

The Centre for Human Rights,
University of Pretoria,
South Africa

Regional Conference on ‘Domesticating the Convention on the Rights of Persons with Disabilities in the African Region: A Focus on Access to Justice and Legal Capacity’

St. George Hotel and Conference Center

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It is an honour for me to be invited to address this conference which brings together delegates from several disciplines and from across the continent and beyond on the effective implementation of disability rights in the Africa region. I am informed that a series of annual conferences on the same theme have been taking place under the auspices of the Center for Human Rights since 2013. This is most encouraging and all efforts should be made to ensure the continuation of the project. This particular conference in 2017 will focus on the implications of the Convention on the Rights of Persons with Disabilities (CRPD) with particular reference to article 13, the right to access to justice and article 12, the right to equal recognition before the law. The conference will also focus on the development of mechanisms, strategies for the effective domestication and implementation of articles 12 and 13 of the CRPD.

I consider the conference very timely given that the African members of the Committee on the Rights of Persons with Disabilities, noting that we are already in the second decade since the adoption of the convention and are still facing serious implementation challenges have recently been seeking ways to address the continent on the same subject. Having analyzed and reviewed the promotion and implementation of the convention in the Region, the five African members of the Committee on the Rights of Persons with Disabilities observed that after 10 years of the adoption of the convention which cumulated in its ratification by more than 40 African states, there are areas of concern that need concerted effort to address if the convention has to achieve its intended result of improving the lives of persons with disabilities in the African member states.

Among these include the need for universal ratification of the convention in the region, signing and ratification of the Optional Protocol, uncertainty of the implementation and monitoring by states that have ratified and consequently high number of states which have ratified and are long overdue in their reporting.

An analysis of the situation in the region will make this need clearer: There are still three States that are signatories to the convention but have not yet ratified. These are: Chad, Cameroon and Libya.

There are five States that are not as yet signatories: Botswana, Equatorial Guinea, Eritrea, Somalia and South Sudan.

Out of a total of 48 states worldwide which are overdue in making their initial report to the CRPD Committee, 21 (45 Percent) are in Africa. The dates and the countries as they should have reported are as follows:

- 2010 (4 countries): Namibia, Guinea, Mali, and Egypt
- 2011 (3 countries): Lesotho, Burkina Faso, and Tanzania
- 2012 (2 countries): Nigeria, Sierra Leone
- 2013 (2 countries): Togo, Cape Verde
- 2014 (5 countries): Mozambique, Benin, Liberia, Ghana and Swaziland
- 2015 (1 country): Zimbabwe
- 2016(4 countries): Côte d'Ivoire, Burundi, Congo, and Guinea Bissau

The second observation that was made by the five African members of the CRPD Committee was that whereas it is commendable that the majority of the African states have ratified the convention and while we recognize the need to impress on those who have not done so to do so, it is a serious concern that the following is the case even where ratification has taken place:

i) There is general lack of research or data on the extent to which laws and policies have been harmonised in line with the CRPD; even where legislations have been harmonised, questions keep arising as to the state commitment to such legislations; the provisions enshrined in article 5 (equality and non-discrimination) have not been the subject of any scrutiny with clear indicators. Moreover, only in very few cases that the principal of non-discrimination has been incorporated into the constitution of states parties, there is little evidence of what remedies are available to persons with disabilities in cases of violations of their fundamental rights and freedoms.

ii) There is a general concern regarding the implementation of article 33 (national monitoring mechanism). There is no data on the number of complaints and nor do we know what remedies are available to persons with disabilities when their rights are violated. There is therefore an urgent need to:

- a) Facilitate the implementation of the rights of persons with disabilities beyond mere ratification.
- b) Internationalize the standards through the use of individual complaints and inquiry procedures under the optional protocol.
- c) Sufficiently explore this mechanism which is a catalyst for the vindication of the rights of persons with Disabilities.

The challenges relating to the implementation of article 13 (access to justice) and Article 12 (Equality before the Law) is in no doubt a serious concern and have so far largely not been voiced out. Consultations with organizations of persons with disabilities reveal that the barriers are huge.

The term “legal capacity” in article 12 has been the most misunderstood resulting in many reservations in the ratification of the convention. This largely explains why the Committee on the Rights of Persons with Disabilities found it necessary to come up with a General Comment number 1 of 2012 to help demystify the concept of legal capacity. There is still a widely held view that there are people, among them those with the psycho-social or intellectual disabilities who do not have any legal capacity. The concept of assisted decision making is as yet to take ground and hence the huge challenge in the implementation of article 12 in general.

Legal capacity is fundamental for the full and effective participation of all persons with disabilities in society on an equal basis with others. The right to legal capacity is a threshold right that is required for the enjoyment of all other rights in the Convention, including the right to equality and non-discrimination. Article 12 provides that persons with disabilities have the right to recognition everywhere as persons before the law, which includes the right to legal capacity on an equal basis with others. Legal capacity encompasses both legal personhood and legal agency as elaborated in the Committee’s General comment No.1 (2012). The right to legal capacity is essential to the realization of article 5 which recognizes that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. It provides that States parties must prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination. Equality before the law must include the enjoyment of legal capacity by persons with disabilities on an equal basis with others. In other words, denying legal capacity on the basis of disability is discriminatory. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory.

Recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention on the Rights of Persons with Disabilities, including, but not limited to, the right to access justice (art. 13); the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (art. 14); the right to respect for one's physical and mental integrity (art. 17); the right to liberty of movement and nationality (art. 18); the right to choose where and with whom to live (art. 19); the right to freedom of expression (art. 21); the right to marry and found a family (art. 23); the right to consent to medical treatment (art. 25); and the right to vote and stand for election (art. 29). Without recognition of the person as a person before the law, the ability to assert, exercise and enforce those rights, and many other rights provided for in the convention, is significantly compromised. States parties have an obligation to ensure that persons with disabilities have access to justice on an equal basis with others. The recognition of the right to legal capacity is essential for access to justice in many respects.

The Convention anticipated that support would be necessary and will need to be provided for persons with certain disabilities to exercise their legal capacity under article 12(3). The fact that support to exercise capacity may impose what may be perceived as a disproportionate or undue burden does not limit the requirement to provide it. In order to adhere to the provisions of right to legal capacity, States parties must:

- a. Reform existing legislation premised on status, functional or outcome based models;
- b. Replace those with models of supported decision making; and
- c. Provide resources to systems of supported decision making to assist persons with disabilities to navigate existing legal systems. Legislating and resourcing such services should be consistent with the key provisions identified in General Comment No. 1. This includes basing any systems of support on giving effect to the rights, will and preferences of those receiving support rather than what is perceived as being in their best interests.

Additional measures may include training and education for the relevant agencies such as legal decision makers, service providers and other stakeholders.

Whereas CRPD or for that matter any of the human rights instrument has the purpose of spelling out rights as should be enjoyed, the realization of such rights is often the subject of contestation. This will normally result to seeking justice mainly through the judicial process. This is how article 13 on access to justice becomes crucial in the realization of the rights spelt out in all the other articles in the convention as well as other human rights instruments. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals. States parties must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied, including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference — on their own behalf or with legal representation — and to defend their rights in court. The article calls for the provision of procedural and age-appropriate accommodations. These accommodations realization include transforming judicial systems to be accessible for and inclusive of persons with disabilities as well as provision of accommodation in legal proceedings in order to avoid that the right to access to justice becomes void in a particular situation. An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals. Age-appropriate accommodations may consist of disseminating information about available mechanisms to bring complaints forward and access to justice using age-appropriate language.

In understanding their own obligations under article 13, States parties should consider the following:

- a. Reasonable avenues to ensure the delivery of information in an understandable and accessible manner;
- b. Communication and accommodation of will and preference as to the procedure in general (including supports);
- c. Reasonable accommodation for the person with disabilities to attend or be alternatively present in the process;
- d. Physical accessibility and accommodation of physical constraints such as fatigue, and an appropriate physical environment;
- e. A process that doesn't limit engagement, which might include timing;
- f. Financial assistance.

Furthermore, State party actions that will also enable transparency include ensuring that all relevant information is accessible and available and that there is adequate recording and reporting of all relevant claims, cases and court orders.

In order to realise the right of equality and non-discrimination, awareness-raising amongst agents of the law and rights holders and capacity building of duty bearers to encourage appropriate respect for and fulfilment of rights and obligations is necessary. Appropriate training of those working in the field of administration of justice should include:

- a. The complexities of intersectionality, including the individual's cultural, religious and social identifications and the fact that persons should not be identified purely on the basis of disability;
- b. The diversity of the disability community and their individual requirements in order to effectively access all aspects of the justice system on an equal basis with others;
- c. The autonomy of persons with disabilities and the importance of legal capacity for all;
- d. The centrality of effective and meaningful communications to successful inclusion.

In conclusion, the two articles on focus in this conference are critical since they form the backbone in addressing equality and non discrimination for persons with disabilities in general and more particularly those with psycho-social and/or intellectual disabilities who have been historically excluded from exercising their own will and preference in all matters concerning their own lives. The development of mechanisms, strategies for the effective domestication and implementation of these two articles will be a major step in the realization of the rights of many.

The outcome of this conference will therefore provide useful information on where the region stands and where it is going in regard to these issues from the view point of those who live in it and this will be quite useful to persons with disabilities in general and the work of the Committee on the Rights of Persons with Disabilities.

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