some circumstances, they are not synonymous.⁵⁵ Provision of support includes, for example, personal assistants, under the right to live independently and be included in the community,⁵⁶ support to exercise legal capacity,⁵⁷ or 'procedural accommodations' in the context of access to justice.⁵⁸ Further, while reasonable accommodation is limited by the concept of disproportionality, procedural accommodations are not.

Importantly, the most prominent application of the reasonable accommodation requirement remains in the field of work and employment. It is, nevertheless, argued that when developing reasonable accommodation laws and policies, there is a tendency to focus on people with physical or sensory impairments, and persons with psychosocial conditions are often overlooked.⁵⁹ Lawson argues that this is because it requires less imagination to identify the obstacles which standard design or procedure might create for people with physical or sensory impairments.⁶⁰ For example, an employee who cannot see and needs a computer to perform their work can be provided with a Braille computer keyboard. However, the barriers which persons with psychosocial impairments might encounter are far less obvious and not easily identifiable.⁶¹

49 Paragraph 28 of General Comment 6; para 12 of the UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination (2009), 30 April 2018, UN Doc CERD/C/GC/32 (2018).

50 Paragraph 28 of General Comment 6.

51 Paragraph 28 of General Comment 6; Lawson (n 34) 209-212.

52 Paragraph 12 of the General Recommendation 32.

53 Paragraph 25(c) of General Comment 6.

54 Paragraph 28 of General Comment 6.

55 Paragraph 25 of General Comment 6.

56 Ferri & Lawson (n 28) 96.

57 As above.

58 As above.

59 A Lawson 'People with psychosocial impairments or conditions: Reasonable accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26 *Law in Context: Socio-Legal Journal* 68.

60 As above.

61 As above.

The power of reasonable accommodation is that it is a versatile measure and is just as applicable to persons with psychosocial disabilities.⁶² Examples of reasonable accommodation for persons with psychosocial disabilities include: flexible working hours;⁶³ permission to work from home temporarily;⁶⁴ job transfer within the organisation;⁶⁵ provision for disability leave; allocating duties to another person during periods of incapacity; modifying procedures for pre-employment testing or assessment;⁶⁶ reorganisation or altering of workstations or acquiring new tools;⁶⁷ quiet workspace or provision of equipment like noise-cancelling headphones in order to limit distractions due to sound sensitivity;⁶⁸ conveying tasks via email or in writing – to provide reference where memory is affected;⁶⁹ and provision of frequent breaks due to concentration difficulties.⁷⁰ Looking at the examples above, it is evident that apart from the employer, employee, and expert, the human resources officer will also be required to play a vital role in identifying relevant reasonable accommodation.

Notably, one of the biggest challenges for persons with psychosocial disabilities in claiming reasonable accommodation is not only the unjustified denial by an employer, but the fact that it's a duty that is activated by disclosure by the employee to the duty-bearer, the employer.⁷¹ Necessary accommodations can only be implemented upon disclosure.⁷² Nevertheless, employees often do not disclose their psychosocial conditions or disabilities. This is problematic, as these conditions are often hidden or invisible,⁷³ concealable,⁷⁴ and affected employees' skills and needs are not immediately ascertainable.⁷⁵

Employees with psychosocial disabilities or those who have experienced psychological disabilities in the past, often choose not to disclose their impairment to employers and so forego the opportunity to be reasonably accommodated.⁷⁶ This is fuelled by the fact that persons with psychosocial impairments or conditions belong to one of the most stigmatised groups in society.⁷⁷ This stigma not only leads to fear that

62 As above.

63 Lawson (n 59) 71.

64 As above.

65 Lawson (n 59) 73.

66 Lawson (59) 70.

67 Ferraina (n 32) 16.

68 SA Federation of Mental Health (n 63); Lawson (34) 71.

69 As above.

70 As above.

71 Lawson (n 59) 78; K Vornholt et al 'Disability and employment – Overview and highlights' (2018) 27 *European Journal of Work and Organizational Psychology* 40 at 49.

72 Vornholt et al (n 71) 48-49.

73 Lawson (59) 78.

74 Vornholt (n 71) 48 and 49.

75 Vornholt (n 71) 47.

76 Ferri & Lawson (n 28) 86; Lawson (n 59) 78.

77 Vornholt (n 71) 47.

disclosure will result in rejection or acts of hostility,⁷⁸ but to misguided negative misconceptions about their competence in employment.⁷⁹ Therefore, the reluctance to disclose is, perhaps, unsurprising.⁸⁰ Studies have found that in many workplaces, employees choose to suffer their mental illness in silence, fearing the stigma that comes with disclosure, while employers are uncomfortable around the topic and do not know how to deal with such a disclosure.⁸¹ A recent study conducted in Kenya found that the discrimination and stigma associated with mental illness often prevents disclosure by employees.⁸² Further, according to the study, disclosure during an interview was bound to affect employment opportunities depending on the potential employer's attitude towards psychosocial conditions, and so for most employees non-disclosure was the better option.⁸³ As a result, a potential recruit may choose to disclose the condition only once an offer is made, which then requires an employer to consider possible accommodations. This sequencing is important in order to protect job applicants.⁸⁴

In addition to stigma, another limitation of disclosure by an employee with a psychosocial disability could be facilitated by 'a perception that in requesting reasonable accommodation, one might be setting oneself apart from one's colleagues or asking for special treatment'.⁸⁵ Also, low self-esteem, and the view that it is the individual who must change and not the workplace are also barriers to employees requesting reasonable accommodation.⁸⁶ Whatever the reason for non-disclosure, it creates practical obstacles to persons with psychosocial conditions who require reasonable accommodation in order to access or maintain employment.⁸⁷ The CRPD does not provide any guidance on how to handle confidentiality concerns of employees or applicants with psychosocial conditions or impairments.

As has already been highlighted, employers in Kenya function in a society and community where psychosocial conditions are highly stigmatised.⁸⁸ It is not too farfetched to assume that negative attitudes by

78 Lawson (n 59) 78.

79 Holness (19) 511.

80 Lawson (n 59) 78.

81 A Hamdulay 'Manage mental illness in the workplace: Wellness – Proactive management' (2014) 10 *HR Future*; South African 2015 IDeA (Impact of Depression at Work Audit) Report, which was conducted by SADAG in collaboration with health and economic research organisation Hexor and pharmaceutical company Lundbeck.

82 I Ebuenyi et al 'Employability of persons with mental disability: Understanding lived experiences in Kenya' (2019) 10 *Frontiers in psychiatry* at 2 and 6.

83 Ebuenyi et al (n 82) 6.

84 Holness (n 19) 510 and 511.

85 Lawson (n 59) 79.

86 As above.

87 M Bell et al (European network of legal experts in gender equality and non-discrimination) 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' (2016) 86.

88 As explained in footnote 25 and 26.

employers is common. A study done in Kenya found that disclosure of mental illness resulted in negative reactions from employers, which lead to further stigmatisation and discrimination in the workplace.⁸⁹ Further, 'attitudinal barriers may persist in the face of legal duties',⁹⁰ and that is why one will find that although the legislation in many states provides that employers should employ persons with disabilities, many employers decide against it.⁹¹

It also does not help that employers may have the wrong perception that work accommodations are too costly.⁹² These beliefs remain 'persistent despite studies showing that the majority of accommodations cost little or nothing'.⁹³ Furthermore, it should be mentioned that because of the negative perceptions about disability, any extra cost of employing persons with disabilities in general, no matter its magnitude, can be a disincentive to employers.⁹⁴ Therefore, costs or assumed costs to the employer are a significant limitation to the potential of reasonable accommodation of persons with disabilities.⁹⁵

Markedly, there may be ways in which to subsidise the accommodation costs and to create public-private partnerships to share the financial burden of accommodation.⁹⁶ As an example, Kenya provides tax cuts for employers who reasonably accommodate employees with disabilities specifically, but no such provision exists for employees who may not qualify as disabled. Nevertheless, a recent study done in Kenya found that generally employers are not aware of these tax cuts – none of the employers interviewed in the said study had ever accessed the government tax rebates available for employers of persons with disabilities in Kenya.⁹⁷ Furthermore, the effectiveness of these initiatives is not clear as yet.

89 ID Ebuenyi et al 'Expectations management; employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42 *Disability and Rehabilitation* 1687 at 1692.

90 Du Plessis (35) 175.

91 Vornholt et al (71) 47.

92 As Above.

93 Vornholt et al (n 71) 45.

94 MP Opoku et al 'Access to employment in Kenya: The voices of persons with disabilities' (2017) 16 *International Journal on Disability and Human Development* 77.

95 Du Plessis (35) 177.

96 As above.

97 Ebuenyi et al (n 89) 1694.

3 The CRPD and the unjustifiable denial of reasonable accommodation as a form of discrimination

The CRPD is the first human rights treaty to provide that the unjustified failure to provide reasonable accommodation is a distinct form of discrimination.⁹⁸ In other words, the unjustified denial of reasonable accommodation is a separate form of discrimination that does not fall under the heading of direct or indirect discrimination.⁹⁹

Lawson argues that reasonable accommodation has an unusual bridging role.¹⁰⁰ This is because its purpose is to ensure that all rights (both economic, social or cultural rights, and civil and political rights) are meaningfully accessible to persons with disabilities.¹⁰¹ Although discrimination is traditionally a civil and political right, because the CRPD defines denial of reasonable accommodation as a form of discrimination, it now imposes a positive obligation on both state parties and private entities.¹⁰² Reasonable accommodation hence carries both financial and non-financial costs.¹⁰³ As a result, it can be argued that although the CRPD provides that the principle of immediate realisation will apply to civil and political rights, and that of progressive realisation for economic, social and cultural rights, the fact that denial of reasonable accommodation amounts to discrimination creates an obligation of immediate effect despite having financial obligations.¹⁰⁴ Scholars such as Waddington and others¹⁰⁵ argue that because the duty to reasonably accommodate forms part of the non-discrimination norm, it is an obligation that has immediate effect.¹⁰⁶ This is also the position taken by the Committee which makes it clear that reasonable accommodation is an immediate duty.¹⁰⁷ In contrast, Lord and others suggest that the concepts of 'reasonableness' and 'undue burden' serve to introduce some notion of

98 Article 2 of CRPD.

99 L Waddington & A Broderick 'Combatting disability discrimination and realising equality: A comparison of the UN Convention on the Rights of Persons with Disabilities and EU equality and non-discrimination law' (2018) 664.

100 Lawson (n 28) 40.

101 Lawson (n 28) 65.

102 Lawson (n 59) 66; Other civil and political rights that impose positive obligations include art 19 and 20 of CRPD.

103 Lawson (n 59) 64.

104 Equality and non-discrimination are principles and rights. The Convention refers to them in art 3 as principles and in art 5 as rights. They are also an interpretative tool for all the other principles and rights enshrined in the Convention. Promoting equality and tackling discrimination are cross-cutting obligations that require immediate realisation. See para 12 of General Comment 6.

105 Waddington & Broderick (n 99) 40.

106 Waddington & Broderick et al (n 99) 40; Lawson (59) 64.

107 Paragraph 42 of General Comment 6.

progressive realisation into the realm of non-discrimination.¹⁰⁸ I agree with Lawson and Waddington and others that reasonable accommodation is an immediate obligation, even though the parameters of the obligation may be circumscribed by concepts such as reasonableness and ‘disproportionate or undue burden’.

Article 5(3) of the CRPD requires state parties to take all appropriate steps to ensure that reasonable accommodation is provided.¹⁰⁹ State parties must ensure that their anti-discrimination legislation provides for the denial of reasonable accommodation as a form of discrimination.¹¹⁰ Accordingly, state parties are obligated to identify barriers and consider how those obstacles might be removed in order for employees with psychosocial disabilities to thrive in the workplace.¹¹¹ Furthermore, such legislation must obligate both public and private sector employers to provide reasonable accommodation to individual employees with disabilities.¹¹²

The process of an employer reasonably accommodating an employee with a psychosocial disability should begin with dialogue, as both parties should consult in order to help identify and remove barriers.¹¹³ Further, the duty to provide reasonable accommodation is not limited to disclosure and a preceding request for accommodation by an employee,¹¹⁴ but applies also where a potential duty bearer, the employer, should have realised that the person in question had a disability that might require accommodations.¹¹⁵ Notably, the changes required by reasonable accommodation carry both financial and non-financial costs.¹¹⁶

The employer should ensure that the accommodation is not only feasible (legally or in practice),¹¹⁷ but that it is also relevant and effective in facilitating the realisation of the right in question.¹¹⁸ Persons with disabilities moreover should not bear the costs.¹¹⁹ Notably, the term ‘reasonable’ has been debated, as some state parties have interpreted the

108 JE Lord et al ‘The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities’ in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 280.

109 Article 4(b) and (c); M Fasciglione ‘Article 27 of the CRPD and the right of inclusive employment of people with autism’ in V D Fina et al (eds) *Protecting the rights of people with autism in the fields of education and employment: International, European and national perspectives* (2015) 150; Ferri & Lawson (n 28) 8; L Waddington & Broderick (n 99) 40.

110 Articles 2 and 5(3); Fasciglione (109) 150; J Clifford ‘The UN Disability Convention and its impact on European equality law’ (2011) 6 *The Equal Rights Review* 11 at 14.

111 Lawson (59) 66 and 67; Ferri & Lawson (28) 48 and 49.

112 Fasciglione (109) 15.

113 Paragraph 26(a) of General Comment 6.

114 Paragraph 24 of General Comment 6.

115 As above.

116 Lawson (59) 64; para 26(a) of General Comment 6.

117 Para 26(b) of General Comment 6.

118 Para 26(c) of General Comment 6.

119 Para 26(d) and (f) of General Comment 6.

term 'reasonable' to refer to an accommodation which does not result in excessive costs or challenges for the employer, while others relate the term to the quality of the accommodation, meaning that the accommodation must be effective in facilitating an individual with a disability to carry out the relevant employment duties.¹²⁰

The Committee has emphasised that 'reasonable accommodation' is a single term, and that 'reasonable' is not an exception clause to the duty.¹²¹ Hence, reasonableness should not be used to assess the costs of accommodation or the availability of resources as this occurs at a later stage, when the disproportionate or undue burden assessment is undertaken.¹²² The 'reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability'.¹²³ An accommodation is reasonable, therefore, if it achieves the individual purpose (or purposes) for the person with a disability for which it is being made.¹²⁴ An accommodation may, however, be reasonable, while still posing a 'disproportionate or undue burden' on a duty bearer.

Notably, 'disproportionate or undue burden' should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. According to the Committee, both terms should be considered synonyms as they demand for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party.¹²⁵ Notably, Lawson and others raise concern about the phrase 'undue burden'. They argue that it may construe persons with disabilities as 'burdens' on the community.¹²⁶ In line with this, a general misconception by employers is that reasonable accommodation is too costly or difficult to provide.¹²⁷ Lawson, in contrast, argues that because article 2 places a heavy emphasis on the concepts of reasonableness and proportionality,¹²⁸ the CRPD puts more weight on the impact of making

120 Fasciglione (109) 150.

121 The Committee is made up of 12 independent experts, and they monitor implementation of the CRPD by the state parties and have the legal authority to issue General Comments that elaborate on the meaning of the provisions of the CRPD or cross-cutting themes. See art 34 of the CRPD; United Nations Human Rights Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html> (accessed 11 October 2022); para 25 of General Comment 6.

122 As above.

123 As above.

124 Paragraph 25 of General Comment 6. See *HMV Sweden CRPD/C/7/D/3/2011*. In this case the Committee in determining whether denial of reasonable accommodation amounts to discrimination, adopted a two-prong test. The first step is to identify whether the accommodation is effective in meeting the needs of the individual with the disability and the second is to determine whether the accommodation imposed a disproportionate burden on the responsible entity.

125 Paragraph 25(b) of General Comment 6.

126 Lawson (59) 64.

127 Paragraph 25 of General Comment 6.

128 Lawson (59) 64.

the relevant modification in the workplace, and not necessarily on absolute figures as the central issue.¹²⁹

The Committee provides that the determination of whether a reasonable accommodation is disproportionate or imposes an undue burden, requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.¹³⁰ Potential factors to be considered include financial costs, the size of the accommodating party, the potential effect of the accommodation on the accommodating party, third-party benefits, negative impacts on other persons and reasonable health and safety requirements.¹³¹ Thus, it is not only financial factors that should be considered, but also social factors.¹³² This is because

many proposed steps will carry net benefits rather than burdens for duty-bearers – in addition to the benefit of securing the custom or employment of the particular individual, benefits might flow from measures such as the introduction of a system or structure that will improve accessibility and thereby increase the organisation's future employees that may require similar infrastructure.¹³³

Notably, when it comes to changes that require financial cost, the reasonableness of bearing a particular cost will depend on the circumstances of the duty-bearer in question (in this case the employer).¹³⁴ According to the Committee, this requires the consideration of the circumstances of the state party as a whole and the private sector entity, overall assets rather than just the resources of a unit or department within an organisational structure in order to make a determination.¹³⁵ This is because what amounts to a disproportionate hardship for a small business may not be so for large and well-resourced organisations.¹³⁶ Hence, a case-by-case approach should be adopted in determining 'disproportionate or undue burden'.

Importantly, the determination of disproportionate or undue burden also includes consultations between the employer and the person with a disability.¹³⁷ This is because the burden of proof rests with the duty bearer who claims that his or her burden would be disproportionate or undue.¹³⁸ In *HM v Sweden*¹³⁹ it was found that the state parties had not produced evidence to indicate that reasonably accommodating the author would

129 As above.

130 Paragraph 26(d) of General Comment 6.

131 Paragraph 26(d) and (e) of General Comment 6.

132 Ferri & Lawson (28) 50.

133 As above.

134 Lawson (59) 64.

135 Paragraph 26(d) and (e) of General Comment 6.

136 Lawson (n 59) 64; Ferri & Lawson (n 28) 50.

137 Paragraph 26 of General Comment 6.

138 Paragraph 26(d) and (g) of General Comment 6.

139 *HM v Sweden* CRPD/C/7/D/3/2011.

impose a disproportionate or undue burden. The Committee found that because Sweden's Planning and Building Act allowed for departure from the development plan, it could thus reasonably accommodate the author, and thus her request would not impose a disproportionate or undue burden on the state party.¹⁴⁰

Importantly, the Committee states that state parties enjoy a margin of discretion in the formulation of reasonable accommodation duties, especially in their decisions of when a burden should be regarded as a disproportionate or undue burden.¹⁴¹ This position was reiterated in the case of *Jungelin v Sweden*.¹⁴² The majority of the Committee in this case affirmed that when it comes to assessing the reasonableness and proportionality of accommodation measures, state parties 'enjoy a certain margin of appreciation'.¹⁴³ State authorities have an intimate knowledge of their country and are thus better placed to interpret what a right means in a certain context when weighing competing public and individual interests.¹⁴⁴ However, the Committee did not hold that state parties enjoy an unlimited margin, but that the Committee would respect the decision if the domestic courts used an objective criterion in reaching its decision.¹⁴⁵ It did instead emphasise that it was generally for the courts of state parties to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.¹⁴⁶ Notably, this decision (the decision by the Committee's majority) has been criticised for not being sufficiently radical in promoting equality and considering the effects of their decision.¹⁴⁷ Indeed, five Committee members issued a joint dissenting opinion and one Committee member partially concurred with the joint dissenting opinion.

The joint dissenting opinion found that despite state parties enjoying a certain margin of freedom when assessing undue burden in the determination of reasonable accommodation, the Committee should have still reviewed the criteria that were used by the state party in this particular case.¹⁴⁸ The dissenting view highlighted the fact that the domestic court should have considered the potential impact of the alternative measures on the future employment of other persons with visual impairments as an additional positive criterion. Thus, the benefit to future employees must also be taken into account. Thus, in the determination of 'disproportionate or undue burden', apart from only looking at the impact on the individual

140 Para 8.5.

141 Ferri & Lawson (n 28) 50.

142 *Marie-Louise Jungelin v Sweden* CRPD/C/12/D/5/2011.

143 *Marie-Louise Jungelin v Sweden* para 10.4.

144 I Mijijima-Konopi 'Regional developments: The jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for Africa' (2016) 4 *African Disability Rights Yearbook* 269 at 279.

145 As above.

146 *Marie-Louise Jungelin v Sweden* para 10.4.

147 Holness (n 19) 523.

148 *Marie-Louise Jungelin v Sweden* para 10.4.

seeking the reasonable accommodation, the effects of denying such accommodation to others who may be similarly affected in the future should also be considered.¹⁴⁹

Holness argues that the dissenting members' opinion should be commended for considering a more robust substantive equality approach to reasonable accommodation, which considered the impact of systemic discrimination in the given employment situation, and thus moved closer to a transformative approach to equality.¹⁵⁰ I agree that the inclusion of social impact and not only financial cost is a more holistic approach to equality.

The Committee has also noted that apart from the limitation of disproportionate or undue burden, the denial of reasonable accommodation can be justified based on objective criteria.¹⁵¹ According to the Committee: it must be communicated in a timely fashion to the person with a disability concerned¹⁵² and the justification test should be determined based on the length of the relationship between the duty bearer and the rights holder.¹⁵³ The implication is that unlike indirect discrimination, an employer can justify denying an employee with a disability reasonable accommodation but only within the parameters provided above.

4 Kenyan legal framework

According to the Kenyan anti-discrimination legal framework, an employee with psychosocial conditions can bring a discrimination claim on a number of grounds: disability or health status under the Constitution,¹⁵⁴ disability under the Persons with Disabilities Act,¹⁵⁵ and/or disability or mental status under the Employment Act.¹⁵⁶ Further, the provisions that list the protected grounds in the Constitution,¹⁵⁷ and the Employment Act¹⁵⁸ imply that the lists of grounds are open, so an employee with a psychosocial condition could also bring a discrimination claim under an unspecified ground. The legal consequences of an employee with a psychosocial condition claiming discrimination under each health status, mental status or unspecified ground is beyond the scope

149 Holness (n 19) 524.

150 As above.

151 Paragraph 27 of the General Comment 6.

152 As above.

153 As above.

154 Article 27(4).

155 Section 15(1).

156 Section 5(3)(a).

157 Article 27(4) of Constitution of Kenya, 2010.

158 Employment Act Cap 226 11 of 2007 sec 5(3)(a).

of this paper as the focus is employees with psychosocial conditions who qualify as person with disabilities.¹⁵⁹

Further, in Kenya, the courts will only recognise an individual as a person with a disability if they are registered under the National Council for Persons with Disabilities (NCPWD).¹⁶⁰ This has been upheld in a number of cases, including *Suleman Angolo v Executive Officer Teachers Service Commission*¹⁶¹ and *Stephen Kariuki Kama v Kenya Ports Authority*,¹⁶² *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁶³ and *Fredrick Gitau Kimani v Attorney General*.¹⁶⁴ In *Esau Rodgers Mumia v Central Bank of Kenya*,¹⁶⁵ the court ruled that one only becomes certified as a person with a disability for purposes of accessing the rights and privileges under the Persons with Disabilities Act after they are registered by the NCPWD in terms of section 7(1)(c) of the PWD Act.¹⁶⁶ For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the NCPWD, relying on duly completed medical reports.¹⁶⁷ Therefore, employees with psychosocial conditions cannot claim anti-discrimination protection as persons with disabilities under Kenyan law unless they are first registered as a person with a disability by the NCPWD.

The Kenyan anti-discrimination legal framework provides both constitutional and statutory safeguards that protect employees with psychosocial conditions against discrimination in employment. Admittedly, under the Kenyan legal framework, an employee with a psychosocial condition who is discriminated against can bring a discrimination claim under the Constitution,¹⁶⁸ Persons with Disabilities Act,¹⁶⁹ Employment Act,¹⁷⁰ and the CRPD.¹⁷¹ It has been argued that the most significant and transformative development in Kenya in respect of

159 Disability is defined in art 260 of the Constitution, sec 2 of the Persons with Disabilities Act, and sec 2 of the Employment Act.

160 Section 7(1)(c) of the Persons with Disabilities Act.

161 [2015] eKLR, Constitutional Petition 12 of 2014 para 11.

162 [2016] eKLR, Constitutional Petition 21 of 2016 para 47.

163 [2019] eKLR, Cause 104 of 2017.

164 [2012] eKLR, Petition 157 of 2011.

165 [2017] eKLR, Cause 940 of 2014.

166 *Esau Rodgers Mumia* (n 165) para 18.

167 *Esau Rodgers Mumia* (n 165) para 21.

168 Constitution of Kenya, 2010.

169 Act 14 of 2003.

170 Employment Act Cap 226 no 11 of 2007.

171 Article 2(6) makes Kenya a monist state incorporating ratified treaties into Kenyan laws automatically, without the necessity of a domesticating statute, thus indicating a shift from the former dualist approach to a monist approach. Kenya ratified the CRPD on 5 May 2008. Additionally, Kenya submitted its State Report to the CRPD Committee on the implementation of the Convention. The next report is due in 2022 but has not been published yet. Global Disability Rights Now 'Formal Operation of the CRPD in Kenya' <http://www.globaldisabilityrightsnow.org/law/kenyacrpdc> (accessed 26 April 2022); UN Treaty Body Database 'Reporting status for Kenya' https://tbinter.net.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN (accessed 28 July 2014); NW Orago 'The 2010 Kenyan Constitution and

equality was the adoption of the Constitution on 27 August 2010.¹⁷² It replaced both the 1969 Constitution and the former colonial Constitution of 1963, and has brought major improvements to the legal and policy framework with regards to discrimination. It has a strong focus on equality, a much-improved right to non-discrimination with special provisions for the protection of rights for particular vulnerable groups that include persons with disabilities.¹⁷³ This strong commitment to the principles of equality and non-discrimination is evidenced throughout the Constitution.¹⁷⁴ It is worth noting that both the Persons with Disabilities Act and the Employment Act were enacted prior to the promulgation of the 2010 Constitution,¹⁷⁵ and before the CRPD came into force, and as such are both currently under review.¹⁷⁶

The Employment Act, which was passed in 2007, declares and defines the fundamental rights of employees in order to provide basic conditions of employment.¹⁷⁷ However, persons with psychosocial disabilities who are not protected by the Employment Act¹⁷⁸ may have recourse in terms of the Persons with Disabilities Act and the Constitution.

The Persons with Disabilities Act, which was enacted in 2003,¹⁷⁹ was the first Kenyan law that specifically protected persons with disabilities from discrimination.¹⁸⁰ The aim of the Act is to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Development Fund for Persons with Disabilities in order to provide

the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 2 *African Human Rights Law Journal* 415 at 419; E Kamundia 'The UN Convention on the Rights of Persons with Disabilities in practice: A comparative analysis of the role of courts in Kenya' in L. Waddington & A. Lawson (ed) *The UN Convention on the Rights of Persons with Disabilities in practice: A comparative analysis of the role of courts* (2013) 288; T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 293; *Karen Njeri Kandie v Alssane Ba* [2015] eKLR Civil Appeal 20 of 2013.

172 The Equal Rights Trust in Partnership with Kenyan Human Rights Commission 'In the spirit of Harambee: Addressing discrimination and inequality in Kenya' ERT Country Report Series: 1 London (February 2012) 170.

173 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 1 at 6; The Equal Rights Trust in Partnership with KHRC (n 172) 170.

174 The Preamble, art 10(2)(b); art 20(4)(b); art 54.

175 Persons with Disabilities Act in 2003, and Employment Act Cap 226 no 11 of 2007.

176 Persons with Disabilities (Amendment) Bill, 2019; The Employment Act (Amendment) Bill, 2019; E Kamundia 'Country Report: Kenya' (2014) 2 *African Disability Rights Yearbook* 190.

177 Employment Act Cap 226, No 11 of 2007.

178 They may not qualify as 'employees' as provided for in sec 2 of the Employment Act, or are excluded because they work for the armed forces or police, the National Youth Service; or is in a family undertaking where an employer and the employer's dependants are the only employees or Export Processing Zone. See, further, sec 3(2) and 3(5) of the Employment Act.

179 Revised Edition 2012 [2003] Chapter 133.

180 The Equal Rights Trust in Partnership with KHRC (n 172) 170.

monetary assistance to organisations and persons with disabilities.¹⁸¹ Hence, this Act provides protection specifically for employees with psychosocial conditions who qualify as disabled.

What it is evident from case law is that discrimination claims may be brought in terms of one or more relevant laws. In *Antony Kipkorir Sang v Attorney General*,¹⁸² for example, a case involving disability discrimination in employment, the claim was brought under sections 27(4), 28, 29, 41(1) and 2(b) and 54(1) of the Constitution,¹⁸³ section 15 of the Persons with Disabilities Act as well as article 1 of the CRPD.¹⁸⁴ In *Duncan Otieno Waga v Attorney General*,¹⁸⁵ an employment discrimination claim based on disability was brought under the PWD Act (sections 15 and 22) and the Universal Declaration of Human Rights (UDHR) in article 1. In *Paul Pkiach Anupa v Attorney General*¹⁸⁶ an employment discrimination case was brought under articles 27(4), 41(1) and (2)(b) and 54(1) of the Constitution, section 15 of the Persons with Disabilities Act and section 5(3)(a) of the Employment Act.¹⁸⁷

It is worth noting that neither the Constitution, nor the Employment Act or the Persons with Disabilities Act explicitly provides that the unjustifiable denial of reasonable accommodation constitutes a form of discrimination. Only the Persons with Disabilities Act refers to reasonable accommodation, but not as an anti-discrimination duty.

The Persons with Disabilities Act prohibits disability discrimination based on accommodation in employment.¹⁸⁸ One could argue that this means that the denial of reasonable accommodation amounts to discrimination based on this; however, there is no definition of what amounts to 'accommodations' or any case law in support of this argument. Further, the same Act requires employers to reasonably accommodate persons with disabilities through the provision of facilities and modifications as may reasonably be required.¹⁸⁹ It does not go on to specify what modifications should be made. This is left to the interpretation of the court. The Act also does not delve into much detail about what the duty entails. Further, the use of the words 'reasonably as required' act as a limitation of the right as it waters down the effect of this section.

181 Persons with Disabilities Act.

182 *Kipkorir Sang v Attorney General* [2014] eKLR, Cause 2408 of 2012.

183 *Kipkorir Sang* (182) para 4.

184 *Kipkorir Sang* (182) para 5.

185 [2014] eKLR, Cause 2408 of 2012 paras b, d, and a.

186 [2012] eKLR, High Court Petition 93 of 2011.

187 *Paul Pkiach Anupa* (n 186) 16.

188 Section 15(1).

189 Section 15(5).

Furthermore, the Persons with Disabilities Act also provides tax incentives for employers who reasonably accommodate persons with disabilities in the workplace. It provides that private employers who improve or modify their physical facilities or avail special services in order to provide reasonable accommodation for employees with disabilities, are entitled to apply for additional deductions from their net taxable income equivalent to 50 per cent of the direct costs of the improvements, modifications or special services.¹⁹⁰

Notably, as has been highlighted above, the Persons with Disabilities Act is currently under review. A 2019 Persons with Disabilities Bill has not been passed into law. Although the Bill is subject to change between now and when it is passed into law, importantly, it adopts a more detailed definition of reasonable accommodation that is similar to the definition adopted by the CRPD in article 2.¹⁹¹ However, the Bill does not provide that the unjustified denial of reasonable accommodation amounts to discrimination.

Nevertheless, despite the fact that the Constitution, the Persons with Disabilities Act and the Employment Act do not address the question as to whether the denial of unjustified reasonable accommodation is a form of discrimination, an employee with a psychosocial condition who is registered as having a disability can directly claim discrimination based on article 2 of the CRPD.¹⁹² Article 2 of the CRPD will easily be applicable because there is no provision in the Constitution, the Employment Act or the Persons with Disabilities Act which is contradictory or in conflict with the denial of reasonable accommodation being a form of discrimination. Indeed, there is a gap and article 2 of the CRPD applies. This is evident in a variety of cases. In *Antony Kipkorir Sang v Attorney General*,¹⁹³ that dealt with disability-based discrimination, the court, citing the CRPD¹⁹⁴ found that the retirement on medical grounds of the claimant police officer with a disability, which was as a result of being shot while on duty, instead of reasonably accommodating him constituted discrimination.¹⁹⁵ Similar decisions were taken in *Duncan Otieno Waga v Attorney General*,¹⁹⁶ *Paul Pkiach Anupa v Attorney General*,¹⁹⁷ and *Juliet Mwangeli Muema v Smollan Kenya Limited*.¹⁹⁸

Similar to the CRPD, an employee's right to reasonable accommodation may be limited if it leads to undue burden for the

190 Section 16(2).

191 Persons with Disabilities (Amendment) Bill, 2019, sec 2.

192 *Kipkorir Sang* (n 182) para 49.

193 [2014] eKLR, Cause 2408 of 2012.

194 *Kipkorir Sang* (n 193) 58

195 *Kipkorir Sang* (n 193) paras 1, 20, 43,57 and 58.

196 *Duncan Otieno Waga v Attorney General* [2014] eKLR Cause 89 of 2013, Industrial Court.

197 *Paul Pkiach Anupa v Attorney General* [2012] eKLR, High Court, Petition 93 of 2011, the High Court of Kenya at paras 15 and 52.

198 [2019] eKLR, Cause 104 of 2017. Court findings at para 2; judgment at paras 1 and 4.

employer. In the case of *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁹⁹ although the respondent alleged financial hardship, the court found that it was merely alleged before the court, but was not demonstrated at all.²⁰⁰ Accordingly, the court found that there would be no significant financial constraints or hardship imposed on the employer if they reasonably accommodated the claimant.²⁰¹ In another case concerning the police, the court was of the view that the police service possesses the economic power, facilities and logistics for accommodating the claimant who had a disability, and that by assigning the claimant alternative duties the police service would not have suffered any undue hardship or prejudice.²⁰² Correspondingly, in the case of *Gichuru v Package Insurance Brokers Ltd*²⁰³ the respondent had requested the appellant, who had returned to work after a spinal cord surgery in India, to proceed on sick leave until he would be able to move around the office unaided. The respondent later suspended him before taking action to dismiss him from employment, and the Supreme Court subsequently found the respondent as having indirectly discriminated against the appellant. The Supreme Court noted that the respondent failed to demonstrate that there would have been any undue hardship had they chosen to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant's movement, or even providing flexible working hours.²⁰⁴ Further, it was held that the respondent had failed to demonstrate what measures they had taken to accommodate the appellant's condition.²⁰⁵ Basically, the respondent failed to demonstrate how they would endure an undue burden if they in fact accommodated the appellant. Additionally, apart from the CRPD which provides for a limitation to the right to reasonably accommodate an employee, section 15(2)(c) of the Persons with Disabilities Act also provides a limitation.

As has been highlighted above, reasonable accommodation may require employers to incur costs, which employers are expected to bear.²⁰⁶ Ngwena argues that the privatisation of redistribution means that accommodation will be heavily conditional on the resources the employer has at its disposal relative to the expense required to reasonably accommodate an employee with a disability.²⁰⁷ As a result, even when employers are willing to hire and accommodate persons with disabilities, it is too costly.²⁰⁸ Further, although large business entities may not be

199 [2019] eKLR, Cause 104 of 2017.

200 *Juliet Mwangeli Muema* (para 199) court findings at para 2.

201 As above.

202 *Kipkorir Sang* (n 182) para 63.

203 (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment).

204 Para 71.

205 As above.

206 Opoku et al (n 94) 10.

207 CG Ngwena 'Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective' LLD thesis, University of the Free State, 2010 at 500.

208 Vornholt et al (n 71) 40 at 47.

affected by cost of reasonably accommodating employees with disability, the same cannot be said of small scale businesses.²⁰⁹ Hence, employees are faced with the predicament of whether to fulfil the requirements of reasonable accommodation for persons with disabilities on the one hand and ensuring productivity and profit on the other.²¹⁰ This is especially significant in low-income countries such as Kenya, where there is mass unemployment, no incentives for employers, and a large pool of labour force from which employers can easily employ.²¹¹ It does not help that Committee has been split on how far employers can be expected to go to provide reasonable accommodation and leaves this to state parties to clarify,²¹² and this lack of clarity by the Committee has led to the Kenyan courts having to rely on a more unclear limitations set out in the Persons with Disabilities Act.

The Persons with Disabilities Act in section 15(2)(c) does provide a limitation to the obligation of an employer to provide reasonable accommodation. It provides that an employer will not have discriminated against a person with disability if special facilities or modifications which are required at the workplace to accommodate the person with a disability are such that the employer cannot 'reasonably be expected to provide'. The wording of this section is vague and wide. It is not clear what factors or even how to determine when an employer is not 'reasonably expected to accommodate an employee' with disability, and as a result it can provide employers with a legal excuse not to accommodate employees with disabilities. This was highlighted in the case of *Macharia v Safaricom Plc*.²¹³

In *Macharia v Safaricom Plc* the respondent, Safaricom PLC, failed to integrate its customer service platform with the necessary software to enable the petitioner, Mr Wilson Macharia, who is visually impaired, to complete the technical part of the employment interview, and further used the lack of software as the reason not to employ him. This is despite shortlisting him and inviting him for the interview, and repeatedly promising from the very beginning that they would make the software available and were in fact in the process of installing it.²¹⁴ The court held that the respondent had shown that in order to accommodate the petitioner the respondent would be required to have a spare software and hence special facilities or modifications would be necessary at the work place to accommodate the petitioner as a person with visual disability, and that making such adjustments and technological incorporations, was not viable in that short run due to budgeting constraints.²¹⁵ How this conclusion was

209 Opoku et al (n 94) 10.

210 Ebuanyi et al (n 89).

211 Opoku et al (n 94) 10.

212 *Marie-Louise Jungelin v Sweden* para 10.4.

213 (Petition 434 of 2019) [2021] KEHC 462 (KLR) (Constitutional and Human Rights) (8 July 2021) (Judgment).

214 *Macharia* (n 213) paras 3-11 and 46.

215 *Macharia* (n 213) para 49.

made by the court is not clarified. Further, relying on section 15(2)(c) of the Persons with Disabilities Act, the court found that the respondent could not have been reasonably expected to provide software due to budgetary constraints, and hence the respondent had not discriminated against the petitioner. Notably, in determining whether Safaricom Ltd would suffer an undue burden, it is not clarified whether the court took into account its size as a company. Safaricom is the largest telecommunications provider in Kenya, and one of the most profitable companies in the East and Central Africa region.²¹⁶ It is in fact, the region's highest-ranking company in East Africa in 2022.²¹⁷ The court also did not seem to look at non-financial factors like third-party benefits, or the potential effect of the of the accommodation on the accommodating party, or the negative impacts on other persons and reasonable health and safety requirements. All suggestions by the Committee as factors to be considered in the determination of an undue burden for an employer.²¹⁸ Further, how the court in this case determined that the employer could not be reasonably expected to accommodate Mr Macharia, is not clear. What is evident is that the court relied on section 15(2)(c) of the Persons with Disabilities Act which is vague. This is an area that requires further development and clarification.

Importantly, although the above cases do not deal with employees with psychosocial disabilities specifically, it provides key insight into how Kenyan courts deal with the denial of reasonable accommodation as an anti-discriminatory duty. Even so, it is important to note that according to the law and case law this right to claim anti-discrimination protection for the unjustified denial of reasonable accommodation directly under article 2 of the CRPD is only available to employees with psychosocial conditions who are registered as persons with disabilities. However, employees with psychosocial conditions who do not qualify and instead fall under the protected grounds of mental status or health status, or unspecified grounds are excluded with no recourse. This is not in compliance with the CRPD.

5 Conclusion

The current Kenyan legal framework does not provide adequate anti-discrimination protection for employees with psychosocial conditions who may be denied reasonable accommodation by their employers. Although employees with psychosocial conditions who qualify and are registered as persons with disability may not be able to make a discrimination claim if they are denied reasonable accommodation by an employer under the

216 IPA 'Safaricom' <https://www.poverty-action.org/organization/safaricom> (accessed 8 October 2022).

217 T Minney 'Safaricom leads ranking of East Africa's Top 20 companies' *African Business* 27 April 2022 <https://african.business/2022/04/finance-services/top-companies-east-africa/> (accessed 8 October 2022).

218 Paras 26(d) and (e) of General Comment 6.

Persons with Disabilities Act or Employment Act, they may still claim in terms of article 2 of the CRPD directly. However, this duty to reasonably accommodate an employee specifically applies only to employees with psychosocial conditions who qualify as persons with disabilities and are registered as persons with disabilities and claim protection under other protected grounds like health status, mental status or unspecified grounds. As a result, a recommendation is that Kenya's employment anti-discrimination law should be amended to recognise the unjustified denial of reasonable accommodation as a form of discrimination in relation to all protected grounds, not just disability, in order to adequately protect employees with psychosocial conditions from discrimination in employment.

CHAPTER 3

IMPERATIVES OF SECURING EQUITABLE ACCESS TO HEALTHCARE SERVICES FOR PERSONS WITH DISABILITIES IN NIGERIA

Uzoma Prince-Oparaku* & Ngozi Chuma-Umeh**

Summary

The government of Nigeria, recognising the huge barriers facing persons with disabilities in their interaction with the healthcare system and daily living, passed the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 (Disability Act) in January 2019 to address some of the factors that impede persons with disabilities in accessing health care. The Act provides for a right to free mental health services and unfettered access to adequate healthcare. It calls for equal access to the physical built environment through the provision and installation of special facilities in public buildings, including healthcare centres. Also highlighted in the Act is the need to provide special communication devices for individuals with visual, hearing or speech impairments. The Act further stipulates a five-year moratorium for compliance with its provisions regarding the alteration of the built environment to improve access of persons with disabilities to public infrastructure. However, three years after the passage of the Act at the national level and in some states in Nigeria, persons with disabilities in Nigeria still encounter a range of barriers in their attempt to access healthcare, and there is every indication that the moratorium is not effectively being utilised. Accordingly, this paper evaluates the impact of the Act in mitigating or eliminating barriers to equitable access to healthcare facilities and services for persons with disabilities in Nigeria. The paper argues that the passage of the Act has had a mixed impact on the equitable enjoyment of the right to accessible healthcare facilities and services for persons with disabilities in Nigeria and that both the national and state authorities are well on their way to miss the five-year moratorium on compliance. The paper recommends a few measures that Nigeria can implement to increase and entrench access to healthcare services and facilities for persons with disabilities.

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1 Introduction

This paper examines how the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 (Disability Act) can shape equitable access to healthcare services for persons with disabilities in Nigeria. The passing of the Act is a significant step triggered by the ratification of the Convention on the Rights of Persons with Disabilities (CRPD)¹ and pressure from disability advocates and persons with disabilities in Nigeria.² Before the enactment of the Act, there existed incoherent disability legislation in nine states in Nigeria that have provisions on right to health for persons with disabilities.³ Noteworthy is the fact that most of these state laws lack the principles underpinning the CRPD in relation to access to health for persons with disabilities. Consequently, the state laws would require substantial amendment and revision to bring them in line with the content of the CRPD. It was anticipated that the enactment of the Disability Act would engender the creation of effective measures for the full realisation of disability rights across all spheres in Nigeria, including equitable access to healthcare services. The peculiar circumstances existing in Nigeria and other African countries bring to the fore several challenges which impact accessible healthcare for persons with disabilities, including prohibitive costs, physical/structural barriers, lack of disability-specific services, lack of political will, prejudicial cultural and religious beliefs as well as weak enforcement of extant laws.

The Act, to some extent, mirrors most of the provisions of articles 9 and 25 of the CRPD on accessibility and the right to health, respectively, while creating a National Disability Commission (Disability Commission) on persons with disabilities with a governing council (the Council) to implement the Act.⁴ In giving effect to the Act, the Nigerian government constituted the Disability Commission in 2020.⁵ Ultimately, the main function of the Disability Commission is to contribute actively in confronting exclusionary policies and practices that keep persons with

1 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), which came into force 2008, and was signed and ratified by Nigeria on 30 March 2007 and 24 September 2010 respectively.

2 A Ewang 'Nigeria passes Disability Rights Law: Offers hope of inclusion and improved access' *HRW* 25 January <https://www.hrw.org/news/2019/01/25/nigeria-passes-disability-rights-law> (accessed 27 May 2021).

3 Lagos State Special People's Law 2011; Plateau State Indigenes with Disabilities Rights and for Other Matters Ancillary thereto 2005; Kano State Persons with Disability Law 2017 (1439AH); Jigawa State Persons with Disabilities Law 2017; Bauchi State Persons with Disabilities Law 2015; Ogun State persons with Disabilities Law 2018; Ekiti State Rights of Persons with Disabilities Law, 2013.

4 Sections 31-38 of the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 (Disability Act).

5 On 25 August 2020.

disabilities away from full participation.⁶ To this end, it can be argued that the Disability Commission⁷ has a mandate under the Act to enhance access to healthcare and other socio-economic rights of persons with disabilities contained in the 1999 Constitution of the Federal Republic of Nigeria and the Disability Act.

The Act has therefore been enthusiastically embraced in Nigeria, but so too has earlier disability legislation that has yet to show efficient administrative infrastructure and understanding of the meaning of disability.⁸ Bearing in mind that healthcare is an item on the concurrent list that falls under the policy oversight and legislative control of both the state and federal government of Nigeria. The Act ultimately challenges state governments in Nigeria to domesticate the Act and ensure implementation in a manner that responds to the socio-cultural environment at the individual level and population level.

Hence, the inquiry that must be raised is whether the Act is being implemented and understood simultaneously with securing equitable access to healthcare services for persons with disabilities. This question is important as it provides an opportunity to appraise whether there is equity in the quality of healthcare provided to persons with disabilities as well as the extent to which health services in Nigeria meet the medical and rehabilitation needs of persons with disabilities. It also affords a platform to focus on surmounting barriers to equitable healthcare access for persons with disabilities. Equitable access is here conceived in terms of the ease with which persons with disabilities can seek and receive healthcare services when needed.⁹ It further implies giving everyone a fair opportunity to attain their full health potential practically without discrimination. A substantive clarification of equitable access in health for persons with disabilities is articulated in the next section of this paper.

This article is divided into six parts including the introduction, which is the first part. The second part presents a conceptualisation of equitable access to healthcare for persons with disabilities in Nigeria. The third part

6 J Erunke 'National Disability Commission: I'm now fulfilled over take-off – Farouq' *Vanguard* 25 August 2020 <https://www.vanguardngr.com/2020/08/national-disability-commission-im-now-fulfilled-over-take-off-farouq/> (accessed 31 May 2021).

7 Section 31 of the Disability Act.

8 For instance, before the enactment of the Disability Act, Nigeria had the Disability Decree of 1993. There has also been in existence different disability legislation in some states of Nigeria that on one hand, seek to protect the rights of persons with disabilities; but, on the other hand adopts the medical model approach to disability. The previous legislation has not been able to provide persons with disabilities in Nigeria the right to equality and non-discrimination. More so the Nigerian government has also been ambivalent in its approach to disability issues. See R Lang & L Upah 'Scooping study: Disability issues in Nigeria: Final report' (2008) 6-7 <https://www.studylib.net/doc/13390397/scoping-study--disability-issues-in-nigeria-final-report> (accessed 19 February 2021).

9 J Levesque et al 'Patient-centred access to health care: Conceptualising access at the interface of health systems and populations' (2013) 12 *International Journal of Equity in Health* 18.

provides an overview of persons with disabilities access to healthcare services before the passage of the Disability Act. The fourth part is an evaluation of progress relative to actualising health-specific provisions under the Act. Part 5 presents measures aimed towards operationalising equitable access to healthcare for persons with disabilities in Nigeria. The final part summarises the article.

2 Equitable access to healthcare for persons with disabilities as conceived

The Disability Act in section 21 makes provision for unfettered access to healthcare for persons with disabilities in Nigeria. Similarly, the obligation to ensure that all aspects of healthcare are accessible is systematically covered by sections 3 to 8 of the Disability Act. Together section 21 and sections 3 to 8 of the Disability Act make it clear that persons with disabilities have the right not only to accessible healthcare services, but also to equality and non-discrimination in relation to all aspects of the right to health as articulated under article 9 and 25 of the CRPD. This invariably reinforces the language and standards of general equality, non-discrimination, and access issues articulated by the Committee on Economic, Social and Cultural rights (The ICESCR Committee) in General Comment 14. The ICESCR Committee in an effort to give fundamental expression of the right to health in the context of human rights proceeds to discuss a range of interconnected components essential to the right to health which are accessibility, availability, acceptability and quality.¹⁰

According to the Committee on Economic, Social and Cultural Rights, accessibility implies that facilities, goods and services must be accessible to everyone without discrimination. Due regard was given by the Committee to issues of physical access, information access, communication access and attitudinal access as important dimensions of measuring access to healthcare in states. Related to the concept of accessibility is availability, which has to do with a sufficient number of functioning healthcare services, facilities and programmes to the public.¹¹ Acceptability refers to the need for health services to be respectful of professional ethics and sensitive to cultural disposition of those concerned,¹² while quality requires that health facilities, goods and services must be medically appropriate and of a good standard.¹³

10 See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant), 11 August 2000, UN Doc E/C.12/2000/4 (2000) <https://www.refworld.org/docid/4538838d0.html> (accessed 4 September 2020).

11 Paragraph 12(a) of General Comment 14.

12 Paragraph 12(c) of General Comment 14.

13 Paragraph 12(d) of General Comment 14.

The foregoing articulations of the ICESR Committee are compatible with the CRPD General Comment 2 on article 9 – accessibility.¹⁴ Noteworthy is the fact that accessibility is one of the principles on which the CRPD is based.¹⁵ The CRPD Committee has also addressed the issue of accessibility in its jurisprudence in the case of *Szilvia Nyusti, Péter Takács and Tamás Fazekas v Hungary*.¹⁶ The CRPD Committee in its discussion of accessibility includes access to the physical environment, transportation, information and communication and other facilities and services open to the public. This means that without access to the foregoing interconnected elements, persons with disabilities would not have equal opportunities in access to adequate healthcare.¹⁷ States therefore have a responsibility to provide accessibility and this principally relates to the idea of a universal design where the state foundationally makes provision for the diverse personal needs of everyone in the society, to the greatest extent and without need for specialised design. Against this backdrop, it is possible to argue that universal design is about operationalising accessibility from the start.

The term ‘universal’ in universal design denotes the importance of responding to the common good through ‘universal programmes’ or law in order to ensure the egalitarian distribution of basic public goods and services. It can be conceived as part of the roadmap to achieving standard access and equal participation in the enjoyment of adequate healthcare for everyone and not just persons with disabilities. This inevitably falls in line with the dictate of achieving equitable access to the right to health as an antithesis to the insensitivity to human differences. The universal design significance in relation to persons with disabilities lies in its appreciation that people having different impairments experience discrimination due to the manner in which accommodations are provided. The ethics of universal design regard this much as its starting point emphasises the importance of providing goods and services that align with the complexity of the human body in such a manner that anyone, irrespective of bodily impairment, is able to have access to designs within the social and healthcare environment.¹⁸

Nevertheless, the idea ‘without the need for specialised design’ usually included in defining what constitutes universal design has been regarded by some scholars as essentialising and ambivalent, because it seems to

14 CRPD Committee, General Comment 2 (2014): Article 9: Accessibility, 22 May 2014, UN Doc CRPD/C/GC/2 (2014) (advanced unedited version).

15 Article 3(f) of the CRPD.

16 Communication 1/2010, views adopted on 16 April 2013.

17 Article 9(1) of the CRPD.

18 Inspired from a reading of the ‘Principles of universal design’ compiled by the Centre for Universal Design (2011); R Imrie ‘Designing inclusive environments and the significance of universal design’ in J Swain et al (eds) *Disabling barriers, enabling environments* (2013) 287.

eliminate specialised interventions from universal design principles.¹⁹ There is also the contention that the universal design disproportionately focuses on expert opinion as well as technological innovation rather than individual experiences.²⁰ Consequently concerns arise as to how universal design principles can respond to individual differences given the complexity of impairments and their interaction in the social environment.²¹ Undeniably, the issues raised with respect to universal design as an equitable approach raise tensions. Yet, the phrase ‘without the need for specialised design’ ought not to be interpreted literally as suggesting an ouster of approaches that could accommodate and respond to a variety of impairments in order to make a wide range of access imaginable.²²

The idea of universal design principle practically anticipates that equitable features of separate designs must come within the general design from the beginning, so as not to over emphasise individual impairments that are often amenable to segregated services or designs.²³ More so, much of the concerns raised can be ameliorated when evaluated within understandings of ethical and social provisions.²⁴ Universal design should be seen as a moral endeavour, especially in giving conscious attention to the needs of the people for whom the accommodations are intended. Securing equitable access to healthcare for persons with disabilities involves probing socio-political and cultural realities, and understanding that these realities must be traceable to historical and recent social structures. The fundamental basis for universal design is the promotion of equal opportunity and forestalling of discriminatory practices that tend to over emphasise personal impairment. These perspectives in essence demonstrate the need to apply moral reasoning to things we value for the different segment of individuals in the society. In this sense, it is argued that the universal design must pursue a flexible and broad approach in its formation in line with an objective moral theory.

- 19 P Welch ‘What is universal design?’ in P Welch (ed) *Strategies for teaching design* (1995) 1; R Mace *Universal design: Housing for the lifespan of all people* (1988); R Duncan ‘Universal design for the 21st Century: Irish & International Perspectives’ in *Conference proceedings of the National Disability Authority’s in Universal Design for the 21st century: Irish and international perspectives* (2007) <http://www.universaldesign.ie/what-is-Universal-Design/Conference-proceedings/Universal-Design-for-the-21st-Century-Irish-International-Perspective/Universal-Design/html> (accessed 3 March 2016).
- 20 J Tibias ‘Universal design: Is it really about design’ (2003) 9 *Information Technology and Disabilities Journal* 5.
- 21 On this, see R Imrie ‘Perspectives in rehabilitation: Universalism, universal design and equitable access to the built environment’ (2012) 34 *Disability & Rehabilitation* 873; WF Preiser ‘Paradigm for the 21st century: The challenge of implementing universal design’ in T Vavik (ed) *Inclusive buildings, products and services: Challenges in universal design* (2009) 28; G Pullin *Design meets disability* (2009) 11.
- 22 Paragraph 8 of General Comment 2.
- 23 See Duncan (n 19); IK Zola ‘Toward the necessary universalising of a disability policy’ (2005) 83 *The Milbank Quarterly* 1.
- 24 Derived from a reading of A Mclean et al ‘Designing as a moral enterprise: Technology Research for Independent Living researchers’ in *Conference proceedings Universal Design for the 21st century: Irish and international perspectives* (n 19).

A flexible and broad approach demands making available in a progressive sense options of use in order to accommodate wider access, adapting same to the user and facilitating the user's potential capacity.²⁵ In order to achieve transformation, societies must work out answers to human problems. States must be able to bring their values into actuality by determining impediments and mutually work towards removing them. This means dealing with stakeholders' interests and power, issues of non-discrimination, as well as committing to a national plan of action towards achieving physical, information, communication and economic access in healthcare for persons with disabilities in Nigeria. Respect for dignity, non-discrimination, inclusion, participation and accessibility are to be the basis for any implementation measures under the Disability Act. Lawton suggests that individual needs inspire the making of needed provisions.²⁶ This is synonymous with the idea of introducing flexibility and dynamism with regard to the provision of reasonable accommodations.²⁷

We are mindful that the act of creating a universal design can aid in minimising the inconvenience of impairment, but may not entirely equalise opportunities for persons with disabilities. Indeed, as argued by Shakespeare, even if society removed barriers, people would be impacted by their impairments to varying extents.²⁸ Pragmatically, when considering a universal design, modifications and alterations to existing structures in accordance with individual need is required for purposes of achieving substantive equality and equal opportunity. Accommodating individual differences is the key to eliminating discrimination against persons with disabilities and a denial of accommodations amounts to disability discrimination.²⁹ Reasonable accommodation seeks to achieve equitable justice for an individual in a manner that non-discrimination is assured, taking the dignity, autonomy and choices of the individual into consideration. For example, a person with an uncommon impairment might request for accommodation that falls outside the universal design.

Since the focus of reasonable accommodation is on the individual, alterations to remove barriers must be modified according to the individual need. This may necessitate that changes be made in respect of existing practices, the physical environment or the provision of additional support for individuals who require them. Hence, it may be argued that the provision of reasonable accommodation is a means of ensuring accessibility for a person with a disability in a particular situation. In the

25 N D'Souza 'Is universal design a critical theory?' in S Keates et al (eds) *Designing a more inclusive world* (2004) 3.

26 P Lawton 'Designing by degree: Assessing and incorporating individual accessibility needs' in WF Preiser & E Ostroff (eds) *Universal design handbook* (2001) 7.

27 D'Souza (n 25) 5.

28 T Shakespeare *Disability rights and wrongs revisited* (2013).

29 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 563; Committee on the Rights of Persons with Disabilities, General Comment 6 on equality and non-discrimination, 26 April 2018, UN Doc CRPD/C/GC/6 (2018).

end, the decision to provide reasonable accommodation is often dependent on whether it is 'reasonable' and 'whether it imposes a disproportionate or undue burden' on the state concerned. The CRPD Committee in its General Comment 6 on equality and non-discrimination explains the reasonableness of an accommodation with reference to its relevance, appropriateness and effectiveness for the person with a disability.³⁰ The CRPD Committee emphasises that the term 'reasonable' is not to be construed as an exemption clause or modifier of the duty to provide accommodations. Likewise, disproportionate or undue burden is to be understood as expressing the idea that the duty to provide reasonable accommodation is bound by a possible excessive or unjustifiable burden on the state concerned.³¹ Moreover, this requires an assessment of the proportional relationship between the means employed and the enjoyment of the right concerned.

Other potential factors to be considered on a case-by-case basis include available resources, overall assets and size of the accommodating party, the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements.³² Usually, the removal of barriers that have an impact on the enjoyment of human rights concerned, feasibility of accommodation as well as relevancy of accommodation are important elements regarding implementation. Nigeria must therefore take positive action to reduce structural disadvantages by providing necessary services and giving appropriate support towards securing equitable access to healthcare services for persons with disabilities. This draws attention to consideration of things that are good, advocates for the realisation of the good and expects people to play a part in them.

3 Overview of persons with disabilities access to healthcare services before the Act

Prior to the enactment of the Disability Act, only general laws protected persons with disabilities' right to health under concepts such as 'everyone' or 'all'. The 1999 Nigerian Constitution of the Federal Republic of Nigeria as amended (Nigerian Constitution)³³ prohibits discrimination against persons generally. Chapter Two of the Constitution enjoins the state to direct its policy towards ensuring that all persons have equality of rights and opportunities before the law and directs the state to ensure that there are adequate medical and health facilities for all persons.³⁴ However, this

30 Paragraph 25 of General Comment 6.

31 As above.

32 Paragraph 26 of General Comment 6.

33 Sections 16 and 17 of the 1999 Nigerian Constitution of the Federal Republic of Nigeria as amended (Nigerian Constitution).

34 Section 17(3)(d) of the Nigerian Constitution.

broad provision has often been taken as unenforceable in any court of law in Nigeria by virtue of section 6(6)(c) of the Constitution.³⁵ This has been interpreted to mean that the right to health shall not by any means be the subject of litigation in any court of law in Nigeria, as noted in *Attorney General of Borno v Rev Joshua Adamu*.³⁶ This argument was also put forward in the case of *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*.³⁷ Thus, it becomes difficult to demand commitment with ease or navigate the implementation of progressive disability health policies and practices.

Despite the existence of some state disability laws³⁸ that provide for free healthcare for persons with disabilities and the existence of several health sector policies at the national and subnational level,³⁹ people with disabilities remain largely discriminated against and systemically excluded. In principle, though the state laws and national health sector policies appear to advance the provision of services to persons with disabilities, these laws/policies entrenched the notion of mere support to persons with disabilities. Arguably, the Nigerian government at the time may seem to have been committed to a rights-based policy for disability programmes because of international treaties it had signed.⁴⁰ However, a casual observation shows that most stakeholders in government lack political commitment and do not have a clear understanding of the ramifications of providing a rights-based agenda to disability inclusion in the health sector. Government institutions and most Nigerians still have what is essentially a medical understanding of disability, thus, making a comprehensive articulation and implementation of policies and services on the social model values of disability an appropriate objective.

35 The Nigerian Constitution provides in sec 6(6)(c) that 'judicial powers vested in accordance with the foregoing provisions of this section...shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter Two of this Constitution'.

36 (1996) 1 NWLR (Pt 427) 68.

37 ECW/CCJ/APP/08/08.

38 n 3 above.

39 National Policy on Sexual and Reproductive Health for Nigerian Women and Girls with Disabilities; National Health Promotion Policy; National Health Promotion Policy; National Strategic Plan for Health Promotion.

40 These treaties include the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171; 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); Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982); Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

Some medical decisions made by the Nigerian government and within the national space seem to convey the perception that the lives of persons with disabilities are not as valuable as those of persons without disabilities. To illustrate, children with disabilities have been used for clinical drug trials and interventions that would otherwise be considered improper if carried out on children without disabilities as was done in Kano in relation to the Pfizer-sponsored clinical trial of trovafloxacin.⁴¹ Most persons with disabilities do not have access to healthcare services provided by teaching hospitals, orthopaedic hospitals and other specialist hospitals in Nigeria because they are yet to be included in the National Health Insurance Scheme (NHIS).⁴² Some persons with disabilities who manage to get to the public or private hospitals grapple with negative attitudes of health workers and unsuitability of hospital facilities and installations. Persons with disabilities among the internally displaced Boko Haram insurgency survivors camped at Dalori in Borno State, lack access to appropriate healthcare facilities.⁴³ Medical rehabilitation therapy was not made available to the internally displaced persons in Dalori and referrals to psychological and social services were never made or provided at the camp.⁴⁴

In relation to the foregoing exclusion, pertinent observations have been made by some persons with disabilities. Firstly, it has been observed that health administrators lack requisite awareness, capacity and necessary facilities as well as infrastructure to effectively provide disability-inclusive healthcare services in most states.⁴⁵ Secondly, there is absence of a policy framework that will ensure persons with disabilities are able to access the efforts made by some state governments in healthcare. Furthermore, a situational analysis of access to sexual and reproductive health services by women and girls with disabilities in Nigeria that was initiated by the Disability Rights Advocacy Centre (DRAC), revealed the plight of women with disabilities in accessing health services in Nigeria.⁴⁶ The survey indicated that women and girls with disabilities experience many challenges in accessing healthcare at various points of contact in the healthcare process. The challenges as stated include: inaccessible public

41 I Mohammed *Academics, epidemics, politics: An eventful career in public health* (2007) 10.

42 Y Osibanjo 'NHIS: Osinbajo says FG working to accommodate PWDs' *The Sun* 9 December 2021 <https://www.sunnewsonline.com/nhis-osinbajo-says-fg-working-to-accommodate-pwds/> (accessed 9 December 2021).

43 FB Grema et al 'Camping condition and casual status of insurgency survivors living with disability in Internally Displaced Persons Camp in North Eastern Nigeria: A case series' (2017) 3 *Bayero University Journal of Evidence-Based Physiotherapy* 28 at 29.

44 Fatimah (n 43) 28.

45 Telephonic interview with Dr Adebukola Adebayo, board member of Lagos State Office of Disability Affairs and Ejiro Okotie of the Nigerian Association of the Blind on 10 October 2020.

46 Disability Rights Advocacy Centre 'A situation analysis on access to sexual and reproductive health services by women and girls with disabilities in Nigeria' May 2020 https://web.facebook.com/DRACNigeria/photos/women-and-girls-with-disabilities-wgwd-experience-many-difficulties-in-accessing/2978651835516968/?_rdc=1&_rdr (accessed 27 May 2021).

transport, lack of accessible facilities and equipment, absence of accessible communication facilities, poverty, negative attitude of healthcare personnel, and very few skilled medical providers. These concerns are not new but they have certainly not been realised in Nigeria and these gaps coalesce to deny persons with disabilities access to basic health services.

From the foregoing, denying persons with disabilities access to the physical environment, transportation, information and communication, and services open to the general public should be viewed in the context of discrimination. Before the passing of the Act, government policy statements on health were ambivalent, while efforts to establish practical laws including healthcare access for persons with disabilities were not followed through.⁴⁷ Nigeria's national health policies and strategies do not usually integrate issues of disability or prioritise accommodations for persons with disabilities. Often, mention is only made regarding persons with disabilities as target groups. What is required is the modification of existing services to suit persons with disabilities and to present information concerning health services in a readable and comprehensible format in accordance with reasonable accommodation. For instance, the 2006 National Health Insurance Scheme (NHIS), the National Strategic Health Development Plan, and the National Strategic Plan on HIV/AIDS never articulated substantive content and substantial interventions for addressing the health needs of persons with disabilities.⁴⁸

Before the inauguration of the Disability Commission, the Ministry of Women and Social Affairs was the lead government department concerned with the responsibility of disability welfare programmes and provision of medical equipment including prosthetics and orthotics for persons with disabilities. Participatory observation and verifiable research inform that the Ministry is largely underfunded and staffed by individuals with little or no normative understanding of disability issues.⁴⁹ The processes and procedures for obtaining medical assistance were far too complicated that most persons with disabilities never really benefited in practice.⁵⁰ The problem is even more pronounced for persons with disabilities who because of their location and condition of disability miss out on medical treatment that can become life threatening without assistance from the Ministry. Persons with severe disabilities often do not survive due to lack of access to basic primary healthcare facilities that are

47 In the past, various attempts have been made to initiate bills at the Nigerian National Assembly in order to secure the rights of persons with disabilities in the country, see Joseph Onyekwere 'Persons with disabilities bill and the burden of presidential assent' *The Guardian* 9 March 2015 <https://www.guardian.ng/features/law/persons-with-disabilities-bill-and-the-burden-of-presidential-assent/> (accessed 27 May 2021).

48 Lang & Upah (n 8) .

49 As above.

50 R Lang & A Murangira 'Barriers to the inclusion of disabled people in disability policy-making in seven African countries' in J Kumpuvuori & M Scheinin (eds) *The United Nations Convention on the Rights of Persons with Disabilities: Multidisciplinary perspectives* (2009) 159.

not readily available in the rural areas and some parts of the urban settings.⁵¹ In locations where some interventions are considered, they are usually haphazard, one-off and palliative with no meaningful result, no checks and balances and no sustainability plan.

The Act was therefore expected to provide a policy direction to government, civil society organisations (CSOs), organised private sector and development partners on how to secure a rights-based approach to disability, including ensuring that persons with disabilities have unfettered access to adequate healthcare.⁵² Under the Act, safeguarding free and equitable medical healthcare services for persons with disabilities in public hospitals is anticipated.⁵³ Leveraging on the Act to ensure that health issues of persons with disabilities are fully mainstreamed into the national health and social welfare programme is anticipated. Persons with disabilities have health needs like other people but require individualised support. Unfortunately, the implementation of these provisions remains largely anticipatory as three years within the five-year moratorium under the Act has now passed with little seen to have been done and mostly by private organisations. With regard to sections 8 and 21 of the Act on access to adequate healthcare, Nigeria undertook to take effective and appropriate measures to facilitate the full enjoyment of the right of persons with disabilities to accessible healthcare.

The Disability Commission though under the Act evidently has authority and powers that are wide-ranging. These include the right to sue or sanction in appropriate cases for the violation of the provisions of the Act, as well as receiving complaints of persons with disabilities on the violation of their rights. It also involves among others the responsibility of managing and superintending over the affairs of the Commission; establishing and promoting rehabilitation centres for the development of persons with disabilities; and collaborating with the public and private sectors and civil society to ensure that peculiar interests of persons with disabilities are taken into consideration in every government policy, programme and activity.⁵⁴ Indeed, the Nigerian government can co-operate with the Disability Commission as partners in implementing policies and programmes, assessment and monitoring, including information collection and dissemination for the effective delivery of accessible healthcare. However, persons with disabilities in Nigeria are wary, yet hopeful in contemplating how successful the inaugurated

51 World Health Organisation 'Disability and health' 24 November 2021 <https://www.who.int/news-room/fact-sheet/detail/disability-and%20health> (accessed 31 October 2022) ; Rick Hoel 'Lack of accessibility can create long term effects on people with disabilities' 18 December 2020 <https://www.accessibility.com/blog/lack-of-accessibility-can-create-long-term-impact-on-people-with-disabilities> (accessed 31 October 2022).

52 Section 21(1) of the Disability Act.

53 Section 21(2) of the Disability Act.

54 Sections 37-39 of the Disability Act.

commission will be, in view of the lack of firm intention on the part of government to carry through a policy that is not immediately in their interest.⁵⁵ In Nigeria, a large portion of public office and governance is founded on assistance and favouritism and the basis for provision of social economic needs of persons with disabilities is often viewed from the medical model of disability perspective.⁵⁶

It is one thing to sign and ratify the CRPD, as well as enact a national disability Act, and another to advance administrative infrastructure and commitment for the effective implementation of the Act. In the absence of a directing framework, persons with disabilities in Nigeria will continue to experience discrimination in conditions and resources that promote and facilitate a healthy life. The Nigerian government is responsible for the quality and equal opportunity of its health systems because health for all is also affected by other human rights, for instance, right to life, adequate standard of living etc. Thus a cross-sector collaboration is critical for public sector reform and transformation. Experts working within the disability sector must work with government institutions in order to influence the deep-seated welfare and charity approach to disability issues.

4 Evaluating progress on actualising health specific provisions under the Act and one or two state laws

Disability rights groups, and community and faith-based organisations passed the Disability Rights Act in Nigeria in 2019 after decades of advocacy. Two years since the passage of this instrument at the national level, it is important to evaluate the level of progress made towards actualising the ideals enunciated therein. This part will enumerate progress and the lack of same. Progress towards achieving these rights as provided under the Act and state versions appear slow.⁵⁷ It is thought that the establishment of a Disability Commission under the Act would have assisted to ensure access to mainstream public services by all persons with disabilities in Nigeria.

The Federal Government of Nigeria, having enacted the national Disability Act, imposes positive obligations on the various state governments to adopt and pass same. The Act can be seen as a first step

55 CJ Eleweke 'A review of the challenges of achieving the goals in the African Plan of Action for people with disabilities in Nigeria' (2012) 28 *Disability and Society* 313.

56 The Ministry's approach to disability is based on the charity/welfare model of disability where demand for assistive devices is often met by massaging the ego of the official in charge of distributing these devices, see Lang & Upah (n 8) 8.

57 GU Bassey 'COVID-19 and its impact on at-risk individuals: Embracing a disability inclusive response' *The Guardian* 28 July 2020 <https://guardian.ng/features/law/covid-19-and-its-impact-on-at-risk-individuals-embracing-a-disability-inclusive-response/> (accessed 27 May 2021).

towards the fulfilment of Nigeria's legal obligations under the CRPD. As stated elsewhere in this paper, some states in Nigeria including – Kano, Bauchi, Plateau, Kwara, Kogi, Ekiti, Lagos, Ondo, and Anambra – have also enacted state level disability laws. This arguably signifies a moral/legal challenge on other state governments who are yet to enact laws for the protection of persons with disabilities in their jurisdiction. The main misgiving regarding the various state laws on disability however is that the provisions under the state's legislation and implementation are largely influenced by the medical model approach to disability.⁵⁸ The respective state legislation also remains applicable within the particular states and represents a mere arrangement of stipulations within the states.⁵⁹ Indeed the respective state legislation is not directed at the full development of human potential and strengthening of respect for human rights and dignity of all persons with disabilities in Nigeria.⁶⁰

This research found that the Nigeria National Health Insurance Scheme⁶¹ has a Physically Challenged Persons' Social Health Insurance Programme.⁶² However, the major challenge is that many persons with disabilities are unaware of this programme. Secondly, the programme is only for a section of persons living with disabilities (in this instance, persons with physical disabilities). The scheme did not contemplate persons with sensory, intellectual and cognitive impairments. This principally resonates with matters regarding disability funding, inclusion and budget priorities. The people who articulated the NHIS operational guidelines might not have set out to discriminate; they simply forgot that persons with disability are a heterogeneous group that should be accommodated in the scheme of things.

The Act will be used to evaluate progress towards accessible healthcare facilities and services for persons with disabilities in Nigeria using a range of interrelated components essential to the right to health of persons with disabilities normatively. These components will evolve around issues of accessibility to facilities and services, availability of adaptive systems, quality and acceptability of services.

4.1 Unfettered access to healthcare facilities and services

The Act in sections 3 to 8 provides for a positive right to equal access to physical structures and environment for persons with disabilities in Nigeria. Sections 3 to 8 of the Act specifically cover the obligation to ensure that all aspects of healthcare are accessible and could be regarded as

58 NC Umeh 'Realising access to inclusive education for hearing-impaired learners in Nigerian Primary Schools' PhD thesis, University of Pretoria, 2017 at 97 & 98.

59 As above.

60 As above.

61 National Health Insurance Scheme (NHIS) Operational Guidelines (2012) 11-48.

62 As above.

applicable to the entire Act. This is based on the understanding that the sections address the general topics of access, requiring the government to take adequate measures to ensure that persons with disabilities have access on an equal basis to the physical environment, transportation, information and communication and other facilities and services provided to the public. Section 5 specifically provides for the duty on government to provide special facilities to ensure that the right to equal access is operationalised. In addition, the Schedule to the Act provides a list of necessary health facilities.⁶³

Issues surrounding the access of persons with disabilities to the built environment, services and virtual spaces remain an important part of the Act. This provision of the Act is supported by the Committee on Economic, Social and Cultural Rights General Comment 14, which highlights that persons with disabilities have the right to accessible healthcare services, including the right to equality and non-discrimination in relation to all aspects of the right to health.⁶⁴ Drawing from General Comment 14, physical accessibility under the Act implies that health facilities, goods and services are situated within safe and easy to reach environments. It also entails the provision of medical services, potable water and sanitation within safe physical reach. Another inherent part of unfettered access to the right to healthcare is the ability of persons with disabilities to seek, receive and impart information relating to health issues in readable formats.

In Nigeria, persons with disabilities experience several barriers in hospitals that prevent them from accessing quality healthcare and actualising their full potential. Most of the facilities and accommodations listed in the Schedule to the Act are non-existent in most hospitals in Nigeria. This constitutes a denial of reasonable accommodation because states are required to ensure that persons with disabilities receive the support they need.⁶⁵ It has been reported that persons with disabilities face many challenges including transportation issues, lack of assistive technologies and non-adapted means of communication.⁶⁶ The reports also indicate that discriminatory service delivery and stigmatisation were

63 The First Schedule to the Discrimination Against Persons with Disability (Prohibition) Act 2018 lists necessary facilities for persons with disabilities inclusive access to healthcare to include but not limited to the following: wheelchairs; clear floors or ground space on wheel chair; wheel chair passage and turning space; crutches; guide canes; hearing aids; curb ramps; ramps; handrails; grab bars; stair-lifts; elevators or lifts; windows; entrance doors; drinking fountains and water coolers; toilet facilities; door protective and re-opening devices; manoeuvring entrances at doors; parking spaces and passenger loading zones; accessible routes including walk ways; halls; sides and spaces; alarms including audible, visual and auxiliary alarms.

64 General Comment 14.

65 Inspired from a reading of art 5 of the CRPD.

66 World Bank 'Disability inclusion in Nigeria: A rapid assessment' (22 July 2020) <https://www.elibrary.worldbank.org/doi/abs/10.1596/34073> (accessed 8 November 2021).

more prominent against persons with disabilities while accessing medical services in Nigeria.⁶⁷

According to Pulrang, environments rendered inaccessible due to lack of adaptation to disability needs increase discrimination against persons with disabilities.⁶⁸ Choosing to ignore the need to provide accommodations in required spaces whether physical, cognitive or mental is tantamount to taking actions to exclude services to persons living with disabilities.⁶⁹ Pulrang while acknowledging that the actualisation of accessibility does not completely remove all barriers, restates that most issues of exclusion experienced by persons living with disabilities is underpinned by issues related to lack of accessibility. Door widths, counter heights, text readability and absence of proper signage often present daunting challenges for persons with disabilities in their attempt to participate in health programmes or access services.⁷⁰

Inaccessibility of health facilities and services is a challenge for persons with disabilities in Nigeria in terms of both physical accessibility and other everyday matters like accessible communication and trained disability health providers. Even where the Act provides for accessible services and facilities, persons with disabilities often experience difficulties.

4.2 Availability of adaptive systems

Another critical issue in Nigeria is the unavailability of adequate healthcare without discrimination for persons with disabilities as provided under the Act. Transportation systems that are safe and responsive to the needs of persons with disabilities is an important facet of the capacity of persons with disabilities to enjoy the right to health. Where transport systems, whether municipal or rural, are not adaptive it directly impacts on the enjoyment of health rights by persons with disabilities. Ipingbemi observes that the Nigerian transport infrastructure is unfair to persons with disabilities.⁷¹

Another challenge to healthcare availability for persons with disabilities concerns admittance to documentation under the National Health Insurance Scheme (NHIS). Documentation and financial contribution are required in order to facilitate easy access to healthcare

67 World Bank *World report on disability: Main report* (2011) <https://www.documents.worldbank.org/en/publication/documentsreports/documentdetail/665131468331271288/main-report> (accessed 4 September 2020).

68 A Pulrang '7 Core arguments of Disability rights' *Forbes* 22 April 2021 <https://www.forbes.com/sites/andrewpulrang/2021/04/22/7-core-arguments-of-disability-rights/?sh=5943b4aa5471> (accessed 31 October 2022).

69 As above.

70 As above.

71 O Ipingbemi 'Mobility challenges and transport safety of people with disabilities in Ibadan Nigeria' (2015) 18 *African Journal of Psychological study of Social Sciences* 23.

services for all Nigerian citizens,⁷² and the Nigerian Government is yet to modify the National Health Insurance Scheme in order to accommodate the needs of persons with disabilities.⁷³ This is discriminatory as it prevents persons with disabilities the opportunity to access health services on an equal basis with others as provided under the Act. Indeed, lack of documentation often prevents many Nigerians from easily accessing healthcare services. Many people require assistance in obtaining documentation and for persons with disabilities, adverse socio-economic outcomes and discrimination often result in denial to provide documentation. Persons with disabilities may never have had such documentation in the first place due to poor education, stigma, low levels or lack of employment and high poverty. Most persons with disabilities are not employed, so may not seek healthcare in healthcare facilities because they lack funds. This has appreciably affected the ability of persons with disabilities to make successful claims for health services under the Act.

Ayub and Rasaki highlight that misperceptions about mental health conditions, including the misunderstanding that they are caused by evil or supernatural forces, often prompt parents or relatives to take persons with mental health issues to religious or healing places instead of hospitals.⁷⁴ Health practitioners usually fail to attend to patients with mental health conditions, maltreat them and subject the families of the patients to financial exploitation.⁷⁵ Also related to this is the fact that patients in wheelchairs are troubled when they are forced or conditioned to look up repeatedly while discussing with health professionals who are standing or not ready to sit or bend down. These include the absence of Braille and sign language interpreters as well as healthcare support facilities and professionals who are trained to cater for persons with disabilities.⁷⁶ Of particular significance, in this regard, is the unavailability of healthcare processes that are tailored to the specific needs of persons with disabilities as required under the Act.

4.3 Quality and acceptability of services

Where persons with disabilities are made uncomfortable with the level and quality of services available at hospitals it becomes impossible for them to enjoy the right to medical care and the right to live as everyone else in their immediate community.⁷⁷ The requirement under section 6 of the Act, for public buildings, structures and automobiles to be made accessible

72 NHIS Operational Guidelines (2012) 11-48.

73 Osibanjo (n 42).

74 AA Olalekan & RA Jimoh 'Barriers to accessing healthcare services by patients with disabilities in Nigerian hospitals' (2021) 4 *Gasua International Journal of Management and Social Sciences, Federal University, Gasua* 280.

75 As above.

76 As above.

77 Sections 3 and 4 of the Disabilities Act.

presupposes a universal design.⁷⁸ A study of 257 public buildings in Nigeria revealed that 80 per cent of the buildings observed had only stairs for both persons with disabilities and persons without disabilities.⁷⁹ This implies that persons living with disabilities in Nigeria continue to suffer exclusion in their attempt to use healthcare and ancillary services. This will in turn negatively affect their health. A study on the connection between the built environment and the health of persons living with disabilities reveals that related markers such as poor roadway situations, uniform land use, traffic, and surrounding hazards are suggestive of higher reported maladies, functional constraints, inertia, and social exclusion.⁸⁰

Ojo acknowledged that patients with disabilities feel segregated when treated as people in need of charity.⁸¹ This feeling of exclusion aligns with obvious lack of access to the basic needs of life, public infrastructure, healthcare delivery, education and employment. The absence of these basic needs and amenities prevent persons with disabilities from leaving as full citizens and living a productive life.

Perry asserts that patients with sensory and cognitive disabilities experience disrespect in hospitals when they complain of any health challenge.⁸² Their impairment makes it impossible for them to discuss health issues with doctors and other healthcare professionals and several hospitals in Nigeria lack the facilities to ensure equal treatment of patients. The attitudes of healthcare providers are key factors to the general well-being of patients with disabilities. Where attitudes are negative, it will impact negatively on the health of the patients with disabilities.⁸³ Indeed poor attitudes of healthcare providers will deter adequate healthcare requirements under section 21 of the Act.

5 Towards operationalising equitable access to healthcare for persons with disabilities in Nigeria

In the first place, sections 3 to 8 read together with section 21 of the Act require Nigeria to put in place a framework on the implementation of

78 K Hanifen 'Living with disabilities in Nigeria' 18 July 2019 <https://borgenproject.org/disabilities-in-nigeria/> (accessed 27 May 2021).

79 A Soyingbe et al 'A study of facilities for physically disabled people in public buildings in Nigeria' Proceedings of the 4th International Research Symposium (SCRI) in conjunction with the International Built and Human Environment Research, University of Salford, 26-27 March 2007, 251-264.

80 AL Boticcello et al 'Disability and the built environment: An investigation of community and neighbourhood land uses and participation for physically impaired adults' (2014) 24 *Annals of Epidemiology* 545.

81 J Ojo 'What Nigerians with disabilities want' *The Punch* (Nigeria) 20 December 2017 at 2.

82 RF Antonak & H Livneh 'Measurement of attitudes towards persons with disabilities' (2000) 22 *Disability and Rehabilitation* 211.

83 J Sanchez 'Perceived accessibility versus actual physical accessibility of healthcare facilities' (2000) 2 *Rehabilitation Nursing* 6.

unfettered access to adequate healthcare without discrimination based on disability. The framework should be structured in partnership with the Disability Commission and disability organisations in such a way as to include persons with disabilities high support needs. Nigeria, a country with about 27 million of its population⁸⁴ with varying degrees of disabilities, must rise to the occasion and provide a modicum of facilities and funded programmes to enable persons with disabilities to achieve their full potential in life. In order to secure a path to sustainable access to health for persons with disabilities the following must progressively be put in place by the government going forward.

- (1) The right to unfettered access to healthcare needs to be construed and observed in a manner that recognises the place of 'reasonable accommodations'⁸⁵ with regard to housing, education, hospital visits, public facilities of all variations amongst others. This is to enable persons with disabilities to enjoy the right to adequate healthcare on an equal basis with others. Applying the principle of reasonable accommodations will ensure that these rights are operationalised in a manner that impacts the life of a person with disability directly. This can take the form of ensuring that modifications and health information is presented in an accessible manner for the benefit of persons with disabilities.⁸⁶
- (2) Successive administrations must work through inclusive communities⁸⁷ to provide both by way of legislation, policy and programme reform that anticipates the needs of persons with disabilities during public health and other emergencies. This is an existing gap found to be severely lacking in the Act and the national strategic response roll out of the federal and subnational COVID-19 Taskforces. More specifically economic stimulus packages /palliatives were handled in a manner that inadvertently excluded persons with disabilities.⁸⁸

84 Jethro Ibileke '27.3 million Nigerians living with disability' *TheNews* (Nigeria) 3 December 2018 <https://www.thenewsnigeria.com.ng/2018/12/03/27-3-million-nigerians-living-with-disabilities/> (accessed 27 May 2021).

85 Reasonable accommodation principles are applied generally to the workplace and post-secondary facilities and processes. However, basic principles of reasonable accommodation can be extrapolated to all parts of the life of the person with a disability to enable them to participate fully in the society like everyone. Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring, modifying work schedules, reassignment to a vacant position; acquiring or modifying equipment or devices, modifying examinations, training materials, or policies, and providing qualified readers or interpreters. For further discussion on the concept of reasonable accommodation, see LV Martel 'Reasonable accommodation: The new concept from an inclusive constitutional perspective' (2011) 8 *SUR International Journal on Human Rights* 85. See also NC Umeh 'Progress towards inclusive primary education in selected West African Countries' (2018) 6 *African Disability Rights Yearbook* 264.

86 R Muhammad 'Life in Times of COVID-19 – Persons with Disabilities' *The Guardian* (Lagos) 5 November 2020 <https://guardian.ng/features/life-in-times-of-covid-19-persons-with-disabilities/> (accessed 27 May 2021).

87 Section 25 of the Disability Act.

88 T Oyetunde 'What next for PWDs as government excludes them from COVID-19 intervention programme' *Sahara Reporters* 23 October 2020 <http://sahara-reporters.com/2020/10/23/what-next-persons-with-disabilities-government-excludes-them-covid-19-intervention-programme> (accessed 28 May 2021).

- (3) Deliberate attempts must be made to generate disaggregated data and research towards accountability for existing programmes and factors limiting efficiency and impact on the actualisation of persons with disabilities right to access to healthcare. The size of the population living with disabilities, and the prevalence of inequality associated with disability in the Nigerian health sector are important signs of the magnitude of the challenge for inclusive policy and governance. Lack of data on access to healthcare for persons with disabilities in Nigeria in relation to inclusive budgeting should be understood in the context of a country that has yet to develop data that are more precise. Nigeria needs a comprehensive database not just for disability identification and services/programmes but also for every other programme implementation and management.
- (4) Steps must be taken to incorporate social workers in the provision of services to persons with disabilities in Nigeria. Interventions are generally initiated to strengthen human functioning and to enhance the effectiveness of societal structures that provide resources and opportunities for clients and users of services, including people with disabilities. Social workers facilitate the access of individuals in a given society to resources and opportunities available to meet their needs including persons with disabilities. Social work in Nigeria is mostly relegated to few private organisations.⁸⁹ Consequently, persons with disabilities who use public healthcare facilities are not aware of beneficial service resources and opportunities in the few instances where these opportunities exist, thereby limiting their access to these resources.

Although the above recommendations are presented under separate paragraphs, they are cross-cutting.

6 Conclusion

More than two years since the national legislation on disability rights was passed, Nigeria is not on track to meet its commitments under its national and subnational laws. Commitments ranging from access to medical healthcare and associated facilities, with a five-year moratorium for attainment have yet to be considered or implemented in any substantial degree. If decisive steps, particularly regarding funding mechanisms, are not taken towards putting in place adaptations and modifications to actualise these rights, Nigeria certainly will not achieve adequate or equitable access to healthcare for persons with disabilities. Advocacy for the achievement of the right of access to healthcare will have to continue even now that there is an enabling Act. This will influence the Disability Commission established under the Act to gain traction and push Nigeria across the line of commitment and actualisation of obligations enshrined in the Disability Act. States should be seen to perform their legal

89 S Amadasun 'Social work services for persons with disabilities in Nigeria: A qualitative enquiry' (2020) 6 *International Journal of Social Science Perspectives* 59.

obligations in good faith. Ultimately, legal obligations under the Act must become transformative and 'translated into reality' for the intended beneficiaries.

CHAPTER 4

ADVANCE DIRECTIVES IN MENTAL HEALTH: A SOLUTION THAT LEGITIMATISES THE PROBLEM?

*Alexious E Silombela Kamangila**

Summary

Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD) calls for persons with disabilities to enjoy the highest attainable standard of health without discrimination on the basis of disability. It demands that this right should be rendered on the basis of free and informed consent. Determining whether the patient is competent to give consent has been seen as critical in balancing between respecting patient's autonomy for those capable of making informed decisions and protecting those deemed cognitively impaired. Advance Directives, which provide patient's preferences on treatment in advance at a moment one is considered competent, have advanced among service users and protagonists of patient's rights in mental health. The coming into force of the CRPD with article 12 propagating universal legal capacity, brings the theoretical basis of Advance Directives into question. This article examines whether Advance Directives have the ability to promote the will and preference of the persons with cognitive disabilities specifically in relation to decisions on treatment, to safeguard legal capacity as envisaged by article 12. Advance Directives are reviewed and viewed as discordant with the CRPD in providing equal legal recognition in their current construction. It proposes Advance Directives as construing cognitive disability as the basis of one's loss of ability to decide, thereby, albeit subliminally, thwarting the right to health. It argues that Advance Directives contextually and in practice, legitimise concepts of lack of mental capacity (hence lack of legal capacity) for persons with cognitive disabilities. To promote Advance Directive legislation in the absence of legal framework that recognises legal capacity in the sense / standard as envisaged by the

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CRPD, is a recipe for disaster. The paper suggests that Advance Directives can only be CRPD compliant if they are reconceptualised to advance the will and preference of the person with fluidity of universal and equal legal capacity.

1 Introduction

Law and medical ethics require that physicians obtain informed consent from patients before initiating any treatment.¹ It can be rightly argued that, a valid informed consent can only be obtained where there is full disclosure of appropriate information to a 'competent patient' who is to make a choice.² The challenge arises where the patient is considered as incompetent thereby lacking mental capacity to decide on one's treatment and without legal capacity one is as toothless as s/he is defenceless. Appelbaum alleges that:

[T]he determination of whether patients are competent is critical in striking a proper balance between respecting the autonomy of patients who are capable of making informed decisions and protecting those with cognitive impairment.³

To preserve patients' choice, Advance Directives (ADs) have been put forward among service users in mental health. The United Nations Convention on the Rights of Persons with Disabilities (CRPD), under article 12, establishes universal legal capacity and makes it clear that there is no stage at which one loses legal capacity.⁴ The presumption is that 'all persons with impairments, regardless of their functioning, can exercise legal capacity'.⁵ It is from this background that this article examines whether ADs restore legal capacity which historically has been denied for persons with psychosocial/cognitive disabilities or has the ability to promote the will and preference of the persons with disability specifically in relation to decisions on treatment. It construes ADs as the acceptance of the social construction of psychosocial disability as the basis of one's loss of ability to decide. This may act as a return to the view of disability (psychosocial disability), 'as an aspect of social security and welfare legislation, health law or guardianship',⁶ which has been the traditional

1 JW Berg et al *Informed consent: Legal theory and clinical practice* (2001) 12.

2 PS Appelbaum 'Assessment of patients' competence to consent to treatment' (2007) 357 *The New England Journal of Medicine* 1834.

3 As above.

4 United Nations Committee on the Rights of Persons with Disabilities, General Comment 1: Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/CG1 (2014) para 14 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1> (accessed 24 January 2019).

5 T Degener 'Challenges and compliance of the UN CRPD' Working Paper of the Academy of European Law (2013) 4.

6 R Kayess & P French 'Out of the darkness into the light? Introduction to the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1 at 14.

way of viewing disability in practice and legislation. The article argues that instead of empowering persons with psychosocial disabilities, if not properly construed, introduced and monitored, ADs legitimise denial of legal capacity to persons with psychosocial disabilities.

2 Legal capacity under the CRPD

In modern times, disability advocates have advanced beyond advocating for equal protection of the law to the need for equal recognition before the law (a fruit of ‘decades of activism by the disability community’).⁷ Legal capacity refers to ‘an individual’s status and authority within a given legal system’.⁸ It describes the rights and status of a person separate from cognitive competence.⁹ Such encompasses ‘persons’ power or possibility to act within the framework of a legal system’.¹⁰ Thus two elements intersect: legal standing as the state of viewing a person as a subject before the law and legal agency which is the ability to act within the legal system.¹¹

Where one is viewed as lacking legal standing, personhood at law is lost and such extinction results in civil death, that is, inexistence at law, which has been the story of persons with psychosocial disabilities.¹² As such, legal capacity is a medium through which persons exercise the right to make decisions and have those decisions respected by others.¹³ Legal capacity thus preserves personal autonomy.

It has been argued that the removal of the footnote to article 12(2) which restricted legal capacity in three of the six official United Nations (UN) languages to mean ‘capacity for rights’,¹⁴ reaffirmed state parties’

7 SKB Glen ‘Changing Paradigms: Mental capacity, legal capacity, guardianship and beyond’ (2012) 44 *Columbia Human Rights Law Review* 123.

8 T Minkowitz ‘The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric Interventions’ (2007) 34 *Syracuse Journal of International Law and Commerce* 405.

9 B Carter ‘Supported decision-making’ Background Discussion Paper, Ministry of Justice, Australia https://healthsciences.unimelb.edu.au/__data/assets/pdf_file/0010/3391696/Supported-decision-making.pdf (accessed 25 July 2020).

10 Council of Europe Commissioner for Human Rights ‘The right of people with disabilities to live independently and be included in the Community’ <https://wcd.coe.int/viewDoc.jsp?id=1917847> (accessed 30 August 2022).

11 B McSherry & K Wilson ‘The concept of capacity in Australian mental health law reform: Going the wrong direction?’ (2015) 40 *International Journal of Law and Psychiatry* 62.

12 As above.

13 G Quinn et al ‘Restoring the “human” in “human rights”’: Personhood and doctrinal innovation in the UN Disability Convention’ in C Gearty & C Douzinas (eds) *The Cambridge companion to human rights law* (2012) 36-55.

14 United Nations Economic, Social & Cultural Rights Council, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc A/AC.265/2006/L.6 (14-25 August 2006).

intention to guarantee legal capacity universally and without limitations.¹⁵ Grounded in the social model, which views disability as an interaction between the individual and the environment, it divorces legal capacity from mental capacity. It emphasises addressing barriers and environmental adaptations and not fixing or curing the individual.¹⁶ Such is a human rights approach which recognises legal capacity of every human being without considering individual capacities.¹⁷ This ensures that persons with disabilities have the decision-making power and recognition before the law on a par with people without disabilities. In this way, capacity is ever existent in the being in her/his entire existence whether mental capacity fluctuates or not.

2.1 Mental capacity conception

The United Nations Committee on the Convention on the Rights of Persons with Disabilities (CRPD Committee) defines mental capacity as the 'decision-making skills of a person'.¹⁸ Assessments of decision-making skills have traditionally focused on a person's cognitive abilities.¹⁹ Methodologically, assessment tests consider a person unable to make a decision where one is said to be unable to understand or retain information, unable to use and weigh information in the process of decision-making and unable to communicate one's decision.²⁰ From these variables, it is clear that there is a recognition of the fluctuation of mental capacity and that its assessment is in relation to a particular decision at a specified time. 'This approach is flawed in that firstly, it is discriminatorily applied to people with disabilities'.²¹ Secondly,

'it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right – the right to equal recognition before the law'.²²

Series alludes to the fact that 'a person is accorded legal rights and responsibilities only as far as they are found to be competent and their decisions are authentically theirs'.²³ Does an 'unwise' decision entail lack of capacity to decide? 'It is irrelevant that the decision is considered unwise in the eyes of the majority, as long as it is broadly consistent with the

15 Minkowitz (n 8) 411.

16 L Series 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80.

17 As above.

18 General Comment 1(n 4) para 12.

19 McSherry & Wilson (n 11) 64.

20 Mental Capacity Act 2005.

21 General Comment 1 (n 4) para 15.

22 As above.

23 Series (n 16) 81.

individual's own value system'.²⁴ Regrettably, empirical research indicate that in mental capacity assessments, the assessors struggle to distinguish between 'incapacious' and 'unwise' decisions.²⁵

2.2 Legal and mental capacity interface

Mental capacity has been and remains closely linked to legal capacity. It is an essential ingredient of individual autonomy that demarcates decisions that are legally effective from those that are ineffective.²⁶ Persons perceived to have mental capacity are said to have legal capacity as such their decisions are respected at law (and in general). On the other hand, those deemed lacking mental capacity will be judged to lack legal capacity hence their decisions are invalid.

Just as there are variances of decision-making skills among persons without disabilities, how well-developed decision-making skills are among persons with disabilities, differ. But this does not necessitate different treatment for those without disabilities but with 'poor decision-making skills'. The CRPD Committee opposes the use of mental capacity as the basis for restriction to equal participation of persons with disabilities in civil law.²⁷ The fact that there is a requirement for establishing mental capacity in order for an AD to be considered binding or informative, reveals its social camouflage. Determining compliance with article 12 requires assessing whether legal capacity is denied to persons with disabilities on an equal basis with persons who do not have disabilities. Essentially, the requirement to evaluate whether the denial of legal capacity is discriminatory on the basis of disability in purpose or effect, is applicable to ADs. Normally, inspections of mental capacity do not arise when persons without disabilities execute a directive. As such its applicability on persons with psychosocial disability is discriminatory hence contrary to the spirit of article 12.

Mental health laws are directed at restricting freedom and self-determination as they are premised on 'an equation of psychosocial disability to legal incapacity, and legal incapacitation is the primary way in which the law deals with persons with psychosocial disabilities'.²⁸ It is only through a guarantee of legal capacity on an equal basis with others in all aspects of life, not ADs, that will result in the elimination of such legal regimes. As Minkowitz rightly argues, 'disability is not a loss of physical

24 C Emmett et al 'Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards' (2012) 36 *International Journal of Law and Psychiatry* 73.

25 As above.

26 G Richardson 'Mental capacity in the shadow of suicide: What can the law do?' (2013) 9 *International Journal of Law in Context* 87.

27 General Comment 1 (n 4) para 12.

28 Minkowitz (n 8) 408.

or mental integrity, but a situation in which people possess their own physical and mental integrity that deserves respect equally with other'.²⁹ Do ADs restore, to persons with disabilities, the historically denied right to legal capacity?

3 Advance directives and universal legal capacity dichotomy

ADs are instruments that enable competent persons to dictate medical treatment choices in anticipation of future periods of incapacity.³⁰ Their intention is to establish one's preferences on treatment should the person become incompetent or incapable of communicating those preferences.³¹ In mental health, ADs stipulate treatment preferences for times 'when a consumer of mental health services has a mental health crisis and is unable to communicate those preferences'.³² ADs are considered by many as a vehicle for the recognition of consumer rights in mental health law.³³ Weller asserts that ADs are a practical step towards a broader 'culture of supported decision-making' in the mental health context.³⁴ ADs act as instruments to support clients in reaching decisions and facilitate collaborative partnership between doctors and patients, particularly due to the fact that it takes into account that mental capacity may fluctuate over the course of mental illness.³⁵ A conceptual analysis of ADs in relation to article 12 of CRPD would suggest that the tool may be essential in the advancement of supported decision-making as opposed to as a tool for decision-making. As Fiona Morrissey observes, ADs are an important supported decision-making tool.³⁶ Ireland is one country that has attempted to embrace ADs.

3.1 Assisted Decision Making (Capacity) Act 2015

In an effort to advance respect for choices of persons with psychosocial disabilities, Ireland legalised advance health directives through the adoption of the Assisted Decision Making (Capacity) Act. Whereas the intention was good, the outcome was retrogressive not only in that the

29 Minkowitz (n 8) 412.

30 P Weller 'Psychiatric advance directives and human rights' (2010) 17 *Psychiatry, Psychology and Law* 218.

31 DS Srebnik et al 'Advance directives for mental health treatment' (1999) 50 *Psychiatric Services* 919.

32 As above.

33 Weller (n 30) 219.

34 As above.

35 S Pathare et al 'Supported decision-making for persons with mental illness: A review' (2012) 34 *Public Health Reviews* 25.

36 FE Morrissey 'The introduction of a legal framework for advance directives in the UN CRPD era: The views of Irish service users and consultant psychiatrists, Ethics, Medicine and Public Health' (2015) 326.

advanced directives are still not binding in Ireland but also that this law retains the mental capacity standard. For instance, the advance health directive has been defined as:

[A]n advance expression made by the person, in accordance with section 84, of his or her will and preferences concerning treatment decisions that may arise in respect of him or her if he or she subsequently lacks capacity.³⁷

Further, the Act provides that an advanced health directive can be made by a person who is not less than 18 years old and has capacity.³⁸ It is the argument of this paper that the emphasis being made on capacity for a validity of ADs is contrary to the aspirations of CRPD but reveals the true face of ADs. And so, the Assisted Decision-Making Act adoption of ADs is a huge step in the wrong direction, as far as article 12 of the CRPD is concerned.

ADs are not tools that universally assist service users in general; rather, they are specifically useful to those who fear that they may be denied the right to choose their course of treatment. In practice, ADs don't serve as the ultimate decision-making supportive tool on treatment, but provide an opportunity for preferences for treatment. ADs are highly promoted by psychiatry professionals. This alone raises red flags as to how tailored they are to the needs and protection of service users as well as survivor organisations.³⁹ It is an argument of this paper that while preference on what kind of treatment (drugs or form) is to be administered to a patient is part of the right enshrined under article 12 of the CRPD, the principle right lies in the freedom to decide on whether treatment should be administered as a preamble determination. Choices on the kind of treatment arises where one has already agreed to treatment. Further, reviews of ADs in practice seem not to support advanced decisions to refute treatment as it 'faces opposition from the majority of psychiatrists'⁴⁰ at enforcement stage.

The origin and progression of ADs in psychiatry emanates from the premise that one can lose mental capacity. For this reason, the validity of an AD depends on it being executed when the executor had mental capacity. And the non-reversible nature once effected during 'crisis' is based on the conviction that a decision made while having mental capacity cannot be reversed when one has lost mental capacity (or while one is under a mental capacity fluctuation). It is the position of this paper that:

37 Section 82(1) of the Assisted Decision Making (Capacity) Act 2015.

38 Section 84 of the Assisted Decision Making (Capacity) Act 2015.

39 Reference is made to article 4.3 of the CRPD (requiring close consultation with organisations of persons with disabilities on all implementation matters) and 8 (awareness-raising obligations).

40 Morrissey (n 36) 326.

[T]he point at which an AD enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on an assessment that the person lacks mental capacity.⁴¹

Gooding and Flynn argues that ‘introducing mental capacity as grounds for interference (involuntary admissions) would fail to stem disability-based discrimination; instead, it would cement it’.⁴² Similarly, embracing ADs which incorporate mental capacity assessments would not advance realisation of legal capacity (will and preferences) of persons with psychosocial disabilities. On the contrary, it will cement societal/cultural prejudices against universal legal capacity.

Although ADs are a creature brought forward as a clear solution to human rights deficits in mental health laws, they not only have limited impact in practice,⁴³ but further act as a fertile ground for prejudices against decision-making abilities of persons with disabilities. Further, as a Survey conducted in Ireland unveils, the use of ADs to refuse all treatment led to negativity to their acceptability.⁴⁴ This demonstrates how in practice ADs are not tools to advance decision-making but rather (largely) to promote treatment choices. This does not ignore the use of ADs to appoint the proxy, but rather requires that even then, in circumstances of purported crisis, the proxy should aim at establishing the person’s will and preference in the present. Essentially, ADs are a tool for those that have agreed to treatment but refuse certain treatments.⁴⁵ ADs are, therefore, very limited in their scope and impact to incite decision-making and even as a tool for supported decision-making.

Conceptually, the genesis of ADs is flawed as far as legal capacity, as conceptualised by the CRPD, is concerned. It largely develops from the concession of the fact that at a certain stage of mental illness, called ‘health crisis’, one loses mental capacity hence legal capacity to determine one’s mental treatment is lost. This should be scrutinised from the understanding that ‘a person is accorded legal rights and responsibilities only in so far as they are found to be competent and their decisions are authentically theirs’.⁴⁶ In this regard, ADs have the potential to inadvertently cast doubt upon the legal capacity of persons with disabilities, categorically labelling them incompetent. It entrenches the assumptions that surround treatment of persons with psychosocial disabilities – that they lack the capacity to make valid medical decisions.⁴⁷ In fact, the CRPD has moved away from

41 General Comment 1 (n 4) para 17.

42 P Gooding et al ‘Querying the call to introduce mental capacity testing to mental health law: Does the Doctrine of Necessity Provide an Alternative?’ Centre for Disability Law and Policy, National University of Ireland, Galway, Ireland (2015) 247.

43 Weller (n 30) 219.

44 Morrissey (n 36) 329.

45 Morrissey (n 36) 330.

46 Series (n 16) 81.

47 PJ Weller ‘“Lost in translation: Human rights and mental health law’ in B McSherry & P Weller (eds) *Rethinking rights-based mental health laws* (2010) 51-72 at 63

the mental capacity-based model. This raises the question: what disability-neutral criteria would be used in preferring a person's decision at one time over another (the case of ADs)?⁴⁸ This is an area fertile for further discussion, as a depth conversation is beyond the reach of this paper.

Ireland has zealously moved away from institutionalisation in favour of community reintegration, without comprehensively restoring legal capacity. To return this population to their communities while denying them full legal capacity – the right to control their own lives - amounts to a denial of existence at law. Where one doesn't exist in law, they cannot enjoy any rights, and the purpose for which ADs aim to achieve, thus returning autonomy to the person, is challenged by the mechanism itself. In the absence of legal capacity, one cannot enjoy any rights, and so to de-institutionalise without returning respect for legal capacity is to institutionalise within society/community. It can hence be argued that the paternalistic approach of ADs restores the social barrier to decision-making of persons with disabilities, which is contrary to the aspirations of the CRPD.

4 A theoretical analysis of advanced directives

The social model of disability construes disability as a result of societal barriers that stand in the way of persons with impairments in their equal participation in everyday life. Whereas the medical model sees the problem being in the individual and needing treatment, the social model considers the individuals' environment and circumstances. In this paper, ADs are interpreted as a product of the medical model view of disability, whereas their implementation to advance the CRPD's aspirations is challenged as they are unmasked as the social barrier legitimising prejudices that have historically treated persons with psychosocial disabilities as incompetent.

4.1 The medical model

The medical model regards disability as impairment requiring treatment.⁴⁹ Psychosocial disability in this case is considered a deviation from the normal health status; a state where one is incompetent and unable to comprehend. Exclusion of persons with psychosocial disabilities from society is regarded as a result of their individual complexities and problems and the reasons for exclusion are 'clearly' in their impairment which prevent them from realising the consequences of their decisions. Such is what the social model theorist Michael Oliver conceptualises as,

⁴⁸ Series (n 16) 866.

⁴⁹ T Degener 'Challenges and compliance of the UN CRPD' Working Paper of the Academy of European Law (2013) 5.

'ideological construction of disability through individualism and medicalisation, the politics of disablement'.⁵⁰ This is where the theoretical critique of the ADs arises. ADs genesis and construction arise from the acceptance or 'realisation' that at a certain state of mental illness, persons with psychosocial disability lose their capability to decide, that is mental capacity is lost. The fact that the condition of making a valid AD lies in the proof of existence of capacity at the point of its execution, supports this thought.⁵¹ But further, the very justification of ADs is that one should make their will and preferences known while they are able to, otherwise once in crisis, they are mentally incapable. Persons with mental impairments need a shelter, a social protection for cases where they have lost legal capacity, and that is what necessitates making decisions in advance.

The medicalisation of disability in ADs lies in the fact that by their nature, they are construed as a treatment preference as opposed to a decision-making tool. That is, refusal of total treatment would rarely be seen as the purpose for which ADs are created. It would be naive to argue that ADs are worse than forced treatment or treatment without consent. Yet it is more dangerous to conclude that 'staged consent' or a choice without the option to refuse would amount to advancement of the aspirations of the CRPD. But more importantly, where ADs are implemented within a pathologising approach, this leads to retrogression. On the other hand, ADs might be tools aimed at breaking social barriers, so as to advance the wishes and will of persons with psychosocial disability (breaking social bearers), thereby advancing the social model of disability.

4.2 The social model

The social model of disability stems from the text of Fundamental Principles of Disability arguing that disability is not as a result of impairments but results from the disabling barriers that persons with disabilities face in society.⁵² This model focuses on society as opposed to the individual and explains disability as a social construct through discrimination and oppression.⁵³ It distinguishes an impairment from disability. Disability is regarded as a mere difference within the continuum of human variations.⁵⁴ Of great importance here is the deviation of the social model from the consideration of disability as a condition of body or mind of the individual (medical model), into considering disability as a result of the way environment and society responds to impairment.⁵⁵

50 M Oliver *The politics of disablement* (1990) 96.

51 Section 84(1) of the Assisted Decision Making (Capacity) Act 2015.

52 M Oliver 'The social model of disability: Thirty years on' (2013) 28 *Disability & Society* 1024.

53 Degener (n 5) 5.

54 As above.

55 As above.

The above understanding of the social model is helpful in critiquing ADs in their implementation. First and foremost, ADs approach to decision making, is hanged on competence. The very requirement of its execution requiring that the executor to be competent, is evidence to it. On the other hand, the decision is largely on choices of treatment as opposed to the ultimate or primary decision on consent or refusal of treatment. The attitude is: let the patient get treatment and be healed from this impairment that is preventing him or her from being able to exercise mental capacity. Such shows a clear medicalisation of disability in the ADs, to which the social model has advanced to move away from.

Secondly, while recognising that ADs are tools that hypothetically intend to break the social barrier of decision-making for persons with psychosocial disabilities so that even in their perceived crisis state their preferences are followed and adhered to, ADs' impact on social prejudices cannot be left unaddressed. To begin with, ADs legitimatise prejudice against individuals with psychosocial disabilities through applying a mental capacity standard, such that only an instrument executed while they had capacity can be trusted. 'To legitimize the very practices the CRPD sought to eradicate'⁵⁶ is a dangerous path to take. Again, as ADs tilt towards accepting at least a particular treatment as opposed to total refusal, they are a premeditated decision to (in some cases, involuntarily) treat persons with disabilities masquerading as tools to preserve autonomy. This is not to argue that persons with psychosocial disabilities will always refuse treatment, rather is to say in a system that has not embraced a 'No to treatment' as a competent decision, the effect of blind endorsement of ADs becomes worrisome. The proxy approach may be raised here, but still the issue is that even that does not show confidence in the choices of the 'patient', but rather hinges trust on the person one chose while he/she had mental capacity. General Comment 1 urges that an outside decision-maker should make a decision based on their 'best interpretation' of the person's will and preferences at the time the decision is made.⁵⁷ As this paper is limited in scope to address all issues, to conclude this discussion on the social model, in a society that is yet to accept decisions of persons as valid once diagnosed with mental illness, ADs will legitimatise the prejudices and in jurisdictions where they are legally binding and common, an absence of an AD in an individual case will automatically oust one's 'choice'. Will and preference are dynamic concepts, which is why ADs cannot be regarded as promoting will and preferences of the executor unless such is proven static or the interpretation of ADs is dynamic in consideration to the person's present wishes. Usually, when faced with a patient, clinicians are underpinned and prejudiced by the patient's best interests concept from which their clinical responsibility and practice emanates. It is the argument of this paper that without a guarantee of equal

56 Series (n 16) 80.

57 General Comment 1 (n 4) para 2.

legal capacity to persons with disabilities, ADs can offer little, if any, guarantee to respect of persons' will and preferences to/on treatment.

As discussed, the medical model has been seen as the basis for considering persons with psychosocial disabilities as lacking mental as well as legal capacity and necessitating treatment on the persons. The social model would strongly pose the lack of legal capacity as a social construction which bars the decision making of persons with psychosocial disabilities. ADs embrace the medical model by acceptance of the over-emphasis on the need to treat psychosocial disabilities. Consistent with the medical model, ADs further emphasise the need for assessment and proof of legal capacity before society can respect such decision(s) when made. The ADs while adopting the social model approach in respect for the user's decision, retain elements of the medical model by (whether directly/indirectly or knowingly/unknowingly) concluding that psychosocial disabilities result in loss of mental capacity. This is a frightening state of affairs for it comes as an empowerment tool yet legitimises the stereotypes that disempower persons with psychosocial disabilities as having no legal capacity. This is ironic and yet a thin line distinction to the extent that the negative impact of ADs can go unnoticed, yet its impact is and will be disastrous. As Kerslake and Flynn observe:

Historically, people with disabilities have been denied legal personhood and agency on a differential basis. This has fostered inequality in legal capacity law that has permeated legal and social systems. The starting point for change is dismantling these unequal systems. It is not recreating structures that perpetuate a different legal status of people with disabilities.⁵⁸

Similarly, the whole adoption of the ADs as an empowering tool for persons with disabilities without breaking the barriers that have been upheld for ages in their denial to decision-making, is regressive to realisation of article 12 of the CRPD. ADs arise from the acceptance of considering a person as having autonomy before the law based on their capability to decide. For persons with disabilities, they are or have been historically considered unable to make a decision, lacking mental capability, as such ADs are tools to return this legal capacity. This legitimises the dehumanisation of persons with psychosocial disabilities as they lose their legal capacity when in 'serious mental' breakdown.

58 A Arstein-Kerslake & E Flynn 'The General Comment on article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law' (2016) 20 *The International Journal of Human Rights* 471 at 485.

5 Examining redemability of advance directives under the lens of the CRPD

An AD understood as ‘a written declaration that a patient can use to accept or refuse future medical treatment’⁵⁹ is facially a tool to advance autonomy of patients even in the most difficult times. Patients use advance directives to communicate to health providers their preferences as regards future health care decisions. As a form of reliable and accurate reflection of a patient’s desires as regards treatment decisions, ‘ADs are extremely useful as direct and reliable expressions of a patient’s wishes’.⁶⁰ Without a doubt, the preceding discussion highlights a distinction of ADs in general as to how they are applicable and conceptualised in mental health services.

It has been posited that ‘ADs were originally developed to allow decisions regarding end-of-life care’.⁶¹ These instruments also known as ‘living wills’ were later introduced or extended to the mental health context, for purposes of advancing possibilities of mental health patients to express their treatment choices in advance before incapacity.⁶² There is therefore no denial that ADs have for ages been recognised and accepted as ‘strategies for giving people with mental disorders more say in the management of their treatment and their lives’.⁶³ ADs are a tool aimed at advancing autonomy. Thus, ADs meet the general legal requirement of consent to medical treatment. In the absence of ADs, patients deemed incapable of giving consent are nevertheless treated in their ‘best interests’.⁶⁴

Now, as a transition of progress to the realisation of rights of persons with cognitive disabilities, ADs should be applauded and safeguarded for they addressed a number of issues that dominated the era of institutionalisation in mental health. Thus, ADs in mental health have been important in many ways. First, ADs advance adherence to treatment as one is involved in the process of choice, hence beneficial therapeutically. Another advantage of ADs is that they reduce involuntary detention and treatment. This has facilitated de-institutionalisation and has been revolutionary to mental health services. Further, ADs advance

59 MO Tyminski ‘The current state of advance directive law in Ohio: More protective of provider liability than patients rights’ (2005) 19 *Journal of Law and Health* 411 at 414.

60 Tyminski (n 59) 416.

61 RL O’Reilly ‘The capacity to execute an advance directive for psychiatric treatment’ (2008) 31 *International Journal of Law and Psychiatry* 66.

62 F Morrissey ‘Advance directives in mental health care: Hearing the voice of the mentally ill’ (2010) 16 *Medico-Legal Journal of Ireland* 21 at 22.

63 Department of Health, ACT, Australia, Department of Health ‘Review of the ACT Mental Health (Treatment and Care) Act 1994: Options Paper’ (2007) 20.

64 Morrissey (n 36).

collaborative decision-making thereby harnessing patient expertise which leads to quality healthcare services.⁶⁵ For this reason, ADs have an economic benefit in that there is a reduction in the readmission rates thereby easing the pressure on mental health services demand.⁶⁶ And finally, ADs advance patient preferences even where the patient is deemed incapable of making a choice or expressing such a choice. Unfortunately, despite all these positives well documented in health services discourse, the introduction and adoption of the CRPD, changes the narrative entirely. With article 12 advancing universal legal capacity in its quest for equality before the law at all times, ADs in the state in which they are conceptualised, fail to pass the human rights model test. Perhaps this is the pinnacle of acclaimed paradigm shift brought by the adoption of the CRPD.

General Comment 1 addresses the challenge well as it states:

For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their *will and preferences* which should be followed at a time when they may not be in a position to communicate their wishes to others. All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others. States parties can provide various forms of advance planning mechanisms to accommodate various preferences, but all the options should be non-discriminatory. Support should be provided to a person, where desired, to complete an advance planning process. The point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on an assessment that the person lacks mental capacity.⁶⁷

To cement the substantive argument above, it goes further to say:

The type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities. This is in accordance with article 3 (d), which sets out ‘respect for difference and acceptance of persons with disabilities as part of human diversity and humanity’ as a general principle of the Convention. *At all times, including in crisis situations*, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.⁶⁸

From the above, it is clear that there is a conceptual titanic confrontation between ADs and article 12, which cannot be ignored. The autonomy of a person with mental disabilities, through the CRPD paradigm shift, is never lost even during mental capacity variance levels of crisis. And so as long as one’s capacity to decide is denied or suspended or pended on the basis of

65 DL Ambrosini & AG Crocker ‘Psychiatric advance directives and the right to refuse treatment in Canada’ (2007) 52 *Canadian Journal of Psychiatry* 398.

66 E O’Shea & B Kennelly *The economics of mental health care in Ireland* (2008) 71.

67 General Comment 1 (n 4) para 17 (emphasis added).

68 As above.

mental capacity, ADs fail to adhere to the spirit of the CRPD. Nevertheless, ADs, can be reconceptualised in mental health to align to the CRPD by subjecting their validity and relevance to the will and preference of the persons with mental disabilities, and realigning its legitimacy guidelines to article 12. That is, as long as ADs are the most effective and clear way of establishing the will and preference of the person, without undermining in anyway universal legal capacity, ADs are redeemable.

6 Conclusion

As alluded to in the preamble of this paper, law and ethics demand that free and informed consent is sought from the patient before any treatment. The CRPD enforces this by

requiring health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed by, *inter alia*, raising awareness of human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.⁶⁹

The recognition of legal capacity for persons with disabilities needs to be pursued with all effort and without shortcuts. This will not be easy and patience will be needed more especially in third world countries, like Malawi, where the concept of rights is already considered foreign and a challenge to state sovereignty. But even in countries like Ireland with long traditional norms of paternalism, the challenge is equally tasking. It is essential that the granting of legal capacity should not be conditional. As ADs in the state they are in contextually legitimise concepts of lack of mental capacity as resulting in lack of legal capacity for persons with psychosocial disabilities, they can be construed as exacerbating the problem they aim to solve. This essay has raised doubts as to ADs' ability to promote effective participation by persons with psychosocial disabilities in decisions concerning treatment that affect their lives. In order for ADs to align to the aspirations of the CRPD, there will be a need to modify their operation so as to exist as living documents that do not end up binding people against their will and preference where such has changed. Further, their validity should not be conditional on existence of mental capacity.

Additionally, it is important to consider the relative utility of ADs in different global contexts. ADs seemed to have been very useful for America and (especially) Europe, given the comparatively well-developed healthcare service infrastructure and the challenges of institutionalisation. Such is not the case for Africa and specifically Malawi, where the challenge starts from the lack of services themselves, such that a choice of treatment is not an urgent conversation, as yet. Thus, as advocates push for

69 Article 25 of the Convention on the Rights of Persons with Disabilities.

availability of mental health services, ADs in the state they are conceptualised might not be the way forward for Africa and/or Malawi. Generally, to promote AD legislation in the absence of legal framework that recognises legal capacity in the sense/standard of the CRPD, is a recipe for disaster. ADs have 'a limited scope when they are merely a reaction to the coercive power of rights-based legalism'.⁷⁰ Elimination of the social barriers of prejudices against persons with psychosocial disabilities remains critical. A solution that legitimatises the problem becomes the problem requiring a solution; the story of ADs.

70 Weller (n 30) 219.

CHAPTER 5

CRITERIA FOR LAW REFORM ON COMPREHENSIVE SEXUALITY EDUCATION FOR CHILDREN WITH DISABILITIES IN SOUTH AFRICA

Thina Mthembu & Willene Holness***

Summary

The recent expanded understanding of Sexual Reproductive Health and Rights (SRHR), which includes Comprehensive Sexuality Education (CSE), seeks to highlight inter alia the needs of adolescents, (especially those with disabilities) a group previously excluded from the narrow scope of SRHR. This paper identifies relevant and context-specific criteria for law reform of CSE provision in legislation for South Africa. The paper considers the international law and interpretive guidelines for CSE but relevant indicators such as inclusivity, accessibility and reasonable accommodation specifically for children with disabilities is absent from UNESCO's Technical guidance on sexuality education: An evidence-informed approach for schools, teachers and health educators (2018). An analysis of the policy and South African legislation identifies that explicit provision for CSE and the accessibility of CSE and reasonable accommodation of children/adolescents with disabilities are largely absent. The implementation delay in the legislative framework currently contributes to the high number of out-of-school children with disabilities and also does not have a concrete provision for CSE. A review of the policy framework shows fragmentation, misalignment, and incoherence, which is unlikely to be remedied absent an enabling legislative provision that identifies the criteria for CSE, including for children/youth with disabilities, and a requirement for multi-sectoral alignment, budgeting and data disaggregation. The paper recommends an amendment to the Children's Act 38 of 2005 for explicit inclusion of CSE as this legislation is applicable to all children and extends beyond the context

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of education-sector specific legislation. Such an amendment would obligate the state to provide CSE not only in schools, but also in juvenile correction centres, hospitals, clinics and in other relevant public service facilities that cater for children – as well as in community-based fora. It further recommends an explicit provision on CSE in relevant sectors and general principles of accessibility and reasonable accommodation in proposed disability-specific legislation.

1 Introduction

Sexual reproductive health rights (SRHR) include individual persons' ability to make choices about their reproduction; and entitle persons to access information and education about their sexuality and to freedom from gender-based violence.¹ This right originally derived from the highest attainable right to health² and is now encapsulated in many treaties, and its content explained in the interpretive guidelines of treaty monitoring bodies (TMBs).³ The recent expanded understanding on the ambit of SRHR, which includes Comprehensive Sexuality Education (CSE), services for safe termination of pregnancy, prevention and treatment of sexually transmitted infections, infertility, and reproductive organ cancers, seeks to highlight inter alia the needs of adolescents, one of the groups previously excluded from the traditional narrow notion of the scope of SRHR.⁴

- 1 L Murungi & E Durojaye 'The sexual and reproductive health rights of women with disabilities in Africa: Linkages between the CRPD and the African Women's Protocol' (2015) 3 *African Disability Rights Yearbook* 1 at 7.
- 2 Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 is the most authoritative encapsulation. Cf UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12), 11 August 2000, UN Doc E/C/12/2000/4 (2000) para 21.
- 3 For example, arts 10 and 16 of the UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13 (CEDAW); UN Committee on the Elimination of Discrimination Against Women, General Recommendation 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap I; Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016) E/C.12/GC/22; art 24 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3; Committee on the Rights of the Child (CRC Committee), General Comment 15: On the right of the child to the enjoyment of the highest attainable standard of health (art 24), (2013); CRC Committee, General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child (2003). Cf art 14 of the African Women's Protocol to the African Charter on Human and Peoples' Rights adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003); African Commission on Human and Peoples' Rights General Comment 2 on the article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014).
- 4 L Ferguson & S Desai 'Sexual and reproductive health and rights for all: Translating the Gutmacher-Lancet Commission's global report to local action' (2018) 26 *Reproductive Health Matters* 1 at 6-7.

The relative invisibility of SRHR in the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁵ and other international instruments may be why states and the disability rights movement in South Africa have not readily politicised the issue of disabled sexualities in their own legislation.⁶ The Committee on the Rights of Persons with Disabilities (CRPD Committee) prefers to mention CSE in the narrow context of concerns about health rather than address it in a manner that advances sexual desire, freedom and self-determination.⁷ Globally, numerous barriers faced by children and young persons with disabilities in accessing sexuality education and other health priorities, mean that CSE is not on top of the political agenda.⁸ UNESCO found that while some legislative and policy pronouncements of sexuality education exist, the commitment is rhetorical and without 'adequate resources and prioritisation of implementation'.⁹ Fortunately, on the African continent, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol)¹⁰ provides more explicit recognition of sexuality education for adolescents with disabilities that should guide state parties in their measures to respect, protect, promote and fulfil the SRHR of persons with disabilities when it comes into force.

Although South Africa recognises CSE as an appropriate curriculum tool to help bridge the apparent knowledge gap between legislative rights and the sexuality education provided in its schools, children with disabilities continue to be disadvantaged, as recent developments in public schools' sexuality education curriculum are silent on their sexuality.¹¹ Educators cite challenges in providing sexuality education to children with disabilities, including in relation to barriers in communication and language, cultural values and incidence of sexual abuse,¹² and unadapted and inaccessible curriculum.¹³ Commendably, the state recognises

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

6 P Chappell '(Re)thinking sexual access for adolescents with disabilities in South Africa: Balancing rights and protection' (2016) 7 *African Disability Rights Yearbook* 133.

7 F Jaramillo Ruiz 'The Committee on the Rights of Persons with Disabilities and its take on sexuality' (2017) 25 *Reproductive Health Matters* 96.

8 K Michielsen & L Brockschmidt 'Barriers to sexuality education for children and young people with disabilities in the WHO European region: A scoping review' (2021) *Sex Education* doi: 10.1080/14681811.2020.1851181.

9 UNESCO *The journey towards comprehensive sexuality education: Global status report* (2021) 7.

10 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018.

11 J Hanass-Hancock et al 'The impact of contextual factors on comprehensive sexuality education for learners with intellectual disabilities in South Africa' (2018) 36 *Sexuality Disability* 123.

12 L de Reus et al 'Challenges in providing HIV and sexuality education to learners with disabilities in South Africa: The voice of educators' (2015) 15 *Sex Education* 333.

13 P Chirawu et al 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32 *Sex Disability* 259.

children with disabilities as rights-bearing citizens. However, its efforts in promoting accessibility to SRHR in terms of equal access to information and SRHR services are insufficient.¹⁴ Yet, adapted resources on sexuality education for some, such as children with intellectual disabilities, have been developed.¹⁵

Sexual minorities and women and girls with disabilities continue to face multiple barriers to accessing SRHR information and services.¹⁶ During COVID-19 and the closures of schools during country lockdowns, access to CSE and SRHR was constrained as remote teaching methods did not reach all children and particularly excluded girl children for a myriad of reasons, including their limited access to computers, the internet and data; being subjected to a higher chore burden compared to boys; being at a higher risk of gender-based violence (GBV); and being at a higher risk of not returning to school post-lockdown.¹⁷

It will be illustrated that the international law and interpretive guidelines point to CSE for children with disabilities that should meet a number of criteria: it should be developmentally appropriate, scientifically accurate, incremental, and based on a human rights approach. Furthermore, it should promote gender equality, be culturally relevant and context-appropriate, transformative, and enable children to develop life skills needed to support healthy choices. These are all criteria that relate to all children. Most importantly, CSE for children with disabilities should be accessible and include reasonable accommodation measures in order to fully and meaningfully include them in the curriculum and so promote their SRHR.

This paper seeks to identify relevant and context-specific criteria for law reform of CSE provision in legislation for South Africa. First, the South African context of CSE is briefly identified. Second, the tentative guidance obtainable from the international treaties and treaty monitoring bodies (TMBs) on the criteria for CSE is analysed. Third, the paper interrogates the South African constitutional and jurisprudential approach to SRHR and CSE, and in particular related rights such as bodily integrity and the provision for accessibility and reasonable accommodation at legislative level. Fourth, the fragmented, incoherent and misaligned policy landscape is discussed to illustrate the gap in implementation of the few existing strands of CSE provision. This policy review illustrates a dire need

14 Chappell (n 6) 125.

15 R Johns & C Adnams 'My right to know: Developing sexuality education resources for learners with intellectual disability in the Western Cape, South Africa' (2016) 4 *African Disability Rights Yearbook* 100.

16 Cape Mental Health et al 'Submission to the CRPD Committee Working Group for South Africa' (2018).

17 M Makaroudis 'The value of comprehensive sexuality education: Considerations for East and Southern Africa during the pandemic' *Regional CSTL Technical Committee Meeting* 16 February 2021 UNFPA, ESARO <https://mietafrica.org/wp-content/uploads/2021/03/Value-of-CSE-MIET-16Feb.pdf> (accessed 30 April 2022).

for law reform in South Africa to close the existing gaps and provide the force of enabling legislation to mandate a more coherent and aligned legal duty to provide CSE to children/youth with disabilities. Fifth, the legislative vacuum for CSE provision for children (with disabilities) in South Africa, in terms of the domestic legislation is identified followed by recommendations for law reform. Last, follows the conclusion.

2 The South African context of CSE

Pedagogically, sex education in South Africa is characterised by a sense of discipline and regulation, with teachers often preferring a transmission mode of teaching to the exclusion of participation and experiential modes of learning.¹⁸ Although some teachers acknowledge the benefits of sexual education, others believe that discussing sexuality with children with disabilities only encourages them to hasten their sexual debut.¹⁹ Some schools that cater for children with disabilities impose corporal punishment to discourage sexual knowledge.²⁰ According to McKenzie, 'this approach to sexuality education denies children the right to a sexual identity and places them at risk of HIV infection'; other risks include unplanned pregnancy and a heightened probability of sexual abuse.²¹

As an alternative to such prohibitory or corrective approaches, Francis proposes that

what young people need from sexuality education is a sympathetic recognition of themselves as sexual beings, because such recognition would minimise assumptions about their sexual experience or lack thereof and would instead encourage open discussions on the sexuality spectrum as a whole, and 'not focus only on their concerns in relation to issues of disease and danger'.²²

18 T Shefer & C Macleod 'Life orientation sexuality education in South Africa: Gendered norms, justice and transformation' (2015) 33 *Perspectives in Education* 1; S Ngabaza & T Shefer 'Sexuality education in South African schools: Deconstructing the dominant response to young people's sexualities in contemporary schooling contexts' (2019) 19 *Sex Education* 422 at 423.

19 Chappell (n 6) 135. However, this belief is unfounded – European Expert Group on Sexuality Education 'Sexuality Education – What is it?' (2016) 16 *Sex Education* 429.

20 J McKenzie 'Disabled people in rural South Africa talk about sexuality' (2013) 15 *Culture, Health & Sexuality* 372.

21 McKenzie (n 20) 372.

22 D Francis 'Sexuality education in South Africa: Three essential questions' (2010) 30 *International Journal of Educational Development* 314 at 315.

Indeed, a human rights approach to SRHR and CSE is preferred, as emphasised by the CRPD.²³ Such an approach does not deny access to abortion or impose forced sterilisation or abortion on persons on the basis of their disability and without their informed consent – as South Africa currently does.²⁴

An important contextual factor is the high number of out-of-school children with disabilities. In 2015, some 597 753 children with disabilities were out of school.²⁵ While in 2018 the National Senior Certificate report indicated that of the 624 733 learners who wrote matric only 3 856 had special educational needs, that is 0.6 per cent, and yet the national disability prevalence rate is estimated at around 7.5 per cent.²⁶ Children in ‘special schools’ do not necessarily receive CSE.²⁷ These children do not have adequate access to education and therefore cannot access the limited sex education that may be offered at schools. Provision of CSE should therefore extend outside of scholastic environments.

While CSE has been implemented in school curricula since 2000, in 2015 some changes were made, including the development of scripted lesson plans, which were piloted in 1 572 schools in five provinces.²⁸ Its roll-out initially met with resistance from parents about the appropriateness of the content of the curriculum.²⁹

A recent study of educators from special schools in Cape Town and eThekweni³⁰ sought to understand the feasibility, barriers and facilitators of implementing a ‘Breaking the Silence’ (BtS) approach to CSE during the

23 T Rugoho et al ‘Sexual and reproductive experiences of youth with disabilities in Zimbabwe’ (2020) 8 *African Disability Rights Yearbook* 31 at 34.

24 Section 5(4)(a) and 5(5) of the Choice of Termination of Pregnancy Act 92 of 1996; sec 3 of the Sterilisation Act 44 of 1998. Cf A Budoo & R Parsad Gunputh ‘Termination of pregnancy of persons with mental disabilities on medical advice: A case study of South Africa’ (2014) 2 *African Disability Rights Yearbook* 101 at 104; T Boezaart ‘Protecting the reproductive rights of children and young adults with disabilities: The roles and responsibilities of the family, the state, and judicial decision-making’ (2012) 26 *Emory International Law Review* 69 at 78; W Holness ‘Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities’ (2013) 27 *Agenda* 35 at 50.

25 J McKenzie et al ‘The education of children with disabilities risks falling by the wayside during the pandemic’ *Daily Maverick* 27 May 2020 <https://www.dailymaverick.co.za/article/2020-05-27-the-education-of-children-with-disabilities-risks-falling-by-the-wayside-during-the-pandemic/> (accessed 5 October 2021), citing DBE statistics. Cf Human Rights Watch ‘“Complicit in exclusion”: South Africa’s failure to guarantee an inclusive education for children with disabilities’ (2015) <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education-children> (accessed 30 April 2022).

26 McKenzie et al (n 25).

27 UN Special Rapporteur on the Rights of Persons with Disabilities *Report on the Sexual and reproductive health and rights of girls and young women with disabilities* A72/133 (2017) para 23.

28 Y Sobuwa ‘Sex ed “sidelines people living with disabilities”’ *Sowetan Live* 23 November 2021 <https://www.sowetanlive.co.za/news/south-africa/2021-11-23-sex-ed-sidelines-people-living-with-disabilities/> (accessed 30 April 2022).

29 L Ubisi ‘Analysing the hegemonic discourses on comprehensive sexuality education in South African schools’ (2020) 81 *Journal of Education* 118.

COVID-19 pandemic. This approach seeks to positively impact on SRHR for young people in and outside of schools by making CSE accessible. The approach is adopted following the UNFPA's project, *Leaving No One Behind*, in collaboration with stakeholders such as the Department of Basic Education.³¹ The findings from that study reinforce outcomes from previous studies that advocate for the need to provide training and support to educators in their provision of CSE to children/youth with disabilities.³² A key finding from the study is that anti-CSE propaganda, particularly on social media, fans the educators' fears and misconceptions of CSE. However, with the intervention of the BtS approach, the study found attitudinal changes could be implemented to ensure educators' acceptance and understanding of the dire need for CSE for these children and tools to adapt and make it accessible to them. The study calls for a number of enablers to guarantee the appropriate provision of CSE, including fostering the educators' understanding of the children/youth's needs and vulnerability; increasing the educators' capability to adjust teaching material and interactive methods (alongside providing adapted teaching materials and resources); as well as utilising a 'whole school approach to facilitate an "integrated approach" to improving the children/youth's SRHR through CSE that is accessible'.³³

Educators should obtain their guidance for adapting curricula and ensuring that CSE is accessible to children/youth with disabilities from policy and legislation, informed by and aligned with international best practices and international law obligations resting on the state.

- 30 J Hanass-Hancock et al 'Leaving no one behind: Feasibility case study: Applying the "breaking the silence" approach in comprehensive sexuality education for adolescents and young people with disabilities during the COVID-19 epidemic' *SAMRC Research Report* (June 2021) <https://www.samrc.ac.za/sites/default/files/files/2021-11-22/BTS%20Study%20Report-%20Leaving%20No%20One%20Behind%20Report.pdf> (accessed 30 April 2022).
- 31 UNFPA *The right to access: Regional strategic guidance to increase access to sexual and reproductive health and rights for young persons with disabilities in East and Southern Africa* (2017) <https://esaro.unfpa.org/en/publications/right-access-regional-strategic-guidance-increase-access-sexual-and-reproductive-health> (accessed 30 April 2022).
- 32 De Reus et al (n 12); J Hanass-Hancock et al 'Breaking the silence through delivering comprehensive sexuality education to learners with disabilities in South Africa: Educators experiences' (2018) 31 *Sexuality and Disability* 1; P Chirawu et al 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32 *Sexuality and Disability* 259; P Rohleder & L Swartz 'Providing sex education to persons with learning disabilities in the era of HIV/AIDS: Tensions between discourses of human rights and restriction' (2009) 14 *Journal of Health Psychology* 601. P Chappell et al 'Educators' perceptions of learners with intellectual disabilities' sexual knowledge and behaviour in KwaZulu-Natal, South Africa' (2018) 18 *Sex Education* 125.
- 33 Hanass-Hancock et al (n 30) 8-9.

3 Tentative guidance on CSE at regional and international levels

Next, the guidance from the CRPD and the African Disability Protocol at international and regional law levels is discussed, as well as guidance from international actors such as UNESCO, the Special Rapporteur on Persons with Disabilities and TMBs on the content and delivery of CSE.

3.1 The CRPD

As a relatively new disability-specific instrument, the assumption is that the drafters of the CRPD would have anticipated the acute need for carefully crafted tools to address the stigma and exclusions faced by persons with disabilities, including children, from exercising their SRHR on an equal basis with others, by inserting a provision on CSE. Detractors of a human rights approach identify that a concrete and explicit right to CSE is not stated in international law.³⁴ However, such a right can be inferred from the broad provisions of other rights that appear in international and regional instruments, as the following analysis shows.

In relation to SRHR, the CRPD enumerates several rights, including the rights to health; liberty and security of person; freedom from exploitation, violence, and abuse; and respect for home and the family.³⁵ Yet, the CRPD does not mention sex access.³⁶ This means that while 'issues of gender and violence are recognised, broader issues related to sexuality and sexual rights' such as 'diversity of sexual identity, positive sexual expression, sexual health and sexuality education' (issues which are particularly contentious in Africa), are not.³⁷ According to the CRPD Committee, the denial of legal capacity to persons with disabilities leads to the deprivation of many of their fundamental rights, including the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment.³⁸ The CRPD obligates states to 'abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect', and recognises that though at times support may be necessary, the ultimate goal is 'to build the confidence and skills of persons with disabilities so that

34 M Curvino & MG Fischer 'Claiming comprehensive sex education is a right does not make it so: A close reading of international law' (2014) 20 *New Bioethics* 72.

35 M Schaaf 'Negotiating sexuality in the Convention on the Rights of Persons with Disabilities' (2011) 8 *SUR International Journal on Human Rights* 113.

36 Chappell (n 6) 132.

37 D Higgins 'Sexuality, human rights and safety for people with disabilities: The challenge of intersecting identities' (2010) 25 *Sexual and Relationship Therapy* 245 at 248.

38 UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment 1 (2014), Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 8.

they can exercise their legal capacity with less support in the future if they so wish'.³⁹

The CRPD requires that state parties take steps to 'ensure that reasonable accommodation is provided' in terms of their measures to promote equality and eliminate discrimination.⁴⁰ Article 2 of the CRPD defines reasonable accommodation as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.⁴¹

The concept of reasonable accommodation (which is what would necessitate adaptations) derives from the broader concept of substantive equality and complements the social model of disability.⁴² It requires allowing for individual differences and undertaking reasonable alterations to ensure equal opportunities.⁴³

The CRPD also includes accessibility as a general principle and a self-standing obligation.⁴⁴ The principle of accessibility requires a universal design of curriculum to be drafted and implemented to equalise participation for all persons with disabilities, and reasonable accommodation is required for specific needs that some persons with disabilities may have.

This means that the provision of reasonable accommodations is a duty. This is demonstrated by the fact that the CRPD regards the denial of reasonable accommodations as discrimination.⁴⁵ However, despite the provision of reasonable accommodations being a duty of states and a right of persons with disabilities, this duty is not without limits. State parties are only required to provide accommodations where doing so does not cause a 'disproportionate or undue burden'.⁴⁶ This means that in the context of a right to education, reasonable accommodation acts as both a sword and a shield because the claimant must prove that the needed accommodation is reasonable, while the onus is on the education provider (particularly the

39 General Comment 1 (n 38) para 20.

40 Articles 2 and 5(3) of the CRPD.

41 Article 2 of the CRPD.

42 C Ngwena 'Equality and disability in the workplace: A South African approach' A Seminar presentation in the School of Law, University of Leeds England (29 November 2004) 15.

43 As above.

44 Articles 3 and 8 of the CRPD.

45 Article 2 of the CRPD.

46 As above.

state) to prove the unreasonableness, disproportion or undue burden of the required measure.⁴⁷

3.2 The African Disability Protocol

African soft-law instruments direct states towards their duty to implement CSE including for children and youth with disabilities (not only in schools) and require children and youth's 'inclusive and effective' participation.⁴⁸ States' progress in meeting this obligation has been slow.⁴⁹ The Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol)⁵⁰ and the General Comments,⁵¹ despite providing insightful interpretive guidance on SRHR of women, and mentioning prohibition of discrimination on the basis of disability, fail to:

[D]edicately consider the challenges that women with disabilities face in the exercise of their sexual and reproductive health and rights, despite recognition of the unique vulnerability, diminishes its potential to address disability specific challenges.⁵²

The African Disability Protocol then offers more hope for a disability-specific context. This treaty, once in force, will require states to provide sexuality education to youth with disabilities.⁵³ The primary purpose of this instrument is to provide an Africanised perspective of disability rights that takes 'into account the lived realities of persons with disabilities while maintaining the core values and principles on disability as set out in the CRPD'.⁵⁴ A key difference is that the African Disability Protocol unlike the CRPD has different provisions for girls/women, children and youth

47 L. Murungi *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: A comparative study of Kenya and South Africa* PhD thesis, University of the Western Cape, 2013, 169.

48 Clauses 34, 40 and 69 of the Addis Ababa Declaration on Population and Development in Africa Beyond 2014 ECA/ICPD/MIN/2013/4 (2013); clauses 3, 3.6 and 3.8 of the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern African (2013).

49 African Union *Five-Year Review of the Addis Ababa Declaration on Population and Development* (2018) 184.

50 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

51 African Commission on Human and Peoples' Rights, General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014) paras 28, 43, and 61; and General Comment No 1 on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012) para 12-13.

52 Murungi & Durojaye (n 1) 10.

53 Article 29(h) of African Union, Protocol to The African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

54 Centre for Human Rights 'Press statement: Centre for Human Rights calls on African States to ratify newly adopted African Disability Rights Treaty' (2018) <https://www.chr.up.ac.za/dru-news/482-press-statement-centre-for-human-rights-calls-on-african-states-to-ratify-newly-adopted-african-disability-rights-treaty> (accessed 22 April 2022).

with disabilities, and so actively addresses the long-standing issue of intersectional discrimination that has been highlighted a number of times by TMBs.

Moreover, this instrument actively calls for the promotion of ‘sexual and reproductive health education for youth with disabilities’ through state measures, whether policy, legislative, administrative or otherwise, to promote the rights of youth with disabilities.⁵⁵ The provision is groundbreaking because for the first time a right to CSE is not being inferred from the broad reading of provisions nor is it alluded to by way of general comments and recommendations. Instead, CSE is explicitly listed in a regional instrument. Reception of the instrument has so far been positive, with the Special Rapporteur on the Rights of Persons with Disabilities welcoming this trailblazing instrument in the belief that it will

trigger a much greater inclusion of the concerns of people with disabilities in laws, policies and budgets because it ensures increased accountability and closer oversight of how states implement their human rights obligations.⁵⁶

However, Viljoen and Biegon caution that:

Although the articulation of more regionalised and localised understanding of these (disability) rights in the form of a distinct treaty may raise greater awareness and assist states in the process of crafting appropriate domestic laws and policies, autochthonous standard setting should not be fetishized. ‘Just as the adoption of the Maputo Protocol did not see immediate benefits accruing to women ... an African-specific treaty would in itself (not) guarantee an improvement in the plight of persons with disabilities’.⁵⁷

They argue that ‘without a clear rationale identifying substantive weaknesses or omissions (within the CRPD) the drafting and adopting of an African pendant would amount to an exercise in “reinventing the wheel”’.⁵⁸

The Protocol’s provisions in relation to accessibility and reasonable accommodation should be interpreted, once it comes into force, together with the provisions on sexuality education, education and the right to health including SRHR,⁵⁹ to create enforceable duties on states to adapt the CSE curriculum and modes of communication where relevant for diverse persons with disabilities – going further than the CRPD. This is to make the information and education received under CSE accessible and

55 Article 29(h) of the African Disability Protocol.

56 OHCHR ‘African States affirm the rights of persons with disabilities in a new landmark Protocol’ (15 February 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22661&LangID=E> (accessed 22 April 2022).

57 F Viljoen & J Biegon ‘The feasibility and desirability of an African Disability Rights Treaty: Further norm-elaboration or firmer norm-implementation?’ (2014) 30 *South African Journal on Human Rights* 345 at 364.

58 Viljoen & Biegon (n 57) 352.

59 Articles 3, 25, 26, 17(2), 24(2) and 28(4)(b).

accommodating to the diverse needs of children and youth with disabilities. The Protocol's clear statement supporting sexuality education should chart the way forward for CSE on the continent in addressing some of the attendant harms that face children and youth with disabilities such as GBV and inaccessible SRHR services, realigning 'the wheel', as it were. However, Viljoen & Biegon's warning should be heeded, and immediate evidence-based measures should be formulated to meet state obligations.

3.3 UNESCO

UNESCO's comprehensive and updated Technical Guidance⁶⁰ is the most up-to-date articulation of the scope and content of CSE. It specifies that CSE should be age and developmentally appropriate, scientifically accurate, incremental, and based on a human rights approach.⁶¹ Scientific accuracy refers to curriculum content based on 'facts and evidence related to sexual reproductive health, sexuality and behaviours'.⁶² CSE's incremental nature identifies that it is not a once-off process but a continuing process commencing at an early age, 'where new information builds upon previous learning, using a spiral-curriculum approach'.⁶³ The evolving capacity of children is recognised in the recommended age and developmentally appropriate nature of CSE. Furthermore, such appropriateness refers to the fitting time (age-related) and development. The technical guidance further states that CSE should be comprehensive and curriculum based; it should also encourage gender equality whilst also being culturally relevant and context-appropriate, transformative and finally capable of developing the life skills needed to support healthy choices.

'Comprehensive' refers to the 'breadth and depth of content' according to the guidance CSE should

encourage discussions on sexual and reproductive health issues, including, but not limited to: sexual and reproductive anatomy and physiology; puberty and menstruation; reproduction, modern contraception, pregnancy and childbirth; and STIs, including HIV and AIDS.

Additionally, drafters and educators of CSE are encouraged not to shy away from content that may be 'challenging in some social and cultural contexts'.⁶⁴ 'Curriculum based' speaks to

60 UNESCO *Technical guidance on sexuality education: An evidence-informed approach for schools, teachers and health educators* (2018) 16-17 https://www.unaids.org/sites/default/files/media_asset/ITGSE_en.pdf (accessed 30 April 2022).

61 UNESCO (n 60) 17.

62 As above.

63 As above.

64 As above.

the presentation of concepts, and the delivery of clear key messages that guide educators' efforts to support students learning in a structured way both in school or out-of-school settings.⁶⁵

CSE, according to UNESCO, contributes to gender equality by 'building awareness of the centrality and diversity of gender in people's lives; examining gender norms shaped by cultural, social and biological differences and similarities'.⁶⁶ Cultural and context appropriateness would examine the ways in which cultural structures, norms and behaviours affect people's choices and relationships within a specific setting.⁶⁷ The transformative aspect, UNESCO puts forward, would ensure that CSE 'empowers young people to take responsibility for their own decisions and behaviours, and the ways in which they may affect others' moreover building 'the skills and attitudes that enable young people to treat others with respect, acceptance, tolerance and empathy, regardless of their disability status'.⁶⁸ Collectively, the criteria would thus enable all recipients of CSE to 'develop the life skills needed to support the making of healthy choices'.⁶⁹

The UNESCO Guidance curiously refers to adaptations necessary 'when cognitive and emotional development is delayed'.⁷⁰ The provision of necessary 'adaptations' for persons with intellectual and/or developmental and psycho-social disabilities, as the Guidance prescribes, unduly limits this anti-discrimination measure to only some persons with specific disabilities. For Kallehauge, the question of whether a burden is undue or disproportionate in the proposed provision of reasonable accommodation turns upon the identity of the duty holder. He asserts that if it is the government or public authority who bears the duty to accommodate, then 'the burden will have to be extremely heavy before it can be considered disproportionate or undue'.⁷¹ As such the traditional parameters of reasonable accommodation in the UNESCO Guidance need to be adapted.

CSE should be included in a 'written curriculum'.⁷² Adaptations to content should therefore explicitly include principles such as universal instructional design, accessibility and reasonable accommodation. Therefore, a broader definition of disability such as that of the CRPD is preferred to ensure no discrimination or exclusions of some disabilities

65 UNESCO (n 60) 16-17.

66 UNESCO (n 60) 17.

67 As above.

68 As above.

69 As above.

70 As above.

71 Kallehauge cited in R White & D Masipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 9 *African Disability Rights Yearbook* 99 at 105.

72 UNESCO (n 60).

from an overly strict interpretation of these categories and these principles should be explicitly mentioned and explained.

UNESCO recognises that children and young people with disabilities

are all sexual beings and have the same right to enjoy their sexuality within the highest attainable standard of health, including pleasurable and safe sexual experiences that are free of coercion and violence; and to access quality sexuality education and SRH services.⁷³

Recognition of the vital role of sustainable development goals (SDG)⁷⁴ in strengthening the links between education, health, gender equality and human rights is encapsulated in the Guidance.⁷⁵ However, tracking states' progress in providing CSE remains 'aspirational'.⁷⁶

The Guidance, and similar initiatives to promote CSE in Global South countries, have been criticised for focusing on a CSE approach rather than a holistic sexuality education approach which focuses on positive sexuality and is offered in some parts of Western Europe.⁷⁷ The lack of emphasis on the decolonial intersection with disabled sexuality in CSE which seeks to dismantle institutional oppression of the disabled is another relevant criticism.⁷⁸ Some of those shortcomings, however, could be remedied with due consideration and adaptations to relevant contexts.

3.4 The UN Special Rapporteur on the Rights of Persons with Disabilities

The Special Rapporteur on the Rights of Persons with Disabilities articulates the steps that states need to take to ensure their legislative and policy frameworks align with the CRPD to ensure CSE is 'inclusive and accessible'.⁷⁹ CSE should be offered in accessible formats and alternative languages, including sign language, Braille, alternative script, easy-to-read formats, and alternative and augmentative modes of communication.⁸⁰

73 UNESCO (n 60) 25.

74 UN GA, Resolution 70/1: Transforming our world: The 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc A/RES/70/1 (2015); World Education Forum 'Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4. Towards inclusive and equitable quality education and lifelong learning for all' (2015).

75 J Herat et al 'The revised international technical guidance on sexuality education - A powerful tool at an important crossroads for sexuality education' (2018) 15 *Reproductive Health* 185.

76 AJ Galati 'Onward to 2030: Sexual and reproductive health and rights in the context of the Sustainable Development Goals' (2015) 18 *Guttmacher Policy Review* 81.

77 JJ Ponzetti *Evidence-based approaches to sexuality education: A global perspective* (2015) cited in E Miedema et al 'But is it comprehensive? Unpacking the 'comprehensive' in comprehensive sexuality education' (2020) 79 *Health Education Journal* 747 at 756.

78 L Ubisi 'De/coloniality, disabled sexualities, and anti-oppressive education: A review of Southern African literature' (2021) 51 *South African Journal of Psychology* 175.

79 UN Special Rapporteur (n 27) para 62(e).

80 UN Special Rapporteur (n 27) para 51.

Information and awareness of parents and caregivers of children and youth with disabilities are identified as a means of combating stigma, stereotypes and exclusions that these children face in exercising their SRHR.⁸¹

3.5 CSE indicators inclusive of children with disabilities?

An interpretation of the mutually interdependent nature of rights recognises that the rights to respect for the home and family, health and freedom from exploitation, violence and abuse, read together, underscore the need for information that persons (including those with disabilities) require in order to make decisions about their sexual reproductive health and relationships – in other words, CSE.⁸² CSE is therefore the tool that gives effect to the respect, fulfilment, protection and promotion of attendant rights. The lack of explicit mention of CSE in treaties, therefore, is not fatal.

TMBs persistently call for states to provide CSE in a non-discriminatory manner and stress the need for accessibility to children and youth with disabilities.⁸³ However, a lack of an express obligatory provision in international law militates against explicit state provision for CSE and, accordingly, negatively affects monitoring the extent to which children with disabilities access relevant SRHR information and services. Sufficient guidelines, however, are provided by international actors such as the UNESCO and the Special Rapporteur, together with TMB's interpretive guidance in general comments, to identify to states the necessary indicators – including the requirement of provision of CSE that is inclusive, accessible and that provides reasonable accommodation. That being said, the main guiding document, UNESCO's Technical Guidance, is silent on accessibility and reasonable accommodation of children with disabilities and this should be remedied in future revisions.

81 UN Special Rapporteur (n 27) para 62(j).

82 International Disability Alliance & Center for Reproductive Rights *Inclusive comprehensive sexuality education and the CRPD: Submission to the CRPD Committee's Half Day of General Discussion on the Right to Education* (undated).

83 The Committee on the Rights of the Child, General Comment 20 on the implementation of the rights of the child during adolescence, 6 December 2016, UN Doc CRC/C/GC/20 (2016) para 61; The Committee on Economic, Social and Cultural Rights, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, UN Doc E/C.12/GC/22 (2016) para 49(f).

4 Bodily integrity, SRHR, accessibility and reasonable accommodation in relation to children with disabilities in South African jurisprudence

Next, the meaning and interpretation of respect for bodily integrity and the jurisprudence on SRHR at the domestic level is discussed to articulate the constitutional rights basis of CSE in South Africa. The courts' engagement on accessibility and reasonable accommodation is also outlined.

4.1 The recognition of SRHR and bodily integrity

SRHR of all persons are protected under section 12(2) of the Constitution of the Republic of South Africa, 1996 which recognises at a minimum that 'each physical body is of equal worth and is entitled to equal respect'.⁸⁴ This section imposes 'a duty on the state to ensure that everyone is able to participate fully in society'.⁸⁵ The Constitution explicitly mentions the right to 'make decisions concerning reproduction'. Woolman and Bishop assert that this is probably because the drafters 'recognised that some of the most devastating and socially entrenched forms of physical (and psychological) oppression and exploitation relate to reproduction and sexuality'.⁸⁶

Bodily integrity has the potential to apply to a wide range of human rights violations, which also affect children's rights.⁸⁷ This is because the right to bodily integrity ensures that all persons including children have the right to autonomy and self-determination over their own body and considers any unconsented physical intrusion a human rights violation. Persons with disabilities (particularly woman and girls) are vulnerable to sexual abuse due to a number of myths, including asexuality, and consequently are vulnerable to HIV/Aids, among other risks.⁸⁸ CSE could be introduced as a preventative intervention that not only helps children identify signs of sexual abuse early on, but also encourages them to report the abuse before it escalates. This is necessary because most of the current legislative interventions are helpful only after the fact of sexual abuse which often goes unreported for a long period of time.

84 S Woolman & M Bishop 'Freedom and security of the person' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (2013) 40-76.

85 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38.

86 *Hoffmann* (n 85) paras 40-80.

87 Child Rights International Network 'Bodily integrity' (2018) <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html> (accessed 18 October 2021).

88 J Hanass-Hancock 'Interweaving conceptualizations of gender and disability in the context of vulnerability to HIV/AIDS in KwaZulu-Natal, South Africa' (2009) 27 *Sex Disability* 35. TN Phasha & LD Myaka 'Sexuality and sexual abuse involving teenagers with intellectual disability: Community conceptions in a rural village of KwaZulu-Natal, South Africa' (2014) 32 *Sex Disability* 153. Cf Schaaf (n 35) 115; Jaramillo Ruiz (n 7) 96; Higgins (n 37) 24.

The educational realities of persons with disabilities distinctly demonstrate that disability ‘remains a concept linked to exclusion, inequality and dependency due to lack of or impaired access to essential resources and services’, as revealed in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.⁸⁹ The High Court found that the educational policy in question implied that children with severe and profound intellectual disabilities were ineducable.⁹⁰ This case demonstrates that arbitrary differentiation between children with and without disabilities cannot be countenanced. In the same vein, the CSE curriculum must not only be accessible but also reflective of the experiences of children with disabilities – even if it incurs additional budgetary planning and costs.

SRHR of children were relevant in *Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development (Teddy Bear Clinic)*.⁹¹ The applicants challenged certain provisions of the Sexual Offences & Related Matters Amendment Act,⁹² which criminalised consensual sexual activity between two consenting minors. The court of the first instance described the provisions as ‘irrational, overbroad and harmful’, noting that they violated a number of constitutionally enshrined rights.⁹³ The provisions were subsequently declared unconstitutional. The matter was referred to the Constitutional Court for confirmation, where the Court addressed all but one of the violated constitutional provisions identified by the court a quo – namely the constitutional right to bodily integrity. The Court’s silence on the matter was a missed opportunity to provide interpretive jurisprudence on the importance of adolescent SRHR and the role of educational interventions such as CSE in this regard, especially since the Court recognised that:

During adolescence children ordinarily engage in some form of sexual activity, ranging from kissing to masturbation to intercourse. Exploration of at least some of these activities is potentially healthy if conducted in ways for which the individual is emotionally and physically ready and willing.⁹⁴

This landmark judgment implies a right to CSE because it recognises that consensual sexual conduct between children can be considered normal developmental behaviour. CSE, therefore, presents itself as an appropriate

89 2011 (5) SA 87 (WCC); T Boezaart ‘General principles (ss 6-17)’ in C Davel & A Skelton (eds) *A commentary on the Children’s Act* (2018) 21-22.

90 Paragraphs 3 & 19.

91 *Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development*, North Gauteng High Court, Pretoria, Case No: 73300/10 [2013] ZAGPPHC 1 (4 January 2013) (unreported).

92 Act 32 of 2007.

93 *Teddy Bear Clinic* (n 91) paras 74-79.

94 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 45.

educational tool to ensure that all children (including children with disabilities) are able to explore not only their sexuality but also exercise the SRHR associated therewith. The South African jurisprudence promotes the promotion, respect, protection and fulfilment of SRHR as encapsulated in the Constitution and existing legislation yet the courts have not yet grappled with legal issues around disabled sexuality.

4.2 Accessibility and reasonable accommodation of the needs of children

The concepts of accessibility and reasonable accommodation as it pertains to children, as well as children with disabilities have been accepted into our jurisprudence, both in the Equality and Constitutional Courts.⁹⁵ The Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (the Equality Act) prohibits discrimination on the basis of disability⁹⁶ and requires a reasonable accommodation in the form of sector-specific codes.⁹⁷ The South African legal landscape is therefore no stranger to the notion of reasonable accommodation and accessibility, but it lacks disability-specific legislation that entrenches these two concepts as general principles or legal duties across sectors. The current provision in the Equality Act has not brought about the systemic change for persons with disabilities that is necessary.

Before analysing the legislative provision for CSE (or absence thereof), the provision for CSE in policy is discussed to illustrate the widespread invisibility of the needs of persons with disabilities to accessibility, universal design and reasonable accommodation.

5 Fragmented, misaligned and incoherent policies on CSE

One of the strongest levers for successful implementation of CSE is a strong policy and legislative pronouncement.⁹⁸ South Africa boasts a significant quantity of SRHR policies on diverse issues and for different sectors. Scholars reviewing diverse SRHR policies (including on health, adolescent health and education), found that they are generally not

95 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Oortman v St Thomas Aquinas Private School & Bernard Langton* (EqC) unreported case number 1/2010 (Witbank); *Haskin v Khan* (EqC) unreported case number 03/19 (Mitchell's Plain).

96 Sections 6 and 9 of the Equality Act. Cf W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907.

97 Section 25(1)(c)(iii) of the Equality Act.

98 C Panchoad et al 'Towards comprehensive sexuality education: a comparative analysis of the policy environment surrounding school-based sexuality education in Ghana, Peru, Kenya and Guatemala' (2019) 19 *Sex Education* 277.

inclusive of persons with disabilities.⁹⁹ CSE, where mentioned, is generally found under the rubric of SRHR policies. Relatively recent policy documents such as the Department of Health's *Policy on sexual and reproductive health and rights: Fulfilling our commitments 2011-2021 and beyond* (the Commitments Policy), the *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (the Strategy), and the *National Strategic Plan on HIV, STIs and TB 2017-2022* (the NSP)¹⁰⁰ and the *National Strategic Plan on Gender-Based Violence and Femicide 2020* (the GBVF SP) include some measures towards inclusion of persons with disabilities.¹⁰¹ Of these, however, most are misaligned with existing international law obligations and the framework policy and the White Paper on the Rights of Persons with Disabilities (the WPRPWD),¹⁰² except for the Strategy, the NSP, and the GBVF SP.¹⁰³

The NSP explicitly identifies the barriers that persons with disabilities face in accessing SRHR and lists the 'core' services that they require access to, including CSE.¹⁰⁴ The provision of adapted curriculum for CSE to persons with disabilities, nor other relevant criteria is mentioned in the NSP. It specifically requires accessibility, principles of universal design to be employed and reasonable accommodation of persons with disabilities to access these services.¹⁰⁵ Of concern, however, is the reference to 'reasonable access' in the NSP, which could be an attempt to temper accessibility requirements. This of course is contrary to the state obligations under the CRPD which does not limit accessibility in this way. The Department of Health's *National Adolescent & Youth Health Policy* though acknowledging the fact that SRHR do not often meet the needs of persons with disabilities, and ostensibly included consultation with youth with disabilities,¹⁰⁶ does not identify how such needs could be better met with the implementation of this policy and crucially does not mention CSE.

In the school environment, not all of these policies apply. Three policies that do apply in this context, however, do not mention persons with disabilities as a category requiring specific measures: the *STI*

99 J Hanass-Hancock et al 'Sexual and reproductive health and rights and disability policy analysis: The South African case report' (2021) <https://www.samrc.ac.za/sites/default/files/files/2021-11-22/BtS%20Policy%20Report%20-%20Sexual%20and%20Reproductive%20Health%20Disability%20Policy%20Analysis.pdf> (accessed 30 April 2022) referring to the *Sexually Transmitted Infections: Management Guidelines* 2018, the *National HIV Testing Services: Policy* (2016), the *Adolescent & Youth Health Policy 2016-2020*, the *Integrated School Health Policy* (2012) and the *Policy Framework to address Gender Based Violence in the Post School Education and Training System* 2020.

100 Republic of South Africa *NSP* (2017) https://www.gov.za/sites/default/files/gcis_document/201705/nsp-hiv-tb-stia.pdf (accessed 1 December 2022).

101 Hanass-Hancock et al (n 99) 5.

102 Department of Social Development (DSD) *The White Paper on the Rights of Persons with Disabilities* (2016) published in GN 230 of Government Gazette 39792 of 9 March 2016 (WPRPD).

103 Hanass-Hancock et al (n 99) 5.

104 NSP (n 100) 82. Cf Hanass-Hancock et al (n 99) 7.

105 NSP (n 100) 56, 66 and 67.

106 National Adolescent and Youth Health Policy (2017) 2 and 7.

*Management Guidelines; the National HIV Testing Services: Policy, the Sexual Transmitted Infections: Management Guidelines 2018; and the Integrated School Health Policy.*¹⁰⁷ By and large, the NSP is the ‘most inclusive’ and it promotes both mainstreaming as well as specialised programmes for persons with disabilities, offering a rights based approach to key issues such as discrimination on the basis of HIV and disability.¹⁰⁸

The Department of Basic Education’s *National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector* (the National Policy),¹⁰⁹ the Departments of Health and Basic Education’s *Integrated School Health Policy*¹¹⁰ and the Department of Social Developments’ *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy* (the Strategy),¹¹¹ however, address the provision of CSE and sexual reproductive health services. However, none of these policies put in place concrete steps for making these services (including CSE) accessible and do not put in place measures for the reasonable accommodation of children/youth with disabilities.¹¹²

Another relatively new policy instrument, the *National Strategic Framework on Reasonable Accommodation for Persons with Disabilities* (Reasonable Accommodation SF)¹¹³ seeks to guide the provision of reasonable accommodation in legislation and policy in different sectors and in order to align with the WPRPWD.¹¹⁴ It specifically requires appropriate budgeting towards this goal and monitoring of such measures.¹¹⁵ The instrument, however, does not clearly indicate the alignment with existing legislative pronouncements in relation to accessibility and reasonable accommodation, perhaps because most legislation does not explicitly create duties on the state to do so, bar the Equality Act and in the workplace context, the Employment Equity Act 55 of 1999.

107 Hanass-Hancock et al (n 99) 5.

108 Hanass-Hancock et al (n 99) 7.

109 DBE *The National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector* (2017) published in GN 777 of *Government Gazette* 41024 of 4 August 2017.

110 *Integrated School Health Policy* (2017) <https://serve.mg.co.za/content/documents/2017/06/14/integratedschoolhealthpolicydbeanndoh.pdf> (accessed 30 April 2022).

111 DSD *The National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (2015) 6.

112 Hanass-Hancock et al (n 99) 7.

113 Department of Women, Children and Persons with Disabilities (DWCPD) *Reasonable Accommodation SF* (2020) N 605 of 2021 in *Government Gazette* No 45328 of 15 October 2021 https://www.gov.za/sites/default/files/gcis_document/202110/45328gen605.pdf (accessed 30 April 2022).

114 DWCPD (n 113) 144.

115 Chapters 4 and 5 of the *Reasonable Accommodation SF* (n 113) 137-141.

None of the policies provide specific budgeting for the provision of SRHR services to ensure inclusion of persons with disabilities, nor do they set out mechanisms to ensure accountability in this regard.¹¹⁶

Of these documents, five policy documents relevant to the education and social development sectors are discussed in turn. The latter sector is important because of its historical status as the key implementing department. These are:

- White Paper 6: Special Needs Education: Building an Inclusive Education and Training System (White Paper 6);¹¹⁷
- The WPRPD;¹¹⁸
- The Strategy;¹¹⁹
- The National Policy;¹²⁰ and
- The *National Curriculum Statement* (NCS) for grades R-12.¹²¹

5.1 White Paper 6

White Paper 6, though not speaking directly to SRHR, acknowledges that 'inclusive education entails accepting that all children have learning needs ... and can learn if given support'.¹²² The policy also concedes that the curriculum could potentially be a learning barrier.¹²³ However, the policy's overly-broad strategies and lack of specificity regarding implementation suggests that this policy was enacted for political symbolism rather than practicality.¹²⁴

5.2 WPRPD

The WPRPD, aims to reflect the already established fundamental values of the CRPD in policy. To do this it proposes a collaborative, multi-

116 Hanass-Hancock et al (n 99) 8. Cf AF Rhwehumbiza *Unrecognised, unfulfilled: Comprehensive sexuality education and information for adolescent girls with intellectual disabilities in Tanzania* LLM Sexual and Reproductive Rights in Africa thesis, University of Pretoria, 2016 at 46

117 Department of Education 'White Paper 6: Special Needs Education: Building an inclusive education and training system' (2001).

118 DSD (n 102).

119 DSD *The Strategy* (n 111) 6.

120 DBE *The National Policy* (n 109).

121 DBE 'National Curriculum Statements (NCS) Grades R-12' <https://www.education.gov.za/Curriculum/NationalCurriculumStatementsGradesR-12.aspx> (accessed 30 April 2022).

122 C Ngwenya & L Pretorius 'Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *South African Journal on Human Rights* 81 at 90.

123 White Paper 6 (n 117) 32.

124 D Donohue & J Bornhau 'The challenges of realising inclusive education in South Africa' (2014) 34 *South African Journal of Education* 1 at 8.

sectoral approach involving all relevant stakeholders to effect the necessary changes needed to transform the life experiences of persons with disabilities.¹²⁵ The policy calls for the provision of ‘family planning, sexuality/sex education programmes’. Regrettably, this intervention is only mentioned in the context of HIV/AIDS prevention.¹²⁶ The WPRPD further suggests using the school curriculum to address negative attitudes and stereotypes relating to disability while simultaneously promoting a disability rights awareness discourse.¹²⁷ Beyond encapsulating the rights of persons with disabilities, this policy emphasises important issues such as supported decision-making and self-representation.¹²⁸

Although the WPRPD is yet to reach authoritative legislative status, its contribution to the disability rights movement cannot be denied; to avoid following the steps of White Paper 6, more needs to be done to expedite the process of concretising this policy into enforceable legislation. The South African Law Reform Commission (SALRC) is currently embarking on law reform to domesticate the CRPD, and this process is an apt vehicle for the incorporation of CSE into enforceable domestic obligations.¹²⁹ The policy mentions the possibility of sexual and intimacy assistance,¹³⁰ but this is simply a throwaway line as there is no interpretive guidance as to what it means.

The absence of a provision explicitly mandating the provision of CSE (outside of the HIV/AIDS context) to children with disabilities in the WPRPD is a correctable flaw because of the importance placed on the state’s obligations to fulfil SRHR domestically and internationally.¹³¹ An explicit provision would have been preferred however to mitigate ameliorating social norms against SRHR and CSE.¹³² This policy could have been clearer as a coordinating framework to ensure a better alignment of existing and future policies on SRHR and specifically CSE, in line with South Africa’s international law obligations.

Three DBE specific policies are discussed next.

125 DSD (n 102) 55.

126 DSD (n 102) 101.

127 DSD (n 102) 64.

128 DSD (n 102) 114.

129 SALRC ‘Domestication of the United Nations Convention on the Rights of Persons with Disabilities *Issue Paper 39: Project 148*’ (2020).

130 DSD (n 102) 23-24.

131 AM Miller et al ‘Sexual rights as human rights: A guide to authoritative sources and principles for applying human rights to sexuality and sexual health’ (2015) 23 *Reproductive Health Matters* 16; A Strode & Z Essack ‘Facilitating access to adolescent sexual and reproductive health services through legislative reform: Lessons from the South African experience’ (2017) 107 *South African Medical Journal* 741.

132 For social norms on SRHR and policy gaps see D Cooper et al ‘Coming of age? Women’s sexual and reproductive health after twenty-one years of democracy in South Africa’ (2016) 24 *Reproductive Health Matters* 79; EL Davids et al ‘Adolescent girls and young women: Policy-to-implementation gaps for addressing sexual and reproductive health needs in South Africa’ (2020) 110 *South African Medical Journal* 855.

5.3 The Strategy

The *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (the Strategy) recognises a need to ‘create and/or strengthen a responsive policy’ in order to meet the SRHR needs of all adolescents, especially those whom society has deemed most vulnerable, such as children with disabilities. It calls for:

The development of an inclusive agenda that intends to promote ... the right to exercise sexuality free of violence and coercion; the right to seek pleasure with respect for other people’s rights; the right to protect fertility; and the right to access modern techniques for the prevention, diagnosis and treatment of sexually transmitted infections.¹³³

Although the Strategy recognises a number of disabilities, it does not mention how it plans to make SRHR available and accessible to such children.¹³⁴ The Strategy seems to use disability as a device to claim inclusivity. As part of the implementation of this policy, the DBE is currently piloting the roll-out of a revised CSE curriculum in selected schools.¹³⁵ This Strategy is a good start but does not meet the call by UNESCO that states develop national policies on CSE, which are explicitly linked to education-sector plans and the country’s national policy.

5.4 The National Policy

The National Policy expressly recognises CSE as a game-changing ‘preventative gambit’ by stating that:

Every person in the Basic Education Sector has the right to access relevant and factual comprehensive sexuality education ... appropriate to their age, gender, culture, language and context, in order that they can make informed decisions about their personal health and safety.¹³⁶

This policy inadequately addresses the needs of vulnerable groups such as children with disabilities by providing very little guidance on how they will be represented in the CSE curriculum. It thus risks becoming an idealised theoretical document.

133 DSD *The Strategy* (n 111) 6.

134 Cf Hanass-Hancock et al (n 99) 6.

135 J Glover & C Macleod ‘Policy brief: Rolling out comprehensive sexuality education in South Africa: An overview of research conducted on life orientation sexuality education’ Critical Studies in Sexualities and Reproduction Research Programme (2016) 1 https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandreproduction/documents/Life_Orientation_Policy_Brief_Final.pdf (accessed 30 April 2022).

136 DBE *National Policy* (n 105) 2 & 4.

5.5 NCS

The NCS specifies policy on curriculum and assessment and undertakes to provide knowledge, skills and values in learning at South African schools.¹³⁷ Its principal purpose is to equip learners,

irrespective of their socioeconomic background, race, gender, physical ability or intellectual ability with the knowledge, skills and values necessary for self-fulfilment and meaningful participation in society as citizens of a free country.¹³⁸

While the NCS claims to be sensitive to issues such as disability, there is no mention of children with disabilities (or their sexuality) in the curriculum. Instead, disability is addressed from an anti-discrimination perspective – but there is no mention of the exercise of sexuality by children with disabilities who are affected in comparison to their non-disabled peers.¹³⁹

5.6 CSE indicators in the policies

The CSE indicators are generally not provided in South African policy. While many of these policies assert a rights-based approach to SRHR, including gender equality, few link this approach with the provision of CSE to persons with disabilities which may require accessibility, universal design and reasonable accommodation (aside from the NSP). Of great concern is the absence of the following indicators in the policies: CSE that is developmentally appropriate, scientifically accurate, incremental, culturally relevant and context-appropriate, transformative, and enables children to develop life skills needed to support healthy choices.

Policy reform is needed in all sectors, including education, justice, health and social services, to strengthen the provision of SRHR to children with disabilities, including CSE in and outside of schools. The existing policies and potentially policies drafted in the future may remain fragmented and incoherent, we submit, without enabling a legislative provision that identifies the criteria for CSE, including for children/youth with disabilities, and the requirement for multi-sectoral alignment, budgeting and data disaggregation to inform better future practice.

137 F Khan *A critical analysis of the laws and policies regulating the management of learner pregnancy in South Africa using the lived exigencies of various stakeholders at selected public secondary schools in KwaZulu-Natal and the Hospital School Pretoria* PhD thesis, University of KwaZulu-Natal, 2016 at 16.

138 Khan (n 137) 16.

139 Khan (n 137) 17.

6 The legislative vacuum for explicit recognition of CSE

The gaps in the policy statements on CSE, are also mirrored in the legislation for the education sector (the National Education Policy Act 27 of 1996 (NEPA), the South African Schools Act 84 of 1996 (SASA) and the Children's Act 38 of 2005). These are discussed in turn.

6.1 SASA

SASA requires that all public schools 'admit learners and serve their educational requirements in a non-discriminatory manner'.¹⁴⁰ Public schools are required to be 'accessible and able to provide relevant educational support services' to learners with disabilities, whenever it is 'reasonably practicable' to do so.¹⁴¹ The drafting of this provision is problematic as it does not refer to reasonable accommodation of children's needs, and introduces the defence of 'reasonably practicable'.¹⁴² Children with disabilities, however, are not afforded compulsory schooling outside of ordinary public schools as the age of commencement has not been promulgated.¹⁴³

6.2 NEPA

NEPA empowers the Minister of Basic Education to determine a national educational policy, which should be directed towards '[t]he advancement and protection of the fundamental rights of every person guaranteed in terms of the Constitution, and in terms of international conventions'.¹⁴⁴ Moreover it is stated that educational policy should contribute 'to the full personal development of each student ... including the advancement of democracy and human rights'.¹⁴⁵ The Act specifically precludes an education policy from denying children their right to education on account of their *physical* disabilities.¹⁴⁶ It is unclear why the Act specifically mentions physical disabilities to the exclusion of other disabilities.¹⁴⁷

140 Section 5(1).

141 Section 12(4) & (5).

142 Murungi (n 47) 334-5.

143 Section 3(2) of the Schools Act and Department of Education *Age Requirements for Admission to an Ordinary Public School* GN 2433 in Government Gazette 19377 of 19 October 1998 para 5.

144 Section 4(a)(i).

145 Section 4(b).

146 Section 4(d).

147 Murungi (n 47) 335.

6.3 The Children's Act

The constitutional dispensation and the ratification of prominent international instruments paved the way for acknowledging that children are also bearers of human rights and not merely vulnerable and voiceless.¹⁴⁸ The Children's Act is the primary legal framework for the realisation of every child's constitutional rights. In relation to children with disabilities, it was agreed from the outset of the South African Law Commission's endeavours to develop a children's code that mentioned had to be made of this category of children.¹⁴⁹ Section 11 of the Act does exactly that by extending opportunities to children with disabilities (and chronic illnesses) to 'participate in amongst other things "educational activities" in a manner that is cognisant of any needs they may have'.¹⁵⁰ The section further states that it is equally important to provide such children with 'conditions that ensure dignity, promote self-reliance and facilitate active participation in the community'.¹⁵¹ Section 13 of the Children's Act grants children the right to 'access information related to health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction'.¹⁵² The section also recognises the importance of accessibility of such information by emphasising cognisance of any special needs a child may have.¹⁵³

Other relevant sections of the Act include section 2 (objectives), section 6 (general obligations) and section 7 (best interests of the child.) These sections use similar terminology to that which is mentioned in the UNESCO Guidance. According to section 2, the Children's Act's objectives include: 'make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children',¹⁵⁴ to 'strengthen and develop community structures which can assist in providing care and protection for children';¹⁵⁵ to 'protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards';¹⁵⁶ and to 'promote the protection, development and well-being of children'.¹⁵⁷ It is submitted that all these provisions could be used to strengthen not only the argument for the provision of CSE but for provision beyond the school environment.

148 Boezaart (n 89) 1-43.

149 Boezaart (n 89) 21-22.

150 Section 11(1)(b).

151 Section 11(1)l.

152 Section 13(1)(a).

153 Section 13(2).

154 Section 2(d).

155 Section 2(e).

156 Section 2(f).

157 Section 2(i).

Section 6, in line with child legislation in many other jurisdictions, provides central principles underpinning how decisions should be made in regard to children in domestic legislation and guides the implementation, proceedings, actions and decisions in relation to children.¹⁵⁸ It establishes a child-centred approach in respect of all legislation, proceedings and state actions regarding children.¹⁵⁹ According to section 6(e), all proceedings, actions or decisions in a matter concerning a child must: recognise a child's need for development ... appropriate to the child's age. Section 6(5) further states that

a child, having regard to his or her age, maturity and stage of development ... where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

This subsection acknowledges the fact that the child himself or herself (irrespective of their disability) must be informed of actions or decisions which significantly affect him or her. The age, maturity and stage of development of the particular child will be crucial in determining whether the child will benefit from this knowledge.¹⁶⁰

Before the Children's Act was enacted, South African legislation did not have a list of factors to be applied when a court has to deal with a child's best interests. This lacuna was often criticised because of the fact that subjective opinions could easily impede objective judgement in a specific case. The factors that follow (as stipulated in the Children's Act) may be used to argue for the provision of CSE especially in relation to the indicators set out in the UNESCO Guidance:

- 'the child's age, maturity and stage of development';¹⁶¹
- 'any other relevant characteristics of the child';¹⁶² and
- 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development'.¹⁶³

Furthermore, the Act extends the right not to be subjected to detrimental social, cultural and religious practices to all children, as well as the right to access information on health promotion and prevention and treatment of ill-health and disease, sexuality and reproduction.¹⁶⁴ The Act explicitly mandates that information on healthcare should be provided 'in a format accessible to children, giving due consideration to the needs of children

158 Boezaart (n 89) 1-4.

159 Boezaart (n 89) 4.

160 Boezaart (n 89) 5.

161 Section 7(1)(g)(i).

162 Section 7(1)(g)(iv).

163 Section 7(1)(h).

164 Sections 12(1) and 13(1)(a) of the Children's Act.

with disabilities'.¹⁶⁵ Therefore, health information should be both child-friendly and accessible to children with disabilities.

The question of precisely what a child's best interests are, is a factual question that has to be determined according to the circumstances of each individual case. It should be properly contextualised and as such the inherent flexibility of this principle should be seen as a strength.¹⁶⁶ Moreover law enforcement must always be 'child-sensitive; (meaning) that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children'.¹⁶⁷

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents ... The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.¹⁶⁸

Strode and Essack explain South Africa's approach to separate legislation for different health interventions such as HIV testing and termination of pregnancy.¹⁶⁹ The legislative framework in place, however, only recognises the SRHR of children over the age of 12 (except for access to abortion), which while aligned with domestic criminal law, poses problems *inter alia* for medical research involving children.¹⁷⁰ That criticism notwithstanding, the nuanced and differing consent requirements for these health interventions are lauded.¹⁷¹ The authors, caution against South Africa's 'divergent' approach to the evolving capacity of children (and adolescents) and call for the drafting of specific guidance for service providers on how to assess that capacity.¹⁷² Unfortunately, the relevance of the CRPD's recognition of equal legal capacity and its implication for assessing children's capacity to consent including in accessing SRHR is not considered in the South African literature.

6.4 The gaps in the legislation and the way forward

Some of the UNESCO CSE indicators are evident in the legislation. For example, developmental appropriateness is contained in the Children's Act.¹⁷³ While a human rights approach is not directly listed, a children's

165 Section 13(2) of the Children's Act.

166 Boezaart (n 89) 8.

167 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 15.

168 *S v M* para 18.

169 Strode & Essack (n 131) 741.

170 Strode & Essack (n 131) 742.

171 Strode & Essack (n 131) 744.

172 As above.

173 Sections 5 and 6 of the Children's Act.

rights approach is encapsulated by all three laws – the South African Schools Act, the National Education Policy Act and, particularly section 6(2) of the Children’s Act. Accessibility or reasonable accommodation as principles or duties are generally not included, aside from the provision for health information in accessible formats for children with disabilities, as well as the general prohibition of discrimination on the basis of disability in the Children’s Act.¹⁷⁴ Cultural relevance and context appropriateness could be inferred from the mention of cultural development and traditions in the Children’s Act in relation to factors to determine the best interests of the child.¹⁷⁵ Notably absent is scientific accuracy.

Explicit provision of CSE to all children is absent in the current legislative provisions but would be congruent with the aims of these three statutes. Compliance with the CRPD’s requirement of measures to eliminate discrimination against persons with disabilities, including girls and women with disabilities, ‘requires more from a state party than inclusion in existing statutes by implication’.¹⁷⁶ Accordingly, it is submitted that an amendment to the Children’s Act would be the best option for explicit inclusion of CSE in the legislative offering because the Children’s Act is applicable to all children and extends beyond the context of education. Such an amendment would obligate the state to provide CSE not only in schools, but also in juvenile correction centres, hospitals, clinics and in other relevant public service facilities that cater for children – as well as in community-based fora.

The Children’s Act currently regulates numerous SRHR and associated aspects such as access to contraceptives, virginity testing and male circumcision. Explicitly recognising a right to CSE in the Act would give effect to the SRHR of children with disabilities. It is submitted that section 13 of the Children’s Act should be amended to include the relevant indicators developed at the international and regional levels, as follows:

Information on health care –

- (1) Every child has the right to –
 - (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction including through the provision of curriculum-based comprehensive sexuality education to all children, including children and youth with disabilities, that is:
 - (i) non-discriminatory and promotes gender equality,
 - (ii) inclusive,

174 Sections 6(2)(d) and (f); and 11 of the Children’s Act.

175 Sections 7(1)(f)(ii) and (h) of the Children’s Act.

176 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 at 17.

- (iii) accessible,
- (iv) age and developmentally appropriate,
- (v) scientifically accurate,
- (vi) incremental,
- (vii) culturally relevant and context-appropriate,
- (viii) transformative,
- (ix) geared towards developing the life skills children need to support healthy choices,
- (x) is based on a human rights approach, and
- (xi) includes reasonable accommodation where necessary.

All other relevant legislation such as NEPA should provide implementing provisions and regulations to guide stakeholders to provide CSE in different sectors. South Africa's tentative approach toward recognising CSE for persons with disabilities should be replaced with a rigorous approach including an urgent programme that includes a disabled sexuality discourse in the life orientation (LO) curriculum in schools. Considering the high burden of sexual abuse in schools,¹⁷⁷ urgent action is imperative.

Recalling that many children and youth with disabilities are out of school, the provision of CSE should be incorporated in other sectors, particularly healthcare and social development where many children with disabilities access services and also should be accessible within community structures. Importantly, since many parents and caregivers act as gatekeepers to exercise the SRHR of children and youth with disabilities, they also require information about CSE in inaccessible spaces.

It is further submitted that explicit provision of CSE in proposed disability-specific legislation should ensure inclusive and accessible CSE in all relevant sectors. Such a provision should incorporate the criteria suggested for the amendment to the Children's Act. An explicit provision that identifies the need to ensure that CSE material and instruction includes the provision of a modified curriculum in alternative formats, including Braille, Easy Read, alternative and augmentative communication and auxiliary aids, where necessary, should be drafted. Such legislation should establish a standard against which other legislation ought to be measured in terms of advocating for the recognition of SRHR of persons with disabilities, including CSE and pertinently their sexuality, in order to dispel harmful myths. General principles entrenched in such legislation, such as non-discrimination, recognition of legal capacity, accessibility and reasonable accommodation, would be a framework for

177 AA Mdikana, NT Phasha & S Ntshangase 'Teacher reported types of sexual abuse of learners with intellectual disability in a South African school setting' (2018) 28 *Journal of Psychology in Africa* 510.

other enabling legislation and policy. Although disability-specific legislation is not a cure-all solution, such legislation would be profoundly significant because it would ensure legal certainty and would safeguard persons with disabilities against unnecessary policy restructurings. The SALRC's current domestication of the CRPD provides a vehicle for explicit recognition of CSE in the draft legislation.

7 Conclusion

CSE in relation to SRHR of children and youth with disabilities in South Africa appears to be an (inadequate) tick-box approach and as a whole is fragmented and incoherent at a policy level, and at a legislative level lacks concrete guidance despite the existence of other health and SRHR related provisions in legislation such as the Children's Act. The policies are by and large not aligned with international law obligations. A recent study on educators' ability to adapt and make accessible the CSE curriculum to children/adolescents with disabilities in special schools identifies many persistent barriers, though these are not insurmountable.¹⁷⁸ Children with disabilities in 'mainstream' schools are often invisible, and their needs for inclusive, accessible CSE that includes reasonable accommodation where needed is less likely to be met considering the general lack of training that educators in those schools have compared to special schools environments. Future research should consider the roll-out of CSE for children with disabilities in mainstream schools as well. The negative impact of the COVID-19 pandemic on the provision of CSE for children with disabilities during the hard lockdowns was articulated.

An analysis of the policy and legislation identified that explicit provision for CSE and the accessibility of CSE and reasonable accommodation of children/adolescents with disabilities are largely absent. The implementation delay in the legislative framework, including in relation to school going-ages not only currently contributes to the high number of out-of-school children with disabilities but also does not have a concrete provision for CSE.

We propose that the main legislation pertaining to children in South Africa should contain explicit reference to CSE and should identify principles or criteria that would meet existing international consensus on the nature of CSE, particularly for children/youth with disabilities. We emphasise the need for accessibility, universal design and reasonable accommodation to be included as principles or criteria and for the inclusion of these concepts in the definitional section of the Children's Act. The SALRC's current law reform on the domestication of the CRPD, we further propose, should also include a similar framework provision on

178 Hanass-Hancock et al (n 99).

CSE for children/youth with disabilities in its formulation of disability-specific legislation. This would ensure greater coherence, less fragmentation and alignment with the CRPD and other international law obligations. These steps would also be one of the first towards meeting the African Disability Protocol's specific requirement for the inclusion of CSE.

The ongoing impact of the COVID-19 pandemic on and the lack of political will to prioritise the education of children with disabilities, particularly girls with disabilities, requires renewed efforts to develop innovative measures to provide CSE in and *outside of* school contexts to reach all children and youth with disabilities, in all the sectors where they access services. One of these measures is the setting of clear legal standards for compliance with legislation.

CHAPTER 6

RESERVATION ON THE CRPD FROM A MAURITIAN PERSPECTIVE

Zahra Hosanee*

Summary

The Convention on the Rights of Persons with Disabilities (CRPD) was the first legally binding document to address disability from a human-rights perspective. The Republic of Mauritius ratified the CRPD in 2010, with reservations on three provisions namely on the state parties' duty to take appropriate measures to provide signage in Braille and in easy-to-read forms in buildings and other facilities open to the public; situations of risk and humanitarian emergencies; and on the right of persons with disabilities to access an inclusive, quality and free education, on an equal basis with others, in the communities in which they live. This paper will show how the reserved provisions, from a Mauritian perspective, are not in line with the object and purpose of the Convention, and why they should not prevail, especially in light of the fact that persons with disabilities in the country already face numerous prejudices and stigmas. Maintaining reservations on these three critical provisions represent additional obstacles to an already challenging situation, as Mauritian laws are not sufficient in themselves to afford the protection envisaged by the CRPD to persons with disabilities inasmuch as they fail to adequately consider the paradigm shift and have not been drafted to accommodate the diversity of persons with disabilities in the country. This paper contends that a whole decade has passed since the ratification of the CRPD in Mauritius and that, with new developments and legislation in place, the country should move to remove such reservations for all the reasons set out hereunder.

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1 Introduction

The Republic of Mauritius¹ ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2010. Reservations were placed on three provisions when doing so, namely those relating to accessibility,² situations of risk and humanitarian emergencies,³ and education.⁴ According to the state party's report submitted under article 35 of the CRPD in 2014, the reservations would be removed once appropriate measures were taken in view of further developments in the three abovementioned fields.⁵

More than a decade later, however, the reservations remain in place, despite new legislation, regulations and other measures having been implemented. This paper will discuss the impact that these reservations have on the lives of persons with disabilities in Mauritius, and why they should not be allowed to remain. Firstly, this paper will review the CRPD generally, and its position on reservations. It will then analyse the trends which Mauritius has adopted regarding disability rights, as well as some significant barriers under national laws faced by persons with disabilities in the country. It will then thoroughly discuss the reserved provisions and the need to remove them.

Essentially, this paper contends that the reservations placed on the CRPD are incompatible with its object and purpose. They were imposed at a time which has now progressed to such an extent, that they are today, merely supplementing to the stigma already faced by persons with disabilities in the country. The reservations fail to consider the full circumstances of persons with disabilities in Mauritius, impede on the equal enjoyment of their rights and fundamental freedoms, and allow for the state party not to be bound to take the necessary measures to remove the barriers thereof. They should as such, be removed so as to further the rights of persons with disabilities in the country.

1 The country consists of the main island, Mauritius, and the surrounding islands of Rodrigues, Agalega, and St Brandon.

2 Article 9(2)(d) of the UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, A/RES/61/106 (2007) (CRPD).

3 Article 11 of the CRPD.

4 Article 24(2)(b) of the CRPD.

5 CRPD Committee, Consideration of Reports submitted by State Parties under article 35 of the Convention, Initial reports of State parties due in 2010: Mauritius, 11 August 2014, UN Doc CRPD/C/MUS/1 (2014) para 11.

2 The CRPD

2.1 Background

The CRPD represented a ground-breaking advancement in disability rights law: it was the first legally binding international instrument to fully address the position of persons with disabilities from a human rights perspective.⁶ It constituted a modern and powerful paradigm for persons with disabilities who were previously viewed as objects, allowing them to be recognised as full legal subjects and participants of society.⁷

While no provision is made for a fixed definition of the term 'disability', the CRPD suggests that disability generally occurs when persons with impairments interact with barriers prevailing in society, whether these be attitudinal or environmental.⁸ Under the CRPD, persons with disabilities include those persons with physical, mental, intellectual, or sensory impairments, who when into contact with such barriers, are prevented from fully and effectively participating in society.⁹

Since the CRPD does not have regard to the condition of a person when establishing what qualifies as a disability, it is said to have departed from the medical model of disability, preferring a social model.¹⁰ It rejects the archaic stereotype which views disability as a medical condition requiring a cure and represents persons with disabilities as active members of society, who are entitled to enjoy equal human rights and fundamental freedoms.¹¹

The CRPD seeks to provide persons with disabilities with the full and equal enjoyment of their rights and fundamental freedoms and to promote the respect for their inherent dignity.¹² Under article 4, the CRPD sets forth a list of all the obligations which must be upheld and fulfilled by state

6 P Weller 'The Convention on the Rights of Persons with Disabilities and the social model of health: New perspectives' (2011) 21 *Journal of Mental Health Northumbria University* 74 at 75.

7 P Harpur 'Embracing the new disability rights paradigm: The importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability & Society* 1 at 2; P Bartlett 'Implementing a paradigm shift: Implementing the Convention on the Rights of Persons with Disabilities in the context of mental disability law' in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (2014) at 169-180.

8 Preamble at para 5 of the CRPD. The Preamble of the CRPD recognises disability as an 'evolving concept, occurring as a result of interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

9 Article 1 of the CRPD.

10 K Kazou 'Analyzing the definition of disability in the UNCRPD: Is it really based on a "social model" approach?' (2017) 23 *International Journal of Mental Health and Capacity Law* 25 at 27.

11 Harpur (n 7) 2.

12 As above.

parties to guarantee the full and effective realisation of these rights and freedoms.¹³ Most importantly, the CRPD in article 3 sets out eight general principles:

- (i) the respect of inherent dignity, individual autonomy, and independence of persons with disabilities;¹⁴
- (ii) non-discrimination;¹⁵
- (iii) the full and effective participation and inclusion in society;¹⁶
- (iv) respecting differences and accepting persons with disabilities as part of human diversity and humanity;¹⁷
- (v) equal opportunities;¹⁸
- (vi) accessibility;¹⁹
- (viii) equality;²⁰ and
- (ix) the respect for children with disabilities.²¹

The CRPD further refers to the concept of ‘reasonable accommodation’, requiring state parties to make any modifications and adjustments which are necessary and appropriate to ensure that persons with disabilities enjoy their human rights and fundamental freedoms, insofar as such steps do not cause any disproportionate or undue burden.²²

These principles, together with the obligations on state parties under the CRPD, form the basis of this paper and will be discussed in greater detail throughout this article.

2.2 Object and purpose of the CRPD

The object and purpose of the CRPD, as provided under article 1 thereof, is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities,

13 Article 5 of the CRPD. The list includes adopting legislative and other similar measures to promote the rights of persons with disabilities and to abolish discrimination; to promote and protect the rights of persons with disabilities in all policies and programmes; to stop breaches of the rights of persons with disabilities; to ensure that both the public and private sector respect the rights of persons with disabilities; to undertake research to further the accessibility of persons with disabilities; to provide accessible information on assistive technology to persons with disabilities; to encourage training on the rights of the Convention for persons working with persons with disabilities; and to consult and involve persons with disabilities when developing and implementing legislative and policies concerning them, amongst others.

14 Article 3(1) of the CRPD.

15 Article 3(2) of the CRPD.

16 Article 3(3) of the CRPD.

17 Article 3(4) of the CRPD.

18 Article 3(5) of the CRPD.

19 Article 3(6) of the CRPD.

20 Article 3(7) of the CRPD.

21 Article 3(8) of the CRPD.

22 Article 2 of the CRPD.

and to promote respect for their inherent dignity'.²³ It is apposite to note that the CRPD is the only human rights treaty to cater for its designated purpose under a separate provision and that the formulation of article 1 is thus a unique one under international human rights.²⁴ This is particularly significant in the present context, in light of the fact that reservations under the CRPD can only be placed insofar as such reservations are in line with the object and purpose thereof.²⁵ The reason for including a separate provision in respect of the 'purpose' of the CRPD stems from the fact that persons with disabilities were previously considered as 'invisible' and the purpose provision sought to ensure that they were afforded all human rights and fundamental freedoms on an equal footing with other persons.²⁶

On the one hand, the obligation to 'respect' as set out in article 1 aims to prevent state parties from interfering with the fundamental freedoms of persons with disabilities, either directly or indirectly, whilst on the other hand, the obligation to 'protect' places an obligation on state parties to ensure that third parties do not interfere with the enjoyment of the human rights of persons with disabilities and to adopt all legislative and policy measures necessary thereon.²⁷ In the same vein, the obligation to 'fulfil' has been deemed to include three further obligations, namely to facilitate the rights of persons with disabilities, by taking such measures as may be necessary to assist persons with disabilities in enjoying their rights; to promote their rights by upholding such rights; and to make the rights of persons with disabilities available when they are unable to realise those themselves.²⁸

With regards to the provision of inherent dignity, it is considered as a crucial element in achieving the paradigm shift from a medical approach to a human rights approach.²⁹ This provision purports to ensure that persons with disabilities are guaranteed their 'intrinsic worth' as human beings, and that they are respected and recognised on an equal basis with others.

The overall object and purpose of the CRPD can thus broadly be summarised as the core provisions of the Convention, which seek to formally guarantee that persons with disabilities are afforded all human rights under international human rights law on an equal basis with others at all material times.

23 Article 1 of the CRPD.

24 E Kakoulis & Y Ikehara 'Article 1: Purpose' in I Banketas, MA Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 36.

25 Article 33 of the CRPD.

26 Kakoulis & Ikehara (n 24) 48.

27 Kakoulis & Ikehara (n 24) 49.

28 As above.

29 Kakoulis & Ikehara (n 24) 51.

2.3 Reservations

A reservation is a unilateral statement made by a state at the time of signing, ratifying, accepting, approving, or acceding to a treaty, with the aim of excluding or modifying the legal effect of one or more of a treaty's provisions in their application to that state.³⁰ In effect, it allows a state to ratify a treaty without having to bind itself to provisions it does not wish to. This is commonly the case when for example, a domestic policy conflicts with the provision in question, or if a country is subject to a different system of law at the time of accession.³¹

A country is entitled to formulate a reservation except if it is prohibited by the treaty; if the treaty states that only specific reservations may be made; or if the reservation is incompatible with the object and purpose of the treaty.³² Although permitted to resort to reservations, unless an exception applies, states are encouraged to avoid this where possible.³³

Article 46 of the CRPD allows for reservations to be placed by state parties, if they are compatible with the object and purpose of the Convention.³⁴ To be valid, a reservation must therefore meet the requirements under article 1 of promoting, protecting, and ensuring the equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and of promoting respect for their inherent dignity. Reservations may be withdrawn at any time.³⁵

3 The CRPD in a Mauritian context

3.1 Overview

As of 2011, the country comprised of about 59 870 persons with disabilities, representing approximately 4.8 per cent of the general population.³⁶ As per the latest population census at the time of drafting this paper, the most common forms of disabilities in the country are largely physical disabilities, visual impairments, and learning difficulties, accounting for about 42 per cent, 24 per cent and 20 per cent of the

30 Article 2(d) of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, p 331. Mauritius adopted the Vienna Convention on the Law of Treaties by way of accession on 18 January 1973.

31 F Shqarri 'Reservations to treaties, prohibited reservations and some unresolved issues related to them' (2015) 6 *Mediterranean Journal of Social Sciences* 97 at 98.

32 Vienna Convention on the Law of Treaties (n 30) art 19.

33 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23 (1993) para 26.

34 Article 46(1) of the CRPD.

35 Article 46(2) of the CRPD.

36 Statistics Mauritius 'Housing and Population Census' (2011) 7 https://statsmauritius.govmu.org/Documents/Census_and_Surveys/HPC/2011/HPC_AR_Vol7_Disability_Report_Yr11.pdf (accessed 10 April 2021).

population of persons living with disabilities respectively, while persons with psycho-social disabilities make up for approximately 9.9 per cent of the population of persons with disabilities.³⁷

The CRPD was signed by Mauritius in September 2007 and ratified in January 2010, with reservations placed on articles 9(2)(d), 11 and 24(2)(b).³⁸ There exists legislation in the country catering for disability rights in certain fields.³⁹

However, despite this state party's best intentions as evidenced by the various advancements pertaining to persons with disabilities in Mauritius,⁴⁰ the following points are noteworthy. Firstly, the Constitution of the Republic of Mauritius⁴¹ fails to make any express reference to the protection of disability rights.⁴² The word 'disability' only appears once in the Constitution, as a ground upon which one cannot be discriminated against.⁴³ Moreover, there is no comprehensive piece of legislation aimed at exclusively promoting and protecting the rights of persons with disabilities in Mauritius, despite the obligation under the CRPD to take legislative measures for the implementation of disability rights.⁴⁴ Numerous gaps, discussed throughout this paper, prevail under current laws, which are not in line with the medical model of disability and which add to the stigma already faced by persons with disabilities. Finally, and most importantly, as will be discussed in detail, the reservations placed on the CRPD constitute three crucial aspects of the lives of persons with disabilities. They defeat the purpose of the CRPD by failing to adequately protect and promote the rights, fundamental freedoms, and inherent dignity of persons with disabilities; constitute a discrimination to their rights; and add to the numerous barriers already faced by persons with disabilities in the country.

37 A Budoo & RA Mahadew 'Mauritius: Country Report' (2014) 2 *African Disability Rights Yearbook* 227 at 228.

38 CRPD Committee, Concluding observations on the initial report of Mauritius, 30 September 2015, UN Doc CRPD/C/MUS/CO/1 (2015).

39 These include the Equal Opportunities Act 42 of 2008; the Training and Employment of Disabled Persons Act 9 of 1996; the National Council for the Rehabilitation of Disabled Persons Act 37 of 1986; the National's Pension Act 44 of 1976; the Social Aid Act 2 of 1983; The Society for Welfare of the Deaf Act 37 of 1968; the Lois Lagesse Trust Fund Act 19 of 1983, amongst others.

40 These include, for example, the implementation of low-floored buses for persons with physical disabilities, the use of Braille textbooks in educational institutions, and the increase in pension funds granted to persons with disabilities, amongst others.

41 GN 54 of 1968.

42 Budoo & Mahadew (n 37) 234.

43 Section 16(3) of the Constitution of the Republic of Mauritius was amended in 2016 to prohibit discrimination on the grounds of disabilities. It now defines 'discriminatory' as 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description'.

44 Global Rainbow Foundation *Building momentum for the disability rights legislation in Mauritius – Learning from the Indian experience* (2020) 6.

3.2 ‘Disability’ under Mauritian laws

As mentioned above, there is no legislation in the country which specifically addresses disability rights law in Mauritius and the Constitution does not provide guidance on the subject matter. Instead, these rights are grounded in other legislation.

Disability is defined under the Training and Employment of Disabled Persons Act⁴⁵ (TEDP Act) as:

To have a long-term physical disfigurement or physical, mental, or sensory disability, including a visual, hearing or speech functional disability, which gives rise to barriers or prejudices impeding his participation at an equal level with other members of society in major life activities, undertakings or fields of employment that are open to other members of society.⁴⁶

Under the Equal Opportunities Act (EOA),⁴⁷ the term ‘disability’ is not used. Instead, the EOA prohibits discrimination on various grounds, including ‘impairment’, which is defined as:

- (a) Total or partial loss of bodily function;
- (b) The presence in the body of organisms that may cause disease;
- (c) Total or partial loss of a part of the body;
- (d) Malfunction of a part of the body, including:
 - (i) A mental or psychological disease or disorder;
 - (ii) A condition or disorder that results in a person learning more slowly than people who do not have a condition or disorder
- (e) Malformation or disfigurement of a part of the body.⁴⁸

Finally, the National Pension’s Act (NPA)⁴⁹ defines the term ‘disabled’ as:

- (a) [...] suffering from a disablement of not less than 60% and resulting from loss of mental or physical faculty;
- (b) [...] suffering from a disablement of not less than 1% and resulting from a loss of mental or physical faculty caused by about industrial accident or a prescribed disease.⁵⁰

These definitions have been highly criticised for failing to effectively represent the paradigm shift to the social model of disability. Not only do they follow the outdated medical approach, but they are also incompatible with the CRPD, the latter explicitly preferring a human-rights approach as

45 Act 9 of 1996.

46 Section 2(a) of the TEDP Act.

47 Act 42 of 2008.

48 Section 2 of the EOA.

49 Act 44 of 1976.

50 Section 2 of the NPA.

explained above.⁵¹ They add to the barriers which persons with disabilities already face. The CRPD Committee has recommended the amendment of these definitions to avoid further use of such derogatory terminology to describe persons with disabilities.⁵² This has not been done to date and fails to portray persons with disabilities as legal subjects.

These definitions are not in line with the social model of disability as established by the CRPD. It is submitted that these definitions, together with the lack of initiative to amend them, have the effect of stereotyping persons with disabilities and impedes on the way they are perceived in society. This puts them at a disadvantage, impacts on their dignity, and represents obstructions to their rights and fundamental freedoms.

3.3 Reservations

The following reservations have been placed on the CRPD:

- (i) Article 9(2)(d), which provides for an obligation on state parties to provide signage in Braille and other easy-to-read and understand forms, in buildings and other facilities open to the public. The ground for reserving this provision related to the heavy financial implications it carried.⁵³
- (ii) Article 11, catering for the obligations on state parties in situations of risk and humanitarian emergencies. It was declared that the Mauritian government was not bound to take measures under this provision, except if permitted under national laws.⁵⁴
- (iii) Article 24(2)(b), relating to the right of children with disabilities to have access to an inclusive education on an equal basis with others and in the communities in which they live. Mauritius stated that this provision would be implemented incrementally with special education.⁵⁵

The next sections discuss what the obligations under these provisions entail; the effect of reservations against these provisions and how they negatively impact persons with disabilities; and the reasons why they should be removed.

51 Concluding observations on the initial report of Mauritius (n 38 above) para 5.

52 Concluding observations on the initial report of Mauritius (n 38 above) para 6.

53 United Nations Treaty Collection 'Convention on the Rights of Persons with disabilities: Declarations and Reservations' at 8 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf> (accessed 26 May 2021).

54 United Nations Treaty Collection (n 53) 8.

55 United Nations Treaty Collection (n 53) 9.

4 Accessibility

4.1 Overview: Articles 3 and 9

Accessibility can be defined in general terms as the ease by which any place, space, item, or service can be entered, exited, approached, reached, understood, interacted with, or otherwise used.⁵⁶ It is a well-established principle under the CRPD and is considered as a pre-requisite for the full integration, inclusion and empowerment of persons with disabilities in society.⁵⁷ The significant weight it holds under the Convention is implied from the fact that it appears both under the general principles listed under article 3, as well as a right of its own under article 9. As far as persons with disabilities are concerned, it denotes the equal access and equal participation in any built environment without facing barriers.⁵⁸

As a general principle, accessibility represents a crucial requirement insofar as the rights of persons with disabilities are concerned, whether these be social, political, civil, economic, or cultural.⁵⁹ It is the central concept which allows persons with disabilities to enjoy their rights effectively and equally.⁶⁰ Accessibility correlates to many other rights and it is therefore imperative to implement this principle properly to ensure that they can be fully enjoyed. It is a key feature to disability rights and should be a priority to state parties, as a failure to uphold this principle would in effect, amount to discrimination.⁶¹ Shortcomings in its implementation would broadly prevent persons with disabilities from enjoying various rights under the CRPD including accessing justice;⁶² living independently;⁶³ having access to information and communication,⁶⁴ education;⁶⁵ health;⁶⁶ habilitation and rehabilitation;⁶⁷ employment;⁶⁸

56 Department of Economic and Social Affairs & Division for Social Policy and Development 'Accessibility and Development: Mainstreaming disability in the post-2015 development agenda' (24 December 2013) https://www.un.org/disabilities/documents/accessibility_and_development.pdf (accessed 11 April 2021).

57 CRPD Committee, General comment 4, Article 24: Right to inclusive education, 2 September 2016, UN Doc CRPD/C/GC/4 (2016).

58 R Sestranetz & L Adams 'Free movement of people with disabilities in South East Europe: An inaccessible right?' (2006) *Handicap International Regional Office for South East Europe* at 11.

59 CRPD Committee, General Comment 2, Article 9: Accessibility, 22 May 2014, UN Doc CRPD/C/GC/2 (2014)

60 General Comment 2 (n 59) 7.

61 As above. Article 2 of the CRPD defines discrimination as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms'.

62 Article 13 of the CRPD.

63 Article 19 of the CRPD.

64 Article 21 of the CRPD.

65 Article 24 of the CRPD.

66 Article 25 of the CRPD.

67 Article 26 of the CRPD.

68 Article 27 of the CRPD.

enjoying an adequate standard of living,⁶⁹ participating in political and social life,⁷⁰ and participating in cultural life, recreation, sports, and leisure.⁷¹

As a stand-alone right, accessibility allows persons with disabilities to live independently, to participate equally and fully in society, and to enjoy all the other rights set out in the CRPD.⁷² Generally, persons with disabilities face frequent barriers preventing them from enjoying their rights and fundamental freedoms. These can include physical, informational, or communicational barriers.⁷³ For this reason, the CRPD places an obligation on state parties to take all appropriate measures to make the physical environment, transportation, information and communication, and other facilities, wherever situated and which are accessible to the public, equally accessible to persons with disabilities. This is to ensure that persons with disabilities can live independently and participate fully in society.⁷⁴

Article 9 lists the measures to be taken to make accessibility a reality for persons with disabilities.⁷⁵ For purposes of this paper, emphasis is laid on the provision of signage in Braille and other easy-to-read and understand forms in buildings and facilities open to the public.⁷⁶

4.2 Article 9(2)(d) of the CRPD

In addition to physical, institutional, and economic accessibility, article 9 includes the right of persons with disabilities to have access to information and communication.⁷⁷ Accordingly, article 9(2)(d) requires state parties to equip public buildings and facilities with signage in Braille and in easy-to-read and understand forms.

To comprehend what article 9(2)(d) entails in a disability context, it is important to grasp the purposes of signage. Primarily, signage imparts and communicates information; helps in wayfinding; and assists in identifying

69 Article 28 of the CRPD.

70 Article 29 of the CRPD.

71 Article 30 of the CRPD.

72 General Comment 2 (n 59) para 7.

73 UN Division for Social Policy Development & Department of Economic and Social Affairs 'Toolkit on disability for Africa: Accessibility' <https://www.un.org/esa/socdev/documents/disability/Toolkit/Accessibility.pdf> (accessed 11 April 2021).

74 Article 9(1) of the CRPD. This article further states that such measures generally apply to: 'Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplace' and 'information, communication and other services.'

75 Article 9(2) of the CRPD.

76 Article 9(2)(d) of the CRPD.

77 Federal Ministry for Economic Cooperation and Development 'A human rights-based approach to disability in development: Entry points for development organisations' at 6 https://reliefweb.int/sites/reliefweb.int/files/resources/A_human_rights-based_approach_to_disability_in_development.pdf (accessed 12 April 2021).

specific locations.⁷⁸ Without the appropriate signage and the information it provides, it may become extremely challenging for anyone, particularly persons with disabilities, to move and orientate themselves in public places.⁷⁹ It is thus essential for state parties to make provision for suitable physical planning and adequate signage to provide the requisite access to information and communication to all persons with disabilities.

The intention of 9(2)(d) appears to be the protection of the rights of persons with visual impairments and intellectual disabilities; these categories being more likely to identify places and receive information from Braille devices, pictures, or easy-to-read and understand forms. However, the CRPD Committee has made it clear that the required standards for accessibility should be 'broad and standardised'.⁸⁰ Accessibility is an unconditional right and the mere fact that a particular type of disability was not considered at the time of developing such standard, does not allow for its non-recognition.⁸¹ This provision may therefore well help persons with other types of disabilities. Through article 9(2)(d), the CRPD therefore seeks to ensure that accessibility is imparted to the wide diversity of persons with disabilities, particularly those facing significant barriers as far as orientation and movement are concerned.

To ensure that the right under 9(2)(d) is fully entrenched, signage ideally needs to be included in bathrooms; elevators; entrances and exits; emergency doors and emergency instructions; cautionary signs; bus stops; hotels and rooms; public transports; bus stops; vending machines and similar operating instructions; and parking spaces.⁸² The easiest way to incorporate this article would be by providing signage in Braille, raised pictograms and raised prints.⁸³ Such signs need to be clear and unambiguous, at a reasonable height and at consistent locations.⁸⁴

4.3 Reservation on article 9(2)(d)

Often, the focus and understanding when talking about 'accessibility' tends to be on physical, or 'visible' disabilities.⁸⁵ Article 9(2)(d) seeks to redress the issue of accessibility for persons whose disabilities are not readily

78 Advanced Multi Sign 'Signage and its purpose' <https://advancedmultisign.com/signage-and-its-purposes/> (accessed 12 April 2021).

79 General Comment 2 (n 59) 6.

80 General Comment 2 (n 59) 8.

81 A above.

82 Blind Foundation 'Accessible signage guidelines' (2013) 3 <http://content.aucklanddesignmanual.co.nz/resources/park-elements/general-signage/Documents/Signage-Accessible-Signage-Guidelines-2013.pdf> (accessed 12 April 2021).

83 Blind Foundation (n 82) 4.

84 As above.

85 Mental Health Europe 'More than a ramp: Rethinking accessibility for persons with psychosocial disabilities' (2020) 2 <https://www.mhe-sme.org/new-reflection-paper-accessibility/> (accessed 13 April 2021).

visible and aims at protecting the wider community of persons with disabilities, to include those with other types of disabilities.

Placing a reservation on article 9(2)(d) limits the scope of accessibility to a certain category of persons with disabilities, as it fails to consider the diversity of people and the obstacles they commonly face.⁸⁶ Of note, the Republic of Suriname is the only other state party to have placed a reservation on this provision in light of its heavy financial implications.⁸⁷ In effect, this reservation acts as an attitudinal barrier which prevents certain persons with disabilities from having access to public places, or from making full and equal use of their rights. It also discriminates against a certain group of persons with disabilities who may face similar difficulties in orientation, movement, and communication. This prevents them from having access to the information they require to move around and consequently requires them to be dependent on third parties to do so. For example, a person with visual impairments would require some sort of personal assistance in a public place where no signage in Braille is available. The lack of signage as required under 9(2)(d) could similarly pose a problem to various other persons with disabilities who may face comparable difficulties of orientation. Considering the diversity of persons with disabilities is critical when dealing with accessibility, ignoring this can go as far as giving the impression that the experiences and barriers faced by certain categories of persons with disabilities lack legitimacy in the eyes of the state.⁸⁸

For these reasons, it is submitted that the reservation placed on article 9(2)(d) by Mauritius represents a discrimination to those concerned by preventing them from enjoying a full range of rights and fundamental freedoms under the CRPD.⁸⁹ It impedes the full inclusion and integration of a certain class of persons with disabilities by failing to provide the required standards of accessibility in public environments. Given the fact that out of the three most prevailing types of disabilities in Mauritius, two pertaining to persons living with visual impairments and learning difficulties, it is crucial to take suitable measures to afford them with the full enjoyment of their right to accessibility.

Although complying with article 9(2)(d) can occasion important financial expenses, barriers relating to the issue of accessibility need to be removed gradually, but steadily.⁹⁰ While all new buildings must meet the universal design which make them accessible to all persons with

86 Mental Health Europe (n 85) 2.

87 The Republic of Suriname ratified the CRPD in 2017 and made the following declaration while doing so in respect of Article 9: '[T]he Government of the Republic of Suriname declares that it shall not for the time being take any of the measures provided for in Article 9 paragraph 2 (d) and (e) in view of their heavy financial implication'.

88 Mental Health Europe (n 85) 4.

89 See (n 62 to 71 above).

90 General Comment 2 (n 59) 8.

disabilities, state parties must plan a timeframe within which to remove existing barriers.⁹¹ There have been some positive changes in this regard over the past few years in Mauritius. The Building Control (Accessibility and Gender Compliance in Buildings) Regulations, adopted in 2017⁹² make reference to the provision of audible features and visual signage, including Braille, for automated teller machines and lifts in buildings such as museums, banks, cinema, and police stations,⁹³ and of visual and audible systems in lifts, lobbies and fire alarm systems.⁹⁴ It also provides for communication aids such as assistive listening systems in conference and assembly areas as well as tactile systems to gain admittance to buildings.⁹⁵ This indicates a propitious change as far as the issue of accessibility for all persons with disabilities is concerned, and good faith from the state party to move forward to reduce the difficulties faced by persons with disabilities in the country. With the promulgation of these new Regulations, the government announced that it would consider withdrawing the reservation on article 9(2)(d).⁹⁶

In its 'Combined Second and Third Report of the Republic of Mauritius' of 2020 (hereinafter referred to as 'the 2020 Report'), the Mauritian government has indicated that, following the coming into force of the Building Control (Accessibility and Gender Compliance in Buildings) Regulations which are in line with the accessibility requirements of the CRPD, it could consider withdrawing from this reservation.⁹⁷ As such, there is no longer any reason to keep the reservation on article 9 now that the Building Control Regulations have been implemented. Withdrawing this reservation would afford a greater protection for persons with disabilities in Mauritius: It would finally recognise the true diversity of persons with disabilities and stop the discrimination against certain groups of persons with disabilities who are, and will, continue to be denied the full enjoyment of their right to accessibility while this reservation prevails. It would also reiterate the Mauritian government's intention to take all necessary measures to comply with the principles established by the CPRD, particularly that of accessibility. Withdrawing would reinforce the commitment of the Mauritian government to bind itself to take such additional measures that would ensure that accessibility is afforded equally to all persons with disabilities, such as applying this provision to all buildings in the country, both old and new, as well as updating current legislation in this regard to

91 As above.

92 The Building Control Act, Government Notice 215 of 2017.

93 Building Control (Accessibility and Gender Compliance in Buildings) Regulations 2017 schedule 1.

94 Building Control Regulations (n 103) schedule 1.

95 Building Control Regulations (n 103) schedule 2(j).

96 Concluding observations on the initial report of Mauritius (n 38 above) para 7.

97 UNCRPD 'Combined Second and Third Report of the Republic of Mauritius' Annex 2 at 5 https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/MUS/CRPD_C_MUS_2-3_7812_E.docx (accessed 18 May 2021).

reflect non-accessibility as discrimination, and to provide persons with disabilities with legal remedies in cases of breach of their rights, as formulated by the CRPD Committee.⁹⁸

5 Situations of risk and humanitarian emergencies

5.1 Overview: Article 11 of the CRPD

Persons with disabilities are generally at higher risks, and are more likely to be negatively impacted in cases of disaster, emergency, and conflict.⁹⁹ This is particularly the case where assistance, communication, evacuation response or recovery efforts are inaccessible.¹⁰⁰ Article 11 deals with the obligations imposed in situations of risk, including armed conflict, humanitarian emergencies, and natural disasters, and requires state parties to take all the measures which are necessary to protect persons with disabilities in these cases.

The Sendai Framework for Disaster Risk Reduction,¹⁰¹ deals exclusively with the issue of risk reduction and was adopted by the UN in 2015. It highlights the targets and priorities which should be considered to prevent and reduce risks, and the CRPD Committee has expressed the need to take measures as set out under this framework to meet the objectives of article 11.¹⁰²

The duties under article 11 includes taking several measures to protect persons with disabilities, which have been set out by the CRPD Committee. Primarily, these include:

- (i) The active consultation and involvement of persons with disabilities when taking steps related to reduction of risks and humanitarian protocols and strategies;¹⁰³

98 As above.

99 Charter on Inclusion of Persons with Disabilities in Humanitarian Action (2016) <http://humanitariandisabilitycharter.org/> (accessed 18 May 2021).

100 UN DSPD & DESA (n 73) 14.

101 UNDRR 'Sendai Framework for Disaster Risk Reduction 2015-2030' (2015) <https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030> (accessed 25 April 2021).

102 IDA & Handicap International Humanity and Inclusion & CBM 'Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD): Legal frameworks guiding inclusive humanitarian action and guidance for CRPD reporting' (2020) 12 https://www.internationaldisabilityalliance.org/sites/default/files/article-11-of-the-crpdc-legal-frameworks-guiding-inclusive-humanitarian-action-reporting-guidance_final-version.pdf (accessed 14 April 2021).

103 UN Human Rights Council (UNHRC), Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies, UN Human Rights Council, 30 November 2015, UN Doc A/HRC/31/30 (2015); IDA et al (n 102) 18.

- (ii) The need for Risks Reduction and Disaster Management strategies to be inclusive and accessible;¹⁰⁴
- (iii) The adequate, accessible, and timely provision of information related to disaster risks and humanitarian emergencies through mass media;¹⁰⁵
- (iv) Ensuring the protection of life and safety by providing assistive devices and accessible applications, shelters and similar facilities, social and health support, trained rescue teams, and accessible communications channels;¹⁰⁶
- (v) Taking all steps to make post-emergency rehabilitation, resettlement, reconstruction, and rebuilding processes inclusive and accessible;¹⁰⁷ and
- (vi) Training all emergency personnel involved on the situation faced by persons with disabilities.¹⁰⁸

The key to meeting the requirements of the CRPD is to ensure close consultation and active participation as far as implementation of legislation under article 11 is concerned.¹⁰⁹ It is not sufficient to merely consult with persons with disabilities – they must be meaningfully involved in all processes of decision-making; be given the opportunity to voice their opinions; and identify any issues pertaining to them.¹¹⁰ Where this is not done, persons with disabilities must be entitled to make complaints.¹¹¹

Essentially, the choices made during the pre-emergency phases are vital, as they are those that will eventually mitigate human suffering and which will help in reconstruction during the critical phases of an emergency.¹¹² Equality, non-discrimination, and reasonable accommodation and accessibility are accordingly of utmost relevance under article 11.¹¹³ Persons with disabilities should have equal access to all the measures taken by a state party as far as risk reduction is concerned, and emergency services must be accessible and inclusive at all materials times.¹¹⁴ The rationale behind upholding these principles is to better protect persons with disabilities in case of risk, as they would be best suited to provide any recommendations on inclusion and accessibility; to raise awareness on issues that they face; and to work on a universal design which would suit all persons with disabilities, being the ones primarily concerned and affected.¹¹⁵

104 UNHRC (n 103) para 9; IDA et al (n 102) 18.

105 UNHRC (n 103) para 6; IDA et al (n 102) 18.

106 UNHRC (n 103) para 56; IDA et al (n 102) 18.

107 UNHRC (n 103) para 29; IDA et al (n 102) 18.

108 UNHRC (n 103) para 53; IDA et al (n 102) 18.

109 UNHRC (n 103) para 9; IDA et al (n 102) 18.

110 IDA et al (n 102) 20.

111 As above.

112 As above.

113 UNHRC (n 103) para 9.

114 General Comment 2 (n 59) para 36.

115 IDA et al (n 102) 23.

5.2 Reservation on article 11

By putting a reservation on article 11, persons with disabilities are under a higher threat of being exposed to abuse, neglect, and abandonment in cases of risk and humanitarian emergencies. In its country report submitted in 2010, Mauritius declared that despite the reservation, the country was conscious of the needs of persons with disabilities.¹¹⁶ It stated that the country was peaceful, and the only potential risks were natural disasters, such as cyclones or torrential rains in a few exposed areas, which would be adequately catered for.¹¹⁷

The Mauritius Disaster Risk Profile estimates that cyclones represent the biggest risk to Mauritius, followed by floods and earthquakes.¹¹⁸ In recent times, the country has become more vulnerable to an increasing frequency of cyclones, torrential rains, and flash floods which have been representing a threat to the lives of many people.¹¹⁹ At least one cyclone with a wind speed of more than 120km/h hits the island every year, while an average of four cyclones form at summertime.¹²⁰ The annual loss caused by cyclones, earthquakes and floods have been calculated to amount to approximately US\$110M.¹²¹ This number provides an indication of the severity of natural disasters on the country. To illustrate this point, 11 people were killed in Mauritius as a result of flash floods in 2013, while some 259 people were displaced in Rodrigues Island in 2019 due to a severe cyclone with gusts of 165km/h which caused major flash floods and property damage.¹²² In 2021, several regions in Mauritius have been frequently and severely affected by heavy rains, affecting both people and property.¹²³

In response to the increasing risk posed by natural disasters, the National Risk Reduction and Disaster Management Act (NRRDM Act)¹²⁴ came into force in 2016, and the National Disaster Risk Reduction

116 Republic of Mauritius 'Country Report to the Third Conference of State Parties to the UN Convention on the Rights of Persons with Disabilities' (1-3 September 2010) 4 <http://www.un.org/disabilities/documents/COP/COP3/best%20practices/mauritius%20-%20Report%20CRPD.doc> (accessed 18 May 2021).

117 Mauritius Country Report (n 116) 5.

118 PreventionWeb 'Disaster risk profile: Mauritius' (2016) <https://www.preventionweb.net/publications/view/52172> (accessed 15 April 2021).

119 UN Environment Program 'Reducing climate change and disaster risk in Mauritius' (2019) <https://www.unep.org/news-and-stories/story/reducing-climate-change-and-disaster-risk-mauritius> (accessed 15 April 2021).

120 Clever Dodo 'Cyclones in Mauritius' (2011) <https://mauriblog.cleverdodo.com/t/13877/cyclones-in-mauritius#:~:text=As%20Mauritius%20is%20found%20in%20the%20inter%20tropical,Gervaise%20cyclone%20devastation%20in%201975%2C%20picture%20credit%20hunneybell.com> (accessed 15 April 2021).

121 PreventionWeb (n 118).

122 UN Environment Program (n 119).

123 'Mauritius Issues Disaster Alert Over Heavy Rains' *Arise News* 28 April 2021; 'Mauritius – Flash Floods in South East After 400mm of Rain in 24 Hours' *Floodlist* 16 April 2021.

124 Act 2 of 2016.

Management Centre was set up to act as a focal point for risk reduction. While both aim at mitigating risk in case of disaster, DPOs have reported that persons with disabilities were neither consulted nor engaged in their implementation; that there have been no data collection as to how many persons with disabilities may require assistance in cases of risk; and that the personnel involved in evacuation have not been trained to deal with persons with disabilities.¹²⁵ In fact, the NRRDM Act does not make any express reference to persons with disabilities and only mentions the evacuation of ‘persons at risk’ which, according to the CRPD Committee, can be generally deemed to include persons with disabilities.¹²⁶

Although provision has been made for ‘persons at risk’, it is submitted that the legislation relating to situations of risk is not sufficiently inclusive and accessible for persons with disabilities. There is no other policy or framework specifically designed for the evacuation of persons with disabilities, which constitutes a massive restriction to the protection afforded to persons with disabilities under article 11. The concerned authorities indicated an intention of removing the reservation once the NDRRM Act came into force,¹²⁷ but this has still not been done.

A reservation on this provision means that persons with disabilities may not be afforded necessary protection in cases of risk. As there was no prior consultation with them, it is difficult to foresee what kind of special measures have been contemplated, if any, for persons with disabilities. Not only does the reservation represent a barrier to the safety of persons with disabilities, but it also relieves the state party from abiding to its obligations under the CRPD, representing a discrimination on persons with disabilities. As long as this reservation is in force, the state is not bound to take any additional measures to accommodate for the needs and safety of persons with disabilities in case of risk and emergencies. With climate change and the growing risk for natural disasters, it has become more important than ever to take the appropriate precautions to ensure the equal safety of all citizens, especially persons with disabilities, being more exposed in such risks. This will not be possible if the reservation prevails. Only if removed, will the state be bound to take all adequate measures required under article 11 to ensure the equal, inclusive, and accessible safety of all. For now, the NDRRM Act is insufficient on its own and more is needed to harmonise risk reduction for persons with disabilities with the spirit of the CRPD, even though the government has indicated in the 2020

125 Voice of Disabled People International ‘Mauritius Shadow Report on the UN Convention on the Rights of Persons with Disability’ (2013) para 17 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCS%2fMUS%2f35602 (accessed 18 May 2021).

126 Section 16(1)(b) of the NDRRM Act; CRPD Committee, Concluding Observations on the initial report of Mauritius: Addendum – Information received from Mauritius on follow-up to the concluding observations, 27 November 2017, UN Doc CRPD/C/MUS/CO/1/Add.1 (2017) para 9.

127 Concluding observations on the initial report of Mauritius (n 38 above) para 6; Concluding Observations on the initial report of Mauritius Addendum (n 126) para 9.

Report that the reservation could now be removed in light of the NDRRM Act.¹²⁸

6 Right to education

6.1 Overview: Article 24 of the CRPD

The right to education is generally considered as a pre-requisite for the enjoyment of other rights.¹²⁹ Article 24 provides for the right to education on an equal basis, based on the principle of non-discrimination and equality. It introduces the concept of inclusive education, with the intention of including persons with disabilities in the general system of education, as equal members of society. An inclusive education is that which will generally strengthen the autonomy of persons with disabilities, reinforce their participation in society, empower them in life, and lessen any marginalisation they may face.¹³⁰

Being a socio-economic right, education is subject to a progressive realisation under article 4 of the CRPD.¹³¹ State parties have a duty to take steps in the realisation of the right to education under article 24, and the concept of 'inclusive education' is one which can be established progressively, but steadily.¹³² State parties do however have certain other obligations, including the duty not to discriminate, which require immediate implementation, regardless of the amount of resources available.¹³³

For purposes of this provision, emphasis is specifically laid on the situation of children with disabilities in Mauritius and the impact of the reservation on article 24(2)(b) on them.

6.1.1 *Inclusive education and special education*

To understand the current position in Mauritius, and the extent to which the country has complied with the duty under article 24, it is necessary to analyse the concept of inclusive education as required by the CRPD.

128 Combined Second and Third Report of the Republic of Mauritius (n 97).

129 C O'Mahony *Education rights in Irish law* (2006) 18.

130 G de Beco 'Transition to inclusive education systems according to the CPRD' (2016) 34 *Nordic Journal of Human Rights* 40.

131 A Broderick & S Quilivan 'The right to education: Article 24 of the CRPD' in C O'Mahony & G Quinn (eds) *Disability law and policy: An analysis of the UN Convention* (2017) 2.

132 As above.

133 Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of state parties' obligations (Art 2, Para 1, of the Covenant), 14 December 1990, UN Doc E/1991/23 (1990) para 1.

A note should consequently be made on the distinction between an inclusive education system, as opposed to a 'special' system of education.

The CRPD Committee distinguishes inclusion from exclusion, segregation, and integration. The latter three generally fall under the category of education predominantly known as 'special education' in Mauritius. In essence, exclusion is the denial of any form of education to persons with disabilities, whether directly or indirectly; segregation means providing access to education in a separate environment, isolated from learners with no disabilities; and integration is to place children with disabilities in the mainstream education system, but only if they can adjust to the requirements of the institution.¹³⁴ These systems largely provide a lower standard of education and lessen the learners' chances upon becoming adults.¹³⁵ Conversely, inclusion recognises that all children should work together, notwithstanding any difficulties or differences they may experience, and at all levels of education.¹³⁶ The right to an inclusive education requires state parties to provide equal and inclusive access to education to all learners with disabilities, at all levels of education.¹³⁷ Such a system has been proved to be advantageous not only to students, but also families, teachers, and communities.¹³⁸

The right under article 24 makes express reference to that of an inclusive education.¹³⁹ The CRPD Committee views exclusionary and segregated education as a form of discrimination and has recommended state parties to replace segregated systems by that of inclusive education.¹⁴⁰ The CRPD itself does not provide any indication of what such a system entails, but the CRPD Committee has provided that in addition to being an underlying human right to all learners, it is also a means of realising other rights, and is a fundamental principle valuing the well-being of all students.¹⁴¹ It is a way to eliminate the barriers to

134 General Comment 4 (n 57) para 11.

135 G de Beco 'The right to inclusive education: Why is there so much opposition to its implementation?' (2018) 143 *International Journal of Law in Context* 1.

136 The Salamanca Statement and Framework for action on Special Needs Education (1994) <https://unesdoc.unesco.org/ark:/48223/pf0000098427> (accessed 19 April 2021).

137 As above.

138 See R Rieser *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* 2nd ed (2012) 289-291. Inclusive education provides the right support to succeed academically and socially; represents a greater chance to be part of the labour market, and increases the tolerance of society towards persons with disabilities, amongst others.

139 Article 24(1) of the CRPD states as follows: 'States Parties shall ensure an inclusive education system at all levels and lifelong learning'.

140 CRPD 10 Years 'Towards inclusive equality: 10 Years Committee on the Rights of Persons with Disabilities' (2018) 60 https://tbinternet.ohchr.org/Treaties/CRPD/Sha red%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf (accessed 15 April 2021).

141 General Comment 4 (n 57) para 10.

education for persons with disabilities, as well as to accommodate all students in regular schools.¹⁴²

In order to achieve the goals set out under the CPRD, a rigorous transformation in culture, policy and practice is necessary.¹⁴³ This requires a revision in existing legislation, policies and mechanisms related to education, and the removal of all barriers which could prevent realising these objectives.¹⁴⁴ Primarily, the right to an inclusive education prioritises 'the full and effective participation, accessibility, attendance and achievements of all students', particularly those who are more likely to be marginalised, or excluded.¹⁴⁵ It is noteworthy that there is a general misconception about the resources involved in maintaining an inclusive system. In truth, inclusive systems have been found to be more economical than segregated systems of education and could in fact be as seven to nine times cheaper.¹⁴⁶ In addition to being beneficial to the learners concerned, inclusive education is thus also reasonably affordable to sustain, as opposed to segregated systems of education.¹⁴⁷

Insofar as Mauritius is concerned, it follows mostly a segregated system of education and the country has been found to be slow in implementing its policy on inclusive education.¹⁴⁸ As a matter of fact, the Special Education Needs Authority Act (SENA Act)¹⁴⁹ came into force in 2018 and oversees all aspects of special institutions in Mauritius. Under this Act, no provision has been made for the development and promotion of inclusive education, even though an inclusive education system was intended to operate alongside that of special education until mainstreaming had been totally implemented in the country.¹⁵⁰

To summarise, as of 2021 and despite having ratified the CRPD, Mauritius had barely adhered to the principle of inclusive education set out under article 24, and still followed for the most part, a special system of education.

142 As above.

143 General Comment 4 (n 57) para 9.

144 As above.

145 As above.

146 G de Beco 'The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, requirements and (remaining) questions' (2014) 32 *Netherlands Quarterly of Human Rights* 263 at 276.

147 As above.

148 Concluding observations on the initial report of Mauritius (n 38 above) para 33.

149 Act of 2018.

150 Consideration of Reports submitted by State Parties under article 35 of the Convention, Initial reports of State parties due in 2010: Mauritius (n 5) para 11.

6.2 Article 24(2)(b): ‘The right to a free, quality and inclusive education in the community they live in’

Article 24(2)(b) deals with the right of persons with disabilities to be entitled to free, inclusive, and quality education in the community they live in, and on an equal basis with others. It derives from the understanding that all children are entitled to be accommodated in the mainstream system of education, regardless of their abilities, or any requirements they may need.¹⁵¹ It also provides for the right of children with disabilities to enrol in schools within their communities.

To fulfil the obligation under 24(2)(b), the CRPD Committee has stated that an education system must comply with the ‘4-As Framework’ of education: Availability, accessibility, acceptability, and adaptability.¹⁵² Although this framework has not been formally adopted for children with disabilities in particular, it provides guidance on the measures to be taken to comply with the duties set out by article 24(2)(b).¹⁵³

6.2.1 The ‘4-As’ Framework

Availability

Institutions and programmes for persons with disabilities ‘must be available in sufficient quantity and quality’.¹⁵⁴ This concept requires schools to be readily available within a child’s community, or where he or she resides, to ensure that children are not inconvenienced by having to travel long distances to attend school. Educational places, infrastructure and learning materials should also be generally available at all levels in the community.¹⁵⁵

Accessibility

All persons with disabilities should have equal access to places of education without discrimination.¹⁵⁶ As previously discussed, accessibility is a central feature of the CRPD. Making education accessible is wide-ranging and encompasses physical accessibility, economic accessibility, and reasonable accommodation.¹⁵⁷

151 UN Division for Social Policy Development & Department of Economic and Social Affairs (n 73) 4.

152 General Comment 4 (n 57) para 19.

153 De Beco (n 146) 280.

154 General Comment 4 (n 57) para 20.

155 As above.

156 As above.

157 UN DSPD et al (n 151) 5.

The educational environment must firstly be physically accessible, and guarantee equality and safety.¹⁵⁸ To achieve physical accessibility, state parties should adhere to the principle of Universal Design; ban any buildings which are inaccessible to persons with disabilities; put in place new technologies; and commit to establishing a timeframe and monitoring mechanism within which to comply with this design.¹⁵⁹ Resources should also be allocated for textbooks and materials to be provided in accessible formats.¹⁶⁰

As far as economic accessibility is concerned, education should be affordable to persons with disabilities.¹⁶¹ This means that if the general system of education is free in a state, it should be equally free for persons with disabilities. The same applies for reasonable accommodation, which should be a priority matter, and free of charge.¹⁶²

Acceptability

Acceptability requires the form and substance of education to be designed in such a way to accommodate all cultures, views, and languages of children with disabilities.¹⁶³ Education should be acceptable to everyone involved and must not belittle anyone involved. State parties therefore have a duty to ensure that education complies with what is acceptable to those concerned and that it conforms with any of their requirements.¹⁶⁴ This applies to any facilities, goods, and services related to the education system.¹⁶⁵

Adaptability

Adaptability calls for the education system to be flexible and to meet the needs of all learners.¹⁶⁶ This can be achieved by applying the Universal Design for Learning, which considers the diversity of learners.¹⁶⁷ The Universal design requires that curricula be conceived to meet the requirements of all students; that standard assessments be replaced by various forms of assessments; and that broader goals be designed to

158 General Comment 4 (n 57) para 21. This includes transport, water, sanitation, cafeterias, and recreational spaces.

159 General Comment 4 (n 57) para 21.

160 General Comment 4 (n 57) para 22. For instance, provision should be made for Braille, ink or digital formats.

161 General Comment 4 (n 57) para 23.

162 De Beco (n 130) 57.

163 General Comment 4 (n 57) para 24.

164 General Comment 4 (n 57) para 23.

165 As above. For example, provision should be made for sign language to conform with language requirements where the education system consists of deaf learners. The same applies for learning material – Where learners with visual impairments are concerned, learning materials and teaching methods should be provided in alternative formats.

166 General Comment 4 (n 57) para 24.

167 As above.

provide alternative ways of learning. The system should also be flexible to meet the demands of children with disabilities in a particular area and accommodate for children with disabilities in any given community.

6.3 Reservation on article 24(2)(b)

Reservations against article 24(2)(b) prevent children with disabilities from accessing the type of education that will enable them to enjoy their rights and fundamental freedoms and to participate in society. It creates a big inconvenience in terms of where to access such education and entitles state parties to allow for children with disabilities to attend school outside their communities, which is vastly discriminatory.¹⁶⁸ The reservation disregards the need for the education system to be accessible, available, adaptable, and acceptable to those involved. It renders the lives of children with disabilities and their families problematic by allowing the state party to overlook the many challenges they may already face, especially that of displacing children from their communities and travelling over long distances daily.

In 2018, Mauritius consisted of 318 primary schools;¹⁶⁹ 178 secondary schools;¹⁷⁰ 111 pre-vocational schools;¹⁷¹ and 72 Special Educational Schools,¹⁷² the latter representing approximately 10 per cent of the total number of schools in the country. The number of children with disabilities who enrolled in Special Education Schools that year amounted to 2 656.¹⁷³ Given the fact that Mauritius follows mostly a segregated approach, and in accordance with the above numbers, the reservation means that a great number of children with disabilities around the country find themselves having to travel over long distances to get to school. In its 2015 Report, the CPRD Committee raised concerns about the fact that many children in rural areas did not have access to public transport and were not being reimbursed for the costs of transportation to travel to school.¹⁷⁴ The reservation therefore represents an additional barrier to those living in more remote areas of the country: Many neither have access to proximate schools, nor public transportation, infringing on their right to have access to education on an equal basis with others.

While a special system of education is not specifically precluded by the CRPD, it is generally not recommended, considering the social model of

168 *European Action of the Disabled (AEH) v France* ECHR Complaint 81/2012 (11 September 2013). The ECSR held that it was a direct discrimination for children with autism to travel from France to Belgium to receive vocational training.

169 Stats Mauritius 'Education Statistics – 2018' at 3 https://statsmauritius.govmu.org/Documents/Statistics/ESI/2018/EI1406/Edu_Yr18.pdf (accessed 20 April 2021).

170 Stats Mauritius (n 157) 5.

171 Stats Mauritius (n 157) 6.

172 Stats Mauritius (n 157) 7.

173 As above.

174 Concluding observations on the initial report of Mauritius (n 38 above) para 33.

disability. An inclusive education is that which meet the general principles set out under article 3, and that which will entitle persons with disabilities to fully enjoy their rights. While this right may take time to be fully achieved and may not be possible immediately, it has been highly recommended by the CRPD Committee and can be implemented progressively.¹⁷⁵

Although Mauritius has a policy on inclusive education since 2006, the CRPD Committee found that the country had been slow in its implementation.¹⁷⁶ With the SENA Act now in force, the question arises as to how the specialised system of education, which has now been grounded into the Mauritian system, will be reconciled with an inclusive education system. The SENA Act is in complete contradiction with the requirements of article 24 and inevitably results in children with disabilities being completely deprived of the quality and inclusive education required under article 24. It appears to be reinforcing the special system of education in the country, rather than showing any intention of stepping away from it and moving towards total mainstreaming. Not only does this new legislation delay the process of fulfilling the obligations set out under article 24, but it also prevents the full inclusion of persons with disabilities in the education system and fails to abide to the principles of equality and non-discrimination.

It was declared in the 2020 Report that, following the adoption of the policy for inclusive education in 2006, some steps had been taken to improve the situation of persons with disabilities in the education sector.¹⁷⁷ According to the 2020 Report, only once the Policy had fully been complied with, would Mauritius consider removing the reservation on article 24. Until then, a system of special education together with one of inclusive education would run side by side.¹⁷⁸

In this regard, it is submitted that the reservation on article 24(2)(b) supplements to these already existing barriers by failing to make a step further towards inclusion by abolishing all systems of special education as recommended by the CRPD Committee. These obstacles can be removed if the state party takes actions to abolish all systems of special education, by withdrawing the reservation on this provision.

175 Broderick & Quilivan (n 131) explain that being a socio-economic right, art 24 is subject to a progressive realisation.

176 As above.

177 'Combined Second and Third Report of the Republic of Mauritius' (n 97).

178 Concluding observations on the initial report of Mauritius (n 38) para 11.

7 Incompatibility of the reservations with article 1

The reservations placed on articles 9, 11 and 24 seek to exclude the legal effect of these provisions in Mauritius. Under article 46(1) of the CRPD, reservations are only permissible if they are compatible with the purpose and the object of the Convention, as set out at paragraph 2.2 above.

As discussed, the reservations which have been placed on the CRPD are not in the best interests of persons with disabilities in the country. They represent additional barriers in a world that is striving every day to remove the stigma of how persons with disabilities are perceived, and supplement to the issues which they are already facing. They appear to be sustaining an outdated system which impedes the rights and fundamental freedom of persons with disabilities. All three provisions pertain to important rights which have a vital role to play in the lives of persons with disabilities. They correlate to the general principles and rights set out under the CRPD and represent a discrimination by infringing on the enjoyment of the rights and fundamental freedoms sought for persons with disabilities by the CRPD.

In fact, accessibility and education of persons with disabilities both play an important role in the integration of persons with disabilities in society. They entitle persons with disabilities to enjoy all their other rights and allow them to be full and equal participants in society. The reservations against these provisions therefore go against the very spirit of the CRPD by failing to provide suitable safeguards to their rights and inherent dignity of persons with disabilities in the country. The same applies for situations of risk which is vital for the protection of persons with disabilities who may be more affected, given that the present measures are not accessible and inclusive. Reservations against article 11 creates a risk of being left behind in such instances and puts the lives of persons with disabilities in danger.

The reservations placed by Mauritius on the CRPD thus prevent persons with disabilities from being recognised as equal members of society, for all the reasons listed throughout this paper. They are incompatible with the purpose and object of the CRPD as they represent obstructions to the protection and the promotion of the rights of persons with disabilities, their fundamental freedoms, and their inherent dignity. The reservations conflict with the very essence of the CRPD and are therefore contradictory to the purpose and object as set out under article 1 of the CRPD.

This state party's steps to improve the situation of persons with disabilities are acknowledged, although the pace at which these are being taken pose a problem for the future of persons with disabilities in the country. A whole decade has passed since the implementation of the CRPD, and since then, only a few innovations have been noted regarding

the full inclusion of persons with disabilities, while three reservations remain in force. Moreover, as pointed out in this paper, the fact that the government has approved the establishment of a body which has as sole purpose the advancement of a special education system, the question of how to move towards a fully inclusive education system, and consequently the withdrawal on the reserved article 24(2)(b), remains intact. Till now, the implementation of policy on inclusive education has been unrushed and with the new SENA Act, total mainstreaming seems far-fetched in the forthcoming years.

The country has made it clear that it would only accede to the Optional Protocol once all reservations had been removed. Similarly, the reservation on article 24 will only be removed 'in due course', persons with disabilities in Mauritius will not be afforded with the protection of the Optional Protocol and its benefits, for the time being. This denies them of the right to make complaints about violations of their rights to the CRPD Committee and prevents the CRPD Committee from making inquiries on systematic violations of the CRPD in the country.¹⁷⁹ Persons with disabilities are currently only left with national remedies although to this date and despite the many challenges they face, there has been no single recorded case law relating to disability in Mauritius.¹⁸⁰ It is submitted that this generally prevent persons with disabilities from enjoying their human rights and fundamental freedoms on an equal basis with others, contrary to the object and purpose of the CRPD.

In its initial report submitted in 2010, the government mentioned the introduction of a Disability Bill which aimed at promoting and protecting the rights of persons with disabilities in line with the CPRD.¹⁸¹ This Bill formed part of the Government Programme for the years 2012-2015. Although some steps have been taken in its drafting, the Bill has still not been implemented in 2022.¹⁸² Concerns were raised about the pace at which the Bill was being drafted; the fact that the Bill was not in the public domain; and that it had not been drafted in consultation with DPOs and NGOs.¹⁸³ While waiting for the removal of the reservations placed on the CRPD, its full protection, and that of its Optional Protocol, it can only be hoped that the Disability Bill, when promulgated, will address immediate and pressing gaps in the law, including the medical approach; accessibility in all buildings; reconciling inclusive education with special education;

179 UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex II at 6.

180 Repository on Disability Rights in Africa 'Mauritius: Updated Country Report' para 5 <http://rodra.co.za/index.php/country-reports-mauritius/23-countries/mauritius/63-mauritius> (accessed 4 December 2022).

181 Consideration of Reports submitted by State Parties under article 35 of the Convention, Initial reports of State parties due in 2010: Mauritius (n 5) para 11.

182 Global Rainbow Foundation (n 44) 10.

183 As above.

and effective remedies and bodies for persons with disabilities in cases of breaches of their rights.

8 Conclusion

This paper discussed the reservations placed by Mauritius on the CRPD, in addition to some issues and prejudices already suffered by persons with disabilities in the country. It reviewed the reservations on article 9(2)(d), 11 and 24(2)(b) in a Mauritian context. Essentially, it concludes that the reservations on these provisions are incompatible with the object and purpose of the CRPD because they relate to important aspects of the lives of persons with disabilities. As previously explained, the object and purpose of the CRPD is to ensure that persons with disabilities are afforded with the equal protection and promotion of *all* human rights, on an equal basis with others. The abovementioned reservations impede on this purpose, preventing certain categories of persons with disabilities from being equally entitled to their human rights. Although some new measures have been put in place since 2010 in this regard, these are generally neither accessible, nor inclusive, and do not protect and promote the rights of persons with disabilities as intended by the CRPD.

The pace at which the country is taking measures to remove these reservations is also extremely lengthy and prevents persons with disabilities from having access to the full range of rights and fundamental freedoms under the CRPD. It is submitted that this will not be possible until the state party takes the initiative to bind itself to take all measures in these three fields by removing the said reservations. For now, the reservations add to the stigma faced by persons with disabilities in the country and should be removed for the full inclusion and integration of persons with disabilities in society. National laws alone are insufficient to achieve these goals for the time being.

SECTION B: COUNTRY REPORTS

RÉPUBLIQUE DU BURKINA FASO

Soka Armelle Ngoutane Peyou*

Summary

Burkina Faso, literally 'Land of the Honest Men', with its capital Ouagadougou, is a landlocked country in West Africa, formerly the Republic of Upper Volta. It is one of the ten least developed countries in the world, with a Human Development Index of 0.402 in 2015. Its population is estimated at 20 487 979 with a population growth rate of 3.01 per cent. The situation of vulnerability of people with disabilities is based on the country's demographic characteristics, with a high propensity in rural areas (80.6 per cent), compared to urban areas (19.4 per cent). Following the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) by Burkina Faso in 2009, there has been a gradual improvement in the condition of people with disabilities, which can be seen in the active role played by civil society and development partners alongside the government. Despite these constant efforts, the country faces economic and financial constraints that negatively impact the effectiveness of the rights of people with disabilities and put into perspective the joint efforts of all stakeholders to ensure that they enjoy their fundamental rights. In a context where people with disabilities are often among the most vulnerable, sometimes combining precarious living conditions, illiteracy, poor access to healthcare and low purchasing power, this section of the population is adversely affected by the country's economic and social processes. As a result, their fundamental rights to health, education, vocational training and employment, justice and decision-making are difficult to enjoy.

In addition, the period covered by this report has been marked by socio-political crises that have delayed efforts to make the human rights of persons with disabilities effective. Indeed, since 2015, conflicts between the state and non-state armed groups in the northern regions of Burkina Faso have increased insecurity. Stakeholders are putting in place targeted responses to assist people with disabilities facing insecurity,

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including food insecurity, in order to contribute to the strengthening of resilience and social cohesion, in particular for the benefit of women, children, the elderly, people living in rural areas and people with HIV, and internally displaced persons with disabilities.

1 Les indicateurs démographiques

1.1 Quelle est la population totale du Burkina Faso?

Selon le 5^e recensement général de la population et de l'habitat du Burkina Faso tenu en 2019, la population générale est estimée à 20 487 979 habitants.¹ Elle représente des individus répertoriés au sein des ménages ordinaires, des ménages collectifs y compris la population des sans-abris (population flottante) et celle des représentations du Burkina Faso à l'étranger (ambassades et consulats). Cette population dite de droit (résidente) est composée de 9 894 028 d'hommes et 10 593 951 de femmes.²

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap au Burkina Faso. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Burkina Faso?

En vue d'obtenir des informations désagrégées sur les personnes vivant avec le handicap dans le cadre du Recensement Général de la Population et de l'Habitat (RGPH) de 2006, le Gouvernement a pris en compte les données issues du recensement général des enfants handicapés (RGEH) de 2013, de l'étude multisectorielle de 2008, de l'EMC de 2014 et de la création d'une base de données sur les personnes handicapées en 2016.³

Les modalités de réponses dans le formulaire du RGPH de 2006 étaient: « handicapé du membre supérieur », « handicapé du membre inférieur », « déficient mental », « aveugle », « sourd-muet » et « autres handicapés ». Lorsqu'une personne recensée souffrait de plusieurs handicaps, on prenait en compte le principal handicap. La question ainsi posée comportait un certain nombre de modalités listées avec cependant une modalité « autre handicap » qui regroupait toutes les autres modalités rencontrées et non listées.

La publication des résultats des recensements et des études thématiques sur le handicap a contribué à l'information sur la situation des personnes vivant avec le handicap. En outre, les annuaires statistiques des départements ministériels et les différentes campagnes d'information, d'éducation et de communication organisées par les acteurs œuvrant dans le domaine du handicap ont également permis de disposer de données sur le handicap. Le processus de collecte de données et de recherche a été participatif et inclusif avec notamment la participation des organisations représentatives des personnes en situation de handicap.⁴

1 Résultats préliminaires du 5e RGPH (2019) 14.

2 Comme ci-dessus.

3 En l'absence de précisions sur la méthodologie de collecte des données sur le handicap dans le rapport préliminaire du 5e RGPH (2019), il a fallu se référer aux données relatives à la méthodologie du 4e RGPH (2006).

4 Résultats du 4e Recensement général de la population et de l'habitation (RGPH) (2006) 61.

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République du Burkina Faso?

Selon une projection faite par l'INSD en 2020 à partir du recensement général de la population et de l'habitat de 2006, le Burkina Faso comptait 3 226 627 personnes vivant avec le handicap.⁵

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République du Burkina Faso?

Selon le 5^e RGPH, la population féminine du Burkina Faso est estimée à 10 593 951 personnes et les femmes représentent 51,7% de la population résidente. Cependant, suivant le RGPH de 2006, elles étaient moins touchées par le handicap que les hommes et représentaient 47,3% de l'effectif total des personnes vivant avec le handicap au Burkina Faso, contre 52,7% d'hommes.⁶

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République du Burkina Faso?

Les données du recensement général des enfants handicapés (RGEH) de 2013 font ressortir 79 617 enfants handicapés d'âge compris entre 0 et 18 ans dont 48 126 de sexe masculin et 31 491 de sexe féminin. Ces enfants présentent un ou plusieurs handicaps et à des degrés de sévérité divers. Les régions les plus touchées sont la Boucle du Mouhoun avec 8 799 enfants handicapés, suivie des Hauts-Bassins qui comptent 8 651 enfants. La région des Cascades enregistre le faible effectif d'enfants handicapés avec 2 375 enfants.⁷

1.6 Quelles sont les formes de handicap les plus répandues en République du Burkina Faso?

Le RGPH de 2006 fait ressortir quatre (04) types de handicap dominants. Il s'agit du handicap du membre inférieur (26,44%), du handicap visuel (17,50%), de la déficience mentale (14,88%) et du handicap auditif (12,7%). Le tableau ci-dessous donne la proportion des personnes handicapées selon la nature du handicap et la région de résidence de la personne.⁸

5 Extrait du message de la Ministre de la femme, de la solidarité nationale, de la famille et de l'action humanitaire à l'occasion de la journée internationale des personnes handicapées (2021).

6 Résultats préliminaires du 5e RGPH (2020) 8.

7 Comme ci-dessus. Le RGEH définit l'enfant handicapé comme toute personne dont « l'âge est compris entre 0 et 18 ans et qui présente une ou des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec les différentes barrières pourront entraver sa participation totale et pleine dans la société sur la base de l'égalité avec les autres ».

8 RGPH (2006) 10.

2 Obligations internationales

- 2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) au Burkina Faso? L'Etat du Burkina Faso a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). L'Etat du Burkina Faso a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).**

La Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) a été ratifiée par l'Etat du Burkina Faso à la faveur du Décret N°2009-176/PRES/PM/MAECR/MPDH/MASSN/MEF du 09 avril 2009 portant ratification de la convention relative aux droits des personnes handicapées.⁹ Son Protocole Facultatif a été signé le 23 mai 2007 et ratifié le 23 juillet 2009.¹⁰

- 2.2 Si l'Etat du Burkina Faso a signé et ratifié la CDPH, quel est/était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? L'Etat du Burkina Faso a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?**

Le rapport initial soumis en application de l'article 35 de la Convention qui fait obligation aux États parties de soumettre au Comité des droits des personnes handicapées un rapport sur les mesures qu'ils ont prises pour donner effet aux dispositions de ladite Convention attendu en 2011, a été soumis au Comité des droits des personnes handicapées par l'Etat du Burkina Faso le 30 novembre 2018¹¹. Les raisons du retard de soumission du rapport ne sont pas indiquées dans le rapport. La branche du gouvernement en charge de la soumission du rapport est le Ministère de la Justice et des Droits Humains du Burkina Faso.

- 2.3 Si la République du Burkina Faso a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport de l'Etat du Burkina Faso. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées au Burkina Faso?**

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, l'Etat du Burkina Faso a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les**

⁹ www.ilo.org (Consulté le 15 Avril 2022).

¹⁰ www.treaties.un.org (Consulté le 15 Avril 2022).

¹¹ Nations Unies, Convention relative aux droits des personnes handicapées, Comité des droits des personnes handicapées, Rapport initial soumis par le Burkina Faso en application de l'article 35 de la Convention, www.ohchr.org (consulté le 13 Avril 2022).

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 l'Etat du Burkina Faso? Si oui, quels étaient les effets de ces observations ou recommandations?

Au cours de l'Examen Périodique Universel de 2018, les Etats suivants ont formulé des recommandations à l'égard du Burkina Faso sur les questions relatives à la mise en œuvre de la Convention sur les droits des personnes handicapées.

- Concernant le droit à l'éducation, prendre de nouvelles mesures pour encourager l'intégration d'élèves handicapés dans le système éducatif (Qatar);¹²
- Concernant la mise en œuvre du droit au travail, à la santé et à l'éducation, redoubler d'efforts à différents échelons pour protéger et promouvoir les droits des personnes handicapées, en particulier en leur facilitant l'accès aux services de soins de santé, d'éducation et d'emploi, ainsi qu'aux bâtiments publics (Algérie);¹³
- Concernant l'accès à la justice ainsi que les droits sexuels et reproductifs, élaborer et appliquer une stratégie qui garantit aux femmes et aux filles, en particulier handicapées, un accès effectif à la justice, à la vie politique et publique, à l'éducation, aux activités lucratives et aux soins de santé, en particulier les services de santé sexuelle et génésique (Mexique);¹⁴
- Continuer à promouvoir les droits des femmes en élaborant et en appliquant des stratégies qui protègent les femmes et les filles, en particulier handicapées, tout en garantissant leur accès à l'éducation, au travail et aux soins de santé (Etat de Palestine);¹⁵
- Sur les mesures générales de mise en œuvre du droit à un niveau de vie suffisant, veiller à la pleine intégration de personnes handicapées dans tous les programmes de développement économique et social (Autriche);
- En ce qui concerne le droit à la santé et à l'éducation, œuvrer intensément pour remédier aux préjugés concernant les enfants handicapés et s'assurer que ces enfants ont accès aux soins de santé et à l'éducation inclusive (Bulgarie);¹⁷
- L'analyse du rapport de la session du Conseil des Droits de l'Homme portant Examen Périodique Universel du 20 sept 2018 fait mention des observations et recommandations des pays au rang desquelles la république Islamique d'Iran a encouragé le Gouvernement Burkinabè à persévérer dans ses démarches visant à adopter et appliquer des politiques concrètes garantissant l'accès des femmes et des filles handicapées à la justice, à l'éducation et au système de santé.¹⁸

Face à toutes ces recommandations, l'Etat du Burkina Faso a consenti des efforts à divers niveaux pour la promotion et la protection des droits des personnes vivant avec un handicap.

Au plan institutionnel, le Conseil national multisectoriel de protection et de promotion des droits des personnes handicapées (COMUD/Handicap) a été renforcé avec la création d'un Secrétariat permanent en 2014. Au plan éducatif, pour renforcer l'inclusion des enfants handicapés dans le système éducatif classique, une direction en charge de la promotion de l'éducation inclusive a été créée et une stratégie nationale pour le développement de l'éducation inclusive a

12 Recommandation A/HRC/39/4 (UPR 2018), 125.159. www.ohchr.org (consulté le 30 Avril 2022).

13 Recommandation A/HRC/39/4 (UPR 2018), 125.160 www.ohchr.org (consulté le 30 Avril 2022).

14 Recommandation A/HRC/39/4 (n 13) 125.140.

15 Recommandation A/HRC/39/4 (n 13) 125.142.

16 Recommandation A/HRC/39/4 (n 13) 125.161.

17 Recommandation A/HRC/39/4 (n 13) 125.158.

18 Nations Unies, Conseil des droits de l'homme: examen périodique du Turkménistan, du Burkina Faso, de Cabo Verde et de l'Allemagne. www.ohchr.org (consulté le 13 avril 2022).

été élaborée en 2015. La mise en œuvre de cette stratégie a permis entre 2015 et 2016:

- La scolarisation de plus de 10.000 enfants handicapés;
- La formation de 1.435 enseignants du primaire, 127 formateurs des ENEP, 1.345 encadreurs pédagogiques, 106 professeurs du post primaire et du secondaire, 14 Chefs d'établissements et 74 journalistes sur l'éducation inclusive;
- La sensibilisation de 519 élèves maîtres et de 766 autorités coutumières, religieuses, les membres APE/AME, COGES et autorités locales sur l'éducation inclusive;
- Le paiement des frais de scolarité et de fournitures scolaires d'enfants handicapés;
- L'appui financier aux organisations de personnes handicapées en matière d'éducation inclusive;
- L'organisation de 12 ateliers de plaidoyer auprès des acteurs non-étatiques et des collectivités territoriales pour une inclusion effective des enfants handicapés physiques en milieu scolaire;
- La réalisation d'une étude sur la situation des établissements scolaires disposant de rampes d'accès et l'organisation d'ateliers régionaux de plaidoyer pour la mise en conformité de établissements scolaires aux normes de construction des rampes d'accès. Au plan de la mobilité et du transport, on note la dotation de matériel de mobilité à des personnes handicapées et aux organisations de personnes handicapées, l'exonération des frais pour l'acquisition de matériel de mobilité.¹⁹

Poursuivre la promotion de l'accès à l'éducation en particulier au profit des personnes handicapées et des filles. Dans le cadre de la promotion de l'éducation pour tous, un module « éducation inclusive » a été élaboré pour la formation des formateurs. En 2014, 100 acteurs ont été formés sur la déficience intellectuelle et visuelle, en langue de signes et en éducation inclusive. En 2016, 428 filles en situation de vulnérabilité ont été identifiées et un appui spécifique de 35 000 F CFA par fille a été alloué en leur faveur. Grâce à ces efforts, le taux brut de scolarisation des filles est passé de 83,2% en 2014 à 86,4% en 2016 contre 82,8% et 85,9% durant la même période pour les garçons. Au niveau de l'éducation non formelle, 3 249 centres pour adultes et 290 centres pour adolescents ont été ouverts en 2016 dans le but d'alphabétiser tous les adolescents de 9 à 15 ans et les adultes de 16 à 34 ans.²⁰

2.5 Y'avait-il un quelconque effet interne sur le système légal de la République du Burkina Faso après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Au titre des traités relatifs à la protection des droits des personnes handicapées, le Burkina Faso est partie à plusieurs instruments qui prennent en compte les droits des personnes en situation de handicap de manière directe ou indirecte, notamment:

- La Convention no 159 de l'O.I. T concernant la réadaptation professionnelle et l'emploi des personnes handicapées adoptée le 20 juin 1983, ratifiée le 26 mai 1989;
- La Convention relative aux droits de l'enfant (CDE) adoptée le 20 novembre 1989, ratifiée le 23 juillet 1990;
- La Charte africaine des droits et du bien-être de l'enfant (CADBE) adoptée le 11 juillet 1990, ratifiée le 8 juin 1992;
- La Convention relative aux droits des personnes handicapées du 13 décembre 2006, ratifiée le 23 juillet 2009;
- La Charte internationale de l'éducation physique et du sport de 1978, ratifiée le 18 novembre 2015;

¹⁹ A/HRC/WG.6/30/BFA/1, 18 www.ohchr.org (consulté le 30 avril 2022).

²⁰ A/HRC/WG.6/30/BFA/1 135.127, 128, 129, 130, 131, 133.

- Le Traité de Marrakech visant à faciliter l'accès des aveugles, des déficients visuels et des personnes ayant d'autres difficultés de lecture des textes imprimés aux œuvres publiées adopté le 27 juin 2013, ratifié le 31 juillet 2017.

2.6 Les traités internationaux ratifiés deviennent-ils automatiquement loi nationale sous le system légal de l'Etat du Burkina Faso? Si oui y'a-t-il des cas où les cours et tribunaux appliquent directement les dispositions d'un traité international?

Au Burkina Faso, le régime juridique des instruments internationaux est fixé par l'article 151 de la Constitution qui énonce que « les traités et accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois [...] ». Ainsi, les traités et accords relatifs aux droits humains, que le Burkina Faso a ratifiés, intègrent l'ordonnancement juridique interne. Après leur publication au Journal officiel, les justiciables sont fondés à les invoquer directement devant les juridictions comme moyens de droit pour défendre leurs causes. Dans ce sens, la Convention relative aux droits des personnes handicapées peut être invoquée par tout citoyen devant les juridictions compétentes.

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 du Burkina Faso? Fournir les détails.

La loi no 012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées réaffirme les principes généraux énoncés dans la CDPH. Cette loi reprend la définition du handicap telle que prévue dans la Convention. Ainsi, aux termes de l'article 2 de la loi « On entend par personne handicapée, toute personne qui présente une ou des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à sa pleine et effective participation à la vie de la société sur la base de l'égalité avec les autres ».

3 Constitution

3.1 La constitution de la République du Burkina Faso contient-elle des dispositions concernant directement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

L'article 18 de la Constitution du 02 juin 1991 indique que « l'éducation, l'eau potable et l'assainissement, l'instruction, la formation, la sécurité sociale, le logement, l'énergie, le sport, les loisirs, la santé, la protection de la maternité et de l'enfance, l'assistance aux personnes âgées, aux personnes vivant avec un handicap et aux cas sociaux, la création artistique et scientifique, constituent des droits sociaux et culturels reconnus par la présente Constitution qui vise à les promouvoir ».²¹

21 Constitution issue du Référendum du 02 juin 1991, modifiée le 05 novembre 2015.

3.2 La constitution de la République du Burkina Faso contient-elle des dispositions concernant indirectement le handicap? Si oui énumérez les dispositions et expliquez comment chacune d'elles traite indirectement du handicap.

La Constitution du Burkina Faso garantit de manière indirecte les droits des personnes vivant avec le handicap dans ses dispositions relatives aux droits et devoirs civils et aux droits et devoirs politiques.

Ainsi, l'article 1 de la Constitution énonce que: « Tous les Burkinabè naissent libres et égaux en droits. Tous ont une égale vocation à jouir de tous les droits et de toutes les libertés garantis par la présente Constitution ».²²

De même l'article 2 dispose que: « La protection de la vie, la sûreté et l'intégrité physique sont garanties. Sont interdits et punis par la loi, l'esclavage, les pratiques esclavagistes, les traitements inhumains et cruels, dégradants et humiliants, la torture physique ou morale, les sévices et les mauvais traitements infligés aux enfants et toutes les formes d'avilissement de l'Homme. La protection de la vie, la sûreté, et l'intégrité physique sont garanties ».²³

Enfin l'article 7 garantit « La liberté de croyance, de non croyance, de conscience, d'opinion religieuse, philosophique, d'exercice de culte, la liberté de réunion, la pratique libre de la coutume ainsi que la liberté de cortège et de manifestation (...), sous réserve du respect de la loi, de l'ordre public, des bonnes mœurs et de la personne humaine ».²⁴

Concernant les droits et devoirs politiques, l'article 12 prévoit enfin que « Tous les Burkinabés sans distinction aucune ont le droit de participer à la gestion des affaires de l'Etat et de la société ».²⁵

4 Législation

4.1 La République du Burkina a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

La loi no 012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées est le document d'ancrage de la protection des droits des personnes vivant avec le handicap au Burkina Faso.

De manière subsidiaire il faut également citer:

- Le décret no 2009-5030/PRES/PM/MTSS/MASSN/MS du 17 juillet 2009 portant fixation des conditions d'emploi et de formation professionnelle des personnes handicapées;
- Le décret no 2012-828/PRES/PM/MASSN/MEF/MS/MENA/MESS du 22 octobre 2012 portant adoption de mesures sociales en faveur des personnes handicapées en matière de santé et d'éducation;

22 Comme ci-dessus.

23 Comme ci-dessus.

24 Comme ci-dessus.

25 Constitution issue du Référendum du 02 juin 1991, modifiée le 05 novembre 2015.

- Le décret no 2012-829/PRES/PM/MASSN/MEF/MJFPE/MTPEN du 22 octobre 2012 portant adoption de mesures sociales en faveur des personnes handicapées en matière d'emploi, de formation professionnelle et des transports;
- Le décret no 2012-828/PRES/PM/MASSN/MEF/MS/MENA/MESS du 22 octobre 2012 portant adoption de mesures sociales en faveur des personnes handicapées en matière de santé et d'éducation;

4.2 L'Etat du Burkina Faso a-t-il une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

Le Burkina Faso a adopté ou modifié au niveau national son cadre réglementaire au bénéfice des personnes vivant avec le handicap, notamment à travers:

- La loi no 013-2007/AN du 30 juillet 2007 portant loi d'orientation de l'éducation.
- La loi no 012-2014/AN du 22 avril 2014 portant loi d'orientation relative à la prévention et à la gestion des risques, des crises humanitaires et des catastrophes.
- La loi no 060-2015/CNT du 5 septembre 2015 portant régime d'assurance maladie universelle.
- Dans le domaine du dépistage et de la prévention du handicap, la loi no23/94/ADP portant Code de la santé publique dispose en son article 103 que « La prévention des incapacités constitue un droit et une obligation de tout citoyen et de la société dans son ensemble et fait partie intégrante des obligations de l'Etat dans le domaine de la santé publique et des services sociaux ».
- L'accès des services de santé aux personnes handicapées est pris en compte par le décret no 2012-828/PRES/PM/MASSN/MEF/MS/MENA/MESS du 22 octobre 2012 portant mesures sociales en faveur des personnes handicapées en matière de santé et d'éducation.
- En outre, le Gouvernement du Burkina Faso a adopté le décret no 2016-311/PRES/PM/MS/MATDSI/MINEFID du 29 avril 2016 portant gratuité des soins au profit des femmes enceintes et enfants de moins de cinq (05) ans vivant au Burkina Faso y compris les femmes et les enfants handicapés.
- La loi no 081-2015/CNT du 24 novembre 2015 portant statut général de la fonction publique d'Etat.
- La loi no 024-2016/AN du 17 octobre 2016 portant protection et promotion des droits des personnes âgées.
- La loi no 039-2017/AN du 27 juin 2017 portant protection des défenseurs des droits humains.
- Le décret no 2017-0818/PRES/PM/MENA/MINEFID du 19 septembre 2017 portant définition du régime des bourses dans les enseignements post-primaire et secondaire.
- Le Code pénal qui prévoit des sanctions à l'encontre de toute personne qui attente à la vie d'autrui.
- L'article 4 de la loi no 028-2008/AN du 13 mai 2008 portant Code du travail sur l'interdiction de toute discrimination en matière d'emploi et de profession.
- La loi no 017-2006/AN du 18 mai 2006 portant Code de l'urbanisme et de la construction au Burkina Faso, dont l'article 34, énonce recommande la prise en compte de l'accessibilité des personnes à mobilité réduite dans les dispositions architecturales au sein des services publics, des immeubles collectifs à usage d'habitation, des lieux de travail.
- La loi no 061-2008/AN du 27 novembre 2008 portant réglementation générale des réseaux et services de communication électronique au Burkina Faso, qui tient compte des difficultés spécifiques rencontrées dans l'accès au service de communication électronique par certaines catégories de personnes en raison notamment de leur niveau de revenu ou de leur handicap.
- La loi no 51-2015/CNT portant droit d'accès à l'information publique et aux documents administratifs qui prend en compte les personnes handicapées, notamment à travers son article 8 qui dispose que les personnes vivant avec le

handicap sont exemptées de tout paiement de frais lorsque l'information ou le document demandé vise leur intégration scolaire, professionnelle et sociale. L'article 12 de la même loi dispose que « lorsque le demandeur est une personne vivant avec un handicap, des mesures spécifiques sont prises pour lui permettre d'accéder à l'information ou au document ».

- Dans le secteur privé, le décret no 2009-5030/PRES/PM/MTSS/MASSN/MS du 17 juillet 2009 portant fixation des conditions d'emploi et de formation professionnelle des personnes handicapées dispose en son article 8 que « toute entreprise employant au moins cinquante salariés est tenue de réserver au moins de 5% des postes d'emploi à des personnes handicapées munies de la carte d'invalidité instituée par la réglementation en vigueur ».
- Le décret no 2012-829/PRES/PM/MASSN/MEF/MJFPE/MTPEN du 22 octobre 2012 portant adoption de mesures sociales en faveur des personnes handicapées en matière de formation professionnelle, d'emploi et des transports permet de recruter dans la Fonction publique des personnes handicapées.
- La Constitution et le Code de procédure pénale garantissent sans distinction aucune la participation effective de toutes les catégories de personnes handicapées au système de justice. Ainsi, aux termes de l'article 408 du Code de procédure pénale si le prévenu est une personne handicapée auditive et ne sait pas écrire, le Président du tribunal nomme d'office, en qualité d'interprète, la personne qui a le plus l'habitude de converser avec lui. Dans le cas où le prévenu sait écrire, le greffier écrit les questions ou observations qui lui sont faites; elles sont remises au prévenu, qui donne par écrit ses réponses. Il est fait lecture du tout par le greffier.
- Aux termes de l'article 153 de la loi no 010-2017/AN du 10 avril 2017 portant régime pénitentiaire, « les détenus vulnérables, notamment les personnes handicapées bénéficient d'un accompagnement spécifique du service social ».
- En matière de mobilité, l'ordonnance no 005/PRES du 18 janvier 1956 portant conditions d'établissement, de délivrance et de validité des permis de conduire en Haute-Volta prévoit la catégorie F qui regroupe les véhicules de la catégorie A, A1, et B conduits par des personnes handicapées motrices et qui sont spécialement aménagés pour tenir compte de leur handicap.²⁶

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) en république du Burkina Faso ont-ils jamais statué sur une question(s) relative au handicap? Si oui énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décision(s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Aucune décision de justice relative au handicap n'a été relevée.

26 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH) (2018) 12.

6 Politiques et programmes

6.1 La République du Burkina Faso a-t-elle des politiques ou programmes qui englobent directement le handicap? Si oui énumérez la politique et expliquez comment cette politique aborde le handicap.

La Stratégie nationale de protection et de promotion des personnes handicapées couvrant la période 2021-2025 et son Plan d'actions opérationnel (2021-2023) ont été adoptés avec pour objectif de contribuer à une meilleure jouissance des droits humains par les personnes handicapées, sur la base de l'égalité avec les autres personnes.

Par ailleurs, des mesures d'actions positives ont été prises par le Gouvernement en application de la loi no 012-2010/AN du 1er avril 2010²⁷ portant protection et promotion des droits des personnes handicapées qui fait obligation d'observer les règles suivantes:

- La prise en compte de l'éducation inclusive dans tous les ordres de l'éducation;
- La priorité d'inscription de tout enfant handicapé dans les établissements préscolaires, primaires, secondaires, supérieurs ou professionnels les plus proches de son domicile;
- La mise à la disposition des élèves handicapés, des aides ou enseignements adaptés à leur scolarisation;
- La création d'unités d'enseignement pour les enfants ou adolescents ne pouvant pas effectuer leur scolarité à temps plein;
- La prise en compte de modules de spécialisation dans les structures de formation des enseignants;
- L'accessibilité physique de tout établissement préscolaire, primaire, secondaire et universitaire et son équipement en matériel adéquat;
- Le recul de deux ans de la limite d'âge réglementaire d'inscription à l'école primaire et de participation aux examens et concours professionnels;
- L'octroi de la bourse aux élèves et étudiants handicapés;
- L'octroi d'un temps supplémentaire et/ou d'un dispositif particulier aux personnes handicapées en fonction de la nature du handicap ou de l'épreuve.
- Les initiatives en faveur de la mobilité des personnes handicapées notamment l'organisation annuelle de « la semaine de la mobilité adaptée » et la production de fauteuils et tricycles adaptés au profit des personnes handicapées. En outre, le Gouvernement offre gratuitement et de façon périodique des tricycles simples, des tricycles motorisés, des fauteuils roulants, des cannes blanches et des déambulateurs à des personnes handicapées nécessiteuses.
- L'emménagement au sein des édifices publics d'une rampe d'accès munie de main courante et dont la pente n'excède pas 5% est imposée.
- En outre, des aménagements raisonnables ont été prises en compte dans les domaines de la santé, de l'éducation, de la formation professionnelle, de l'emploi et des transports à travers l'adoption de décrets d'application.²⁸
- Le respect du quota de 10% de postes à pourvoir dans la Fonction publique et dans les établissements publics de l'Etat aux personnes vivant avec le handicap. À titre illustratif, en 2014, le recrutement sur mesures nouvelles a permis d'intégrer

27 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées, 14..

28 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH) (2018) 15.

97 personnes handicapées au Ministère de l'éducation nationale et de l'alphabétisation. Outre les concours classiques de la Fonction publique auxquels les personnes handicapées ont pris part, un recrutement spécial a été organisé en 2017 au bénéfice des personnes vivant avec le handicap.

Globalement et dans le but de vulgariser toutes les mesures prises en faveur des personnes vivant avec le handicap, le Gouvernement en collaboration avec les OPH a réalisé des activités de communication pour le changement de comportement à travers des activités de sensibilisation, théâtres fora, des causeries éducatives, des conférences régionales et provinciales, des ciné-débats, des émissions télé et radiophoniques de grande portée ainsi que des formations.

6.2 La République du Burkina Faso a-t-elle des politiques ou programmes qui englobent indirectement le handicap? Si oui énumérez chaque politique et décrivez comment elle aborde indirectement le handicap.

Les politiques et programmes englobant indirectement le handicap peuvent être recenser de manière thématique comme suit:

Accès à la justice. La politique nationale en matière de justice accorde une place de choix à l'accès à la justice sans aucune discrimination. Cette politique consacre la normalisation des services de la justice en vue d'améliorer l'accessibilité physique. Ainsi, dès 2008, les services du rez-de-chaussée du tribunal de grande instance de Ouagadougou ont été pourvus de rampes d'accès. Il en est de même pour toutes les juridictions construites après cette même année. Dans le cadre de la normalisation des infrastructures en milieu carcéral, la question du genre et des personnes handicapées est prise en compte. Pour faciliter l'accessibilité financière à la justice, il est créé par décret no 2013-477/PRES/PM/MJ/MEF du 11 juin 2013 un Fonds d'assistance judiciaire. Ce Fonds qui est opérationnel depuis 2016 permet la prise en charge de toute personne physique se trouvant dans l'impossibilité, en raison de l'insuffisance de ses ressources, d'exercer ses droits en justice soit comme demandeur, soit comme défendeur.

Une direction chargée de l'accès à la justice et de l'aide aux justiciables est créée depuis 2012 au ministère en charge de la justice. Elle est chargée de coordonner les actions relatives à l'accès à la justice, de traiter les plaintes et réclamations des requérants et de donner des avis sur ces dossiers en collaboration avec tout service ou juridiction intéressée, de suivre et de faciliter l'exécution des décisions en collaboration avec tout service ou juridiction intéressée.²⁹

Protection sociale du travailleur vivant avec le handicap. La Politique nationale de protection sociale (PNPS) adoptée en septembre 2012 a pour objectif global de contribuer au changement qualitatif des conditions de vie de toutes les couches sociales. L'atteinte de cet objectif passe par le développement de mécanismes adéquats et pérennes de prévention et de couverture des risques majeurs ainsi que de la gestion des chocs et l'extension de l'assurance sociale à toutes les catégories de travailleurs, de même que l'élargissement de la gamme des prestations à tous les risques sociaux.³⁰

Accès à l'information et aux TIC. Le degré d'accessibilité aux médias et le pourcentage des sites web publics conformes aux normes de l'initiative pour l'accessibilité du web est faible. Pour combler cette insuffisance, l'État burkinabè a mis au profit de l'Union nationale des associations burkinabè pour la promotion

29 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées, 18-55.

30 Comme ci-dessus.

des aveugles et malvoyants (UN-ABPAM) un cybercafé inclusif. En ce qui concerne les médias publics, le journal de la mi-journée de la télévision nationale du Burkina (TNB) est signé au profit des personnes handicapées auditives. Pour une meilleure inclusion des personnes handicapées auditives dans le processus de développement du pays, la langue de signes est utilisée dans le système scolaire et dans les médias.³¹

Soutien parental et lutte contre le délaissement d'enfant porteur de handicap. Pour lutter contre l'abandon, la dissimulation, le délaissement d'enfant handicapé, le Burkina Faso a pris des mesures préventives et répressives. Ainsi, le Ministère de la Femme, de la Solidarité Nationale et de la Famille, les OPH et les ONG intervenant dans le domaine du handicap font des campagnes de sensibilisation et des activités de plaidoyer pour mettre fin à la discrimination à l'égard des enfants handicapés au sein des familles et de la communauté et faire connaître les droits et les potentialités de la personne handicapée en général et de l'enfant handicapé en particulier.³²

Éducation inclusive. À ce titre, les actions suivantes ont été réalisées entre 2015 et 2017:

- La scolarisation de plus de 10 000 enfants handicapés entre 2015 et 2016;
- Le paiement des frais de scolarité et de fournitures scolaires de 5 637 enfants handicapés;
- L'appui financier aux organisations de personnes handicapées pour la réalisation d'activités en matière d'éducation inclusive;
- La production et la vulgarisation de 5 000 exemplaires de recueils de textes sur les droits des enfants handicapés, de 10 000 affiches et de 11 000 dépliants en relation avec l'éducation inclusive;
- L'appui matériel, financier et en ressources humaines apporté par le mena aux structures éducatives en charge des enfants handicapés et/ou vulnérables;
- La sensibilisation progressive des communautés sur l'éducation pour tous;
- L'ouverture de 32 classes transitoires d'inclusion scolaire (CTIS) pour le handicap sensoriel au niveau de certains établissements publics et privés;
- Le recul de deux (02) ans de l'âge légal de scolarisation et d'obtention des bourses en faveur des élèves et étudiants handicapés conformément au décret no 2012-828/PRES/PM/MASSN/MEF/MS/MENA/MESS du 22 octobre 2012 portant adoption de mesures sociales en faveur des personnes handicapées en matière de santé et d'éducation;
- La prolongation de deux (02) ans du séjour des étudiants handicapés en cité universitaire;
- La sensibilisation des partenaires sociaux (associations des parents d'élèves, comités de gestion, associations des mères éducatrices) pour l'adaptation des infrastructures à tous les publics cibles;
- La mise à disposition des enseignants dans les structures privées d'éducation spécialisée;
- L'accompagnement financier des structures privées en charge des enfants à besoins spécifiques;
- La formation des enseignants en éducation inclusive;
- La formation des enseignants des classes transitoires;
- Le suivi pédagogique des enseignants dans les CTIS;
- L'octroi de matériel spécifique et de mobilité. En 2017, du matériel spécifique a été octroyé aux enfants handicapés comme l'indique le tableau ci-dessous:

31 Comme ci-dessus.

32 Comme ci-dessus.

Au niveau du préscolaire, un centre pilote a été créé à Garango pour la prise en compte de toutes les sensibilités permettant de garantir une éducation inclusive de qualité. Ce centre a enregistré un effectif de cent vingt-cinq (125) élèves dont quatorze (14) enfants handicapés en 2017.

En application de cette disposition, l'État et ses partenaires ont opéré dans certaines écoles des aménagements visant à adapter les infrastructures et équipements scolaires. Ces aménagements ont consisté à la construction de latrines adaptées, de rampes d'accès munies de main courante, à la dotation en tables bancs et tableaux adaptés au profit des écoles et établissements du primaire, du post-primaire et du secondaire. L'obligation de doter les établissements d'aménagements est prévue dans le cahier des charges de construction de nouvelles infrastructures scolaires et universitaires.³³

Accès aux services de santé. Plusieurs actions de santé publique sont développées. Il s'agit:

- De la réalisation en 2015, d'une enquête nationale sur les troubles mentaux dans la population générale qui révèle une prévalence de 41,43% de personnes enquêtées ayant au moins un des troubles mentaux étudiés. Un plan stratégique 2014-2018 y relatif est en cours de mise en œuvre. Il faut noter également qu'un Projet « Santé mentale pour tous » a été mis en œuvre de 2013 à 2016 dans cinq (05) régions sanitaires du pays;
- De l'adoption et la mise en œuvre du Plan stratégique de santé oculaire 2016-2020, du Projet de gestion de la morbidité et du handicap liés au trachome et à la filariose lymphatique (MMDP), du Projet régional de lutte contre le trachome 2012-2016, du Projet de renforcement de la prise en charge du trichiasis trachomateux pour la période 2016-2020.³⁴

Adaptation et réadaptation. La Stratégie nationale de protection et de promotion des personnes handicapées est élaborée suivant les directives de l'OMS sur la réadaptation à base communautaire (RBC). À ce titre, des projets pilotes RBC sont mis en œuvre dans cinq (05) régions sur les treize (13) que compte le pays. Il s'agit des régions du Centre-est, du Centre-Sud, du Sud-Ouest, de la Boucle du Mouhoun et du Centre-Nord.

En matière de services d'adaptation et de réadaptation, on dénombre 43 centres de réadaptation offrant pour la plupart des soins de kinésithérapie et/ou d'appareillage dont un centre de référence national, le Centre national d'appareillage orthopédique du Burkina (CNAOB). La plupart de ces centres de réadaptation disposent du matériel et de l'équipement de la réadaptation médicale.

Dans le domaine de la formation initiale, un projet de création d'une filière de formation de kinésithérapeutes est toutefois en cours de mise en œuvre. Pour l'instant, les kinésithérapeutes et les orthoprothésistes sont formés à l'extérieur du pays. Dans le cadre du Projet de formation des spécialistes en santé (PROFOSS), un programme de formation de vingt (20) kinésithérapeutes, de cinq (05) médecins spécialistes en médecine physique et réadaptation (MPR) et cinq (5) orthoprothésistes est en cours. Des modules de formation en soins de kinésithérapie existent dans le programme de formation du personnel médical et paramédical. Pour assurer la formation continue du personnel de la réadaptation, des sessions de formation sont réalisées à leur endroit au niveau national et à

33 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées, 18-55.

34 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées, 18-55.

l'étranger à travers le Programme « Appui au renforcement des capacités de soins en médecine physique-réadaptation ».³⁵

Sports et loisirs. Le Gouvernement, à travers le ministère en charge des sports, participe et encourage la pratique des activités sportives tant au niveau national qu'international. À ce titre, au niveau national, on retient les subventions à la Fédération de sports pour personnes handicapées. Quant au niveau international, les sportifs handicapés bénéficient de soutiens dans l'obtention de documents administratifs de voyage et de participation aux compétitions telles les jeux mondiaux d'été, les jeux mondiaux d'hiver, les jeux de la Francophonie et les jeux para olympiques.³⁶

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, la République du Burkina Faso a-t-elle un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

Conformément aux dispositions des articles 33 de la CDPH et 56 de la loi no 012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées, il a été créé le COMUD/Handicap. Il est l'instance d'orientation en matière de protection et de promotion des droits des personnes handicapées au Burkina Faso. Le COMUD/Handicap regroupe l'ensemble des acteurs du domaine du handicap à savoir les départements ministériels concernés par la question du handicap, les autorités administratives déconcentrées et décentralisées, les organisations de la société civile dont celles des organisations de personnes handicapées (OPH), les partenaires techniques et financiers. Aux termes de l'article 5 du décret no 2012-406/PRES/PM/MASSN/MEF/MS du 15 mai 2012 portant création, attributions, composition et fonctionnement du COMUD/Handicap, il est chargé:

- Du suivi-évaluation de la mise en œuvre de la Convention des Nations Unies relative aux droits des personnes handicapées et de la loi no 012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées au Burkina Faso;
- De l'orientation des actions de protection et de promotion des droits des personnes handicapées;
- De l'appui à la mobilisation des ressources nécessaires à la mise en œuvre des Projets et Programmes en faveur des personnes handicapées;
- Du plaidoyer en faveur de la protection et de la promotion des droits des personnes handicapées;
- De l'examen et l'adoption du rapport annuel sur la situation des personnes handicapées au Burkina Faso.³⁷

7.2 En dehors des cours ou tribunaux ordinaires, la République du Burkina Faso a-t-elle un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes

35 Comme ci-dessus.

36 Comme ci-dessus.

37 Rapport initial du Burkina Faso sur la mise en œuvre de la convention relative aux droits des personnes handicapées, a18-55.

handicapées s’y attèle tout de même? Si oui décrire l’organe, ses fonctions et ses pouvoirs.

La Direction de la promotion de l’éducation inclusive, de l’éducation des filles et du genre est chargée, conformément à l’article 2 de l’arrêté no 2018-007/MENA/SG/DPEIEG du 10 janvier 2018 portant attributions, organisation et fonctionnement de la Direction de la promotion de l’éducation inclusive, de l’éducation des filles et du genre. A ce titre, elle a pour missions:

- De coordonner les différentes actions en faveur de la promotion de l’éducation inclusive, de l’éducation des filles et du genre;
- De développer des stratégies favorisant l’accès, le maintien et la réussite des filles et des enfants en situation de handicap, de marginalisation et de vulnérabilité dans les structures éducatives;
- De développer un système de suivi de l’éducation inclusive, de la promotion de l’éducation des filles et du genre;
- D’identifier et de promouvoir toute action susceptible de contribuer à l’analyse de la problématique de la scolarisation des filles, des enfants en situation de handicap, de marginalisation et de vulnérabilité;
- De collecter et de diffuser la documentation relative à l’éducation des filles et du genre, à l’éducation des enfants en situation de handicap, de marginalisation et de vulnérabilité.

En outre, les personnes handicapées sont représentées dans des structures chargées entre autres de l’application, du suivi et de l’évaluation de la législation et des politiques de protection et de promotion des droits des personnes handicapées. On peut citer la Commission nationale des droits humains et l’Observatoire national de la solidarité.³⁸

8 Institutions Nationales des Droits de l’Homme (Commission des Droits de l’Homme ou Ombudsman ou Protecteur du Citoyen)

L’Etat du Burkina Faso est-il doté d’une Commission de Droits de l’Homme ou d’un Ombudsman ou d’un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l’Homme ou l’Ombudsman ou le Protecteur du Citoyen de l’Etat du Burkina Faso à jamais abordé des questions relatives aux droits des personnes handicapées.

La commission nationale des droits humains, en abrégé CNDH, est une autorité publique indépendante dotée de la personnalité morale. Elle est l’institution nationale de promotion, de protection et de défense des droits. Initialement créée par le décret n°628-2001/PRES/MJPDH du 20 novembre 2001, reformée par la loi n°062-2009/AN du 21 décembre 2009, sa création repose désormais sur la loi n°001-2016/AN du 24 mars 2016 conformément aux Principes de Paris, cadre de

38 Comme-ci dessus.

référence des Nations Unies aux institutions nationales des droits humains (INDH).³⁹

La Commission exerce des fonctions de concertation, de consultation, d'évaluation, de proposition en matière de promotion, de protection et de défense des droits humains et d'examen des requêtes concernant les allégations de violations de droits humains. Ses missions intègrent toutes les actions de promotion, de protection des droits des personnes vivant avec le handicap. A ce titre, l'article 9 de la loi portant création de la CNDH prévoit dans la composition des membres de la CNDH, un représentant élu des associations des personnes vivant avec un handicap. Les questions relatives aux droits des personnes handicapées sont régulièrement abordées et des actions menées. Par exemple dans le cadre de la riposte à la Covid-19, la CNDH a procédé à la remise de matériels d'hygiène et de protection aux associations de personnes vivant avec le handicap en 2020.⁴⁰

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en république du Burkina Faso des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

Dans le cadre de la coopération multilatérale, des institutions du système des Nations Unies appuient l'État pour la mise en œuvre des politiques et programmes en faveur des personnes handicapées. D'autres partenaires développent des politiques et des services inclusifs pour l'égalité et la promotion des droits des personnes vivant avec le handicap, notamment Handicap International (HI), dont le Burkina Faso constitue le premier pays d'intervention en Afrique de l'Ouest depuis 1991. En partenariat avec le Ministère de la Santé, l'association a participé à la réhabilitation du Centre national d'appareillage orthopédique du Burkina (CNAOB), puis a soutenu le développement d'autres centres de réadaptation et d'appareillage sur le territoire. Jusqu'en 2015, HI menait quasi exclusivement des projets de développement. Depuis, l'association répond aussi aux crises chroniques dans le pays.

HI facilite la mise en place d'un réseau régional de réadaptation, forme des professionnels de santé et de la réadaptation fonctionnelle. L'association favorise l'accès d'enfants handicapés à l'école ordinaire et des jeunes handicapés à la formation professionnelle. Elle forme les personnes qui travaillent dans les secteurs du handicap et de l'éducation inclusive. HI répond aux besoins des familles dans la région du Sahel qui font face à l'insécurité croissante, fournissant une aide de base et des séances de stimulation physique aux enfants malnutris. L'association met également en place de plans de préparation à l'urgence dans les écoles qui font face à l'insécurité. HI dirige enfin un projet qui vise à renforcer les acteurs de la réponse humanitaire pour rendre leur projet plus inclusif pour les personnes âgées et handicapées.

39 Voir <https://cndhburkina.bf> (consulté le 30 avril 2021).

40 Le représentant actuellement en fonctions est cumulativement président de la Sous-Commission Permanente des droits Humains et Développement (DHD). Voir <https://cndhburkina.bf> (consulté le 30 avril 2021).

Light for the World, une organisation non gouvernementale qui mène également des actions majeures en faveur des personnes vivant avec le handicap. Ses actions se rapportent essentiellement au plaidoyer dans le but d'améliorer les systèmes de santé, d'assurer l'éducation et l'élimination des barrières injustes en faveur des personnes vulnérables et des personnes vivant avec le handicap dans les régions les plus pauvres du monde⁴¹. Au Burkina Faso, l'Organisation soutient l'expansion des soins oculaires locaux, notamment pour les enfants grâce à des projets d'éducation inclusive, de réhabilitation et d'accès au travail et aux revenus pour les personnes handicapées.

A la faveur d'un rapport publié et porté à l'attention des pouvoirs publics en novembre 2020, Light for the World met en lumière la prise en compte du handicap au Burkina Faso et plaide pour une meilleure prise en compte de la petite enfance dans le financement de l'éducation.

Le sous financement de l'éducation de la petite enfance expose plus de la moitié des enfants à des défaillances dans leur croissance. « Pour le cas spécifique du Burkina Faso, l'étude a montré que près de la moitié des jeunes enfants sont exposés au risque de souffrir d'un mauvais développement: une situation qui nécessite d'agir en toute urgence »⁴².

Au rang des actions Light for the World avait mobilisé 178 millions en 2018 pour l'autonomisation économique de 200 personnes handicapées et femmes vulnérables du Koulpélégou par le biais⁴³ de l'OCADES-CARITAS Burkina

D'autres ONG⁴⁴ et Organisations de la société civile locale œuvrent pour une meilleure prise en compte des droits des personnes vivant avec le handicap.⁴⁵

9.2 En Afrique de l'Ouest, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Au niveau national, les personnes handicapées sont représentées dans des structures chargées entre autres de l'application, du suivi et de l'évaluation de la législation et des politiques de protection et de promotion des droits des personnes handicapées. On peut citer la Commission nationale des droits humains, l'Observatoire national de la solidarité et le COMUD/Handicap.

41 Consulté sur www.light-for-the-world.org (consulté le 09 avril 2022).

42 « Education: light for the world et ses partenaires plaident pour une prise en compte de la petite enfance dans le financement de l'éducation au Burkina Faso », Consulté sur www.lefaso.net le 09 avril 2022.

43 Organisation Catholique pour le Développement et la Solidarité, l'OCADES CARITAS BURKINA est une organisation à but non lucratif, née d'une volonté des Evêques du Burkina d'adapter leur instrument de pastorale sociale aux interpellations, à l'environnement local et international, aux valeurs et aux principes de l'engagement de l'Eglise Famille de Dieu au Burkina Faso pour le Développement et la Solidarité. Elle s'implique dans le capital humain, le spirituel, le politique, l'économique, le social et le culturel afin de travailler à plus de mieux être et de dignité de la personne humaine. Consulté sur <https://ocadesburkina.org/> (consulté le 09 avril 2022).

44 CCI/Handicap, Humanité et Inclusion International Service, Organisation Dupont pour le Développement, Social Light For The World, Christoffel Blindenmisson, UNICEF/Burkina, Light For The World, Sensorial Handicap Cooperation. Source: SP/COMUD/ Handicap.

45 Fédération Burkinabè des Associations pour la promotion des personnes Handicapées (FEBAH), Réseau National des Organisations de Personnes Handicapées (ReNOH), Union Nationale des Associations de Femmes Handicapées du Burkina (UNAFEHB), Light for the world/Burkina, Mouvement Burkinabè des Droits de l'Homme et des Peuples (MBDHP), Humanité et inclusion/Burkina, Association burkinabè pour la promotion des Aveugles et des malvoyants (ABPAM), Association des femmes Albinos, Centre national des personnes handicapées, Fondation pour l'étude, la promotion des Droits de l'Homme et du Développement en Afrique (FEPDHA).

En dehors des partenariats ponctuels entre deux ou plusieurs organisations relevant d'Etat différents aucune coordination régionale n'a été relevée.⁴⁶

9.3 Si le Burkina a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des Personnes Handicapées dans le processus de mise en œuvre?

Suite à la ratification par le Burkina Faso de la Convention relative aux droits des personnes handicapées (CDPH) le 23 juillet 2009, la mise en œuvre de cette Convention est assurée sous la coordination du Secrétariat d'Etat chargé des affaires sociales, des personnes vivant avec un handicap et de la lutte contre l'exclusion, du COMUD/Handicap et son Secrétariat permanent, de la Direction de la protection et de la promotion des personnes handicapées (DPPH) et de la Direction de la promotion de l'éducation inclusive, de l'éducation des filles et du genre (DPEIEFG). L'implication des organisations et des groupes de personnes vivant avec le handicap est assurée par le COMUD/Handicap en tant qu'instance faitière d'orientation en matière de protection et de promotion des droits des personnes handicapées au Burkina Faso conformément aux dispositions des articles 33 de la CDPH et 56 de la loi n°012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées. Le COMUD/Handicap regroupe l'ensemble des acteurs du domaine du handicap à savoir les départements ministériels concernés par la question du handicap, les autorités administratives déconcentrées et décentralisées, les organisations des personnes handicapées (OPH), les partenaires techniques et financiers.⁴⁷

Il convient enfin de relever que pour la mise en œuvre et le suivi de la Convention, le Gouvernement alloue chaque année des crédits budgétaires aux différents départements en charge du handicap. A titre d'exemple, pour le ministère en charge de la solidarité nationale, 1 883 250 000 francs CFA a été allouée en 2013 et 747 982 500 francs CFA en 2014 dans le cadre du projet de renforcement de la protection sociale. Pour le suivi de la Convention, le SP/COMUD/Handicap a reçu respectivement du budget de l'Etat en 2015, 2016 et 2017 les montants de 25 000 000; 20 000 000 et 27 000 000 de francs CFA.⁴⁸

9.4 Quels genres d'actions les OPH du Burkina Faso ont-elles prise elles-mêmes afin de s'assurer qu'elles soient pleinement intégrées dans le processus de mise en œuvre?

L'élaboration des textes et des programmes de protection des droits des personnes handicapées se fait suivant un processus participatif et inclusif. Ainsi, les personnes handicapées ont été associées aux processus suivants:

- L'élaboration et l'adoption de la loi no 012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées et de ses décrets d'application;
- L'élaboration et la mise en œuvre de la stratégie nationale de protection et de promotion des personnes handicapées (SN-3PH);

46 Par exemple Handicap International facilite la mise en place d'un réseau régional de réadaptation qui forme des professionnels de santé et de la réadaptation fonctionnelle avec l'appui d'autres organisations locales. Consulté sur www.handicap-international.fr/fr/pays/burkina-faso (consulté le 9 avril 2022).

47 Rapport initial sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH), avril (2018) 22.

48 Rapport initial sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH), avril (2018) 100.

- L'élaboration du Programme national de prise en charge intégrée des enfants handicapés.⁴⁹

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH du Burkina Faso lors de leur engagement dans la mise en œuvre?

Quelques faiblesses dans la collaboration mise en œuvre entre l'Etat et les OPH sont à relever. Une non affiliation à la COMUD/Handicap qui a pour conséquence la non-participation systématique de toutes les OPH aux réflexions sur les politiques publiques, aux projets structurants et autres programmes de développement mis en œuvre par l'Etat.

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH au Burkina Faso?

La collaboration du Gouvernement avec les ONG et plusieurs associations permet le développement de la réadaptation à base communautaire (RBC). Cette approche, socle de la Stratégie de protection et de promotion des personnes handicapées au Burkina Faso permet de prévenir la survenue du handicap, de répondre aux besoins des personnes handicapées et de faciliter leur inclusion sociale tout en améliorant leur qualité de vie. Ainsi, le développement de la RBC a permis d'entreprendre diverses actions au profit des personnes handicapées.

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 au Burkina Faso?

Afin de garantir la bonne utilisation des fonds apportés par les donateurs, l'Etat burkinabè a ouvert un compte dénommé « Fonds partenaire » au profit du département en charge des personnes handicapées. Ce fonds fait régulièrement l'objet de contrôle participatif des associations des personnes vivant avec le handicap. Notamment sur les projets suivants:

Les projets et programmes qui ciblent les personnes handicapées sont:

- Le Projet de renforcement de l'éducation inclusive;
- Le Projet pilote de réadaptation à base communautaire;
- Le Projet bridging the Gap II /Comblent l'Ecart II/Burkina Faso;
- Le Projet handicap et inclusion sociale;
- Le Projet handicap et VIH/sida;
- Le Programme de renforcement des capacités en médecine physique et réadaptation.

⁴⁹ Rapport initial sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH), avril (2018) 22.

9.8 Votre recherche (pour ce projet) a-t-elle identifié des aspects qui⁵⁰ nécessitent le développement de capacité et soutien pour les OPH au Burkina Faso afin d'assurer leur engagement dans la mise en œuvre de la Convention?

Les OPH pourraient bénéficier d'un meilleur appui infrastructurel, technique et financier de l'Etat et des partenaires pour assurer la couverture de l'ensemble du territoire national dans l'exécution de leurs activités en faveur des personnes vivant avec le handicap.

9.9 Y'a-t-il des recommandations provenant de votre recherche au sujet de comment les OPH pourraient être plus largement responsabilisées dans les processus de mise en œuvre des instruments internationaux ou régionaux?

Le rôle des OPH dans la mise en œuvre des instruments internationaux peut être rendu effectif ou amélioré à travers le renforcement du cadre de collaboration mis en œuvre entre l'Etat et le COMUD/Handicap à travers leur participation systématique aux réflexions sur les politiques publiques, les projets structurants ainsi que leur mise en œuvre afin d'assurer une meilleure prise en charge inclusive des droits des personnes handicapées.

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, il semble que certaines organisations mentionnées au 9.1 ci-dessus collaborent de manière directe ou indirecte avec les OPH dans les programmes de recherche incluant des aspects liés au handicap.

10 Branches gouvernementales

10.1 Existe-t'il au Burkina Faso de(s) branche(s) gouvernementale(s) spécifiquement chargée(s) de promouvoir et protéger les droits et le bien-être des personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Au niveau institutionnel, des structures chargées de la protection et de la promotion des droits des personnes handicapées ont été mises en place. Il s'agit notamment du Secrétariat d'Etat chargé des affaires sociales, des personnes vivant avec un handicap et de la lutte contre l'exclusion, du Conseil National Multisectoriel pour la Promotion des Droits des personnes handicapées du Burkina Faso du (COMUD/Handicap) et son Secrétariat permanent, de la Direction de la protection et de la promotion des personnes handicapées (DPPH) et de la Direction de la promotion de l'éducation inclusive, de l'éducation des filles et du genre (DPEIEFG).

50 Comme ci-dessus.

En référence à l'article 31 du décret no 2018-0272/PRES/PM/SGG-CM du 12 avril 2018 portant attribution des membres du Gouvernement, le Secrétariat d'État chargé des affaires sociales, des personnes vivant avec un handicap et de la lutte contre l'exclusion est chargé entre autres:

- De l'organisation, du suivi et du contrôle de la gestion des structures publiques et privées de prise en charge des personnes handicapées et des exclus sociaux;
- De la promotion et de la protection sociale des personnes âgées, handicapées, inadaptées, défavorisées, exclues, marginalisées et nécessiteuses;
- De l'information et de la sensibilisation de la population sur les droits reconnus aux personnes âgées, personnes handicapées et exclus sociaux;
- De la promotion des activités socioéconomiques en faveur des personnes âgées, handicapées et autres personnes vulnérables en relation avec les ministres compétents.

La Direction de la protection et de la promotion des personnes handicapées est chargée:

- D'élaborer des stratégies de protection et de promotion des personnes handicapées et de veiller à leur mise en œuvre;
- De vulgariser les mesures réglementaires et législatives en faveur des personnes handicapées;
- De développer la concertation avec les ONG, associations et autres acteurs intervenant dans le domaine du handicap;
- De suivre et de coordonner les interventions des acteurs du domaine de la protection et de la promotion des personnes handicapées;
- D'apporter un appui conseil aux organisations œuvrant en faveur des personnes handicapées.⁵¹

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées dans votre pays? Exemple: Certaines régions d'Afrique pratiquent des tueries rituelles de certaines catégories de personnes handicapées telles que les personnes atteintes d'albinisme. A cet effet, la Tanzanie est aux avant-postes. Nous devons remettre en cause les pratiques coutumières qui discriminent, blessent et tuent les personnes handicapées.

Il faut noter la persistance de certaines pratiques traditionnelles constituant des entraves à la pleine réalisation des droits humains, notamment la situation générale des personnes vivant avec l'albinisme au Burkina Faso. L'albinisme est souvent considéré comme un signe de mauvais augure au Burkina Faso. En effet, la société perpétue des croyances fort préjudiciables et rétrogrades à l'endroit des personnes atteintes d'albinisme, qui sont souvent discriminées, humiliées, voire assassinées au cours de pratiques rituelles.⁵²

51 Rapport initial sur la mise en œuvre de la convention relative aux droits des personnes handicapées (CDPH), avril (2018) 22.

52 <https://spong.bf/resilience-des-personnes-albinos-laudace-dasseta-pratiques-rituelles> (consulté le 12.avril2012).

Les préoccupations principales des personnes atteintes d'albinisme au Burkina Faso sont le rejet par la société et le risque de cancer de la peau. Les croyances concernant l'albinisme sont très courantes dans le pays, en particulier la conviction que les parties du corps de personnes atteintes d'albinisme peuvent apporter de l'énergie et de la chance. En conséquence, elles sont souvent victimes de violences verbales et physiques et beaucoup vivent dans la peur d'être violées ou pourchassées pour des parties de leur corps. Leurs familles sont elles aussi confrontées au rejet par la société en raison des mythes qui entourent cette maladie. Les personnes atteintes d'albinisme du Burkina Faso rencontrent des difficultés dans l'accès aux soins de santé dont elles ont besoin pour se protéger du soleil car les produits nécessaires sont onéreux et peu disponibles.

Face à cette situation, L'Association Burkinabée pour l'Intégration des Personnes atteintes d'Albinisme (ABIPA) a appelé le gouvernement à adopter une législation visant à promouvoir l'insertion des personnes atteintes d'albinisme dans la sphère socio-économique et à leur assurer une protection juridictionnelle en tant que groupe vulnérable aux actes criminels. Même si l'Association Nationale pour l'Intégration des Personnes atteintes d'Albinisme au Burkina Faso (ANIPA) a affirmé avoir reçu l'appui du ministère de l'Action sociale et de la Solidarité nationale qui aurait présenté les recommandations de l'ONG au sein de leur département, aucune action gouvernementale concrète dans ce sens n'a encore été rapportée.⁵³

11.2 Comment votre pays répond-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

(Réponses au point 6.2 ci-dessus)

- **Accès aux bâtiments publics:**
- **Accès au transport public:**
- **Accès à l'éducation:**
- **Accès à l'emploi et à la formation professionnelle:**
- **Accès à la détente et au sport:**
- **Accès à la justice:**
- **Accès aux soins de santé:**

11.3 La République du Burkina Faso accorde-t-elle des subventions pour handicap ou autre moyen de revenus en vue de soutenir les personnes handicapées?

Pour promouvoir la formation professionnelle et l'entrepreneuriat en vue de la création de coopératives et de nouvelles entreprises, le Burkina Faso a pris des mesures qui prennent en compte les personnes handicapées et leurs organisations. Ce sont:

- Au niveau technique, la création de l'Agence nationale pour l'emploi (ANPE), du Centre de formation professionnelle de Ouagadougou (CEFPO), du Centre de formation professionnelle de référence de Ziniaré (CFPR-Z), du Centre d'évaluation de la formation professionnelle de Ouagadougou/ Centre d'incubation (CEFPO/CI), du Centre de formation professionnelle industrielle de Bobo-Dioulasso (CFPI-B), ainsi que du Groupement d'intérêt Programme national de volontariat du Burkina Faso (GI-PNV/BF):
- Au plan financier, il y a des fonds et des programmes. Les différents fonds sont entre autres le Fonds d'appui au secteur informel (FASI), le Fonds d'appui à la promotion

53 <https://m.lefaso.net/spip.php?article113940> (consulté le 12 septembre 2022).

de l'emploi (FAPE), le Fonds d'appui aux initiatives des jeunes (FAIJ), le Fonds d'appui à la formation professionnelle et à l'apprentissage (FAFPA) et le Fonds d'appui aux activités rémunératrices des femmes (FAARF). Au niveau des différents fonds créés, les personnes handicapées bénéficient de mesures spécifiques notamment, la réduction du taux de remboursement des crédits, qui varie entre 0 et 4% en fonction des institutions.

En ce qui concerne les programmes, nous pouvons retenir: le Programme spécial de création d'emploi pour les jeunes et les femmes (PSCE/JF) et le Programme emplois jeunes et développement des capacités (PEJDC).

L'État également a mis en place le Fonds national d'appui aux travailleurs déflatés et retraités (FONA-DR) suivant le décret no 2008-049/PRES/PM/MEF/MTSS du 6 février 2008.

Par ailleurs, le Plan national de développement économique et social (PNDES) 2016-2020, prévoit le relèvement du taux de personnes handicapées actives occupées de 2,2% en 2015 à 50% en 2020. Les principales actions devant contribuer à l'atteinte de cet objectif sont le recrutement spécial dans la fonction publique et l'appui à l'autonomisation économique des personnes vivant avec le handicap.

Il convient également de noter les appuis directs divers apportés aux personnes handicapées pour leur autonomisation socio-économique à travers notamment le financement de près de 3000 projets économiques individuels.⁵⁴

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique (représentation politique et leadership, vote indépendant etc) en République du Burkina Faso?

La Constitution dispose en son article 12 que: « Tous les burkinabè sans distinction aucune ont le droit de participer à la gestion des affaires de l'État et de la société. À ce titre, ils sont électeurs et éligibles dans les conditions prévues par loi ». Par ailleurs, l'article 40 de la loi no 012-2010/AN du 1er avril 2010 dispose que: « Toute personne handicapée jouit des mêmes droits civils et politiques et les exerce sur la base de l'égalité avec les autres et dans le respect des textes en vigueur relatifs à la capacité juridique ». La loi no 014-2001/AN du 3 juillet 2001 portant Code électoral et ensemble ses modificatifs donne des procédures d'assistance pour l'exercice du droit de vote de la personne handicapée.

Le législateur burkinabè, afin de donner une base légale à l'assistance de la personne handicapée par un tiers, a prévu à l'article 91 du Code électoral que: « Tout électeur atteint d'infirmité ou de handicap physique le mettant dans l'impossibilité d'exprimer son choix et d'introduire son bulletin dans l'urne, est autorisé à se faire assister par un électeur de son choix ou par un membre du bureau de vote ». En outre, l'article 41 de la loi no 012-2010/AN du 1er avril 2010 dispose que « les procédures, les équipements et le matériel électoraux doivent être appropriés et accessibles aux personnes handicapées ».

Par ailleurs, des indicateurs et des outils de collecte de données prenant en compte la participation à la vie politique et publique des personnes handicapées ont été élaborés. Il s'agit entre autres, des indicateurs suivants:

- Le nombre de personnes handicapées inscrites sur la liste électorale;

54 https://www.un.int/burkinafaso/statements_speeches/d%C3%A9claration-du-burkina-faso-droits-des-personnes-handicapées (consulté le 12 septembre 2022).

- Le nombre de personnes handicapées candidates aux élections;
- Le nombre de personnes handicapées ayant un mandat électif;
- Le nombre de bureaux de vote ayant un dispositif accessible aux PH.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

En dépit des efforts accomplis par le Gouvernement pour l'amélioration des droits humains au Burkina Faso, le pays fait face à des contraintes économiques et financières qui impactent négativement leur effectivité. En outre, la période couverte par le présent rapport a été marquée par des difficultés d'ordre sécuritaire marquées par des attentats terroristes, la recrudescence du grand banditisme et l'apparition de groupes d'auto-défense non respectueux des droits humains et des lois de la république dans certaines localités du pays. Cette situation a accentué la vulnérabilité des personnes en situation de handicap, notamment les femmes, les enfants et les personnes âgées.

L'article 46 de la loi portant protection et promotion des droits des personnes handicapées dispose que: « la protection et la sécurité des personnes handicapées dans les situations de risques, de conflits, de crises humanitaires et de catastrophes naturelles sont assurés en priorité au même titre que les enfants et les femmes ». En situation de crise et d'urgence humanitaire, une priorité est accordée aux personnes handicapées conformément aux dispositions de la loi n°012-2010/AN du 1er avril 2010 portant protection et promotion des droits des personnes handicapées et de la loi n°012-2014/AN du 22 avril 2014 portant loi d'orientation relative à la prévention et à la gestion des risques, des crises humanitaires et des catastrophes. En réponse aux situations de risque et d'urgence humanitaire, l'Etat Burkinabè a créé un Conseil national de secours d'urgence et de réhabilitation (CONASUR) doté d'un Secrétariat permanent.

Il faut également noter la persistance de certaines pratiques traditionnelles constituant des entraves à la pleine réalisation des droits humains. C'est le cas en ce qui concerne particulièrement les femmes et les filles vivant avec le handicap sur lesquelles un accent particulier doit être porté.

Militant dans ce sens, l'Association pour l'épanouissement des femmes et enfants handicapés du Burkina (AEFÉHB) présidée par Madame Agnès Consigniga a convié deux associations alliées dans le cadre d'un plaidoyer. Il s'agissait de l'Association nationale des déficients auditifs du Burkina (ANDAB) dont la présidente est Madame Evelyne Hien Winkoun, par ailleurs Secrétaire générale de l'Association des femmes handicapées auditives du Burkina (AFHA) et du Comité national des femmes aveugles représenté par Madame Linda Zongo, Secrétaire chargée à la Communication. La réflexion et les débats ont porté sur la sensibilisation de la société et des autorités à promouvoir les droits des femmes et jeunes femmes handicapées. Il s'est agi d'interpeller sur les inégalités et violences auxquelles sont confrontées ces femmes et jeunes femmes quotidiennement. De trouver des voies de recours pour les assister afin qu'elles soient autonomes. Ces objectifs tels que définis ont permis que le thème principal du plaidoyer soit identifié. Il est donc question de l'inclusion de la personne handicapée dans le budget et les politiques de développement durable avec instauration d'un quota pour les femmes et jeunes femmes handicapées. Les trois structures dans leur présent plaidoyer invitent l'Etat au respect des instruments juridiques nationaux et internationaux ratifiés. Entre autres, ont-elles évoqué la Convention internationale relative aux droits des personnes handicapées ratifiée le 23 juillet 2009, la loi portant protection et promotion des droits des personnes handicapées adoptée en juin 2010 et le décret N° 2012 – 824 PRES/PM/MASSN/MÉF/MS portant condition de délivrance de la carte d'invalidité en faveur des personnes handicapées au Burkina Faso.

Relativement au dernier décret cité, les associations invitent l'Etat à faire la promotion de la carte d'invalidité qui reste méconnue par les services publics. Toute chose qui enfreint à leur droits et avantages dans les domaines de: la santé, l'éducation, les transports, la formation professionnelle, l'emploi, les sports, loisirs, culture et communication, la participation à la vie politique et publique, l'action sociale. Aussi, le présent plaidoyer demande aux autorités de revoir l'accès à cette carte d'invalidité dont la procédure s'avère très longue du fait des difficultés liées à l'obtention du certificat médical, l'une des pièces principales pour la demande de ladite carte.

Aux autorités, les associations demandent de revoir le coût des aides techniques et leur faible disponibilité. En effet ces aides techniques tels que les fauteuils roulants, béquilles, prothèses auditives et orthopédiques, ainsi que d'autres prestations sanitaires pour corriger ou alléger le handicap ne sont pas accessibles financièrement aux personnes handicapées. Il est exigé l'accessibilité aux subventions publiques afin de permettre une autonomisation financière. Mieux, il est proposé d'ériger un Fonds spécial destiné aux femmes et aux jeunes femmes handicapées. Les trois associations plaident pour la restauration de la Journée des personnes handicapées célébrée tous les 3 décembre de chaque année.⁵⁵

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement au Burkina Faso en ce qui concerne sujet les personnes handicapées?

Selon le PNDES, les priorités du Burkina Faso en matière de droits humains sont les suivantes:

- Le renforcement de la démocratie, de l'effectivité des droits humains, de la justice et de la paix;
- Le renforcement de la sécurité et la protection civile;
- Le renforcement de l'accès de tous aux services de santé de qualité;
- L'amélioration de l'accès de tous à une éducation de qualité;
- La réduction des inégalités sociales et de genre et la promotion de la femme comme acteur dynamique du développement;
- La promotion du civisme et de la citoyenneté;
- La promotion de l'emploi décent pour les femmes et les jeunes et la protection sociale particulièrement pour les personnes âgées et les personnes handicapées. Mettre en place un système de production statistique sur les droits humains et le civisme;
- Renforcer la coopération avec les instances internationales et régionales de droits humains. Dans le cadre de la mise en œuvre, du suivi et de l'évaluation des observations finales, le renforcement des capacités des différents acteurs s'avère nécessaire. A cet effet, le Burkina Faso a un besoin de renforcement des capacités des représentants du Gouvernement, de la société civile, des institutions nationales de défense des droits humains ainsi que les médias sur les mécanismes de mise en œuvre et d'évaluation des recommandations sur la mise en œuvre des droits des personnes handicapées.

55 <https://www.facebook.com/pg/delicesdefemmesburkinafaso/posts> (consulté le 12 septembre 2022).

A la faveur de la douzième (12ème) session de la conférence des Etats parties à la convention des nations unies relative aux droits des personnes handicapées tenue à New York, les 11 -12 et 13 Juin 2019 sur le Thème: «Assurer l'inclusion des personnes handicapées dans un monde en mutation grâce à la mise en œuvre de la Convention des Nations Unies relative aux Droits des Personnes Handicapées», le Burkina Faso a indiqué les défis actuels liés à la situation des personnes vivant avec le handicap au Burkina Faso. Au cours de son allocution, Madame Hélène Marie Laurence ILBOUDO/MARCHAL, Ministre de la Femme, de la Solidarité Nationale, de la Famille et de l'Action Humanitaire, a adressé les préoccupations suivantes:

- La prise en charge intégrée des personnes handicapées notamment les femmes et les enfants handicapés dans les zones à défi sécuritaire;
- L'élaboration du rapport national sur la situation des personnes handicapées au Burkina Faso.⁵⁶

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Burkina Faso? Pourquoi?

Le Burkina Faso a accompli d'importants progrès dans la mise en œuvre de la Convention relative aux droits de personnes handicapées. En effet, de nombreux textes législatifs ont été adoptés ou modifiés pour donner effet à la Convention dans l'ordonnement juridique interne. Ces mesures se traduisent par l'enrichissement des politiques publiques inclusives des besoins spécifiques des personnes vivant avec le handicap.

Malgré ces efforts, de nombreux défis restent à relever pour la pleine et effective jouissance des droits des personnes handicapées. Les actions suivantes contribueraient à améliorer la promotion des droits des personnes handicapées.

- Renforcer les politiques publiques nécessaires pour faciliter l'accès des personnes handicapées aux infrastructures, à l'emploi et aux services de santé;
- Renforcer les capacités des centres de formations spécialisés pour les enfants à besoin spécifiques;
- Améliorer l'accès des personnes handicapées à la protection sociale, l'emploi et l'entrepreneuriat;
- Faciliter l'accès aux soins de santé et aux services de réhabilitation au bénéfice des personnes handicapées;
- Rendre le système éducatif plus inclusif en adaptant les curricula de formation, les outils pédagogiques et les infrastructures scolaires adaptés aux besoins des apprenants handicapés;
- Favoriser l'accès des personnes handicapées aux TIC;
- Adopter des mesures de discrimination positive pour favoriser la représentativité des personnes handicapées au sein des instances politiques et administratives de prise décision.

56 www.un.int/burkinafaso/statements_speeches/déclaration-du-burkina-faso-droits-des-personnes-handicapées (consulté le 12 septembre 2022).

RÉPUBLIQUE DU CAP-VERT

*Serge Marcellin Tengho**

Summary

According to the Ministry for Europe and foreign affairs, the Cape Verdian population is 555 988. There are 104 000 persons with disabilities, that is 19 per cent of the total population. According to the law of 2005, the most prevalent forms of disabilities include mental, motor and sensorial disabilities.

The Republic of Cape Verde signed on the 30 March 2007 and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as well as its Optional Protocol on 10 October 2011. The Republic of Cape Verde was supposed to submit its country report on July 2013.

Through article 72, the Constitution of Cape Verde affirms that 'the human person is sacred and inviolable. Every individual has the Right to life, liberty, security and integrity of his or her person'. In addition, the Constitution indirectly addresses disabilities through article 2 where Cape Verdians are born and remain free and equal in rights and duties. Any discrimination based on disability is therefore prohibited.

The Republic of Cape Verde has important pieces of legislation that directly address disability. The key one is the Law 2005-102, of 11 February 2005 on equal rights and opportunities, participation and citizenship of people with disabilities. The policies that directly address persons with disabilities are: the Education Strategic Plan (2017-2021); the National Plan on Human Rights and Citizenship (2017-2022); the Decree-law n°38/2015 setting the procedures for the recruitment and selection of people with disabilities in the public administration imposing a minimum quota of 5 per cent of the people with disabilities.

Other than ordinary courts or tribunals, the Republic of Cape Verde does not have an official body which specifically addresses the violation of the rights of persons with

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disabilities. The Republic of Cape Verde has a National Human Rights Commission and Citizenship, since 2014 (Decree-law n°10/2014 of 21 February 2014). There are numerous organisations that represent and advocate for the rights and welfare of persons with disabilities in Cape Verde, represented by the Cape Verdian Federation of Associations of Disabled Persons which is an umbrella body of more than ten organisations. In the Republic of Cape Verde, according to the Decree-law n°37/2016 of 17 of June 2016, the Ministry of Family and Social Inclusion is in charge of persons with disabilities. The Ministry develops and implements policies and strategies in favour of persons with disabilities. Persons with disabilities encounter multiple levels of exclusion and discrimination. As far as access is concerned, although laws provide for access to public buildings and employment, in practice, very little is done to ensure access for persons with disabilities.

The Republic of Cape Verde should conduct a reliable specific household census of persons with disabilities, taking into account women, children and elderly persons with disabilities. The Cape Verdian Government should strengthen and speed up the implementation of its national policies and programmes for the implementation of disability rights.

1 Les indicateurs démographiques

1.1 Quelle est la population totale de la République du Cap-Vert?

Le Cap-Vert ou encore République du Cap-Vert est un Etat insulaire d'Afrique de l'ouest, composé d'un archipel et de dix îles volcaniques. Selon le Ministère de l'Europe et des Affaires Etrangères, il couvre une superficie de 4 033km, pour une population de 555 988 Habitants; soit une densité de 137,9 habitants/Km².¹

1.2 Méthodologies employées en vue d'obtenir des données statistiques sur la prévalence du handicap en République du Cap-Vert. Quels sont les critères utilisés pour déterminer qui fait partie de la couche des personnes handicapées au Cap-Vert?

Au terme des dispositions de l'article L.114 de la loi du 11 février 2005² « constitue un handicap, au sens de la présente loi, toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison de son altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychique, d'un polyhandicap ou d'un trouble de santé invalidant ». En réalité, il y a une absence de méthode d'où l'absence de données statistiques désagrégées relatives au handicap. Ceci est dû au fait qu'il n'y a pas eu de recensement des personnes handicapées dans le pays; recensement qui aurait permis de déterminer le taux de prévalence du handicap. Pour aller plus loin, le dernier recensement de la

1 Ministère de l'Europe et des Affaires Etrangères: Présentation du Cap-Vert-2022, in service-public.fr.

2 Loi portant sur l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées.

population (cinquième GRPH) entière au Cap-Vert remonte à l'année 2020 et de nos jours, le nombre exacte d'habitants du pays fait plutôt l'objet d'estimations. Dans ces conditions, il n'a pas été possible d'obtenir des données statistiques sur la prévalence du handicap dans le pays.

1.3 Quel est le nombre total et le pourcentage des personnes handicapées au Cap-Vert?

Lors de la première conférence internationale pour l'inclusion au Cap-Vert en ayant pour thème: « le Handicap au centre de l'attention », il a été établi selon l'Institut Nationale de la Statistique (INS) que le Cap-Vert compte 104 000 personnes handicapées,³ soit presque 19% de la population; bien que selon les estimations de l'Organisation Mondiale de la Santé (OMS), 15% de la population mondiale vit avec un handicap, sous une forme ou une autre.

1.4 Quel est le nombre total et le pourcentage des femmes handicapées au Cap-Vert?

Malgré le nombre total des personnes handicapées qui date de depuis 2018 selon l'INS, en attendant le résultat du cinquième RGPH, aucun recensement récent n'a été mené sur le nombre total et le pourcentage des personnes handicapées au Cap-Vert. Il s'en suit donc qu'au niveau national on constate qu'aucune étude n'a été menée jusqu'ici pour présenter le taux de prévalence du handicap tant chez les hommes, les femmes que chez les enfants.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés au Cap-Vert?

En attendant les résultats du RGPH, aucune étude récente ne présente le pourcentage du nombre d'enfants vivant avec un handicap au Cap-Vert.

1.6 Quelles sont les formes de handicaps les plus répandues en République du Cap-Vert?

Selon la loi de 2005, on distingue aujourd'hui cinq grandes familles de handicap à savoir: le handicap moteur; le handicap psychique; celui mental; sensoriel et les maladies invalidantes. Cependant, il faut noter que de nos jours, la plupart des gens ont une vision restreinte, voire cliché, du handicap, en imaginant automatiquement une personne en fauteuil roulant, avec des malformations physiques, ou une canne blanche à la main. Il ne faut pas non plus oublier qu'un handicap n'est pas toujours visible.

3 French.xinhuanet.com publié le 30 octobre 2018 (consulté le 6 juin 2022).

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relatives aux Droits des Personnes Handicapées (CDPH) au Cap-Vert? Le Cap-Vert a-t-il signé et ratifié la CDPH, Fournir le (s) date (s). Le Cap-Vert a-t-il signé le protocole facultatif? Fournir le (s) date (s).

La République du Cap-Vert a signé la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en date du 30 mars 2007 et le 10 octobre 2011, il y a eu confirmation formelle, adhésion et ratification. Concernant le protocole facultatif de ladite convention, à notre connaissance, le Cap-Vert n'a pas encore procédé à sa signature.

2.2 Si le Cap-vert a signé et ratifié la CDPH, quel est /était le délai de soumission de son rapport? Quelle branche du gouvernement est responsable de la soumission du rapport? Votre pays a-t-il soumis son rapport? Sinon quelles sont les raisons du retard telles qu'avancées par la branche gouvernementale en charge?

Conformément à l'Article 35 de la CDPH, le Cap-Vert était tenue de soumettre son rapport initial dans un délai de deux ans, soit en juillet 2013 (ce qui a été fait) compte tenu du fait que c'est le 10 octobre 2011 que le pays a ratifié la CDPH. Il y a aussi eu la soumission du second rapport datant de 2018.⁴

Soucieux de mieux s'acquitter de l'obligation qui lui incombe de présenter des rapports, en application des conventions internationales relatives aux droits de l'homme qu'il a ratifié, le Cap-Ver a mis sur pied en 2017 un mécanisme spécial, la Commission interministérielle pour l'établissement des rapports nationaux (résolution no 55/2017 du 15 juin), qui relève du Cabinet du Premier Ministre. Cette commission est composée de représentants des organismes publics chargés, notamment, de promouvoir le dialogue avec les organisations de la société civile et les institutions de défense des droits de l'homme aux fins de l'établissement des rapports.⁵

2.3 Si le Cap-Vert a soumis le rapport au 2.2 et si le comité en charge des droits des personnes handicapées avait examiné le rapport, veuillez indiquer si le comité avait émis des observations finales et des recommandations au sujet du rapport du Cap-Vert. Y'avait-il des effets internes découlant du processus de rapport liés aux questions handicapées dans votre pays?

Le Cap-Vert a soumis un premier rapport en 2013, et à la lecture de son rapport de 2018, il est établi que des efforts ont été effectués suite aux observations finales et recommandations tant sur les droits de l'enfant (recommandations 115.26, 115.45

4 Rapport national soumis conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Comité des Droits de l'Homme lors de la trentième session tenue du 7 au 18 mai 2018 par le Groupe de travail sur l'Examen Périodique universel (2018) 2.

5 Rapport national soumis conformément au paragraphe 5 de l'annexe à la résolution 16/21 (2018) 4 & 5.

à 50, 115.82 à 87 et 115.107 et 116.1, 116.5 et 116.6); celui du respect et protection des droits des personnes et groupes vulnérables (recommandations 115.43 et 44, 115.51, 115.65, 115.80 et 115.108); la promotion de l'égalité des sexes (recommandations 115.63, 115.66 à 79 et 115.81, et 116.2 à 4); la traite des êtres humains (recommandations 115.88 à 115.96); les droits sociaux et économiques (recommandations 115.63, 115.102 à 115.106, 115.112 et 116.11), etc.

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 du bien-être de l'Enfant, le Cap-Vert a-t-il également fait mention spécifique du droit des personnes handicapées dans ses rapports les plus récents? Si oui, les observations finales adoptées par les organes statutaires ont-elles fait mention du handicap? Si pertinent, ces observations ont-elles été suivies d'effet? Était-il fait mention des droits des handicapés dans le rapport de la Revue Périodique Universelle (RPU) des Nations Unies de votre Etat? Si oui, quels étaient les effets de ces observations ou recommandations?

Dans son rapport sur les Droits de l'Homme, la République du Cap-Vert a fait mention du droit des personnes handicapées dans son rapport national soumis au Groupe de travail sur l'Examen Périodique universel.⁶

Dans ce rapport, il est à noter que pour remplacer la loi précédente, qui datait de 2000, les autorités ont adopté la loi n° 40/VIII/2013, qui présente une vision intégrée et transversale concernant la prévention, la qualification, la réinsertion et la participation des personnes handicapées, conformément à la Convention que Cabo Verde a ratifiée en 2011. La réglementation afférente à cette loi est en cours d'élaboration; le décret-loi n° 38/2015, qui fixe les procédures de recrutement et de sélection dans l'administration publique, prévoit un quota de 5% pour les personnes handicapées.

Les autorités ont décidé d'accorder des avantages fiscaux aux entreprises qui créent des emplois pour les personnes handicapées (loi n° 26/VIII/2013, du 21 janvier, portant approbation du Code des avantages fiscaux, modifiée par la loi n° 102/VIII/2016, du 6 janvier, et budget de l'État pour 2017).

En vertu du décret n° 7/2017, du 6 mars, les personnes issues de ménages à faible revenu et les personnes handicapées peuvent bénéficier de bourses de formation professionnelle distribuées par le Ministère de la famille et de l'inclusion sociale.

Le budget de l'État pour 2017 (loi n° 5/IX/2016, du 30 décembre, et loi n° 20/IX/2017, du 30 décembre) prévoit, à partir de l'année scolaire 2017/2018, la gratuité de l'inscription et des études pour les personnes handicapées dans les établissements d'enseignement publics (niveaux préscolaire, fondamental et secondaire, et formation professionnelle) ainsi que dans les écoles privées, aux conditions définies par l'État.

6 (Comme ci-dessus) 10-11.

2.5 Y'avait-il un quelconque effet interne sur le système légal du Cap-vert après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

Après ratification des instruments internationaux ou régionaux, en ce qui concerne le cadre juridique, la révision du Code pénal menée en 2015 (décret législatif n°4/2015 du 11 novembre) constitue une avancée majeure qui a consolidé la législation nationale dans plusieurs domaines. Par la révision de son code pénal, le Cap-Vert a continué de mettre sa législation nationale en conformité avec le Statut de Rome de la Cour Pénale Internationale, puisqu'il a aussi ajouté des articles relatifs aux crimes internationaux, plus précisément les génocides, aux crimes contre l'humanité et aux crimes de guerre, mettant ainsi à jour son système juridique pénal.

2.4 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'article 11 al 4: « les règles et les principes du Droit international général ou commun et du Droit international conventionnel dûment approuvés ou ratifiés prévalent après leur entrée en vigueur dans l'ordre juridique international et interne sur tous les actes législatifs et réglementaires internes soumis aux principes de la Constitution à compter de leur entrée en vigueur dans l'ordonnement juridique international et interne ». ⁷ Il ressort de cet extrait que les traités ne prennent effet qu'après avoir été régulièrement ratifiés et sous réserve de leur application par l'autre partie pour les traités bilatéraux et de la réalisation des conditions de mise en vigueur prévues par eux pour les traités multilatéraux. Eu égard à cette disposition constitutionnelle, l'on peut logiquement envisager que les cours et tribunaux du Cap-Vert peuvent directement appliquer les dispositions des traités internationaux.

2.5 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 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 capverdienne; une procédure n'a pas semblé nécessaire; dans la Constitution de 2010 l'article 72 promeut les droits des personnes vivant avec handicap. Notons cependant qu'il y a une nécessité d'harmoniser la législation interne avec les dispositions du CDPH, même si l'applicabilité directe du traité ratifié est communément admise dans la doctrine juridique interne.

7 Confère Constitution 2010 de la République du Cap-Vert.

3 Constitution

3.1 La constitution du Cap-Vert contient-elle des dispositions concernant directement le handicap? Si oui, énumérez les dispositions et expliquez comment chacune d'elles traite du handicap.

La Constitution en vigueur du 3 mai 2010 de la République du Cap-Vert contient des dispositions concernant directement le handicap. En consacrant tout un article sur cette question, selon l'article 72 al 1: « les handicapés et les personnes âgées ont droit à une protection spéciale de la famille, de la société et de l'Etat qui doivent leur garantir la priorité dans les services publics et privés, un traitement spécial et des soins spécifiques ainsi que leur donner les moyens nécessaires pour éviter leur marginalisation ».

En son alinéa 2, l'Etat en coopération avec des institutions privées et des associations de handicapés ou de personnes âgées, promeut une politique nationale visant progressivement à:

- a) « assurer le traitement, la rééducation et l'insertion des handicapés ainsi que la prévention de handicaps »;
- b) « offrir aux personnes âgées et aux handicapés les conditions économiques, sociales et culturelles qui permettront de participer à la vie sociale »;
- c) « sensibiliser la communauté aux problèmes des handicapés et des personnes âgées, et créer des conditions permettant d'éviter leur isolement et leur marginalisation sociale ».

L'alinéa 3 revenant une fois de plus sur le handicap précise que l'Etat encourage et soutient l'instruction et la création des écoles spéciales de formations techniques et professionnelles pour les handicapés. Et l'alinéa 4 viendra conclure en énonçant que « l'Etat encourage et soutient la création des associations de handicapés et des personnes âgées ».

3.2 La constitution du Cap-vert 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 Cap-Verdienne proclame et affirme dans ses principes fondamentaux son attachement aux principes des Droits de l'Homme en son article premier en ces termes: « le Cap-Vert est une République souveraine, unitaire et démocratique qui garantit le respect de la dignité des personnes et reconnaît l'inviolabilité des Droits de l'Homme comme fondement de toute la communauté humaine, de la paix et de la justice »;

En son article 2, « la République du Cap-Vert reconnaît également l'égalité de tous les citoyens devant la loi, sans distinction de race, de sexe, de religion, de conviction politique ou d'idéologie, indépendamment de leur origine sociale et de leur situation économique, et assure la pleine jouissance des libertés fondamentales pour tous les citoyens ».

Tout ceci semble davantage conforté en son article 22 qui prescrit le principe de l'égalité en ces termes: « tous les citoyens ont la même dignité sociale et sont égaux devant la loi; nul ne peut être privilégié, avantagé ou désavantagé, privé d'un droit quelconque ou exempté d'un devoir en raison de considération de race, de

sexe, d'ascendance, de langue, d'origine, de religion, de sa condition économique et sociale, de convictions politiques ou idéologiques ».

Ces principes consacrés par la loi fondamentale sont applicables à tous, y compris aux personnes handicapées.

4 Législation

4.1 La République du Cap-Vert a-t-elle une législation concernant directement le handicap? Si oui, énumérez la législation et expliquez comment la législation aborde le handicap.

En date du 11 février 2005, le Cap-Vert a voté une loi portant sur l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées. Cette loi contient notamment des dispositions relatives aux droits à l'éducation et à la formation ainsi qu'aux droits à l'insertion socio-économique des personnes handicapées. On ne pourrait oublier de mentionner également l'article 72 de la constitution.⁸

4.2 Le Cap-Vert a-t-il une législation concernant indirectement le Handicap? Si oui, énumérez la principale législation et expliquez comment elle réfère au handicap.

On peut dire qu'au Cap-Vert, toute législation est guidée par le principe de l'égalité de tous et s'applique à tous les citoyens sans exception y compris les personnes handicapées. C'est dans ce sens qu'on peut conclure que la plupart des lois du pays concernent indirectement le handicap.

5 Décisions des cours et tribunaux

5.1 Les cours (ou tribunaux) au Cap-vert ont-ils jamais statué sur une question relative au handicap? Si oui, énumérez le cas et fournir un résumé pour chacun des cas en indiquant quels étaient les faits; la (les) décisions (s), la démarche et l'impact (le cas échéant) que ces cas avaient entraînés.

Bien que nous n'ayons pas eu d'informations disponibles sur les cas statué relatifs à la violation des droits des handicapés, notons que la CNDHC enregistre quand-même des plaintes pour cas de violations des droits de l'homme.⁹

⁸ Tel que cité au 3.1 précédent.

⁹ Comme ce fut le cas entre 2014 et 2017 où l'Ombudsman a reçu 492 plaintes, soient 36 collectives et 456 individuelles, tel que nous le constatons dans le Rapport national soumis conformément au paragraphe 5 de l'annexe de la résolution 16/21 du conseil des droits de l'homme.

6 Politiques et programmes

6.1 Le Cap-vert 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.

Après la signature de la Convention Internationale relative aux Droits des Personnes Handicapées (CDPH), le gouvernement capverdien s'est vite lancé dans la mise sur pieds de certains programmes.

Dans le cadre de leur plan stratégique relatif à l'éducation (2017-2021), les autorités vont s'efforcer de permettre aux enfants ayant des besoins pédagogiques spéciaux d'accéder à l'enseignement préscolaire sur un pied d'égalité avec les autres, en fournissant du matériel pédagogique adapté et en formant les éducateurs. L'enseignement préscolaire sera lié à un programme géré par le Ministère de la famille et de l'inclusion sociale (favorisant l'accès aux soins de santé et à la prise en charge des enfants handicapés de 0 à 3 ans, dans le cadre du système national de soins). Au titre de ce plan, il est également prévu d'installer des rampes d'accès et d'autres équipements facilitant la mobilité dans tous les établissements d'enseignement, et les enfants ayant des besoins pédagogiques spéciaux sont considérés comme un groupe cible pour les programmes d'action sociale dans les écoles.

Approuvé en 2017 (résolution no 127/2017 du 17 novembre), le deuxième plan national pour les droits de l'homme et la citoyenneté (2017-2022) prévoit à son alinéa 5 la mise en place d'un mécanisme national de prévention de la torture et de nombreuses autres mesures centrées notamment sur les groupes vulnérables (personnes âgées, personnes handicapées, immigrants et personnes LGBTI).

Le décret-loi n° 38/2015 fixant les procédures de recrutement et de sélection des personnes handicapées dans l'administration publique imposait un quota minimum de 5% de personnes handicapées.

6.2 Le Cap-vert 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.

Suite à la loi capverdienne sur l'entrée, le séjour, la sortie et l'expulsion des ressortissants étrangers qui comprenait des mesures visant à combattre, prévenir et réprimer la traite des êtres humains et accordait le statut de résident temporaire aux ressortissants étrangers qui en avaient été victimes, le Plan national de lutte contre la traite des personnes (2018-2021) a par ailleurs été élaborée.

En outre, l'adoption du troisième Document de stratégie pour la croissance et la réduction de la pauvreté (2012-2016), de la Stratégie migratoire nationale et du Plan d'action correspondant (2013-2016) et, en 2013, de la Stratégie nationale de l'émigration pour le développement¹⁰ vise à développer des projets ou financer des projets afin de lutter contre la pauvreté et, surtout d'améliorer les conditions de vie

10 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations on Cabo Verde in the absence of a report, 8 October 2015, UN Doc CMW/C/CPV/CO/1 (2015) paras 8 et 10.

des femmes et des jeunes. Il s'agit du département en charge de la lutte contre la pauvreté et l'exclusion. Toutes ces initiatives bien que ne convoquant pas directement les handicapés, traitent cependant des cas des personnes vivant avec un handicap.

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, le Cap-Vert 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.

En dehors des juridictions ordinaires, il n'existe pas à ce jour en République du Cap-Vert, un organisme officiel s'intéressant spécifiquement aux violations des droits des personnes handicapées.

7.2 En dehors des cours ou tribunaux ordinaires, le Cap-Vert 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 République du Cap-Vert a un organisme officiel qui, bien que n'étant pas spécifiquement en charge de la violation des droits des personnes en situation de handicap s'y attèle tout de même: la Commission Nationale pour les Droits Humains et de la Citoyenneté (CNDHC).

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

8.1 Le Cap-vert est-il doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un protecteur du citoyen? Si oui, ses missions incluent elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droit de l'Homme ou l'Ombudsman ou le Protecteur du citoyen et de la République du Cap-Vert n'a jamais abordé des questions relatives aux droits des personnes handicapées.

Avec l'évolution du cadre institutionnel, il convient de mentionner l'entrée en fonction de l'Ombudsman en décembre 2013, après son élection par le Parlement. Le statut du Bureau de l'Ombudsman, qui emploie actuellement 12 personnes, a été réglementé dès février 2014 (décret-loi n° 10/2014 du 21 février).

La Commission nationale des droits de l'homme et de la citoyenneté est toujours l'entité publique chargée de la protection et de la promotion des droits de l'homme, de la citoyenneté et du droit international humanitaire, et fait office

d'organe d'orientation et de contrôle des politiques publiques relatives à ces domaines. Elle continue d'examiner les plaintes pour violation des droits de l'homme et adresse des recommandations au Gouvernement et aux entités concernées.¹¹

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous au Cap-Vert des organisations qui représentent et défendent les droits et le bien être des personnes handicapées? Si oui, énumérez chaque organisation et décrivez ses activités.

Il existe des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées en République du Cap-Vert :

- L'Association des Déficiences visuelles du Cabo Verde (ADEVIC);
- Camara Municipal de Praia (CMP);
- L'Organisation des Femmes du Cap-Vert (OMCV);
- L'Association pour la Solidarité et le Développement « Zé Moniz »;
- L'Association de Promotion de la Santé Mentale;
- L'Association Capverdienne de Déficients;
- L'Association pour les enfants défavorisés;
- Association Jean-Paul II;
- Association d'Appui au Développement et à l'Intégration de l'Enfant Déficient, etc.

9.2 Dans les pays de l'Afrique de l'Ouest, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

Au niveau national, il existe plusieurs associations ou organisations qui s'occupent de la prise en charge des personnes handicapées. Ces associations et organisations se regroupent au sein d'un pôle fédérateur à savoir: la Fédération Capverdienne des Personnes Handicapées (FECAP).

Au niveau de la sous-région, il existe au sein des pays de l'Afrique de l'Ouest, un organe régional de coordination des OPH, à savoir la Fédération Ouest Africaine des Organisations de Personnes Handicapées (FOAPH). Cette organisation sous régionale a été créée pour regrouper les réseaux nationaux des OPH de cette sous-région Afrique de l'Ouest.

9.3 Si le Cap-Vert a ratifié la CDPH, comment a-t-il assuré l'implication des Organisation des Personnes Handicapées dans le processus de mise en œuvre?

Les OPH sont régulièrement invités pour donner leur point de vue aux conférences et séminaires organisés par le gouvernement. L'ensemble des OPH présentes sont

11 Rapport national soumis conformément au paragraphe 5 de l'annexe de la résolution 16/21 du conseil des droits de l'homme (2018) 2-3.

régulièrement conviées à exposer leurs problèmes et recommandations lors de la journée mondiale des personnes handicapées.

Bien plus, ces associations agissent quelques fois en concert avec le gouvernement comme ce fut le cas avec le plan stratégique et le plan d'action pour les droits des personnes handicapées 2016-2019 qui contiennent des actions jointes sur les femmes handicapées.

Toutefois, en dépit de cette observation, l'on doit retenir de manière générale qu'il y a encore beaucoup de problèmes de mise en œuvre de la CDPH au Cap-Vert.

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 Fédération Capverdienne des Associations de Personnes Handicapées (FECAD) mènent des actions de plaidoyer, de sensibilisations à travers différents projets et en collaboration avec les autorités gouvernementales pour la reconnaissance de leurs droits. C'est grâce à cette mobilisation que la loi du 11 février 2005¹² portant promotion et protection des droits des personnes handicapées au Burundi a été adoptée.

Les OPH n'ont ménagé aucun effort pour que le gouvernement capverdien procède à la ratification de la Convention des Nations Unies relatives aux Droits des Personnes Handicapées en 2011. Ceci leur permet d'être entendues collectivement dans l'espace public et de porter leurs revendications au plan de l'efficacité politique.

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

Le manque de moyen financier¹³ et de personnel qualifié sont les premiers obstacles que rencontrent les OPH au Cap-Vert. La méconnaissance ou la mauvaise interprétation des textes juridiques sont aussi un problème dû à l'analphabétisation¹⁴ qui est aussi un autre obstacle.

Une évaluation sommaire de la capacité organisationnelle des OPH montre certaines faiblesses. La plupart ne disposent pas d'un siège pour se réunir. Les adhérents sont en majorité de personnes vulnérables sans qualification professionnelle et vivant dans la précarité.¹⁵ Elles n'ont pas les capacités techniques pour monter un projet et mobiliser des fonds de la part des partenaires au développement. Depuis une décennie, la visibilité médiatique des OPH se réduit aux interviews données à la presse écrite et audiovisuelles par leurs leaders notamment, lors de la commémoration de la Journée internationale des Personnes Handicapées célébrée chaque année le 3 décembre.

12 Loi portant sur l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées.

13 Comme nous le fait constater Cabo Verde Business Club, in www.cap-vert-cabo-verde.com (consulté le 12 juin 2022).

14 Lors de la première conférence internationale pour l'inclusion en 2018 ayant pour thème: « Le handicap au centre de l'attention », l'assistante sociale et spécialiste Adélsia Almeida faisait constater que 26% des personnes handicapées n'ont aucun niveau de scolarité ou d'instruction, et seulement 3,1% ont un niveau d'instruction supérieur. A suivre ceci sur: french.china.org.cn

15 Si près de 30% de la population des personnes valides vit déjà dans un état de pauvreté voire de précarité, à plus forte raison les personnes handicapées.

9.6 Y'a-t-il des exemples pouvant servir de modèles pour la participation des OPH?

Plusieurs exemples témoignent de modèles de participations. Certaines personnes en situation de handicap sont encadrées par quelques centres et associations qui s'occupent de leur prise en charge. Il se trouve que ces personnes en général et les jeunes en situation de handicap en particulier ne sont pas représentés dans les organes de prise de décision. La Fédération Capverdienne des Associations de personnes Handicapées (FECAD) indique que cela a des impacts négatifs sur la mise en pratique des projets de développement du pays puisque les jeunes handicapés ne s'y trouvent pas impliqués. Les actions menées par cette organisation visent à sensibiliser les autorités publiques pour une plus grande prise en compte de la situation des personnes en situation de handicap dans la conduite des affaires de l'Etat.

Le rôle de sensibilisation et les différents plaidoyers par les OPH ont porté des fruits au fil des années. Les exemples notoires sont la reconnaissance par les organisations des personnes en situation de handicap envers le Gouvernement du Cap-Vert pour certaines mesures initiées visant à alléger la souffrance de ces personnes ou de les accompagner. Ces mesures sont la diversité et la couverture des services disponibles tels que les services d'appui à la prise de décision; à la communication; mobilité; aide personnelle; logement; et l'accès à des services généraux comme l'éducation, l'emploi, la justice et la santé, et d'autres services communautaires. Bien plus, nous avons aussi les services de soutien pour les besoins particuliers (MFIS) et des salles de ressources du Ministère de l'éducation (ME).¹⁶

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?

Les OPH sont engagées dans la promotion de l'intégration socio-économique/professionnelle, la mise en œuvre d'actions de formation, d'appui à la recherche d'emploi, d'appui psychologique et la recherche d'activités génératrices de revenu en faveur des personnes handicapées. Les OPH promeuvent l'autonomisation, la scolarisation, l'apprentissage et la réinsertion sociale par le travail. Elles ont aussi participé à la création d'établissements scolaires et à la réadaptation en milieu urbain et rural.

Le travail le plus considérable semble être celui mené pour la ratification de la CDPH en 2011 (qui interdit la discrimination fondée sur le handicap. Par conséquent, en cas de discrimination, leurs droits seront toujours protégés) et la loi du 11 février 2005 portant sur l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées.¹⁷

16 Questionnaires sur les politiques inclusives des personnes handicapées au Cap-Vert effectué par le Haut-Commissariat des Nations Unies pour les Droits de l'Homme, www.ohchr.org (consulté le 12 juin 2022).

17 Cette loi garantit l'exercice de ces droits en créant un outil afin d'en garantir cet exercice: il s'agit des Maisons Départementales des Personnes Handicapées (MDPH).

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?

Afin de développer la capacité et le soutien des OPH pour s'assurer leur engagement dans la mise en œuvre, il est urgent que le Ministère de la Famille et de l'Inclusion sociale puisse créer un fond dédié aux associations et ONG. En identifiant sur des critères sérieux les OPH effectives sur le terrain, (en vue de connaître les forces et faiblesses) cela pourrait permettre la formation d'équipes compétentes et expérimentées en capacité d'assurer l'éducation, la formation des personnes en situation de handicap, en axant plus d'efforts dans les zones rurales.

Aussi, elles doivent faire appel à une expertise externe en vue de formuler un plan stratégique et un plan d'action. Il est aussi indispensable de solliciter l'assistance technique de partenaires au développement en vue de bénéficier des programmes de renforcements de capacités. Enfin, un aspect qui doit mériter une attention particulière pour les OPH est la maîtrise des techniques du Lobbying dans l'objectif d'influencer les pouvoirs pour faire aboutir leurs projets.

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?

Une mise à la disposition des OPH de matériels, de moyens financiers et des ressources humaines formées serait nécessaire pour leur plein épanouissement.

Les OPH doivent être représentés dans les organes en charge du suivi et de la mise en œuvre d'instruments de droits de l'homme ratifiés par le Cap-Vert notamment, dans les ministères de la Famille et de l'Inclusion Sociale; de l'Education et de la Valorisation des Ressources Humaines; Ministère du Travail et de la Solidarité Sociale; Ministère de la Justice et de l'Administration Interne, et surtout au niveau de la Commission Nationale pour les Droits Humains et la Citoyenneté.

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?

La loi du 11 février 2005 crée les Maisons Départementales des Personnes Handicapées. Et les missions de celles-ci sont clairement énoncées dans le rapport de la Commissions des affaires sociales du Sénat du 29 juin en ceci: « l'information, l'accueil et l'écoute des personnes handicapées, l'aide à la définition de leur projet de vie, l'évaluation des demandes, les décisions d'attribution et d'orientation, le suivi de la mise en œuvre desdites décisions; enfin l'accompagnement et la médiation ». ¹⁸

Il existe aussi bien d'autres institutions travaillant pour les droits des personnes handicapées telles que le Centre d'Accueil Irmãos Unidos; l'Institut Capverdien des Mineurs; l'Institut National Antonio Aurelio Gonçalves, etc.

18 Maison Départementale de Personnes Handicapées: quatre ans après la loi du 11 février 2005: Rapport de la Commission des Affaires Sociales du Sénat (29 juin).

10 Branches gouvernementales

10.1 Avez-vous de (s) branche (s) gouvernementale(s) spécifiques (s) 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).

La nouvelle structure gouvernementale (décret-loi no 37/2016, du 17 juin) à savoir le Ministère de la famille et de l'inclusion sociale est responsable de l'enfance, des personnes âgées, des personnes handicapées, de la lutte contre la pauvreté et de la promotion de l'égalité des sexes. Un ministre a ainsi, pour la première fois, des responsabilités concernant l'égalité des sexes, en complément de la surveillance assurée par l'Institut cap-verdien pour l'égalité et l'équité entre les sexes.

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées dans votre pays? 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 au Cap-Vert sont:
- Encourager l'éducation des personnes handicapées car les textes concernant la promotion des droits des personnes handicapées sont mal interprétés et insuffisamment vulgarisés; ceci parce que l'analphabétisation est également un obstacle majeur.
- Les infrastructures adaptées aux personnes en situation de handicap sont insuffisantes tout comme les ressources financières en leur faveur.
- Les personnes en situation de handicap sont toujours victimes de préjugés, stéréotypes et pratiques dangereuses, voilà pourquoi les OPH dénoncent ces comportements.
- L'accès aux soins des personnes ayant un handicap mental constitue un défi majeur compte tenu du manque de personnel qualifié en psychiatrie.
- La pauvreté extrême de la population capverdienne affecte spécifiquement les groupes vulnérables comme les personnes handicapées. Ces derniers pour la plupart vivant de la mendicité, dorment dans la rue. C'est pour cette raison que les associations des personnes handicapées font un travail de plaidoyer auprès des pouvoirs publics et des fédérations des employeurs pour le recrutement de personnes handicapées.
- La mobilité constitue un autre défi majeur pour ces personnes vulnérables. Plusieurs ont mis en exergue la difficulté de se procurer à titre gracieux de fauteuils roulants, unique moyen de locomotion dans la mesure où les transports en commun refusent de transporter les usagers handicapés. Ils prétextent que leurs bus n'ont pas de rampe d'accès pour les fauteuils roulants ou que les handicapés mettent du temps pour monter ou descendre. Il arrive parfois que le fauteuil roulant d'une personne décédée soit récupéré par un autre handicapé. Pour avoir une maison en location

par exemple, il faut s'assurer que le lieu soit le plus accessible possible, c'est-à-dire pas d'escalier; rampe; toilettes accessibles, entrée et salle assez grande pour qu'un fauteuil puisse passer.

- On peut noter dans le même registre l'exclusion propre de la part de certains handicapés parce que disent-ils, sont rejetés de la société; tout comme la population a des préjugés au sujet du handicap qui est tantôt une maladie contagieuse voire héréditaire. L'inclusion de ces derniers ne passera que par la rupture de ces barrières afin de permettre une meilleure inclusion de ces derniers sur presque tous les plans.

11.2 Comment votre pays répond-il aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

• Accès aux bâtiments publics:

Rare sont les bâtiments publics disposant de rampes d'accès pour les fauteuils roulants. La loi de 2005 en prévoyant l'accessibilité définit les moyens de la participation des personnes handicapées à la vie de la cité. Ainsi, elle crée l'obligation de mise en accessibilité des bâtiments et des transports dans un délai de 10 ans. 17 ans plus tard, au lieu que les maîtres d'ouvrages publics doivent prévoir des rampes d'accès en établissant des règles dans la construction des édifices et routes pour faciliter l'accès et la circulation des personnes handicapées, il est constaté que cela s'effectue encore avec un peu de timidité.

• Accès au transport public:

Bien que l'accessibilité concerne aussi le domaine des transports, il faut noter que le système de transport public est inexistant. Le système de transport en commun en vigueur se limite aux bus et minibus appartenant à des particuliers travaillant à leur propre compte. Ces derniers choisissent à leur guise leur itinéraire en fonction de sa rentabilité. Certains quartiers de la banlieue de la capitale sont très mal desservis. De plus, les chauffeurs de bus et minibus circulant dans la capitale refusent systématiquement de transporter les personnes handicapées car n'étant pas équipées de rampe d'accès pour les fauteuils roulants. Cette discrimination en matière de transport pourrait être remédiée en cas de mise en place d'un système de transport public accessible aux personnes handicapées. Cependant, cette loi de 2005 portant sur la protection des personnes handicapées pourrait être un début de solution à cette difficulté.¹⁹

• Accès à l'éducation:

Des programmes pour personnes handicapées ont déjà été mis sur pieds. Bien plus, la loi de 2005 reconnaît à tout enfant porteur de handicap le droit d'être inscrit, en milieu ordinaire, dans l'école dont relève son domicile. Ce principe est également renforcé par la loi du 8 juillet 2013 d'orientation et de programmation pour la refondation de l'école de la République. Avec tout ceci, le nombre d'élèves en situation de handicap scolarisé en milieu ordinaire est passé d'environ 100 000 en 2006 à plus de 320 000 en 2017. En 2006, 26% des élèves en situation de handicap bénéficiaient d'un accompagnement humain dans leur scolarité. En 2011, ils étaient 47%.²⁰

• Accès à l'emploi et à la formation professionnelle:

Selon les statistiques de la Banque Mondiale, le taux de chômage est estimé à un peu plus de 30% de la population active. Les personnes handicapées appartenant à la frange de la population la plus favorisée touchée par le chômage de masse. Le

19 Il est question de difficultés parce que les services publics avaient élaboré un schéma directeur d'accessibilité qui devait s'étendre sur trois ans pour le transport urbain, six ans pour le transport interurbain et neuf ans pour le transport ferroviaire. Jusqu'à nos jours les personnes handicapées rencontrent toujours ce problème.

20 République Française: La refondation de la politique du handicap depuis 2005, 13 avril 2019. A consulter aussi dans <https://www.vie-publique.fr> (consulté le 26 juin 2022).

code du travail capverdien consacre le principe de non-discrimination en matière d'emploi. Toutefois, en matière d'emploi, la loi de 2005 confirme les dispositions de la loi de 1987 sur l'obligation d'emploi des travailleurs handicapés (OETH) (5% d'emploi réservés).²¹ Elle étend cette obligation à la fonction publique. Elle durcit les sanctions financières en cas de non-respect de cette obligation en augmentant le montant de la contribution à l'association de gestion du fonds pour l'insertion professionnelle des personnes handicapées (AGEFIPH). Ceci se justifie par le fait que entre 2006 et 2014, le taux d'emploi des personnes en situation de handicap a augmenté de 0,8 point dans le secteur privé et de 1,3 point entre 2009 et 2015 dans le secteur public.²²

- **Accès à la détente et au sport:**

Les personnes handicapées ne participent pas vraiment dans ces activités socio-culturelles. La loi de 2005 prévoit la création d'un espace sportif commun pour les personnes en situation de handicap.

- **Accès à la justice:**

Les personnes handicapées appartiennent à la frange de la population vivant dans la précarité. Ainsi, l'accès effectif de personnes handicapées à la justice mérite une attention particulière.²³ Outre, l'accessibilité des tribunaux, l'aide juridictionnelle permettra aux personnes handicapées de saisir plus souvent les juridictions internes.

- **Accès aux soins de santé:**

Le gouvernement capverdien jusqu'ici ne ménage aucun effort pour la prise en charge des personnes handicapées et ce de manière globale à travers des consultations médicales.

11.3 Le Cap-vert accorde-t-il des subventions pour handicap ou autre moyen de revenue en vue de soutenir les personnes handicapées?

Quelques actions ponctuelles de distribution de denrées de première nécessité sont fournies aux personnes handicapées surtout lors de la journée internationale des personnes handicapées.

Au sujet des subventions ou autre moyen de revenu en vue de soutenir les personnes handicapées, lors de la présentation de son rapport au sujet de l'application par le Cap-Vert, Mme Marita Rosabal Pena, Ministre de l'éducation et de la famille et de l'inclusion sociale soulignait que pour aider les familles en situation de pauvreté extrême, ainsi que les personnes en situation de handicap, les autorités du pays ont mis en place une rente sociale d'inclusion, sous forme d'aide, qui devrait être à disposition de 5000 familles à l'horizon 2020.²⁴

Notons cependant que cette initiative est d'actualité malgré quelques manquements.

21 Car les personnes handicapées restent durement touchées par le sous-emploi et le chômage. En 2016, 36% des personnes reconnues handicapées sont en emploi contre 64% dans l'ensemble de la population et 18% de personnes reconnues handicapées sont au chômage, contre 10% de l'ensemble de la population. Confère Ministère du travail.

22 République Française: La refondation de la politique du handicap depuis 2005. A consulter aussi dans <https://www.vie-publique.fr> (consulté le 26 juin 2022).

23 A propos du cadre juridique, Monica Furtado, responsable du Ministère capverdien de la famille avait annoncé l'accès gratuit à l'éducation et l'adoption prochaine d'une loi fondamentale pour répondre aux demandes de toutes les personnes handicapées. On peut le lire sur: french.china.org.cn mis à jour le 30-10-2018

24 Rapport de Mme le Ministre l'éducation et de la famille et de l'inclusion sociale, lors de l'examen du rapport du Cap-Vert par le Comité des droits de l'enfant le 23 mai 2019. www.ohchr.org.

11.4 Les personnes handicapées ont-elles un droit de participation à la vie politique, représentation politique et leadership, vote indépendant etc) au Cap Vert?

La constitution capverdienne garantit à tous les citoyens majeurs, y compris les personnes handicapées, la libre jouissance de leurs droits civiques et politiques. La République du Cap-vert a également ratifié en date du 6 août 1993, le Pacte International sur les Droits Civiles et Politiques qui accorde à tout citoyen le droit de jouir pleinement et sans discrimination des droits civils et politiques.

L'article 54 alinéa 1 de la Constitution de la République capverdienne garantit à tous les citoyens le droit de participer à la vie politique, directement ou par l'intermédiaire de représentants élus librement. En son alinéa 2, sont électeurs tous les citoyens majeurs de dix-huit ans.

L'article 55 alinéa 1 stipule que tous les citoyens ont le droit d'accéder dans des conditions d'égalité et de liberté aux fonctions publiques et au mandat électif, dans les conditions établies par la loi. L'alinéa 2 précise que nul ne peut être désavantagé dans sa carrière professionnelle, son emploi ou les prestations sociales auxquels il a droit du fait qu'il occupe des fonctions publiques ou qu'il exerce ses droits politiques.

Concernant la représentation politique, il y a lieu de constater que les personnes handicapées ne sont pas encore représentées au gouvernement, bien que certaines d'entre elles se soient battues pour braver les barrières socio-culturelles, étudier, décrocher un emploi et même participer à la vie socio-économique.

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilités :

- **Femmes handicapées:**

Outre les garanties constitutionnelles et conventionnelles, la Convention sur l'Élimination de toutes les formes de Discrimination à l'égard des Femmes, le Protocole de Maputo portant sur la protection juridique des femmes en général, l'Etat partie a pensé aux mesures spécifiques protégeant les femmes y compris celles handicapées.

- **Enfants handicapés:**

La République du Cap-Vert a ratifié les instruments régionaux et Internationaux relatif aux droits de l'enfant, mais l'Etat partie n'a pas édicté une législation spécifique protégeant le droit des enfants handicapés. Cependant, le gouvernement gère des programmes éducatifs, d'emploi et thérapeutiques pour les personnes handicapées. En cela donc, les enfants handicapés physiques peuvent fréquenter des établissements d'enseignement primaire, secondaire et supérieur. Le gouvernement a apporté un soutien dans des écoles pour enfants handicapés visuels et mentaux. Le gouvernement assure aussi une prise en charge médicale pour les enfants handicapés.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattues ou prises en compte présentement dans votre pays au sujet des personnes handicapées?

Le plus grand vœu des personnes handicapées capverdiennes à l'heure actuelle serait que le Cap-Vert ratifie les conventions de l'OIT n°144 (convention sur la consultation tripartite, qui est une norme internationale du travail); celle n°102 qui traite de la sécurité sociale (normes minimales) et n°122, qui est la convention sur la politique d'emploi.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir au Cap-vert? Pourquoi?

Eu égard au droit de participation politique des personnes handicapées, l'Etat partie devrait adopter un texte législatif favorisant la participation politique de personnes souffrant de déficience mentale et rendre effective cette participation.

L'Etat serait bien inspiré de légiférer une loi pour la promotion et protection de la journée nationale des personnes handicapées

La loi sur l'aide juridique et l'assistance juridique pour garantir explicitement la gratuité totale de tous les frais d'honoraires, d'huissiers ou d'expertises, pour les recours exercés par les personnes handicapées.

Un manque criard du personnel suffisamment qualifié pour répondre aux besoins spécifiques, en particulier dans le domaine de la santé sexuelle et reproductive et du manque de matériels adaptés aux personnes handicapées. Ainsi, le gouvernement par le Ministère de la santé de combler ces lacunes par la formation, mais aussi par des campagnes publiques de sensibilisation.

SEYCHELLES

*Gerard Emmanuel Kamdem Kamga**

1 Population indicators

1.1 What is the total population of Seychelles?

According to the World Bank data, the Republic of Seychelles has almost 98 000 inhabitants, three-quarters of whom live on the main island of Mahé.¹

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

In the Seychelles, the National Council for Disabled Persons Act of 28 March 1994 provides for the promotion and protection of disabled persons. This act considers a 'disabled person' as a person suffering from a physical or mental disability on account of injury, disease, or congenital deformity.

1.3 What is the total number and percentage of people with disabilities in the Seychelles?

With regards to the percentage of people with disabilities in Seychelles, it was reported that they comprise about 3 per cent of the population in the country. The census of 2010 identified 2 169 people above the age of five with characteristics of various type of disabilities.²

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1 The World Bank in Seychelles <https://www.worldbank.org/en/country/seychelles/overview> (accessed 10 March 2022).

2 Seychelles: Initial State Party report to the Committee on the Rights of Persons with Disabilities (2015) <https://www.mindbank.info/item/6621> (accessed 30 May 2022). See also SAF Ocean Indien <https://www.safocanindien.org/les-personnes-handicapees-representent-environ-3-de-la-population-des-seychelles/> (accessed 8 November 2021).

1.5 What is the total number and percentage of women with disabilities in the Seychelles?

This information is not available.

1.6 What is the total number and percentage of children with disabilities in the Seychelles?

This information is not available.

1.5 What are the most prevalent forms of disability and/or peculiarities to disability in the Seychelles?

The answer to this question is not clear. Nonetheless it is worth noting that in January 2011 when the population of the Seychelles was estimated at 88 300 inhabitants, the number of deaf or hard of hearing people was about 600, all ages and types of deafness included.³ Back in 1981, during the International Year of the Disabled, a survey was undertaken to identify all disabled people in the country. A total of 2 908 persons were registered as disabled in this survey. In 1991 a different survey was conducted and found that the total was 732. In 1996 another survey was carried out with 1 496 people recorded. With regards to disability, it emerged that the disabled population was organised into five categories including physical, mental/intellectual impairments and/or sensory impairments (hearing, speech and vision). Out of the 1 496 people registered, an important proportion appeared to have more than one disability.⁴

2 The Seychelles' international obligations

2.1 What is the status of the United Nation's Convention on the Rights of People with Disabilities (CRPD) in the Seychelles? Did the Seychelles sign and ratify the CRPD? Provide the date(s).

The United Nation's Convention on the Rights of People with Disabilities (CRPD) in the Seychelles is not part of the domestic legislation. The Republic of Seychelles has signed the CRPD on 30 March 2007 and ratified same on 2 October 2009.

2.2 If the Seychelles has signed and ratified the CRPD, when is/was its country report due? Which government department is responsible for the submission of the report? Did Seychelles submit its report? If so, and if the report has been considered, indicate if there was a domestic effect

3 Langue des signes et administration de la justice : le cas des Seychelles. <https://www.cairn.info/revue-ela-2016-3-page-343.htm#no199> (accessed 10 March 2022).

4 'Disability in Seychelles and the National Council for the Disabled: Moving Towards Inclusion and Opportunities' *Seychelles Nation* 12 July 2008 <https://www.nation.sc/archive/220152/disability-in-seychelles-and-the-national-council-for-the-disabled-moving-towards-inclusion-and-opportunities>. (accessed 10 March 2022).

of this reporting process. If not, what reasons does the relevant government department give for the delay?

According to section 35 of the CRPD, the Republic of Seychelles had to submit its initial report within two years, that was on 2 October 2011 given that the country ratified the CRPD on 2 October 2009. Instead, the Seychelles submitted its initial report to the CRPD in 2015. The government department in charge of submitting the report is the Ministry of Social Affairs and Family Affairs.

2.3 While reporting under various other United Nations' instruments, or under the African Charter on Human and Peoples' Rights, or the African Charter on the Rights and Welfare of the Child, did Seychelles 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?

Indeed, in its third country report 2006-2019 to the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, the Seychelles made reference to the rights of persons with disabilities. On this account, the Employment Act of 1995 emphasised the consequences that may result in cases where the employer makes any employment decision such as termination of contract, disciplinary measure based on the worker's age, gender, race, colour, nationality, language, religion and disability among others.⁵ On the other hand, mention was made of disability rights in the Seychelles in the State's UN Universal Periodic Review (UPR). During the 38th session of the Working Group on the Universal Periodic Review held from 3 March to 14 March 2021, the government in Seychelles reported specifically on the rights of persons with disabilities. Under paragraph D entitled 'Persons with disabilities' reference is made about the National Strategic Framework for Disability that has been finalised; a strategic framework that revolves around the theme of 'leaving no one behind'. In the same vein, the same report portrays the extent to which provisions are made for the effective integration of children with disabilities under the special education programme. In doing so, it allows for the provision of educational programmes for students at compulsory school age who by reason of intellectual, communicative, behavioural, and physical or multiple exceptionalities, are in need of special education. To implement this particular measure, a Special Education Needs (SEN) Unit was reinstated with one Principal Education Officer for Special Needs and two Senior Education Officers.⁶ It is worth noting that in Seychelles, the government has initiated the relevant steps to further assist persons with disabilities through programmes and structures including support services provided to children, family members, health and social services professionals; the provision of psychologists, counsellors, personal support to students with visual impairments in mainstream and special education centres; and access arrangements for students during national and international exams.⁷

5 African Commission on Human and Peoples' Rights, Seychelles: 3rd Periodic Report, 2006-2019 <https://www.achpr.org/states/statereport?id=137> (accessed 10 March 2022).

6 Human Rights Council, Working Group on the Universal Periodic Review, Thirty-eighth session, 3-14 May 2021. National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Seychelles, 11 March 2021, UN Doc A/HRC/WG.6/38/SYC/1 (2021) <https://www.ohchr.org/en/hr-bodies/upr/sc-index> (accessed 10 March 2022).

7 As above.

In terms of observations, the Committee on the Rights of Persons with Disabilities raised issues about the delays in the review, repeal and amendment of existing domestic legislation that was contrary to the Convention on the Rights of Persons with Disabilities and lack of a specific act or resolution for the domestication of the Convention. It went on to recommend to the government of Seychelles to expedite efforts to review all legislation and policies to harmonise them with the Convention, to promote a human rights model for disability and discard the use of all derogatory language in laws and when referring to persons with disabilities; the Committee further recommended to the government to amend the National Council for Disabled Persons Act (1994) to ensure that disabled persons through their representative organisations, were included at all levels of legislative and policy formulation.⁸ The effect of these observations/recommendations place the state in front of its responsibilities in terms of the promotion and protection of the rights of persons with disabilities. It is in light of such recommendations that relevant steps have been initiated by Seychelles, notably the completion of the National Strategic Framework for Disability that leaves no one behind as well as reforms in education and other sectors.

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

Seychelles ratified the African Charter on Human and Peoples' rights on 13 April 1992. Since then the key effect is that the country is a state party to the African Charter. With regards to international agreements ratified by Seychelles, section 64(4) of the Constitution of Seychelles of 1993 provides that a treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by an Act or a resolution passed by the votes of a majority of the members of the National Assembly. The subsequent paragraph reads that clause (4) shall not apply where a written law confers upon the President the authority to execute or authorise the execution of any treaty, agreement, or convention. One can assume that the ratification of the African Charter in 1992 implies the incorporation of this treaty within the body of the domestic law; even though it is not clear which authority completed such ratification.

With regard to the question as to whether the courts of Seychelles ever considered this question, no information is available.

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

It is difficult to say whether the United Nations' CRPD or any other ratified international instrument has been domesticated by Seychelles. The reason is that so far, the key document dealing with the rights of persons with disabilities remains the National Council for Disabled Persons Act of 28 March 1994 relating to the promotion and protection of disabled persons. This Act was enacted prior to the

⁸ As above.

United Nations' CRPD and therefore it is unlikely that the Act complies with the principles of the CRPD.

3 Constitution

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

Indeed, the Constitution of the Seychelles contain provisions that directly address disability. Under the paragraph entitled 'State support for the disabled' section 36 read as follows:

The State recognises the right of the aged and the disabled to special protection and with a view to ensuring the effective exercise of this right undertakes –

- a. to make reasonable provision for improving the quality of life and for the welfare and maintenance of the aged and disabled;
- b. to promote programmes specifically aimed at achieving the greatest possible development of the disabled.

This provision confirms the extent to which a particular category of groups especially the elderly and the disabled can be vulnerable. To prevent such vulnerability, the state commits to provide them with special protection not only when it comes to the quality of their life but also through the implementation of policies and programmes that will enable their full development.

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

It can be said that the Constitution of the Seychelles contains provisions that indirectly address disability. Section 27 provides that every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society. The expression 'every person' means that the equal protection of the law is applicable to all irrespective of the status, sex, language, religion or disability.

4 Legislation

4.1 Does the Seychelles have legislation that directly addresses issues relating to disability? If so, list the legislation and explain how the legislation addresses disability.

As previously mentioned, the key document framing issues of disability in the country is the National Council for Disabled Persons Act of 28 March 1994. This legislation was designed solely for the promotion and protection of disabled

persons. It considers a 'disabled person' as a person suffering from a physical or mental disability on account of injury, disease, or congenital deformity.

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

Indeed, a number of laws indirectly address issues pertaining to disability in this country. Then section 26 of the Children Act on assumption of parental rights by the Director provides that if it appears to the Director in relation to a child who is in his care under section 25 that his parents are dead and he has no guardian; or a parent or guardian of his suffers from some permanent disability rendering the parent or guardian incapable of caring for the child then the Director can assume parental rights.⁹ Another law that indirectly frames disability is the Civil Code. Under Section VI entitled 'Exemption from guardianship', article 427 provides as follows:

Certain persons holding certain offices or subject to certain disabilities may be exempted from acting as guardians. Except in the case of disabilities, no one shall be deprived without good cause of his right to be a guardian of his own children.¹⁰

In the same vein article 2127 provides in case of a conventional mortgage to be executed in the presence of a notary, that if the inability to execute such instrument is due to physical disability the party shall declare or acknowledge his assent in the presence of the notary and two witnesses.¹¹ Similarly, under the section dedicated to 'The grounds upon which prescription is suspended', article 2252 mentions that prescription shall only run against minors or interdicted persons if, for a minor within two years of reaching majority and for the interdicted person within the two years from the removal of the disability, they or their representatives exercise their rights over the property subject to prescription.¹²

The penal Code of the Seychelles is also a law that indirectly address issues of disability. Article 219 on 'Acts intended to cause grievous harm or to prevent arrests' provides that any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person will be guilty of a felony, and is liable to imprisonment for life.¹³

Similarly, the Employment Act of 1998 in its article 44 allows a competent officer to provide a disabled person seeking employment with a permit exempting his or her employer from providing the minimum wage and other increments and benefits described in article 40. In the same vein, the 1987 Social Security Law has provisions on persons with disabilities. This Act provides a framework where persons with disabilities, whether employed or not, are taken care of.

9 Children Act of 15 July 1982 <https://seylil.org/akn/sc/act/1982/16/eng@2016-07-11> (accessed 3 April 2022)

10 Civil Code of Seychelles Act of 1 January 1976 <https://seylil.org/akn/sc/act/1976/13/eng@2015-12-31> (accessed 3 April 2022).

11 As above.

12 As above.

13 The Penal Code of 1 February 1955 <https://seylil.org/akn/sc/act/1952/12/eng@2020-06-01> (accessed 3 April 2022).

5 Decisions of courts and tribunals

- 5.1 Have the courts (or tribunals) in Seychelles 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.**

This information is not available.

6 Policies and programmes

- 6.1 Does the Seychelles have policies or programmes that directly address disability? If so, list each policy and explain how the policy addresses disability.**

For the past years, Seychelles has been working on a National Policy and Plan of Action on Disability. At the time of submitting its initial report in 2015 the National Policy was validated by stakeholders and a second draft of the National Plan of Action was finalised for consultation with relevant stakeholders. The following is an extract from the introduction to such National Policy:

This first National Policy on Disability of the Government of Seychelles is aimed at addressing the barriers that have been preventing persons with disabilities from reaching their full potential. It recognises that whilst a lot has been done to give persons with disabilities opportunities a lot still remains to be done to meet the aspirations of the Seychellois disabled population and attain full compliance to the CRPD.¹⁴

- 6.2 Does the Seychelles have policies and programmes that indirectly address disability? If so, list each policy and describe how the policy indirectly addresses disability.**

There are a few available policies that indirectly address disability in the Seychelles. The Inclusive Education Policy of 2015 is one of these documents. Under the section dedicated to the Overview of Inclusive Education and National Development, paragraph 1.1.4 reads as follows:

- i. Mainstream schools are accessible to children with disabilities and teachers are equipped with the necessary skills to work with children with disabilities (*Article 9*).
- ii. Education policies that clearly articulate the types of provision necessary for children with disabilities are in place and have access to appropriate adaptive aids/equipment which will facilitate their learning (*Article 24*).
- iii. Data is available on the numbers of children with disabilities in educational institutions and monitoring and evaluation systems are in place (*Article 31*).¹⁵

Another policy that indirectly addresses disability in the Seychelles is the National Policy for Open and Distance Learning published in 2015. It came to replace the

¹⁴ Seychelles: Initial State Party Report (n 2).

¹⁵ UNESCO 'Seychelles' <https://education-profiles.org/sub-saharan-africa/seychelles/~inclusion#School%20Organization> (accessed 26 April 2022).

National Distance/Open Learning Policy launched in 2003. Under the section entitled guiding Principles and Values, paragraph 2.5.4 on equity provides that Open and Distance Learning providers shall ensure the enhancement of the conditions for optimum achievement by every individual or groups, including the gifted, the slow learner and the learning disabled; and for both genders to succeed.

7 Disability bodies

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

There exists in the Seychelles the National Council for Disabled Persons, an entity in charge of the promotion and protection of the rights of the disabled. As a body, article 4(1) provides that the Council shall consist of not more than ten members, appointed by the Minister, from amongst persons who, in the opinion of the Minister, represent the organisations connected with matters relating to disabled persons. With regard to its functions, article 5(1) of the above mentioned 1994 Act outlines the following:

5.(1) The functions of the Council are –

- (a) to co-ordinate the activities of public or private organisations and other persons engaged in the welfare of disabled persons;
- (b) in collaboration with public or private organisations and other persons -
 - (i) to provide care and assistance to disabled persons;
 - (ii) to promote, develop and organise services and programmes for rehabilitation and employment of disabled persons;
 - (iii) to provide and secure employment for disabled persons;
- (c) to cooperate with public or private organisations and other persons in furtherance of the welfare of disabled persons;
- (d) to assist public or private organisations and other persons in promoting and organising projects and income generating activities for the benefit and welfare of disabled persons;
- (e) to advise the Government on education, sports, training programmes, employment and vocational training courses for disabled persons;
- (f) to assist public or private organisations and other persons in organising sporting activities for disabled persons;
- (g) to assist in the provision of facilities considered by the Council to be necessary or desirable for the welfare of disabled persons;
- (h) to undertake any other activities in furtherance of the functions of the Council.

7.2 **Other than the ordinary courts or tribunals, does the Seychelles have any official body that though not established to specifically address the violation of the rights of persons with disabilities, can nonetheless do so? If so, describe the body, its functions and its powers.**

This information is not available.

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

- 8.1 Does the Seychelles 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 persons with disabilities? If your answer is yes, also indicate whether the Human Rights Commission, Ombudsman or Public Protector of the Seychelles has ever addressed issues relating to the rights of persons with disabilities.**

There exists in the Seychelles both a Human Rights Commission and an Ombudsman. The Human Rights Commission is a self-governing, neutral and independent national human rights institution, being a statutory authority, whose role is to promote and protect human rights. The institution was established to carry out its mandate under the Seychelles Human Rights Commission Act 7 of 2018 (the Act). Given that the role of this body is to promote and protect the rights of everyone, it is obvious that its mandate also includes the protection of the rights of people with disabilities. There is no available information as to know whether the Human Rights Commission of the Seychelles has ever addressed issues relating to the rights of persons with disabilities.¹⁶

The Office of the Ombudsman is established by the Constitution of the Republic of Seychelles 1993 in articles 143 and 144. The Ombudsman is appointed by the President from candidates nominated by the Constitutional Appointments Authority and serves a term of seven years which is renewable. Schedule 5 of the Constitution defines the powers of the Ombudsman. The Ombudsman may investigate any public authority up to and including the President (Schedule 5, 1(1)(a)). The investigations include complaints of violations of fundamental human rights and allegations of corruption by public officials (Schedule 5, 1(1)(b); 1(2)(a)). Schedule 5 also places restrictions on what may be investigated.¹⁷

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

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

In the Seychelles, there are indeed organisations that represent and advocate for the rights and welfare of persons with disabilities. The Seychelles Disabled Persons Organisation (SDPO) is one of these organisations. It is a network of national organisations or assemblies of disabled people, established to promote human rights of disabled people through full participation, equalisation of opportunity and

16 Seychelles Human Rights Commission 'Who we are' <https://www.seychelleshumanrights.com/index.php/about-us/who-we-are> (accessed 26 May 2022).

17 Seychelles: Office of the Ombudsman <https://www.eisa.org/wep/seagency.htm> (accessed 26 May 2022).

development.¹⁸ The goal of this organisation is to promote the human rights of disabled persons, promote economic and social integration of disabled persons and develop and support organisations of disabled persons.¹⁹ It is mentioned that people with disabilities in the country are able to associate and collectively identify needs and priorities to participate in the planning, implementation and evaluation of services and measures concerning the lives of persons with disability. Various organisations that promote and protect the rights of disabled persons provide their members the opportunity to develop skills in various fields and provide mutual support among members.²⁰ In addition to the Seychelles Disabled Persons Organisation (SDPO), many other NGOs dedicated to the promotion and protection of the rights of the disabled are listed under LUNGOS; the national NGO platform. These include Association for the Hearing Impaired (APHI), Faith and Light (church based) Blind Association, Parents of Disabled Association (PODAS), and Special Olympics.²¹

9.2 In the countries in the Seychelle's region (Indian Ocean) are DPOs organised/coordinated at national and/or regional level?

Disabled People's Organisations in the Indian Ocean appears to be largely organised at national levels. In the case of the Seychelles, except the Seychelles Disabled Persons Organisation (SDPO) that is a network of national organisations or assemblies of disabled people, DPOs in the country seem to be organised on a cluster basis, that is, according to the different categories of disabilities. This information derives from the list of other DPOs listed under the national NGO platform such as the Association for the Hearing impaired (APHI), Faith and Light (church based) Blind Association, Parents of Disabled Association (PODAS) and others.

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

It is clearly mentioned that the government consulted with people with disability and other entities involved in disability in the course of supporting and then ratifying the Convention. This has included the participation of NGOs and associations which represent people with disability.²²

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

This information is not available. Nonetheless, given that the goal of a DPOs such as for instance the Seychelles Disabled Persons Organisation (SDPO), a network of national organisations of disabled people to promote the human rights of disabled people through full participation, equalisation of opportunity and development one can imagine that these actions can be done through advocacy and awareness campaigns.

18 Seychelles Disabled People's Organization SDPO <https://wiser.directory/organization/seychelles-disabled-peoples-organization-sdpo/> (accessed 26 May 2022).

19 As above

20 Seychelles: Initial State Party Report (n 2).

21 As above.

22 As above.

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

As emphasised in the Seychelles 2020 Human Rights Report, although the Constitution and law provide for special protections for persons with physical, sensory, intellectual, and mental disabilities, including reasonable provisions for improving the quality of life, no laws address access to public buildings, transportation, or government services, and the government did not provide such services.²³ Added to this, the DPOs do not have enough funding to achieve their objectives.

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

This information is not available.

9.5 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?

It is observed that before the ratification of the Convention, the government sought wide input from disability organisations, the disabled community and service providers on the principles enshrined in the Convention. At the time, emphasis was then placed on the promotion and sensitisation of the population on the rights of persons with disabilities. A gradual change in mindset has been forthcoming through a gradual embracing of the social model of disability.²⁴

9.6 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?

This information is not available.

9.7 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?

It emerged from this research that DPOs in the Seychelles require seasoned experts in the field to help achieving their goals notably by engaging and networking with the government. As a result, capacity building is required to allow DPOs to make the relevant impact through their involvement with the implementation process. DPOs in the Seychelles need to be further organised and be more visible notably on the internet. It was difficult to gather information about them and what they do as they do not have a website to communicate on their activities. It is imperative to build the capacity of DPOs in the Seychelles and relevant government departments

23 Seychelles 2020 Human Rights Report <https://www.state.gov/wp-content/uploads/2021/03/SEYCHELLES-2020-HUMAN-RIGHTS-REPORT.pdf> (accessed 8 June 2022).

24 Seychelles: Initial State Party Report (n 2).

and civil society organisations for disability mainstreaming at all levels of legislative, budgetary and governmental action should play a role.

It is important facilitate advocacy on and popularisation of the ADP and MDL through organisations of persons with disabilities, CSO, CBOs and other stakeholders for the signing and ratification of the Protocol to the ADP and domestication of the MDL.

9.8 Are there specific research institutes in the region where the Seychelles is situated (Indian Ocean) that work on the rights of persons with disabilities and that have facilitated the involvement of DPOs in the process, including in research?

No such institutions were found.

10 Government departments

10.1 Does the Seychelles 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 Ministry of Social Affairs and Family Affairs is the government department in charge of protecting and promoting the rights and welfare of persons with disabilities. In terms of its mission, the ministry of Social Affairs and Family Affairs enhances social functioning at all levels of society by promoting, empowering and supporting the functions and responsibilities of individuals and families. This Ministry aims at offering family support services especially for children, elderly and disabled. This government department is the parent Ministry to 3 Councils and one Agency that include the National Council for Children, National Council for the Elderly, National Council for the Disabled and Agency for Social Protection.²⁵ Finally, regarding its mandate, the Ministry of Social Affairs and Family Affairs of the Seychelles aims to offer intervention and counselling services to support child protection. It further offers alternative care which can be adoption, foster care, children in residential care or night shelter.²⁶

25 Ministry of Social Affairs and Family Affairs https://www.seybusiness.com/Ministry_of_Social_Affairs_and_Family_Affairs/2944 (accessed 15 June 2022).

26 As above.

11 Main human rights concerns of people with disabilities in the Seychelles

11.1 Describe the contemporary challenges of persons with disabilities, and the legal responses thereto, and assess the adequacy of these responses.

The lack of comprehensive legislation to promote and protect the right of persons with disabilities remains a key challenge in the realisation of the rights of persons with disabilities in the Seychelles. In addition to this, the lack of a proper national policy on disability contributes to the challenges experienced by the disabled. As previously mentioned, the country's human report for the year 2020 outlines some of such challenges. Reference is made to the fact that although the Constitution and law provide for special protections for persons with physical, sensory, intellectual, and mental disabilities, including reasonable provisions for improving quality of life, no laws address access to public buildings, transportation, or government services, and the government did not provide such services.²⁷ Some of these challenges also emerged from the Seychelles' initial report which portrayed the extent to which many people with disabilities experience poorer outcomes in health, education, employment as well as constraints in the attitudes of some people, who see them as less than equal.²⁸ There are also physical and environmental barriers that continue to limit the development and participation of persons with disabilities and the lack of data on this group of the population remain a major impediment to progress in this area.²⁹

11.2 Do persons with disabilities have a right to participation in political life (political representation and leadership) in the Seychelles?

In the Seychelles, article 14 of the Constitution provides as follows:

A person who is a citizen of Seychelles and has attained the age of eighteen years is entitled to be registered as a voter unless the person is disqualified from registration under an Act on the ground of:

- (a) Infirmary of mind;
- (b) Criminality; or
- (c) Residence outside of Seychelles.

From this provision, it can then be observed that in Seychelles the disabled have the same right to vote as everyone else. Their right to participation in political life is reinforced by the fact that additional assistance is needed during election times. Such assistance 'includes having someone to assist them when they cast their vote and making available transportation, mobility aids and making reasonable accommodation where necessary'.³⁰ Despite these clarifications, it is worth noting that on the ground, persons with disabilities in the country are grossly underrepresented in political and public life. There are no programmes available aimed at encouraging persons with disabilities to take up civil roles.³¹

27 Seychelles 2020 Human Rights Report (n 20).

28 Seychelles: Initial State Party Report (n 2).

29 As above.

30 Seychelles: Initial State Party Report (n 2).

31 As above.

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

Even if there is no section or chapter in the Seychelles' Constitution dedicated to socio-economic rights as a whole, there are articles that focus on rights that belong to this specific category. With regard to education, article 33 observes that the State recognises the right of every citizen to education. The state is committed to providing 'compulsory education, which shall be free in State schools for such minimum period, which shall not be less than ten years, as may be prescribed by law'. The expression 'every citizen' means that disable education is open to everyone including persons with disabilities who should not be left behind. Within this context, article 15(1) of the Education Act of 2004 on Special Education provides that 'the Minister shall provide special education programmes for learners of compulsory school age, who, by reason of intellectual, communicative, behavioural and physical or multiple exceptionalities, are in need of special education'. At the time of its initial report in 2015 Seychelles made reference to the establishment of 33 government pre-schools or crèches, located next to the 23 district primary schools, and 10 secondary schools.³² It was also observed that most children with disabilities attend the School for the Exceptional Child, a mixed disability school. The same report went on to observe that Seychellois with disabilities have equal rights of access to education, including in the early childhood, secondary and tertiary but the reality is that very few children with disabilities complete the full cycle of mainstream education owing to barriers of physical access and barriers in perceptions and attitudes.

Concerning the right to health, article 34 of the Constitution provides that the State recognises the right of every citizen to adequate and decent shelter conducive to health and well-being and undertakes either directly or through or with the co-operation of public or private organisations to facilitate the effective realisation of this right. In the same vein, as emphasised in the National Strategic Plan, 2006-2016 by the Ministry of Health, the National Health Policy in the country is based on the principle of 'Health for all and Health by all'. The Primary Health Care remains the key to attaining the goal of health for all and it forms an integral part of the national health system. During its initial report, reference was made to the government's strategy that is to ensure that healthcare services are accessible to all Seychellois and that access is based on need and not ability to pay.³³ In fact, the Primary Health Care is available free of charge. The government funds a comprehensive range of personal health services, including mental health services, sexual and reproductive health services and health information, for both disabled and non-disabled people. Similarly, free immunisation programmes for all children, to prevent illnesses which could result in secondary disabilities are also free of charge.

In terms of challenges, it is worth noting that public health campaigns do not cater for different types of disability. As a result, addressing multiple impairments remains a concern. More importantly, the health sector is one sector that is burdened by limitations in qualified human resources.³⁴ It is observed that accessible health services and health information is a major challenge. Whilst there is a reasonable understanding about wheelchair and ambulatory mobility issues, there is less of an understanding about barriers that are faced by people with intellectual, mental or sensory disabilities.³⁵

32 As above.

33 As above.

34 As above.

35 As above.

With regard to other social services, it has to be noted that in Seychelles, the Social Welfare System aims to ensure that all Seychellois enjoy an adequate standard of living. In so doing, attention is given to those who are considered as less fortunate to ensure that they do not live in poverty. The range of benefits and services provided that directly or indirectly benefit Seychellois families include old age pensions, sickness benefits and special assistance programmes for disadvantaged groups, such as the chronically ill, and persons with disabilities.³⁶ It is within this framework that benefits are provided to people who are unable to work due to disability. In the same vein specialised supplementary income assistance is provided to assist people with disability who face additional costs of living.³⁷

When it comes to challenges, reducing the dependency on the social benefits system remains a concern. Persons with disability who can gain employment refrain from doing so owing to the fact that once they enter the world of work, their benefit is discontinued as per the provisions of the Social Security Act. In addition, access to employment is mostly to low paying jobs hence these people see little benefit to gaining employment and therefore prefer to remain at home and access social benefits.³⁸

11.4 Case studies of specific vulnerable groups

This information is not available.

12 Future perspective

12.1 Are there any specific measures with regard to persons with disabilities being debated or considered in the Seychelles at the moment?

As echoed in its Initial Report, the reality in the Seychelles is that very often in the home persons with disabilities are discouraged by parents, relatives or guardians who fear for their safety and adopt the view that they should be protected and prevent them from trying out the world of work and remain dependent on the welfare system. Changing this mindset is one of the activities that is being focused on by the Council in its sensitisation programmes and on a one-to-one basis.³⁹

12.2 What legal reforms would you like to see in the Seychelles? Why?

Seychelles has ratified the CRPD but not its Optional Protocol. Time has come for authorities to enact a genuine domestic legislation that complies with the provisions of the CRPD. This will provide a conducive environment allowing a genuine promotion and protection of persons with disabilities.

36 As above.

37 As above.

38 As above.

39 As above.

RÉPUBLIQUE FÉDÉRALE DE SOMALIE

Marianne Severin*

Summary

According to the World Bank (WB), the Federal Republic of Somalia population is estimated in 2020 at a total of 15 893.13 inhabitants. According to the 2020-2023 roadmap of the Ministry of the Promotion of Women and Human Rights, the percentage of people with disabilities in Somalia is over 15 per cent of the total population. The Federal Republic of Somalia does not provide information on common forms of disability; there are still no databases due to the lack of a census. Somalia signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 2 October 2018 and 6 August 2019 respectively. It did not sign and ratify the Optional Protocol, however. The Federal Republic of Somalia has not submitted any report, although it was due in September 2021. The reasons for the delay may be related to the Covid-19 pandemic.

According to article 35 of the 2012 Constitution of Somalia, international agreements apply directly in domestic courts, which is the monist approach to international laws. The ratification of the CRPD meant its incorporation into the legislation of Somalia; the Law N° 134 creating the National Disability Agency (NDA) was promulgated in December 2018 and the Disability Bill drafted in 2019.

The Constitution of Somalia contains provisions directly relating to persons with disabilities. According article 11 there is an equality between all citizens independently of their gender, religion (...) disability. No person shall be discriminated against based on (...) disability. In addition, the Constitution indirectly addresses disabilities through its article 12 which states that it is the State's responsibility to ensure that it does not violate rights through its actions, and makes reasonable decisions to protect the rights of any person from abuse by others. Furthermore, article 13 states that everyone has the right to life, and article 27

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provides for socioeconomic rights such as a right to care. No one can be deprived of urgent care whatever the reason, including the lack of economic means. Somalia has numerous pieces of legislation that directly addresses disability. The key ones are:

- *Law 134 of 31 December 2018 creating the National Agency for Persons with Disabilities which is 'mandated under paragraph 5(2)(e) to oversee the delivery of services, including social services for persons with disabilities'.*
- *Article 2 of the Provisional Constitution sets out 14 grounds of discrimination including disability.*
- *Article 27(5) recognises that persons with disabilities who have long suffered from discrimination must have the necessary support to realise their socio-economic rights.*
- *The Ministry of Women and Human Rights drafted a disability law. This law is in its final phase of public consultation. Participants in this consultation process included persons with disabilities, representatives of civil society organisations and the Somali Bar Association.*

We did not find any case law in Somalia. However, the policies that directly address persons with disabilities are:

- *Roadmap 2020-2023 – Persons with disabilities and disability rights in Somalia. Following an audit on the implementation of a first roadmap, 2017-2019, this programme develops new issues, not foreseen in the previous one.*
- *Development of a national social protection policy by the Ministry of Labour and Social Affairs (18 July 2019). Its implementation (17 September 2019) aimed at establishing an inclusive social protection system that meets the needs of employable people with disabilities, to combat poverty and social exclusion. Social service programmes are thus planned and will consider existing policies, rights stipulated in the Constitution and laws.*
- *Better protection and management of people with mental and mental disabilities:*
 - a) *In response to allegations of mistreatment of these persons, the Government launches criminal investigations into the private institutions in charge of these persons with disabilities. The National Disability Agency will now be responsible for monitoring their living conditions.*
 - b) *Creation of a toll-free telephone number for reporting abuse of persons with disabilities.*
 - c) *Provision of legal defense for persons with mental and mental disabilities, by the Penal Code.*

Other than ordinary courts or tribunals, the Federal Republic of Somalia has an official body that specifically addresses the violation of the rights of persons with disabilities; the National Disability Agency whose role is to file a criminal complaint against any public and private entity that violates the rights of people with disabilities. Somalia has a National Human Rights Commission (NHRC). Its mandate includes the protection of disability rights. The NHRC has a broad mandate that includes monitoring the human rights situation in Somalia, investigating human rights violations, including torture or cruel, inhuman, or degrading treatment or punishment, and an advisory mission to the Government on the integration of human rights into legislation and policies. There are numerous organisations that represent and advocate for the rights and welfare of persons with disabilities in Somalia. These include Somali Union for the Blind (SUB), Somali Disability Empowerment Organization (SODEN), SAFDI Somalia Association

Female Disability, Somali Women Development Centre (SWDC), Somali National Association for the Deaf (SONAD). These organisations contribute to the promotion of disability rights through awareness-raising. To improve their efficiency, they need to organise themselves in a national federation and improve their capacity through training including on disability and financial subventions. In the Federal Republic of Somalia, the Ministry of the Promotion of Women and Human Rights is initiated a comprehensive process to allow Somalia to overcome its delay in reporting to conventional bodies, due to the country's protracted civil war. The Ministry for the Promotion of Women and Human Rights and other line ministries are working on comprehensive legislation and policies for the protection of people with mental disabilities. The NDA (Law 134 of 31 December 2018) is responsible for removing barriers faced by persons with disabilities, holding the Government accountable for the protection of the rights of persons with disabilities, and ensuring the effective participation of persons with disabilities in all aspects of society; notably in the areas of governance and development.

People with mental disabilities are very often victims of ill-treatment in private and public institutions. In view of the increasing number of allegations of ill-treatment, the State has launched criminal investigations against these institutions. The NDA is now responsible for monitoring the living conditions of these people with disabilities. In addition, a free telephone number has been created to report any mistreatment against them. Finally, persons with a mental disability now have a specific legal defense under the Criminal Code. A person who 'does not possess the capacity for understanding and willpower' at the time of the commission of an offence should not be punished for an act constituting a crime. As a result, these individuals are not detained for offences committed because they are not found guilty. Although there are some good laws to foster disability rights, it is imperative that they are implemented if they are to make a difference in the protection of disability rights. A special attention should be called for women, girls, children as well as elderly people with disabilities. Moreover, the Federal Republic of Somalia has a duty to carry out a census of its population in general and of the population with disabilities in order to obtain precise data broken down by age, sex, region, and category of disability.

1 Les indicateurs démographiques

1.1 Quelle est la population totale de la République fédérale de Somalie?

Selon la Banque Mondiale, la population somalienne est évaluée en 2020 à un total de 15 893 13 habitants.¹

1.2 Méthodologie employée en vue d'obtenir des données statistiques sur la prévalence du handicap en République fédérale de Somalie. Quels sont

¹ Banque Mondiale, Population, total – Somalia, 2022 <https://donnees.banquemondiale.org/indicateur/SP.POP.TOTL?locations=SO> (consulté le 22 march 2022).

les critères utilisés pour `déterminer qui fait partie de la couche des personnes handicapées en République fédérale de Somalie?

La feuille de route 2017-2019 a identifié la nécessité de mener le recensement de la population somalienne qui informerait sur le nombre et les pourcentages de personnes en situation de handicap, ventilé par sexe, âge, catégorie de handicap et région.²

Il est d'ailleurs demandé au gouvernement un budget pour la collecte de données ventilées dans le cadre du recensement national, incluant les personnes en situation de handicap.³

1.3 Quel est le nombre total et le pourcentage des personnes handicapées en République fédérale de Somalie?

Selon la feuille de route 2020-2023 du ministère de la Promotion de la femme et des droits de l'homme, le pourcentage de personnes en situation de handicap en Somalie serait supérieur à 15% sur l'ensemble de la population.

La longue période de conflit et d'insécurité, de pauvreté, de violence et d'absence de soins médicaux ont impacté de manière disproportionnée les personnes en situation de handicap et ont augmenté l'incidence des handicaps en Somalie (...).⁴

1.4 Quel est le nombre total et le pourcentage des femmes handicapées en République fédérale de Somalie?

Information non disponible.

1.5 Quel est le nombre total et le pourcentage des enfants handicapés en République de Somalie?

En réponse à la liste de points concernant le rapport initial de la Somalie devant le Comité des droits de l'enfant.⁵

Selon les résultats de l'évaluation, les enfants handicapés représentaient 18 % à 20 % de la population nationale, et la majorité d'entre eux avaient un handicap physique. Les déficiences visuelles et auditives étaient également courantes, de même que les troubles mentaux. La plupart des handicaps étaient postérieurs à la naissance, et principalement dus à l'absence de services de santé appropriés pour les mères enceintes, aux explosions et aux blessures survenues au domicile.⁶

2 The Ministry of Women and Human Rights Development Federal Republic of Somalia 'Road Map 2020-2023 – Persons with disabilities and disability rights in Somalia' (September 2020) <https://mwhrd.gov.so/en/wp-content/uploads/2020/09/Disability-Roadmap-2020-2023-1.pdf> 1 (consulté le 22 march 2022).

3 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 6 and 7.

4 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 1: 'The long period of conflict and insecurity, poverty, violence, and lack of access to healthcare have disproportionately impacted on persons with disabilities and have increased the incidence of disabilities in Somalia'.

5 Comité des droits de l'enfant, « Liste de points concernant le rapport initial de la Somalie », CRC/C/SOM/Q/1, 19 mars 2020, 4 (Données, statistiques et autres informations, si disponibles – 17) Type de handicap & nombre d'enfants handicapés] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSOM%2fQ%2f1&Lang=fr (consulté 12 avril 2022).

6 Comité des droits de l'enfant (n 5) 11.

1.6 Quelles sont les formes de handicap les plus répandues en République fédérale de Somalie?

Il n'existe pas encore de bases données sur les formes de handicap les plus répandues en République fédérale de Somalie, dû à l'absence de recensement.

2 Obligations internationales

2.1 Quel est le statut de la Convention des Nations Unies relative aux Droits des Personnes Handicapées (CDPH) en République fédérale de Somalie? La République fédérale de Somalie a-t-il signé et ratifié la CDPH? Fournir le(s) date(s). La République fédérale de Somalie a-t-il signé et ratifié le Protocole facultatif? Fournir le(s) date(s).

La République fédérale de Somalie a signé la Convention Relative aux Personnes Handicapées (CDPH), ainsi que son Protocole facultatif, le 2 octobre 2018. Les CDPH et Protocole facultatif ont été ratifiés le 6 août 2019.⁷

2.2 Si la République fédérale de Somalie 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 fédérale de Somalie 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 fédérale de Somalie était tenue de soumettre son rapport initial le 6 septembre 2021.⁸ La République fédérale de Somalie n'a soumis aucun rapport. Les raisons du retard pourrait être liées au contexte de pandémie.

2.3 Si la République fédérale de Somalie 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 fédérale de Somalie. 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 fédérale de Somalie a-t-elle également fait mention

7 United Nations Human Rights Treaty Bodies 'UN body database' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=161&Lang=en (consulté le 22 mars 2022).

8 Comme ci-dessus.

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 fédérale de Somalie? Si oui, quels étaient les effets de ces observations ou recommandations?

Comité contre la torture

La République fédérale de Somalie, conformément à l'Art. 19 de la Convention contre la torture et autres peines ou traitements cruels, inhumains et dégradants, a soumis son rapport initial le 16 décembre 2019; ce dernier était attendu en 1991.⁹

La République fédérale de Somalie « fait état de mauvais traitements et de violence sur des personnes souffrant de troubles mentaux et/ou physiques dans des établissements de santé mentale ». Le gouvernement reconnaît qu'il est de son devoir de régler « ce problème et de veiller au respect des personnes handicapées, notamment celles souffrant de troubles mentaux ». ¹⁰ Sous la responsabilité du ministère de la Promotion de la femme et des droits de l'homme, le gouvernement est en train de mettre en place l'Agence Nationale du Handicap dans le but de protéger les droits des personnes en situation de handicap, dont celles atteintes de troubles mentaux. ¹¹ Une « loi-cadre sur le handicap est en cours ». ¹²

Pour finir, une législation et des politiques globales de protection des personnes atteintes de handicap mental sont en cours d'élaboration. Enfin, une collaboration étroite entre le Ministère de la promotion de la femme et des droits de l'homme et les établissements de santé et de santé mentale sera développée afin de « veiller à ce leurs personnels soient formés au respect des protocoles en vigueur ». ¹³

C'est un tel contexte que la République fédérale de Somalie a ratifié la Convention relative aux droits des personnes handicapées en août 2019.

Comité des droits de l'homme

À la suite de la liste de points établie avant la soumission du rapport initial de la Somalie, se rapportant aux personnes handicapées (art. 2, 7, 9, 10 et 26), ¹⁴ la République fédérale de Somalie a fait mention spécifique du Droit des personnes en situation de handicap dans son rapport publié le 18 octobre 2020 (dû initialement en 1991, puis date d'échéance au 9 avril 2021). ¹⁵

9 Comité contre la torture, « Rapport de l'Etat partie », 16 décembre 2019, CAT/C/SOM/1, 1 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSOM%2f1&Lang=fr (consulté le 10 avril 2022).

10 Comité contre la torture (n 9) 12.

11 Comme ci-dessus.

12 Comité contre la torture (n 9) 2.

13 Comme ci-dessus

14 Comité des droits de l'homme, « Liste de points établie avant la soumission du rapport initial de la Somalie », 5 mai 2020, CPR/C/SOM/QPR/1 (2020) 2 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSOM%2fQPR%2f1&Lang=fr (consulté 11 avril 2022)

15 Comité des droits de l'homme 'Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021' 18 October 2020, UN Doc CCPR/C/SOM/1 (2020) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSOM%2f1&Lang=fr (consulté 11 avril 2022).

La République fédérale de Somalie fait état de la ratification de la CDPH le 6 août 2019 et de la responsabilité du ministère de la Promotion de la femme et des droits de l'homme pour les questions sur les droits des personnes en situation de handicap, de la rédaction d'un projet de loi sur le handicap (2019).

Le projet de loi [étant] actuellement aux dernières étapes des consultations publiques nationales. Les participants au processus de consultation comprennent des personnes handicapées, des représentants d'organisations de la société civile et de l'Association du Barreau somalien.¹⁶

L'art. 18 du projet de loi mentionne le droit à l'égalité et à la non-discrimination des personnes en situations de handicap; elles doivent donc bénéficier de la même protection et des mêmes avantages en vertu de la loi sans être discriminées. Toute discrimination fondée sur le handicap doit être bannie tant dans la sphère publique que privée. Le gouvernement a le devoir de garantir aux personnes en situation de handicap l'accès à l'éducation et à l'emploi dans les secteurs privé et public.¹⁷ Le gouvernement prendra « des mesures pour atténuer les effets de la discrimination exercée par les parents, les conjoints, les enfants, les membres de la famille ou les aidants naturels de la personne handicapée ». ¹⁸

Prévision de mesures punitives contre les discriminations à l'égard des personnes en situation de handicap. Ces dernières peuvent également demander un recours pour faire valoir leurs droits. Enfin, le projet de loi « confère à la Commission des droits de l'homme la responsabilité première d'enquêter sur les violations présumées des droits des personnes en situation de handicap ». ¹⁹

Création d'une Agence nationale des personnes handicapées à la suite « de la promulgation de la Loi n° 134 de l'Agence nationale des personnes handicapées du 31 décembre 2018 ». ²⁰

Comité pour l'élimination de la discrimination à l'égard des femmes

La République fédérale de Somalie n'a rendu aucun rapport au Comité pour l'élimination de la discrimination à l'égard des femmes.

Comité de droits économiques, sociaux et culturels

La République fédérale de Somalie n'a rendu aucun rapport au Comité de droits économiques, sociaux et culturels. La date d'échéance était au 30 juin 1992.

Comité des droits de l'enfant

Dans son rapport initial soumis en application de l'article 44 de la Convention, attendu en 2017,²¹ la République fédérale de Somalie a répondu que la loi sur le handicap est en cours. Qu'en matière de « Handicap, santé et bien-être de base (art. 6; 18, par.3; 23; 24; 26; 27, par.1 à 3; et 33 de la Convention) » :

16 Comité des droits de l'homme (n 14) 32: 'The draft law is currently in the final stages of the national public consultations. Participants in the consultation process include persons living with a disability, representatives from Civil Society Organizations and the Somali Bar Association'.

17 Comité des droits de l'homme (n 14) 32.

18 Comité des droits de l'homme (n 14) 32: 'It is also required to introduce measures to mitigate the effects of discrimination by parents, spouses, children, relatives or caregivers of the person with a disability'.

19 Comité des droits de l'homme (n 14) 32

20 Comité des droits de l'homme (n 14) 32. The Ministry of Women and Human Rights Development, on behalf of the Government, is in the process of establishing the National Disability Agency following the enactment of the National Disability Agency Law, Law 134 of 31 December 2018.

Il convient de veiller à ce que les femmes, les personnes âgées, les personnes handicapées et les minorités, qui ont longtemps souffert de discrimination, reçoivent le soutien nécessaire pour réaliser leurs droits socioéconomiques ». ²²

Le projet de politique nationale d'éducation aborde des questions telles que le droit à une éducation et à une formation, adaptées à l'âge et aux besoins des élèves; la garantie d'une éducation de base gratuite et obligatoire; l'égalité des droits, des chances et des responsabilités; la protection contre toutes les formes de stigmatisation et de discrimination, y compris celles fondées sur le clan, la culture, le sexe, le handicap. ²³

Commission africaine des Droits de l'Homme et des Peuples

Dans les 48^{ème} et 49^{ème} Rapports d'activités combinés 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, couvrant la période du 11 novembre 2019 au 3 décembre 2020, l'état de présentation des Rapports montre que la République fédérale de Somalie n'a jamais soumis de rapport. ²⁴

Examen Périodique Universel ²⁵

Dans le Rapport national soumis conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme, il y a une mise au point sur la mise en œuvre des recommandations issues de l'EPU et acceptées par la Somalie, ainsi que les progrès réalisés depuis la présentation du rapport national de 2015:

- Ratification de la Convention internationale relative aux droits des personnes handicapées;
- Création de l'Agence nationale pour les personnes handicapées. ²⁶

A propos de la collaboration avec les mécanismes internationaux des droits de l'homme (organes conventionnels) (IV)

A la suite d'une campagne de consultation et de sensibilisation, le gouvernement a signé la CDPH en octobre 2018 et ratifié en août 2019, ce qui a:

Impulsé une dynamique de mise en œuvre des droits des personnes handicapées, renforcée la promotion et la protection de ces droits, et facilité la participation des personnes handicapées à la vie publique, notamment au processus politique et électoral. Parallèlement, la Somalie a élaboré une loi inclusive sur les droits des personnes handicapées, en partenariat avec des parties prenantes issues de la population handicapée, loi qui est sur le point d'être finalisée. (...) En décembre 2018, le ministère de la Condition de la femme et de la promotion des

21 Comité des droits de l'enfant, « Rapport initial soumis par la Somalie en application de l'article 44 de la Convention, attendu en 2017 », 16 octobre 2021, UN Doc CRC/C/SOM/1 (2021) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CR%2FC%2fSOM%2fRQ%2f1&Lang=fr (consulté le 15 mai 2022).

22 Comité des droits de l'enfant (n 21) 29.

23 Comité des droits de l'enfant (n 21) 36.

24 Commission Africaine des Droits de l'Homme et des Peuples, « 48ème et 49ème Rapports d'activités combinés de la Commission Africaine des Droits de l'Homme et des Peuples », 11 novembre 2019 au 3 décembre 2020, 8 https://www.achpr.org/fr_activityreports/viewall?id=52 (consulté 13 avril 2022).

25 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel Trente-huitième session, « Rapport national soumis conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'homme », 26 février 2021, UN Doc A/HRC/WG.6/38/SOM/1 (2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/050/37/PDF/G2105037.pdf?OpenElement> (consulté 13 avril 2022).

26 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25).

droits humains avait facilité et coordonné la promulgation d'une loi portant création de l'Agence nationale somalienne pour les personnes handicapées. Cette institution est chargée de lever les obstacles auxquels se heurtent les personnes handicapées, de tenir le Gouvernement responsable de la protection des droits des personnes handicapées et de garantir la participation effective des personnes handicapées à tous les aspects de la société, notamment dans les secteurs de la gouvernance et du développement.²⁷

En matière de Justice et prévention de l'impunité (VI)

Le Code pénal somalien

(...) « Le projet de loi sur les droits des personnes handicapées apporter[a] une protection juridique importante (et supplémentaire) et primer[a] sur les articles du Code pénal somalien ».²⁸

Concernant les Affaires humanitaires, internationales, paix et sécurité (VII)

Législation relative aux droits de l'homme

Le gouvernement somalien a élaboré diverses lois visant à renforcer la protection des droits de l'homme, dont la « loi nationale sur les droits des personnes handicapées, qui permettr[a] d'incorporer dans le droit interne les obligations de la Somalie découlant des instruments internationaux qu'elle a ratifiés ».²⁹

L'Agence nationale pour les personnes handicapées

Un projet de loi sur la création de l'Agence nationale pour les personnes handicapées est signé le 31 décembre 2018, par le chef d'État; ce projet étant devenu force de loi, ce qui a permis en janvier 2021, l'approbation la nomination de cinq commissaires, par le Conseil des ministres pour diriger l'Agence. Sur les cinq, il y a trois femmes. En outre, le « ministère de la Condition de la femme et de la promotion des droits humains menait, pendant la rédaction du présent rapport, les dernières séries de consultations du processus d'élaboration de la loi nationale sur les droits des personnes handicapées, qui abordera de nombreux problèmes rencontrés par celles-ci dans l'exercice de leurs droits ».³⁰

Droit de l'enfant et protection de l'enfance (LX)

Protection sociale

Le Ministère du travail et des affaires sociales « a élaboré la toute première politique nationale de protection sociale (présentée en mars 2019) ». Elle vise à « atténuer la vulnérabilité, à renforcer l'alignement des priorités humanitaires et de développement, et à répondre à la dépendance à l'égard de l'aide humanitaire. (...). Elle a pour but de favoriser la résilience des Somaliens et « de réussir à atténuer les catastrophes et continuer de réduire la pauvreté ». Cette politique permettra « un meilleur accès aux services sociaux et à l'aide sociale, grâce à des initiatives en faveur des groupes les plus vulnérables, notamment les femmes, les enfants, les personnes handicapées (...).³¹

27 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 5.

28 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 8.

29 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 11.

30 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 12.

Les enfants des rues

Une évaluation de la situation des enfants en situation de handicap a été effectuée par le ministère de la Condition de la femme, dans quatre localités; les villes de Modadiscio, Galkayo, Baidoa et Kismayo. Il a été identifié et analysé les « principaux obstacles à la participation des enfants handicapés à la société, notamment leur accès aux services auxquels ils ont droit. Enfin cette évaluation a permis de comprendre « la prévalence du handicap au travers de discussions informelles ».³²

La compilation concernant la Somalie – Rapport du Haut-Commissariat des Nations Unies aux droits de l'homme -,³³ sous la rubrique Etendue des obligations internationales et coopération avec les mécanismes et organes internationaux s'occupant des droits de l'homme (II) - confirme la ratification de la CDPH en août 2019.³⁴

Respect des obligations internationales en matière de droits de l'homme, compte tenu du droit international humanitaire applicable (IV)

- **Question touchant plusieurs domaines**

Egalité et non-discrimination

Il a été relevé par les organisations de la société civile une « absence de cadre juridique de protection des droits des personnes handicapées qui font face à de la discrimination et sont marginalisées, notamment sur le marché de l'emploi ».³⁵

- **Droits civils et politiques**

Libertés fondamentales et droit de participer à la vie publique et politique

Il a été relevé que les « femmes, les personnes handicapées (.....) ont peu participé aux consultations organisées pour déterminer le modèle électorale en Somalie ».³⁶

- **Droits économiques, sociaux et culturels**

Droit à un niveau de vie suffisant

Dans le contexte de la pandémie de COVID-19, il y eu une augmentation sans précédent des prix des produits et articles de base. Les conséquences ont été des risques « supplémentaires sur la sécurité alimentaire des populations vulnérables, notamment les personnes déplacées, les personnes handicapées et les personnes vivant dans la pauvreté ».³⁷

- **Droit à l'éducation**

31 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 16.

32 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 17.

33 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel -, « Compilation concernant la Somalie – Rapport du Haut-Commissariat des Nations Unies aux droits de l'homme », 26 février 2021, UN Doc A/HRC/WG.6/38/SOM/2 (2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/050/13/PDF/G2105013.pdf?OpenElement> (consulté 13 avril 2022).

34 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 1.

35 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 3.

36 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 6.

37 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 7.

Alors que les taux de scolarisation sont les plus bas du monde et le système éducatif extrêmement faible, le manque d'investissements et la discrimination limitent l'accès à l'éducation aux femmes, filles, personnes déplacées, réfugiés et des personnes en situation de handicap. (...) Les filles en situation de handicap sont victimes de « formes de discriminations aggravées.³⁸

- **Droit de certains groupes ou personnes**

Femmes

(.....) Les personnes en situation de handicap sont celles les plus touchées au sein du couple/le milieu familial. (...) « Étant donné l'absence d'accès à la justice, la peur des représailles, la stigmatisation et la discrimination, et la culture d'impunité, la plupart des cas de violence sexuelle et fondée sur le genre n'étaient pas signalés ».³⁹

Résumé des communications des parties prenantes concernant la Somalie.

Respect des obligations internationales relatives aux droits de l'homme, compte tenu du droit international humanitaire applicable

- **Questions touchant plusieurs domaines**

Egalité et non-discrimination

Mention d'un Plan national de développement (2017-2019) qui prévoit :

L'élaboration d'une politique nationale et d'une loi pour l'enfance qui seraient fondés sur les obligations internationales de la Somalie. Conformément à ce plan, le Gouvernement a, en 2017-2019, mis en chantier plusieurs politiques, parmi lesquelles la ratification de la Charte africaine, le projet de loi sur les mutilations génitales féminines, la loi sur le handicap.⁴⁰

- **Droits de certains groupes ou personnes**

Personnes handicapées

L'organisation de la société civile, SOS CVS demande au gouvernement somalien de « faire mieux connaître les droits des enfants en mettant en évidence les problèmes des groupes d'enfants marginalisés, tels que les enfants handicapés ». ⁴¹

L'accès à l'éducation reste encore très limité pour les enfants en situation de handicap. Ceux qui y parviennent font face à de la discrimination et la stigmatisation de la part des enseignants et leurs camarades.

En matière d'éducation:

La politique fédérale relative aux besoins spéciaux en matière d'éducation, au handicap et à l'éducation inclusive décrit 13 domaines à prendre en considération pour que les enfants handicapés puissent bénéficier de l'égal accès à l'éducation. Toutefois, ce plan

38 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 7-8.

39 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 9.

40 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel –, « Résumé des communications des parties prenantes concernant la Somalie », 26 février 2021, A/HRC/WG.6/38/SOM (2021) 3 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/050/43/PDF/G2105043.pdf?OpenElement> (consulté 13 avril 2022).

41 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 40) 9.

n'a été ni, mis en œuvre ni financé. Le développement de l'éducation spéciale a également été entravé par le faible nombre ou l'absence d'enseignants qualifiés et le manque de locaux adéquats et de moyens financiers pour l'éducation répondant à des besoins particuliers. Aucun appui n'est accordé aux personnes handicapées pour fréquenter les écoles et les universités.

Les auteurs de la même communication recommandent à la Somalie de renforcer les politiques éducatives afin de réunir les conditions nécessaires au plein accès à l'éducation, en particulier pour les groupes marginalisés, notamment les filles, les enfants handicapés, les enfants des communautés pastorales et les enfants déplacés.⁴²

2.5 Y'avait-il un quelconque effet interne sur le système légal de la République fédérale de Somalie après la ratification de l'instrument international ou régional au 2.4 ci-dessus?

La ratification de la Convention Relative aux Droits des Personnes Handicapées (CRDPH) et du Protocole facultatif, le 6 août 2019 par la République fédérale de Somalie, a eu pour effet:

- La rédaction d'un projet de loi sur le handicap en 2019; son art. 18 mentionnant le droit à l'égalité et à la non-discrimination des personnes en situation de handicap;⁴³
- La promulgation de la Loi n° 134 de l'Agence national des personnes handicapées (31 décembre 2018).⁴⁴

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. 53 de la Constitution de la République fédérale de Somalie de 2012 – Négociations internationales:

Dans l'esprit de la coopération intergouvernementale, le gouvernement fédéral consulte les États membres sur les négociations relatives à l'aide extérieure, au commerce, aux traités ou à d'autres questions importantes relatives aux accords internationaux.⁴⁵

Selon l'Art. 90 – les Responsabilités et pouvoirs du Président de la République fédérale de Somalie sont (.....) « (q) de signer les traités internationaux proposés par le Conseil des Ministres et approuvés par la Maison du Peuple du Parlement fédéral ».⁴⁶

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

42 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 40) 10.

43 Comité des droits de l'homme (n 14) 32.

44 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 12.

45 Constitution de la République fédérale de Somalie de 2012 [Somalia 2012] art 53 International Negotiations: 'In the spirit of inter-governmental cooperation the Federal Government shall consult the Federal Member States on negotiations relating to foreign aid, trade, treaties, or other major issues related to international agreements' https://www.constituteproject.org/constitution/Somalia_2012?lang=en (consulté 13 avril 2022).

46 Constitution de la République fédérale de Somalie de 2012 (n 45) art 90 The Responsibilities and Powers of the President of the Federal Republic of Somalia are: '(q) Sign international treaties proposed by the Council of Ministers and approved by the House of the People of the Federal Parliament'.

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 de la République fédérale de Somalie. Entre la signature de la CDPH et son protocole facultatif (octobre 2018) et leur ratification en août 2019, il y a eu la promulgation de la loi n°134 créant l'Agence Nationale des personnes handicapées (décembre 2018) et la rédaction du projet de loi sur le handicap (2019).

3 Constitution

3.1 La constitution de la République fédérale de Somalie 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 fédérale de Somalie contient des dispositions directement relatives aux personnes en situation de handicap. Selon l'Art. 11 - Egalité:

- « (1) Tous les citoyens, indépendamment de leur sexe, religion, statut social ou économique, opinion politique, clan, **handicap** »;
- « (3) L'État ne doit discriminer aucune personne sur la base de l'âge, de la race, de la couleur, de la tribu, de l'ethnicité, culture, dialecte, sexe, naissance, **handicap**, religion, opinion politique, occupation ou richesse ». ⁴⁷

3.2 La constitution de la République fédérale de Somalie 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 2012, proclame dans son Chapitre 2 – Droits fondamentaux et devoirs du citoyen –

- Titre 1 - Principes généraux des droits de l'Homme – Art 10 – Dignité humaine – que:
- (1) La dignité humaine est donnée par Dieu à chaque être humain, et c'est la base pour tous les droits de l'homme.
 - (2) La dignité humaine est inviolable et doit être protégée par tous.
 - (3) Le pouvoir de l'Etat ne peut être exercé de manière à violer la dignité humaine. ⁴⁸

L'article 12 – Application des droits fondamentaux – stipule qu'il « est de la responsabilité de l'Etat de s'assurer qu'il ne viole pas les droits à travers ses actions,

47 Constitution de la République fédérale de Somalie de 2012 (n 45) art 11 – Equality: '(1) All citizens, regardless of sex, religion, social or economic status, political opinion, clan, disability, occupation, birth, or dialect shall have equal rights and duties before the law'. '(3) The State must not discriminate against any person on the basis of age, race, colour, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation, or wealth'.

48 Constitution de la République fédérale de Somalie de 2012 (n 45) CHAPTER 2: FUNDAMENTAL RIGHTS AND THE DUTIES OF THE CITIZEN Title One: General Principles of Human Rights, art 10: Human Dignity (1) Human dignity is given by God to every human being, and this is the basis for all human rights. (2) Human dignity is inviolable and must be protected by all. (3) State power must not be exercised in a manner that violates human dignity.

mais prend des décisions raisonnables pour protéger les droits de toute personne des abus par d'autres ». ⁴⁹

Titre 2 – Droits, libertés basiques et limites – Art. 13 – Droit à la vie – « tout le monde a le droit à la vie ». ⁵⁰

L'article 27 – Droits économiques et sociaux - stipule que « chaque individu a le droit aux soins et personne ne peut être privé de soins urgents quel que soit la raison, dont le manque de moyen économique ». ⁵¹

4 Législation

4.1 La République fédérale de Somalie a-t-elle une législation concernant directement le handicap? Si oui énumérez la législation et expliquez comment la législation aborde le handicap.

La République fédérale de Somalie a une législation effective concernant directement le handicap:

- - Loi n°134 du 31 décembre 2018 créant l'Agence nationale des personnes handicapées. ⁵² L'Agence est « mandatée en vertu de l'alinéa 5(2)e) pour surveiller la prestation de services, y compris les services sociaux des personnes handicapées (...) ». ⁵³
- - L'Art. 2 de la Constitution provisoire énonce quatorze (14) motifs de discrimination dont le handicap. ⁵⁴
- - L'Art. 27(5) reconnaît que (...) les personnes en situation de handicap qui souffrent depuis longtemps de discrimination doivent bénéficier du support nécessaire pour réaliser leurs droits socio-économiques. ⁵⁵
- - Le ministère des femmes et du développement des droits de l'homme a rédigé une proposition de loi sur le handicap, après ratification de la CRPP, le 6 août 2019. Cette loi est dans sa phase finale de consultation publique. Les participants à ce processus de consultation incluent les personnes en situation de handicap, des représentants des organisations de la société civile et de l'Association du Barreau de Somali. ⁵⁶

49 Constitution de la République fédérale de Somalie de 2012 (n 45) art 12: Application of the Fundamental Rights (2) It is the responsibility of the state not only to ensure it does not violate rights through its actions, but also to take reasonable steps to protect the rights of the people from abuse by other.

50 Constitution de la République fédérale de Somalie de 2012 (n 45) Title Two: Rights, Basic Personal Liberties and Limitations, art 13: Right to Life Everyone has the right to life.

51 Constitution de la République fédérale de Somalie de 2012 (n 45) art 27: Economic and Social Rights Every person has the right to healthcare, and no one may be denied emergency healthcare for any reason, including lack of economic capability

52 Comité des droits de l'homme (n 14) 6 National Disability Agency Establishment Law 134 of 31 December 2018.

53 Comité des droits de l'homme (n 14) 33: 'The NDA once established, is also mandated under article 5(2)(e) to monitor the provision of services including social services of persons with disability at both federal and federal member state'.

54 Comité des droits de l'homme (n 14) 16 art (2) of the Provisional Constitution expressly sets out 14 prohibited grounds from discrimination: 'age, race, colour, tribe, ethnicity, culture, dialect, gender, birth, **disability**, religion, political opinion, occupation, or wealth'.

55 Comité des droits de l'homme (n 14) 16: The Constitution, under article 27(5) recognises that '(...) the disabled (...) who have long suffered discrimination get the necessary support to realize their socio-economic rights'.

4.2 La République fédérale de Somalie a-t-elle une législation concernant indirectement le handicap? Si oui énumérez la principale législation et expliquez comment elle réfère au handicap.

La République fédérale de Somalie a une législation concernant indirectement le handicap:

- **Le code pénal, approuvé par le décret législatif n°5 du 16 décembre 1964, est actuellement à l'étude; (...)**

« Les réformes législatives cruciales introduites par le ministère des femmes et du développement des droits de l'homme, telles que la Loi sur les droits de l'enfant, le projet de loi sur le handicap, le projet de loi sur les infractions sexuelles, une fois promulguées, fourniront un cadre juridique adéquat conforme à la Constitution provisoire et aux obligations internationales de la Somalie en matière de droits de l'homme, mais elles constitueront également des lois spéciales ayant préséance sur les dispositions du Code pénal ».⁵⁷

- **Code du travail – Chapitre 21 – Personnes avec handicap:⁵⁸**

Para. 135 – Le droit de travailler et la non-discrimination dans l'emploi

- (1) Les personnes en situation de handicap ont le droit de travailler à égalité avec les autres (...)
- (2) Le Ministre, le Commissaire fédéral du travail, le Directeur de l'emploi, le Directeur de la sécurité et de la santé et le registraire des organisations syndicales et des employés (...) ont le devoir de protéger et promouvoir la réalisation du droit au travail des personnes en situation de handicap, dont ceux qui ont un handicap au cours de leur emploi (...)
- (3) Une personne en situation de handicap ne peut être discriminée au travail sur la base de son handicap (...).⁵⁹

Para. 136 – Affectation dans un travail approprié.

Chaque employeur doit s'assurer qu'un employé en situation de handicap soit recruté d'une manière qui reconnaît son handicap et ne doit pas être affecté sur un poste à risque ou qui pose un danger pour sa sécurité et sa santé étant donné la nature et les limites de son handicap.⁶⁰

56 Comité des droits de l'homme (n 14) 32: 'The Ministry of Women and Human Rights Development, which is responsible for disability rights issues, has also drafted a Disability Law (2019) which partly domesticates the convention. The draft law is currently in the final stages of the national public consultations. Participants in the consultation process include persons living with a disability, representatives from Civil Society Organizations and the Somali Bar Association'.

57 Comité des droits de l'homme (n 14) 6: 'The Penal code is currently under review (.....) The crucial legislative reforms introduced by the Ministry of Women and Human Rights Development, such as the Child Rights Bill, the Disability Bill, FGM on Sexual Offenses Bills, will once they are enacted not only provide an adequate legal framework in line with the Provisional Constitution and Somalia's international human rights obligations but also constitute special laws taking precedence over the provisions of the Penal code'.

58 Federal Republic of Somalia – Ministry of Labour and Social Affairs (MOLSA), Draft Labour code (Version 3). Chapter 21: Persons with Disability 80-82 <https://molgov.so/legislations/> (consulté 4 mai 2022).

59 Federal Republic of Somalia – Ministry of Labour and Social Affairs (MOLSA) (n 58) 80-81:

- (1) Persons with disabilities have the right to work, on an equal basis with others (...)
- (2) The Minister, the Federal Labour Commissioner, the Director of Employment, the Director of Safety and Health and the Registrar of Trade Unions and Employers' Organizations are (.....) under duty to safeguard and promote the realization of the right to work for persons with disability, including for those who acquire a disability during the course of employment (3) A person with disability must not be discriminated against in employment on of his or her disability (...).

60 Federal Republic of Somalia – Ministry of Labour and Social Affairs (MOLSA) (n 58) 81-82: Every employer must ensure that an employee with disability is deployed in a manner that recognizes the nature and the limitations of his or her disability and must not be deployed to work in a place that poses a risk or danger to his or her safety and health owing to the nature and limitations of his or her disability.

Para. 137 – Fournir un soutien nécessaire

Chaque employeur doit s'assurer de fournir à un employé en situation de handicap le soutien nécessaire pour accomplir ses tâches avec un confort raisonnable.⁶¹

5 Décisions des cours et tribunaux

- 5.1 Les cours (ou tribunaux) de la République fédérale de Somalie 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 fédérale de Somalie 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.**

Feuille de route 2020-2023 – Inclusion des personnes avec handicap et Droits des personnes handicapées en Somalie⁶². À la suite d'un audit sur la mise en œuvre d'une première feuille de route, 2017-2019, ce programme de 2020-2023 élabore de nouveaux développements et de nouveaux enjeux, non prévus dans le précédent.⁶³

- 6.2 La République fédérale de Somalie 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.**

- Elaboration d'une politique nationale de protection sociale par le ministère du travail et des affaires sociales (18 juillet 2019). Sa mise en œuvre (17 septembre 2019) visant à établir un système de protection sociale inclusif répondant aux besoins des personnes employables, dont les personnes en situation de handicap, afin de lutter contre la pauvreté, la vulnérabilité et les exclusions. Des programmes de services sociaux sont ainsi prévus et tiendront compte des politiques existantes, et des droits stipulés dans la Constitution et des lois.⁶⁴

61 Federal Republic of Somalia – Ministry of Labour and Social Affairs (MOLSA) (n 58) 82: Every employer must ensure that an employee with disability is given the support necessary to enable him or her perform his or duties with reasonable comfort.

62 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2).

63 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 1.

64 Comité des droits de l'homme (n 16) 33: 'With regards to social services, the Government endorsed a National Social Protection Policy developed by the Ministry of Labour and Social Affairs on 18 July 2019. It launched its implementation on the 17 September 2019. The Policy aims to progressively establish an inclusive social protection system catering to the needs of employable individuals and all vulnerable groups including the disabled; and providing them with the opportunities to overcome poverty, vulnerability and exclusions. Social service programs will be created to meet the particular needs of the vulnerable groups taking stock of existing policies, and rights stipulated under the Constitution and laws'.

- Une meilleure protection et prise en charge des personnes ayant un handicap mental et psychique;
 - a) Face aux allégations de mauvais traitements infligés à ces personnes, le gouvernement lance des enquêtes criminelles sur les institutions privées en charge de ces personnes en situation de handicap. L'Agence Nationale du Handicap aura désormais la charge de surveiller leurs conditions de vie.⁶⁵
 - b) Création d'un numéro de téléphone gratuit pour le signalement de mauvais traitements infligés aux personnes en situation de handicap.⁶⁶
 - c) Offre d'une défense juridique aux personnes ayant un handicap mental et psychique, par le Code pénal:

(...) Une personne qui ne « possède pas la capacité de compréhension et de volonté » au moment de la perpétration d'une infraction ne devrait pas être punie pour un acte constituant un crime.⁹¹ Par conséquent, ces personnes ne sont pas détenues pour des infractions commises, car elles ne sont pas réputées coupables.⁶⁷

7 Organismes en charge des personnes handicapées

7.1 En dehors des cours ou tribunaux ordinaires, la République fédérale de Somalie a-t-elle un organisme officiel qui s'intéresse spécifiquement de la violation des droits des personnes handicapées? Si oui décrire l'organe, ses fonctions et ses pouvoirs.

En dehors des cours ou tribunaux ordinaires, la République fédérale de Somalie dispose d'un organisme officiel qui s'intéresse spécifiquement à la violation des droits des personnes handicapées; l'Agence Nationale du Handicap (ANH), suite à la promulgation de la Loi n° 134 du 3 décembre 2018. L'ANH a pour rôle, en vertu du:

Paragraphe 5(3) de déposer une plainte pénale contre toute entité publique et privée qui viole les droits des personnes en situations de handicap (...). A ce titre, cela comprendrait les cas de mauvais traitements infligés aux personnes ayant des problèmes de santé mentale dans des établissements d'aide sociale privés.⁶⁸

L'ANH, une fois établie (al. 5(2)e) est mandatée pour surveiller les prestations des services dont les services sociaux ayant la charge des personnes en situation en handicap (...).⁶⁹

65 Comité des droits de l'homme (n 14) 33: 'With regards to allegations of ill-treatment of persons with a disability and mental health conditions, the Government takes these seriously and instigates criminal investigations into such cases. Since these institutions are privately owned and managed, the establishment of the NDA will address this issue through their overall oversight and monitoring role of the living conditions of persons with disability'.

66 Comité des droits de l'homme (n 14) 33: 'The Somali Police Force has also adopted a free emergency phone number, enabling the public to report crimes including ill-treatment and abuse committed against persons with disability'.

67 Comité des droits de l'homme (n 14) 33: 'The Penal Code provides a legal defense for persons with mental health issues'. It states as a general rule that a person who does not 'possess the capacity of understanding and of volition' at the time of committing an offence should not be punished for any act constituting a crime. Hence, such persons are not detained for committed offences as they are not deemed culpable'.

68 Comité des droits de l'homme (n 14) 32-33: 'The law affords the National Disability Agency (NDA), under article 5(3) the power to file a criminal complaint against any public and private entity which violates the rights of disabled persons espoused in the draft law on Disability (once it is enacted) and other laws of the country. As such, this would include cases of mistreatment of persons with mental health conditions in private welfare institutions'.

69 Comité des droits de l'homme (n 14) 33: 'The NDA once established, is also mandated under article 5(2)(e) to monitor the provision of services including social services of persons with disability (...).'

7.2 En dehors des cours ou tribunaux ordinaires, la République fédérale de Somalie 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.

La République fédérale de Somalie 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.

8 Institutions Nationales des Droits de l'Homme (Commission des Droits de l'Homme ou Ombudsman ou Protecteur du Citoyen)

8.1 La République fédérale de Somalie est-il doté d'une Commission de Droits de l'Homme ou d'un Ombudsman ou d'un Protecteur du Citoyen? Si oui ses missions incluent-elles la promotion et la protection des droits des personnes handicapées? Si votre réponse est oui, indiquez également si la Commission de Droits de l'Homme ou l'Ombudsman ou le Protecteur du Citoyen de la République de Guinée n'a jamais abordé des questions relatives aux droits des personnes handicapées.

La République fédérale de Somalie est dotée d'une Commission Nationale des Droits de l'Homme⁷⁰, conformément à la loi de juin 2016. Le ministère de la condition de la femme et de la promotion des droits de l'homme a achevé, en décembre 2017, « la sélection de neuf candidats commissaires recommandés au Conseil des ministres pour examen ». « Dans le cadre des préparatifs visant à rendre la commission opérationnelle, (...) le ministère avait inclus « le soutien à la Commission des droits de l'homme dans le Programme conjoint sur les droits de l'homme, dont la mise en œuvre a débuté en 2018 ».⁷¹ La Commission nationale des droits de l'homme est dotée d'un mandat étendu qui comprend:

Le suivi de la situation des droits de l'homme en Somalie, la conduite d'enquêtes sur les violations des droits de l'homme, dont la torture ou les peines ou traitements cruels, inhumains ou dégradants, et une mission de conseil auprès du Gouvernement concernant l'intégration des droits de l'homme dans la législation et dans les politiques.⁷²

70 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 10-11.

71 As above.

72 Comité contre la torture (n 9) 3-4.

9 Organisation des personnes handicapées (OPH) et autres Organisations de la Société Civile

9.1 Avez-vous en République fédérale de Somalie des organisations qui représentent et défendent les droits et le bien-être des personnes handicapées? Si oui énumérez chaque organisation et décrivez ses activités.

La République fédérale de Somalie a des organisations qui représentent et défendent les droits et le bien-être des personnes en situation de handicap:

- **Somali Union for the Blind (SUB)**⁷³ est une organisation non gouvernementale créée en 1988. Elle est à but non lucratif et apolitique. Elle a pour but de rassembler les personnes non-voyantes pour faire entendre une voix commune. Son but étant de:
 - a) Défendre les droits des personnes non-voyantes afin qu'elles puissent acquérir des compétences de vie.
 - b) Mettre en place des formations professionnelles
 - c) Les impliquer dans les organes de développement et de décision
 - d) Les réhabiliter, guider et conseiller en raison des conséquences des guerres civiles qui ont ravagé la Somalie
 - e) Conduire une orientation sociale et une sensibilisation aux droits humains fondamentaux en général et spécifiquement des non-voyants
 - f) Promouvoir et faciliter l'accès à l'éducation et à la formation
 - g) Construire des centres d'apprentissage formels afin de lutter contre l'analphabétisation des personnes non-voyantes
 - h) Développer des sources ou des activités rémunératrices (...).⁷⁴
- **Somali Disability Empowerment Organization (SODEN)** a été fondée en mars 2011.⁷⁵ C'est une ONG à but non lucratif et apolitique qui

Aborde le problème [du handicap] de façon plus durable, en transformant la vie professionnelle, économique et sociale des personnes handicapées en une vie d'interdépendance et en éliminant les préjugés qui donnent une fausse impression des personnes handicapées. Enfin de compte, il faut souligner qu'une personne handicapée n'est pas une personne inapte. La SODEN a été fondée par des individus qui ont fait face aux vrais défis d'avoir un handicap.⁷⁶
- **SAFDI Somalia Association Female Disability**⁷⁷ est une association qui « oeuvre à l'autonomisation des femmes et des filles handicapées et à la protection de leurs droits dans la société sociale et publique. L'organisation est une initiative dirigée par des femmes et composée de membres qualifiés à la

73 Somali Union for the Blind (SUB) <https://www.facebook.com/Somali-Union-of-and-for-the-Blind-643606085670195/> (consulté le 20 mai 2022).

74 As above.

75 Somali Disability Empowerment Organization (SODEN) <https://www.somalidisability.org/about-us/> (consulté le 20 mai 2022).

76 Somali Disability Empowerment Organization (SODEN) (n 75) Somali Disability Empowerment Network was founded on 12 March 2011 to address the issue in a more sustainable way, where the professional, economic and social lives of the disabled people are transformed into lives of interdependence and eliminating the stigmas that give the wrong impression about the people with disabilities. The bottom line is to emphasise that a person with a disability is not inability person. SODEN has been founded by individuals that have faced the real challenges of having a disability.

tête de l'organisation »⁷⁸. Les objectifs et les buts de cette association est mettre l'accent l'accès à l'éducation des femmes en situation de handicap, pour leur permettre d'acquérir des compétences et accéder à l'emploi et donc de participer à la politique socioéconomique de la Somalie.⁷⁹

- **Somali Women Development Centre (SWDC)**⁸⁰ est ONG à but non lucratif et apolitique fondée en 2000, qui a pour mission de défendre les droits humains des plus vulnérables, dont les femmes en situation de handicap.

Par le renforcement des capacités des femmes, le lobbying et le plaidoyer auprès des parties concernées, la promotion de la réconciliation et du processus de consolidation de la paix, la fourniture de services d'aide juridique gratuits en collaboration avec les parties prenantes concernées afin de mettre fin à l'impunité en Somalie.⁸¹

Le SWDC vise à renforcer l'accès à la justice en « fournissant de l'aide juridique aux femmes et aux groupes vulnérables. L'aide juridique contribue à un système juridique plus juste, humain et efficace en Somalie ».⁸²

- **Somali National Association for the Deaf (SONAD)**⁸³ est une association nationale pour malentendants et sourds créée en 2006. Elle représente et défend leurs intérêts et aborde les questions suivantes:

a) La réhabilitation médicale

L'accès difficile aux traitements médicaux et de réadaptation pour la communauté handicapée de Mogadiscio « en raison du haut niveau de sécurité, du manque de centres de santé publics et privés appropriés. La plupart des causes de surdité en Somalie est le paludisme. SONAD se concentrera donc sur la réhabilitation du centre médical pour l'acquisition et le traitement de la surdité ».⁸⁴

b) Réhabilitation par l'éducation

Lutte contre le manque d'éducation avec la création d'établissement pour les personnes malentendantes/sourdes.⁸⁵

c) Réhabilitation par l'emploi

Egalité des chances sur le marché de l'emploi et la non-discrimination à l'emploi.⁸⁶

77 SAFDI Somalia Association Female Disability <https://naafo.org.so/2021/07/30/women-disability-empowerment/> (consulté le 20 mai 2022). SAFDI Somalia Association Female Disability works towards the empowerment of disabled women and girls and the protection of their rights in the social and public in the society. the organisation is female led initiatives with qualified members in the leadership of the organisation.

78 SAFDI Somalia Association Female Disability (n 77).

79 As above.

80 Somali Women Development Centre (SWDC) <https://www.swdcsom.org/> (consulté le 20 mai 2022).

81 Somali Women Development Centre (SWDC) (n 80) SWDC is engaged in human rights protection with focus on vulnerable groups, this is achieved through enhancing the capacity of women, lobbying and advocacy with concerned parts, promotion of reconciliation and peace building process, providing free legal aid service in collaboration with the relevant stakeholders in order to end impunity in Somalia.

82 Somali Women Development Centre (SWDC) <https://www.swdcsom.org/who-we-are/mission-and-vision/> (consulté le 20 mai 2022).

83 Somali National Association for the Deaf (SONAD) <https://www.sonadsomalia.org/> (consulté le 20 mai 2022).

84 As above.

85 Somali National Association for the Deaf (SONAD) (n 84).

9.2 Dans votre région, les OPH sont-elles organisées ou coordonnées au niveau national et/ou régional?

A l'extrémité orientale de la Corne de l'Afrique, les OPH ne semblent pas organisées ou être organisées en une fédération en Somalie.

9.3 Si la République fédérale de Somalie a ratifié la CDPH, comment a-t-il assuré l'implication des Organisations des personnes handicapées dans le processus de mise en œuvre?

Les Organisations des personnes handicapées en République fédérale de Somalie ont été impliquées dans l'élaboration du Plan « Inclusion des personnes handicapées et droits des personnes handicapées dans la gouvernance et le processus de développement: 2017-2019 » auprès du Ministère des Femmes et des Droits de l'Homme.⁸⁷ Ce plan étant la base du Plan d'Action 2020-2023 (Road Map 2020-2023).⁸⁸

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?

Incluses dans le processus d'examen constitutionnel, les OPH ont formulé des recommandations pour garantir les droits des personnes en situation de handicap dans la Constitution finale et interdire les discriminations.⁸⁹

9.5 Quels sont, le cas échéant les obstacles rencontrés par les OPH lors de leur engagement dans la mise en œuvre?

Les OPH souffrent d'un manque de soutien en dépit des efforts constants de plaider pour les droits et les besoins des personnes en situation de handicap. Agissant au niveau local, elles ont peu de capacités matérielles et financières et sont très éloignées des grandes initiatives des organisations nationales et internationales impliquées dans la défense des droits de l'homme et plus spécifiquement des droits des personnes en situation de handicap.⁹⁰

9.6 Y'a-t-il des exemples pouvant servir de 'modèles' pour la participation des OPH?

Lors de la journée internationale de la journée des personnes handicapées (3 décembre), les OPH ont participé durant trois années consécutives (2017, 2018, 2019) à des forums de discussion dans le cadre du renforcement et du plaider pour une politique et une législation efficace en faveur des personnes en situation

86 As above.

87 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 1.

88 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 6.

89 Global Disability Summit, Somalia Ministry of Women and Human Rights Development <https://www.globaldisabilitysummit.org/commitments/somalia-ministry-of-women-and-human-rights-development> (consulté le 23 mai 2022).

90 Somalia Civil Society Organisations, Submission for the 3rd Cycle of Universal Periodic Review of Somalia to Human Rights Council 38th Session of the Working Group on the UPR (Apr-May 2021).

de handicap.⁹¹ Les OPH sont également très actives dans le processus de réforme constitutionnelle.⁹²

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?

Les OPH ont pleinement participé à l'examen des premiers chapitres de la Constitution provisoire, dont le chapitre sur les droits fondamentaux et des devoirs des citoyens.

Les OPH ont fait des propositions concrètes pour la Déclaration des droits relatifs aux personnes en situation de handicap.

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 des OPH dans la promotion et la protection des droits des personnes en situation de handicap en Somalie, le gouvernement fédéral devrait financer un travail d'enquête sur l'ensemble du territoire afin d'identifier le nombre et pourcentage exacts de personnes en situation de handicap. Les femmes/filles en situation de handicap étant les grandes oubliées, cette enquête devrait être financée et menée dans l'urgence.

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 se réunir en fédération afin d'exercer une influence coordonnée et plus importante afin d'exercer plus de responsabilités dans le processus de mise en œuvre des instruments internationaux ou régionaux.

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?

Nous n'avons pas trouvé d'instituts de recherches spécifiques en République fédérale de Somalie sur les droits des personnes en situation de handicap.

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

91 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 6.

92 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 2.

personnes handicapées? Si oui, décrivez les activités de cette (ces) branche(s).

Créé en 2013, le ministère de la Promotion de la femme et des droits de l'homme a « engagé un processus global permettant à la Somalie de résorber son retard en matière de présentation de rapport aux organes conventionnels, dû à la guerre civile prolongée qu'a connue le pays ». ⁹³ Le ministère de la promotion de la femme et des droits de l'homme et d'autres ministères de tutelle œuvrent

A l'élaboration d'une législation et politiques globales de protection des personnes atteintes de handicap mental. Le ministère responsable collaborera étroitement avec les établissements de santé et de santé mental du pays afin de veiller à ce que leurs personnels soient formés au respect des protocoles en vigueur ⁹⁴

À la suite de la promulgation de la Loi N°134 du 31 décembre 2018, le ministère de la promotion de la femme et des droits de l'homme a mis en place l'Agence nationale des personnes handicapées (National Disability Agency- NDA). Elle est chargée de

Lever les obstacles auxquels se heurtent les personnes handicapées, de tenir le gouvernement responsable de la protection des droits des personnes handicapées et de garantir la participation effective des personnes handicapées à tous les aspects de la société, notamment dans les secteurs de la gouvernance et du développement. ⁹⁵

En janvier 2021, cinq (5) commissaires ont été nommés par le Conseil des ministres pour diriger la NDA; trois (3) de ces commissaires sont des femmes. ⁹⁶

11 Préoccupations majeures des droits de l'homme relatives aux personnes handicapées

11.1 Quels sont les défis contemporains des personnes handicapées en République fédérale de Somalie? (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.

Dans la liste de points établie avant la soumission du rapport initial de la Somalie – Personnes handicapées (art. 2, 7, 9, 10 et 26) – il a été demandé à la Somalie de commenter

Les informations selon lesquelles les personnes ayant un handicap mental sont battues et giflées, sont victimes de violence verbale et sont confinées dans des pièces sombres pendant la plus grande partie de la journée, ainsi que les informations selon lesquelles

93 Comité contre la torture (n 9) 3.

94 Comité contre la torture (n 9) 12.

95 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 5.

96 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel Trente-huitième session (n 25) 12.

des personnes handicapées seraient parfois enchaînées ou attachées dans leur propre foyer (...).⁹⁷

Les personnes atteintes d'un handicap mental sont également victimes de mauvais traitements dans les établissements d'aide sociale privée.⁹⁸

11.2 Comment la République fédérale de Somalie répond-t-elle aux besoins des personnes handicapées au regard des domaines ci-dessous énumérés?

- Concernant les allégations de mauvais traitements infligés aux personnes atteintes de handicap mental, le gouvernement somalien, prend ces accusations au sérieux et lance donc des enquêtes criminelles. Les institutions en charge des personnes ayant un handicap mental étant dirigées par des intérêts privés, la NDA a la charge de surveiller les conditions de vie de ces pensionnaires.⁹⁹

En vertu de l'Art. 5(3), la NDA a le pouvoir

De déposer une plainte pénale contre toute entité publique et privée qui viole les droits des personnes handicapées épousés dans le projet de loi sur le handicap (une fois qu'elle est promulguée) et d'autres lois du pays. A ce titre, cela comprendrait les cas de mauvais traitements infligés à des personnes ayant des problèmes de santé mentale dans des établissements d'aide sociale privés. En outre, la NDA, une fois établie, est également mandatée en vertu de l'alinéa 5(2)e) pour surveiller la prestation de services, y compris les services sociaux des personnes handicapées dans les États membres fédéraux et fédéraux.¹⁰⁰

- Plan en faveur de l'éducation inclusive des enfants en situation de handicap. Néanmoins la mise en œuvre n'est pas financée et impossible par manque d'enseignements qualifiés et de locaux adéquats. En outre aucune aide n'est accordée aux personnes en situation de handicap pour fréquenter les écoles et les universités.¹⁰¹
- En mars 2019, le Ministère du travail et des affaires sociales a présenté la « toute première politique nationale de protection sociales en matière de meilleur accès aux services sociaux et d'aide sociale en faveur des groupes vulnérables, dont les personnes en situation de handicap.¹⁰²
- La politique d'aide juridictionnelle du gouvernement somalien vise à garantir l'accès à la justice pour les plus vulnérables (dont les personnes en situation de handicap. L'article 15 du Code de procédure pénale impose donc le droit à une assistance juridique gratuite, et l'article 34 (par. 4) de la Constitution provisoire « dispose que l'Etat assure gratuitement la défense juridique des personnes qui n'ont pas les moyens de se prendre en charge elles-mêmes ». ¹⁰³

97 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel Trente-huitième session (n 25) 5.

98 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel Trente-huitième session (n 25).

99 Human Rights Committee, Initial report submitted by Somalia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2021*,** 20 January 2021, UN Doc CCPR/C/SOM/1 (2021) 33 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSOM%2f1&Lang=en (consulté le 24 mai 2022).

100 Human Rights Committee (n 99) 32-33. The law affords the National Disability Agency (NDA), under article 5(3), the power to file a criminal complaint against any public and private entity which violates the rights of disabled persons espoused in the Draft Law on Disability (once it is enacted) and other laws of the country. As such, this would include cases of mistreatment of persons with mental health conditions in private welfare institutions. Further, the NDA once established, is also mandated under article 5(2)(e) to monitor the provision of services including social services of persons with disability at both federal and federal member state.

101 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel, Trente-huitième session, Résumé des communications des parties prenantes concernant la Somalie*, 26 février 2021, 9 https://www.upr-info.org/sites/default/files/documents/2021-04/a_hrc_wg_6_38_som_3_f.pdf (consulté le 28 August 2022).

102 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 16.

- L'article 8 du projet de loi sur le handicap de 2019 (Disability Law) stipule que les personnes en situation de handicap ont le droit à l'égalité et la non-discrimination; « il stipule que les personnes handicapées devraient bénéficier de la même protection et des mêmes avantages en vertu de la loi sans être victimes de discrimination. Elle interdit également la discrimination fondée sur le handicap, tant dans la sphère publique que privée. (...) Selon le projet de loi, le gouvernement sera tenu de mettre en œuvre et d'élaborer des règlements garantissant que les personnes handicapées ont un accès égal à l'éducation et à l'emploi dans les secteurs privé et public ».¹⁰⁴

11.3 La République de fédérale de Somalie accorde-t-elle des subventions pour handicap ou autre moyen de revenu en vue de soutenir les personnes handicapées?

Il n'y a aucune indication sur d'éventuelles subventions pour handicap ou autre moyen de revenu en soutien aux personnes en situation de handicap.

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 fédérale de Somalie?

Aucune mention spécifique de la personne en situation de handicap n'est mentionnée dans la Constitution provisoire de 2012. Cependant, dans la Feuille de route 2020-2023, la Convention nationale des Femmes a inscrit dans sa Charte un cadre de participation des personnes en situation de handicap au processus électoral. Si l'accord est inscrit, il reste encore à le définir.¹⁰⁵

11.5 Catégories spécifiques expérimentant des questions particulières/vulnérabilité:

Enfants en situation de handicap. Selon le Résumé des communications des parties prenantes concernant la Somalie du Conseil des droits de l'homme, la République fédérale de Somalie fait état de la difficulté des enfants en situation de handicap à accéder à l'éducation. Ceux qui y accèdent font face à la discrimination et la stigmatisation de la part des enseignants et de leurs camarades valides. Afin que ces enfants puissent bénéficier d'un accès égal à l'éducation, la politique fédérale relative aux besoins spéciaux en matière d'éducation, au handicap et à l'éducation inclusive. En dépit des déclarations, il n'y aucune mise en œuvre de cette politique, ni de financement. L'éducation spéciale pour les enfants en situation de handicap est entravée par le manque d'enseignants formés et qualifiés, de locaux adéquats et de moyens financiers pour répondre aux besoins spécifiques de ces enfants. Aucune aide n'est accordée aux enfants en situation de handicap de l'école à l'université.¹⁰⁶

103 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel (n 25) 9.

104 Human Rights Committee (n 99) 32: 'Article 8 of the draft law further stipulates the rights to equality and non-discrimination of disabled persons. It states that persons with disability should without being discriminated have equal protection and benefit under the law. It also prohibits discrimination both in the public and private sphere on the grounds of disability. Further, persons with disability will be guaranteed protection on other grounds as stipulated under the constitutional provisions on equal protection against discrimination. According to the draft law, the Government will be obligated to implement and develop regulations ensuring that persons with disability have equal access to education and employment in both the private and public sectors'.

105 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 4.

106 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel, Trente-huitième session, Résumé des communications des parties prenantes concernant la Somalie* (n 101) 9.

Concernant les enfants des rues, le ministère de la promotion de la femme et des droits de l'homme a procédé à une évaluation rapide des enfants des rues en situation de handicap. Quatre (4) villes sont concernées, Mogadicio, Galkayo, Baido et Kismayo. Le ministère a enquêté sur les différents obstacles auxquels font face ces enfants des rues en situation de handicap, notamment leur difficulté à accéder aux services auxquels ces enfants devraient avoir droit. Pour cela, le ministère a voulu comprendre la prévalence du handicap à travers des discussions informelles. À la suite de cette enquête, il est recommandé au gouvernement somalien de concevoir des politiques appropriées et des programmes ultérieurs qui aborderont la prévention et l'atténuation de ce problème.¹⁰⁷

Femmes en situation de handicap. Le ministère de la promotion des femmes et des droits de l'homme a permis aux personnes en situation de handicap et à leurs organisations de défense de leurs droits de participer à l'examen des cinq (5) premiers chapitres de la Constitution provisoire, en particulier le Chapitre 2 sur les droits fondamentaux et les devoirs des citoyens. Pour cela, il y a eu la création de plateformes/ateliers où des propositions concrètes ont été faites pour la déclaration des droits relatifs aux personnes en situation de handicap, y compris les femmes, les filles et les enfants en situations de handicap.¹⁰⁸

Une plateforme politique pour la défense des droits des femmes et des femmes en situation de handicap s'est mise en place dans un contexte de consultation inclusive avec le gouvernement fédéral somalien. C'est ainsi qu'une Convention nationale des femmes a eu lieu et a adopté la Charte des Femmes Somaliennes Handicapées; le droit des femmes en situation de handicap à participer au processus électoral. En mars 2019, sous la direction du ministère des femmes et des droits de l'homme, 350 femmes et acteurs défenseurs des droits des femmes, à travers toute la Somalie, ainsi que la diaspora, se sont réunis à Mogadicio pour exprimer une volonté commune pour que les droits des femmes soient inscrits dans la Constitution, le processus électoral. Des efforts particuliers ont été faits afin d'assurer la participation des femmes en situation de handicap. La Charte demande que l'État aille beaucoup loin en renforçant dans la pratique les droits des femmes dans l'éducation, la santé, le logement et l'emploi en institutionnalisant la discrimination positive envers les personnes en situation de handicap.¹⁰⁹ Pour finir, une enquête a été menée auprès de 10 000 femmes sur leurs besoins et intérêts dont les efforts spécifiques pour atteindre les femmes en situation de handicap.¹¹⁰

107 Conseil des droits de l'homme – Groupe de travail sur l'Examen périodique universel Trente-huitième session (n 25) 17.

108 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 2.

109 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 4.

110 The Ministry of Women and Human Rights Development Federal Republic of Somalia (n 2) 5.

12 Perspective future

12.1 Y'a-t-il des mesures spécifiques débattus ou prises en compte présentement en République fédérale de Somalie au sujet les personnes handicapées?

Face à la recrudescence de violences contre les personnes présentant des troubles mentaux et/physiques dans les institutions de santé mentale, une loi cadre sur le handicap est en cours et l'Agence Nationale du Handicap créée afin de lutter contre les formes de discrimination et protéger les droits des personnes en situation de handicap.

12.2 Quelles réformes légales sont proposées? Quelle réforme légale aimeriez-vous voir en République fédérale de Somalie? Pourquoi?

La République fédérale de Somalie a le devoir de procéder à un recensement de sa population en générale et de la population en situation de handicap afin de données des données précises ventilées par âge, par sexe, par régions, par catégorie de handicap.

La mise en œuvre de la législation de défense des droits des personnes en situation de handicap doit être beaucoup plus rapide et une attention toute particulière serait réclamée sur les femmes, les filles et les enfants en situation de handicap ainsi que les personnes âgées (groupes vulnérables).

Les OPH devraient se fédérer afin d'avoir plus de visibilité et pouvoir faire pression auprès des autorités gouvernementales pour des financements.

La République de Guinée aurait tout intérêt à accélérer la mise en œuvre de la loi du 15 mai 2018 sur la promotion et protection des droits des personnes en situation de handicap, afin de transformer le pays en une société beaucoup plus inclusive.

Enfin, un centre de recherche sur la question des droits des personnes en situation de handicap serait un atout pour la défense des droits des personnes en situation de handicap.

SECTION C: REGIONAL DEVELOPMENTS

Disability rights in the African regional human rights system

Section C contains 2 commentaries related to disability, the Marrakesh Treaty and African copyright laws: Lessons for the African region from *Blind SA v Minister of Trade, Industry and Competition* and recognising the testimonial competence of persons with intellectual and psychosocial disabilities in Southern Africa: Lessons from Lesotho

REGIONAL DEVELOPMENTS

THE MARRAKESH TREATY AND AFRICAN COPYRIGHT LAWS: LESSONS FOR THE AFRICAN REGION FROM *BLIND SA v MINISTER OF TRADE, INDUSTRY AND COMPETITION*

Paul Ochieng Juma*

1 Introduction

Globally, the advancement of digital technology has allowed for access, management, dissemination, and utilisation of copyrighted literary information and works. However, in spite of such technological progress, persons with print and visual disabilities in Africa are denied access mainly because there are no exceptions in national copyright laws allowing them access to works protected by copyright.¹ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty)² requires state parties to ensure that their copyright legislation does not unreasonably bar access to books by persons with print and visual disabilities.³ The Marrakesh Treaty has been given effect in South Africa by the decision of the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition (Blind SA)*.⁴ The Constitutional Court held that the conferment

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- 1 J Band & K Cox 'National implementations of the Marrakesh Treaty by countries that have ratified or acceded to the Treaty' (2021) 6 <https://www.arl.org/wp-content/uploads/2021/01/2021.01.15-MarrakeshTreaty.pdf> (accessed 4 December 2022).
- 2 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, WIPO Doc. VIP/DC/8, 27 June 2013 (entered into force 30 September 2016).
- 3 Article 30(3) of the 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 (CRPD).
- 4 *Blind SA v Minister of Trade, Industry and Competition & Others* Case CCT 320/21 [2022] ZACC 33.

of exclusive rights of literary works to copyright-holders under domestic legislation without taking into account the rights of persons with print and visual disabilities to have access to those materials amounts to unfair discrimination under the Constitution of the Republic of South Africa, 1996 (the Constitution).⁵ In reaching its decision, the Court took into account international obligations under the Marrakesh Treaty.

Several African countries have copyright laws that violate the rights of persons with print and visual disabilities and do not conform to the Marrakesh Treaty.⁶ While this article is not a commentary on the copyright laws of individual countries in Africa, the paper will give illustrations, including using Kenya and Nigeria, on how the non-conformity of domestic legislation to the Marrakesh Treaty violates the rights of persons with print and visual disabilities in the region. The aim of this commentary is to use the decision of the Constitutional Court of South Africa in one sense to critically comment on the case and in another sense to use the case as a positive lesson for other jurisdictions and a source of persuasive jurisprudence. The commentary is divided into five sections. The first section is the introduction. Section two gives an overview of the Marrakesh Treaty's key legal and policy innovations and its relationship to international human rights. In section three, the decision in *Blind SA* is analysed. Section four reflects on lessons that can be drawn from *Blind SA* for ensuring the rights of persons with print and visual disabilities in the African region. Section five is the conclusion.

2 Marrakesh Treaty

The Marrakesh Treaty specifically addresses the problem of book famine. The phrase 'global book famine' was coined in the United Kingdom (UK) by the UK Royal National Institute of Blind People as part of its 'Right to Read' campaign.⁷ In the Global South, where 90 per cent of persons with print and visual disabilities reside, the book famine is very severe due to national copyright laws that prohibit literary materials from being adapted into accessible formats. Particularly, only less than one per cent of published materials in developing countries are available in accessible formats.⁸

The Marrakesh Treaty was adopted on 27 June 2013 by the member states of the World Intellectual Property Organization (WIPO).⁹

5 Constitution of the Republic of South Africa, 1996.

6 Band & Cox (n 1) 6.

7 L. Ayoubi 'The Marrakesh Treaty: Fixing international copyright law for the benefit of the visually impaired persons' (2015) 13 *New Zealand Journal of Public & International Law* 256.

8 L. Helfer et al 'Copyright exceptions across borders: Implementing the Marrakesh Treaty' (2020) 42 *European Intellectual Property Review* 333.

9 Ayoubi (n 7) 256.

On 30 September 2016, the Marrakesh Treaty entered into force with 20 member states. The goal of the Marrakesh Treaty is to increase access to printed materials for persons with print and visual disabilities around the world.¹⁰ It aims at limiting rights-holders' exclusive rights in favour of persons with disabilities. The Marrakesh Treaty requires its contracting member nations to create limitations and exceptions to copyright law that will make it easier for those with print and visual disabilities to access printed works in accessible formats such as Braille and digital audio files. It also establishes rules for the exchange of such accessible format copies across borders.¹¹

Overall, the Marrakesh Treaty aims to reconcile the rights of copyright owners with those of persons with disabilities in accordance with the Convention on the Rights of Persons with Disabilities (CRPD).¹² Article 30(3) of the CRPD obliges state parties to ensure that laws protecting intellectual property (IP) rights do not constitute unreasonable or discriminatory barriers to access by persons with disabilities. Closely related to the right of accessibility is the concept of reasonable accommodation, which is significant to persons with print and visual disabilities. The CRPD defines reasonable accommodation as necessary and appropriate modification and adjustments that may be employed to ensure that persons with disabilities enjoy or exercise on an equal basis with others, all human rights and fundamental freedoms.¹³ Therefore, by mandating exceptions to copyright law, the Marrakesh Treaty is building upon the CRPD's principle of reasonable accommodation, which essentially requires states to take positive measures to adapt literary works into accessible format copies to enable the effective participation of persons with print and visual disabilities in the literary society.¹⁴

3 Facts of *Blind SA* case

The case began in the High Court of South Africa.¹⁵ It involved Blind SA, a non-profit organisation, which was acting in the interest of persons with print and visual disabilities and the public in general. Blind SA challenged the constitutionality of certain provisions of the Copyright Act arguing that the law did not include provisions designed to ensure that persons with print and visual disabilities can access works under copyright. The applicant (Blind SA) argued that the requirement for members of the public to obtain the consent of copyright owners before converting any works into formats suitable for the use by persons with print and visual disabilities was discriminatory and unconstitutional. Blind SA took the view that the

10 Preamble of the Marrakesh Treaty.

11 Article 5-6 of the Marrakesh Treaty.

12 CRPD (n 3).

13 Article 2 of the CRPD.

14 JL Pretorius et al *Employment equity law* (2001, 2021 Update) chap 7, para 7.1.

15 *Blind SA v Minister of Trade* (2021) ZAGPPHC 871.

Copyright Act needed to be amended immediately to allow for an express exception that permits the production of literary works in accessible format copies that are suitable for use by persons with print and visual disabilities.¹⁶ The legislative process to amend the Copyright Act had endured since 2015. The amendment was by way of the Copyright Amendment Bill (CAB),¹⁷ which Parliament passed on 28 March 2020. Through section 19D, the CAB under the heading '[g]eneral exceptions regarding protection of copyright work for persons with disability' sought to allow for the conversion of copyright works into accessible format copies.

However, the CAB amendment was delayed by the President on 16 June 2020 after raising concerns about its constitutionality.¹⁸ As a result, the National Assembly's decision to pass the CAB was rescinded and the Bill was reclassified and referred back to Parliament for re-consideration. According to *Blind SA*, the delay in amending the Copyright Act was unconstitutional because it perpetuated the violation of the rights of persons with print and visual disabilities. Over and above relying on section 9 of the Constitution, which guarantees the right to equality and non-discrimination on the ground of disability, *Blind SA* relied on the following fundamental rights that are guaranteed by the Constitution: the right to human dignity (section 10), freedom of expression (section 16(1)(b)), basic education (section 29(1)), and the right to language and culture (section 30). The respondents did not oppose the assertion that the Copyright Act does not afford access by print-disabled persons to accessible format copies. However, they argued that the lack of accessibility limitations in the Copyright Act was not unconstitutional since the first respondent was empowered by law to promulgate regulations that would allow for the reproduction of works under copyright in the manner contemplated by *Blind SA*.

3.1 Issues

The main issue in *Blind SA* was whether the provision of the Copyright Act to limit the availability of works under copyright in accessible formats infringes on the rights of persons with print and visual disabilities to equality, human dignity, freedom of expression, basic education, and language and culture in accordance with sections 9, 10, 16(1)(b), 29(1) and 30 of the Constitution respectively.¹⁹ An attendant issue was whether the Court in exercise of its broad remedial powers in terms of section 172(1)(b) of the Constitution, should read-in, with immediate effect, section 19D of the CAB into the Copyright Act for purposes of ensuring equity and justice

16 *Blind SA* (n 4) para 17.

17 (B 13B-2017).

18 *Blind SA* (n 4) para 7.

19 *Blind SA* (n 4) para 4.

to the public. The case considered the need to align the Copyright Act with the Marrakesh Treaty, as well as other international agreements, which South Africa is a signatory to, such as the CRPD.

3.2 Decision

At first instance, the High Court agreed with *Blind SA* and declared the Copyright Act to be unconstitutional to the extent that it failed to make provision for exceptions that would enable access to literary works in accessible formats by persons with print and visual disabilities.²⁰ The High Court, per Mbongwe J, held that the statutory prohibition of the free conversion of works to be discriminatory and inconsistent with the right to equality under section 9 of the Constitution. This is particularly so because persons with print and visual disabilities are one of the groups contemplated by section 9 as a previously disadvantaged category of people who are not only entitled to the full and equal enjoyment of all rights and freedoms, but for which the state has a duty to take positive measures to protect and advance their equality.²¹

The judge found section 19D of the CAB to be in accordance with South Africa's intent obligations under the Marrakesh Treaty. Therefore, the delay in adopting the CAB, according to the High Court, was unreasonable and contrary to the provisions of the Constitution as it unjustifiably perpetuated the violation of the rights of persons with print and visual disabilities.²² The decision of the High Court was upheld on appeal to the Constitutional Court. The Constitutional Court reaffirmed the duty of the state to ensure that works are made accessible in the variety of formats that will best serve those with print and visual disabilities. To this end, it declared sections 6 and 7 as read with section 23 of the Copyright Act to be inconsistent with the rights of equality, human dignity, freedom of expression, basic education, and language and culture in accordance with sections 9, 10, 16(1)(b), 29(1) and 30 of the Constitution respectively.

3.3 Analysis

Generally, copyright law protects certain categories of original works, including literary, musical, dramatic, cinematographic, broadcast, and sound recordings. *Blind SA* concerned published literary works.²³ The Constitutional Court defined literary works to include books, magazines, periodicals, articles, textbooks and other educational materials.²⁴ The

20 *Blind SA* (n 15) para 28.1.

21 Pretorius et al (n 14) para 7.2.

22 *Blind SA* (n 15) para 11.

23 *Blind SA* (n 4) para 60.

24 *Blind SA* (n 4) para 48.

definition is aligned with the provisions of the Marrakesh Treaty, which stipulates that works permitted to be converted into accessible format include

literary and artistic works within the meaning of ... the Berne Convention ... in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.²⁵

Article 2(a) of the Marrakesh Treaty further interprets this definition as including works in audio form, such as audiobooks. However, article 2(a) should be interpreted to exclude audio-visual works, such as films, for conversion into accessible format since no consensus was reached during the negotiation process of the Marrakesh Treaty.²⁶

The decision in *Blind SA* is the first time the Constitutional Court interpreted the provisions of South Africa's Copyright Act in relation to the Marrakesh Treaty. Sections 6 and 7 as read with section 23 of the Copyright Act vests ownership of copyright in a literary work in the author, who is defined as the person who first makes or creates the work. The provisions have conferred copyright-holders with certain exclusive rights to their protected works, which include reproduction, adaptation, distribution, broadcasting, communication, importation, and exportation rights and the right to enforce technological protection measures over their digital contents. Besides the rights of the copyright-holders, the Copyright Act does not mention the rights of persons with print and visual disabilities. It means that only the owner of the copyright can limit the use or re-dissemination of their works. Sections 6, 7, and 23 of the Copyright Act were alleged to violate South Africa's Constitution and the country's obligations under the Marrakesh Treaty in *Blind SA*.

Although the Copyright Act focuses on the interests of the copyright-owners, there is need for determining the legitimacy of these interests in relation to limitations and exceptions for the benefit of persons with print and visual disabilities. The Marrakesh Treaty reaffirms the importance of public interest in the balance of protection and access and relates it to the case of the persons with print and visual disabilities by stating that its Contracting Parties recognise:

[T]he need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities.²⁷

25 Article 2(a) of the Marrakesh Treaty.

26 JJ Hua 'Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese copyright law' (2017) 1 *China and WTO Review* 14.

27 Preamble of the Marrakesh Treaty.

It is apparent on examination of the list of exclusions to the protection offered by copyright contained in the Marrakesh Treaty that the public interest is the overriding concern. Therefore, exclusions made for the benefit of persons with print and visual disabilities should be interpreted with the public interest in mind. In fact, under article 4(1) of the Marrakesh Treaty, contracting parties are obliged to provide, in their national laws, a limitation or exception to the rights of reproduction, adaptation and distribution, so as to facilitate the availability of literary works in accessible format to persons with print and visual disabilities.

Prior to the Marrakesh Treaty, South Africa's Copyright Act required authorisation from the copyright owner before any literary work could be copied, interpreted or disseminated. Unterhalter AJ acknowledged that the purpose of the requirement of authorisation under the Copyright Act was to protect the rights of owners of copyright in literary works.²⁸ The concept of 'authorisation' was one of the innovations under the British Copyright Act.²⁹ Due to colonialism, the concept of authorisation is firmly established in the legislation of many common law countries in Africa. South Africa inherited her first copyright laws from her former colonial masters, the Netherlands and Britain.³⁰ The action for authorising infringement, in the context of persons with print and visual disabilities in South Africa, is to be found in section 23 of the Copyright Act. The section restricts access to literary works by rendering it illegal to perform certain actions without obtaining the rights holder's consent.³¹ As a result, those with print and visual disabilities have reduced access to a great deal of copyright work. According to the Constitutional Court, the application of the requirement of authorisation without regard of its impact to different classes of persons, such as those with print and visual disabilities amounts to unfair discrimination under section 9(3) of the Constitution.

Thus, any restriction by the state to restrict the use of any information that is subject to copyright, must be done in a manner that does not violate the provisions of the Constitution. According to Unterhalter AJ, the right of a copyright owner under the Copyright Act to authorise the reproduction or adaptation of literary works to the exclusion of persons with print and visual disability is a constitutional infirmity that must be cured.³² The Preamble of the Constitution states, inter alia that all citizens, including those with disabilities, are equally protected by law. In the Bill of Rights, persons with disabilities enjoy the rights to dignity,³³ education,³⁴

28 *Blind SA* (n 4) para 69.

29 British Copyright Act of 1911.

30 M Riby-Smith 'South African copyright law – The good, the bad and the Copyright Amendment Bill' (2017) 12 *Journal of Intellectual Property Law & Practice* 216.

31 Section 23 of the Copyright Act.

32 *Blind SA* (n 4) para 88.

33 Sec 10 of the Constitution.

34 Sec 29 of the Constitution.

language and culture,³⁵ access to information³⁶ and freedom of expression³⁷ on an equal basis with non-disabled persons. Therefore, in order to ensure that there is substantive equality under the Copyright Act, it is necessary for the state to accommodate the different needs of persons with disabilities.³⁸ Clearly, the exclusive rights of copyright-owners to literary works as set out in the Copyright Act cannot be justified since they do not allow for special measures that take into account the needs of persons with disabilities to access literary works.

Another example of the Copyright Act falling behind in terms of the Marrakesh Treaty can be found in its definition of 'reproduction'. Section 1 of the Copyright Act defines reproduction in terms of literary works to include a reproduction in the form of a record or a cinematograph film. An argument that was raised in *Blind SA* is that reproduction under the Copyright Act permits sufficient amplitude to allow literary works to be rendered into accessible format copies for the use of persons with print and visual disabilities.³⁹ It was contended by the respondents that the Copyright Act does not violate the provisions of the Constitution since section 13 empowers and requires the Minister in charge of intellectual property (IP) to promulgate regulations that would permit the reproduction of literary works into accessible format copies for persons with print and visual disabilities. Section 13 of the Copyright Act stipulates that:

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Clearly, this provision only mentions the limitations and exceptions to the right to reproduction. According to Unterhalter AJ, the definition of reproduction in South Africa's Copyright Act is not comprehensive as it is only limited to making copies of literary works. The judge's conclusions are valid because reproduction alone cannot translate literary works into accessible format copies. The latter, according to Unterhalter AJ, requires interpretation and an effort to render the meaning in other accessible formats, which goes beyond reproduction.⁴⁰

According to Sullivan, reproduction is linked to the right of distribution.⁴¹ However, it can be argued that according to the Marrakesh Treaty, reproduction is also connected to the right of adaptation. As a

35 Sec 30 of the Constitution.

36 Sec 32 of the Constitution.

37 Sec 16 of the Constitution.

38 Pretorius et al (n 14) chap 7, para 7.1.

39 *Blind SA* (n 4) para 76.

40 *Blind SA* (n 4) para 87.

result, limitations and exceptions of copyright ownership should not be restricted only to making copies. What is required are copies that are accessible, thus the right of adaptation. The phrase ‘accessible formats’ has been defined broadly under the Marrakesh Treaty to mean ‘alternative manner or format’ that allows an eligible person to have access to a work that is equivalent to a person without a disability.⁴² The Marrakesh Treaty does not list the formats in detail in which literary works can be converted into, but rather is accommodating of all possible formats accessible to persons with disabilities.⁴³ The Judge in *Blind SA* reiterated this point in the following manner:

Those who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer.⁴⁴

Therefore, section 13 of the Copyright Act is not useful for clarifying the scope and definition of intended limitations and exceptions as per the Marrakesh Treaty. The South African Parliament, as discussed earlier, had initiated an amendment to the Copyright Act in 2019 in order to bring the Copyright Act in line with the Marrakesh Treaty. Section 19D of the CAB partly cures the infringement on the rights of persons with print and visual disabilities in respect to access of literary works. As a remedy to the defects of the Copyright Act, the Constitutional Court read in the amendment into the present law.⁴⁵

4 Lessons for the African region

Undoubtedly, the decision in *Blind SA* aims to ensure that persons with print and visual disabilities participate effectively in education, entertainment, and other relevant activities in the society. However, in order for persons with disabilities to be able to effectively have access to literary works, an enabling legal framework is required. Although certain African states, for example Botswana, Burkina Faso, Central African Republic, Ethiopia, Ghana, Lesotho, Mali, Morocco, Rwanda, Tanzania, Tunisia, and Zimbabwe have ratified the Marrakesh Treaty, they are yet to amend their copyright laws.⁴⁶ The copyright laws in these states, it could therefore be argued, do not meet the minimum standards of copyright protection required by the Marrakesh Treaty. African states need to

41 J Sullivan *Study on Copyright Limitations and Exceptions for the visually impaired* World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), SCCR/15/7, 20 February 2007, at 28.

42 Art 4(1)(a) of the Marrakesh Treaty.

43 Hua (n 26) 14.

44 *Blind SA* (n 4) para 89.

45 *Blind SA* (n 4) para 104.

46 Band & Cox (n 1).

introduce limitations and exceptions to copyright rules in order to permit reproduction, distribution, and making available of published works in formats designed to be accessible to persons with print and visual disabilities. Copyright-owners are unlikely to voluntarily provide measures facilitating these exceptions. Experience has shown that copyright-owners will resist any measures that are not mandatorily provided by law to allow for limitations and exceptions for beneficiaries so that they can legally gain access to literary works.⁴⁷ Therefore, the adoption and implementation of the Marrakesh Treaty is the only way to address the accessibility problem.

Some African states may argue that provision of access for persons with print and visual disabilities were already provided for under their domestic copyright law and there is no need for amendments as per the Marrakesh Treaty. Examples of African States with pre-Marrakesh exceptions in their copyright legislation include Cameroon,⁴⁸ Cape Verde,⁴⁹ Mauritius,⁵⁰ Nigeria,⁵¹ and Uganda.⁵² However, some of these provisions do not capture the essence of the Marrakesh Treaty thus the need for reforms. For example, Nigeria's copyright legislation provides as follows:

[R]eproduction of published work in braille for the exclusive use of the blind, and sound recordings made by institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled person.⁵³

Clearly, this pre-existing exception for persons with visual disabilities is not Marrakesh compliant as it is too narrow in scope. A close reading of the provision reveals that the scope of the beneficiaries in the Nigerian Act is only limited to 'the blind', whereas the application of the Marrakesh Treaty extends to those who cannot read print books due to a physical disability.⁵⁴ Therefore, the parameters of beneficiary persons under domestic copyright regimes in Africa should be expanded to include persons with print and visual disabilities and those who are unable to physically hold a book or move their eyes for reading, so as to comply with the Marrakesh Treaty.⁵⁵ This approach, according to Helfer et al, is consistent with the CRPD's evolving concept of disability.⁵⁶

47 C Tan 'Moving towards a more inclusive copyright regime for the visually impaired' (2012) 24 *Singapore Academy Law Journal* 433.

48 Section 29 of the Copyright and Neighbouring Rights of 2000.

49 Article 64 of the Copyright Law of 1990.

50 Section 23 of the Copyright Act of 2014.

51 Second schedule of the Copyright Act, Cap 28 Laws of the Federation of Nigeria, 2004.

52 Section 15 of the Copyright and Neighbouring Rights Act of 2006.

53 Nigerian Copyright Act (n 51) Second schedule.

54 Article 3 of the Marrakesh Treaty.

55 Hua (n 26) 20.

56 Helfer et al (n 8) 334.

In addition, the Nigerian provision is only limited to reproduction. However, in order to ensure accessibility of literary works to persons with print and visual disabilities, the producers need to adapt and distribute the information.⁵⁷ For these rights to be realised, exceptions should be adequately addressed in domestic legislations in order to allow for adaptation and distribution rights as discussed in *Blind SA*.⁵⁸ In fact, Nigeria was among the countries which argued for the need to include the right to adapt as a copyright exception since persons with print and visual disabilities have different levels of education which may impact on their ability to understand literary works.⁵⁹

The Marrakesh Treaty allows for works to be produced in any alternative manner or form which would facilitate the access of a beneficiary person to the work.⁶⁰ Accessible format copies in terms of the Nigerian Copyright Act only include Braille and means that are perceptible only to the blind. This narrow definition of an accessible format copy thus excludes other forms that would benefit persons with print and visual disabilities, such as large print, audiobooks, and electronic books. Domestic copyright legislation in Africa should consider widening the defined scope of accessible format copy, in accordance with the Marrakesh Treaty, to include alternative forms that would facilitate persons with disabilities in gaining access to copyright works as feasibly and comfortably as someone with no print or visual disability.⁶¹

Some African countries such as Côte d'Ivoire,⁶² Kenya,⁶³ Liberia,⁶⁴ and Malawi⁶⁵ amended their copyright legislation after ratifying the Marrakesh Treaty to allow people with print and visual disabilities to translate works into accessible formats. For example, in the case of Kenya, section 26(c) of the Copyright (Amendment) Act⁶⁶ provides as follows:

Notwithstanding the provisions of section 26, it shall not be an infringement of copyright for—(a) an authorized entity to reproduce or to distribute copies or sound recordings of a previously published literary work if such copies or sound recordings are reproduced or distributed in specialized formats exclusively for use by visually impaired or other persons with disabilities; or (b) to make, import, distribute, lend or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumvention of any technological

57 *Blind SA* (n 4) para 87.

58 *Blind SA* (n 4) para 89.

59 WIPO Standing Committee on Copyright and Related Rights SCCR/24/12 (July 16-25, 2012) 424-425.

60 Article 3 of the Marrakesh Treaty.

61 Article 2 of the Marrakesh Treaty.

62 Articles 1 & 32 of Law 2016 555 on Copyright and Related Rights.

63 Sections 2 & 26(c) of the Copyright (Amendment) Act 20 of 2019.

64 Section 9.16 of the Liberia Intellectual Property Act, 2016.

65 Section 49 of the Copyright Act, 2016.

66 Section 26(c)(1) of the Copyright (Amendment) Act.

protection measures that may be in place, subject to the terms and conditions set out under Regulations.

It means that literary works may be copied, adapted and distributed in accessible formats for the benefit of person with print and visual disabilities without infringement of copyright. Such provisions will no doubt greatly improve access to literary works and resolve the problem of book famine in the African region.

5 Conclusion

Without sufficient exceptions for persons with print and visual disabilities, copyright owners are free to limit transformation of their works into accessible formats. In light of *Blind SA*, there is need for national copyright laws to adopt limitations and exceptions for persons with disabilities who are unable to read normal copies because of visual or other impairments. The book famine and its impact on the human rights of persons with print and visual disabilities should justify adoption of limitations and exception that allows for reproduction and distribution of literary works in accessible formats. African states should consider the Marrakesh Treaty as a guiding tool for adoption of limitations and exceptions and for evaluating pre-existing copyright provisions against the current international standards.

REGIONAL DEVELOPMENTS

RECOGNISING THE TESTIMONIAL COMPETENCE OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN SOUTHERN AFRICA: LESSONS FROM LESOTHO

*Dianah Msipa**

1 Introduction

On 3 May 2008, the disability rights movement celebrated the coming into force of the Convention on the Rights of Persons with Disabilities (CRPD), which brought hope for the realisation of the rights and fundamental freedoms of all persons with disabilities.¹ In Africa, as in other parts of the world, the CRPD has been received with great enthusiasm with 49 of the 55 African states ratifying the CRPD since its adoption in 2006.² In the Southern African Development Community (SADC), all the 16 member states have ratified the CRPD, indicating a willingness to abide by its norms and standards.³ However, 14 years after

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

2 United Nations Treaty Body Database 'Ratification status for CRPD – Convention on the Rights of Persons with Disabilities' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en (accessed 28 November 2022).

3 The 16 member states of the Southern African Development Community (SADC) ratified the CRPD on the following dates: Angola ratified the CRPD on 19 May 2014; Botswana ratified on 12 July 2021; Comoros on 16 June 2016; and the Democratic Republic of Congo on 30 September 2015. The Kingdom of Eswatini ratified the CRPD on 24 September 2012; the Kingdom of Lesotho ratified on 2 December 2008; Madagascar on 12 June 2015; Malawi on 27 August 2009; Mozambique on 30 January 2012; and Mauritius on 8 June 2010. Mozambique ratified the CRPD on 30 January 2012; Namibia on 4 December 2007; Seychelles on 2 October 2009; South Africa on 30 November 2007; United Republic of Tanzania on 10 November 2009; Zambia on 1 February 2010; and Zimbabwe on 23 September 2013. See also United Nations Treaty Body Database (n 2).

the CRPD came into force, many African countries are still grappling with implementing and applying its progressive provisions in various spheres.

One such area is the testimonial competence of persons with intellectual and psychosocial disabilities. In a number of southern African countries, persons with intellectual and psychosocial disabilities are considered incompetent to testify as witnesses in criminal courts due to the nature of their disability, a position that is clearly at odds with the right to access justice enshrined in the CRPD.⁴ To date, Lesotho is the only southern African country that has taken the bold step towards implementing the CRPD by altering the legal position on testimonial competence. The recent landmark judgment of the Constitutional Division of the High Court of Lesotho in *Koali Moshoeshoe v DPP (Moshoeshoe)*,⁵ as well as the Persons with Disability Equity Act⁶ have both transformed the position on testimonial competence for persons with intellectual and psychosocial disabilities in Lesotho. This commentary highlights the lessons that other southern African countries, who are yet to align their laws on testimonial competence with the CRPD, can draw from Lesotho. These countries include Angola, Botswana, Eswatini, Malawi, Mozambique, Namibia and Zimbabwe.⁷ Specifically, the lessons relate to the centrality of the right to legal capacity and the related right to support for upholding the right to access justice.

The commentary is divided into four sections. The first section introduces the pertinent issues. In section two, the significance of *Moshoeshoe* for the other southern African countries is explained. Section three sets out the two lessons that can be gleaned from developments in Lesotho and section four concludes the commentary by summarising the main arguments.

2 The significance of *Moshoeshoe* for other countries in southern Africa

At issue in *Moshoeshoe* was the constitutionality of section 219 of the Criminal Procedure and Evidence Act, which addresses the testimonial competence of persons with intellectual and psychosocial disabilities.⁸ Section 219 provides that:

No person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or

4 Article 23 of the CRPD. See section two below for a detailed discussion of the position on testimonial competence in various southern African countries.

5 *Koali Moshoeshoe v DPP (Moshoeshoe)*, Constitutional Case 14/2017.

6 Persons with Disability Equity Act 2 of 2021.

7 This commentary will only focus on these seven countries because of their common legal position on testimonial competence.

8 *Moshoeshoe* at 4.

otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.⁹

The applicant in *Moshoeshoe* was an adult Basotho man with intellectual disability who had been raped by a fellow villager.¹⁰ He reported the crime to the police, and the matter was subsequently referred to the magistrate's court for prosecution.¹¹ However, the prosecutor relied on section 219 of the Criminal Procedure and Evidence Act and declined to prosecute on the basis that Moshoeshoe was not competent to testify due to his intellectual disability.¹² In effect, therefore, section 219 declared persons with intellectual and psychosocial disabilities as lacking competence to testify in criminal courts in Lesotho. This approach to the testimonial competence of persons with intellectual and psychosocial disabilities is not unique to Lesotho. Other countries in southern Africa adopt a similar approach.

In Botswana, section 216 of the Criminal Procedure and Evidence Act also provides that persons with intellectual and psychosocial disabilities are not competent to testify in court.¹³ Curiously, this provision uses language that is identical to section 219 in Lesotho. To demonstrate this point, it is worth quoting section 216 in its entirety, which reads as follows:

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or laboring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.¹⁴

Similarly, the Criminal Procedure and Evidence Act in the Kingdom of Eswatini has a provision that may be used to deny persons with intellectual and psychosocial disabilities testimonial competence.¹⁵ Section 214 of the Eswatini Act is couched in the same terms as section 219 in Lesotho. Eswatini's section 214 states as follows:

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.¹⁶

Namibia's Criminal Procedure Act also contains a similar provision stating that:

9 Section 219 of the Criminal Procedure and Evidence Act 9 of 1981 (Lesotho).

10 *Moshoeshoe* at 4.

11 As above.

12 *Moshoeshoe* at 5.

13 Section 216 of the Criminal Procedure and Evidence Act (Botswana).

14 As above.

15 Section 214 of the Criminal Procedure and Evidence Act (Eswatini).

16 As above.

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.¹⁷

The Statute governing criminal procedure and evidence in Zimbabwe also contains a provision that may be used to declare persons with intellectual and psychosocial disabilities as incompetent to testify.¹⁸ Section 246 of the Criminal Procedure and Evidence Act uses language similar to the provision in Lesotho, stating that:

No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of any reason, shall be competent to give evidence while under the influence of any such malady or disability.¹⁹

In Angola, the Penal Procedure Code also declares persons with intellectual and psychosocial disabilities as incompetent to testify, though it uses different language. The Penal Procedure Code provides that persons with a 'psychic anomaly' may be banned from acting as witnesses in criminal courts.²⁰ Persons with intellectual and psychosocial disabilities may fall within the category 'psychic anomaly'.

Similarly, in Malawi, the Criminal Procedure and Evidence Code states that those who are

prevented from understanding the questions put to them, or from giving rational answers to those questions, by immature or extreme old age, disease, whether of mind or body, or any cause of the same kind

are not competent to testify.²¹

Persons with intellectual and psychosocial disabilities may be denied the competence to testify under the category, 'disease of the mind'.

The position in Mozambique is the same. The relevant provision in the Penal Procedure Code reads as follows: '[w]ho is not competent to give evidence as a witness? Those who have been interdicted due to mental illness'.²² This provision may also be used to deny the testimonial competence of persons with intellectual and psychosocial disabilities.

17 Section 194 of the Criminal Procedure Act (Namibia).

18 Section 246 of the Criminal Procedure and Evidence Act (Zimbabwe).

19 As above.

20 Article 131(1) of the Penal Procedure Code 48 of 2007 (Angola).

21 Section 210 of the Criminal Procedure and Evidence Code, Chapter 4:07 (Malawi).

22 Article 216(1) of the Penal Procedure Code 2015 (Mozambique).

As demonstrated above, several countries in southern Africa adopt a similar approach to the testimonial competence of persons with intellectual and psychosocial disabilities. Denial of testimonial competence is a violation of the right of persons with disabilities to access justice on an equal basis with others, which is enshrined in article 13 of the CRPD.²³ In very simple terms, access to justice refers to accessing the 'systems, procedures, information, and locations used in the administration of justice'.²⁴ A finding of incompetence means that a person cannot testify in court, and therefore, has no access to the justice system and no means to vindicate their rights and fundamental freedoms.

Lesotho has successfully changed this position through the decision in *Moshoeshoe* and the enactment of the Persons with Disability Equity Act. After prosecution was declined, Moshoeshoe, together with two disabled persons' organisations, the Lesotho Society of Mentally Handicapped Persons, Parents, and Families (LSMHPPF) and the Lesotho National Federation of Organizations of the Disabled (LNFOD), challenged the constitutionality of section 219 of the Criminal Procedure and Evidence Act.²⁵ The Court agreed with the applicants and ruled that section 219 was unconstitutional because it was inconsistent with the rights to equality before the law and freedom from discrimination enshrined in the Constitution of Lesotho.²⁶ Consequently, the Court declared section 219 null and void.²⁷

Subsequently in 2021, Lesotho solidified its position on the testimonial competence of persons with intellectual and psychosocial disabilities in the Persons with Disability Equity Act.²⁸ It states that persons with disabilities 'shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho, or before a magistrate on a preparatory examination'.²⁹ As the first country to challenge and alter the common position on testimonial competence, Lesotho is in a unique position to offer lessons to the other countries in southern Africa that are yet to do so.

3 Lessons from Lesotho

Two main lessons emerge both from the positive aspects as well as the omissions in *Moshoeshoe* and the newly enacted Persons with Disability

23 D Msipa 'Moshoeshoe v DPP: A missed opportunity for persons with intellectual and psychosocial disabilities in Lesotho?' (2021) 13 *Drexel Law Review* 931.

24 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 284.

25 *Moshoeshoe* at 1.

26 *Moshoeshoe* at 18-19. The right to equality before the law is enshrined in sec 19 of the Constitution of Lesotho. The right to freedom from discrimination is enshrined in sec 18 of the Constitution of Lesotho.

27 *Moshoeshoe* at 8 and 18

28 Persons with Disability Equity Act (Lesotho).

29 Section 32(3) of the Persons with Disability Equity Act (Lesotho).

Equity Act. The first lesson is that upholding testimonial competence requires the recognition of the right to legal capacity. The second is that the recognition of the testimonial competence of persons with intellectual and psychosocial disabilities is not enough on its own, the provision of support is also necessary for effective witness participation. Each of these lessons is addressed in turn.

3.1 Upholding testimonial competence requires the recognition of the right to legal capacity

The first important lesson arises from the Court's omission in neglecting to address the right to legal capacity.³⁰ On its face, *Moshoeshoe* is only about testimonial competence, a concept in the law of criminal evidence and procedure referring to an individual's ability or capacity to testify in court.³¹ At its core, however, testimonial competence is about the right to legal capacity.³² Legal capacity is defined as both the capacity to hold rights and the capacity to act in order to exercise those rights.³³ Both components, capacity to hold rights and capacity to act, must be present, for having rights is of little use without the possibility of acting in order to exercise those rights. Indeed,

[o]ne must have rights and be able to act, for having rights when one cannot act may undermine those rights and one cannot act without a recognised identity that enables one to hold rights in the first place. The unification of both elements of identity and agency in article 12 is to be applauded.³⁴

The denial of testimonial competence involves prohibiting individuals with intellectual and psychosocial disabilities who hold rights from acting as witnesses in order to exercise those rights.³⁵ Therefore, the denial of testimonial competence is tantamount to the denial of legal capacity.

To some extent, the Court in *Moshoeshoe* recognised this when it ruled that section 219 is inconsistent with the right to equality before the law, which is the equivalent of the right to equal recognition before the law found in the CRPD, of which legal capacity is a part.³⁶ Although the Court identified the nexus between testimonial competence and the right to equality before the law, it did not address the right to legal capacity.

30 Msipa (n 23) 931.

31 DT Zeffert & LH Hoffman *The South African law of evidence* (1988) 369.

32 Article 12(2) of the CRPD.

33 Committee on the Rights of Persons with Disabilities, General Comment 1 – Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 13.

34 D Msipa 'Survivors of sexual assault with intellectual disabilities: Accommodating difference in the courtroom' LLM thesis, McGill University, 2014 at 50 (on file with the author).

35 Msipa (n 34) 46.

36 *Moshoeshoe* at 10.

Legal capacity is important for the recognition of testimonial competence because it is universal.³⁷ All persons with disabilities, regardless of the nature and severity of the disability, have the right to legal capacity.³⁸ Denial of testimonial competence usually occurs after the court assesses the individual, taking into account the nature and severity of the disability. The statutes governing the rules of criminal evidence and procedure bestow upon the court the power to assess the individual and make a determination as to whether they lack testimonial competence. For example, in Lesotho, the relevant provision reads as follows:

It shall be competent for the court in which any criminal case is pending or, in the case of a preparatory examination, for the magistrate, to decide upon all questions concerning the competency or compellability of any witness to give evidence.³⁹

Similar provisions giving the court power to assess whether or not the witness is competent are also contained in legislation in Eswatini⁴⁰ and Zimbabwe.⁴¹ The recognition of universal legal capacity makes these assessments unnecessary, allowing for the recognition of the testimonial competence of all persons with intellectual and psychosocial disabilities, regardless of severity. Therefore, recognising the nexus between testimonial competence and legal capacity is crucial for upholding the testimonial competence of all persons with intellectual and psychosocial disabilities. Because the Court in *Moshoeshoe* did not address the right to legal capacity, it also neglected to interrogate the related concept of support in relation to giving effective testimony.

3.2 The provision of support is necessary for effective participation as a witness

The second lesson is that it is not enough to simply declare that persons with intellectual and psychosocial disabilities are competent to testify. The provision of support is necessary to facilitate their effective participation as witnesses. Although testimonial competence is a key concept in *Moshoeshoe*, the Court only mentioned it once in its judgment and did not explore the reasons why the competence of persons with intellectual and psychosocial disabilities is contested.⁴² Had the Court done so, it would have become apparent that the mere removal of the prohibition to testify is insufficient for upholding the right to access justice. Persons with intellectual and psychosocial disabilities have communication and other needs that may limit their ability to participate effectively as witnesses in

37 Article 12(2) of the CRPD.

38 As above.

39 Section 218 of the Criminal Procedure and Evidence Act (Lesotho).

40 Section 214 of the Criminal Procedure and Evidence Act (Eswatini).

41 Section 245 of the Criminal Procedure and Evidence Act (Zimbabwe).

42 *Moshoeshoe* at 5.

court. Therefore, merely removing the legal impediment presented by the denial of testimonial competence, without the provision of the necessary support, will not empower them to be effective witnesses. In fact, it may have the unintended effect of reinforcing the negative stereotype that they cannot be reliable witnesses in court. Therefore, although the ruling in *Moshoeshoe* has the positive effect of removing the legal impediment to persons with intellectual and psychosocial disabilities testifying in the criminal courts in Lesotho, this, in itself, is not enough.

The second component of the right to equal recognition before the law is the right to receive support in order to exercise one's legal capacity.⁴³ By including the right to receive support as an essential component of the right to equal recognition before the law, the CRPD dramatically transformed the way support is perceived. Prior to the CRPD coming into force, requiring extensive support in order to exercise one's rights was regarded as a legitimate ground for the denial of legal capacity and the appointment of a guardian to act on behalf of the person with a disability.⁴⁴ The CRPD changed this position and legitimised the role of support by recognising the right to receive support and requiring states parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.⁴⁵ Moreover, the CRPD emphasises 'the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support'.⁴⁶ This is why article 12 is widely regarded as 'emblematic of the paradigm shift' in the CRPD.⁴⁷

The right to receive support is in line with the right to access justice, which requires states parties to provide procedural and age-appropriate accommodation to enable persons with disabilities to access justice on an equal basis with others.⁴⁸ The term 'accommodation' refers to any

necessary and appropriate modification and adjustments ... 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.⁴⁹

Therefore, any modification, which is made for the purpose of supporting persons with disabilities to participate effectively in court is an

43 Article 12(3) of the CRPD.

44 A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future' (2007) 34 *Syracuse Journal of International Law and Commerce* 429 at 445.

45 Article 12(3) of the CRPD.

46 Preamble, para j of the CRPD.

47 G Quinn 'Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD: Address at Harvard Law School Project on Disability Conference 3' (2010) (transcript available at Harvard Law School Library).

48 Article 13(1) of the CRPD.

49 Article 2 of the CRPD.

accommodation. Examples of accommodations include simplifying language, giving testimony via closed circuit television or through an intermediary, and conducting proceedings in closed court in order to facilitate effective communication.⁵⁰

Four years after the *Moshoeshoe* judgment, the Persons with Disability Equity Act, which was enacted to domesticate the CRPD, addressed support in the context of the right to access justice.⁵¹ The Act provides for persons with disabilities to receive the support they need in relation to the right to access justice. For example, it mandates the Chief Justice to

make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings.⁵²

It further provides that persons with disabilities 'shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial justice process'.⁵³

Therefore, in addition to removing all legal impediments to testifying in court, southern African countries must also ensure that persons with intellectual and psychosocial disabilities receive the support they need to testify effectively in court.

4 Conclusion

Several countries in southern Africa including Angola, Botswana, Eswatini, Malawi, Mozambique, Namibia and Zimbabwe have a common legal approach to the testimonial competence of persons with intellectual and psychosocial disabilities. Each of these countries have provisions in the statutes governing criminal procedure and evidence stating that persons with intellectual and psychosocial disabilities lack testimonial competence, and as such, they cannot testify in criminal courts.

Until 2017, Lesotho had a similar provision in its Criminal Procedure and Evidence Act. Section 219 declared persons with intellectual and psychosocial disabilities incompetent to testify. This provision was declared unconstitutional and void in the *Moshoeshoe* decision. The legislature went on to expressly mention that all persons with disabilities are competent to testify in section 32(3) of the Persons with Disability Equity Act.

50 Msipa (n 23) 940.

51 Section 32 of the Persons with Disability Equity Act (Lesotho).

52 Section 32(1) of the Persons with Disability Equity Act (Lesotho).

53 Section 32(4) of the Persons with Disability Equity Act (Lesotho).

This makes Lesotho the only country in southern Africa to successfully contest and change the legal position on the testimonial competence of persons with intellectual and psychosocial disabilities. As such, the other countries have lessons to learn both from what Lesotho got right and from what it missed. Two lessons in particular can be gleaned from Lesotho's experience. The first lesson is that upholding testimonial competence requires the recognition of the right to legal capacity. Second, the recognition of the testimonial competence of persons with intellectual and psychosocial disabilities is merely a first step, they also need to be given the support necessary for their effective participation. Lesotho's experience therefore, provides useful guidance on how to recognise the testimonial competence of persons with intellectual and psychosocial disabilities in order to uphold the right to access justice enshrined in the CRPD.

BOOK REVIEW

CHALOTTE GLINTBORG AND MANUEL L DE LA MATA (EDS)
IDENTITY CONSTRUCTION AND ILLNESS NARRATIVES IN PERSONS
WITH DISABILITIES (2021)

*Faith Njahîra Wangari**

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1 Introduction

The perspectives of individuals with disabilities, which include those with chronic illnesses, have continued to be amplified in the new millennium, leading to more awareness and acceptance of disability. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) states that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹

Inclusion of the term 'life-long' in the concept of disability in the CRPD is inclusive as it allows for individuals with chronic illnesses to claim the identity of disability and recognises the evolving nature of disability as a concept.

In this conceptualisation, disability is understood as an encompassing term which includes those with chronic illnesses that may not have widespread recognition as disability when viewed outside the scope of this

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

conception. For these individuals, diagnosis and recognition of their lived realities are often used as the parameters to determine if they can identify as persons with disabilities. Along with mantras such as ‘nothing for us without us’ that have been widely used in social justice activism spaces, disability studies literature recognises the importance of including narratives of those with disabilities in disability conversations.

Stigma and discrimination against persons with disabilities are often connected to beliefs held about certain embodiments and the stories told about them. On the African continent and beyond, negative attributes are assigned to people whose body or mind realities deviate from the normative expectations. These attributes, often based on misinformation, are grounds for exclusion, attacks and dehumanisation. This has been evident in the discrimination and attacks on persons with rare disabling conditions such as albinism, based on the beliefs that they result from curses or that they possess supernatural powers.² A story teller’s style and the language they employ, reveal a lot about the power that the storyteller holds, in relation to the communities they exist in. It matters that persons with disabilities get to narrate their own stories.

Identity construction and illness narratives in persons with disabilities (2021) edited by Chalotte Glintborg and Manuel L de la Mata explores the concepts of narrative and identity from the perspectives of individuals with chronic illnesses in several European countries. The book is part of an interdisciplinary disability studies series aimed at applying disability studies approaches in different fields. It foregrounds the narratives of persons with disabilities and chronic illnesses in its exploration of the experience of specific disabilities. It asserts the place of the first-hand narrator about their experiences. This edited volume relies on the stories of those with aphasia, acquired brain injury, dementia, severe mental illness, as well as children with speech and language disabilities.

This book is presented as a collection of research study reports that focus on narrative inquiry and identity construction. The first two chapters generously introduce the two concepts thus creating a foundation for the readers. Subsequent chapters dedicate space to the research participants in the various studies to share narrations of themselves. Narrations by people with the disabilities themselves are the focus of this book unlike popular practice where narratives about especially people with cognitive and language-impacting disabilities are told by others. Additionally, the contributions of other community members are noted as important elements in narrations.

2 UN Human Rights Council, Report of the Independent Expert on the enjoyment of human rights by persons with albinism, 10 January 2017, UN Doc A/HRC/34/59 (2017).

Glintborg and Mata, the editors of this book, begin with a vision that sees the possibility of everyone, including those with cognitive disabilities, to shape narratives about their lives by amplifying direct voices in this collection. Their objective is to hand narration powers to persons with disabilities and chronic illnesses who are often silenced and invisibilised. The editors argue that ‘narrative inquiry amplifies voices that may have otherwise remained silent’.³ Glintborg and Mata believe this to be a necessary addition to literature as it expands on the existing perceptions of stories and narratives of persons with chronic illnesses.

2 Overview of the book

The book has ten chapters with the first two serving as an introduction to the concepts of narrative inquiry and narrative identity. Its editors use the final chapter to share their conclusion and future perspectives with the reader. In the introduction, the authors outline the various definitions of the terms, narrative, narrative inquiry, narrative choices and stories. They also share their reasons for focusing on ‘health and illness research’ as the springboard for their contribution to illness narratives.⁴

In chapter one, the authors preface the book on narratives of those with disabilities that have an illness component. Glintborg and De la Mata introduce the concept of narrative inquiry as a research approach for its ability to capture direct narrations of those experiencing the disabilities. They also discuss the various power dynamics that are negotiated between those with these illnesses and the healthcare professionals who provide care. In leaning on the patients’ perspectives, the book notes the place of media platforms in ‘creating illness communities’ by those who seek to be in communities that may not be immediately available to them physically.⁵ Further, they argue that narratives allow for individuals to renegotiate their perceptions of self in the instance of chronic illness.

The concept of identity-self is presented in chapter two. The chapter explores the existing definitions of this concept as it exists within narrative approaches. The authors argue that disability cannot be understood in isolation but has to be viewed beyond the embodied medical diagnosis in the self. Influences of culture and everyday interactions make up the narratives of disability that get told. Identity is not a rigid concept. Persons with and without disabilities are often forced by contextual factors to shift the ways in which they define themselves. Changes in geographical location, life stage and educational level, for example, require a shift in the stories of self. While ‘master narratives’ may be more focused on the experiences of the disease, the constructions of these narratives are urged

3 At 4.

4 At 3.

5 As above.

to not solely focus on the embodied reality.⁶ The master narratives approach can be likened to the social model of disability which requires that the identification of disability, especially in the context of discrimination be situated in the society.

Chapters 3 to 9 capture research into specific disabilities and chronic illnesses. In chapter 3, ‘Stories of self when living with aphasia in a digitised society’, by Helena Taubner, Malin Hallén and Åsa Wengelin, is divided into the following parts, the introduction, method, results, discussion and references. This chapter focuses on individuals with aphasia which is often acquired during life and impacts on the linguistic capabilities of an individual. Focusing on narratives and the stories individuals tell of themselves, it allows the authors to illustrate that the impact on narrative and identity for those with aphasia is greater on the self than those whose disabilities do not impact on their language capabilities. Nevertheless, because ‘the language we use to tell our stories of self does not only include spoken words’, this study also relied on observation of written social media accounts of the nine participants.⁷

Taubner, Hallén and Wengelin’s research took place over a period of five years. They made use of Problem-Centered-Interviews (PCIs) and ethnographic observations. These two research methods allowed them to collect information while taking into consideration the linguistic implications of aphasia on their respondents. Collecting data from social media pages was highlighted to have added layers of ethical and consent considerations to the research. This research finds that respondents create narratives of themselves while constantly deciding on disclosure or lack thereof of their aphasia. Societal expectations on communication are seen to also impact on the stories of self that the respondents create. The authors name these ‘identity dilemmas’.⁸ These are captured in the stories that respondents tell of themselves before and after experiencing a stroke. The authors assert that, by telling stories about themselves, individuals are exercising their agency as selves regardless of the amount of language they have access to, and that online spaces make this choice possible.

Chapter four, “‘We got a second chance’: Couple narratives after being affected by an acquired brain injury”, by Chalotte Glinthorg and Cecilie Thøgersen, takes a close look at how couples navigate the change of bodymind realities.⁹ In this chapter, the impact of acquired brain injuries (ABI) on spouses and family members who often become caregivers is captured and discussed alongside the stories that the individual with the ABI tell of themselves. This can be said of many acquired disabilities or

6 At 15.

7 At 21.

8 At 29.

9 ‘Bodymind’ is used as coined by Dr Sami Schalk in her description of the embodiment of disability being a conflation of both realities. S Schalk *Bodyminds reimagined: (Dis)ability, race, and gender in Black women’s speculative fiction* (2018).

disabilities with late-onsets that similarly do not receive rehabilitative therapy to adjust to their new realities. The authors capture the high likelihood for spouses to view the acquired injury as an opportunity to recreate their life-stories as well. In their discussion of the negative impact of ABI, the authors apply the concepts of benefit finding in chronic illness instead.

While ABI is categorised as a traumatic occurrence which is bound to shift one's assumptions about life, the chapter argues that 'post-traumatic growth involves sense-making'.¹⁰ Based on the severity of the trauma, this can often be sifted through the lens of spirituality to guide the creation of the individual narratives as evident in those shared by the authors. The discussion in this chapter confirms the hierarchy of believability that is applied to narratives told by those ABI tell of themselves, their loved ones and those of a professional attending to them. The accounts of the professional are ranked highest on this scale. The chapter also introduces the concept of 'dyadic coping' as the framework through which to understand the dynamic of couples dealing with traumatic experiences such as ABI and how this plays out across generations.¹¹ Against this backdrop, the authors argue for a focus on the positive outcomes of acquired brain injury narratives as a necessary addition in the exploration of post-traumatic life experiences.

Chapter five on 'Narrative identity and dementia: The problem of living with fewer available resources' by Lars-Christer Hydén and Mattias Forsdlad delves into the reality of identity and narrative creation amongst persons with dementia. In the telling of autobiographical stories, individuals with dementia may face cognitive, linguistic or interactional limitations. The authors propose an inclusion of the memories and linguistic capabilities of those around the individual with dementia as resources that the person with dementia can make use of in their telling of the stories of self.

This chapter offers a definition of dementia and its various forms. These are directly related to the specific impact that the individual's dementia has on their ability to tell stories. Challenges range from fewer cognitive and linguistic resources, memory, attention and voicing which impact on their ability to create narratives of their identities. However, the authors maintain that, 'loss of memory (in particular episodic and autobiographical memory) does not automatically lead to a loss of identity'.¹² Due to the limited resources internally available, the chapter suggests that the reliance on narratives of others with similar experiences in online platforms should be identified as valid stories that the person can utilise.

10 At 39.

11 At 47.

12 At 59.

In chapter six, 'Recovery stories of people diagnosed with severe mental illness: Katabatic and anabatic narratives', by Francisco Javier Saavedra-Macias employs recovery narratives (RNs) along with illness narratives (INs) to analyse stories told by persons diagnosed with severe mental illness. The chapter offers definitions of the terms 'disease', 'illness' and 'sickness' in prefacing the study. Much like the preceding chapters, it reasserts that 'narrative is the basic tool that allows us to construct our identities'.¹³ These constructions have an added layer when the narrator is a patient with psychosocial disability whose reality and symptoms of the disability can be conflated. In recovery models of mental health, patients take a more active role in their management along with healthcare professionals. This is in contrast to predominant models in healthcare where the professional has a higher power status than the patient in deciding treatment or management and this extends to patients without disabilities too.

Unlike illness narratives that can incorporate caregivers' views, recovery narratives solely rely on the information offered by the people affected by the specific disability or condition. The individual gets to decide which aspects of their bodymind realities to share in their narrations of themselves. However, due to their singular focus on upward improvements, recovery narratives have been termed 'recovery porn' for their failure to take into consideration all the other possible outcomes besides recovery.¹⁴ This can be likened to 'inspiration porn'. Inspiration porn is a trope of disability which relies on the stereotypical view of persons with disabilities as objects of inspiration for non-disabled people in a non-disabled world.¹⁵

Chapter seven on '(Re)constructing identity after aphasia: A preliminary study about how people with aphasia describe their lives' by Sara Yuste, Andrés Santamaria, Mercedes Cubero and Manuel L de la Mata moves away from accounts of the impact of aphasia and illuminates 'identity construction of the patient after aphasia'.¹⁶ We are the total sum of our experiences, past, present and our hopes for the future. This chapter analyses the linguistic impact that aphasia has on an individual and how they make use of the existing language resources to communicate their identities. Information in this chapter is gathered from a study with four respondents with varying degrees of aphasia. All respondents in the study view their experience of a stroke as a turning point in their conceptions and narrations of selves. All respondents identified the therapy they received as

13 At 68.

14 At 78.

15 Stella Young 'I'm not your inspiration, thank you very much' TEDxSydney https://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much/transcript?language=en (accessed 5 August 2022).

16 At 84.

having been a helpful factor in their constructions of their current narratives.

In chapter eight on 'Narratives and identity construction of children with developmental speech and language disorders' by Kristine Jensen de Lopéz and Rena Lyons, much needed literature on the identity construction and narratives of children who are often silenced, is presented. Often children with the limited linguistic resources on account of developmental speech and language disabilities are presumed to not have cognitive abilities that would allow for the experiences of stigma. De Lopéz and Lyons contest this assumption. The self-narratives of these children are heavily reliant on societal narratives about them. Equally, their identities are shaped by society. Consequently, children's agency is compromised.

This chapter illustrates that identities of disabilities are not always the dominant ones in children with disabilities. The possibility of negatively framed identities being projected from society is thus quite high. This chapter advocates for the active and wholesome involvement of children with developmental speech and language disabilities in the creation of narratives that are told about them by adults. The children involved in this study were supported through 'identity construction sessions' which provided them with safe environments to explore conceptions of their narratives. This chapter highlights that access to a space to create identity has a direct impact on a child's mental health.

Chapter nine, 'Hope in offenders' narratives of attention deficit hyperactivity disorder (ADHD)' by Nichlas Permin Berger and Lars Fynbo captures a study involving adults who are incarcerated. They all have a diagnosis of ADHD. The interviews with all the respondents reveal that they blame disability for their crimes. They all indicated a connection between their diagnosis and their crimes to claim innocence. Some of the respondents fault the social welfare systems for failing to diagnose their ADHD earlier and causing them to commit crime out of despair. Most of the respondents were grateful for their diagnosis as it granted access to language to explain their realities, something they lacked before.

In the concluding chapter, the authors spotlight once more, the interplay of diagnosis of some disabilities and chronic illnesses and the individual constructions of identity. The chapter reaffirmed the commitment to amplify voices of individuals with these identities that are often erased and invisibilised as a necessary venture.

3 Significance

Although its main focus is chronic illnesses in Europe, *Identity construction and illness narratives in persons with disabilities* offers literature that is welcome

in the African disability context. Its cardinal thesis about the ability for all individuals to narrate their stories and construct their narratives is instructive for a continent where professionals, either as healthcare professionals or humanitarian workers historically have led these conversations. The book allows for meaning-making in the never-ending cycle of reconstructing identities on the part of individuals with chronic illnesses which are progressive in nature.

Online modalities allow people with disabilities to tell their stories of self in the way they choose. Social media access with the fast-growing internet coverage across the world and the African continent allows for those with disabilities to contribute to the narratives that are told of disabilities. A recognition of this as a valid form of narrative creation also shifts significantly from the need to first have social connections or high economic capability to get mainstream media coverage. The creation of illness communities becomes that much easier especially for those with chronic illnesses who are unable to exist in physical spaces either due to inaccessibility, immune-compromised status or any other disability impacting reality.

The book captures multiple instances of interdependence in everyday life and in the creation of narratives of self and identities. Disability justice lists interdependence as one of the core principles of disability existence.¹⁷ Due to the prevalence of the capitalistic notion of independence, the concept of interdependence can be difficult for some to grasp especially in the context of disability. This book generously offers examples of how interdependence plays out while also teasing out the nuances around community living.

Most of the chapters show receiving therapy after experiencing injuries was helpful in the process of reconstructing identities. This is noteworthy especially in the instances where rehabilitation upon injury or diagnosis of disability only focuses on physical recovery to approximate non-disabled identity. Additionally, the research practice in the study in respect of children, embodies best interests of the child practices through active involvement and should be adopted.

4 Conclusion

Identity construction and illness narratives in persons with disabilities carves out clear space for narratives of those with chronic illnesses and positions them within disability discourse. The book's targeted focus on self-narrations of people with illnesses and conditions whose disability status is at times contested, is a powerful message and its greatest strength. It opens up

17 '10 principles of disability justice' Sins Invalid 17 September 2015 <https://www.sinsinvalid.org/blog/10-principles-of-disability-justice> (accessed 5 August 2022).

possibilities for advocacy for individuals with chronic illnesses through their narratives. This kind of literature has a potential to propel much needed conversations about identity, rehabilitation, disability and diagnosis while foregrounding individual narratives. The inclusion of perspectives of incarcerated individuals is an essential acknowledgment of the human rights of a neglected social group and a reaffirmation of its human experience.