

# **Changing the landscape:**

**Core Curriculum on Disability Rights for  
Undergraduate Law Students in Africa**

Pretoria University Law Press  
PULP

2015

***Changing the Landscape: Core Curriculum on Disability Rights for Undergraduate Law Students in Africa***

**Published by:**

**Pretoria University Law Press (PULP)**

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

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**Printed and bound by:**

BusinessPrint, Pretoria

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**Cover:**

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ISBN: 978-1-920538-41-5

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# Introduction to the Curriculum

This 'Core Curriculum on Disability Rights for Undergraduate Law Students in Africa' has been developed as part of a broader initiative to foster and strengthen knowledge and awareness about and interest in the rights of persons with disabilities among lawyers in Africa. This initiative, the 'Disability Rights and Law Schools in Africa Project' was supported by the Open Society Foundations, initially the Open Society Initiative for Southern Africa (OSISA) and later complemented by the Higher Education Support Programme (HESP) and the Human Rights Initiative (HRI). For the avoidance of doubt, the curriculum is written with the aim of being delivered to learners undertaking legal studies.

The Law Schools Project comprises support to a network of selected universities, particularly in Africa, with the Centre for Human Rights, Faculty of Law, University of Pretoria, playing a coordinating role. These faculties are:

- Chancellor College, University of Malawi
- Eduardo Mondlane University, Mozambique
- Makerere University, Uganda
- Midlands State University, Zimbabwe
- University of Botswana
- University of Dodoma, Tanzania
- University of Nairobi, Kenya
- University of Namibia
- University of Zambia

## Collaborative process

Drafting a curriculum for a full undergraduate course is an ambitious undertaking. Its many iterations, reworking, and revisions span some four years, and include numerous authors, commentators and other contributors. It is therefore impossible to definitively allocate authorship. The following persons all contributed in significant ways: William Aseka; Natasha Banda; Luis Bitone; Enoch Chilemba; Helene Combrinck; Yvonne Dausab; Nadja Gomez; Ilze Grobbelaar-du Plessis; Thuto Moratuo Hlalele; Hilda Kaluwa; Serges Kamga; Elizabeth Kamundia; Magnus Killander; Bernadette Malunga; Esau Mandipa; Lawrence Mashava; Orquidea Massarongo; Lungowe Matakala; Nkatha Murungi; Tshepiso Ndzinge Makhamsa; Charles Ngwena; Jehoshaphat Njau; Chipso Nkatha; Ruusa Ntinda; Ally Possi and Peter Shughuru.

While most modules are the outcome of contributions by numerous authors, the last three (modules 10 to 12) were added towards the final stages of the Project. Different to other modules, these three were developed almost exclusively by a single author, Elizabeth Kamundia, whose professionalism and devotion to the Project is specifically recognised and appreciated.

The Curriculum benefitted considerably from the inspiration, support and critical comments of various experts of the Open Society Foundations, in particular Alison Hillman, Tirza Leibowitz, Patricia Mwanyisa, Boaz Muhumuza, Elena Naumkina, and Louise Olivier.

The African Law Schools Project forms part of a broader global network of law schools in Europe and the Americas. Some of these global partners, in particular the following persons have made significant contributions:

- Prof Luke Clements, Cardiff University
- Prof Arlene Kanter, Syracuse University
- Shivaun Quinlivan, National University of Ireland, Galway

The Contribution of Prof Michael Stein, Harvard University, and extraordinary professor in the Centre for Human Rights, is also acknowledged with appreciation.

It appears from the process described above that the curriculum writing process has been the product of extensive collaboration. While we cannot name everyone who contributed to the curriculum by name, we would like to express our appreciation to all who contributed in some way to this publication.

## Overview

The curriculum comprises of the following modules:

- Module 1: Introduction to disability rights
- Module 2: Protection of the rights of persons with disabilities: Global framework
- Module 3: Protection of disability rights under African regional and national law
- Module 4: Non-discrimination against persons with disabilities
- Module 5: Right to health
- Module 6: Participation in political and public life
- Module 7: Employment
- Module 8: Education
- Module 9: Vulnerabilities and inter-sectionalities
- Module 10: Legal capacity law and policy
- Module 11: Access to justice
- Module 12: Strategies towards implementing disability rights

## Adapting the master curriculum

Each partner institution should adapt the curriculum to suit local circumstances, taking into account several factors including the level at which the curriculum is being delivered and the time available for delivering the curriculum. Against this background, each partner institution is expected to

develop its own local curriculum (complete with learning objectives, module content and reading list amongst other components) from the master curriculum with the necessary modifications.

General modifications may include:

- Incorporating, to the greatest extent possible, the domestic legal system of the locale so that learners can be acquainted with the application of disability rights in their own jurisdiction, including the disability laws, policies and courts decisions of the locale;
- Developing broad learning objectives. The lecturer will then have the flexibility to pursue these objectives through whatever content and teaching methods they feel are appropriate to meet the learner's educational needs and in accordance with their own teaching style;
- Modifying language to reflect the extent to which a country is bound by the provisions of the UN Convention on the Rights of Persons with Disabilities. This of course depends on whether or not the country within which the institution is situated has ratified the CRPD, and in circumstances where the convention has been ratified by the country in question, whether the provisions of the convention have been domesticated (with regard to dualist states); and
- Selecting the most relevant modules to form part of the local curriculum, based on objective criteria. Module 1, the introductory module should ideally be part of the local curriculum.

Specific modifications include:

- Tweaking the balance between aspects of learning that require description and those that require application; if teaching disability rights at masters level, the focus should be more on application of disability rights, while undergraduate teaching can lean more towards describing the nature of disability rights. However, as written, the curriculum requires some level of application regardless of the level at which it is taught.
- Introducing learners to the nature of human rights before getting into disability rights in particular; this is especially relevant for lecturer's teaching disability rights to learners in the first year of law studies. As written, most of the modules assume that the concept of rights is not new to learners.

## Delivering the curriculum

Each partner institution should be cognisant of the fact that delivering the curriculum requires reflecting on appropriate and effective pedagogical approaches. As much as possible, the curriculum should be delivered using teaching methods that are conducive to interaction with learners and that accommodate the broad range of learning styles that exist amongst learners. To aid interaction, the curriculum makes use of class activities including debates, class discussions, group discussions and on

occasion suggests useful field trips that may further enhance learning. The curriculum also suggests films and online video clips that may assist students understand how abstract rights play out in the real world. In addition, lecturers should consider using current issues on disability in the country (such as news features) to enhance class activities and to ground disability rights in the specific context.

In the course of delivering the curriculum, lecturers should consider including activities such as inviting guest speakers, for example, having people with disabilities speak to the learners about what the various rights mean to them from an experiential perspective.

In addition, lecturers should be cognisant of the fact that some learners taking the disability rights course will be learners with disabilities. As such, lecturers should adopt teaching methods that are inclusive of learners with disabilities. For example, some modes of presenting information may be completely inaccessible to students with disabilities; an example is visual presentation for students who are vision impaired.

Underlying this section on pedagogy is the concept of Universal Design for Learning which emphasises multiple means of presenting information, multiple means for students' expression of knowledge and multiple means of engagement in learning (National Centre on Universal Design for Learning 2006).

## Way forward

With this publication, the Centre for Human Rights aims to bring more academic attention to the rights of persons with disabilities in Africa. The aim is to post the curriculum on the Centre for Human Rights' website and to invite all interested persons to contribute by adding relevant content to the curriculum. In this way, the curriculum would be continuously updated and kept relevant.

As far as practicable, each partner institution should regularly update the master curriculum in the light of new developments. To facilitate this exercise, the Centre for Human Rights will convene an annual curriculum development meeting as a forum for the review of disability rights curricula.

## Module 1: Introduction to disability rights

### Module overview

The systemic exclusion and marginalisation of people with disabilities from equal participation in all major sectors of our societies is a well documented global phenomenon (World Health Organization & World Bank 2011). As the United Nations Convention on the Rights of Persons with Disabilities (CRPD) attests,

despite various instruments and undertakings, people with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world (CRPD, para (k) of preamble)

Undoubtedly, denial of the equality and human dignity of people with disabilities is a palpable, deep-seated injustice. It should not be allowed to persist unchallenged, including in the African region. In the age of human rights, 'rights' are an essential currency for challenging the pervasive denial of the equal citizenship of people with disabilities across the whole gamut of our socioeconomic sectors.

The field of disability rights is experiencing a period of relative growth. In last two decades or so, a steady trend of rising global awareness about disability rights and the imperative of eliminating disability-related discrimination through a rights-based approach has been emerging and taking root (Kanter, 2003). In more recent years, the trend has been galvanised with the adoption of the CRPD by the United Nations Assembly 2006 as well as by more concerted international and domestic advocacy efforts to promote the human rights of people with disabilities since the adoption of the CRPD. The African region is part of this trend partly through efforts that preceded the CRPD. The most notable regional development in this regard was the adoption by the African Union of the Continental Plan of Action for the African Decade of Persons with Disabilities in 1999 and the establishment of the Secretariat for the African Decade of Persons with Disabilities (African Union, 2009: 2). From the outset, the focus of the Continental Plan of Action was decidedly on achieving the 'full participation and equality' of people with Disabilities' (African Union). In recent years, the promulgation of disability rights-specific legislation in a number of countries, including Kenya, Malawi, Tanzania, Uganda, Zimbabwe and Zambia is serving to consolidate this trend (Banda & Kalaluka, 2014; Chilemba, 2014; Kindiki, 2011; Kamundia, 2014; Mandipa & Manyetera, 2014; Oyaro, 2014; Shuguru, 2013). At a rhetorical level, at least, the signs are that the winds of disability rights are blowing across the African region.

The shift from relating to disability as a predominantly charity issue which, at best, engenders state and private benevolence to a rights-based approach that gives rise to vertical and

horizontal obligations has been given human rights imprimatur by the adoption of the CRPD. As will be highlighted in Module 2 (on Protection of PWDs Rights: Global Frameworks), more than two-thirds of African states have ratified the CRPD. This is not to say that the disability-rights struggle has been won and that we can be complacent. Indeed, in the preponderant of African jurisdictions, conspicuous gaps in the formulation and domestication of disability rights remain. Furthermore, greater challenges lie ahead in the implementation and actual fulfilment of disability rights. Rather, it is to highlight that the opportune historical time for the growth and advocacy of disability rights on the African continent appears to have arrived.

But what are disability rights to begin with? What does 'disability' mean? What social, cultural or philosophical meanings or understandings shape the normative content of disability rights? Do current societal meanings and understandings of disability and disability rights accord with the goals of inclusive equality? The importance of raising these questions is not so much because we do not know what rights are or that we have no idea, at all, what disability means or should mean. The reason for raising these questions is primarily because disability is far from being a simple concept that engenders consensus. Instead, it is 'complex, dynamic, multidimensional and contested' (World Health Organization & World Bank, 2011: 3). The other reason for raising the question is that simply describing something as a 'right' does not guarantee its responsiveness to unmet needs. It is possible to have rights which might turn out to be merely token or even regressive. Ultimately, disability rights will only serve a worthwhile purpose if they are transformative in the sense to being substantively responsive to the legacy of disability-related inequality which is structural in nature.

When interrogating the link between disability and structural inequality, especially, disability raises questions about whether justice can be achieved if we continue to remain firmly attached to the body and biological notions of 'impairment' as the main and intuitive explanation for the inequalities that people with disabilities experience. Do we not have a better prospect of achieving justice and building an inclusive if we abandon preoccupation with the body and intellectual status and begin to treat disability as much more than what is intrinsic to the body and mind? Should we not also admit into the equation of disability our socioeconomic environment in order to see the disabling effects of the barriers it poses for people with disabilities? Indeed, disability-rights struggles in the last two more decades have been precisely about freeing disability from a paradigm that prizes the body, its anatomy and physiology, as the main explanation in favour of an explanation that attributes disability to the barriers that people with disabilities experience in a society constructed on an unstated norm of ablebodiedness. If rights are to be protective and

reparative juridical instruments in respect of disability, then, they also need to be formulated and implemented in ways which acknowledge the environment as a causative and aggravating link in the creation of disability. And this is precisely what the CRPD has achieved.

In its preamble and substantive provisions, the CRPD seeks to capture that the normative inclusion of people with disabilities is firmly anchored in substantive equality. The goal of securing equality and human dignity is the glue that holds the CRPD together. The chief purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity' (CRPD, article 1). An important juridical modality through which the CRPD seeks to ensure the achievement of equality and respect for human dignity is in its consistent emphasis on the duty to accommodate people with disabilities in all sectors of our socio-economic life. The CRPD conceives failure to provide 'reasonable accommodation' as constituting discrimination. There is a duty, therefore, to reexamine our socio-economic environment to render it accessible to disabled people so that the environment does not continue to be disabling.

The main objective of this module is foundational. It serves to provide learners with a philosophical and socio-cultural base for critically understanding the normative value and content of disability rights as human rights that are contingent upon first understanding the concept of disability through unmasking its various permutations. The module seeks to provide learners with a foundation for understanding the multiple dimensions and the contestation that attends the concept of disability as precursors for understanding that disability rights are an outcome of competing social or cultural constructions of disability. To this end, the module will focus on interrogating or deconstructing the meaning of 'disability' so that learners acquire a comprehensive and nuanced understanding of disability as a concept that is used as an adjective to describe rights that are intended to protect the human rights of people with disabilities. The main focus is on enabling learners to appreciate the underlying social meanings that influence how as societies we think about disability and how these meanings intersect with the formulation, interpretation and application disability rights.

## Learning objectives

On completing this module, learners should be able to:

- understand 'disability' as both an evolving and contested concept whose permutations can be very broad and whose meaning depends on the context and objectives of the interpreter;
- understand the various approaches to disability or 'models' of disability as socially constructed meanings of disability which have implications for the formulation of individual rights and corresponding duties by stakeholders, including

policymakers, legislators, courts, human rights institutions, civil society and NGOs;

- understand the emergence of disability rights as human rights as an outcome predominantly influenced by the 'social model' of disability, which has served as a counterweight to a 'medical model' of disability; and
- understand disability rights as primarily human rights that serve to combat the exclusion, marginalisation and stigmatisation of people with disabilities in order to protect their inherent dignity and ensure their participation in all socioeconomic sectors on an equal basis with others.

## Module content

### *The main components*

The module is divided into two main parts. The first part seeks to promote understanding about the nature of rights in general and the importance of having rights that we describe as disability rights. As part of building a rationale for disability rights, it explains that in all cultures people with disabilities have been at the receiving end of human rights violations and that disability-related discrimination is a reality. In promoting an understanding of disability rights in the African region, it is suggested that African communitarian traditions and philosophies provide a base upon which to develop positive conceptions of human rights in ways that are synergic with the CRPD. To this end, the first part highlights that in the African context, culture needs not have a negative relationship with disability.

The second part is the greater part of the module. It explores the concept of 'disability rights' but with the accent on the 'disability' component of the concept. It seeks to clarify the concept of 'disability' and the normative implications of any such clarification. It highlights the challenges, and indeed pitfalls, of attempting to define disability exhaustively. Furthermore, it uses 'models' of disability to explain how disability is social constructed but highlighting that models of disability are in fact overlapping approaches to disability which do not exist in isolation from one another. Whilst acknowledging that there is no consensus on what constitutes disability, it is suggested that the conceptualisation of 'persons with disabilities' in article 1 of the CRPD could be used as a pragmatic base from which to build and promote a domestic understanding of disability in a human rights context, notwithstanding that this conceptualisation it is not without its own critics ((World Health Organisation & World Bank 2011: 8).

### Lecturer's notes

It serves well to explain at the outset that throughout the module contains parts that are described as **lecturer's notes**. The lecturer's notes are *italicised*. They are directed to the lecturer rather than the learners. The notes should be understood as suggestions rather than prescriptions to rigidly

follow. They serve to assist the lecturer in thinking about effective ways for imparting vital knowledge to learners and adapting the module to suit the exigencies of the curriculum at the partner institution, including the unique developments in the jurisdiction where the partner institution is located.

The lecturer's notes are best treated as food for thought for the lecturer to use when developing or even experimenting with teaching methods that are conducive to interaction with learners. The notes, which are often accompanied by questions to reflect upon, serve to facilitate a closer integration of a learner participatory approach in the module so that interaction between learners and the lecturer or amongst learners need not wait for the formal class activities that are located in the boxes. The lecturer's notes may also serve to explain any assumptions that are built into the module. The assumptions may not always hold true as much depends on the level at which the module is offered and its duration. Where the assumptions do not hold true, the lecturer will need to make commensurate adjustments.

### Student activities

The module contains **student activities**. Class activities are designed not just to promote basic understanding but also to encourage critical thinking so that learners can appreciate the complexities of disability as a discourse. All the activities are in boxes so that they stand out more easily. Because the curriculum is offered at different levels, it is better for the lecturer to determine the appropriate time for assigning class activities. Also, the lecturer is at liberty to design the methods for addressing the class activities, including whether to assign the activities to individual learners or to groups. In general, because there are often two sides to any argument in disability discourses, group exercises serve a better purpose.

### Terminology: 'people (or persons) with disabilities' and 'disabled people (or persons)'

It will be highlighted in the second part of the module (§ 3.4.4.5) that the terminology we use to describe people who we see as having disabilities is important. It must serve to affirm rather than undermine the equality and human dignity of people we are describing. For now, however, it can be noted that the modules uses the terms 'people (or persons) with disabilities' interchangeably with 'disabled people (or persons)' to reflect current accepted usage in different countries and contexts.

## 1 What are disability rights?

### 1.1 Lecturer's notes

*The module assumes that the concept of rights is not new to learners and that it has already been introduced elsewhere in a foundation course in the first year of studying law. Therefore, after an elementary statement about the notion*

*of rights, and highlighting the cross-cultural nature of the phenomenon of disability, the spotlight should be on explicating the concept of 'disability' and ultimately its link with, and implications for, the formulation, interpretation and application of disability rights. If this assumption is not true, such as when the curriculum is offered to learners in the first year of study at the same time as other introductory law courses, then the lecturer will need to adapt the module accordingly, say, by first providing learners with more than an elementary introduction on the nature of legal rights.*

*When breaking the ice and introducing the topic of rights, learners can be asked whether we can do without rights if our goal is to respond to structural inequality and build an inclusive society. Learners can be asked to reflect on why the biggest historical event in modern Africa – decolonisation and the independence of African countries – was marked by the adoption of constitutions containing a Bill of Rights. Learners can be asked to reflect on the significance of what was contained in the equality clauses of the Bills of Rights of their own country. It is also important to ask learners whether 'disability' is featured in independence constitutions, expressly or impliedly? If disability did not feature, learners can be asked to reflect on the possible explanations? As most African countries have since reviewed the independence constitutions, learners can be asked to reflect on what has changed, in new constitutions in respect of disability. If disability is now expressly included in the equality clauses, learners can, likewise be asked to reflect on the significance of this development and its connection with disability rights.*

### 1.2 Some basic premises about rights

We can begin by refreshing our memory about the nature of rights in general. We can start by recalling what is common to all rights. We can recall a common understanding of the place of rights in African jurisdictions that under the provisions of their own domestic constitutions, regional instruments and United Nations instruments are committed to respect for democratic principles, human rights, rule of law and good governance. We can approach disability rights as any other rights to highlight that they are not a special or exceptional category of rights. In highlighting the ordinariness of disability rights, our point of departure should be to note that:

- Though disability rights are sometimes described as new or it can be argued that some rights are formulated in new ways (Dhanda, 2008; Mégret, 2008), ultimately, disability rights are not new rights in a human rights sense. Rather, they bring poignancy to human rights that *already exist* but have been historically denied, neglected or marginalised. Disability rights *reaffirm* that people with disabilities are entitled to the respect of their inherent dignity and of all human rights and fundamental freedoms on an equal basis with others (Preamble to, and article 1 of, the CRPD).
- When conceived as human rights which already inhere in individuals by reason of being human, disability rights become also moral rights and not merely legal claims or entitlements. There are more than what *is* found in positive law and there are what *ought* to be found in positive law.
- As human rights, disability rights *may* be protected by existing domestic law or *may not* be

protected by existing domestic law. There is frequently a gap between rights that are proclaimed and rights that are in fact protected by domestic legal regimes, or even international legal regimes (Viljoen, 2012: xv).

- Attaching the language of rights to something gives it normative force. It translates rights into something more than a mere desire or aspiration. Like any other juridical instruments, disability rights are *claim rights* (Hohfeld, 1913). They give rise to correlative duties which are enforceable. In the age of constitutionalism and human rights, disability rights ought to be taken seriously precisely because they come with juridical obligations (Dworkin, 1977). When rights are not taken seriously, the expectations of the rights-holders are disappointed and injustices persist.
- Disability rights have *vertical* as well as *horizontal* application (Scheinin, 2012) in that they are binding on the state as well as on private individuals. If disability rights are conceived as only binding the state, then, they will be of limited reach as private individuals will not be placed under an obligation to desist from discrimination and treat disabled people equally.
- As part of its vertical obligations, the state has an obligation to regulate the conduct of natural and legal persons to ensure that they respect, protect and fulfil the rights of people with disabilities. The state as a duty to adopt measures such as legislative and administrative measures that require private individuals to respect the rights of disabled people to human dignity and equality in the provision of services.
- Inaction on the part of the state or impediments which are posed by the state or its organs in the implementation of legal entitlements, or constraints which are the outcome of varying economic, social or cultural circumstances of rights-holders, including ignorance about rights and lack of means, serve to seriously undermine the capacities of people with disabilities to assert and realise their human rights.
- The state bears a constitutional and human rights responsibility to ensure that rights guaranteed to citizens in domestic constitutions, legislation and in ratified human rights treaties, are not mere tokens. Rights-holders, especially vulnerable and historically disadvantaged groups such as people with disabilities, must be able to derive benefits from rights in practice, including the rights that are guaranteeing in the CRPD.
- In order to transform the history of exclusion and material deprivation of people with disabilities, in their human rights form, disability rights subscribe to the indivisibility, interdependence and interrelatedness of all fundamental rights and freedoms (Preamble to the CRPD, para (c)). Disability rights are holistic rights that conflate rather than maintain a dichotomy between civil and political rights on the one hand and socioeconomic rights on the other. The substantive provisions of the CRPD are replete with examples of a holistic approach to human rights that combines both civil and political rights and socioeconomic rights. Article 19 on independent living serves as an example. The state has an obligation to not only recognise the equal right of persons with disabilities to live and participate in the community and to exercise choice over their place of residence and living arrangements, but also to take positive steps to facilitate the realisation of this right, including ensuring that persons with disabilities have access to residential and other community support

services such as personal assistance that is necessary to support living and inclusion in the community.

- To fulfil disability rights, states should adopt positive measures, including legislative, administrative and programmatic measures, to establish an enabling environment in which to realise the rights that are guaranteed. For rights to be meaningful in any democracy, rights-holders should have the means with which to realise their rights. At a minimum, rights-holders should have information about their rights as well as knowledge about how to exercise the rights. The now well-established mantra of the obligations to respect, protect and fulfil, apply equally to disability rights (Scheinin, 2012).
- Courts (and tribunals) are well positioned constitutionally and institutionally to interpret and apply disability rights, including holding the executive accountable where there has been a violation of commission or omission. However, the promotion of effective realisation of disability rights requires a multi-sectoral approach which includes but is not confined to the role of the courts.
- Even with generous rules for recognising *locus standi*, nonetheless, courts depend on disputes being brought to them. They cannot intervene on their own. When courts decide cases, they tend to intersect with the rights of the parties before the court rather than to the broader community. Courts are, therefore, limited in their capacity to develop comprehensive standards and best practices for respecting, protecting and promoting disability rights. Because of the constitutional doctrine of separation of powers, courts cannot generally be proactive in advocating for transformation of all socioeconomic sectors that impact on the life of people with disabilities with a view to building an inclusive society.
- As part of democratic participation, human rights institutions, equality and disability commissions, civil society, NGOs, people with disabilities, disabled peoples' organisations, human rights activities, and other pertinent stakeholders all have role in giving life to disability rights and not just the courts.

### 1.3 Cross-cultural nature of disability discrimination

#### 1.3.1 Lecturer's note:

*We need disability rights that are grounded and rather than rights that merely remain in the CRPD as an abstract document. It would be incomplete, therefore, to discuss the notions of disability rights and disability without at the same time reflecting on their intersections with 'culture'. Ultimately, the concept of disability is anchored in culture. However, when introducing the intersection between culture and disability discrimination, the lecturer should guard against promoting simplistic, stereotypic, racist, colonial notions that are denigrating to the dignity of Africans. On reading Western anthropological accounts, or some press releases in the Global north, practices that are in fact derogations from contemporary African cultures are sometimes purveyed as marking the norm even when the majority of African communities are unambiguously against the practices because it harms others. At the same time, critical thinking which eschews cultural or political correctness must be encouraged amongst learners. Culture*

should be approached with a view to avoiding overgeneralisations that obscure nuance or promote exceptions to become the rule. Discussion on the intersection between culture and disability should not only seek to uncover the negative elements (of which there is an abundance of), but also the positive aspects.

Some of the questions that can be put to learners in order to introduce the cultural dimensions and to promote critical thinking about culture as something that is dynamic and not hermetically sealed can be along these lines: *What is African culture? What is a traditional African society? Does culture change? Is everything that is done in the name of African culture part of African culture? Does African culture have something to say about disability? What are the negatives and what are the positives in African culture in its interaction with disability? Can we pass laws to discipline culture?*

### 1.3.2 Culture and negative relationship with disability

The fact that the UN General Assembly conceded, albeit after many years of delay and prevarication, to adopt the CRPD global instrument to protect the rights of people with disabilities across the world in 2006, underscores the reality of the global nature of the phenomenon of disability-related discrimination. It underlines the cross-cultural nature of the bane of disability-related discrimination. Though the plight of people with disabilities is more accentuated in the Global South on account of relative material differences and poverty, nonetheless, disability is not the preserve of a particular culture. It is an age-old bane. In making this point we may use the following premises as points of departure:

- Disability exists throughout the world, without respect for national, ethnic or cultural boundaries (Ingstad & Whyte, 1995; Anderson, 2004: 4).
- Whether disability is viewed as bodily, intellectual or physiological impairment, or failure by society to accommodate 'impairment' or a combination of the two, disability is present in all societies whether in the Global north or south (Barnes, 1996: 43-49).
- Across cultures, there has been a clear historical tendency to perceive people with disabilities in negative light as misfortunes and dependants and as people that are intrinsically incomplete and imperfect.
- Historically, people with disabilities have not only endured exclusion and isolation. In some cases, society has also gone as far as visiting official as well as unofficial annihilation upon people with disabilities. For example, the Greeks abandoned disabled babies to the hillsides to die, while the Chinese drowned disabled people in rivers. The Christian church in the 15th century was superstitious about disabled people, perceiving them as punishment for sin or incarnations of the 'devil' (Barnes, 1996).
- Across cultures, including in some African traditional societies, infanticide has historically been sanctioned for certain categories of disabled babies (Chimedza & Peters, 1999).
- In modern times, the Third Reich took eugenic thinking to the ultimate extreme when it sanctioned, amongst other murderous acts, the killing of disabled people (Müller-Hill, 1988).

- Equally disconcerting, today, in some parts of Africa, people with disabilities live a precarious existence not only on account of material deprivation, discrimination and social isolation, but also because of real threats to their lives. People who are born with albinism are a case in point. In some parts of Africa, they have been murdered in ritual killings to obtain body parts by those who believe that albinism has magical powers (Shout Africa, 2010).
- Historically, especially in countries in the Global North, institutionalisation of persons with disabilities, especially persons with intellectual disabilities, has been part of the response to the need to provide care and assistance. However, institutionalisation of persons with disabilities has come with its fair share of serious and gross human-rights violations of persons supposedly in care. Institutionalisation has become for many people with disability synonymous with neglect, mistreatment and abuse (Kanter, 2015: 65-66). Though institutionalisation of persons with disabilities has not been nearly as prevalent in the African region, nonetheless, it exists and raises the same human rights concerns. Article 19 of the CRPD on the right to independent living is specifically intended to respond to the flight of coerced institutionalisation of persons with disabilities by requiring states not only to recognise that persons with disabilities have a right to live and participate in communities but to also facilitate this choice by providing material and other support.

In capturing these extreme violations of the human rights of people with disabilities, the intention is not to portray them as the average societal reaction to disability or to claim that people with disabilities are *always* perceived in a negative light and are *always* subject to discrimination. Rather, it is to highlight that cross-cultural fixation with the myth of bodily and intellectual perfection is a historical truism that is generalisable to a large extent. At the same time, it is also equally important to enter important caveats as a way of also capturing that culture can also relate positively to disability.

### 1.3.3 Culture and positive relationship with disability

When reflecting on the intersection between culture and disability, especially in African communities, we can also note that:

- Across cultures, there are also positive historical portrayals of people with disabilities, including in African societies (Groce, 1985; Scheer & Groce, 1988; Talle, 1990; Kisanji, 1995; Kisanji, 1998).
- In his study of community attitudes towards people with disabilities in Tanzania, for example, Kisanji found that negative attitudes were juxtaposed with positive attitudes which exhibited a spirit of accommodation and relations of equality and respect for human rights (Kisanji, 1995).
- While African societies are diverse, there are certain generalisable traditions and philosophies which we can tap into to establish a cultural archive that impacts positively on promoting the human rights of people with disabilities in African societies even if the traditions and the philosophies may not have specifically addressed disability (Cobbah, 1987). More specifically, the

accent of African values on ‘groupness, sameness, and commonality’, and on communal solidarity, co-operation, interdependence and collective responsibility in contradistinction to notions of crude individualism and survival of the fittest (Cobbah, 1987: 320), presents Africans with a rich cultural heritage upon which to anchor the human rights of disabled people.

- African philosophy of communitarianism known as *ubuntu* (or its equivalents) in the various parts of Africa is a cardinal philosophy for promoting the human rights of disabled people. The kernel of *ubuntu* as an African value system and societal practice is its accent on the ontological relationship between individuals (Murove 2009, 30). A person is only a person through other persons (Mbiti, 1969). Each person has inherent worth and dignity which must be respected unconditionally as part of community citizenship. Therefore, to see a person with disabilities as something less would also diminish the personhood of the observer.
- Normatively, *ubuntu* engenders much more than mutual recognition as a categorical imperative. It also comes with socioeconomic duties. It requires compassion, solidarity and sharing as manifestation of mutual recognition of human beings, even when they are strangers, as all people are interdependent and everyone belongs to a human community (Munyaka & Motlhabi, 2009: 74). This is not to say that respect for autonomy is absent in African communitarianism. Rather, it is to stress that individualism is realised within greater communitarian ideals of mutual recognition and support. In many ways, therefore, the notion of disability rights as human rights which conflate civil and political rights with socioeconomic rights, as does the CRPD, and is not new to Africans and to *ubuntu*. Instead, it is old wine in new modernistic bottles.
- It is of interest to the development of indigenous jurisprudence on disability rights in the African region to note that philosophers, jurists and courts in South African courts, spurred by the South African Constitutional Court, have begun to use or at least engage seriously with *ubuntu* as a constitutional value that can or ought to inform the interpretation of constitutional rights (Mokgoro, 1998; Cornell, 2004: 669-674; Cornell & van Marle, 2005; Gade 2011; Bennet, 2011).

of disability? Is a conceptual clarification of disability something we can do without? If our answer is in the affirmative, it means that we (including policymakers, legislators, courts, human rights activists) all intuitively know who a person with a disability is in the same way as, perhaps we know sex categories. But even categories that we believe we are familiar with can become problematic as did race during apartheid in South Africa. In respect of some persons before apartheid racial classification boards, gross morphology did not always live up to the expectations of the drafters of racial classification laws. Intersex status can get us unstuck if we start off with only two dichotomised sex categories – male and female. So categories are rarely as simple as they might appear. Each category, as Shakespeare has noted, can ‘dissolve into a breath of reference and confusion on closer examination’ (Shakespeare, 1999: 25). The challenge is even more compounded in disability as we shall see.

As societies, communities or individuals, we would be naïve to assume that we have a common understanding of what disability is and that the understanding can provide a basis upon which we build disability rights. Even amongst people who identify themselves as people with disabilities or disabled persons or are perceived by others as people with disabilities, there may be disagreement about what constitutes disability or what the response of society and the state should be (Watson, 2002). It is not surprising, therefore, that drafters of the CRPD could not easily reach consensus on how to define ‘disability’ (Lawson, 2007: 593-595). In the end, by way of finding a way forward, drafters of the CRPD acknowledged that ‘disability’ is an ‘evolving concept’ (Preamble to the CRPD, para (e)). On account of the evolving nature of disability, the CRPD opted, instead, not so much for a definition but an explanation of who ‘persons with disabilities are’ (CRPD, article 2).

## 2 What is ‘disability’?

### 2.1 Introducing the concept of disability

#### The elusive nature of a definitional construction of disability or a person with a disability

‘The question of who “qualifies” as disabled is as unanswerable or as confounding as questions about any identity status. One simple response might be that you are disabled if you say you are ...’ (Linton, 1998:12-13)

To understand disability rights as valuable claims that can be asserted by people with disabilities to protect their inherent dignity and rights to equality, we ultimately need to understand what ‘disability’ is as it is the subject matter of the rights in question. Why might it be important or even essential to clarify the meaning of disability or have a definition

### Student activity around nomenclature of 'people with disabilities' the second paragraph of art 1 of the CRPD

Consider the following questions:

- (1) Do you agree with the second paragraph of article 1 of the CRPD?
- (2) Does the explanation of who 'people with disabilities' are accords with what most people you know think about disability? When you were growing up, for example, how did your family or the community in which you grew up relate to disability? What term was used to denote or describe persons perceived as having disabilities? When you think about the way people with disabilities are described in the community in which you live do you think the focus is on the condition that people with disabilities are believed to have or it is on their personhood as people who experience barriers in society?
- (3) What might have determined the choice of the term 'people with disabilities' over other terms such as 'the disabled', 'the handicapped', 'handicapped people' or 'disabled people'.
- (4) Do you think the second paragraph of article 1 leaves out certain people or includes everyone who is perceived as having a disability or feels they have a disability?
- (5) Is there a bias in the second paragraph of article 1 in favour of people with 'long-term impairments'?
- (6) Is it possible to explain disability without ever using the term 'impairment' or its equivalent?
- (7) How would people with disabilities that you know wish to be described?
- (8) How are people with disabilities described in the media – in newspapers, television and on the radio in the country in which you live? Is the terminology for describing people with disability changing or remaining the same?
- (9) Is there an African conception or worldview of disability? If so, explain the African conception of disability in terms, especially, of its connection with human dignity and any attendant rights and duties. If there is an African conception of disability, what are its strengths and weaknesses?

In legal settings, the ability to use legal rights to regulate effectively given human activities or social effects that impact adversely on persons we seek to protect depends, amongst other requirements, on being able to specify, with relative ease, which individuals fall within the intended class of beneficiaries. This is especially important where the law seeks to use a rights-based approach to alleviate embedded inequality and uplift the welfare of a historically disadvantaged and marginalised group as people with disabilities are. To be able to assert a right, the claimant must fall within the protected class. Equally, to be able to formulate a disability right, the policymaker or legislature must first have a set of objectives about what kind of protection or benefits they intend to confer and on whom precisely.

## 2.2 Lecturer's note

*At this stage, rather than proceed to explain the various approaches to understanding disability and how the understandings are used implicitly or explicitly to formulate the protected categories in disability-related laws, the lecturer can devise hypothetical examples to illustrate the kind of challenges which can be faced when little effort has been spared by the policymakers or lawmakers to spell out who the protected beneficiaries are. As part of building knowledge incrementally, learners can be prompted early into thinking critically about normative content of disability rights and their connections with definitions of disability. Learners can be asked to do some mind exercises by pausing to reflect on the place of definitions of disability and imagining the effectiveness of legislation in hypothetical pieces of legislation in two contexts.*

*One context is a 'social benefits' context and the other is an 'antidiscrimination' context. The importance of using the two hypothetical examples is to invite learners to reflect on the connection between the conceptualisation of disability and context so that they can appreciate that the purpose underlying the definition or explanation of disability is just as important as the words that are used (or not used) to explain what disability is. Disability rights cannot be understood without first asking what purpose they serve or are intended to serve. By reflecting on the purpose of disability rights and the means chosen to acknowledge them in law, learners can also begin to reflect on the philosophy or philosophies underpinning disability rights.*

*It is important to encourage learners to appreciate at an early stage that even law that is intended to protect the rights of people with disabilities can be manifestly incomplete or can contain contradictory philosophies. Such reflection prepares learners to become aware at an early stage of the complexities of disability as a legal concept and the pitfalls of assuming that any given law either follows a 'medical model' approach or a 'social model' approach. In reality, most laws have elements of both and can, indeed, contain other models. What makes the difference is where the emphasis or balance lies and the context in which the law is applied.*

*The inclusion of economic dimensions in the hypothetical is concomitantly intended to encourage learners to prepare their minds for a larger framework of socioeconomic construction of disability so that they do not limit the explication of disability only to the much traversed and recited 'medical model' and the 'social model'. Learners can also explore other models or approaches such as an 'economic model' of disability (Bickenbach, 1993: 93-104).*

### Student activity on the Disability Grants Act of Sena

The Disability Grants Act has been passed by Sena, an African country. The preamble to the Act says that it is an Act to 'provide income support to persons with disabilities in order to meet daily necessities'. The recipients of grants must be between 18 and 60 years old, be permanently resident in Sena and be 'unable to work or find work because of disability'. However, the Act does not explain, at all, what constitutes 'disability' or a 'person with a disability'. Furthermore, the Act does not refer explicitly or implicitly to any other document which may contain a meaning or a lead to the meaning of 'disability' or a 'person with a disability'.

Let us suppose the Disability Grants Act has been adopted with immediate effect in Sena where use of terms such as 'disability' and 'persons with disabilities' in a legal instrument is new to administrators of social welfare benefits. Reflect on the following questions:

- (1) Will the Disability Grants Act be a help or hindrance to claimants seeking disability grants?
- (2) Will the Act apply, for example, to a truck driver who suffers from diabetes and recently lost his job following an above-knee amputation which leaves the driver unable to work until he is fitted with an artificial leg and has successfully completed a rehabilitation programme to allow him to drive a truck again?
- (3) Will the Act apply to a person openly living with HIV who on account of prejudice of airlines has not been able to find work as an air steward on account of his/her HIV status even though he/she has a good CD4 count and is not suffering from any AIDS-related illness?
- (4) Will the Act apply to person who is a leprosy survivor but has denied a job as a waiter in restaurant on the ground that customers will not want to be served food by someone who has some of his fingers missing?
- (5) Will the Act apply to a university lecturer who suffers from periodic clinical depression that leaves him unable to perform duties such as delivering lectures, setting examinations and marking examinations scripts for the first half of each semester in each academic year?
- (6) What kinds of individual and societal interests might a policymaker or legislator wish to balance when devising criteria for entitlement to a disability grant? Draw up two columns of the competing interests that need balancing.

*The point behind the above example is not that, in the end, the meaning will not necessarily be ascertained (such as by reading policy documents, or better still, requesting the responsible government department to formulate guidelines, or learning from other countries). Rather, it is that the examples open the door for contested understandings of disability to play out. One of the areas for learners to reflect on is whether the Act is meant to serve both the purposes of providing income support to people with disabilities who are unable to work even if they wish to work, as well as people who can otherwise work but have been denied the opportunity to work because of negative attitudes towards disability.*

*A lot of time might be spent by the administrators in endless searches or arguments trying to discover the meaning of who falls within the protected category instead of dispensing the benefits to the people who need them timely. Alternatively, it may be that each administrator will begin to use his or her own discretion or 'common sense' to determine who is entitled to the disability grant. But can this approach to the determination of the eligibility criteria be conducive to fairness and transparency in the administration of benefits intended to alleviate the effects of disability and to be understood as rights?*

*If the scope of rights that are guaranteed is uncertain to both administrators and claimants, it is not a good start for all stakeholders! At the same time, where we share different understandings of disability, how do we go about formulating the rights? Do we favour one view over another or do we try and forge a compromise?*

### Student activity on the Prohibition against Discrimination Act of Timbuktu

Timbuktu, an African state, has adopted the Prohibition against Disability Discrimination Act. The Act prohibits 'unfair discrimination against persons with disabilities on the basis of "disability"'. However, as with the Disability Grants Act (above), no guidance has been provided as to what constitutes 'persons with disabilities' or 'disability'.

Rekai is a journalist and newscaster. When she was ten, her parents took her through a ritual of marking her face as a way of identifying Rekai with her family lineage and clan. The markings – three on each side of her face stretch from Rekai's mouth to her ears. The markings have remained highly visible throughout her life. To someone unfamiliar with the cultural significance of the markings, Rekai can be mistaken for someone who has 'ugly' scars. Indeed, in many commentaries the ritual is described as 'scarification'. In many anthropological writings it is described as 'tribal marking'. However, for the clan Rekai identifies with, the markings are an object of beauty.

Rekai is proud of her cultural heritage, including the markings her face. She has been denied employment by a news channel to anchor news at prime time on the ground that her face will be 'distracting' to viewers and cause the channel to lose ratings to a rival news channel.

Consider the following questions:

- (1) Can Rekai derive protection from the Prohibition against Disability Discrimination Act?
- (2) Would this be an Act that Rekai would wish to use in order to assert her right to equality and non-discrimination? If your answer is 'No', suggest what would be the ideal law for Rekai to use.
- (5) Will the Act apply to a university lecturer who suffers from periodic clinical depression that leaves him unable to perform duties such as delivering lectures, setting examinations and marking examinations scripts for the first half of each semester in each academic year?

*The second example, the hypothetical Prohibition against Discrimination Act of Timbuktu, is intended, in one sense, to highlight that the same considerations in respect of the hypothetical Disability Grants Act of Sena regarding the*

importance of clarifying the concept of disability apply. It shows that in respect of law intended to protect people with disabilities from unfair discrimination, clarifying who falls within the protected category is a prerequisite to exercising the right. If the category cannot be ascertained easily and without frequently inviting contestation, including protracted litigation, then the efficacy of the protective legislation will be severely compromised.

In another sense, the hypothetical example is intended to highlight a cultural dimension to disability laws. The example should encourage learners to question whether disability discrimination laws can, in some cases, also be culturally stigmatising. The implicit suggestion is that Reikai is not someone who would, ordinarily, want to use a law that describes her cultural heritage as a disability. Yes, she needs protection from discrimination (such as protection from discrimination on the ground of ethnicity) but not if she has to be labelled first as a person with a disability. While others may perceive Reikai as disabled, she does not see herself as disabled. So there is a question of agency here and undesired differentness. However, there is also room for using disability discrimination legislation 'strategically' or 'pragmatically' if it is the only avenue available at the time to provide protection.

However, learners will get to understand that spelling out the definition of 'disability' or 'a person with a disability' is not necessarily a panacea either. Even when a definition is spelt out, it can give rise to endless arguments, especially if it is too restrictive and has the effect of excluding a significant proportion of people who have experienced disability-related discrimination. This is the fate which, to a large extent, beset the Americans with Disabilities Act of 1990 which is discussed in a later section.

### 2.3 Disability is a broad and imprecise concept

When eliciting the concept of disability, we need to acknowledge that we are facing an extraordinarily broad and imprecise concept (Bickenbach, 1993: 15; World Health Organisation and the World Bank, 2011: 3). Unless we first establish the context in which we need a concept of disability or the criteria are supplied, we are unlikely to get very far without first including literally everyone (Wendell, 1996: 11-13; Shakespeare, 1999: 27-28).

#### Summarising the broad and imprecise nature of the concept of disability

'Conceptually, disability is broad and imprecise. Unless the context is circumscribed, and the criterion for determining disability is supplied, disability has the potential to include an extraordinarily wide range of people who at some stage in their life experience physical or mental restrictions that are regarded to be a departure from the 'norm' or have the experience of being treated as such. Some restrictions may be permanent and others temporary. Some might be severe and others mild. Disability includes people with sight, hearing, communication, physical, intellectual and emotional restrictions. Disfigurement, illness, disease, and the physical and mental limitations that are a natural consequence of aging can all be subsumed under disability, and so can people with latent conditions that do not cause any physical or mental restrictions. The label of disability can arise from self-identity or it might be assigned by other individuals, professionals and institutions. Thus, disability is a concept that is not susceptible to a rigid, incontestable definition, and much depends on the context. In the final analysis, disability is capable of a construction that is so fluid and so encompassing as to include virtually everyone at some stage in their lives.' (Ngwena, 2006: 617-618).

Because disability is a broad and imprecise concept, as part of consolidating our knowledge thus far, we can say that:

- Disability is a site of contestation.
- Disability is a porous category which is not easily amenable to fixing impermeable boundaries and closing the gate through rigid exclusion criteria.
- Disability can be severe or mild, permanent, long-standing or transient.
- Disability can manifest or be perceived to manifest in an anatomical, physiological or intellectual form.
- Disability includes not only what is externally perceived but also what is not perceived and is latent.
- The label of disability can be ascribed by others or it can arise from self-identity.
- The label of disability may be desired or undesired. At times, it serves a strategic purpose only where in a given context a person may regard themselves as a disabled person but not for all purposes.

This is not all we need to know about disability but rather what we have learnt thus far. Once we become familiar with the 'social model of disability', we will also begin to understand how socioeconomic barriers are an important component of how we think about disability, especially in a human rights context.

### 2.4 'Modelling' disability

#### 2.4.1 Lecturer's note

In many commentaries, there is a tendency towards being too simplistic about 'models' of disability and presenting the 'medical model' and the 'social model' of disability as

*the only models of disability. Further, as part of this oversimplification, there is a tendency towards presenting the discourse in mutually exclusive historical periods where the models come in neat compartments chronologically and sequentially succeeding one another with the medical model emerging first but being subsequently expunged by the social model.*

*It is, therefore, important for the lecturer to sensitise learners to the plethora of models or approaches to disability without losing the dominance of the 'medical model' and the 'social model'. Equally, important, learners need to be sensitised to the notion of co-existing models of disability that intertwine with one another as more reflective of what one finds in most laws on disability today. Depending on the context, one model may come to dominate the other.*

### 2.4.2 Multiplicity of disability models

Part of how we can come to grips with the concept of disability and develop a more holistic picture is by following the development of disability as a discourse as well as a site for human rights struggles. In the contestation of disability, different schools of thought or competing theoretical perspectives or frameworks have merged. The frameworks provide us with paradigms for understanding not only what society thinks or does about disability but also what society ought to think and do about disability. As Berg has noted, for example, in the context of critiquing the Americans with Disabilities Act and its conceptions of disability, that definition of disabilities in legislation is underpinned by ideology (Berg, 2000).

#### Unmasking underpinning medicalising ideology in the legal regulation of disability

The definition of disability in anti-discrimination law is part of a larger cultural discourse that establishes and upholds dominant notions of health, illness and disability while imposing a particular set of expectations upon individuals deemed to occupy each class. Specifically, the restrictive category of disability reflects and reinforces the notion that disability is an objective biomedical phenomenon that constitutes an essential aspect of the individual. In keeping with this assumption, a principal function of the category of disability is not to inquire into the existence of prejudice or an exclusionary physical environment, but rather to establish the exact nature and severity of the impairment itself, because it is the impairment – not the environment – that is seen as the root cause of the social and economic problems faced by the disabled individual (Berg, 2000:4-5).

At the risk of oversimplification, we can say the 'medical model' and the 'social model' are the two main paradigms that have dominated current discourse on disability, with the social model serving as a counterpoint to the medical model and, ultimately, shaping the approach to disability rights in the CRPD. The reason for using parenthesis so far when referring to the medical model and the social model is in order to highlight the following aspects:

- 'Models' are not models in a strict scientific sense but instead contrasting approaches for understanding disability and the normative responses to disability.
- Though the terms 'medical model' and 'social model' have gained the widest currency, authors may use different terms for the same approach, such as using 'biomedical model' for medical model and 'socio-political model' for social model (Bickenbach, 1993: 61-92). Initially Oliver, one of the pioneers of the social model, used the term 'individual model' to describe what is now described as the medical model (Oliver, 1983)
- There are myriad other theoretical paradigms for understanding disability. Models of disability are not a closed category. As new thinking about disability is developed, new models will emerge. To illustrate the rich variety of models, the following can be noted:
  - (1) Perhaps the human rights model does not require further explanation save to highlight that the adoption of the CRPD in 2006 consolidates and brings into mainstream human-rights jurisprudence a rights-based approach towards disability that is informed by the notion of disability as a universal human right issue.
  - (2) Bickenbach, for example, uses three categories to classify models of disability: **biomedical model** (a term synonymous with medical model); the **economic model** (which looks at disability in terms of economic efficiency) and the **socio-political model** (a term synonymous with the social model). Bickenbach uses the economic model to explain how the state responds to disability in areas such as social welfare benefits, rehabilitation and workplace insurance for disability (Bickenbach, 1993: 93-134).
  - (3) Some commentators use the term '**social welfare model**' to describe mainly state intervention to provide 'special' services for people with disabilities in specific sectors such as housing, education and employment (Waddington & Diller, 2002).
  - (4) Some commentators addressing disability rights in the United States and to a point Canada have, in addition to using the medical and social model, also used the '**minority group model**' or 'civil rights model' to highlight the social status of people with disabilities as analogous to the status of social groups such as raced and gendered groups that have also been at the receiving end of discrimination. The model calls for a political call for action and requires eradication of exclusionary social practices and structures as a matter of individual rights (Hahn, 1994; Crossley, 1999: 659-665; Diller, 2000: 31-38; Kanter, 2011: 421-426; Penny, 2002: 89-93).
  - (5) **Bio-psycho-social model**: This model was developed by the World Health Organisation and published in 2001 (World Health Organisation, 2001). Following criticisms by disabled people's organisations amongst others, that an approach to disability that the World Health Organisation had published in 1980 – the International Classification of Impairments, Disabilities and Handicaps

(ICIDH) – which was built around ‘impairment’ was an overly medicalised approach that ignored the environment, World Health Organisation revised ICIDH and came up with the International Classification of Functioning, Disability and Health (ICF). The ICF employs three operational concepts – ‘impairment of body structure and function’, ‘activity limitations’ and ‘participation limitation’. While the ICF retains ‘impairment’ as a foundational concept, it is built around a more interactive model of disability where the dynamic relationship between health status (as intrinsic characteristics) and the physical and social environment (as extrinsic factors) are unambiguously acknowledged (Bickenbach et al, 1999: 1183-1186; Ngwena, 2006: 637). The ICF is regarded not just by its architects but also by critics as an approach to disability that achieves a compromise between the medical model and the social model (World Health Organisation & World Bank 2011: 4; Crossley, 1999: 646; Barnes, 2000: 443; Ngwena, 2006: 637). But describing the ICF as an ‘interactive’ model of disability should not be understood as suggesting it is the only model that adopts an interactive approach. If anything, the ‘social model’ of disability is the model that pioneered an interactive approach.

- (6) **Liberal model:** Using mostly the equality philosophies of Ronald Dworkin and Will Kymlicka, Penney has used the term ‘liberal model’ to describe a model of disability that placed an emphasis on achieving justice through redistribution of resources to compensate for ‘natural disadvantages’ (Penney, 2002: 86-87).
- (7) **Cultural model:** If we take inclusive equality seriously (which we must if we are committed to disability rights!), then we must also guard against cultural imperialism in the making of disability. To a point, the Class Activity in Box 3 (above) implicitly invited learners to question who does the labelling even for the purposes of conferring protection and whether protection which comes already packaged as protection against ‘disability discrimination is always wanted’ or may in fact be misguided paternalism and unacceptable cultural imperialism which, paradoxically, serves to recolonise the community that is being protected.

Discourses around whether being deaf marks one as having a disability or a member of a linguistic minority raise these issues poignantly (Groce, 1985; Jan & Miller, 2002; Foster, 2003). They underscore that disability is a discursive formation that is open to contestation. How we respond to the issues of deafness and the normative responses we advocate, will inevitably be influenced by our cultural biases, including whether we are members of the Deaf community and whether we see deafness as a *problem* in the first place.

Analyses of disability built around the work of Foucault (Carlson, 1985; Hughes, 2005), deconstructionists (Young, 1990), feminists

(Hillyer, 1993; Wendell, 1996; Garland-Thomson, 2002) and critical race theorists (Campbell, 2008) can be used to illustrate the power of culture in the making and sustenance of disability. When cultural norms are used to create categories, they do not do so haphazardly. When we, as societies, create the ability/disability dichotomy, we begin with an unstated norm or centre of normalcy. We use ‘our’ cultural values (meaning dominant cultural values) to create a dichotomy between people who possess ‘normal’ traits and those who do not (Minnow, 1990:50-51). Imposing a category that is unwanted injures human dignity. Furthermore, it is an ‘othering’ process that creates a system for distributing rights and burdens in a manner that is self-serving to those who have the cultural or political power to do the labelling. Historically, the neglected question we have never asked is whether those who are labelled do not have a say in the construction of categories that mark the ability/disability system. How inclusive are the values we use to create the ability/disability system?

It is important to examine each approach that is claimed as a model of disability closely to see to what extent it overlaps with the other models and whether in fact it is not in substance a restatement of another model. Ultimately, it is important to appraise each understanding of disability to see to what extent it has the capacity to overcome structural inequality that is a result of disability-related discrimination (Ngwena, 2014).

### 2.4.3 Medical model

To understand what is now widely described as the ‘medical model’ and its origins, one has at the same time to factor in the social model. This is because the social model explains what the medical model is not and vice-versa. The social model was developed out of discontent with the ‘medicalisation’ of disability by disabled people especially. The medical model began its life as ‘individual model’ to highlight its preoccupation with the body and mind or intellect as the explanation for disability. The term ‘medical model’ is something of later nomenclature and shorthand to describe an approach to disability that focuses on impairment. Oliver, a leading exponent and one of the pioneers of the social model explains the provenance of the social model and, by implication, the medical model:

I originally conceptualised models of disability as the binary distinction between what I chose to call the individual model and social models of disability. This was no amazing new insight on my part dreamed up in some ivory tower but was really an attempt to enable me to make sense of the world for my social work students and other professions whom I taught. The idea of the individual and the social model was taken quite simply and explicitly from the distinction made between impairment and disability by the Union of the Physically Impaired against Segregation ... I wanted to put this distinction into a framework that could be understood by professions with a limited though expanding knowledge of disability issues. The individual model for me encompassed a whole range of issues and was underpinned by what I

call the personal tragedy theory of disability. But it also included psychological and medical aspects of disability; the latter being what I prefer to call the medicalisation of rather than the medical model of disability. In short, for me, there is no such thing as the medical model of disability, there is instead, an individual model of disability of which medicalisation is one significant part (Oliver, 1990a).

The medical model is an approach to disability that:

- locates the 'problem' of disability within the individual;
- understands the 'problem' as intrinsic to the individual in that it originates from functional limitations or psychosocial losses arising from disability;
- uses functional determinism as the gold standard for telling whether the body is normal and measuring and verifying disability clinically;
- treats disability in the same way as illness in terms of the diagnostic, curative and rehabilitative capacities of medicine; and
- was largely promoted by the World Health Organisation in 1980 through its taxonomy of disabilities – the *International Classification of Impairments, Disabilities and Handicaps* (World Health Organisation, 1980) which conceived disability in terms of a tripartite typology involving: 'impairment' meaning 'any loss or abnormality of psychological, physiological or anatomical structure or function'; 'disability' meaning 'any restriction of lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'; and 'handicap' meaning 'a disadvantage for a given individual resulting from an impairment or a disability that limits or prevents the fulfilment of a role that is normal (depending on age, sex and social and cultural factors) for that individual'.

The medicalisation of disability has been met with discontent at several levels mainly because it:

- treats disability as deficit and as an illness;
- ignores the causative role of the socioeconomic environment in the creation of disability and in the process exonerates society from a duty to dismantle barriers;
- fosters a 'sick role' on disabled people and reinforces the social power of professionals people, including doctors and rehabilitation experts over disabled people;
- reinforces dependence and charity historical approaches to disability;
- stigmatises disablement and disabled bodies as it uses a biostatistical norm to measure disability as departure from the norm; and ultimately; and
- depoliticises disability (Finkelstein, 1980; Oliver, 1983; Oliver, 1990; Oliver, 1996; Barnes 1996; Ngwena, 2006: 620-630)

Brisenden has articulated some of the main shortcomings with the medicalisation of disability:

The problem, from our point of view, is that medical people tend to see all difficulties solely from the perspective of proposed treatments for a 'patient', without recognizing that the individual has to weigh up whether this treatment fits into the overall economy of their life. In the past especially,

doctors have been too willing to suggest medical treatment and hospitalization, even when this would not necessarily improve the quality of life for the person concerned. Indeed, questions about the quality of life have been portrayed as something of an intrusion upon the purely medical equation. This has occurred due to failure of imagination, the result of the medical profession's participation in the construction of a definition of disability which is partial and limited. This definition has portrayed disability as almost entirely a medical problem, and it has led to a situation where doctors and others are trapped in their responses by a definition of their own making (Brisenden, 1986).

Crossley has summarised the medical model in the following way:

The defining characteristic of the medical model is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remedying the disability. Under this view, while the cause of impairments may vary, the disabled individual is viewed as innately, biologically different and inferior. The physical difference of the individual is often apparent, and the nondisabled see the individual's inferiority and resulting social disadvantage as flowing from that physical difference. Thus, according to the medical model of disability, the disabled individual's problem lies in her impairment (Crossley, 649-650).

#### 2.4.4 Social model

##### *Origins of the social model*

The social model is an approach to disability that was largely (though not solely) pioneered by British disability movements with disabled people's organisations playing a vanguard role (Finkelstein, 1980; Oliver, 1983; Oliver, 1990; Oliver 1996; Ngwena, 2012: 283). Independent living movements in North America also played a role (Barnes, 2004; Barnes, 2012)

As Oliver has acknowledged, the provenance of the social model can be found in the statement made in 1976 by the Union of the Physically Impaired against Segregation (UPIAS) expressing the discontent of disabled people with the medicalisation of disability and advocating for a new and radical approach that moves away from disability as intrinsic impairment. The UPIAS said:

In our view, it is society which disables ... *Disability is something imposed on top of our impairments*; by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.

Thus we define impairment as lacking all or part of a limb, or having a defective limb, organ or mechanism of the body; and disability as the disadvantage or restriction of activity caused by a contemporary

social organisation which takes little or no account of people who have physical impairments and thus excludes them from the mainstream of social activities (UPIAS, 1976).

#### **UPIAS Definition of Impairment and Disability**

**Impairment:** lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body.

**Disability:** disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from the mainstream of social activities.

The major achievements of UPIAS were in:

- developing a normative sociopolitical conceptualisation of disability and conceiving exclusion of disabled people as political oppression analogous to oppression based on grounds such as gender and race (Abberley, 1987; Charlton, 1998);
- drawing a distinction between what is biological – impairment – and what is social or political – disability;
- conceiving disability as the disadvantage or restriction caused by contemporary social organisation which takes no or little account of people who have impairments and thus excludes them from participation in the mainstream of social activities' (UPIAS, 1976); and
- beginning to influence national and international organisations, official policies and academe to develop exploring alternative understandings of disability away from the historical focus on 'impairment'.

Initially, the focus on UPIAS was on 'physical impairments', a focus which reflected its members. Later, this was broadened to include all impairments, whether physical, sensory or cognitive. British sociologists took a lead in popularising as well as bringing developing the social model as an academic discourse. In articulating the social model, Oliver, a leading exponent, said:

... disability, according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalized throughout society (Oliver, 1990:33).

#### ***Essence of the social model***

The social model can be understood as an approach to disability that has the following main features:

- It constitutes a major shift away from viewing impairments as the cause of disability. Instead, it is the way that society is organised that produces the phenomenon of disability. Thus, socioeconomic barriers are disabling and failure to dismantle them explains disability.
- It is a sociopolitical approach to disability in three main senses: 1) It explains disability as the outcome of failure by society to dismantle environmental barriers; 2) It is normative. It requires society to take positive steps to dismantle the barriers and accommodate disabled people; and 3) ultimately, it implicates the socioeconomic exclusion of disabled people and the failure to dismantle barriers as political oppression.
- It is an approach to disability that is focused on socioeconomic inclusion and participation as part of fulfillment of equality in a liberal democracy (Jones, 2011).
- The social model does not deny the fact of 'impairments'. It does not deny that for individuals medical or rehabilitative interventions are important and essential services in appropriate cases. However, what is important to understand is that the social model is not an approach to disability that focuses on individual restrictions but rather on the wider socioeconomic environment. The focus of the social model is on the duty of society to dismantle barriers.

#### ***Criticisms of the social model***

As with any conceptual approach, it is never above reproach. The social model has its critics. Indeed, the last bullet point was in fact implicitly addressing some of the critics of the social model. In the main, the social model has been criticised on the following grounds:

- for being too rigid and reductionist to the point of ignoring the reality of impairments and the experience of those who feel the pain, discomfort and inconveniences that they relate with impairments (Crow, 1996; Hughes & Paterson, 1997; Shakespeare & Watson, 2002; Shakespeare, 2006; Anastasiou & Kauffman, 2013).
- for ignoring the place of prevention in disability (World Health Organisation & World Bank, 2011).

#### ***Persistence of the medical model in policies or laws that profess to adopt a social model***

#### **Lecturer's note**

*As part of promoting understanding of the persistence of the medical model even in areas where the state claims to be guided by a social model, learners have been set a class activity around the decision of the Western Cape High Court in Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa (2011) 5 SA 87 (WCC). The lecturer need not use this case if the jurisdiction in which the learners are located has its own case law which can equally serve the learning objectives.*

It is important for learners to be aware that policymakers may attach the name of a particular model to a policy that they are implementing and legislators may do the same. In practice, however, a policy or law which claims to have moved from, say,

a 'medical model' to a 'social model' may continue to retain its original character unless there has been a conscious and genuine effort to transform. This is illustrated by the education policy that was challenged successfully in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* (2011) 5 SA 87 (WCC).

The *Western Cape Forum for Intellectual Disability* concerns the denial of funding for education for children classified as having 'severe and profound intellectual disabilities' on the basis that such children are uneducable. This was so notwithstanding that the state policy for learners with disabilities – *White Paper 6* – subscribed to *Education for All* and recognising diversity through provision of inclusive education (Department of Education, 2001).

Learners can read *Western Cape Forum for Intellectual Disability* case for themselves. Also to gain a fuller understanding of contradictions in law and policy, they can read any one of the following commentaries on the *Western Cape Forum for Intellectual Disability* case: Ngwena & Pretorius, 2012; Ngwena, 2013. In their criticism of government policy that was at issue in *Western Cape Forum for Intellectual Disability*, Ngwena and Pretorius said:

It is a great irony that, even disregarding the Constitution and the Convention on the Rights of Persons with Disability, which South Africa has ratified together with the Optional Protocol to the Convention, that in *Western Cape Forum* the state blatantly flouted its own flagship policy – *White Paper 6*. This policy was the state's flagship policy and had taken several years to develop. It was manifestly intended to be inclusive and yet the state undermined its own policy by falling prey to an embedded discourse of disability which has long labelled children with severe or profound intellectual disabilities as 'ineducable'. *Western Cape Forum* tells us what happens when state policymakers effortlessly lapse into old ways of thinking and, without any moral compunction, categorise and draw a distinction between what is 'normal' and deserving of a claim on state resources from what is 'abnormal' and undeserving (Ngwena & Pretorius, 2012: 114)

When reading the *Western Cape Forum for Intellectual Disability* in order to interrogate models of disability, learners can first familiarise themselves with the facts and the decision, and then answer some questions. In the next box, the facts and the decision are summarised and that is followed by questions learners should attempt to answer.

### Student activity on unmasking disability models in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*

The following is a summary of the facts to help you quickly grasp the facts. However, in order to be able to respond to the questions below, it is essential to read the entire judgment.

*Western Cape Forum for Intellectual Disability* concerns an application that was brought before the Cape High Court to challenge the constitutionality of state policy and practice for the funding and provision of schools for children who were classified as having 'severe and profound intellectual disabilities' in the Western Cape. The application was brought by the Western Cape Forum for Intellectual Disability (Western Cape Forum), a non-governmental organisation which provided care for such children in the Western Cape. The respondents were the state at national and provincial levels. As part of the discharge of its constitutional duty to provide basic education under section 29(1) of the Constitution, which says 'everyone has a right to basic education, including adult education', the state had established 'special schools', through the Department of Education, to cater for the needs of children with 'moderate to mild intellectual disabilities'. These were children with an Intelligence Quotient (IQ) in the 30 to 70 range and could not be admitted to 'mainstream schools'. However, the state made no equivalent provision for children classified as having 'severe and profound intellectual disabilities'. These were children with an IQ of 20-25 (severe intellectual disabilities) and less than 20 (profound intellectual disabilities).

Over and above differentiation in terms of provision of schools, there was also differentiation in the amount of funding. The amount depended on whether a child was admitted to a mainstream school or a special school, or could not be admitted to either school. Each year, the Department of Education spent R6 632 per child attending a mainstream school, and R26 767 per child attending a special school. However, it made no direct financial provision for children who could not be admitted to a mainstream school or a special school, namely children with severe or profound intellectual disabilities. For such children, the main financial contribution made by the state took the form of an indirect contribution described as an annual 'subsidy' of the amount of R5 092 per child. The contribution was made by not so much the Department of Education, but by the Department of Health to organisations such as Western Cape Forum which provided 'Special Care Centres' to cater for their needs. However, demand exceeded supply. Not all children with severe or profound intellectual disabilities could obtain access to Special Care Centres. In the Western Cape, Special Care Centres catered for about 1 000 children in a province with approximately 1 500 children with severe or profound intellectual disabilities. In order to distinguish between learners according to IQ and whether they would be placed in a school and be entitled to educational support the Department of Education used an administrative instrument called Screening, Identification, Assessment and Support Strategy (SIAS Strategy).

The applicant argued that state education policy and practice constituted an infringement of the fundamental rights of children with severe and profound intellectual disabilities for the reasons that there was no school provision, at all, for such children, and that the only financial contribution that was made by the state was an indirect subsidy paid to non-

governmental organisations running Special Care Centres and of an amount that compared most unfavourably with their counterparts. While the applicant sought to vindicate the constitutional rights of the children through alleging breach of the constitutional rights to equality (section 9), human dignity (section 10), basic education (section 29(1)(a)) and the right of children to be protected from neglect or degradation (section 28(1)(d)), the case was principally argued and determined through the application of the right to equality and basic education.

Answer the following questions:

- 1 What was the decision? What were the reasons given for the decision?
- 2 What reasons were given by the state for excluding children with severe and profound intellectual disabilities from entitlement to educational funding?
- 3 Can the reasons given by the state for not providing educational support for children with severe and profound intellectual be explained as arising from a particular understanding of severe and profound intellectual disability which makes it unnecessary for the state to think in terms of a duty to provide education?
- 4 What purpose do you think was served by categorising children according to IQ levels? Furthermore, do you think that intelligence is something we can measure objectively?
- 5 When you consider the role played by the SIAS Strategy in determining the inclusion/exclusion criteria, what model (or models) of disability do you think the SIAS Strategy supports?
- 6 When you consider *White Paper 6: Special Needs Education. Building an Inclusive Education and Training System*, a policy paper that is mentioned in the judgment and was part of the court's deliberation, what model (or models) of disability do you think White Paper 6 supports?
- 7 What model (or models) of disability do you think the decision of the court supports?
- 8 What model (or models) of disability do you think the South African Constitution supports?

**Nomenclature: Is there correct terminology to use when describing people with disabilities?**

Of course, there is correct terminology to use when naming any social group, especially a group that has been at the receiving end of pejorative and degrading epithets (Doyle 1995: 4-6). This is no more true for people with disabilities than it is for other groups that have been described in insulting and hurtful ways, say, on account of race, religion or sexual orientation. However, beyond using respectful and dignified terminology, there is rarely ever a single way of describing a social group. We can accept that in our context that both 'people (persons) with disabilities' and 'disabled people or persons' are acceptable as they are accepted by people with disabilities in different contexts (Ngwena, 2006: 615-617). The best way of describing a social group is how the group would wish to be described. In our contexts, two usages have emerged. The wider and

now more popularised term is 'people with disabilities' as 'people first language' (Clark & Marsh, 2002). At the same time 'disabled people' is favoured by movements that wish to highlight the place of the social model and the duty of society to dismantle barriers that disable people so as to enable every one and thus build an inclusive society (Priestly, 2006: 21-22). Used in this sense, 'disabled people' is strategic naming as it implicates a moral wrong and as the same time calls for remedial action. The African Union used both terms interchangeably and so do many disabled people's organizations on the African continent (African Union, 2009: 2).

### 3 Disability rights: Consolidating knowledge and understanding

#### 3.1 Lecturer's note

*One way of assisting learners to consolidate their knowledge and understanding of the topics covered in this module is to ask them to apply their knowledge to the developments in their own jurisdiction to reflect on how disability rights are being approached at a broad philosophical level. Learners can be asked to read a piece of domestic legislation, policy or decision of the court in order to address a number of issues that are linked with conceptions of rights and conceptions of models of disability.*

*The following box is an illustration only of how lecturers can develop class activities relevant to their own jurisdictions in respect of interrogating domestic policy, legislation or a decision of a court. It is vitally important for lecturers to devise problems that are relevant to the environment of the learners so that they do not end up knowing more about other countries than their own jurisdiction.*

#### Student activity on unmasking the nature of disability rights and underpinning model(s) of disability in policy, legislation and court decisions of your jurisdiction in the context of protection against unfair discrimination and promotion of equality

In order to answer the questions below, learners must first be asked to read the following documents:

- 1 Bill of rights of the South African Constitution with particular reference to section 9 which guarantees equality;
- 2 Employment Equity Act of 1998;
- 3 Decisions of the court in *IMATU v City of Cape Town* (2005) 14 LC 6.12.2
- 4 Department of Labour *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (2002)

Learners can be asked the following questions:

- (a) Does the Constitution protect disabled people against unfair discrimination? If so, what model(s) of disability do you think the Constitution uses or should use?
- (b) In section 6(1), the Employment Equity Act 'disability' is listed ground against unfair discrimination. But what

But what if section 6(1) had not listed disability? Could disability be implied?

- (c) What does disability mean in section 6(1)? Does 'disability' in 6(1) of the Employment Equity Act mean the same thing as 'people with disabilities' in Chapter III of the Act? Chapter III of the Act deals with 'affirmative action' measures? To answer this question, learners must first read *IMATU v City of Cape Town and Code of Good Practice: Key Aspects on the Employment of People with Disabilities*.
- (d) What model(s) of disability does section 6(1) of the Employment Equity Act use?
- (e) Should people with disabilities be entitled to a right to affirmative action? If so, what would be the implications of describing affirmative action as a right? What do you think is the approach of Chapter III of the Employment Equity Act in relation to whether affirmative action is a right?

### Student activity on unmasking the nature of disability rights and underpinning model(s) of disability in policy, legislation and court decisions of your jurisdiction in the context of access to disability grants

In order to answer the questions below, learners should first be asked to read the following documents:

- 1 Bill of rights of the South African Constitution with particular reference to section 9 which guarantees equality and section 27 which guarantees social security and assistance to those who are unable to support themselves;
- 2 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; and
- 3 Social Assistance Act of 2004 as amended.

Having taken note that section 9b of the Social Assistance Act establishes criteria for eligibility to a social assistance grant on the ground that a person is, '**owing to a mental and physical disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance**', learners can be asked the following questions:

- (a) Is the meaning of disability in section 9b of the Social Assistance Act clear, say, to those who have the task of dispensing disability grants?
- (b) In your view what model(s) of disability does section 9b use? Do you agree with its general orientation?

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- Talle, A (1990) 'Notes on the concept of disability among the pastoral Maasai in Kenya' in Bruun, FJ & Ingstad, B (eds) *Disability in a cross-cultural perspective* Working Paper No 4, University of Oslo 61-78, cited in Kisanji, J 'The march towards inclusive education in non-Western countries: Retracing the steps' (1998) 2 *International Journal of Inclusive Education* 55 60
- Waddington, L & Diller, M 'Tension and coherence in disability policy: The uneasy relationship between the social welfare model and civil rights models of disability in American, European and International Employment Law' in Breslin, ML & Yee, S (2002) *Disability rights law and policy* Ardsley: Transnational Publishers Inc 242
- Watson, N 'Well I know this is going to sound very strange to you, but I don't see myself as a disabled person: Identity and disability' (2002) 17 *Disability and Society* 509

## Legislation

### South Africa

- Constitution of the Republic of South Africa, 1996
- Employment Equity Act 55 of 1998
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- Social Assistance Act 13 of 2004

### United States

- Americans with Disabilities Act Pub L No 101-336, § 104 Stat 327, codified at 42 USC §§ 12101-12213 (1990) as amended

## Codes of Practice

- Department of Labour *Code of good practice: Key aspects on the employment of people with disabilities* (2002)

## International law instruments

- Convention of the Rights of Persons with Disabilities. GA Res. 61/611, adopted on 13 December 2006, and entered into force on 3 May 2008

## Consensus documents

- African Union Continental Plan of Action for the African Decade of Persons with Disabilities 1999-2009 [http://sa.au.int/en/sites/default/files/Disability\\_Decade%20Plan%20of%20Action%20-Final.pdf](http://sa.au.int/en/sites/default/files/Disability_Decade%20Plan%20of%20Action%20-Final.pdf)

## Cases

### South Africa

- Imatu v City of Cape Town* (2005) 14 LC 6.12.2
- Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* (2011) 5 SA 87 (WCC)

## Recommended reading

*The following three articles have been recommended because they serve the objective of consolidating the objectives of the module. Though in one sense, the articles address specific jurisdictions – the USA in the case of Berg's article, and South Africa in the case of Ngwena's articles – nonetheless, the articles specifically pay close attention to global discourses on disability. All three articles attempt to go behind disability laws to elicit the underpinning philosophical orientation and its relationship with 'models' of disability. The articles highlight contradictions*

and gaps in laws that are intended to confer disability rights.

*When reading any article, account must be taken of jurisprudential developments which came after the article was published. Berg's article, for example, was written before the US Congress passed the Americans with Disabilities Act of 2008 which amended some aspects of the interpretation of the Americans with Disabilities Act of 1990. Similarly, the articles by Ngwena were written before the United Kingdom adopted the Equality Act of 2010 which rationalises antidiscrimination legislation including the British Disability Discrimination Act so that there is a single antidiscrimination Act.*

Berg, PE 'Ill/Legal: Interrogating the meaning and functions of the category of disability in antidiscrimination law' (2000) 18 *Yale Law & Policy Review* 1

Ngwena, CG 'Deconstructing the definition of "disability" under the Employment Equity Act: Part 1 Social Deconstruction' (2006) 22 *South African Journal on Human Rights* 613

Ngwena, CG 'Deconstructing the definition of "disability" under the Employment Equity Act: Legal Deconstruction' (2007) 23 *South African Journal on Human Rights* 116

### Further reading

*The book by JE Bickenbach serves as a good reflective introduction to learners that are coming to study disability for the first time. Although it addresses 'physical' disability only, nonetheless, it contains a rich discussion of the various approaches or 'models' of disability. The author adopts a critical approach in ways that can allow learners to take a step back and begin to think for themselves, including being able to also criticise the various models of disability, including the social model.*

Bickenbach, JE *Physical disability and social policy* Toronto: Toronto University Press (1993)

### Film and video

*One of the ways of promoting understanding about disability is through the film media. Fortunately, the advent of internet has made film an accessible medium, especially, short video clips which can be watched without having to sit for an hour or two. The choice of what to watch is vast such that it is not easy to reduce the choice to a few items. Different video clips will address different aspects of disabilities, including personal stories about disabilities. Over and above watching video clips on African disability issues, it would also serve well to watch videos that capture the experiences and portrayals of disability in other parts of the world.*



# Module 2: Protection of disability rights – Global framework

## Module overview

Historically, disability has been treated as an aspect of social security and welfare legislation. Persons with disabilities were depicted not as subjects with rights but as objects of welfare or charity. It took some time for disability to be recognised as a human rights issue at the international level. In fact, disability as a fundamental human rights issue started to be slowly recognised as from the 1970s.

The Module aims to provide an overview of global instruments that were adopted within the framework of the United Nations dealing with persons with disabilities. Thus the road towards the CRPD will be explored and unpacked. A survey of both soft law and binding instruments that address the rights of persons with disabilities will be given.

In essence, the Module will firstly address the development of soft law relating to disability rights. The 'soft law' includes the 1948 Universal Declaration of Human Rights (UDHR), the 1950 Resolution by the UN General Assembly and the Economic and Social Council (ECOSOC) on the Social Rehabilitation of the Physically Handicapped, the UN General Assembly Declaration on the Rights of Mentally Retarded Persons, the UN General Assembly Declaration on the Rights of Disabled Persons, the World Programme of Action concerning the Disabled, the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities and the Millennium Development Goals.

Secondly, the Module will address the protection of disability rights under relevant treaties that were adopted before the CRPD. The treaties include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child (CRC) and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

Finally, the Module will address the protection of disability rights under the CRPD and its Optional Protocol. Thus the main focus will be on substantial and procedural protection of the rights of persons with disabilities under the CRPD and the Optional Protocol. In essence, Students will be required to grasp the historical trajectory of the protection of the rights of Persons with disabilities at the Global Level and under the CRPD.

## Learning objectives

At the end of this Module, learners should have an understanding of:

- Sources of International Law and their relevance to disability rights;
- The historical trajectory of the protection of the rights of persons with disabilities at the Global Level;
- Development of soft law and treaty law for the protection of the rights of persons with disabilities prior to the CRPD; and
- The substantive and procedural protection of the rights of persons with disabilities under the CRPD and its Optional Protocol.

## Module content

The Module is divided into three sections. The first section will briefly address the sources of international law and provides the development of soft law for the protection of the rights of persons with disabilities at the Global Level. The second section will provide the development of treaty law for the protection of disability rights prior to the CRPD. The third section will address both the substantial and procedural protection of the rights of persons with disabilities under the CRPD and its Optional Protocol.

### 1 Development of soft law for the protection of the rights of persons with disabilities

#### 1.1 Sources of international law

The sources of international law are found in article 38(1) of the Statute of the International Court of Justice and these are international conventions (as governed by the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations of 1986); international custom; the general principles of law recognised by modern states; and judicial decisions and the teachings/writings of most highly qualified authors.

Although there is no provision for a hierarchy of the sources of international law, it is largely agreed that treaties, multilateral or bilateral, are viewed as the primary source of international law. This is followed by international custom as secondary source of international law. Soft law falls under international custom. Soft law can basically be defined as standards generated by declarations adopted at diplomatic conferences or resolutions by international organisations that are intended to be

guidelines regulating the conduct of states is well evidenced by soft law. Such resolutions or declarations are not binding in nature.

## 1.2 Soft law for the protection of the rights of persons with disabilities

Disability has been an invisible concept under international human rights law. Persons with disabilities have not been expressly recognised under binding international human rights instruments. The equality clauses within the international Bill of Rights do not explicitly mention persons with disabilities as a protected group.

However, most developments in disability rights at the international level have been in non-binding soft law. As such, efforts to protect the rights of persons with disabilities at the international level can be traced back to the 1948 UDHR; 1950 UN General Assembly and the Economic and Social Council (ECOSOC) resolution on social rehabilitation of the physically handicapped; 1971 Declaration on the Rights of Mentally Retarded Persons; 1975 Declaration on the Rights of Disabled Persons; 1982 World Programme of Action concerning Disabled Persons; 1991 Principles for the Protection of Persons with Mental Illness; 1993 Standard Rules on the Equalisation of Opportunities for persons with disabilities; and the Millennium Development Goals:

### 1.2.1 Universal Declaration of Human Rights

The UDHR was adopted by the UN General Assembly Resolution 217A (III) on 10 December 1948. It is the first human rights instrument to be adopted by the UN. It guarantees both civil and political rights, and socio-economic and cultural rights. In essence, the UDHR guarantees the enjoyment of all the generation of human rights by all human beings without any kind of distinction. Although not specifically mentioned in any provision, persons with disabilities are equally covered under the UDHR by its reference to 'all human beings'.

### 1.2.2 ECOSOC resolutions

In 1950, the Social Commission, a subsidiary to ECOSOC, considered two reports: 'The social rehabilitation of the handicapped' and 'The social rehabilitation of the blind'. Persons with disabilities and rehabilitation were discussed at the Geneva Conference. The report on 'Social rehabilitation of the physically handicapped' was later proclaimed by the UN general Assembly to be a common standard of achievement for all peoples and all nations. ECOSOC recommended that states consider measures to help persons with disabilities.

### 1.2.3 Declaration on the Rights of Mentally Retarded Persons

In 1971, the General Assembly adopted a resolution entitled Declaration on the Rights of Mentally

Retarded Persons. Article 1 of the Declaration emphasised that 'mentally retarded persons' were to enjoy the same rights as all other human beings. The Declaration also itemised the rights important to persons with disabilities. Such rights included education, training and rehabilitation. However, the Declaration, like most early soft-law instruments on persons with disabilities, reflected the medical model of disability and made use of improper and disempowering terminology like 'mentally retarded persons'.

### 1.2.4 Declaration on the Rights of Disabled Persons

In 1975, the Declaration on the Rights of Disabled Persons then followed. The Declaration asserted that persons with disabilities have the same civil and political rights as other human beings. It further emphasised the right of persons with disabilities to protection against exploitation and degrading treatment. Persons with disabilities' right to participate in matters regarding them was also emphasised under the Declaration.

Through these declarations, principles such as equality and non-discrimination, and several substantive persons with disabilities' rights like right to education, training and rehabilitation started to be articulated. Nevertheless efforts did not end there.

### 1.2.5 World Programme of Action

In 1982, the United Nations adopted the World Programme of Action Concerning Disabled Persons (WPA). The main aims of the WPA were to prevent exclusion and marginalisation of persons with disabilities. One of the goals of the WPA was the equalisation of opportunities for persons with disabilities. The WPA defined equalisation of opportunities as:

... the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.

This at least marked the beginning of a significant shift from a medical approach to disability to a focus on human rights and equality in general.

As a follow-up to the WPA, the UN launched the Decade of Disabled Persons and it was set from 1983 to 1992. Thus the disability agenda was eventually getting some momentum at least from the standpoint of the UN.

### 1.2.6 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care

In 1991, the UN General Assembly adopted the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The Principles established mental health care standards and procedural guarantees for the protection of persons with mental illness against abuse in health institutions. As an example, excessive or prolonged uses of physical restraint or involuntary seclusion or sterilisation on the grounds of mental illness were all prohibited under the Principles.

### 1.2.7 Standard Rules

In 1993, the UN adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules). The Standard Rules were firmly built on the above-discussed WPA and clearly emphasised equality of opportunities for persons with disabilities. The main aim of the Standard Rules was therefore to achieve full and effective inclusion of persons with disabilities in all aspects of society. Furthermore, the Standard Rules sought to ensure that persons with disabilities exercise the same rights and bear the same obligations as their non-disabled counterparts.

The Standard Rules developed the work of the WPA in situating impairment as an incident of human diversity. Accordingly, states were urged to incorporate disability into policy and planning. Unlike the above-discussed Declarations, the Standard Rules made clear statements about the rights of persons with disabilities and the promotion of accessible environments. To that extent, the Standard Rules embraced a rights-based approach to disability.

Although international monitoring of disability rights was limited, the Standard Rules made provision for the appointment of the Special Rapporteur on Disabilities. The Special Rapporteur performs duties under the auspices of the UN Commission on Social Development (CSD). The Special Rapporteur may initiate surveys, report to the CSD, render advisory services to states on implementation and monitoring of the Standard Rules and assistance in preparation of replies to surveys, and to initiate direct dialogue with states and local non-governmental organisations in sharing their views for purposes of compiling reports to the CSD. The following table indicates the Rules:

- Rule 5. Accessibility
- Rule 6. Education
- Rule 7. Employment
- Rule 8. Income maintenance and social security
- Rule 9. Family life and personal integrity
- Rule 10. Culture
- Rule 11. Recreation and sports
- Rule 12. Religion

### 1.2.8 The Millennium Development Goals

The Millennium Development Goals (MDGs) were formulated by the UN in 2000. The aim of the MDGs, amongst others, is to halve global extreme poverty by 2015. It is common cause that persons with disabilities have been classified to be amongst the 'poorest of the poor' especially in developing countries. As such, the MDGs are of importance in the present discussion. However, it should be noted that persons with disabilities were not identified as a specific target group for action in the MDGs.

Although persons with disabilities became explicit subjects of international human rights law through the above-discussed instruments, the major weakness of the bulk of the instruments is that they embrace the medical approach to disability. As a matter of fact, the instruments tended to be paternalistic and legitimised segregation of persons with disabilities through specialised services and institutions. This is one of the reasons that the international community called for a binding treaty addressing persons with disabilities.

Be that as it may, it is also important to note that the above instruments, though not binding, were still important normative pronouncements with regards to the protection of the rights of persons with disabilities and were to serve as guidelines to states.

## 2 Development of treaty law for the protection of the rights of persons with disabilities

### 2.1 Treaty law prior to the CRPD

In 1966, the ICCPR and ICESCR were adopted. The ICCPR provides for the enjoyment of all civil and political rights by all human beings whilst the ICESCR provides for economic, social and cultural rights in that regard. Although the conventions do not explicitly mention persons with disabilities, it is submitted that persons with disabilities are clearly covered by the provisions therein. For one thing, the covenants are universal in the sense that they cover all human beings. Unlike other treaties like CEDAW or the CRC, they do not focus on a specific population group:

#### 2.1.1 The ICCPR and the Human Rights Committee

As indicated above, the ICCPR guarantees to all human beings the enjoyment of civil and political rights. Although persons with disabilities are not specifically mentioned in the ICCPR, it is agreed that persons with disabilities are guaranteed the same rights contained therein. The statement in the Preamble to the ICCPR that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' should certainly be interpreted to include persons with disabilities. Rights that facilitate participation such as the right to education and the

right to health for persons with disabilities cannot be overstated, for they play an important role in helping to prepare persons with disabilities for a life of active participation in the mainstream society.

The Human Rights Committee monitors the implementation of the ICCPR by state parties. Although the Human Rights Committee has not issued a specific statement in relation to the application of the ICCPR to persons with disabilities, General Comment 18 by the same is worth mentioning. The General Comment deals with the right to equality and non-discrimination. While it is true that the ICCPR does not explicitly mention persons with disabilities, the Human Rights Committee has made it clear that disability is covered by the term 'other status' in the ICCPR.

In addition, the Human Rights Committee rejected the concept of formal equality in the human rights context in favour of substantive equality. This is a firm position that was taken by the Committee and has important implications for achieving equality and non-discrimination of persons with disabilities.

### 2.1.2 *The ICESCR and its Committee*

Socio-economic and cultural rights at the international level are enunciated in the ICESCR. Just like the ICCPR, the ICESCR does not explicitly make reference to persons with disabilities. It is however agreed that all the rights enunciated in the ICESCR are applicable to persons with disabilities as well.

The Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR. In 1994, the CESCR assumed responsibility for supervising disability issues within the area of its competence. It adopted General Comment 5 on persons with disabilities in 1995. In the General Comment, the Committee recognised that while the ICESCR does not explicitly refer to persons with disabilities, article 2(2) of the Convention required that the rights enunciated be exercised without discrimination of any kind, whether on the basis of certain specified grounds or other status. This therefore clearly encompassed discrimination on the basis of disability. The Committee further stated that both *de jure* and *de facto* discrimination against persons with disabilities have a long history.

In essence, General Comment 5 was also the first international document to broadly define disability-based discrimination as follows:

For the purposes of the Covenant, disability-based discrimination may be defined as including any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying the recognition, enjoyment or exercise of economic, social or cultural rights.

The Committee further stressed that where progressive realisation of human rights is foreseeable, its application should not be

misinterpreted as depriving the obligation of all meaningful content. States therefore are encouraged to progressively take measures towards full realisation of persons with disabilities' rights. The following table is an extract from General Comment 5:

- 5 The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2(2) of the Covenant that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability.
- 6 The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18(4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

### 2.1.3 *The CRC and its Committee*

It is important to note that the CRC is the first treaty before the adoption of the CRPD to explicitly give reference to persons with disabilities. It is the first binding global human rights instrument to expressly prohibit discrimination on the basis of disability. More substantively, article 23 of the CRC obliges states to recognise the rights to dignity, self-reliance and active participation in community of 'mentally and physically disabled children'. Though it subjects the realisation of the rights of children with disabilities to the availability of state resources, the article expressly guarantees the right to education, training and health care services, amongst other provisions.

### Article 23

- 1 States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
- 2 States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
- 3 Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
- 4 States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

- 10 Girls with disabilities are often even more vulnerable to discrimination due to gender discrimination. In this context, States parties are requested to pay particular attention to girls with disabilities by taking the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society ...
- 17 In addition to the legislative measures recommended with regard to non-discrimination (see paragraph 9 above), the Committee recommends that States parties undertake a comprehensive review of all domestic laws and related regulations in order to ensure that all provisions of the Convention are applicable to all children, including children with disabilities who should be mentioned explicitly, where appropriate. National laws and regulations should contain clear and explicit provisions for the protection and exercise of the specific rights of children with disabilities, in particular those enshrined in article 23 of the Convention.

#### 2.1.4 Other treaties

CEDAW, CAT, ICERD and ICRMW also address the rights of persons with disabilities, though not explicitly, by providing for non-discrimination which is a common thread in disability rights. All the other rights embodied in the Conventions are also guaranteed to persons with disabilities.

The Committee on the Elimination of Discrimination against Women issued General Comment 18 on disabled women in 1991. In the General Comment, the Committee urged states to provide information on the status of disabled women in their periodic reports. The following table is an extract from General Recommendation 18:

As a matter of fact, many obligations are put on the state to ensure that children with disabilities receive special care in relation to special needs with a view to them achieving the fullest possible social integration and individual development.

However, the main weakness of the CRC is the alignment to the medical model of disability and reference to derogatory terminology like 'mentally disabled' or physically disabled children.

The Committee on the Rights of the Child monitors the implementation of the CRC. In 2006, the Committee issued General Comment 9 on the Rights of Children with Disabilities. The Committee thus detailed recommended actions for state parties to fully take measures which ensure that children with disabilities realise their rights at an equal level with their non-disabled counterparts. The following are extracts from General Comment 9:

[The Committee] Concerned about the situation of disabled women, who suffer from a double discrimination linked to their special living conditions ... Recommends that States parties provide information on disabled women in their periodic reports, and on measures taken to deal with their particular situation, including special measures to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also issued a report that addresses persons with mental disability in institutions. The Special Rapporteur condemned the seclusion and involuntary treatment of persons with psychosocial disabilities in institutions.

At the regional level, the European Court of Human Rights has in some of its case law shown willingness to interpret ECHR rights in the light of the CRPD, while in other cases failed to find violations of the European Convention in relation to violations of the rights of persons with disabilities.

In *Glor v Switzerland* (application 13444/04, judgment of 30 April 2009), a case dealing with whether there had been a violation of articles 8 (respect for private and family life) and 14 (prohibition of discrimination) of the European Convention in respect of alleged discriminatory treatment of a man with diabetes; the European Court of Human Rights held that article 14 applied to persons with disabilities and referred to the CRPD as representing European and international consensus on the need to prevent discriminatory treatment of, and ensure equality for, persons with disabilities. This was especially significant given that Switzerland at the time was not a state party to the Convention.

An Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was adopted in 1999 and entered into force two years later.

Regional and sub-regional initiatives in Africa in relation to the rights of persons with disabilities are covered in Module 3.

#### Student activity

- 1 Trace the development of soft law preceding the adoption of the CRPD and comment as to the model of disability applicable to each discussed soft law.
- 2 With reference to General Comment 5 by the Committee on Economic, Social and Cultural Rights, explain how the Committee addressed the concept of disability even if it was not specifically mentioned in the ICESCR.
- 3 'It is agreed that the CRC is the first binding international human rights instrument to specifically make reference to disability.' In your opinion, what are the major drawbacks of article 23 of the CRC with regards to the realisation of the rights of children with disabilities?

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

In December 2001, a resolution to develop a binding human rights instrument addressing was adopted during the 56th Session of the General Assembly. An Ad Hoc Committee was established to carry the negotiations further.

The CRPD and its Optional Protocol were finally adopted on 13 December 2006. It entered into force on 3 May 2008 after receiving twenty ratifications. The CRPD became the first UN Treaty to be adopted in the 21st Century and also became the first rapidly negotiated instrument ever. In addition, the CRPD is the most ratified treaty to date.

It is the most comprehensive treaty in the field of disability rights. It is both a human rights and developmental instrument. Strictly speaking, the CRPD does not create new rights for persons with

disabilities but rather, it subtly reformulates and extends existing human rights to take into account the specific experience of persons with disabilities. It contains civil and political rights, and economic, social and cultural rights in one document.

Ratification of CRPD and its Protocol by African states (states which have not signed or ratified the convention are not included in the list)				
Country	Convention signature date	Protocol signature date	Convention ratification date	Protocol ratification date
Algeria	30-3-2007	30-3-2007	4-12-2009	
Benin	8-2-2008	8-2-2008	5-7-2012	5-7-2012
Burkina Faso	23-5-2007	23-5-2007	23-7-2009	23-7-2009
Burundi	26-4-2007	26-4-2007		
Cameroon	1-10-2008	1-10-2008		
Cape Verde	30-3-2007		10-10-2011	
Central African Republic	9-5-2007	9-5-2007		
Comoros	26-9-2007			
Congo (Republic of the)	30-3-2007	30-3-2007		
Cote d'Ivoire	7-6-2007	7-6-2007		
Djibouti			18-6-2012	18-6-2012
Egypt	4-4-2007		14-4-2008	
Ethiopia	30-3-2007		7-7-2010	
Gabon	30-3-2007	25-9-2007	1-10-2007	
Ghana	30-3-2007	30-3-2007		
Guinea	16-5-2007	31-8-2007	8-2-2008	8-2-2008
Kenya	30-3-2007		19-5-2008	
Lesotho			2-12-2008	
Liberia	30-3-2007	30-3-2007	26-7-2012	
Libyan Arab Jamahiriya	1-5-2008			
Madagascar	25-9-2007	25-9-2007		
Malawi	27-9-2007		27-8-2009	
Mali	15-5-2007	15-5-2007	7-4-2008	7-4-2008
Mauritania			3-4-2012	3-4-2012
Mauritius	25-9-2007	25-9-2007	8-1-2010	
Morocco	30-3-2007		8-4-2009	8-4-2009
Mozambique	30-3-2007		30-1-2012	30-1-2012
Namibia	25-4-2007	25-4-2007	4-12-2007	4-12-2007
Niger	30-3-2007	2-8-2007	24-6-2008	24-6-2008
Nigeria	30-3-2007	30-3-2007	24-9-2010	24-9-2010
Rwanda			15-12-2008	15-12-2008
Senegal	25-4-2007	25-4-2007	7-9-2010	
Seychelles	30-3-2007	30-3-2007	2-10-2009	
Sierra Leone	30-3-2007	30-3-2007	4-10-2010	
South Africa	30-3-2007	30-3-2007	30-11-2007	30-11-2007
Sudan	30-3-2007		24-4-2009	24-4-2009
Swaziland	25-9-2007	25-9-2007		
Togo	23-9-2008	23-9-2008	1-3-2011	1-3-2011
Tunisia	30-3-2007	30-3-2007	2-4-2008	2-4-2008

Uganda	30-3-2007	30-3-2007	25-9-2008	25-9-2008
United Republic of Tanzania	30-3-2007	29-9-2008	10-11-2009	10-11-2009
Zambia	9-5-2008	29-9-2008	1-2-2010	
Zimbabwe			23-09-2013	23-09-2013

<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>

Signature and ratification of CRPD by all countries as at 20 September 2014		
Participant	Signature	Formal confirmation (c), Accession (a), Ratification
Afghanistan		18 Sep 2012 a
Albania	22 Dec 2009	11 Feb 2013
Algeria	30 Mar 2007	4 Dec 2009
Andorra	27 Apr 2007	11 Mar 2014
Angola		19 May 2014 a
Antigua and Barbuda	30 Mar 2007	
Argentina	30 Mar 2007	2 Sep 2008
Armenia	30 Mar 2007	22 Sep 2010
Australia	30 Mar 2007	17 Jul 2008
Austria	30 Mar 2007	26 Sep 2008
Azerbaijan	9 Jan 2008	28 Jan 2009
Bahamas	24 Sep 2013	
Bahrain	25 Jun 2007	22 Sep 2011
Bangladesh	9 May 2007	30 Nov 2007
Barbados	19 Jul 2007	27 Feb 2013
Belgium	30 Mar 2007	2 Jul 2009
Belize	9 May 2011	2 Jun 2011
Benin	8 Feb 2008	5 Jul 2012
Bhutan	21 Sep 2010	
Bolivia (Plurinational State of) <sup>1</sup>	13 Aug 2007	16 Nov 2009
Bosnia and Herzegovina	29 Jul 2009	12 Mar 2010
Brazil	30 Mar 2007	1 Aug 2008
Brunei Darussalam	18 Dec 2007	
Bulgaria	27 Sep 2007	22 Mar 2012
Burkina Faso	23 May 2007	23 Jul 2009
Burundi	26 Apr 2007	22 May 2014
Cabo Verde	30 Mar 2007	10 Oct 2011
Cambodia	1 Oct 2007	20 Dec 2012
Cameroon	1 Oct 2008	
Canada	30 Mar 2007	11 Mar 2010
Central African Republic	9 May 2007	
Chad	26 Sep 2012	
Chile	30 Mar 2007	29 Jul 2008
China <sup>2</sup>	30 Mar 2007	1 Aug 2008
Colombia	30 Mar 2007	10 May 2011
Comoros	26 Sep 2007	
Congo	30 Mar 2007	2 Sep 2014
Cook Islands		8 May 2009 a
Costa Rica	30 Mar 2007	1 Oct 2008
Côte d'Ivoire	7 Jun 2007	10 Jan 2014
Croatia	30 Mar 2007	15 Aug 2007
Cuba	26 Apr 2007	6 Sep 2007

Cyprus	30 Mar 2007	27 Jun 2011
Czech Republic	30 Mar 2007	28 Sep 2009
Democratic People's Republic of Korea	3 Jul 2013	
Denmark	30 Mar 2007	24 Jul 2009
Djibouti		18 Jun 2012 a
Dominica	30 Mar 2007	1 Oct 2012
Dominican Republic	30 Mar 2007	18 Aug 2009
Ecuador	30 Mar 2007	3 Apr 2008
Egypt	4 Apr 2007	14 Apr 2008
El Salvador	30 Mar 2007	14 Dec 2007
Estonia	25 Sep 2007	30 May 2012
Ethiopia	30 Mar 2007	7 Jul 2010
European Union	30 Mar 2007	23 Dec 2010 c
Fiji	2 Jun 2010	
Finland	30 Mar 2007	
France	30 Mar 2007	18 Feb 2010
Gabon	30 Mar 2007	1 Oct 2007
Georgia	10 Jul 2009	13 Mar 2014
Germany	30 Mar 2007	24 Feb 2009
Ghana	30 Mar 2007	31 Jul 2012
Greece	30 Mar 2007	31 May 2012
Grenada	12 Jul 2010	27 Aug 2014
Guatemala <sup>2</sup>	30 Mar 2007	7 Apr 2009
Guinea	16 May 2007	8 Feb 2008
Guinea-Bissau	24 Sep 2013	
Guyana	11 Apr 2007	10 Sep 2014
Haiti		23 Jul 2009 a
Honduras	30 Mar 2007	14 Apr 2008
Hungary	30 Mar 2007	20 Jul 2007
Iceland	30 Mar 2007	
India	30 Mar 2007	1 Oct 2007
Indonesia	30 Mar 2007	30 Nov 2011
Iran (Islamic Republic of)		23 Oct 2009 a
Iraq		20 Mar 2013 a
Ireland	30 Mar 2007	
Israel	30 Mar 2007	28 Sep 2012
Italy	30 Mar 2007	15 May 2009
Jamaica	30 Mar 2007	30 Mar 2007
Japan	28 Sep 2007	20 Jan 2014
Jordan	30 Mar 2007	31 Mar 2008
Kazakhstan	11 Dec 2008	
Kenya	30 Mar 2007	19 May 2008
Kiribati		27 Sep 2013 a
Kuwait		22 Aug 2013 a
Kyrgyzstan	21 Sep 2011	
Lao People's Democratic Republic	15 Jan 2008	25 Sep 2009
Latvia	18 Jul 2008	1 Mar 2010
Lebanon	14 Jun 2007	
Lesotho		2 Dec 2008 a
Liberia	30 Mar 2007	26 Jul 2012
Libya	1 May 2008	
Lithuania	30 Mar 2007	18 Aug 2010
Luxembourg	30 Mar 2007	26 Sep 2011
Madagascar	25 Sep 2007	

Malawi	27 Sep 2007	27 Aug 2009
Malaysia	8 Apr 2008	19 Jul 2010
Maldives	2 Oct 2007	5 Apr 2010
Mali	15 May 2007	7 Apr 2008
Malta	30 Mar 2007	10 Oct 2012
Mauritania		3 Apr 2012 a
Mauritius	25 Sep 2007	8 Jan 2010
Mexico	30 Mar 2007	17 Dec 2007
Micronesia (Federated States of)	23 Sep 2011	
Monaco	23 Sep 2009	
Mongolia		13 May 2009 a
Montenegro	27 Sep 2007	2 Nov 2009
Morocco	30 Mar 2007	8 Apr 2009
Mozambique	30 Mar 2007	30 Jan 2012
Myanmar		7 Dec 2011 a
Namibia	25 Apr 2007	4 Dec 2007
Nauru		27 Jun 2012 a
Nepal	3 Jan 2008	7 May 2010
Netherlands	30 Mar 2007	
New Zealand <sup>4</sup>	30 Mar 2007	25 Sep 2008
Nicaragua	30 Mar 2007	7 Dec 2007
Niger	30 Mar 2007	24 Jun 2008
Nigeria	30 Mar 2007	24 Sep 2010
Norway	30 Mar 2007	3 Jun 2013
Oman	17 Mar 2008	6 Jan 2009
Pakistan	25 Sep 2008	5 Jul 2011
Palau	20 Sep 2011	11 Jun 2013
Panama	30 Mar 2007	7 Aug 2007
Papua New Guinea	2 Jun 2011	26 Sep 2013
Paraguay	30 Mar 2007	3 Sep 2008
Peru	30 Mar 2007	30 Jan 2008
Philippines	25 Sep 2007	15 Apr 2008
Poland	30 Mar 2007	25 Sep 2012
Portugal	30 Mar 2007	23 Sep 2009
Qatar	9 Jul 2007	13 May 2008
Republic of Korea	30 Mar 2007	11 Dec 2008
Republic of Moldova	30 Mar 2007	21 Sep 2010
Romania	26 Sep 2007	31 Jan 2011
Russian Federation	24 Sep 2008	25 Sep 2012
Rwanda		15 Dec 2008 a
San Marino	30 Mar 2007	22 Feb 2008
Saudi Arabia		24 Jun 2008 a
Senegal	25 Apr 2007	7 Sep 2010
Serbia	17 Dec 2007	31 Jul 2009
Seychelles	30 Mar 2007	2 Oct 2009
Sierra Leone	30 Mar 2007	4 Oct 2010
Singapore	30 Nov 2012	18 Jul 2013
Slovakia	26 Sep 2007	26 May 2010
Slovenia	30 Mar 2007	24 Apr 2008
Solomon Islands	23 Sep 2008	
South Africa	30 Mar 2007	30 Nov 2007
Spain	30 Mar 2007	3 Dec 2007
Sri Lanka	30 Mar 2007	
St Lucia	22 Sep 2011	
St Vincent and the Grenadines		29 Oct 2010 a

State of Palestine		2 Apr 2014 a
Sudan	30 Mar 2007	24 Apr 2009
Suriname	30 Mar 2007	
Swaziland	25 Sep 2007	24 Sep 2012
Sweden	30 Mar 2007	15 Dec 2008
Switzerland		15 Apr 2014 a
Syrian Arab Republic	30 Mar 2007	10 Jul 2009
Thailand	30 Mar 2007	29 Jul 2008
The former Yugoslav Republic of Macedonia	30 Mar 2007	29 Dec 2011
Togo	23 Sep 2008	1 Mar 2011
Tonga	15 Nov 2007	
Trinidad and Tobago	27 Sep 2007	
Tunisia	30 Mar 2007	2 Apr 2008
Turkey	30 Mar 2007	28 Sep 2009
Turkmenistan		4 Sep 2008 a
Tuvalu		18 Dec 2013 a
Uganda	30 Mar 2007	25 Sep 2008
Ukraine	24 Sep 2008	4 Feb 2010
United Arab Emirates	8 Feb 2008	19 Mar 2010
United Kingdom of Great Britain and Northern Ireland	30 Mar 2007	8 Jun 2009
United Republic of Tanzania	30 Mar 2007	10 Nov 2009
United States of America	30 Jul 2009	
Uruguay	3 Apr 2007	11 Feb 2009
Uzbekistan	27 Feb 2009	
Vanuatu	17 May 2007	23 Oct 2008
Venezuela (Bolivarian Republic of)		24 Sep 2013 a
Viet Nam	22 Oct 2007	
Yemen	30 Mar 2007	26 Mar 2009
Zambia	9 May 2008	1 Feb 2010
Zimbabwe		23 Sep 2013 a

<https://treaties.un.org> (24 September 2014)

At the present moment, 43 African states are parties to the CRPD. This represents more than three quarters of the African continent.

### 3.1 Substantial protection of the rights of persons with disabilities under the CRPD

#### 3.1.1 The general principles

Article 3 of the Convention establishes a set of eight overarching and foundational principles (Table C). These guide the interpretation and implementation of the entire Convention, cutting across all issues. They are the starting point for understanding and interpreting the rights of persons with disabilities, and further are the benchmarks against which each right is measured.

General principles under the CRPD	
General principles	
A	Respect for the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
B	Non-discrimination
C	Full and effective participation and inclusion in society
D	Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
E	Equality of opportunity
F	Accessibility
G	Equality between men and women
H	Respect for the evolving capacities of children with disabilities and for the right of children with disabilities to preserve their identities.

## Inherent dignity

In a human rights context, inherent dignity refers to the worth of every person. When the dignity of persons with disabilities is respected, their experiences and opinions are valued and are formed without fear of physical, psychological or emotional harm.

## Individual autonomy

The principle entails that, individuals are to be in charge of their own life and have the freedom to make their own choices. Respect for the individual autonomy of persons with disabilities means that persons with disabilities have, on an equal basis with others, reasonable life choices, are subject to minimum interference in their private life and can make their own decisions, with adequate support where required.

## Participation and inclusion

The principle is important to correctly identify specific needs, and to empower the individual. Full and effective participation of persons with disabilities in society is recognised in the CRPD as a general principle, a general obligation, and as a right.

## Non-discrimination

Discrimination on the basis of disability is defined in the Convention 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 in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation (see Module 5).

## Accessibility

Accessibility ensures empowerment and inclusion. Like the principle of participation and inclusion, accessibility constitutes both a general principle and a stand-alone article (article 9). The state must ensure access to justice (article 13), independent living and social inclusion (article 19), information and communication services (article 21), education (article 24), health (article 25), rehabilitation (article 26), work and employment (article 27), adequate standard of living and social protection (article 28), participation in political and social life (article 29), and participation in cultural life, recreation, leisure and sport (article 30).

## Equality of opportunities

The CRPD imposes an obligation to creating societal conditions that respect difference, address disadvantages and ensure that all persons are treated in a manner that respects their inherent dignity. Achieving equality sometimes requires additional measures such as the provision of assistance to persons with psychosocial or intellectual disabilities in order to support them in making decisions and in exercising their legal capacity on an equal basis with others.

## Respect for the evolving capacities of children with disabilities

Children are in a continuing process of learning and development; children with disabilities are no exception to this principle. It is only through respect for their rights that children with disabilities would be able to fulfil their capacities.

### 3.1.2 The rights of persons with disabilities under the Convention

The CRPD is a wide-ranging human rights treaty covering the full spectrum of civil, cultural, economic, political and social rights. As pointed out above, the CRPD does not establish new rights for persons with disabilities; instead, it elaborates on what existing human rights mean for persons with disabilities and clarifies the obligations of states parties to protect and promote the rights of persons with disabilities. A total of 21 articles entrenches substantive rights of persons with disabilities.

Rights set out in the CRPD			
Article	Rights	Article	Rights
10	The right to life	22	Respect for privacy
11	Situations of risk and humanitarian emergencies	23	Respect for home and the family
12	Equal recognition before the law	24	Education
13	Access to justice	25	Health

14	Liberty and security of the person	26	Habilitation and rehabilitation
15	Freedom from torture or cruel, inhuman or degrading treatment or punishment	27	Work and employment
16	Freedom from exploitation, violence and abuse	28	Adequate standard of living and social protection
17	Protecting the integrity of the person	29	Participation in political and public life
18	Liberty of movement and nationality	30	Participation in cultural life, recreation, leisure and sport
19	Living independently and being included in the community		
20	Personal mobility		
21	Freedom of expression and opinion, and access to information		

Some of these rights, for example education, employment, health and political participation, will be discussed in more detail in the subsequent modules.

### 3.1.3 International cooperation

Recognising the potential role international cooperation plays particularly in areas of capacity building, research programme, facilitation of access to scientific knowledge, technical and economic assistance, the CRPD devotes a particular article on international cooperation (art 32). To this end, not only states parties have a role to play in fostering international cooperation to promote the rights of persons with disabilities but also inter-governmental and civil society organisations.

## 3.2 Procedural protection of the rights of persons with disabilities under the CRPD and the Optional Protocol

### 3.2.1 The Committee on the Rights of Persons with Disabilities

To ensure maximum compliance with the provisions of the convention, an independent body of experts is established under the Convention, the Committee on the Rights of Persons with Disabilities. The Committee is tasked with reviewing states' implementation of the Convention. This is done through reporting by state parties and through considering complaints submitted by alleged victims of violations of provisions of the Convention as discussed below:

## Reporting

Each state party to the Convention has an obligation to report on measures taken to give effect to its

obligations under the Convention. The reports are to be submitted within two years after the entry into force of the Convention for the state concerned (initial report) and thereafter, at least every four years (periodic report). The Committee can also request a state to report (reports on demand). If the Committee find the information provided by the state inadequate, it may request further information.

The Committee on the Rights of Persons with Disabilities has adopted reporting guidelines for purposes of advising states parties on the form and content of their reports. The guidelines are meant to facilitate the preparation of reports and ensure that reports are comprehensive and presented in a uniform manner by states parties. According to the guidelines, states parties are required to encourage and facilitate the involvement of non-governmental organisations, including disabled persons' organisations (DPOs) in the preparation of reports (for what it terms a 'constructive engagement'). Such constructive engagement on the part of these organisations is expected to enhance the quality of reports as well as promote the enjoyment by all of the rights protected by the Convention. In their reports states parties are required to recognise and respect the diversity of persons with disabilities and ensure that reports are not generalised but specific to different types of disability.

State reports are supposed to document the measures that state parties have adopted and the progress they have made in order to guarantee the realisation of all the rights included in the convention. These reports are unlikely to illustrate the whole picture as governments are often reluctant to portray the exact situation regarding human rights in their own country. In order for the Committee to obtain a more comprehensive picture of the human rights situation in a country, more independent sources of information are required.

DPOs and/or other interest organisations even if consulted in the preparation of the state report may submit independent reports. Parallel reports should highlight issues that have been left out of state report and suggest concrete recommendations for legislative or policy changes.

## Concluding observations<sup>1</sup>

After consideration of state reports, the Committee makes concluding observations. Thus based on the dialogue with a state and any other information received, the Committee makes concluding observations also known as concluding comments. Concluding observations refer to positive aspects of a state's implementation of the Convention and the areas where the state has to take further positive action.

Some of the notable concluding observations that the Committee has made are on Tunisia (13 May 2011), Spain (19 October 2011) and Costa Rica (12 May 2014). Other concluding observations by

1. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5) (accessed 10 June 2015).

the Committee were on the initial reports of Belgium, New Zealand, Ecuador and Republic of Korea. On Tunisia, the Committee recommended that the state adopt urgent legislative measures to ensure that persons with disabilities, including persons who are under guardianship or trusteeship, to exercise their right to vote and participate in public life, on an equal basis with others.

Similarly on Spain, the Committee expressed concern over the fact that the right to vote of persons with intellectual disabilities can be restricted if the person concerned has been deprived of his or her legal capacity or has been placed in an institution.

On Costa Rica, the Committee recommended that the state party adopt the measures necessary to raise awareness amongst employers and promote the employment of persons with disabilities in the private sector, including affirmative action programmes and legislation on reasonable accommodation. The State of Costa Rica was also urged to monitor compliance with employment quotas in the public sector.

Apart from concluding observations, the Committee also adopts General Comments. General Comments simply refers to the publication of the interpretation of the CRPD provisions by the Committee. General Comments provide guidance to the implementation of the Convention. They cover a variety of subjects ranging from comprehensive interpretation of substantive provisions to general guidance on the information on specific articles of the CRPD that states should submit in their reports. So far, the very first General Comment by the Committee is General Comment 1 on article 12 and General Comment 2 on article 9.

It may serve well to capture the General Comments in Boxes.

### General Comment 1

The Committee adopted General Comment 1 article 12: Equal recognition before the law. This is the first interpretive General Comment by the Committee. The Committee explained that the recognition of legal capacity is inextricably linked to the enjoyment of many other human rights guaranteed under the CRPD for example the right to vote and to stand for a public office. The Committee further emphasised that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights. The table below is an extract from General Comment 1:

Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.

### General Comment 2

The Committee adopted General Comment 2 on article 9: Accessibility. The Committee explained that accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. Thus without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies. The table below is an extract from General Comment 2:

#### Normative content

13. Article 9 of the Convention on the Rights of Persons with Disabilities stipulates that, "to enable persons with disabilities to live independently and participate fully in all aspects of life, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas". It is important that accessibility is addressed in all its complexity, encompassing the physical environment, transportation, information and communication, and services. The focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity. This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of

whether the perpetrator is a public or private entity. Accessibility should be provided to all persons with disabilities, regardless of the type of impairment, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, legal or social status, gender or age. Accessibility should especially take into account the gender and age perspectives for persons with disabilities.

### 3.2.2 Individual communication procedure

The Optional Protocol to the CRDP (the Protocol) contains an individual communication procedure through which individuals or groups of individuals who believe that their rights are violated by the state party can submit a complaint to the Committee. It is important to note that although the Protocol is a legally binding instrument, the decisions of the Committee are not legally binding. However, the Protocol allows the Committee to express an expert opinion as to whether a violation of a right has occurred and to request that appropriate remedies be provided. The Committee expects that as the state party has voluntarily agreed to the provisions of the Optional Protocol, it will take the decisions of the Committee seriously and implement them in good faith.

A complaint to the Committee is often referred to as a 'communication'. It need not take any particular form; any correspondence supplying the necessary particulars will therefore suffice. It is not necessary to have a lawyer prepare the case, though legal advice usually improves the quality of the submissions.

Communications must indicate the author, not constitute an abuse of the right of submission of such communications or be incompatible with the provisions of the Convention, the communication must not be *res judicata*, must have exhausted available domestic remedies unless the remedies are unreasonably prolonged or unlikely to bring effective relief, must not be manifestly ill-founded or not sufficiently substantiated and lastly, must not entail a retrospective application of the convention. Individual communications may only be submitted against a state party not only to the convention but also to the optional protocol. Further, the state party must have recognised the competence of the committee established under the optional protocol to consider complaints from individuals.

The following are some of the decisions of the Committee:

Case name	Subject matter	Committee's decision
<i>Liliane Gröninger v Germany</i> Communication 2/ 2010	Failure to promote the right to work by failing to facilitate the inclusion of a person with disabilities into the labor market.	The Committee found a violation of

<i>Zsolt Bujdosó and five others v Hungary</i> Communication 4/ 2011	Failure by the state party's authorities to eliminate discrimination on the ground of disability and to respect the obligation to guarantee to persons with disabilities political rights, including the right to vote, on an equal basis with other citizens.	The Committee was of the view that article 29 of the CRPD does not foresee any reasonable restriction nor does it allow any exception for any group of persons with disabilities.
<i>Ms SC v Brazil</i> Communication 10/2013	Employer policy allowing for demotion after prolonged medical leave.	The Communication was held to be inadmissible.
<i>Ms Marie-Louise Jungelin v Sweden</i> Communication 5/ 2011	Recruitment process, reasonable accommodation in the workplace and facts and evidence.	The Committee held that when assessing the reasonableness and proportionality of accommodation measures, state parties enjoy a certain margin of appreciation. Resultantly, no violation of the CRPD was found by the Committee.
<i>Mr X v Argentina</i> Communication 8/ 2012	Denial of home arrest, conditions of detention and access to adequate medical care and rehabilitation for persons with disabilities while in detention.	The Committee made a finding that the denial of home arrest, conditions of detention and access to adequate medical care and rehabilitation for persons with disabilities while in detention is a violation of the Convention.

#### ***Nyusti and Takacs v Hungary* Communication 1/2010**

In the case of *Nyusti and Takács v Hungary* (Communication 1/2010, views adopted on 16 April 2013), the Committee was of the view that all services open or provided to the public must be accessible in accordance with the provisions of article 9 of the Convention on the Rights of Persons with Disabilities. The state party was called upon to ensure that blind persons had access to automatic teller machines (ATMs). The Committee recommended, inter alia, that the state party establish 'minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments; ... create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones; ... and ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities'.

### Student activity

- 1 Read the case of *Ms Marie-Louise Jungelin v Sweden* Communication 5/2011. Write a dissenting opinion to the majority finding of the Committee.
- 2 How is compliance by state parties ensured under the Convention?
- 3 How can countries sufficiently give effect to the general principles on accessibility and non-discrimination under the CRPD?
- 4 In your opinion, how effective is the individual complaints mechanism under the Protocol to the CRPD?
- 5 With reference to the concluding observations of the CRPD Committee on African states, what were the issues raised that were uniquely African?

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- International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976 (UN Treaty Series, vol 999, 171 and vol 1057, 40)
- Convention on the Elimination of all forms of Discrimination against Women
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Universal Declaration on Human Rights, adopted by GA Res 217A (III) on 10 December 1948 (UN Doc A/18/810)
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care
- Declaration on Rights of Mentally Retarded Persons
- Declaration on the Rights of Disabled Persons
- Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by UN General Assembly Resolution 48/96 on 18 December 1992 (UN Doc A/RES/48/96)
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### Further reading

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# Module 3: Protection of disability rights under African regional and national law

## Module overview

The purpose of this module is to examine the protection of disability rights under African regional and national law. This exercise entails looking at the development, current position, and the future of disability rights within the African regional system. The latter must be understood broadly as focusing on the African human rights system and entails an examination of continental, sub-regional and national law.

The module begins with a history of the progression of the African instruments used by the Organisation of African Unity (OAU) and its current incarnation, the African Union (AU) of today, as well as looking at the current norms applicable to disabled persons at the regional and sub-regional level. Secondly, it examines the protection of disability rights in the African region and sub-regions. In addition, the necessity of the African specific treaty on disability rights will also be explored. **Students will be required to make a case for and against the adoption of a specific treaty or a protocol on disability rights in Africa.**

Lastly, the module will explore disability laws, including case law at the national level in selected African countries to highlight various lessons to enable students to ask and answer questions such as, what trends can be discerned? What are the examples of effective or innovative ways of addressing the rights of persons with disabilities through the law? And what are the various pitfalls to be aware of? Students will be required to critically analyse provisions on disability laws in their domestic laws. Students will be required to critically analyse case law on disability laws in their domestic laws or in their sub-region.

## Learning objectives

On completion of this module, the student will be able to:

- Engage with the historical background on the protection of disability rights in Africa.
- Understand and critically engage with the regional, sub-regional and national protections of disability rights in the African human rights system.
- Understand and engage with the merits and demerits of an African Protocol to the African Charter on Human and Peoples' rights on the rights of persons with disabilities.
- Understand and critically analyse their own national legislation, policies and court decisions on disability rights.
- Identify what legal reforms can be undertaken to promote and protect rights of persons with disabilities.

## Module content

### The main components

This module is divided into three sections. Section 1 presents the historical background on the protection of disability rights in Africa. Section 2 is about the protection of disability rights at the African regional and sub-regional levels and Section 3 explores disability laws at the national level in selected African countries.

### Lecturer's notes

As indicated in the first module, the lecture's notes are directed to the lecturer and should be understood as suggestions rather than prescriptions to rigidly follow. They serve to assist the lecturer in thinking about effective ways for imparting vital knowledge to learners and adapting the module to suit the exigencies of the curriculum at the partner institution, including the unique developments in the jurisdiction where the partner institution is located.

## 1 Disability rights in Africa – A historical background

### 1.1 Lecturer's notes

*We need disability rights that are grounded in the historical context. It is imperative to examine the treatment of people with disabilities in Africa by tapping into the ethnography of communities and specifically into local realities. It is important to consider cultural practice while cross-referencing to Module 1 to show that African culture is not only discriminatory and exclusionist, but also that our communitarian ideals offer us a potentially rich ground for enabling disability rights. The module should also unpack what has been done historically to prevent disabilities on the continent and then proceed to discuss steps or initiatives taken by African leaders to address disabilities*

### 1.2 Historical background

Historically, people with disabilities in Africa suffer discrimination and exclusion. This is due to the fact that disability is perceived to be a curse on a family or the result of witchcraft practice by the family or its close family members (Combrinck, 2008, 302). This cultural belief has victimised people with disabilities and has enforced their exclusion from the communities. However, as indicated in Module 1, African culture is not only discriminatory and

exclusionist, but its communitarian ideals offer a potentially rich ground for enabling disability rights.

The first initiative of the OAU in relation to out people with disabilities was the African Regional Conference on the International Year of the Disabled Person in 1980 and in the same year the African Rehabilitation Institute (ARI) was established as a specialised agency of the OAU to look after the agendas of persons with disabilities.

### ARI

The African Rehabilitation Institute (ARI) aims to develop facilities such as rehabilitation centres for disabled Africans. It also supports research projects and training in the field of disability rehabilitation. The ARI eases communication and coordinated actions between African nations, and focuses on the prevention of disability on the continent. The ARI has its headquarters in Harare, Zimbabwe, and has regional offices in Brazzaville, Dakar and Nairobi. (For more information see <http://arica.org/>)

The African Charter on Human and Peoples' Rights, which was adopted in 1981, did not expressly prohibit discrimination on the basis of disability. However, article 18(4) of the Charter provides that 'the disabled shall ... have the right to special measures of protection in keeping with their physical and moral needs'. Article 13 of the African Charter on the Rights and Welfare of the Child, adopted in 1990, deals with the rights of disabled children.

In 1999, an OAU Ministerial Conference on Human Rights urged its members to pay special attention to the rights and needs of people with disabilities and soon after the conference the period 1999 to 2009 was declared the African Decade of Disabled Persons.

In 2002 the OAU transformed into the African Union (AU). The AU had from its inception a much clearer human rights mandate. At its very first session it adopted the Continental Plan of Action for the African Decade of People with Disabilities (CPOA) with the aim of implementing equality and the empowerment of persons with disabilities.

In 2003, in recognition of the importance of addressing disability rights, the Disability African Regional Consultative Conference was held in Johannesburg. At this conference the Secretariat of the African Decade of Persons with Disabilities (SAPDPD) was established. It runs various disability-oriented programmes in five African countries.

Subsequent instruments of the AU have made provisions for disabled persons, such as the Protocol on the Rights of Women in Africa, the African Youth Charter and the African Charter on Democracy, Elections and Governance. The second African Decade on the Rights of Disabled Persons was declared from 2010-2019.

Despite various shortcomings, significant improvements on the issue of disability rights have been made at the supranational level. The clear shift from regarding disability as a welfare issue towards perceiving it as a rights issue is one of the main reasons for this shift.

### Student activity

- 1 Historically, how were people with disabilities perceived in your country? How are they perceived today?
- 2 In your country, are there any communitarian ideals that offer a potentially rich ground for enabling disability rights?
- 3 What is the value of a regional organisation such as the African Rehabilitation Institute with regards to disability?
- 4 Discuss the prevention of disability in Africa in general and in your country in particular

## 2 Regional and sub-regional protection of persons with disabilities in Africa

### 2.1 Lecturer's notes

*This module covers all developments on disability rights on the continent at regional and sub-regional levels. The lecturers should attempt to capture all new initiatives taking place including at institutional level and see that the laws and policies are updated. This entails: checking if there is a new case law at the African Commission or at the African Court or sub-regional court; updating the debate on whether the continent needs a treaty or a protocol on disability rights; and getting students to discuss the pros and cons of various options.*

### 2.2 Regional instruments

The most important African human rights instrument is the African Charter which has been ratified by all AU member states. People with disabilities enjoy all the rights that other people do under the Charter, despite it not expressly listing disability as a prohibited ground for discrimination in article 2. Fortunately, the grounds listed are not exhaustive, and disability can be read in as discrimination under the term 'other status'. However, such an approach does not enhance the visibility of people with disabilities or their right to equal treatment under the Charter.

Article 18 of the African Charter singles out people with disabilities, women, children, and elderly people as specially protected groups. This means that positive steps need to be taken to protect the 'physical and moral needs' of people with disabilities. In other words, mere lip-service should not be paid to equality as that would only achieve formal equality. Achieving substantive equality should be regarded as important.

The African Children's Charter has provisions explicitly dealing with disabled children. Article 13(1) echoes the African Charter by providing that disabled persons' rights must receive special protection in order to ensure their dignity, self-reliance and participation in the community. The African Children's Charter also lists various positive steps that states have to take in the interest of disabled children, especially with regard to education, training and employment.

Article 23 in the Protocol to the African Charter on the Rights of Women in Africa, which has been in force since 2005, binds state parties to protect women with disabilities, and to take positive steps in ensuring their training, employment and participation in decision-making. It further requires that states ensure that disabled women are treated with dignity and are free from discrimination and violence.

The latest important regional instrument is the African Youth Charter adopted in 2006. Article 24 deals with disabled youths and guarantees their equal access to education, healthcare, employment and special care. A duty is also placed on states to eliminate obstacles towards the integration of youths with disabilities.

### 2.3 The African Commission on Human and Peoples' Rights

The expert body which monitors states' compliance with the African Charter and the Protocol on the Rights of Women is the African Commission on Human and Peoples' Rights. In 2009 the Commission created a five-member Working Group on the Rights of Older Persons and People with Disabilities in Africa (resolution ACHPR/Res143 (XXXXV) 09). The reports of the Working Group can be found at <http://www.achpr.org/mechanisms/older-disabled/>.

Individuals and NGOs may submit complaints to the Commission alleging violations of the Charter. So far, the only communication of the Commission dealing with disability rights is *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003), which was decided in 2003 and which has been cited by some legal scholars as one of the most important human rights cases on behalf of people with disabilities, decided by any regional human rights body (Kanter, 2014).

In this case, two health care professionals from the UK who were visiting the Gambia, submitted the complaint on behalf of mental health patients detained under the Lunatics Detention Act (LDA) of The Gambia. They alleged that under the LDA there was no definition of 'lunatic' or safeguards for patients under the Act, and that under the LDA there was no requirement to acquire consent for treatment or to review treatment. Legal aid was not available to the patients under the Act, and the patients were not allowed to vote. The Commission found that the people confined in the mental hospital have a right to participate in and enjoy life to the fullest, on an equal basis with people without disabilities. The Commission found therefore that

their treatment constituted a violation of their right to human dignity, to have one's cause heard, and to vote, in violation of the African Charter.

With regard to the right of human dignity, the Commission found specifically that labelling a person with a mental illness as either a 'lunatic' or an 'idiot' itself deprives them of their dignity. The Commission further elaborated that mentally disabled persons share and would like to realise the 'same hopes, dreams, and goals' as other human beings (para 61).

In finding other violations in this case, the Commission continued to uphold the ideal that persons with disabilities' rights are the same as other peoples' rights. Article 7 of the Charter stipulates fair trial rights and the Commission found violations under article 7 of the Charter because the LDA did not provide for any way to challenge a detention order. The Commission thus recognised the right to have one's cause heard as a right for people with mental disabilities who have been detained under the LDA. Article 13 of the Charter provides for the right to participate in the government of one's country, which includes voting. The Commission once again found that this right applies equally to persons with disabilities as to every other human being under the Charter.

The Commission recognised that the LDA's therapeutic objectives and treatment of persons with mental disabilities fell short of guaranteeing mental health patients the right to achieve the best attainable state of mental and physical health because article 16 and article 18, provide that special care should be provided to people with Disabilities.

#### ***Purohit* decision**

The significance of the *Purohit* decision lies in the Commission's willingness to find the rights enumerated in the Charter as applicable to people with mental disabilities who had been confined against their will in a state run institution. A rights based approach to disabilities recognizes people with disabilities as rights holders as opposed to the welfare approach which does not. (see Module 1). The Commission in the *Purohit* case recognized that people with disabilities are equal in every respect to people without disabilities and have a right to dignity, thereby upholding the rights-based approach to disability, even before the CRPD was adopted.

It is significant that the Commission did not find article 6 of the Charter applicable in this case. At issue is the competence of the medical practitioners to detain patients and the period of detention. While the Commission may have been correct to find that article 6 did not apply to the case at hand, this decision provides an example of how relying on pre-existing rights found in the Charter, instead of enumerating disability rights specifically, can leave gaps in the protection of people with disabilities ... The competence of medical professionals and the length of detention were not specifically addressed in the *Purohit* decision ...

### Student activity

- 1 Critically examine the protection of disability rights in African regional instruments.
- 2 Identify gaps in the Commission's reasoning in the *Purohit* case.
- 3 Discuss why only one communication has so far been brought to the African Commission regarding violations of persons with disabilities' rights and possible barriers to bringing such cases. Interestingly, this case was brought by a nurse and a social worker who were touring the Gambia. What can students offer as possible explanations for the fact that this case was brought by two tourists and not others such as family members of the detained patients, staff at the hospital or other Gambians?

## 2.5 Sub-regional protection of persons with disabilities in Africa

Originally, sub-regional blocs were established to ensure sub-regional economic integration for the development of Africa at large. However, their mandate has evolved to include human rights (Viljoen, 2012, 481-512). Regional Economic Communities include: the 1999 East African Community Treaty (EAC Treaty), the Treaty of the Southern African Development Community (SADC Treaty), the Economic and Monetary Community of Central Africa (CEMAC), the Arab Maghreb Union (UMA), and Economic Community of West Africa.

The EAC which comprises of Uganda, Tanzania, Kenya, Rwanda and Burundi, protects human rights in its requirement for gender mainstreaming, as well as the respect for human rights as condition to admit new members which is set out in its article 3(3)(b). As far as disability rights are concerned, the EAC treaty clearly mentions persons with disabilities in its article 102(2) which underlines the necessity to adopt an 'education and training programme for people with special needs and other disadvantaged groups'. In addition to this, article 120(c) stresses the need for a common approach to empower disadvantaged and marginalised groups comprising of persons with disabilities. Furthermore, in order to crystallise disability rights in the EAC, stakeholders came together and adopted a policy on disability rights (EAC Secretariat, EAC Policy on Persons with Disabilities (2012)). Moreover, to ensure that disability rights become a reality in the EAC, the East African Legislative Assembly (EALA) has adopted a resolution advising member states to ratify and implement the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) (EALA 37th sitting, second meeting, second session 24 September 2008). The prospect for disability rights in the EAC is good because future plans such as the Strategic Plan on Gender, Youth, Children, Persons with Disability, Social Protection and Community Development (2012-2016) clearly capture disability as an area of focus. Although this plan could be criticised for being welfare approach

centred, it could also be argued that its coverage of disability rights is a step in the right direction (Murungiet al, 2013, 380), even if it requires improving upon.

The Treaty of the Southern African Development Community (SADC Treaty) comprising states in Southern Africa, plus the Democratic Republic of the Congo, Mauritius and the Seychelles mentions people with disabilities specifically. In this regard, it prohibits discrimination on many grounds including disability in article 6(2). Furthermore, almost all, if not all elements of the SADC legal architecture clearly refer to disability. In this respect, the SADC Protocol on health, through its article 15, urges member states to remove all environmental barriers and provide various assisting devices to enhance persons with disabilities' independent living. Similarly, the SADC Charter of Fundamental Social Rights in its article 9(1)(2) also urges member states to provide access in all areas for persons with disabilities. This protection is further advanced by the SADC Social Security code which highlights social security rights for persons with disabilities. Moreover, while the 2008 SADC Protocol and gender and development guarantees disability rights in its article 9, it also classifies the CRPD amongst the treaties to be given special attention in SADC (article 3 (b) of the Gender Protocol). Finally, the SADC Principles and Guidelines Governing Democratic Elections also urge member states to ensure the full participation of persons with disabilities in elections. Nevertheless, in spite of the progressive framework highlighted here, as correctly observed by Murungi et al, some aspects of the disability agenda are still informed by the medical model of disability.

Besides catering for sub-regional economic integration, the ECOWAS, CEMAC and UMA treaties also address human rights, albeit incidentally. These treaties are in line with the African Charter and prohibit discrimination on all grounds, including disability. However, through 2012, the ECOWAS Commission explicitly notes that one of the core purposes of its humanitarian policy is to protect vulnerable persons including 'physically challenged persons' in the time of emergency (objective 5). Overall, given that the primary objective of regional economic communities is to ensure socio economic development and sub-regional integration, any move towards protecting disability rights shall be encouraged.

## 2.6 Should there be an African-specific treaty on the rights of persons with disabilities?

Recently in Africa, there have been debates on whether to use current regional instruments to protect people with disabilities, or to adopt a specific treaty on disability rights, to adopt a Protocol to the African Charter on the rights of people with disabilities or to simply rely on the CRPD to implement disability rights in Africa.

### 2.6.1 Current regional instruments' provisions on persons with disabilities

Within the African Union and sub-regional systems in Africa, initiatives on the rights of people with disabilities are not harmonised. While there are a few provisions pertaining to the rights of people with disabilities in the African Charter, these provisions do not comprehensively protect the rights of people with disabilities. Article 2 of the Charter lists 'other status' under its non-discrimination clause, which can be found to include disabilities. Article 18(4) of the African Charter specifically mentions persons with disabilities as needing special protection. However, this is the only explicit reference to persons with disabilities in the Charter, and it groups persons with disabilities with the elderly, thereby not recognising persons with disabilities specific circumstances and rights. Additionally, the Protocol on Rights of Women (art 23), the African Charter on the Rights and Welfare of the Child (art 13), and the African Youth Charter (art 15(4)(a) & 16(2)(n)) all mention disability rights but only within the context of each respective instrument.

In addition to these regional initiatives, the sub-regional bodies in Africa provide piecemeal and varied protection for people with disabilities on the continent. The SADC Treaty mentions people with disabilities specifically in its non-discrimination clause, an aspect that is lacking from the African Charter. By comparison, the EAC Treaty, as mentioned earlier, still perceives people with disabilities as objects of welfare and charity rather than as individuals entitled to human rights protections. As evidenced by the fractured approaches in both the AU and sub-regional systems, the African system as a whole lacks a cohesive and thorough instrument or institution that can protect the rights of people with disabilities consistently.

The international treaty on the rights of people with disabilities has been praised for moving disability rights from medical model to human rights model (Ngwena and Pretorius, 2012, 108-109). The CRPD has been ratified by 35 African states as of 15 January 2015. Apparently, this seems to show that most African countries take the CRPD seriously. Nevertheless, the ratification of treaties does not always mean commitment to its implementation as ratification is often motivated by all sort of reasons (Kanter 2014, Hathaway, 2002). However, one approach to protect disability rights in the African region is to advocate for wider ratification of the CRPD which could be the starting point if implementation has to follow. Nonetheless, the main problem that arises with this approach is that the CRPD, as a global instrument adopted by the UN, may lack specific aspects which need to be addressed in the African region.

One aspect of people with disability rights that is of importance in the African region is the issue of HIV and how it relates to disabilities. The CRPD does not specifically address the connection between HIV/AIDS and disabilities. This is a significant issue in the African region as evidenced by efforts such as the Kampala Declaration on Disability and

HIV/AIDS, adopted by a meeting of civil society organisations in 2008. In Africa, persons with disabilities are often denied adequate information on sexual health and HIV/AIDS due to discriminatory beliefs that they do not engage in sexual activity. Persons with disabilities are more susceptible to sexual abuse and therefore at a higher risk of HIV infection. Furthermore, people living with HIV who are not treated properly often acquire impairments and may be seen as disabled, regardless of whether or not they see themselves that way (Kamga, 2013, 230).

Besides the HIV/AIDS question, Africa also faces the challenges of discrimination against people with albinism, which, in the most extreme cases has resulted in their murder. Despite the controversy on whether albinism is a disability, the reality is that the condition is covered under by the CRPD. Indeed, people with albinism have extremely delicate skin which is abnormally sensitive to light. Furthermore, they have limited visual ability. Due to their sensory and visual impairments, and for ritualistic ceremonies, albinos are killed in various part of Africa. These issues are not specifically addressed by the CRPD. Therefore, in addressing disability issues within the local context, the African Protocol should contain express provisions dealing with the discrimination and killing of people with albinism. A clear identification of albinism as disability and its adequate protection through the Protocol will ensure that the rights of people with albinism are respected.

The main feature of the African human rights system is its reliance on communitarian way of life translated in the form of peoples' rights secured in the classical African humanist philosophy of *Ubuntu*. Accordingly, the 'African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence and collective responsibility' (Cobbah, 1987, 303). Unfortunately, this African philosophy is not captured by the CRPD which is crafted around individualism. As indicated in module 1, far from being exclusively discriminatory, the ideals contained in the African communitarian way of life have the potential to protect the rights of people with disabilities.

It is contended that an African Protocol informed by the philosophy of *Ubuntu* will be vital in protecting disability rights. In this vein, a disability will not be an individual's or a specific family's challenge, but the community's challenge. From this perspective, a disabled child would be assisted and cared for by the community at large and not perceived as a curse for his/her family. Similarly, in case of conflicts, displaced people with disabilities will be assisted by members of the community that have a duty to their fellow human being to do so. Nevertheless, member of the community must guard against paternalism and denial of autonomy to people with disabilities who must be allowed to make decisions on their behalf.

Highlighting the shortcomings of the CRPD in regard of African way of life, is not to say that the CRPD is not responsive to African problems, but to note that tapping into local context and way of life

will enhance the prospects of ensuring human rights and disability rights in particular. The Protocol is the framework through which local realities could be contextualised to benefit people with disabilities in Africa. (See module 1).

While advocating for the adoption of a Protocol on disability rights, it is important to emphasise that it is not a question of choosing either the suggested Protocol or the CRPD. Both instruments should be used together to the benefit of people with disabilities. In this respect, as much as African states should rely on the CRPD, the African Protocol should not be seen as duplicating the CRPD, but as supplementing what is omitted from the CRPD. More importantly, there is nothing wrong with a region specific instrument as long as it does not compromise hard won gains in the CRPD.

*of monist tradition that has ratified the CRPD, and has yet to enshrine disability rights in its constitution or to adopt disability-specific legislation. (Namibia). Finally, the focus will be on a country of dualist tradition that has yet to sign and ratify the CRPD and has no direct reference to disability rights in its Constitution (Botswana).*

### 3.1.1 South Africa

In South Africa, disability rights are protected through the Constitution, legislation and the courts.

### 3.1.2 The status of the CRPD

South Africa signed the CRPD and its Optional Protocol on 30 March 2007, and subsequently ratified both instruments on 30 November 2007.

### 3.1.3 The legal status of international law in the South African legal system

South Africa subscribes to a dualistic approach to international law. This entails the incorporation of an international instrument into the national law. In this regard, the Constitution in section 231(2) and (4) provides:

An international agreement binds the Republic only after it has been approved by resolution in Parliament by both the National Assembly and the National Council of Provinces ...

Any international agreement becomes law in the Republic when it is enacted into law by national legislation ...

Nevertheless, the Constitution also provides exceptions to the dualist approach espoused by the country, especially in case of an interpretation of the Bill of Rights. In this respect the constitution provides as follows (section 39(1)):

When interpreting the Bill of Rights a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider *international law*; and (c) may consider foreign law.

Furthermore according to section 233 of the Constitution further

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

These exceptions to the dualist approach were reiterated by the Constitutional Court in the *Makwanyane* case (1995 (3) SA 391 (CC)).

#### Student activity

- 1 Is it important that African norms dealing with people with disabilities should be binding on states?
- 2 Does the fact that a country ratified the CRPD mean the country is committed to realise the rights contained therein?
- 3 What are the most important African-specific concerns which are not covered in the CRPD which should be included in an African treaty or Protocol on people with disabilities?
- 4 Who should draft the African Protocol, a government commission, experts, DPOs, NGOs, all of the above, or others? Why?

## 3 Disability laws at the national level in selected African countries: South Africa, Kenya, Uganda, Namibia and Botswana

### 3.1 Lecturer's notes

*This module covers developments on disability rights at the national level. The lecturer should attempt to capture developments taking place in the country and see that the laws and policies are updated. In fact, when the lecturer is adapting the module to the local level, it is imperative to highlight the applicable laws within the local jurisdiction. Essentially, this module explores how the global and regional instruments are given effect in the local jurisdiction.*

*In the context of this curriculum, we cannot survey all the 54 African countries to examine how the CRPD had been implemented. Therefore, we will explore the implementation of the CRPD in five countries. We will choose a country with a dualist tradition of international law that has ratified the CRPD, but without specific disability legislation (South Africa). Secondly, we will look at countries of monist traditions that have ratified the CRPD, and have directly provided for disability rights in their Constitutions and have adopted specific disability legislation (Kenya and Uganda although Uganda is dualist in principle). Thirdly, the focus will be on a country*

### 3.1.4 The Constitution

Article 9(3) and (4) of the Constitution expressly prohibits discrimination on the grounds of disability.

The indirect constitutional protection of disability rights is found in the Bill of Rights which applies to 'everyone' including persons with disabilities.

### 3.1.5 Legislation

South Africa does not have a comprehensive disability Act that deals exclusively with disability rights. The country has however enacted different pieces of legislation that refer to persons with disabilities. This legislation includes:

- **Broad-Based Black Economic Empowerment Act 53 of 2003**

This Act deals with economic empowerment of black women and men and *persons with disabilities*. The Act gives priority to issues such as employment equity and equalising opportunities.

- **Children's Act 38 of 2005**

The Children's Act provides for the necessary care of and assistance to children. Section 11 of the Act specifically caters for children with disabilities or chronic illnesses. Similarly, section 6(2)(d) and (f) of the Act prohibits unfair discrimination against a child based on any grounds including health status or disability.

- **Co-operatives Act 14 of 2005**

A main aim of the Co-operatives Act is to provide support programmes to emerging co-operatives, specifically those cooperatives that comprise of formerly disadvantaged groups and the vulnerable including persons with disabilities.

- **Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007**

This Act addresses the legal aspects of or relating to sexual offences. Amongst its provisions, there are specific sexual offences that were adopted to protect children and *persons with mental disabilities*.

- **Criminal Procedure Act 51 of 1977**

The Criminal Procedure Act deals with inter alia, an accused's capability to stand trial. According to section 194 of the Act, 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. This is clearly a violation of the right to

access to justice provided for by article 13 of the CRPD.

- **Domestic Violence Act 116 of 1998**

This Act outlaws any forms of violence within domestic relationships. In this context, domestic violence is prohibited between family members or caregivers and persons with disabilities.

- **Electoral Act 73 of 1998**

This Act provides that voters with *disabilities* should be assisted by a person of their choice where necessary, and *persons with disabilities* can be registered as special voters. This enables persons with disabilities to vote on a predetermined day before election day either at the voting station or at their residence (See sections 33 and 39 of the Act).

- **Electronic Communications Act 36 of 2005**

According to section 2(s)(iii) the main object of this Act is to provide for the regulation of electronic communications that cater for all including persons with disabilities.

- **Employment Equity Act 55 of 1998**

The Employment Equity Act aims to promote equity in the workplace. In this vein, it specifically prohibits the unfair discrimination of employees on the ground of disability. Additionally chapter 3 addresses the employer's duties regarding affirmative action, ensuring that persons from designated groups including persons with disabilities have equal job opportunities.

- **Labour Relations Act 66 of 1995**

This Act prohibits unfair labour practices. Accordingly, disability is not a ground for discrimination.

- **Mental Health Care Act 17 of 2002**

The Mental Health Care Act aims at regulating and providing mental health care, treatment and rehabilitation services available for everyone, and specifically controls the way in which the property of persons with mental illness and persons with severe or profound intellectual disability may be dealt with by a court of law (See section 3).

- **National Education Policy Act 27 of 1996**

Amongst other things, the National Education Policy Act shields persons with disabilities from discrimination based on disability in accessing education.

- **The Sterilisation Act 44 of 1998**

The National Sterilisation Act of 1998 together with **National Health Act 61 of 2003** prohibits the forced sterilisation of persons with disabilities. The National Health Act emphasises the right to reproductive health for all including persons with disabilities.

- **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**

This Act promotes the right to equality and prohibits discrimination on various grounds including disability.

- **Social Assistance Act 13 of 2004**

This Act regulates the eligibility for social assistance (section 5 of the Act) which is provided for persons with disabilities in the form of disability grants (section 9 of the Act).

- **South African Library for the Blind Act 91 of 1998**

This piece of legislation ensures access to the library for blind and visually impaired persons.

- **South African Schools Act 84 of 1996**

The aim of this Act is to offer uniform education for all including learners with disabilities. Amongst others, the School Act clearly provides for reasonable accommodation for learners with disabilities in order to ensure access for education for all.

### 3.1.6 Case law

The protection of disability rights in South Africa is to some extent crafted around human dignity as provided for in the Bill of Rights (section 10). This was emphasised by the Equality court in *WH Bosch v The Minister of Safety and Security & Minister of Public Works* (Case no 25/2005 (9)). In this case, the Equality Court in Port Elizabeth held that:

There is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or potential violation of the disabled person's right to equality and maintenance of his dignity that was tendered or averred by the respondent. The court therefore found the discrimination to have been unfair.

The judgment urged all South African Police Services (SAPS) stations be made accessible to persons with disabilities.

In another Equality Court case in Germiston, *Esthé Muller v Minister of Justice & Minister of Public Works* (Case no 01/2003) an out-of-court settlement was reached in 2004 and ensured that all court buildings be made accessible to persons with

disabilities. The *Bosch* and *Muller* cases led to the adoption of a programme at the Department of Public Works to renew existing public services buildings in ensuring accessibility to persons with disabilities.

In addition to this, in the case of *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton* (Case 1/2010 (December 2010)), the Equality Court ruled in favour of Lettie Oortman and against the St Thomas Aquinas private school that was ordered to re-admit the applicant, Oortman to school and to also take reasonable measures to ensure that Oortman gain access to all the classrooms and the toilets allocated to her on her wheelchair.

In the *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration & Others*, ([2008] 4 BLLR (LC) 356-390) after a car accident which led to an injury to the victim, the latter was not accommodated, but was dismissed by the bank. The court found that the dismissal amounted to unfair discrimination and violation of human dignity of the applicant.

In the *Western Cape Western Cape Forum for intellectual Disability v Government of the Republic of South Africa & Another* (2011 (5) SA 87 (WCC)), the Western Cape High Court held that failure to afford education to learners with intellectual disabilities in special schools or no other schools was a violation of their right to basic education, to equality, to human dignity and their right to protection from neglect and degradation.

## 3.2 Kenya

### 3.2.1 Status of the CRPD in Kenya

Kenya signed and ratified the CRPD on 30 March 2007 and 19 May 2008 respectively.

### 3.2.2 Status of international law in the Kenya's legal system

According to article 2(6) of the 2010 Constitution 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution'. This suggests that Kenya has a monist system. However, the courts have used two approaches: Firstly, In *Re the Matter of Zipporah Wambui Mathara* ([2010] eKLR <http://kenyalaw.org/caselaw/cases/view/71032/>), the High Court was of the view that international law supplants conflicting local law. Secondly in *Beatrice Wanjiku v The Attorney General* ([2011] eKLR <http://kenyalaw.org/caselaw/cases/view/81477/>) the High Court was of the view that international law does not supersede local statute as they are both law under the Constitution and therefore have equal status.

### 3.2.3 The Constitution

In Kenya disability rights are protected through the constitution, legislation and the courts.

Article 54 of the Constitution explicitly protects disability rights. It reads:

54. (1) A person with any disability is entitled –
- (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
  - (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
  - (c) to reasonable access to all places, public transport and information;
  - (d) to use Sign language, Braille or other appropriate means of communication; and
  - (e) to access materials and devices to overcome constraints arising from the person's disability.
- (2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

Other articles that protect disability directly are the following: 7(3)(b); 21(3); 27(4) and (5); 54; 81(c); 82(2)(c)(i); 83(1)(b); 97(1)(c); 98(1)(d); 99(2)e; 100(b); 120(1); 177(1)(c); 193(2)(d); 227(2)b; 232(1)(i)(iii); and 260.

### 3.2.4 Legislation

Legislation that directly addresses issues relating to disability includes:

- **The Persons with Disabilities Act 14 of 2003**

The Persons with Disabilities Act provides for the rights and rehabilitation of people with disabilities. It also seeks to achieve the equalisation of opportunities for persons with disabilities, and to establish the National Council for Persons with Disabilities (NCPWD). In addition to this, the Act created the National Development Fund for persons with disabilities in order for them to afford financial assistance from organisations.

- **Social Assistance Act 24 of 2013**

According to section 23 of the Social Assistance Act, persons with disabilities are eligible for social assistance if they suffer from a severe mental or physical disability, the person's disability hinders their ability to ensure their basic needs and there is no known source of income or support for the person.

- **The Mental Health Act 10 of 1989**

The aim of the Mental Health Act is to amend and strengthen the law catering for: the care of persons with mental disabilities, their custody and the management of their estates as well as the management and control of mental hospitals.

Section 16 of the Act allows non-consensual psychiatric treatment as well as detention. Section 26 of the Act empowers the court to make orders for the management of the estate of persons suffering from a mental disorder as well as for the guardianship of any such person.

- **Criminal Procedure Code (cap 75) of 2008**

The Criminal Procedure Code through its sections 162, 163, 164 and 280 established the procedure through which a court may determine that a person is of unsound mind and the ensuing consequences, including that once so declared a person may be sent to a mental hospital or to a 'lunatic asylum' (section 280) until such time as the medical officer or the court or the Attorney-General deem such person to be of sound mind.

- **Sexual Offences Act 3 of 2006**

According to section 31 of the Act, persons with disabilities are 'vulnerable witnesses' and as such they are allowed to use intermediaries in their engagement with the judicial system. An intermediary is 'a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker'. Section 31(10) of the Act protects 'vulnerable witnesses' from the unsubstantiated evidence of an intermediary.

- **The Basic Education Act 14 of 2013**

The Basic Education Act promotes special needs education for learners who need it. Those who need special education include 'intellectually, mentally, physically, visually, emotionally challenged or hearing impaired learners, pupils with multiple disabilities, the specially gifted and talented pupils' (Section 44 (3) of the Basic Education Act).

- **Penal Code of 1970**

The penal code through its section 12 exonerates persons with mental illnesses from criminal responsibility for an act or omission that took place at the time of mental illness.

- **The Employment Act 11 of 2007**

The Employment Act shields persons with disabilities from direct or indirect discrimination in employment on the ground of disability.

- **The Children's Act 8 of 2001**

The Children's Act openly protects children with disabilities from discrimination based on their disability (section 5). Section 107(2) of the Act provides for the extension of guardianship when a child suffers from a mental or physical disability or illness rendering him or her incapable of

maintaining himself or herself or managing his own affairs and property without a guardian's assistance. It is important to note that a continued guardianship for children with disabilities is as against the right to legal capacity

### 3.2.5 Case law

- In *Fredrick Gitau Kimani v The Attorney General* ([2012] eKLR <http://kenyalaw.org/caselaw/cases/view/81883>) the applicant, a public officer, had a leg amputated as a result of diabetes. Subsequently he was forced to retire for medical reasons because he had been certified by the National Council of Persons with Disabilities (NCPWD) as a person with a disability. According to the Persons with Disabilities Act, the retirement age for persons with disabilities is 60 years of age. However, the applicant was forced to retire at retired 55. Therefore he claimed that his early retirement was discrimination based on health, status, age and disability which was a direct violation of article 27(4) of the Constitution as read with section 15(6) of the Persons with Disabilities Act. The Court found for the application and awarded him damages.
- *Kenya Society for the Mentally Handicapped (KSMH) v The Attorney General* ([2012] eKLR <http://kenyalaw.org/caselaw/cases/view/86061>) was brought by KSMH on its own behalf and in the public's interest. KSMH accused the state of violating the rights of persons with mental and intellectual disabilities by discriminating against them in the provision of support and services contrary to articles 21(3), 28 and 27(1) of the Constitution. Amongst others, the KSMH claimed that the state was slow to adopt measures and implement policies to achieve equal opportunities for persons with mental and intellectual disabilities to obtain education and employment and access to healthcare. The application was dismissed for lack of evidence to support the claim
- In the case of *In the matter of Leah Wachu Waiganjo (a person suffering from a mental disorder) and in the matter of an application by William Kibera Waiganjo to be appointed manager to the estate of and guardian to the said Leah Wachu Waiganjo* ([2012] eKLR <http://kenyalaw.org/caselaw/cases/view/80879>) an application was made by William Kibera-Waiganjo (the applicant) to be appointed guardian *ad litem* and manager of the estate of Leah Wachu Waiganjo (the subject). The applicant claimed that Leah suffers from a mental disorder and was therefore incapable of managing her affairs. Medical evidence revealed that Leah suffered from temporal lobe epilepsy and periodic depression. Based on the Court's observations of Leah and the medical reports, the Court found for the applicant and appointed him to be Leah's guardian *ad litem*, to manage her estate, including proper provision for her maintenance, and to take any appropriate legal action for her benefit and for the benefit of her estate.

## 3.3 Uganda

### 3.3.1 Status of the CRPD in Uganda

Uganda signed the CRPD and its optional protocol on 30 March 2007 and ratified both instruments on 25 September 2008.

### 3.3.2 Status of international law in the Uganda's legal system

In principle, Uganda is a dualist country, and therefore requires the domestication of international law for its application at country level. However, the presentation of a treaty to the legislature does not always lead to automatic domestication or application in national law. Oyaro (2014) argues that the 'ratification of treaties and their coming into domestic effect has grown out of usage rather than as a result of standardisation by law'. Notwithstanding, the ambiguity on the status of international law in the legal system, some judges rely on this law. For instance in the case of *Attorney General v Susan Kigula* (Constitutional Appeal No 3/2006 (2009) UGSC 6 (SC) (21 January 2009) 12) the Supreme Court referred to international law to inform its decision on the death penalty. Similarly, in *Uganda v Peter Matovu* (Criminal Session Case No 146/2001 (2002) UGHC 72 (19 October 2002)), the High Court relied on provisions of the **Committee on the Elimination of Discrimination against Women** (CEDAW) to reach its decision.

### 3.3.3 The Constitution

The Constitution of Uganda contains provisions that directly address disability. Article 21 provides for equality and prohibits discrimination against all persons and specifically includes persons with disabilities. Other articles that address disability directly are the following: National Objective XVI, National Objective xxiv(C), articles 32, 35 and 37.

### 3.3.4 Legislation

Legislation that addresses disability directly include:

- **The Persons with Disabilities Act, 2006**

This Act is the main legislation for the protection of human rights for persons with disabilities. It prohibits discrimination against persons with disabilities and calls for the equalisation of opportunities.

- **The Mental Treatment Act**

Adopted in 1938 and revised in 1964, the Mental Treatment Act deals with persons with mental disabilities, but is still in line with the medical model approach to disability. It provides for the declaration of unsound mind by the court and the subsequent compulsory detention and treatment and/or rehabilitation.

- **The National Council for Disability Act, 2003**

The National Council of Disability Act establishes the National Council for Disability which is the national body through which the needs, problems, concerns, potential and ability of persons with disabilities can be communicated to the government and its agencies. The National Council for Disability is also mandated to monitor and evaluate the extent to which the government, nongovernmental organisations and private institutions include and meet the needs of persons with disabilities. It also coordinates activities between government departments, service providers and persons with disabilities (Laws of Uganda, National Council for Disability Act, 2003 section 4).

### 3.3.5 Case law

- *Legal Action for Persons with Disabilities v Attorney General* (High Court of Uganda, Misc App No 146/2011, judgment delivered 20 May 2014)

The applicants sued the Attorney General, Kampala Capital City Authority (KCCA) and Makerere University Kampala (MUK) on the grounds that public buildings and facilities within Kampala city and Makerere University (an institution of higher education) were not accessible to persons with disabilities. The applicants relied on the anti-discrimination provisions in the Constitution and the Persons with Disabilities Act of 2006 requesting that all public buildings be made accessible to persons with disabilities to ensure their full inclusion in the society.

The High Court dismissed the application on the following grounds: The KCCA and MUK had taken sufficient reasonable measures within their means to make their buildings and facilities accessible. The court was also of the view that KCCA and particularly MUK had limited resources and could not fully make all buildings immediately accessible and that the current state of inaccessibility was attributable to buildings constructed prior to the period when issues of disability became a pertinent national agenda. The court also noted that to expect MUK to prioritise resources to making buildings accessible would substantially increase the cost of education hence affect other students.

- *Nyeko Okello & Santo Dwoka v Centenary Rural Development Bank Limited (High Court of Uganda Civil Suit No 23/2008 (unreported))*

The applicants who were persons with disabilities and clients of Centenary Rural Development Bank (CERUDEB) noted that the Bank was not accessible to persons with disabilities as it has no ramps. They approached the Bank to discuss the issue, but to no avail. Therefore, they took the matter to court to compel the Bank to ensure accessibility for persons with disabilities, and before the case was heard the Bank reacted and constructed ramps. Since the breach had been remedied, the judge advised for a settlement out of court. A consent judgement was

later entered into by the parties with costs awarded to the applicants, but no damages were awarded by the court.

## 3.4 Botswana

### 3.4.1 Status of the CRPD in Botswana

Botswana has neither signed nor ratified the CRPD and its Optional Protocol.

### 3.4.2 Legal system of Botswana

Botswana is a dualist state. Therefore, the domestication of international instruments is required prior to application. However, the Court of Appeal in the case of *State v Marapo* ((2002) AHRLR 58 (BwCA 2002) para 22) highlights that international norms cannot be ignored while dealing with human rights. This was reiterated by the Court of Appeal in *Attorney-General of Botswana v Dow* ((2001) AHRLR 99 (BwCA 1992)) para 109 in these terms:

Botswana is a member of the community of civilised states ... it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.

Nevertheless, to confirm the dualist nature of the legal system, the Court of Appeal has, underlined that non domesticated international norms can only be used as interpretative sources of national law (*Dow*, para 108).

### 3.4.3 The Constitution

The Constitution has no direct provision dealing with disability rights.

### 3.4.4 Legislation

Legislation that directly address disability rights are the Inclusive Education Policy (IEP), the Early Childhood Care and Education Policy (the ECCEP) of 2001.

There is no specific legislation dealing with disability rights in general. Nevertheless, there is legislation that directly addresses issues of disability:

- **The Building Control (Amendment) Regulation of 2009**

It was adopted in conformity with the 1990 and 2007 Building Control Acts of Botswana. The regulation provides that for the construction of non-domestic buildings and apartments, a Disability Access Certificate should be obtained from the local building authority.

### 3.4.5 Case law

The Court of Appeal in the cases of *Attorney General of Botswana v Dow* ((2001) AHRLR 99 (BwCA 1992, para 109)) and *Makuto v The State* (2000 (2) BLR 130 (CA)) underlined that discrimination on the ground of disability falls within the scope of the right to non-discrimination within the Constitution of Botswana. Although this observation was made by the court, the cases had nothing to do with disability rights.

In *JNG Express (PTY) Ltd v Botswana Insurance Co Ltd* ((2006) 1 BLR 421 (HC)) the High Court of Botswana decided on a case dealing with the termination of employment on the grounds of an epileptic fit. The employee in this case suffered a seizure following a prank by a co-worker who 'leapt from behind a bush with a mighty roar' at a game camp. After recovering the employee was to receive a letter of termination of employment from her employer for her epileptic condition. The court was of the view that the termination of the employment of the employee who had allegedly suffered an epileptic fit was 'both substantively and procedurally unfair'. Depending on the earlier decision of the Botswana High Court in *Moseki v Johnson Crane Hire (Botswana) (Pty)(Ltd)* (IC 143/99), unreported) – where the Botswana High Court set out the principles for termination on employment due to ill-health, the court held that:

Incapacity arising from ill health or injury can ... be a legitimate reason for terminating a contract of employment if it is fairly done ... the employer is obliged to establish the nature and extent of the disability through meaningful consultation with the employee, either with or without the intervention of a medical doctor.

The court also observed that '[i]f the incapacity is serious or permanent, the employer should consider alternative employment or adapting the employee's work to accommodate such disability'.

## 3.5 Namibia

### 3.5.1 The status of the CRPD in Namibia

Namibia signed and ratified the CRPD and its Optional Protocol on 4 December 2007.

### 3.5.2 The status of international law in Namibia's legal system

Namibia is a monist state, hence international treaties become part of the domestic laws upon ratification, unless reservations are submitted to that effect. So far there are however, no cases that engage with the monism of the legal system.

### 3.5.3 The Constitution

There are no provisions in the Constitution of Namibia that directly address disability.

### 3.5.4 Legislation

Namibia has legislation that directly addresses disability. This includes:

- **National Policy on Disability (1997)**

The National Policy on Disability endorses the principles of the social model of disability as a basis for the formulation and implementation of disability policy and practice. The underpinning principles upon which this National Policy is premised are the equalization of opportunities, inclusion and integration. Moreover, the policy states that disability issues are inherently linked to the advancement of human rights and inextricably linked to human development. The National Policy on Disability identifies 14 priority areas that the Government will need to address in order to facilitate the effective social inclusion of disabled people throughout Namibian society. These include education, awareness raising; prevention, intervention and health education; treatment, therapeutic aids and orthopaedic technical services; environmental accessibility; access to information; adult education; social integration and the environment; culture, religion, recreation and sports; social welfare and housing; social, economic and legal protection; the training of personnel; and family and personal integrity ([https://www.ucl.ac.uk/lc-ccr/downloads/DISABILITY\\_POLICY\\_AUDIT\\_RESEARCH\\_FINAL\\_REPORT.pdf](https://www.ucl.ac.uk/lc-ccr/downloads/DISABILITY_POLICY_AUDIT_RESEARCH_FINAL_REPORT.pdf))

- **The National Disability Council Act 26 of 2004**

Article 16(3) of the Act states that the National Disability Council may run programmes or conduct campaigns to inform the public and to raise the awareness of the public concerning an issue relating to disability.

- **The National Policy on Special Needs and Inclusive Education (2008)**

- **National Policy on Mental Health (2005)**

In terms of section 4(1) the National Disability Council has the power and function to make representations on behalf of any persons with disabilities before any organ of the state, or provide or procure legal assistance for any persons with disabilities, if the matter in question relates to the rights of, or the integration of persons with disabilities into society. In addition to this, National Disability Council is tasked to recommend to Cabinet, the taking of necessary steps in order to facilitate compliance with the National Policy on Disability and the amendment of any law.

- **Affirmative Action (Employment) Act 29 of 1998**

The objective of the Affirmative Action (Employment) Act is to address the injustices of the past. According to the Act, previously

disadvantaged groups including persons with disabilities should be given the opportunity to be equal to other groups in society in terms of realisation of human rights and the right to employment in particular.

The Labor Act prohibits discrimination in employment decisions based on a number of factors, including any 'degree of physical or mental disability'.

- **Sector Policy on Inclusive Education (2013)**
- **The Racial Discrimination Prohibition Amendment Act 26 of 1991**

This acts also prohibits discrimination based on disability in section (1).

### 3.5.5 Case law

There is no single case dealing with disability rights.

#### Student activity

- 1 Compare and contrast the decision of the courts in the South African Case of *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa & Another* and the Ugandan case of *Legal Action for Persons with Disabilities v Attorney General*.

Special emphasis should be on the reasoning of the courts and their decision.

### Observations

South Africa has ratified the CRPD and has a Bill of Rights which protects everyone including persons with disabilities. The strength of the South African approach is due to the fact the courts are empowered to rely on international and foreign law while interpreting the Bill of Rights. However, for a better visibility of disability rights, it is imperative to adopt specific disability legislation and not be limited to an approach which places disability in 'general antidiscrimination legislation' (Van Reenen and Combrinck, 2011: 144). It is nevertheless important to note that there is some litigation on disability rights which cannot justify the lack of specific disability legislation on disability rights in any case.

Countries such as Kenya and Uganda that have ratified the global Convention and incorporated specific provisions on disability rights in their Constitutions and have adopted specific legislation on the issues. Although in some cases these positive developments did not trickle down to courts, in general such developments are likely to make a difference through the courts that render decisions on disability rights and should therefore be encouraged.

At the same time a country such as Namibia despite having ratified the CRPD, still has to enshrine specific provisions on disability rights in its constitution and still needs to have more legislation dealing directly with the issues, and still needs to ensure more indirect references to disability rights and more importantly promote litigation on these rights.

The third category represented by Botswana is yet to sign and ratify the CRPD. Here there are only a few direct references to disability rights in the Constitution and very little legislation dealing with the issues. Though there are few cases on disability rights, the country needs to learn from best practice in Kenya and Uganda starting with the ratification of the CRPD.

#### Student activity

- 1 Critically engage with the protection of disability rights in your country and provide recommendations on what needs to be done for a better protection of these rights in your country.
- 2 How can the local context enhance the protection disability rights in your country?

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## Regional instruments

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The draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with disabilities.

Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res143(XXXXV) 09

## Sub-regional instruments

- The 1999 East African Community (EAC Treaty)
- The Treaty of the Southern African Development Community (SADC Treaty)
- The Economic and Monetary Community of Central Africa (CEMAC)
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*Nyeko Okello & Santo Dwoka v Centenary Rural Development Bank Limited* (High Court of Uganda Civil Suit No 23/2008 (unreported))

*Uganda v Peter Matovu* (Criminal Session Case No 146/2001 (2002) UGHC 72 (19 October 2002))

## Recommended reading

*The following two articles have been recommended because they contain the most recent scholarly work on disability rights on the African continent. They are also sources for country-based reports as well as commentaries on recent developments in the fields of disability rights in Africa*

*African Disability Rights Yearbook*, 2013

*African Disability Rights Yearbook*, 2014

## Further reading

*The following sources have been recommended because they provide additional insight on disability rights in some African countries as well as in Africa in general.*

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# Module 4: Non-discrimination against people with disabilities

## Module overview

This module aims to give learners an understanding of disability based discrimination as well as the concept of reasonable accommodation, as provided in articles 2 and 5 of the Convention on the Rights of Persons with Disabilities (CRPD). Disability-based discrimination constitutes the main obstacle to the equal rights enjoyment by persons with disabilities since it results in their continued marginalisation and exclusion from most spheres of life. The right to be free from discrimination entails freedom from all forms of discrimination based on prohibited grounds, including race, colour, sex, age, language, religion, political or other opinion or other status. Nevertheless, this module focuses on freedom from disability based discrimination (non-discrimination on the basis of disability or disability non-discrimination).

The module first explains the concept of non-discrimination against persons with disabilities as well as the right to reasonable accommodation. Thereafter, the module looks at the prevailing standards on non-discrimination on the basis of disability at the UN/global level and at the African regional level. It further discusses the domestic treatment of disability non-discrimination and reasonable accommodation at the national level in selected jurisdictions: Canada, UK, USA, Australia, Malawi, South Africa, and Kenya. Domestic treatment of disability non-discrimination occurs in the context of criminal laws, constitutional laws, civil anti-discrimination laws and social welfare laws. These varying approaches are compared, and the advantages and disadvantages of each are highlighted.

Emphasis will be placed on critical analysis of the various concepts, as well as domestic application of the concepts by learners.

## Learning objectives

The module seeks to equip learners with the knowledge to:

- Understand the concept, definition and significance of non-discrimination on the basis of disability and the centrality of reasonable accommodation in this definition.
- Develop a broad and critical understanding of international, regional and domestic legal and normative framework on non-discrimination on the basis of disability, including the concept of reasonable accommodation.
- Understand and apply the provisions pertaining to non-discrimination and reasonable accommodation to given situations.
- Understand the legal measures for the domestic implementation of the right of disability non-discrimination that have been adopted in selected jurisdictions and critically analyse the

applicability of these measures in the learners' domestic legal systems.

- Identify how the right to non-discrimination on the basis of disability is violated, as well as how the right can be promoted.

## Module content

There are three module sections. Section 1 explains the concept of non-discrimination against persons with disabilities while section 2 explains the concept of reasonable accommodation; both sections draw from international and regional human rights instruments. Section 3 discusses the domestic treatment of disability non-discrimination and reasonable accommodation at national level in selected jurisdictions: Canada, UK, USA, Australia, Malawi, South Africa and Kenya.

### 1 The concept of non-discrimination on the basis of disability

#### 1.1 Lecturer's notes

*When breaking the ice and introducing the topic of non-discrimination, learners can be asked how disability was viewed in the communities in which the learners grew up. For examples, were learners with disabilities able to attend mainstream public education at basic education level? Learners can also be asked to share prevalent cultural beliefs and practices (positive and negative) relating to disability from their communities. Learners can be asked, throughout the module, to reflect on the role of the law as an agent of social change in the field of disability.*

#### 1.2 Non-discrimination on the basis of disability

The CRPD defines discrimination on the basis of disability under article 2 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 in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

The Human Rights Committee (HRC) (which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR)) in General Comment 18 on non-discrimination defines discrimination as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

‘Distinction’ inherently encompasses exclusion, restriction or preference; while ‘impairing’ includes nullifying, and ‘enjoyment’ covers exercise; and ‘human rights and freedoms’ include entitlements, interests, rights and freedoms contained in the provisions of a human right treaty. Therefore, the definition of non-discrimination which captures the three elements (namely ‘distinction/exclusion’, ‘impairing’ and ‘right’) entails differentiation based on a prohibited ground such as disability that impairs the enjoyment of a human right.

It is important to note that discrimination based on disability is often caused by discomfort and pity, or misguided compassion that materialises as paternalistic and patronising behaviour. *Cleburne v Cleburne Living Ctr* (473 US 432 (1985)) is illustrative in this regard. In this case, Cleburne Living Center, Inc (CLC) submitted a permit application seeking approval to build a group home for the mentally retarded. The city of Cleburne, Texas refused to grant CLC a permit on the basis of a municipal zoning ordinance. CLC then sued the City of Cleburne on the theory that the denial of the permit violated the Equal Protection rights of CLC and their potential residents. The case went all the way to the Supreme Court, which asserted the following relevant to the discussion on causes of discrimination based on disability:

As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns. With respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.

Other times, discrimination against disabled persons is the result of ‘benign neglect’ and is ‘primarily the result of apathetic attitudes rather than affirmative animus’ (*Alexander v Choate* 469 US 287, 105 S Ct 712, 83 L Ed 2d 661 [1985]).

### 1.3 Direct and indirect discrimination

Under existing international law, states should take measures that curb both direct and indirect discrimination against all persons, including persons with disabilities (see Committee on Economic, Social and Cultural Rights (CESCR) General Comment 5, para 14).

Overt/direct discrimination is where the differential treatment is expressly mandated in the law or policy or where the differential treatment is based on a prohibited ground of discrimination. For example: A law which states that learners with visual impairments must not be admitted in state

schools constitutes direct/overt discrimination on the basis of disability.

Indirect/convert or hidden discrimination occurs where a neutral looking law or policy serves the aim or has the effect of giving advantage to a particular group (A), or imposing a disadvantage on a particular group (B) (CESCR General Comment 20, para 10). In other words, indirect discrimination occurs where requirements, conditions or practices, imposed equally on everyone, say by a school or employer, have a disproportionate adverse impact on a particular group’s possibility of exercising their rights. For example, if a school admits a student with a visual impairment but does not provide any of the course materials in a format that the student can read (either in Braille or using text to speech software). In such cases, the school is indirectly discriminating against the student.

*De jure* discrimination refers to differential treatment that is imposed by law. *De facto* discrimination occurs when state agencies discriminate in practice but not necessarily ordained by law, that is, not officially established. The term *de facto* discrimination is usually used not for individual discrimination but systematic discrimination or a pattern of discrimination that is wide enough to produce statistical disparities between groups in a manner consistent with the imbalances that are produced by *de jure* discrimination (CESCR GC 20, para 12). An example of *de facto* discrimination is where a state fails to fund public schools to be able to provide education to students with disabilities, and instead funds (few) special schools with the result that education is segregated and only few learners with disabilities are able to access education. While such a state may not have a law stating that ‘students with disabilities do not have a right to education’, the end result is that students with disabilities do not access education on an equal basis with others.

Types of disability based discrimination			
Type of discrimination	Explanation	Illustration	Effect
Disability based discrimination	Distinction based on disability that impairs the enjoyment of a human rights on an equal basis with others.	All schools in a state admit all learners except learners who are blind and/or learners who are deaf.	Deaf and/or blind learners will be excluded from enjoying the right to education.

Direct discrimination based on disability	Distinction that is expressly mandated by law or policy and/or where disability is not a prohibited ground of discrimination .	A government policy or law that disqualifies persons who are 'of unsound mind' from voting.	Persons with psychosocial disabilities and persons with intellectual disabilities run the risk of being excluded from enjoying their right to political participation on an equal basis with others .
Indirect discrimination based on disability	Neutral looking distinction that has the effect of discriminating against persons with disabilities.	A A law or policy requiring that all prospective government employees pass a physical fitness test even if such a test is irrelevant to the job at issue.	Persons with physical disabilities may be excluded from public employment.
<i>De jure</i> disability based discrimination	Distinction imposed by law.	A law prohibiting adults who are blind from voting.	Adults who are blind will not exercise the right to vote and may be stigmatised by society on that basis.
<i>De facto</i> disability based discrimination	Distinction not imposed by law that is systematic or wide spread and that puts persons with disabilities as a group at a disadvantage compared to other groups of people.	A practice by government health workers of not vaccinating children with disabilities against diseases that attack young children on the basis that because of limitation in resources, priority in vaccination is given to 'children who are likely to thrive'.	Most children with disabilities may not enjoy the right to the highest attainable standard of health and may develop further disabilities.



**Student activity**

*Highlighting important aspects and facilitating application and understanding.*

Learners should be encouraged to think of examples of discrimination on the basis of disability from their own jurisdictions. Learners could then be asked to consider the following questions:

- 1 Are people engaging in discrimination on the basis of disability always aware that they are behaving in a discriminatory way?
- 2 What are the root causes of the discrimination? Fear, pity, hatred or ignorance?
- 3 What should be done in order to check unintended and indirect discrimination on the basis of disability?
- 4 When discrimination arises from deep seated cultural or religious traditions, should it be excused? In other words, when is discrimination wrongful?

**1.4 Formal and substantive equality**

It has been stated that ‘conceptually, equality and non-discrimination connote the same idea and can be seen as simply the positive and negative statements of the same principle’ (Bayefsky, 1990). It suffices here to consider the ‘positive statement’ of this ‘same idea’.

Formal or juridical equality refers to the idea that individuals in like situations should be treated alike. Equal treatment is based on the appearance of similarity without regard to the broader context within which such treatment occurs. It ignores the structural factors that result in certain groups falling behind the rest of society. In other words, the formal conception of equality excludes indirect discrimination (Mjöll, 2009). Formal equality guarantees consistency in treatment (procedural equality) and fails to consider content of treatment (substantive equality) despite any unequal results that may flow from it (Mjöll, 2009).

This formal equality model is also referred to as the sameness approach or symmetrical approach, that was most popular in the years preceding the adoption of the Universal Declaration of Human Rights. Formal equality is included in such instruments as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which have open-ended non-exhaustive anti-discrimination clauses.

Substantive equality seeks to ensure that the life chances of a person will not be undermined by factors out of that person’s control, which factors usually form prohibited grounds of discrimination. In many cases, substantive equality may be achieved without additional resources, for example, through changing priorities and modifying policies and rules. On the other hand, substantive equality is not about merely ensuring parity of resources; it may be about, where necessary investing additional resources to cover any extra costs needed to ‘equalise’ *in fact* those who are disadvantaged on account of one of the prohibited grounds. To illustrate: with regard to education, the law must provide all people with equal entitlements to education. But in order for the ‘equal entitlement’ to translate to actual access to education for learners with disabilities, it may be necessary to invest additional resources to ensure that schools are accessible and that learners are provided with reasonable accommodation.

Substantive equality entails equality of results and equality of opportunity. It recognises that apparently identical treatment can, in practice, reinforce inequality because of past or ongoing discrimination or differences in access to power and resources. This approach focuses on both the effects and purposes of a measure. See the illustration on substantive equality and education in the foregoing paragraph.

## 1.5 UN/global standards on non-discrimination against persons with disabilities

The classical non-discrimination clauses in the UN Covenants including articles 2 and 26 of the ICCPR and article 2, Paragraph 2 of the ICESCR, are directed against discrimination of any kind, but list the following as the most important examples of grounds for discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 14 of the European Convention on Human Rights lists the same discrimination grounds, with the addition of association with a national minority. There is no mention of disability (Mjöll, 2009) in any of these instruments which may be said to have contributed to the invisibility of persons with disabilities on the international stage. Nevertheless, 'while disability was a forgotten category when the ICCPR and the ICESCR were drafted, these treaties are currently interpreted in a way that supports the human rights approach to disability' (Degener & Quinn, 2002).

In General Comment 20 (on non-discrimination) and in General Comment 5 (on persons with disabilities), the CESCR has affirmed that disability is an analogous prohibited ground of discrimination under the ICESCR (Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 20, Non-discrimination in economic, social and cultural rights (Forty second session, 2009) UN Doc E/C.12/GC/20) at 27, 28 and Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 5, Persons with disabilities (Eleventh session, 1994) UN Doc E/1995/22)). The CESCR recommends the need to enact laws or legislation that expressly prohibit disability based discrimination and that provide judicial remedies.

On its part, the HRC recommends the need to enact laws or legislation that expressly prohibit discrimination on listed grounds (which must include disability) (General Comment 18, para 12). This is because article 26 of the ICCPR expressly requires the existence of legislation that prohibits discrimination.

The Convention on the Rights of the Child (CRC) was the first international human rights instrument to expressly prohibit discrimination on the basis of disability (article 2). The CRC Committee, which monitors the implementation of the CRC, has elaborated on the rights of children with disabilities, including non-discrimination, in General Comment 9. Accordingly, all children with disabilities are entitled to enjoy all human rights guaranteed by the CRC by virtue of this explicit right of disability non-discrimination.

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

As discussed above, the CRPD elaborates on human rights as they apply in the context of disability. It recognises the concept of disability non-

discrimination in the preamble by providing that discrimination on the basis of disability is a violation of the inherent dignity and worth of the human person.

The CRPD provides for the specific right of non-discrimination under article 5 although non-discrimination is defined under article 2 and also recognised as a general principle under article 3. The preamble to the Convention also repeatedly refers to the principles of equality and non-discrimination (preambular letters a, b, c, e, f, h, p, r, and x) (Mjöll, 2009).

The CRPD defines disability based discrimination as distinct from discrimination generally and provides that disability based discrimination includes the denial of reasonable accommodation (article 2). *Reasonable accommodation is discussed in details under section 2 below.*

The CRPD guarantees the right to non-discrimination under article 5 as illustrated by Table 3 below.

Non-discrimination against persons with disabilities under article 5		
CRPD Provision	Contents of provision	Obligations imposed and implementation measures to be taken by state parties (Schulze (2010); CEDAW Committee General Recommendation 25, para 17)
Art 5(1)	States Parties recognize 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	States must ensure both equality under the law, which is achieved through strict respect for non-discrimination, and equality as a social goal, which is achieved by, inter alia ensuring equal opportunities
Art 5(2)	States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds	States must provide effective legal protection from disability discrimination by providing for the justiciable right of disability non-discrimination in legislation backed by appropriate sanctions. States must enact an anti-discrimination legislation that explicitly contains disability as a prohibited ground of discrimination. States should also provide for independent agencies to hear allegations of systematic discrimination and individual cases; investigate and report on those allegations; and seek systematic remedies and change through appropriate legal and other channels.

Art 5(3)	In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided	States must ensure that anti-discrimination laws or measures ensure the provision of reasonable accommodation to persons with disabilities.
Art 5(4)	Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention	States are allowed to take specific measures to achieve or accelerate de facto equality, including taking special measures (including affirmative action) which must not treat persons with disabilities as weak or vulnerable and that should in no way entail as a consequence the maintenance of unequal or separate standards.

### 1.5.2 Summary of the CRPD Committee's concluding observations on equality and non-discrimination

As at January 2015, at least 74 countries and the European Union have filed reports to the CRPD Committee.<sup>1</sup> The CRPD Committee has issued concluding observations to 19 countries: New Zealand, Denmark, Republic of Korea, Belgium, Ecuador, Mexico, Azerbaijan, Costa Rica, Sweden, Australia, Austria, El Salvador, Paraguay, Argentina, China, Hungary, Peru, Spain and Tunisia ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)). Here is a summary of those concluding observation as they relate to articles on non-discrimination.

The Committee expressed concern about:

- The tendency of states parties to have a narrower scope of anti-discrimination laws than is provided under the CRPD;
- The under-developed systems for dealing with matters of multiple discrimination, where disability is combined with gender or ethnicity;
- The absence of measures prohibiting and punishing all forms of discrimination against persons with disabilities;

1 Countries that have filed state reports with the CRPD Committee include Australia, Austria, Argentina, Algeria, Armenia, Azerbaijan, Brazil, Bosnia and Herzegovina, Belgium, Bolivia, Bulgaria, Canada, Colombia, Cuba, Cyprus, China, Chile, Cook Islands, Croatia, Czech Republic, Costa Rica, Dominican Republic, Denmark, Ecuador, El Salvador, European Union, Ethiopia, Gabon, Germany, Guatemala, Haiti, Honduras, Hungary, Islamic Republic of Iran, Italy, Jordan, Kenya, Latvia, Luxembourg, Lithuania, Mauritius, Mexico, Mongolia, Malta, Montenegro, Morocco, Nepal, New Zealand, Oman, Panama, Philippines, Poland, Paraguay, Peru, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Spain, Sweden, Serbia, Seychelles, Slovakia, South Africa, Sudan, Slovenia, The former Yugoslav Republic of Macedonia, Tunisia, Turkmenistan, Thailand, Ukraine, United Arab Emirates, Uruguay and Uganda. Office of the High Commissioner for Human Rights [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29) (accessed 23 January 2015).

- Laws that do not recognise the denial of reasonable accommodation as a form of discrimination, inconsistent application of the concept of reasonable accommodation by states parties and lack of information on reasonable accommodation;
- The lack of affirmative action measures to speed up the *de facto* equality of persons with disabilities;
- The adoption of plans and other administrative measures that do not explicitly cover persons with disabilities;
- The lack of simplified judicial and administrative remedies that would allow persons with disabilities to report cases of discrimination on grounds of disability;
- The lack of information on measures and actions designed to address the specific situations of persons with disabilities who belong to indigenous peoples and of deaf-blind persons;
- The lack of a comprehensive definition of discrimination against persons with disabilities and the contradictions between many local laws and regulations and national laws with regard to the prohibition of discrimination;
- Laws that allow abortive treatment for a wider circle than in general for the fetuses deemed to have health damage or some disability thus discriminating on the basis of disability; and
- The fact that disability affects parents' guardianship or custody of their children and that legal protection against discrimination on the grounds of disability is not enforceable in cases of discrimination due to perceived disability or association with a person with a disability.

The Committee recommended that:

- States parties provide a legal definition of discrimination against persons with disabilities and include in such a definition the prohibition of indirect discrimination;<sup>2</sup>
- States parties adopt legislation prohibiting all forms of discrimination on the grounds of disability, setting out penalties in cases of discrimination and defining the denial of reasonable accommodation as a form of discrimination<sup>3</sup> regardless of the level of disability.

2 Recommendation to China <http://docstore.ohchr.org/SelfServicesFilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhSrBkvDLHrFFq8wSOe2z9g3jLWXscOK3cW%2bh6NEqWxDjRLAKgX49CP9xOmOS0nj0fJl6mx6njq3Tv58P4WDFvkFz0VqtyHBw%2bLwbk%2bt8Zi0s%2b> (accessed 26 January 2015).

3 Recommendation to Denmark <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/194/60/PDF/G1419460.pdf?OpenElement> and El Salvador <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstksiS6LWF8TU4o56WJXMhKcwRp7hBWgrY38CDaU0Xb%2bUphmF3HheW5A0F1NbO3gvWh2XuL4XameBMib4TcxPJOWh14jxajLaL2HwrThEJj>. Paraguay <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgS19RWfPJldrCFmmb%2b7m2ungB6Pi9l9xVGXNTsk%2fslPwJa73BTPaIjO%2bm7iKKquuDLwB3ZOqV4uVBs6N951v2hiH5tBMguMqrSAeBBL%2bYJ>; China <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhSrBkvDLHrFFq8wSOe2z9g3jLWXscOK3cW%2bh6NEqWxDjRLAKgX49CP9xOmOS0nj0fJl6mx6njq3Tv58P4WDFvkFz0VqtyHBw%2bLwbk%2bt8Zi0s%2b>; Hungary <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmg8z0DXeL2x2%2fDmZ9jKJskZ6Y9eRc83PT5FhFy95TQZkyGQot9vWZBNEf0eAwM4AH0py5P0KQ9jmr6ZHdZ17dkoAgtBSbh58518HTma66df>; Argentina <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhspZQ2s>

Such legislation should define reasonable accommodation<sup>4</sup> in a manner which reflects the CRPD definition covering necessary and appropriate modification and adjustment applicable in a particular case beyond general accessibility;<sup>5</sup>

- States parties strengthen anti-discrimination laws to address intersectional discrimination<sup>6</sup> and to guarantee the protection from discrimination on the grounds of disability to explicitly cover all persons with disabilities<sup>7</sup> including children, indigenous people,<sup>8</sup> women and girls, hearing impaired, deaf, deaf-blind<sup>9</sup> and people with psychosocial disabilities;
- State party to expand the protection of discrimination on the grounds of disability to explicitly cover multiple disability, perceived disability and association with a person with a disability;<sup>10</sup>
- Guidance, awareness-raising and training should be given to ensure a better comprehension by all stakeholders, including members of the legal

profession, particularly the judiciary,<sup>11</sup> and persons with disabilities themselves, of the concept of reasonable accommodation and prevention of discrimination;<sup>12</sup>

- States parties improve their data gathering in order to have clear statistics on indigenous and minority persons with disabilities as well as other individuals who are subjected to multiple forms of discrimination;<sup>13</sup>
- Discrimination laws be strengthened by broadening the available remedies<sup>14</sup> to include other remedies that require a change of behaviour in people who discriminate against persons with disabilities, such as injunctive powers;<sup>15</sup>
- States parties take steps to simplify existing judicial and administrative remedies in order to enable persons with disabilities to report acts of discrimination to which they have been subjected;<sup>16</sup>
- Bodies charged with monitoring and executing disability non-discrimination laws should assume a proactive role;<sup>17</sup> and
- Distinctions in the period allowed under law within which a pregnancy can be terminated based solely on disability be abolished.<sup>18</sup>

- 3 [ppBOANJSxHHwrsEJaYmnlvM3jA08AJH2x7hoUTgh3174tt8%2fqvOaLf8uHB4GIT%2b4irAdCKzr9VRfnZtld%2b1WMR0li6jG7jGEklvRBW](http://ppBOANJSxHHwrsEJaYmnlvM3jA08AJH2x7hoUTgh3174tt8%2fqvOaLf8uHB4GIT%2b4irAdCKzr9VRfnZtld%2b1WMR0li6jG7jGEklvRBW); Spain <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsxq2MulDp%2fqMKQ6SGOn0%2fNZ5trZrfgNmKdTjE%2fScMKF96xMrtyzhDx7aguCpqqdK4xQVGCY502yRGHBFyeVZXNyDyVAuXWX8uweN1J3Pv65K>; Tunisia <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsvO00RvDbzSfy057%2fflh1RwM0BYu1Nnxrjo6vZmLus%2b%2f1ZDuFiYNWHTW%2fDL5M9e5FT3JpAI4%2b19V01DUHQWd59p8OmVGRZCEyZAcDbhMk7> (all accessed 26 January 2015).
- 4 Recommendation to New Zealand <http://daccess-dds-nu.un.org/doc/UNDOC/GEN/G14/195/35/PDF/G1419535.pdf?OpenElement> (accessed 26 January 2015).
- 5 Recommendation to China <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrBkvDLHrFFq8wSoe2z9g3jLWXSoc02f1ZDuFiYNWHTW%2fDL5M9e5FT3JpAI4%2b19V01DUHQWd59p8OmVGRZCEyZAcDbhMk7> (accessed 26 January 2015).
- 6 Recommendation to Denmark <http://daccess-dds-nu.un.org/doc/UNDOC/GEN/G14/194/60/PDF/G1419460.pdf?OpenElement> and Austria <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7s9IOchc%2bi0vJdc3TEt6JuQH6d6LwuOqunaiCbff0Z0e%2b%2fWMB4CH5VprCrZY%2bNACxgE0TuveykmCBkAshdLASuEb> (both accessed 26 January 2015).
- 7 Recommendation to Australia <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsn zSGolKOaUX8SsM2PfxU7tjZ6g%2fxLBVYsYEv6iDyTYxNk%2bsAB%2fHgrVpAKHcEYTB%2b1t%2fH3HX1F%2f2P%2bo%2bk3O4KxhfhPoTQZ3LeS75n8PHidYHE3> (accessed 26 January 2015).
- 8 Recommendation to Argentina <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs p ZQ2sppBOANJSxHHwrsEJaYmnlvM3jA08AJH2x7hoUTgh3174tt8%2fqvOaLf8uHB4GIT%2b4irAdCKzr9VRfnZtld%2b1WMR0li6jG7jGEklvRBW> (accessed 26 January 2015).
- 9 Recommendation to Argentina <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs p ZQ2sppBOANJSxHHwrsEJaYmnlvM3jA08AJH2x7hoUTgh3174tt8%2fqvOaLf8uHB4GIT%2b4irAdCKzr9VRfnZtld%2b1WMR0li6jG7jGEklvRBW> (accessed 26 January 2015).
- 10 Recommendation to Spain <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsx q2MulDp%2fqMKQ6SGOn0%2fNZ5trZrfgNmKdTjE%2fScMKF96xMrtyzhDx7aguCpqqdK4xQVGCY502yRGHBFyeVZXNyDyVAuXWX8uweN1J3Pv65K> (accessed 26 January 2015).

- 11 Recommendation to Tunisia <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs vO00RvDbzSfy057%2fflh1RwM0BYu1Nnxrjo6vZmLus%2b%2f1ZDuFiYNWHTW%2fDL5M9e5FT3JpAI4%2b19V01DUHQWd59p8OmVGRZCEyZAcDbhMk7> (accessed 26 January 2015).
- 12 Recommendation to Spain <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs l xq2MulDp%2fqMKQ6SGOn0%2fNZ5trZrfgNmKdTjE%2fScMKF96xMrtyzhDx7aguCpqqdK4xQVGCY502yRGHBFyeVZXNyDyVAuXWX8uweN1J3Pv65K> (accessed 26 January 2015).
- 13 Recommendations to Peru <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs jCEIYpMEPRoNhdzZPK7VI6RG1n562Mfvp5l7K6ZlieCygEedsP4VVIybf5SQ6LvSkb8ODfMyrEd2r2ky0zZZOtHZNjy%2bxYt0BwAukih137> (accessed 26 January 2015).
- 14 Recommendation to El Salvador [http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7s9IOchc%2bi0vJdc3TEt6JuQH6d6LwuOqunaiCbff0Z0e%2b%2fWMB4CH5VprCrZY%2bNACxgE0TuveykmCBkAshdLASuEb](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs tksiS6LWf8TU4056WJXmHkewRp7hBWgrY38CDaU0Xb%2bUphmF3HheW5A0F1Nb03gvWh2XuL4XameBMb4TcxPJ0wh14jxajLAL2HwrThEij; and Austria (http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs n zSGolKOaUX8SsM2PfxU7s9IOchc%2bi0vJdc3TEt6JuQH6d6LwuOqunaiCbff0Z0e%2b%2fWMB4CH5VprCrZY%2bNACxgE0TuveykmCBkAshdLASuEb) both accessed 26 January 2015</a></p>
<p>15 Recommendation to Austria <a href=) (accessed 26 January 2015).
- 16 Recommendation to Argentina <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs p ZQ2sppBOANJSxHHwrsEJaYmnlvM3jA08AJH2x7hoUTgh3174tt8%2fqvOaLf8uHB4GIT%2b4irAdCKzr9VRfnZtld%2b1WMR0li6jG7jGEklvRBW> (accessed 26 January 2015).
- 17 Recommendation to China <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs r BkvDLHrFFq8wSoe2z9g3jLWXSoc02f1ZDuFiYNWHTW%2fDL5M9e5FT3JpAI4%2b19V01DUHQWd59p8OmVGRZCEyZAcDbhMk7> (accessed 26 January 2015).
- 18 Recommendation to Austria <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs nzSGolKOaUX8SsM2PfxU7s9IOchc%2bi0vJdc3TEt6JuQH6d6LwuOqunaiCbff0Z0e%2b%2fWMB4CH5VprCrZY%2bNACxgE0TuveykmCBkAsh>

## 1.6 Regional and sub-regional standards on disability non-discrimination

The regional and sub-regional standards for non-discrimination against persons with disabilities can be extrapolated from the regional human rights instruments of the African human rights system, namely, the African Charter on Human and Peoples' Rights (ACHPR); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (AWP); the African Charter on the Rights and Welfare of the Child (ACRWC); and the African Youth Charter (AYC). There are also other sub-regional treaties (RECs) which provide for the standards on the sub-regional level.

Article 18(4), the ACHPR specifically mentions the aged and the disabled and states that they: 'shall also have the right to special measures of protection with their physical or moral needs'. It is noteworthy that this section does not prohibit discrimination; as has been stated, 'it could be argued that the African Charter is a document located in a historical context that makes mention of disability rights in terms of "special measures of protection in keeping with their physical or moral needs"'. The ACHPR can therefore be assumed to be located in dated 1980's ethos of the charity or medical model of disability and does not acknowledge the social barriers or stigma that drives discrimination towards persons with disabilities (The Secretariat of the African Decade of Persons with Disabilities).

The African Commission on Human and Peoples' Rights has already addressed a communication that touched on the issue of discrimination on the basis of disability – *Purohit and Moore v The Gambia* (Communication No 241/2001 (2003)). Purohit and Moore were two mental health advocates who submitted a complaint to the African Commission on Human and Peoples' Rights on behalf of patients of Campama, the psychiatric unit of the Royal Victoria Hospital in The Gambia. The Complainants argued, inter alia that to the extent that mental illness is a disability, the practice of detaining persons regarded as mentally ill indefinitely and without due process constitutes discrimination on the analogous ground of disability. In this case, the Commission stated the following with regard to discrimination:

Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances

dLAsUeB; and to Hungary (<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmg8z0DXeL2x2%2fDmZ9jKJskZ6Y9eRc83PT5FhFy95TQZkyGQot9vWZBNEf0eAwM4AH0py5P0KQ9jmr6ZHdZ17dKoAgtBSBh58518HTma66df>) (both accessed 26 January 2015).

in order for anyone to enjoy all the other rights provided for under the African Charter ... Clearly the situation presented above fails to meet the standards of antidiscrimination and equal protection of the law as laid down under the provisions of Articles 2 and 3 of the African Charter ... Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination ... Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

The African Children's Charter builds upon and goes further than the African Charter in its scope of protection of disability rights. Under article 13(1) of the Children's Charter, a child with disabilities has the right to special measures of protection. These measures should be provided not only in keeping with the physical and moral needs of the child, but also 'under conditions which ensure his dignity, promote his self-reliance and active participation in the community'. The special measures of protection that the state is obliged to take, subject to availability of resources, include providing effective access to training, preparation for employment, and recreation opportunities. These activities should be conducted in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development. A child with disabilities should also be allowed access to public highways, buildings and other places to which he may legitimately want to have access to (The Secretariat of the African Decade of Persons with Disabilities).

Article 23(2) of the African Women's Protocol expressly recognises the right of non-discrimination on the basis of disability in respect of all of women, including girls by requiring states to ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

The African Youth Charter guarantees youth with disabilities the right to special care and to equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities under article 24. State parties are obliged under the Charter to work towards eliminating any obstacles that may have negative implications for the full integration of youth with disabilities. Despite its positive stance, the African Youth Charter refers to youth with disabilities as 'physically and mentally challenged youth', a reference which puts emphasis on the impairment of the individual and may thus be understood as being derogatory (The Secretariat of the African Decade of Persons with Disabilities).

There are also sub-regional treaties that recognise the right of disability non-discrimination. For example, the Southern Africa Development

Community (SADC) Treaty provides that SADC and its members shall not discriminate against any person on various grounds, including disability (article 6(2)). While not explicitly providing for non-discrimination, other sub-regional treaties mention disability. Under the East African Community (EAC) Treaty, the member states have undertaken to closely co-operate amongst themselves in the development and adoption of a common approach towards the disadvantaged and marginalised groups including persons with disabilities.

Summary of regional standards on disability non-discrimination		
Legal instrument	Article	Provision
African Charter on Human and Peoples' Rights (ACHPR)	Art 18(4)	The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.
African Charter on the Rights and Welfare of the Child (ACRWC)	Art 13	<p><b>Handicapped Children</b></p> <p>(1) Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.</p> <p>(2) States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.</p> <p>(3) The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.</p>
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Art 23(2)	<p><b>Special Protection of Women with Disabilities</b></p> <p>The States Parties undertake to:</p> <p>(a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;</p> <p>(b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.</p>

African Youth Charter	Art 24	<p><b>Mentally and Physically Challenged Youth</b></p> <p>(1) States Parties recognise the right of mentally and physically challenged youth to special care and shall ensure that they have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities.</p> <p>(2) State Parties shall work towards eliminating any obstacles that may have negative implications for the full integration of mentally and physically challenged youth into society including the provision of appropriate infrastructure and services to facilitate easy mobility.</p>
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## 2 The concept of reasonable accommodation

### 2.1 Lecturer's notes

*It would be incomplete to discuss non-discrimination on the basis of disability without at the same time examining the notion of reasonable accommodation. If teaching disability rights to final year learners or at an LLM level (learners who can be assumed to have been introduced to the concept of rights), the lecturer could ask students to consider how reasonable accommodation re-defines the right to non-discrimination, and whether this redefinition is useful for other groups that have traditionally been discriminated against, for example, ethnic minorities or women.*

*Further, the lecturer should be aware of the tendency to conflate between reasonable accommodation and measures that are geared towards substantive equality (such as affirmative action). The lecturer could provide examples of each and challenge students to identify whether a certain measure is one of reasonable accommodation or affirmative action.*

### 2.2 Reasonable accommodation

Reasonable accommodation is defined in article 2 of the CRPD to mean:

necessary and appropriate modification and adjustment 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.

The term 'reasonable accommodation' is interchangeably used with various other terms such as 'reasonable adjustment/measures' or 'effective/suitable modifications'. The term 'undue burden' is often also referred to as 'disproportionate burden', 'undue hardship', 'unreasonable disruption', 'unreasonable requirement' or 'unjustified costs'. It is important to note that some jurisdictions, such as the US make distinctions between these terms; in US law, undue burden and undue hardship are not the same and neither is reasonable accommodation and reasonable modifications.

The obligation of reasonable accommodation in relation to persons with disabilities exists in various spheres of life such as education, health care, insurance, transportation and work. The obligation entails that persons or entities (such as an employer) need to make certain modifications or adjustments to allow persons with disabilities to fully participate in the relevant sphere of life. The scope and type of the modification required is determined on a case by case basis, based on the needs of the individual disabled person and the capabilities of the person or entity that has the obligation of reasonable accommodation. The purpose of reasonable accommodation is to remove the specific disadvantage to which a particular disabled individual would otherwise be exposed so as to ensure equality.

For example, as Anna Lawson has written:

In relation to health services, reasonable accommodation duties might well require adjustments to be made to a medical practitioner's communication method or timetabling procedures and practices so as to enable a disabled person to have access to the same general health services as everybody else. Reasonable accommodation, however, could not provide the basis of an argument that such a person should be entitled to additional health services not otherwise provided. Neither could it be used as the basis of an argument that a fee payable for general health services should be waived because of their impairment. (Lawson, 2010).

The obligation of reasonable accommodation is not absolute, and can be limited by the showing that the provision of such requested reasonable accommodation would pose an undue burden on the provider. If the person or entity with the obligation to provide reasonable accommodation can prove that the needed modifications or adjustments would create an undue burden, the person or entity is released from the obligation to provide reasonable accommodation. Evidence of an undue burden can not be speculative and is generally thought of as based on a physical impossibility (for example, moving the location of a building itself), great expense in relation to the gross or overall income of the person nor entity, or impracticability (such as requiring a ramp when there is already an elevator).

### Highlighting a landmark case on reasonable accommodation

The Canadian Supreme Court held in *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 (para 94), that:

The failure to fund sign language interpretation is not a 'minimal impairment' of the ... rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a 'reasonable accommodation' of the appellants' disability.

It has been stated that

[t]he focus of reasonable accommodation on the particularity of each individual case requires attention to be given by those discharging the duty to two key concerns – the effectiveness of the steps to the particular disabled person and the potential burden they might impose on the particular duty bearer (Lawson, 2010).

On effectiveness, reasonable accommodation duties demand that consideration be given to identifying the most effective means of removing the relevant disadvantage for the particular disabled person in question. This is likely to necessitate some dialogue between that person and the duty bearer so as to figure out how the relevant disadvantages might most effectively be tackled (Lawson, 2010). On relevance, the issue is that of the potential burden of a proposed step on the particular duty bearer. A 'burden' for these purposes would not be confined to financial cost, and might, for instance, include factors such as disruptiveness to working arrangements or deterioration in the quality or nature of core services. Reasonable accommodation requires assessment of the level of any potential burden to be conducted in a manner that is sensitive to the circumstances of the particular duty-bearer. Thus, a financial cost that represents a small fraction of the annual budget of a large, wealthy organisation might nevertheless represent so large a sum as to threaten the financial health of a small and poorly resourced organisation (Lawson, 2010). Despite this clarification, questions remain regarding who determines whether or not an accommodation is reasonable and when is a burden 'undue' in a particular case?

In *Central Alberta Dairy Pool v Alberta* [1990] 2 SCR 489, the Supreme Court held that certain factors need to be considered in order to determine whether the provision of accommodation would create undue burden or hardship, these include:

- (a) Financial costs;

- (b) Impact on collective bargaining agreements;
- (c) Disruption of service to the public;
- (d) Effects on employee morale;
- (e) Interchangeability of workforce and facilities;
- (f) Size of the employer's operations;
- (g) Safety;
- (h) Overall economic climate; and
- (i) Financial resources required for the accommodation.

Reasonable accommodation and affirmative action, although sharing similar characteristics, are not the same. While affirmative action applies to an entire class of persons, reasonable accommodation applies to an individual person based on the particular circumstances of the person's situation (Bhaba, 2009). These two concepts are similar, however, because they both require positive action or affirmative steps to ensure equality.

The following sections will discuss the obligation to provide reasonable accommodation in greater detail and how it is implemented on the international and regional levels, and in different jurisdictions.

### 2.3 UN/global standards on reasonable accommodation for persons with disabilities

Prior to the CRPD, no treaty specifically mentions the right to reasonable accommodation. However, the Committee on Economic, Social and Cultural Rights has stated in General Comment 12 (para 28) that reasonable accommodation under the CESCR includes the consideration of the following:

The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g., as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

The CRPD, itself, recognises the twin pillars of protection from discrimination and reasonable accommodation as together contributing to ensure that persons with disabilities enjoy equal rights and opportunities in all spheres of life. Subsequent articles in the CRPD also refer to relevant spheres where reasonable accommodation may be needed; these include article 14(2) on liberty and security of the person, article 24 on education and article 27 on work and employment.

The first case that the Committee on the Rights of Persons with Disabilities has decided regarding reasonable accommodation is *HM v Sweden* (April 2012). The case concerned a disabled woman who

needed to build a hydrotherapy pool on her property for reasons of meeting health and rehabilitation needs but was subsequently denied planning permissions by a Swedish council because the pool would violate the city's development plan.

#### Highlighting the first case decided by the CRPD Committee on reasonable accommodation

The Committee on the Rights of Persons with Disabilities found in *HM v Sweden* (para 8.5) that:

In the present case, the information before the Committee shows that the author's health condition is critical and access to a hydrotherapy pool at home is essential and an effective – in this case the only effective – means to meet her health needs. Appropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool. The Committee notes that the State party has not indicated that this departure would impose a 'disproportionate or undue burden'. In this connection, the Committee notes that the Planning and Building Act allows for departure from the development plan, and that it can thus accommodate, when necessary in a particular case, an application for reasonable accommodation aimed at ensuring to persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination. On the basis of the information before it, the Committee therefore cannot conclude that the approval of a departure from the development plan in the author's case would impose a 'disproportionate or undue burden' on the State party.

See also section 1.3.2 above for a summary of the recommendations made by the CRPD Committee to Australia, Austria, El Salvador, Paraguay, Argentina, China, Hungary, Peru, Spain and Tunisia, some of which touch on reasonable accommodation. The most repeated recommendation though is that states parties should define discrimination on the basis of disability as including denial of reasonable accommodation.

### 2.4 Regional law

In the absence of particular provisions relating to reasonable accommodations in the African Union and sub-regional organisations, it may be worthwhile to determine what measures have been taken in the European context in relation to regional regulation of the concept of reasonable accommodation. Council Directive 2000/78/EC is an EU Directive to provide a general framework for equal treatment in employment and occupation. Article 5 of the Directive, entitled 'Reasonable accommodation for disabled persons', states the following:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would

impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Furthermore, the burden of proof in cases related to persons with disabilities is on the employer, who has to prove that the principle of equal treatment has not been breached (article 10). Nevertheless, article 5 of the Employment Equality Directive does not explicitly state that a failure to comply with the duty of reasonable accommodation should be regarded as a form of discrimination against persons with disabilities (Lawson, 2010) whereas such denial is grounds for a claim of discrimination under the CRPD.

Europe has also seen various cases that can be said to touch on reasonable accommodation of persons with disabilities, even though the words 'reasonable accommodation' did not feature explicitly in those cases. For example, in *Vincent v France* (Application 6253/03), the applicant, a French national and person with paraplegia, had been detained in various prisons, during which time he continuously complained that the prison conditions did not allow him to move around freely and independently with his wheel chair. Every time he needed to enter or leave his prison cell, he had to be lifted from the wheelchair and one of the wheels had to be removed in order for the wheelchair to fit through the doorway. The European Court of Human Rights held that the applicant was not reasonably accommodated and that the conditions he was subjected to in the various prisons amounted to a violation of article 3 of the European Convention on Human Rights which prohibits inhuman or degrading treatment.

Similarly, in *Autism-Europe v France* (Complaint 13 of 2002), a case that came before the European Committee on Social Rights, the applicant, Autism Europe, claimed that persons with autism did not have adequate access to educational institutions in France. The Committee held that France's lack of expediency in providing the necessary conditions needed to enable persons with autism to enjoy their right to education amounted to a violation of the state's obligation to afford disabled persons with the right to education and non-discrimination.

#### Student activity

*Highlighting important aspects and facilitating application and understanding*

Learners should be divided into an even number of groups and asked to debate the following proposition (some groups in support, others in opposition):

Given the economic circumstances of most African countries, it is currently unreasonable to expect the principle of reasonable accommodation to apply in Africa.

Alternatively, learners could also be asked to discuss the pros and cons of the above proposition.

## 3 Section 3 – The domestic treatment of disability non-discrimination and reasonable accommodation at national level in selected jurisdictions prior to the CRPD

### 3.1 Lecturer's notes

*It is important to encourage learners to appreciate that even after ratifying the CRPD, the philosophy in the Convention does not instantly translate in the domestic sphere and that interested actors in the domestic sphere (for example Disabled Peoples' Organisations, National Human Rights Institutions, equality bodies, Ombuds offices) have to work at translating disability rights into actual gains in the domestic sphere.*

*Further, while the human rights approach in the CRPD should be the main approach to disability issues globally henceforth, there may still be room for other approaches including using criminal and social welfare laws depending on the context of a country. For example, the use of fines (imposed through the criminal law process) may be a useful deterrent against disability discrimination in employment. Learners should be asked to reflect about their own contexts: how revered are human rights in the local context? Do learners feel that high levels of poverty, inequality and past discrimination justify social welfare elements in laws on disability?*

### 3.2 Disability non-discrimination at national level

Prior to the CRPD, various approaches to disability non-discrimination were followed by countries around the world, ranging from civil law, to constitutional law, to welfare law to criminal law. It will be interesting to see what approaches countries will take to disability non-discrimination in their domestic laws in the wake of the CRPD.

A 2002 study carried out by Degener and Quinn analysed disability anti-discrimination laws from 42 countries and noted the wide variance between the laws:

Some laws define disability based discrimination and clearly prohibit such acts of discrimination, while others leave the question of what constitutes discrimination to the courts or other monitoring bodies. Some laws purport to uphold the principle of equality but provide no clear picture of what needs to be changed in society in order to reach this goal ... some laws give the overall impression that even though they contain some anti-discrimination language, they are essentially social welfare laws, fostering programmes that are not necessarily aimed at complete social equality and integration for persons with disabilities ... some of these anti-discrimination laws are strong, others appear to be 'toothless tigers' ... (Degener & Quinn, 2002).

Degener and Quinn distinguished between four different legal approaches to the enactment of anti-

discrimination provisions for the protection of disabled persons: criminal law, constitutional law, civil law and social welfare laws. The categories are not mutually exclusive and one country may employ several approaches (Degener & Quinn, 2002 and Kanter, 2003).



### Student activity

#### Facilitating critical thinking

Learners could be asked to consider where anti-discrimination laws in their countries of origin fit in. Are they civil, criminal, welfare-based, constitutional or a combination of various categories? (Just to prompt students to think about the issue even before going into it in detail).

### 3.3 Using the criminal law

France, Finland and Spain prohibit discrimination against disabled persons in their criminal laws. France outlaws disability-based discrimination in employment, business activities and in the provision of goods and services to the public. The punishment is a maximum of two years' imprisonment or a fine. Unlawful distinctions are punishable under article 225-1 to article 225-4 of the French Criminal Code.<sup>19</sup> The Finnish Criminal Code punishes employment-related discrimination, and discrimination with respect to goods and services for the general public.<sup>20</sup> The Spanish law prohibits disability-based discrimination in employee recruitment or in the course of employment if a disabled worker is capable of doing the job. Article 22(4) of the Spanish Criminal Code, is to the effect that disability is a factor that aggravates criminal responsibility.<sup>21</sup>

Some other states that generally have adopted a civil or social law approach to prohibit disability discrimination nonetheless make provision for the imposition of sanctions that have a broad penal or administrative aspect. For instance, the Australian Disability Discrimination Act 1992 characterises the incitement of unlawful discrimination or harassment as an offence punishable with six months' imprisonment or a fine. The victimisation of a person who exercises his or her rights under the Act is similarly declared an offence. The Persons with Disabilities Act, 2003 of Kenya contains an offence titled 'Concealment of persons with disabilities'. According to the Act, 'no parent, guardian or next of kin shall conceal any person with a disability in such a manner as to deny such a person the opportunities and services available under this Act'. A person who contravenes this section is guilty of an offence and is liable on conviction to a fine not exceeding twenty thousand shillings.

19 [http://www.coe.int/t/e/social\\_cohesion/soc-p/discrimination%20e%20in%20color.pdf](http://www.coe.int/t/e/social_cohesion/soc-p/discrimination%20e%20in%20color.pdf) (accessed 27 January 2015).  
 20 See Sections 3, 5 and 11 <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (accessed 27 January 2015).  
 21 Ministerio de Justicia, 'Criminal Code' file:///C:/Users/Elizabeth/Downloads/Spain\_Criminal\_Code\_Codigo\_Penal.pdf (accessed 27 January 2015).

With regard to using criminal law to curb disability-based discrimination, Degener and Quinn state that, '[w]hile we do not have statistical evidence, it seems probable that criminal disability anti-discrimination law is rarely proven and prosecuted'.

### 3.4 Using constitutional law

A number of countries have constitutional anti-discrimination provisions which explicitly include disability. These are: Austria,<sup>22</sup> Brazil,<sup>23</sup> Canada,<sup>24</sup> Finland,<sup>25</sup> Ghana,<sup>26</sup> Germany,<sup>27</sup> Kenya,<sup>28</sup> Malawi,<sup>29</sup> South Africa,<sup>30</sup> and Uganda.<sup>31</sup> These clauses generally prohibit discrimination (via a negative command) against disabled persons without defining exactly what constitutes discrimination.

The constitutions of Austria, Brazil, Canada, Germany, Ghana, Kenya, Malawi, South Africa, and Uganda also enable or entrust the legislator to take affirmative action to combat disability discrimination. In the area of employment and political participation, some states have introduced quotas to advance the exercise of these rights by persons with disabilities. For example, the constitutions of Brazil and Kenya provide for quota schemes in the area of employment. Malawi, Uganda and Kenya provide for quota schemes in the area of political participation. A number of countries also recognise the right to use sign language in their constitutions; these include Finland, Kenya and South Africa.

According to Degener and Quinn, 'Constitutional anti-discrimination clauses seem to be more effective in transforming society than criminal anti-discrimination clauses', because in most countries, the Constitution is the highest law of the land and hence constitutional provisions may render lower contradictory law unconstitutional and void. On the other hand, Degener and Quinn give a number of reasons as to why constitutional disability discrimination law can have limited effect:

22 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1015&context=gladnetcollect> (accessed 27 January 2015).  
 23 [http://www.stf.jus.br/repositorio/cms/porta1StfInternacional/porta1StfSobreCorte\\_en\\_us/anexo/constituicao\\_ingles\\_3ed2010.pdf](http://www.stf.jus.br/repositorio/cms/porta1StfInternacional/porta1StfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf) (accessed 27 January 2015).  
 24 <http://laws-lois.justice.gc.ca/eng/const/page-15.html> (accessed 27 January 2015).  
 25 <http://www.refworld.org/docid/3ae6b53418.html> (accessed 27 January 2015).  
 26 <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/31976/101268/F1513408204/GHA31976.pdf> (accessed 27 January 2015).  
 27 <http://www.iuscomp.org/gla/statutes/GG.htm> (accessed 27 January 2015).  
 28 <http://www.klrc.go.ke/index.php/constitution-of-kenya113-chapter-four-the-bill-of-rights/part-3-specific-application-of-rights/220-54-persons-with-disabilities> (accessed 27 January 2015).  
 29 <http://dredf.org/legal-advocacy/international-disability-rights/in-ternational-laws/malawi-constitution/>  
 30 <http://www.thehda.co.za/uploads/images/unpan005172.pdf> (accessed 27 January 2015).  
 31 [http://www.parliament.go.ug/new/images/stories/constitution/Constitution\\_of\\_Uganda\\_1995.pdf](http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf) (accessed 27 January 2015).

First, depending on the legal system, some constitutions fail to give substantive rights to citizens, which means that the anti-discrimination clause may not be invoked by a disabled person in court. Second, constitutional rights only apply to public or so called vertical law. That is, constitutional provisions protect disabled persons against discrimination by national or local state entities but not private employers or private providers of goods and services. Finally, constitutional provisions tend to be broad and vague ... this leaves vast discretion to the courts, and their rulings are very much determined by the prevailing legal culture.

Canada, Malawi and Kenya are given below as case studies of using constitutional anti-discrimination provisions.

### 3.4.1 Canada

Canada is a state party to the CRPD. The Charter of Rights and Fundamental Rights Freedoms of Canada provides for the right of non-discrimination, including disability non-discrimination in section 15. Section 15(1) of the Charter provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) allows for the taking of special temporary measures to achieve *de facto* equality. The Charter is entrenched as part of Canada's Constitution thereby forming part of the country's supreme law.

However, the Charter applies only to the government; the private sector is not subject to section 15. Further, the Charter depends upon the courts for its enforcement. Both direct/intentional and indirect/unintentional discrimination are covered. The courts require barriers to be removed for persons with disabilities to enjoy equality of opportunity in the mainstream society. In addition, the courts have strongly endorsed the concept of reasonable accommodation. In particular, the Canadian Supreme Court has interpreted equality in section 15(1) of the Canadian Charter to mean 'substantive equality'.

The Canadian courts have affirmed that the right to disability non-discrimination (under the Charter) is not only a negative right but also a positive right that requires the state to take positive measures to ensure that persons with disabilities enjoy rights and benefit from services equally. In this regard, the Supreme Court of Canada in *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, held that:

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the

human rights field. It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.

Canada also has the Canadian Human Rights Act (CHRA), which is a comprehensive anti-discrimination piece of legislation that further promotes equality of opportunity. Its non-discrimination clause in article 2 contains disability as a forbidden ground or practice of discrimination by providing in part that:

all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on ... disability ...

Currently, Canada does not have a disability specific law at the federal level. However, it is noteworthy that there exists the provincial Ontarians with Disabilities Act (ODA). Further, the Employment Equity Act also provides for an obligation to provide reasonable accommodation in paragraph 5(b).

### 3.4.2 Kenya

Kenya is a state party to the CRPD. The Constitution of Kenya, adopted in 2010, has various provisions that directly address disability (See articles 7(3)(b), 21(3), 27(4) and (5), 54, 81(c), 82(2)(c)(i), 83(1)(b), 97(1)(c), 98(1)(d), 99(2)e, 100(b), 120(1), 177(1)(c), 193(2)(d), 227(2)b, 232(1)(i)(iii) and 260, all of which will be discussed in more detail below). These provisions are broad and far-reaching, addressing communication and access to information, access to all places and to public transport, non-discrimination and equality of persons with disabilities, respect for the dignity of persons with disabilities as well as substantive rights including the right to education, healthcare, political participation and employment. In particular, article 54 of the Constitution specifically addresses the rights of persons with disabilities. Article 54 of the Constitution is a stand-alone article on disability and provides as follows:

- (1) A person with any disability is entitled –
  - (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
  - (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
  - (c) to reasonable access to all places, public transport and information;
  - (d) to use Sign language, Braille or other appropriate means of communication; and
  - (e) to access materials and devices to overcome constraints arising from the person's disability.

- (2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

The Kenyan Constitution protects against discrimination of persons with disabilities by providing that the state must not discriminate directly or indirectly against any person on the ground of disability under article 27(4). Similarly, under article 27(5), a person may not discriminate against another person merely on account of that other individual having a disability. Article 27(6) of the Constitution provides for affirmative-action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination: this includes persons with disabilities. Further, equality and non-discrimination are some of the national values and principles of governance identified under article 10(2)(b) of the Constitution.

The Constitution also makes provision for substantive rights including the right to education, healthcare and employment. These provisions are to be read together with article 21(3) which places an obligation on all state organs and public officers to address the needs of vulnerable groups including persons with disabilities. With regard to employment, the public service is required to afford adequate and equal opportunities for appointment, training and advancement to persons with disabilities at all levels of the public service in accordance with article 232(1)(i)-(iii). Article 227(2)(b) on advancing procurement of public goods and services by persons previously disadvantaged by unfair competition or discriminated against also has critical implications on work and employment for persons with disabilities.

With regard to political participation, articles 81(c), 82 (2)(c)(i), 91(1)e, 97(1)(c), 98(1)(d), 100(b) and 177(1)(c) provide for fair representation of persons with disabilities in politics. Articles 83(1)(b), 99(2)(e) and 193(2)d prohibit persons of 'unsound mind' from political participation and run the risk of infringing on the right to legal capacity for persons with disabilities and of being discriminatory on the basis of disability.

The courts in Kenya have decided on disability discrimination on several occasions. One such case is the case of *Fredrick Gitau Kimani v The Attorney General*.<sup>32</sup> In this case the petitioner, a public officer, who was diagnosed with diabetes and whose left leg had been amputated, was relieved of his duties on medical grounds. He had been certified by the NCPWD as a person with a disability. According to the Persons with Disabilities Act, the retirement age for persons with disabilities is 60 years of age. However, the petitioner retired at 55. The Petitioner argued that the early retirement amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of article 27(4) of the Constitution as read with section 15(6) of the Persons with Disabilities Act. The

32 [2012] eKLR <http://kenyalaw.org/caselaw/cases/view/81883> (accessed 28 April 2014).

Court held that the Petitioner was discriminated against and awarded him damages.

### 3.4.3 Malawi

The Constitution of Malawi expressly prohibits discrimination on the basis of disability and allows for special (temporary) measures aimed at achieving *de facto* equality. Malawi has just passed the Disability Act of 2012, which provides a definition of disability-based discrimination that mirrors the CRPD's definition and recognises the concept of reasonable accommodation as well. The Act defines discrimination as

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 equal basis, of any human rights or fundamental freedoms, in the political, economic, social, cultural, civil or other field (<http://www.osisa.org/law/blog/promoting-disability-rights-malawi>).

## 3.5 Using civil law

A third approach that some countries have used is to enact civil anti-discrimination laws for persons with disabilities. According to Degener and Quinn, countries with a civil rights oriented anti-discrimination law include: Australia, Canada, Costa Rica, Ethiopia, Ghana, Guatemala, Hong Kong, Hungary, India, Ireland, Israel, Kenya, Korea, Madagascar, Mauritius, Namibia, Nigeria, the Philippines, South Africa, Spain, Sri Lanka, Sweden, the UK, the USA, Zambia and Zimbabwe. Most of these statutes cover employment-related discrimination against disabled persons. Some laws are labour laws and thus cover only the area of employment discrimination; the laws differ to a great extent with respect to coverage of all other areas (housing, education, transportation, land possession, the provision of goods and services, access to premises, clubs, sports and other facilities and telecommunications). The most comprehensive disability discrimination laws are from Australia, Canada, Hong Kong, Israel, the Philippines, UK and the USA.

Compared to criminal and constitutional anti-discrimination laws, civil disability anti-discrimination legislation tends to be more explicit about the scope of the law and more detailed about the rights and remedies. Most of these laws provide a definition of what constitutes discriminatory practice and/or equality. In addition, all the civil disability discrimination laws make some provision for their enforcement (Degener & Quinn, 2002).

### 3.5.1 United States of America

The United States of America (USA) has signed but not ratified the CRPD. The Americans with Disabilities Act (ADA) of 1990 is a comprehensive law whose purpose is to provide a 'clear and comprehensive national mandate for the

elimination of discrimination against individuals with disabilities' (<http://www.eeoc.gov/laws/statutes/adaaa.cfm>). The scope of the ADA in addressing the barriers to participation by people with disabilities in the mainstream of society is very broad. The ADA's civil rights protections are parallel to those that have previously been established by the federal government for women and racial, ethnic and religious minorities. The ADA prohibits discrimination in the areas of employment, access to public accommodations (goods and services available to the public), transportation and telecommunications. Housing and tertiary education are not specifically included because separate laws prohibit discrimination in those areas. Further the ADA prohibits such discrimination by state and local governments and private parties. Other laws prohibit discrimination by the federal government and recommend hiring goals for people with disabilities working in the federal government.

The ADA applies to persons who have a disability and in the employment context (only) also to persons who have a relationship or association with an individual with a disability. The person with a disability must fit the ADA's definition of a person with a disability, which is

a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment.

The ADA does not define the key terms 'substantially limits', 'major life activity', and 'physical or mental impairment', although the regulations promulgated by the relevant federal agencies do provide clarification of what is meant by these terms.

Prior to the United States Supreme Court decision in *Sutton v United Air Lines, Inc*, the circuits were divided over whether to consider the ameliorative effects of any implemented mitigating measures in determining whether a person is substantially limited in a major life activity. Authority for considering one's unmitigated condition stems from the position taken by the Equal Employment Opportunity Commission<sup>33</sup> (EEOC). The disagreement amongst the circuits over whether to consider mitigating measures ended when the United States Supreme Court ruled in *Sutton* that a determination of disability must take into account any mitigating measures a person uses to ameliorate the condition (Harrington, 2000). However, in 2008, Congress rewrote the ADA to specifically reject the Supreme Court's view in *Sutton* (ADA Amendments Act of 2000). Today, the ADA does not require that person alleging discrimination under the ADA to show that he or she is disabled in his or her unmitigated state. In other words, if a person uses a prosthetic or other device, medication or self-correcting behaviour to mitigate the effect of an impairment, the person will

be considered in his or her unmitigated state for the purpose of coverage under the ADA.

### **Reasonable accommodation**

There are various US federal laws that relate to the right of disabled persons to receive reasonable accommodations. The first federal law to establish a right to reasonable accommodation is the Rehabilitation Act of 1973. The ADA is modelled after this law. In addition, the Voting Accessibility for the Elderly and Handicapped Act of 1984, the Air Carrier Access Act of 1986 and the Fair Housing Amendment Acts of 1988 also recognises a right to reasonable accommodation.

The US Equal Opportunity Commission explains reasonable accommodation as follows:

Title I of the Americans with Disabilities Act of 1990 (the 'ADA') requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. 'In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.' There are three categories of 'reasonable accommodations':

'(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.'

The only statutory limitation on an employer's obligation to provide 'reasonable accommodation' is that no such change or modification is required if it would cause 'undue hardship' to the employer. 'Undue hardship' means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

(<http://www.eeoc.gov/policy/docs/accommo.html>)

33 The EEOC is the administrative agency authorised by Congress to promulgate regulations for implementing Title I of the ADA

In *US Airways, Inc v Barnett* 535 US, 122 SCt 1516, 1523 (2002), the Supreme Court held that the reasonableness of the accommodation is determined through whether it 'seems reasonable on its face' – in other words, if it appears to be 'feasible' or 'plausible'. Furthermore, the accommodation must be effective to meet the needs of the individual. There are thus two qualifications; the accommodation must be both *reasonable* and *effective*. If the accommodation proves to be ineffective, alternative accommodations must be considered – there is thus a continuous duty to provide reasonable accommodation.

The EEOC in 1999 published *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA*. In this document three categories of reasonable accommodation are identified:

- modifications or adjustments to the job application process;
- modifications or adjustments to the work environment; and
- modifications or adjustments to ensure equal benefits and privileges of employment.
- The Enforcement Guidance further identifies modifications and adjustments that cannot be considered forms of reasonable accommodation:
  - essential function does not have to be eliminated;
  - it is not required to lower either qualitative or quantitative production standards;
  - it is not required to provide personal use items needed to accomplish daily activities; and
  - it is not required to provide personal use amenities.

In *EEOC v UPS Supply Chain F3d*, 9th Cir 27 (2010), three principles in relation to reasonable accommodation were confirmed:

- The accommodation afforded must be effective in order to be reasonable.
- The unique circumstances of the employee must be taken into consideration during the interactive process.
- The employer must provide reasonable accommodation in such a manner as to ensure that the disabled person enjoys the same privileges and benefits as non-disabled persons. In other words, the obligation to make reasonable accommodation is not limited to enabling the disabled person to perform essential functions of the job.

Note that the obligation to provide reasonable accommodation only applies to *qualified* individuals. Reasonable accommodation should thus only be made when an individual is in fact qualified to perform his or her duties, and not in order to enable an unqualified person to perform these duties.

### ***Reasonable modification***

Under Title II of the ADA, all public entities have an obligation to make reasonable modifications in their policies, procedures and practices in order to avoid discrimination against persons with disabilities.

In US Law, reasonable accommodation and reasonable modification are two different concepts. In this regard, it has been stated that:

the duty of reasonable accommodation requires an individualistic approach whereas the duty of reasonable modification requires an across-the-board approach. The duty of reasonable modification is a higher level of obligation than the duty of reasonable accommodation, and therefore, the operators of public entities and public accommodations must go to greater lengths to accommodate the disabled individuals than the employers for their disabled employees or potential employees. (Kay Han)

### ***Learning from the American experience: positive and negative change as a result of the ADA***

#### ***Progress as a result of the ADA***

The Centre for an Accessible Society has stated that:

The ADA has profoundly changed how society views and accommodates its citizens with disabilities. Universal design – the practice of designing products, buildings and public spaces and programs to be usable by the greatest number of people – has helped create a society where curb cuts, ramps, lifts on buses, and other access designs are increasingly common. In the process, we have discovered that an accessible society is good for everyone, not just people with disabilities. Curb cuts designed for wheelchair users are also used by people with baby carriages, delivery people, and people on skateboards and roller blades. (The Centre for an Accessible Society <http://www.accessiblesociety.org/topics/ada/>).

Further, the ADA has created a more inclusive climate where companies, institutions, and organisations are reaching out far more often to people with disabilities. Colleges and universities, for example, now accommodate more people with disabilities than they did before ADA, even though they have been obligated by law for nearly 25 years to make their campus and classrooms accessible (The Centre for an Accessible Society <http://www.accessiblesociety.org/topics/ada/>).

#### ***Limitations of the ADA***

Despite tremendous strides forward, many people with disabilities are dismayed that more progress has not come, particularly in the area of employment. According to DeLeire, 'studies of the consequences of the employment provisions of ADA show that the Act has led to less employment of disabled workers'. DeLeire quotes a 1998 study by Daron Acemoglu and Joshua Angrist which noted that in principle, the anti-discrimination mandate of ADA that allows disabled workers to sue their employers for wrongful termination could increase the employment of disabled workers by reducing turnover. Acemoglu and Angrist argued, however, that such 'firing costs' are more likely to have caused a reduction in the hiring of disabled workers, an argument confirmed

by their empirical analysis of data from the Current Population Survey. They found that ADA caused a large drop in the number of weeks worked by disabled men but no drop in the number of weeks worked by nondisabled men; the drop in weeks worked by disabled men appeared to result from less hiring of disabled workers. (DeLeire, 2000).

Some people view the lack of increase in the employment rate of people with disabilities since the ADA as the result of the adverse court rulings. Another problem has been contradictory federal policies that actually make it difficult for people with disabilities to work. Federal and state regulations are still biased in favour of nursing homes and institutional care providers over personal attendant services. This policy forces many people to live in nursing homes instead of at home, which adversely affects their participation in the community and the gaining of employment. (The Centre for an Accessible Society <http://www.accessiblesociety.org/topics/ada/>).

Further, more recent data is to the effect that apart 'from a short-term effect of the ADA's requirement of special accommodations, the ADA was not causally linked to declining disabled employment over much of the 1990s'. (<http://www.nber.org/digest/nov04/w10528.html>).

### 3.5.2 United Kingdom

The United Kingdom of Great Britain (UK) is a state party to the CRPD. The UK Equality Act 2010 replaced most of the provisions of the UK Disability Discrimination Act, 1995 (DDA) except the Disability Equality Duty, continues to apply. Chapter 2 of the Equality Act prohibits any conduct which constitutes direct or indirect discrimination.

Section 13 of the Act defines discriminatory conduct, which inherently entails less favourable treatment of a certain category of people than others based on a protected ground. The protected grounds of non-discrimination include disability. The Act also expressly requires the provision of reasonable accommodation to prevent disability discrimination.

However, there are a number of qualifications that must be met in order for the conduct to be discriminatory, including proportionality. In the case of disability-based discrimination, the Act allows for more favourable treatment in favour of persons with disabilities even if such treatment entails less favourable treatment against persons without disabilities. This may imply respect for special measures to achieve de facto equality.

#### *Learning from the UK experience*

This section is based on learning from the DDA. While it is acknowledged that the DDA is no longer law since the passing of the UK Equality Act 2010, the author is of the opinion that important lessons may still be learnt from the 1995 Act. The continued relevance of the DDA is based on the fact that the UK Equality Act 2010 is consolidating legislation

which does not substantively repeal so much of what was in the DDA.

While the DDA enabled several thousand people to gain some financial redress at the Employment Tribunals, the Act failed to adequately tackle and reduce employment discrimination. A study conducted by the Public Interest Research Unit (PIRU) in 2005 noted that

instances of employment discrimination remain common; prejudice is widespread and sometimes extreme; institutional discrimination was apparent in all the organisations studied; employment and wage levels are significantly lower among individuals with disabilities; and discrimination continues to damage health and the quality of life.<sup>34</sup>

The research by PIRU identified a number of factors as helping to explain the limits to the success of the Disability Discrimination Act (DDA) employment provisions:

- (a) Employees were unlikely to make a claim because of low level of awareness of the DDA among employees and a poor understanding of it among trade union officials as well as substantial obstacles to making a claim.
- (b) Claims were unlikely to succeed; in 2004-2005, 236 DDA employment claims succeeded at tribunal; 4,437 were dropped, settled through ACAS, or failed at tribunal.
- (c) Employers were unlikely to be deterred; partly because of the Disability Rights Commission not being an effective enforcement agency for Part 2 (employment field) of the DDA. Its enforcement powers were limited, and PIRU's research suggests that it made limited use of its powers.
- (d) The definition of disabled continued to exclude a large percentage of individuals with severe, life-limiting, impairments; and to discriminate against those with particular illnesses and disabilities e.g motor neurone disease. Further, individuals with mental health impairments generally found it much harder, than individuals with physical impairments or learning difficulties, to meet the definition of 'disabled'
- (e) The 'duties of public authorities' were unlikely to be enforced due to the loose, ambiguous, and incomplete wording of the provision, the exclusion of important organisations from the duties, and the specific duties not adding up to a coherent approach. (PIRU, 2005).

### 3.5.3 Australia

Australia is a state party to the CRPD. Australia has a disability specific anti-discrimination law, known as the Disability Discrimination Act 1992 (DDA). This law is a federal act that seeks to eradicate discrimination on the basis of disability. Australia does not have a charter or bill of rights.

34 Public Interest Research Unit 'Ten years of the Disability Discrimination Act: Anniversary Research Indicates Qualified Failure' <http://www.piru.org.uk/press-releases/ten-years-of-dda/> (accessed 22 July 2014).

The DDA prohibits direct and indirect discrimination in many parts of public life, such as employment, housing, land possession, the provision of goods and services, education and access to premises and expressly prohibits harassment on the basis of disability. It also protects friends, relatives and others from discrimination on the basis their connection with persons with disabilities.

The DDA protection mechanism is largely complaints-based which is spearheaded by the office of the Disability Discrimination Commissioner with the Human Rights and Equal Opportunity Commission that are established by the DDA.

### ***Reasonable accommodation***

The Australian Disability Discrimination Act of 1992 does not explicitly refer to the concept of reasonable accommodation, but instead refers to 'the removal of unreasonable requirements'. The provision has been interpreted by the Australian Human Rights and Equal Opportunity Commission to include the requirement of reasonable adjustment, but not if it would impose unjustifiable hardship or if it would be unreasonable.

Even though 'unjustifiable hardship' is not defined, the Commission concluded that all the relevant circumstances (on a case by case basis) must be taken into account, which would include the nature of benefits and detriments concerned; increase or decrease in sales of the business; the skills, abilities, training and experience of the person seeking adjustment; and whether the adjustments would impose unreasonable requirements on other employees.

#### ***3.5.4 South Africa***

The Constitution of South Africa expressly prohibits discrimination on the basis of disability and allows for special (temporary) measures aimed at achieving *de facto* equality. However, South Africa prohibits unfair discrimination but such discrimination on the basis of a protected ground may be allowed if it is proved to be 'fair'. However, the general presumption is that discrimination on the basis of such protected grounds is unfair (*Harksen v Lane NO* 1998 (1) SA 300 (CC); *Albertyn & Goldblatt*, 2006). South Africa does not have a disability specific law. Nevertheless, South Africa has generic anti-discrimination and pro-equality legislation, such as Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the Employment Equity Act. The concept of reasonable accommodation is included in the PEPUDA and in its jurisprudence.

### ***Reasonable accommodation***

The South African Constitution in section 9(3) explicitly prohibits discrimination on the ground of disability. Section 9 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 provides the basis for the obligation to

provide reasonable accommodation for persons with disabilities in South Africa:

Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including ?

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

Under the Promotion of Equality and Prevention of Unfair Discrimination Act, all persons and entities have an obligation to reasonably accommodate persons with disabilities. However, the obligation to afford reasonable accommodation in South Africa is particularly prevalent in the employment sector. The Employment Equity Act 55 of 1998 defines 'reasonable accommodation' in section 1 as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access or to participate or advance in employment.'

### **3.6 Social welfare laws**

According to the Degener and Quinn study, some countries choose to approach the issue of disability discrimination through the enactment of traditional social welfare laws for disabled persons. Countries that have done so include China and Finland (Degener & Quinn, 2002).

In these laws, anti-discrimination provisions are found next to more traditional provisions on the prevention of disability and rehabilitation. Except for the Finnish 1992 Act on the Status and Rights of Patients, which provides that every resident in Finland is entitled to health and medical care without discrimination, these laws focus on enacting and enforcing social services and integration principles rather than rights-based anti-discrimination provisions. Non-discrimination provisions found in social welfare legislation tend to be vague and or restricted in scope, limited to the area of public employment or public education for example (Degener & Quinn, 2002).

The Chinese Law of the Peoples' Republic of China on the Protection of Disabled Persons of 1990 contains a general prohibition on discrimination against disabled persons but does not specify what that means for how society is organised. A textual analysis of the law gives the impression that the traditional medical model of disability, that is, institutionalisation and segregation, forms the framework of the act (Degener & Quinn, 2002).

In sum, discrimination provisions contained in social welfare legislation tend to be less

comprehensive and reform oriented. The paradigm shift from the medical model of disability to the human rights model of disability seems to be less obvious in this type of legislation (Degener & Quinn, 2002).

### Student activity

#### Facilitating critical thinking

Write a short essay mapping the disability law of your country. Identify specific provisions in domestic law within your country that follow the different approaches, i.e constitutional, criminal, civil rights, and social welfare approaches.

### Student activity

#### Highlighting important aspects and facilitating application and understanding

The tension between a woman's right to reproductive autonomy and abortion in instances where the pregnancy might result in a child with disability? consider the following:

In its Concluding Observations to Austria, the Committee stated that:

'While the Committee recognises women's right to reproductive autonomy, the Committee notes that under Austrian law it is legal for a foetus to be aborted up to the onset of birth if serious damage to the health of the foetus can be expected'. The Committee expressed concern 'that there appears to be a link between this provision and the fact that according to OECD statistics, births of children with Down's syndrome in Austria fell by 60% between 1995 and 2006'.

#### Suggestion

Learners could be asked at this stage to engage in a discussion on the above highlighted tension. Issues to consider may include: does allowing disability as a reason for abortion imply that disabled people or their lives are less worthwhile than the lives of others? Is eugenic abortion wrong – why or why not? What is the role of stereotypes and prejudices in all this? What is the role of the way society is structured/link this back to the human rights approach to disability and where we should locate the 'problem' of disability.

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- 'Music within' (Articulus Entertainment, Quorum Entertainment & The Music Within LLC 2007) (documenting the story of Richard Pimentel, who lost his hearing during the Vietnam War and returned to become an activist and participant in the creation of the Americans with Disabilities Act).
- 'Murderball' (Paramount Pictures, MTV Films, Participant Productions, A&E IndieFilms & EAT Films 2005) (documenting athletes who play full-contract rugby in wheelchairs – a game they call 'Murderball' – in order to compete in the Paralympic Games in Athens, Greece)
- 'My country' (ADA 1996), available at <http://www.ada.gov/videogallery.htm> (documenting symphony conductor and polio survivor James DePreist's profile of three people with disabilities whose lives have been shaped by the struggle for equal rights, drawing parallels between racial barriers and the barriers faced by people with disabilities).
- 'Lives worth living' (Independent Television Service & Storyline Motion Pictures 2011) (documenting the story of the disability rights movement, including interviews with its leaders).
- Clip from 'Talk' by the Disability Rights Commission (UK) – available at <http://breakingprejudice.org/teaching/video-clips/ableism.html>.

### Further material

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# Module 5: Right to health

## Module overview

This module focuses on the right to the highest attainable standard of physical and mental health of persons with disabilities. Persons with disabilities have the same right to access health services as all others. While this right includes access to disability-related health services, it consists primarily of access to general health services. This module explores the right to health as provided in article 25 of the Convention on the Rights of Persons with Disabilities (CRPD).

First, the module examines the normative content of the right to health in international and regional human rights instruments. Concluding observations issued by the Committee on the Rights of Persons with Disabilities are also examined to concretise the right to health in the context of disability. The module then applies the right to health as provided under article 25 of the CRPD in the African context. Learners will be required to reflect on the progress (or lack thereof) made by their own jurisdictions in fulfilling the right to health for persons with disabilities. The module then focuses on selected contentious aspects of the right to health including persons with psychosocial disabilities and the right to health and reproductive rights of people with disabilities. In examining these two issues, the imbalanced power relationship between persons with health needs and the medical profession, which is particularly complex for persons with disabilities, is highlighted. Other contentious issues that are highlighted are discrimination in health insurance and disability compensation regimes. The module concludes by discussing how the national law of selected jurisdictions including Kenya, Sierra Leone and the United Kingdom relates to the right to health.

## Learning objectives

After having studied this module, learners will be able to:

- Understand the normative content of the right to health of persons with disabilities under international human rights law at the global and African regional levels.
- Critically analyse their own domestic systems and identify what the issues are with regard to persons with disabilities accessing healthcare.
- Explain what the contentious issues are with regard to access to healthcare by persons with disabilities, and identify possible solutions in line with the CRPD and within the context of the Learners' domestic context.
- Understand the various forms of legal protection of health rights which are available to persons with disabilities at domestic level within selected jurisdictions.

## Module content

There are four module sections; section 1 is on the normative content of the right to health in international and regional human rights instruments; section 2 is on applying the right to health as provided for under article 25 of the CRPD in the African context; section 3 focuses on selected contentious aspects of the right to health: persons with psychosocial disabilities and the right to health, reproductive rights of people with disabilities, non-discrimination in health insurance and disability compensation regimes; section 4 discusses the manner in which the national law of Kenya, Sierra Leone and the United Kingdom relates to the right to health.

### 1 The normative content of the right to health in international and regional human rights instruments and state obligations

#### 1.1 Lecturer's notes

*In facilitation learning in this module, the lecturer should guard against perpetuating assumptions that disability is 'illness' and should aim to make that distinction from the get go. The case of CV Brazil (no 10/2003) is useful for making this distinction. In this case, the CRPD Committee stated that the difference between illness and disability is a difference of degree and not a difference of kind, and a health impairment which is initially conceived of as illness can develop into an impairment in the context of disability because of its duration or its chronic development. The lecturer should highlight that a human rights based model of disability requires taking into account the interaction between individuals with impairments and attitudinal and environmental barriers.*

#### 1.2 International human rights system on the right to health

There is a vast array of legal and policy instruments in the international human rights system that articulate a legally enforceable right to health. Jurisprudentially the 'right to health' is best termed 'the right to the highest attainable standard of physical and mental health' (art 12 ? International Covenant on Economic, Social and Cultural Rights (ICESCR)). The right to the highest attainable standard of physical and mental health falls under the genre of Economic, Social and Cultural (ESC) rights. The obligations imposed by ESC rights work in a number of different ways including providing freedoms, imposing obligations on the state regarding third parties and imposing obligations on

the state to adopt measures or to achieve a particular result.<sup>1</sup>

In General Comment 14 on the right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights outlines the various obligations flowing from article 12 of the ICESCR. The General Comment has identified the following as forming the *core obligations* stemming from article 12:

- Ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalized groups;
- Ensuring access to minimum essential food which is nutritious, safe and adequate – i.e. ensuring freedom from hunger for everyone;
- Ensuring access to basic shelter, housing and sanitation, and adequate supply of safe and potable water;
- Ensuring equitable distribution of all health facilities, goods and services; and
- Adoption and implementation of a national public health strategy and programme of action

According to the Committee on Economic, Social and Cultural Rights in its General Comment 14, the right to health in all its forms and at all levels contains the following interrelated and essential elements:

- *Availability*: Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party;
- *Accessibility*: Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability) and information accessibility.
- *Acceptability*: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate; and
- *Quality*: Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

With regard to persons with disabilities, the Committee on Economic, Social and Cultural Rights has highlighted that persons with disabilities have the right of access to and to benefit from medical and social services, including orthopaedic devices which facilitate their independence, prevent further disabilities and support their social integration (General Comment 5, para 34).

Further, persons with disabilities have the right to rehabilitation services which enable sustenance of optimum levels of independence and functioning, provided in a way that respects their rights and dignity. The Committee on Economic, Social and Cultural Rights also has stated that forced sterilisation of girls and women with disabilities is a

breach of article 10 of ICESCR on protecting the family (General Comment 5, para 34).

Finally, the Committee on Economic, Social and Cultural Rights has stated that the right to the enjoyment of the highest attainable standard of health is

closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.

Hence, the right to the enjoyment of the highest attainable standard of health demonstrates clearly the interdependence of human rights, and the need for states to adopt a wholesome approach to the fulfilment of the rights enshrined in human rights instruments.

### 1.3 State obligations with regard to health under the CRPD

Article 25 of the CRPD is the central provision guaranteeing the health rights of persons with disabilities. It provides as follows:

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

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- (c) Provide these health services as close as possible to people's own communities, including in rural areas;
- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- (e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is

1 International Commission of Jurists 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability' [http://www.humanrights.ch/upload/pdf/080819\\_justiziabilit\\_esc.pdf](http://www.humanrights.ch/upload/pdf/080819_justiziabilit_esc.pdf) (accessed 26 August 2014).

permitted by national law, which shall be provided in a fair and reasonable manner;

- (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Under article 4 of the CRPD, states parties undertake to ensure and promote the full realisation of all human rights of persons with disabilities. The following obligations stand out as particularly relevant to state obligations with regard to the right to the highest attainable standard of physical and mental health of persons with disabilities.

- Obligations to do with legislation, policy and programmes – adopting appropriate legislation, amending existing legislation that discriminate against persons with disabilities and taking into account the protection of the rights of persons with disabilities in all policies and programmes (Legislation, policy and programmes should protect the right of persons with disabilities to access healthcare in a way that is meaningful).
- Obligations to do with training – professionals working with persons with disabilities require training on the rights of persons with disabilities, combined with the requirement that public institutions act in conformity to the Convention. In particular, professionals in the health sector should be trained on the right to health for persons with disabilities.
- Obligations to do with research – states parties are obliged to promote research and development of new technologies including mobility aids and devices as well as communication technologies. Further on communication is the obligation to provide accessible information to persons with disabilities about mobility aids and devices and assistive technologies, all of which might be especially useful in the field of healthcare.
- Progressive realisation of economic and social rights – the right to the highest attainable standard of physical and mental health falls under social and economic rights. According to article 4(2), each ‘State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights ...’ (See Section 1 above on General Comment 14 ICESCR on the core obligations with regard to the right to health).
- The obligation to closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the CRPD (Persons with disabilities and their organizations should be involved in access to healthcare laws, policies and programmes).

#### 1.4 The concluding observations of the Committee on the Rights of Persons with Disabilities (CRPD Committee) on the right to health

As at January 2015, at least 74 countries and the European Union have filed reports to the CRPD Committee.<sup>2</sup> The CRPD Committee has issued concluding observations to 19 countries: New Zealand, Denmark, Republic of Korea, Belgium, Ecuador, Mexico, Azerbaijan, Costa Rica, Sweden,

Australia, Austria, El Salvador, Paraguay, Argentina, China, Hungary, Peru, Spain and Tunisia ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)). The CRPD Committee has issued concluding observations on the right to health to El Salvador, Paraguay, Argentina, China and Peru, amongst other countries. This section summarises the content of the concluding observations with regard to the right to health.

The Committee expressed concern about:

- The discrimination against persons with disabilities in terms of access to health, including sexual and reproductive health, caused by barriers including the lack of equipment suitable for use by all, for example for obstetrical and gynaecological care.
- The lack of information on the right to health of persons with disabilities in rural areas, scant information on HIV-related services and the availability of community rehabilitation services.
- Involuntary commitment systems in mental health laws which do not respect the individual will of persons with disabilities.
- Restrictions on the exercise of legal capacity that exclude persons with disabilities from taking decisions concerning their own treatment.
- The lack of clear-cut mechanisms for ensuring that persons with disabilities give their free and informed consent for any type of medical treatment before it is administered.
- The lack of health-care professionals trained in the human rights model of disability.
- The fact that the demand for public medical services is higher than the supply.
- The fact that many insurance companies reject the applications of persons with disabilities, thus leaving them unable to pay medical fees.
- The lack of early detection programmes of deafness for children in order to minimise and prevent further disabilities.
- The lack of rehabilitation services for persons with disabilities.

The Committee recommended that:

- States parties adopt the requisite legislative measures to protect persons with disabilities against discrimination in health matters (El Salvador, Peru).

2 Countries that have filed state reports with the CRPD Committee include Australia, Austria, Argentina, Algeria, Armenia, Azerbaijan, Brazil, Bosnia and Herzegovina, Belgium, Bolivia, Bulgaria, Canada, Colombia, Cuba, Cyprus, China, Chile, Cook Islands, Croatia, Czech Republic, Costa Rica, Dominican Republic, Denmark, Ecuador, El Salvador, European Union, Ethiopia, Gabon, Germany, Guatemala, Haiti, Honduras, Hungary, Islamic Republic of Iran, Italy, Jordan, Kenya, Latvia, Luxembourg, Lithuania, Mauritius, Mexico, Mongolia, Malta, Montenegro, Morocco, Nepal, New Zealand, Oman, Panama, Philippines, Poland, Paraguay, Peru, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Spain, Sweden, Serbia, Seychelles, Slovakia, South Africa, Sudan, Slovenia, The former Yugoslav Republic of Macedonia, Tunisia, Turkmenistan, Thailand, Ukraine, United Arab Emirates, Uruguay and Uganda. Office of the High Commissioner for Human Rights [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29) (accessed 23 January 2015).

- States parties take the necessary measures to ensure that all health services are fully accessible to persons with disabilities at all levels, including the community level, and that these measures incorporate the gender perspective (Paraguay).
- States parties adopt measures to ensure persons with disabilities can exercise their right to free and informed consent regarding medical treatment, including mental healthcare (El Salvador, Argentina, China).
- States parties repeal laws permitting involuntary treatment and confinement, including upon the authorisation of third party decision-makers such as family members or guardians (China).
- States parties develop a wide range of community-based services and supports that respond to needs expressed by persons with disabilities, and respect the person's autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health (China).
- States parties improve coordination between mental health services and inclusive employment, education and housing mechanisms (Argentina).
- States parties ensure the access by persons with disabilities to health insurance schemes (El Salvador).
- States parties carry out public health campaigns directed at persons with disabilities, including components on gender and age, sexual and reproductive rights and HIV/AIDS prevention and care (El Salvador).
- States parties involve women with disabilities in campaigns to prevent breast and cervical cancer (El Salvador).
- States parties adopt plans and allocate more human and financial resources for the accessibility of health-care services, including equipment suitable for use by all (El Salvador, Argentina, Peru).
- States parties produce statistics and data on persons with disabilities so that better planning can facilitate their access to health-care services, and identify options for their access to community rehabilitation services (El Salvador).
- States parties develop comprehensive health-care programmes that specifically make provision for persons with disabilities and ensure that they have access to habilitation and rehabilitation health services (Argentina).
- States Parties provide services of early identification of disabilities, in particular deafness (Peru).

### 1.5 The health rights of persons with disabilities in the African regional human rights system

Health rights in the African Charter on Human and Peoples' Rights (ACHPR) are guaranteed primarily by article 16. Other provisions in the ACHPR having a bearing on health are article 2 (prohibition of discrimination), article 3 (equality before the law), article 5 (right to dignity, prohibition of torture and slavery), article 15 (right to work under equitable and satisfactory conditions) and article 24 (right to a satisfactory environment). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child

(ACRWC) also provide for the right to health in article 14 and article 14 respectively.

In April 2001, heads of state of African Union countries met and pledged to set a target of allocating at least 15 per cent of their annual budget to improve the health sector (The Abuja Declaration). According to a report by the World Health Organisation, since 2001, only 27 countries have increased the proportion of total government expenditures allocated to health and only Rwanda and South Africa have achieved the Abuja Declaration target of 'at least 15%' (GGHE/GGE). Meanwhile, seven countries reduced their relative contributions of government expenditures to health during the period. In the other twelve countries, there is no obvious trend upwards or downwards. (The World Health Organisation 'The Abuja Declaration ten years on' (2011) <http://www.who.int/healthsystems/publications/Abuja10.pdf>)

On its part, the African Union Commission reports that six AU member states have met the 15 per cent benchmark: Rwanda (18.8 per cent), Botswana (17.8 per cent), Niger (17.8 per cent), Malawi (17.1 per cent), Zambia (16.4 per cent), and Burkina Faso (15.8 per cent) (<http://www.ppafrica.org/docs/policy/abuja-e.pdf>).

### 1.6 Children with disabilities and the right to health

The rights of children, including children with disabilities, are covered in the Convention on the Rights of the Child (CRC). Article 23 of the CRC deals specifically with the rights of 'handicapped and disabled' children. Article 24 deals with the right of children to the highest attainable standard of health.

The Committee on the Rights of the Child (CRC Committee) has adopted General Comment 9 on 'children with disabilities' which addresses various aspects of children with disabilities and access to healthcare. Further, in examining state reports submitted to it, the CRC Committee has made very important recommendations regarding the health rights of children with disabilities including the collection of disaggregated data and statistics to be used in formulation of policies; and the provision of support to families of children with disabilities and initiation of early detection programmes to assess causes and extent of disabilities amongst children with disabilities.

The CRC Committee has identified forced sterilisation of girls with disabilities as a form of violence and noted that state parties to the CRC are expected to prohibit by law the forced sterilisation of children with disabilities. The Committee has also explained that the principle of the 'best interests of the child' cannot be used to justify practices which conflict with the child's human dignity and right to physical integrity (CRC Committee General comment 13 (2011) & CRC Committee General Comment 9).

## 1.7 Women with disabilities and the right to health

The 2013 report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment notes that ‘women living with disabilities, with psychiatric labels in particular, are at risk of multiple forms of discrimination and abuse in health-care settings’. As such, it is important to give attention to the specific circumstances of women with disabilities *vis-à-vis* their access to health.

Unlike the CRPD, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) does not contain a specific provision on the rights of women with disabilities. However, it must be borne in mind that CEDAW’s prime rationale is the equalisation of human rights and opportunities between men and women. Article 12 of CEDAW guarantees the equal right to health care in favour of all women. With regard to women with disabilities, the CEDAW Committee has adopted two General Recommendations which highlight the situation of women with disabilities (General Recommendations 18 & 24).

In General Recommendation 18 on Disabled Women, the CEDAW Committee has recommended that states report on special measures they have adopted to ensure that women with disabilities have equal access to health services. General Recommendation 24 on women and health states the following important matters in respect of the health rights of women with disabilities:

- States should give special attention to the health needs and rights of women belonging to vulnerable and disadvantaged groups, including women with physical and mental disabilities;
- States must take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities, and are respectful of their human rights and dignity.

In examining state reports as required under article 18 of CEDAW, the CEDAW Committee has stated that states report on women with disabilities’ health rights and collect data, on a disaggregated basis, to facilitate the formulation of policies and ensure equality of access and opportunities in respect of health services.

## 1.8 Enforcing the right to health

A key avenue through which the right to health is enforced globally is through the court system. The International Commission of Jurists (ICJ) published a study on comparative experiences of justiciability in 2008. This study notes that

Judicial protection of the right to health has been achieved in different legal systems through the right to life; the right to be free from torture or cruel, inhuman and degrading treatment; and the right to the respect of private and family life.<sup>3</sup>

The ICJ study makes use of several cases from around the world (India, Colombia, Inter-American Court of Human Rights and the European Court of

Human Rights) to illustrate the above point. The Indian Supreme Court, ruling on the basis of the constitutional right to life in *Paschim Banga Khet Majoor Samity and others v State of West Bengal and another* decided that it encompasses access to primary health care, at least in cases of emergency.<sup>4</sup> On its part, the Colombian Constitutional Court furthered its trend of judicial activism in matters regarding economic, social and cultural (ESC) rights by deciding that ESC rights were justiciable when connected with a fundamental right enshrined by the Constitution. That Court has asserted in numerous cases, for example, that failure to provide access to health care services may entail a violation of the right to life.<sup>5</sup> The Inter-American Court of Human Rights has followed a similar path. Within its broad interpretation of the right to life, which includes not only negative obligations, but also positive obligations, the Inter-American Court has found, in a number of cases, that failure to provide severely marginalised populations with access to basic healthcare services amounts to a violation of the right to life under the American Convention on Human Rights.<sup>6</sup>

With regard to the European Court of Human Rights, in the case of *D v the United Kingdom*,<sup>7</sup> the European Court of Human Rights stressed the connection between the maintenance of health care services and the prohibition on cruel, inhuman and degrading treatment. In this case, D pled guilty to possession of cocaine while trying to enter the United Kingdom and was sentenced to six years’ imprisonment. Whilst in prison he was diagnosed with HIV and as suffering from AIDS. Upon his release from prison D was placed in immigration detention pending his removal to St Kitts. D challenged his removal, arguing that the lack of medical care for AIDS sufferers in St Kitts violated his right to be free from torture, cruel, inhuman or degrading treatment (<http://www.southern.africa.litigationcentre.org/1997/01/02/d-v-united-kingdom-european-court-of-human-rights-1997-3/>). The Court held that deportation of a prison inmate who was benefiting from a HIV treatment to a country where such treatment was not available amounted to a violation of the right to be free from inhuman or degrading punishment under the ECHR.<sup>8</sup> In some cases, the European Court has also held that a failure on the part of the state to prevent environmental conditions that can be hazardous to

3 International Commission of Jurists ‘Courts and the legal enforcement of economic, social and cultural rights’ 2008 [http://www.humanrights.ch/upload/pdf/080819\\_justiziabilit\\_esc.pdf](http://www.humanrights.ch/upload/pdf/080819_justiziabilit_esc.pdf) (accessed 27 August 2014).

4 See Supreme Court of India *Paschim Banga Khet Majoor Samity and others v State of West Bengal and another* (1996) 4 SCC 37, AIR 1996 Supreme Court 2426, 5 June 1996.

5 See Colombian Constitutional Court, cases T-484/1992, August 11, 1992; T-328/1993, August 12, 1993; T-494/93, October 28, 1993; T-597/93, December 15, 1993; T-217/95, June 23, 1995; amongst many others.

6 See Inter-American Court of Human Rights *Instituto de Reeducación del Menor v Paraguay* 2 September 2004, paras 147-148, 156, 159-161, 166, 172-173 and 176; *Yakye Axa Indigenous Community v Paraguay* 17 June 2005, paras 161-169, 172 and 175; *Sawhoyamaya Indigenous Community v Paraguay*, 29 March 2006, paras 152-155, and 167-178.

7 European Court of Human Rights *D v the United Kingdom* 2 May 1997.

8 *D v the United Kingdom* (n 7 above) paras 51-53.

health may amount to a violation of the right to privacy and family life.<sup>9</sup>

How selected African Constitutions relate to the right to health	
Country	Article in the Constitution on the right to health
Algeria	54 – All citizens have the right for the protection of their health. The State ensures the prevention and the fight of endemics and epidemics.
Benin	8 – The human person is sacred and inviolable. The state has the absolute obligation to respect it and protect it. It shall guarantee him a full blossoming out. To that end, it shall assure to its citizens equal access to health, education, culture, information, vocational training, and employment.
Cameroon	1 Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2 State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
Democratic Republic of Congo	47 – The right to health and to food security is guaranteed. The law defines the fundamental principles and the rules of organization for public health and food security.
Ethiopia	41(4) – The State has the obligation to allocate increasing resources to provide public health, education and other social services.
Gambia	216(4) – The State shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons.
Kenya	43(1) Every person has the right – (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.
Lesotho	27 Protection of health (1) Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to – (a) provide for the reduction of stillbirth rate and of infant mortality and for the healthy development of the child; (b) improve environmental and industrial hygiene; (c) provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) create conditions which would assure to all, medical service and medical attention in the event of sickness; and (e) improve public health.
Malawi	13 The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals – (c) Health To provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.
Namibia	Article 95 Promotion of the Welfare of the People The State shall actively promote and maintain the welfare of the people by adopting, <i>inter alia</i> , policies aimed at the following: (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.

Rwanda	Article 41 All citizens have the right and duties relating to health. The State has the duty of mobilizing the population for activities aimed at promoting good health and to assist in the implementation of these activities.
South Africa	27 Everyone has the right to have access to health care services, including reproductive health care;
Togo	Article 34 - The State recognizes to the citizens the right to health. It works to promote it.
Zambia	112 [Directive Principles of State Policy] The following Directives shall be the Principles of State Policy for the purposes of this Part: the State shall be based on democratic principles; (d) the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities;

## 2 Applying the right to health in article 25 of the CRPD in the African context

### 2.1 Lecturer's notes

*It would be incomplete to discuss the notion of the right to health and disability without anchoring it in African realities. Ultimately, rights are fulfilled or violated in a particular context; getting students to reflect on this fact is an important element of encouraging critical thinking. Students should be encouraged, in the first place to think about healthcare in their own contexts generally (not only with regard to people with disabilities); and then to share what they think might be issues that are particular to people with disabilities in the healthcare context. The lecturer should however guard against promoting simplistic, stereotypical notions about the state of economic and social rights in Africa. Getting local statistics on the issue of health (for example, what proportion of the national budget is allocated to health) is a useful way to ground the discussion in local realities.*

### 2.2 Applying the right to health in the African context

This section focuses on application and seeks to answer the following questions:

- What are the core challenges with regard to achieving the right to health in the African context?
- What kinds of barriers exist in accessing healthcare, and what accommodations might be needed to make the health system accessible to persons with disabilities?
- Is there case law in Africa that addresses the right to health for persons with disabilities?
- What is the relationship between article 26 on rehabilitation and article 25 on healthcare in the African context?

### 2.3 The core challenges with regard to achieving the right to health in Africa

It is well known that some disabilities are caused by lack of access to adequate health care or lack of

<sup>9</sup> See, for example, European Court of Human Rights *López Ostra v Spain*, 9 December 1994, paras 51, 56-58; *Guerra and others v Italy*, 19 February 1998, para 60; *Fadeyeva v Russia*, 9 June 2005, paras 94-105, 116-134.

maternal health care. An article on the human right to health in Africa and its challenges notes that:

One out of every eight children born in sub-Saharan Africa dies before the age of five. In 2008 there were 8,8 million under-five deaths worldwide, half of them in Africa. The maternal mortality rate (MMR) in the region is equally abysmal. The global MMR hovers around 536 000 annually, approximately half (265 000) occurring in sub-Saharan Africa. Relative to population, the region leads the rest of the world in deaths resulting from HIV/AIDS, malaria and other preventable diseases. Life expectancy has plummeted to 45 years, worse than anywhere else. (Nnamuchi & Ortuanya, 2012 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307304](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307304))

Writing on litigating the right to health in Africa, Interights notes that ‘despite the several regional and international instruments detailing the right to health, debates surrounding the existence and content of state obligations abound’. Interights further notes that while several constitutions in the region do not include health as a right, progressive decisions from India, from which lessons can be drawn, have established the right to health as a component of civil and political rights, particularly the right to life and freedom from cruel, inhuman and degrading treatment. However, despite these developments, the litigation of right to health issues across the region remains complex. According to Interights, the complexity arises because the right to health is ‘subject to debates surrounding limited state resources and the practical difficulties of taking cases’. While many African states are parties to regional and international human rights instruments with economic and social rights, the place of the right to health in national legal frameworks remains precarious ... that the complexities of tracking expenditure and weak monitoring systems fail to protect the 15 per cent of state budgets allocated to health goals by the Abuja Declaration. Issues pertaining to corruption and the allocation of resources, which have implications on the enjoyment of the right to health, are challenging to litigate. This makes it difficult to address the misuse of funds earmarked to implement the right to health (INTERIGHTS ‘Right to health in Africa’ <http://www.interights.org/right-to-health-africa/index.html>).

A further aspect to consider is that some impairments give rise to health conditions, which may require special expertise. Article 25(b) of the CRPD, for example, requires states parties to provide those health services needed by persons with disabilities specifically because of their disabilities. An example of the need for such services exists amongst people of short stature who are often prone to complications including bowing of the legs (genuvarum), pressure on the spinal cord at the base of the skull and excess fluid around the brain (hydrocephalus). In Africa, lack of research and medical response to such conditions can have dire consequences on this group of people, which is compounded by the social stigma they experience. In some countries, such as Uganda, people of short stature or ‘Little People’ have formed their own organisation in order to promote awareness and

understanding of the various conditions, which cause shortness of stature/dwarfism and medical complications associated with it. The Ugandan organisation, Little People of Uganda, also aims to ‘work with the medical profession, especially those in contact with little people in order that they not only understand the medical aspects of dwarfism but also dwarfs as people in their own right’ (<http://www.littlepeople.ngo.ug/>).

Persons with albinism experience similar challenges in many parts of Africa. The lack of pigment during the development of the eye causes decreased visual acuity or low vision. In some countries in Africa, children with albinism are excluded from mainstream education because of limited access to corrective lenses and low vision aids. In extreme cases, persons with albinism are persecuted, dismembered and even killed, based on superstitions and beliefs that their body parts can transmit magical powers.

Another aspect to consider in the African context is that fragile states, conflict-ridden countries and natural disasters often cause impairments as well as exacerbate the conditions in which people with disabilities exist (Grobbelaar-du Plessis & Van Reenen, 2011).

The above paragraphs illuminate the challenges in achieving the right to health in Africa, including:

- Limited state resources;
- Corruption;
- Weak monitoring systems;
- Limited expertise on providing health care to persons with disabilities; and
- Fragile conflict-ridden states.

### Student activity

#### Discussion

- 1 How do we address the right to health within the context of floundering health systems for all?
- 2 How do we promote such a resource-heavy right in resource-scarce settings?
- 3 Is there a way to promote the right to health for people with disabilities separately from the right to health within the general health system?
- 4 Assuming that addressing the right to health separate from the general health system is not effective, in what ways could the tools provided by the CRPD enhance efforts to attain the right to health for all in resource-scarce settings?

## 2.4 Barriers and accommodations in the healthcare context

In 2011, the Equal Rights Centre in Washington DC, prepared a report titled: ‘Ill-prepared Healthcare’s barriers for people with disabilities’. The report identified barriers that hinder access to healthcare by persons with disabilities as including stereotypes about disability on the part of healthcare

providers, health care provider misinformation, and lack of appropriately trained staff, limited health care facility accessibility and lack of examination equipment that can be used by people with varying disabilities (X-rays, examination tables, mammogram screeners, weight scales, prescription labels), lack of sign language interpreters, lack of materials in formats that are accessible to people who are blind or have low vision, and lack of individualised accommodations ([http://www.equalrightscenter.org/site/DocServer/III\\_Prepared.pdf?docID=561](http://www.equalrightscenter.org/site/DocServer/III_Prepared.pdf?docID=561)).

Further, the report indicated that

only 20 percent of optometrists' offices had the accessibility needed to perform an eye exam on someone who uses a wheelchair; only 23 percent of doctors' offices and hospitals offered patient information in large print, and only 24 percent offered patient information in an accessible format; and only 1 percent of pharmacies offered information in Braille and only 1 percent offered audible prescription bottles. In fact, 86 percent of tested pharmacies would not accommodate the use of an audible prescription bottle even if provided by the customer ([http://www.equalrightscenter.org/site/DocServer/III\\_Prepared.pdf?docID=561](http://www.equalrightscenter.org/site/DocServer/III_Prepared.pdf?docID=561)).

With regard to the undue burden qualification in construing reasonable accommodation, medical facilities do not have to make accommodation or provide auxiliary aids and services under US law, for example, when doing so would impose an undue burden. Whether or not an accommodation constitutes an undue burden depends on a variety of factors, including the cost of the accommodation relative to size of the business (For a more detailed discussion on reasonable accommodation, see module 4 on non-discrimination and reasonable accommodation).

Finally, issues of confidentiality also arise, for example, in instances where a person who is blind is required to answer confidential medical questions which are read aloud to her by office personnel in a busy waiting room, rather than providing her a private space or an electronic version she could complete by herself. In the African context, family members tend to be the interpreters for people with communication disabilities, which also poses potential violations of a patient's right to confidentiality.

### Student activity

*Highlighting important aspects and facilitating application and understanding*

Learners should be asked to give other examples of accommodations that may be needed in health care settings. So far, the text has not identified accommodations such as a patient listening style for some persons with psychosocial disabilities when they are in a crisis and providing information in easy to read and easy to understand formats for persons with intellectual disabilities, which accommodation would in fact benefit all people.

Another activity here would be to ask students to think about their own experiences with medical professionals. The following questions would aid this exercise: What have you liked? Not liked? What if you had to have someone in the room with you during the visit? What if the doctor refused to talk to you directly? What if the office is not accessible and you use a wheelchair? What if the doctor used technical language the entire time, even when it was apparent that you did not understand? What if information was given to you in a language you do not understand?

## 2.5 African case law on the right to healthcare for people with disabilities

### ***Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003)**

In *Purohit and Another v The Gambia*, the Commission addressed, amongst other issues, the right to health and treatment of persons with mental illness. The case was brought by the complainants on behalf of patients detained at the Psychiatric Unit of the Royal Victoria Hospital in The Gambia. The parties alleged that the provisions of the Lunatics Detention Act (LDA) was inadequate in that it failed to define who a 'lunatic' is and it did not prescribe requirements to guarantee safeguard of rights during diagnosis and detention of patients. The case further alleged that the conditions of detention were unfavourable and violated the rights of patients. The complainants stated that the system did not provide for any independent examination of administration at the Unit or the facilities available. The Act did not make any provision for legal aid of inmates in addition to the fact that it was silent as to compensation for patients in the event of violation of their rights.

In its decision, the Commission emphasised that human dignity is an inherent right which must be respected at all times irrespective of the mental capability of a person and persons with mental disability have the right to a decent life just like all others. According to the Commission, such persons must not be denied their right to healthcare which is necessary for their survival in society and they should be accorded special treatment to enable them to attain the highest level of health. The state must make provisions to enable persons wrongfully detained and whose rights have been violated to access legal aid and seek redress. The Commission also stated that the right to health is vital for the enjoyment of all other rights and includes the right to access health care facilities and health services without discrimination. The Commission further noted that states have the duty to ensure that mental health patients be

accorded with special treatment by virtue of their condition. The state also has an obligation to take 'concrete and targeted steps' to ensure the full realisation of the right to health. The Commission found that the government was in violation of the Charter and urged it to repeal the LDA and to provide adequate medical as well as material care for mental health patients.

(Centre for Human Rights 'Celebrating the African Charter' 2011 at 30)

## 2.6 The relationship between article 26 on rehabilitation and article 25 on healthcare in the African context

Article 26 of the CRPD is on habilitation and rehabilitation. Article 26(1) requires states parties to organise, strengthen and extend comprehensive habilitation and rehabilitation services in the areas of health, employment, education and social services. According to article 26(1)(a), habilitation and rehabilitation services and programmes should begin at the earliest possible stage and should be based on the multidisciplinary assessment of individual needs and strengths. Further, habilitation and rehabilitation services and programmes should be geared towards participation and inclusion in the community, be voluntary and be available to persons with disabilities as close as possible to their own communities.

According to the CRPD Committee, habilitation and rehabilitation services and programmes:

- should not be based on the medical model of disability and should be based on free and informed consent (Concluding observations to Australia CRPD/C/AUS/CO/1);
- should not focus solely on health and should go hand in hand with the establishment of the necessary community services provided at local level so that they are able to meet individual needs (Concluding observations to Paraguay CRPD/C/PRY/CO/1); and
- should promote the informed consent of individuals with disabilities and respect their autonomy, integrity, will and preference (Concluding observations to China CRPD/C/CHN/CO/1).

In the African context, habilitation and rehabilitation services and programmes are especially important, given the fact that the leading causes of disability on the continent include war and road accidents (World Health Organization 'Disability and rehabilitation status' 2004). In this context, rehabilitation in health care may be best understood as part of how health systems should be designed.

## 3 Addressing selected contentious aspects of the right to health

### 3.1 Lecturer's notes

*In discussing contentious aspects of the right to health, the lecturer should encourage students to be alive to the ways through which laws that are meant for the 'protection' of people with disabilities sometimes end up being oppressive and violating their rights.*

*Of note is the fact that this section lends itself well to allowing students to share lived experiences; the lecturer should invite students to talk about real life situations that they may be aware of that relate to forced sterilisation, forced treatment in the mental health field as well as compensation for motor vehicle accidents.*

### 3.2 Persons with psychosocial disabilities and the right to health

Key issues arising with regard to persons with psychosocial disabilities and the right to healthcare include involuntary commitment, forced treatment and issues of informed consent and the use of restraints and solitary confinement in mental healthcare institutions. While this section discusses certain aspects of these issues, the module on legal capacity comprises the bulk of the discussion.

In its General Comment on equal recognition before the law, the CRPD Committee has identified mental health laws that permit forced treatment as being a key area in which people with disabilities are denied their right to legal capacity. According to the CRPD Committee, article 14 of the CRPD on liberty and security of the person entails the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment. The General Comment places an obligation on states parties to provide access to support for decisions regarding psychiatric and other medical treatment. The CRPD Committee notes that forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities, and urges states parties to abolish policies and legislative provisions that allow or perpetrate forced treatment. Forced treatment is identified as an ongoing violation of mental health laws across the globe 'despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment'. The Committee urged states parties to ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned.

Other closely related articles on this issue in the CRPD include article 19(1) which provides that people with disabilities should choose their own place of residence and should not be obliged to live in a particular living arrangement, and article 25(c) of the CRPD which requires states parties to provide health services as close as possible to people's own communities. Institutionalisation in mental health

institutions negates the right to access health services in the community on an equal basis with people without disabilities. Most people with disabilities in Africa do not live in institutions, but are isolated within their own communities, or may end up in the criminal justice system on account of unmet needs. There is therefore a strong link between articles 14, 17, 19 and 25 of the CRPD in regard to the rights of persons with psychosocial disabilities.

### 3.2.1 *Involuntary commitment, forced treatment and informed consent*

Article 25(d) of the CRPD provides that states parties should require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent. However, as noted by the CRPD Committee, many mental health laws allow for involuntary commitment and forced treatment.

In 2013, the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment published a report on certain forms of abuses in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment. The report stated that legislation authorising the institutionalisation of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. According to the report, this must include the repeal of provisions authorising institutionalisation of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorising the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness (A/HRC/10/48, paras 48, 49) ([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)).

The 2013 report of the Special Rapporteur further states that

informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision. Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services. ([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf))

In the case of *Damião Ximenes v Brazil* Case 12.237, Report No 38/02, Inter-Am CHR, Doc 5 rev 1 (2002) 174, the Inter-American Court of Human Rights found a violation of the right to health by relying not just on the American Convention but also on the Protocol of San Salvador, and a number of other international declarations and interpretive guidance sources.

#### *Damião Ximenes v Brazil*

On November 22, 1999, Mrs Irene Ximenes Lopes Miranda submitted to the Inter-American Commission on Human Rights a petition against the Federative Republic of Brazil. That petition alleged violations of articles 4, 5, 11, and 25 of the American Convention on Human Rights, on the right to life, the right to humane treatment, the right to privacy, and the right to judicial protection, all in connection with the generic duty of the state to respect and ensure the rights enshrined in the American Convention, to the detriment of Mr Damião Ximenes Lopes, her brother, who died while at the Guararapes Rest Home, in Sobral, Ceará, after he was admitted there to receive psychiatric treatment.

The petitioner alleged that the Brazilian state is responsible for the death of her brother, Damião Ximenes Lopes, at the Casa de Repouso Guararapes, on 4 October 1999. According to the petitioner, her brother was admitted to said Casa de Repouso to receive psychiatric treatment as he suffered from a mental illness, and two days after being admitted, his mother went to visit him and found him with visible signs of torture, his hands tied, nose bleeding, face and abdomen swollen; he asked her to call the police. Hours later, after receiving medication, he died.

The petitioner alleged that, despite the situation described in the previous paragraph, the result of the autopsy performed on her brother's corpse only mentioned the apparent lesions, and was silent as to the cause of his death, reporting in its conclusion, 'in view of what is set forth above, we infer that it is an actual death of undetermined cause'. According to the petitioner, the Casa de Repouso is known for the inhumane treatment meted out to its patients. To this end, the petitioner cited statements made by former patients and newspaper clippings.

The Court ruled that Brazil has an international responsibility to fulfil, in this case, its requirement to look after and prevent the vulnerability of life and personal integrity, as well as its requirement to regulate and monitor medical healthcare. The Court also concluded that 'the State did not provide the family members of Ximenes Lopes effective recourse to guarantee access to justice, determination to the truth of the facts, investigation, identification, due process and ... punishment of those responsible for the violation of due process and to judicial protection'.

As a reparatory measure, the Court ordered Brazil to pay compensation to the family.

In addition, the *Damião Ximenes* case established the duty of states to guarantee the provision of health care services to all persons with psychosocial disabilities including the duty to provide such services in the least restrictive manner possible. The Court also ruled that the state has an obligation to protect health even in private facilities, which is where Ximenes Lopes died.

### Student activity

24 hour submission short essay to facilitate application and understanding

The CRPD Committee has noted that many mental health laws allow for involuntary commitment and forced treatment. Does the law in your country allow for treatment without consent? On what grounds? To what extent do mental health laws further or frustrate the right to access healthcare for people with disabilities?

### 3.2.2 Restraints and solitary confinement

The Special Rapporteur's 2013 report addresses specifically the issue of the use of restraints and solitary confinement. The report states in part that

the mandate has previously declared that there can be no therapeutic justification for the use of solitary confinement and prolonged restraint of persons with disabilities in psychiatric institutions; both prolonged seclusion and restraint may constitute torture and ill-treatment (A/63/175, paras. 55-56). The Special Rapporteur has addressed the issue of solitary confinement and stated that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment (A/66/268, paras. 67-68, 78).

According to the Special Rapporteur's report, any restraint on people with mental disabilities for even a short period of time may constitute torture and ill-treatment. The report calls for an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities. This ban should apply in all places of deprivation of liberty, including in psychiatric and social care institutions. The report asserts that the environment of patient powerlessness and abusive treatment of persons with disabilities in which restraint and seclusion is used can lead to other non-consensual treatment, such as forced medication and electroshock procedures ([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)).

### 3.2.3 The link to torture

In his 2013 report, the Special Rapporteur on Torture also notes that as detention in a psychiatric context may lead to non-consensual psychiatric treatment, deprivation of liberty that is based on the grounds of a disability and that inflicts severe pain or suffering could fall under the scope of the Convention against Torture (A/63/175, para 65). According to the Special Rapporteur, in making such an assessment, factors such as fear and anxiety produced by indefinite detention, the infliction of forced medication or electroshock, the use of restraints and seclusion, the segregation from family and community, and so on, should be taken into account ([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)).

### 3.2.4 Proposed solution

The Special Rapporteur proposes to replace forced treatment and commitment by services in the community. According to the Special Rapporteur, such services must meet needs expressed by persons with disabilities and respect the autonomy, choices, dignity and privacy of the person concerned, with an emphasis on alternatives to the medical model of mental health, including peer support, awareness-raising and training of mental health-care and law enforcement personnel and others ([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSessionSession22A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSessionSession22A.HRC.22.53_English.pdf)).

### Student activity

Debate to facilitate further application and understanding

Learners should be divided into an even number of groups (some 'for' some 'against') and asked to debate this proposition from Treffert, D.A:

'... major mental illness, by its intrinsic nature and manifestations, makes the use of coerced care-rather than purely voluntary treatment-necessary in some instances.'

### 3.3 Reproductive health rights of persons with disabilities

Article 23(c) of the CRPD provides that state parties have an obligation to ensure that 'persons with disabilities, including children, retain their fertility on an equal basis with others' and to ensure their right to decide freely and responsibly on the number and spacing of their children (article 23(b)). Thus sterilisation without free and informed consent is contrary to the CRPD. Further, article 25(a) provides that states parties shall provide persons with disabilities with the same range and quality of healthcare as provided to other persons including in the area of sexual and reproductive health.

#### Contextualising forced and coerced sterilisation

Highlight to place the issue of forced sterilisation in a wider context

Other women who have been subjected to forced sterilisation include Roma women in Europe, women living with HIV/AIDS in Africa and Latin America, women from ethnic and racial minority communities and low income and drug using women.

To illustrate:

In *LM and Others v Government of the Republic of Namibia* (I 1603/2008, I 3518/2008, I 3007/2008) [2012] NAHC 211 (30 July 2012)), the government was held liable for forcibly sterilising women who were HIV-positive. The court held that 'I am of the view that the defendant has failed to discharge its onus to prove that all three the plaintiffs had given informed consent in respect of their respective sterilisation procedures'. (<http://www.saflii.org.za/na/cases/NAHC/2012/211.html>)

Is there a tension between the right to access health care based on voluntary and informed consent and policies that permit forced sterilisation or forced abortions for women with disabilities? Explain.

The Open Society Foundations and the Campaign to Stop Torture in Health Care Settings issued a position paper on sterilisation and women with disabilities in 2011. This paper differentiates between sterilisation, forced sterilisation and coerced sterilisation. Sterilisation is defined as 'a process or act that renders an individual incapable of sexual reproduction'. Forced sterilisation is defined as occurring 'when a person is sterilized after expressly refusing the procedure, without her knowledge or is not given an opportunity to provide consent'. Finally, 'coerced sterilization occurs when financial or other incentives, misinformation, or intimidation tactics are used to compel an individual to undergo the procedure'. The paper identifies that 'women with disabilities are particularly vulnerable to forced sterilizations performed under the auspices of legitimate medical care or the consent of others in their name' and characterises forced sterilisation as 'an act of violence, a form of social control, and a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment'.

Forced sterilisation amongst women with disabilities is exacerbated by traditional social attitudes that characterise disability as a personal tragedy, the difficulty some women with disabilities may have in understanding or communicating what was done to them and laws that allow legal guardians to make such decisions on the individual's behalf.

('Sterilization of women and girls with disabilities: A briefing paper' <http://www.soros.org/publications/sterilization-women-and-girls-disabilities-0>)

On the international level, *FIGO* – the International Federation of Gynecology and Obstetrics has recently issued updated guidelines on sterilisation which incorporate the disability perspective. The guidelines make it clear that only women themselves can give ethically valid consent to their own sterilisation. According to the guidelines, family members including husbands, parents, legal guardians, medical practitioners and, for instance, government or other public officers, cannot consent on any woman's or girl's behalf. The guidelines make it clear that this is so even if such procedures are recommended as being in the women's own health interests. Further, the guidelines state that all information must be provided in language, both spoken and written, that the women understand, and in an accessible format such as sign language, Braille and plain, non-technical language appropriate to the individual woman's needs ([http://www.wunrn.com/news/2011/06\\_11/06\\_27/062711\\_fem\\_ale.htm](http://www.wunrn.com/news/2011/06_11/06_27/062711_fem_ale.htm)).

The Open Society Foundation's position paper on sterilisation and women with disabilities identifies measures that may reduce the incidence of

forced sterilisation. The measures identified include making

sexual education and parenting programs available and accessible, training in self defense and assertiveness, providing the necessary personal assistance and support services in the community that will reduce the risk of sexual abuse, monitoring closed settings in which women and girls with disabilities are often placed (such as orphanages, psychiatric hospitals, and institutions), and providing alternative methods of contraception which are not irreversible or as intrusive as sterilization.

('Sterilization of women and girls with disabilities: A briefing paper' <http://www.soros.org/publications/sterilization-women-and-girls-disabilities-0>)

### **3.3.1 First person accounts of forced sterilisation**

The Mental Disability Advocacy Centre (MDAC) in its report 'The right to legal capacity in Kenya' gives a first person account of forced sterilisation, which account was given to MDAC by Atieno, a woman with an intellectual disability in her late 20s:

I don't think I would get children. I will tell you something, you see here [lifts up the blouse and reveals a scar on her stomach] here I was made an operation ... This is contraceptive, all of us had been done like this, we cannot get children ... Nobody asked me [if I want it]. They should have asked me, because I love children ... I feel bad, but what can I do now? ([http://mdac.info/sites/mdac.info/files/mdac\\_kenya\\_legal\\_capacity\\_2apr2014.pdf](http://mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2apr2014.pdf))

KELIN's report 'Robbed of Choice: Forced and coerced sterilization experiences of women living with HIV in Kenya' gives a first person account of 'Nancy', a 29 year old woman who was sterilised without her consent at the age of 25:

The doctor told me 'you are not only positive but also blind'. You cannot continue to have children ... He ignored the fact that I was married at the time and had one other child and so I could take care of children despite my condition.

(<http://kelinkenya.org/wp-content/uploads/2010/10/Report-on-Robbed-Of-Choice-Forced-and-Coerced-Sterilization-Experiences-of-Women-Living-with-HIV-in-Kenya.pdf>)

## Student activity

*For discussion:*

Learners should be asked to reflect upon the above first person accounts, in relation to the reasons that are often given to justify forced sterilisation of persons with disabilities.

### 3.4 Non-discrimination in health insurance

#### 3.4.1 Disability and health insurance

National health insurance programmes can generally guarantee either: free medical services or subsidised health services in favour of the specified beneficiaries. Furthermore the schemes can be generally available or contributions based. There can also be a fixed number of services available in respect of specific contingencies or the scheme can be broad-based.

Furthermore in regulating the commercial insurance industry states can lay down specific measures which either prohibit discrimination against persons with disabilities in the provision of the different types of cover available in terms insurance policies or can lay down promotional measures in favour of persons with disabilities. Evidence suggests that people with a history of a mental health condition can experience difficulties obtaining insurance. Discriminatory practices include either refusal of insurance or denial of claims on the grounds of non-disclosure of a previous mental health condition (<https://www.beyondblue.org.au/about-us/programs/system-reform-and-access/discrimination-in-insurance>).

Article 25(e) of the CRPD provides that states parties should prohibit discrimination against persons with disabilities in the provision of health insurance and life insurance. In reality, persons with disabilities do face discrimination in health insurance. For example, the 2013 Kenya National Commission on Human Rights' briefing paper on the right to legal capacity in Kenya states that '[i]nsurance companies were cited as being inaccessible, in some instances refusing to insure persons with disabilities because they were "a high risk" population' (<http://www.knchr.org/ReportsPublicationsThematicReportsGroupRights.aspx>).

A question that may arise is: What does it mean not to discriminate in the area of insurance, while the essence of insurance is to factor health risks into actuarial calculations? The Australian 'Guidelines for Providers of Insurance and Superannuation' provide insight into this question. Section 24 of the Disability Discrimination Act (DDA) makes unlawful: (a) discriminating by refusing to provide services (for example, complaints have been made where insurance has been refused because a person has had a depressive illness, or has a vision impairment, or has quadriplegia, or has cancer or had cancer in the past); (b) discriminating in the terms or conditions of provision of services (for

example, complaints could be made where insurance is only provided to a person with a disability at a much higher premium or after a longer waiting period than applies to persons without the disability); and (c) discriminating in the manner that services are provided (for example, as with any service provider, it is unlawful for a provider of insurance or superannuation to fail to make its information on products equally accessible to people with a disability when required) (<https://www.humanrights.gov.au/guidelines-providers-insurance-and-superannuation>).

Section 46 of the DDA provides that discrimination in insurance or superannuation is not unlawful if the discrimination is based upon actuarial or statistical data on which it is reasonable to rely; and is reasonable having regard to the matter of the data and other relevant factors or in a case where no such actuarial or statistical data is available and cannot reasonably be obtained? the discrimination is reasonable having regard to any other relevant factors. The insurer bears the burden of showing that the section 46 exemption applies. In deciding upon what is reasonable, matters taken into account include practical and business considerations, the nature of the risk being considered, all other relevant factors of the particular case and the aims of the DDA, especially the aim of eliminating disability discrimination as far as possible.

(Federal Court decision in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2004/396.html?stem=0&synonyms=0&query=bassanelli>)

#### Illustration in legislation

*Sample clause protecting persons with psychosocial disabilities from discrimination*

Kenya's Mental Health Bill 2014

Clause 11 (1) A person with mental illness shall not be discriminated against or subject to unfair treatment in obtaining adequate health insurance for the care and treatment of physical and mental health problems from public and private health insurance providers.

(2) Any person or insurance company that contravenes the provisions of this section commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or both.

### 3.5 Disability compensation regimes

This section discusses various disability compensation regimes: occupational disability compensation regimes, motor vehicle accident compensation regimes and compensation for victims of armed conflicts and other public emergencies. In discussing these compensation regimes, the facilitator should consider, and pose the following questions to learners: do these

compensation regimes fall under 'rights'? Does awarding benefits depending on the *cause* of disability contribute to a rights-based model of disability? If not, how would a rights based model provide benefits?

### **3.5.1 Occupational disability compensation regimes**

These types of regimes generally provide for compensation for persons who acquire disabilities in the course of employment. They are generally referred to as 'workmen's compensation'. Invariably such schemes provide for payment of grants to the category of beneficiaries, and such payments usually include payment of past and future medical expenses. Such regimes are further characterised by the establishment of statutory bodies that administer the system of compensation. Examples of African states' statutes dealing with the subject are: Botswana (Workers' Compensation Act), Gambia (Injuries Compensation Act), Kenya (Work Injury Benefits Act), Nigeria (Workmen's Compensation Act), and Uganda (The Workmen's Compensation Act, 2000).

### **3.5.2 Motor vehicle accident compensation regimes**

Under motor vehicle accident compensation regimes, victims of motor vehicle accidents on public roads are compensated for past and future medical expenses, where they have sustained injuries. In terms of such a regime, statutory bodies are created to administer claims in terms of the regime and deal with other related matters. An example is the South African Road Accident Fund.

### **3.5.3 Compensation for victims of armed conflicts and other public emergencies**

In respect of this broad category, a distinction is made between different causes that give rise to a claim for compensation. Generally, the following causes are treated differently: members of the armed forces who acquire disabilities in the execution of their duties, including, uniquely to the African context, members of liberation or anti-colonial paramilitary organisations who acquired disabilities in the national liberation struggle; civilian victims of armed conflicts; victims of public disturbances such as riots, strikes, terrorism and so on; and victims of natural disasters. In respect of civilian victims of armed conflicts a further category is worthy of special measures *viz* victims or survivors of landmine explosions.

## **4 How the right to health is addressed in national law**

This section examines the manner in which the right to health is addressed at the national level in selected jurisdictions. In using Kenya and Sierra Leone as examples, please refer to Section 2.2, above, on the

core challenges with regard to achieving the right to health in Africa.

### **4.1 Kenya**

Article 43(1)(a) of the Constitution of Kenya provides that every person has the right to the highest attainable standard of health which includes the right to health care services, including reproductive healthcare. Section 20 of the Persons with Disabilities Act, 2003 provides that the National Council for Persons with Disabilities shall be represented in the implementation of the national health programme under the Ministry responsible for health for the purposes of prevention and early identification of disability and early rehabilitation of persons with disabilities. The further purposes envisaged by this section are to enable persons with disabilities to receive free rehabilitation and medical services in public and privately owned health institutions, avail essential health services to persons with disabilities at an affordable cost, avail field medical personnel to local health institutions for the benefit of persons with disabilities and the prompt attendance of field medical personnel to persons with disabilities.

The Commission for the Implementation of the Constitution of Kenya has published a document titled 'Guidelines for the inclusion of persons with disabilities in mainstream society'.<sup>10</sup> Disabled People's Organisations including the Disability Caucus on the Implementation of the Constitution and United Disabled Persons of Kenya were involved in the development of the guidelines, as were the Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC). The guidelines give specific advice to policy makers and implementers on how they can use the principles under article 3 of the CRPD to effectively include persons with disabilities in all spheres of life. The recommendations are crafted in order to respond to the prevailing issues in the provision of healthcare to persons with disabilities in Kenya:

10 Commission for the Implementation of the Constitution 'CIC launches guidelines for inclusion of persons with disabilities in mainstream society' [http://www.cikeny.org/index.php/newsroom/item/429-cic-launches-guidelines-for-inclusion-of-persons-with-disabilities-in-mainstream-society#.U\\_sDsMWSzfl](http://www.cikeny.org/index.php/newsroom/item/429-cic-launches-guidelines-for-inclusion-of-persons-with-disabilities-in-mainstream-society#.U_sDsMWSzfl) (accessed 25 August 2014).

Recommendations	Actors
<p><b>To fulfil the right to the highest attainable standard of health, the state should:</b></p> <p>(a) Address discrimination against persons with disabilities which is prevalent in the field of health insurance.</p> <p>(b) Address discrimination in the realm of reproductive health care with regard to persons with disabilities, especially women with disabilities (the parenting abilities of women with disabilities are frequently questioned and their children taken from them against their will; their right to marry and found a family is also often limited to the point of complete denial).</p> <p>(c) Ensure awareness-raising interventions targeting women with disabilities to inform them about their right to retain their fertility.</p> <p>(d) Health interventions for persons with disabilities should be provided on the basis of their free and informed consent.</p> <p>(e) Ensure that health services are available, accessible, acceptable and of good quality. In this regard, equipment and material used in hospitals should be designed in such a way as to ensure that they are usable to persons with disabilities. An example in this case is mammogram machines.</p> <p>(f) Ensure that mental healthcare services are provided within the community as opposed to primarily within institutional settings</p> <p>(g) Ensure that its employees in public hospitals understand the rights of people with disabilities, and specifically their right to retain their fertility (in this regard, actions such as forced sterilisation of disabled people should attract penal sanctions)</p> <p>(h) Improve diagnostic services. This is especially relevant in the realm of mental healthcare. Persons with Autism are often institutionalised at Mathare Hospital having been misdiagnosed as persons with mental illness. This underscores the need to address the extensive institutionalisation of persons with psychosocial disabilities in Kenya and the need to provide a variety of support measures including crisis and recovery supports, multidisciplinary home-based and assertive outreach care and a comprehensive range of relevant medical, psychological and social therapies for service users and their families.</p>	<p><b>State actors</b></p> <p>(a) Ministry of Health</p> <p>(b) County Governments</p> <p>(c) National Government (with regard to health policy)</p> <p>(d) National Gender and Equality Commission</p> <p>(e) Kenya National Commission on Human Rights</p> <p><b>Non-State Actors</b></p> <p>(a) Private insurance companies</p> <p>(b) DPOs</p>

## 4.2 Sierra Leone

The health system in Sierra Leone has been undergoing a process of decentralisation since 2004. The legal framework is provided by the Hospital Boards' Act of 2003, the Local Government Act of 2004 and the Persons with Disability Act 3 of 2001. The 2002 National Health Strategy indicates that disability is one of the priority health problems in Sierra Leone.

The report 'Moving forward together: Report on the rights of persons with disabilities in Sierra

Leone' by the United Nations Integrated Peace Building Office (UNIPSIL) in Sierra Leone, states that persons with disabilities in Sierra Leone are more likely to be excluded from accessing healthcare while those that do access health services carry higher financial burdens. According to the report, the type and quality of service largely depends on the price paid for it. For example, orthopaedic materials are mostly imported and therefore very expensive and affordability of more advanced healthcare remains a problem. With regard to health services that are needed by persons with disabilities specifically because of their disabilities, there is no specific allocation within the Ministry of Health to support disability related intervention (with the exception of a small pilot programme on community rehabilitation). Most of the rehabilitation services are provided by partners such as development agencies and NGOs. In addition to financial constraints, the report identifies other barriers to persons with disabilities in Sierra Leone accessing healthcare: inaccessible transportation, distance, accessibility of medical facilities, long queuing and communication barriers.

On mental health, the UNIPSIL report identified the following challenges: lack of community mental health services or psychiatric services in general hospitals in Sierra Leone (there is only one psychiatric hospital in Sierra Leone located in Kissy, Freetown, and only one psychiatrist in the country at the time of the report-2011), deplorable conditions in the psychiatric hospital (chaining patients to beds, poor sanitation, shortage of drugs, food and electricity), little regard for mental health issues among government officials, widespread stigma and discrimination amongst families and communities, the concealing of persons with psychosocial disabilities within private homes and finally, when admitted in the psychiatric institution, the consent of the person with a psychosocial disability is not systematically sought; instead, admission largely occurs on the consent of families.

However, the report also contains some good practice examples in the health sector:

Participants from Ngo town, Kono District reported that medical personnel pay home visits when persons with disabilities are unable to reach the health centre and try to find drugs even when these are not available in town.

Persons with disabilities were originally included in the Free Health Care Programme by the government which was eventually restricted to pregnant women, lactating mothers and children under five years old. Persons with disabilities qualify for treatment at cost recovery price although this is restricted to National Rehabilitation Centres and depends upon availability of drugs, that is, this reduced cost service is inconsistent and uneven. In this light, the implementation of section 17 of the Persons with Disability Act 3 of 2001, which generally guarantees to Sierra Leonean persons with disabilities the right to free medical services at public health institutions, will contribute to stabilising the situation. The sustainability of such a far reaching provision will ultimately depend on allocation of resources.

(‘Moving forward together: Report on the rights of persons with disabilities in Sierra Leone’ by the United Nations Integrated Peace Building Office (UNIPSIL) in Sierra Leone <http://unipsil.unmissions.org/LinkClick.aspx?fileticket=HNvCvCysVLQ%3D&tabid=9611&language=en-US>)

### 4.3 United Kingdom<sup>11</sup>

Publicly funded healthcare in the UK is provided through the National Health Service (NHS) in England, Health and Social Care in Northern Ireland, NHS Scotland and NHS Wales. The NHS was founded in 1948 and provides free healthcare (at the point of need) to everyone within the UK. The only exception is that in England a relatively small charge is made (known as a prescription charge: all medication is however free to people in hospital or under 16/over 60 or on a low income).

The key legislation in England is the NHS Act 2006; in Wales, the NHS (Wales) Act 2006; in Scotland, the NHS (Scotland) Act 1978; and in Northern Ireland, the Health and Personal Social Services (Northern Ireland) Order 1972. The provisions of the Equality Act 2010 (for England, Scotland and Wales) and the Disability Discrimination Act 1995 (for Northern Ireland) apply.

In England, NHS services are delivered by about 200 Clinical Commissioning Groups which are locally based and responsible for ensuring that their locality has adequate health care services. In Wales, there are seven such bodies (known as Local Health Boards) and in Scotland there are 14 (known as Regional NHS Boards). In Northern Ireland, health and social services are commissioned by a single Regional Health and Social Care Board (created by the Health and Personal Social Services (Northern Ireland) Order 1972) which devolves responsibility for the delivery of services to 5 regional trusts. Northern Ireland is the only nation in the UK where responsibility for both health and social care support is delivered by the same body. In England, Wales and Scotland, social care services are the responsibility of local government and subject to distinct legislation and funding arrangements.

#### 4.3.1 Legislation and policy on healthcare

In addition to the legislation noted above, healthcare related legislation includes: in Scotland, the Community Care and Health (Scotland) Act 2002 and the Patient Rights (Scotland) Act 2011, the Public Health etc (Scotland) Act 2008 and the Mental Health (Care & Treatment) (Scotland) Act 2003; in England and Wales, the Mental Health Act 1983 Act and the Mental Capacity Act 2005.

The following policies regulate access to health services in the UK:

11 From the UK State Report to the CRPD Committee [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29) (accessed 20 February 2015).

- (a) ‘Healthy lives, healthy people White Paper: Our Strategy for Public Health in England’ 2010. The Paper addresses the wider factors that affect people at different stages in their lives, instead of tackling individual risk factors in isolation. It includes investing to increase health visitor numbers, doubling by 2015 the number of families reached through the Family Nurse Partnership programme, and refocusing Sure Start Children’s Centres on those who need them most.
- (b) The national mental health strategy ‘No Health without Mental Health: A cross-Government mental health outcomes strategy for people of all ages’ 2011. Its aim is to improve public understanding of mental health, and reduce negative attitudes and behaviours towards people with mental health problems

#### 4.3.2 Health care on the ground in the UK

In Scotland, the National Patient Experience Programme ‘Better Together’ Inpatient Survey for 2009/2010 showed that patients who identified themselves as disabled were slightly less positive about their overall experience as in-patients compared with patients who identified themselves as non-disabled. In its report to the CRPD Committee, the UK government conceded that there are attitudinal barriers in health services but undertook to change these negative attitudes through awareness-raising.

#### *Children*

Scotland’s approach to disabled children is founded in the ‘Getting it Right for Every Child’ (GIRFEC) approach. Alongside the duties set out in the Community Care and Health (Scotland) Act 2002, this approach puts children’s needs at the centre of systems and decision-making, and works to deliver services that meet those needs.

In Wales, the ‘Disabled Children Matter Wales’ campaign aims to enable disabled children to express their views directly to Ministers in Wales. The campaign directly influenced the decision by the Welsh Government to award £1 million to develop early support materials, including information booklets, to support disabled children and their families. The Early Support Programme aims to ensure that services used by young disabled children and their families are better coordinated and provides them with the information they need at the time they need it.

#### *Disabled adults*

In England patients receiving health care services can – in a few situations – opt to have what is known as a Personal Health Budget (and sometimes an actual cash payment – known as a ‘direct payment’) so they can have greater choice and control over funding spent on their health care.

### 4.3.3 Monitoring health care

In England, the Care Quality Commission (CQC) is the independent regulator of all health and adult social care, including for disabled people. The CQC regulates hospital treatment, mental health services and care in residential homes, in the community and in people's own homes. In Wales, the 'Healthcare Inspectorate Wales' fulfils a similar role and in Scotland this is discharged by 'NHS Quality Improvement Scotland'.

#### Student activity

##### Essay

You are a human rights advocate who has been trained on the human rights of people with psychosocial disabilities. A person (Siditi) comes to your office and recounts having gone through the following experience:

It was about two months ago. I was not feeling well; i'd just failed important professional exams, and i'd broken up with my girlfriend. I was not sleeping well, and also, I was not motivated to do anything, including, eat, or shower, or socialise. I had locked myself in my room. My father and brothers came and broke down the door, despite the fact that I was asking them to give me some time to compose myself. They then dragged me outside, and tied me up with ropes, following which they bundled me to the boot of the car and drove off. Upon reaching the hospital, the nurses held me down and injected me by force, even though I told them clearly that I did not want to be injected. After I woke up I was really angry, and so I refused to eat, and to take medication for some time. Dr. Keene recommended that I undergo Electroconvulsive therapy (ECT). I was then subjected to ECT treatment to which i did not give my consent. Indeed nobody explained to me what was going on. All I know now is that since then I suffer from things that I cannot explain for example memory lapses which have caused me to be fired from my job. I do want to keep recovering, but am plagued by fears that I will go through this again. I know that it's not right, what was done to me, but I don't know how to make sure it does not happen again.<sup>1</sup>

What, if any, human rights violations are revealed by Siditi's experience? If all the parties involved (Siditi, Siditi's father and brother, the nurses at the Mental Health facility where Siditi was taken, Dr Keene, Siditi's employer) were informed about human rights and were willing to uphold them, how should the situation have unfolded? Do you think human rights knowledge would make any difference at all to Siditi's experience? Assume that Siditi would like to take legal action for the infringement of his rights. What mechanism do you think would best suit his case? In what forum? Citing which laws?

<sup>1</sup> This case is taken from Users and Survivors of Psychiatry – Kenya 'Facilitator's guide: Human rights of persons with psychosocial disabilities'.

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- Special Rapporteur on torture and other cruel, inhuman or degrading treatment 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan E Méndez' [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)
- Pieterse, M *Can rights cure? The impact of human rights litigation on South Africa's health system* (2014) Pretoria University Law Press

### Films

The films identified here are drawn from:

- Hall, T 'Using film as a teaching tool in a mental health law seminar' [http://www.law.uh.edu/hjhlp/Issues/Vol\\_52/Hall.pdf](http://www.law.uh.edu/hjhlp/Issues/Vol_52/Hall.pdf)
- 'A beautiful mind' (DreamWorks Pictures 2001)
- 'One flew over the cuckoo's nest' (Fantasy Films 1975)
- 'Girl, Interrupted' (Sony Pictures 1999)
- 'Call me crazy' (Made for television film 2013)
- 'Shine' (1996)

### Further reading

- Australian Human Rights Commission 'Guidelines for providers of insurance and superannuation' <https://www.humanrights.gov.au/guidelines-providers-insurance-and-superannuation>
- Darold, A & Treffert, MD 'The MacArthur Coercion Studies: A Wisconsin perspective' (1999) 82 *Marquette Law Review* 759 <http://scholarship.law.marquette.edu/mlr/vol82/iss4/4>
- INTERIGHTS 'Right to health in Africa' <http://www.interights.org/right-to-health-africa/index.html>
- International Federation of Gynecology & Obstetrics 'Female Contraceptive Sterilization' [http://www.wunrn.com/news/2011/06\\_11/06\\_27062711\\_female.htm](http://www.wunrn.com/news/2011/06_11/06_27062711_female.htm)
- KELIN 'Robbed of Choice: Forced and coerced sterilization experiences of women living with HIV in Kenya' <http://kelinkenya.org/wp-content/uploads/2010/10/Report-on-Robbed-Of-Choice-Forced-and-Coerced-Sterilization-Experiences-of-Women-Living-with-HIV-in-Kenya.pdf>
- Kenya National Commission on Human Rights 'Briefing paper on the right to legal capacity in Kenya' (2013) <http://www.knchr.org/ReportsPublications/ThematicReportsGroupRights.aspx>
- Little People of Uganda Website <http://www.littlepeople.ngo.ug/>
- Mental Disability Advocacy Centre 'The right to legal capacity in Kenya' [http://mdac.info/sites/mdac.info/files/mdac\\_kenya\\_legal\\_capacity\\_2\\_apr2014.pdf](http://mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2_apr2014.pdf)

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- United Nations Integrated Peace Building Office (UNIPSIL) 'Moving forward together: Report on the rights of persons with disabilities in Sierra Leone' <http://unipsil.unmissions.org/LinkClick.aspx?fileticket=HNvCvCysVLQ%3D&tabid=9611&language=en-US>

## Module 6: Participation in political and public life

### Module overview

This module aims to give learners an understanding of the concept of political participation for persons with disabilities under article 29 of the Convention on the Right of Persons with Disabilities (CRPD). The module will first will examine the legal requirements under article 29 of the CRPD. This part will also explain the two major components of political participation towards persons with disabilities, that is, the right to vote and the right to be elected. Learners will be required to critically analyse the provision of their domestic law that touches on participation in political and public life for persons with disabilities. The second part of the module examines the justification for political participation for voters with disabilities in Africa. The third part of the module explores good regional practice and in so doing considers suggestions for reform in order to ensure effective participation in political and public life for persons with disabilities on an equal basis with others. Part four introduces the problems voters with disabilities face while exercising franchise. Part five then applies article 29 of the CRPD in the African context by examining issues that relate to participation in political and public life which affect persons with disabilities. Finally, the module suggests different measures that countries may use to ensure an inclusive political process.

### Learning objectives

Upon completion of this module, the student will be able to:

- Understand the implications of article 29 of the CRPD on participation on political and public life;
- Explain what the core issues with regard to political participation for persons with disabilities are;
- Critically analyse their own legal systems and identify the barriers which limit persons with disabilities to effectively participate in political and public life;
- Identify good practices on participation in political and public life for persons with disabilities at the regional and international level; and
- Assess the barriers facing person with disabilities in participating in political and public life as well as suggest possible solutions to these barriers.

### 1 What does the CRPD provide in relation to the right of persons with disabilities to participate in the political process?

#### 1.1 Lecturer's notes

*The module assumes that different rights related to persons with disabilities have been introduced to learners at this stage. The module further assumes that the CRPD has also been introduced to learners. At this stage the module exclusively focuses on article 29 of the CRPD which provides for the right to political participation for persons with disabilities.*

*When introducing the module learners can be asked if they have had the chance to read article 29 of the CRPD. Learners can also be asked their understanding of article 29. Did they get any salient features from reading article 29 of the CRPD? Learners can also be asked to reflect on relation of this article with other articles in the CRPD importantly articles 5, 9 and 12 of CRPD. Learners can be asked on their understanding of what political participation means under international human rights having the ICCPR in mind. They can reflect on what the ICCPR provides for political participation. Does the ICCPR proscribe political participation for persons with disabilities?*

*The module assumes that the right to political participation is guaranteed in the countries' constitutions. Learners can therefore be asked to reflect on the significance of what was contained in the clauses of the Bills of Rights of their own country in relation to political participation for persons with disabilities.*

The CRPD is the first international human rights instrument to provide specific details as to the right of persons with disabilities to participate in political and public life. Article 29 of the CRPD elaborates this right in the context of disability (Janet, 2014). Interpreted on its own and together with provisions of cross cutting applicability in article 3 (general principles), article 4 (general obligations) and article 5 (equality and nondiscrimination), the CRPD categorically prohibits all exclusionary practices connected to political participation (JE Lord et al, 2014).

The general principles set out in article 3 such as non-discrimination, inclusion, participation and autonomy, serve as an additional check against limitations and exclusions grounded in disability animus (Janet, 2014). Moreover, article 4(3) of the CRPD expresses the general obligations that states must consult person with disabilities when developing and implementing legislations and policies to give effect to the CRPD and in other decision making process of concern. (JE Lord et al, 2014)

## 1.2 Understanding political participation and public life

The Committee to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW Committee) defines political and public life as

... a broad concept referring to the exercising of political power in particular the exercising of legislative, judicial, executive and administrative power. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community based organizations and other organizations concerned with public and political life

(CEDAW, General Comment 23; Political and Public Life, paragraph 5).

The Human Rights Committee to the ICCPR, in its elaboration of article 25 of the Covenant, takes a similar position. It reaffirms the fact that

the conduct of political and public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administration powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, regional and local levels.

(ICCPR; General Comment 25, The Right to Participate in Public Affairs and the Right of Equal Access in Public Services, article 25, 07/12/96.)

Based on these international instruments, it appears that persons with disabilities need to be allowed to participate in politics because this is where decisions affecting their lives are made. Further the right to political participation under the CRPD allows voters with disabilities the right to vote and be elected.

Article 29 guarantees the right of persons with disabilities:

- To vote, on a non discriminatory basis in elections;
- To access an effective, impartial and non discriminatory procedure for the registration of voters;
- To have equal and effective access to voting procedures and facilities in order to exercise their right to vote, including the provisions of **reasonable accommodation**;
- To secretly cast their votes;
- To have assistance in order to exercise their right to vote or stand for elections as a candidate for public office;
- To participate in the conduct of public administration, including the administration of political parties and civil society;
- To participate in the work of international organisations, including serving as a representatives of government in international organisations; and
- To form and join DPOs at all levels.

### 1.2.1 The right to vote for persons with disabilities

Political participation in most cases entails exercising the right to vote (Janet, 2012). Voting is a well-established right of citizens in the normal process of elections through which a representative or indirect participation in the overall decision-making processes of the country is to be effected (Waterstone, 2011; Janet, 2012). Even though it is clear that every citizen is endowed with this right, a simple constitutional or other legislative recognition of the right to vote in a general term may not guarantee the enfranchisement of citizens with disabilities in this democratic process (Earle & Bushner, 2002). Therefore, to ensure that voters with disabilities can have access to voting, special accommodations may be required to facilitate the process. These facilities and technical assistance vary depending on the type of disability and the corresponding need for accommodations (Janet, 2014).

### 1.2.2 The right to be elected for persons with disabilities

The right to be elected is the other form of political participation. Just like right to vote, mere constitutional or legislative declaration and recognition of this right to 'every citizen' does not entail that persons with disabilities are guaranteed the same plain to compete for a seat at the legislature or to hold office in the executive (Earle & Bushner, 2002; Phitalis, 2011). For this right to be realised, it needs to have both long term and urgent accommodative measures which include conscious and creative individual and collective efforts as well as programmes aimed at assessing and minimising of those barriers that would otherwise impede their activeness in this political spectrum (Phitalis, 2011). To this end, regular and consistent disability sensitisation programmes should be disseminated to the community and its leadership as a first step (Phitalis, 2011). This will not only increase societal awareness, but also minimise the public ignorance

and mistrust towards person with disabilities (Phitalis, 2011; Chege, 2007).

Furthermore, this right cannot be realised by states merely abstaining from taking measures which might have a negative impact on the right. But states are also required to take positive measures including reasonable accommodations to overcome the obstacles that might prevent voters with disabilities from being elected (Human Rights Council, 2011). The CRPD Committee in its concluding observations to Spain stated that for person with disabilities to be able to hold public office properly, they need to be provided with all required support, including personal assistants (CRPD/C/ESP/CO/1, paragraph 48). Therefore, measures that government can take to realise the right to be elected may include use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities (Human Rights Council, 2011).

The CRPD under article 5(4) provides for affirmative action for person with disabilities. These may include measures that are necessary to accelerate equality for person with disabilities in the political participation area. Quotas have been used in different countries to try and have representations for person with disabilities in parliament. For instance in Kenya there is an obligation to ensure the progressive implementation of the principle that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities' (Constitution of Kenya, 2010, article 54(2)). Even the legislation in Burkina Faso provides for the quotas in legislative, executive or judicial bodies (Human Rights Council, 2011, paragraph 50).

### 1.3 What other human rights treaties say about political participation

The right to participate in political processes is a well-established principle of human rights law and is expressed in article 21 of the *Universal Declaration of Human Rights* (UDHR). Furthermore, article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that:

**Every citizen** shall have the right and the opportunity ... without reasonable restrictions ... to vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Specialised human rights conventions, including the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Convention on the Rights of the Child* (CRC) all recognise the right to participate in decision-making for racial minorities, women, and children respectively.

## 2 Justifications for political participation for persons with disabilities

### 2.1 Lecturers notes

*The module makes the assumption that learners have had the chance to discuss article 29 in detail. The module also assumes that learners at this stage of the module have been able to discuss the importance of political participation for the general public. Here learners can be asked what are some of the reasons why political participation is important. Learners can also be asked why political participation is important for persons with disabilities. Learners should have a thorough understanding of why the right to political participation is said to be a right and a means towards attaining other rights especially in regards for persons with disabilities. Learners should also be asked whether it is important to allow persons with disabilities participate freely in political affairs. If some of the answers are not affirmative then learners should be able to give reasons.*

Persons with disabilities, like all other citizens, need to be represented for several reasons, as discussed in the following paragraphs.

### 2.2 The legitimacy perspective

Under this approach, persons with disabilities need to be allowed to participate in politics and even vote for 'one of their own' so that there is a genuine link between the represented and the representatives. Therefore a legitimate parliament should be able to claim the requisite and moral force from the electorate (Philips, 2001). Conversely, if there is no representation of the disabled community in parliament, they may not owe any type of moral claims (Philips 2001). Furthermore, with person with disabilities elected to parliament, it would help parliament 'act for' rather than 'stand for' the rights of disabled community (Philips 1994). This in turn creates some sort of ownership in the mindset of the represented as long as parliament is acting for their rights (Sawer, 2008). However, this is not true in most African countries, as disabled communities do not feel the sense of ownership because of their under representation or no representation at all within the government.

### 2.3 The social justice perspective

This perspective tries to rationalise the importance of political representation for person with disabilities through the explanation of some social purposes (Crowley, 2001). There is usually a consensus that social causes can be addressed through political representation (Philips, 1994). For instance, persons with disabilities may seek remedies through their representatives for some social issues such as efforts to increase the standard of living and to make housing more affordable if the group is fairly represented in politics. In addition, representing persons with disabilities may assist in addressing the social injustice and the impacts of such prejudice. Therefore, political representation for people with

disabilities not only ensures breaking the link between social inequality and their political reflections, but also avails facilities for person with disabilities, which pave way for their consultation and protection. (Crowley, 2001)

## 2.4 The democratic perspective

Democracy refers to the 'governance of the people for the people by the people' (Albert 2007). Democracy demands cognisance of minority rights while acknowledging majority rule. Therefore people with disabilities have a right to exercise their rights on an equal basis with the majority. One such right is the right to political participation and public life. If people with disabilities are entitled to enjoy this right on an equal basis with citizens without disabilities, they may feel more a part of the democratic electoral system. The democratic approach essentially justifies the importance of the political participation for person with disabilities because it stands in favour of an inclusive political system (Albert 2007).

## 3 Regional approach

### 3.1 Lecturers notes

*Under this part of the module, students will be focusing on the regional application of the right to political participation with regards to persons with disabilities. The module assumes that learners have knowledge of the different UN regional bodies. The modules on that assumption request learners to briefly discuss the different UN regional bodies and the different treaties applicable to it. Learners can be asked which is the applicable court under the Americas, Europe and Africa. Learners can also be asked on the importance of the regions towards human rights protection especially for the marginalized like persons with disabilities.*

*Learners can be asked to read in detail the treaties applicable to the Americas, Europe and Africa. In doing so, learners can be requested to find out the provisions applicable to political participation for persons with disabilities. Learners should be able to note whether persons with disabilities are allowed to participate freely in election of their government. If not, then learners should note what the limitations towards persons with disabilities in political participation are. Learners should analyse why the limitations are placed towards persons with disabilities. Learners should also be asked to find if there any case law applicable to persons with disabilities right to political participation in any of the regions discussed.*

*The module also assumes that learners are from different African countries. With that assumption in mind, learners can be asked to look at their domestic laws applicable to political participation. Are persons with disabilities allowed to participate freely in their countries political affairs? Learners should pay close attention to the language used in their domestic legislations such as 'unsound mind'. Learners should try to find out whether there is definition of terms such as 'unsound mind'.*

Below the approaches of the regional human rights systems in the Americas, Europe and Africa to

participation are discussed as well as some examples from states in these regions.

## 3.2 The Americas

The American Convention of Human Rights 1969 guarantees the right to participate in political affairs and public life. Article 23 of the Convention provides that every citizen has the right to vote. However, the second clause qualifies that right:

The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

In the USA, the right to vote is a 'fundamental right' meaning that laws that seek to limit this right will receive the strictest scrutiny by courts. Different laws in the US protect voters with disabilities. The Voting Rights Act 1965 provides that The Voting Accessibility for the Elderly and Handicapped Act 1984 guarantees voting accessibility in federal elections for the handicapped and the elderly. The Rehabilitation Act 1973, though not a voting law, applies to voting since it seeks to stop discrimination to otherwise qualified voters. The American with Disabilities Act 1990 also protects rights for voters with disabilities from discrimination. This Acts prohibits discrimination based on disability in accessing elections in the USA. Most recently, the Help America Vote Act of 2002 (HAVA) was enacted to ensure fairness and accuracy of federal elections. It also addresses the right of people with disabilities to vote by providing federal funds to make polling places and voting machines accessible and to educate officials, poll workers, and volunteers who work at the polls regarding the access needs and voting rights of people with disabilities (Kanter & Russo, 2006).

In terms state elections, 39 of 50 states in the US have capacity requirements for voters with disabilities to exercise franchise. For example the state of Delaware requires a person to be 'adjudged mentally incompetent' by specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment, before that person can be prohibited from voting (15 Del Code Ann § 1701 (Amended by 73 Del Laws, c 34, effective 8 May 2001).

In Canada, a federal court held in 1988 that the provision of the Canadian Elections Act 2000 prohibiting a person who is 'restrained of his liberty of movement or deprived of the management of his property by reason of mental disease ...' from voting was both overbroad and arbitrary. Rather than amend the Act to make it more narrowly tailored, the Canadian Parliament repealed that section of the Act entirely, and thus Canada is one of the few countries that has no capacity requirement for voting.

### 3.3 Europe

At the European level, the right to free elections is guaranteed by article 3 of Protocol 1 to the European Convention on Human Rights 1952 (ECHR). It was initially unclear whether the Convention's drafters wanted to confine themselves solely to the democratic structures of the ECHR member states or to guarantee an individual right to free elections for everyone (Harris, 2009). The European Court of Human Rights (ECtHR) case law clarified this. In its landmark judgment of *Mathieu-Mohin and Clerfayt v Belgium* [No 9267/81] of 1987, the ECtHR confirmed that Article 3 of Protocol 1 protects the 'subjective right of participation' (paragraph 51) – that is, the right to vote and the right to be elected.

Although no specific limitations to the right to free elections are included in article 3 of Protocol 1 the ECtHR has recognised that the right to vote is not absolute. Some restrictions foreseen by national legislation are permissible. But the ECtHR always inquires as to whether limitations imposed are impinging on the 'free expression of the opinion of the people in the choice of the legislature'. In doing so, the ECtHR 'looks for arbitrariness or a lack of proportionality' in the restrictive measures introduced by national authorities (Harris, 2009).

The ECtHR decided a case in which the applicant complained about his automatic disenfranchisement due to his mental health problems. In the landmark judgment of *Alajos Kiss v Hungary*, the ECtHR unanimously found a violation of article 3 of Protocol 1. The court stressed that no independent assessment or review had been conducted in order to assess whether the individual could in fact vote.

#### Case highlight: *Alajos Kiss v Hungary*

Mr. Kiss suffered from manic depression and was placed under partial guardianship. Under article 70(5) of the Hungarian Constitution, persons placed under total or partial guardianship lose their right to vote. In assessing the proportionality of this measure, the ECtHR noted that the Hungarian legislature never 'sought to weigh the competing interests or to assess the proportionality of the restriction' (paragraph 41). The Court went further in denying a wide margin of appreciation to Hungarian authorities since,

if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question ... The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs ... (paragraph 42).

In the course of reaching its conclusion, the Court made some far-reaching statements, referring in particular to article 29 CRPD:

*The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law, (...). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote (paragraph 44).*

The importance of the *Kiss* case cannot be underestimated. The judgment clearly strikes down automatic deprivation of voting rights of persons under protective measures.

However, despite this landmark decision from the ECtHR, some countries in Europe still have exclusionary provisions limiting person with disabilities from exercising franchise. For instance the Hungarian Constitution provides an explicit exception from the universal right to vote – only persons with full legal capacity can exercise it (article 70(3) of the Constitution of Hungary). Persons placed under full or partial guardianship, even if in an unrelated area (such as parental rights, or consent to medical treatment), are excluded from political participation.

On the other hand, countries like The Netherlands have opted for a no exclusion policy. The 1983 constitutional text provided that persons who because of their intellectual disabilities were placed under custodial care could not exercise their right to vote (article 54(2) of the Constitution). In 2003, the Administrative Judicial Department of the Council of State held that this general exclusion provision was in violation of the ICCPR. Following this decision and advice of the Electoral Council, in 2008 the Constitution was amended and the provision was repealed. Therefore, individual with intellectual disabilities can now enjoy the right to vote. (Council of State decision 29.10.2005, LjN AM5435)

### 3.4 Africa

The African Charter on Human and Peoples' Rights 1981 governs human rights issues in Africa. The values of the Charter in the promotion and effective implementation of the political rights of persons with disabilities can be acknowledged from different angles. First, the preamble of the Charter espouses freedom, equality, justice and dignity to which these people are highly in need of. Secondly, the Charter unequivocally compels the need to root out all forms of discrimination based on non exhaustive lists of grounds like race, colour, sex, language, religion or political opinion. Though disability is not expressly mentioned, on the same grounds already addressed in the previous instruments, the non-discrimination provision of the Charter could serve as an essential

tool to fight discriminations in the political tournaments on the ground of disability. Non-discrimination on the basis of disability could be read inter alia to the category of 'other status' and based on the wording of the article which prohibits discrimination of 'any kind'. Articles 3, 5 and 19 of the Charter deal with the fundamental notions of equality (at the individual level), inviolability of human integrity and dignity which apply equally to all human beings and the equality amongst people (as a group). Hence, these provisions clearly recognise the equality of persons with disabilities as an individual and as group of people without any difference. Article 13 addresses the right to participate in the government of one's own country which is to be reflected in different ways. However, it must be noted that, article 13 is not as clear and detailed as the provisions of other human rights instruments which recognise the same right (Mbondenyi, 2009).

The African Charter on Democracy, Elections and Governance 2007 is also relevant to the electoral rights of person with disabilities. This Charter provides for the promotion of representative system of government with effective citizen participation in the democratic, development and governance issues recognising universal suffrage as inalienable rights (article 8). States are mandated to eliminate all forms of discrimination and that states need to take positive legislative & administrative measures to protect minorities.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 protects the right of women with disabilities to political participation. Women with disabilities suffer double discrimination that is, discrimination based on sex and disability. Article 9 entitles women with and without disabilities the right to equal participation in political life of their country through affirmative action, enabling national legislations and other measures that could ensure their participation without any discrimination. The Protocol also provides for the right to be represented in all electoral processes at all levels equally with men.

In *Purohit and Others v The Gambia*, the African Commission held that the right to political participation is extended to every person under the ACHPR, including persons with mental disability.

#### Case highlight: *Purohit & Others v The Gambia*

**Facts of the Case:** Mental health advocates witnessed the inhumane treatment of mental health patients in a hospital psychiatric unit and in their complaint to the Africa Commission on behalf of the patients detained in the unit, they challenged the legislation governing mental health, the *Lunatic Detention Act 1917*. The complainant alleged numerous violations including that the Act contained no guidelines for making a determination and diagnosis of mental disability, there were no safeguards required during the diagnosis, certification or detention of the persons, there was no requirement of consent to treatment, no independent examination of conditions, and no provisions was made for legal aid or for compensation in case of rights violation. The complainant also alleged that persons in the psychiatric unit were denied in their right to vote and this violated their human rights.

Decisions of the Commission:

- The Commission found that exclusions of persons with mental disabilities in a Gambian psychiatric hospital from voting constituted a violation of their human rights under the African Charter of Human and Peoples Rights.
- The Commission stated that 'it is very clear that there are no objective bases within the legal systems of the Respondent State to exclude mentally disabled persons from political participation'.

Despite the ruling of the African Commission in *Purohit*, persons with disabilities especially those with intellectual or psychosocial disabilities, have been deprived of legal capacity and placed under guardianship or in institutions against their will and are denied the right to vote in many countries in Africa. In **Uganda** for example, persons with disabilities have representation at national and local levels but persons who are of unsound mind are not allowed to vote (Uganda Constitution 1995, section 80(2) & 102; Presidential Election Laws 2005, Section 4; Parliamentary Elections Act 2005 section 4). This is so despite Uganda being one of the countries with many elected person with disabilities. Uganda uses a quota system that reserves seats in Parliament for person with disabilities and the government pays for sign language interpreters and personal assistants for those elected (Uganda Constitution 1995, section 78(1)). It is estimated as result of this initiative, there are 47 000 councillors with disabilities working at local government structures (World Report on Disability 2011). This essentially means that there is at least one representative of the disability community at each of the five levels of local council.

Section 32 of the Constitution of **The Gambia** 1997 specifically guarantees protection of the rights of the disabled. These rights include but are not limited to access to health services, education and are against discrimination. In fact the state is mandated by section 216 to ensure that policies they pursue protect the right of the disabled. Where a voter is unable to exercise his/her franchise properly the Elections Decree 1996 provides that the presiding officer may offer assistance to such a voter (section 66(10)). However, a voter with an intellectual disability is excluded from exercising franchise (Constitution 1997, section 39).

Furthermore, section 13 of the Election Decree calls people with an intellectual disability a 'lunatic' whose name cannot be entered or retained on the register of voters.

In **Zambia** the Constitution provides that any person who under the laws of Zambia is adjudged or otherwise declared to be of unsound mind shall not make an application for registration as citizen (article 6(2) Constitution of Zambia 1991). Furthermore, a person shall not be qualified to be elected as a member of the National Assembly if he/she is of unsound mind (article 65(1)(b) Constitution of Zambia 1991). If one becomes of unsound mind then he/she does not have the right to hold office of Member of Parliament (article 133(2)(f) Constitution of Zambia). Section 7 of Electoral Act 2006 states that 'no person shall be qualified for registration as a voter if he/she has been adjudged of unsound mind'. The Local Government Elections Act 1991, section 17, also bars person of unsound mind from being elected as a councilor.

Article 81 of the **Kenyan** Constitution provides that the electoral system has to adhere to the principles of fair representation of people with disabilities. The state is obliged to promote the use of Sign Language, Braille, and other means of communication and technology to accommodate PWDs in the voting process. Under section 29 of the Persons with Disabilities Act all PWDs shall be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections. The Constitution in article 232(1)(iii) guarantees representation of PWDs in the National Assembly. Article 83(1)(b) prohibits any person to be registered as a voter if declared to be of unsound mind.

The right to vote in Equatorial **Guinea** is protected by article 2 of the Constitution 1991 which provides 'national sovereignty shall be vested in the people who shall exercise it through election by universal suffrage'. Exclusion of voters with mental disabilities is evidenced in article 43(1) which states that 'the president may end his functions in the event of permanent and mental invalidity'. The Electoral Law of 1993 (last amended 1995) also provides that citizens suffering from mental disability and those committed in psychiatric institutions are not allowed to vote (article 8). The law further provides that a prime minister and president may be forced to end their terms in case of a permanent physical disability (article 43 & 57 of the Constitution 1991).

Article 19 of **Central African Republic Constitution** 2004 provides that 'all Central Africans of both genders, of age eighteen or older, benefitting of their civil rights, are qualified as electors under the law'. Article 9 further provides that persons with disabilities should be assisted when exercising franchise. However, the Electoral Code of the Central African Republic 2004, article 79, provides that the right to vote is suspended for those people who otherwise are allowed to vote but committed to a psychiatric institution. The Code further inhibits accessibility of voters with disabilities by providing that no one may vote by proxy or correspondence (article 80, Electoral Code of the Central African Republic 2004). This

essentially limits any help that a voter with disability may require.

The **Tanzanian Persons with Disabilities Act** contains a number of provisions guaranteeing various rights for persons with disabilities. Section 51 of Act provides for political participation and enjoyment of public life for people with disabilities. The Act further ensures PWDs in Tanzania, have the right to vote and hold public office. The Act directs the minister responsible to make consultation with the National Electoral Commission to facilitate the participation of persons with disabilities in the voting process. The Act directs the National Electoral Commission to ensure polling stations have accessible requirements to voters with disabilities including accommodation of voters of all kinds of disabilities. The Act directs the provision of education to workers in the polling stations to assist PWDs to vote during elections. However, it should be noted that section 11(1)(b) of the Tanzanian Elections Act of 1985 restricts persons with intellectual disabilities and mental health problems from registering as voters and participate in political affairs.

In **Namibia** both people with and without disabilities have a right to vote as stipulated by article 17 of the Constitution which states 'every citizen who has reached the age of eighteen years shall have the right to vote...' However, the Constitution excludes voters with intellectual disability from becoming members of national assembly (section 47 Constitution of Namibia 1990). The Electoral Act 1992 section 13(2) also excludes voters who have been declared of unsound mind from being registered as a voter.

In **Gabon** voters with mental disability are not allowed to exercise franchise. (Law on common rules for all political elections in the Gabonese Republic, 1996 last amended 2008). This piece of legislation specifically states in article 26 that 'adults under guardianship or curatorship' cannot be registered to vote. However, it is worth noting that article 98 of this law guarantees voters with disability assistance in case he/she cannot place his ballot properly. More fundamentally, article 98 guarantees off-site voting, for voters with disabilities who cannot travel to the polling station.

The **Togo** Constitution 1992, article 33, provides that the state shall take the necessary measures to ensure that the rights of people with disabilities are protected. As is the trend in most African countries, article 62 of the Constitution bars a person with both a physical and mental disability from becoming a president unless three court designated doctors say otherwise. Like the Constitution, the Electoral Code 2000, article 161, also provides that before declaring candidacy the candidate must provide 'medical certificate attesting to physical and mental aptitude'.

## 4 Barriers to political participation

### 4.1 Lecturer's notes

Learners at this stage of the module have already been exposed in detail the tenets of article 29 of CRPD, the importance of political participation for persons with disabilities and a regional look at how different regions have tried to protect the right for persons with disabilities. Therefore it is the assumption of the module that learners at one point have had discussions on some barriers that persons with disabilities face while exercising franchise. Learners can be asked to research on some of the barriers persons with disabilities face. Learners can be asked to arrange the challenges according to the different disabilities with special focus being on psychosocial and mental disabilities. Learners can also be asked to pay close attention to the language of 'unsound mind' in most African legislations. Learners can also take the initiative of discussing why such language is common in most African countries. Learners can also discuss whether such language is tenable under the CRPD.

Disability inclusion extends to all aspects of life and is critically important in the decision-making process, whether formal or informal. While the right to participate in politics and public life is well established in human rights law, persons with disabilities are frequently denied this right in a variety of ways and for a variety of reasons. Stereotypes about disability often leads to discrimination against person with disabilities in decision making processes generally, and, specifically, in the process of voting, running for office or participating in public outreach initiatives by political parties.

In Africa, persons with disabilities are often denied their right to participate in political and public life due to discriminatory laws and outdated policies. In some African countries, being associated with a disabled family member is tantamount to being associated with a curse. An enabling environment is essential in promoting and assuring political participation and enjoyment of public life for persons with disabilities. The role of governments in ensuring that persons with disabilities are able to participate in decision-making processes of all kinds is important and extends not only to election management bodies, but to all decision-making entities within the government.

### Student activity

#### What are the barriers to participation in political and public life for persons with disabilities?

Objective: To identify barriers to political participation for persons with disabilities and to generate practical solutions

**Step 1: Discuss** – Divide the class into different groups of about five each, depending on the number of learners in class. Ask the learners to discuss the following questions, encouraging them to consider these questions as they may apply to persons with different kinds of disabilities for example physical, sensory, intellectual, and psychosocial.

- (1) What barriers do you think might exist in exercising rights to political participation in your country? And specifically what are the barriers in respect of:
  - Voting?
  - Holding public office?
  - Accessing information?
- (2) Would you vote for a person with a disability? Why or why not?
- (3) Should the parliament have quotas for persons with disabilities?
- (4) What has your own experience and/or observation been relating to barriers faced by people with disabilities in holding public office, in voting or in accessing information about politics?

**Step 2: Report** – Ask each group to briefly summarise their discussion and take note of the barriers that are listed.

#### Barriers to participation in decision-making for persons with disabilities

##### General barriers

- Negative attitudes towards persons with disabilities; and
- Poorly trained elections workers.

##### Barriers for persons with visual disabilities

- Lack of accessible information about public meetings and consultations, political parties, voting and registration;
- Lack of accessible information on voting procedures (such as material in large print, audio format or Braille);
- Lack of transportation to public meetings, registration and polling stations; and
- Lack of alternative voting devices or accessible voting methods (for instance tactile ballot guides to allow blind voters to vote independently).

##### Barriers to deaf persons

- Lack of accessible information about public meetings and consultations, political parties, voting and registration (for example information on radios will not reach deaf persons and public meetings held without sign language interpretation or other modes of access will pose barriers); and
- Lack of assistance or information on voting procedures (such as Sign Language interpreters or pictorial guides).

##### Barriers for persons with physical disabilities

- Physical barriers to public buildings, including courts, voting registrations centers and polling stations; and
- Polling stations rooms are too small to accommodate person using wheelchairs and voting boxes placed on high tables.

#### Barriers for persons with intellectual and psychosocial disabilities

- Hostility and/or exclusion of persons with psychosocial disability and intellectual disabilities in decision making process;
- Laws prohibit people of unsound from voting or vying for electoral positions; and
- Lack of mobile voting mechanism for persons who cannot leave their homes or who are currently residing in hospitals/ institutions.

**Lecturer's note:** *It is important to emphasise the link between perceptions and assumptions made about persons with disabilities and resulting exclusions from political participation.*

The result of discriminatory attitudes' often lead to legislative frameworks that restrict or even prohibit altogether the right to vote, particularly for persons with psychosocial or intellectual disabilities. Legal provisions that deny persons with disabilities from voting typically fail to provide any process for court challenge or judicial review and are often vague, arbitrary and lacking in legitimate aim or purpose. Beyond explicitly discriminatory provisions in law, lack of access to information, such as the timing of public meetings or voting registration requirements, may also create barriers to political participation.

Participation in political and public life provides an opportunity to the members of the public, directly or indirectly, to participate in the process of governance. The right to participate in political and public life is interrelated with other rights such as the right to education and the right to information. When persons with disabilities are denied the right to education and information, it will be difficult for them to fully and efficiently participate in the decision making process.

States have to ensure persons with disabilities participate in political life either directly or through freely chosen representatives without discrimination. They have to establish suitable environments for persons with disabilities to perform all public functions at all levels of government. In promoting this right, states must ensure persons with disabilities are able to vote, free from intimidation, and voting procedures, and facilities and voting materials must be accessible and easy to understand.

Inclusion of persons with disabilities in political and public life is part of national strategies, policies and programmes in many states. Some countries provide financial support to national disability institutions and organisations, to promote their participation in the activities of the government. Others have established special national councils to provide advice to the government on issues relating to disability.

## 5 The way forward – Protecting the right to political participation for persons with disabilities

### 5.1 Lecturer's notes

*The module makes the assumption that learners have had the chance to read article 29 of the CRPD. Learners can be asked to find out if there are any limitations provided for under article 29 of the CRPD. Learners can also be asked what the position of article 29 vis-à-vis other human rights treaties which seek to limit the right to political participation is. Learners can also be asked the importance of reasonable accommodation for persons with disabilities in exercising the right to political participation.*

*Learners by now should have been exposed to the argument that people with mental and psychosocial disabilities be subjected to 'competency tests' before being allowed to exercise franchise. Learners can be asked whether these tests are in line with the provisions of the CRPD. Learners can also be asked to discuss the case of Kiss v Hungary vis-à-vis Zsolt Bujdoss & Others v Hungary which was held by the CRPD Committee.*

*The right to political participation can be effectively exercised by secret ballot. Learners can at this stage be asked whether people with disabilities are entitled to the right to secret ballot. Learners should be able to discuss the right to secret ballot vis-à-vis the right to be assisted during voting. Learners can be asked to look at their domestic legislation to find out whether people with disabilities are allowed to vote. At this stage therefore, learners can be asked to read in detail and discuss the cases of Brotherton NO v Electoral Commission of Zambia and Simon Mvindi & 5 Others v The President of the Republic of Zimbabwe & 3 Others.*

Constitutions of most African countries permit disenfranchisement of persons with disabilities on the basis of a perceived lack of capacity to vote arising from their disability status (Janet, 2014; Waterstone, 2011). This is so despite the provisions of article 29 CRPD which provides an unconditional right to vote for all persons with disabilities, and does not allow any implicit restrictions on the basis of any real or perceived inability to vote, whether imposed through an overall ban on broad categories of disabled persons or on bans on all persons with particular type of disabilities who are presumed to have limited voting capability or through an individualised assessment of the voting capacity of specific disabled individuals (Janet, 2012; Janet, 2014). Therefore, article 29 of the CRPD does not provide for any exception from the universal right to vote on basis of disability. Instead the CRPD mandates that no individuals with disabilities may be disenfranchised (Janet, 2014).

Furthermore, restricting the right to vote on the basis of disability not only constitutes direct discrimination, but it is also predicated on the unacceptable and unfounded stereotype that all persons with disabilities are incapable. Even classifications that target specific sub-groups of persons with disabilities, such as those under guardianship are protected by article 29 (Janet, 2012).

Following the decision in *Kiss v Hungary* there has been a contention that states are allowed disenfranchise persons with disabilities after conducting an individualised assessment of voting capacity. The assessment of voting capacity is premised on grounds that it is permissible to protect the integrity of the political system from individuals who are unable to formulate valid political opinions. Hence those who are found to lack capacity to vote are therefore unable to vote. However, the state is not permitted to determine what is a valid political opinion to be allowed to exercise franchise (Janet, 2014). Furthermore, if there are both disabled and non-disabled persons who are unable to cast a competent vote, the assessment should be done to all and not just the disabled persons. Consequently the CRPD Committee in *Zsolt & Others v Hungary* (2011) held that article 29 does not foresee any kind of limitation or assessment upon persons with disabilities in exercising the franchise (Janet, 2014).

#### Case highlight: *Zsolt Bujdoss & Others v Hungary*

**Facts of the Case:** The authors claimed to be victims of a violation by Hungary of their rights under article 29 of the CRPD. They claimed that as persons under guardianship, they by direct application of article 70(5) of the Hungarian Constitution, were automatically deleted from the electoral registers. The decision incapacitating them did not address their ability to vote, as they were automatically and indiscriminately disenfranchised by operation of the Constitutional provision, regardless of the nature of their disability, their individual abilities, and the scope of the incapacitation measure. The authors argued that they are able to understand politics and participate in elections if they were allowed to, and maintain that this automatic ban is unjustified, and breaches article 29, read alone and in conjunction with article 12 of the Convention.

#### Decision of the Committee

- The Committee held that article 29 requires states parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote.
- The Committee also found that article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention.

*Zsolt Bujdoss & Others v Hungary* Communication No 4/2011 CRPD/C/10/D/4/2011.

Furthermore, in its General Comment 25, the Human Rights Committee, in relation to article 25 of the ICCPR, noted that

positive measures should be taken to overcome specific difficulties, such as literacy [or] language barriers ... which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to

ensure that illiterate voters have adequate information on which to base their choice.

The same approach could be used for persons with disabilities under article 29 of the CRPD.

The trend amongst African countries is limiting franchise based on the unsoundness of the mind (see section 3 of the module). Article 29 of the CRPD does not allow any limitation of the right to vote. All persons with disabilities whether declared to have been of unsound mind or not should be allowed to vote. The language of unsound mind is common and unfortunately there is no definition of what unsound mind consists of. In most cases people with intellectual disabilities are clustered to be of unsound mind. However, the Supreme Court of Virginia defined unsound mind to exist where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life (*Molchon v Tyler* 546 S.E.2d 691, 695 (Va 2001)). Therefore, a person is of unsound mind only when he or she has been so declared by a judicial process (Mute, 2010). Hence people with intellectual disabilities are technically not of unsound mind as the practice in most African countries shows (Mute, 2010). It is important to note that people suffering from mental illness are not disabled. This is because the CRPD defines disability to be the interaction between persons with impairments and attitudinal and environmental barriers that hinders full participation (CRPD, Preamble). However, if person's organ (in this case the mind) is so impaired as to undermine such person's long-term effective interaction with his or her surroundings (social, economic, political, and so on), then that individual has a disability (Mute, 2010).

The other issue about right to political participation is secret ballot. Voters with disabilities like all other citizens are entitled to vote by secret and independent ballot. In some cases, voters with disabilities may need to have another person help them with casting their vote, and in such cases their right to a secret ballot is violated. For instance the High Court of Zambia was faced with the question of secret ballot in *Brotherton NO v Electoral Commission of Zambia*. The Court in *Brotherton* held that voters with disabilities like other citizens are entitled to secret ballot. This may entail allowing voters to choose a person of their liking to help them cast a vote and also ensuring the ballot papers are inaccessible formats such as braille and large print. Similarly the Supreme Court of Zimbabwe in *Simon Mvindi & 5 Others v The President of the Republic of Zimbabwe & 3 Others* held that people with disabilities are entitled to vote in secret like other citizens.

**Case highlight: *Simon Mvindi & Others v The President of the Republic of Zimbabwe & Others***

**Facts of the Case:** six applicants with visual impairments made a constitutional challenge under section 59 & 60 of the Electoral Act. During the 2008 elections ballot papers were inaccessible to voters with visual impairments. Section 59 & 60 guaranteed voters with visual impairments a right to be assisted by electoral officials and police officers at the scene. The applicants challenged these two sections arguing that their right to free expression and secret ballot was infringed. Instead they preferred to be assisted by relatives or friends to cast ballots. The applicants wanted these two sections declared unconstitutional because there was infringement of the constitutionally guaranteed right to free expression.

Decision of the Court:

- The Court declared sections 59 & 60 null and void because it violated the principle of secret ballot.
- The Court also held that government should ensure that voting materials should be in sign and ballot papers in large print or Braille.

*Simon Mvindi & Others v The President of the Republic of Zimbabwe & Others* SC 106/08.

## 6 Measures to ensure inclusive political process for persons with disabilities

### 6.1 Lecturer's notes

*At this stage of the module learners have been exposed to barriers that people with disabilities face, both legal and non-legal. Learners have also been exposed to some of the best practices around the world that protect the right to political participation. So learners can be asked what some of the best practices that seek to protect the right to political participation for voters with disabilities are. Learners should be directed toward class exercise 2. Lecturer should now compare the answers that students have and what the module provide.*

*At this stage learners should be able to discuss the right to reasonable accommodation in political participation. Learners should refer to the case of Brotherton NO v Electoral Commission of Zambia which talked about the right to reasonable accommodation in political participation for people with disabilities. Learners can also be asked to find cases from other jurisdictions that deal with reasonable accommodation for persons with disabilities in political participation. Learners can also be asked to come up with other measures that can be used to ensure an inclusive electoral system.*

*There are a variety of measures that governments, national human rights institutions, and disabled people's organisations (DPOs) can undertake in order to enhance the participation of persons with disabilities in political and public life.*

### Student activity

**What measures can be taken to ensure that persons with disabilities are included in participation in your country?**

**Objective:** To identify measures that can be taken to ensure that persons with disabilities are included in participating in political and public life in line with article 29.

**Step 1:** Divide the class into small discussion groups. Ask each group to identify measures that could be taken in their legal systems to ensure that persons with disabilities are included and effectively participate in political and public life.

**Step 2:** Ask each group to briefly summarise their discussions and take note of the measures listed.

Some of the measures may include:

### 6.2 Provide reasonable accommodation for voters with disabilities

Reasonable accommodation aims to remove physical and other barriers that persons with disabilities might face while accessing the right to vote (Lord & Brown, 2011). Reasonable accommodation generally refers to modifications or adjustments that voters with disabilities may request in order to get rid of the barriers that may hinder their equal enjoyment of political participation. The obligation to provide reasonable accommodation rests with the electoral body (Lord & Brown, 2011). The scope and type of accommodation or modification required is determined on a case-by-case basis, based on the needs of the voter with a disability. However, the obligation to provide reasonable accommodation is not absolute and the electoral body can refuse it if it's going to cause undue burden to them. In *Brotherton NO v Electoral Commission of Zambia* the High Court of Zambia held that reasonable accommodation must be afforded to voters with disabilities.

### Case highlight: *Brotherton NO v Electoral Commission of Zambia*

**Facts of the case:** The applicant on behalf of the Zambia Federation of Disability Organizations sued the Electoral Commission of Zambia for failing to provide accessible elections for voters with disabilities. The dispute in this case was the electoral commission's failure to initiate legislative reform to ensure equitable participation by persons with disabilities in the electoral process of Zambia. One of the issues was that people with disabilities were forced to stand in long queues with no accessible or suitable toilets. There was no reasonable accommodation that would have allowed disabled voters to be assisted in exercising franchise. The issue in this case is whether or not the applicants were discriminated against in pursuit of the exercise of the right to vote.

Decision of the court:

- The electoral commission discriminated against persons with disabilities in accessing right to vote.
- The Court also held that voters with disabilities are entitled to reasonable accommodation in form of special voting mechanisms. However the court noted that this can only be exercised when a voter with disability requests such accommodation. This essentially means that reasonable accommodation is an entitlement but can only be enjoyed if requested.

*Brotherton NO v Electoral Commission of Zambia* Case No: 2011/HP/0818 [2011] ZMHC 32.

### 6.3 Develop inclusive voter education and information

Ensuring access for persons with disabilities to voter education and information may require various accommodation and modifications. For example, illustrative or pictorial information may be useful for a broad range of potential voters, including but not limited to persons with intellectual disabilities, persons who have learning disabilities as well as people who are deaf or have hearing impairments and cannot hear or speak. Furthermore, differences in communication and information needs must be taken into account in order to accommodate the diversity of the electorate. Variables such as language, literacy, urban v rural, cultural traditions, age and gender should be taken into consideration in planning for effective education and outreach. Civic education can be promoted using the following ways:

- Teachers and other civic educators must be educated on policies and strategies for promoting the right of persons with disabilities to participate in the democratic process at all levels.
- Civic education programmes must be made disability inclusive, ensuring that the voice and image of persons with disabilities as participants in the democratic process is reflected.
- Materials used to disseminate information to children about civic responsibility and the political systems should portray images of persons with disabilities, and should refer to persons with disabilities specifically as voters, politicians and active participants in the community and in decision making.

- DPOs have an essential role to play in designing and implementing inclusive civic education programmes.

### 6.4 Training and other measures to enhance election access

Ensuring election access for persons with disabilities has numerous implications for election officials and election management bodies (EMBs). Illustrative measures include:

- Development of standards and guidelines for the accessibility of registration and polling centers;
- Ensuring that site selection of registration and polling centers take into account all aspects of accessibility for persons with disabilities;
- Providing training for election officials on accessibility issues facing persons with disabilities in the voting context;
- Providing election information and voting materials in accessible formats, such as Braille and in easy to read and understand forms;
- Allowing voters to be assisted by a person of their own choosing and, in addition, make available to voters guides and professional sign language interpreters to facilitate accessibility at polling centers; and
- Utilising accessible technology, such as accessible websites and electronic voting machines that are fully accessible to persons with disabilities.

### 6.5 Conduct inclusive election monitoring and observation

Many different stakeholders undertake election monitoring and observation. Observers may include domestic observers from local civil society organisations, representatives of political parties, journalists, oversight and regulatory agencies, and national human rights institutions (NHRIs). Additionally, international observers representing international governmental or non-governmental organisations may also take part in election monitoring and observation.

**NB:** It is important to explain to the class that elections monitoring and observation should be a comprehensive process that covers the following elements:

- Voter registration;
- Media coverage of election campaigns;
- Election campaigning during a certain period;
- The aggregation of votes and determination of results;
- Election security issues such as violence and intimidation and election security techniques that may trump election access solutions; and
- Monitoring effective access by all groups to all electoral disputes and complaints.

In order to design an inclusive approach for election monitoring and observation, persons with disabilities must be included in both monitoring efforts and the development of tools that are used in monitoring efforts. To ensure inclusion in monitoring efforts, disability advocates should be

recruited to conduct election monitoring and coalition-building strategies must include DPOs. The materials developed to guide electoral monitoring processes should incorporate a disability dimension. This might include, for example, electoral observer reference guides and checklists and electoral observer reporting forms that provide specific guidance on disability access.

## 6.6 Develop accessible ballots

In order to guarantee the right to vote, governments may need to take specific measures to ensure that voters with disabilities are able to access the ballot. Where barriers exist, positive measures may need to be introduced in order to facilitate the right to vote. In many African countries, efforts have been made to make paper ballots accessible through the development of tactile ballot guides. The tactile guides allow a paper ballot to be placed into a paper guide with cut out windows that the voter uses as a guide to enable him/her to know where to place the thumb print or mark. Tactile guides have been effectively used in Sierra Leone, Ghana, and Liberia and elsewhere to help secure the right to vote in secret and independently.<sup>1</sup> Materials on the use of the guide were developed, poll workers were trained on its use, and outreach was undertaken to ensure that voters who were blind or visual impairments were aware of its availability. In 2007, Australia ran a trial electronic voting system for 300 000 persons with visual disabilities (Australian Human Rights Commission, 2010). Before the trial, persons with visual disabilities had no option to cast a secret ballot but instead had to use another person to vote on their behalf. While the trial was deemed too expensive to implement permanently, in its place the electoral service provided a telephone option (Part B ? Participation in Political and Public Life 2011). The telephone option was used in the 2010 Australian Federal election and gave visually impaired voters the chance to vote secretly by using an unaffiliated call center that was trained to recite the ballot options to the voter and record the vote. The call center representative did not know the voters name and no election officials were in attendance at the time of voting. Further measures were taken to assure accuracy.

### Good practice tips for accessible balloting

- Development of tactile ballot guides for use by voters who are blind or visually impaired to enable unassisted and secret ballot casting.
- Accommodations to allow marking of the ballot with toe or elbow prints for voters without arms.
- Pictorial instructions for voters who are deaf to understand balloting procedures.
- Use of headphones to listen to candidate information and provide for various means of marking selections, such as Braille keyboard for persons who are blind.
- Easy-to-read instructions for balloting.
- Placing ballot boxes on low table for individuals using wheelchairs.
- Ensuring that individual voting booths are accessible for individuals using wheelchair, crutches or other assistive devices so that they may access the booth.
- Use of magnifying glasses, ergonomic pens and flashlights with batteries.
- Absentee ballots.

## 6.7 Ensuring NGO participation

In order to promote a fully inclusive political process, it is essential for government officials to consult with NGOs. In particular, government officials should ensure the participation of DPOs that represent various disability groups. DPOs are perhaps best placed to serve as resources on accessibility with regard to electoral processes and public decision-making more generally. DPOs should be regarded as experts resource organisations for:

- Training of election officials;
- Designing accessible voting procedures;
- Conducting voter education on issues of elections;
- Developing election monitoring tools that are inclusive of disability issues; and
- Designing accessible websites and elections.

There are various approaches for ensuring that electoral institutions benefit from the expertise of persons with disabilities. Election Access Task Forces, consisting of members of the disability community, may provide advice and assistance to election officials. A disability access focal point could be designated within an electoral commission to address access issues and to interface with the disability community. DPOs should be included in all outreach to civil society organisations relating to electoral engagement. For example in the United Kingdom, political parties worked together to begin the 'Access to Elected Office for Disabled People' strategy to identify and address barriers faced by persons with disabilities who want to enter politics.

## 6.8 Accessing electoral complaints mechanisms

An important element of the right to political participation includes ensuring that electoral complaints mechanisms are accessible to persons with disabilities. An electoral complaints mechanism, whatever its form in a particular country, must ensure that persons with disabilities can file a complaint based on disability

<sup>1</sup> See, eg, 'Tactile balloting to help blind voter in election 2004' *Modern Ghana* 23 September 2004 <http://www.modernghana.com/news/63517/1/tactile-balloting-to-help-blind-voters-in-election.html> (accessed 25 September 2014). For samples of Tactile ballot guides, see 'Global initiative to enfranchise people with disabilities' <http://www.electionaccess.org> (accessed 25 September 2014).

discrimination in the electoral context. In particular, individuals with disabilities must be able to challenge restrictions and limitations on election rights that may impact persons with disabilities, including seeking political office, supporting political parties and candidates, and registration and voting itself. Complaints must be addressed quickly within a framework that is fully accessible to all.

Key questions to consider in ensuring the accessibility of electoral complaints mechanisms are:

- Clarity of format and formal requirements for election complaints in the election law or in implementing regulations, including who may file a complaint and on what basis.
- Official forms provided for the filing of election complaints should be easy to find on a website, available in accessible formats (for example usable with screen reading technology); written in plain language.
- Informational materials on the legal bases on which to file a complaint should include examples of access issues, such as denials of voter registration on the basis of disability or inability to cast a vote due to an inaccessible voting procedure.
- Decisions of complaints mechanisms should be made available, along with the reasons for such decisions.

- Design civic education to address the inclusion of persons with disabilities in political and public life.
- Include disabled peoples organisations as participants and as expert resources in civic education and voter education programmes.
- Provide information about election registration in accessible formats to persons with disabilities (for persons with visual, sensory and intellectual disabilities).
- Implement accessible election campaigns.
- Design polling stations to be accessible to persons with physical disabilities and ensure that voters with disabilities are accommodated at the polling station.

### Student activity

This exercise is geared toward allowing learners to generate their own, practical solutions to the barriers they have been identified and discussed during the course of this module.

**Step 1:** Divide participants into small discussions groups. Ask each group to consider the following:

- What is the role of government in addressing barriers for persons with disabilities in political decision-making?
- How would you confront perceptions about people with psych-social disabilities in voting?
- How could you ensure that election observers think about accessibility issues in their monitoring role?
- What steps could you take to reach voters with disabilities in voter awareness programmes?
- How might DPOs play a supporting role in expanding the inclusion of persons with disabilities in political processes?
- What role might political parties play in ensuring the inclusion of persons with disabilities in part platforms?

**Step 2:** Ask each group to briefly summarise their discussion and take note of the barriers that are listed.

Key recommendations for ensuring inclusive political process:

- Review legal frameworks comprehensively for conflicts with article 29 of the CRPD, including Electoral Codes, legal capacity provisions, and constitutional provisions.
- Train election officials in how to effectively accommodate voters with disabilities.
- Ensure that electoral registration is not denied to individuals based on disability.

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## Module 7: Employment

Exclusion, prejudice and discrimination against persons with disabilities prevail in the area of employment across the continent of Africa. Consequently, many persons with disabilities in Africa remain unemployed. Yet a number of human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD) set out the right to work and employment. The failure by many persons with disabilities in Africa to enjoy their right to employment is compounded by weak legal frameworks at the domestic level. This module looks at the right to work/employment for people with disabilities in the African context.

### Module content

The module commences with a hypothetical case aimed at stimulating the interests of the learners (This case constitutes the overall class activity and students should make presentation on it at the end of the course delivery). Thereafter, the module proceeds to give a general introduction containing learning outcomes followed by a discussion of the approaches pertaining to employment of persons with disabilities. It then proceeds to provide a discussion and extrapolation of the applicable international standards under the pertinent international human rights instruments and ILO instruments, before discussing African regional instruments. Thereafter, it extracts the 'core elements' that can be highlighted from the standards. It further discusses a number of African domestic laws and cases with a view to determining how the 'core elements' and international standards are reflected in, and could influence, relevant domestic legislation in selected African states parties to the CRPD. Lastly, it highlights a number of conclusions that could be drawn. The module also contains class activities aimed at providing learners with an opportunity for enhancing understanding as well as applying knowledge. This module should be read together with the previous modules on non-discrimination; reasonable accommodation; and education and training.

### Learning outcomes

At the end of this module students should:

- Have knowledge of, and be able to apply, international instruments providing for the right to decent work and employment for persons with disabilities. This includes the knowledge to understand and apply the state obligations imposed by article 27 of the CRPD.
- Be able to identify and apply the core elements of the right to work for persons with disabilities under international human rights law.
- Have knowledge of how selected national jurisdictions have dealt with employment of persons with disabilities in their domestic laws and cases.

- Be able to critically analyse how domestic laws in Africa should serve and be applied as potential tools for realising the right to decent work for persons with disabilities.

#### Student activity: Promoting employment opportunities for persons with visual impairments in Zambia

(At the end of the delivery of the module, learners should be able to make presentations on this case)

##### Facts

Zambia is a state party to the CRPD and its Optional Protocol. It has entered no reservation or declaration. With a view to promoting the right to employment for persons with visual impairments in the country, Zambia has adopted a policy by which only persons that are blind will be employed as masseurs in the country's massage parlour. In addition, every blind person is required to undergo training to become a masseur where the state pays for all the expenses to be incurred. For this reason, blind persons will only be allowed to engage in a separate form of employment if they explain and prove to the satisfaction of an independent body that they could not find any employment opportunity in any of the country's massage parlours. A group of person with visual impairments challenged the policy in the High Court which dismissed the claim. On appeal, the Supreme Court, which is the final court of appeal, dismissed the claim holding that the Policy constituted a special measure designed to promote the employment rights of person with visual impairment and hence it could not be faulted.

A Zambian DPO (Zambia Union of the Blind) has serious reservations about this Policy and intends to bring a petition to the CRPD Committee. It has come to you for advice on the issues that should be included in the notice of petition. Please, explain the substantive rights issues that you think should be included in the complaint to the CRPD Committee to convince the Committee that the Policy is inconsistent with the CRPD and the obligation of Zambia as a state party to the CRPD.

**NB:** Explain at least three crucial substantive rights issues

### 1 Conceptualising the employment of persons with disabilities

As will be discussed in 3.2 below, the CRPD in article 27 emphasises the right to work/employment in an open labour market that is inclusive. Thus the CRPD conceptualises the right to decent work in terms of the open and inclusive labour market model. The open labour market model stands in sharp contrast to the sheltered work/employment or 'reserved' employment model. The sheltered employment model entails emphasising vocational and/or technical training for persons with

disabilities and their employment in factories/industries where they discharge routine or manual jobs. In terms of this model, persons with disabilities do not have the freedom to make their own choices regarding employment. On the other hand, the open labour market employment model recognises that persons with disabilities have the right to choose the type, nature, place and manner of work (and compete for jobs) on an equal basis with others.

It is noteworthy that in its concluding observations, the CRPD Committee has also addressed the employment models after examining states parties' reports. For example, in the case of China's state party report, the Committee was concerned about the practice of reserved employment, which discriminated against persons with disabilities in their vocational and career choices. The Committee recommended the undertaking of all necessary measures to ensure that persons with disabilities have freedom of choice to pursue vocations according to their choices (*Concluding observations on China* (2011) paras 41 & 42). Similarly, in respect of Austria, the Committee bemoaned the fact that approximately 19 000 Austrians worked in sheltered workshops outside of the open labour market and received very little pay (*Concluding observations on Austria* (2013) para 44). The Committee thus recommended the enhancement of programmes to employ persons with disabilities employ in the open labour market (*Concluding observations on Austria*, para 47).

**CRPD Committee on approaches to employment for persons with disabilities**

**CRPD Committee: Concluding observations on Austria (2013):**

Excerpts

Work and employment (art 27)

- 44 The Committee notes with concern that approximately 19,000 Austrians work in sheltered workshops outside of the open labour market and receive very little pay.
- 47 The Committee recommends that the State party enhance programmes to employ persons with disabilities in the open labour market.

CRPD Committee: Concluding observations on China (2012): Excerpts

Work and employment (art 27)

- 41 The Committee is also concerned about the practice of reserved employment (such as the field of 'blind massage'), which discriminates against persons with disabilities in their vocational and career choices.
- 42 The Committee recommends that the State party undertake all necessary measures to ensure the persons with disabilities freedom of choice to pursue vocations according to their preferences.

CRPD Committee: Concluding observations on Paraguay (2013): Excerpts

Work and employment (art 27)

- 63 The Committee ... is also concerned at the fact that employment training programmes concentrate on manual and craft work and occupations and that there is no promotion of equal employment opportunities.
- 64 The Committee recommends that the State party adopt without delay policies on the employment of persons with disabilities ... including ... opportunities for persons with disabilities to choose own-account employment by means of training in areas of their choice ...

It is noteworthy that in the United States of America, the government's Department of Justice recently (April, 2014) reached a settlement agreement with the Rhode Island involving approximately 3250 Rhode Islanders with intellectual and developmental disabilities whereby the Islanders agreed to close all sheltered workshops ('Department of Justice Reaches Landmark Americans with Disabilities Act Settlement Agreement with Rhode Island': 8 April 2014).<sup>1</sup> The settlement was reached on the grounds that the workshops violate the integration mandate of the Americans with Disabilities Act 1990 (ADA) and the decision of the Supreme Court of the United States in *Olmstead et al v LC* (Decided on 22 June 1999)<sup>2</sup> require that services to people with disabilities be provided in the most integrated settings and not in segregated settings.<sup>3</sup> The settlement was hailed as 'the nation's first statewide settlement to address the rights of people with disabilities to receive state funded employment and daytime services in the broader community, rather than in segregated sheltered workshops and facility-based day programs' Indeed, as will be highlighted below, the right to work for persons with disabilities is currently conceptualised in terms of the open labour market employment model.

1 <http://www.justice.gov/opa/pr/departement-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode> (accessed 30 March 2015).

2 (98-536) 527 U.S. 581 (1999).

3 <http://www.justice.gov/opa/pr/departement-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode> (accessed 17 June 2015).

### Student activity

Explanation:

There is also the concept of supported employment. It takes the form of a 'special employment programme' aimed at contributing to the employment of people with severe disabilities such as persons with intellectual impairments and mental disabilities or mental health conditions (Paris, Organisation for Economic Co-Operation and Development *Transforming disability into ability: Policies to promote work and income security for disabled people* (2003); WHO & World Bank *Word report on disability* (2011) 242). It is believed that supported employment could assist with integrating persons with disabilities into the competitive labour market. In addition, it might provide 'employment coaching, specialized job training, individually tailored supervision, transportation, and assistive technology'. These could be aimed at enabling persons with disabilities to learn and perform better in their jobs (Washington, United States Department of Labour, Office of Disability Employment Policy *What is supported employment?* (1993)). It has been stated that supported employment has been used for 'people with severe disabilities, including those with psychiatric or intellectual impairment, learning disabilities, and traumatic brain injury' (*Word report on disability* (2011) 242).<sup>1</sup>

Question:

To what extent would you regard the concept of supported employment to be consistent with the CRPD?

1 See also RE Crowther et al 'Helping people with severe mental illness to obtain work: Systematic review' (2001) 322 *BMJ* 204-208; P Wehman et al 'Supported employment: A decade of rapid growth and impact' (1998) 24 *American Rehabilitation* 31; JA Cook et al 'Integration of psychiatric and vocational services: A multisite randomized, controlled trial of supported employment' (2005) 162 *The American Journal of Psychiatry* 1948.

### Student activity

- (1) What would the relationship that might exist between the two employment approaches/models and the models of disability discussed in Module 1 be, namely, the medical, social and human rights models?
- (2) How would the open labour market employment model promote the respect of the following four general principles of the CRPD?
  - (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
  - (b) Non-discrimination;
  - (c) Full and effective participation and inclusion in society; and
  - (d) Equality of opportunity.

## 2 International standards on the right to work for persons with disabilities

### 2.1 Standards under the Covenant on Economic Social and Cultural Rights (CESCR)

#### 2.1.1 The CESCR

The CESCR guarantees the right to work in article 6 and the right to favourable working conditions in article 7. The CESCR further sets out labour unionism and collective bargaining rights in article 8. These rights are guaranteed to all persons, including persons with disabilities.

Articles 6 & 7 of the CESCR – Right to work	
Article 6	1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.
Article 7	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

It can be observed that the CESCR in article 6(1) highlights the fact that everyone has the right to engage in the work that he or she freely chooses and accepts.

#### 2.1.2 Committee on Economic, Social and Cultural Rights – General Comment 5 (1994)

The Committee on the CESCR, in its General Comment No 5, has highlighted that persons with disabilities have the right to work and employment. In General Comment 5, the Committee elaborates on the contents of CESCR's articles 6, 7 and 8 with regard to the right to work of persons with disabilities in paragraphs 20 to 27.

Amongst others, the Committee discourages the 'reserved' or sheltered employment model (Committee on ESCR, General Comment 5, para 21) (The sheltered employment concept is briefly discussed in 1 above).

The Committee further acknowledges the existence of applicable ILO instruments such ILO Convention No 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities (in addition to Recommendation No 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation No 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities) and it urges states parties to ratify Convention 159 (ILO conventions are briefly discussed in 2.3 below).

#### Employment under the Universal Declaration

Universal Declaration of Human Rights (UDHR):

Article 23(1):

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

## 2.2 Standards under the Convention on the Rights of Persons with Disabilities

### 2.2.1 The CRPD

The substantive right to work and employment for persons with disabilities under the CRPD is set out in article 27. The other provisions in the CRPD, such as the preamble; and the general principles in article 3 are also applicable. Similarly, other substantive rights in the CRPD, such as education (article 24) and equality and non-discrimination (article 5) are significant in ensuring the right to work for persons with disabilities.

#### CRPD article 27 – Work and employment

- (1) States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
  - (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
  - (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
  - (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
  - (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
  - (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
  - (g) Employ persons with disabilities in the public sector;
  - (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
  - (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
  - (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
  - (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
- (2) States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

As seen in article 27, the CRPD emphasises the right of to work/employment in an open labour market that is inclusive. Thus the CRPD conceptualises the right of persons with disabilities to decent work and employment in terms of the open labour market model.

## 2.2.2 Obligations under CRPD article 27

It can be seen from Table 2 above, that the CRPD requires states to discharge the following obligations in realising the right to employment for persons with disabilities:

- Employing persons with disabilities in the public sector;
- Promoting the employment of persons with disabilities in private sector through appropriate policies and measures (in terms of article 27, these may include the taking of specific measures such as affirmative action programmes, incentives, and so on);
- Prohibiting discrimination on the basis of disability with regard to all matters concerning employment;
- Providing reasonable accommodation to persons with disabilities in the workplace;
- Promoting access to freely-chosen work;
- Respect for unionism and/or collective bargaining rights;
- Promoting access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- Promoting vocational and professional rehabilitation;
- Promoting job retention and return-to work programmes; and above all
- Adhering to the open labour market employment model.

There are also a number of provisions in the CRPD that are applicable to exercising the right to work. These include: the right to equality and freedom from discrimination under article 5; the right to inclusive education under article 24; the obligation to ensure accessibility under article 9; the obligation to provide habilitation and rehabilitation in article 26; and the right to health under article 25. These rights should also be exercised by persons with disabilities as 'enabling and facilitating rights' for exercising the right to work and employment. For example, without education or training, persons with disabilities will not attain the requisite skills and qualifications to access employment in the open labour market. Similarly, disability based discrimination, which includes the denial of reasonable accommodation, will exclude persons with disabilities from enjoying their right to substantive equality and to work in an open and inclusive labour market.

## 2.2.3 The Committee on the Rights of Persons with Disabilities (CRPD Committee)

The CRPD Committee has further elaborated on the right to decent work for persons with disabilities in its concluding observations adopted after examining states party reports and in its decisions adopted after determining individual communications brought under the CRPD's Optional Protocol. The Committee has given significant insights pertaining to the right to decent work for persons with disabilities through these two mechanisms, as will be demonstrated below.

## 2.2.4 Concluding Observations

In its Concluding Observations on Tunisia, the Committee was concerned by the low level of inclusion of persons with disabilities in the private sector (*Concluding Observations on Tunisia* (2011) para 33). The Committee recommended the implementation of measures of affirmative action for the employment of women and men with disabilities (*Concluding Observations on Tunisia*, para 34(a)).

In the case of Hungary, the CRPD Committee was worried that the overall employment rate of persons with disabilities remained lower than for other population groups despite reasonable accommodation efforts (*Concluding Observations on Hungary* (2012) para 43). The Committee recommended the development of 'programmes to integrate persons with disabilities into the open labour market and the education and professional training systems' (*Concluding Observations on Hungary*, para 44); and the need to make all work places and educational and professional training institutions accessible for persons with disabilities with a special view to further intensifying efforts to increase the employment opportunities for women and men with disabilities in the public and private sectors (*Concluding Observations on Hungary*, para 44).

With regard to Argentina, the Committee took notice of the labour law that established a minimum quota of 4 per cent for the employment of persons with disabilities in the public sector (Act 25.689) and of the various employment programmes for that had been developed within the public sector (*Concluding Observations on Argentina* (2012) para 43). However, the Committee was concerned that there remained cultural barriers and prejudices that hindered persons with disabilities from entering the labour market, particularly in the private sector, despite the existence of tax incentives for employers (*Concluding Observations on Argentina*, para 43). Thus the Committee urged Argentina to develop a public policy to promote the inclusion of persons with disabilities in the labour market through, amongst others, awareness-raising campaigns targeting the private sector and the public at large designed to break down cultural barriers and prejudices against persons with disabilities (*Concluding Observations on Argentina*, para 44).

In respect of Peru, the Committee appreciated a Supreme Decree that requires public sector institutions to have at least 3 per cent of the total work composed of workers with disabilities (Supreme Decree No 027-2007-PCM). But the Committee expressed concern at the high rate of unemployment and underemployment of persons with disabilities that went up to nearly 60 per cent and 35,3 per cent respectively (*Concluding Observations on Peru* (2013) para 40). It thus urged Peru to develop new policies that promote the inclusion of persons with disabilities in the labour market which could include tax incentives for companies and persons who employ persons with disabilities; the recruitment of persons with disabilities in public administration; the development of self-employment programmes; and

the adoption of educational programmes to capacitate persons with disabilities in order to include them in the labour market (*Concluding Observations on Peru*, para 41).

With regard to Paraguay, the Committee took notice of the quota system for employing persons with disabilities in the public sector. However, it was concerned that employment training programmes concentrated on manual and craft work and occupations and that there was no promotion of equal employment opportunities (*Concluding Observations on Paraguay* (2013) para 63). It recommended that Paraguay should adopt, without delay, policies on the employment of persons with disabilities in both the public and the private sectors, including the adoption of affirmative action measures, and opportunities for persons with disabilities to choose own-account employment by means of training in areas of their choice and access to soft loans (*Concluding Observations on Paraguay*, para 64).

In the case of El Salvador, the Committee was concerned that providing reasonable accommodation was not an integral part of employment policies, thereby perpetuating discrimination against persons with disabilities in that domain and that there was lack of vocational training for persons with disabilities (*Concluding Observations on El Salvador* (2011) para 55). It recommended the adoption of measures including affirmative action; the implementation of programmes on access to vocational training for persons with disabilities; and encouraging their formal and informal training free of charge through the technical body recognised by the state for that purpose (*Concluding Observations on El Salvador*, para 56).

On the part of Sweden, the Committee was concerned at the fact that unemployment was higher for persons with disabilities than for the general population and that in 2008 the rate of unemployment had increased by 100 per cent (*Concluding Observations on Sweden* (2014) para 49). It urged Sweden to increase measures of support, including, amongst others, personal assistance in employment, technical assistance in performing in the workplace, reduced social fees, financial support to employers, and rehabilitation and vocational training (*Concluding Observations on Sweden*, para 50).

Lastly, the Committee reiterated to Azerbaijan to expand its existing programmes, including vocational training programmes, with a view to enhancing the skills of persons with disabilities to enable them to participate competitively in the open labour market (*Concluding Observations on Azerbaijan* (2014) para 43).

Examples of obligations or measures recommended/ appreciated by CRPD Committee	
Obligations/measures	State party concerned
Openlabour market employment	Paraguay (2013) paras 63 & 64 Austria (2013) paras 44 & 47 China (2012) para 41 & 42 Azerbaijan (2014) paras 42 & 43
Affirmative action	Tunisia (2011) para 34(a) Paraguay (2013) paras 64 El Salvador (2011) para 56
Provision of incentives: Tax deductions for employing persons with disabilities	Argentina, para 43 Peru, para 41
Reasonable accommodation	Hungary (2012) para 43 El Salvador (2011) para 55 Azerbaijan (2014) para 43
Employment quotas for persons with disabilities	Argentina (2012) para 43 Peru (2013) para 40 Azerbaijan (2014) paras 42 & 43
Provision of support measures: personal assistance in employment, technical assistance in performing in the workplace; financial support to employers	Sweden (2014) para 50

### 2.2.5 Individual communication

The Committee dealt with the issue pertaining to the right to employment of persons with disabilities in *Gröninger v Germany* (discussed below). The Committee made a number of significant observations, which include:

- That article 27 of the CRPD implies an obligation on the part of states parties to create an enabling and conducive environment for employment, including in the private sector;
- That article 4(1)(a) of the CRPD imposes on the state party the general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD related to work and employment; and
- That article 3 establishes that in its legislation, policies and practice the state party should be guided by the general principles set out therein.

#### CRPD Committee decision – *Gröninger v Germany*

The *Gröninger v Germany* communication raised matters relating to CRPD's articles 3, 4, 5, 8 and 27. It arose from the failure on the part of Germany to promote the right to work for persons with disabilities by not facilitating their inclusion in the labour market. The allegation in this case was attributed to the exclusion of the author's son from having effective access to general technical and vocational training, programmes and placement services principally because in terms of the domestic legislative framework (section 219 of the country's Social Law), the author's son was not eligible for an integration subsidy (an affirmative action measure) since his full working capacity could not be restored within three years.

In reaching its decision, the Committee observed that the subsidy scheme in practice required employers to go through an additional application process, the duration and the outcome of which was not certain and that the persons with disabilities had no possibility to take part in the process. It further observed that the policy seemed to respond to the medical model of disability as it considered disability as being transitional and that, in consequence, could be 'surpassed or cured' with time. Hence, the Committee found the policy to be inconsistent with the general principles and the preamble of the CRPD. The Committee highlighted that that article 27 of the CRPD implies an obligation on the part of states parties to create an enabling and conducive environment for employment, including in the private sector.

Thus the Committee found that Germany's existing model for the provision of integration subsidies did not effectively promote the employment of persons with disabilities. It further noted that the subsidy was the only affirmative action available to assist author's son for his inclusion in the labour market. It highlighted that the CRPD in article 27 enshrines the rights to benefit from appropriate measures of promotion of employment opportunities such as to have effective access to general placement services as well as assistance in finding and obtaining employment.

The Committee found that the measures taken by the responsible authorities of the state party to assist the integration of the author's son into the labour market did not meet the standard of the state party's obligations under articles 27, paragraphs 1(d) and (e), read together with article 3, paragraphs a, b, c and e, article 4, paragraphs 1(a) and 1(b) and article 5, paragraph 1 of the Convention. Accordingly, it determined that Germany had failed to fulfil its obligations under these provisions.

### Student activity

#### Hypothetic scenario – Handcraft business for wheelchair users in Angola

##### Scenario:

The only education and vocational training service provider available to wheelchair users in Angola is a government institution that provides training in handcraft. Because of this, all wheelchair users in Angola resort to this institution in order to learn handcraft skills and produce crafts which they could sell and provide for themselves and their families. Wheelchair users that do not attend the training institution resort to begging on the streets. There are also a number of welfare organisations that employ wheelchair users that have the appropriate handcraft training to produce artifacts that the organisation exports to Zambia, Malawi; Tanzania; and South Africa.

**NB:** It should be noted that there is no policy to compel wheelchair users to attend the training institution.

##### Question:

Explain the approach to work and employment for persons with disabilities that Angola is following with regard to wheelchair users who seek to earn a living. To what extent is this scenario in line with the recommendations of the CRPD Committee regarding the right to work and employment for persons with disabilities?

## 2.3 ILO instruments

As early as 1944, the ILO had stated in the Employment (Transition from War to Peace) Recommendation (No 71) that disabled workers, 'whatever the origin of their disability, should be provided with full opportunities for rehabilitation, specialized vocational guidance, training and retraining, and employment on useful work'. This recommendation has been followed by numerous other instruments of relevance to the right to work of persons with disabilities (discussed immediately below).

### 2.3.1 ILO Vocational Rehabilitation (Disabled) Recommendation (No 99, 1955)

In terms of its scope, the Recommendation states that: 'Vocational rehabilitation services should be made available to all disabled persons, whatever the origin and nature of their disability and whatever their age, provided they can be prepared for, and have reasonable prospects of securing and retaining, suitable employment' [Recommendation No 99, para 2]. The underlying principle is that: 'All necessary and practicable measures should be taken to establish or develop specialised vocational guidance services for disabled persons requiring aid in choosing or changing their occupations' [Recommendation No 99, para 3].

### 2.3.2 ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation

Amongst its obligations, the Convention expects its member states to undertake

'to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof (Convention No 111, art 3).

### 2.3.3 ILO Convention (No 159, 1983) on the promotion of equal opportunities and equal treatment for men and women with disabilities

In terms of its purpose, the Convention expects member states to

consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society (Convention 159, art 1(2)).

According to its principles, the Convention expects, amongst others, that:

Each Member shall, in accordance with national conditions, practice and possibilities, formulate, implement and periodically review a national policy

on vocational rehabilitation and employment of disabled persons (art 2);

and that:

The said policy shall aim at ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled persons in the open labour market [art 3].

### ***2.3.4 ILO Recommendation No 168 Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No 168)***

The recommendation expects member states to, amongst others, ensure community participation in the execution of vocational rehabilitation services for persons with disabilities. In this regard, the Recommendation states that:

Vocational rehabilitation services in both urban and rural areas and in remote communities should be organised and operated with the fullest possible community participation, in particular with that of the representatives of employers', workers' and disabled persons' organisations (Recommendation No 168, para 15).

It also expects 'Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers' to be taken (para 9). Lastly, it expects adaptations to be made to the employment and related services in providing vocational rehabilitation services for persons with disabilities. In this regard, the Recommendation provides that:

In planning and providing services for the vocational rehabilitation and employment of disabled persons, existing vocational guidance, vocational training, placement, employment and related services for workers generally should, wherever possible, be used with any necessary adaptations (para 5).

### ***2.3.5 ILO Code of Practice on Managing Disabilities in the Workplace***

The ILO Code of Practice on Managing Disabilities in the Workplace, adopted in 2001, guides employers in all sectors and sizes of enterprises to introduce a positive strategy in managing disability-related issues in the workplace. The Code of Practice recommends practice related to job retention, early intervention, monitoring, assessment and rehabilitation.

<b>Brief look into the ILO Code of Practice on Managing Disabilities in the Workplace</b>	
Objectives 1.1(a)	Ensuring that people with disabilities have equal opportunities in the workplace.
Principles 1.2.2	Employers benefit from the employment of people with disabilities who can make a significant contribution at their place of employment, in jobs matched to their skills and abilities, if disability-related issues are appropriately managed.
Definitions 1.4	Adjustment or accommodation: Adaptation of the job, including adjustment and modification of machinery and equipment and/or modification of the job content, working time and work organization, and the adaptation of the work environment to provide access to the place of work, to facilitate the employment of individuals with disabilities Job adaptation The adaptation or redesign of tools, machines, work stations and the work environment to an individual's needs. It may also include adjustments in work organization, work schedules, sequences of work and in breaking down work tasks to their basic elements.
General duties of employer 2.1.1	To manage disability-related issues in the work place, employers should adopt a strategy for managing disability as an integral part of their overall employment policy and specifically as part of the human resources development strategy. This disability management strategy may be linked to employee assistance programmes, where they exist.
Responsibilities of competent authorities 2.2.1	The competent authorities should advocate the adoption of workplace disability management strategies by employers, as part of a national policy to promote employment opportunities for people with disabilities in the private and public sectors.
General duties of workers' representatives 2.3.1	In promoting policies of equal employment opportunity for workers both at the level of the individual employer and in the national consultation and negotiation processes, workers' organisations should actively advocate employment and training opportunities for persons with disabilities, including job retention and return-to-work measures.
Adjustments 7.	In recruiting or retaining workers with disabilities, employers may need to make an adjustment or adjustments in some cases to enable the individual to perform the job effectively.

## **2.4 Standards under African regional instruments**

### ***2.4.1 African Charter of Human and Peoples' Rights***

First, article 2 of the ACHPR prohibits discrimination on various grounds including on the basis of 'other status', which entails that it also includes a prohibition of disability based discrimination as an analogous ground. Thus persons with disabilities should not be discriminated against in all areas of employment.

Furthermore, the ACHPR guarantees the right of everyone to work under article 15, which provides that: 'Every individual shall have the right to work

under equitable and satisfactory conditions, and shall receive equal pay for equal work’.

Above all, the ACHR contains a provision that expressly mentions persons with disabilities in article 18(4). This provision recognises the right of persons with disabilities to special measures of protection that are responsive to their physical and moral needs. It could be observed that although the drafting embodies elements of the outmoded welfare approach to disability, it nevertheless puts emphasis on substantive equality by requiring states to take measures that are responsive to the ‘needs’ of persons with disabilities. Thus in implementing the right to work for persons with disabilities under the Charter, states parties are expected to be pro-active and take measures that accommodate persons with disabilities in employment.

#### **2.4.2 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**

The African Women’s Protocol also contains a provision that specifically addresses women with disabilities in article 23. Under this article, women with disabilities have the right to ‘special protections’, whereby states parties are required to take specific measures commensurate with the physical, economic and social needs of women with disabilities to facilitate their access to employment, professional and vocational training, amongst others.

In addition, the Protocol recognises economic and social welfare rights for all African women in article 13. These rights include work, career advancement and other economic opportunities. It also guarantees all African women the right to education and training in article 12.

#### **2.4.3 African Youth Charter**

The Youth Charter also follows the African Charter and the Women’s Protocol in containing a disability provision that sets out the rights of youth with disabilities in article 25. The first paragraph specifically singles out the right to access education, training and employment.

Furthermore, the Youth Charter recognises the right of all African youth, who include youth with disabilities, to sustainable livelihood and youth employment in article 15, and the right to education and skills development in article 13.

#### **2.4.4 Other African instruments**

The African Charter on Democracy, Governance and Elections obliges states parties to take measures required to generate productive employment for all persons in article 40. It also mentions persons with disabilities. Amongst others, it requires state parties to take measures that guarantee the rights of persons with disabilities and other marginalised and vulnerable groups in article 8(2). It further guarantees all persons ‘crucial’ rights such as

education, including compulsory and free basic education and literacy in article 43.

The African Convention on Internally Displaced Persons (CPAID) also imposes obligations that could facilitate the right to work for internally displaced. Amongst others, it obliges states parties to provide special protection for and assistance to internally displaced persons with special needs in article 9(2)(c). These include persons with disabilities. It further requires the promotion of self-reliance and sustainable livelihoods in article 3(1)(k). This provision can facilitate the right to work for internally displaced persons with disabilities as a means of ensuring their livelihood.

#### **2.4.5 Proposed African Disability Protocol – February 2014 draft**

The African human rights system is in the course of adopting a disability protocol.

The Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa recognises the right to decent work for persons with disabilities in article 14 (which is reproduced below).

##### **Draft African Disability Protocol article 14 – Decent work**

Draft II of 14 March 2014 <http://www.achpr.org/news/2014/04/d121> (accessed 30 March 2015).

- (1) States Parties shall ensure that persons with disabilities have, on an equal basis with others, the right to decent and productive work, to just and favourable conditions of work, to protection against unemployment and to protection from forced or compulsory labour. States Parties shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right, including by:
  - (a) Prohibiting discrimination on the basis of disability with regard to all matters concerning all forms of employment, including employment opportunities, vocational training, conditions of recruitment, hiring and employment, continuance of employment, career advancement, safe and healthy working conditions;
  - (b) Protecting the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work and the right by persons with disabilities to exercise their labour and trade union rights;
  - (c) Promoting opportunities for persons with disabilities to initiate self-employment and entrepreneurship;
  - (d) Employing persons with disabilities in the public sector, including by reserving and enforcing minimum job-quotas for employees with disabilities;
  - (e) Promoting the employment of persons with disabilities in the private sector through appropriate policies and measures, including through the use of special measures such as tax incentives;
  - (f) Ensuring that reasonable accommodation is provided to persons with disabilities in the workplace; and

- (g) Ensuring that persons who become disabled in the course of their employment are not laid off from their jobs on the basis of their disability.
- (2) States Parties shall take steps to ensure that the principle of equal pay for equal work is not used to undermine the right to work for persons with disabilities. In particular, States Parties shall take appropriate measures to recognise the social and cultural value of the work of persons with disabilities.

It can be observed that the proposed protocol includes a number of provisions that are similar to the CRPD's corresponding provisions. However, it does not make reference to the open labour market employment concept. This could be its major drawback since the failure to expressly mention the open labour market employment model is contrary to the standards under the CRPD (discussed in 3 above). In addition, this might give the prospective states parties to the Protocol an excuse to continue with the sheltered employment model. It is noteworthy that Rule 7 of the 1993 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (adopted by UN General Assembly Resolution 48/96 on 18 December 1992) also expects states to prioritise the open labour market employment model.<sup>4</sup> Therefore, it is regrettable that the draft Protocol does not make reference to the model.

## 2.5 Isolating core elements of the international standards

A number of 'core elements' of the right to decent work for persons with disabilities can be highlighted from the standards under the CRPD, the ILO treaties and the African instruments.

These can be listed as including:

- Employment in open and inclusive labour market (Open labour market employment);
- Prohibition of discrimination on the basis of disability;
- Provision for reasonable accommodation;
- Provision for specific measures, including affirmative action and quotas;
- Provision for specific incentives, including tax deductions;
- Promotion of employment in public and private sector;
- Provision for inclusive education and training;
- Provision for technical education and vocational training;
- Opportunities for career advancement, promotion and job retention;
- Favourable working conditions on an equal basis with others;
- Promotion of self-employment promoting vocational and professional rehabilitation;

<sup>4</sup> However, the Standard Rules still regard the sheltered employment to be an acceptable exception in instances where the 'needs' of certain persons with disabilities 'cannot be met in open employment'.

- Promoting job retention and return-to work programmes; and
- Labour unionism and collective bargaining rights.

### Student activity

- (1) Kenya is an Africa state party to the CRPD. It is considering adopting a disability specific legislation that should also address the issue of employment for person with disabilities. The drafters have sought advice on the provisions that should be included in the statute in order to promote and protect the right to employment for persons with disabilities. Advise the drafter on this by suggesting at least 7 aspects or elements that should be covered and explain the role that each of the elements will play in promoting the right to employment for persons with disabilities in Kenya.
- (2) There are glaring inequalities in the employment sector of Ghana with many persons having no access to employment. A senior representative of the Minister of Labour has come to you for advice on at least 3 measures that the government could take to foster substantive equality for persons with disabilities in the employment sector, especially within the private employment sector. Advise the Minister's representative and explain the role that each of the three measures selected would play in fostering substantive equality.

### Student activity

#### Hypothetical situation – Reasonable accommodation for a person with severe morning drowsiness?

Situation:

There is a person who has severe morning drowsiness with the effect that the condition makes the person continually *dose of* during the morning hours. He has just been employed as a proof reader at a publishing house. He is supposed to work for about 8 hours every day. He has requested management to allow him to report to work after mid day each working day and has offered to work overtime to catch up on the lost morning hours. The company has a policy of shutting down or sealing off its premises close ton after sun set (around 17:00 hours).

Question:

You are the legal officer for management. Advise management whether or not the person has a disability; and irrespective of this; advise management on the possibility and nature of reasonable accommodations that it could provide to the employee in order for the Publishing House to escape a legal suit that could be brought against it based on these facts.

### 3 Selected African domestic employment laws

A number of African states parties to the CRPD have enacted laws which aim at or could be used for implementing the right to decent work for persons with disabilities.

#### 3.1 South Africa

##### 3.1.1 *Employment Equity Act 55 of 1998*

It is noteworthy that the EEA had two main remedial strategies, namely, non-discrimination and affirmative action.<sup>5</sup> Thus it should be understood and applied in this context in the case of the right to employment for persons with disabilities. The applicable provisions in the Employment Equity Act (EEA) with regard to the right to work for persons with disabilities in South Africa include the following:

- Section 1: Defines ‘people with disabilities’ as people who have a long-term or recurring physical and mental impairment which substantially limits their prospects of entry into, or advancement in, employment.
- Section 1: Defines reasonable accommodation as any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.
- Section 1: Defines ‘designated groups’ as black people, women and persons with disabilities. (This implies that persons with disabilities have the right to be provided with reasonable accommodation).
- Section 5: Imposes an obligation on every employer to promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice.
- Section 6: Prohibits unfair discrimination against any employee on various grounds, including disability. It also allows for the taking of affirmative action measures.
- Section 8: Prohibits psychological testing and similar assessments, unless the test is scientifically valid and reliable, can be applied fairly to all employees, and is not biased against any employee or group.
- Section 13: Imposes an obligation on every ‘designated’ employer to take affirmative action measures in favour of people from ‘designated’ groups. (Hence, persons with disabilities have the right to benefit from affirmative action measures).
- Section 15: Provides that affirmative action measures include preferential treatment and numerical goals, provision of reasonable accommodation, but exclude quotas.
- Section 20: Imposes an obligation on every ‘designated’ employer to prepare and maintain an employment equity plan which will achieve reasonable progress towards employment equity in the employer’s workplace. The equity plans must state, amongst others, the objectives to be

met within each year of the plan, the affirmative action measures to be taken, and the duration of the plan, which must be from one to five years. (Accordingly, persons with disabilities have the right to benefit from equity plans).

#### Observations on the EEA

Based on its dual mandate for substantive equality in the workplace: Ensuring non-discrimination and affirmative action; the EEA, amongst others, protects the right to work and employment for persons with disabilities in South Africa by protecting them from discrimination, granting them entitlement to benefit from affirmative action measures, and employment equity plans; and granting them the right to be provided with reasonable accommodations.

##### 3.1.2 *Selected domestic court cases in South Africa*

The domestic courts and/or tribunals in South Africa have dealt with employment matters that raised disability issues.

The following cases discussed below are amongst such court decisions.

#### Duty to advance and promote the position of persons with disabilities in the field of employment?

##### *Singh v Minister of Justice and Constitutional Development & Others 2013 (3) SA 66 (EqC)*

A woman with a disability had applied to serve in one of the vacant and advertised positions of magistrate. She was not offered the job. She took the matter to court on the basis that the state had failed in its duty to promote employment opportunities for persons with disabilities. Her claim was based on the argument that the criteria used by the third respondent in short-listing candidates for posts as entry level magistrates and the application thereof at the named places was unfairly discriminatory in that the applicant’s (complainant) gender and/or disability was not appropriately considered when the short-listing was done by the third respondent. (Disability was not listed in the factors to be considered in the guidelines).

The Court observed that in terms of section 9(3) of the Constitution, which recognises the right to freedom from disability based discrimination, the government has a duty to advance and promote the position of persons with disabilities, including in the field of employment.

5 C Ngwena ‘Deconstructing the definition of “disability” under the Employment Equity Act: Legal deconstruction’ (2007) 23 *South African Journal on Human Rights* 116.

**Meaningful engagement to decide of reasonable accommodation for persons with disabilities in employment?**

***Standard Bank SA v CCMA & Others* [2008] 29 ILJ 1289 (LC)**

The employee in this case was involved in a fatal motor vehicle accident. She suffered severe back pains. She found it difficult to continue doing 'normal' duties. The employer, 'Bank' sympathised with her and offered a light administrative work. She found it to be uninspiring and requested telephone sales job. She then found it difficult to sit and requested headset to enable her to work properly and the employer refused and relegated her to paper shredding job. A year later after the accident, she was frequently absent from work. The Bank acknowledged that she is unlikely to be able to resume her 'normal' functions and asked to be medically boarded, which application was refused. Two years after the accident, she was dismissed. She referred the matter to the CCMA for unfair dismissal. The Commissioner held the dismissal was unfair.

On review, the Court held that employers were required to adopt a four-stage inquiry before dismissing employees for incapacity, namely: (i) whether the employee is unable to perform his or her work, and if not; (ii) the extent to which the employee is capable of working; (iii) whether the employee's work circumstances can be adapted and, if not; (iv) whether alternative work is available.

The Court observed that if an employer dismisses an 'incapacitated' employee without taking these steps, the dismissal is automatically unfair because it constitutes a 'designated group' (as discussed in 3.1 above). It was found that in the particular case the Bank failed to investigate if it could assist the employee and yet a number of simple measures would have made it possible for the employee to continue in her employment. These include adapting her workstation around her disability; purchasing and allowing her to use a headset for the telephone; purchasing a special chair for the employee; or allowing her to work half day only.

The Court further held that it would be a case of automatic unfair dismissal when an employee who had a disability but was not incapacitated was dismissed. The Court also found that the dismissal had been procedurally unfair since the Bank did not discharge its duty to consult with the employee on the ways she could be accommodated by also engaging with technical experts who could accommodate and adjust the work environment to enable the employee to continue working.

## 3.2 Malawi

### 3.2.1 Disability Act 8 of 2012

Malawi's new disability legislation contains provisions relevant to the right to employment for persons with disabilities. These Provisions include the following:

- Section 2: Definitions of disability, discrimination and reasonable accommodation in section 2 which mirror the CRPD's definitions in article 2. (However, the definition of discrimination in the Act does not recognise the denial of reasonable

accommodation as constituting disability based discrimination).

- Section 12(1): Recognises the right to work and employment of persons with disabilities.
- Section 12(1): Provides for the right of persons with disabilities to work and employment in an open, inclusive and accessible working environment to earn/gain a living through work that is freely chosen or accepted in a labour market (This complies with the open labour market employment model under the CRPD).
- Section 12 (3):<sup>6</sup> Sets out obligations for realising the right as follows:
  - Freedom from discrimination on the basis of disability, with regard to all matters concerning all forms of employment; and to the provision of effective access to general, technical and vocational guidance programmes, placement services and vocational and continuing training.
  - Government to promote the employment of qualified persons with disabilities in the public and private sector, through appropriate policies and measures, which shall include affirmative action programmes and incentives.
- Section 13: Prohibits (disability) discrimination in work and employment.
- Section 10: Recognises the right to inclusive education and training of persons with disabilities.
- Section 11: Prohibits discrimination in education and/or training against persons with disabilities.

#### Malawi Disability Act: Positives and negatives

<b>Positives</b>	Recognises the open labour market employment model (sec 12(1)) Recognises inclusive education (sec 10(a))
<b>Negatives</b>	Does not impose the obligation to provide reasonable accommodation in the work place or in any other context. This is regrettable since the Act also fails to recognise the denial of reasonable accommodation as discrimination, which is provided in the CRPD as well as some other countries' domestic laws (for example, the ADA in the US and the DDA in Australia).

### 3.2.2 Employment Act 6 of 2000

The provisions that could directly facilitate the right to work for persons with disabilities in Malawi include:

- Section 5(1): Prohibits discrimination against any employee or prospective employee on various grounds, including disability, in respect of recruitment, training, promotion, terms and conditions of contract of employment and in all aspect of employment.
- Section 5(2): Recognises and allows for the taking of special measures, including affirmative action, to achieve *de facto* equality in employment.
- Section 57(a): Prohibits the dismissal of any employee on the ground of disability.
- Section 6(1): Requires equal remuneration for equal work without discrimination on various grounds, including disability.

<sup>6</sup> It would appear there is no sec 12(2).

### 3.3 Zambia

#### 3.3.1 *Persons with Disabilities Act 6 of 2012*

The Persons with Disabilities Act makes comprehensive provision of the rights of in Zambia. It has a number of provisions that could facilitate the realisation of the right to decent work as envisaged by the international standards discussed above. The pertinent provisions include the following:

- Section 2: Defines ‘disability’ and ‘person with disability’ in a manner that is based on the social and human rights models and is consistent with the CRPD; (Accordingly, the Act is predominantly based on the social and human rights models of disability);
- Section 2: Defines discrimination and reasonable accommodation and recognises the denial of reasonable accommodation as constituting disability based discrimination;
- Section 6: Provides for equality and freedom from disability based discrimination, prohibits violence, abuse or exploitation against persons with disabilities;
- Section 35: Provides for the right to work. It imposes a number of obligation including the following:
  - Requires the Minister (responsible for persons with disabilities) to prescribe safeguards to promote the right to employment after consultation with the Minister responsible for labour;
  - Envisages duties that include protection from discrimination on the basis of disability with regard to all aspects of employment such as pertaining to ‘conditions of recruitment, hiring and employment, continuance of employment, the creation, classification and abolition of positions, the determination of wages, pensions or other benefits, apprenticeship, promotion, career advancement and safe and healthy working conditions’;
  - Section 35(3): Requires the Minister, after consultation with the Minister responsible for labour and Technical Education and Vocational Educational and Training Authority (TEVETA), to issue regulations and take measures in order to promote the right by ensuring at least 10 requirements, which include:
    - creating a labour market and work environment that is open, inclusive and accessible to persons with disabilities (This adheres to the open labour market employment model);
    - protecting the rights of persons with disabilities to just and favourable conditions of work; ensuring that persons with disabilities exercise their labour and trade union rights on an equal basis with others;
    - enabling persons with disabilities to have effective access to technical and vocational training and guidance programmes, placement services and vocational and continuing training;
    - creating and promoting employment opportunities and career advancement for persons with disabilities in the labour market;
    - creating and promoting opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business; employing persons with disabilities in the public sector;
- creating and promoting the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- ensuring that reasonable accommodation is provided to persons with disabilities in the workplace;
- Promoting vocational and professional rehabilitation, job retention and creating return-to work programmes for disabled persons.
- Section 37: Requires the government to grant tax rebate to a person who employs a persons with a disability and to grant special incentives to persons with disabilities who are engaged in business and to business organisations that employ persons with disabilities. (These measures would qualify as incentives and affirmative action measures that promote the employment of persons with disabilities);
- Section 37: Requires government to grant tax rebate to an employer who modifies or makes ‘special services’ in order to provide reasonable accommodation for ‘disabled employees’. (These measures would qualify as incentives and affirmative action measures that promote the employment of persons with disabilities);
- Section 37: Exempts an employee with a disability from payment of income taxes, as the relevant legislation may prescribe. (This would also constitute an affirmative action measure in favour of persons with disabilities in employment);
- Section 38: Protects persons with disabilities from being posted or transferred to a section or place of establishment that is not ‘suited’ for them;
- Section 38: Requires the provision of reasonable accommodation;
- Section 38: Provision of counsel; retraining and re-deployment in cases where an employee ‘suffers’ a disability as a result of the employment;
- Section 39: Requires the Zambia Agency for Persons with Disabilities to secure the reservation of a prescribed percentage of positions in employment in the public and private sectors for persons with disabilities, in consultation with the relevant institutions. (This would qualify as a specific and affirmative action measures);
- Section 14(1)(d): Mandates the Zambia Agency for Persons with Disabilities to operate schemes and projects for self-employment or regular or sheltered employment for persons with disabilities. (This would promote sheltered employment, contradiction of the open labour market employment model); and
- Section 22: Provides for the right to inclusive education and training.

Zambia Persons with Disabilities Act: Positives and negatives	
<b>Positives</b>	Recognises the open labour market employment model (Sec 35(3)(a)). Provides for Reasonable accommodation (sec 38) & affirmative action (sec 35(3)(a)). Recognises inclusive education at all levels (sec 22(1)).
<b>Negatives</b>	Continues to recognise and promote the sheltered employment model (sec 14(1)(d)).

### 3.4 Tanzania

#### 3.4.1 Persons with Disabilities Act 9 of 2010

It contains provisions that would facilitate the right to decent work and employment for persons with disabilities in Tanzania. These include:

- Section 2: Defines disability and a 'person with a disability' in a manner that reflects the social and human rights models of disability;
- Section 2: Defines 'reasonable changes' (which should be understood as reasonable accommodation) as necessary, appropriate and adjustments offered in a manner that does not impose a disproportionate burden, where needed in a particular case, to ensure persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms;
- Section 6: Prohibits all forms of discrimination on the basis of disability and guarantees equal and effective legal protection against discrimination on all grounds;
- Section 6: Requires the taking of all appropriate measures to ensure that reasonable changes/accommodations are provided to persons with disabilities of all ages and gender;
- Section 27(1): Sets out the right to education and training for persons with disabilities to education and training in inclusive settings;
- Section 28: Prohibits discrimination in learning institutions;
- Section 31: Sets out the general obligation to provide employment to persons with disabilities;
- Section 31(1): Imposes an obligation on every employer in public or private entities to fill existing vacancies that are 'fit for a person with a disability' by giving the post to the persons with disabilities who meet the pertinent minimum qualification;
- Section 31(2): Provides for the enactment of regulations that require every employer with the work force of at least 20 to employ based on a quota system and to ensure that three percentum of it constitutes persons with disabilities; (This mechanism might qualify as an affirmative action measure);
- Section 32: Provides for the continuance of employment for persons with disabilities by requiring every employer to endeavour to maintain employment of the persons with disabilities on his working place;
- Section 33: Prohibits discrimination against persons with disabilities in various, if not all, aspects of employment.; including matters relating to advertisement; recruitment; terms or conditions of employment; creation, classification or abolition of jobs or posts; training, advancement, apprenticeship, transfer, promotion or retrenchment; provision of facilities related to or connected with employment; and provision of any other benefits;

- Section 34 (1): Imposes obligations pertaining to the working environment; which obligations listed in the first paragraph include the duties of every employer to:
  - Provide job accommodation and working tools;
  - permit employees with disabilities to exercise their labour and trade union rights in accordance with any relevant laws; and
  - Enable employees with disabilities to have effective access to general technical and vocational guidance and continuing training for their carrier and advancement;
- Section 34(2): Requires the Minister to ensure, amongst others: the promotion of employment for persons with disabilities by:
  - Applying affirmative action treatment;
  - job retention and return to work for any employee who has obtained a disability in a workplace; and
  - Provision of reasonable changes.
- (Hence, it recognises the right of persons with disabilities to benefit from affirmative action measures and the provision of reasonable changes/accommodation).

Tanzania Persons with Disabilities Act: Positives and negatives	
<b>Positives</b>	Does not recognise the sheltered employment model. Provides for affirmative action measures in employment (sec 34(2)(a)). Provides for reasonable changes/accommodations in employment (sec 34(2)(c)). Recognises inclusive education and training (in inclusive setting) (sec 27(1)).
<b>Negatives</b>	Does not recognise or make reference to the open labour market employment model.

### 3.5 Uganda

#### 3.5.1 Persons with Disabilities Act 2006

It contains a number of pertinent provisions, which include:

- Section 5: Requires government to promote the educational development of persons with disabilities through, amongst others, the encouragement of inclusive education;
- Section 6: Prohibits discrimination in educational services against persons with disabilities on the basis of disability;
- Section 11: Obliges government to 'take vocational rehabilitation measures to develop the skills and potentials of persons with disabilities to enable them compete favourably for available productive and remunerative employment opportunities in *the labour market*';
- Section 12: Prohibits discrimination in employment against a qualified person on the basis of that person's disability with regard to various, if not all, aspects of employment;
- Section 13: Provides for the right of persons with disabilities to employment, including:
  - The right to practise their professions and to carry on any lawful occupation, trade or business of their choice;
  - The duty of government to encourage all government and private sectors to promote the right to empowerment of persons with disabilities,

including those who acquire disability during the course of their employment, to work on an equal basis with others and to earn a living by work through a quota system of employment; and

- the duty of the employer to carry out appropriate modifications in their work premises to facilitate the employment of persons with disabilities (It is noteworthy that employers can claim tax exemption on any costs incurred as a result of the modifications carried out under the Act);
- Section 16: Imposes the duty on the employer to ensure that the physical features of the premises occupied by an employee do not place an employee with a disability at a disadvantage;
- Section 17: Provides for tax reductions of up to 15 per cent of all payable tax to private employers who employ at least ten either as regular employees, apprentice or learner on full time basis;
- Section 33: Provides for affirmative action in favour of persons with disabilities. It requires Government to take affirmative action in favour of persons with disabilities for the purpose of redressing imbalances which exist against them; and
- Section 2: Defines, amongst others, disability and ‘person with disability’ (The definition of disability embodies the social model and human rights models).

Uganda Persons with Disabilities Act: Positives and negatives	
<b>Positives</b>	Gives a hint that it does not recognise the reserved or sheltered employment model (secs 11 & 13(1)). Provides for affirmative action measures in employment (sec 33). Provides for carrying out of appropriate modifications in work premises to facilitate the employment of persons with disabilities (sec 13(4)(b)). Provides for the encouragement of inclusive education (sec 5(a)).
<b>Negatives</b>	Does not recognise or make reference to the sheltered employment model. Does not expressly mention the concept of reasonable accommodation, although it requires modifications in the work premises to facilitate the employment of persons with disabilities. Does not expressly mention the open labour market employment model.

### Student activity

- 1 Discuss whether national laws (in Africa) should strictly adhere to the open labour market model or should leave room where the sheltered employment model could be regarded as an exception.
- 2 Discuss whether the ‘strict and successful’ (domestic legislative) implementation of equality and non-discrimination for persons with disabilities in employment could achieve the *full* realisation of the right to employment by persons with disabilities in Africa.
- 3 Learning from the provisions on employment in the domestic disability legislation in Africa; discuss at least three specific measures (excluding provision for reasonable accommodation) that could be explored by African countries in promoting the right to employment of persons with disabilities and the contribution that each measure could make in this regard.

### Student activity

#### Hypothetical situation: Which one between quotas or tax deductions?

The situation:

Malawi is a poor African country (state party to the CRPD) that has been critically hit by high unemployment rates of persons with disabilities. It is considering prioritising one strategic measure. It intends to choose between the imposition of employment quotas for persons with disabilities, on the one hand; or the provision for incentives such as tax rebates for employers that engage/employ persons with disabilities, on the other.

The Question:

One senior state official has come to you for advice on which one of these two measures the country should prioritise. Explain and justify the advice you would give to the Malawian official in selecting the measure to be prioritised.

## 4 Conclusion

The CRPD specifically recognises the right to decent work and employment for persons with disabilities. The standards that the CRPD provides are also similar to those contained in a number of African regional human rights treaties. The module has identified that the standards comprise ‘core elements’ such as recognising the right of persons with disabilities to work in an open and inclusive labour market freely chosen on an equal basis with others; the provisions of reasonable accommodation to persons with disabilities in employment; the provision for specific measures such as affirmative action, quotas and other equity plans in favour of employees with disabilities and employer incentives such as tax rebates/reductions; the prohibition of disability based discrimination in all aspects of employment; favourable working for persons with disabilities; promotion of employment opportunities in public and private entities; freedom to exercise unionism and/or collective bargaining rights; opportunities for career development, training, advancement and job-retention; and right to inclusive education and training, including technical and vocational training.

Accordingly, African states parties to the CRPD and the applicable African treaties are expected to take legislative and other measures for purposes of adhering to the international standards under the CRPD. A number of African countries, such as South Africa, Malawi, Tanzania, Zambia and Uganda, have already enacted disability or employment legislation that could be utilised as an implementation tool for realising this right. Domestic courts such as South Africa’s courts have also dealt with cases relating to the employment of persons with disabilities.

It can be observed that the domestic legislation surveyed in this module demonstrate that a number of countries provide good practices with regard to a majority of the core elements. These include the right of persons with disabilities to work in an open

and inclusive labour market; the provisions of reasonable accommodation in the workplace; the provision for specific measures such as affirmative action, quotas and incentives; the prohibition of disability based discrimination in all aspects of employment; promotion of public and private sector employment opportunities; freedom to exercise unionism and/or collective bargaining rights; and right to inclusive education and training, including technical and vocational training.

### Student activity

Students are expected to give feedback on the following questions:

- 1 With a view to giving effect to the purpose of the CRPD as set out in its article 1, explain why the open labour market employment model is crucial in ensuring the full enjoyment of the right to employment by persons with disabilities on an equal basis with others.
- 2 Discuss any three key lessons you could pick from the discussion of the right to employment for persons with disabilities that, in your view, African states parties to the CRPD should not take for granted in their quest to realise the right to decent work for persons with disabilities in their jurisdictions.
- 3 Lastly, students should make 'moot court' presentations or legal counsel-like presentation on the *Main Class Activity* relating to the *hypothetical case* given in **Table 1** at the beginning of the module (relating to the promotion of employment opportunities for person with visual impairments in Zambia).

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## United States of America

- Olmstead, Commissioner, Georgia Department of Human Resources, et al. v. L. C., by zimring, guardian ad litem and next friend, et al* (98-536) 527 US 581 (1999)

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- Concluding Observations on Australia, CRPD Committee (2013) UN Doc CRPD/C/AUS/CO/1  
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- Persons with Disabilities Act 9 of 2010

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### Uganda

- Persons with Disabilities Act 20 of 2006

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## Module 8: The right to education

### Module overview and content

Education is one of the most widely recognised and accepted ‘social goods’. As a right, education entails the recognition of every individual’s entitlement to education without any discrimination on the basis of the listed grounds of non-discrimination. However, whereas the right is generally recognised and the responsibilities of states to ensure the right to education are also acknowledged, the education of persons with disabilities has not been implemented satisfactorily in most countries, especially in Africa.

This chapter assesses various issues pertinent to the education of persons with disabilities, including the normative standards set out in the regional and international instruments, existing approaches to education of persons with disabilities, challenges in the education of persons with disabilities, concepts in the education of persons with disabilities, and the domestication of the standards on the education of persons with disabilities.

### Learning objectives

At the end of this module students should be able to:

- Understand the meaning of the right to education and its application to PWDs;
- Understand different approaches in relation to education of PWDs;
- Understand the challenges to the education of PWDs; and
- Understand the various concepts applied in the education of PWDs, such as inclusive education, support, reasonable accommodation and so on.

## 1 Normative content of the right to education at the international and regional levels

### 1.1 International human rights law

The right to education is widely recognised in international human rights instruments and other international initiatives including the Universal Declaration of Human Rights (UDHR), International Convention on Economic Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of the Child (CRPD). Most of the earlier human rights treaties did contain specific provisions on education of persons with disabilities. However, it is possible to find a few references to the education of persons with disabilities in some of the instruments, particularly through the application of their non-discrimination provisions.

The Universal Declaration declares that *everyone* has the right to education and that it should be free in at least the *elementary* and *fundamental* stages.<sup>1</sup> The ICESCR echoes this provision by stating that *everyone* has a right to education and that primary education should be free and compulsory.<sup>2</sup> The ICESCR thus reinforces the sentiments of the Universal Declaration in a more detailed and legally binding treaty. The Convention on the Rights of the Child also provides for the right of every child to education, which is to be achieved progressively and provided on a basis of equality.<sup>3</sup> Article 29(1) sets out the aims of education and emphasises the individuality of education. This means that education should be framed in such a way as to address the individual needs of all children, including children with disabilities.

According to the CRC, the primary aim of education ought to be the development of the child’s personality, talents and mental abilities to their fullest.<sup>4</sup>

In General Comment 1, the CRC Committee underscored the fact that the aims of education address the content of the education, and that the educational process ought to reinforce all the fundamental values of the child.<sup>5</sup> This understanding is particularly important in the determination of the appropriate environments for the education of children with disabilities, that is, whether in a special school or in a regular school.

As was already highlighted, the foregoing instruments do not specifically provide for the education of persons with disabilities. Nevertheless, the treaties contain non-discrimination clauses which make the rights applicable to persons with disabilities without discrimination. For instance, article 2 of the CRC prohibits discrimination on the basis of disability in the implementation of any of the rights. Similarly, in General Comment 5, the UN Committee on Economic, Social and Cultural Rights expanded the grounds for non-discrimination under the ICESCR to include disability.<sup>6</sup> Accordingly, the rights under the ICESCR, including the right to education, apply to persons with disabilities as to all other people.

The CRPD is the main instrument that expounds on the implementation of the right to education for persons with disabilities. The CRPD recognises the right of persons with disabilities to have equal access to education, including life-long learning, tertiary and vocational training. Article 24 of the CRPD provides for:

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1 Art 26(1).  
2 Art 13.  
3 Art 28.  
4 Art 29.  
5 CRC General Comment 1: The aims of education, para 8.  
6 CESCR General Comment 5: Persons with disabilities, para 6.

- Recognition of the right to education for persons with disabilities on the basis of equality with all people in society;
- An inclusive education approach to education of persons with disabilities;
- The aims and scope of inclusive education;
- The guiding principles for the implementation of inclusive education;
- Measures necessary to ensure the participation of persons with disabilities in education; and
- State responsibilities in tertiary, vocational, adult and lifelong learning for persons with disabilities.

It is important to note that though the aforementioned instruments recognise the right to education of persons with disabilities on an equal basis with others, they hardly provide the 'how' to ensure that the right is actually implemented, and that persons with disabilities indeed have access to education. It is therefore very significant that article 24(2) of the CRPD includes guidelines on how to ensure that the right to education is meaningfully implemented for the benefit of persons with disabilities.

Article 24 of the CRPD draws inspiration from a long list of preceding instruments, mostly non-binding instruments, on the education of persons with disabilities. These include; Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975), Standard Rules of Equalization of Opportunities for Persons with Disabilities (1993), The Salamanca Statement and Plan of Action on Special Needs Education (1994), as well as General Comments of the UN Committee in Economic Social and Cultural Rights (General Comment 5), and General Comment 9 of UN Committee on the Rights of the Child.

- \* The Salamanca Statement advocated for priority to be given to the education of children with disabilities within regular schools. The Salamanca Framework on Special Needs Education recognised the diversity of characteristics, interests, abilities and learning needs amongst children and hence called for education systems to be designed and educational programmes implemented in a way that takes into account these diversities (The Salamanca Statement, para 2 & 3). The Salamanca Statement further endorsed the integration of learners into the mainstream classroom and the education of children with 'special needs' in regular schools. The Statement considered the education of children with disabilities in the regular school or mainstream classroom a way of addressing discriminatory attitudes, achieving universal education due to expansion of access, and improving the cost-effectiveness of the entire education system (Salamanca Statement, para 2).

Article 24 of the CRPD is complemented by other provisions in the Convention that have to be taken into account in interpreting the article. These include the General Principles in article 3, as well as article 5 on equality and non-discrimination of persons with disabilities. Article 9 on the right to access specifically calls for schools to be made accessible to persons with disabilities. The specific aspects of article 24 are discussed later in this module.

## 1.2 Education of persons with disabilities in African human rights instruments

### 1.2.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) is the principal human rights treaty of the African Union. The ACHPR does not recognise disability as one of the grounds for non-discrimination. However, in the *Purohit & Moore v The Gambia* case, the African Commission on Human and Peoples' Rights recognised that the grounds for non-discrimination under the ACHPR include non-discrimination on the basis of disability.<sup>7</sup> Accordingly, the right to education under article 17(1) of the Charter which states that 'every individual shall have the right to education' is as relevant to persons with disabilities as it is to all other people in the society. The African Commission has not given an interpretation of the right to education as contained in the Charter. Since the ACHPR does not differentiate state party obligations on the basis of civil-political or socioeconomic rights, the right to education for all as recognised under the Charter requires states to prioritise their resources for its immediate implementation.

The Charter provides that 'the ... disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.<sup>8</sup> This provision gives a basis for states to adopt disability specific measures in order to make access to the rights by persons with disabilities meaningful. However, the framing of the provision to the fact that the provision restricts itself to 'the physical and moral' needs unnecessarily limits its effectiveness and makes it ambiguous since disability specific needs go beyond the physical and moral. The meaning of 'moral needs' is particularly subjective and difficult to determine.

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

The African Charter on the Rights and Welfare of the Child (ACRWC) recognises that 'every child shall have the right to an education'.<sup>9</sup> It calls for special measures in respect of 'female, gifted and disadvantaged' children.<sup>10</sup> The meaning of 'disadvantaged' is not set out, but can be understood to refer to children who for one reason or another are vulnerable to exclusion from education such as orphans, children of indigenous communities, or children with disabilities.

Article 13(2) of the ACRWC calls upon states parties to ensure that children with disabilities have

effective access to training, preparation for employment and recreation opportunities in a

7 *Purohit and Moore v The Gambia* Communication No 241/2001 (2003).

8 Art 18(4).

9 Art 11.

10 Art 11(3).

manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

This provision provides requires African states to ensure that education is relevant to children with disabilities.

## 2 The right to education under the CRPD

The CRPD provides for the right to education for persons with disabilities in an elaborate provision. Indeed, article 24 of the CRPD is one of the longest provisions of the CRPD, both in terms of content and breadth of issues provided for. As was highlighted above, article 24 is founded upon from pre-existing international law provisions on the right to education. Indeed, the Ad Hoc Committee on the drafting of the CRPD noted that article 24 draws on article 13(1) of the ICESCR and 29(1) of the CRC by selecting the aspects of both that are relevant to persons with disabilities.<sup>11</sup>

Article 24(1) of the CRPD establishes the right of persons with disabilities to education and sets out the aims of such education. In addition to the aims of education set out in article 29(1) of the CRC and article 13 of the ICESCR, article 24(1) calls upon states parties to ensure that the education of persons with disabilities is directed towards the full development of the human sense of dignity and self-worth and the development of the 'creativity' of persons with disabilities. The article also requires states parties to ensure education is directed towards the development of respect for human diversity. Education that is geared towards ensuring respect for human diversity would essentially include creating awareness on disability amongst learners.

Hence, according to the CRPD, education should be aimed at:

- The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and
- Enabling persons with disabilities to participate effectively in a free society.

Article 24(2) sets out guiding principles on how the right to education is to be implemented in order to achieve the aims envisaged in sub-article 24(1). The purpose of the subsection is evident in the first sentence of the sub-article which states that 'in

realizing this right, State Parties shall...' The sentence is a clear indication that the principles are a pathway through which the right as established in article 24(1) is to be achieved.

These principles require:

- Non-exclusion of persons with disabilities from the general education system on the basis of disability;
- Non-exclusion of children with disabilities from free and compulsory primary education, or from secondary education, on the basis of disability;
- That persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- That reasonable accommodation of the individual learner's requirements is provided;
- That persons with disabilities receive the support required, within the general education system, to facilitate their effective education; and
- That effective individualised support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

Article 24(2) reaffirms and reinforces some of the general principles of the Convention and their application in the context of education, such as reasonable accommodation, full and effective inclusion in society, and non-discrimination. These principles are discussed further later in the module.

Article 24(3) addresses the right of persons with disabilities to learn life and social development skills in order to facilitate their full and equal participation in education and as members of the society. Life and social development skills refer to abilities that enable a person with disabilities to adapt or participate effectively in a society, such as communication, literacy including brail, mobility, and use of assistive equipment.

Article 24(3) specifically calls for:

- Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
- Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; and
- Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development.

11 See Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm> (accessed 3 September 2014) at footnote 59; B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in M Freeman *Law and childhood studies* (2012) 432.

### Student activity

Discuss the kinds of facilities necessary to enable teaching of life-skills.

At what point of education should life-skills be taught?

Article 24(4) sets out state obligations in respect of training and employment of teachers including teachers with disabilities and other staff and professionals working at all levels of education. It calls for the employment of a workforce equipped with skills relevant to the education of persons with disabilities such as qualifications in sign language and braille.

Article 24(5) provides for the right of persons with disabilities to access various forms of tertiary education and lifelong learning. Hence, whereas a lot of attention is accorded to access to basic education at the primary and secondary levels, states parties to the CRPD have a responsibility to ensure not only that tertiary education is accessible to persons with disabilities, but that it is also available in various forms such as universities, continuous education and lifelong learning, or vocational training.

## 2.1 Article 24 and other articles of the CRPD

The right to education under the CRPD ought to be considered holistically, as an integral part of the other provisions of the Convention. Hence, the provision ought to take into account the general principles under the CRPD,<sup>12</sup> the provision on equality and non-discrimination,<sup>13</sup> accessibility,<sup>14</sup> and group specific provisions such as the provisions on women and children.<sup>15</sup> It has been shown above that the CRPD expressly reaffirms some of the general principles such as reasonable accommodation and non-discrimination.

Article 9 of the Convention calls for the elimination of barriers to accessibility of facilities, including school facilities.<sup>16</sup> The CRPD Committee has expounded on the relationship between the right to accessibility and education in its General Comment on Article 9,<sup>17</sup> stating that:

Without accessible transport to schools, accessible school buildings, and accessible information and communication, persons with disabilities would not have the opportunity to exercise their right to education (art. 24 of the Convention). Thus schools have to be accessible, as is explicitly indicated in article 9, paragraph 1 (a), of the Convention. However, it is the entire process of inclusive

<sup>12</sup> Art 3.

<sup>13</sup> Article 5 of the CRPD.

<sup>14</sup> Art 9 of the CRPD.

<sup>15</sup> Articles 7 and 6 of the CRPD respectively.

<sup>16</sup> Art 9(1).

<sup>17</sup> CRPD Committee, General Comment on art 9: Accessibility (2013) CRPD/C/11/13.

education that must be accessible, not just buildings, but all information and communication, including ambient or FM assistive systems, support services and reasonable accommodation in schools. In order to foster accessibility, education as well as the content of school curricula should promote and be conducted in sign language, Braille, alternative script, and augmentative and alternative modes, means and formats of communication and orientation (art. 24, para. 3 (a)), with special attention to the appropriate languages and modes and means of communication used by blind, deaf and deaf-blind students. Modes and means of teaching should be accessible and should be conducted in accessible environments. The whole environment of students with disabilities must be designed in a way that fosters inclusion and guarantees their equality in the entire process of their education.<sup>18</sup>

In its General Comment on equality before the law, the CRPD Committee has emphasised the need for persons with disabilities to be accorded the opportunity to make meaningful choices about their lives on various issues including education. States need to ensure that decision making on inclusive education is not substitutive but supportive.

### Student activity

Discuss the examples of ways in which the decision making of students with disabilities is substituted as opposed to supported.

To what extent should the opinion of a child with disabilities be taken into account in determining the most suited school for their education?

## 3 Concepts and approaches in education and the education of persons with disabilities

The CRPD calls for the establishment of 'an inclusive education system at all levels' so as to ensure the education of persons with disabilities without discrimination and on the basis of equal opportunity (article 24(1)(a)). It is therefore important to understand the meaning of 'inclusive education' or 'inclusive education system' as envisaged under the CRPD. The analysis of the international and regional standards above also highlights some concepts which are relevant to the education of persons with disabilities. These concepts underlie the understanding of inclusive education, and guide the implementation thereof. They include support in education; reasonable accommodation; and choice in education.

It is important to mention that approaches to the education of persons with disabilities have changed over time. In the earlier years, education of persons with disabilities was mainly undertaken in special schools. In more recent years, education of persons

<sup>18</sup> CRPD General Comment on art 9: Accessibility, para 39.

with disabilities takes place in a range of settings including special schools, integrated schools or units, and inclusive schools. The question of whether inclusive education actually requires exclusive education of persons with disabilities in regular schools, or whether an inclusive education system necessarily ought to embrace both special and ordinary schools in a manner that allows choice between systems, is highly controversial. Some of the divergent interpretations of inclusive education are highlighted below.

### 3.1 Inclusive education

#### 3.1.1 Lecturer's note

*The subject of inclusive education is vibrant and on-going. There are a lot of unsettled questions about the meaning of inclusion, as well as the best way to achieve inclusive education as contemplated by the CRPD. There are evident divergent interpretations as to organisation of the education system in a manner that maximises the potential of persons with disabilities. While there are strong leanings towards education of all learners in the mainstream school, a review of the negotiation archives of the CRPD shows in fact that choice between systems was actually contemplated by the drafters of the Convention.*

*It is therefore essential to present the Module from a perspective that allows students to engage with the debates surrounding approaches to inclusive education more holistically, especially taking into account the resource and infrastructural realities in their respective countries. For instance, students may consider whether the CRPD gives room for progressive realisation of inclusive education as implemented in South Africa.*

The essence of the inclusive education approach is that the framework within which education is delivered is broad enough to accommodate the needs and circumstances of every learner in the society, including learners with disabilities, equally. The Dakar Framework on Education states that as a matter of principle education must neither exclude nor discriminate.<sup>19</sup> UNESCO further defines inclusive education<sup>20</sup> as the

process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is *the responsibility of the regular system to educate all children.*<sup>21</sup>

Inclusive education is therefore an approach that emphasises the goal of non-exclusion of learners from both the content of the education, and the settings in which the education is provided. There is

little contestation to the fact persons with disabilities ought to benefit from the same content of education, divergence in opinion abounds as to the physical environment in which the learning ought to be conducted. In particular, the question is whether learners with disabilities must, *in all cases*, be educated in the same classroom as their peers without disability. There at least three main approaches to the organising of education and their accommodation of children with disabilities. These are education separate systems, integrated systems, and inclusive systems. The separation approach is epitomised by the use of special schools as the default education institution for all persons with disabilities, with the exception of persons with mild forms of impairment who are able to study in the regular (often non adapted) schools. The integration approach entails the education of all learners within the regular classroom or in special units within the mainstream school. The integration approach emphasises the physical location of learners in the process of learning. The third system combines aspects of the first two as far as possible, ensuring that persons with disabilities are educated in environments that 'maximise academic and social development'.<sup>22</sup> This requires the establishment of a range of education services and options for persons with disabilities as for all other members of the society. The range includes special schools that can be used to facilitate the learning of life skills to enable transition into inclusive schools, as well as inclusive systems that are adequately adapted to enable education of persons with disabilities. The latter option therefore allows a person with disability to choose of learning environment that maximises their potential.

Proponents of the single school system argue that schools ought to adapted in order to accommodate the needs of all learners, and hence to diminish the need for special schools. This requires availability of universally accessible premises, assistive devices and aids, skilled teachers, small teacher-student ratios to enable individualised attention, and flexible curriculum to accommodate the learning needs of all learners. The proponents of an inclusive education system with a range of learning services argue that the education system ought to recognise and accommodate the needs of learners in various learning contexts with the ultimate goal of full inclusion in education and society. In accordance with this school of thought, persons with disabilities may learn in specialised schools or units to acquire life skills such as Braille and mobility in order to facilitate inclusion into the mainstream school and society. This means that education in special school would play a transient role in a process of inclusion. It also means that inclusive education can be delivered in both integrated and separate systems of education where necessary, and that the organisation of the education system ought to be guided by the need to ensure that all learners meaningfully benefit from education.

A school system founded on the latter approach would be characterised by:

19 Expanded commentary on the Dakar Framework for Action para 20 [http://www.unesco.org/education/efa/wef\\_2000/expanded\\_com\\_eng.shtml](http://www.unesco.org/education/efa/wef_2000/expanded_com_eng.shtml) (accessed 5 September 2014).

20 UNESCO *Guidelines for Inclusion: Ensuring access to education for all* (2005) 13.

21 Emphasis added.

22 Art 24(2)(e) of the CRPD.

- A clear and express recognition of the rights of persons with disabilities to education in the law and policies;
- A common public authority on education, that is, ensuring the education of persons with disabilities is managed by the same government department or ministry as the education of all other persons in the society;
- A range of education options including properly equipped specialised schools and adapted and equipped regular schools to cater for the full range of disability specific needs of learners; and
- Skilled teachers and support staff with disability specific skills such as an understanding of Braille and sign language.

The divergent opinions on the implications of inclusive education for the organisation of education are replicated in the documents of the treaty bodies. For instance, the UN Committee on the Rights of the Child notes that;

Inclusive education should be the goal of educating children with disabilities. The manner and form of inclusion must be dictated by the individual educational needs of the child, since the education of some children with disabilities requires a kind of support which may not be readily available in the regular school system.<sup>23</sup>

The CRC Committee further states that,

The Committee notes the explicit commitment towards the goal of inclusive education contained in the draft convention on the rights of persons with disabilities and the obligation for States to ensure that persons including children with disabilities are not excluded from the general education system on the basis of disability and that they receive the support required, within the general education system, to facilitate their effective education.<sup>24</sup>

The above quotes lean on both an understanding of inclusive education as education in separate settings, as well as in the regular classroom. However, the CRC Committee explicitly endorses the use of a continuum of services and range of options where inclusive education is deemed not feasible in the near future.<sup>25</sup> The CRC Committee states in that regard that:

... the extent of inclusion within the general education system may vary. A continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future.

The CRPD Committee has also addressed inclusive education in its consideration of state party reports and General Comments. As highlighted above, the Committee has pointed out the need for all schools to be accessible to persons with disabilities, both in terms of premises and content. This requirement applies to all schools. Implicitly therefore, all

schools ought to be universally accessible and hence suitable for the education of all learners, disability notwithstanding.

However, the approach of the CRPD Committee is not consistent on whether inclusive education has to be delivered exclusively in inclusive schools or whether in some cases, special schools may be maintained. For instance, in its observations on the report of Spain, the Committee gave guidance on the determination of placement of children with disabilities in special schools. The Committee did not take the opportunity to expressly require or encourage the state to stop the use of special schools. However, in its recommendations to China, the Committee urged the state to take the money channelled into special education and put it into the mainstream education system 'to promote inclusive education in the mainstream school'.<sup>26</sup> The Committee has retained the latter view in more recent concluding observations.

### Student activity

Discuss the implications of the immediate abolition of special schools in African countries. Would such a move ensure optimum education for persons with disabilities? Base the discussions on your specific country.

## 3.2 Reasonable accommodation in education

Article 24(2)(c) of the CRPD calls for the provision of reasonable accommodation for the individual requirements of learners. The general requirements of reasonable accommodation are discussed in other parts of this curriculum. In as far as it applies to the right to education, however, reasonable accommodation requires policies and practices that allow flexibility in response to individual needs. Such flexibility ought to include greater latitude for end service provider, in this case teachers and school authorities, to make decisions as to modifications necessary to accommodate a student. During the CRPD negotiating process, it was argued that to reasonably accommodate a student's requirements requires state parties to ensure an accessible curriculum, accessible teaching medium and technologies, alternative and augmentative communication modes, sign language, Braille, alternative learning strategies, accessible physical environment, and specialised training of teachers to ensure full participation of students with disabilities.<sup>27</sup>

The modifications required may include review of lesson plans, location of classes, relocation of classes where necessary, or appropriately adapted tests for students with disabilities. Since reasonable accommodation is an individual measure geared at

23 CRC General Comment No 9: children with disabilities, para 66.

24 As above.

25 As above.

26 See the Concluding Observations of the CRPD Committee available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5) (accessed 20 March 2015).

27 Seventh Session 'Article 24 - Education: Comments, Proposals and amendments submitted electronically' 2.

enabling the individual to fully benefit from education, it is also essential to maintain smaller classroom numbers so as to guarantee individual attention to learners and hence support the essential modifications. In order to reasonably accommodate learners with disabilities, schools and other learning environments should also be adequately supplied with the necessary equipment, aids or services to facilitate optimum learning.

It is difficult to exhaustively catalogue of all the measures necessary to reasonably accommodate learners with disabilities simply because such measures are individually defined and diverse. Reasonable accommodation demands an individual approach to the needs of the persons with disabilities. Individuality of reasonable accommodation also means that adjustments necessary to accommodate one group of persons with disabilities may vary from what is required for another group with a different kind of impairment.

In deciding whether hardship or 'burden' of accommodation is excessive or 'undue' in a learning context such as a school, college or other tertiary education setting, the factors that should be taken into account include:

- The financial resources required to provide the accommodation;
- The degree and kinds of effects that accommodations will have on other students;
- The impact of accommodations on the educational program itself; and
- The risks, if any, that the measures pose for other students, including others learners with disabilities.

The balancing of cost of adjustment versus the capacity of the education provider is much more relevant in relation to private education providers. Arguably, the costs of ensuring reasonable accommodation should not be considered too onerous for the state, as this would constitute discrimination of persons with disabilities. As the primary duty bearer for ensuring education for all, the state cannot abdicate the responsibility to make education effective for persons with disabilities through reasonable accommodation.

In summary, practical measures to ensure reasonable accommodation in education include ensuring that:

- teachers have dynamic skills to respond to the needs of all the learners;
- That school budgets and curricula are flexible to the needs of learner; and
- Individual education plans be developed in order to cater for the individual educational needs of learners with disabilities.

#### Student activity

- What is the difference between reasonable accommodation and affirmative action for persons with disabilities in education?
- What are the limits of 'reasonable' accommodation in education?

### 3.3 Support in education

Article 24(2) calls for 'support within the general education system' or 'in environments that maximise academic and social development' in order to facilitate effective education of persons with disabilities. The duty to provide support in education is closely related to the general obligation of the state to

undertake or promote the availability and use of new technologies, including information and communication technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.<sup>28</sup>

The Salamanca Statement of Action stated that

within inclusive schools, children with special educational needs should receive whatever extra support they may require to ensure effective education ...there should be a continuum of services to match the continuum of special needs encountered in every school.<sup>29</sup>

The Standard Rules state that

education in mainstream schools presupposes the provision of interpreter and other appropriate support services. Adequate accessibility and support services, designed to meet the needs of persons with different disabilities, should be provided.<sup>30</sup>

Support measures include:

- personal assistance;
- teachers trained in methodology and techniques such as appropriate languages and other forms of communication for teaching children with a diverse range of abilities;
- an accessible curriculum, appropriate and accessible teaching materials;
- equipment and assistive devices;
- specialised training of teachers, school counsellors and psychologists;
- an accessible teaching medium and technologies;
- alternative and augmentative communication modes;
- alternative learning strategies; and
- an accessible physical environment.

### 4 Case studies: Approaches to inclusive education in national laws, policy, and practice

It has already been indicated that various approaches have been adopted to the implementation of inclusive education. This section highlights some of the approaches taken in the law,

<sup>28</sup> Article 4(1)(g).

<sup>29</sup> Salamanca Statement 12.

<sup>30</sup> Standard Rules (n 15 above) Rule 6(2).

policy and practice on education of persons with disabilities in select African countries.

## 4.1 South Africa

### 4.1.1 The law and policy

South Africa is party to the CRPD. The Constitution of South Africa recognises everyone's right to education without discrimination of any basis including disability.<sup>31</sup> This right is implemented through the South African Schools Act, the Children's Act, as well as various policies and supporting programmes.<sup>32</sup> The most significant policy framework on education of persons with disabilities in South Africa is the Education White Paper 6 on Special Needs Education (2001), as well as its supporting programme, the National Strategy on Identification, Assessment and Support.<sup>33</sup>

In terms of statutory law, the Children's Act also does not address the right to education. However, the Act provides that in any matter concerning a child with disability, due consideration must be given to, amongst other things, making it possible for the child to participate in social, cultural, religious and educational activities while taking into account any special needs that the child might have in that regard, and providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.<sup>34</sup> Accordingly, while education as contemplated under the Act would enable the child to achieve self-reliance and participate actively in the society, the implementation of the right to education must to be provided in a manner that respects a child's dignity.

The South African Schools Act directs ordinary public schools to admit learners with disabilities whenever it is practicable, and directs schools to serve the educational needs of learners without discrimination. Arguably, the reference to 'whenever it is practicable' grants broad discretion to the implementing authorities on admission of learners with disabilities. However, the special education policy framework and guidelines provide guidance on the determination of the practicability of admission of a learner with disabilities.

The foregoing legal provisions are implemented through White Paper 6 on Special Needs Education (WP 6). The hallmark of WP 6 is the progressive approach to the realisation of inclusive education. In terms of this approach, the goal of inclusive education is to be achieved in a period of twenty years. The roadmap to full implementation of the policy constitutes three phases, that is, the short, medium and long-term goals. The phased approach, particularly in as far as it applies to basic education, is significant because the right to basic education

under the Constitution is not qualified, and therefore imposes obligations of an immediate nature. It can therefore be argued that the progressive realisation of the Policy suggests that there is a difference between the nature of state obligations for basic education and those for inclusive education.

WP6 proposes the education of all learners in inclusive schools as the norm, and a number of special schools which serve as support centres for inclusive schools, to enable the inclusion of learners with high or very high support needs to learn within the regular school. The SIAS is used to determine whether a child with disability is to be placed in a special or inclusive school through an assessment of the level of support needs that the student is deemed to have.

#### Student activity

- Does the conceptualisation of inclusive education in WP6 satisfy the requirements of article 24(2) of the CRPD?
- Does WP 6's progressive approach to inclusive education discriminate against learners with disabilities? Does the progressive approach, particularly in relation to basic education, violate the Constitutional provision on basic education?
- The approach of the SIAS in assessing the student's level of needs is highly diagnostic, focusing attention on the student's individual characteristics as opposed to the school environment's incapacity to respond to the needs of the student.

## Case Law

*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC)

## 4.2 Kenya

### 4.2.1 The law and policy

Kenya ratified the CRPD in 2008. The Constitution of Kenya recognises the rights of all people without discrimination on any of the prohibited grounds, including disability.<sup>35</sup> The Constitution further provides that every person has a right to education<sup>36</sup> and that the state shall take legislative, policy and other measures towards the progressive realisation of this right. The Constitution further entitles a person with disabilities to, 'access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person'.<sup>37</sup> This provision has been interpreted to mean that persons with disabilities should be educated in the same schools as other students.<sup>38</sup>

31 Constitution of the Republic of South Africa, 1996, sec 29 read together with sec 9.

32 South African Schools Act 84 of 1996; & Children's Act 38 of 2005.

33 Department of Education White Paper 6: Special needs education (2006); National Strategy on Identification, Assessment and Support (2008).

34 Children Act, sec 11(1).

35 Constitution of Kenya, sec 27(4)

36 Constitution sec 43(1)(f).

37 Constitution, sec 54(1)(b).

38 YP Ghai & JC Ghai *Kenya's Constitution: An instrument for change* (2011) 58.

In terms of legislation, education in Kenya is regulated by different Acts of Parliament. Basic education (that is, early childhood education, primary and secondary education) is regulated by the Basic Education Act of 2013, while technical and vocational education are regulated by the Technical and Vocational Education Act of 2013, and the Universities Act of 2012.

The Children Act prohibits discrimination on the basis of disability,<sup>39</sup> and recognises the right of a child with disabilities to ‘education and training free of charge or at a reduced cost whenever possible’.<sup>40</sup> The latter sentence contradicts the entitlement of ‘every child’ to free and compulsory basic education.

The Persons with Disabilities Act (2003) outlaws denial of admission of any person with a disability to any course of study by reason only of their disability, if the person has the ability to acquire substantial learning in the course (section 18). The challenge with this provision is that ‘capacity to learn’ is a subjective standard. The Act also requires learning institutions to take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations. These measures are both affirmative in nature, and to some extent a requirement for reasonable accommodation of learners with disability in education.

Despite the presence of the legislative framework, there are few policy commitments to support the implementation of the law. The Education Policy Framework<sup>41</sup> only reiterates the provisions of the Constitution and recognises the need to implement the CRPD, but does not give guidance as to how these provisions are to be actualised within the education system. In fact, the Policy pays very little attention to the education of persons with disabilities, except for a general provision that calls upon states to

[i]ntegrate special needs education programmes in all learning and training institutions and ensure that the institutions are responsive to the education of learners with special needs and disability<sup>42</sup>

By requiring integration of special needs education into all learning and training institutions, the Policy seems to embrace an inclusive, all-encompassing education system that does not include special schools. However, the approach of the Policy falls short of acknowledging the need for a holistic change in the education system in order to make it inclusive as opposed to merely integrating the special needs learners. For instance, the policy statement seems to be geared towards adaptation of the physical facilities, without any reference to necessary changes in the curriculum to allow

accommodation of the learning needs of persons with disabilities.

#### Student activity

- Is the legal framework in Kenya sufficient to ensure inclusive education in terms of article 24 of the CRPD?
- Does the difference between the range of costs covered for compulsory basic education for children with disabilities under the Children Act and other children amount to discrimination?

### 4.3 Zimbabwe

#### 4.3.1 Law and policy

Zimbabwe ratified the CRPD in 2013. Section 23 of the Zimbabwean Constitution specifically prohibits discrimination on the basis of disability. The Disabled Persons Act of 1992 further states that no disabled person shall, on grounds of his disability alone, be denied any service or amenity ordinarily provided to members of the public (section 8(1)(b)). The Education Act also recognises the right of ‘every child’ in Zimbabwe to education. The Education Act prohibits discrimination on several grounds including gender and religion, but does not mention disability expressly. The Act further provides that primary education is compulsory for all children, and that a child is entitled to enrol in a school nearest to his residence, unless the school is fully enrolled. These provisions notwithstanding, there is a marked difference between the numbers of children with disabilities that are out of school as compared to the overall rate of out of school children in the country; that is, 28 per cent and 10 per cent respectively.

#### Student activity

- Does the right of all children to enrol in their neighbourhood school facilitate inclusive education?
- What are the implications of the absence of an express provision prohibiting discrimination on the basis of disability in the Education Act?

### 4.4 United Kingdom

#### 4.4.1 Law and policy

The United Kingdom ratified the CRPD in 2009. The Equality Act of 2010 prohibits discrimination against a person with disability unless such discrimination is a proportionate means of achieving a legitimate aim (section 15). This provision gives room for affirmative action measures. The Act further calls for adjustments for persons with disabilities (section 20) in situations that substantially disadvantage persons with disabilities, such as in the context of: a provision, criterion or practice; a physical feature of the disabled person; or the lack of an auxiliary aid. The costs of such adjustments are in no case to be borne by the person with disabilities. Section 20 embodies

39 Children Act, sec 5.

40 Children Act, sec 12.

41 Ministry of Education and Ministry of Higher Education ‘Policy framework for education and training – Reforming education and training in Kenya’ (2012).

42 ‘Policy framework for education’ (n 99 above) 38.

the concept of reasonable accommodation of the individual needs of persons with disabilities, to enable them access rights including education.

The Equality Act which is applicable to schools through Schedule 10 requires school authorities to prepare accessibility strategies which address the infrastructural and curricular accommodations for persons with disabilities.

#### 4.4.2 Case law

*Price v United Kingdom European Court of Human Rights* App No 33394/96 (2001) 34 EHRR 1285.

### 4.5 United States of America

#### 4.5.1 Law and policy

The USA has signed but not ratified the CRPD. Nevertheless, the Americans with Disabilities Act (ADA) (1990) is one of the oldest and progressive disability specific statutes anywhere in the world. The Act sets out the basic principles relative to persons with disabilities, including the need for reasonable accommodation and accessibility. In the context of education, the ADA is supplemented by the Individuals with Disabilities Education Act (IDEA) most recently amended in 2004, and whose purpose is to cater for the unique needs of children with disabilities and to prepare them for further education, employment and independence. The IDEA applies only to states that receive federal funding under the Act, though as of 2014 no state had declined such funding. In effect therefore, the IDEA is applicable all across the USA. To be eligible for protection under IDEA, a child must have a disability, and must have need for special education as a result of the disability. The IDEA seeks to reinforce six principles:

- Principle 1: Zero Reject
- Principle 2: Non-discriminatory Evaluation
- Principle 3: Appropriate Education
- Principle 4: Least Restrictive Environment
- Principle 5: Procedural Due Process
- Principle 6: Parental and Student Participation

US courts have affirmed the 'zero reject rule' which means that schools are required to provide educational services to all children irrespective of their apparent capacity to learn or the severity of the impairment. The IDEA further requires schools to draft an individualised education programme for each eligible student with disabilities. One of the critiques of IDEA is that its scope is so wide that schools become financially liable for not only educational but also medical needs (such as various therapists) of children with disabilities. Also, teachers complain that the administrative duties imposed on them by IDEA are too great. Furthermore, disregard of 'capacity to learn' in the determination of the placement of learners means that learners who stand to benefit very little or not at all from learning in the same classroom as their peers without disability must still be admitted to school.

#### Student activity

- Are there learners that 'may not benefit from education' on the basis of disability?

#### 4.5.2 Case law

- *Pennsylvania Association for Retarded Children Case* (1971) – the court decided that the state could not ever deny or end the education of a person with mental disability. It stressed that education was a continuous process focussed not only on academics but also on teaching individuals how to navigate their social environment.
- *Mills v Board of Education of District of Columbia* – A group of disabled children was denied due process when they were not allowed to enrol in public schools. The court decided that all children, regardless of any disability, were entitled to a free public education.
- *Smith v Robinson (US, 1984)* – The government does not cover all the costs for the education of children with disabilities. Instead, it supports states to live up to their constitutional obligation to provide equal education to children with disabilities.

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# Module 9: Vulnerabilities and inter-sectionality

## Module overview and content

When factors of vulnerability converge or intersect in one person, the person or people become more susceptible to the violation of their rights. The phenomenon of dual or multiple marginalisation is common and universal. Factors of vulnerability are also mostly universal. For instance, while children are generally considered to be vulnerable members of society, children with disabilities would be dually marginalised while girls with disabilities are likely to experience multiple discrimination depending on the society in which they are found. There are two main approaches to the protection of the rights of vulnerable groups; the use of group specific treaties or legislation and general instruments or provisions. These approaches are evident both at the international and national levels.

With regard to persons with disabilities, factors that exacerbate dual or multiple marginalisation include age, sex, social status, membership of a minority group, displacement, sexual orientation, or multiple impairments. It is therefore essential to establish how the intersection of vulnerability affects the fulfilment of rights and how international and national human rights instruments, including the CRPD respond to the issues of persons with disabilities who are also subject to other forms of marginalisation.

This module highlights the approach adopted in international and regional human rights instruments, to the protection of vulnerable groups of persons with disabilities, the approach of the CRPD, and the approach adopted at the national level in some selected jurisdictions.

## Learning objectives

Upon completion of this module, learners should be able to:

- Understand the phenomenon of vulnerability and intersectionality and its operation in the context of disability;
- Understand the effect of discrimination on a combination of grounds;
- Know the international and regional framework for the protection of vulnerable persons under international law; and
- Understand the approach and extent to which national laws and policies protect vulnerable persons.

## Lecture's note

*A substantial number of persons with disabilities are also people who are otherwise considered vulnerable or marginalised. Where the law recognises such vulnerability, the individual or group can find themselves at the meeting*

*point of two or more legal regimes. The module ought to help students to understand the legal implications of the intersection of such laws. The lecture should help students to understand the power behind 'labelling'. As such, the effect and variations in the understanding of vulnerability across countries and contexts should be emphasised. The areas of vulnerability identified in this module are merely illustrative, not exhaustive. Students should be encouraged to explore and discuss the concept of vulnerability within their own societies.*

## 1 Introduction

### 1.1 What is vulnerability?

Vulnerability refers to involuntary circumstances that expose a person to high risk of deprivation of rights, or more need for external support in order to cope. Vulnerability can be individual or collective such as vulnerability based on a person's individual characteristic. Often however, vulnerability is based on group characteristic such as sex, gender, sexual identity, age, or impairment which in interaction with social attitudes and practices result in further marginalisation of the persons involved.

Vulnerability as a concept of social ordering is subject to manipulation. What really determines 'vulnerability' in society is largely defined by the custodians of social power. For instance, in a highly patriarchal society, women are generally considered vulnerable. However, in the same patriarchal context, women's vulnerability is considered a weakness and hence discounts their contribution to the society. Accordingly, the term 'vulnerability' is power-laden, and has the potential to affect attitudes and responses towards person(s) considered 'vulnerable'.

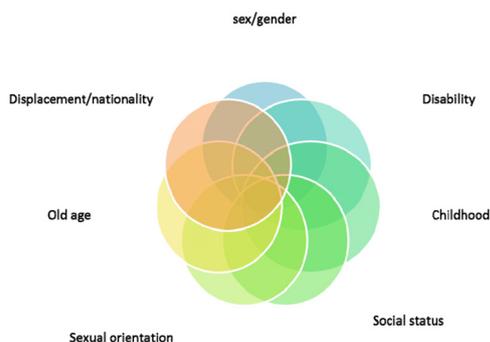
For instance, persons with disabilities are consistently regarded as being vulnerable to abuse, deprivation, poverty, and other social ills. At the same time, persons with disabilities are also consistently marginalised in service delivery, suggesting that a perception of vulnerability exacerbates marginalisation. On the other hand, being considered 'vulnerable' has been a tool for mobilising legal protection and leveraging measures to alleviate the vulnerability. Furthermore, factors of vulnerability are not universal. What is considered a form of vulnerability, and hence undesirable in one society may not be considered the same in another.

When various factors of vulnerability converge in a particular or individual or group, the individual or group at the intersection of such factors is likely to experience multiple discrimination and marginalisation.

### Student activity

- Women who are hearing impaired are considered more valuable as wives in some African societies. As a result, most of these women attract higher bride price and are treasured by their families. How does this traditional or social belief affect the position of the women in the particular society? Can deaf women in such societies be considered vulnerable?
- Identify other examples of disabilities that are considered socially accepted in your community.

Fig. 1: Illustration of inter-sectionalities



## 1.2 How does the intersection of vulnerability affect rights?

When a person or group is subject to multiple forms of vulnerability, it means that they have to overcome more barriers to access rights. It often means:

- That they have to put in more effort to access rights relative to other people in the same community; or
- That they have to obtain external support to enable access rights; or
- That they may access some but not all rights on an equal basis with others in the communities in which they live.

Examples of factors that exacerbate vulnerability of persons with disabilities abound. Age for instance exacerbates the effects of disability, meaning that older persons with disabilities are often more marginalised. On the other hand, old age is itself a cause of disability in some cases. In a similar manner, the discrimination of sexual minorities in a majority of countries means that LGBTI with disabilities are much more likely to be excluded from services intended for persons with disabilities on the basis of their sexual orientation.

### Student activity

- Use the illustration above to identify some examples of intersections of vulnerability in an individual.
- Give examples of the challenges of discrimination suffered by an individual with multiple vulnerabilities.
- How does the listing of grounds of non-discrimination in specific instrument affect persons who are at the intersection of various grounds?

## 2 International and regional approach to intersections and disabilities

### 2.1 International approach to multiple vulnerabilities

Generally, human rights instruments prohibit discrimination in the implementation of the rights contained therein on a range of grounds. This is the approach adopted in the earlier human rights instruments such as the UDHR, ICCPR and the ICESCR. However, the acknowledgement that generic human rights instruments fail to address the unique needs of specific groups in society has contributed to the emergence of group specific instruments. The group specific instruments started mainly as soft laws such as the Declaration on the Rights of the Child, Declaration on the Rights of the Mentally Retarded Persons (1971), the Declaration on the Rights of Disabled Persons (1975), the Beijing Platform for Action (1995), and the UN Declaration on Indigenous People.

Ultimately, binding treaties were adopted, including the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the UN Convention on the Rights of Persons with Disabilities (CRPD). The 1951 Refugee Convention expressly includes refugees with disabilities on the list of needy people to benefit from social security grants (article 24(a)). Similarly, the 1987 Conclusion on Refugee Children (Conclusion No 47 (XXXVIII)) expressly protects refugee children with disability.

One of the challenges of the trend of proliferation of group specific instruments is the harmonisation of standards in their application to persons who fall in more than one category of vulnerability. For instance, a girl with disabilities would benefit from legal protection as a child (CRC), a female (CEDAW), and a person with disability (CRPD). The multiplicity of instruments further points to the shortcomings of exhaustive lists of grounds of non-discrimination. Discrimination is often founded on social norms which evolve and get refined over time.

The practice has been that once the plight of a particular group obtains sufficient visibility in the international or regional agenda, and once a certain level of consensus is reached on the need to respond to the needs of the particular group, then the process of developing the measures such as extrapolation of existing provisions through interpretation, or the drafting of declarations or treaties are initiated. This trend is found both at the international and national levels. For instance, most of the independence constitutions and legislation of African countries did not recognise gender and disability as grounds for non-discrimination. The newer Constitutions have however expanded the recognised grounds of discrimination to reflect social consensus on identity, as in the case of Kenya and South Africa.

The fact that group specific instruments recognise further marginalisation within the subject group makes it even more difficult to establish the hierarchy of application of the laws. For instance, the CRC calls for special measures in respect of children with disabilities (article 23), child refugees (article 22), and children of minority or indigenous communities (article 30). The CEDAW on the other hand calls for special measures in respect of women living in rural areas (article 14), recognising their likelihood to be excluded from rights.

The CRPD recognises the potential for dual or multiple forms of vulnerability on a range of grounds including age, sex, and social status amongst others<sup>1</sup> and hence for special measures in respect of specific groups such as children. For instance, when determining the regime of rights applicable to a girl child with disabilities, who lives in the rural areas, where all the three conventions would be applicable, a harmonious approach must be adopted.

## 2.2 The regional approach

The trend of combining general provisions bolstered by specific instruments at the global level is replicated at the regional level. Hence, the African Charter on Human and Peoples' Rights (ACHPR) makes generic provisions intended to make the rights therein applicable to all. The group specific instruments in the African context include the African Women's Protocol, African Children's Charter, African Youth Charter, the African Refugee Convention and the Convention on Internally Displaced Persons in Africa.

### 2.2.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples Rights (ACHPR) adopts a general approach to the rights of all people, but makes specific provisions in respect of children, women, older persons, refugees and persons with disabilities (article 18). The ACHPR provides that 'the aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs'.<sup>2</sup> The criticisms of the ACHPR's approach to the rights of persons with disabilities include: that the provision does not confer substantive rights upon PWDs; that the 'specific measures of protection' to be afforded to persons with disabilities are vague and unclear; and that by combining the rights of PWDs with those of the aged, the article diminishes the potential for realization of the rights. These criticisms are compounded by the fact that the ACHPR does not recognise discrimination as a ground of non-discrimination. Nevertheless, in the *Purohit and Others v The Gambia case*, the African Commission held that the general prohibition of discrimination in article 2 of the ACHPR covered 'everyone' including persons with disabilities.

1 CRPD Preamble, para (p).  
2 Art 18(4).

### 2.2.2 African Women's Protocol

In terms of the African Women's Protocol, states parties commit to 'ensure the protection of women with disabilities' and particularly to

take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making' (article 23).

Article 23(b) also compels states to 'ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity'. The article lists some of the important concerns of women with disabilities such as 'freedom from violence, including sexual abuse, access to employment, professional and vocational training, participation in decision making', but is silent on others such as access to education and healthcare that are vital for the empowerment of these women.

### 2.2.3 African Charter on the Rights and Welfare of the Child

Article 13 of the ACRWC expressly provides for the rights of children with disabilities. The article refers only to mental and physical impairments. However, through the Concept Note for the Day of the African Child 2012, the ACERWC embraced a broader understanding of children with disabilities with disabilities in line with the UN Convention on the Rights of Persons with Disabilities.<sup>3</sup>

Article 13(2) of the Charter emphasises states' obligation to provide assistance to children with disabilities and their caregivers to enable effective access to rights including 'training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and cultural and moral development'.

The ACRWC also recognises other groups of marginalised children including refugee children, and children of imprisoned mothers. Just as with the CRC and the other instruments discussed in the parts above, the ACRWC does not address the appropriate approach to be adopted in ensuring the rights of a child who falls at the intersection of the vulnerabilities.

### 2.2.4 African Youth Charter

The Youth Charter adopts an approach similar to the other African instruments, that is, having a specific provision that prohibits discrimination on various grounds including disability, as well as a disability specific provision in the text of the

3 ACERWC 'Concept Note on the Commemoration of the Day of the African Child 2012 – The rights of children with disabilities; the duty to protect, respect, promote and fulfil' (2012) para 11.

instrument. Hence, youth with disabilities are expressly protected by article 24 of the African Youth Charter in terms similar to the ACHPR and the ACRWC.

As indicated earlier, there are various other vulnerable groups of persons, whose circumstances, in interaction with disabilities, exacerbate the abuse of their rights. Such other group includes refugees and internally displaced persons, older people, sexual minorities, as well as indigenous, language and ethnic minorities. A range of measures have been adopted at the regional level to respond to the particular needs of these groups. For instance, after its establishment in 2001, the African Commission Working Group on Indigenous Peoples established criteria for the identification of indigenous people to include groups that are socially, culturally and economically distinct, that have a special attachment to their lands and territories, that suffer discrimination and are perceived as less developed.

Though the Convention Governing the Specific Aspects of Refugee Problems in Africa does not specifically address persons with disabilities, the African Convention on Internally Displaced Persons (IDPs) in Africa calls for special attention to be accorded to internally displaced persons with special needs including persons with disabilities (article 9(2)(c)).

### Lessons from the international and regional approach

- Generally, legal instruments adopt a general prohibition of discrimination on various grounds including disability, and make specific provisions in respect of persons with disabilities.
- There is no defined criteria or hierarchy of application of norms to individuals or groups that fall within the intersections of disabilities
- The international framework is increasingly adopting group specific instruments to respond to the specific needs of marginalised groups.
- A group specific instrument enhances the visibility of the specific group and adapts existing rights to benefit the specified group.

### 3 The CRPD's approach to multiple vulnerabilities

The CRPD builds upon other previous instruments on human rights, some of which address the rights of various marginalised groups, including the ICESCR, CEDAW and CRC discussed in the section above.<sup>4</sup> Indeed, at the initial stages of the negotiations of the CRPD, there was positive acknowledgment of the benefits of the CRC and CEDAW as models of a Treaty that the CRPD could adopt.<sup>5</sup> The Ad Hoc Committee considered three models that the Convention could adopt:

- the holistic convention model such as the CRC;
- the non-discrimination approach such as the CEDAW; and
- the hybrid model, combining non-discrimination and equality with separate statements of existing rights guarantees tailored to the specific situations of persons with disabilities.

Ultimately, a hybrid approach to the Convention was adopted in terms of which a twin-track system of prohibition of discrimination and inequality, as well as substantive provisions on rights is adopted. Accordingly, in addition to the prohibition of discrimination on the basis of disability, the CRPD recognises the difficult conditions

faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national, ethnic, indigenous or social origin, property, birth, age or other status.<sup>6</sup>

Further, the CRPD recognises that;

women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.<sup>7</sup>

In addition to these statements, the CRPD proceeds to make special provisions on the rights of women and children with disabilities. In article 6, the CRPD calls upon states parties to recognise that

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

...

and calls upon states parties to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the Convention.

The Convention further recognises that

children with disabilities should have the full enjoyment of all human rights and fundamental freedoms on an equal basis with other children" in accordance with the CRC (Preamble, para r). In addition, the Convention calls for "measures to ensure the fulfilment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children (article 7).

However unlike the specific provisions on the rights of women and children, the CRPD does not elaborate on the application of the rights there in to other groups that would be subject to multiple or aggravated forms of discrimination such as indigenous persons with disabilities.

<sup>4</sup> CRPD Preamble para (d) and (r).

<sup>5</sup> UN Enable 'Negotiation Archives – Report of the second session of the Ad Hoc Committee' <http://www.un.org/esa/socdev/enable/rights/ahc2.htm> (accessed 12 September 2014).

<sup>6</sup> CRPD, Preamble para (p).

<sup>7</sup> CRPD, Preamble para (q).

### 3.1 What is the rationale behind specific provisions for children and women under the CRPD?

The inclusion of group specific provisions into the CRPD was contested during the negotiations. It was argued that making specific provisions for certain groups had the potential to leave out other groups that were not expressly mentioned in the Convention.<sup>8</sup> The International Disability Caucus successfully insisted on a standalone provision on the rights of women with disabilities on the basis that they experienced multiple barriers in access to rights and hence required more and specific protection. Some of the concerns raised on the vulnerability of women with disabilities include;<sup>9</sup>

- ‘women with disabilities experience gross violations of their human rights as victims of rape, forced sterilization and multiple discrimination due to being a woman and a person with disabilities’;
- According to UN statistics only 25 per cent of women with disabilities are part of the workforce; they are twice as unlikely to find a job as men with disabilities;
- Women with disabilities living in institutions are at twice as much at risk of becoming victims of physical and sexual abuse than those living in the community; and
- High rates of violence both at the hands of family members and care-givers prevail amongst women with disabilities. The dependence on care-givers, personal assistants and family members makes it generally difficult for persons with disabilities to seek redress for such violations.

On the usefulness of a specific provision on children with disabilities in light of the already existing article 23 of the CRC, there was considerable opposition amongst delegates during the negotiations of the CRPD as to the inclusion of a child specific provision on the basis that rather than have a standalone provision, the issues of children with disabilities ought to be mainstreamed throughout the Convention.<sup>10</sup> It was further stated that:

Article [23] is a specific elaboration of disability issues in a Convention on children that does not otherwise deal with disabilities. Draft Article 16 of the present text, however, is a specific elaboration of children's issues in a convention where the rest of the text does deal with disabilities. Duplicating Article 23 in this context, therefore, may not adequately deal with the issues faced by children with disabilities. The Ad Hoc Committee may wish to revisit this draft Article so that it instead covers issues that affect children with disabilities, but which have not been dealt with elsewhere in the Convention. Examples could include the vulnerability of children with disabilities to sexual abuse and exploitation, of refugee children with disabilities, and of orphan children with disabilities.<sup>11</sup>

8 M Schulze ‘Understanding the UN Convention on the Rights of Persons with Disabilities’ (2010) 45.

9 Schulze (n 8 above) 46.

10 Schulze (n 8 above) 47-48.

### 3.2 Issues for discussion

- What other groups may be considered excluded and hence requiring specific protection and why are such other ‘groups’ excluded from specific protection?
- What is the effect of the exclusion of other groups from specific provisions under the Convention?
- The visibility of the plight of the ‘group’ as at the time of negotiation; and
- The extent (notoriety) of violation.

## 4 National standards on vulnerability and intersections

### 4.1 South Africa

#### 4.1.1 Law and policy

The South African Constitution prohibits discrimination on a number of prohibited grounds including disability. However, despite ratification of the CRPD, South Africa does not (yet) have a comprehensive disability specific instrument. The rights of persons with disabilities are provided under various policies and laws such as the 1997 Integrated National Disability Strategy (INDS), the 1998 Employment Equity Act (EEA), and the 2000 Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). These instruments do not address multiple factors of vulnerability. They have no provisions on women with disabilities, children with disabilities, or indigenous persons with disabilities.

Nevertheless, measures geared at guaranteeing protection for groups with multiple vulnerabilities such as children are integrated in some of the instruments. For instance, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 calls for provision of supporting and enabling facilities such as Braille, sign language and hearing aids to children with disabilities to enable their access to education. In a similar vein, one of the objectives of the Children's Act 38 of 2005 is to ‘recognise the special needs that children with disabilities might have’.<sup>12</sup> The Act prohibits discrimination of children on the basis of disability and obliges states to ensure the care, development and protection of children living with a disability or chronic illness through the promotion of equal opportunity and protection for children with disabilities.<sup>13</sup>

Refugees in South Africa are protected in general by the Constitution, the Refugees Act of 1998 and the Refugee Regulations, which came into force on 1 April 2000 and the Immigration Act of 2002. The Acts do not make special provisions in respect of refugees with disabilities.

11 Ad Hoc Committee on the CRPD, Draft article 17 <http://www.un.org/esa/socdev/enable/rights/ahcwgreporta16.htm> (accessed 12 September 2014).

12 SA Children Act, sec 2(g).

13 SA Children Act, secs 6(2)(d) & 11.

### 4.1.2 Case law

*Scalabrini Centre of Cape Town and Five Others v The Minister of Social Development* – the case successfully challenged the non-eligibility of refugees with disabilities for the disability. As a result, amendments to the regulations of the Social Assistance Act 13 of 2004 (which took effect from 1 April 2012) were undertaken to extent the grant to refugees with disabilities.

## 4.2 Malawi

### 4.2.1 Law and policy

Malawi is party to the CRPD and recognises the rights of persons with disabilities in the Constitution, and a disability specific Act of 2012. The 2006 National Policy on Equalisation of Opportunities for Persons with Disabilities, the Vision 2020 and the Malawi Poverty Reduction Strategy Paper as well as the Malawi Economic Growth Strategy, the Handicapped Persons Act, 1971 also make provisions on persons with disabilities in the country. These instruments do not specifically recognise intersection of vulnerability.

However, the 2006 National Policy on Equalisation of Opportunities for Persons with Disabilities does make specific provisions on children and women with disabilities. Also, the Parliamentary Committee on Gender and Disability includes five members of Parliament whose task is to review programmes and services for women and persons with disabilities.

The Child Care, Protection and Justice Act (2010) calls on local governments to assist children with disabilities to ‘grow up with dignity among other children and to develop their potential and self-reliance’. The Policy Investment Framework, the 2001 National Special Needs Education Policy, and the 1971 Education Act all provide for the rights of children with disabilities to education.

The refugee law, that is, the 1989 Malawi Refugee Act, does not mention refugees with disabilities. In fact, on acceding to the 1951 UN Convention, Malawi entered several reservations including on articles 13 (acquisition of property by refugees); 15 (right of association); 17 (wage-earning employment); 19 (practice by refugees of liberal professions); 20 (access to public education); 22 (labour legislation and social security); and 26 (freedom of movement). While these reservations are generally incapacitating for all refugees, they have the potential to exacerbate the plight of refugees with disabilities even more.

## 4.3 Namibia

### 4.3.1 Law and policy

Namibia ratified the CRPD in 2007. The 1990 Namibian Constitution recognises the inalienable human rights and freedoms of all citizens, but does not specifically recognise disability as one of the

grounds for non-discrimination in access to rights. Other instruments addressing the rights of persons with disabilities in Namibia include the 1997 National Disability Policy, the 2004 National Disability Council Act, the Affirmative Action (Employment) Act 1998; the 2004 National Policy for Mental Health. In general, these instruments do not address specific vulnerable groups except the National Disability Act which makes provision for ‘Disabled People Living in Rural Areas’ (2004 National Disability Council Act, para 2.5.4). The National Policy on Inclusive Education provides for the education of children with disabilities. The 1999 Namibia Refugees (Recognition and Control) Act does not address the rights of refugees with disabilities.

## 4.4 USA, Europe, and Canada

### 4.4.1 Law and policy

The USA has not ratified the CRPD. Nevertheless, the American with Disabilities Act (ADA) is largely informed by the social model of disabilities. It has however been argued that the ADA approaches the protection of persons with disabilities from a civil-rights perspective and within the general prohibition of discrimination. It is argued that this approach ‘provides civil rights protection without equality measures’<sup>14</sup> and therefore cannot appropriately cater for vulnerable groups such as children, women, or refugees with disabilities.

It is important to note the EU is the only regional block which is party to the CRPD. The EU was empowered by articles 13 and 95 of the European Community Treaty which prohibits discrimination on the ground of disabilities. EU laws prohibit discrimination in general. Nevertheless, the Framework Directive 2000/78/EC specifically calls upon EU member states to ‘comply with equal treatment’ taking into account disabilities. This means that a single equality provision recognising disability as a ground for non-discrimination suffices to discharge the responsibility under the Directive. Such an approach is detrimental to vulnerable groups and persons that suffer discrimination on multiple grounds including disability.

Canadian law adopts a similar approach to the European approach, that is, the use of general prohibitions of discrimination and equality before the law. The Canadian Human Rights Act explicitly provides for the duty of employers to accommodate persons with disabilities. However, victims of multiple discriminations such as women, children, and refugees with disabilities are not expressly mentioned or special measures pertaining to them are not referred to. The Employment Equity Act attempts to resolve this by stating that the aim of the Act is amongst other things to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities

14 MA Stein & JE Lord ‘Human rights and humanitarian assistance for refugees and internally displaced persons with disabilities’ in I Grobbelaar-Du Plessis & T Van Reenen (eds) *Aspects of disability law in Africa* (2011) 33.

and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

## 5 Lessons from case studies

The general approach to the rights of vulnerable groups in national law and policy is to have a general non-discrimination clause which recognises disability as a prohibited ground of discrimination. National laws also focus on the rights of specific groups (most often in separate statutes) but do not adequately address the intersection between such groups and disability. Where a comprehensive disability law is adopted, then there is a higher likelihood that the rights of persons with disabilities who are also otherwise marginalised are comprehensively addressed.

It is also evident that ensuring the inclusion of these vulnerable groups entails not only the provision of negative rights (such as non-discrimination), but also the provision of positive rights which compel the society to fully include persons with disabilities in all aspects of society life. According to Stein, Lord and Stein (2010:33), failure to require positive measures that target substantive equality in addition to prohibition of discrimination fails to advance the rights of those who suffer discrimination on multiple grounds such as women and children with disabilities. However, formal equality as set out in the laws and policies of Canada does not enhance the rights of PWDs, hence the need to move from formal to substantive equality whereby actions are taken to accommodate a person to avoid discrimination.

In summary:

- A general non-discrimination provision alone does not enhance the protection of persons at the intersection of disability and other forms of vulnerability.
- Provisions outlining specific positive measures to be adopted to ensure that specific groups of persons with disabilities access rights are more conducive to the achievement of such rights.
- A comprehensive disability statute is more conducive to addressing the intersection between disabilities and other forms of vulnerability.

### Student activity

- Who are vulnerable persons?
- What is discrimination on a combination of grounds?
- How can discrimination on a combination of grounds be addressed?
- What do you think are the reasons for PWDs being mentioned in some of the treaties set out above but not in others?
- Despite the recognition of the rights of persons with disabilities, and the prohibition of discrimination in the laws of these countries, it is still reported that children with disabilities are disproportionately represented in the number of out of school children. Why would this be the case?

Students should identify and interview a person with disabilities and who is also subject to other forms of vulnerability and discrimination. The interview ought to obtain from the interviewee their experience based on the interaction of their disability and other factor of vulnerability such as age, displacement or gender.

### Lecturer's note

*The purpose of this exercise is to give students a practical understanding of the issues raised in the module in order to appreciate how inter-sectionality of vulnerability exacerbates exclusion of persons with disabilities and other form of vulnerability.*

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## Module 10: Legal capacity law and policy

### Module overview

This module aims to give students an understanding of the conceptual and practical implications of the right to legal capacity as provided for in article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD). First, the module examines the normative content of the right to equal recognition before the law in international and regional human rights instruments. Particular attention is paid to General Comment No 1 (2014) of the Committee on the Rights of Persons with Disabilities (CRPD Committee). Current and traditional legal capacity regimes based on status, functional and outcome approaches are also examined *vis-à-vis* article 12 of the CRPD. Theoretical and philosophical concepts that relate closely to the right to legal capacity (personhood, autonomy and paternalism) are explored to provide deeper understanding of the right to equal recognition before the law. An examination of other human rights that are closely related to the right to legal capacity (right to access justice, the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment, the right to respect for one's physical and mental integrity, the right to choose where and with whom to live and the right to marry and found a family) is also undertaken, with reference to case law where applicable.

Second, the module applies article 12 of the CRPD to the African context. This entails revealing the contribution made by African countries to the negotiation of article 12 of the CRPD, examining concluding observations issued by the CRPD Committee, contextualising the right to legal capacity in the African setting and exploring ongoing projects on the right to legal capacity within Africa. Finally, the module identifies good international practice on the right to legal capacity and tentatively highlights emerging lessons to be learnt from global initiatives on legal capacity.

### Learning objectives

Upon completion of this module, the student will be able to:

- Understand the conceptual and practical implications of article 12 of the Convention on the Rights of Persons with Disabilities;
- Explain what the core issues are with regard to the exercise of the right to legal capacity by persons with disabilities, from the international level to the regional level;
- Critically analyse their own legal system and practice on the ground in their own country and identify what the issues are with regard to persons with disabilities exercising their right to legal capacity;

- Identify good practice on the right to legal capacity at international, regional and national level; and
- Assess the barriers facing persons with disabilities in exercising the right to legal capacity and identify possible practical solutions to these barriers.

### Module content

There are three module sections; section 1 is on the import of article 12 of the CRPD, section 2 is on applying article 12 of the CRPD in the African context and section 3 identifies good international practice and makes suggestions for reform.

#### 1 The import of article 12 of the CRPD

##### 1.1 Lecturer's notes

*There are two important issues that the lecturer should be aware of regarding this module. First, is that the module assumes that the concept of rights, in particular the right to equality and non-discrimination is not new to learners and that it has already been introduced elsewhere in a foundation course in the course of studying law. Hence, all the lecturer needs to do to start off the class is make a statement about the nature of equality and non-discrimination, and highlight how traditionally, different groups such as women (especially in the context of marriage), slaves, religious or other minorities have been denied the right to equal recognition before the law.*

*Secondly, the module requires a deep understanding of philosophical concepts such as personhood, autonomy, paternalism, liberty and dignity. Hence, the module as written lends itself better to post graduate teaching rather than undergraduate teaching and would require significant modification to suit undergraduate law students. One way of assisting undergraduate learners appreciate the matters at stake is to point to actual laws in the country that hinder the enjoyment of legal capacity on an equal basis with others. Such laws include mental health laws that allow forced treatment, land laws that deny persons with disabilities equal right to own land, penal laws that assume that persons with intellectual disabilities cannot give consent to sexual relations and marriage laws that allow divorce on grounds of 'insanity'.*

##### 1.2 The right to equal recognition before the law in international human rights instruments

Equality before the law is a basic general principle of human rights protection. Article 7 of the Universal Declaration of Human Rights provides in part that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.

Article 16 of the International Covenant on Civil and Political Rights provides that ‘everyone shall have the right to recognition everywhere as a person before the law’. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women’s equality before the law and requires the recognition of women’s legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system. Article 3 of the American Convention on Human Rights enshrines the right to juridical personality and the right of every person to recognition as a person before the law. Article 12 of the CRPD further describes the content of the right to equal recognition before the law and focuses on the areas in which people with disabilities have traditionally been denied the right. In full, article 12 states the following:

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

**Article 12 - Equal recognition before the law**

- (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
- (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

**1.2.1 General Comment 1 (2014): Equal recognition before the law**

In April 2014, the Committee on the Rights of Persons with Disabilities (CRPD Committee) published its first General Comment ‘General Comment No. 1 (2014) Equal recognition before the

law’. In this General Comment, the CRPD Committee provides guidance on, inter alia the distinction between legal capacity and mental capacity, scope of state obligations under article 12 of the Convention, the components of a supported decision-making regime, and the relationship between article 12 and other articles in the CRPD.

***The distinction between legal capacity and mental capacity***

According to the General Comment on article 12:

Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

***Scope of state obligations under article 12***

According to the General Comment, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realisation. The following state obligations arise under article 12:

- Obligations to do with legislation, policy and programmes – States parties are required to holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Laws that permit discriminatory substitute decision-making should be repealed or amended; such laws include laws allowing for guardianship and trusteeship and mental health laws that permit forced psychiatric treatment. Other laws to be scrutinised in light of article 12 of the CRPD are marriage laws, voting laws and laws on access to justice.
- Obligations to do with the provision of access to support to persons with disabilities in exercising legal capacity – Support is identified as including where a person chooses one or two trusted persons to assist the person in exercising legal capacity, peer support, advocacy including self advocacy support, advance planning mechanisms, assistance with communication, measures relating to universal design and accessibility and development and recognition of diverse non-conventional methods of communication such as non-verbal communication. Of note is the assertion in the General Comment that the right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The state has an absolute obligation to provide access to support in the exercise of legal capacity.
- Obligations to provide safeguards against abuse – According to the General Comment, the primary purpose of safeguards in the exercise of legal capacity is to ensure the respect of the person's rights, will and preferences. In order to accomplish this, the safeguards must provide

protection from abuse on an equal basis with others.

- Obligations to do with training – According to the General Comment, state parties have an obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity. Police officers, social workers, and the judiciary are also required to be trained to recognise persons with disabilities as full persons before the law.

### ***Components of a supported decision-making regime***

The General Comment contains an in depth description of supported decision-making regimes:

- Supported decision-making must be available to all;
- All forms of support in the exercise of legal capacity must be based on the will and preference of the person;
- A person's mode of communication must not be a barrier to obtaining support in decision-making;
- The state has an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring supports in the community;
- State parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;
- Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities;
- The person must have the right to refuse support and terminate or change the support relationship at any time;
- Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity; and
- The provision of support to exercise legal capacity should not hinge on mental capacity assessments.

### ***Relationship between article 12 and other articles in the CRPD***

The General Comment also highlights rights that are closely related to the right to equal recognition before the law, being the right to access justice (article 13), the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (article 14), the right to respect for one's physical and mental integrity (article 17), the right to liberty of movement and nationality (article 18), the right to choose where and with whom to live (article 19), the right to freedom of expression (article 21), the right to marry and found a family (article 23), the right to consent to medical treatment (article 25), and the right to vote and stand for election (article 29). The General Comment also notes that people with intellectual disabilities and people with psychosocial disabilities are especially affected in regard to violation of the right to legal capacity.

To underscore the above, an examination of several cases before the European Court of Human Rights, reveals that the rights violations that frequently arise alongside deprivation of legal capacity include:

- Denial of the right to respect for private and family life;<sup>1</sup>
- Denial of the right to a fair trial;<sup>2</sup>
- Denial of right to liberty and security;<sup>3</sup>
- Denial of the right to vote;<sup>4</sup>
- Denial of the right to be free of degrading treatment;<sup>5</sup>
- Denial of the right to an effective remedy;<sup>6</sup>
- Denial of the right to integrity and privacy;<sup>7</sup> and
- Denial of the right to be free from discrimination.<sup>8</sup>

### **1.3 The right to equal recognition before the law in African regional human rights instruments**

Article 3 of the African Charter on Human and Peoples' Rights provides that 'every individual shall be equal before the law', and that 'every individual shall be entitled to equal protection of the law'.

The African Commission on Human and Peoples' Rights has developed a draft protocol on the rights of persons with disabilities in Africa. Article 7 of the draft protocol is on equal recognition before the law.<sup>9</sup> While the article largely echoes the provisions of article 12 of the CRPD, it also addresses issues that are specific to the exercise of the right to legal capacity within the African continent. In addition to the provisions of the CRPD, article 7 of the draft protocol requires states parties to ensure that non-state actors and other individuals do not violate the right of persons with disabilities to realise their right to legal capacity; and that persons with disabilities have the equal right to hold documents of identity and other documents that may enable them to exercise their right to legal capacity (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

1 *Shtukaturov v Russia* [2008] ECHR 223 (for more information, see [http://mdac.info/sites/mdac.info/files/English\\_Shtukaturov\\_V\\_Russia.pdf](http://mdac.info/sites/mdac.info/files/English_Shtukaturov_V_Russia.pdf)); *Re MF at the Constitutional Court of the Czech Republic* [January 2007] US 2630/07 #2; *Re ET at the Constitutional Court of the Slovak Republic* Case No I. ÚS 313/2012-52, Judgment 28 November 2012; and *Sýkora v Czech Republic* [2012] ECHR 1960. The right to respect for home and private life was also raised in *Stanev v Bulgaria* [2012] ECHR 46 but was not addressed by the court.

2 *Shtukaturov; Stanev; Re MF; Re Shtukaturov at the Constitutional Court of the Russian Federation; Re ET; & Kedzior v Poland* [2012] ECHR 1809.

3 *Shtukaturov; Stanev; Kedzior; Re Shtukaturov; & Sykora.*

4 *Alajos Kiss v Hungary* [2010] ECHR 692; and *Re MF.*

5 *Stanev.*

6 *Stanev.* The right to judicial protection under the Constitution was found in *Re ET.*

7 *Re ET.*

8 *Re ET.*

9 African Commission on Human and Peoples' Rights 'Comments invited on draft protocol on the rights of persons with disabilities in Africa' <http://www.achpr.org/news/2014/04/d121> (accessed 20 August 2014).

## 1.4 Do the Constitutions and domestic law of select countries in Africa provide for the right to equal recognition before the law?

A large number of constitutions of African countries provide for equal recognition before the law. For example, article 27 of the Constitution of Kenya states that '[e]very person is equal before the law and has the right to equal protection and equal benefit of the law'; article 17(2)(a) of the Constitution of Nigeria states that 'every citizen shall have equality of rights, obligations and opportunities before the law'; article 9 of the Constitution of South Africa states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'; article 29 of the Constitution of Algeria states that '[a]ll citizens are equal before the law'; article 21 of the Constitution of Uganda states that '[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'; article 44 of the Constitution of Malawi states that the right to equality and recognition before the law is not subject to derogation, restrictions or limitation; and article 13 of the Constitution of Tanzania states that '[a]ll persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law'.

Despite this, the domestic laws of many countries in Africa run contrary to article 12 of the CRPD as they allow substituted decision-making and fail to make provision for access to support in exercise of legal capacity by persons with disabilities. To illustrate: Section 7 of Uganda's Mental Health Treatment Act, 1964 allows for the involuntary detention of 'a person alleged to be of unsound mind'. Section 101(e) of Tanzania's Law of Marriage Act allows a person to petition for divorce on the grounds that the spouse is 'suffering from an incurable mental illness'. Sections 80(7)(a) and 94(3)(b) (inter alia) of Malawi electoral laws run counter to the right of persons with disabilities to stand for elections and/or to effectively hold office (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

Further, the briefing paper 'How to implement article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya' identifies that the following laws run counter to article 12 of the CRPD: The Mental Health Act, The Civil Procedure Act and the Civil Procedure Rules, The Children's Act, The Constitution of Kenya, Matrimonial Causes Act, Sale of Goods Act, Law of Succession Act, Traffic Act, Penal Code, Criminal Procedure Act, Sexual Offences Act, Evidence Act, Elections Act, HIV and AIDS Prevention and Control Act.

There has been limited progress on legal capacity law reform at national level in most African countries. In the countries where there has been progress, the form this progress has taken is legislation as well as reports laying the foundation for reform by identifying for amendment laws that

run counter to article 12 of the CRPD. With regard to legislation, section 8(1) of Zambia's Persons with Disabilities Act 2012 states that '[a] person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life'. It is the only country in Africa whose domestic law explicitly recognises the right to legal capacity, despite the fact that most African countries have ratified the CRPD. Civil society organisations in Zambia are developing a framework for implementation of section 8 of Zambia's Persons with Disabilities Act. There have been two key reports on legal capacity in Kenya; the first by the Kenya National Commission on Human Rights and the second by the Mental Disability Advocacy Centre (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

Potential openings for change vary widely, depending on the context of the country. In countries that are reforming their Persons with Disabilities Acts (such as Kenya and Mozambique), or their Mental Health laws (such as Kenya, Uganda, Zambia and Liberia) the law reform process presents a huge potential for change. With regard to the latter laws (mental health laws) a question remains regarding whether mental health law reform is the most appropriate way to promote the right to legal capacity. Using the General Comment on article 12 as the guiding framework, it is clear that there are huge contradictions in some of the mental health laws that are being formulated post CRPD. For example, Kenya's draft Mental Health Bill, 2014, at clause 17(1) states that '[p]ersons with disabilities shall enjoy legal capacity on an equal basis with others'. Immediately following this provision, clause 17(4) states that 'the court shall make a determination as to whether a person has legal capacity' (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

Finally, because Africa lacks huge guardianship infrastructure, it should be easier, theoretically, to advocate law reform abolishing guardianship. However, the extent to which law reform can be used to yield laws that provide for equal legal capacity remains to be seen (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

## 1.5 Current and traditional legal capacity regimes

According to Amita Dhanda, the examination of disability laws across jurisdictions shows that the attribution of incapacity to persons with disability occurs through three main ways: status attribution, functional approaches and outcome tests (Amita Dhanda (2006-2007).

### 1.5.1 Status attribution

Under status attribution, once it is established that any individual is a person with disabilities, the law presumes a lack of capacity. Example:

## ***Kenya's Marriage Act 2014***

The Marriage Act allows for a marriage to be annulled, and also, for a marriage to be voided where at the time of the marriage and without the knowledge of the petitioner, the other party suffers 'recurrent bouts of insanity' (sections 12, 73(1)(g), and 66(6)(g)).

## ***New York States' Guardians of Mentally Retarded and Developmentally Disabled Persons***

Section 1750 provides that

[w]hen it shall appear to the satisfaction of the court that a person is a mentally retarded person, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of guardian or guardians is in the best interest of the mentally retarded person.

### ***1.5.2 Functional approaches***

Under the functional test, disability is treated as a threshold condition. Hence, the person with disabilities is considered incapable if, by reason of the disability, he or she is unable to perform a specified function.

## ***England and Wales Mental Capacity Act 2005***

Section 2 – For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

## ***Irish Assisted Decision-making (Capacity) Bill 2013***

Clause 3 of the Bill is to the effect that a person's capacity will be construed functionally. According to Clause 3(2):

a person lacks the capacity to make a decision if he or she is unable –

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his or her decision (whether by talking, writing, using sign language, assisted technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.

## ***Constitution of Kenya***

Article 83(1)(b) provides that a person qualifies for registration as a voter at elections or referenda if the person is not declared to be of unsound mind. Article 99(2)(e) disqualifies persons of 'unsound mind' from being elected a member of Parliament. Article 193(2)d disqualifies persons of 'unsound mind' from being elected a member of a county assembly. The Constitution is silent on the definition of 'unsound mind' and case law is to the effect that unsoundness of mind is a question of judicial determination. The judicial determination is likely to be a functional test of the person whose capacity is being questioned.

### ***1.5.3 Outcome tests***

Under the outcome test, the attribution of incompetence is made on the basis of the decision arrived at by the person with disabilities.

## ***Kenya's Mental Health Act***

Under section 10 the Act,

any person received as a voluntary patient under this section may leave the mental hospital, upon giving to the person in charge seventy-two hours' notice in writing of his intention to leave ... and the release shall be at the discretion of the person in charge of the mental hospital concerned.

In essence, the person's decision to seek treatment is not questioned, but the decision to discontinue treatment is seen as proof of incapacity.

### **Student activity**

#### **24 hour take home essay**

Learners should be asked to write a short paper giving examples of laws that fall under each of the three approaches from their domestic law. For guidance, learners should examine the following laws inter alia: constitutions, mental health laws, civil procedure laws, marriage laws, electoral laws, criminal procedure laws, succession laws and persons with disabilities acts.

## ***1.6 Theoretical and philosophical concepts that relate closely to the right to legal capacity***

### ***1.6.1 Personhood***

Quinn theorises about personhood in his paper, 'Personhood and legal capacity perspectives on the paradigm shift of article 12 CRPD' (2010). According to Quinn, personhood is truly foundational to the debate about the paradigm shift of article 12, and the 'real debate concerns what are the essential *indicia* of personhood – the criteria by which we can ascribe personhood'. Quinn asserts

that liberal democracies make certain political assumptions about personhood; that ‘persons’ are rational and autonomous, capable of identifying their own ‘good’ and then creating their own legal universes with reciprocal rights and obligations freely entered into with others. This view of the ‘person’ (as rational and autonomous) may partially explain why persons with psychosocial disabilities and persons with intellectual disabilities have been, and still are disproportionately denied the right to legal capacity.

Quinn points out that this view of persons as ‘unencumbered beings’ is wrong because ‘our choices are nearly always a mix of raw preferences with rationality. Indeed, our rationality is often shaped by our preferences and not the other way around’ and ‘most of us, most of the time, both think and act irrationally’. Secondly, while we may occasionally separate ourselves from our culture, we are a product of our culture and have social bonds, yet the ‘social dimension to personhood is also screened from view by liberal foundationalism’. In other words, ‘most of us base our decisions on preferences - and most of us depend on family and friends to give context to our choices even as we differ’.

Quinn identifies two reasons why these false premises (autonomy and rationality) continue to exert such an influence: ‘One is an unstated fear that if rationality is dethroned then chaos follows’ and secondly, the most powerful impulse behind this image of a rationally functioning civil society comes from commerce, which needs stability, predictability and reliability.

Quinn asserts that ‘there is no necessary reason why rationality should be given such pride of place in describing personhood ... practically none of us make decisions – from the most minor to the most important without support’.

According to Rawls,<sup>10</sup> human beings count as free and equal persons when they have the moral powers necessary to engage in social cooperation. The first moral power is the capacity for a sense of justice, by which Rawls means reasonableness, understood as the ability to regard others as equal citizens and to engage with others on terms they could imagine others could accept (Rawls, 1993: 19). Having the second moral power, the capacity for a conception of the good, means that persons are rational in the sense of being able to determine their goals and take the most useful steps toward those goals (Rawls, 1993: 19).

In a Theory of Justice, Rawls introduces a veil of ignorance; inviting readers to imagine themselves in an original position behind a veil of ignorance. Behind this veil, you know nothing of yourself and your natural abilities, or your position in society. You know nothing of your sex, race, nationality, or individual tastes. Behind such a veil of ignorance all individuals are simply specified as rational, free, and morally equal beings. You do know that in the ‘real

world’, however, there will be a wide variety in the natural distribution of natural assets and abilities, and that there will be differences of sex, race, and culture that will distinguish groups of people from each other.

Rawls has been interpreted by some as excluding persons with cognitive disabilities from duties of justice (for example, Martha Nussbaum) while some argue that taken as a whole, Rawls the theory of justice does accommodate the claims of persons with cognitive disabilities (for example, Sophia Wong).

Martha Nussbaum<sup>11</sup> argues that in Rawls’s view ‘people with severe mental impairments’ lack the moral capacities to some essential minimum degree, and that therefore, they fail to qualify as equal moral persons (Nussbaum 2006, 133). In Nussbaum’s view, Rawls’s strong allegiance to the social contract tradition, with its image of the parties to the contract as ‘free, equal, and independent,’ and as possessing a roughly equal amount of both physical and mental capacity cannot do justice to the claims of people with cognitive and even physical disabilities. The reason, according to Nussbaum, is the presence of a large asymmetry of power between the parties, which makes it no longer mutually advantageous for them to be included as fully equal parties to the social contract. Nussbaum argues that Rawls would ultimately need to give up the idea of rough equality in power and the related idea of mutual advantage as the aim of the social contract, were he to be able to do full justice to the claims of people with disabilities. In the words of Wong, Nussbaum’s argument runs as follows:

- (1) First Premise: Citizens labeled with severe mental impairments lack the two moral powers to some essential minimum degree.
- (2) (Implicit Premise): Personhood requires the actual exercise of the two moral powers.
- (3) Conclusion: Therefore, citizens labeled with severe mental impairments fail to qualify as equal moral persons.

Nussbaum argues that adding to the account of the Veil of Ignorance the fact that the parties are ignorant of whether they have a disability or not would violate the deep commitment to similarity of power, with its associated idea of mutual advantage. Further, according to Nussbaum, in the case of mental disability this problem would be compounded by the need to suspend any determinate account of the rationality of the parties.

Nussbaum uses a specific list of the ‘Central Human Capabilities’ as the benchmark for the definition of a social minimum. The capabilities are life, bodily health, bodily integrity senses, imagination, thought, emotions, practical reason, affiliation, other species, play and control over one’s environment.

Nussbaum’s capabilities approach uses the idea of a threshold: for each important entitlement, there is some appropriate level beneath which it seems

10 Excerpted from S Wong ‘Duties of justice to citizens with cognitive disabilities’ in EF Kittay, & L Carlson *Cognitive disability and it’s challenge to moral philosophy* (2010).

11 As above. Page no?

right to say that the relevant entitlement has not been secured. The intuitive idea of a life with human dignity already suggests this: people are entitled not only to mere life but to a life compatible with human dignity, and this means that the relevant goods must be available at a sufficiently high level.

Nussbaum argues that the idea of dignity is spelled out from the beginning in terms of equality: it is the equal dignity of human beings that demands recognition. According to Nussbaum, 'a long tradition of Western political philosophy agrees on this point – that all of the political, religious, and civil liberties can only be adequately secured if they are equally secured'. As such, to give some groups of people unequal voting rights, for example, is to set them up in a position of subordination and indignity *vis-a-vis* others. It is to fail to recognise their equal human dignity (Nussbaum, 2010).

Wong argues that citizens with cognitive disabilities are ably covered by Rawls's theory of justice. According to Wong, Rawlsians should regard all citizens as moral persons provided they have the potential for developing the two moral powers. Wong claims that every citizen requires specific Enabling Conditions to develop and exercise the two moral powers. According to Wong, 'Current social practices indicate that many individuals labeled with cognitive disabilities are being treated very differently from their nondisabled peers'. However, Wong asserts that there is a growing, though not yet universal, consensus that distinctions based on religion, race, sexual orientation, gender, and physical disability are no longer acceptable reasons to exclude any human being from the scope of a theory of justice. Rawls's theory of justice should not be interpreted as treating citizens labeled with cognitive disabilities differently from the 'nondisabled'.

This is the gist of Wong's argument:

- (1) All citizens should be regarded as having the potential for the two moral powers, and therefore as moral persons, even those labeled as having cognitive disabilities.
- (2) Justice requires that citizens' basic needs be met. According to Rawls, this duty is lexically prior to both the liberty and the equality principle.
- (3) Enabling Conditions (the circumstances that allow citizens to develop and exercise the two moral powers) should be included in our understanding of the basic needs of all citizens.
- (4) Structuring basic social institutions to deny citizens the Enabling Conditions blocks their developmental pathways toward becoming moral persons (fully cooperating members of society) and is therefore unjust by Rawls's own lights.
- (5) Conclusion: citizens labeled with cognitive disabilities are owed the same duties of justice as other citizens. Rawls's theory implies one specific duty of justice to citizens labeled with cognitive disabilities: to provide them with the Enabling Conditions until they become fully cooperating members of society.

Examples of Enabling Conditions are:

- Belonging to social groups like families or religious communities;
- Interacting with adults who are already exercising the two moral powers;
- Developing relationships with family members, classmates, friends, and co-workers; and
- Taking ample time to develop their capacities.

Wong notes that some human beings require years, even decades, to develop the two moral powers, given the appropriate Enabling Conditions. Wong argues that all citizens should be regarded as having the potential for the two moral powers, and therefore as moral persons, even when they are labeled as having cognitive disabilities. Hence, citizens labeled with cognitive disabilities are owed the same duties of justice as other citizens. (Wong 2010)

Masolo writes about personhood from an African communitarian perspective. He argues that humans are such deeply social beings that they would not be able to develop their full capacities as persons outside their relations with others; that they would not, for example, be able to develop communicative capacities, which include mind, or the capacity to develop language and form concepts. Masolo asserts that humans are constantly in communication with each other and that 'by means of communicative interaction we become more than just human beings: we *become* persons'. Masolo states that contrary to the Kantian monadological framework, traditional African philosophy, which is essentially a philosophy of the person, 'is extremely sensitive to the complexity of the human psyche and the social dimensions of individual consciousness'. Masolo asserts that by articulating the pre-metaphysical social genesis of the individual and his or her dependence on others for self-actualisation, African philosophers have contributed significantly to the establishment of an alternative normative standpoint for viewing the world from a communalist rather than the individualist perspective.

To some extent, personhood will always depend on context. According to Quinn, 'to a certain extent the concept of personhood is not entirely deontological – it is always relative to the kind of society we value'. Adam Smith observed, that 'what is compatible with human dignity may itself vary from society to society'. Nussbaum observes that social norms profoundly affect what is and isn't compatible with equal human dignity.

### 1.6.2 Autonomy

Individual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces. It is a central value in the Kantian tradition of moral philosophy but it is also given fundamental status in John Stuart Mill's version of utilitarian liberalism (Kant 1785/1983, Mill 1859/1975, ch.

III) (<http://plato.stanford.edu/entries/autonomy-moral/>).

Autonomy has value because being recognised as an autonomous agent has normative significance: autonomous agents are entitled to respect; their actions and choices should be protected from interference and intervention; they are candidates for participation in political processes and decisions (Holroyd, 2009).

Bach & Kerzner have identified that the historical approach to safeguarding against abuse and neglect for people with disabilities and older adults has been to define these groups as in need of protection. In response, abuse and neglect legislation has historically been designed to allow the state to intervene to take care of people; such legislation allows for state intervention in an adult's life to provide a range of health, social and other services. Bach & Kerzner note that this has led in many instances to an overly-paternalistic approach which has undermined individual autonomy. In the words of the Supreme Court of Canada, '[t]he corollary of a judicial determination that an adult is in need of protection is a corresponding limitation on that adult's autonomous decision making and liberty' (Bach & Kerzner <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner-partII-sectionVI>).

The above approach conflates the need for protection with loss of capacity. Other approaches attempt (successfully or unsuccessfully) to balance between protection and autonomy. An example of this is Principle 11 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles). Principle 11 addressing consent to treatment, offers a complex and detailed political compromise between autonomy and paternalism. Principle 11(6)(b) allows forced treatment where the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, where, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent.

The final and most authoritative approach is that found under article 14 of the CRPD, whereby disability cannot be used as a justification for restricting liberty and autonomy.

### 1.6.3 Paternalism

Paternalism, in its crudest form, can be defined as coercive intervention to the behavior of a person in order to prevent an individual from causing harm to his or her self. 'Paternalism is the coercing of people primarily for what is believed to be their own good' (Dworkin (1983) (Quoted in Szerletics, 2011)).

According to Szerletics:

It seems more promising to conceive paternalism as being connected to the violation of the protected person's *autonomy*, where autonomy encompasses both internal (i.e. mental capacity, rationality, skills for preference formation, etc.) and external factors

(i.e. adequate set of options)... The aims of paternalism are not only prevention from self-harm but also the promotion of the welfare and interests of its subjects. Compulsory primary education or compulsory social security membership does not directly prevent self-harm but aims to create long-term benefits for citizens. Consequently, we can distinguish between benefit-promoting and harm-preventing forms of paternalism.<sup>12</sup> Overall, there seem to be two elements that form the core concept of paternalism: (1) the interference with the subject's autonomy and (2) the benevolent aim of preventing self-harm or promoting benefit.

An example of overly paternalistic adult protection legislation is Nova Scotia's Adult Protection Act, which is based on a best-interests model. Subsection 9(3) is illustrative and states as follows:

Where the court finds, upon the hearing of the application, that a person is an adult in need of protection and either

(a) is not mentally competent to decide whether or not to accept the assistance of the Minister; or (b) is refusing the assistance by reason of duress, the court shall so declare and may, where it appears to the court to be in the best interest of that person, (c) make an order authorizing the Minister to provide the adult with services, including placement in a facility approved by the Minister, which will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect.

As Bach & Kerzner note, the concern about the above provision is that there is no definition of 'mentally competent' and there is no mention of the role of supports in enhancing the person's ability to address the situation without the intrusion of the Minister.

The following case is also illustrative of the paternalistic approach:

12 A Szerletics 'Paternalism: The Essex Autonomy Project: Green Paper Technical Report. Version 1' (2011).

### Case illustrating paternalism

*DH NHS Foundation Trust and PS (By her litigation friend, The Official Solicitor)*

Proceedings were brought in the Court of Protection of England and Wales and instituted on 13 April 2010 by the DH NHS Foundation Trust (the Trust) against PS (by her litigation friend, the Official Solicitor) designed to ensure that PS undergoes necessary surgery. Evidence was given to the effect that attempts had been made to explain the need for surgery to PS and she failed (and on occasion refused) to attend hospital for treatment. The court held that:

I am further satisfied, given her hospital and needle phobia, that it may well be necessary to sedate PS in order to convey her to hospital, and that the risks of sedation in these circumstances have been appropriately addressed by the Trust. The need for such sedative treatment will only arise if persuasion fails, and I am accordingly satisfied that it is necessary for the trust to authorise such treatment as being in PS's best interests, and to use force if necessary to sedate her and convey her to hospital.

### Student activity

#### Discussing autonomy and paternalism

Is autonomy manifested in degrees? Do the abilities and capacities that constitute autonomy obtain all at once or progressively? Is a blanket prohibition against paternalism warranted? Why, or why not?

## 1.7 Human rights closely related to the right to legal capacity: A detailed discussion

### 1.7.1 Liberty, security and consent

Article 14(1)(b) of the CRPD states that states parties shall ensure that persons with disabilities, on an equal basis with others are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

Article 14 of the CRPD was a result of the historic demands of users and survivors of psychiatry for an end to the regime of detention and institutionalisation. As such, according to the UN Office of the High Commissioner for Human Rights (2009, paras 48, 49):

No mental health law, no matter how narrowly framed, can ever meet the requirements of Article 14, so long as it contains any provision whatsoever that allows involuntary confinement of people with psychosocial disabilities for purposes of treatment or preventive detention, or for any other reason linked in legislation to the existence of the disability (as diagnosed or attributed in any other way), or any

other provisions for involuntary mental health treatment.

Article 5 of the European Convention safeguards the right to liberty and security of the person. However, the European Convention on Human Rights states in article 5(1)(e) that being of 'unsound mind' is a permissible ground for deprivation of liberty, a position that appears to be inconsistent with article 14(1)(b) of the CRPD. In addition, article 6 of the European Convention guarantees the right of every person without distinction, to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law. In *X v United Kingdom*, the Court observed that pre-committal reviews had to be wider than a simple procedure of *habeas corpus* and required that mental health legislation be amended to establish 'Mental Health Review Tribunals'. The United Kingdom consequently amended its mental health legislation to include provisions for such tribunals which are tasked with evaluating the legality of the permanent detention of persons with psychosocial disabilities and are empowered to discharge persons in situations deemed appropriate. According to the revised law, the tribunal meets with the individual once after six months of detention and once within twelve months. Further, in *Megyeri v Germany*, the European Court held that all persons with psychosocial disabilities who are accepted indefinitely in a hospital have the right to judicial review before a tribunal in order to determine whether their detention is legal. In *Shtukaturov v Russia*, the court stated that the deprivation of legal capacity is not a ground to deprive someone of their liberty. In *Re MF at the Constitutional Court of the Czech Republic*, the court quashed provisions of the 1992 Mental Health Act that allow a person deprived of legal capacity to be involuntarily detained in a psychiatric hospital solely on the 'consent' of their guardian and thus removing the possibility of review of the lawfulness of detention.

In the African system, the Commission held in *Purohit and Moore v The Gambia* that article 7 (right to have one's cause heard by a court) included a right to an independent hearing into involuntary psychiatric admissions. However, the Commission refrained from finding that such involuntary confinement constituted a violation of the right to liberty, and freedom from arbitrary detention guaranteed under article 6 on the basis that the article did not cover persons hospitalised for medical reasons.

At the domestic level, South Africa's Mental Health Care Act (2002) is based on, amongst others, the principle of the least restrictive alternative; community-based health services and the integration of mental health into primary health care. The Mental Health (Care and Treatment) Act of Scotland (2003) is similarly based on the principle of the least restrictive alternative, which recognises that the liberty and autonomy of the individual as the starting premise for any mental care and treatment.

### 1.7.2 *The right to live in the community*

Article 19 of the CRPD guarantees the right of persons with disabilities to live in the community 'with choices equal to others' and mandates states to ensure their 'full inclusion and participation in the community' including through ensuring that they have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others. It has been stated that article 12 on the right to equal recognition before the law, is particularly key to article 19. Living independently and being included in the community has been interpreted as a logical extension of in article 12 of the CRPD, in the sense that recognition of legal capacity as required under article 12 restores the 'power of persons with disabilities to decide about their own lives, while the right to independent living paves the way for persons with disabilities to choose how to live their lives' (European Foundation Centre, 2010).

Globally, the institutionalisation of people with disabilities is one of the key violations of article 19 of the CRPD on the right to live independently in the community. Examination of case law before the European Court of Human Rights shows that denial of legal capacity and institutionalisation often intersect. In *Shtukaturov v Russia*, the applicant was denied legal capacity and institutionalised for 7 months. In *Stanev v Bulgaria*, deprivation of legal capacity and institutionalisation did intersect. However, the Court did not address the applicant's arguments about his right to live in the community and about deprivation of legal capacity, both brought under article 8 of the ECHR. In *Sykora v Czech Republic* Mr Sykora was detained 20 days. In *Kedzior v Poland*, *Re GC at the Bulgarian Supreme Court*, *Re Delova at the Constitutional Court of the Russian Federation* and *Re EM at the first instance Hungarian Court*, there is an intersection between the deprivation of legal capacity and institutionalisation.

In Africa, institutionalisation often occurs in the context of mental health care. Article 19 contains a clear obligation to develop community-based alternatives to institutional care. The ills of institutionalisation have been well documented, not least amongst them that it cuts off a person from family, friends, academic pursuits, and employment among other pursuits. Further, neglect, and abuse proliferate in institutions (Kamundia, 2012).

In addition to the CRPD, the Declaration of Caracas and the Inter-American Commission on Human Rights' Recommendation both recognise the rights of persons with psychosocial disabilities to live and be treated in the community. The Declaration of Caracas states that '[t]he resources, care and treatment that are made available must strive to ensure that patients remain in their communities...' and recognises in particular that '... the mental health hospital ... isolates patients from their natural environment, thus generating greater social disability... and creates unfavourable conditions that imperil the human and civil rights of patient ...'. On its part, the Recommendation calls upon states to promote and implement, through

legislation and national mental health plans, the organisation of community mental health services, to achieve the full integration of persons with psychosocial disabilities into society and involve professional organisations, associations of clients and their family members, their friends, social welfare agencies, and other members of the community in the rehabilitation of persons with psychosocial disabilities.

### 1.7.3 *Respect for personal integrity and freedom from torture, violence, exploitation and abuse*

According to the General Comment on article 12, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (article 17), freedom from torture (article 15), and freedom from violence, exploitation and abuse (article 16). According to the CRPD Committee, forced treatment denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention.

Article 7 of the International Convention on Civil and Political Rights (ICCPR) guarantees the right of all persons from being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee in its General Comment 20 has confirmed that the prohibition of torture under article 7 of the ICCPR applies to 'patients in medical institutions' and that 'persons incapable of giving consent' as well as those under any form of detention may not be subjected to medical or scientific experimentation that may be detrimental to their health. The UN Special Rapporteur on Torture (2008, paras 64-65) has also noted that psychiatric institutionalisation may constitute torture or ill-treatment when it amounts to indefinite detention or continues for long periods of time. In addition, the UN Human Rights Committee in a number of decisions has found that failure to have regard to the mental state of prisoners and to provide mental health services in this context can amount to cruel, inhuman and degrading treatment.

### *Case law on respect for personal integrity and freedom from torture, violence, exploitation and abuse*

In *Clement Francis v Jamaica* the Committee found a violation of articles 7 and 10(1) of the ICCPR where the state failed to respond to the deteriorating mental health of a detainee sentenced to death and to take appropriate steps to offer treatment for the condition. The Committee in *C v Australia* came to the same decision in a case involving an Iranian asylum-seeker detained by the Australian authorities, holding that his continued detention in the face of his deteriorating mental health was a violation of article 7 of the ICCPR. Article 15 of the CRPD is framed in similar terms as article 7 of the ICCPR, and it also specifically provides that no

person shall be subjected to medical or scientific experimentation without their consent.

The Inter-American Commission on Human Rights has established in this regard that persons with psychosocial disabilities are a vulnerable group requiring special scrutiny to ensure that they are not subjected to violations of their physical and mental integrity. For instance, in *Victor Rosario Congo v Ecuador*, the Inter-American Commission found a violation of the right to humane treatment when a person with a psychosocial disability was denied health services in a public hospital. This decision was especially significant given the Commission's demonstrated willingness to refer to and apply the MI Principles and jurisprudence of the European Court of Human Rights, in addition to reliance on the American Convention. It is important to highlight that this decision preceded the CRPD.

Additionally, in a number of cases involving article 8 of the European Convention (respect for private and family life), such as *YF v Turkey*, the Court has stated both physical and psychological integrity may be violated by medical intervention. It has also been argued that the decisions in *Gloss v United Kingdom* and *Storck v Germany* have extended this concept to situations where individuals lack capacity to consent to treatment. However, as per the decision in *Herczegfalvy v Austria* it would appear that article 3 of the Convention (prohibition of torture and inhuman and degrading treatment) will not be violated where therapeutic necessity required that an incapacitated person is subjected to non-consensual treatment in order to preserve their physical and mental health although they nevertheless remain protected by article 3. The import of this decision is that, should the manner of treatment reach a 'minimum level of severity' then article 3 may be violated. At the same time, it bears noting that the European Court has been reluctant to find a violation of article 3 on this basis. For instance, in *Kudla v Poland* the Court expressed the view that the suffering and humiliation which inevitably forms part of legitimate non-consensual treatment would not violate article 3. This holding may be now said to be contrary to the CRPD.

At the domestic level, regard may be had to a landmark case in Nigeria, *Ishmael Azubuike & 3 Others v Attorney General of the Federation & 3 Others*, brought on behalf of mentally ill prisoners at the Maximum Security Prison in Lagos. The Court held that their confinement without treatment constituted a violation of the constitutional right to dignity and physical integrity. This demonstrates that even in the absence of progressive statutory law, use can be made of the Constitution to promote and protect the rights of persons with psychosocial disabilities.

Declarations on article 12 of the CRPD	
Country	Excerpt of Declaration
Australia	Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards; Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.
Canada	Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.
Egypt	The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub') but not the capacity to perform ('ahliyyat al-ada'), under Egyptian law.

From United Nations Treaty Collection ([https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec))



### Student activity

Discuss:

What is your own initial perspective on legal capacity?

Narrowing in on the exercise of legal capacity by persons with psychosocial disabilities, what supports and services must be in place in a system which does not resort to involuntary interventions, and how would that look in the context of various countries in Africa?

Are the declarations by Australia and Canada legitimate, given that reservations should not go against core provisions of a convention?

## 2 Applying article 12 of the CRPD in the African context

### 2.1 Lecturer's notes

*Rights need to be grounded in real contexts; otherwise they remain abstract imperatives in human rights treaties. It would be incomplete therefore to discuss the notions of the right to legal capacity without at the same time reflecting on how this right would be made real in the African context. Having understood what the right to legal capacity entails, students should be asked to consider challenges and opportunities of realising this right in the African context. What impact does traditional African culture have on practices such as disinheriting people with disabilities? Does culture have any role to play in the forced treatment of people with psychosocial disabilities, especially where such treatment is initiated by family members? In exploring these issues, the lecturer should guard against promoting simplistic notions about the nature of African culture.*

*A discussion on resource implications of the shift to supported decision-making may also be important to have, bearing in mind that the CRPD Committee has stated that the right to equal recognition before the law is not subject to progressive realisation, while at the same time taking into account the level of economic development of most African states.*

### 2.2 What contribution did African countries make during the negotiation of article 12 of the CRPD

Contributions of African countries towards the drafting of article 12	
Country	Contribution
Kenya	Highlighted 'the need to require states to take all appropriate and effective measures to ensure the equal rights of persons with disabilities to own, inherit, use, or otherwise dispose of property since in Africa persons with disabilities often are not allowed to own or use property.'
Libya	Stated that '[p]ersons with disabilities have legal obligations and rights on an equal basis with other people with the exception of persons with 'damaged brains', who should be exempted from certain punishments'.
Libya?	Asserted that persons with some kinds of disability (mental disabilities such as brain damage) should be exempted from full legal capacity: 'It would be better to say that all persons with disabilities enjoy full legal capacity except those with mental disorders'.
Egypt	Asserted that the concept of legal capacity does not correspond with its legal system: 'Some persons with disabilities cannot exercise legal capacity or the capacity to act. The language in the Convention does not make clear that some persons with disabilities cannot have absolute equality.'
Kenya (on behalf of the African group)	Proposed adding 9(c)(iii), to read as follows: 'Provide persons with disabilities with adequate support services to develop networks for supported decision-making.' This addition would encourage support groups providing information and help persons with disabilities in making decisions. Decision-making assistants should not be limited to parents and others; persons with disabilities can also assist other 'persons with disabilities'.

Kenya (on behalf of the African group)	Stated that 'the decision that a person needs support must be made by a relevant authority, and there must be safeguards... There must be periodic review. The person in a coma may not be in a coma for the rest of his/her life.'
Kenya (on behalf of the African group)	Proposed that 'The language of the text must include all three components of exercising legal capacity and decision-making: 1) a person independently; 2) supported decision making; and 3) substitute decision making.' Kenya (on behalf of the African group) supported including due process.
Kenya (on behalf of the African group)	Stated that both the Canadian text and the IDC proposal 'focused too heavily on the paradigm shift and not enough on the situation in which persons with disabilities do require somebody else to make decisions on their behalf. This article must explicitly protect the rights of those persons, who are particularly vulnerable. It is not sufficient to stop at the point of supported decision making. Neglecting to ensure the rights of those whose disabilities are so severe that they cannot express their preferences would represent a critical failure of the convention. As we draft this convention, the rights of all persons with disabilities must be the key focus, including the most vulnerable. With respect to Africa, if the wording in this article was not exactly right, many states would likely attach reservations to the convention.'

Source: <http://www.un.org/disabilities/default.asp?id=1423>

### 2.3 What did the CRPD Committee recommend to developing countries whose state reports it has examined on article 12?

Tunisia is the only African country whose state report the CRPD Committee has examined and issued concluding observations on. The Committee recommended that Tunisia review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making. The Committee further recommended that training be provided on this issue to all relevant public officials and other stakeholders. It is important to note the issues that the Committee has expressed concern about to the developed countries that it has examined (El Salvador, Paraguay, Argentina, China and Peru) as the issues may, to a large extent be generalisable to Africa:

- lack of understanding concerning the scope of article 12;
- lack of data and information on persons with disabilities who have been declared legally incapable;
- reports that a number of persons with disabilities (especially those living in rural areas and in long-term institutional settings) do not have identity cards and, sometimes, have no name;
- the complete absence of a system of supported decision-making;
- the inconsistencies observed in both the laws already in force and bills that are now being considered which are based, or continue to be based, on a substitute decision-making models;
- the legal disqualification arising in civil and family law when persons with intellectual, psychosocial, hearing or visual impairments are interdicted or declared legally incapable;

- denying the ability to exercise the right to marry to the 'deaf-mute, blind-deaf and blind-mute persons, as well as to mentally handicapped persons and those suffering from mental deterioration';
- lack of information on persons with disabilities placed in the system of guardianship or protection, and on the propriety of the processes for lifting interdictions;
- legislation that limits possibilities for 'blind', 'mute' and 'deaf' persons and those who 'are not in full command of their mental faculties' to work as notaries;
- the reluctance of some justice officials to apply the rules that set limits on a court's discretion in restricting the legal capacity of persons with disabilities; and
- judges having complete discretion to appoint a trustee or decide on what decision-making support tools are needed by persons with disabilities.

## 2.4 Contextualising the right to legal capacity in the African setting – What are some of the issues arising?

Despite being part of the law in many African countries, formal guardianship is not an often employed mechanism in the African context; the more prevalent situation is that of informal substituted decision-making within families and communities (MDAC, 2014). Indeed article 7(a) of the draft protocol responds to this reality by expressly prohibiting non-state actors and other individuals from violating the right of persons with disabilities to realise their right to legal capacity.

According to the briefing paper 'How to implement article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya', in Kenya, the law is not the greatest barrier to the exercise of the right to legal capacity by persons with disabilities. The briefing paper identifies that factors such as poverty and high rates of unemployment amongst persons with disabilities and the dependency that ensues as a result, a largely inaccessible environment, limited state support and services and unaddressed mental health care needs inter alia negate the exercise of the right to legal capacity by persons with all types of disabilities. Hence, the problem of exercising legal capacity in Kenya is largely an informal rather than a formal one.

To illustrate, the briefing paper states that:

Article 12(5) provides that States Parties shall ensure the equal rights of persons with disabilities to own and inherit property. Interviews revealed that because of deeply embedded cultural stereotypes persons with all categories of disabilities are often disinherited. This, despite the fact that the Constitution of Kenya at Article 40 provides for the right to own property for all people. But, practice on the ground is that persons with disabilities often are not able to exercise this right for extra-legal reasons.

According to the briefing paper:

law reform is a critical element to the realization of Article 12 in Kenya, but even more critical if Article 12 is to be realized in the country is a focus on the practical element, the informal places in which the right to legal capacity is routinely denied. And this requires even wider reaching reforms – broad based awareness raising, accessifying the environment and addressing the widespread poverty among people with all types of disabilities in Kenya.

### Student activity

Can the findings from Kenya on the right to legal capacity be generalised to the learners' country of origin?

Consider the components of a supported decision-making regime as identified under Section 1.1 above. What are the challenges as well as the opportunities for setting up a supported decision making regime in your country of origin? (To prompt discussion, highlight the centrality of families in Africa (so what about persons with disabilities without families, or instances where a person does not want to be supported by their family for certain decisions?), limited state support, how to provide safeguards in the private space that is home).

## 2.5 Ongoing projects on the right to legal capacity in Africa

### 2.5.1 Zambia

The two organisations in Zambia that are leading the work on article 12 of the CRPD are the Zambian Federation of the Disabled (ZAFOD) and the Mental Health Users Network of Zambia (MHUNZA). The two DPOs are engaged in mental health law reform (advocating for the recognition of the right to legal capacity in Zambia's Mental Health Bill), community advocacy on legal capacity, peer networks, and individual and family supports projects.<sup>13</sup>

In responding to the Zambian context, one of the objectives of pilot projects is to develop and implement practical strategies for social and economic inclusion. The objectives of the pilot projects also highlight the need to empower and engage not just people with disabilities but their families as well. Further, the need to develop and implement community based mental health supports is highlighted. It is planned to develop information tools for training self advocates and mental health users on the right to legal capacity (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

<sup>13</sup> The Institute for Research and Development on Inclusion and Society is supporting ZAFOD and MHUNZA in pilot projects on article 12: M Bach 'How can we create change in the legal framework, in the community and in our social systems?' Paper given at a Workshop on 'Latest developments on legal capacity in Africa' (Nairobi, Kenya, 11-12 June 2014).

## 2.5.2 Kenya

In Kenya, there are ongoing initiatives on actualising article 12 of the CRPD for Persons with Intellectual Disabilities as well as for persons with psychosocial disabilities. The Kenya Association of the Intellectually Handicapped (KAIH) works on actualising article 12 for persons with intellectual disabilities in 6 regions within Kenya while USP-Kenya works on realising article 12 for persons with psychosocial disabilities in four counties in Kenya. The two organisations focus on legislative reform, peer support groups, self advocacy and awareness-raising (Series, Arstein-Keslake & Kamundia Forthcoming, 2015).

## 2.6 African case law touching on legal capacity

In the *Purohit v the Gambia* case, the issue was the right of persons with psychosocial disabilities to challenge their detention, the conditions under which they are detained and their right to vote. Paragraph 75 of the decision states that:

The right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular state. Legal incapacity may not necessarily mean mental incapacity ... Legal incapacity as a justification for denying the right under Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.

In the case of *In the matter of Leah Wachu Waiganjo (a person suffering from a mental disorder) and in the matter of an application by William Kibera Waiganjo to be appointed manager to the estate of and guardian to the said Leah Wachu Waiganjo*<sup>14</sup> an application was made by William Kibera Waiganjo (the applicant) to be appointed guardian ad litem and manager of the estate of Leah Wachu Waiganjo (the subject). The basis of the application was that Leah suffers from a mental disorder that rendered her incapable of managing her affairs. Medical evidence was produced to show that she suffered from temporal lobe epilepsy and periodic depression.

In the ruling, the Court stated:

The Subject was presented to court on the 27<sup>th</sup> June 2012. She is a middle-aged lady who appears well-nourished and well-groomed. She knew her name and was able to state correctly her home and the names of her father and other relatives. She stated that she is not married, but that she had a male child called Joseph Waiganjo who had died. She further stated that she has a piece of land given to her by her parents which her father and brother take care of it on account of her illness. The Subject answered all

the questions asked with a lot of hesitation and probing. It was apparent that she was confused and incapable of making sound judgment. My own observations of her, coupled with the medical reports before the court, indicate that she is not capable of taking care of her own affairs and estate.

Based on the Court's observations of Leah and the medical reports, the Court concluded that Leah 'is suffering from a mental disorder to such extent as to be incapable of managing her affairs, though she is capable of managing herself, and is not dangerous to herself or to others, nor likely to act in a manner offensive to public decency'. The court therefore appointed the applicant to be Leah's guardian ad litem, to manage her estate, including proper provision for her maintenance, and to take any appropriate legal action for her benefit and for the benefit of her estate.

## 3 Good international practice and models for reform

### 3.1 Lecturer's notes

*Good international practice changes constantly, especially regarding 'new' conceptualisations of rights. Hence, the lecturer should keep abreast of developments in legal capacity around the world. Has there been any case striking down legislation that allows plenary guardianship in any country? Are judges being influenced by article 12 CRPD at all in making decisions on guardianship matters? Are there newer, better models of supported decision-making being developed in any part of the world?*

### 3.2 The case of Ireland

In its Programme for Government, the Irish Government committed to introducing a capacity bill 'that is in line with the UN Convention on the Rights of Persons with Disabilities'. In 2013, the Irish Government published the Assisted Decision-Making (Capacity) Bill 2013. The purpose of the Bill is to

reform the law and to provide a modern statutory framework that supports decision-making by adults and enables them to retain the greatest amount of autonomy possible in situations where they lack or may shortly lack capacity (<http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf>).

#### 3.2.1 Capacity legislation reform – Process

Between 2011 and 2013, a number of Irish interest groups who work in the area of disability, mental health and aging came together to advise the Government on reforming its capacity law to conform with the CRPD. They produced a document called the *Essential Principles*, based on best international practice, international human rights standards and on the guiding principles of the UN Convention on the Rights of Persons with

14 (2012) eKLR <http://kenyalaw.org/caselaw/cases/view/80879> (accessed 28 April 2014).

Disabilities (CRPD) (See [http://www.nuigalway.ie/cdlp/documents/principles\\_web.pdf](http://www.nuigalway.ie/cdlp/documents/principles_web.pdf)).

After the publication of the Assisted Decision-Making (Capacity) Bill 2013, the civil society organisations, led by the Centre for Disability Law and Policy of the National University of Ireland, Galway, made a number of submissions to the Department of Justice on the Bill as a coalition, which amplified their voice (section 3.1.2 contains the key proposals contained in the joint submission). The organisations continue to advocate for capacity legislation that is in line with article 12 of the CRPD.

### **3.2.2 Capacity legislation – Content**

The Assisted Decision-Making (Capacity) Bill 2013 changes the existing law on capacity, shifting from the current all or nothing status approach to a functional approach, whereby capacity is assessed on an issue- and time-specific basis. The Bill provides a statutory framework enabling formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant to assist them in making decisions or as a co-decision-maker who will make decisions jointly with them.

The Bill also provides for the making of applications to court in respect of persons whose capacity may be in question to seek a declaration as to whether those persons lack capacity and for the making of consequent orders approving co-decision-making agreements or appointing decision-making representatives. The Bill provides for protection from liability for informal decision-makers in relation to personal welfare and healthcare decisions made on behalf of a person with impaired capacity where such decisions are necessary and where no formal decision-making arrangements are in place. It also reforms the law relating to enduring powers of attorney.

Finally, the Bill also provides for the establishment of a new statutory office, the Office of the Public Guardian. The Office of the Public Guardian will supervise decision-making assistants, co-decision makers, decision-making representatives and persons holding enduring powers of attorney.

### **3.2.3 Capacity legislation – Proposals for amendments**

In its October 2013 submission to the Department of Justice and Equality on the Assisted Decision-Making (Capacity) Bill, the Centre for Disability Law and Policy made concrete suggestions for amendment of the Bill to bring it in line with article 12 of the UN Convention. It was proposed to replace the definition of mental capacity in the bill with a definition of legal capacity, with the assertion that all natural persons have legal capacity and that this cannot be removed, reduced or restricted based on mental capacity/disability. Further, the submission proposed that the bill should not make support options contingent on a test of mental capacity, and

support options should be available for all who need support for decision-making. The submission proposed that support persons should be legally bound by duties, including the duty to build a relationship with the appointer over time in order to fully understand the appointer's will and preferences, and the duty to adhere to the appointer's will and preferences as communicated and to endeavour to ensure that the appointer's relevant decisions are implemented.

In the event that the validity of a support agreement is contested, the burden of proof should be on the third party contesting the validity to demonstrate the agreement is invalid by proving the person did not have the ability to make an agreement. Third parties who rely on support agreements in good faith should be exempt from liability in case the decision made by the person is later contested. Further, support agreements should be entered into based on the free and informed consent of the relevant person (including co decision-makers). Carers, family members, professionals acting in good faith and other third parties should be obligated to support individuals to create an assisted decision-making agreements, rather than resorting to informal substitute decision-making (Centre for Disability Law and Policy: Policy Submissions [http://www.nuigalway.ie/research/centre\\_disability\\_law\\_policy/submissions.html](http://www.nuigalway.ie/research/centre_disability_law_policy/submissions.html)).

## **3.3 The case of India**

Similar to Ireland, India currently has a new bill to reform its law on legal capacity that will shortly be put before the Indian parliament. It also has a separate bill that proposes amendments to its National Trust Act (National Trust Act Amendments Bill 2011 (India)) which would provide the structure for the blossoming of a new supported decision-making mechanism. Interestingly, the Indian bill reforming legal capacity law proposes to maintain a substituted decision-making partial guardianship regime for those that are currently under guardianship. However, all individuals in the future who are in need of decision-making assistance, will be provided with access to the support system set up in the National Trust Act.

## **3.4 The case of Canada**

Various Canadian Provinces, such as British Columbia have innovative legislative provisions on capacity, chiefly the Representation Agreement Act, 1996 and the Adult Guardianship and Planning Statutes Amendment Act, 2007). The Representation Agreement Act allows an individual to nominate one or more people to act as their supporters or representatives in making legally binding decisions and exercising legal capacity. Importantly, the diagnostic threshold to determine who is permitted to create a representation agreement is flexible enough to allow a people with a diversity of decision-making skills to enter into agreements. (British Columbia law reform principles can be found here: [http://www.nidus.ca/PDFs/Nidus\\_History\\_Principles\\_Law\\_Reform.pdf](http://www.nidus.ca/PDFs/Nidus_History_Principles_Law_Reform.pdf)).

### 3.5 Pilot programmes

There are several pilot programmes on supported decision-making happening around the globe including in Australia and in Bulgaria. The South Australia Office of the Public Advocate successfully completed a supported decision-making pilot in 2012 and continues to expand activities in this area. The Victoria Office of the Public Advocate is currently undertaking a similar pilot programme. The Bulgarian Centre for Not for Profit Law is successfully running a project to test in practice supported decision making models in Bulgaria with an aim to change the legal framework to empower people with psychosocial disabilities and intellectual disabilities to exercise their legal capacity to act. The project is carried out in partnership with Global Initiative on Psychiatry (GIP), Bulgarian Association of People with Intellectual Disabilities (BAPID) and National Organization of Mental Health Services Users (NOMHU).

### 3.6 Learning from global initiatives on legal capacity

The following lessons emerge from global initiatives on legal capacity:

- It is important to not just have law reform initiatives, but to also have practical models piloting supported decision-making on the ground.
- The process should be led by persons with disabilities and their representative organisations, especially persons with intellectual disabilities and persons with psychosocial disabilities. Once this is in place, it is important to have allies – academics, broader civil society, service providers, etc.
- It is beneficial to identify someone in an influential position, for example, a member of parliament to champion the cause.
- It is important to keep researching and dialoguing about the hard questions, for example, the coalition in Ireland was asked to prepare textual proposals to flesh out some of the amendments that they were jointly proposing, to illustrate, if functional tests of capacity are not in line with the CRPD, what should replace the functional test?
- Engage the media wisely to get the issue into public debate, but this should be done carefully given ingrained stigma and prejudice against people with disabilities.

#### Student activity

##### Debate:

Learners should be divided into an even number of groups and invited to debate the following issue, with some groups being in support of the 'son' and some opposing the 'son's' position.

A son, having been asked why he took his father to a psychiatric institution against his (father's) will and signed consent forms allowing for the forced treatment of his father stated as follows:

I am a Christian. My faith tells me that I must do good, and part of doing good is not letting others suffer, especially one's parents. I know my dad was sick, he has been sick before so I know the pattern, and he wouldn't take the decision to go to hospital, he never does, denial is one of the classic signs of his illness – my obligation as a Christian is to do the right thing, to help where I can! Further, I am aware of Article 29 of the African Charter of Human and Peoples' Rights which states that: 'the individual shall have the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need...' As an African, I am under a duty to take care of my parents in case of need, and that means their health as well, including by use of force for the greater good/if required to avoid deterioration of their health.

(Guide: seeks to discuss what is wrong with paternalism since we as human beings are often in relationships that give rise to duties. Also seeks to debate whether 'support' can always overcome decision-making deficits)

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- Films by Daniel Mackler; a film maker, writer and musician who explores alternatives to the medical model of psychosocial disability <http://recoveryfromschizophrenia.org/2014/04/daniel-macklers-films-are-now-free-on-youtube/>

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## Module 11: Access to justice

### Module overview

This module aims to give students an understanding of the concept of access to justice as provided for in article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). First, the module will examine the import of article 13 of the CRPD using various sources including comments issued by the Committee on the Rights of Persons with Disabilities to countries whose state reports (submitted in line with article 35 of the CRPD) have already been examined by the Committee. Students will be required to critically analyse provisions in their domestic law that touch on access to justice for persons with disabilities. Accessibility will be conceptualised broadly to include social, intellectual, communication, institutional, physical and economic accessibility, having regard to diversity *within* disability. The module will then seek to apply article 13 of the CRPD in the African context; examining issues that relate to access to justice which issues affect persons with disabilities. Students will be required to consider good and bad practice emanating from the law and practice of their own countries, and examples of good and bad practice from other countries will be provided. Finally, the module will explore good international practice and in so doing consider suggestions for reform in order to ensure effective access to justice for persons with disabilities on an equal basis with others.

### Learning objectives

Upon completion of this module, the student will be able to:

- Understand the implications of article 13 of the Convention on the Rights of Persons with Disabilities on access to justice;
- Explain what the core issues are with regard to access to justice for persons with disabilities from the international level to the regional level;
- Critically analyse their own legal systems and justice systems and identify what the issues are with regard to persons with disabilities accessing justice;
- Identify good practices on access to justice for persons with disabilities at the regional level and at the international level; and
- Assess the barriers facing persons with disabilities in accessing justice as well as identify possible practical solutions to these barriers.

### Module content

There are four module sections; section 1 is on the import of article 13 of the CRPD, section 2 is on applying article 13 of the CRPD in the African context, section 3 identifies and gaps in law and in practice on the respect, protection and fulfillment of

access to justice while section 4 identifies good international practice and makes suggestions for reform.

## 1 The import of article 13 of the CRPD

### 1.1 Lecturer's notes

*In many countries within Africa, there are NGOs working on various aspects of access to justice for marginalised groups. During the first class, it might be useful to have a brief presentation from a lawyer working in such an organisation regarding practical aspects of access to justice for marginalised groups generally.*

*When breaking the ice and introducing the topic of access to justice, the lecturer could ask learners to speak about cases that they may have had experience with: how long did the cases take to be concluded? What are the general obstacles to accessing justice for people in the particular country generally?*

### 1.2 Article 13 of the CRPD

The formulation of this section is guided by the wording of article 13 of the CRPD. Sections of article 13 are isolated for in depth discussion. Questions are formulated under each isolated part to guide discussion.

#### Student activity

**States parties are required to ensure effective access to justice for persons with disabilities on an equal basis with others.**

Consider:

- Is access to justice provided for in other international human rights norms other than the CRPD?
- What does access to justice *mean*?
- Why does access to justice matter?
- Do the Constitutions of the respective countries as well as the domestic laws provide for the right to access to justice?

### 1.3 Access to justice in other international human rights norms

- Universal Declaration of Human Rights – article 7 (equality before the law and equal protection of the law); article 8 (all have the right to an effective remedy); article 10 (the basic right of the individual to a fair trial in both civil and criminal proceedings);
- International Covenant on Civil and Political Rights – article 14(1) (all persons shall be equal

before the court and tribunals); article 14(3)(f) (regarding criminal proceedings, to have the free assistance of an interpreter if he cannot understand or speak the language used in court); article 16 (the right to recognition everywhere as a person before the law);

- International Convention on the Elimination of All Forms of Racial Discrimination – Article 5(a) (equal treatment before the tribunals and all other organs administering justice); and
- Convention on the Elimination of All Forms of Discrimination against Women – article 15(2) (reference to equal treatment in all stages of procedure in courts and tribunals).

### 1.3.1 Provisions on access to justice at the regional level

The African (Banjul) Charter on Human and Peoples Rights (African Charter) – article 7 (entitles every individual in a ratifying state to have her or his cause heard and to be tried within a reasonable time by an impartial court or tribunal).

## 1.4 What does access to justice mean?

### 1.4.1 CRPD negotiations regarding access to justice

*Snippet from the CRPD negotiations – United States:*

Access to justice encompasses access to facilities; however accessible communications is also of paramount importance. In addition, access to justice includes ensuring that police and other officials modify their policies and practices where necessary (7th Session of the Ad Hoc Committee, 18 January 2006 <http://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>).

According to Ortoleva:

Access to Justice' is a broad concept, encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice. People who feel wronged or mistreated in some way usually turn to their country's justice system for redress. In addition, people may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial. Persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system in their country because they have faced barriers. Additionally, persons with disabilities have been discriminated against in terms of attaining positions as lawyers, judges, and other officials in the justice system. Such barriers not only limit the ability of persons with disabilities to use the justice system, but also limit their ability to contribute to the administration of justice to society and to the community as a whole. Thus, Article 13 of the CRPD explicitly references the right of persons with

disabilities to access to justice (Ortoleva 2011).

Access to justice has been said to encompass three key components – substantive justice, procedural justice and symbolic justice (International Development Research Centre, 2007). Substantive justice concerns itself with an assessment of the rights claims that are available to those who seek a remedy. In this regard, people with disabilities have a right to an effective remedy where they have been discriminated against on the basis of disability. This could be in employment, access to goods and services including transport, education and social services. Substantive justice presupposes that people with disabilities are recognised as persons before the law and entitled to make a claim in their own right (Ortoleva, 2011).

Procedural aspects of access to justice focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum). Barriers in getting a claim into court include physical, structural (legal process), communicative and/or language barriers, information and advice barriers, prohibitive cost, uncertain outcome, and court or tribunal setting being inappropriate (Flynn, 2011).

The symbolic component of access to justice steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens' belonging and empowerment. This might require the involvement of civil society and DPOs in bringing about a just society for persons with disabilities, participation of persons with disabilities in all aspects of the justice system including as witnesses, lawyers, judges (Flynn, 2011).

## 1.5 Why does access to justice matter?

According to Ortoleva:

... the ability to access justice is of critical importance in the enjoyment of all other human rights and in the fair and effective administration of justice. For example, a person with a disability who feels that she or he has been denied the right to work may wish to turn to the justice system to seek a remedy. However, if the justice system fails to accommodate her or his physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work. Similarly, a person with a disability who has been the victim of a crime may wish to report the crime to the police and press charges against the offender. However, if she or he is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able to exercise her or his rights as a victim. These examples demonstrate that human rights are indivisible, interdependent, and interconnected (Ortoleva 2011).

## 1.6 Do the constitutions of the respective countries as well as domestic laws provide for the right to access to justice?<sup>1</sup>

Article 41 of the Constitution of Malawi provides for access to justice and legal remedies. Article 13(1) of the Constitution of Tanzania provides that all persons are equal before the law and are entitled to protection and equality before the law. The article addresses issues of fair hearing and the right of appeal or other legal remedies. Article 35 of the Constitution of Mozambique provides that all citizens are equal before the law. Article 56 of the Constitution of Zimbabwe provides that all persons are equal before the law. Further, article 69 provides for the right to a fair hearing including the right of access to the courts.

### 1.6.1 The case of Kenya: Law and practice

The Constitution of Kenya provides for access to justice at articles 48, 50 (especially article 50(2)(m)(h), article 50(3) and article 50(7) and article 159(2)). Kenya's Persons with Disabilities Act, 2013, addresses access to justice at section 38. The Sexual Offences Act, section 31 provides for the use of intermediaries in cases where a 'vulnerable witness' is involved (a witness with psychological, intellectual or physical impairment may apply for the court to declare him or her as a vulnerable witness).

### 1.6.2 Practice

United Disabled Persons of Kenya carried out a baseline assessment on access to criminal justice system by persons with disabilities (UDPK, 2012). The report identified that there are ongoing reforms in Kenya's judiciary and that new courts are fairly accessible as compared to the courts that are housed in older buildings. However, police stations and prison facilities are largely inaccessible to persons with disabilities. Further, police and prison staff are not well trained on the rights of persons with disabilities.

### Highlight

In addition to the laws identified in this section (the Persons with Disabilities Act and the Sexual Offences Act), students should consider whether the following laws exist in their countries and whether they address access to justice for persons with disabilities:

- Legal Aid Acts ('access to justice would be meaningless without the right to free legal aid, and that this is even more important for persons with disabilities because of their lack of knowledge of the legal system and their extreme poverty' Gibson, 2010);
- Prisons Service Acts;

- Detention Camps Acts;
- Judicial Service Act;
- Police Service Acts; and
- Penal Codes.

States parties shall ensure effective access to justice for persons with disabilities ... in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

- CRPD negotiations regarding access to justice; any aspect emphasised?
- In what capacities are people with disabilities participants in the legal system and the criminal justice system?

## 1.7 CRPD negotiations regarding access to justice; any aspect emphasised?

*Snippet from the CRPD negotiations* – Israel: the inadequacy of most justice systems to interact with PWD often results in the acquittal of PWD who have committed crimes and the failure to protect victims with disabilities. *It is lack of accommodation at the 'process' level that is most harmful* (emphasis mine) (7th Session of the Ad Hoc Committee, January 18, 2006)

## 1.8 In what various capacities can people with disabilities be participants in the justice system?

- As people seeking to learn about or to obtain information on how the justice system works;
- As persons seeking access to the court house;
- Parties (complainants, defendants, plaintiffs, respondents, etc – depending on jurisdiction);
- Witnesses;
- Prisoners;
- Jurors;
- Lawyers;
- Prosecutors;
- Judges; and
- Arbitrators.

### Highlight

With regard to the employment of persons with disabilities in the justice sector, a pre-requisite to the exercise of the right to equal employment opportunity is the right to education.

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

The importance of appropriate training for public officers and other professionals is greatly emphasised in the CRPD. It forms the basis for class discussion in this section.

1 See Schedule 1 for excerpts of the sections identified hereunder.

### Student activity

Sections 3.1.1 and 3.1.2 have imparted an understanding of access to justice as espoused in article 13(1) of the CRPD. Article 13(2) on police and prison staff training is also an essential component in access to justice for persons with disabilities. In this regard, consider:

- The role of NGOs and DPOs in particular in police and prison staff training;
- The role of National Human Rights Institutions in police and prison staff training; and
- The need for exchange of knowledge, information and good practices in investigating cases in which persons with disabilities are involved (Article 32 of the CRPD).

### Highlight

NGOs, DPOs and NHRIs undertaking police and prison staff training should consider what *kind* of training is most useful to ensure equal access to justice. NGOs and DPOs that litigate disability rights should compile data on what is most useful for persons with disabilities in all stages of encountering the justice system. In training the police, emphasis should be on providing practical examples on how the police can better facilitate access to justice for persons with disabilities. It is not just about theory, and communicating about provisions in the law; it is also about imparting practical information to the police that is useful in their day to day work.

### Suggestion

Students could be asked at this stage to search the internet to find the work of the following organisations in working with police, investigators and other actors in the justice system:

- Bizchut, The Israel Human Rights Center for People with Disabilities; and
- The Cape Mental Health Society.

This foreshadows discussion on good practice that will follow towards the end of the module.

## 2 Applying article 13 of the CRPD

### 2.1 Lecturer's notes

*It is important to ground disability rights in a particular context, rather than have them remain as abstract rights in the CRPD. If possible, a 'study visit' to the local courts would be useful to get learners to witness barriers (or lack thereof) to the justice system for persons with disabilities.*

### 2.2 Applying article 13 of the CRPD

This section focuses on application. It seeks to apply Article 13 of the CRPD in the African context. The section answers the following questions:

- What did the Committee on the Rights of Persons with Disabilities recommend to countries whose reports (required to be provided by article 35 of

the CRPD) it has examined with regard to article 13?

- How does access to justice link up with the state obligations provided under article 4 of the CRPD?
- Contextualising access to justice in the African setting – what are some of the issues arising?
- What are the specific issues for persons with the different types of disability?
- What kinds of accommodations might be needed to accessify the system?
- Is there case law that demonstrates the issue of access to justice for persons with disabilities in Africa?

### 2.3 What did the Committee on the rights of persons with disabilities say to countries whose report it has examined on Article 13?

#### 2.3.1 CRPD Committee's Concluding Observations to China

##### Access to justice (art 13)

While appreciating the **establishment of legal aid service centres** for persons with disabilities, the Committee notes that **these service centres often lack the necessary resources** and do not operate on an **independent basis**. The Committee is concerned that neither the criminal nor the civil procedure laws in China **are accessible for the use of persons with disabilities** on an equal basis with others and, instead, **patronizing measures are put into place**, such as the designation of public defenders that treat the person concerned as if they **lacked legal capacity**.

The Committee suggests that the State party **allocate the necessary human and financial resources to the legal aid service centres**. It asks the State party to ensure that these centres safeguard the access to justice of persons with disabilities independently and in practice, including below the county level. The Committee suggests that the State party **reviews its procedural civil and criminal laws in order to make mandatory the necessity to establish procedural accommodation** for those persons with disabilities who intervene in the judicial system can do it as **subject of rights and not as objects of protection**. (Emphasis in bold mine, to illustrate what needs to be done in *practice* to ensure access to justice for persons with disabilities.)

With regard to Hungary, the Committee recommended that the State party:

**move from substitute decision-making to supported decision-making** which respects the person's autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual's right, in his/her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose a place of residence.

With regard to Argentina, the Committee expressed concern that there is no **strategy for mainstreaming gender and disability issues into legislation and programmes focusing on women**, including those that deal with access to justice (among others.) The Committee did not issue any recommendations on access to justice with regard to Tunisia, Spain and Peru (Emphasis in bold mine, to illustrate what needs to be done in *practice* to ensure access to justice for persons with disabilities.)

## 2.4 How does access to justice link up with the state obligations provided under article 4 of the CRPD?

Under article 4 of the CRPD, states parties undertake to ensure and promote the full realisation of all human rights for all persons with disabilities. The following obligations stand out as particularly highlighting state obligations with regard to access to justice for persons with disabilities:

- Obligations to do with legislation, policy and programmes – adopting appropriate legislation, amending existing legislation that discriminates against persons with disabilities and taking into account the protection of the rights of persons with disabilities in all policies and programmes (legislation, policy and programmes should protect the right of persons with disabilities to access justice in a way that is meaningful).
- Obligations to do with training and research – professionals working with persons with disabilities require training on the rights of persons with disabilities, combined with the requirement that public institutions act in conformity to the Convention (Professionals in the justice sector should be trained on access to justice for persons with disabilities as emphasised in section 3.1.3)
- Progressive realisation of economic and social rights – is the right to access to justice a civil and political right, or an economic, social and cultural right? Does it contain mixed elements from both genres of rights? Is the distinction between civil and political rights on the one hand and economic, social and cultural rights on the other hand a true distinction in the first place?
- The obligation to closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the CRPD (Persons with disabilities and their organisations should be involved in access to justice laws, policies and programmes).

## 2.5 Contextualising access to justice in the African setting – What are some of the issues arising?

The African context is characterised by:

- Informal way of dealing with issues, so for instance, legal issues tend to be addressed out of court.
- Limited state funded legal aid.
- Context of poverty and limited social provisioning by the state (an example of a conflict in this regard is where a perpetrator of a crime against a person

with a disability is also the person who supports the person with a disability, usually a family member).

- Limited expertise on disability amongst actors in the justice system.
- Inadequate legal framework for the effective protection of certain aspects of human rights.

## 2.6 States parties are required to provide procedural and age-appropriate accommodations. What kinds of accommodations might be needed to access the system?

With regard to age appropriate accommodations, according to section 188 of Kenya's Children's Act, a Children's Court shall have a setting that is friendly to the child offender. Section 186(h) of the same Act provides that every child accused of having infringed any law shall, if he is disabled, be given special care and be treated with the same dignity as a child with no disability.

### Student activity

Students should identify similar provisions in the domestic laws of their countries with regard to children.

What kinds of procedural and age-appropriate accommodations might be needed to access the system? One way to answer this question is to first address one's mind to what the specific access to justice issues are for the persons with the different types of disabilities. (Concern – while it may be necessary to identify persons with specific impairments and link them up to specific accommodations, how does one keep from slipping into the medical model type of approach? Should one explore ways of stating accommodations without identifying type of disability? If you were crafting a law to ensure access to justice for persons with disabilities, would you be disability specific in the law, or would you just use a generic phrasing, 'all persons with disabilities should access justice on an equal basis with others'?)

According to the International Disability Alliance, procedural accommodations and age-appropriate accommodations include:

- Enabling accompaniment during investigation or testimony by a chosen support person;
- Utilisation of alternative and augmentative communication, such as pictures and communication boards, to enable the person to fully communicate;
- Investigations performed by those who have experience and expertise in communicating with persons with disabilities, instead of by a standard police investigator;
- Utilisation of experts to remove misinformation regarding the disability that may hinder courts from accepting the testimony, and assist in understanding the witness' way of communication;

- Assistance in court in formulating questions so they are understood by the witness, and in the case of children – taking into account their evolving capacity;
- The possibility of testifying without official attire, or *in camera* (in private) through video links or in the judge's chambers, without detracting from the weight and validity of the testimony;
- Sufficient time for giving testimony and appropriate breaks during proceedings;
- Provision of information about the proceedings in plain language and child-friendly formats; and
- Establishing court procedures to enable a process for requesting accommodations. (International Disability Alliance 2013).

More detail on accommodations is provided below:

- For persons who are blind or partially sighted – repeal prohibitions on animals in the courthouse as some animals are service animals and avail legal information in formats which are accessible to persons who are blind or partially sighted;
- For persons who are Deaf – facilitate use of sign language and in prisons, where inmate telephone calls are time-limited, the prison may be required to permit inmates who use TeleTYpewriter (TTY) phones a longer period of time to make those calls;

#### Student activity

Sign Language interpreters are bound to keep all communications confidential. In the African context, Deaf clients are likely to be accompanied by their relatives or friends to see a lawyer, with such relatives and/or friends acting as interpreters. Are there concerns arising in this regard, taking into account the confidentiality of the lawyer-client relationship? Does it matter anyway, whether the interpreter is known to the Deaf client or not – are issues of lawyer-client confidentiality bound to arise anyway, as long as there is an interpreter involved? Any ways of resolving this? (the whole issue of advocate-client privilege to confidential communication).

- For persons who are Deafblind – facilitate use of tactile communication;
- For persons with physical disabilities – with regard to the building in which the court or tribunal is situated and the courtroom or tribunal room itself – ramps, lifts, wide corridors, accessible transportation to court, accessible witness chairs and jury boxes, someone to hold up objects or to point, etc (where someone has no hands). Prisons must have accessible holding cells, including beds, benches, toilets, and bathing facilities; and
- Persons with intellectual disabilities, persons with psychosocial disabilities, people with cognitive disabilities may face barriers to accessing justice due to legal prohibitions on their complaining or accessing a court. This may be because there is no support or advocacy to enable them to advocate for themselves. It may be that testimonies are not admitted by courts due to communication difficulties, or that testimonies – as victim, witness, or defendant – are deemed inadmissible or unreliable, based on the person's diagnosis. People with psycho-social or intellectual disabilities may find it difficult to understand the procedural complexities which judicial

proceedings involve. Such accommodations may include additional explanation of the nature of the procedural acts, simplifying language used in the proceedings.<sup>2</sup>

Students should attempt to identify additional accommodations. Students should also attempt to link the above section (accommodation needs) with the African context as discussed in section 2.3.

#### Student activity

Procedural and age-appropriate accommodations may affect rules of evidence, which are set up to guarantee the right to a fair trial. How do we balance these two interests? Students should consider the rules in their domestic law on evidence and think up potential conflicts between certain rules and the obligation to provide procedural accommodations, and ways to resolve such conflicts.

#### Student activity

Dilemma:

A DPO involved in training prison staff on disability issues in Kenya was presented with the following situation:

In its attempts to provide accessibility for persons with disabilities, the prison allowed inmates with physical disabilities to have crutches for mobility within the prison. A person with a psychosocial disability used one such crutch to kill another inmate. What should the response of the prison be?

- To have a separate space for incarcerating persons with disabilities (use this to discuss the dilemma of difference).
- Provide access to good mental healthcare in prison.
- Classify mobility aids as dangerous weapons and deny persons with disabilities mobility aids.
- Discount this event as a one-off incident and make no changes to the system
- Other?

Make guesses as to how the prison system in your country would respond, with reasons.

## 2.7 Is there case law that demonstrates the issue of access to justice for persons with disabilities in Africa?

Esthe Muller, a South African lawyer and also a wheelchair user, filed suit under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 against the Justice Department and the Department of Public Works because of the inaccessibility of the courthouses (South African

2 Mental Disability Advocacy Centre 'Access to justice for people with intellectual disabilities and people with psychosocial disabilities in Russia: Recommendations on legislative and policy measures required to achieve effective enjoyment of the right to access justice by all persons with intellectual disabilities and psychosocial disabilities in Russia' [http://mdac.info/sites/mdac.info/files/English\\_Access\\_to\\_Justice\\_for\\_People\\_with\\_Intellectual\\_Disabilities\\_and\\_People\\_with\\_Psycho-social\\_Disabilities\\_in\\_Russia.pdf](http://mdac.info/sites/mdac.info/files/English_Access_to_Justice_for_People_with_Intellectual_Disabilities_and_People_with_Psycho-social_Disabilities_in_Russia.pdf) (accessed 30 August 2013).

Government Information, 2004). Ms Muller had to be carried down a flight of stairs to enter the courthouse and on another occasion the court had to postpone her cases because she could not get into the room. In September 2004, the South African Equality Court reached a final settlement in which the two government departments admitted that they had failed to provide proper wheelchair access and that this was a form of unfair discrimination against Ms Muller and other people with similar accessibility needs. The departments committed to a plan to ensure that all court buildings throughout the country would be made accessible within three years (Ortoleva, 2011).

### Student activity

Gowi is a 12 year old boy who is blind. It has come to the attention of his mother (Atta) that their neighbour who is also her cousin (Gowi's uncle Doma) has been sexually molesting Gowi. You are the legal officer at the Disability Rights Centre. Atta comes to your organisation seeking advice. She indicates that she is confused about what to do for various reasons. The first reason is that Doma is her cousin, and should family members not solve any problems arising between them within the family? Is this not the 'African way'? The second reason why Atta is confused about what to do is that Doma often gives her money to assist her in running the household. If Doma is imprisoned, how will she manage to eke out a living for herself and Gowi? Indeed, the land on which Atta and Gowi have built their house is in Doma's name. What will happen to them if Atta 'raises trouble' about what Doma has done? Atta's third concern is that Gowi is blind. From the TV shows that Atta has seen, the witness always has to point to the perpetrator of the crime in open court. How will Gowi be able to do this? Atta's fourth concern is that she was too ashamed when she first found Gowi after the attack that she washed and 'treated' Gowi herself although she admits that the 'treatment' does not seem to have worked since Gowi has an infection. How will the police manage to prosecute in these circumstances? Advise Atta. Assuming you take up Gowi's case, outline what needs to be addressed.

## 3 Article 13 in the African context – The gaps

This section focuses on the gaps with regard to the respect, protection and fulfillment of access to justice for persons with disabilities in the African context. The section addresses one question:

- What are the gaps in law and in practice?

### 3.1 What are the gaps in law and in practice?

Generally, gaps in law include:

- Laws that deny persons with disabilities legal capacity, forbidding persons with disabilities from suing or being sued in their own name and/or from testifying;
- Laws whose effect is discriminatory against persons with disabilities, including laws that leave

out 'disability' from lists of prohibited grounds of discrimination;

- Laws that are too general, (for example, laws that state that 'persons with disabilities have equal access to justice') running the risk of not providing the level of detail that is needed to ensure true equal access to justice;
- Laws that leave out essential components of access to justice for persons with disabilities, including the need to train police and prison staff on the rights of persons with disabilities to access justice;
- Laws that have poor enforcement mechanisms, rendering rights empty.
- Laws according to which less weight is given to the testimony of a person with disabilities.
- Laws that use derogatory language in referring to persons with disabilities, running the risk of prejudicing judicial officers to the detriment of persons with disabilities.
- Juvenile justice laws that do not address the circumstances of children with disabilities who may find themselves in conflict with the law.

The case of Malawi discussed below can be generalised to the whole of Africa to paint a fairly good picture of what the gaps are in practice regarding access to justice.

## 3.2 The case of Kenya

### 3.2.1 Sampling the law

Several laws in Kenya adversely affect access to justice by persons with disabilities; chief amongst them the Children's Act and the Mental Health Act. This section outlines how one particular law, the Civil Procedure Act does so.

The Civil Procedure Act makes provision for procedure in civil suits in Kenya. Order 4 of the Civil Procedure Act indicates that where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect shall be made. The Act also introduces partial guardianship in cases where a person of 'unsound mind' is a litigant. Rule 15 states that the provisions relating to minors apply to persons who have been adjudged to be of unsound mind and to persons who though they have not been so adjudged are found by the court after inquiry to be of unsound mind and are incapable of protecting their interests when suing or being sued. This provision considers minors and 'persons of unsound mind' as lacking capacity on the same basis and standard despite the different circumstances.

Section 93 of the Civil Procedure Act strips a person with disability their right to legal capacity by recognising that a *guardian ad litem* or next-of-friend may oust the capacity of a person with disability to litigate a suit. This provision is general to all disabilities as it does not use the terminology 'unsound mind'. The provision is flawed and discriminatory as it fails to treat persons with disabilities as equals before the law in terms of legal action. It presumes that all persons with disabilities do not have the legal capacity to institute a suit. The section stipulates that:

In all suits to which any *person under disability* is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

### 3.2.2 Practice

The shadow report to Kenya's initial state report on the CRPD presented by United Disabled Persons of Kenya (UDPK) states the following with regard to article 13:

UDPK has undertaken research and consultations on access to justice for persons with disabilities. Persons with disabilities face numerous challenges at the various stages of the criminal justice system. The study indicates that physical access barriers and lack of sign language interpretation services are a major concern in the three institutions in the criminal justice system; namely the police, the judiciary and the prison. It is also noted that the prohibitive cost of litigation and lack of knowledge on the legal process is a major impediment to the access to justice by persons with disabilities. Additionally the knowledge levels of the staff on disability equality in the three institutions remains low, a factor that compromises the dignity and rights of persons with disabilities in the criminal justice system. (UDPK, 2012)

## 3.3 The case of Malawi

### 3.3.1 Sampling the law

Section 2 of the Registered Land Act of Malawi (Malawi Legal Information Institute) defines 'guardian' to mean 'any person responsible (whether under customary law or otherwise) for protecting the interests of any person who is under a disability, whether by reason of age, unsoundness of mind or any other cause'. On agents and persons under disability, the Act provides that

[w]here any person who, if not under a disability, might have made any application, done any act or been a party to any proceeding under this Act or under any rules made there under is a minor, a person of unsound mind or a person under any other disability, the guardian of such person, or if there is no such guardian a person appointed under some written law to represent that person, may make any application, do any act and be party to any proceeding on behalf of that person, and shall generally represent that person for the purposes of this Act.

What are the implications of this provision in cases where the 'guardian' is also the person infringing on the land rights of the person with disabilities?

### 3.3.2 Practice

A paper titled 'Access to Justice'<sup>3</sup> identifies several gaps on access to justice for persons with disabilities in Malawi:

- The high level of poverty in Malawi and the prohibitive costs of legal services mean that the majority of the population has no access to formal justice; this is limited to the wealthy elite.
- Traditional courts and other non-state mechanisms of conflict resolution which contribute significantly in providing justice for many citizens are not adequately resourced.
- The key limitation that affects most Malawians is not lack of rights awareness but the ability and capacity to enforce their rights in practice.
- An inadequate number of courts is a real barrier to justice for most Malawians. The courts are located mainly in urban and peri-urban areas or rural community centres. Thus, for the majority of the people who live in remote rural areas, the nearest court is miles away. This coupled with the fact that most rural areas do not have regular public transport further hinders access to justice. Further, where public transport exists, it is prohibitively expensive for most Malawians.
- The physical design of some court premises in Malawi also generally denies access to people with physical disabilities.
- The fees required at different stages in the trial process are reasonably low. However, in the context of Malawian income levels, they are likely to be prohibitive for a substantial number of people who might intend to lodge a case or move it forward.

#### Student activity

UDPK's shadow report to Kenya's initial state report on the CRPD makes the following suggestions as being key to ensuring to persons with disabilities access to justice on an equal basis with others:

- There is need to strengthen the national public defense system and improvement of legal aid for persons with disabilities.
- Provide legal information and training for judges, lawyers, police, prison officers, prosecutors and public defenders for sensitivity to the needs and rights of persons with disabilities.
- Increase the availability of legal information to persons with disabilities through partnerships with DPOs.
- Promote alternative dispute resolution techniques and reforming informal mechanisms.
- Reduce social, attitudinal, physical and institutional barriers through annual plans that are adequately resourced.
- Students should be asked to think up other ways of ensuring equal access to justice for persons with disabilities.

3 'Access to Justice' available at <http://www.afrimap.org/english/images/report/mal-eng-part-2-chapter-6.pdf> (accessed 30 August 2013) (As at 31 May 2014, I have not yet been able to find more details on this article – including the author).

- With regard to recommendation 1, on legal aid, free legal advice in many countries in Africa is provided by NGOs. However, the paper on Malawi quoted above identifies at least three limitations of the legal advice services offered by NGOs. First, given the low number of lawyers and paralegals available to do the work, the organisations cannot meet the demand. Second, the organisations' lawyers and paralegals are not physically accessible to most of their potential clients because, they mostly operate from offices located only in the urban centres. Third, the organisations do not coordinate their activities sufficiently to facilitate the establishment of common standards, optimisation of synergies and sharing of experiences and lessons. Does this ring true for the students from the various countries?

With regard to recommendation 5 – is it likely to be effective as framed or do governments require more in depth guidance on what removal of barriers means in practice?

### Student activity

The law is a source of both oppression and liberation:

Kinza is a 30 year old woman who used to work as an assistant manager at a bank in Zombisa, a country in Southern Africa. Kinza is the single mother of Leva, a 5 year old boy. She owns the home she lives in with Leva. Over the past year, Kinza has been admitted to Gaou Psychiatric Hospital twice. Kinza's psychiatrist has stated that her mental health condition will recur over and over again for the rest of her life. Kinza's mother (Debbie) has now gone to court under section 20 of the Zombisa Mental Health Act which provides that:

the court may make orders for the management of the estate of any person suffering from mental disorder; and for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

The High Court of Zombisa has granted Debbie's application and appointed her Kinza's guardian and manager of Kinza's property. Debbie has since taken Leva to live with her, since she feels that she would be a better mother to Leva than Kinza would. In the meantime, she has put Kinza's house up for sale and intends to use part of that money to pay lodging fees for Kinza at Gaou Home, a residential premise ran by Gaou Psychiatric Hospital. Debbie is sure that this is the best thing, because Kinza will have to stay on her medication, and be 'safe' while having a bit of independence (the home allows residents to go out from time to time with a chaperone). Debbie feels that it is good for Kinza to stay at Gaou Home with people like herself who are recovering from mental health conditions, and to not be 'stressed by work again' for the rest of her life. You are a partner at the law firm of Akzo&Archi Advocates. Kinza comes to you, and asks you to represent her in court because she would like to raise Leva herself, and because she would like to stop the intended sale of her house. She is also concerned that she will never again be able to vote since she has been made aware of provisions in the Constitution of Zombisa that prohibit persons of 'unsound mind' from voting. As an advocate, you are aware of Zombisa's Civil Procedure Act which provides that persons under guardianship can only bring a case to court through their guardian. At the time of your meeting Kinza, she articulates herself well, even though she seems rather nervous.

- (1) Identify the legal issues arising in this case.

- (2) Identify the barriers that Kinza is likely to encounter in her search for justice.
- (3) Would you take Kinza's case? Why or why not? (One of the barriers for persons with disabilities in obtaining legal assistance is 'the lack of knowledge by legal professionals of how to work with clients with disabilities, and a lack of knowledge of the legal concerns faced by persons with disabilities' (Ortoleva, 2011).
- (4) Assuming that you took the case, what steps would you take following your meeting with Kinza?
- (5) What other mechanisms can be used to advance access to justice for persons with psychosocial disabilities? (am thinking, generally – awareness raising, capacity building for actors within the justice sector, fulfillment of other human rights such as education, media engagement, grassroots empowerment, budgetary analysis).

## 4 Good international practice and suggestions for reform

### 4.1 Lecturer's notes

*This section elaborates on comparative examples that demonstrate good practice. Some examples given lean towards practice while others elaborate on laws as well as guidelines regarding access to justice from various jurisdictions. Good practice in law is always evolving; the lecturer should stay abreast of good practice examples that may crop up locally, or internationally.*

This section addresses one question:

- What examples of good international practice on access to justice exist?

### 4.2 South Africa

#### 4.2.1 The Sexual Assault Victim Empowerment Programme

The Sexual Assault Victim Empowerment Programme (SAVE programme) was established to assist South African Police Service (SAPS) and prosecutors in the Department of Justice in cases of sexual assault involving complainants with intellectual disabilities. The SAVE Programme has been in operation since the early 1990s and has been evaluated and shown to be successful in facilitating access to justice for persons with intellectual disabilities (B Dickman et al 2006). This is achieved through –

- the administering of psychometric tests and evaluation of the victim's competence to act as witness;
- evaluation of the victim's capacity to consent to sexual intercourse;
- the compilation of a court report; and
- the provision of expert evidence in court (Centre for Disability Law and Policy & The Gender, Health and Justice Research Unit 2013); and

- accommodations in court including giving evidence using a closed circuit television with the assistance of a trained intermediary.

In addition, the programme trains members of the South African Police Service and public prosecutors to develop the skills they need to conduct interviews with complainants with intellectual disabilities with greater sensitivity to and understanding of their special needs.

The costs of the programme are high in that it requires specialised staff such as social workers and psychologists. It is currently administered and funded (through fund-raising initiatives) by the Cape Mental Health Society.

The SAVE programmes has been instrumental in increasing the number of cases involving persons with intellectual disabilities going to trial.

### 4.3 Israel

The Zero Project reports on Israeli's The Investigation and Testimony Procedural Act (accommodations for persons with mental or intellectual disabilities), 2005 as follows:

The Israeli Investigation and Testimony Procedures Law of 2005 provides accommodations for persons with cognitive and mental disabilities whose impairment affects their capacity to be investigated or to submit testimony. It pertains to a number of severe offences, whether the person is a perpetrator, a suspect, a victim or a witness to a crime. Central to its objectives is a professional who is trained to investigate persons with intellectual disabilities, a so-called Special Investigator. In addition, it establishes several adaptations to the testimony given in court, including an exemption from cross-examination by the defendant when a person with an intellectual disability is testifying as a witness to the alleged crime. Adequate accommodations prove crucial during adjudication and provide for deterrence against the abuse of disabled persons which often occurs in institutions, or far from the public eye.

Adaptations provided for under the law include: Interrogations performed by a professional (psychologist, social worker, special education professional) specially trained in how to communicate with persons with disabilities, vested with powers of police investigators; Right to be accompanied during interrogation and its documentation; Utilisation of experts to advise the court on the type of disability, its characteristics and possible implications on the testimony; Utilisation of special devices and alternative and augmentative communication, such as pictures and communication boards; and giving testimony through closed circuit television or behind closed doors, in the judge's chambers and without official attire.<sup>4</sup>

The Investigation and Testimony Procedural Act (accommodations for persons with mental or

intellectual disabilities), 2005 was initiated by *Bizchut*, The Israel Human Rights Centre for People with Disabilities.

## 4.4 United States of America

### 4.4.1 *Georgia Commission on Access and Fairness in the Courts: A Meaningful Opportunity to Participate: A Handbook for Georgia Court Officials on Courtroom Accessibility for Individuals with Disabilities*<sup>5</sup>

Georgia's handbook on courtroom accessibility provides accurate, up-to-date information about the rights of people with disabilities in clear, easy-to-understand language. The handbook was designed to build the capacity of judges, bailiffs, clerks, and other courthouse personnel to effectively identify and remove the barriers to full participation that individuals with disabilities encounter in Georgia courtrooms. The handbook follows the framework established in the Americans with Disabilities Act of 1990 (ADA). It was developed prior to the CRPD.

### 4.4.2 *Washington State Access to Justice Board, Ensuring Equal Access for Persons with Disabilities: A Guide to Washington Administrative Proceedings*<sup>6</sup>

The guide to Washington Administrative Proceedings is intended as a resource for Washington judges, administrative law judges and hearing officers, court administrators, and court staff in their attempts to eliminate barriers presented by court buildings and practices. The Guide focuses on visual, hearing/communication, mobility, and cognitive disabilities, and gives a basic understanding of how these disabilities may affect access. It also clarifies what the law requires of courts in order to help courts provide effective access. The Guide identifies common barriers for people with disabilities, discusses the obligations of judges and court personnel, identifies some approaches to solving common problems, and recommends steps for compliance.

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- 4 Zero Project, Israel: Access to Justice <http://www.zeroproject.org/policies/y2012/israel/> (accessed 30 August 2013).
- 5 [http://www.georgiacourts.org/files/ADAHandbk\\_MAY\\_05\\_800.pdf](http://www.georgiacourts.org/files/ADAHandbk_MAY_05_800.pdf) (accessed 20 July 2013).
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### Student activity

#### Commonalities in the good practice models and benchmarks for reform

The good practice models have the following principles in common (Bizchut, 2011):

- (1) The right to equality;
- (2) Fairness;
- (3) Serving justice and social deterrence;
- (4) Ensuring full capacity to testify;
- (5) Providing accommodation – not alleviation;
- (6) Ensuring the interests of the other parties in the proceedings
- (7) Individual accessibility;
- (8) Accommodations at each stage of the proceedings;
- (9) Accessibility as a professional matter; and
- (10) Independent accessibility, not on behalf of the defense or the prosecution.

Identify and share practices from your country of origin that further access to justice by persons with disabilities.

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### Film

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- Paul Pkiach Anupa & Kenya Paraplegic Organisation v The Attorney General & the Judicial Service Commission* <http://www.kenyalaw.org/caselaw/cases/view/85079/> (accessed 30 August 2013)
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## Laws

### The Constitution of Kenya

**Article 48:** The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

### Fair hearing

**Article 50 (2):** Every accused person has the right to a fair trial, which includes the right –

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

**Article 50 (3)** If this Article requires information to be given to a person, the information shall be given in language that the person understands.

**Article 50 (7)** In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

### Judicial authority

**Article 159 (2):** In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) justice shall be done to all, irrespective of status;

### The Persons with Disabilities Act, 2013

#### 38 Legal system

(1) The Attorney-General, on consultation with the Council and the Law Society of Kenya, shall make regulations providing for free legal services for persons with disabilities with respect to the following –

(a) matters affecting the violation of the rights of persons with disabilities or the deprivation of their property;

(b) cases involving capital punishment of persons with disabilities; and

(c) such matters and cases as maybe prescribed in the regulations made by the Attorney- General.

(2) The Chief Justice shall make rules providing for–

(a) the exemption, for persons with disabilities, from the payment of fees in relation to matters or cases described in subsection (1); and

(b) the provision, to persons with disabilities who attend court, of free sign language interpretation, Braille services and physical guide assistance.

(3) Accused persons who are denied bail shall be entitled to be held in custody in facilities modified in accordance with regulations made by the Minister.

(4) The Chief Justice shall endeavour to ensure that all suits involving persons with disabilities are disposed of

expeditiously having due regard to the particular disability and suffering of such persons.

### The Constitution of Malawi<sup>7</sup>

- 41(1) Every person shall have a right to recognition as a person before the law.
- (2) Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
- (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.

### The Constitution of Tanzania<sup>8</sup>

- 13(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

### The Constitution of Mozambique<sup>9</sup>

Article 35 – All citizens are equal before the law, and they shall enjoy the same rights and be subject to the same duties, regardless of colour, race, sex, ethnic origin, place of birth, religion, level of education, social position, the marital status of their parents, their profession or their political preference.

### The Constitution of Zimbabwe<sup>10</sup>

- 56(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

### African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999

#### Article 17: Administration of Juvenile Justice

- (1) Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
- (2) States Parties to the present Charter shall in particular:
  - (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
  - (b) ensure that children are separated from adults in their place of detention or imprisonment;
  - (c) ensure that every child accused in infringing the penal law:

- (i) shall be presumed innocent until duly recognized guilty;
- (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
- (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
- (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
- (d) prohibit the press and the public from trial.

- (3) The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.
- (4) There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

### Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

#### Article 8: Access to Justice and Equal Protection before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- (e) that women are represented equally in the judiciary and law enforcement organs;
- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

7 [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/\\$FILE/Constitution%20Malawi%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/$FILE/Constitution%20Malawi%20-%20EN.pdf) (accessed 10 August 2013).

8 <http://www.judiciary.go.tz/downloads/constitution.pdf> (accessed 10 August 2013).

9 [http://confinder.richmond.edu/admin/docs/Constitution\\_\(in\\_for\\_ce\\_21\\_01\\_05\)\(English\)-Mozlegal.pdf](http://confinder.richmond.edu/admin/docs/Constitution_(in_for_ce_21_01_05)(English)-Mozlegal.pdf) (accessed 10 August 2013).

10 <http://www.swradioafrica.com/Documents/Final%20draft%20Constitution%2024%20Janu'ry%202013.pdf> (accessed 10 August 2013).



## Module 12: National implementation and monitoring of disability rights

### Module overview

The Preamble of the UN Convention on the Rights of Persons with Disabilities (CRPD) identifies that persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world. Throughout the curriculum, common ways of denying the equality and human dignity of people with disabilities in the African context have been identified; these include exclusion from mainstream education, concealment and isolation from community life, forced sterilisation, denial of reasonable accommodation in employment and treatment without the specific consent of people with disabilities in healthcare settings. With the adoption of the CRPD by the United Nations Assembly in 2006, it is incumbent on all spheres of society to redress the profound social disadvantage of persons with disabilities and to promote their participation in the civil, political, economic, social and cultural spheres.

Article 33 of the CRPD sheds light on redressing social injustices against persons with disabilities; the article is on national implementation and monitoring. Article 33 requires states parties to designate focal points within government for implementation of the convention, coordinating disability related action in different sectors as well as for monitoring the convention. In addition to state initiated national implementation and monitoring mechanisms, there is a significant role for human rights organisations, including Disabled Peoples' Organisations to advance the rights of persons with disabilities. Indeed article 33(2) provides that 'civil society, in particular persons with disabilities and their representative organisations shall be involved and participate fully in the monitoring process'.

This module aims to introduce learners to national implementation and monitoring mechanisms as well as other strategies that can be pursued towards the advancement of disability rights. Broadly, this module is meant to give guidance on what the curriculum should ultimately do: instill skills and competences to effect social change. Strategies identified towards national implementation and monitoring include research, pilot project development, capacity building of state officials, advocacy organisations and professionals, self-advocacy empowerment, engagement with law reform including lobbying political leaders and other stakeholders including the media, public awareness campaigns and strategic litigation (Bach, 2012).

### Learning objectives

On completing this module, learners should be able to:

- Understand the role of the state in implementing and monitoring disability rights;
- Understand the role of civil society in advancing the rights of persons with disabilities, including understanding the capacity, expertise and resources that are required in order to advance the rights of persons with disabilities; and
- Identify the most relevant strategies for advancing the rights of persons with disabilities in the learner's local context.

### Module content

This module is divided into two sections. Section 1 explains national implementation and monitoring in accordance with article 33 of the CRPD. Section 2 identifies strategies that can be used by civil society to advance the rights of persons with disabilities.

## 1 National implementation and monitoring of the rights of persons with disabilities

### 1.1 Lecturer's notes

*An important first question to consider in teaching this module is whether the country has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD). This section of the module especially lends itself well to countries that have ratified the CRPD, but may also have some relevance to countries that have not ratified the CRPD. Secondly, this module requires a practical understanding of the implementation of the rights of persons with disabilities at the local level. What institutions exist for the implementation of disability rights in the country? Is there a National Human Rights Institution (NHRI) in the country? If so, does the NHRI have the mandate to monitor the CRPD? Is there an equality body in the country? What is the role of the equality body with regard to the implementation of the rights of persons with disabilities? Does the country have a national disability agency, board, council or other state institution set aside as a focal point on matters relating to persons with disabilities? If the country has a body (or bodies) that focus on national implementation and monitoring of disability rights, it might be worthwhile inviting one of the officials to give a guest lecture on the role of the institution in implementing the rights of persons with disabilities. Another question for learners to ask themselves would be whether there are civil society organisations, including DPOs that are committed to the implementation of disability rights. Finally, it is important to highlight to students the principle of progressive realisation of economic, social and cultural rights in line with article 4(2) of the CRPD.*

## 1.2 National implementation and monitoring

An important question to consider with regard to the implementation of international treaties is: what are the mechanisms in the treaty in question to enforce the specific right domestically or to place obligations on the state to enforce the right in question? In part, the answer to this question depends on whether a state is monist or dualist in its approach to international law. 'Monist' legal systems, where international law is incorporated directly into the domestic legal system, allow for the immediate domestic application of international treaties. For instance, the Colombian Constitutional Court has made extensive use of both international treaties and non-binding instruments to interpret fundamental rights in the Colombian Constitution.<sup>1</sup> In 'dualist' states, international law is not automatically part of domestic law and further steps are needed to incorporate it into domestic law. In some countries international treaties do not apply until domestic legislation reproduces or refers to the content of a treaty.

With regard to the CRPD, article 33

requires states parties to establish a triangular mechanism comprising of government, an independent element and civil society, in particular organisations of persons with disabilities (DPOs), to handle and monitor the implementation of the Convention' (Birtha, 2013).

It has been argued that 'Article 33 of the UN CRPD is the most comprehensive provision referring to national level implementation and monitoring ever included in an international human rights treaty' (Birtha, 2013).

In full, article 33 of the CRPD is to the following effect:

<b>Article 33</b>	
<b>National implementation and monitoring</b>	
(1)	States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
(2)	States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework,

<sup>1</sup> See, amongst many others, Colombian Constitutional Court (Corte Constitucional de Colombia) decisions C-936/2003, T-1318/2005, T-403/2006 and T-585/2006 (applying both the ICESCR and GCs adopted by the CÉSCR).

including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

- (3) Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

### 1.2.1 Summary of the CRPD Committee's Concluding Observations on implementation and monitoring

As at January 2015, at least 74 countries and the European Union have filed reports to the CRPD Committee.<sup>2</sup> The CRPD Committee has issued Concluding Observations to 19 countries: New Zealand, Denmark, Republic of Korea, Belgium, Ecuador, Mexico, Azerbaijan, Costa Rica, Sweden, Australia, Austria, El Salvador, Paraguay, Argentina, China, Hungary, Peru, Spain and Tunisia ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)). Here is a summary of those Concluding Observations as they relate to article 33 of the CRPD.

#### *Designating an independent monitoring body that is compliant with the Paris Principles*

The Committee has urged nearly every country that it has examined to designate an independent monitoring body that is compliant with the Paris Principles to monitor the CRPD. Countries that have received recommendations to this effect include Argentina, Australia, Austria, Belgium, China, Costa Rica, Denmark, El Salvador, Ecuador, Hungary, Korea, Paraguay, Peru, Sweden and Tunisia ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)). In particular states parties have been urged to:

- designate an independent national oversight mechanism that is in full compliance with the

<sup>2</sup> Countries that have filed state reports with the CRPD Committee include Australia, Austria, Argentina, Algeria, Armenia, Azerbaijan, Brazil, Bosnia and Herzegovina, Belgium, Bolivia, Bulgaria, Canada, Colombia, Cuba, Cyprus, China, Chile, Cook Islands, Croatia, Czech Republic, Costa Rica, Dominican Republic, Denmark, Ecuador, El Salvador, European Union, Ethiopia, Gabon, Germany, Guatemala, Haiti, Honduras, Hungary, Islamic Republic of Iran, Italy, Jordan, Kenya, Latvia, Luxembourg, Lithuania, Mauritius, Mexico, Mongolia, Malta, Montenegro, Morocco, Nepal, New Zealand, Oman, Panama, Philippines, Poland, Paraguay, Peru, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Spain, Sweden, Serbia, Seychelles, Slovakia, South Africa, Sudan, Slovenia, The former Yugoslav Republic of Macedonia, Tunisia, Turkmenistan, Thailand, Ukraine, United Arab Emirates, Uruguay and Uganda. Office of the High Commissioner for Human Rights [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29) (accessed 23 January 2015).

- Paris Principles (Argentina, Costa Rica, Ecuador, Paraguay, Peru, Sweden);
- immediately set up a monitoring system that is fully in line with the provisions of article 33 of the Convention (Australia);
- guarantee full independence of the Independent Monitoring Committee, in accordance with the Paris Principles (Austria);
- ensure full compliance with the Paris Principles (Belgium);
- establish an independent national monitoring mechanism in line with article 33, paragraph 2, of the Convention and in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) (China, Hungary);
- take the necessary measures for the establishment or designation of a coordination mechanism, and of an independent monitoring mechanism, in the Faroe Islands (Denmark);
- officially designate mechanisms to monitor the implementation of the Convention in the country, involving both civil society and an institution fulfilling the Paris Principles regarding independent human rights institutions (El Salvador);
- remember that the national monitoring mechanism must be independent and carry out specific tasks related to promotion, protection and monitoring the implementation of the Convention (Ecuador);
- ensure that the Policy Coordination Committee for Persons with Disabilities carries out its role of effective development and implementation of policies related to persons with disabilities (Korea); and
- ensure that the Higher Committee for Human Rights and Fundamental Freedoms complies with the Principles relating to the Status of National Institutions and establish a dedicated unit on disabilities (Tunisia).

### ***Guaranteeing the full participation of persons with disabilities in monitoring***

The Committee has urged nearly every country that it has examined to guarantee the full participation of persons with disabilities in monitoring. In particular states parties have been urged to:

- provide guarantees, as a matter of priority, for the full participation of persons with disabilities and the organisations that represent them in the oversight process (Argentina);
- revise laws, in particular, China was urged to revise article 8 of the Law on the Protection of Disabled Persons, thus allowing non-governmental organisations other than the China Disabled Persons' Federation to represent the interests of disabled people in the State party and be involved in the monitoring process (China);
- consult with disabled persons' organisations in creating or designating focal points for implementing the Convention (Costa Rica);
- enable civil society and, in particular, representative organisations of persons with disabilities, to fully and regularly participate in monitoring of the implementation of the Convention (Denmark, Hungary, Peru, Hong Kong, China and Ecuador);

- adopt legal provisions to ensure the full participation of persons with disabilities and their representative organisations in the monitoring of the implementation of the Convention (Korea);
- set up an independent mechanism; that mechanism should be in permanent consultation with disabled persons' organisations at the national level (Paraguay); and
- ensure that disabled persons' organisations are able to participate in the Higher Council for the Social Advancement and Protection of Persons with Disabilities, and thus play a central role in monitoring the implementation of the Convention (Tunisia).

### ***Strengthening existing bodies to enable effective monitoring***

The Committee has urged some states parties to strengthen already existing bodies. In particular, states parties have been urged to:

- raise the institutional rank of the body in question, in the case of Argentina, CONADIS;
- strengthen the authority of the Commissioner for Rehabilitation (Hong Kong and China);
- strengthen the National Commission so that it may fulfil its mandate effectively and independently (Mexico); and
- ensure that the National Human Rights Commission and the 32 state human rights entities, as the independent monitoring mechanism for the Convention, define the mechanism's structure, goals, indicators and resources (Mexico).

### ***Endowing NHRIs with human and financial resources***

The Committee has urged some states parties to endow NHRIs with the requisite human and financial resources in order to enable them work effectively. In this regard, the Committee has urged states parties to:

- allocate a transparent budget for the Independent Monitoring Committee and give it the power to administer said budget autonomously (Austria);
- strengthen the capacity of the monitoring body by providing an adequate budget and resources to ensure that it can effectively discharge its mandate (Costa Rica);
- strengthen its capacities with the necessary budget and resources to fulfil its mandate effectively (Ecuador);
- provide the National Human Rights Commission of Korea with sufficient human and financial resources to monitor effectively the implementation of the Convention (Korea);
- set up an independent mechanism with the necessary resources to monitor implementation of the Convention (Paraguay); and
- endow CONADIS with the human and financial resources it needs in order to effectively fulfil its mandate to coordinate the implementation of the Convention at all levels and in all sectors of government (Argentina).

### 1.2.2 Focal point for the implementation of the Convention

Focal points are an issue of internal public administration and have to be formally designated. Countries can choose, depending on the structure of the state to designate one focal point in the most relevant ministry for disability matters, or designate several focal points (sub-focal points) in different departments. Sub-focal points are often designated in federal states where responsibilities are shared between various layers of government. It is not an obligation but article 33(1) also mentions the establishment of a coordination mechanism, which aims to facilitate the co-operation between governmental bodies to avoid adopting isolated measures at different departments (Birtha, 2013).

This part samples some African countries that have a focal point for the implementation of the rights of persons with disabilities.

#### **Botswana**

While Botswana has not ratified the CRPD, the Coordinating Office for People with Disabilities (CPWD) within the Office of the President is charged with the responsibility to 'develop and coordinate the implementation of policies, strategies and programs through mainstreaming them into development agenda to empower people with disabilities' (Office of the president of Botswana: <http://www.gov.bw/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Office-of-People-with-Disabilities/>) (Hlalele et al *African Disability Rights Yearbook* 2014).

Further, under the Office of the President, there is a memorial fund known as the Sir Seretse Khama Memorial Fund (SSKMF) which was established by statutory instrument in 1981 in Botswana with the core mandate to assist people with disabilities with various assistive devices 'Sir Seretse Khama Memorial Fund' (2012) <http://www.gov.bw/en/News/Sir-Seretse-Khama-Memorial-Fund-Appeal/>). These assistive devices include walking frames, wheelchairs, hearing aids, walking sticks, amongst others. The fund is supervised by the CPWD (Hlalele et al *African Disability Rights Yearbook* 2014).

#### **Egypt**

The Egyptian National Council for Disability Affairs was established in 2011. The Council adopts a general comprehensive policy through the set-up of the different national committees and their sub-committees throughout the country that supports policies and services to promote issues such as inclusion in schools and universities, accessibility in all its forms, health services, employment, legal issues, raising awareness in the media, and collaboration with the Ministry of Health to set up comprehensive and inclusive centres for needed medical services (Meadows et al *African Disability Rights Yearbook* 2014).

#### **Kenya**

The National Council for Persons with Disabilities was set up by the Persons with Disabilities Act, 2003 to promote the right of persons with disabilities in Kenya and to mainstream disability issues in all aspects of national development (<http://ncpwd.go.ke/>). The Council is charged under section 7 of the Act to formulate and recommend to the government measures to promote the rights of persons with disabilities (Kamundia *African Disability Rights Yearbook* 2014).

#### **Zambia**

The Zambia Agency for Persons with Disabilities is established under the Persons with Disabilities Act to promote the rights of persons with disabilities in Zambia and to mainstream disability issues in all aspects of national development. Some of its functions under the Act are to:

- plan, promote and administer services for all categories of persons with disabilities;
- keep statistical records relating to incidences and causes of disabilities, which may be used for the planning, promotion, administration and evaluation of services for persons with disabilities;
- provide rehabilitation, training, and welfare services to persons with disabilities; and
- recommend to the government measures to promote the rights of persons with disabilities (Banda et al *African Disability Rights Yearbook* 2014).

#### **Zimbabwe**

Section 4 of the Disabled Persons Act establishes the National Disability Board (NDB). The functions of the board are set out in section 5 of the Act. The NDB is mandated with formulating policies that are tailored to achieve equal opportunities for persons with disabilities by ensuring that they obtain education and employment. The NDB is also tasked with ensuring that persons with disabilities participate fully in sporting, recreational and cultural activities and that they are afforded full access to community and social services (Mandipa *African Disability Rights Yearbook* 2014).

#### **Namibia**

Namibia has a National Disability Council; according to section 16(3) of the Namibia Disability Council Act, the Council may run programmes or conduct campaigns to inform the public to raise the awareness concerning an issue relating to disability. The National Disability Council was established so that line Ministries would be required to report annually to the Council on activities related to disability programmes. At every level programmes that are aimed at social, economic and political development include persons with disabilities in order to increase their visibility at all levels from decision making to implementation. Courts in Namibia have the jurisdiction to hear any case arising from the exercise of the functions and powers

of the National Disability Council (Ntinda *African Disability Rights Yearbook* 2014).

### 1.2.3 Independent mechanism to promote, protect and monitor the CRPD

Article 33(2) of the CRPD makes a clear distinction between three dimensions (promotion, protection and monitoring), where tasks need to be carried out in regard to the implementation of the CRPD (Birtha, 2013).

It has been argued that:

Promotion includes scrutiny of compliance of draft legislation to ensure consistency with the obligations under the Convention, scrutiny of existing legislation, regulations and practices, awareness raising, human rights education and research. Protection shall cover investigation and examination of individual and group complaints, litigation, conducting enquiries, issuing reports and filing *amicus curiae* briefs. Monitoring includes collecting data and information on human rights violations, developing indicators and benchmarks, assessing progress, visiting places where violations often occur and the contribution to State Reports to the UN Committee. The framework, established under article 33(2) of the CRPD shall include at least one independent mechanism that is compliant with the Paris Principles (Birtha, 2013).

This part samples some African countries that have a focal point for the promotion, protection and monitoring of the rights of persons with disabilities.

#### Egypt

The National Council for Human Rights was established by Act 94 of 2003 as an independent body responsible for promoting, developing and protecting human rights, strengthening human rights values, and raising awareness of human rights. The Council enjoys 'A' status in accordance with the International Coordinating Committee of NHRIs 'Chart of the Status of NHRIs: Accredited by the ICC' (28 January 2104), available at: ([http://www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf)). The Council does have a disability committee tasked with addressing the rights of persons with disabilities. The Council has hosted, in collaboration with disabled peoples' organisations, various seminars and conferences considering issues pertaining to the rights of persons with disabilities ([www.nchregypt.org](http://www.nchregypt.org)) (Meadows et al *African Disability Rights Yearbook* 2014).

#### Kenya

The Kenya National Commission on Human Rights (<http://www.knchr.org/Home.aspx>) monitors compliance with the CRPD, and was designated as the monitoring body under article 33(2) of the Constitution in 2010 by the Attorney-General of Kenya. The Commission has a 'Disability Focal Point' that ensures that the rights of persons with

disabilities are secured in various legislation and policies. Recently, the National Gender and Equality Commission (<http://www.ngekenya.org/>) has been appointed the monitoring body under Article 33(2), and the process of transition is ongoing as at February 2015. The National Gender and Equality Commission has a department on 'Disability and Elderly', whose mandate is to effectively promote mainstreaming of issues of disabilities and elderly into all aspects of socio-cultural, economic and political development and monitor implementation of the right of persons with disabilities and the elderly (Kamundia et al *African Disability Rights Yearbook* 2014).

#### Malawi

The Malawi Human Rights Commission (MHRC) was established by the Constitution to address the violations of human rights of all persons, including persons with disabilities. Further, the Malawi Human Rights Commission Act makes provision for matters relating to the status and functioning of the MHRC. Amongst others, the Act requires the MHRC 'to promote more particularly the human rights of vulnerable groups, such as children, illiterate persons, persons with disabilities and the elderly' (Chilemba *African Disability Rights Yearbook* 2014).

## 2 Strategies towards the advancement of disability rights

### 2.1 Lecturer's notes

*Before considering the strategies that can be employed towards the advancement of disability rights, it is important for learners to be asked to consider some of the common barriers to realising the rights of persons with disabilities. These include, of course, negative societal attitudes towards people with disabilities, limited resources, lack of political will, failure to shift from the medical model of disability to the human rights model of disability, knowledge gap amongst professionals, and social and economic isolation of people with disabilities.*

*The second point to underscore is that large-scale transformation should be rooted in the implementation of multi-level and diverse initiatives (Bach, 2012). Students should be encouraged to identify and consider learning points from other movements towards social change; examples of these can be drawn from the movement against female genital mutilation, the movement against the discrimination of people living with HIV/AIDS and advocacy for the rights of gay and lesbian individuals.*

*This section comprises many class activities. It is not expected that all the class activities be undertaken; the lecturer should use his/her discretion in choosing the class activities that are most aligned to the level at which disability rights is being taught.*

## 2.2 Strategies towards the advancement of disability rights

This section highlights seven strategies towards the advancement of disability rights. Strategies identified include research, pilot project development, capacity building of state officials, advocacy organisations and professionals, self-advocacy empowerment, engagement with law reform including lobbying political leaders and other stakeholders including the media, public awareness campaigns and strategic litigation (Bach, 2012). Underlying the strategies identified in this section is the need for Disabled Peoples' Organisations (DPOs) and their allies to form networks and collaborations and to teach and learn from other civil society movements.

### 2.2.1 Research

An important tool to employ towards taking disability rights forward is research. From the outset, it is important to emphasise that disability rights research should be conducted in partnership with organisations of persons with disabilities, and should be cognisant of the multiple identities of persons with disabilities (should not approach people with disabilities as a homogenous group). Disability rights research could be geared towards a number of different ends:

- exposing human rights violations against people with disabilities;
- building the case for changes in law or policy (based on specific recommendations generated from research);
- assessing the most urgent needs amongst persons with disabilities and using such information to inform budgetary allocation;
- creating awareness on the rights of people with disabilities;
- making the case for strategic litigation;
- building a database on specific issues in order to inform the formulation and implementation of policies;
- documenting good practice on disability rights from civil society and urging the state to fund such practices; and
- building the case for international cooperation, for example with regard to access to scientific and technical knowledge.

Civil society, including DPOs is likely to leverage their influence and impact by coordinating research. Joint reports are welcomed by consumers and are generally viewed as having greater authority and credibility (CSIS Report [http://csis.org/files/media/csis/pubs/070918\\_49steps\\_english.pdf](http://csis.org/files/media/csis/pubs/070918_49steps_english.pdf)).

### Student activity: Designing a research project

Students should be divided into groups and asked to design a specific research project on a disability related subject. The team with the best research project could then be enabled to meet with a local DPO to discuss the viability of the research project, and if the local DPO agrees, to seek funding for the project in partnership with the DPO.

### 2.2.2 Strategic litigation

Strategic litigation, also called impact litigation or test case litigation, has been defined as

a method used by public interest organisations and lawyers through test cases in the judicial system, to create lasting effects beyond individual case and thus further the enforcement of human rights and make social change eventually (Yitong, 2011).

In strategic litigation, public interest organisations or law firms usually determine in the first place a certain sphere of human rights violations in which they would like to use litigation as a tool to enforce human rights, and then try to find victims of such violations in order to file a law suit. Thus, strategic litigation pursues broad social justice, rather than individual justice (Yitong, 2011).

According to Kalaluka, strategic litigation in disability rights:

refers to the entire process of prosecuting the rights of persons with disabilities before national or international courts or tribunals. This includes obtaining instructions to litigate, preparing briefs for trials, conducting trials and enforcing court decisions. Disability rights litigation emanates from society's failure to take appropriate measures to ensure that persons with disabilities are able to participate fully in society and to enjoy their fundamental human rights on an equal basis with others (Kalaluka, 2013).

Objectives of strategic litigation in disability rights would include:

- Creating progressive jurisprudence which advances the rights of persons with disabilities at national, regional or international level (The International Centre for the Legal Protection of Human Rights (InteRights) <http://www.interights.org/our-cases/index.html>);
- Instigating reform of national laws which do not comply with the UN CRPD in countries that have ratified the Convention;
- Ensuring that laws that aimed at promoting and protecting the rights of persons with disabilities are interpreted and enforced properly;
- Seeking a new interpretation to existing laws, where the interpretation would advance the rights of persons with disabilities;
- Enabling individual persons with disabilities to seek remedies for human rights violations;
- Empowering people with disabilities who have been victims of human rights abuses and rebalancing the historic injustices against people

with disabilities (above four bullet points from Mental Disability Advocacy Centre [http://mdac.org/en/what-we-do/strategic\\_litigation](http://mdac.org/en/what-we-do/strategic_litigation)); and

- Raising awareness on disability by bringing issues to the fore in public discourse (International Disability Alliance <http://www.internationaldisabilityalliance.org/en/disability-rights-litigation>).

Important factors to consider when using strategic litigation as a mechanism for bringing social change:

- What is the potential impact of a piece of litigation?
- What resources and expertise does the organization have/would more value be derived from collaborating on a case with other actors?
- What level of involvement with a case allows the organisation to bring real added value? (for example, simply providing advice, co-representing applicants in partnership with local lawyers or intervening on issues of public interest as a third party or *amicus curiae*).
- Are there potential negative effects to consider? For example, what would the impact be of a negative decision? Could a successful decision have negative consequences, for example by causing a public backlash against the very people a case is aiming to defend? (The International Centre for the Legal Protection of Human Rights (InteRights) <http://www.interights.org/our-cases/index.html>)



### Student activity

#### Identifying and learning from strategic litigation cases

Students should be asked to identify cases of strategic litigation in their countries of origin, regionally as well as internationally.

International examples include:

*Brown v Board of Education* 347 US 483 (1954)

*DH and Others v The Czech Republic* Application No 57325/00, 2006

An important case to consider at national level is *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (CC).

Students should then write a short essay on what the disability rights movement can learn from the strategic litigation cases that have already been determined.

#### Article 8, CRPD: Awareness-raising

- (1) States Parties undertake to adopt immediate, effective and appropriate measures:
  - (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
  - (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
  - (c) To promote awareness of the capabilities and contributions of persons with disabilities.
- (2) Measures to this end include:
  - (a) Initiating and maintaining effective public awareness campaigns designed:
    - (i) To nurture receptiveness to the rights of persons with disabilities;
    - (ii) To promote positive perceptions and greater social awareness towards persons with disabilities;
    - (iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
  - (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
  - (c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
  - (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 8 is based on the recognition that no amount of law reform will positively impact on the rights of persons with disabilities unless general attitudinal barriers are also removed (Kamundia, 2012). Hence, awareness-raising is about bringing an issue to the knowledge of a person or a group. It strives to address attitudes, social relationships and power relations to effect social change. However, it is often only a first step towards changing practices. Awareness-raising on the situation of persons with disabilities can, for example, help a decision-maker to realise that there is a significant proportion of persons with disabilities in the community that s/he administers; but it may not be sufficient to ensure that priorities of persons with disabilities/disability issues are systematically included in community development planning (<http://www.disabilityrightsfund.org/files/supporttodpo.pdf>).

### 2.2.3 Public awareness campaigns

Often, violations of the human rights of persons with disabilities occur because people (employers, educators, family members, policy makers, etc) are simply not aware of the rights of persons with disabilities. Hence, awareness-raising is identified under article 8 of the CRPD as being a core state obligation. A look at article 8 of the CRPD is imperative at this juncture:

In reality, the extent to which states are aware of the rights of persons with disabilities remains in doubt. Hence, it is critical that in this issue, states involve and work closely with persons with disabilities and their representative organisations, in line with article 4(3) of the CRPD. Awareness activities on disability should never be planned without close consultation with, and involvement of, persons with disabilities themselves or their representative organisations. Awareness-raising can be conducted using a variety of mediums and tools selected according to the type of audience, such as street theatre, posters, interactive sessions at the

local shopping centre, media campaigns, and demonstrations, amongst others (<http://www.disabilityrightsfund.org/files/supporttodpo.pdf>).

### Student activity: Designing an awareness raising campaign

Divide students into groups. Each group should then discuss and develop a campaign to raise awareness on disability within the university. The class should then vote for a single awareness raising campaign, which the students would then all participate in realising/in bringing to fruition.

## 2.2.4 Capacity building of advocacy organisations, state officials and professionals

Over and beyond raising awareness, it is important to strategically build the capacity of certain key actors on disability rights. This is especially relevant with regards to the rights in the CRPD that aim to really change the way in which disability issues have been addressed in the past. Examples:

- Building the capacity of the ministry/department of education on inclusive education;
- Building the capacity of psychiatrists in state hospitals on the right of persons with psychosocial disabilities to give free and informed consent, and not to be treated by force;
- Building the capacity of judges, magistrates and other judicial officers on the principle of reasonable accommodation as it pertains to non-discrimination in the context of disability;
- Building the capacity of journalists regarding how they portray disability in the media; and
- Building the capacity of law lecturers in traditional legal courses such as contract law, criminal law and marriage law on the right to legal capacity and the replacement of 'incompetency approaches' with the support paradigm.

In order to be efficient in capacity building, civil society actors, including DPOs should first build their own expertise on disability issues. Although DPOs are comprised of persons who have a personal experience of disability, DPOs and their members often lack opportunities to develop their knowledge and understanding of new disability models and related rights and legal instruments. Unintentionally, DPOs can therefore contribute to sustaining charity model approaches. DPOs should therefore seek training that can complement their practical experience of disability in order to equip them with relevant knowledge and critical arguments to better explain disability. Developments in the field of disability at the international level, such as the emergence of the social model, the entry into force of the UNCRPD and inclusive development are essential references on which DPOs should become expert (<http://www.disabilityrightsfund.org/files/supporttodpo.pdf>).

## 2.2.5 Self-advocacy empowerment

Self-advocacy is about people with disabilities speaking up for themselves, making their own decisions and taking control of their lives. It does not preclude support but emphasises the fact that the person with a disability is the one in charge of their life (Inclusion International <http://www.inclusion-international.org/self-advocacy/about-self-advocacy/>). Self-advocacy is a tool that can be used by all people who experience discrimination; in the disability context, self-advocacy is often used by people with psychosocial disabilities and those with intellectual disabilities.

At this juncture, it is important to showcase an example of self-advocacy drawn from an African country, Kenya. The Kenya Association of the Intellectually Handicapped (KAIH <http://kaihid.org/>) is an organisation that works on empowering people with intellectual disabilities and their families in Kenya. KAIH is based in six regions of the country – Nairobi, Kiambu, Nyeri, Migori, Siaya and Mombasa with a membership of two thousand members, spread into one hundred parents support groups and five self-advocate groups. KAIH works on several rights in the CRPD including articles 19 on living independently in the community, article 12 on equal recognition before the law, article 8 on awareness raising, article 13 on access to justice and article 27 on work and employment. This section highlights KAIH's work on self-advocacy, drawn from a report by the Kenya National Commission on Human Rights titled 'How to implement article 12 of Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A briefing paper'.

### Excerpt on the self-advocacy model run by the Kenya Association for the Intellectually Handicapped

Self-advocacy is based on seeing the potential of persons with intellectual disabilities and believing that just like anyone else, if self-advocates are empowered, they can advocate for their own rights. Self-advocacy is about self-representation; encouraging persons with intellectual disabilities to develop their own voice. One of the most powerful things about self-advocacy is shifting the societal perception that persons with intellectual disabilities are 'big babies' who are 'just there to be seen and not to be heard'.<sup>1</sup> The first step towards changing this view is challenging these assumptions with regard to 'small decisions' such as what to wear, and what to eat, and encouraging persons with intellectual disabilities to weigh in on these decisions in their homes.

Some of the decisions that the self-advocates have been supported in making include healthcare decisions (HIV testing), financial decisions (opening bank accounts) and choosing support persons. To ensure full benefits to the self-advocates, KAIH first sensitised the service providers about intellectual disabilities. KAIH has also trained support persons to give the self-advocates a choice of support outside the family.

1 Interview with Kenya Association of the Intellectually Handicapped (Nairobi, Kenya, 6 May 2013).

The five self-advocates groups are registered with the government in the department of social services. The self-advocates direct the activities of their groups. KAIH uses natural support as much as possible, working closely with people that the self-advocates themselves identify as being the people who can assist them in making decisions. (Kenya National Commission on Human Rights, 2013).

### 2.2.6 Pilot project development

Pilot projects are activities planned as a test or a trial; pilot projects are important in demonstrating the workability of theoretical concepts in real life. Pilot projects create actual examples and can therefore be powerful in lobbying for state funding with regard to implementing a particular right on a wider scale. Pilot projects also enable all stakeholders to learn through action. To demonstrate, there have been pilot projects of inclusive education, see:

- Department of education, Republic of South Africa (2002) 'Implementing inclusive education in South Africa: True stories we can learn from';
- Evaluation of a Pilot Project on inclusive education in India (<http://eric.ed.gov/?id=EJ804725>); and
- DIPF Educational research and educational information 'Pilot Project: "inclusive primary school"' (<http://www.dipf.de/en/research/projects/pilot-project-inclusive-primary-school>).

Pilot projects have also been conducted in the area of finding alternative, community-based mental health supports, for example:

- World Health Organisation 'Mental health and psychosocial support programme in Lybia' ([http://www.who.int/features/2013/mental\\_health\\_libya/en/](http://www.who.int/features/2013/mental_health_libya/en/)).

There have also been pilot projects on supported decision-making/article 12 of the CRPD; see:

- Bulgarian Centre for Not for Profit Law 'Supported decision-making or how people with intellectual disabilities or mental health problems can live independent lives' (<http://inclusion-international.org/wp-content/uploads/2014/01/PodkrepEN.pdf>);
- New South Wales Government, Family and community services 'Supported Decision Making Pilot' ([http://www.adhc.nsw.gov.au/\\_\\_data/assets/file/0003/279039/SDMP\\_fact\\_sheet\\_Oct2013.pdf](http://www.adhc.nsw.gov.au/__data/assets/file/0003/279039/SDMP_fact_sheet_Oct2013.pdf)); and
- Office of the Public Advocate, Victoria, Australia 'Supported Decision-Making Pilot Project' (<http://www.publicadvocate.vic.gov.au/file/file/Research/Current%20projects/SDM%20project%20flyer%20FINAL.pdf>).

#### Student activity: Field trip to pilot project on disability rights

Students should be asked to research the existence of pilot projects on disability rights in their countries of origin. Calls to local DPOs and to the national federation of NGOs would be a good way to start investigations. A field visit to the pilot project could then be organised to give students the opportunity to see rights in action.

### 2.2.7 Law reform initiatives

Law reform efforts require engagement with political leaders and other stakeholders including the media. Research is important in this regard as engaging political leaders works best in instances where one has convincing data. Bach argues that law reform efforts must chart a balance between importing model legislation on disability, and generating context-specific solutions, recognising that:

- Comparative law projects to identify reform proposals, principles and draft model legislation may provide good examples to start with, but may also hinder the 'legal imagination' in a particular context, risk neo-colonialism and generate less ownership of the process by the stakeholders.
- Participatory processes build the capacity of disability organisations and self-advocates to engage in law reform. Their involvement ensures that the questions and solutions do justice to their experience and their vision for change.
- The opportunities for law reform are going to vary country to country depending on political context and 'readiness' for change. The key is to be strategic and make progress in ways that build a platform for leveraging longer-term reform (Bach, 2012).

#### Student activity: Law reform initiative

If the country has ratified the CRPD, students should be divided into groups and asked to take up specific rights in the Convention. Students should then, in their groups examine the extent to which the state party in which they are based has implemented the specific right. In so doing, students should examine laws, court decisions and practice on the issue. To illustrate:

Group A takes up the right to education. The first step would be to look at the education laws and policies to examine the extent to which inclusive education is part of the state laws and policies. The second step may be to examine cases to see whether the right to education for children with disabilities in that specific context has ever been litigated. The third step may be to visit local schools in the area in which the university is based to see the extent to which inclusive education is implemented.

If a country has not ratified the CRPD, students could be asked to design a plan towards lobbying to state party to ratify the Convention. To illustrate:

- Students could write an article for publication in a local daily, urging for the ratification of the CRPD.
- Students could write a letter to the local member of Parliament, urging him or her to take up the issue of ratification of the CRPD.

## 2.3 Concluding remarks on advancing implementation of disability rights

Long-term processes for national-scale change to implement disability rights would benefit from:

- Keeping the 'big picture' of change in mind. Short-term successes in law reform efforts may not result in desired outcomes, but if DPOs and their allies undertake strategies in a participatory, open, respectful manner, in the long run they will have prepared the ground for reform and transformation with the relationships and alliances they build along the way (Bach, 2012).
- Long-term processes for national-scale change to advance the rights of persons with disabilities would benefit from intentional initiatives that combine a number of strategies, including the strategies identified above.

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### Essential reading

- African Disability Rights Yearbook* (2013) 1 available at [http://www.pulp.up.ac.za/pdf/2013\\_07/2013\\_07.pdf](http://www.pulp.up.ac.za/pdf/2013_07/2013_07.pdf)
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### Films

- Centre for Disability Law and Policy, 2012 Summer School, Primary International Process: The Disability Convention Monitoring Process – Interacting effectively with the CRPD processes (articles 34-39) Andrea Coomber, Interights, London The 4th International Summer School <https://www.youtube.com/watch?v=KSUJl2ok2eA&feature=BFa&list=ULNCfMVbeljEc>
- Centre for Disability Law and Policy, 2012 Summer School, The Domestic Process: Interacting effectively with New Domestic Processes for Change: (Article 33). New national 'focal point'; new national 'coordinating mechanism'; new national 'framework for monitoring' Gauthier De Beco, University of Louvain, Belgium <https://www.youtube.com/watch?v=UfmLdw3GV50&feature=BFa&list=ULKSUJl2ok2eA>
- Disability advocacy: Giving people with disabilities a fair go <https://www.youtube.com/watch?v=vEq8eRuTsdg>
- Just Ask: Sensory Disability Awareness Film <https://www.youtube.com/watch?v=LU0dQXJ-YQM>
- Talk to me: Physical disability awareness [https://www.youtube.com/watch?v=CL8GMxRW\\_5Y](https://www.youtube.com/watch?v=CL8GMxRW_5Y)

### Further material

- De Beco, G 'Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe' OHCHR study (2011) 4
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