

SEXUAL VIOLENCE AND ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES
IN TANZANIA AND SOUTH AFRICA

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DEDICATION

I dedicate this dissertation to my family and friends for their encouragement throughout the writing of this dissertation.

I also dedicate this dissertation to all those who, in one way or another, facilitated my long academic journey, all the way to this Masters level.

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LIST OF ABBREVIATIONS

ADA	Americans with Disabilities
CAP	Chapter
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIP	Construction Industry Policy
CJS	Criminal Justice System
CWDs	Children with Disabilities
DOC	Document
DP	Disabled People
DPP	Director of Public Prosecutions
Equality Act	Promotion of Equality and Prevention of Unfair Discrimination Act
ICCPR	International Covenant on Civil and Political Rights
INDS	Integrated National Disability Strategies
IPU	Inter-Parliamentary Union
MWDs	Men with Disabilities
NCPS	National Crime Prevention Strategy
NGO	Non-Governmental Organisations
NPD	National Policy on Disabilities
OHCHR	Office of the High Commissioner for Human Rights
Plan of Action	National Plan of Action for the Prevention and Eradication of Violence against Women and Children
PWDs	Persons with Disabilities
RES	Resolution

SABS	South African Bureau of Standards
SAFCD	South African Federal Council on Disability
SAHRC	South African Human Rights Commission
SOSPA	Sexual Offences Special Provisions Act
SVRI	Sexual Violence Research Initiative
UK	United Kingdom
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
Victim's Charter	Service Charter for Victims of Crime in South Africa
WHO	World Health Organisation
WB	World Bank
WWDs	Women with Disabilities

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CHAPTER ONE

Background to the study

1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)¹ regards sexual violence against Persons with Disabilities (PWDs), a violation of human rights.² South Africa and Tanzania are states parties³ to the UNCRPD. Therefore, they are under obligation to undertake all measures to protect PWDs ‘from all forms of exploitation, violence and abuse.’⁴

Despite the preceding guarantee, sexual violence generally reported, has been increasing since at least 1994 in South Africa.⁵ Although the increase reflects the general trend, PWDs in particular have been affected disproportionately.⁶ Indeed, some studies suggest that, sexual violence against PWDs do happen even more frequently than does violence against non-disabled persons.⁷ A comparable study in Tanzania equally indicates that, ‘persons with disabilities are victims of sexual violence on a far greater scale than persons without disabilities.’⁸ Thus, given this trend, the present study becomes necessary in order to assess the effectiveness of the criminal justice system in Tanzania and South Africa and to assess its ability to afford accessible justice for PWDs as a reaction to sexual violence.

¹ A/RES/61/106 (2006/2008).

² n 1 above, art 16(1-5).

³ Both signed the UNCRPD on 30 March 2007 on the same date South Africa ratified the UNCRPD, however, Tanzania ratified the UNCRPD on 10 November 2009.

⁴ n 1 above, art 16(1-5).

⁵ E Naidu *et al* ‘On the margins: Violence against women with disabilities’ <<http://www.wwda.org.au/onthemargins.pdf>> (accessed on 25 July 2012).

⁶ Naidu (n 5 above) 13.

⁷ Human Rights Watch ‘As if we weren’t human: Discrimination and violence against women with disabilities in Northern Uganda’ <http://www.hrw.org/sites/default/files/reports/uganda0810webwcover_0.pdf> (accessed on 29 July 2012).

⁸ MM Ngololo ‘Prevention of HIV/AIDS and violence against women and girls with disabilities in Tanzania’ <http://www.peacewomen.org/assets/file/Resources/NGO/vaw_preventionofhiv_aidsandviolenceagainstwomenandgirlswithdisabilitiesintanzania.pdf> (accessed on 29 July 2012).

1.1. Statement of the problem

According to the 2008 Tanzania disability survey,⁹ more than eight percent of the general population are estimated to have some form of disabilities. These figures cover both physically and cognitive impaired persons. The comparable statistics indicate the prevalence of PWDs of over two million in South Africa.¹⁰ Historically, persons with disabilities have been discriminated against because of their disabilities. Discrimination, misperceptions and stereotypes about PWDs and a subsequent history of oppression put PWDs at an increased risk of sexual violence.¹¹

Despite the right to accessing justice guaranteed by the UNCRPD,¹² yet, there persists barriers to accessing justice for PWDs. Attitudinal, physical, and communication barriers in the justice system in particular the police and courts, leave persons with disabilities who are victims of sexual violence unattended, hence resulting to prolonged PWD's exposure and defenceless against further abuses.¹³ Research in this area suggests that, mere acts of sexual violence are rarely reported to protective agencies,¹⁴ as such, if sexual violence is committed against PWDs, the underreporting is even aggravated since the society is generally not prepared to respond to particular needs of PWDs. Research further suggests that, where acts of sexual violence are reported, PWDs who are victims of sexual violence are likely to encounter professionals who show emotional resistance, little knowledge and skills, and even greater likelihood to re-victimise the already sexually victimised PWDs.¹⁵

1.2. Research questions

From the above identified problems, the study proceeds to investigate the following key questions:

- 1.2.1. To what extent do policies and laws in Tanzania and South Africa address sexual violence against PWDs?

⁹ National Bureau of Statistics, Tanzania disability survey report (2008) <TANZANIA 2008 DISABILITY SURVEY 10 JUNE 2010.pdf> (accessed on 10 July 2012).

¹⁰ Statistics South Africa 'Prevalence of disability in South Africa' (2001) 1
<<http://www.statssa.gov.za/census01/html/Disability.pdf>> (accessed on 9 June 2012).

¹¹ n 7 above.

¹² n 1 above, art 13.

¹³ 'Tanzania: The justice system fails people with developmental disabilities' *Daily News* (Tanzania) 2 March 2011
<<http://allafrica.com/stories/201103030896.html>> (accessed on 17 May 2012).

¹⁴ M Crisma & E Bascelli *et al* 'Adolescents who experienced sexual abuse: Fears, needs and impediments to disclosure'
<http://ac.els-cdn.com/S0145213404002005/1-s2.0-S0145213404002005-main.pdf?_tid=ab8d30a0d51dc2b609b88cddde4c6a22&acdnt=1339401022_f5a38af56c0dce1b43cf7bd66847bbbb>
(accessed on 10 June 2012). © University of Pretoria

¹⁵ D Udell & R Diller 'Access to justice : Opening the courthouse door'
<http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf> (accessed on 10 August 2012).

1.2.2. To what extent do policies and laws in Tanzania and South Africa guarantee access to justice for PWDs?

These questions may help us understand the society's notion of PWDs, and the potential role it plays in subjecting PWDs to sexual violence. They will further help us to critically analyse the extent to which policies and laws address sexual violence and guarantee effective accesses to justice for PWDs who are victims of sexual violence. In particular, this study assesses the policy and legal framework on access to justice in a comparative approach between South Africa and Tanzania.

1.3. Underlying assumption of the study

This study proceeds with an assumption that persons with disabilities experience discrimination in various forms, including sexual violence and obstacles in accessing justice but that there could be gaps in the laws and policies aimed at protecting the persons with disabilities. Given this, PWDs could be confronted with a multitude of barriers in institutional and physical set up of justice system in South Africa and Tanzania.

1.4. Research objectives

On the basis of the issues identified, the purpose of this study is three fold:

- 1.4.1. It seeks to expose the nature and forms of sexual violence experienced by PWDs in Tanzania and South Africa;
- 1.4.2. It investigates access to justice for PWDs in sexual violence situation; and
- 1.4.3. It intends to offer recommendations to improve PWDs' accessibility to justice system.

1.5. Research methods

The study involves a combination of comparative and analytical approaches. In-depth review of national laws, relevant international treaties, policies and other documents considered pertinent to this research are considered. Throughout this research, primary sources including legislation, treaties, declarations, resolutions, and reports are critically examined to assess their relevance in affording access to justice to PWDs who fall victims of sexual violence. Interviews were also conducted, especially to solicit pertinent information on the underlying legal framework regulating accessibility to built structures. Tanzania and South Africa remain focal points in this research.

1.6. Literature review

Persons with disabilities experience sexual violence at alarming rate.¹⁶ Yet, they are less likely to receive judicial remedies that their counterparts without disabilities receive.¹⁷ Civjan argued that, PWDs who are victims of sexual violence, more often meets justice system that is inadequately prepared to meet their particular needs.¹⁸ He further noted that, there are several reasons for this lapse, which includes societal, attitudinal and some, physical. Naidu *et al* stated that, the way the society makes sense of disability often determines its response to the needs of disabled people.¹⁹ Making this sound more realistic Civjan observed that, PWDs ‘are often treated as children, devalued, or simply not thought of when programmes are designed.’ Alongside this societal perception, physical and attitudinal barriers to accessing justice system persist at a significant level.²⁰ It is important to note that, PWD’s experience of sexual violence often occurs in astounding situations, abuse by partners, caregivers, and family members is so common among persons with disabilities ‘that it can be assumed to exist in any locale.’²¹ In this respect, research shows that, many adults with disabilities have experienced sexual abuse either in their adulthood or they may be adult survivors of childhood sexual abuse.²² Smith and Harrell observed that, isolation within a community, reliance on caregivers for personal care, and limited transportation options does create unsafe situations for PWDs.²³ Furthermore, severe underreporting of sexual violence crimes and perpetrator’s perception of PWDs as easy targets because of societal stereotypes and extremely low rates of prosecutions, serves to further expose PWDs to sexual violence crimes.²⁴

Although this research does not attempt to categorise disabilities, Sobsey associates diversity in disabilities to their increased vulnerability to sexual violence.²⁵ He observes that, disability

¹⁶ SR Civjan ‘Making sexual assault and domestic violence services accessible’

<<http://ici.umn.edu/products/impact/133/133.pdf>> (accessed on 18 September 2012) or (accessed on 28 July 2012).

¹⁷ Civjan (n 16 above).

¹⁸ B Anello ‘Inter-sectoral workshop on violence against women with disabilities and deaf women and access to the justice system’ <<http://dawn.thot.net/workshop.html>> (accessed on 29 July 2012).

¹⁹ Naidu *et al* (n 5 above).

²⁰ Anello (n 18 above).

²¹ Anello (n 18 above)

²² ‘People with disabilities and sexual assault’

<<http://kyasap.brinkster.net/Portals/0/pdfs/Disabilitiesandsexualassault.pdf>> (accessed 10 June 2012).

²³ N Smith & S Harrell ‘Forging new collaboration: A guide for rape crisis, domestic violence, and disability organisations’

<<http://www.vaw.umn.edu/documents/forgingnewcollaborations/forgingnewcollaborationspdf.pdf>> (accessed on 25 May 2012).

²⁴ Smith & Harrell (n 23 above).

²⁵ D Sobsey ‘Violence and abuse in the lives of people with disabilities: the end of silent acceptance?’ (1994) *Baltimore, MD: Paul H. Brookes Publishing Co. Inc.* in Smith & Harrell (n 23 above).

encompasses a broad and diverse range of disability types, including cognitive, physical, sensory, and psychiatric disabilities. Unlike Sobsey, Anello identified six types of disabilities;²⁶ physical disabilities,²⁷ developmental (or intellectual) disabilities,²⁸ mental health or psychiatric disabilities,²⁹ learning disabilities,³⁰ hearing disabilities³¹ and visual disabilities.³² They share a view that, it is incorrect to make general statements about the rate of victimization among PWDs.³³ For example; people with cognitive disabilities are disproportionately affected by sexual violence.³⁴ Another study found that individuals with developmental disabilities, for example are up to ten times more likely to experience sexual assault than adults with other type of disabilities.³⁵ However, sexual violence to persons with disabilities is not without gender ramification, in 1994 a statistical survey on assault and sexual assault against women in Canada indicated that women and girls with disabilities are considerably more likely to face sexual violence than men with disabilities.³⁶ Despite this finding, the survey acknowledged that men and young boys are also vulnerable to sexual violence.³⁷

In Tanzania as well as South Africa, survivors with disabilities who reach out for justice, are often met by criminal justice system that is not fully equipped to work at the intersection of sexual violence and disability. While PWDs in Tanzania confront an additional layer of discriminatory criminal justice system often in attitudinal and infrastructural terms, those in South African meet discrimination and disadvantage that originates in a history of institutionalised racism.³⁸

Obstacles to accessing justice system can have dangerous consequences. For example, compared to persons without disabilities facing similar circumstances, those with disabilities who lack effective access to justice, experience violence that is more severe and long lasting.³⁹ Naidu *et al*,

²⁶ Anello (n 18 above).

²⁷ Which take the form of limitations in mobility and may result from neurological conditions (such as cerebral Palsy, Spina Bifida, Multiple Sclerosis), orthopaedic conditions (associated with polio, arthritis, Muscular Dystrophy) or spinal cord injuries.

²⁸ Usually associated with delayed or limited development in learning that affect a person's ability to understand, remember or differentiate.

²⁹ A range of conditions or disorders fall under this general category, including Major Depressive Disorder, Schizophrenia and Bipolar Disorder.

³⁰ These disabilities usually relate to a neurological dysfunction which affects the brain's ability to process information, and may include dyslexia.

³¹ Which can range from partial hearing loss to deafness.

³² Which can range in degree from poor vision to blindness.

³³ Sobsey (n 25 above).

³⁴ Sobsey (n 25 above).

³⁵ Naidu *et al* (n 5 above).

³⁶ Anello (n 18 above).

³⁷ Sexual and Gender-based Violence, <<http://www.universityofpretoria.ac.za/manual/4.htm>> (accessed on 9 August 2012).

³⁸ Naidu *et a* (n 5 above).

³⁹ Crisman & Bascelli *et al* (n 14 above).

suggests the need for disability-awareness and integration training across all governmental and non-governmental organisations that have a role to play in dealing with the abused PWDs.

1.7. Limitations of the study

In South Africa and Tanzania, disability remains a largely invisible issue and, as such, there is a limited pool of literature from which to draw. The researcher so far has been able to locate abundant literature addressing sexual violence against women and girls generally and only little on persons with disabilities in particular. On access to justice generally, the author has located a wide body of literature, but considerably few addressing particularly access to justice for PWDs in sexual violence situation. Nevertheless, there is lack of consistency in documented information about PWDs, both in South Africa and Tanzania.

1.8. Chapter outline

The study contains four chapters. The first chapter focuses on the background, objectives and study methods and sets the problem to be investigated. The second chapter presents the conceptual framework regarding persons with disabilities, access to justice and sexual violence. The third chapter presents the policy and legal framework regarding protection of PWDs against sexual violence and the guarantees accorded to PWDs toward effective access to justice in sexual violence situation. Lastly, chapter four presents conclusions and recommendations.

This study observes that, PWDs are vulnerable to sexual violence often in a greater scale than against persons without disabilities. Nevertheless, there is an impression that sexual violence is a human rights issue. This is certain in South Africa than in Tanzania. The study finds that these developments began to take place in South Africa from 1994 while Tanzania started to register same developments in 2003 with the adoption of the Construction Industry Policy and the enactment of the Persons with Disabilities Act of 2010. There are many policy documents that promote and protect rights of persons with disabilities. Despite all the legal mechanisms in place, implementation of these laws and policies remains a challenge in both South Africa and Tanzania. Consequently, the study recommends policy and legislative reforms with the aim to improving the situation of persons with disabilities in respect of access to justice in Tanzania and South Africa. Also, it is recommended that civil society organisations, particularly the media sector should sensitise the public about the rights of persons with disabilities, especially freedom from discrimination, access to justice for PWDs who are victims of sexual violence.

CHAPTER TWO

Conceptual framework

2. Introduction

It is by now a common knowledge that sexual violence is a human rights issue; it impedes victims of sexual violence of full enjoyment of the human rights to physical and mental integrity and sexual autonomy.⁴⁰ If committed against PWDs, sexual violence also constitutes a manifestation of discrimination and hatred against PWDs.⁴¹ Women and girls with disabilities are particularly exceptionally vulnerable to sexual violence although available literatures suggest that men with disabilities are equally vulnerable to sexual violence. This suggestion also finds favour with the Amnesty International, which noted that, criminal justice system should not be tainted by ‘stereotypical assumptions, including assumptions about sexual violence towards men and boys, as well as towards women and girls.’⁴² As indicated in the preceding chapter, social exclusion, limited mobility, communication barriers, and social perceptions that PWDs are weak, stupid, or asexual help to compound the problem.⁴³ Nevertheless, sexual violence against PWDs is further exacerbated as PWDs are often financially and socially dependent on others,⁴⁴ who are often perpetrators of sexual violence against PWDs.

On the other hand, it will be shown below in this research that, significant challenges towards ensuring effective access to justice for PWDs still remain both in South African and Tanzania. This is despite the fact that the UNCRPD guarantees the rights of PWDs to live free from sexual violence⁴⁵ as well as guarantees towards an uninterrupted right to recourse⁴⁶ in case of human rights violation including sexual violence.

⁴⁰ Amnesty International ‘Rape and sexual violence: Human rights law and standards in the international criminal court’ <<http://www.amnesty.org/en/library/asset/TOR53/001/2011/en/7f5eae8f-c008-4caf-ab590f84605b61e0/ior530012011en.pdf>> (accessed on 18 September 2012).

⁴¹ n 40 above.

⁴² n 40 above.

⁴³ n 7 above, 7.

⁴⁴ WHO and WB ‘World report on disability’ <http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf> (accessed on 16 September, 2012). © University of Pretoria

⁴⁵ n 1 above, art 16.

⁴⁶ n 1 above, art 13.

2.1. Defining persons with disabilities

Defining disability is particularly significant for its effect of shaping peoples' response towards PWDs; it further informs peoples' attitudes towards persons with disabilities as victims of sexual violence and the extent to which PWDs are entitled to accessing justice.⁴⁷

This chapter explores earlier definitions prior to the UNCRPD, the position under the UNCRPD, as well as legislative definitions as used in South Africa and Tanzania. Nevertheless, the author prefers to indicate scepticisms with regard to any attempt to strictly defining 'disability' or 'persons with disabilities.' The author's viewpoint is in line with the already admitted evolving-nature of the concepts 'disability' or 'persons with disabilities.'⁴⁸

Earlier definition of disability was conceived since 1975, when the Declaration on the Rights of Disabled People⁴⁹ was adopted by the United Nations. Accordingly, a "disabled person" was defined as any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.⁵⁰ As will be indicated in subsequent sections, this definition embraced the medical model of disabilities and failed to reflect on the impact the social environment has in disabling PWDs.

The declaration had an influential role on national laws; one example is the 1990 Americans with Disabilities Act (ADA)⁵¹ which defined a 'disability' as a 'physical or mental impairment that substantially limits one or more major life activities of such individual.' This definition was later explained by the United States of America Supreme Court in the case of *Sutton v United Air Lines*⁵² (the *Sutton case*), in which, the court confirmed the literal meaning of disability as entrenched under the ADA. Like the declaration, the ADA, reinforces the medical model of disability.

On the other hand, the UNCRPD does not define disability or persons with disabilities in a strict sense; it rather provides guidance on the concept of "disability" and its relevance to the

⁴⁷ C Edwards *et al* 'Access to justice for people with disabilities as victims of crime in Ireland' <[http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/378104926A5AB35A802579C900409963/\\$File/NDA_Access_to_Justice.pdf](http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/378104926A5AB35A802579C900409963/$File/NDA_Access_to_Justice.pdf)> (accessed on 10th August 2012).

⁴⁸ n 1 above, Preamble, para 'e.'

⁴⁹ A/RES/3447 (XXX) UN Doc A/10034 (1975).

⁵⁰ Declaration (n 49 above) para 1. © University of Pretoria

⁵¹ Americans with Disabilities Act 42 U.S.C. § 12101.

⁵² *Sutton v United Air Lines, Inc.* (97-1943) 527 U.S. 471 (1999).

Convention.⁵³ The UNCRPD adopted a social model of disability by recognizing that, disability is an evolving concept that results from interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁵⁴ The Convention further states that,

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁵⁵

Looking at disability from this perspective, effective access to justice by persons with disabilities is limited not because of an individuals' impairment, but because of barriers confronted by persons with disabilities, which might include physical, attitudinal, and procedural barriers. As will be shown below, barriers to accessibility are generally widely recognised in policy and legislative frameworks in South Africa and Tanzania. The author nevertheless recognises that, barriers to accessibility have significantly impeded PWD's accessibility to the justice system.

It is important to note from the definitions that, the UNCRPD affirms a paradigm shift from medical model that reinforced an internalized oppression which made PWDs less likely to challenge their exclusion from mainstream of society.⁵⁶ The UNCRPD therefore, reinforces a social model in which, disability is understood 'as an unequal relationship within a society in which the needs of people with impairments are often given little or no consideration.'⁵⁷ It maintains that PWDs are "disabled" by the fact that they are excluded from participation within the mainstream of society including justice system as a result of physical, organisational and attitudinal barriers.'⁵⁸

As was noted in the preceding chapter, PWDs experiencing sexual violence are not all the same, some live with impairments that are multifaceted and which defy a single categorization such as 'physical,' 'sensory,' 'cognitive' and 'mental health.' Given the circumstance, this research covers PWDs as a generic group; it cuts across a range of impairment categories, including people with physical and sensory impairments, people with intellectual disabilities and those experiencing mental ill health. Similarly, the phrase 'persons with disabilities' (PWDs) will be used throughout this research in disregard of inconsistencies throughout the literature reviewed. In Ireland for instance, the

⁵³ OHCHR 'Monitoring the convention on the rights of persons with disabilities: Guidance for human rights monitors' Professional training series No. 17, 15 <http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf> (accessed on 12 September 2012).

⁵⁴ n 1 above, Preamble.

⁵⁵ n 1 above, art 1.

⁵⁶ G Carson 'The social model of disability'

<<http://www.ukdpc.net/site/images/library/2011/Middle%20of%20Pr%20of%20Disability2.pdf>> (accessed 22 August 2012).

⁵⁷ Carson (n 56 above).

⁵⁸ Carson (n 56 above).

concern by disability movement is to put the person first, before the disability⁵⁹ but in other countries, such as the UK, ‘disabled people’ (DP) is more commonly referred to.⁶⁰

Inconsistencies are equally to be found in South Africa and Tanzania’s PWDs protection framework. In Tanzania for instance, while the National Policy on Disability,⁶¹ repeatedly refers to PWDs as ‘disabled people,’ ‘people with disabilities’ as well as ‘persons with disabilities’ simultaneously, the same equally applies to South Africa, where the Integrated National Disability Strategy, employs such terms ‘persons with disabilities,’ ‘disabled people’ and ‘people with disabilities’ simultaneously.

2.1.1. The impact of medical model of disability on PWDs’ effective access to justice

The medical model of disability is rooted in an undue emphasis on clinical diagnosis,⁶² the reality of the matter is that under the guise of objective scientific enquiry a particular image of persons with disabilities is being furthered, and it is an image full of negative implications, the very nature of which is destined to lead to an inhibiting and discriminating environment against PWDs.⁶³ The medical model of disability views disability as an individual’s deficit.⁶⁴ The status of ‘being disabled’ has therefore been viewed as the natural cause for PWDs being unable to accessing justice system.⁶⁵ Looking at disability from this angle does inevitably restrict societies’ responses to the need to ‘fix’ an individual’s impairment through medicine or rehabilitation. Consequently, it places the lives of PWDs to professionals who control not only the form of medication (if treatment is necessary) but also the form of life,⁶⁶ and I would add, most fundamentally ‘when’ and ‘how’ a person with disability will react against sexual abuses. Under the medical model, individuals with disabilities occupy a sick role; consequently, they are excused from the normal obligations of society including denial to assuming an active role in their life. This certainly impacts on their role as potential active participants in the justice system in situations they fall victim of sexual violence.

⁵⁹ Edwards *et al* (n 47 above) 26.

⁶⁰ Edwards *et al* (n 47 above) 26.

⁶¹ National Policy on Disability (2004).

<<http://www.tanzania.go.tz/pdf/NATIONAL%20POLICY%20ON%20DISABILITY.pdf>> (Accessed on 15 August 2012).

⁶² S Brisenden ‘Independent living and the medical model of disability’ (1993) 1 *International Journal, Disability, Handicap and Society* <<http://www.leeds.ac.uk/disability-studies/archiveuk/brisenden/brisenden.pdf>> (accessed on 11 September 2012).

⁶³ Brisenden (n 62 above).

⁶⁴ n 53 above, 8.

⁶⁵ n 53 above, 8.

⁶⁶ Brisenden (n 62 above).

Over the past few decades, the world witnessed an important change in the way disability is perceived. Instead of looking at what is wrong with the person, focus has shifted to the failure of social environment to accommodate the needs of persons with impairments.⁶⁷ Accordingly, disability is recognized as a consequence of the interaction of the individual with an environment that does not accommodate that individual's differences and limits or impedes the individual's accessibility to the benefits the society offers to the rest.⁶⁸ This new approach is referred to as the social model of disability. As noted above, the UNCRPD endorses this model and takes it forward by explicitly recognizing the intersection between individual and the surrounding social environments.⁶⁹

2.1.2. Human rights-based approach to disability

Fundamental to human rights is the principle that all human beings are equal in dignity and rights and that they are entitled to their human rights without distinction of any kind. Therefore, persons with disabilities are rights-holders who can, and should, determine the course of their lives as much as any other member of society. In a human rights-based approach to disability, limitations imposed on persons with disabilities by the social and physical environment are regarded as violations of their basic human rights.⁷⁰

From access to justice point of view, a human rights-based approach acknowledges that if whatever is necessary for a person to live in dignity, then it is a right that can be claimed and the government can be held accountable.⁷¹ Sexual violence to PWDs constitutes one such denial of dignity, and as such, PWDs are entitled to effective remedies through effective and guaranteed access to justice system.

2.1.3. Disability and national laws

The UNCRPD does not preclude the use of definitions in national laws, as such varying laws in South Africa and Tanzania provide for definitions. Unlike many specialized laws, the South African and Tanzanian constitutions do only refer to 'disability' without particularly defining disability or persons with disabilities as such. Arguably, this is not by mistake, as the highest law of the land, constitutions represent among other things the values and principles that the country stands for.⁷² Constitutions send out an important message about the status of persons with disabilities within the national legal order

⁶⁷ n 1 above, art 1.

⁶⁸ n 53 above, 8.

⁶⁹ n 1 above, art 1.

⁷⁰ A human rights-based approach to disability: The legal framework for survivor assistance in 24 states parties <<http://www.survivorcorps.org/PDFs/Advocacy/SurvAssist24.pdf>> (accessed on 26 August 2012).

⁷¹ 'Advocacy workbook' *Landmine Survivors Network* (2004) 16, <<http://www.handicap-international.fr/kit-pedagogique/documents/ressourcesdocument@universityofpretoria/AdvocacyWorkbook2007.pdf>> (accessed on 8 September 2012).

⁷² n 71 above, 19.

leaving it to particular laws to define disability or persons with disabilities in a manner that suit the particular context. In this regard, the Constitution of South Africa⁷³ refers to disabilities in its non-discrimination provisions, where it provides in section 9(3) that, ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... disability’ whereas, the letter’s Constitution does not in its non-discrimination provision⁷⁴ expressly refer to disability as one of the prohibited ground for discrimination, nevertheless, the relevant article,⁷⁵ does mention ‘all persons’ and such other terms like ‘stations in life’ which by necessary implication covers persons with disabilities.

Unlike Tanzania where there is Persons with Disabilities Act,⁷⁶ South Africa does not have dedicated disability legislation; however, there are in existence several pieces of laws that deal with disability issues particularly in areas of access to justice and sexual violence. These include the Criminal Law (Sexual Offences) Amendment Act (sexual offences Act)⁷⁷ and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (Equality Act)⁷⁸ to mention some. The former law, defines a person with mental disability as ‘a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act; (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation; (c) unable to resist the commission of any such act; or (d) unable to communicate his or her unwillingness to participate in any such act. One major critique with this definition is that, it reinforces a medical model of disability by putting much emphasis on the ‘individual’s inability’ rather than focusing on social environments that often manifest itself in perpetrator’s behaviours and actions that tend to deny the ‘victim’s ability to exercise free and genuine choice, that is, to enjoy his or her human rights to physical and mental integrity and sexual autonomy’.⁷⁹

On the other hand, the Tanzanian law on disability, ‘Persons with Disabilities Act,’ defines mental disability to mean ‘inability to meet individual and societal needs by reason of emotional and mental retardation.’⁸⁰ Moreover, the Act goes even further that, ‘in relation to an individual,’ disability means ‘loss or limitation of opportunities to take part in the normal life of the community on

⁷³ Act 108 of 1996.

⁷⁴ The Constitution of the United Republic of Tanzania, 1977 (as amended from time to time), art 13.

⁷⁵ n 74 above, art 13.

⁷⁶ Act 9 of 2010.

⁷⁷ Act 32 of 2007.

⁷⁸ Act 4 of 2000.

⁷⁹ n 40 above, 6.

⁸⁰ n 76 above, sec 3.

an equal level with others due to physical, mental or social factors.’⁸¹ The author observes that, the Act has failed to precisely indicate to whom these ‘factors’ are attributable, are they attributable to an individual PWD or to society? In this connection, one would note that, the Persons with Disabilities Act, despite being the most recent law, even recent than the UNCRPD itself, the UNCRPD did not influence its approach to disability. However, this section being devoted for conceptualization, the author reserves further detailed arguments for the next chapter which is reserved for a discussion on policy and legal framework regarding sexual violence and access to justice for PWDs.

2.2. Disability and access to justice

Human rights instruments and their monitoring bodies at the international level have established and consistently emphasized the rights to effective access to justice in times of human rights violation. The UN-Human Rights Committee has particularly emphasised the need for states parties to ensure accessible and effective remedies for violation of human rights while further emphasizing the need for the states to pay particular attention to particular groups of people considered vulnerable such as PWDs. The committee in particular stated that,

... In addition to effective protection of ... rights, states parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons.⁸²

It is important to note that, the emphasis comes at the top of the fact that persons with disabilities are often ‘invisible victims’ of sexual violence⁸³ whose needs and experiences of the criminal justice system are largely undocumented.⁸⁴ As noted in the preceding section, persons with disabilities are one category of people most vulnerable to sexual violence, as such the criminal justice system ought to pay a considerable attention to persons with disabilities as their needs are the outcomes of a protracted past social exclusion affecting largely their accessibility to what the society considers essential. As access to justice constitutes no exception to this exclusion, this section discusses the concept ‘access to justice’ and assesses its parameters so as to set the context into which, the South African and Tanzanian policy and legal framework will be scrutinised in the next chapter.

⁸¹ n 76 above, sec 3.

⁸² UN Human Rights Committee, General Comment 31, para 15.

⁸³ ME Baaz and M Stern ‘The complexity of violence: A critical analysis of sexual violence in the Democratic Republic of Congo (DRC)’

<http://www.peacewomen.org/assets/file/ComplexityofViolence_nordicafrica-sida_2010.pdf>

(accessed on 19 September 2012).

⁸⁴ Baaz and Stern (n 83 above).

2.2.1. Defining access to justice

There is lack of consensus regarding a proper definition of ‘access to justice.’⁸⁵ Two approaches have nevertheless been used to describe the concept, narrower and the broader approach.⁸⁶ The narrow approach regards access to justice ‘as being concerned with the means for securing vested rights, particularly through the use of courts and or tribunals.’⁸⁷ Accordingly, emphasis has been to put measures in place to overcome obstacles faced by vulnerable groups such as PWDs⁸⁸ in making effective use of the criminal justice process for redress.⁸⁹ However, criticisms have been levelled against this approach, for its procedurally-based scope.⁹⁰

The broader approach seeks a firm conjunction of procedural and substantive aspect of justice.⁹¹ Accordingly, access to justice requires a construction that best ensures just, equitable and inclusive legal and judicial outcomes.⁹² From the perspective of PWDs as a vulnerable group, the broader approach seeks to guarantee accessibility of PWDs to law-implementing processes and institutions.⁹³ Access to justice in this regard will be better understood as a broad concept, encompassing PWD’s effective access to the system, procedures, information, and locations used in the administration of justice.⁹⁴

One definition that substantially seems to embrace the broader approach of ‘access to justice’ defines the concept as;

Access by people, in particular from poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts, this includes the ability of people to seek and obtain a remedy through formal and informal justice systems and the ability to seek and exercise influence on law-making and law-implementing processes and institutions.⁹⁵

⁸⁵ AE Nkea ‘Justice system’s responses to the May 2008 xenophobic violence in South Africa and its impact on access to justice for migrants: A case study of greater Johannesburg’ (2010) *University of the Witwatersrand* .

⁸⁶ Nkea (n 85 above) .

⁸⁷ Nkea (n 85 above).

⁸⁸ Nkea (n 85 above).

⁸⁹ Nkea (n 85 above).

⁹⁰ Nkea (n 85 above).

⁹¹ UNDP ‘Access to justice in Aceh: Making the transition to sustainable peace and development in Aceh’ (2004) <<http://www.undp.or.id/pubs/docs/Access%20to%20Justice.pdf>> (accessed on 19 September 2012).

⁹² Nkea (n 85 above).

⁹³ Nkea (n 85 above).

⁹⁴ E Flynn ‘Access to justice – UN CRPD and EU law’ *Centre for disability law and policy, National University of Ireland Galway* 3 <http://www.era-comm.eu/dalaw/kiosk/documentation/UNCRPD/111DV70_FLYNN_EN.pdf> (accessed on 5 September 2012). © University of Pretoria

⁹⁵ ‘Towards meaningful rule of law research: An elementary approach’ (unpublished) in a ‘Framework for strengthening access to justice in Indonesia’ 1.

This definition acknowledges that, PWDs have often been denied fair and equal treatment before courts, tribunals, and other bodies that make up the justice system, as the system has failed to ensure a barrier-free access.⁹⁶ Such barriers do significantly limit the ability of PWDs to use the justice system for redress in situations of sexual violence. It should be noted beforehand that, ‘access to justice’ as shall be referred to elsewhere in this research is restricted to PWD’s right to a just, equitable and inclusive remedial system through the formal criminal justice system.

The author has nevertheless identified some key elements from the above definition, it is important to note that the cumulative effects of these elements would result in an inclusive, participatory and barrier-free criminal justice system. The elements include; existence of normative legal framework that guarantees access to justice for PWDs, sufficient legal awareness by persons with disabilities who are victims of sexual violence, accessibility to the built environment and effective administration of justice.⁹⁷

2.2.2. Existence of normative legal framework that guarantees PWDs access to justice

The normative legal framework presupposes the existence of the set of rules and laws, (both substantive and procedural,) available institutions that are by law established as responsible bodies for justice delivery and the actors therein, including police officers, prosecution officers and judges/magistrates. Different pieces of laws exist in South Africa and Tanzania that do, or at least, are intended to guarantee access to justice for PWDs. However, full guarantees of accessible justice system for PWDs remains a challenge in South Africa although much problematic in Tanzania. In South Africa, the 1996 Constitution, the sexual offences Act,⁹⁸ and Equality Act,⁹⁹ etc. are in the fore front seeking to guarantee accessible justice for all including PWDs, while in Tanzania, there are 1977 Constitution and the Penal Code.¹⁰⁰

2.2.3. Victim’s knowledge of the law

This concerns victim’s awareness and or understanding of the laws, rights and obligations accruing to and for them throughout justice delivery process, it also entails awareness of the available institutions and the way each operates in the justice system and the intersections between them. In this regard, it is

<<http://siteresources.worldbank.org/intjusforpoor/resources/a2jframeworkenglish.pdf>> (accessed on 27 August 2012)

⁹⁶ Flynn (n 94 above) slide 3.

⁹⁷ n 95 above, 1.

⁹⁸ n 77 above.

⁹⁹ n 78 above.

¹⁰⁰ Cap 16 R. E. 2002.

vital for persons with disabilities to be informed how the criminal justice system works, and most fundamentally how to access it.¹⁰¹

2.2.4. Access to the built environments

This concerns physical accessibility to infrastructures such as police stations and courthouse. As South African Human Rights Commission stated, ‘physical barriers to access are often the result of thoughtless construction.’¹⁰² The World Report on Disability¹⁰³ as well, addresses the impact of inaccessible environment for PWDs, it states that; ‘inaccessible environments create disability by creating barriers to participation and inclusion.’ In this regard, when police stations and courthouses are inaccessible by PWDs, the result is a total denial of their rights to among others, the right to equality, dignity and freedom from abuses. Physical inaccessibility therefore tends to justify the assertion that, disability is imposed by the society (social construct) with most of its effects being inflicted on persons by the social environment rather than individual person’s impairment.¹⁰⁴ In addressing accessibility issues, the national norms and minimum standards for the building of courthouses and police stations to ensure barrier-free access must be developed.

2.2.5. Effective administration of justice

There is a valid presumption that the state and all its organs are responsible through legislative and other measures to assist the courts to ensure its accessibility and effectiveness.¹⁰⁵ However, much still remains for the actors in the justice sector to consider special circumstances of PWDs who constitutes a category of vulnerable group with greater demand of particular attention.

In this connection, administration of justice concern the role played by the actors in the justice system. It is important to note that, like many other jurisdictions, South African and Tanzanian criminal justice system involves the police service, prosecution service, the court and the correction service. Nevertheless, issues that raise concern about the effectiveness of the criminal justice system particularly in delivering justice to PWDs, includes lack of opportunity for PWDs to fully and

¹⁰¹ Edwards *et al* (n 47 above) 124.

¹⁰² South African Human Rights Commission (SAHRC) ‘Towards a barrier-free society’ (2002) 5.
<<http://www.info.gov.za/view/DownloadFileAction?id=70265>> (accessed 5 September 2012).

¹⁰³ n 44 above, 170.

¹⁰⁴ n 102 above, 10.

¹⁰⁵ I Sinclair and A Du Plessis ‘Domestic violence adjudication in South Africa: A view on therapeutic jurisprudence and human rights protection of the female victim’ (University of Pretoria)

<<http://www.aija.org.au/TherapJurisp06/Monograph%20Papers/2%20Sinclair&DuPlessis.pdf>> (accessed on 8 September 2012).

effectively participate in the justice delivery process.¹⁰⁶ Participatory justice process requires effective physical accessibility and communication guarantees to all persons including persons with disabilities.¹⁰⁷ In this connection, effective administration of justice also concerns individual skills of police officers, prosecution officers, and judges to soliciting the best out of PWDs, thus ensuring equitable access to justice for PWDs.¹⁰⁸ It further requires a process that is free from harassment and intimidation, supported by a proper understanding of the PWD's needs.

2.3. Key barriers to accessing justice

PWD's accessibility to the justice system depends on the level of barrier-free environment. It is important to note that often the built environment are planned, designed and constructed without regard to the need of PWDs.¹⁰⁹ Nevertheless, the list of barriers is long; it is a combination of structural, physical, and attitudinal barriers to mention, which prevent full participation by PWDs in the justice system.¹¹⁰ It is the aim of this research to identify barriers that PWDs experience in their way to accessing justice for sexual violence.

2.3.1. Structural barriers

This refers to the organisational structure of the criminal justice system, the division of labour between institutions and their intersections. Organisational structure significantly affects communication between and outside agencies. In this regard, communication is particularly essential in terms of identifying not only PWDs but also their needs.¹¹¹ As Shaw¹¹² stated, in the context of South African criminal justice system in general, structural set up of a criminal justice system is essential and needs to be reflective of its ability to prevent, process and deter crimes. He then emphasised that to ensure full potentials of the criminal justice system, reform is a must and ought to be a national priority.¹¹³ He further pointed out that, if the criminal justice system is to function effectively, then 'the system should consist of both proactive and reactive components.' In the context of PWDs, proactive

¹⁰⁶ Edwards *et al* (n 47 above) 59.

¹⁰⁷ Edwards *et al* (n 47 above) 119.

¹⁰⁸ Edwards *et al* (n 47 above) 119.

¹⁰⁹ 'Attitudinal barriers for people with disabilities'

<<http://www.ncwd-youth.info/attitudinal-barriers-for-people-with-disabilities>> (accessed on 5 September 2012).

¹¹⁰ n 109 above.

¹¹¹ Edwards *et al* (n 47 above) 124.

¹¹² Project Leader and Senior Researcher, Crime and Policing Policy Institute for Defence Policy.

¹¹³ M Shaw 'Reforming South Africa's criminal justice system' (1997)

<<http://www.iss.co.za/Pubs/Monographs/No12/Camerer.html>> (accessed on 7 September 2012).

component is essential not only for effective access to justice for PWDs but also to the longer term reduction of sexual violence for PWDs.¹¹⁴

Assessing the effectiveness of the criminal justice system especially from the perspective of its structural set-up, the author concedes with Shaw's assessment that, inter-agency 'co-ordination' is vital to any successfully criminal justice system that is oriented towards effective access to justice for PWDs.¹¹⁵

2.3.2. Physical barriers

Access to courthouses and police stations are supposedly everybody's entitlement. However, for PWDs, getting into these facilities means a confrontation with many stairs, heavy and narrow doors, narrow paths, and unusable witness box, all potentially impeding access for PWDs. Access to justice for all, therefore demands assurance that litigants who are PWDs are entitled to free and uninterrupted access to justice institutions.¹¹⁶ It is astounding that, justice infrastructures that encompass courthouses and police stations are often designed around the capabilities of 'non-disabled' persons,¹¹⁷ for they were throughout history, 'designed with an image of strength'¹¹⁸ hence, rich of features inhibiting access for PWDs.

The Architectural Barriers Act,¹¹⁹ the Americans with Disabilities Act,¹²⁰ Uniform Federal Accessibility Standards¹²¹ and the United States Court Design Guide in the United States of America, represents the world's most progressive accessibility framework¹²² and therefore, highlights the best response to accessibility problem. The framework details accessibility standards and demands inclusion of accessibility features such as ramps, accessible doors and stairs, elevators, and restrooms etc. not only for new buildings but also into those going through renovation. This latter quality makes the framework always potentially relevant in addressing the historical exclusion of PWDs from the justice system. It further establishes the Architectural and Transportation Barriers Compliance

¹¹⁴ Shaw (n 113 above).

¹¹⁵ Shaw (n 113 above).

¹¹⁶ EF Wood 'Toward a barrier-free courthouses: Equal access to justice for persons with physical disabilities' 1 http://www.americanbar.org/content/dam/aba/uncategorized/2011_aging_artj7640_barrierfreect_tb.authcheckdam.pdf (accessed on 8 October 2012).

¹¹⁷ Wood (n 116 above) 1.

¹¹⁸ Wood (n 116 above) 1.

¹¹⁹ 42 U.S.C. §§ 4151-57.

¹²⁰ n 51 above.

¹²¹ 49 Fed. Reg. 31528 (1984).

¹²² n 102 above, 35.

Board¹²³ to monitor and coordinate compliance with the set standards. Nevertheless, its jurisprudence especially in *Hill v. Shelby County*¹²⁴ highlights the potential role litigation can play in addressing accessibility problem. The case challenged physical inaccessibility to courthouse on the basis of the constitutional rights to ‘due processes’ and the right to ‘equal protection.’ the case involves the courts located on the second floor of the building without elevator or other means for automatic lifting the Disabled plaintiff. Although the plaintiff’s complaint was dismissed, the court took judicial notice of the fact that lack of elevators without appropriate alternative means, potentially impedes access to courts for PWDs.

2.4. Criminal justice system

The term ‘criminal justice system’ (CJS), could be defined as constituting all activities and agencies pertaining to the prevention, investigation, prosecution, sentencing and all post-trial processes.¹²⁵ CJS concerns the ‘violation of criminal law and strictly interpreted, deals with the enforcement and procedures of criminal law.’ Two main objectives of the CJS have been identified as constituting crimes control and assurance of the due process.¹²⁶ However, police, prosecuting authorities, courts, and the correction services constitute major components of the criminal justice system.¹²⁷ Some argue, it does also consist of the ‘informal justice and policing structures.’¹²⁸ However, throughout this research ‘Criminal Justice System’ neither concerns the informal justice system nor deals with sentencing and any post-trial processes.

2.5. Sexual violence against PWDs

As noted above, sexual violence against PWDs has gained recognition internationally as a human rights issue.¹²⁹ However, there is often a tendency to conflate sexual violence and rape. As stated by Triffterer,¹³⁰ ‘sexual violence’ is a term broader than rape, thus implying that rape remains a category

¹²³ Created in 1973, as an independent agency of the United States Government, devoted to accessibility for PWDs .

¹²⁴ *Hill v. Shelby County* 599 F. Supp. 303 (N.D. Ala. 1984).

¹²⁵ Criminal justice system, <http://www.oregonlaws.org/glossary/definition/criminal_justice_system> (accessed on 29 August 2012).

¹²⁶ W Drakeford and K Friedman ‘History of the criminal justice system’: EDJJ professional development series, Module 1, p 5, <<http://www.edjj.org/training/pdf/CM%201-%20History.pdf>> (accessed on 19 September 2012).

¹²⁷ Drakeford and Friedman (n 126 above).

¹²⁸ Nkea (n 85 above) 25-26.

¹²⁹ n 1 above, art 16.

¹³⁰ O Triffterer ‘commentary on the Rome Statute of the International Criminal Court’ (2008) 712 in Amnesty International (n 40 above) 214.

of sexual violence particularly that which involves penetration.¹³¹ Olsvik, on his part, suggested that ‘sexual violence can take the form of both physical abuse, such as unwanted sexual touch and rape, and emotional abuse, such as obscene comments and peeping.’¹³² In this connection, the human rights of equality and non-discrimination in the enjoyment of physical and mental integrity¹³³ require a measure of weight given to the free and full agreement to sexual contact of all parties to that contact, regardless as to whether the same do or do not involve penetration.¹³⁴ In this regard it is important to stress that ‘individual’s sexual autonomy’ as an aspect of the rights to physical and mental integrity, constitutes the reason for criminalization of sexual violence in all its forms and manifestations.

Unfortunately, despite the proliferation of sexual violence against PWDs, yet the question has not received adequate attention from researchers and policy makers.¹³⁵ As a result, several initiatives including the Sexual Violence Research Initiative (SVRI) based in South Africa has been established to address this shortcoming. Nevertheless, on 25 February 2008 the UN Secretary General launched a campaign ‘Unite to End Violence against Women’¹³⁶ with the focus to raising awareness and increase political will and resources for preventing and responding to all forms of violence. Although the campaign focuses on women, the author is of the view that, the initiative holds potentials for PWDs who are equally vulnerable to sexual violence and that the reference ‘violence against women’ certainly includes women and girls with disabilities. In 2006, a report of the UN-Secretary-General’s in-depth study on violence against women was released, which among other things, establishes the “intersection” between, being a ‘women,’ ‘with disability,’ and the potentials it holds towards sexual victimization. In this respect the report clearly stated that; the different manifestations of violence and women’s personal experience of it are shaped by many factors, including disability.¹³⁷

There are in place several other initiatives at the international level addressing sexual violence worldwide. In 2000 for instance, the UN-Security Council adopted a resolution¹³⁸ addressing sexual

¹³¹ Section 130, Penal Code of Tanzania, the ‘Penal Code, Cap 16 (R: E 2002). In Tanzania, penetration remains essential for rape crime, while the position in South Africa has recently changed following the enactment of the Criminal Law (Sexual Offences) Amendment Act (32/2007) which among other things, replaced the common law definition of rape with the new definition that does not retain the ‘element of penetration’ as essential for the crime of rape.

¹³² VM Olsvik ‘Intersectionality used in the analysis of power relations in connection with abuse of women with physical disabilities’ (2007), <<http://www.ostforsk.no/notater/pdf/162007.pdf>> (accessed on 19 September, 2012).

¹³³ The Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 19, para 24(b).

¹³⁴ Y Bartolozzi ‘Sexuality and human rights a discussion paper’ <http://www.ichrp.org/files/reports/47/137_web.pdf> (accessed on 18 September, 2010).

¹³⁵ ‘Moving the agenda forward’ <<http://www.svri.org/forum2011/SVRIForum2011Report.pdf>> (accessed on 7 September 2012).

¹³⁶ n 135 above.

¹³⁷ The Secretary-General’s in-depth study on violence against women mandated by General Assembly resolution 58/185/2006, paras 66, 361, 366 & 378(i).

¹³⁸ S/RES/1325 (2000).

violence in armed conflicts. Accordingly, the resolution calls on parties to armed conflict to take special measures to protect women and girls from all forms of sexual abuse and or violence.¹³⁹ Although relevant for PWD's protection against sexual violence, the resolution is limited in scope, as such; it is not applicable outside of the armed conflicts situation. Another resolution¹⁴⁰ was adopted in 2007 by the UN-General Assembly. This latter resolution is of particular importance for its recognition that sexual violence against women and girls persist in every country in the world,¹⁴¹ thus making it equally relevant to South Africa and Tanzania. This resolution among other things, strongly condemns all acts of violence irrespective of 'whether these acts are perpetrated by the State, by private persons or by non-State actors,'¹⁴² nevertheless, the resolution call for elimination of all forms of violence in the family, and community at large. It further emphasizes the need to criminalise all forms of violence, and calls on states to make them legally punishable.¹⁴³

2.5.1. Sexual violence for PWDs under the UNCRPD

In its preamble, the UNCRPD recognises the high risk of sexual violence that women and girls with disabilities face.¹⁴⁴ Nevertheless, article 16 therein makes freedom from violence a human right issue, breach of which PWDs are entitled to remedies. Unlike the preamble which draws a particular attention to women and girls, article 16 of the UNCRPD seeks to protect PWDs as a generic group which also affirms the author's approach which does not attempt to categorise PWDs without denying the fact that some categories are exceptionally affected by sexual violence and subsequent inaccessible justice. Of interest to this research are the parameters that article 16 covers with regards to states' obligations toward free-sexual violence environment for PWDs and the guarantees of the effective remedies where sexual violence occurs.

The UNCRPD calls on states parties to legislate laws that guarantee free-sexual violence life for PWDs; this would also mean laws that assure PWDs of their access to justice in time of sexual violence. The UNCRPD also recognises the importance of education both for PWDs and for those in the justice sector necessary to ensure PWD's access to justice.¹⁴⁵ Moreover, the UNCRPD obliges states parties to take preventive measures to protect not only PWDs but their families and caregivers essentially by disseminating information not only on how to recognise a sexual violence but also how to report instances of sexual violence, the author firmly believes that these measures if implemented

¹³⁹ n 138 above, para 10.

¹⁴⁰ A/RES/61/143 (2007).

¹⁴¹ n 140 above, para 4.

¹⁴² n 140 above, para 4.

¹⁴³ n 140 above, para 4.

¹⁴⁴ n 1 above, Preamble, para 'q.'

¹⁴⁵ n 1 above, art 13.

would certainly improve access to justice for PWDs.¹⁴⁶ The convention further, demands effective laws and policies that would ensure prompt identification of sexual violence instances, effective investigation and prosecution of perpetrators of sexual violence.¹⁴⁷ From the UNCRPD, four elements could be identified that cater for protection of PWDs from sexual violence and those tending to guarantee their accessibility to justice system. The elements includes the need for a normative legal framework, sufficient legal knowledge for implementing the legal provisions that are already in place, assurance of accessible built environment, and effective administration of justice by those in the justice sector.

2.5.2. Sexual violence for PWDs under other UN-treaties

Viljoen and Biegon stated that, ‘let the obvious be underlined,’ the UN instruments are as well Africa’s.¹⁴⁸ It is therefore important to consider relevant provisions as entrenched in different UN-instruments that addresses sexual violence and access to justice for PWDs. The United Nations has a commitment that stems from the UN-Charter, which re-affirms the faith of the people of the world in fundamental human rights and in the dignity and worth of the human person.¹⁴⁹ The UN has adopted within its framework, different instruments including the Universal Declaration of Human Rights,¹⁵⁰ the International Covenant on Civil and Political rights (ICCPR),¹⁵¹ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹⁵² to mention some. In the Universal Declaration, the UN clearly spelt the rights which belong to all persons. These include the right to security of person,¹⁵³ which, as will be stated in the subsequent chapter, covers the protection against sexual violence. As regards access to justice, the Universal Declaration affirms the rights of all persons to equality before the law as well as equal protection of the law,¹⁵⁴ it further precisely state that, everyone is entitled to effective remedy for acts that violate the fundamental rights. Equally framed provisions are entrenched under article 2(3) (a) of the ICCPR, and article 2(b) of the CEDAW.

¹⁴⁶ n 1 above, art 16(2).

¹⁴⁷ n 1 above, art 16(5).

¹⁴⁸ F Viljoen and J Biegon ‘The feasibility and desirability of an African disability rights’ (unpublished) 4.

¹⁴⁹ Preamble to the Charter of the United Nations (1945).

¹⁵⁰ A/RES/217 A (III) (1948).

¹⁵¹ A/RES/2200A (XXI) (1966).

¹⁵² A/RES/34/180 (1979).

¹⁵³ n 150 above, Universal Declaration , art 3.

¹⁵⁴ n 150 above, Universal Declaration , art 7.

2.5.3. Sexual violence for PWDs under African Human Rights Framework

As Viljoen and Biegon argued, African human rights system addresses PWDs inadequately and in a fragmented manner.¹⁵⁵ However, they recognised the potential mechanisms that can be exploited to protect PWDs, in this regard they argued, ‘The African Charter,¹⁵⁶ African Children’s Charter,¹⁵⁷ African Women’s Protocol¹⁵⁸ and the African Youth Charter¹⁵⁹ ‘all potentially implicitly include persons with disabilities within their ambit.’¹⁶⁰ The African Charter, despite its failure to mention persons with disabilities in article 2, a non-discrimination provision, yet it protects ‘every individual,’ ‘every human being,’ ‘every citizen,’ and ‘all peoples’¹⁶¹ from all forms of abuses of their rights. Further, under article 18, the Charter calls on states parties to undertake special measures of protection for PWDs, in this sense, states parties including South Africa and Tanzania, have obligation to protect PWDs from sexual violence, as PWDs are often victims of sexual violence in an exceptional scale.¹⁶² The African Children’s Charter, without doubt, covers children with disabilities as it uses the expression ‘every child’ throughout the text. In addition, unlike the African Charter, the African Children’s Charter explicitly guarantees the children with disabilities of the right to special measures of protection¹⁶³ that would ensure children, of the freedom from physical or mental injury or abuse, including sexual abuse.¹⁶⁴

On the other hand, the African Women’s Protocol equally contains a provision guaranteeing the right to special measures of protection for ‘women with disabilities.’¹⁶⁵ As for freedom from sexual violence in particular, the Protocol explicitly obliges states parties to ‘ensure the right of women with disabilities to freedom from violence, including sexual abuse.’¹⁶⁶ However, the African Youth’s Charter requires states parties to ‘enact and enforce legislation that prohibit all forms of violence, including sexual abuse.’¹⁶⁷ Similarly, the African Youth’s Charter, contains a provision for physically and mentally disabled persons. Accordingly, states parties including South Africa and Tanzania are required to recognise PWDs rights which include the right to freedom from sexual violence.¹⁶⁸

¹⁵⁵ Viljoen & Biegon (n 148 above) 13.

¹⁵⁶ The African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1981).

¹⁵⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁵⁸ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).

¹⁵⁹ African Youth Charter, (2006).

¹⁶⁰ Viljoen and Biegon (n 148 above) 13.

¹⁶¹ Viljoen and Biegon (n 148 above) 13.

¹⁶² n 37 above.

¹⁶³ n 157 above, African Children’s Charter, art 13(1).

¹⁶⁴ n 157 above, African Children’s Charter, art 16(1).

¹⁶⁵ n 158 above, African Women’s Protocol, art 23.

¹⁶⁶ n 158 above, African Women’s Protocol, © University of Pretoria

¹⁶⁷ n 159 above, African Youth’s Charter, art 24(1).

¹⁶⁸ n 159 above, African Youth’s Charter, art 24(1).

One more important document is the great lakes region's Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (great lakes Protocol or Protocol).¹⁶⁹ Although limited to countries of great lakes region, the Protocol is of particular importance to PWDs in Tanzania. Furthermore, although the Protocol focuses on sexual violence against women and children; it is beneficial to women with disabilities (WWDs) and children with disabilities (CWDs) who constitute the vast majority of PWDs who are often sexually victimized than men with disabilities (MWDs) and non-disabled persons generally. One particular important provision is its broad and human rights-based definition of 'sexual violence.'¹⁷⁰ Accordingly, sexual violence constitutes any 'act which violates the sexual autonomy and bodily integrity. Sexual violence covers such acts, including but not limited to rape, sexual assault, grievous bodily harm, assault or mutilation of female reproductive organs, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and harmful practices. As regards harmful practices, the Great Lakes Protocol adopts a broad approach that perceive sexual violence as inclusive of all behaviour, attitudes and or practices which negatively affect the fundamental rights of women and children.'¹⁷¹ Nevertheless, as regards enforced sterilisation, the Protocol is a response to PWD's subjection to sterilisation measures as a result of society's misunderstanding on the capabilities that PWDs might have in caring and providing for their children.

Further acts constituting sexual violence includes, sexual exploitation or the coercion of women and children to provide sexual comfort, trafficking in, and smuggling of women and children for sexual slavery or exploitation. It goes further as to mention forced abortions¹⁷² or forced pregnancies of women and girl children, considering the myth that PWDs are incapable parents, the Protocol has laid a foundation for measures at national levels to curb forced abortion for PWDs.

Nevertheless, as regards access to justice, member states are obliged to ensure criminal procedures that are sensitive to the needs of the victims and survivors of sexual violence. It clearly proposes that prosecution of persons accused of crimes of sexual violence be undertaken in such modalities including giving of evidence in camera, or by video links,¹⁷³ etc. these measures are often appropriate for PWDs who are often vulnerable to intimidation and abusive legal processes.

2.6. Conclusion

Unlike Tanzania, South Africa is acclaimed for its progressive rights-based Constitution. Despite this progress, PWDs are yet confronted by barriers that impede them from taking an active role not only in

¹⁶⁹ Adopted at the International Conference on the Great Lakes Region (2006).

¹⁷⁰ n 169 above, art 1(5).

¹⁷¹ n 169 above, art 1(5) (i).

¹⁷² n 169 above, art 1(5) (m).

¹⁷³ n 169 above, art 6(5).

creating a violence-free community but also from assuming an active role in the justice system. The situation in Tanzania is even more problematic for the Constitution does not even explicitly prohibit discrimination against PWDs in its non-discrimination provision. Although understandable that the constitution does protect ‘every person,’ express mention of PWDs, would have added value in the protection of PWDs against any discriminatory act such as sexual violence and a much more guaranteed barrier-free accessible justice for PWDs.

Both South Africa and Tanzania do retain laws, regulations and policies that perpetuate discrimination against PWDs. They largely reinforce a medical model of disability, the impact of which, PWDs are less likely to challenge their exclusion from the mainstreams of community. In this connection, there are still laws that regard PWDs as ‘incompetent persons,’ consequently, PWDs cannot even testify for violation of their own rights, let alone taking active role in the investigation of crimes that constitutes violation of their rights. It is therefore significant to note that for PWDs, the experience of reporting a crime, contributing in the investigation, follow-up and actively participate in the trial process can be a difficult one; often structural and attitudinal barriers can mean that PWDs fail to effectively access justice. Barriers in this sense do undermine the role of criminal justice systems in protecting the rights of, and providing redress to PWDs.

CHAPTER THREE

Policy and legal framework on sexual violence and access to justice for Persons with Disabilities in South Africa and Tanzania

3. Introduction

This chapter provides an analysis of policy and legal framework regarding sexual violence and access to justice for PWDs. Ideally, policies and legislative framework should be developed to address the prevalence of stereotypical assumptions and untold discrimination against PWDs in South Africa and Tanzania.

For Tanzania, it was not until July 2004, that the government through the Ministry of Labour, Youth Development and Sports, adopted the National Policy on Disability (NPD)¹⁷⁴ supposedly the outcome of many years of consultations with disability stakeholders.¹⁷⁵ Much as the government had no clear disability policy, yet to some extent Tanzania has been actively involved in both international and local initiatives that address disability issues. At the international level, Tanzania is a state party to various disability specific United Nations instruments which include the Declaration on the Rights of People with Disabilities (1975),¹⁷⁶ the Convention on the Rights of the Child (1989)¹⁷⁷ and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).¹⁷⁸ Nevertheless, Tanzania has signed and ratified the UNCRPD¹⁷⁹ on 30 March 2007 and 10 November 2009 respectively. 10 November 2011 was the due date for Tanzania's initial report under section 35 of the UNCRPD, however, for unknown reasons, no report was submitted for consideration before the Committee on the Rights of Persons with Disabilities.

On the other hand, South African disability framework evolved over a number of years and as some argue, 'certain components of this framework originated in the political dispensation before 1994.'¹⁸⁰ Overall, South Africa has successfully created an enabling environment for policy and

¹⁷⁴ n 61 above, 1.

¹⁷⁵ n 61 above, see the Preface to the policy.

¹⁷⁶ n 49 above.

¹⁷⁷ A/RES/44/25 of 20 November 1989.

¹⁷⁸ A/RES/48/96 of 20 December 1993.

¹⁷⁹ n 1 above.

¹⁸⁰ ANV Staden 'A strategy for the employment of persons with disabilities' submitted in fulfilment of the requirements for the degree PhD in labour relations management, Faculty of economic and management sciences, University of Pretoria, (2011) 112.

legislative development in the field of disability.¹⁸¹ Nevertheless, South Africa has undertaken several initiatives including developing and adopting the White Paper on an Integrated National Disability Strategy (INDS), and the adoption of the Plan of Action for the African Decade of People with Disabilities, as well as the adoption of the recent Policy on Disability. South Africa also actively participated in the development of the UNCRPD and the establishment of the Equality Courts.¹⁸² However, as was the case for Tanzania, South Africa whose due date for its initial report was 30 November 2009, no report was submitted for consideration by the Committee on the Rights of Persons with Disabilities.

The INDS among other things, highlights the often shortcomings in laws, it states that, laws often fail to protect the rights of PWDs and or through laws, barriers are created that inhibits PWDs from accessing equal opportunities.¹⁸³

In South Africa, 27 April 1994 was the time when discrimination began to face a serious fight in law¹⁸⁴ and I would add, in policy. It was the date the interim constitution of South Africa came into operation with its provisions guaranteeing equal protection to all people including PWDs,¹⁸⁵ on 4 February 1997, the 1996 Constitution officially replaced the interim constitution; the latter nevertheless retains equality as a fundamental constitutional value in close terms to that of the interim Constitution.¹⁸⁶ Furthermore, it is clear in its preamble that the Constitution is adopted with the aim to creating a society based on social justice and fundamental human rights. As some argue, the 1996 Constitution ‘plays a vital role in providing a bridge between unjust past and a just future.’¹⁸⁷ It is in this Constitution that ‘achievement of equality’ for all is mentioned as one of the South Africa’s foundational values.¹⁸⁸ There is therefore, no justification for discriminatory treatment faced by PWDs in whatever aspect of life including criminal justice sector.

¹⁸¹ AK Dube ‘the role and effectiveness of disability legislation in South Africa’
<http://www.dfid.gov.uk/r4d/PDF/Outputs/Disability/PolicyProject_legislation_sa.pdf> (accessed on 10 September, 2012).

¹⁸² Created under section 16, Equality Act (n 78 above).

¹⁸³ South African Government Information, ‘National crime prevention strategy: summary’ 4
<<http://www.info.gov.za/otherdocs/1996/crime1.htm#6>> (accessed 15 September 2012).

¹⁸⁴ Staden n 180 above, 115.

¹⁸⁵ Interim Constitution, Sec 8.

¹⁸⁶ Staden n 180 above, 115.

¹⁸⁷ Staden n 180 above, 115.

¹⁸⁸ n 73 above, Sec 1(a).

3.1. The policy framework on sexual violence against PWDs

South Africa had in 1996 released the National Crime Prevention Strategy (NCPS),¹⁸⁹ which was then followed by the South African Policy on Disability.¹⁹⁰ This latter policy was particularly created to build upon the NCPS,¹⁹¹ as such, it focuses on security and welfare for PWDs¹⁹² and further highlights on the need of increased inter-departmental co-operation on disability-related issues.¹⁹³ CWDs and WWDs are particularly mentioned as more subject to sexual violence under the policy.¹⁹⁴ The relevance of these documents to PWD's and their vulnerability to sexual violence is of critical importance. For instance, one of the objectives of the NCPS is to bring together all departments involved in crime control and prevention and the coordination of their activities.¹⁹⁵ As pointed out in the preceding chapter, coordination between agencies is particularly important for PWD's free violence life and subsequent access to justice.¹⁹⁶ Yet, as pointed out above, overall, South Africa has successfully created an enabling environment for policy development in the field of disability and sexual violence.¹⁹⁷ The Sexual Offences Act¹⁹⁸ for instance, clearly makes provisions for the adoption of a national policy framework to regulate all matters in the Act,¹⁹⁹ including the manner in which sexual offences must be dealt with in a co-ordinated and sensitive manner.²⁰⁰ Furthermore, the Act establishes the committee known as the 'Inter-sectoral Committee for the Management of Sexual Offence Matters.'²⁰¹ Accordingly, the author is of the view that, the committee with its mandate to developing and compiling a draft national policy framework,²⁰² and its power to make recommendations to the Minister with regard to the amendment of the national policy framework,²⁰³ makes this so called 'policy framework,' yet potentially rich for better protection of PWDs against sexual violence.

¹⁸⁹ n 183 above.

¹⁹⁰ South African Policy on Disability.

¹⁹¹ n 190 above, 16.

¹⁹² n 190 above, 9.

¹⁹³ n 190 above, 2.

¹⁹⁴ n 190 above, 13.

¹⁹⁵ n 183 above, 2.

¹⁹⁶ Shaw (n 113 above).

¹⁹⁷ n 77 above, sec 62(1) &(2).

¹⁹⁸ n 77 above.

¹⁹⁹ n 77 above, sec 62(1).

²⁰⁰ n 77 above, sec 62(1).

²⁰¹ n 77 above, sec 63(1).

²⁰² n 77 above, sec 65(1).

²⁰³ n 77 above, sec 65(2).

On its part, the Government of Tanzania has also put in place a National Plan of Action for the Prevention and Eradication of Violence against Women and Children (Plan of Action)²⁰⁴ to be operative for the period 2001-2015. Nevertheless, as it appears, although PWDs are not the plan's focus point, potentials exist that PWDs will significantly benefit therein especially considering the fact that the Plan of Action focuses on women and children generally which certainly includes WWDs and CWDs. Furthermore, the Plan of Action is envisioned to creating a society free from among other vices, sexual violence against women and children including WWDs and CWDs who constitutes a large majority of PWDs who are often victims of sexual violence.²⁰⁵

The Plan of Action recognises the existence of discriminatory legislation²⁰⁶ and particularly mentions inadequate dissemination of sexual violence-related laws as one of the challenges towards their full implementation.²⁰⁷ The author is of the view that, inadequate dissemination often stems out of inadequate information and communication and lack of coordination between agencies. To this end, inadequate dissemination leads to an increased legal illiteracy among PWDs which is fatal for PWDs effective access to justice. Nonetheless, as one of its stated objectives the Plan of Action promises to ensure provision of among other benefits, easily accessible information to women and children including WWDs as well as CWDs as a way to addressing sexual violence.²⁰⁸

3.2. The legal framework on sexual violence against PWDs

Despite being a criminal offence, sexual violence is a human rights issue.²⁰⁹ This is because sexual violence jeopardises the body security and violates the rights to one's autonomy including sexual autonomy, this was re-affirmed by the Supreme Court of Appeal of South Africa in *DPP v Prins*.²¹⁰ For this reason section 12(1) (c) of the Constitution of South Africa may be regarded as of particular importance, it provides that, everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence.²¹¹ This provision is important since it may be read to refer to everyone including PWDs.²¹² The court in *S v Baloyi*²¹³ affirmed the state's obligation to protect the right of everyone including the right of PWDs to freedom from sexual violence. Equally,

²⁰⁴ National Plan of Action for the Prevention and Eradication of Violence against Women and Children (2001 – 2015).

²⁰⁵ n 204 above, 8.

²⁰⁶ n 204 above, 8.

²⁰⁷ n 204 above, 8.

²⁰⁸ n 204 above, 8.

²⁰⁹ n 73 above, sec 12(1) (c).

²¹⁰ *DPP v Prins* (369/12) [2012] 106 ZASCA (15 June 2012) para 1, the court emphasized that sexual violence jeopardises the right to dignity and bodily integrity.

²¹¹ n 73 above, sec 12(1) (c).

²¹² n 73 above, secs 12(1)(c) and 12(2)(b).

²¹³ *S v Baloyi* 2000 (2) SA 425 (CC).

the court in *Carmichele v Minister of Safety and Security*²¹⁴ emphasised that, the South African Bill of Rights has a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

Tanzanian constitution on the other hand, equally provides that, ‘every person is entitled to respect and protection of his person.’²¹⁵ Unlike the South African Constitution, it is doubtful whether the drafters of Tanzanian constitution had in mind sexual violence as a violation of the right to ‘security of person.’ The doubt stems from article 16(2) which establishes an obligation on the state’s authority to ‘lay down legal procedures regarding the circumstances, manner and extent to which the rights under article 16(1) may be encroached,’ if the right to the ‘security of person’ as provided under article 16(1) of the constitution covers within its parameters, the freedom from sexual violence, then would it be correct to argue that article 16(2) suggests a possibility that circumstances may arise justifying encroachment of the right to freedom from sexual violence? If the answer is not in affirmative, then the Constitution of Tanzania does not prohibit sexual violence in article 16(1). However, this question seem to have been settled in *DPP v Daudi Pete*²¹⁶ in which, the court made it clear that, effective enjoyment of constitutional rights demands a broad possible interpretative approach to fundamental rights. Nevertheless, from this same principle, it will certainly be correct to argue that the protection of the rights to freedom from sexual violence stems from other provisions of the constitution such as those providing for the rights to respect of one’s dignity²¹⁷ and the right to freedom from inhuman or degrading treatment.²¹⁸

In South Africa, the Sexual Offences Act²¹⁹ constitutes a single legislation that which comprehensively addresses sexual violence.²²⁰ This enactment was meant to ‘deal with all legal aspects of or relating to sexual offences in a single statute.’²²¹ Furthermore, the Act has introduced a new statutory offence of sexual assault applicable to all forms of sexual violation without consent. Accordingly, any person who unlawfully and intentionally sexually violates another person without the latter’s consent is guilty of the offence of sexual assault.²²² Nevertheless, despite its general relevance for PWDs, the Act has enacted comprehensive provisions dealing with sexual offences against persons who are mentally disabled, as such, any sexual conduct perpetrated against a mentally disabled person for financial or any other reward, favour or compensation, renders the perpetrators

²¹⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

²¹⁵ n 74 above, art 16(1).

²¹⁶ *DPP v Daudi Pete* (1993) TLR 22.

²¹⁷ n 74 above, art 12(2).

²¹⁸ n 74 above, art 13(6)(e).

²¹⁹ n 77 above.

²²⁰ sec 2(a), Act’s long title.

²²¹ sec 2(a).

²²² sec 5 (1).

therein, guilty of an offence of being involved in the sexual exploitation of a person who is mentally disabled.²²³ In this regard, the Act is clear that, these new offences are created to address the particular vulnerability of persons who are mentally disabled in respect of sexual abuse or exploitation.²²⁴

The Act further, creates a duty to report sexual offences committed against persons who are mentally disabled,²²⁵ it is important to note that, breach of this obligation is an offence under the Act and upon conviction the offender will be liable for a fine and or imprisonment for a period not exceeding five years or both fine and imprisonment.²²⁶ As noted above, the Act also makes provisions for which national policy framework regulating all matters relating to sexual violence in the Act could be adopted,²²⁷ in this regard, the Act is explicit that, the policy framework to be adopted, would cover such matters as the manner in which sexual violence offences must be dealt with in a 'co-ordinated and sensitive manner.'²²⁸ In this sense the importance of a coordinated and sensitive approach for sexual offences involving PWDs is of untold importance.

In its preamble, the Act recognises the disadvantageous impact sexual violence has upon vulnerable persons including PWDs.²²⁹ The preamble further recognises the past inefficiency of South African legal framework on sexual violence that failed to 'deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences.'²³⁰ Equally important, the Act defines 'sexual act' to mean 'an act of sexual violation',²³¹ which is the concern of this research. It further defines "sexual violation" in a very broad term to mean any act which causes direct or indirect contact²³² between the genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal or any object including any object resembling or representing the genital organs or anus of a person or an animal.²³³ The contact may also include those involving the mouth of one person²³⁴ and that of another person,²³⁵ or the mouth of one person and the genital organs or anus of another person or, in the case of a female, her breasts.²³⁶

²²³ sec 23.

²²⁴ Act's long title.

²²⁵ sec 54(2)(a).

²²⁶ sec 54(2)(b).

²²⁷ sec 62(1).

²²⁸ sec 2(a)(iii).

²²⁹ Preamble to the Act, para (i).

²³⁰ Preamble to the Act, para (iv).

²³¹ sec 1(1).

²³² sec 1 (1)(a).

²³³ sec 1 (1) (a)(i).

²³⁴ sec 1 (1)(a) (ii).

²³⁵ sec 1 (1)(a) (ii)(bb).

²³⁶ sec 1 (1)(a)(ii) (aa).

Nevertheless, the contact may also involve any other part of the body of another person, other than the genital organs or anus of that person or in the case of a female, her breasts²³⁷ which could be used in an act of sexual penetration,²³⁸ cause sexual arousal or stimulation²³⁹ or be sexually aroused or stimulated thereby;²⁴⁰ or any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal²⁴¹ or mouth of the complainant and the genital organs or anus of an animal.²⁴² Sexual violation also includes the masturbation of one person by another person,²⁴³ or the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.²⁴⁴

The Act, under section 1(3) (d) (v) and section 57(2), creates a presumption of inability to appreciate the nature of the sexual act in favour of ‘a person who is mentally disabled.’ Accordingly, any act of ‘sexual violation’ as defined above, if committed against a person who is mentally disabled; the perpetrator(s) therein, will not be expected to plead a defence of consent hence relieving the PWD who is a victim of sexual violence of the undue and often protracted judicial process of establishing existence or non-existence of consent. Regarding the definition of ‘sexual acts’ and ‘sexual violations’ as set out in the Act, the author is of the view that, the Act has broadly and adequately defined these terms, as such, all potential forms of sexual violence have been captured including those that could be perpetrated against PWDs.

Unlike the South African Sexual Offences Act, Tanzania has in place the Penal Code,²⁴⁵ which contains in its Chapter XV, the former Sexual Offences Special Provisions Act (SOSPA) of 1998 as a comprehensive law dealing with sexual violence offences in Tanzania. The Penal Code in large measures, is a gender-based law as such, it still recognises such offences like rape,²⁴⁶ abduction²⁴⁷ and indecent assaults²⁴⁸ as offences against women or girls thereby leaving MWDs inadequately protected against sexual violence. This law, except for section 137 which unacceptably refers to PWDs as ‘imbecils’ and ‘idiot’ it does not contain any meaningful provision for PWDs. However, the Act until recent, contained provisions which increased chances for sexual violence, section 138(6) for instance,

²³⁷ sec 1 (1)(a)(ii) (cc).

²³⁸ sec 1 (1)(a)(ii)(cc) (aaa).

²³⁹ sec 1 (1) (a)(ii)(cc) (bbb).

²⁴⁰ sec 1 (1)(a)(ii)(cc) (ccc).

²⁴¹ sec 1 (1)(a)(ii) (dd).

²⁴² sec 1 (1) (a)(iii).

²⁴³ sec 1 (1) (b).

²⁴⁴ sec 1 (1) (c).

²⁴⁵ n 100 above.

²⁴⁶ n 100 above, sec 130.

²⁴⁷ n 100 above, secs 133 & 134.

²⁴⁸ n 100 above, sec 135.

except for its being repealed and replaced by section 178 (b) of the 2009 Law of the Child Act,²⁴⁹ allowed marriage of a girl of less than twelve years in accordance with the applicable custom of the tribe or religion and on the condition that such marriage shall not be consummated before the girl attains the age of twelve years.²⁵⁰ Problematic as it appears, the situation becomes worse when a girl who is also PWD fall into such a relationship, this is due to the society's perceptions which regards PWDs valueless, hence for a girl who is also a PWD, marriage is an exceptionally good fortune not to be disturbed irrespective of the treatment a girl is subjected into. Another shortcoming with the Penal Code is that, unlike the South African sexual offences Act, the Penal Code is characterized by the lack of a comprehensive and broad approach to sexual violence offences. As such, the Penal Code allows impunity for wide array of sexual oriented conducts, which would otherwise be punished but unpunished for such narrow approach.²⁵¹

Despite significant shortcomings in addressing sexual violence for PWDs in the Penal Code, yet, the Persons with Disabilities Act²⁵² only inadequately address sexual violence for PWDs. This new Act, has nevertheless exacerbated the problem to some categories of PWDs, as for instance, its definition of 'mental disability' to mean inability to meet individual and societal needs by reason of emotional and mental retardation,' largely embraces the medical model of disability, consequently promoting isolation of PWDs and, or the use of carers for PWD's livelihood and wellbeing, both potentially perilous for sexual violence against PWDs. There is also the Law of the Child Act which in addition to prohibiting discrimination against children founded on grounds of disability,²⁵³ it also contemplate a life free from all forms of child abuse.²⁵⁴ Child abuse is defined under the Act to refer to contravention of the rights of the child by such means including sexual violence.²⁵⁵ This Act, despite its limited scope, it is relevant in the current study as CWDs are often the most victims of sexual violence. Furthermore, section 96(1) of the Act obliges the social welfare officer on reasonable suspicion of a child abuse to undertake whatever necessary stapes in support of the police officer to protect the child from any harm.

²⁴⁹ Act No. 21 of 2009.

²⁵⁰ n 100 above, sec 138(6).

²⁵¹ The Penal Code does not even explicitly mention sexual violence which is often an umbrella term for sexual-related offences.

²⁵² n 76 above.

²⁵³ n 249 above, sec 5(2)

²⁵⁴ n 249 above, sec 3.

²⁵⁵ n 249 above, sec 3.

3.3. The policy framework on access to justice for PWDs

In South Africa the situation faced by PWDs is one which is characterized by extreme levels of inequality and discrimination. Barriers exist that create conditions not only leading to discrimination but also marginalisation and unequal access to justice for PWDs.²⁵⁶ To this end, PWDs' situation in South Africa is certainly due to the country's historical faulty policies. As noted by the South Africa Human Rights Commission, 'policies and practices adopted by the apartheid government served not only to ignore these rights, but also to set up and maintain mechanisms which contributed to further abuse and discrimination.'²⁵⁷ However, the introduction of the Bill of rights and strong justice institutions like the Constitutional Court, created mechanism to address past inequalities and to ensure that the rights of all people including PWDs are protected. It is this desire to addressing the past inequality that has given a particular impetus for South Africa to develop a policy framework on access to justice,²⁵⁸ a framework that is largely contained in the overarching NCPS,²⁵⁹ and the Policy on Disability, both supplemented by the Service Charter for Victims of Crime in South Africa (victim's charter or charter).²⁶⁰

The NCPS is built on four pillars of which, pillar one concerns the national programmes for criminal justice system with its aims to among others 'improve the access of dis-empowered groups to the criminal justice process' and 'improve the service delivered by the criminal justice process to victims through increasing accessibility to victims and sensitivity to their needs.'²⁶¹ However, although the NCPS has its own flaws, it significantly encouraged 'interdepartmental collaboration and an approach which emphasized on information giving as a key tactic to achieve streamlining in the criminal justice system.'²⁶² It would be noted that, for PWDs who are victims of sexual violence, inter-agency coordination and an improved accessible information mechanism that respect diversity is of vital significance for effective access to criminal justice system.

²⁵⁶ SAHRC Policy Paper (1997) 'disability'

<http://www.sahrc.org.za/home/21/files/Reports/SAHRC%20policy%20paper%205_disability.pdf1997.pdf> (accessed 18th September, 2012).

²⁵⁷ n 256 above, 1.

²⁵⁸ E Pelser and J Rauch, 'South Africa's criminal justice system: Policy and priorities'

<<http://www.csvr.org.za/wits/papers/papepjr.htm>> (accessed on 2 August 2012).

²⁵⁹ n 183 above.

²⁶⁰ Service charter for victims of crime in South Africa,' <<http://www.npa.gov.za/files/Victims%20charter.pdf>> (accessed on 10 September, 2012).

²⁶¹ n 183 above, pillar one, 7.

²⁶² n 183 above, 7.

The Policy on Disability, on the other hand, lists accessibility as one of its underpinning principles;²⁶³ it further defines accessibility in broad terms covering infrastructural access, access to information and environmental access. Accordingly, accessibility refers to a way to easily and safely approach, use and benefit from a physical building, facility or service, appropriately set to enhance participation and to enjoy and exercise rights and responsibilities by all citizens.²⁶⁴ Courts and Courthouses and police services are beyond doubt covered under this provision, as such, they are particularly required to ensure effective accessibility to their services by PWDs. Equally important for PWD's access to justice is the principle of 'enhanced inter-sectoral collaboration,'²⁶⁵ this, potentially creates better environment for collaboration among justice sector institutions.

The policy further contains provisions for victim's empowerment; it recognises an exceptional vulnerability of PWDs in the first place and explicitly demands response to PWD's needs in respect of their individual disabilities.²⁶⁶ The policy highlights such responses to include developing protocols and guidelines for crises intervention in situations of abuse, developing services and programs to protect PWDs against abuse, and developing and implementing communication strategy that will inform PWDs of the victim empowerment services available.²⁶⁷ Under the policy, management and implementation structures includes, identifying areas of co-ordination and integration for all role-players.²⁶⁸ These players, are accordingly required to ensure provision of integrated and holistic services²⁶⁹ that will include those directly related to access to justice for PWDs.

In its complementary role, the victim's charter²⁷⁰ although it does not explicitly mention PWDs, yet, it is of particular significance for PWDs as it speaks to victims of crimes generally. The charter is a consolidation of the legal framework relating to the rights of and services provided to victims of crime in South Africa,²⁷¹ as such, it emphasises on the victim-cantered approach. The charter is of vital importance for PWDs as it aims to ensure victim empowerment through meeting victim's particular needs.²⁷² Under the Charter, victims are reminded of their constitutional rights among others, to offer and receive information regarding the progress of their cases throughout the investigation, trial, and sentencing process.²⁷³ Considering how access to information could be

²⁶³ n 190 above , 19.

²⁶⁴ n 190 above , 49.

²⁶⁵ n 190 above , 22.

²⁶⁶ n 190 above , 37.

²⁶⁷ n 190 above , 37-38.

²⁶⁸ n 190 above , 40.

²⁶⁹ n 190 above , 41.

²⁷⁰ n 260 above.

²⁷¹ n 260 above, see Charter's cover page. © University of Pretoria

²⁷² n 260 above, see Charter's foreword, p 4.

²⁷³ n 260 above, p 9.

problematic for PWDs; the victim's charter empowers PWDs to demand appropriate information in an appropriate format that meet the particular needs of the victim.

It would be recalled, PWDs are often vulnerable to intimidation and abusive legal processes,²⁷⁴ in this regard, the victim's charter reiterates victim's rights to protection against intimidation and abuses, in which case, the charter promises victims who are also witnesses, of the possibility to be placed in a witness protection programme where intimidation and or abuses are likely to inhibit the victim from fully participating in the justice process.²⁷⁵

As noted above it was not until 2004, when Tanzania adopted the National Policy on Disability (NPD).²⁷⁶ Among other things the policy recognises the strong association between disability on one hand and prejudice as well as negative attitude towards PWDs on the other hand.²⁷⁷ Regarding access to justice, the NPD contains a policy statement recognising the impact of negative attitudes towards PWDs which often inhibits PWDs from participating in social activities including justice process.²⁷⁸ It nonetheless proposes a policy solution that; the negative perception needs to be corrected by availing PWDs every opportunity to ensure equality between them and non-disabled.²⁷⁹ The measures for implementation include 'information sharing,'²⁸⁰ and creating a mechanism to raise 'public awareness on the needs, rights, abilities and contribution of PWDs.'²⁸¹ For accessing built environment such as courthouses and police stations, the policy clearly recognises that;

There is a cause and effect relationship between disability and environment. Almost all public buildings are built to cater for the needs of the non-disabled. Stairs, narrow doors and toilets are inaccessible to the majority of disabled persons.²⁸²

As a solution to this, the policy in the first place recognises that, 'effective participation of people with disabilities ... largely depends on environmental accessibility,'²⁸³ in this regards, the policy has therefore offered a solution that requires a firm collaboration between the government and stakeholders to take 'measures to ensure that public buildings such as courthouses and police stations are accessible for PWDs.'²⁸⁴ The policy further mentions as its objectives, the need for review and

²⁷⁴ Edwards *et al* (n 47 above) 119.

²⁷⁵ n 260 above, 11.

²⁷⁶ n 61 above.

²⁷⁷ n 61 above, 1.

²⁷⁸ n 61 above, 12.

²⁷⁹ n 61 above, 12.

²⁸⁰ n 61 above, 12.

²⁸¹ n 61 above, 12.

²⁸² n 61 above, 7.

²⁸³ n 61 above, 17.

²⁸⁴ n 61 above, 17.

amendment of laws that are not PWDs-friendly as well as the need to improve service delivery²⁸⁵ which include justice delivery. It should be noted that, the NPD only emphasised and built upon the 2003 Construction Industry Policy (CIP)²⁸⁶ in which, ‘lack of appropriate building regulations and standards’ is particularly mentioned as one of the contributing factors to poor quality of products and services that does not pay regards to diversity.²⁸⁷ The author is of the view that, the relevance of the NPD and CIP on access to justice for PWDs is vital, although the latter falls short of precision regarding PWDs due to the fact that, the CIP although addresses the need for ‘appropriate building regulations and standards,’ this is not linked to PWDs as they are not even mentioned therein. Nevertheless, alongside these policies, the government continued to implement the 2001-2015 Plan of Action.²⁸⁸

The Plan of Action promises to ensuring among other things the provision of affordable, accessible and specialized legal aid services for speedy justice²⁸⁹ in line with the well-known legal canon that ‘justice delayed is justice denied,’ this would also remind us of the argument in chapter one above that, inadequate justice-delivery process, often subjects PWDs to an experience of violence that which is more severe and long lasting.²⁹⁰ Furthermore, as pointed out in the preceding chapter, adequate knowledge on PWDs-related issues is particularly important for effective access to justice for PWDs. The Plan of Action recognises this demand and further stresses on the need for trainings and awareness building among actors in the administration of justice.²⁹¹

The Plan of Action is however not without its own flaws, as noted above, it focuses on eradication of violence against women and children, as such, it does not pay any considerable attention on PWDs generally, except for women with disabilities (WWDs) and children with disabilities (CWDs). It is important to note that, the Plan of Action even fails to considerably address the particular needs of WWDs and CWDs, who are often victims of sexual violence rather in a far greater scale than men with disabilities (MWDs), and women and children without disabilities generally.

²⁸⁵ n 61 above, 10.

²⁸⁶ Construction Industry Policy (2003).

²⁸⁷ n 286 above, sec 8(2)(1)(a).

²⁸⁸ n 204 above.

²⁸⁹ n 204 above, 11.

²⁹⁰ n 14 above.

²⁹¹ n 204 above, 11.

3.4. The legal framework on access to justice for PWDs

The Constitution of South Africa provides for the rights to accessing the court for any violation, resolution of which requires the application of laws.²⁹² Thus, it is clear from this provision that PWDs are entitled to approaching the court for violation of any law that would otherwise be guaranteeing their rights to freedom from sexual violence. The author observes that, this is rather a wider approach toward protection of all persons including PWDs from all forms of violence including sexual violence. It is important to note that, South African Constitution itself guarantees the right of everyone to live a life ‘free from all forms of violence’²⁹³ including sexual violence.

On the other hand, the Tanzanian Constitution under article 30(3) is to the effect that, any person claiming that any provision in the Bill of rights or any law concerning his rights has been, is being or is likely to be violated may institute proceedings for redress in the High Court. It is without doubt that this provision equally entitles any person including PWDs to have recourse to courts of law for violation of their rights in the Bill of rights and any other law concerning one’s rights. The problem however, arises as to whether the Tanzanian constitution entrenches or at least recognises the right to freedom from sexual violence?

As argued above there is doubt as to whether the drafters of Tanzanian constitution had in mind sexual violence as violation of the right to ‘security of person’ or at least recognising sexual violence as a violation of human rights. The doubt stems from two provisions of the Constitution itself. First; article 16(2) establishes an obligation on the state authorities to lay down legal procedures regarding the circumstances, manner and extent to which the rights under article 16(1) may be encroached, if the rights to the security of person as provided under article 16(1) of the Constitution covers in its parameters the freedom from sexual violence, then would it be correct to argue that article 16(2) suggest a possibility that circumstances may arise justifying encroachment of the right to freedom from sexual violence? If the answer is not in affirmative, then the Constitution of Tanzania does not address sexual violence in article 16(1).

Easing the situation, the court in the *DPP v Daudi Pete*,²⁹⁴ preferred the broad interpretative approach to fundamental rights, as such, prohibition of sexual violence could be inferred in the rights to security of person,²⁹⁵ dignity²⁹⁶ and the right to freedom from inhuman or degrading treatment.²⁹⁷

²⁹² n 73 above, sec 34.

²⁹³ n 73 above, sec 12(1)(c).

²⁹⁴ n 216 above.

²⁹⁵ n 74 above art 16(1).

²⁹⁶ n 74 above, art 12(2).

²⁹⁷ n 74 above, art 13(6)(e).

This, seemingly valid proposition gives rise to the second argument, this comes from article 30(3) of the Constitution which provides that, any violation of any of the rights in the Bill of rights or any other law concerning one's rights or duties owed to him, could only be instituted in the High Court. It is from this provision that, in Tanzania, the High Court is the court of first instance for adjudication of human rights disputes. In contrast, the practice as to sexual violence offences indicates otherwise. Acts of sexual violence falls purely within criminal law framework whose violation calls for the use of appropriate courts with original jurisdiction to try sexual violence offences. The High Court, being not such appropriate court of first instance for sexual violence crimes, contradicts any possibility that it regards sexual violence as a human rights issue. Again, the court has in *Elizabeth Stephen and another v Attorney General*²⁹⁸ settled the position, accordingly, if available, other adequate means of redress for alleged violation of human rights should be pursued. This however, was not the court's own invention, instead, the court only put into practice section 8(2) of the Basic Rights and Duties Enforcement Act²⁹⁹ which is to that effect. It follows therefore that; trial by magistrate's courts of sexual violence offences does not necessarily deny a human rights status of an offence in question.

3.5. Discrimination and access to justice

As already indicated, there is strong link between discrimination and inaccessible justice for PWDs. Section 9(2) of the 1996 South African constitution and article 13 of the Tanzanian constitution guarantees the right to equality before the law. PWDs are therefore equally entitled to accessing the court on equal basis with non-disabled persons. However, unlike the Constitution of South Africa, Tanzanian Constitution does not expressly extend the right to equality to include equal 'benefit of the law',³⁰⁰ as such, the author observes that equality of benefit of the law is of critical importance for its orientation towards attainment of the substantive equality between PWDs and non-disabled persons.³⁰¹ Nevertheless, in terms of section 9(2) of the South African Constitution, laws are to be enacted that are designed to protect categorise of persons including PWDs from all forms of unfair discrimination in all aspects of life including justice sector.

Accordingly, in response to a Constitutional demand for legislative measures,³⁰² Equality Act³⁰³ was enacted in South Africa to promote the rights to equality and avoidance of unfair discrimination. In this connection, it may be noted that, for PWDs, the Equality Act implies

²⁹⁸ *Elizabeth Stephen and another v Attorney General* (2006) (HC) TLR 404.

²⁹⁹ Cap 13 R.E. 2002.

³⁰⁰ n 73 above, sec 9(1) explicitly extend to 'benefits of the law.'

³⁰¹ Sinclair and Du Plessis (n 105 above) 15 © University of Pretoria

³⁰² n 73 above, sec 9 (4).

³⁰³ n 78 above.

advancement from the discriminatory history PWDs have all along gone through,³⁰⁴ as the Act contains guiding principles including ‘access to justice to all persons in relevant judicial and other dispute resolution forums.’³⁰⁵ Nevertheless, the Act expressly prohibits any form of unfair discrimination on ground of disability including any contravention of the rules, standards, and regulations governing environmental accessibility.³⁰⁶ This is particularly important considering the fact that built environments such as Courthouses and police stations needs to meet specific requirement for PWDs to be able to accessing them. It is to be noted that, the Equality Act entitles every person to accessing the equality court for any conduct that unfairly discriminate against them³⁰⁷ in which case, the equality court is empowered to make among other orders, an order to comply with the provisions of the Act.³⁰⁸

Unlike the Constitution of South Africa, Tanzanian constitution although guarantees the right to equality before the law,³⁰⁹ it does not specifically demand a particular enactment that will give effect to its letters and spirit as it does the Equality Act of South Africa to the 1996 Constitution of South Africa. The author observes that, lack of a specific law seeking to promote equality envisioned in the constitution often results in unproductivity of the equality provision in the Constitution.

3.6. Legislative framework on access to built environment focusing on PWDs

Article 9(1) of the UNCRPD obligate states parties to undertake measures to ensure access for PWDs to physical environments. Nationally, the South African Policy on Disability recognises that, systematic deprivation and disadvantages experienced by PWDs are largely a result of barriers and restrictive environments ranging from restrictive access to buildings and inappropriate modes of communication.³¹⁰ Section 24 of the Bill of Rights in the South African Constitution guarantees that, ‘everyone has the right to an environment that is not harmful to their health or well-being.’ This provision certainly requires accessible built environments in particular courthouses and police stations. Nevertheless, it is unfair discrimination under the Equality Act to design and construct structures in contravention of the accessibility standards³¹¹ contained in the South African Bureau of Standards Code of practice³¹² and regulations thereof. It may be noted that, there is no similar provision in the

³⁰⁴ n 256 above, 29.

³⁰⁵ n 78 above, sec 4(1)(b).

³⁰⁶ n 78 above, sec 9(b).

³⁰⁷ n 78 above, sec 20(1).

³⁰⁸ n 78 above, sec 20.

³⁰⁹ n 74 above, art 13.

³¹⁰ n 190 above, 12.

³¹¹ n 78 above, sec 9 (b).

³¹² South African Bureau of Standards Code of Practice 0400-1987.

Constitution of Tanzania, as such accessibility in Tanzania is not a constitutional human right, and instead a favour often guaranteed in law only as a mere legal right.

Currently, the main law which regulates accessibility to built environments in Tanzania is the Persons with Disabilities Act.³¹³ This Act, especially its accessibility provisions, is a response to the 2004 Construction Industry Policy which in section 8(2) (1) acknowledge the lack of laws seeking to regulate access and built environments appropriate for PWDs. In section 4 (e), the Act entrenches ‘accessibility’ as one of its basic principles. Like the CIP, and latter emphasised by the NPD, sections 40 and 49 of the Persons with Disability Act legally demands ‘preparation of code of practice, standards and guidelines on accessibility’ which until the date of this research neither of these were put in place. Responding to the question ‘why this inaction?’ Architect Steveen Masangia blamed the obvious government’s claim of financial constrictions. Furthermore, it is clear from section 35(2) that, regulations shall be adopted prescribing accessibility of buildings, and further clear from section 35(3) that, following the adoption of the regulations, ‘every public or private body shall comply with the regulations.’ The Act further sets a responsibility on all heads of public bodies to ensure that their services are accessible to PWDs,³¹⁴ as such, the Act is obligatory for the head of police and judiciary to ensure appropriate physical accessibility to police stations and courthouses respectively. It is important to note that, potentially the Act has far reaching consequences for PWDs as it requires under section 35(4) that all public buildings currently not in conformity with the Act be aligned with accessibility requirement under the Act.

The position in South Africa is a more advanced one; in 2002 a joint legislative review project by South African Human Rights Commission (SAHRC) and the South African Federal Council on Disability (SAFCD) has identified specific legislative deficiencies that, if corrected, would guarantee access for PWDs to buildings including courthouses, police stations and other facilities.³¹⁵ The project is a result of the implication that the 1996 South African Constitution and other pro-rights laws have upon planning and development of built environments. In South Africa, access and built environments is regulated by two main laws i.e. Building Standards Act,³¹⁶ and The National Building Regulations.³¹⁷ The former is the enabling Act under which the National Building Regulations are made. It provides a framework within which the Regulations can be administered, monitored and enforced. The National Building Regulations, are made in terms of section 17(1) of the Building Standards Act, it is important to note that the regulations are meant to ensure that, buildings are

³¹³ n 76 above.

³¹⁴ n 76 above, sec 36.

³¹⁵ n 256 above, 35.

³¹⁶ Act 103 of 1977 last amended in 1989.

³¹⁷ National Building Regulations, made under section 17(1) of the Act 103 of 1977, (n 316 above).

designed and built to be convenient for users including PWDs.³¹⁸ Furthermore, there is also the South African Bureau of Standards (SABS) 0400 Code of Practice for the Application of the National Building Regulations. This is a non-statutory and therefore non-binding set of guidelines giving technical information for the practical application of the National Building Regulations.

The SAHRC and SAFCD's project have identified among other deficiencies, that the framework contained 'insufficient definition of disability to meet the specific requirements of various disabled user groups,' this finding was informed of the fact that, Part S of the National Building Regulations primarily provided for disabled users in wheelchairs who only constitutes twenty-five percent of PWDs³¹⁹ in South Africa, as such, the framework did not sufficiently accommodate the majority PWDs who equally confronts multiple but diverse barriers in terms of physical accessibility including access to justice infrastructures. The result of the review project by SAHRC and SAFCD is the 2008 amendment of the National Building Regulations; in particular the substantial amendment of Part S, which largely addresses many of the shortcomings contained in the previous framework, the amended regulations defines 'persons with disabilities' in similar terms to those under the UNCRPD, accordingly 'persons with disabilities;'

Means those persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers might hinder their full and effective participation in society on an equal basis with others³²⁰

It is argued that, in terms of 'physical accessibility', the built environment framework in South Africa has accommodated the paradigm shift towards a social model of disability. Alongside this definition, the regulation includes express provisions that ensure safe entrance for PWDs into buildings and ability to use all facilities within the buildings,³²¹ the facilities includes toilets which should also be adequate in number.³²² PWDs must be able to access buildings from all approaches 'via the main entrance'³²³ and should lead to the ground floor.³²⁴ For the buildings that have lifts, it is mandatory that, lifts must be able to accommodate the needs of PWDs.³²⁵ Within the buildings, all commonly used 'paths and travel' must allow obstacle-free passage that would accommodate the needs of vision impaired persons and those in wheelchairs among all other groups that would have special needs.³²⁶ Further, the regulations require all buildings with parking facilities that

³¹⁸ n 256 above, 1.

³¹⁹ Statistics South Africa (1996).

³²⁰ n 317 above, regulation AZ2.

³²¹ n 317 above, regulation S1(1)(a).

³²² n 317 above, regulation S1(3).

³²³ n 317 above, regulation S1(1)(b).

³²⁴ n 317 above, regulation S1(1)(b).

³²⁵ n 317 above, regulation S1(1)(d).

³²⁶ n 317 above, regulation S1(1)(e).

accommodates more than fifty motor vehicles to include parking facility appropriate for PWDs which is better suited to provide access to the ground floor or main entrance.³²⁷

Despite these inclusive provisions, the regulations yet fall short of expected minimum guarantees, as was indicated under the report on the review project, the framework failed, and the author still maintains that, the framework fails to fully mainstream disability in its various fundamental provisions. In this regard, the author agrees with SAHRC's report that, the framework's failure to cross-reference Part S with other sections of the National Building regulations, results in further loopholes, anomalies and misconceptions in the application of regulations. As an example, Part B of the regulations provides for 'structural designs' whereas, Part B1 (1) requires that 'Any building and any structural element or component thereof shall be designed to provide strength, stability, serviceability and durability ...' the author is particularly concerned that, this cross-cutting provision should have included 'accessibility' as one of the design requirement. Not only that but also, Part M, regulation M1 (b) (c) which provides for the general requirements for stairways, requires all stairway to 'permit safe movement of persons from floor to floor, and have dimensions appropriate to its use.' This provision speaks to all persons generally, as such, the author is concerned that, this provision should have been expanded to include a specific mention of PWDs or at least as suggested in SAHRC's report, there should have been a cross-reference to Part S of the regulations which is exclusively devoted for accessibility needs of PWDs.

As regards access and built environment for PWDs, neither in South Africa nor in Tanzania, litigation has not been a significant route toward the elimination of physical barriers to effective access to justice for PWDs. The author is concerned that, if strategically utilized, litigation could significantly influence access and built environments. As an example, the U.S. Supreme Court in 2004 held in *Tennessee v. Lane*³²⁸ that individuals are entitled to sue state court systems for failing to comply with the ADA.³²⁹ In this case, George Lane had sued Tennessee for failing to make the county courthouse accessible to persons who rely on wheelchairs. Lane had been jailed for refusing to crawl up the courthouse steps to attend court proceedings.³³⁰ The Supreme Court rejected Tennessee's argument that it was immune from suit and held that Congress was within its power in enacting the ADA as a means of protecting the constitutional right of access to the courts.³³¹

³²⁷ n 317 above, regulation S1(2).

³²⁸ *Tennessee v. Lane* 541 U.S. 509 (2004).

³²⁹ n 51 above.

³³⁰ n 328 above, para 514.

³³¹ n 328 above, paras 518, 531.

3.7. Conclusion

As noted earlier in this chapter, sexual violence and inaccessible justice for PWDs is often the result of faulty policies and laws. These laws and policies do often facilitate discrimination, consequently perpetuates victimisation for PWDs into sexual violence. It is also important to note that, the same policies and laws are equally responsible for inaccessible justice for PWDs.

This research has uncovered that, unlike South Africa, Tanzania is falling far behind despite the enactment of the Persons with Disabilities Act. As was highlighted earlier, the Penal Code inadequately addresses sexual violence, yet, the Persons with Disabilities Act did not sufficiently respond to these shortcomings in the Penal Code, and instead, it only implicitly addresses sexual violence for PWDs. These could ordinary be inferred in provisions that impose obligations on the government to establish, operate, manage or maintain settlement for the protection of persons with disabilities,³³² and those imposing the duty to report infringements of the rights of PWDs. These provisions except broadly and liberally interpreted, only implicitly seek to protect PWDs from sexual violence.

South Africa, unlike Tanzania, is yet to have dedicated disability legislation, thus operating in the field of disability in a fragmented legal framework. In this regard, this research is premised on a belief that, South Africa would have done further far reaching developments if a comprehensive law on disability were to be enacted.

³³² n 76 above, secs 18(1) & 22(1).

CHAPTER FOUR

Conclusions and Recommendations

4. Findings

This research has interrogated the extent to which policies and laws in Tanzania and South Africa address sexual violence against PWDs and guarantee access to justice for PWDs in sexual violence situations. This study proceeded on the assumption that persons with disabilities experience discrimination in various forms, including sexual violence and obstacles in accessing justice but that there could be gaps in the laws and policies aimed at protecting the persons with disabilities. In chapter three of the study, the assumption has been proven that indeed, persons with disabilities face discrimination and experience sexual violence. From the preceding, the study presents the following findings.

4.1. Laws and policies in South Africa and Tanzania do not adequately protect PWDs from sexual violence

In terms of statistics, data on the prevalence of sexual violence particularly against PWDs in South Africa and Tanzania are not consistent.³³³ Between 1994 and 2010 both South Africa and Tanzania adopted legislation and policies addressing discrimination against PWDs. However, in South Africa, a wide body of laws and policies has been developed in the field of sexual violence and access to justice for PWDs, particularly the 1996 Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The latter was enacted to give meaning to the spirit of the constitution, and the development of legally binding access and built environment standards, as well as the establishment of the Equality Courts. Policy developments in South Africa include the adoption of the white Paper on Disability on an Integrated National Disability Strategy, the Policy on Disability, National Crime Prevention Strategy, and the Service Charter for Victims of Crime in South Africa.

However, the fragmented nature of the legal framework for protection of the rights of PWDs in South Africa must be highlighted. The country lacks a dedicated disability law, as such; the multiplicity of laws, regulations, codes, and standards hinder any meaningful and effective enforcement and monitoring mechanism on the protection of PWDs.

³³³ See chapters 1 & 2.

Tanzania has some policy developments in the field of sexual violence and access to justice. These include the formulation of the National Plan of Action for the Prevention and Eradication of Violence against Women and Children, National Policy on Disability and the Construction Industry Policy. In terms of legislation, Tanzania has enacted the Persons with Disabilities Act³³⁴ which does not adequately provide full protection to PWDs in terms of legal protection from sexual violence. The Act does not make any express provision for sexual violence; consequently sexual violence could only be inferred from such provisions like those tending to guarantee safe settlement for PWDs.

The Penal Code of Tanzania remains the main legislation addressing sexual violence in Tanzania. However, unlike the South African Sexual Offences Act, which broadly addresses sexual violence, the Penal Code, only criminalises a handful of conducts as sexual offences, leaving a wide array of conducts that are equally sexually oriented going unpunished. In addition, the Penal Code only refers to PWDs³³⁵ as ‘imbecile’ and ‘idiot.’ These expressions reinforce the medical model of disability by placing much emphasis on the limitations of an individual PWD without regard to the external factors usually beyond the reach of the PWD in question.

4.2. Laws in Tanzania do not provide adequate access to justice for PWDs in sexual violence situation

Despite its fragmented nature, the South African legal framework at least provides adequate access to justice for victims of sexual violence, for instance, in terms of physical accessibility, South Africa has a legal mechanism that seeks to guarantee physical accessibility to courthouses and police stations, these include the Building Standards Act, Building Regulations and the SABS Code of Practice. Despite this development, the framework yet fails to cross-reference Part S with other sections of the National Building regulations, as a result of which it gives way to gaps and misconceptions in the application of regulations. As an example, Part B of the regulation provides for ‘structural designs’ requirements, whereas, it requires that ‘[a]ny building and any structural element or component thereof shall be designed to provide strength, stability, serviceability and durability but it does not include ‘accessibility’ as one of the design requirement.

Nevertheless, both South Africa and Tanzania have not employed litigation mechanism as an appropriate route toward the elimination of barriers to effective access to justice for PWDs.³³⁶ this mechanism has proved usefulness in other jurisdictions particularly in America where, location of the

³³⁴ n 76 above.

³³⁵ n 100 above, sec 137.

³³⁶ Litigation has proved usefulness in America, consider the case of *Tennessee v lane*, (n 328 above).

court in the second floor of the building was challenged for its potentials to denying physical access to it, for some particular categories of PWDs particularly those relying on wheelchairs.³³⁷

Nevertheless, despite these shortcomings in the legal and policy framework in Tanzania and South Africa, opportunities are present, giving way to start afresh and build a sustainable, coherent and trusted policy and legal framework that would adequately address sexual violence and access to justice for PWDs. In this regard, the study proposes the following recommendations:

4.3. General recommendations

- 4.3.1. South Africa and Tanzania should establish a comprehensive education programme for PWDs. This should be addressed to PWDs, carers and professionals working in the disability field. Education programmes must focus not only as they do now on obligations, but also on PWD's rights for them to understand their rights.
- 4.3.2. Civil society organisations particularly the media sector should be made to act as an oversight and awareness raising bodies. This way, sexual violence and access to justice for PWDs would be addressed much effectively.

4.4. Country specific recommendations

4.4.1. To South Africa

- I. South Africa should adopt a comprehensive, dedicated law on disability that will consolidate the existing legal framework on the protection of the rights of PWDs. In this way, the rights of PWDs will be promoted in a more streamlined way.
- II. Under the said legal framework, South Africa should establish a centralized monitoring mechanism to oversee the compliance and coordination of disability issues throughout the country.

³³⁷ See chapter three, (n 328 above).

4.4.2. To Tanzania

- I. In terms of accessibility, responsible organs in Tanzania should enact or give way for enactment of the National Building Standards, Building Regulations and Codes of Practices that will regulate access to physical structures.
- II. Since the process to enact a new constitution is underway, discrimination on grounds of disability should be explicitly mentioned in this new constitution to be promulgated in 2014.
- III. The new constitution should explicitly provide for the right to freedom from sexual violence and to have guiding principles including accessibility to physical infrastructures.
- IV. The new Constitution should adopt a wider possible human rights approach in its Bill of Rights. It should cover a broad range of rights and clearly establish principles that will give way to broader interpretative approach favouring persons with disabilities and other vulnerable groups.

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