

**Achieving equality and accessibility for persons with visual impairments:
uncovering deficiencies in South African consumer protection and labelling legislation**



**UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA**

Michal Danielle van den Berg (120 361 46)

LLB (*Cum Laude*) 2015
University of Pretoria

LLM (*Cum laude*) 2017
University of Pretoria

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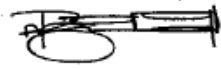
Supervisor: Professor A. Kok

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120 36 046

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SUMMARY

This thesis delves into the intricate landscape of product labelling legislation in South Africa, shedding light on its inherent inaccessibility concerning product labels and accompanying leaflets. By meticulously examining the stipulations set forth in the legislation, this research identifies instances where the prescribed methods of label presentation pose significant barriers for persons with visual impairments. South Africa, as a party to the United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as “*the Convention*”) is bound by specific accessibility obligations. Among these obligations lies the imperative to ensure the accessibility of product labels, a facet that is pivotal in empowering persons with visual impairments to make informed choices. This research draws attention to the alignment between South Africa’s commitment to the Convention and its responsibility to address the accessibility challenges within its product labelling framework. The legislation governing product labelling encompasses a myriad of requirements dictating how information should be presented on labels and leaflets. Through a meticulous analysis of these stipulations, it becomes evident that the prescribed methods predominantly cater to individuals with full visual capacity, inadvertently marginalising those with visual impairments. This raises concerns about the legislation’s compliance with South Africa’s obligations under the Convention. South Africa’s commitment to the Convention is the cornerstone of the argument presented in this research. The Convention emphasises the principles of non-discrimination, equality, and accessibility, urging its signatories to take actions to eliminate barriers and ensure equal opportunities for persons with disabilities. The accessibility of product labels emerges as a critical aspect in this context, representing the tangible application of these principles in the realm of consumer rights. The research argues that the South African government, in upholding its commitment to the Convention, is duty-bound to address the accessibility challenges inherent in its product labelling legislation. While acknowledging the complexities of amending established legal frameworks, this thesis advocates for a proactive approach in aligning the legislation with international standards of inclusivity.

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List of abbreviations

American with Disabilities Act (ADA)

Americans with Disabilities Amendment Act (ADAA)

Department of Women, Children and Persons with Disabilities (DWCPD)

Department of Women, Youth and Persons with Disabilities (DWYPD)

Disabled People's International (DPI)

Disabled People South Africa (DPSA)

Disability Rights Movement (DRM)

Committee on Economic, Social and Cultural Rights (UNCESCR)

Convention on the Rights of the Child (CRC)

European Convention on Human Rights (ECHR)

European Union (European Union)

Elimination of All Forms of Racial Discrimination (ICERD)

Human Rights Committee (HRC)

Inter-departmental Co-ordinating Committee on Disability (ICCD)

International Classification of Disease (ICD)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

International Classification of Functioning, Disability and Health (ICF)

Information and Communications Technology (ICT)

International Organization for Standardization (ISO)

International Year of Disabled Persons (IYDP)

The Constitution of the Republic of South Africa, 1996 (Constitution)

National Strategic Framework on Universal Design and Access (Framework on Universal Design and Access 2020)

National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (Framework on Reasonable Accommodation 2020)

National Human Rights Institutions (NHRI)

Non-Governmental Organisations (NGOs)

Office of the High Commissioner for Human Rights (OHCHR)

Organisations of Persons with Disabilities/ Disabled People's Organisations/ Parents Organisations (DPO)

Optional Protocol to the CRPD (OP-CRPD)

Promotion of Equality and Prevention of Unfair Discrimination Act, No. 52 of 2002 (Equality Act)

South African Bureau of Standards (SABS)

South African National Standard (SANS)

United Nations (United Nations)

United Nations Convention on the Rights of Persons with Disabilities (Convention)

International Covenant on Civil and Political Rights (ICCPR)

Universal Declaration of Human Rights (UDHR)

White Paper on an Integrated National Disability Strategy (White Paper 1997)

White Paper on the Rights of Persons with Disabilities (White Paper 2015)

World Health Organization (WHO)

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Chapter 1: Introduction

1. Background

Persons with visual impairment¹ often lead independent lives, relying on themselves for their daily activities, including the purchase and use of critical products. This includes the purchasing and consumption of medicinal products, which could be lifesaving or, conversely, fatal. In order to safely consume these products, it is crucial for persons with visual impairment to have access to essential information, such as the product name, dosage, warning labels, usage instructions, and suitability. However, the need for access to product information extends beyond medicinal products and applies to other consumer goods that may pose a danger if their information is not readily available, such as food products containing allergens like peanuts or disinfectants containing toxins such as sodium hypochlorite. Unfortunately, in South Africa, almost none of these products require accessible product information² on labels³ or leaflets⁴ for persons with visual impairment.

Upon conducting initial research, it was observed that the labelling regulations for products in South Africa fail to account for a crucial aspect: they only cater to the needs of sighted persons, particularly concerning the identification of unsafe products.⁵ All persons, including those who are visually impaired, have the right to be protected from hazards and harm, as well as the right to access product information on labels to make informed decisions about the products they choose to purchase, use, or consume. It is crucial that these rights are safeguarded. In South Africa, such rights are infringed due to a lack of accessible product information. This results from the *de jure* meaning and requirement of “legible” or “writing” contained in specific legislative provisions, regulations, or standards regulating the labelling of consumption-based,⁶ hazardous,⁷ poisonous,⁸ or inherently unsafe products.⁹ The product information on the label or leaflet must always be words in writing or pictograms (to assist illiterate persons) but not in an accessible [legible] manner (to assist persons with visual impairment). Consequently, the labelling requirements currently in

¹ This term is used because it is employed by the Committee on the Convention in its General Comments - the United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024). See General Comment No. 2 Committee on the Rights of Persons with Disabilities (2014) CRPD/C/ GC/2, pp. 1 – 14 at p. 7.

² “Product information” will be taken to mean any information concerning the product. This term is utilised because it is a term that is the culmination of the requirements contained in section 3 of SANS 289: 2016 *Labelling requirements for prepackaged products (prepackages) and general requirements for the sale of goods subject to legal metrology control*.

³ A “label” will be taken to mean any product information written, printed, affixed to, applied to, attached to, embossed on, or appearing upon a package containing any product giving any information concerning the product or the contents of the product on the product’s standalone physical product, its inner or outer package or container. This term is employed because it is defined as such in the Medicines and Related Substances Act, No. 101 of 1965, Foodstuffs, Cosmetics, and Disinfectants Act, No. 54 of 1972 and Hazardous Substances Act, No. 15 of 1973.

⁴ A “leaflet” will be taken to mean any product information written, printed, affixed to, applied to, attached to, embossed on, or appearing upon paper containing any product giving any information concerning the product or the contents of the product attached or within the proximity of the product. This term is employed because it is a term that is a culmination of the requirements outlined in the Medicines Act: General Regulations, GN R.859 of 25 Augustus 2017 (Government Gazette No. 41064).

⁵ Illiterate persons are protected, to an extent, as pictograms on the product itself or, on an accompanying leaflet prove to be a useful illustrative tool in assisting them to consume or use the product safely. Shetty, S, Sunita, S, Shetty, I, *Empowering the visually impaired by customized Braille prescription and thus reducing medication errors* Vol. 69, (2021), Indian J Ophthalmol, pp. 1388 – 1390 at p. 1388, the article found that persons with visual impairments are most likely to have difficulty in managing medications when compared to sighted persons.

⁶ Medicines and Related Substances Act, No. 101 of 1965 (hereafter referred to in the footnotes as the “*Medicines Act*”); Pharmacy Act, No. 53 of 1974 hereafter referred to in the footnotes as the “*Pharmacy Act*”); Foodstuffs, Cosmetics, and Disinfectants Act, No. 54 of 1972 (hereafter referred to in the footnotes as the “*Foodstuffs Act*”).

⁷ Hazardous Substances Act, No. 15 of 1973 (hereafter referred to in the footnotes as “*Hazardous Substances Act*”).

⁸ Foodstuffs Act.

⁹ Medicines Act; Foodstuffs Act; and Hazardous Substances Act.

effect for these products only consider, and therefore, by extension, only protect and benefit persons who can physically see the product's information on the product's label or leaflet.

2. Research problem

The problem at hand pertains to the deficiency in the legislative framework that regulates labelling requirements for products that are consumption-based,¹⁰ hazardous,¹¹ poisonous,¹² or inherently unsafe for consumption,¹³ which fails to provide equal protection and benefits to persons with visual impairment.

Persons with visual impairment are entitled to not just the same advantages as those with sight but also the same safeguards against hazards and harm inherent in unsafe products. To achieve this, it is essential to provide persons with visual impairment with all the necessary information pertaining to the product. However, the current requirement for product information on the label or leaflet of a product is limited to written words or pictograms, both of which fail to consider other accessible formats for persons with visual impairment to intake the product information.¹⁴ In other words, there is a failure to consider methods other than standard written text or images to ensure that persons with visual impairment can access and understand the product information effectively. When purchasing consumption-based, hazardous, poisonous, or inherently unsafe products not required by law to have accessible product information legible to persons with visual impairment, then arguably, such provisions unfairly discriminate against persons with visual impairment on the grounds of disability.

Currently, persons with visual impairment are in an inaccessible labelling law environment. As a result, they are being met with inequality and a lack of access to crucial information on commonly used products without any accommodating measures. Consequently, the legislative framework of South African product labelling cannot remain unchanged.

3. Research question

- 3.1. What is the content and scope of substantive equality and disability jurisprudence within South African law?
- 3.2. What is the meaning, role, and impact of reasonable accommodation and accessibility in international human rights law, as it applies to disability?
- 3.3. In which manner does the legislative framework regulating product labelling of consumption-based, hazardous, poisonous, or inherently unsafe products unfairly discriminate against persons with visual impairment?

¹⁰ Medicines Act; Pharmacy Act; and Foodstuffs Act.

¹¹ Hazardous Substances Act.

¹² Foodstuffs Act.

¹³ Medicines Act; Foodstuffs Act; and Hazardous Substances Act.

¹⁴ Shetty, S, Sunita, S, Shetty, I, (2021) at p. 1388, the study done in India with 100 persons with visual impairment ranging from all genders and ages reflected in the article the following statistics: among medication-handling challenges for persons with visual impairment, 89 percent of persons were unable to read the prescription labels, 58 percent of persons did not know the name of the medication and 96 percent of persons did not tell health – care providers when they faced difficulties in handling their medication.

- 3.4. To what extent ought accessibility obligations and reasonable accommodation measures be applied to ensure that persons with visual impairment are not unfairly discriminated against?

4. Assumptions

- 4.1. With the advent of the Interim Constitution, South Africa adopted a substantive conception of equality, directly influencing disability jurisprudence. The substantive conception of equality does not focus on the same treatment. The essence of substantive equality vests because it requires the law to consider people's varied circumstances, which needs particular attention to ensure a similarly favourable outcome for all. Substantive equality is not ignorant of the past and, as such, urges due consideration of material inequality and systemic disadvantage. The Constitutional Court refers to the concept of substantive equality in rejection of the formal conception of equality and confirms that the Constitution is transformative, providing a substantive conception of equality. It is, therefore, this substantive conception of equality that South Africa adopts.

The three main models of disability, namely the medical, social, and human rights models, are beneficial for understanding formulations of disability. In short, the medical model reduces disability to a medical phenomenon of “impairment”. Disability is understood as an individual and medical phenomenon resulting in limited functioning seen as defective. As of late, the medical model has become primarily unusable, and consequently, most have turned to the social model. In stark contrast, the social model can be summarised as not solely focusing on the impairment and cure – it contests that society imposes a disability on persons with impairments. The human rights model is based on a new understanding of persons with disabilities¹⁵ as human rights holders and subjects. Similar to the social model, it also locates the “problem” not with the individual but with society. Furthermore, it focuses on an individual's fundamental rights and inherent human dignity. The social and human rights models are valuable tools for achieving equality, participation, inclusion, quality of life, and dignity for persons with disabilities.

Since disability is exceptionally diverse and constantly evolving, drafting a harmonised definition that suits everyone is challenging. Nevertheless, even at an early stage, there was reportedly a “general agreement” that if a definition of disability was included in the United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as the “*Convention*” or the “*CRPD*”),¹⁶ it should reflect the social model of disability. The social model found expression in the final text of the Convention provided in paragraph (e) of the Preamble, which reads: “[d]isability...results from the 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”. Unfortunately, South Africa has yet to adopt a harmonised definition of disability. While disability is a listed ground of equality protection under section 9(3) of the Constitution, no definition is provided.

¹⁵ This term is used consistently in this thesis because it is utilised by the Convention. See the Preamble and Articles 1 – 34 of the Convention.

¹⁶ United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024).

South Africa embodies the most progressive approaches to conceptualising disability, expressly rejecting the medical model and favouring the social model – going even further and adopting a human rights model. With the medical model being expressly rejected, both the social and human rights models are valuable tools for achieving substantive equality for persons with disabilities. South Africa has joined progressive jurisdictions because its doctrine of substantive equality is well-placed to translate the social model of disability into an effective model for dismantling barriers against persons with disabilities.

- 4.2. To achieve equality for persons with disabilities, it is necessary to adhere to both accessibility obligations and reasonable accommodation measures. While they work in tandem, it's crucial to differentiate between the two. The responsibility to provide reasonable accommodation should not be conflated with the legal mandate to attain accessibility.

Whether a support measure falls under accessibility or reasonable accommodation depends on the circumstances in which it's provided. If it's broad, progressive, and generalised, it falls under accessibility. If it's individualised and immediate, it falls under reasonable accommodation.

Disability equality can progressively be achieved through compliance with accessibility obligations and immediately achieved through the implementation of reasonable accommodation measures.

- 4.3. The current labelling requirements of consumption-based, hazardous, poisonous, or inherently unsafe products in South Africa are enacted by labelling legislation, regulations, and standards. These measures aim to ensure the health and safety of the general public but fall short of ensuring the same protection and benefit for persons with visual impairment.

National legislation regulating product labelling consequently unfairly discriminates against persons with visual impairment based on disability, which is strictly prohibited nationally in section 9 of the Constitution and internationally in Article 5 of the Convention.

- 4.4. Accessibility promotes full and effective equal participation by improving access to product information. Therefore, mandatory accessibility standards related to labelling ought to be established and progressively implemented to ensure the accessibility of product information on labels and leaflets for all persons, especially for persons with visual impairments.

The implementation of accessibility standards can, however, not in all situations guarantee access to rights for all persons with disabilities. Since the individual needs and specific requirements of each person with a disability will vary, reasonable accommodation measures may still be required in individual cases even where accessibility standards are already developed and set. Persons with rare impairments that were not considered when the accessibility standards were developed or who do not use the methods offered to achieve accessibility can request a reasonable accommodation that falls outside the scope of any accessibility standard.

5. Literature review

This thesis will begin by examining the substantive equality provisions and disability jurisprudence in South Africa, which serve as the foundation for discussing the lack of accessibility and reasonable accommodation measures for persons with visual impairment. The next section will analyse the labelling legislation, specifically identifying the requirements for product labelling and how they unfairly discriminate against persons with visual impairment. The final section will propose possible solutions, with a focus on mandatory accessibility requirements for product labelling while also taking into consideration the Constitution and national and international laws. In conclusion, the thesis aims to identify instances of unfair discrimination against persons with visual impairment within specific legislation and recommend changes to the current legal framework.

5.1. The content and scope of substantive equality and disability jurisprudence within South African law

5.1.1. Introduction

From its inception, the Constitutional Court has emphasised two important principles for interpreting and applying the right to equality in South Africa. Firstly, a formal approach to equality is insufficient, given the country's history. Secondly, a substantive approach is required. This means that while treating people equally is important for achieving equality, it does not necessarily mean treating them the same in all circumstances. *Hugo* argues that if society insists on equal treatment based on equal worth and freedom alone, true equality will not be achieved.¹⁷ Consequently, substantive equality has become integrated into South African law and has been developed through case law and academic analysis.

5.1.2. Equality in a democratic South Africa

Equality and non-discrimination are the most widely recognised human rights in international law.¹⁸ All countries forming part of the United Nations have legal obligations to promote and protect equality and non-discrimination.¹⁹ However, in the same breath, equality is a widely contested concept.²⁰ The answer to “what is equality, or what ought equality be” differs depending on a jurisdiction's philosophical, political, or other prevalent thought.²¹ It would be ignorant to

¹⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para. [41] (hereafter referred to as “*Hugo*”).

¹⁸ MacNaughton, G, *Untangling equality and non-discrimination to promote the right to health care for all* Vol. 11(2), (2009), Health and Human Rights Journal, pp. 1 – 103, at p. 48; In *Brink v Kuisboff N.O.* 1996 (4) SA 197 (CC) at para. [34] where O'Regan J, states that “[t]he concepts of ‘equality before the law’ and ‘discrimination’ are widely used in international instruments” (hereafter referred to as “*Brink*”); Article 4 and Article 7 of the Universal Declaration of Human Rights of 1948; Article 3 and Article 26 of the International Covenant on Civil and Political Rights of 1966; Article 4 of the African Charter on Human and Peoples Rights of 1989.

¹⁹ MacNaughton, G, (2009) at p.48.

²⁰ See Albertyn, C, & Goldblatt, B, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality* Vol. 14, (1998), South African Journal on Human Rights, pp. 249 – 276 at pp. 258 – 260; Ackermann, L.W.H, *Equality and the South African Constitution: The Role of Dignity* (2000), Heidelberg Journal of International Law, pp. 537 – 556 at p. 542; Chaskalson, A, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order* Vol. 16, No. 2, (2000), South African Journal on Human Rights, pp. 193 - 205, at p. 204; *Hugo* at para. [41]; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [32] (hereafter referred to as “*Prinsloo*”); the Constitutional Court supported the approach in *Hugo*; *Dawood v Minister of Home Affairs*; *Sbalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 946 (CC) at para. [35] (hereafter referred to as “*Dawood*”).

²¹ *Prinsloo* at para. [18]. In *Brink*, O'Regan, J, concluded, after having investigated the jurisdictions of Canada, India, the United States of America, and various other international conventions on equality, that the wording of the various conventions and

transplant the conception of or approach to equality of another jurisdiction into our equality jurisprudence, considering our conception of equality is a product of our egregious history.²² The epilogue to the Interim Constitution²³ posited the notion of equality as one of the fundamental ideas that would transform a divided nation into one grounded on democratic values, social justice, and the protection of fundamental human rights.²⁴

5.1.2.1. Substantive equality within a South African context

A central tenant of substantive equality is context. In *Government of the Republic of South Africa v Grootboom*,²⁵ the Constitutional Court held as follows: “[I]nterpreting a right in its context requires the consideration of two types of contexts. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context”.²⁶ The notion of context includes text,²⁷ historical and political context,²⁸ and the contemporary context of the reality within which an individual or group exists (or otherwise put, the complainant’s position).²⁹ Substantive equality is not ignorant of the past and, as such, urges due consideration of material inequality and systemic disadvantage.³⁰ The Constitution compels us to dismantle existing patterns of disadvantage.³¹

Aligned to, or even forming part of, context is the relevance and importance of difference within substantive equality. The fact that human beings can never be identical is indisputable, which requires differentiating between persons depending on what is intended and the purposes sought to be achieved through such differentiation.³² This then invokes the need to regulate rational and fair differentiation across differences; that is, a need for a substantive conception of equality, inclusive of formal equality.³³ However, formal equality connotes sameness, equal, or similar treatment for persons in the same situation.³⁴ It requires that the law treats individuals equally, regardless of the varying circumstances they may be in.³⁵ The formal concept of equality claims that inequalities can be eliminated by extending all rights and entitlements by commonly accepted standards.³⁶ Substantive equality, in turn, requires the law to take into account a person’s varied

constitutions, as well as the interpretations given to those constitutions, are different thereby representing different conception of and approaches to equality.

²² See *Prinsloo* at para. [19]. In *Brink* at para. [39] O’Regan, J, ascribed the difference between national constitutions and conceptions of equality to the text and the different historical circumstances as well as jurisprudential and philosophical understandings of equality.

²³ The Constitution of the Republic of South Africa Act, No. 200 of 1993 (hereinafter referred to as the “*Interim Constitution*”).

²⁴ Rapatsa, M, *The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?* Vol 11(2), (2015), Acta Universitatis Danubius Juridica, pp. 1 – 114 at p. 18.

²⁵ 2001 (1) SA 46 (CC).

²⁶ *Ibid.* at para. [22].

²⁷ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para. [26] (hereafter referred to as “*Walker*”).

²⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) at para. [10] (hereafter referred to as “*Makwanyane*”).

²⁹ *Hugo* at para. [112] and *Walker* at paras. [45] – [49].

³⁰ *Brink* at para. [42].

³¹ *Van Heerden* at para. [25]; *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para. [28], [32], [34] – [35] & [37] (hereafter referred to as “*Hoffman*”), where the Constitutional Court considered prejudice, stereotyping, and systemic disadvantage.

³² Rapatsa, M, (2015) at p. 21.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

circumstances, which needs particular attention to ensure similar favourable outcomes for all.³⁷ This was emphasised in the *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & others*.³⁸ A substantive conception of equality considers persons' social and economic conditions and historically disadvantaged groups in society.³⁹ Substantive equality asserts that even though we are different, the Constitution should eliminate the adverse effects of such inherent differences.⁴⁰ According to Albertyn and Kentridge,⁴¹ the substantive approach to equality underpins the vision of South Africa's democracy as envisaged and embodied in the Interim Constitution and the Constitution after that. In its expansive outlook, substantive equality seeks to accommodate [differences] and address social and economic disparities among persons or groups of persons, with the view of redressing inequality amongst these persons.⁴² The Constitution informs a conception of equality beyond equal treatment.⁴³ Therefore, the right to equality does not mean that every person must be treated equally in all circumstances.⁴⁴ Substantive equality enjoins the treatment of persons by other persons and the government as equals - not identically or equally - while being cognisant of and taking into account relevant factors such as race, gender, sex, sexual orientation, religion, ethnic origin, and status.⁴⁵ It has become trite that difference is accommodated in substantive equality, recognised⁴⁶ and celebrated.⁴⁷ In the context of (in)equality, the difference is interlaced with the vulnerability of groups of persons on the very basis of group membership alone, in which vulnerability is informed and, to a significant extent, determined by past patterns of disadvantage and stereotyping.⁴⁸ This thesis aims to unpack the existent patterns of disadvantage experienced and suffered by persons with visual impairment.

The remaining aspect of substantive equality that I touch on is its transformative nature. For an unacceptably high number of South Africans, simply surviving the day within a materially unequal society is a struggle. Most South Africans, including those persons with disabilities, live with the aftermath of a calculated and institutionalised oppressive system. Therefore, it follows that since the advent of the Interim Constitution, a process of transformation has started and continues. This process of transformation is not only necessary and integral to the achievement of equality, but it is a constitutional demand “[t]hat our society be transformed from the closed, repressive, racist, oligarchy of the past, to an open and democratic society based on human dignity, equality, and freedom”.⁴⁹ The Constitution is a transformative constitution that provides a substantive conception of equality.⁵⁰ In assessing these two approaches, in the context of the principles and purpose of the Constitution, a mere formal conception of equality risks neglecting the deepest commitments of the Constitution, whereas a substantive concept of equality is supportive of the commitments of the Constitution.⁵¹

³⁷ Rapatsa, M, (2015) at p. 21.

³⁸ *Sodomy* at para. [62].

³⁹ Rapatsa, M, (2015) at p. 22.

⁴⁰ *Ibid.*

⁴¹ Albertyn, C, & Kentridge, J, *Introducing the Right to Equality in the Interim Constitution* Vol. 10, (1994), South African Journal on Human Rights, pp. 149 – 178 at p. 152.

⁴² *Ibid.*

⁴³ Currie, I, & De Waal, J, Equality in Currie, I, & De Waal, J, (Eds.), *The Bill of Rights Handbook*, (2013), at p. 214.

⁴⁴ *Hugo* at para. [41].

⁴⁵ *Prinsloo* at para. [32]; *Walker* at para. [128].

⁴⁶ *Sodomy* at para. [63].

⁴⁷ *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para. [153] (hereafter referred to as “*Pillay*”); *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)* 2006 (1) SA 524 (CC) at para. [60] (hereafter referred to as “*Fourie*”).

⁴⁸ *Immigration* at para. [44].

⁴⁹ Chaskalson, A, (2000) at p. 204.

⁵⁰ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para. [174].

⁵¹ Currie, I, & De Waal, J, (2013) at p. 214.

5.1.3. Exposition of disability

In this discussion, I will delve into the three models of disability influenced by the disability rights movement that aid in the comprehension of disability. Additionally, I will provide a brief overview of the definition of disability and the evolution of these three models, which serve as paradigms for understanding the construction of disability found in the most widely recognised national legislation and international treaties.

5.1.3.1. Models for understanding disability

Three models of disability have been conceptualised—the medical, social, and human rights models. Within the conceptualisation of disability, corresponding conceptions of equality can easily be found. The medical model corresponds with formal equality,⁵² while the social model corresponds to substantive equality, and the human rights model corresponds to transformative equality.⁵³ Over the decades, there have been numerous models of disability, each attempting to understand and define disability.⁵⁴ The most influential models of disability, developed in the United States of America and the United Kingdom during the 1970s and 1980s, have been the medical and social models of understanding disability.⁵⁵ The medical model reduces disability to a medical phenomenon of “impairment”. In contrast, the social model takes a social-contextual approach to disability, seeing “disability as a social construct” and rejects exclusion and denial of rights based on impairment as constructions of disability.⁵⁶ With the adoption of the revolutionary human rights treaty during the late 2000s, the Convention gave rise to a new model, the human rights model of disability.⁵⁷

The medical model views the limitations faced by persons with disabilities due to a medical condition inherent to the person.⁵⁸ It looks for signs of “defects” that prevent persons with disabilities from participating in “normal” life.⁵⁹ Persons with disabilities are viewed by the medical model as having deficiencies that require diagnosis, treatment, and cure.⁶⁰ The medical model adopts a non-disabled perspective as the norm and locates the “problem” of disability in the extent to which the individual differs from that norm. In other words, this conception of disability automatically leads to the person being regarded as abnormal and inferiorly different.⁶¹ The medical

⁵² Degener, T, *Disability in Human Rights Context* Vol. 5(3), (2016), LAWS, pp. 1 – 24 at p. 1 & 17.

⁵³ *Ibid.* She argues that the Convention introduced a new concept of equality, being transformative equality, into international human rights law. Degener, referring to Amadottir, is of the opinion that Amadottir has most compellingly introduced the three equality concepts in the realm of international human rights law describing the Convention as the by-product of these developments. The “newer” human rights model of disability and transformative equality does not replace “older models” of disability or concepts of equality.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Degener, T, (2016) at p. 2 & 19.

⁵⁷ Degener, T, (2016) at p. 2; Worm, I, *A Human Rights – Based Approach to Disability in development* (2012), Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, pp. 1 – 41 at p. 4; Broderick, A, *Of rights and obligations: the birth of accessibility* Vol. 24(4), (2020), *The International Journal of Human Rights*, pp. 393 – 413 at p. 399.

⁵⁸ Bhabha, F, *Disability equality rights in South Africa: concepts, interpretation and the transformation imperative* Vol.25, (2009), *South African Journal on Human Rights*, pp. 218 – 245 at p. 223.

⁵⁹ Pooran, B. D, & Wilkie, C, *Failing to Achieve Equality: Disability Rights in Australia, Canada, and the United States* Vol. 20(1), (2005), *Journal of Law and Social Policy*, pp.1 – 34 at pp. 2 – 3.

⁶⁰ Bhabha, F, (2009) at p. 223.

⁶¹ Ngwena, C, *Deconstructing the definition of ‘disability’ under the Employment Equity Act: Social Deconstruction* Vol. 22(4), (2006), *South African Journal on Human Rights*, pp. 613 – 646 at pp. 626 – 627; De Campos Martel Velho, L, *Reasonable Accommodation:*

model can be broken down into two primary tenets: firstly, a person’s “impairment” can be diagnosed, treated, or potentially rehabilitated through modern medicine and technology. Secondly, it holds that such interventions can only be administered by specific professionals, leaving persons with disabilities reliant on these professionals and, as a result, devoid of complete independence.⁶²

On the other hand, the social model looks at more than just the impairment.⁶³ There is a movement from a narrow, medical view of disability to a new, more comprehensive societal view. The social model views the problem with society and not the “affected” individual.⁶⁴ The felt and experienced limitations of a person with disabilities are not caused by such a person’s inability to function in society but rather the society’s inability to function inclusively for everyone.⁶⁵ The failure of society to consider the needs of persons with disabilities impacts them both individually and collectively as a group. This is because all aspects of society’s structures are built on the assumptions, needs, and experiences of persons without disabilities.⁶⁶

The Convention seeks to bring about a paradigm shift in disability policy based on a new understanding of persons with disabilities as rights holders and human rights subjects.⁶⁷ In terms of the human rights model,⁶⁸ much emphasis is placed on the individual’s fundamental rights.⁶⁹ In other words, the approach taken to a disability must address and develop the fundamental rights of persons with disabilities.⁷⁰ According to Article 1 of the Convention, the purpose of the Convention is “[t]o promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. It is the first human rights treaty that acknowledges that all persons with disabilities are rights holders and prohibits the use of impairment as a justification for denying or restricting those rights.⁷¹ A human rights-based approach to disability implies that all persons are active subjects with legal claims. Persons with disabilities need to participate in all spheres of life equally with persons without disabilities.⁷² As these barriers can be found in all sectors and at any level, a human rights-based approach to disability is relevant for programs in various sectors, including

The New Concept from an Inclusive Constitutional Perspective Vol. 8 (14), (2011), SUR International Journal on Human Rights, pp. 85 – 111 at p. 87; Du Plessis, M., *The social model of disability, rights discourse and the impact of South Africa’s Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments* Vol. 17, (2013), Law, Democracy & Development pp. 202 – 225 at p. 205; Grobbelaar-Du Plessis, I., & Nienaber, A., *Disability and Reasonable Accommodation: HM v Sweden Communication 3/2011* (Committee on the Rights of Persons with Disabilities) Vol. 30(2), (2014), South African Journal on Human Rights, pp. 366 – 379 at p. 379; Bhabha, F., (2009) at p. 223.

⁶² Jackson, M. A., *Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale* Vol. 7 (1), (2018), LAWS, pp. 1 – 21 at p. 4.

⁶³ Ngwena, C., *Developing juridical method for overcoming status subordination in disablism: The place of transformative epistemologies* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 275 – 312 at p. 283.

⁶⁴ Jackson, M. A., (2018) at p. 4; Ngwena, C., (2006) at p. 630; Du Plessis, M., (2013) at p. 206; Basson, Y., *Selected Developments in South African Labour Legislation related to Persons with Disabilities* Vol. 20, (2017), Potchefstroom Electronic Law Journal, pp. 1 – 21 at p. 4; Grobbelaar-Du Plessis, I., & Nienaber, A., (2014) at p. 379; Bhabha, F., (2009) at p. 223.

⁶⁵ Bhabha, F., (2009) at p. 223 – 224.

⁶⁶ *Ibid.* at p. 224.

⁶⁷ Degener, T., (2016) at p. 1 – 2; Worm, I., (2012) at p. 5.

⁶⁸ It can be argued that Degener coined the term “human rights model” between 1999 – 2001, “[T]he human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person’s medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main “problem” outside the person and in society”. See Degener, T., (2016) at p. 3.

⁶⁹ Jackson, M. A., (2018) at p. 6, where the author argues that the human rights model evolved from within “[a] continuum of rights-based thinking”.

⁷⁰ Basson, Y., (2017) at p. 5.

⁷¹ Degener, T., (2016) at p. 1 – 2.

⁷² See Worm, I., (2012) at p. 4 – 5. See Micovic, M. A., *Consumer Right to Product Accessibility* Vol. 54(4), (2020), Zbornik Radova, pp. 1433 – 1452 at p. 1436: without access to the physical product, to information and communication, including information and communications technologies, open or provided to the public, severely impaired persons would not have equal opportunities for participation in their respective societies. There is an obligation on the South African government, and in certain instances on private parties, to ensure the removal of barriers for persons with disabilities. There is an obligation by the bearer of the duty to ensure that the rights-holder has equal access to information on products, especially products that could be fatal to persons with visual impairment.

information, health, education, employment, or governance.⁷³ The emphasis is thus on the person with a disability as an individual with the same rights as all other persons on an equal basis, claiming for “remediation of unequal treatment from the duty bearers”.⁷⁴

5.1.3.2. Defining disability

The definition of a disability is established as being of utmost importance,⁷⁵ essential for protection by the law, allocation of benefits, and affirmative action.⁷⁶ Therefore, a legal definition is necessary. It should be in concert with the lived experience of a persons with disabilities.⁷⁷ This definition should align with the real-life experiences of persons with disabilities.⁷⁸ It will empower the courts to interpret the term effectively and drive essential reforms.⁷⁹ The focus should be on the impact of impairments and their interaction within society.⁸⁰ The goal of a disability definition is to:

“[R]ender a person with disabilities easily identifiable as that the focus of the juridical enquiry is on the alleged conduct and causation rather than proving membership of the protected group”.⁸¹

The three main models of disability, namely the medical, social, and human rights models, are beneficial for understanding formulations of disability.⁸² Given the exceptionally diverse and ever-evolving nature of the concept, it is challenging to draft a harmonised definition that suits all.⁸³ The Convention does not include a formal definition of disability; this term is not defined in Article 2 of the Convention, which contains the Convention’s definitions.⁸⁴ Guidance on its meaning is, however, provided in paragraph (e) of the Preamble, which reads as follows:

“[R]ecognizing that disability is an evolving concept and that disability results from the 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”.

This mirrors a traditional social model interpretation of ‘disability’, which contrasts with the concept of ‘impairment’.⁸⁵ Impairment refers to a physiological dysfunction or limitation in a person’s body or mind, such as a sensory, motor, or cognitive impairment.⁸⁶ It focuses on the actual condition affecting an individual’s health or functioning. Disability, on the other hand, goes beyond the impairment itself to recognise how that impairment interacts with the environment.⁸⁷ It

⁷³ Micovic, M. A, (2020) at p. 1437.

⁷⁴ See specifically the article of Lawson, A, & Beckett, A, *The social and human rights models of disability: towards a complementarity thesis* Vol. 25(2), (2021), *The International Journal of Human Rights*, pp. 348 – 379 at pp. 380 – 392.

South African Law Reform Commission *Domestication of the United Nations Convention on the rights of Persons with Disabilities* (Issue 39), (2020), pp. 1 – 263 at p. 31.

⁷⁶ *Ibid.* at p. 19.

⁷⁷ Ngwena, C, *South African Journal on Human Rights - Deconstructing the definition of 'disability' under the Employment Equity Act: social deconstruction* Vol. 22(4), (2006), *South African Journal on Human Rights*, at p. 617.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ South African Law Reform Commission (2020) at p. 32 citing the work of Ngwena, C.

⁸² *Ibid.* at p. 19.

⁸³ Lawson, A, & Beckett, A, (2021) at p. 352.

⁸⁴ *Ibid.* at p. 353.

⁸⁵ *Ibid.* According to this model, ‘disabled people’ refers to those experiencing specific forms of oppression or disadvantage, while ‘people with impairments’ denotes individuals perceived to have functional limitations or body and mind differences.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

encompasses the barriers individuals may face in society due to their impairments, including physical, social, and attitudinal barriers. Disability highlights the impact of societal norms, accessibility, and support systems on a person's ability to fully participate in activities and access opportunities. Therefore, while impairment refers to the specific physiological condition, disability considers the broader context of barriers and opportunities influenced by that impairment within society.

The social model of disability was central to two debates on definitional issues: firstly, whether the Convention should explicitly reference the social model; and secondly, how disability should be defined if a definition were to be included.⁸⁸ Regarding the first issue, during the early stages of the Ad Hoc Committee (hereafter referred to as the "AHC") – the Committee was established by the United Nations General Assembly to draft the Convention, (in its third session), India and Jordan advocated for the inclusion of explicit reference to the social model in the 'general principles' article of the Convention.⁸⁹ This proposal received support from Yemen. In the AHC's eighth and final session, China suggested adding the following paragraph to the preamble:

“[R]ecognizing an evolving concept of disability where disability is a state of participation restriction result[ing] from interaction between an individual with impairments and environmental barriers”.⁹⁰

Although the proposal did not explicitly use the phrase 'social model of disability' as acknowledged by the Chair of the AHC, it aimed to “incorporate language reflecting the social model of disability” into the Convention text.⁹¹ With certain modifications, this proposal was reflected in the final text of the Convention, specifically in paragraph (e) of the preamble.

The second issue, related to whether and how 'disability' should be defined, arose intermittently during the AHC negotiations. Ultimately, no specific definition of disability was included in the final text. Nevertheless, even during its early stages, there was reportedly a “general agreement” that if a definition was included in the Convention, it should reflect the social model of disability.⁹² As mentioned, the social model then found expression in the final text of the Convention, provided in paragraph (e) of the Preamble

Furthermore, Article 1 of the Convention provides non-exhaustive guidance on the interpretation of the term 'persons with disabilities', who are the intended beneficiaries of the Convention. This article articulates the treaty's purpose. According to this:

“[P]ersons 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”.

Advocates of 'people first' language argue in favour of using 'persons with disabilities', emphasising placing the person before their perceived functional limitations. While 'persons with impairments' appears to reconcile the implications of both people-first and social model approaches, there is

⁸⁸ *Ibid.* at p. 352.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.* at p. 357.

unease with the term ‘impairment’, which some perceive as reinforcing societal norms that stigmatise bodily and mental differences.⁹³

While there is no explicit mention of the human rights model of disability in the text of the Convention, close connections are drawn between the content of the Convention and the human rights model.⁹⁴ It has been argued by Stein & Stein that the Convention is similarly orientated to the human rights model.⁹⁵ Degener has gone further, describing the Convention as a codification of the human rights model of disability.⁹⁶ The Committee has stressed the need to ensure consistency with the human rights model in connection with the definition of disability used in various laws or policies.⁹⁷

Even with the models of disability informing the definition of disability, no *universally* accepted definition of disability has been accomplished despite various attempts to produce one.⁹⁸ Unfortunately, South Africa has also yet to adopt a harmonised definition of disability.⁹⁹ At present, the definition depends on the specific legislation. Still, it can be argued that disability is defined by “[t]he limitations hindering the full and effective participation of persons with disabilities in society on an equal basis with others, which is expected to last for longer than a year and which exists after maximum correction or control of the impairment”.¹⁰⁰

⁹³ *Ibid.* at p. 353.

⁹⁴ *Ibid.* at p. 357.

⁹⁵ Stein, M. A & P. J. S, Stein, *Beyond Disability Civil Rights* (2007), pp. 1203 – 1240 at p. 1240.

⁹⁶ Degener, T, *Disability in Human Rights Context* Vol. 5(3), (2016), LAWS, pp. 1 – 24 at p. 14.

⁹⁷ Concluding observation of the initial report of the United Arab Emirates (2016) CRPD/C/ARE/CO/1, pp. 1 – 15 at p.2: “[L]egislation on persons with disabilities dates from before the ratification of the Convention, has not been harmonized with the latter and does not reflect the *human rights model* of disability”.

Concluding observation of the initial report of Morocco (2017) CRPD/C/MAR/CO/1, pp. 1 – 13 at p. 1: “[T]he Committee notes with concern that the concept of disability in various national laws, adopted before the ratification of the Convention, is contrary to the *human rights model* of the Convention. It also notes the prevalence of the medical approach, focusing mainly on the prevention of impairments and on health treatment or attention that is not in line with the recognition of persons with disabilities as human-rights holders”.

Concluding observation of the initial report of Slovenia (2018) CRPD/C/SVN/CO/1, pp. 1 – 14 at p. 1: “[A] number of disability definitions that are not in compliance with the *human rights model* of disability, in particular definitions that are derogatory or describe the “unfitness” of persons to participate in regular education, independent life and work on the grounds of their impairment”.

Concluding observation of the initial report of Nepal (2018) CRPD/C/NPL/CO/1, pp. 1 – 9 at p. 2: “[T]he Committee recommends that the State party adopt a *human rights model* of disability, which stresses the human dignity of persons with disabilities and conditions arising from interaction with various barriers that may hinder their full and effective participation in society on an equal basis with others. The State party should ensure that its classification of disability is human rights-based and does not exclude certain groups of persons with disabilities. The State party should take appropriate measures to remove all barriers to ensure that persons with disabilities from rural areas and indigenous backgrounds have access to disability identity cards”.

Concluding observation of the initial report of South Africa (2018) CRPD/C/ZAF/CO/1, pp. 1 – 15 at p. 2: “[T]he Committee recommends that the State party harmonize and align the concept of disability in all laws and policies to bring them into line with the *human rights model* of disability in the Convention. In particular, it is recommended that persons with disabilities, through their representative organizations, are involved in the design of disability assessments and that multiple assessments are eliminated, which should reduce the burden on applicants, and promote consistency and transparency in such assessments”.

⁹⁸ Reyneke, J. M, & Oosthuizen, H, *Are the rights of the disabled a reality in South Africa? Part One* Vol. 28(2), (2003), *Journal for Juridical Science* pp. 91 – 108 at p. 93; Ngwena, C, (2004) at p. 164; Dube, A. K, *The role and effectiveness of disability legislation in South Africa* Vol. 1, (2005), *Disability Knowledge and Research*, pp. 1 – 89 at p. 1 – 7, 16 & 77; Ngwena, C, (2014) at p. 275 – 277; *Disability and disablism*, Council of Europe, (2021), <<https://www.coe.int/en/web/compass/disability-and-disablism>> (accessed 08 November 2020); and *Understanding disability statistics*, Americans with Disability Act National Network, (2020), <<https://adata.org/factsheet/understanding-disability-statistics>> (accessed 08 November 2021).

⁹⁹ Bhabha, F, (2009) at p. 229.

¹⁰⁰ *First Country Report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities* (Convention), (2012), Department of Women, Children and People with Disabilities, at pp. 1 – 87 at p. 3.

5.2. The meaning, role, and impact of the concepts of reasonable accommodation and accessibility in international human rights law as it applies to disability

5.2.1. The Convention on the Rights of Persons with Disabilities

The Convention and the Optional Protocol to the Convention were signed by South Africa on 30 March 2007 and ratified on 30 November 2007.¹⁰¹ On 3 November 2008, in terms of Article 34 of the Convention, a monitoring Committee on the Convention (hereafter referred to as the “Committee”) was elected to monitor States Parties’ compliance with their treaty obligations under the Convention.¹⁰² South Africa belongs to the dualist tradition regarding incorporating treaties into its national law.¹⁰³ Therefore, to incorporate the Convention into its national law, South Africa had to pass enabling legislation incorporating the Convention and the Optional Protocol into its legal system. South Africa did not do this in the case of the Convention.¹⁰⁴ Even though South Africa did not pass enabling legislation incorporating the Convention when becoming a party to an international or regional human rights treaty, States Parties agree to be bound by the treaty’s provisions. Accordingly, in the case of the Convention and the Optional Protocol, South Africa is subject to monitoring its treaty obligations by the Committee. This monitoring of its obligations includes *inter alia*, the Committee receiving and reviewing periodic reports from States Parties.¹⁰⁵

The primary purpose of the Convention is to champion, safeguard, and ensure equal access to all fundamental human rights. Rather than introducing new rights or regulations, it offers a comprehensive framework for the application of existing rights, specially tailored to address the unique needs and circumstances of persons with disabilities. This treaty encompasses an explicit social development dimension and is fundamentally structured as a human rights instrument. It takes an all-encompassing approach to the categorisation of persons with disabilities and reaffirms their entitlement to the full spectrum of human rights and fundamental freedoms. Furthermore, the Convention provides detailed guidance on how these rights apply to persons with disabilities, highlighting situations where accommodations are necessary to enable the effective exercise of these rights. It also identifies specific areas where rights must be upheld and measures taken to ensure the inclusion and equality of persons with disabilities. This comprehensive treaty spans civil, political, economic, social, and cultural rights, addressing issues like accessibility and non-discrimination. Since its adoption, the Convention has played a transformative role on a global scale, propelling advancements in the rights and inclusion of persons with disabilities and fostering legal and policy reforms in numerous countries while also raising awareness about disability rights.

One of the defining features of the Convention is its reflection of a profound shift in how people perceive persons with disabilities. The treaty places a strong emphasis on empowering persons with disabilities.¹⁰⁶ Empowerment is especially crucial in this context as it provides persons with disabilities with a more significant role in making decisions that directly impact their lives.¹⁰⁷ The 50 articles contained within this Convention, which comprehensively cover the rights of persons

¹⁰¹ Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 366; Jackson, M. A, (2018) at p. 9.

¹⁰² *Ibid.*

¹⁰³ “Dualist” States may not incorporate international human rights treaties into national law except through an express order from the national legislator. This is in contrast with “monist” States, who consider international and national law to be one system of law.

¹⁰⁴ Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 366.

¹⁰⁵ South Africa has reported in 2014.

¹⁰⁶ Grobbelaar – du Plessis, I, *Gestremdebeidsreg: 'n internasionaalregtelike en regsvergelyste analise* (2010), University of Pretoria, pp. 1 – 644 at p. 202.

¹⁰⁷ *Ibid.*

with disabilities, effectively address a substantial gap that previously existed in international human rights regarding such individuals. It is crucial to note that the Convention underscores the necessity of a shift in community attitudes towards disability.¹⁰⁸ This transformation is a fundamental requirement for the successful implementation of the Convention.¹⁰⁹ Even though persons with disabilities technically possess the same rights as those without disabilities, advocates of the Convention have consistently asserted that discrimination against persons with disabilities continues to exist in almost every facet of life.¹¹⁰ This persists despite the fact that persons with disabilities contribute significantly to their communities in various ways.¹¹¹

5.2.1.1. The content of the Convention: relevant articles

My focus centres on an examination of key elements within the Convention. I place particular emphasis on Article 5 of the Convention, which intricately addresses the pivotal themes of equality and non-discrimination, with a specific lens on the concept of reasonable accommodation. Furthermore, my analysis extends to Article 9 of the Convention, dedicated to the critical topic of accessibility. These articles have the potential to catalyse the establishment of *de facto* equality for persons with visual impairments, especially concerning accessible labelling. The foundational premise of this thesis posits that mandatory accessible labelling could profoundly transform the predominantly inaccessible labelling framework. This transformation would shift the paradigm towards accessibility, ensuring that persons with visual impairments can effectively access and comprehend labels. Conversely, the significance of reasonable accommodation provisions becomes evident if measures to enhance labelling accessibility are not promptly implemented. These provisions play a pivotal role in bridging the accessibility gap and preventing the disadvantage of persons with visual impairments. What, then, do the Article 5 and 9 provisions entail?

5.2.2. Reasonable accommodation

Article 5(1) of the Convention requires that all States Parties recognise that all persons are equal before and under the law and are entitled, without any discrimination, to equal protection and equal benefit of the law. According to Article 5(3) of the Convention, to promote equality and eliminate discrimination, States Parties are required to take appropriate steps to ensure that reasonable accommodation is provided. Article 2(4) of the Convention defines reasonable accommodation as follows:

“[R]easonable accommodation means *necessary and appropriate* modification and adjustments not imposing a *disproportionate or undue burden*, where needed in a *particular* case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

¹⁰⁸ *Ibid.*
¹⁰⁹ *Ibid.*
¹¹⁰ *Ibid.* at p. 203.
¹¹¹ *Ibid.*

According to the Committee, the duty to provide reasonable accommodation in accordance with Articles 2 and 5(3) of the Convention can be broken down into two constituent parts. The first part imposes a positive legal duty to provide a reasonable accommodation.¹¹² A reasonable accommodation is *a modification or adjustment* that is *necessary and appropriate* when it is required in a *particular case* to ensure that a person with a disability (the rights-holder) can equally enjoy their rights.¹¹³ The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.¹¹⁴

5.2.2.1. A positive legal duty to provide a reasonable accommodation

Firstly, during the negotiations of the Convention, specifically the fourth session of the Ad-Hoc Committee of the Convention, the view was expressed that the term “reasonable accommodation” is a “single term” and that the word “reasonable” is not intended to be an exception clause in and of itself.¹¹⁵ In General Comment No. 6, the Committee confirmed that the term “reasonable accommodation” must be interpreted as a single term and that “reasonable” should not be misunderstood as an exception clause to the reasonable accommodation duty.¹¹⁶ Secondly, the term “accommodation” is generally uncontroversial to the extent that it is understood to mean adjustments or modifications to existing “[p]ractices, materials, environments, general rules” to facilitate the participation and inclusion of persons with disabilities.¹¹⁷ Thirdly, the modifications and adjustments must be “necessary and appropriate” to remove the disadvantage for persons with disabilities.¹¹⁸ States Parties will be required to take “necessary” measures to give effect, at minimum, to the essence of human rights in order to ensure that the basic needs and capabilities of persons with disabilities are met.¹¹⁹ The word “appropriate” implies that accommodations must be effective in ensuring that persons with disabilities can exercise their human rights on an equal basis with others.¹²⁰ Fourthly, attention must be drawn to the words “where needed in a particular case” since this emphasises the individualised nature of the reasonable accommodation duty.¹²¹ The reasonable accommodation duty is an individualised or specific response designed to meet the particular needs of the person with a disability to ensure equal opportunities in a given situation.¹²² Lastly, the extent of the burden of the modification or adjustment (a matter to be discussed directly below) must be considered, as this is a determinant for the duty bearer.

5.2.2.2. Disproportionate or undue burden

Reasonably accommodating a rights holder is subject to the limitation that a duty bearer is not obliged to provide such a reasonable accommodation if it would impose a disproportionate or undue burden. According to Waddington and Broderick, when an excessive burden is identified,

¹¹² General Comment No. 2 of 2014 at p. 7.

¹¹³ Article 2 of the Convention.

¹¹⁴ General Comment No. 2 of 2014 at p. 7.

¹¹⁵ Broderick, A, *Report on Reasonable Accommodation under the CRPD: The Georgian Context* (2017), United States Agency for International Development, pp. 1 – 61 at p. 28.

¹¹⁶ General Comment No. 6 Committee on the Rights of Persons with Disabilities (2018) CRPD/C/ GC/6, pp. 1 – 19 at p. 7.

¹¹⁷ Broderick, A, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (2015), Maastricht University, pp. 1 – 465 at p. 105.

¹¹⁸ Broderick, A, (2017) at p. 14.

¹¹⁹ Broderick, A, (2015) at p. 164.

¹²⁰ Broderick, A, (2017) at p. 14.

¹²¹ *Ibid.*

¹²² Waddington, L, & Broderick, A, *Promoting equality and non-discrimination for persons with disabilities* (2017), Council of Europe, pp. 1 – 61 at p. 12 – 13.

the obligation to provide accommodation is often considered lifted in most cases. However, it is crucial to acknowledge that the limitation stated in Article 2 of the Convention does not exempt the duty bearer from the obligation to provide a reasonable accommodation permanently. It only sets a limit on the duty.¹²³

“[I]n other words, if there are two (or more) accommodation options, both (each) of which can achieve the same result, the duty bearer is entitled to opt for the less burdensome accommodation. It is unlikely that no accommodation would be possible at all to enable a person with a disability to participate in each environment or activity, but of course, that depends on the circumstances of the case”.¹²⁴

Both the Committee in General Comment No. 6 and the European Disability Forum have emphasised that the duty to provide reasonable accommodation, considering financial and resource constraints, must be assessed based on (i) the type, size, and scope of the entity, (ii) the financial capacity or cost of the accommodation, (iii) the impact of the modification on the duty bearer, and (iv) the resources available to the duty bearer.¹²⁵ Even though the final text of the Convention does not include these factors explicitly, these factors are generally subsumed within the defence of the reasonable accommodation duty.¹²⁶ In determining whether an accommodation constitutes a disproportionate burden or not, the cost factor may be weighed against the benefits that a person with a disability receives on the granting of a reasonable accommodation. Benefits to other parties may also be considered in the proportionality test.¹²⁷ De Campos Velho Martel notes that “[a] serious cost-benefit analysis of reasonable accommodation includes more than just economic factors [...]. It must also include the costs of stigma and the benefits of inclusion, not only to the person requesting the accommodation but also to third parties”.¹²⁸ Non-financial considerations must also be considered. In the context of employment, some examples demonstrate that financial cost is not the only matter that may justify a failure to accommodate persons with disabilities.¹²⁹ For example, health and safety requirements will serve as a consideration relevant to establishing whether a requested accommodation would constitute a disproportionate burden.¹³⁰

5.2.3. Accessibility

The Convention was the first international human rights treaty to set out the concept of accessibility in the context of disability.¹³¹ Accessibility is defined as any “[p]lace, space, item or service, whether physical or virtual, that is easily approached, reached, entered, exited, interacted with, understood or otherwise used by persons of varying disabilities”.¹³² Accessibility provides flexibility to accommodate each person’s individual needs and preferences.¹³³ Article 9 of the Convention

¹²³ Broderick, A, (2017) at p. 27.

¹²⁴ *Ibid.*

¹²⁵ General Comment No. 6 of 2018 at p. 8.

¹²⁶ Broderick, A, (2017) at p. 230; General Comment No. 6 of 2018 at p. 8.

¹²⁷ Broderick, A, (2015) at p. 164; Broderick, A, (2017) at p. 31; De Campos Martel Velho, L, (2011) at p. 104.

¹²⁸ De Campos Martel Velho, L, (2011) at p. 104.

¹²⁹ Broderick, A, (2015) at p. 174; Broderick, A, (2017) at p. 32.

¹³⁰ *Ibid.*

¹³¹ Lawson, A, *Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v Hungary* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 380 – 392 at p. 380; Broderick, A, (2020) at p. 396.

¹³² *Ibid.*

¹³³ Micovic, M. A, (2020) at p. 1433.

articulates accessibility for persons with disabilities.¹³⁴ Article 9(1) of the Convention requires States Parties to take the:

“[A]ppropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas”.

Thus, accessibility ensures that persons with disabilities can exercise all rights and fundamental freedoms in society on equal terms.¹³⁵ Furthermore, Article 9(2)(a) sets out several other obligations relating to, *inter alia*, the development, promulgation, and monitoring of the implementation of minimum standards and guidelines for accessibility. In addition, States Parties to the treaty are required, under Article 9(2)(b) of the Convention, to ensure that private entities providing public facilities and services “take into account all aspects of accessibility for persons with disabilities”.

With regards to labelling, South Africa and many other developing economic countries have not yet fulfilled the accessibility obligations to the European Union’s extent. After ratifying the Convention in January 2011, the European Union (hereafter referred to as the “*European Union*”) has been bound to fulfil its *among other things*, accessibility obligation.¹³⁶ By 2022, the European Union had already adopted several legal acts harmonising accessibility requirements for goods and services.¹³⁷ Relevant to this thesis, the European Union requires the labelling of medicinal products intended for human consumption to include Braille and that the package leaflet be available, on special request, in formats accessible to persons with visual impairment.¹³⁸ The argument formulated in this thesis, taking particular cognisance of universal design, is that information has already been made available in accessible formats by the European Union to a certain degree. It has been acknowledged that a barrier-free, accessible society is essential to persons with disabilities,¹³⁹ but it will require a significant reallocation of resources. Being under a budgetary constraint, South Africa may elect to allocate resources to the progressive realisation of other significantly essential rights, such as housing or education, instead of fulfilling their accessibility obligations under the Convention. This will, however, not exempt South Africa from complying with the treaty.

5.2.3.1. Universal design as a constitutional element of accessibility

¹³⁴ The Convention was the first binding human rights treaty to enshrine the accessibility norm and to apply it to the myriad of other provisions contained in the treaty, according to Broderick, A, (2020) at p. 396.

¹³⁵ Micovic, M. A, (2020) at p. 1433; Broderick, A, (2020) at p. 397; Lawson, A, (2014) at p. 381; Lid, I. M, *Accessibility as a Statutory Right* Vol. 28(1), (2010), Nordic Journal of Human Rights, p. 20 – 38 at p. 21 & 38.

¹³⁶ Drabarz, A, *Harmonising Accessibility in the EU Single Market: Challenges for Making the European Accessibility Act Work* Vol. 43, (2020), Review of European and Comparative Law, pp. 83 – 102 at p. 84.

¹³⁷ *Ibid.* Article 56 of the European Union Directive 2001/83/EC as amended by European Union Directive 2004/27/EC.

¹³⁸ Article 56(a) of Directive 2004/27/EC states: “[T]he name of the medicinal product, as referred to in Article 54, point (a) must also be expressed in Braille format on the packaging. The marketing authorization holder shall ensure that the package information leaflet is made available on request from patients’ organisations in formats appropriate for the blind and partially-sighted”.

¹³⁹ Broderick, A, (2020) at p. 399.

With the adoption of the Convention, the term “universal design” became internationally recognised,¹⁴⁰ referring to products, environments, programmes, and services.¹⁴¹ As defined in Article 2 of the Convention:

“[U]niversal design means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”.

The Committee has stated that “[a]ll new [...] products have to be designed in a way that makes them fully accessible for persons with disabilities, following the principles of universal design”. Tabling the discussion on availability and affordability, I focus on the accessibility of universally designed labels and leaflets. Access to product information¹⁴² is achieved through the obligation of ensuring that manufacturers (and others) provide universally designed labels and leaflets to cover the broadest range of persons, especially those with disabilities. Access to product information must be based on universal design principles, as it is essential for treating persons with visual impairment equally.¹⁴³ All product labels and leaflets should aim to be universally designed and must take into account the range of disabilities, the characteristics of the product, and the information that should be communicated in a clear and understandable way. While persons without visual impairment are often overloaded with information, persons with visual impairment are rarely fully informed.¹⁴⁴ There is an apparent lack of information on products provided in accessible formats such as Braille, audio, large print, easy-to-read texts, symbols, and raised text. If product information were universally accessible, all persons, including those who are visually impaired [consumers], would have access to comprehensive, comparable, reliable, and user-friendly information:

“[T]herefore, to obtain accessible order, where no one is excluded from or limited in the use of products [space and services] and everybody to enjoy all spheres of lived life equally, States Parties must design and implement legal and policy constructs operationalising Convention provisions in a way that are both universal and feasible.¹⁴⁵ The application of accessibility standards should be mandatory”.¹⁴⁶

5.2.4. The relationship between reasonable accommodation and accessibility

Article 5(3) of the Convention provides that, to promote equality and eliminate discrimination, the South African government must take all appropriate measures to ensure that reasonable accommodation is provided. An unjustified failure to provide a reasonable accommodation and failure to have an accessible environment, in certain instances, is deemed to be a form of

¹⁴⁰ In terms of South Africa’s policy document, the *White Paper on Persons with Disabilities*, pp. 1 – 194, by the Department of Social Development in 2016, did not use the terminology universal design. Instead, the document refers to enabling environments. On p. 98, persons with disabilities require, in addition to enabling environments and access to services available to the general population, a range of disability-specific services to attain and maintain maximum independence, inclusion, and participation in all aspects of life. The specific term “universal design” is also not mentioned in the Constitution or in the Equality Act, but the overall requirement of providing enabling environments is in place. See section 9(a) of the Equality Act.

¹⁴¹ Micovic, M. A, (2020) at p. 1439.

¹⁴² See Eskyte, I, *Disabled People’s Vulnerability in the European Single Market: The Case of Consumer Information* Vol.4 (2019), *Journal of Consumer Policy*, pp. 521 – 543 at p. 533 – 536. In reality, it can be quite challenging for consumers with physical or mental disabilities to access product information, resulting in significant limitations to their shopping options and consumer autonomy. As a result, they are often unable to make informed purchasing decisions without the aid of someone without a disability.

¹⁴³ *Ibid.*

¹⁴⁴ Eskyte, I, (2019) at p. 521 – 543.

¹⁴⁵ Drabarz, A, (2020) at p. 84.

¹⁴⁶ *Ibid.*

discrimination under the Convention.¹⁴⁷ To achieve complete accessibility, South Africa must systematically eliminate obstacles by implementing a legislative framework with specific, enforceable, and time-bound goals.¹⁴⁸ Unlike the obligation to provide reasonable accommodation, the obligation to ensure accessibility in Article 9 of the Convention is “[g]eneralised and anticipatory and not triggered by an individual request”. Moreover, accessibility duties usually require compliance with set standards. Consequently, while non-compliance with both articles may be considered a type of discrimination, the accessibility mandate is designed to rectify long - term discrimination against a group of people by establishing universally applicable accessibility standards. In contrast, the immediate and personalised nature of the reasonable accommodation obligation can be employed to guarantee accessibility for an individual with a disability in a specific circumstance.¹⁴⁹

The dissimilarities between accessibility and reasonable accommodation may result in two distinct scenarios. Firstly, persons who have rare impairments that were not considered when the accessibility standards were developed or did not use the methods offered to achieve accessibility (perhaps illiterate persons with visual impairment who do not read Braille) might ask the duty-bearer for a reasonable accommodation (perhaps requesting audio assistance) that falls outside the scope of particular accessibility standards. It is possible for accessibility standards, universally designed, to fall short of including all persons on an equal basis. Therefore, a measure amounting to a reasonable accommodation may still be required in an individual case, even where accessibility standards already exist. As the Committee points out, “reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation”. Secondly, since the obligation to ensure accessible environments is a duty that is implemented gradually, the duty to accommodate is implemented immediately. Therefore, reasonable accommodation can fill an essential gap in ensuring the participation and inclusion of persons with disabilities during the period in which full accessibility has not yet been achieved. The person must be accommodated, within reason, before the finalisation of the accessibility standards.

5.3. How the legislative framework regulating product labelling of consumption-based, hazardous, poisonous, or inherently unsafe products unfairly discriminates against persons with visual impairment

5.3.1. Introduction

Consumers expect and deserve protection against risks and harm found in foodstuff, hazardous, poisonous, and inherently unsafe products. Therefore, appropriate regulatory systems are essential, especially when the consumers are particularly vulnerable. In South Africa, many regulatory systems relate to the labelling of these products to protect the consumer. Legislation regulating product labelling in South Africa, especially when taking consumer protection legislation into account, is complex and must be looked at as a whole rather than in isolated parts.

¹⁴⁷ Broderick, A, (2020) at p. 406; Lawson, A, (2014) at p. 386; Draft General Comments *Committee on the Rights of Persons with Disabilities* Convention /C./11/4 at para. 4 & 31.

¹⁴⁸ Lawson, A, (2014) at p. 386. The government is also expected to monitor the emergence of new barriers in the private sphere and subsequently ensure that “[a]ll-new objects, infrastructure, facilities, goods, products and services have to be designed in a way that makes them fully accessible for persons with disabilities, in accordance with the principles of universal design”.

¹⁴⁹ Typically, providing accommodations does not have a significant impact on anyone else. However, it is possible that accommodations can lead to improved accessibility for persons with disabilities, as well as for those without disabilities, promoting equal access for all. Also of note, the Committee has summarised the main distinction between reasonable accommodation and accessibility as follows: “[A]ccessibility is related to groups, whereas reasonable accommodation is related to individuals”.

5.3.2. Labelling legislation

5.3.2.1. South Africa

5.3.2.1.1. Medicines and Related Substances

The Medicine and Related Substances Act (hereafter referred to as the “*Medicines Act*”) provides for the registration and control of medicines and substances for the protection of the general public.¹⁵⁰ In terms of section 18 of the Medicines Act, no person may sell any medicine or scheduled substance unless the immediate container or package bears a label, package inserts, and patient information leaflets stating the prescribed particulars. Section 18 (5) of the Medicines Act gives the Minister the authority to prescribe additional labelling requirements to the Medicines Act. In regulation 10 of the General Regulations,¹⁵¹ it is stated that certain information must appear on every medicine container, package insert, and patient information leaflet in clearly indelible letters and font size. This information should be in English and at least one other official language when the medicine is intended for human use and consumption. The container, package, package inserts, and patient information leaflets must also bear clear instructions and warning signs.¹⁵² The information contained on every medicine container, package, package insert, and patient information leaflet is vital to the person intending to consume it. In some instances, it is literally a matter of life and death since medicines are inherently unsafe; instructions and warnings are critical.¹⁵³

The requirement for product information to be exclusively presented in written words or pictograms, in ink, and in both English and another official language that is visually clear and legible poses a significant challenge for persons with visual impairment. This is because the stipulated format assumes that persons with visual impairments can perceive and interpret standard printed text or pictograms, provided they are clear and legible. However, the fundamental issue is that many persons with visual impairment face limitations in their ability to see, even if the information is presented clearly and legibly. For those with no sight or minimal vision, presenting information in written words or pictograms does not address their needs, as they cannot rely on visual cues for comprehension.

5.3.2.1.2. Foodstuffs, Cosmetics, and Disinfectants

The Foodstuffs, Cosmetics and Disinfectants Act¹⁵⁴ (hereafter referred to as the “*Foodstuffs Act*”) ensures the control and regulation of, *among other things*, the sale, labelling, and packaging of foodstuffs, cosmetics, and disinfectants. Section 15(1) of the Foodstuffs Act gives the Minister the authority to prescribe additional labelling requirements in regulation to the Act. The Minister has prescribed the Regulations Relating to the Labelling and Advertising of Foodstuffs (hereafter

¹⁵⁰ *Prince* at para. [24]. According to the Preamble of the Medicines Act, it is also “[t]o provide for the registration of medicines and related substances intended for human and for animal use, to provide for the establishment of a Medicines Control Council and to provide those labels be approved by the council”.

¹⁵¹ Medicines Act: General Regulations, GN R.859 of 25 Augustus 2017 (Government Gazette No. 41064).

¹⁵² See Reg.10(1)(i); Reg.10(1)(t); Reg.10(1)(u); Reg.10(1)(v); Reg.10(1)(w); Reg.10(1)(x); Reg.10(1)(y); Reg.10(1)(z); & Reg. 10(1)(z)(cc)(iv) of the General Regulations.

¹⁵³ Du Toit, K, & van Eeden, E, *The impact of the Consumer Protection Act on pharmacists* Vol.104(11), (2014), South African Medical Journal, pp. 738 – pp. 740 at p. 739.

¹⁵⁴ No. 54 of 1972.

referred to as the “*Regulations relating to the Labelling of Foodstuffs*”) in 2010 and Regulations Relating to the Labelling, Advertising, and Composition of Cosmetics (hereafter referred to as the “*Regulations relating to the Labelling of Cosmetics*”) in 2017.

In terms of regulation 2 of the Regulations Related to the Labelling of *Foodstuffs*,¹⁵⁵ a person may not sell or offer any pre-packaged foodstuff for sale unless the foodstuff container, or the bulk stock from which it is taken, is labelled under these regulations. Furthermore, according to regulation 4 of the Regulations Related to the Labelling of Foodstuffs, subject to regulation 54(3), a foodstuff that is not pre-packaged but displayed for sale must have the required particulars for labelling displayed in its immediate proximity. The information required to appear on any label must be in English and, where possible, at least one other official language. It must be *visible*, easily legible, and indelible.¹⁵⁶

In terms of regulation 4(1)(c) and (e) of the Regulations Relating to the Labelling of *Cosmetics*, no person may sell, manufacture, or import any cosmetic that may cause damage to human health when used under normal or reasonably foreseeable conditions of use. Particularly taking into account the labelling and any other indication or information provided. According to regulation 8(1) of the Regulations Relating to the Labelling of Cosmetics, the primary and secondary container of every cosmetic for sale in South Africa must have a label attached to it. According to regulations (14) and (15) of the Regulations Relating to the Labelling of Cosmetics, unless expressly otherwise provided in regulations made in terms of the Foodstuffs Act, the information required to appear on a label must be in at least English; visible; legible and indelible.

Under section 13(1) of the National Regulator for Compulsory Specifications Act¹⁵⁷ the Minister of Trade and Industry declared the Compulsory Specifications for *Chemical Disinfectants* (hereafter referred to as “*Compulsory Specification*”). In terms of section 5 of the Compulsory Specifications, the manufacturer or supplier shall provide on a label on or firmly attached to the packaging of a chemical disinfectant in a legible and indelible manner the spectrum of activity claimed, the areas of application, the names of the active ingredients in letters not less than 4mm in height, the expiry date, instruction for usage, and any warnings.

The absence of accessible product information, particularly concerning persons with visual impairments, may be construed as an act of discrimination due to the potential perils and risks it subjects these individuals to. The information presented on product containers or packaging holds a pivotal role in safeguarding the well - being of individuals. To illustrate, consider an individual with a life-threatening allergy to a specific product or ingredient. In the absence of accessible information, they may inadvertently acquire and consume a substance that could precipitate dire consequences for their health. Similarly, expired products or those containing hazardous components, such as disinfectants, can pose grave risks if mishandled. Foodstuffs and medicines, often directly ingested, inherently carry safety risks when misused. Consequently, information like the presence of allergens in ingredients, expiration dates, and precautionary warnings assumes paramount significance. Regrettably, this crucial information remains beyond the reach of persons with visual impairment, placing them at a disadvantage and exposing them to potential hazards. Unlike the realm of medicines, where pharmacists or medical professionals provide guidance, no analogous support system exists for everyday commodities like food, cosmetics, or disinfectants.

¹⁵⁵ Regulations Relating to the Labelling and Advertising of Foodstuffs, GN R.116 of 01 March 2010 (Government Gazette No. 32975).

¹⁵⁶ Reg. 7(1)(a) – (b) of the Regulations Related to the Labelling of Foodstuffs.

¹⁵⁷ No. 5 of 2008.

This creates a situation wherein visually impaired consumers are left devoid of adequate means to access critical information that could profoundly impact their health and safety.

5.3.2.1.3. Hazardous Substances

The Hazardous Substances Act¹⁵⁸ (hereafter referred to as the “*Hazardous Substances Act*”) ensures the control and regulation of, *inter alia*, substances that may cause injury or ill-health, or death to a person due to their toxic, corrosive, irritant, strongly sensitising or flammable nature.¹⁵⁹ The Hazardous Substances Act prescribes and defines four groups of hazardous substances: Group I, Group II,¹⁶⁰ Group III,¹⁶¹ and Group IV.¹⁶² Of relevance for this chapter is Group I. The Hazardous Substances Act also defines a label, a package, and a sealed package for purposes of the Act. Still, the labelling requirement for each specific group of hazardous substances is dealt with in various regulations. The Minister of Health has, in terms of section 29(1) of the Hazardous Substances Act, as read in conjunction with section 29(10)(a) of the Hazardous Substances Act, made a regulation regarding the labelling requirements for Group I hazardous substances, which will be divided into either Category A or Category B. In terms of regulation 8(1)(a), any container containing a Category A Group I hazardous substance imported, manufactured, or packaged in South Africa must be clearly and conspicuously labelled. Furthermore, the label must be placed on one or more surfaces of the container to be read horizontally when the container is set down correctly. Any container containing a Category B Group I hazardous substance imported into South Africa must comply with the abovementioned.¹⁶³

The underlying goals that underscore the labelling prerequisites for substances of a hazardous nature are deeply rooted in the preservation of both public health and environmental integrity. However, this regulatory framework inadvertently neglects a significant demographic - persons with visual impairments. In the framework established by the Hazardous Substances Act and its associated regulatory directives, a crucial deficiency becomes evident as there is no provision addressing accessible formats that can proficiently communicate vital information via labels to persons with visual impairments. This oversight carries considerable repercussions, as it exposes persons with visual impairment to potential harm arising from the handling and utilisation of substances possessing inherent risks of unsafety and toxicity. This contrast is stark when compared to sighted counterparts who benefit from comprehensive labelling and detailed instructions that bolster their safety. Considering the significant vulnerabilities faced by persons with visual impairments, it becomes increasingly imperative to engage in a thorough reconsideration of the labelling requirements outlined in the legislative framework.

5.3.3. Unfair discrimination

In order to attack the South African legislation discussed directly above, as per section 9 of the Constitution, it is necessary to analyse the facts and apply those facts to the law. The following discussion will proceed on the assumption that the equality jurisprudence and analysis developed

¹⁵⁸ No. 15 of 1973.

¹⁵⁹ Preamble of the Hazardous Substances Act.

¹⁶⁰ Consists of 9 classes of wastes excluding class 1: explosives and class 7: radioactive substances.

¹⁶¹ Consists of electronic products and group.

¹⁶² Consists of radioactive substances

¹⁶³ Reg. 8(2)(a) of the Regulations under the Hazardous Substances Act.

for section 8 of the interim Constitution applies equally to section 9 of the 1996 Constitution, despite some differences in the wording of these provisions.¹⁶⁴

It has been argued that, in *Prinsloo* and *Harksen*, an inquiry is necessary when an attack of constitutional invalidity is based on section 8 of the interim constitution.¹⁶⁵ In *Harksen*, the approach was summarised as follows:

- “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to “discrimination”, does it amount to “unfairdiscrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant.The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
- (c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)”.¹⁶⁶

The constitutionality of the identified South African legislative pieces will be considered in Chapter 4 of the thesis in light of the abovementioned analysis.

5.4. The extent to which accessibility obligations and reasonable accommodation measures ought to be applied to ensure that persons with visual impairment are not unfairly discriminated against

South African legislation must provide access to crucial information on specific products universally and legible to all.¹⁶⁷ Persons with visual impairment expect and deserve accessible and legible product information to protect against risks and harm found in medicine and scheduled substances, foodstuffs, and hazardous products. Therefore, appropriate regulatory systems are essential, especially when consumers are particularly vulnerable. In South Africa, many regulatory systems relate to the labelling of medicine and scheduled substances, foodstuffs, and hazardous

¹⁶⁴ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (hereafter referred to as “*Larbi-Odam*”); *Sodomy* at para. [15].

¹⁶⁵ *Sodomy* at para. [17].

¹⁶⁶ *Harksen v Lane* 1998 (1) SA 300 (CC) at para. [52] (hereafter referred to as “*Harksen*”).

¹⁶⁷ According to Article 9 of the Convention; Department of Social Development *White paper on Persons with Disabilities*, 09 March 2016, (Government Gazette No. 39792), pp. 1 – 194 at p. 44.

products to protect the consumer. The problem with the above labelling regulations is that they do not consider persons with visual impairment. This chapter will centre on persons with visual impairments who are unable to rely on their eyesight. It will explore accessibility, which is established in the binding Convention, and reasonable accommodation, a constitutional principle that can effectively eliminate the obstacles that prevent them from accessing legible information on household products, mostly consumable items. In short, the barrier of product information inaccessibility can gradually be removed using accessibility standards for the labelling of products. It can be immediately removed by providing reasonable accommodation for persons with visual impairment, or it can be done by using a combination of both accessibility and reasonable accommodation measures if all the requirements are met in each instance.

There remains a need for the adoption or amendment of national legislation or regulations regulating sector-specific labelling to give full effect to the requirements of the Convention and the right to equality.¹⁶⁸ The government must review the extent to which existing legislation, regulations, and standards comply with the Convention, the Equality Act, and the Constitution. It is a *prima facie* assumption that South African labels and leaflets containing product information are inaccessible and that persons with visual impairment are unfairly discriminated against. Therefore, South Africa must undertake further actions, such as (i) amending the current sector-specific legislative framework regulating labelling to comply with minimum accessibility requirements set for labelling or (ii) reasonably accommodating persons with visual impairment where the necessary minimum accessible standards for labelling have not yet been implemented.

6. Delineations and limitations

6.1. Delineations

The only foreign jurisprudence to be considered and compared with that of South Africa is the United States of America, Canada, and Brazil in respect of reasonable accommodation. The United States of America and Canada have been described as the “birthplaces” of the concept of reasonable accommodation.¹⁶⁹ With regard to Brazil,¹⁷⁰ it is imperative to turn to jurisdictions with similar socio-economic positions and similar implementations of international human rights treaties to South Africa, dealing with disability, accessibility, and reasonable accommodation. Much can be extracted by comparing these legal systems respectively.

An in-depth analysis of all labelling and related legislation will not be done. Instead, focus will be on specifically identified legislation relating to the labelling of products that can be consumed, are hazardous, are poisonous, or are inherently unsafe. The specific provisions contained in the abovementioned legislation relating to labelling will be scrutinised to determine how these provisions amount to unfair discrimination and why persons with visual impairment ought to be provided with access to product information. When discussing labelling and relevant legislation, the European Union, which pioneered the requirement for Braille labelling on medicine and controlled substances, along with Colombia, will be referred to as a potential source of solution(s)

¹⁶⁸ Refers to the relevant legislative framework of labelling standards and requirements as set out in the Standards Act, No. 8 of 2008, the South African Bureau of National Standards (SANS 289:2016 relating to the labelling of pre-packaged goods); Consumer Protection Act; the Equality Act; Medicines Act; Pharmacy Act; Foodstuffs Act; Hazardous Substances Act; and Agricultural Product Standards Act.

¹⁶⁹ De Campos Martel Velho, L., (2011) at p. 89.

¹⁷⁰ *Ibid.* at p. 84; the Convention unlike many other countries, forms part of the country’s Constitution.

for South Africa. It will cite the European Union as a pioneer in accessible labelling along with Colombia as a country mandating accessible labelling that shares a socio-economic status similar to South Africa.

Unlike South Africa, Member States of the European Union are, for instance, required to have legislation in place in conformance with the EU Directive 2004/27/EC (hereafter referred to as “*Directive 2004*”). Directive 2004 requires that all medicinal products authorised after 30 October 2005 carry Braille identification.¹⁷¹ Furthermore, with regards to foodstuffs, certain Member States of the European Union specifically advocated for the improvement of access to information for persons with visual impairment by proposing the use of Braille and modern technologies capable of implementing an audio-narrating label for food products. This, in turn, will help persons with visual impairment identify products and access health and safety information.

Finally, unlike other countries with a similar socio-economic situation, such as India or Brazil - Colombia has enforced the provision of Braille and accessible labelling for persons with visual impairments in legislation. Countries with similar socio-economic situations can be compared to each other to provide insights into how different policies, institutions, and practices affect economic and social outcomes. By comparing countries with similar socio-economic situations, policymakers, researchers, and other stakeholders can better understand the factors that drive economic growth, reduce poverty, and promote development. Additionally, comparing countries with similar socio-economic situations can help identify best practices and policy innovations that can be adapted and applied in other countries facing similar challenges. Colombia has published Law 2265 to introduce the Braille reading and writing system for the packaging of food products, cosmetics, and medical products, among others. Law 2265 aims to ensure access to information for persons with visual impairments through the implementation of mobile applications, other available technological, digital, and informative media, or the Braille system, thereby impacting both local and imported products.

6.2. Limitations

It is necessary to emphasise the limitations of this thesis.

6.2.1. Disability and equality

The scope of this thesis is limited to the specific disability of sight. This means that the primary focus will be on issues, challenges, and solutions related to visual impairments. Other types of

¹⁷¹ Article 56(a) of Directive 2004 states that: “[T]he name of the product, as referred to in article 54, point (a) must also be expressed in braille format on the packaging. The MA holder shall ensure that the packaging information leaflet is made available on request from patients’ organisations in formats appropriate for the blind and partially sighted”. The pharmaceutical Directive applies to all medicinal products for human use intended to be placed on the markets in the EU Member States. All EU legislation relating to pharmaceutical products is covered under the EEA Agreement and so the EEA areas.

disabilities, such as those affecting physical mobility, perceptual abilities, or reading capabilities, will not be addressed within this thesis. By narrowing the scope to sight-related disabilities, the research aims to provide a detailed and nuanced understanding of the needs of persons with visual impairments.

Even though the thesis will discuss the concept of substantive equality concerning persons with visual impairment in a product labelling-related context, it will by no means be an analysis of the principles and concepts relating to equality in exhaustive detail.

6.2.2. Other relevant legislation

The only consumer legislation to be discussed will be the CPA. The discussion of the CPA will serve to underscore the legislative deficiencies in safeguarding the interests of persons with visual impairment. While specific provisions will be identified that pose challenges, my primary focus regarding the constitutionality of the CPA will centre on the section pertaining to product labelling and trade descriptions. Legislation, such as the National Credit Act,¹⁷² will not be discussed as it falls outside the thesis's scope.

Even though there may be other legislations that regulate the labelling of products, for example, the labelling of electronic products, machinery, and so forth, this thesis will only focus on legislation regulating products relating to human consumption and use, which can potentially be hazardous, poisonous, or inherently unsafe.

The Tobacco Products Control Act,¹⁷³ Liquor Products Act,¹⁷⁴ and Liquor Act¹⁷⁵ were originally going to form part of the final thesis, but in doing research, it was decided that it does not warrant forming part thereof. The two main reasons are that, firstly, the problem of inaccessible product information for liquor and tobacco products is the same as that of foodstuffs, and in-depth discussion of these legislative pieces will be unnecessarily repetitive. Secondly, it is a personal choice to consume tobacco or liquor. The usage of these products is not a “mandatory” part of life, unlike medicinal or foodstuffs products. The person consuming tobacco or liquor will, in all likelihood, know what they are consuming as the purchasing of these products is strictly regulated and not readily available to anyone at any place. These persons must actively be seeking out these products to purchase them, knowing full well what it is they will be consuming, albeit an inherently unsafe product.

¹⁷² No. 34 of 2005.

¹⁷³ No. 83 of 1993.

¹⁷⁴ No. 60 of 1989.

¹⁷⁵ No. 59 of 2003.

6.2.3. Illiterate persons and technology

While illiterate persons are considered vulnerable, this thesis will not focus on them, as legislative measures such as pictograms are already in place to protect them. Instead, this thesis proposes solutions that prioritise the accessibility of labels or leaflets to ensure that illiterate and literate individuals alike can access important information. However, it is worth noting that some solutions, such as using Braille, may not be effective for illiterate persons who are visually impaired. In these cases, reasonable accommodation measures that cater to their specific needs would need to be explored.

Additionally, while there are technological aids available for persons with visual impairment, this thesis does not discuss them. Instead, technological solutions that create more accessible labels or leaflets for persons with visual impairment will be examined, which may require the use of technological assistive devices such as mobile phones. The focus will be on discussing the technological solutions rather than the assistive devices themselves.

6.2.4. Other products and their label or leaflets

While it is essential for all products to have legible product information on their labels and leaflets, this thesis only offers a possible solution that applies to the specific products mentioned. As such, I propose, *inter alia*, that the regulations within the legislative framework of these products be amended to mandate that the product information is made accessible to persons with visual impairment. It should be noted that the argument presented in this thesis may, to some extent, also be applicable to other products outside the scope of this research.

7. Methodology

The thesis shall commence by establishing a normative analytical framework that entails an evaluation of the normative aspects of disability, disability equality, and the legislative framework pertaining to labelling. The primary focus throughout the thesis shall remain on disability equality and the concepts of accessibility and reasonable accommodation, with particular emphasis on elucidating the existing legal landscape. To accomplish this objective, the thesis will undertake a systematic analysis of the most pertinent and current legal sources, including legislation, regulations, standards, reported cases, journal articles, policy documents, and discussion papers up to 2023.

At different stages of this thesis, alongside the normative analysis, the traditional legal doctrinal approach will also be employed. In essence, this approach involves the systematic analysis of legislative provisions, case law, and academic sources, with the aim of clarifying the current state of the law and presenting the material in a coherent and structured manner.¹⁷⁶ It is a descriptive, evaluative, and critical method that examines the content of legal opinions to assess their reasoning effectiveness and explore their implications for future cases.¹⁷⁷ For instance, this approach will be

¹⁷⁶ Broderick, A, (2015) at p. 14.

¹⁷⁷ *Ibid.*

utilised in the examination of various theoretical models of equality and disability, based primarily on academic literature authored by legal scholars in the field.

The final research methodology employed in this thesis will be a comparative analytical approach, which involves the act of comparing the law of one country with that of another to gain a better understanding of how legal judgments are made.¹⁷⁸ This approach is not limited to comparing only two laws or written words but can be extended to broader comparisons, including international comparisons. To this end, I will compare the application of reasonable accommodation in South Africa to that of the United States, Canada, and Brazil while also considering the labelling legislation and initiatives of the European Union and Colombia. The primary objective of this comparison is to examine one mass of legal data in relation to another and assess the similarities and differences between the two.¹⁷⁹

8. Structure

Chapter 1: Introduction

In Chapter 1, the thesis is introduced, providing a comprehensive overview of its background, objectives, and the structure of the subsequent chapters. The chapter serves as a foundation, offering insights into the context and significance of the research topic. It outlines the key aims and objectives, providing a roadmap for the reader to navigate through the ensuing chapters. By presenting a clear introduction in Chapter 1, the thesis aims to provide a solid framework for understanding the research and its subsequent analysis.

Chapter 2: The content and scope of substantive equality and disability jurisprudence within South African law

In Chapter 2, the first research question is explored, which involves an examination of equality jurisprudence in South African law and the rationale behind adopting a substantive concept of equality. The chapter provides a comprehensive overview of disability, placing emphasis on the disability rights movement and its influence on shaping the legal definition of disability. Both equality and disability serve as the backdrop for the subsequent discussion on the concepts of accessibility and reasonable accommodation, which play pivotal roles in advancing substantive equality within the South African context. By delving into these aspects, the thesis aims to shed light on the importance of accessibility and reasonable accommodation in achieving substantive equality while considering the global landscape of disability rights.

Chapter 3: The meaning, role, and impact of the concepts of reasonable accommodation and accessibility in international human rights law as it applies to disability

In Chapter 3, the focus is on addressing the second research question, which involves an exploration of the concepts of accessibility and reasonable accommodation within the framework of international human rights law. First the chapter analyses the relevant articles of the Convention, its General Comments and Communications. The chapter then delves into the legal basis and

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

normative status of reasonable accommodation, examining its multifaceted nature. Furthermore, the chapter investigates the legal basis and normative status of accessibility as outlined in the Convention, with particular attention given to the right to access and instances of denial of access. By bridging the theoretical foundations with practical application, the thesis aims to provide insights into the potential integration of these concepts within the legislative landscape, thereby advancing substantive equality for persons with visual impairment.

Chapter 4: The manner in which legislation and standards regulating product labelling of consumption-based, hazardous, poisonous, or inherently unsafe products unfairly discriminate against persons with visual impairment

Chapter 4 of this thesis is dedicated to addressing the third research question, which entails identifying the legislation, regulations, and standards governing product labelling. Specifically, this chapter examines the Consumer Protection Act, Medicines Act, Pharmacy Act, Foodstuffs Act, and Hazardous Substances Act as relevant laws to be analysed. Within this chapter, attention is given to highlighting the ways in which these laws unfairly discriminate against persons with visual impairment. The ultimate aim is to ensure equal treatment and non-discrimination for persons with visual impairment by promoting accessibility and reasonable accommodation within the legal framework.

Chapter 5: The extent to which accessibility obligations and reasonable accommodation measures ought to be applied to the legislation and standards in order to ensure that persons with visual impairment are not unfairly discriminated against.

In Chapter 5, the emphasis is on outlining the application of accessibility obligations and reasonable accommodation measures to the legislative framework. The objective is to propose a solution that upholds the constitutional right to equality and non-discrimination while simultaneously safeguarding the consumer rights of persons with visual impairment. Chapter 5 aims to provide a well-rounded and informed approach to address the challenges and ensure the protection of the rights of persons with visual impairment in relation to accessibility and reasonable accommodation.

Chapter 6: Conclusion

In Chapter 6, the final research question is addressed, and the conclusions of this thesis are presented. This chapter serves as the culmination of the research journey, bringing together the findings and insights gathered from the preceding chapters. It provides a comprehensive overview of the conclusions drawn from the analysis of equality, disability, reasonable accommodation, accessibility, and the legislative framework. By examining the final research question, the chapter offers a comprehensive understanding of the extent to which persons with visual impairment are subjected to unfair discrimination and the measures required to ensure their equal treatment and inclusion. Through this conclusive chapter, the thesis reaches its endpoint, leaving readers with a deeper comprehension of the challenges faced by persons with visual impairment and the potential pathways for reform and improvement within the legal framework.

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Chapter 2: The content and scope of substantive equality and disability jurisprudence within South African law

1. Introduction

Chapter 2 delves into the core of our inquiry by addressing the first research question, which revolves around the nuanced intersection of equality and disability within the context of South African law. This chapter serves as a comprehensive exploration of these fundamental concepts, aiming to elucidate their theoretical underpinnings and indigenous interpretations within the South African legal landscape. Specifically, we focus our lens on substantive equality and its transformative potential for persons with disabilities in South Africa. Concurrently, we embark on a journey to trace the historical evolution, conceptualisation, and various models of disability, discerning their intricate connections with the paradigms of equality. Moreover, we scrutinise two pivotal mechanisms, reasonable accommodation and accessibility, both wielded in South Africa to uphold substantive equality for persons with disabilities.

2. Equality

2.1. Introduction

Prior to the transition to a democratic society, the Apartheid regime established a repressive system that exhibited scant regard for persons with disabilities within the realm of jurisprudence. Nevertheless, as history unfolded, the grip of this oppressive regime loosened, paving the way for the advent of democracy. Despite the transformation, vestiges of the past continued to persist. In response to the imperatives of rectifying historical injustices and ushering in a new era of inclusivity, our nation found solace in the promulgation of a comprehensive Constitution that enshrined fundamental rights for all individuals, regardless of their abilities. With the formal recognition of the right to equality as an inherent entitlement for every person, a myriad of complex inquiries surfaced. Chief among these questions was the profound query of how this right should be construed and implemented in practice. The quest for answers began, resonating with the evolving dynamics of our society as it navigated the intricate path towards realising the principles of equality and inclusivity.

In its endeavour to bring clarity to matters of equality, the Constitutional Court has emphatically articulated two fundamental principles governing the interpretation and application of the right to equality. Firstly, recognising the intricate tapestry of our historical context, the Court underscored that a mere formal approach to the interpretation and application of equality would be inadequate.¹ Secondly, it unequivocally adopted a substantive approach, signifying that, while equal treatment is undoubtedly pivotal in the pursuit of equality, it is insufficient to treat all individuals identically in every circumstance. This perspective, as elucidated by *Hugo*, emphasises that true equality is not attained by uniform treatment alone, as it must also

¹ See Albertyn, C, & Goldblatt, B, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, Vol. 14, (1998), South African Journal on Human Rights, pp. 249 – 276 at p. 250, “[I] reiterate my disagreement with a statement to the effect that the CC has rejected formal equality in an absolutist sense, since formal equality is inclusive of and substantive conception of equality”.

take into account the unique circumstances and needs of individuals to achieve *de facto* equality.² Consequently, the concept of substantive equality has become deeply entrenched within the fabric of the equality clause, finding resonance in judicial decisions and academic discourse.

However, it is imperative to recognise that the equality clause, particularly in cases involving persons with disabilities, cannot be confined to a purely negative interpretation. While the prohibition against unfair discrimination undoubtedly plays a crucial role in preventing discriminatory practices, it alone cannot guarantee substantive equality. Even in a hypothetical scenario where no individual is subjected to unfair discrimination based on their disability, persons with disabilities may still find themselves unable to fully participate in a society primarily designed for those without disabilities. Hence, adopting a comprehensive perspective of the right to equality is imperative, encompassing both positive and negative dimensions. In this context, the various paradigms of equality within South African jurisprudence is explored, providing an in-depth exposition of the right to equality as enshrined in the Constitution's equality clause.

2.2. Equality: a value and justiciable right

This subsection starts with the supremacy clause in the Interim Constitution.³ With the enactment of the Interim Constitution, section 4(1) provides that it:

“[S]hall be the supreme law of the Republic and any law or act inconsistently with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency”.⁴

Its epilogue posited the notion of equality as one of the fundamental ideas that would transform a divided nation into one grounded on democratic values, social justice, and the protection of fundamental human rights.⁵ This is, of course, because of our particular history, which is inextricably associated with inequality occasioned by conquest, colonialism, and apartheid. However, quite oddly, neither the Interim Constitution nor the Constitution defines the concept of equality.⁶ The same rings true for the *right to*, or the *value of*,

² *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereafter referred to as “*Hugo*”) at para. [41].

³ The Constitution of the Republic of South Africa Act, No. 200 of 1993 (hereinafter referred to as the “Interim Constitution”). *Ibid* para. [10].

⁴ The final 1996 Constitution, The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the “Constitution”) in section 2 provides: “[T]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

⁵ Rapatsa, M, *The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?* Vol 11 No. 2, (2015), Acta Universitatis Danubius Juridica, pp. 1 – 114 at p. 18. In the Constitution, section 1 provides the values upon which the Constitution is founded upon:

“[T]he Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b. Non-racialism and non-sexism.

c. Supremacy of the constitution and the rule of law.

d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”.

⁶ Rapatsa, M, (2015) at p. 20. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (hereafter referred to as the “Equality Act”), however, defines equality as including “[t]he full and equal enjoyment of rights and freedoms as contemplated in the Constitution” and includes *de jure* and *de facto* equality and also equality in terms of outcomes.

equality.⁷ Instead, the Constitution constitutes an objective normative value system⁸ to ascribe meaning to the concept of equality.⁹ The constituent part of this objective normative value system must be the values¹⁰ that make up the system.

Consequently, any South African positive law must function as a subject and be subservient to the Constitution.¹¹ In other words, the Constitution not only embraces equality¹² as a *value*, but it adopts equality as an *organising principle*¹³ resonating from its centre as a standard that permeates and informs the entirety of the South African positive law.¹⁴ Thus, equality not only finds itself at the heart of the Constitution but also at the heart of our entire constitutional democracy. Accordingly, equality as a core foundational value and a right is central to an egalitarian Constitution, with the prohibition of unfair discrimination and transformation as its primary purpose.¹⁵

“[T]hus, equality evolves as an all-encompassing norm which covers wide-ranging aspects in society... Indeed, this has been given added impetus by South Africa's polarised past ... Hence, the right to equality is an integral part of South Africa's history and present jurisprudence and shall continue to play a crucial function in modelling the country's transformation agenda ... and legal developments at large”.¹⁶

Equality as a value and right is central to our Constitution, with transformation as a primary purpose.¹⁷ As a core foundational value, equality gives substance to the aim and objective of the Constitution. As a right, equality provides the mechanism for achieving equality. The value is used to interpret and apply the right as the right is infused with the substantive content of the value.¹⁸ There must be a distinction between equality as a right and a foundational value. As a value, equality gives substance to the vision of the

⁷ The Constitutional Court's equality jurisprudence found its genesis in section 8 of the Interim Constitution and, after that developed under section 9 of the Constitution. The interpretation of and principles established through the interpretation and application of section 8 apply without more to section 9. In this regard, see examples: *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para. [15] (hereafter referred to as “*Sodomy*”) where Ackermann, J, proceeded “[o]n the assumption that the equality jurisprudence and analysis developed by ... [the CC] in relation to S[.] 8 of the [I]nterim Constitution is applicable equally to the 1996 Constitution, notwithstanding certain differences in the wording of these sections” and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. [32] (hereafter referred to as “*Immigration*”) where Ackermann, J, followed “the approach laid down by ... [the CC] in various of its judgments as collated and summarised in [*Harksen*] ... and as applied to S[.] 9 of the Constitution in [*Sodomy*]”.

⁸ See *S v Makwanyane* 1995 (3) SA 391 (CC) (hereafter referred to as “*Makwanyane*”) at para. [7] where Chaskalson, P, made it clear that the Interim Constitution is a “transitional constitution[,] but one which itself establishes a new order in South Africa”; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para. [54] – [55] where the Constitutional Court stated that the Constitution is not merely a formal document regulating public power, but also embodies an objective, normative value system; *Brink v Kitschhoff* NO 1996 (4) SA 197 (CC) (hereafter referred to as “*Brink*”) at para. [44], “[t]he Preamble states the need to create a new order in ‘which there is equality between men and women’ as well as equality between ‘people of all races’”. The Preamble of the Interim Constitution was constitutive of an objective normative value system through a substantive constitutional revolution, turning the old legal order on its head. This is maintained in the Preamble of the Constitution by laying the foundations for an open and democratic society.

⁹ Rapatsa, M, (2015) at p. 19.

¹⁰ The founding values of the constitutional order are: “[H]uman dignity, the achievement of equality and the advancement of human rights and freedoms. Alongside non-racialism and non-sexism; the supremacy of the Constitution and the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness”.

¹¹ Due to section 2 of the Constitution.

¹² Equality forms an integral part of the objective normative value because of our past. Inequality was enforced by rule by law, as opposed to the rule of law, and it's contrasted to such an extent by the Constitution that it's an organising principle, thereby ensuring that every facet of our law must conform to that organising principle (for example, laws relating to tax has to be equal).

¹³ *Hugo* at para. [74].

¹⁴ *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) at para. [22] (hereafter referred to as “*van Heerden*”).

¹⁵ See Albertyn, C, & Goldblatt, B, (1998) at p. 249. In *Brink* at para. [42], the need to identify and prohibit unfair discrimination and remedy the results is the primary purpose of the equality clause.

¹⁶ Rapatsa, M, (2015) at p. 19.

¹⁷ See Albertyn, C, & Goldblatt, B, (1998) at p. 249.

¹⁸ *Ibid*; *van Heerden* at para. [22].

Constitution.¹⁹ As a right, it provides the mechanism for achieving equality.²⁰ Equality is the first substantive right in the Bill of Rights. The right to equality provides equal protection of the law and benefits, protection from unfair discrimination, affirmative action measures, the prohibition of unfair discrimination, and national legislation to prevent or prohibit unfair discrimination.²¹

As per the majority in *Dawood*, the achievement of equality, as a value, informs the right to equality, and this is evident from section 1(a) of the Constitution, listing “the achievement of equality” as one of the founding values of South Africa,²² which importance transcends that of mere values with corresponding rights.²³ The guarantee of equality lies at the very heart of the Constitution. The achievement is “[a] standard which must inform all law and against which all law must be tested for constitutional consonance”.²⁴ Therefore, in the context of the value of “the achievement of equality”,²⁵ the Constitutional Court has stated that the Constitution was written with equality in consideration of our inequality history and vision. Accordingly, equality is afforded the status of an organising principle.²⁶ The values of human dignity, the achievement of equality, and freedom are of fundamental importance to our constitutional democracy.²⁷ The emphasis on these values gains added significance because section 1(a) of the Constitution enjoys the highest entrenchment of any provision in the Constitution.²⁸ These values are further entrenched in the Constitution, not only to protect other fundamental rights but in a manner that enables them to impact other areas of the law significantly.²⁹ The impact of these values is further strengthened by the constitutional provisions dealing with the construction of the Constitution, ordinary statutes, and the development of the common law and customary law.³⁰ In this regard, the Constitution requires every court to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom when interpreting the Bill of Rights, legislation or customary law.

¹⁹ What the Constitution envisions is the ideal of achieving equality. Albertyn, C, & Goldblatt, B, (1998) at p. 249; *Hugo* at para. [74] “[B]ut in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre”.

²⁰ Albertyn, C, & Goldblatt, B, (1998) at p. 249.

²¹ Albertyn, C, & Kentridge, J, *Introducing the Right to Equality in the Interim Constitution* Vol. 10, (1994), South African Journal on Human Rights, pp. 149 – 178 at p.156; *van Heerden* at para. [25]:

“[I]n this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework”.

²² *Dawood v Minister of Home Affairs; Sbalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 946 (CC) at para. [35].

²³ *Van Heerden* at para. [22] where Moseneke, J, held that “[t]he achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value” and, *Duncanmec (Pty) Limited v Gaylard* N.O. 2018 (11) BCLR 1335 (CC) at para. [2] where the court held racism and racially offensive conduct to be antithetical to our constitutional order, at the heart of which lies a concept of equality that is both an entrenched right and a foundational value that constitutes the bedrock of the order.

²⁴ *Van Heerden* at para. [22].

²⁵ See as examples of the achievement of equality being the “[b]edrock of our Constitution”: *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at para. [52]; *Fraser v Children’s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) at para. [20]; *Hugo* at para. [74]; *Bel Porto School Governing Body Premier, Western Cape* 2002 (3) SA 265 (CC) at para. [6]; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at para. [17].

²⁶ *Hugo* at para. [74].

²⁷ Read in this context human dignity, equality, and freedom underpin the vision of democracy embodied in the Constitution. These values occur in section 1, 7(1), 9, 10, 12, 36(1) & 39(1)(a) of the Constitution. In Woolman, S, *Dignity*, in Woolman, S, & Bishop, M, (Eds.), *Constitutional Law of South Africa*, (2014), at Ch. 36, p. 76, Woolman indicated that in order to “realise” the constitutional values of dignity, equality, and freedom, it would require a “[l]evel of material support and immaterial support”; Mokgoro, Y, *Ubuntu and the Law in South Africa*, Vol. 1(1), (1998), Potchefstroom Electronic Law Journal, pp. 15 – 25, at p. 20; Kriegler, J, in *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC) at para. [40] – [41] held these values to be “[f]oundational to the [R]epublic” and has emphasised that alongside equality, the other two core constitutional and democratic values are freedom and equality:

“[M]oreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom”.

²⁸ Along with section 2 of the Constitution; Ackermann, L. W. H, *Equality and the South African Constitution: The Role of Dignity* (2000), Heidelberg Journal of International Law, pp. 537-556 at p. 542.

²⁹ Ackermann, L.W.H, (2000) at p. 543.

³⁰ *Ibid.*

The guarantee of equality lies at the very root of the Constitution. The achievement is “[a] standard which must inform all law and against which all law must be tested for constitutional consonance”.³¹ Which model of equality does South Africa then adopt to further equality, and how does the right to equality function in South African law?

2.3. Theoretical models of equality within a South African context

Understanding equality requires appreciating that equality jurisprudence in South Africa has been dominated by two main equality models – formal and substantive equality.³² Each model of equality results in different outcomes in the context of persons with disabilities “[w]hen applied through legislation and policy as the trigger and methods for analysing instances of discrimination vary under each model of equality”.³³ It will also enable me to state *what substantive equality means* in the abstract and bring forth the relevance of substantive equality in the context of disability. Lastly, I will briefly discuss the critical analysis of the equality clause itself. I will start by addressing the formal equality model first.

“Equality requires sameness” in its general application to South African law is outdated and severely misguided as to what equality means. Formal equality on its own simply connotes sameness, equal, or similar treatment to persons in the same situation.³⁴ It is primarily concerned with equal treatment in applying and enforcing laws and rights, despite the unequal results that may flow therefrom.³⁵ It requires that the law treat persons in the same manner irrespective of the different circumstances they may find themselves in.³⁶

“[I]t would [...] treat identically qualified applicants in the same way regardless of the fact that they might have different genders, racial background, or physical impairments”.³⁷

The insistence on identical treatment leads to the disregard of differential characteristics, and in so doing, it risks reinforcing rather than redressing disadvantage and, thus, perpetuating inequality.³⁸ There will be no equality should the same rights and entitlement be extended to all persons, with or without an impairment, since such rights and entitlements will only benefit the advantaged persons and “[r]einforce the dominant paradigm”.³⁹ The right to equality will not, for example, be achieved if all persons, including those with visual impairments, were to be given the same products to consume with the same product label as required by law for sighted persons. Persons with visual impairment are physically incapable of reading the same label as sighted persons. It is for this reason that it may be necessary to treat such persons differently. The Constitutional Court rejected the formal model of equality when interpreting and applying equality within South Africa as it has affirmed the importance of difference as a positive feature of society.⁴⁰

In stark contrast to the formal model of equality, the substantive model of equality does not focus on the same treatment. The essence of substantive equality vests in the fact that it requires the law to consider people’s varied circumstances, which needs particular attention to ensure a similarly favourable outcome

³¹ *Van Heerden* at para. [22].

³² Rapatsa, M, (2015) at p. 21. Broderick, A, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (2015), Maastricht University, pp. 1 – 465 at p. 32.

³³ Broderick, A, (2015) at p. 31.

³⁴ *Ibid.* at p. 32.

³⁵ *Ibid.* at p. 31.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ South African Law Reform Commission *Domestication of the United Nations Convention on the rights of Persons with Disabilities* (Issue 39), (2020), pp. 1 – 263 at p. 18.

³⁹ *Ibid.*

⁴⁰ *Barnard* at para. [174].

for all. Substantive equality acknowledges the complexity of (in)equality.⁴¹ It takes cognisance of the systemic nature of (in)equality and its entrenchment in society. It establishes “[a]n aspirational ideal — the achievement of a society based on equality — and presumes that this is (at least partly) possible through law”.⁴² Substantive equality is committed to eradicating and is understood as a remedy to systemic and entrenched inequalities.⁴³

In a South African context, assessing the formal and substantive conception of equality, in the context of the principles and purpose of the Constitution, a mere formal conception of equality risks neglecting the deepest commitments of the Constitution, whereas a substantive concept of equality is supportive of the commitments of the Constitution.⁴⁴ The formal model of equality is encapsulated in the prohibition of direct (unfair) discrimination and results in the enactment of bald non-discrimination prohibitions that do not take into account individual or contextual differences between marginalised and socially privileged groups (or, put otherwise, between disabled and non-disabled groups). Applying the formal model alone does not redress inequalities as it contains no procedural mechanism for prohibiting indirect (unfair) discrimination, accommodating the needs of persons with disabilities, or permitting positive measures.⁴⁵ In stark contrast, substantive equality concerns the discriminatory effects of a particular facially neutral rule. Substantive equality includes indirect (unfair) discrimination, which is vital in uncovering clandestine forms of discrimination against persons with disabilities.⁴⁶ Substantive equality also requires that concrete measures are implemented to remove barriers to participation. As per *Hugo*, the prohibition on unfair discrimination in the Constitution seeks not only to avoid discrimination against persons who are members of disadvantaged groups; it seeks to do more than that by accommodating their needs.⁴⁷ Furthermore, the Constitutional Court refers to the concept of substantive equality in rejection of the formal conception of equality and confirms that the Constitution is transformative, providing a substantive conception of equality.⁴⁸ It is, therefore, this substantive conception of equality that South Africa adopts.

2.4. Section 9 of the Constitution

In 1994, for the first time in South African legal history, South Africans had a fundamental and constitutionally entrenched right to equality contained in section 8 of the Interim Constitution and, after that, in section 9⁴⁹ of the Constitution.⁵⁰ The Constitution places disability equality within the equality clause, and including disability rights within a constitutional equality clause makes the South African

⁴¹ Albertyn, C, *Substantive equality and Transformation in South Africa*, Vol. 23(2), (2007), South African Journal on Human Rights, pp. 253 – 276 at p. 254.

⁴² *Ibid.* As mentioned above, in a constitutional sense, therefore, substantive equality is both a value and a legally enforceable right.

⁴³ *Ibid.*

⁴⁴ Currie, I, and De Waal, J, Equality in Currie, I, & De Waal, J, (Eds.) *The Bill of Rights Handbook* (2013), at p. 214.

⁴⁵ Broderick, A, (2015) at p. 148.

⁴⁶ *Ibid.*

⁴⁷ Currie, I, and De Waal, J, (2013) at p. 214.

⁴⁸ *Barnard* at para. [174].

⁴⁹ “[E]quality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

⁵⁰ The interpretation of and principles established through the interpretation and application of section 8 applies without more to section 9. In this regard see examples: *Sodomy* at para. [15] where Ackermann, J, proceeded “[o]n the assumption that the equality jurisprudence and analysis developed by ... [the CC] in relation to section 8 of the interim Constitution is applicable equally to the 1996 Constitution, notwithstanding certain differences in the wording of these sections”.

Constitution one of only a handful worldwide.⁵¹ The Constitution embodies an “unequivocal rejection of the infringements of dignity, freedom and equality that occurred in and, to an extent, defined our past”.⁵² To fully understand the content, scope, and impact of the provisions contained in section 9, it is necessary to see the function⁵³ of the values of human dignity,⁵⁴ equality,⁵⁵ and freedom⁵⁶ in the context of the “[c]onstitution as a whole and to appreciate the important role given to these values by specific provisions of the Constitution for the general development of the legal order”.⁵⁷ This position aligns with how section 9 must be interpreted. Such an interpretation must be purposive,⁵⁸ value-laden,⁵⁹ generous,⁶⁰ grounded in the text,⁶¹ and solidified in context.⁶²

“[S]ection 9 can doctrinally consider being divided into three constituent parts or elements. The first denotes 'equality as rationality' and regulates unequal treatment constitutional. The second denotes 'equality as fairness' and regulates unfair discrimination in the constitutional sense. The third denotes 'equality as fair discrimination' and regulates constitutionally mandated measures to transform an unequal society. The first two elements or parts of equality find concretisation through the Harksen-test, and the third finds concretisation through the notion entitled restitutionary equality”.⁶³

Two aspects of section 9 will now be discussed: unequal treatment in the constitutional sense⁶⁴ and unfair discrimination.⁶⁵ Restitutionary equality, found in section 9(2), does not form part of this thesis and will not be discussed since it does not bear sufficient relevance.⁶⁶

⁵¹ Gillberd, E. A, *Universally Accessible public transportation systems: experiences with the implantation in the thirteen integrated public transport network municipalities in South Africa* (2021), University of Pretoria, pp. 1 – 207 at p. 20.

⁵² Ackermann, L.W.H, (2000) at p. 542.

⁵³ Albertyn, C, & Goldblatt, B, (1998) at p. 254: “[T]he Constitution identifies equality, dignity and freedom as the democratic values underpinning the new society. All of these must be given meaning, and all should be used in the interpretation of rights”.

⁵⁴ *Ibid*:

“[W]e suggest that their meaning within the South African Constitution can, briefly, be understood as follows. Dignity should be understood as enhancing the value of individual integrity and autonomy within a social world that enriches that autonomy through relationships with others, and not in opposition to them”.

⁵⁵ *Ibid*:

“[T]his value of equality promotes and protects the ability of each human being to develop to his or her full human potential and to forge mutually supportive human relationships in the home, the community, the workplace and society as a whole. The laws, policies and practices of the state and society should promote relationships between persons and groups, which facilitate each person's ability to be full social citizen of our new democracy. This entails the removal of systemic discrimination and deeply entrenched patterns of structural disadvantage and the development of opportunities and resources for meaningful participation in society”.

⁵⁶ *Ibid*:

“[F]reedom entails both the ability of the individual to make choices to maximise his or her human potential in the context of social relationships which facilitate those choices and in the absence of systemic barriers”.

⁵⁷ Ackermann, L.W.H, (2000) at p. 542; Albertyn, C, & Goldblatt, B, (1998) at p. 250:

“[T]he centrality of equality to the constitutional project of transformation, together with the shifting and contested meanings of equality as both a democratic value and a right, make legislative and judicial interpretations of equality important sites of struggle over the pace, nature and extent of transformation”.

⁵⁸ Albertyn, C, & Kentridge, J, (1998) at p. 158: “[E]quality rights must be interpreted in a purposive manner, taking account of the principles and values underlying the Constitution”; Currie, I, & De Waal, J, (2013) at p. 140.

⁵⁹ *Makwanyane* at para. [9]. See also section 39(1)(a) of the Constitution.

⁶⁰ The right to equality cannot mean whatever we want it to mean, and, consequently, section 9 can only be given a broad or generous interpretation as far as the language permits. *Makwanyane* at para. [9]. See also Currie, I, & De Waal, J, (2013) at pp. 138 – 140. *Attorney-General v Moagi* 1982 (2) B.L.R 124 (CA).

⁶¹ Currie, I, & De Waal, J, (2013) at p. 140:

“[S]triking a balance between adhering to the text and drawing content from values requires an interpreter to make a value judgment regarding what interests ought to be protected or promoted by the right”. Even though the application and interpretations of certain sections contained therein have been involved litigiously, the omission of defining the concept of equality echoes deliberateness. By defining something, an automatic limitation is placed thereon.

⁶² *Makwanyane* at para. [10]; *Sobramoney* at para. [16]; *City Council of Pretoria v Walker* 1998 (2) SA 3 (CC) at para. [26]; *Hugo* at para. [73].

⁶³ Van der Walt, J. J, *An ethic conception of substantive equality in a 'Post'- Apartheid South Africa* (2018), University of Pretoria, pp. 1 – 330 at p. 62.

⁶⁴ Section 9(1) of the Constitution.

⁶⁵ Section 9(3) – (5) of the Constitution.

⁶⁶ Section 9(2) of the Constitution.

2.4.1. Section 9(1)

Section 9(1) “[e]ntitles everybody, at the very least, to equal treatment by our courts of law”⁶⁷ and entails that “[n]o one is above or beneath the law and that all persons are subject to the law impartially applied and administered”.⁶⁸ Section 9(1) does not entail that the law must treat all persons identically under all circumstances, as it has been shown above that the Constitution informs a substantive conception of equality and to treat two people whose circumstances are radically different in precisely the same way could well constitute unfair discrimination.⁶⁹ The purpose of this aspect of equality is to ensure that the government functions rationally when exercising public power or performing a public function.⁷⁰

Section 9 distinguishes between two forms of differentiation, namely mere differentiation and differentiation that amounts to discrimination.⁷¹ Section 9(1), which is the classic positive formulation of legal equality,⁷² guarantees that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law” and concerns what the Constitutional Court has termed “mere differentiation”.⁷³ Citing the Constitutional Court in *Prinsloo*, the Court suggested that “[i]t deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination”.⁷⁴ The former has been termed “mere differentiation” because before it can be said that it infringes the equality clause, it must be established that there is no rational relationship between the differentiation in question and the legitimate governmental purpose.⁷⁵ Even if mere differentiation is rationally connected to a legitimate governmental purpose, it is not the end of the equality enquiry under section 9, for the differentiation might still constitute unfair discrimination under section 9(3) or section 9(4) in respect of the person against whom the differentiation impacts.⁷⁶

Sections 9(3) to 9(5) are concerned with (un)fair discrimination (that is, differentiation constituting discrimination that is (un)fair).⁷⁷ Mere differentiation occurs when no prohibited ground is implicated. Although the grounds mentioned explicitly in sub-section (3) constitute a broad basis on which discrimination is prohibited, they do not constitute a closed category. If differentiation occurs on specified grounds, it amounts to discrimination.⁷⁸ Suppose it does not but a to be recognised ground is based on attributes or characteristics that objectively can impair the fundamental dignity of persons as human beings, in that case, such differentiation will also amount to discrimination based on this newly recognised prohibited ground.⁷⁹ Since the differentiation in this thesis takes place on the listed ground of disability, a further enquiry into section 9(1) will not be necessary as it automatically constitutes presumptively unfair discrimination. The differentiation between persons with visual impairment and sighted persons with

⁶⁷ *S v Ntuli* 1996 (1) SA 1207 (CC) at para. [18], which case was decided on section 8(1) of the Interim Constitution.

⁶⁸ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [22].

⁶⁹ Ackermann, L.W.H, (2000) at p. 544.

⁷⁰ To ascertain the legitimacy of the purpose of the specific rule of law one must enquire as to what are the reasons given for the specific purpose of the rule of law. The reasons must render the purpose a legitimate governmental purpose and it is this purpose that would be proffered to validate the differentiation. See *Prinsloo* at para. [26].

⁷¹ *Prinsloo* at para. [23].

⁷² Ackermann, L.W.H, (2000) at p. 544.

⁷³ *Prinsloo* at para. [25].

⁷⁴ *Ibid.* at para. [23].

⁷⁵ *Ibid.* at para. [25].

⁷⁶ Ackermann, L.W.H, (2000) at p. 546.

⁷⁷ I.e., section 9(3) or 9(4) and 9(5) of the Constitution.

⁷⁸ *Ibid.*

⁷⁹ The essential criterion is whether the differentiation has the potential to impair the fundamental dignity of persons as human beings. See *Prinsloo* at para. [31].

respect to labelling requirements (only considering the legibility thereof for sighted persons) can be regarded as presumptively unfair discrimination.

2.4.2. Section 9(3) – 9(5)

The right against unfair discrimination is contained in sections 9(3) to 9(5). At the heart of section 9(3) lies the prohibition against unfair discrimination by the State on the specified and other grounds. Section 9(4) prohibits unfair discrimination between private individuals on the grounds listed in section 9(3). Section 9(3) provides that differentiation on one of the recognised prohibited grounds, one of the grounds being a disability, is discrimination. Section 9(5), in turn, provides that discrimination on one of the listed grounds is presumptively unfair. Furthermore, if there is discrimination on an unspecified ground, unfairness will have to be established by the complainant. “Unfair” requires assessing the impact of the discrimination; that is, determining whether the discrimination impacted the (visually impaired) complainant unfairly. The differentiation does not amount to unfair discrimination, the enquiry ends, and there is no infringement of section 9(3) or section 9(4). However, if the discrimination is unfair, the final enquiry entails a determination as to whether the infringement is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality, and freedom.⁸⁰

The inquiry about the fairness of the discrimination concentrates on the impact of the law or conduct on the complainant.⁸¹ In assessing the impact of discrimination, the focus is placed primarily on the victim’s experience.⁸² In terms of *Harksen v Lane*, the fairness of discrimination is determined by the following factors: the “position of the complainants in society” and “whether they have suffered patterns of disadvantage”. Other factors are “the discrimination is based on a specific ground”, the “nature of the provision or power and the purpose sought to be achieved” by the provision, the “extent to which the discrimination has affected the rights and interests of the complainant”, and “whether this has led to an impairment of their fundamental dignity”.⁸³ In addition, hereto, but in substantiation of a context-sensitive analysis of fairness, the Constitutional Court that substantive equality requires, whenever “assessing fairness or otherwise”, “[a] flexible but situation sensitive approach [, which] is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society”.⁸⁴

In other words, the following assessment will focus on the experience of a visually impaired person within the specific discriminatory situation they encounter. It will determine whether legislating specific labelling requirements exclusively for the general sighted public’s protection and benefit, especially in the context of consumption-based,⁸⁵ hazardous,⁸⁶ poisonous⁸⁷ or inherently unsafe products,⁸⁸ is fair towards persons with

⁸⁰ These rights can be limited according to section 36, but only in very specific circumstances and not all rights are limitable. All courts can hear discrimination-based claims, but equality courts have been established under the Equality Act.

⁸¹ See *Harksen* at para. [50] – [51] where the Constitutional Court set out factors to consider in determining whether discrimination has an unfair impact.

⁸² Ackermann, L.W.H, (2000) at p. 546.

⁸³ South African Law Reform Commission (2020) at p. 24

⁸⁴ *Van Heerden* at para. [27].

⁸⁵ Medicines and Related Substances Act, No. 101 of 1965; Pharmacy Act, No.53 of 1974; and Foodstuffs, Cosmetics and Disinfectants Act, No. 54 of 1972.

⁸⁶ Hazardous Substances Act, No. 15 of 1973.

⁸⁷ Foodstuffs, Cosmetics and Disinfectants Act, No. 54 of 1972.

⁸⁸ Medicines and Related Substances Act, No. 101 of 1965; Foodstuffs, Cosmetics and Disinfectants Act, No. 54 of 1972; and Hazardous Substances Act, No. 15 of 1973.

visual impairment. Consider the following straightforward example: there are two elderly persons who both live alone and take the same medication for diabetes and a heart condition that they receive from a state hospital. One is visually impaired, and the other is not. If they are both given the same printed medicinal boxes with instructions only legible to the sighted person, they have, in theory, been treated equally because both received the same medication from the state hospital. However, the effect of this is that the visually impaired person has been disadvantaged simply because his needs have not been considered. He cannot read, see, or receive information about what medication and how to consume it since nothing has been printed legibly for him. The prohibition on unfair discrimination in the Constitution seeks not only to avoid discrimination against persons with visual impairment who are members of disadvantaged groups, but it seeks to do more than that through positive measures.⁸⁹ Positive measures include accommodating the needs of such a visually impaired person and making products universally accessible.

3. Disability

In subsection 3, it embarks on a journey through history to provide a comprehensive historical overview of the disability rights movement in South Africa. This exploration delves into the origins, development, and milestones of the movement, tracing its evolution over time. Furthermore, it delves into the theoretical models of disability that have shaped the discourse surrounding disabilities in South Africa. These models encompass the medical model, the social model, and the human rights model of disability, each offering distinct perspectives on disability and its implications for individuals and society.

Additionally, the subsection scrutinises the pivotal issue of how disability is defined within the South African legal framework and societal context. To gain a comprehensive understanding of this definition, it draws insights from the three established models of disability, illuminating how each model informs and influences the formulation of disability within the South African legal landscape.

This subsection underscores the intricate interplay between the historical evolution of the disability rights movement, the theoretical lenses through which disability is perceived, and the legal constructs defining disability within South Africa. By unravelling this multifaceted narrative, it aims to provide a comprehensive foundation for subsequent discussions on the mechanisms and measures aimed at ensuring substantive equality for persons with disabilities in South Africa.

3.1. Introduction

Over 1 billion people are estimated to live with some form of disability.⁹⁰ Available statistical data on the prevalence of disability in South Africa are neither comprehensive nor accurate.⁹¹ Still, it is estimated that persons with disabilities comprise 5 to 12 percent of the South African population, representing all races,

⁸⁹ *Van Heerden* at para. [27].

⁹⁰ *World Health Organisation: Disability and Health*, World Health Organisation, (2020) <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>> (accessed on 07 November 2021).

⁹¹ Dube, A. K, *The role and effectiveness of disability legislation in South Africa* Vol. 1, (2005) Disability Knowledge and Research, pp. 1 – 89 at p. 16.

classes, ages, and sexes.⁹² The number continues to rise due to the growing ageing population and chronic health conditions.⁹³ Persons with disabilities are the world's most significant minority, but unlike most minority groups, it is an open minority. Any individual can at any time become part of this minority group.⁹⁴ Disability is an integral part of humanity because everyone, no matter how unlikely it may seem, can transition from non-disabled to disabled.⁹⁵ Vision impairment, resulting in vision difficulties, *is a leading cause of disability*.⁹⁶ According to the 2001 Census of the total percentage of persons with disabilities, the highest disability recorded was visual impairment at 32,1 percent.⁹⁷ Persons with disabilities form a vital minority group within our society that has, unfortunately, suffered unfair discrimination and lack of independence.⁹⁸ However, since the advent of the Constitution, it has extended fundamental human rights to all citizens for the first time in the history of South Africa.⁹⁹

To begin, the subsection embarks on an in-depth exploration of the disability rights movement, tracing its origins and evolution from its inception to the present day. This historical journey aims to shed light on the pivotal moments, key figures, and transformative milestones that have shaped the movement's trajectory over time. Subsequently, it delves into a comprehensive analysis of the three predominant models that underpin our comprehension of disability. These models have been significantly influenced by the disability rights movement and have emerged as paradigmatic frameworks for understanding the construct of disability. Moreover, it navigates through the intricate terrain of the definition of disability, a concept that holds profound implications within the realm of legislation and international treaties. This subsection elucidates the development of these models for understanding disability, highlighting their influence on the formulation of disability constructs found in prominent national legislations and international conventions. By dissecting these facets of the disability rights movement, models of disability, and the definition thereof, it aims to provide a comprehensive foundation for subsequent discussions on the mechanisms and measures designed to ensure substantive equality for persons with disabilities, particularly within the context of South African law and international human rights frameworks.

3.2. The disability rights movement

According to Haegele and Hodge, the concept of disability was initially framed in religious discourses within the beliefs of Western Judeo-Christian society.¹⁰⁰ Disability was regarded by religious leaders as the cognitive authority in society, as an act of a higher being, and that disability presented itself as an opportunity for miracles to occur. Charitable organisations and medical professionals ultimately replaced religious leaders.

⁹² Office of the Deputy President, *Integrated National Disability Strategy White Paper*, (1997) <<http://www.info.gov.za/whitepapers/1997/disability.htm>> (accessed on 09 November 2021).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* Many people are aware of this and subsequently obtain disability cover (insurance) to ensure that all their needs are covered. It provides a different perspective thinking of disability as something that any person is susceptible to because one tends to regard a matter as more important or urgent when it affects them, or someone they love, personally.

⁹⁶ Naidoo, K. S., Jaggernath, J., Ramson, P., Chinanayi, F., Zhuwau, T., Overland, L., *The prevalence of self-reported vision difficulty in economically disadvantaged regions of South Africa*, Vol. 4(1), (2015), African Journal of Disability, pp.1 – 11 at p. 1.

⁹⁷ Grobbelaar-du Plessis, I., & Grobler, C., *South Africa – Country Report*, (2013), 1 ADY 307-340 (CRPD/C/ZAF/1), Centre for Human Rights University of Pretoria at pp. 1 – 81 at p. 9. According to the First Country Report (South Africa) at p. IV, based on the sample of the 2011 General Household Survey, of the total of 45,345,000 South Africans aged five years and older who reported, 3,001,000 had sight impairments.

⁹⁸ Reyneke, J. M., & Oosthuizen, H., *Are the rights of the disabled a reality in South Africa? Part One* Vol. 28(2), (2003), Journal for Juridical Science pp. 91 – 108 at p.91; Ngwenya, C., *Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue* Vol. 29(2), (2004), Journal for Juridical Science, pp. 167-197 at p.168.

⁹⁹ Dube, A. K., (2005) at p. 16.

¹⁰⁰ Haegele, J. A., & Hodge, S., *Disability Discourse: Overview and Critiques of the Medical and Social Models* Vol. 68(2), (2016), Quest, pp. 193 – 206 at p. 193 – 194.

The disability rights movement (hereafter referred to as the “*DRM*”) began after persons with disabilities were viewed as burdensome and of no particular use to society.¹⁰¹ This gave rise to the welfare or charity phase as more charitable organisations began to emerge. During this phase, charitable organisations took on “taking care of” persons with disabilities. While there is no debating the necessary assistance these organisations provided, they also, unfortunately, perpetuated ostracisation and apartheid. They ended up serving as places to confine persons with disabilities rather than integrating them into the society of the 1940s and 1950s.

In the 1960s, the DMR witnessed a significant shift away from regarding persons with disabilities as mere recipients of charity toward adopting a medical (model) approach to understanding their disability. The advancement of medical and scientific knowledge, including technology, thus ensured irrevocable change. The advent of modern medicine added a new and significant dimension to the historical treatment of disabilities and persons with disabilities. Instead of merely being placed into the care of a charitable organisation, as medical technology progressed, persons with disabilities also became the objects of rehabilitation and cure.¹⁰² With the cognitive authority being doctors and scientists, instead of religious leaders and organisations, the “defects” of persons with disabilities were regarded as a “fixable problem”. During this phase, persons with disabilities were, unfortunately, still the objects of welfare and medical care instead of the subject of rights. A generation of medically assisted persons with disabilities watched the liberation movements of other minority groups fighting for their rights as equal citizens in society.¹⁰³ Their demand for equal rights, access to education, employment and public facilities were all issues that had particular relevance to persons with disabilities who had mostly been excluded from society.¹⁰⁴ This demand for equality saw the coming-of-age phase in the 1970s and 1980s for persons with disabilities across the United States of America (hereafter referred to as the “*USA, U.S or United States*”), the United Kingdom (hereafter referred to as the “*UK*”), Europe, and Scandinavia.¹⁰⁵

In the early 1980s, the lives of many were changed when the social (model) approach was introduced as a product of the DMR. During this phase, the difference in terminology between “disability” and “handicap” emerged.¹⁰⁶ This entails a political repurposing of the idea of “disability”, which describes the socially created disadvantage and marginalisation experienced by persons who have or are perceived to have “impairments”.¹⁰⁷ This distinction highlighted the difference between “being disabled”, which refers to socially created exclusion and disadvantage, and being “handicapped”, which refers to an individual’s particular mental and physical characteristics. Subsequently, in 1981, as a direct result of the DRM, the Disabled People’s International (hereafter referred to as the “*DPP*”) officially drew a distinction between “[t]he functional limitation within the individual caused by physical, mental or sensory impairment” (or, put otherwise, their handicap), and the “loss or limitation of opportunities to take part in everyday life of the

¹⁰¹ Jagoe, K, *The Disability Rights Movement: its development in South Africa* Vol. 1, (1992), Independent Living Committee of Disabled Peoples’ International pp. 1 – 115 at p. 25.

¹⁰² Ngwena, C, *Deconstructing the definition of “disability” under the Employment Equity Act: Social Deconstruction* Vol. 22(4), (2006), South African Journal on Human Rights, pp. 613 – 646 at p. 620.

¹⁰³ People of colour, students, women, and homosexuals.

¹⁰⁴ Jagoe, K, (1992) at p. 27, the writer draws attention to the similarities between the two phases:

“[T]here are a number of common characteristics of the medical and the welfare phases. There is the belief that the professional is the “expert”, the controller of knowledge and has the power to direct the situation. The disabled person is regarded as the client or patient, an inferior member of the “team” if a member at all. The latter is considered a passive recipient of whatever service. Not only are disabled people deemed incapable of making decisions about their own lives, but the hierarchical relationship itself perpetuates passivity, and ignorance and inhibits participation in every aspect of our lives”.

¹⁰⁵ *Ibid.* Degener, T, *Disability in Human Rights Context* Vol. 5(3), (2016), LAWS, pp. 1-24 at p. 1 & 17.

¹⁰⁶ *Ibid.* at p. 28: “[D]isability refers to what is inherent in the individual and to a large degree unchangeable and static. Handicap refers to the restrictions experienced in society”.

¹⁰⁷ *Ibid.*

community due to physical and social barriers” (or, put otherwise, their disability).¹⁰⁸ It was also in 1981 that, for the first time, the United Nations had the International Year of Disabled Persons.

Historically, persons with disabilities have often been the *object* of welfare and charity, medical rehabilitation and cures, rather than being recognised as the *subject* of legal rights.¹⁰⁹ It was during the 2000s that the DRM shifted towards a new understanding in which persons with disabilities are rights holders and human rights subjects. For the first time, an international human rights treaty – the United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as “*the Convention*”) acknowledged that all persons with disabilities are rights holders.¹¹⁰ The human rights phrase “[a]cknowledges the fact that disability should be addressed from the perspective of human rights rather than from a social welfare perspective”.¹¹¹ Furthermore, it recognises that persons with disabilities are the holders of rights on an equal basis with others and not the objects of charity anymore.¹¹²

In South Africa, any movements advocating for the rights of persons with disabilities did not have the same desired effect as the DRM globally.¹¹³ It was only in the early 1980s that there was an advancement in their cause.¹¹⁴ Persons with disabilities began to unite and identify the areas where they were being oppressed and (unfairly) discriminated against. Persons with disabilities have begun to say, “[t]hose are your stereotypes, your assumptions, your definitions of our inferiority and that these projections are convenient to maintain the power balance firmly on your side.”¹¹⁵

“[T]here exist many stereotypes which have boxed disabled people into neat rather sub-human categories. These stereotypes define people with disabilities as passive, weak, helpless, unable to make decisions or take responsibility for themselves, overly sensitive, asexual, etc. The saddest thing about stereotypes is that they have the potential to develop into self-fulfilling prophecies. The flip side of all negative stereotypes is equally destructive and unrealistic. [...]. They are equally unrealistic - and dangerous - as they deny the essential humanity, vulnerability, range of emotions and responses with which we credit average human beings”.¹¹⁶

Through the 1980s, various self-help groups emerged around the country.¹¹⁷ These groups eventually formed the Disabled People South Africa (hereafter referred to as “*DPSA*”) to connect persons with disabilities.¹¹⁸ Like the global DRM, DPSA challenged the barriers that prevented them from participating equally. Unlike the rest of the world, the Apartheid government did not recognise the United Nation’s 1981 International Year of Disabled Persons, instead, they opted to declare 1986 the National Year of the Disabled.¹¹⁹ The Apartheid government also established the Inter-departmental Co-ordinating Committee on Disability (hereafter referred to as the “*ICCD*”).¹²⁰ The task of the ICCD was to advise the government

¹⁰⁸ Lawson, A, & Beckett, *The social and human rights models of disability: towards a complementarity thesis* Vol. 25(2), (2021), The International Journal of Human Rights pp. 348 – 379 at p. 348.

¹⁰⁹ Ngwena, C, (2006) at p. 626 – 627.

¹¹⁰ United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024).

¹¹¹ Broderick, A, (2015) at p. 79.

¹¹² *Ibid.*

¹¹³ Specifically, the success of the DRM in the USA and the UK since the 1970s.

¹¹⁴ Ngwena, C, (2006) at p. 626 – 627.

¹¹⁵ *Ibid.*

¹¹⁶ Jagoe, K, (1992) at p. 26.

¹¹⁷ *Ibid.* at p. 29.

¹¹⁸ According to the South African Human Rights Commission’s educational booklet titled *Human Rights and Persons with Disabilities*, pp. 1 – 16, at p. 10, the DPSA is recognised as the national assembly of persons with disabilities by Disabled People International, which has observer status at the United Nations.

¹¹⁹ Jagoe, K, (1992) at p. 29. To this end, the DPSA agreed in principle to participate in the activities of 1986 as the South African Year of the Disabled and to accept a grant from the government. Other than this grant, DPSA received no monetary assistance from our current government and was reliant on seeking other sources of funding.

¹²⁰ Dube, A. K, (2005) at p. 13.

on policy reform in response to the World Programme of Action Concerning Disabled Persons in 1982. Still, the DPSA felt that the recommendations on disability by the ICCD failed to provide the information and insights needed to create equal opportunities for most persons with disabilities.¹²¹ This was partly because, as an initiative of the Apartheid government, the study failed to acknowledge the fundamental role that the regime played in creating the conditions of poverty and discrimination that persons with disabilities experienced.¹²² Activist Michael Masutha explains why DPSA had no choice but to reject the ICCD initiative:

“[D]PSA rejected the entire initiative purely because we felt that the apartheid system was repugnant to the notion of equality and equalisation of opportunities, principles that were central to the World Programme of Action. Furthermore, we did not believe that the apartheid state could promote equal opportunities when it was based on principles of inequality”.¹²³

It must be recognised that under Apartheid, all persons with disabilities, irrespective of race, were discriminated against and marginalised because of their disability.¹²⁴ In particular, they had limited access to fundamental socio-economic rights.¹²⁵ This kind of unfair discrimination [and marginalisation] occurred because persons with disabilities, in general, were generally perceived as persons who were sick or in need of care rather than as equal citizens with equal rights and responsibilities. However, following the transition to democracy, the government responded to calls for equality for persons with disabilities.¹²⁶

The first democratic government of South Africa took an active decision after extensive consultation with DPSA that disability must be mainstreamed across all sectors post-1994.¹²⁷ This led to the establishment of the Disability Programme within the former Reconstruction and Development Programme in 1995. It later evolved into the Office on the Status of Disabled Persons in 1997 in the Presidency, further transforming into the Department of Women, Children, and Persons with Disabilities (hereafter referred to as the “DWCPD”) in 2009. Subsequently, in 2010, it transformed into the Department of Women, Youth and Persons with Disabilities (hereafter referred to as the “DWYPD”).¹²⁸ The Office on the Status of Persons with Disabilities in the Presidency, as well as the release of the White Paper on an Integrated National Disability Strategy in 1997 (hereafter referred to as the “White Paper (1997)”), guided the unfolding legislative and policy reform of the post-Apartheid South Africa, which is premised on the social model of disability.¹²⁹

The White Paper (1997) entails a comprehensive and ambitious programme to transform the “[d]isabling attitudes and environments that undermine the dignity of persons with disabilities, and to develop policies and legislation to that end”.¹³⁰ The White Paper (1997) provided the government and society with guidelines to promote non-discriminatory development planning, programme implementation, and service delivery. Government departments were required to formulate their disability policies and strategies in accordance with the provisions of the White Paper (1997) and the core business of the respective departments.

¹²¹ *Ibid.* at p. 13 – 14.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Dube, A. K, (2005) at p. 14. It cannot be emphasised enough that white persons with disabilities still had an overall advantage and privilege.

¹²⁵ For instance, employment, education and appropriate health and welfare services.

¹²⁶ Dube, A. K, (2005) at p. 14.

¹²⁷ First Country Report (South Africa) at p. iii.

¹²⁸ Department of Women, Youth and Persons with Disabilities 2020/21 Annual Performance Plan; with Minister and Deputy Minister, *Parliamentary Monitoring Group*, (2020) <<https://pmg.org.za/committee-meeting/30138/>> (accessed 30 September 2022).

¹²⁹ Dube, A. K, (2005) at p. 17.

¹³⁰ *Ibid.*

Since 1994, almost all these sectors have undergone some transformation for persons with disabilities, but there remains an ongoing struggle for disability activists to ensure further transformation. They must battle against stagnation and lack of government participation. In 2007, the Convention and the Optional Protocol to the Convention were signed and ratified by South Africa. Even though South Africa did not pass enabling legislation incorporating the Convention, when becoming a party to an international or regional human rights treaty, State Parties agree to be bound by the provisions of the treaty. The Convention constitutes a paradigm shift in the normative approach to disability.¹³¹ Like the jurisprudence of the Constitutional Court, the Convention is spirited by substantive equality with a transformative imperative.¹³² The Convention strives to overcome the legacy of systemic disability related to inequality and discrimination by recognising the importance of diversity.¹³³ The Convention creates a “[n]ew vision of disability that finds concrete expression in the duty to accommodate differences under conditions of equality and human dignity”.¹³⁴

In 2015/6, the foundation of the White Paper on the Rights of Persons with Disabilities (hereafter referred to as the “*White Paper (2015)*”) upgraded the White Paper (1997) in various ways. Unlike its predecessor, the White Paper (2015) promotes, supports, and integrates persons with disabilities within a social model and human rights policy framework instead of merely focusing on the social model.¹³⁵ Unfortunately, there will always be areas that require continued pressure, input, and monitoring by both the disability sector and the government.¹³⁶

Far we have come in striving for the betterment of life for persons with disabilities. The disability rights movement has progressed and expanded sufficiently to make a genuine difference and voice for the collective. The laws have been both necessary and mostly accepted as positively impacting lives. However, it is not suggested that our current government has done enough. Unfortunately, the reality is that few countries, especially South Africa, provide quality services for persons with disabilities.¹³⁷ It is argued that there is great potential for further action and improvement.

3.3. Theoretical models for understanding disability

Since the 1960s, there have been many different models of disability in scientific literature, all merely attempting to understand, occasionally explain, or define disability.¹³⁸ Before the advent of the Convention, the DRM, scholars, and activists formulated academic debates around two distinctly different models of understanding disability - the social and medical models of disability.¹³⁹ After the advent of the Convention, the human rights model [human rights-based approach] to disability has been at the forefront of academic debate. Scholars of disability studies developed both medical and social models during the 1970s and 1980s in the UK and the USA.¹⁴⁰ The DMR profoundly influenced the shaping, understanding, and evolution of the models for understanding disability because the theoretical background to disability studies emerged

¹³¹ Ngwena, C, & Albertyn, C, Special issue on disability: Introduction Vol. 30(2), (2014) South African Journal on Human Rights, pp. 214 – 220 at p. 214.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *White paper on Persons with Disabilities*, Department of Social Development, (2016) at pp. 1 – 194 at p. 38.

¹³⁶ First Country Report (South Africa) at p. iii.

Lest us forget about the Life Esidimeni Tragedy that occurred between October 2015 and June 2016. In the Article of Durojaye, E, & Agaba, D. K., *Perspective Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa* Vol. 20 (2), (2018), Health and Human Rights Journal, pp. 1 – 249 at p. 161, the reader is informed of 144 persons with mental disabilities, relying on mental health care, dead and a further 1,418 persons *tortured*, endured trauma, and poor health outcomes.

¹³⁸ Degener, T, *Disability in Human Rights Context* Vol. 5(3), (2016), LAWS, pp. 1 – 24 at p. 2.

¹³⁹ Ngwena, C, (2004) at p. 173.

¹⁴⁰ *Ibid.* Degener, T, (2016) at p. 2.

from the DMR in both the UK and the USA.¹⁴¹ Only recently, during the 2000s, a new human rights model emerged due to the Convention. Therefore, three models of disability have been conceptualised: the medical, social, and human rights models.

“[T]he most important models of disability in the English-speaking world have been the medical and the social model of disability. Scholars of disability studies developed both models during the 1970s and 1980s in the UK and the USA. With the adoption of the CRPD, a new model emerged, which is the human rights model of disability”.¹⁴²

The inception of the medical model of disability occurred when medical and scientific professionals replaced religious leaders as the cognitive authority in society in the 1960s.¹⁴³ This was mainly because medical and scientific knowledge could identify and define illnesses and body parts along with having the ability to heal such injuries and cure such illnesses.¹⁴⁴ This model is an outcome of the medicalisation of disability. It views the limitations faced by persons with disabilities due to a medical condition inherent to the person.¹⁴⁵ It looks to signs of physical, cognitive, or sensory “defects” that prevent persons with disabilities from participating in “normal” life.¹⁴⁶ It views persons with disabilities as having defects that must be diagnosed, treated, and cured.¹⁴⁷ It also adopts a non-disabled perspective as the norm and locates the “problem” of disability in the extent to which the individual differs from the norm. In other words, this conception of disability automatically leads to the person being regarded as abnormal and inferiorly different.¹⁴⁸

“[m]edical models of disability prevent the application of the equality principle to persons with disabilities. Under the medical model of disability, persons with disabilities are not recognised as rights holders but are instead “reduced” to their impairments. Under these models, discriminatory or differential treatment against and excluding persons with disabilities is seen as the norm and legitimized by a medically driven incapacity approach to disability”¹⁴⁹.

The medical model strongly reinforces the idea that it is the impairment itself that causes the limitation, without recognising the role of the social environment in disabling persons with impairments.¹⁵⁰ This model has dominated policy responses to persons with disabilities, resulting in a disabling culture that perpetuates negative attitudes and discriminatory practices that ultimately oppress and exclude persons with impairments.

¹⁴¹ Degener, T, (2016) at p. 1, 2 & 17.

¹⁴² *Ibid.* at p. 2.

¹⁴³ Haegele, J. A, & Hodge, S, (2016) at p. 193.

¹⁴⁴ *Ibid.*

¹⁴⁵ Bhabha, F, *Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative* Vol. 25(2), (2009), South African Journal on Human Rights, pp. 218 – 245 at p. 223.

¹⁴⁶ Pooran, B. D, & Wilkie, C, *Failing to Achieve Equality: Disability Rights in Australia, Canada, and the United States* Vol. 20(1), (2005), Journal of Law and Social Policy, pp.1 – 34 at pp. 2 – 3; Ngwenya, C, (2004) at p.173, “[m]edical model of disability where the defining criterion is functional impairment as an outcome of an actual physical or mental impairment, with the rehabilitation of the disabled person as the focal point”.

¹⁴⁷ Bhabha, F, (2009) at p. 223.

¹⁴⁸ Ngwenya, C, (2004) at p. 173; Ngwenya, C, (2006) at pp. 626 – 627; De Campos Martel Velho, L, *Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective* Vol. 8 (14), (2011), SUR International Journal on Human Rights, pp. 85 – 111 at p. 87; Du Plessis, M, *The social model of disability, rights discourse and the impact of South Africa’s Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments* Vol. 17, (2013), Law, Democracy & Development pp. 202 – 225 at p. 205; Basson, Y, *Selected Developments in South African Labour Legislation related to Persons with Disabilities* Vol. 20, (2017), Potchefstroom Electronic Law Journal, pp. 1 – 21 at p. 4; Grobbelaar-Du Plessis, I, & Nienaber, A, *Disability and Reasonable Accommodation: HM v Sweden Communication 3/2011 (Committee on the Rights of Persons with Disabilities)* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 366 – 379 at p. 379; Bhabha, F, (2009) at p. 223.

¹⁴⁹ General Comment No. 6 Committee on the Rights of Persons with Disabilities (2018) CRPD/C/ GC/6, pp. 1 – 19 at p. 2.

¹⁵⁰ Kayess, R & French, P, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities* Vol. 8(1), (2008), Human Rights Law Review, pp. 1 – 34 at p. 6.

In 1980, the medical model influenced the World Health Organisation (hereafter referred to as “WHO”) in the development of the International Classification of Impairments, Disabilities, and Handicaps (hereafter referred to as the “ICIDH”).¹⁵¹ The ICIDH defined impairment as “[a]ny loss or abnormality of a psychological, physiological, or anatomical structure or function”.¹⁵² The focus on impairment was met with criticism, especially from disability advocates, as it was seen as overlooking the socio-cultural environment in the construction of disability, leading to the adoption, in 2001, of the International Classification of Functioning, Disability and Health (hereafter referred to as the “ICF”) to replace the ICIDH.¹⁵³ While the ICF retains “impairment” as a foundational concept, it is built around a more interactive model of disability. The ICF can be said to have shifted from a purely medical outlook to a hybrid one, containing elements of both the medical and social models. It is undoubtedly a departure from the perceived medical orientation of the ICIDH. It finds resonance with the social model of disability that takes cognisance that the environment can create a disability.¹⁵⁴

There are essentially three central tenets of the medical model that harness criticism, ultimately being insufficient in its content to be of relevant use without considering any other model. One tenant is that a person's “impairment” can be diagnosed, cured, or rehabilitated by modern medicine and technology. Once the disability is diagnosed, it must be cured or rehabilitated to integrate the “affected disabled” person into society. It does not look to society as the problem – only to persons with disabilities. Another tenant is the persistence of negative “defective” perceptions of disability embedded within the model.¹⁵⁵ The medical model blends persons with disabilities with the sick role.¹⁵⁶ This language can influence how all individuals within society interact with and talk about persons with disabilities.¹⁵⁷

“[F]or example, in the sport context, one outcome of this model is that potential athletes with disabilities find that their dreams and aspirations are mocked or disregarded by those who are typically functioning... Just the idea of someone with a disability succeeding in high-level athletics is at odds with the common perception of disability.”¹⁵⁸

A final tenant is medical professionals and scientists’ influence over treating persons with disabilities in society. These professionals act as gatekeepers in society and use diagnoses and labelling to determine which individuals receive services, types of services, and benefits. Only such specific professionals can provide interventions, making persons with disabilities utterly reliant on them. Consequently, they are entirely deprived of independence.¹⁵⁹

As of late, considering the above criticisms, the medical model has become mostly unusable,¹⁶⁰ and consequently, most have turned to the social model.

¹⁵¹ South African Law Reform Commission (issue paper 39) (2020) at p. 20; Ngwena, C, *Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. part I (defining disability)* Vol. 6(2), (2005) Stellenbosch Law Review at p. 220 – 221.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Haegele, J. A. & Hodge, S, (2016) at p. 193.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Jackson, M. A, *Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale* Vol. 7 (1), (2018), LAWS, pp. 1 – 21 at p. 4.

¹⁶⁰ Save for where medical diagnosis or definitions are necessary.

“[T]he most important point [is] that since this process started, there has been a consensus on the fact that the medical model of disability, which looks at disability as a defect or a disease that needs to be cured through medical intervention, has been completely left behind. The model that now prevails is the social model, in which the problem is defined as the interaction between the setting in which the person with impairment lives and the person”.¹⁶¹

In stark contrast, the social model can be summarised as not looking at the impairment and cure only – it contests that society imposes a disability on individuals with impairments.¹⁶² In this context, there is nothing inherently disabling about having an impairment, but rather, that disability is imposed in addition to impairments by the way that individuals with impairments are isolated and excluded from full participation in society.¹⁶³ It moves beyond the medical view of disability to a new, broader societal view. The social model views the problem with society and not the “affected” individual.¹⁶⁴ The limitations felt and experienced by a person with disabilities are not caused by their inability to function in society but rather by society’s inability to function inclusively for such a person.¹⁶⁵ Society’s failure to account for the needs of persons with disabilities affects both individuals and the entire class “[s]ince the entirety of the society’s structures is premised on the assumptions, needs, and experiences of non-disabled persons”.¹⁶⁶ In terms of the social model, disability activist academics reinterpreted ‘disability’ as social oppression, shifting the focus dramatically away from cure, treatment, care, and protection. Instead, they emphasised the acceptance of impairment as a positive aspect of human diversity and challenged the social norms that lead to exclusion.¹⁶⁷

Kayess & French acknowledge the transformative power of the social model of disability while also discussing its criticisms and limitations. Despite its revolutionary impact on the perception of disability and its significant role in shaping the Convention, the social model is not without its detractors. Various criticisms have emerged over the years, highlighting the complexities and nuances of disability that the social model may sometimes overlook. One of the primary criticisms of the social model is that it can oversimplify the complex realities of living with a disability. By focusing predominantly on societal barriers and excluding the biological aspects of disability, the social model might inadvertently minimise the genuine physical and psychological challenges that persons with disabilities face.

“[I]ts core thesis that limitations result from disability not impairment has been critiqued for its failure to recognise and address the genuine issues that individuals face due to impairment, and not disability, in terms of health, well-being and individual capacity”.¹⁶⁸

The social model’s reduction of disability to purely social and environmental factors can sometimes lead to a radical social constructionist view of disability, where impairments are seen as having no underlying reality.¹⁶⁹ By concentrating on external barriers, the model can sometimes overlook the internal experiences and needs related to specific impairments. The social model of disability strongly rejects individual and medical approaches, to the extent that it risks implying that impairment is not a problem.¹⁷⁰ According to Shakespeare, while other socio-political accounts of disability recognise the crucial insight that persons with

¹⁶¹ Lawson, A, & Beckett, (2021) at p. 349.

¹⁶² Haegele, J. A, & Hodge, S, (2016) at p. 197. Ngwena, C, *Developing juridical method for overcoming status subordination in disablism: The place of transformative epistemologies* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 275 – 312 at p. 283.

¹⁶³ *Ibid.*

¹⁶⁴ Jackson, M. A, (2018) at p. 4; Ngwena, C, (2004) at p. 174; Ngwena, C, (2006) at p. 630; Du Plessis, M, (2013) at p. 206; Basson, Y, (2017) at p. 4; Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p.379; Bhabha, F, (2009) at p. 223.

¹⁶⁵ Bhabha, F, (2009) at p. 223 – 224.

¹⁶⁶ *Ibid.* at 224.

¹⁶⁷ Kayess, R & French, P, (2008) at p. 6.

¹⁶⁸ *Ibid.* at p. 7.

¹⁶⁹ *Ibid.*

¹⁷⁰ Shakespeare, T, *The Social Model of Disability* in L. J, Davis, (Eds.), *The Disabilities Studies Reader*, (2010), New York: Routledge at pp. 197 - 204 at p. 200.

impairments are disabled by both societal barriers and their bodies, the social model suggests that persons are disabled solely by society, not by their bodies.¹⁷¹ This interpretation can be seen as not just opposing medicalisation but also as rejecting medical prevention, rehabilitation, or cure of impairments.¹⁷² For persons with static impairments that do not degenerate or cause medical complications, it may be possible to view disability as entirely socially constructed.¹⁷³ However, for those with degenerative conditions that may lead to premature death or any condition that involves pain and discomfort, it is harder to overlook the negative aspects of impairment.¹⁷⁴ Furthermore, there is an overly simplistic distinction between impairment and disability.¹⁷⁵ Researchers conducting qualitative studies with persons with disabilities quickly find that, in everyday life, it is difficult to clearly separate the impact of impairment from the impact of social barriers.¹⁷⁶ In reality, disability is produced by the interaction of individual bodies and social environments. Social and individual aspects are nearly inseparable in the complexity of the lived experience of disability.¹⁷⁷

“[F]or example, steps only become an obstacle if someone has a mobility impairment: each element is necessary but not sufficient for the individual to be disabled. If a person with multiple sclerosis is depressed, how easy is it to make a causal separation between the effect of the impairment itself; her reaction to having an impairment; her reaction to being oppressed and excluded on the basis of having an impairment; other, unrelated reasons for her to be depressed?”¹⁷⁸

According to Shakespear, the social model defines disability explicitly as oppression. This framing means the question is not whether persons with disabilities are oppressed in a particular situation, but only to what extent they are oppressed.¹⁷⁹ This introduces a circularity into disability research, making it logically impossible for a qualitative researcher to identify persons with disabilities who are not oppressed. Furthermore, according to Shakespear, the concept of a “barrier-free utopia”, where all socially imposed barriers are removed, is difficult to operationalise despite the value of approaches like Universal Design.¹⁸⁰ Natural and urban environments present various challenges, and accommodations often conflict due to different needs among persons with disabilities.¹⁸¹ Physical and sensory impairments are the easiest to accommodate, but creating a “barrier-free world” for persons with cognitive or learning disabilities is even more complex. Ultimately, while adaptations are essential, some disadvantages associated with impairments cannot be entirely eliminated by environmental changes.

The social model has also been critiqued for not adequately addressing the diversity and intersectionality within the disability community. Disability intersects with various other social categories, including gender, race, age, and socio-economic status, leading to complex, multi-layered experiences of discrimination and exclusion. Kayess & French argue that the social model, in its broad focus on societal barriers, might not fully capture the unique challenges faced by individuals who experience multiple forms of discrimination.

“[D]isability can only describe one form of oppression. However, persons with impairments may be subject to more than one form of oppression, for example, women may be subject to disability oppression and

171 *Ibid.*
172 *Ibid.*
173 *Ibid.*
174 *Ibid.*
175 *Ibid.* at p. 201.
176 *Ibid.*
177 *Ibid.*
178 *Ibid.*
179 *Ibid.* at p. 200.
180 *Ibid.* at p. 201.
181 *Ibid.*

gender oppression”.¹⁸²

The social model’s application in policy and practice can also encounter practical challenges. Implementing the model requires significant changes in societal attitudes, infrastructure, and institutional practices, which can be difficult to achieve. While the social model provides a valuable framework for understanding disability, translating this framework into tangible improvements in the lives of persons with disabilities requires substantial commitment, resources, and systemic change. This includes rethinking public spaces, educational systems, employment practices, and social services to be more inclusive and accessible.

The social model has been primarily developed and propagated in Western contexts, which raises concerns about its applicability in different cultural and socio-economic settings.¹⁸³ This model may not fully account for the varied cultural understandings of disability and the different ways in which societies organise themselves. In some cultures, disability might be intertwined with spiritual beliefs or traditional practices that the social model does not address. Therefore, there is a need for a more culturally sensitive approach that respects and incorporates diverse perspectives on disability.

The social model of disability is described as a descriptive and heuristic tool rather than an explanatory theory.¹⁸⁴ It identifies external factors that disable persons with impairments, focusing on social barriers. However, it does not explain why these barriers exist or persist. It provides a mechanism for identifying disabling factors but lacks depth in explaining the root causes of disability.¹⁸⁵ The application of the social model can be ambiguous, especially when it is critiqued as an explanatory theory. The model’s primary function is descriptive and heuristic, aimed at identifying social barriers and advocating for change.¹⁸⁶ When used as an explanatory theory, its limitations become apparent. This ambiguity can undermine its effectiveness in driving social change, as it may not provide a comprehensive understanding of the disabling processes.¹⁸⁷ Lawson & Beckett however state that by focusing criticism on its explanatory power, one risks undervaluing or misunderstanding its role as a descriptive and heuristic tool that helps guide thinking and discussion about disability.

“[C]ritiquing the UPIAS/DPI model as though it is an explanatory theory of disablement risks overlooking and even undermining the descriptive and heuristic functions of the model”.¹⁸⁸

Lawson & Beckett furthermore state that the social model provides a framework for identifying where policy reform is needed but does not offer a detailed roadmap for policy responses to disability. This lack of specificity allows for flexibility but also means that the model alone cannot guide comprehensive disability policy reform. The authors state that “[t]he social model cannot be used to provide a detailed blueprint or roadmap for policy responses to disability”.¹⁸⁹

Critics like Stein and Stein argue that the social model has become rigid and narrowly focused on formal justice, which treats people similarly without considering their individual circumstances.¹⁹⁰ This rigidity leads to legislation that only addresses anti-discrimination but does not encompass positive rights.¹⁹¹

¹⁸² Kayess, R & French, P, (2008) at p. 21.

¹⁸³ *Ibid.* at p. 23.

¹⁸⁴ Lawson, A, & Beckett, A, (2021) at p. 364.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Lawson, A, & Beckett, A, (2021) at p. 364.

¹⁹⁰ Stein, M. A & P. J. S, Stein, *Beyond Disability Civil Rights* (2007), pp. 1203 – 1240 at p. 1210.

¹⁹¹ *Ibid.*

“[T]his is because the social model has been proscribed to a rigid concept of formal justice that narrowly treats similarly situated people as alike. And so long as the extent of disabled versus non-disabled equality is assessed in terms of sameness, it cannot adequately account for programs seeking to raise the group to an equal level through treatment that is more than equal. By limiting itself to the boundaries of the social model, the disability civil rights agenda has neglected these complementary means of institutional restructuring”.¹⁹²

According to Stein, the social model encounters two significant obstacles due to its reliance on formal equality theory. First, its dependence on corrective justice requires it to challenge the deeply ingrained but erroneous belief that the world inevitably excludes persons with disabilities.¹⁹³ Second, the model’s exclusive focus on first-generation rights prevents it from invoking the full range of second-generation rights.¹⁹⁴ The social model posits that modifying socially constructed environments can enable the participation of persons with disabilities in society.¹⁹⁵ However, since this model relies solely on corrective justice, it must challenge the deeply ingrained misconception that society rightfully excludes persons with disabilities due to their inherent limitations.¹⁹⁶ Proponents of the social model have often dismissed all disability-related exclusions, arguing that they stem from arbitrary biological norms¹⁹⁷. This approach is unnecessary, as addressing exclusionary conditions does not have to depend solely on first-generation rights. Instead, social inclusion is more effectively promoted through a human rights framework that integrates civil and political rights with economic, social, and cultural rights.¹⁹⁸ Furthermore, while the social model’s principles are essential for civil rights, they fall short in the human rights field.¹⁹⁹ The social model emphasises equal treatment for equally situated individuals, effectively excluding second-generation support for persons with disabilities. In contrast, second-generation rights recognise that all persons with disabilities are entitled to equal opportunities due to their equal humanity, allowing for individual differences among persons with disabilities.²⁰⁰ Second-generation rights encompass two main aspects. Firstly, they benefit persons with disabilities who deviate from standard arguments of uniformity, as some individual differences are not addressed even by inclusive principles such as Universal Design. Secondly, they involve measures essential for the realisation of first-generation rights. Social model proponents, by primarily advocating for first-generation rights, have overlooked opportunities to further empower persons with disabilities.²⁰¹

In sum, while the social model of disability has been instrumental in transforming the understanding of disability from a purely medical issue to a societal one, its limitations have become increasingly evident. The model’s neglect of the realities of impairment and its overemphasis on social barriers have led to a narrow focus on formal justice without adequately addressing individual needs and circumstances. Moreover, its rigidity and lack of a detailed policy blueprint necessitate a more comprehensive approach. As we move forward, it is essential to integrate the strengths of the social model with other frameworks. This is where the human rights model comes into play, offering a more holistic perspective that recognises the value of impairment as part of human diversity and emphasises the importance of positive rights and individual well-being.

The human rights model is based on a new understanding of persons with disabilities as human rights holders and subjects.²⁰² Similar to the social model, it also locates the “problem” not with the individual

¹⁹² *Ibid.*

¹⁹³ Stein, M. A, *Disability Human Rights* (2007), Faculty Publications, pp. 75 – 121 at p. 91.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.* at p. 92.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² Degener, T, (2016) at p. 1 – 2; Worm, I., A (2012) at p. 5.

but with society. Furthermore,²⁰³ it focuses on an individual's fundamental rights and inherent human dignity.²⁰⁴

“[T]he human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main ‘problem’ outside the person and in society”.²⁰⁵

Stein describes that this model goes beyond the traditional views of disability as solely a medical or biological issue, emphasising instead the role of society in creating and perpetuating disability through exclusionary practices and barriers. A key aspect of this model is its recognition of both first- and second-generation rights,²⁰⁶ ensuring not only non-discrimination but also the provision of necessary supports and services to enable full participation in society. This holistic approach aims to rectify the shortcomings of previous models by addressing economic, social, and cultural rights alongside civil and political rights.

“... [t]he theoretical implications of adding disability protections to the existing canon of human rights, both for individuals with disabilities and for other under-protected people. To do so, it develops a “disability human rights paradigm” that combines components of the social model of disability, the human right to development, and philosopher Martha Nussbaum's version of the “capabilities approach,” but filters these frameworks through a disability rights perspective to preserve that which provides for individual flourishing and modify that which does not”.²⁰⁷

The approach to a disability must address *and* develop the fundamental rights of persons with disabilities.²⁰⁸ This disability human rights paradigm aims to shift the perception of disability from being a deviation or deficit to being a form of human variation.²⁰⁹ This paradigm seeks to ensure that societal structures support the development of individual capabilities, viewing disability as part of the diversity of the human condition. According to Article 1, the purpose of the Convention is “[t]o promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. The Convention is the first human rights treaty that acknowledges a human rights model in that all persons with disabilities are human rights holders, active subjects with legal claims, and that an impairment may not be used to justify denial or restrictions of such rights.²¹⁰ Furthermore, persons with disabilities need to be able to participate in all spheres of society equally with their non-disabled peers.²¹¹

The disability human rights model applies to both the process and the outcome of human rights. It

²⁰³ It can be argued that Degener coined the term “human rights model” between 1999 – 2001, “[T]he human rights model focuses on the inherent dignity of the human being and subsequently, but only, if necessary, on the person's medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main “problem” outside the person and in society”. See Degener, T, (2015) at p. 3.

²⁰⁴ Jackson, M. A, (2018) at p. 6, where the author argues that the human rights model evolved from within “[a] continuum of rights-based thinking”.

²⁰⁵ Degener, T, (2015) at p. 6.

²⁰⁶ First-generation rights include non-discrimination, freedom from abuse, and political participation. Second-generation rights focus on the provision of necessary supports and services, such as accessible education, healthcare, and social security.

²⁰⁷ Stein, M. A, (2007) at p. 77.

²⁰⁸ Basson, Y, (2017) at p. 5; Ngwena, C, (2004) at p. 173.

²⁰⁹ Stein, M. A & P. J. S, Stein, (2007) at p. 1212.

²¹⁰ Degener, T, (2015) at p. 1 – 2. General Comment No. 6 (2018) at p. 2: “[T]he human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights”.

²¹¹ See Worm, I, (2012) at p. 4 – 5. These barriers can be physical, attitudinal or communication barriers, for example. In the context of this thesis, and because the focus is specifically on certain products with their accompanying label, the barriers faced by severely impaired persons is limited to physical and communication barriers. See Micovic, M. A, *Consumer Right to Product Accessibility* Vol. 54(4), (2020), Zbornik Radova, pp. 1433 – 1452 at p. 1436: without access to the physical product, to information and communication, including information and communications technologies, open or provided to the public, severely impaired persons would not have equal opportunities for participation in their respective societies. There is an obligation on the South African government, and in certain instances on private parties, to ensure the removal of barriers for persons with disabilities. There is an obligation by the bearer of the duty to ensure that the rights-holder has equal access to information on products, especially products that could be fatal to persons with visual impairment.

necessitates the participation of persons with disabilities, along with other stakeholders, in the process of societal reconstruction so that they may claim their rights.²¹² To comply with this framework, States must collaborate in policy design, implementation, enforcement, and monitoring with persons with disabilities, their families, advocates, organisations, and other aspects of civil society.²¹³ This collaboration ensures a sense of ownership among those citizens targeted by the process. Including persons with disabilities also makes it more likely that the policies enacted will accurately reflect their social conditions and have a greater impact on their daily lives.²¹⁴ Only through these measures can the level of equality required by the Convention be ensured for persons with disabilities.

The view that the human rights model extends and improves upon the social model is gaining traction. Degener's viewpoint as a member of the Committee on the Convention is that the Convention (hereafter referred to as the "*Committee*") not only goes beyond the social model of disability but goes further by codifying the human rights model.²¹⁵ Lawson & Beckett suggest a different approach, writing that the human rights model is inseparably combined with, complementary to,²¹⁶ and built upon the social model despite the differences between the models.²¹⁷ The authors advocate for a complementary approach, integrating the social model with other models, such as the human rights model, to provide a more comprehensive framework for understanding and addressing disability. Both the social and human rights models are valuable tools for achieving equality, participation, inclusion, and dignity for persons with disabilities. Instead of the two models contending against the other, the two models ought to complement and inform one another. The social and human rights models can complement and enhance each other in several ways. The social model's focus on removing societal barriers can be integrated with the human rights model's emphasis on ensuring legal and policy protections, creating a more comprehensive approach to disability rights. Combining the two models can strengthen advocacy efforts by addressing both societal attitudes and legal frameworks. This dual approach ensures that changes are not only implemented but also protected by law. While the social model empowers individuals to challenge societal barriers, the human rights model provides the necessary legal tools to protect and enforce their rights. The human rights model's emphasis on universal rights can help address the diverse and intersectional nature of disability, ensuring that all persons with disabilities, regardless of additional social categories, such as gender, race, or socioeconomic status, are included. Policies developed with both models in mind can be more robust and inclusive, covering a wide range of issues from accessibility and accommodation to legal protections and anti-discrimination measures. In practical terms, using both models together can lead to better legislation that not only protects the rights of persons with disabilities but also promotes societal change to remove barriers. It can also enhance public awareness through campaigns and educational programs that raise awareness about both the need for societal change and the importance of protecting human rights. Services designed with an understanding of both the need for accessibility and the protection of individual rights can be improved. Moreover, advocacy efforts that are equipped to tackle both societal and legal challenges

²¹² Stein, M. A & P. J. S, (2007), at p. 1240.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Degener, T, (2016) at p. 2. Worm, I, (2012) at p. 4. Degener does however not disregard the social model but argues that the social model has been built upon and improved by the human rights model.

²¹⁶ Lawson, A, & Beckett, A, (2021) at p. 371.

²¹⁷ *Ibid.* at p. 349. These differences are highlighted Degener, T, (2016) at p. 3 – 15 as follows:

"[T]he human rights model builds on the social model in that it is built on the premise that disability is a social construct, but it develops it further. There are six propositions for this assertion. First, the human rights model can vindicate that human rights do not require a certain health or body status, whereas the social model can merely explain that disability is a social construct. Secondly, the human rights model encompasses both sets of human rights, civil and political, as well as economic, social, and cultural rights and thus not only demands anti-discrimination rights for persons with disabilities. Thirdly, the human rights model embraces impairment as a condition which might reduce the quality of life, but which belongs to humanity and thus must be valued as part of human variation. Fourthly, the human rights model values different layers of identity and acknowledges intersectional discrimination. The fifth proposition is that, unlike the social model, the human rights model clarifies that impairment prevention policy can be human rights sensitive. Lastly, it is opined that the human rights model not only explains why 2/3 of the world's disabled population live in developing countries but that it also contains a roadmap for change".

can lead to more effective and lasting change. By leveraging the strengths of both models, advocates and policymakers can develop more effective strategies for achieving equality, participation, inclusion, quality of life, and dignity for persons with disabilities.

Governmental institutions and private entities, as duty-bearers, must meet certain obligations imposed by the Convention. These obligations entail addressing the multiple barriers faced by persons with disabilities to ensure that they can fully participate in all spheres of society on an equal basis. If duty bearers fail to fulfil this obligation, persons with disabilities can claim remediation of unequal treatment from these duty bearers.²¹⁸ As these barriers can be found in all sectors and at any level, a human rights model for disability is relevant for programmes in various sectors, including “[i]nformation, health, education, social protection, employment, economic development, and governance”.²¹⁹ The emphasis is thus on persons with disabilities, who possess the same rights as all others on an equal basis.

In progressive jurisdictions,²²⁰ the social model of disability has gained popularity and support over the medical model of disability to achieve equality.²²¹ South Africa has joined progressive jurisdictions as its doctrine of substantive equality, and it is well-placed to translate the social model of disability into an effective model for dismantling barriers against persons with disabilities.²²² Cognisance must be taken of the fact that the Convention is based upon the human rights model, as cited in the General Comment No. 6 of (2018) dealing with equality and non-discrimination.²²³ It is the human rights model, and not the social model, to which the Committee now refers when monitoring the efforts of State Parties to implement the Convention.²²⁴

According to the government’s White Paper (2015), “[t]he dependency created by the medical model disempowers persons with disabilities and isolates them from the mainstream of society, preventing them from accessing fundamental social, political and economic rights”. The White Paper (2015) embodies the most progressive approaches to conceptualising disability, expressly rejecting the medical model and favouring the social model – going even further and adopting a human rights model. According to the Concluding Observations by the Committee, referring to the White Paper (2015), the Committee commends South Africa for deciding to audit its laws and policies to bring them into line with the human

²¹⁸ See specifically the Article of Lawson, A, *Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takaas v Hungary* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 380 – 392.

²¹⁹ Micovic, M. A, (2020) at p. 1437.

²²⁰ Ngwena, C, (2004) at p. 179, where it is indicated that these jurisdictions include the USA, Canada, Australia, the United Kingdom and South Africa.

²²¹ Ngwena, C, (2004) at p. 175, discussing the global shift away from the medical model towards the social model; Grobelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 379; Basson, Y, (2017) at p. 16:

“The first of the problem with the ... concept is that it counters the shift towards the social model. The approach of ... is thus (perhaps inadvertently) based on the medical model, which has been heavily criticised and is generally considered outdated and inappropriate”.

Bhabha, F, (2009) at pp. 224 & 227:

“Historically, the early legal construction of disability was based on the medical model. The shift in disability theory from the medical model to the social model has done much to create a more hospitable climate for the meaningful inclusion of people with disabilities in mainstream society”.

Du Plessis, M, (2013) at p. 202:

“These changes to education for learners with disabilities are said to be underpinned by the international and domestic shift from a medical model of disability to a social model of disability”.

²²² Ngwena, C, (2004) at p. 193.

²²³ Jackson, M. A, (2015) at p. 7; Lawson, A & Beckett, A, (2021) at p. 349.

²²⁴ Lawson, A, & Beckett, A, (2021) at p. 349.

rights model of disability.²²⁵ Despite South Africa's progressive approach, it still has many legislative provisions that heavily rely on the medical model for defining disability. It is also established that South Africa aligns itself with the concept of disability as articulated in the Convention, which refers to disability as “[a]n evolving concept resulting from the 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”.²²⁶ Based upon the human rights model, as necessitated by the Convention, it ought to be the model of disability that should inform the relevant definition of disability in South Africa that effectively removes the current barriers faced by persons with disabilities.²²⁷

3.4. Defining disability

Throughout history and into the present day, the concept of disability has undergone diverse interpretations. The definition and conceptualisation of “disability” are often shaped by cognitive authorities, which encompass professional organisations and individuals possessing the power, influence, and authority to establish definitions and conceptual understandings within society, as well as to exert control over the knowledge within the disability field. Recognising the significance of comprehending our perception of disability, it is imperative to engage in a comprehensive and detailed discussion on this subject.

The goal of a disability definition is to “[r]ender a person with disabilities easily identifiable as that the focus of the juridical enquiry is on the alleged conduct and causation rather than proving membership of the protected group”. A definition of disability should have the capacity to do the following:

“[i]nclude all persons who experience disability discrimination as a social group; combatting of stigma and prejudice; treat persons with disabilities with respect and dignity; protect against unfair treatment based on a real or perceived disability; encourage the institution of claims; easily identify the protected group; contain “impairment” or a perception thereof as an essential requirement so that the social model definition of disability can be rendered indelible; apply to the full range of circumstances where disability can take place; address past, present, future and imputed disabilities; should not contain exclusions that disenfranchise from enjoying full equality and human dignity; and focus on the conduct of the perpetrator and its impact rather than on the nature of disability when adjudicating discrimination”.²²⁸

Unfortunately, South Africa has also yet to adopt a harmonised definition of disability.²²⁹ While disability is a listed ground of equality protection under section 9(3) of the Constitution, no definition is provided.²³⁰ In the *Hoffman* case, the only case to reach the Constitutional Court in which disability was relied on as a ground of equality, the Constitutional Court did not address the matter of a standardised definition of disability for future use and reference.²³¹

²²⁵ Concluding observation of the initial report of South Africa (2018) CRPD/C/ZA/CO/1, pp. 1 – 15 at p. 2.

²²⁶ *Ibid.*, As found in paragraph (e) the Preamble of Convention.

²²⁷ The barriers can be gradually removed using accessibility standards for the labelling of products; they can be immediately removed using reasonably accommodating a visually impaired person, or it can be done using a combination of both accessibility and reasonable accommodation. However, to remove the barriers for persons with disabilities, one must first determine who is regarded as a person with disabilities.

²²⁸ *Ibid.*

²²⁹ Bhabha, F, (2009) at p. 229.

²³⁰ *Ibid.* at p. 230.

²³¹ *Ibid.*

“[I]n the only case to reach the Constitutional Court in which disability was relied on as a ground of equality, the Court opted instead to create a new category of equal protection, delaying pronouncing on disability equality to another day”.²³²

At present, the definition depends on the specific legislation. To date, different disability rights are present in different Acts, each with its own definition or with no definition at all.²³³ Since disability rights are scattered amongst various Acts, it should be noted that there are essentially two types of Acts: legislation that integrates the needs of persons with disabilities in a specific manner (particularly in the field of building

²³²

Ibid.

²³³

Dube, A. K, (2005) at p. 17. According to the Centre for Human Rights at the University of Pretoria in their repository on disability rights in Africa, the following national legislation relates to disability rights. However, there is still no disability-specific legislation currently in place in South Africa. The legislation is extensive but sufficiently inclusive: Broad-based Black Economic Empowerment Amendment Act, No. 46 of 2013; Child Justice Act, No. 75 of 2008; Children's Act, No. 38 of 2005; Co-operatives Act, No. 14 of 2005; Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007; Criminal Procedure Act, No. 51 of 1977; Domestic Violence Act, No. 116 of 1998; Electoral Act, No. 73 of 1998; Electronic Communications Act, No. 36 of 2005; Employment Equity Act, No. 55 of 1998; Labour Relations Act, No. 66 of 1995 as amended 1L15.7; Mental Health Care Act, No. 17 of 2002; National Education Policy Act, No. 27 of 1996; National Health Act, No. 61 of 2003; National Land and Transport Act, No. 5 of 2009; National Road Traffic No. Act, 93 of 1996; Postal Services No. Act, 124 of 1998; Skills Development Act, No. 97 1998; Skills Development Levies Act, No. 9 of 1999; Social Assistance Act, No. 13 of 2004; South African Citizenship Act, No. 88 of 1995; South African Library for the Blind Act, No. 91 of 1998; South African Schools Act, No. 8 4of 1996; and the Sterilisation Act, No. 44 of 1998.

standards,²³⁴ employment,²³⁵ social security,²³⁶ and education),²³⁷ or are general mainstream laws that also happen to provide rights to persons with disabilities - this legislation has been primarily the Equality Act and the Employment Equity Act (hereafter referred to as the “*Equity Act*”).²³⁸

The Equality Act aims to prevent and prohibit unfair discrimination and harassment, promote equality and eliminate unfair discrimination, prevent and prohibit hate speech, and provide for matters connected.²³⁹ Prohibition of discrimination on the grounds of disability exists, even though the Act does not contain a definition for disability. The Act only states the following concerning disability:

“9. Prohibition of unfair discrimination on the ground of disability

²³⁴ The National Building Regulations and Building Standards Act, No. 103 of 1977, is a good example of an Act that has been implemented to assist persons with disabilities but, unfortunately, negates providing a definition of disability.

²³⁵ Unlike the National Buildings Act, however, the Equity Act has a definition for disability, and it is: “[p]eople who have long-term or recurring physical or mental impairments which substantially limit their prospects of entry into or advancement in employment”. This definition leaves much unsaid, as the constitutive elements of this definition require deconstruction by the interpreter before they can be applied. The Equity Act is the principal legislation for protecting and promoting employment equity, and it deals with the combination of the person with a disability and the workplace and not the fact that the person has a disability. The Labour Relations Act, 66 of 1995 is also a piece of employment legislation that protects employees with disabilities from unfair dismissals, even though it does not have a definition for disability.

²³⁶ If a person does not fall under the protected or preferred class of disability by virtue of not falling within a legally specific definition, negative consequences are to follow. Persons with disabilities will obtain a disability grant and receive certain tax deductions from the government that persons without disabilities are ineligible for. In respect of the disability grant, according to section 5 of the Social Assistance Act No.13. of 2004 (hereafter referred to as the “*Social Assistance Act*”) that individuals will not be able to receive the disability grant due to their ineligibility because they are defined as non – disabled for failing to fall within a legally specific definition. Consequently, they fail to become the bearer of rights exclusive to persons with disabilities. The Social Assistance Act defines a “disabled person” as a person referred to in section 9(b) of the Act:

“[A] person is, subject to section 5, eligible for a disability grant, is he or she –

a. Has attained the prescribed age; and

b. Is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance”.

Even though it is established that a person must have a physical or mental “disability”, there is no clarification found within this definition as to what a disability is in this context. Considering a large percentage of persons with disabilities in South Africa are living in poverty and are almost completely reliant on such a disability grant, it would seem necessary to further elaborate on the definition of “disability”. The same follows suit for claiming from the South African Revenue Service (hereafter referred to as “SARS”) in terms of section 6B(1) of the Income Tax Act, No. 58 of 1962. SARS specifically ensures that persons are aware that it does not follow any other definition, such as the definition expressed by the World Health Organisation. A disability for tax purposes means:

“[A] moderate to severe limitation of any person’s ability to function or perform daily activities. This can be as a result of a physical, sensory, communication, intellectual or mental impairment. The limitation (and the extent thereof) will only be regarded as a disability if it has lasted or has a prognosis of lasting, more than a year and it has been diagnosed by a duly registered medical practitioner trained to diagnose the applicable disability or to express an opinion thereon”.

SARS also requires a person to complete a “confirmation of the diagnosis of disability” form and the form to be endorsed by a medical practitioner. SARS also makes a clear distinction between being disabled and being impaired; what a person can claim from SARS when disabled is more favourable than towards a person that is without a disability or merely impaired. More information on the eligibility of persons with disabilities can be found on their website at South African Revenue Service, *Tax and Disability*, (2021) < <https://www.sars.gov.za/types-of-tax/personal-income-tax/tax-and-disability/>> (accessed on 08 November 2021). A visually impaired person seeking monetary assistance from SARS or SASSA already indicates that the individual is most likely living in poverty. Poverty usually coincides with residency in a rural settlement; insufficient funds; transport complexities, and time. The most difficult of all is to find the necessary assistance at medical appointments and for all the required documentation, forms, and formalities. Additionally, most, if not all, of the forms will not contain Braille. It will not be possible to complete the process or the forms without assistance. According to the World Health Organisation, affordability of health services and transportation are two main reasons why people with disability do not receive much-needed healthcare in low-income countries. The process for persons with disabilities to claim or exercise their rights can and should be streamlined. Both these definitions are designed to facilitate the monetary assistance of persons with disabilities and appear to be informed, at least in part, by a medical model approach. Both adopt medical conceptions of disability that emphasise the existence of a medical condition, requiring objective assessments by a physician. Its focus on the individual’s physical or mental impairment creating a functional limitation tends to require a medical diagnosis and corroboration. It undervalues the actual capabilities and limitations of the individual. There is little room, if any, for a subjective consideration of social aspects of the person’s relationship with his or her environment. If the social model approach informed the definition, the problem to be with society and not the ‘affected’ individual. The felt and experienced limitations of a person with disabilities are not caused by the person with a disability being unable to function in society. It is instead caused by the government’s inability to function inclusively for everyone.

²³⁷ Persons with disabilities can also be admitted to the correct or appropriate disability-orientated educational institution, as opposed to persons without a disability who will likely not qualify for admission to such an institution. In Reyneke, J. M, & Oosthuizen, H, (2003) at p. 100, the writers explain that, firstly, disabled learners experience great difficulty gaining access to education as there are very few existing special needs schools. Secondly, admission to these schools is extremely limited. Furthermore, learners who experience learning difficulties as a result of severe poverty do not qualify for educational support and cannot afford to pay school fees. The educational system for disabled learners in South Africa usually allows only learners with medical disabilities access to support programmes and not learning difficulties. The clear distinction between different disabilities further fuels the argument that the definition of disability, especially within the sub-categories of types of disabilities, is needed.

²³⁸ No. 55 of 1998

²³⁹ South African Law Reform Commission (issue paper 39) (2020) at p. 25.

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

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

Even though the Equality Act does not provide for a definition of disability, it provides for substantive equality and prohibits unfair discrimination. The standardisation of the definition of disability is accepted to be a complex matter as the definition is, to a significant degree, context and purpose linked. Raising awareness of the purpose and application of definitions of disability remains a challenge.²⁴⁰ To adequately define disability, the definition must reflect the lived experiences of persons with disabilities, so eradicating discrimination is needed. According to Ngwena, an overarching conceptual definition of disability is currently broad and imprecise.²⁴¹ Without specific context and the criteria for determining disability, disability cannot be defined. Even if there were to be a set definition, that definition could not be rigid and incontestable, as much depends on the context.²⁴²

In contrast to the broader category of disability, the subcategory of visual impairment is defined due to its medically identifiable and classifiable nature. Impairment of vision is universally recognised as a form of disability. This thesis will focus on individuals who are severely visually impaired or blind, as they cannot rely on their sight. The thesis will outline the constitutionally mandated principle of reasonable accommodation and the concept of accessibility, which is confirmed in the enforceable Convention. These measures are designed to effectively eliminate the barriers preventing individuals with visual impairments from accessing legible information on products related to consumption, hazards, poisons, or inherent safety concerns, which constitute the central focus of this thesis.

4. Reasonable accommodation

4.1. Introduction

In terms of sections 9(3) and 9(4) of the Constitution, neither the State nor any person may unfairly discriminate, directly or indirectly, against anyone based on disability since disability is one of the listed grounds in section 9(3) and, therefore, any discrimination on the basis thereof will be presumed unfair in terms of section 9(5). Depending on the nature of the disability, special measures may have to be taken to ensure that all the needs and interests of persons with disabilities are not merely considered but the barriers to their effective participation are removed.²⁴³ The prohibition of unfair discrimination against persons with

²⁴⁰ *Ibid.*

²⁴¹ Ngwena, C, (2006) at p. 617.

²⁴² *Ibid.*

²⁴³ Currie, I, & De Waal, J, (2013) at p. 234 – 235.

disabilities cannot be understood in negative terms only²⁴⁴ and includes a positive duty to ensure the reasonable accommodation of the interests of persons with disabilities.

The Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*²⁴⁵, citing *Eaton v Brant County Board of Education*,²⁴⁶ highlighted the importance of reasonable accommodation, specifically concerning persons with disabilities. Reasonable accommodation has been developed into a principle through which unfair discrimination is eliminated, and substantive equality is sought to be achieved²⁴⁷ by taking cognisance of the fact that in a diverse society, reasonable accommodation is a mechanism for acknowledging difference and accepting the variability of people as they are by accommodating such acknowledged difference.²⁴⁸

The Court in *Christian Education* held that “[s]ingle out a member ... for disadvantageous treatment would, on the face of it, constitute unfair discrimination. However, to ... make an exception from a general law to accommodate them would not be unfair to anyone else who did not hold those views.”²⁴⁹ The Court, citing *Prinsloo*, indicated that the essence of equality lies not in treating everyone in the same way but in treating everyone with equal concern and respect.²⁵⁰ This indicates that reasonable accommodation has been developed with the paradigm of a substantive concept of equality.

4.2. A South African legal context

In South Africa, reasonable accommodation gives effect to a necessary element of an individual’s freedom and dignity: “[a]n entitlement to respect for the unique set of ends that an individual pursues”.²⁵¹ The latter is based on the Constitution’s commitment to affirming diversity, and the affirmation of diversity, in turn, accords with and strengthens the Constitution’s underlying, organising, and monumental declaration.²⁵² In *Prince*, the Constitutional Court confirmed the constitutional commitment to the accommodation of differences if this can be done without frustrating the government’s objectives.²⁵³ A reasonable accommodation is best defined in the Equity Act, which defines reasonable accommodation as “[a]ny modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”. The South African conception of reasonable accommodation can therefore be summarised as follows: it is through a positive duty to accommodate placed on society that the principle prohibits the relegation of people to the periphery of society for their failure or refusal to conform to certain majoritarian or dominant social norms.²⁵⁴ Reasonable accommodation, under South African law, entails the existence of a positive duty on a specific

²⁴⁴ *Ibid.*

²⁴⁵ 2008 (1) SA 474 (CC) at para. [74].

²⁴⁶ *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at para. [67].

²⁴⁷ Ngwena, C, *Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part II: Reasonable Accommodation* Vol. 16(3), (2005), Stellenbosch Law Review, pp. 534 – 561 at p. 544.

²⁴⁸ See Ngwena, C, & Pretorius, L, *Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* Vol. 28(1), (2012), South African Journal on Human Rights, pp. 81 – 115 at p. 182.

²⁴⁹ *Christian Education South Africa v Minister of Education* 2000 (4) at para. [42].

²⁵⁰ *Ibid.*

²⁵¹ *Pillay* at para. [64].

²⁵² *Ibid.* at para. [75].

²⁵³ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at para. [79] (hereafter referred to as “*Prince*”).

²⁵⁴ *Pillay* at para. [73]. Ngwena, C, (2005) at pp. 544 – 545, it is stated that under Canadian law reasonable accommodation has been defined as: “[R]easonable positive measures to meet the special needs of those who, by reason of disability, religious affiliation, or other protected characteristic, cannot be adequately served by accommodations or arrangements suitable for the majority”.

person or institution within society (for example, the state, an employer,²⁵⁵ a school,²⁵⁶ or a supplier²⁵⁷) to enable and allow equal participation within society and equal enjoyment of rights by those who do not or cannot conform to certain majoritarian or dominant societal norms.²⁵⁸

The Constitutional Court has only dealt with reasonable accommodation in religious and cultural beliefs.²⁵⁹ On each occasion, the Constitutional Court had to decide whether a particular party should be exempted from complying with a rule of general application to accommodate that party's religious beliefs or culture.²⁶⁰ In these cases, reasonable accommodation is provided for inclusion, acceptance, and integration through exemption from the application of legal rules. However, what is sought to be drawn from reasonable accommodation in this thesis is inclusion, acceptance, and integration by either acknowledging or developing the equal protection that ought to be afforded to persons with visual impairment by the law.

4.3 Qualifying criteria

Reasonable accommodation applies to all persons, regardless of disability, in the function of the general principle of non-discrimination. Thus, reasonable accommodation must be provided to ensure equal opportunities on account of not only disability but other grounds for discrimination, such as age and sex.²⁶¹ However, according to the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (the "*Framework on Reasonable Accommodation (2020)*"), there are three essential criteria a person with a disability must meet to qualify for reasonable accommodation measures based on disability.

The first criterion is that the person requesting reasonable accommodation must have an impairment, which "[m]ay be physical, sensory, neurological, intellectual, psychosocial or a combination of these".²⁶² The second criterion is that the impairment must be long-term, recurring, episodic, or progressive.²⁶³ Long-term implies that the impairment lasts or is likely to last for over twelve months or for life.²⁶⁴ Recurring or episodic conditions are conditions that are likely to happen again.²⁶⁵ In other words, the condition will subside for a period and recur as it will not ever be cured. Progressive conditions are likely to develop, change or recur. Persons who have progressive conditions are considered as persons with disabilities when their impairment substantially limits their functioning.²⁶⁶ Referring to the *Hoffman* case, a condition such as HIV, when asymptomatic, will not be seen as a disability even though it is a progressive or recurring

²⁵⁵ Section 1 of the Equity Act defines reasonable accommodation as "[a]ny modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment".

²⁵⁶ An example is the *Pillay* case where the decision of the governing body of Durban Girls' High School to refuse Sunali Pillay an exemption from its code of conduct to allow her to wear a nose – stud, discriminated unfairly against her based on religion.

²⁵⁷ Section 3(1)(b)(iv) of the Consumer Protection Act, No. 68 of 2008 (hereafter referred to as the "*CPA*").

²⁵⁸ *Pillay* at para. [73]. Ngwenya, C, (2006) at pp. 544 – 545; Article 2 of the Convention; Article 18(4) of the African Charter on Human and Peoples Rights, does not define reasonable accommodation, but does indicate that: "[T]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".

²⁵⁹ Bonthuys, E, *Reasonable Accommodation as a Mechanism to Balance Equality Rights and Rights to Religion in Family Law* Vol. 25(2), (2010), Southern African Public Law, pp. 666 – 681 at p. 671. These cases are *Christian Education, Prince*, and *Pillay*.

²⁶⁰ *Ibid.* at p. 671.

²⁶¹ National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (hereafter referred to as the "*Framework on Reasonable Accommodation 2020*") at p. 120. This framework guides the implementation of reasonable accommodation measures to support and promote the rights of persons with disabilities in South Africa.

²⁶² *Ibid.* at p. 127.

²⁶³ *Ibid.* at p. 126.

²⁶⁴ *Ibid.* at p. 127.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

condition. The reason is that the condition does not substantially limit a person's daily life. Other conditions that will not be regarded as a disability when asymptomatic include, for example, tuberculosis, hypertension, diabetes, or renal failure. Only when the symptoms of the impairment are progressively and substantially limiting in nature will it be regarded as a disability. In other words, only when the symptoms substantially limit a person's ability to carry out everyday tasks without the support of reasonable accommodation will it be regarded as meeting the second qualifying criteria.²⁶⁷ This criterion, however, appears to have adopted a medical model conception of disability, neglecting to fully appreciate the disabling attitudes and structures in society that can impose disadvantage on persons who are at times separated due to their impairment.²⁶⁸

“[D]rawing a distinction between symptomatic and asymptomatic individuals’ risks creating a hierarchy of disability rights coupled with a race to the bottom and could set a precedent for differentiating between various members of a disadvantaged class. Moreover, the under-inclusiveness of such a definition may operate to deny protection to those discriminated against based on a perceived disability”.²⁶⁹

The third criterion is that the impairment is substantially limiting in nature. Put differently, the impairment restricts and limits the participation of the person with a disability during their daily life. If the effects of the impairment are not substantially limiting, but are long-term or recurring, it falls within the third qualifying criterion. Similarly, if the effects of the impairment are substantially limiting, but are not long-term or recurring, it too falls within the third qualifying criterion.

“[A]n impairment is substantially limiting if in its nature, duration, or the effects of the impairment substantially limit a person's ability to perform essential functions of the job or daily activities independently, without being assisted. This includes people with temporary disabilities for the time they are affected”.²⁷⁰

A person will not be reasonably accommodated, based on disability, if they do not meet the above criteria or if the positive measures taken do not satisfy the unjustifiable hardship test. Therefore, the person will not be accommodated if they do not have a disability or if the accommodation sought is unjustifiable.

4.4 Unjustifiable hardship

It is irrefutable then that positive steps must be taken, but to what extent must society be required to accommodate to enable those outside the “mainstream” to swim freely in its waters?²⁷¹ The Constitutional Court²⁷² and others abroad have considered the question mentioned above. The USA and Canada employ the phrase “undue hardship” as the test for reasonable accommodation. However, the meaning attached by the respective jurisdictions to the phrase differs drastically. The USA Supreme Court has held that employers need only incur “a *de minimis* cost” to accommodate an individual's religion.²⁷³ The Canadian Supreme Court, on the other hand, declined to adopt that standard and stressed that “more than mere negligible effort is required to satisfy the duty to accommodate”.²⁷⁴ The Constitutional Court noted that since our constitutional project affirms diversity, the approach of the Canadian Supreme Court is more in

²⁶⁷ *Ibid.*

²⁶⁸ Bhabha, F, (2009) p. 231.

²⁶⁹ *Ibid.*

²⁷⁰ Framework on Reasonable Accommodation (2020) at p. 127.

²⁷¹ *Pillay* at para. [76].

²⁷² See *Prince*.

²⁷³ *Trans World Airlines Inc v Hardison* 1977 (63) 432 (US) at para. [84].

²⁷⁴ *Central Okanagan School District No. 23 v Renaud* 1992 (2) 970 (SCR) at [983G] – [985A]. See Ngwenya, C, (2005) at pp. 544 – 548; Ngwenya, C, & Pretorius, L, (2012) at pp. 181-184.

line with the spirit of our constitutional project.²⁷⁵ Significantly, South Africa employs the “unjustifiable hardship” test, which is a more rigorous standard than “undue hardship”. This more rigorous standard is necessitated by South Africa’s history of providing so little accommodation for persons with disabilities.²⁷⁶

“Unjustifiable hardship” is legally defined as “[a]n action that requires significant or considerable difficulty or expense. This involves considering, among other things, the effectiveness and efficiency of the accommodation and the extent to which it would seriously disrupt the operation of the business or create a disadvantage.²⁷⁷ Determining unjustifiable hardship involves an objective analysis that includes consideration of not only whether the accommodation will create “difficulty or expense that will seriously disrupt the operation of the business” but also (i) the effectiveness of the accommodation, (ii) the impact of providing or failure to provide accommodation; (iii) the systemic patterns of inequality in society, as well as (iv) the objectives of the Constitution.²⁷⁸ It does not involve a consideration based solely on the actual cost of the measure alone.²⁷⁹ The question of whether someone has complied with the duty to reasonably accommodate is contextual and dependent on the Constitution’s values and principles.²⁸⁰ A reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.²⁸¹

An organisation may make a case for unjustifiable hardship. However, it cannot refute the need to provide reasonable accommodation measures by comparing persons with disabilities to persons without disabilities or the expense [actual cost] in itself without due consideration to the overall size of the organisation.²⁸² This is a significant measure for government institutions (and their agencies) and large private entities.²⁸³

4.5. A failure to accommodate

Persons with disabilities are also protected by the Equality Act, adopted pursuant to the mandate in section 9(4) of the Constitution to enact legislation to prohibit or prevent unfair discrimination.²⁸⁴ In terms of section 9(c) of the Equality Act,²⁸⁵ “any person” is positively obliged to (i) eliminate obstacles unfairly limiting or restricting persons with disabilities’ enjoyment of equal opportunities and (ii) reasonably accommodate the needs of persons with disabilities. The extent to which the aforementioned two positive duties can be enforced in a court of law remains to be seen, but what is clear is that there exists constitutional

²⁷⁵ Pillay at para. [76].

²⁷⁶ Framework on Reasonable Accommodation (2020) at p. 121.

²⁷⁷ *Ibid.* at p. 127.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Pillay at para. [76].

²⁸¹ *Ibid.*

²⁸² Framework on Reasonable Accommodation (2020) at p. 121.

²⁸³ *Ibid.* It may be that, depending on the size and gross income of the organisation, the type of reasonable accommodation measure and the extent to which it is provided, is different for different organisations.

²⁸⁴ Bhabha, F, (2009) p. 221, where the author indicates there are multiple legislations, apart from the Equality Act, mandated by section 9(4) of the Constitution to prohibit or prevent unfair discrimination.

²⁸⁵ Of relevance is section 9 of the Equality Act, prohibition of unfair discrimination on the ground of disability, which reads:

“[S]ubject to section 6, no person may unfairly discriminate against any person on the ground of disability, including-

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

justification for the imposition, to a certain extent, of such duties since persons with disabilities generally do not have access to or cannot participate in, whether at all or in a meaningful manner, public or private life because the means to do so are intended and designed for use, enjoyment, and exploitation by persons without disabilities.²⁸⁶ Therefore, without positive action, persons with disabilities will be relegated to the periphery of society.²⁸⁷ While persons with disabilities especially feel the extent of the exclusion from mainstream society, a failure by legal rules to accommodate those who depart from the norm inflicts the same exclusion and disadvantage.²⁸⁸ Since our Constitution and, by implication, our society values dignity, equality, and freedom, we are enjoined to act positively to accommodate diversity.²⁸⁹

The case of *Singh*²⁹⁰ provided the Equality Court with the first opportunity to consider this ground of unfair discrimination. The applicant is a visually disabled magistrate who had been denied a promotion by the government because she did not possess a driver's licence, which was a compulsory requirement for the promotion. The court held that it was abundantly clear that when her application was considered, "[t]he appointment committees did not take into account her disability and that it had a positive duty to advance and promote the position of disabled people".²⁹¹ The court emphasised the positive duty to advance and promote the position of persons with disabilities.

Section 9 of the Equality Act prohibits unfair discrimination on the grounds of disability, and section 9(a) of the Equality Act provides the minimum standard of necessary supporting or enabling facilities in that any denial or removal of a supporting or enabling facility from a person with disabilities that is necessary for their functioning in society is considered unfair discrimination in terms of section 9(a). Section 9(c) of the Equality Act builds on this minimum standard by determining that either one of the following failures act positively constitutes *prima facie* unfair discrimination: (i) the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or (ii) the failure to take steps to reasonably accommodate the needs of persons with disabilities. The purpose of this thesis is founded upon a lack, on the part of society and the law in general, of accommodating the needs of persons with visual impairment.

Section 14(3)(i)(ii) of the Equality Act is vital and states that taking reasonable steps to accommodate diversity is a factor in determining the fairness of discrimination.²⁹² Whether fairness requires reasonable accommodation will depend on (i) the *nature* of the *case* (direct or indirect discrimination) and (ii) the *nature* of the *interests* involved.²⁹³ Fairness may require reasonable accommodation, but such a requirement does not render the other factors listed in section 14 of the Equality Act nugatory. Reasonable accommodation is but one factor in determining the unfairness of discrimination. The duty to accommodate would arise when a lack or failure to reasonably accommodate would constitute unfair discrimination – this conclusion is derived from the Constitutional Court's interpretation of section 9 read with section 14 of the Equality Act in *Pillay*.

²⁸⁶ *Pillay* at para. [74].

²⁸⁷ *Ibid.*

²⁸⁸ *Pillay* at para. [75].

²⁸⁹ *Ibid.*

²⁹⁰ *Singh v Minister of Justice and Constitutional Development* 2013 (3) SA 66 (EqC) (hereafter referred to as "*Singh*").

²⁹¹ *Singh* at para. [32].

²⁹² *Pillay* at para. [77].

²⁹³ *Ibid.*

5. Accessibility

5.1. Introduction

Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society.²⁹⁴ Without access to the physical environment, transportation, information and communication, and other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in society.²⁹⁵ Persons with disabilities are prevented from enjoying some of their fundamental rights owing to a lack of access.²⁹⁶ The implementation of accessibility remains low in South Africa, like many others, and persons with disabilities are often denied their rights owing to such inaccessibility.²⁹⁷ This thesis contends that persons with visual impairments encounter obstacles in accessing product information due to a lack of accessible labels or accompanying leaflets with legible formats for all users.

5.2. Normative content of accessibility: a South African context

Whilst the population generally draws from the benefits of universal design and accessibility, it is pivotal in ensuring that persons with disabilities' rights are upheld. The Convention was the first international human rights treaty to set out the concept of accessibility in the context of disability.²⁹⁸ Accessibility is defined as any “[p]lace, space, item or service, whether physical or virtual, that is easily approached, reached, entered, exited, interacted with, understood or otherwise used by persons of varying disabilities”.²⁹⁹ The Convention formulates accessibility as a norm,³⁰⁰ a founding principle,³⁰¹ and an overarching obligation,³⁰² referring to the inclusive practice of removing barriers to ensure equal access for persons with disabilities to, among other things, information and communication.³⁰³ As captured in Article 9(1) of the Convention, the purpose of accessibility is to “[e]nable persons with disabilities to live independently and participate fully in all aspects of life”. Article 9(1) of the Convention continues by stating:

“[S]tates Parties shall *take appropriate measures to ensure to persons with disabilities access*, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and *elimination of obstacles and barriers* to accessibility, shall apply to, inter alia:

- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

²⁹⁴ General Comment No. 2 Committee on the Rights of Persons with Disabilities (2014) CRPD/C/ GC/2, pp. 1 – 14 at p. 1.

²⁹⁵ *Ibid.* at p 127.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ Lawson, A, *Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v Hungary* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 380 – 392 at p. 380; Broderick, A, (2020) at p. 396.

²⁹⁹ *Ibid.*

³⁰⁰ Broderick, A, (2020) at p. 393. The accessibility norm appears in paragraph (e) of the Preamble of the CRPD which reads:

“(v) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms”.

³⁰¹ It is also a general *principle* in Article 3(f) and a general *obligation* contained in Article 4 (1)(h) of the CRPD.

³⁰² See Article 9(1) – (2) of the CRPD.

³⁰³ Broderick, A, (2020) at p. 393. According to the Committee, accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access. The nature of the right to access(ibility) will be discussed in Chapter 3. For current purposes I will refer to the accessibility obligation and the right to accessibility as a socioeconomic right, especially in relation to progressive realisation as discussed below.

- b) Information, communications and other services, including electronic and emergency services.”.

The Convention lays the accessibility provision as a vital precondition for the effective and equal enjoyment of civil, political, economic, social, and cultural rights by persons with disabilities.³⁰⁴ In other words, accessibility is a crucial aspect of fulfilling the rights of persons with disabilities. Accessibility is defined in the White Paper (2015) and the Framework on Universal Design and Access:

“[T]he extent to which *aspects* of society can be equally, easily, safely, and appropriately used or reached by persons with disabilities (special needs) or impairments; accessibility describes the extent to which an environment, service or product allows access to as many people as possible in particular to persons with disabilities; These *aspects* include buildings, facilities, constructed spaces, transport, *information*, equipment, services, activities, resources, utilities, language, communication and technology (own emphasis)”.

The duty of South Africa as a party to the Convention is to ensure accessibility should be seen from the perspective of equality and non-discrimination.³⁰⁵ In other words, the denial of access should be considered to constitute an act of disability discrimination. Disability discrimination is expressly prohibited by Article 5 of the Convention.³⁰⁶ Accessibility should be viewed not only in the context of equality and non-discrimination but also “[a]s a way of investing in society and as an integral part of the sustainable development agenda”.³⁰⁷ Regarding accessibility in the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter referred to as the “Equality Act”),³⁰⁸ non-compliance with minimum standards will result in direct discrimination against persons with disabilities.³⁰⁹

“[T]he non-compliance with basic minimum standards leads to the progressive depletion of rights assigned under the Constitution. The depletion of rights for persons with disabilities leads to the following outcomes: direct discrimination and breaches of health and safety”.³¹⁰

5.3. The implementation of accessibility within South Africa

The White Paper (2015) commits duty bearers to realise the rights of persons with disabilities by, *inter alia*, accelerating the implementation of existing legislation that advocates equality for persons with disabilities, taking calculated action to ensure that their rights as equal persons are upheld; removing discriminatory barriers to access and participation, and embedding the obligations contained in the Convention.³¹¹ It places access at the centre of giving effect to the principles set out in Article 3 of the Convention and the principles contained in South Africa’s Constitution, including, *inter alia*, equality and non-discrimination; accessibility; as well as effective participation and inclusion in society.³¹²

³⁰⁴ *Ibid.* at p 4.

³⁰⁵ South Africa Disability Legislation and Policy Gap Analysis Centre for Human Rights (2015) University of Pretoria, pp. 1 – 402 at p. 151.

³⁰⁶ Article 9 of the Convention; General Comment No. 2 of 2014 at p. 4.

³⁰⁷ General Comment No. 2 of 2014 at p. 2.

³⁰⁸ No. 4 of 2000.

³⁰⁹ Department of Women, Youth and Persons with Disabilities, National Strategic Framework on Universal Design and Access, 15 October 2021 (Government Gazette No. 45328) at p. 168.

³¹⁰ *Ibid.*

³¹¹ White Paper (2015) at p. 9.

³¹² *Ibid.*

There are many legislative provisions in South Africa regulating accessibility in buildings,³⁰⁷ housing,³¹³ safety,³¹⁴ land, transport and information. For most persons with disabilities in South Africa, a lack of information is the main hindrance to their development. This is partly due to a scarcity of material resources and to a lack of appreciation of the importance of access to information. Therefore, despite attempts by the government since the transition to democracy in 1994, the literacy level and access to adapted reading materials remain low.

“[W]hat is clear is that if the South African government does not create the right conditions for the development of this sector, no amount of support from its social and private partners will help us succeed in this endeavour”.³¹⁵

The only legislation dealing with accessible information is the National Library of South Africa Act, No. 2 of 1998 (hereafter referred to as the “*National Library Act*”) and the South African Library for the Blind Act, No. 91 of 1998 (hereafter referred to as the “*Library for the Blind Act*”). The National Library Act focuses on collecting, recording, preserving, and giving access to the national documentary heritage and the world’s information resource centre. The Library for the Blind Act focuses on providing and improving access to library and information services for persons with visual impairment. These two Acts cannot be said to be sufficient in providing accessible information to persons with visual impairment.

The label on a product contains crucial information. The information on the label or accompanying leaflet is always required to be either word in writing or pictograms but never in Braille, tactile writing, easy-to-read format, or any other method.³¹⁶ Arguably, such legislation, therefore, unfairly discriminates against persons with visual impairment on the grounds of disability by failing to reasonably accommodate their needs or making the product’s information accessible. If a product’s information were accessible to all persons, persons with visual impairment would have independent access to such products without the fear and risk of a potentially fatal injury. Such accessible information gives them the independence to live without needing assistance from others and the necessary privacy to purchase products they may wish to keep private.

5.4. The relationship between accessibility standards and reasonable accommodation

³¹³ See Housing Amendment Act, No. 4 of 2001. *Ibid.* at p. 147 – 148:

“[W]hile progress has been made in ensuring access to physical buildings as addressed by the National Building Regulations and Building Standard Act, houses often are not accessible to persons with disabilities, and new residential areas often are not designed in ways which can be accessible for persons with disabilities. The Housing Amendment Act 4 of 2001 is a significant piece of legislation that provides guidance to the National Department for Housing (NDH) on fulfilling its statutory and constitutional obligations. The Act has three key objectives – it:

- i) Prescribes fundamental principles binding all spheres of government in respect of housing development;
- ii) Provide the framework within which the housing delivery process must operate; and
- iii) Provide for the facilitation of a sustainable housing development process”.

³¹⁴ See Occupational Health and Safety Act, No. 85 of 1993. *Ibid.* at p. 147 – 149:

“[I]n South Africa Occupational Health and Safety Act is aimed at providing for the health and safety of persons at work and for the health and safety of persons in connection with the activities of persons at work. The main objective of the Act is to ensure that the employer provides a working environment that is safe to all employees and the needs of employees with disabilities are included. For example, evacuation procedures should take into account the needs and requirements of an employee with a disability and guarantee his or her safe evacuation from the work place/sire in case of an emergency”.

³¹⁵ Gap Analysis Centre for Human Rights (2015) at p. 157.

³¹⁶ For example, placing a QR code on the product that will enable the user to scan same after which orally the information will be read aloud to the user.

Article 5(3) of the Convention stands as a beacon, guiding the South African government in its pursuit of equality and the eradication of discrimination. It impels the government to employ every appropriate means to ensure the provision of reasonable accommodation, as meticulously defined in Article 2 of the Convention. The Convention unequivocally establishes that a failure, unjustified in nature, to furnish reasonable accommodation or create an accessible environment can, in certain circumstances, be classified as a form of discrimination.³¹⁷

The concept of accessibility, intrinsically linked with socio-economic rights, charts its course toward realisation in a progressive manner. South Africa, embracing the obligation to dismantle barriers systematically, must craft a legislative framework replete with tangible, enforceable, and time-bound objectives.³¹⁸ Article 9 of the Convention underscores the generalised and anticipatory nature of the accessibility duty, distinctly different from the individualised trigger of reasonable accommodation.³¹⁹

Accessibility, often guided by stringent standards, necessitates compliance in myriad forms. These standards may encompass the creation of national norms ensuring the legibility of product information for visually impaired individuals, achieved through various means such as Braille, large print, simplified text, symbols, and technological innovations.

While both accessibility and reasonable accommodation share the goal of rectifying discrimination, their divergent characteristics lead to distinct scenarios. First, individuals with rare impairments or those unable to benefit from existing accessibility standards may seek a form of reasonable accommodation that lies beyond the confines of established standards. Accessibility standards, though universally designed, may inadvertently exclude certain individuals, thereby necessitating tailored reasonable accommodations in specific cases. As highlighted by the Committee, reasonable accommodation becomes a potent tool for ensuring accessibility in unique individual contexts. Second, recognising the gradual implementation of the duty to ensure accessible environments, in contrast to the immediate nature of the reasonable accommodation duty, reveals an important synergy. Reasonable accommodation can bridge the gap during the transitional period when full accessibility remains unrealised. This timely intervention facilitates the participation and inclusion of persons with disabilities in mainstream society until the overarching accessibility standards are meticulously finalised and enforced, ensuring that no one is left behind on the path to full and equitable accessibility.

6. Conclusion

In conclusion, this chapter has delved into the intricate concepts of substantive equality, disability, and their resonance within the South African context. It has provided a comprehensive exploration of these fundamental notions, shedding light on their multifaceted dimensions and implications. Additionally, the chapter has introduced and laid the groundwork for a deeper examination of two critical human rights measures aimed at ensuring substantive equality for persons with disabilities. These measures, which carry enforceable obligations, hold paramount importance in the quest for equitable treatment and the protection

³¹⁷ Broderick, A, (2020) at p. 406; Lawson, A, (2014) at p. 386; Committee on the Rights of Persons with Disabilities, Draft General Comments *Committee on the Rights of Persons with Disabilities* CRPD/C/11/4 para. 4 & 31.

³¹⁸ Lawson, A, (2014) at p. 386. The government is also expected to monitor the emergence of new barriers in the private sphere and subsequently ensure that 'all-new objects, infrastructure, facilities, goods, products and services have to be designed in a way that makes them fully accessible for persons with disabilities, in accordance with the principles of universal design.

³¹⁹ The accommodation does not usually have a broader impact on anybody else, it is possible that the accommodation may result in enhancing overall accessibility of structures for persons with disabilities (and indeed for non-disabled individuals) on an equal basis with others.

of the rights and dignity of persons with disabilities. As we move forward in this study, the insights gleaned from this chapter will serve as a solid foundation for our subsequent discussions, offering a nuanced perspective on the role of these measures in international human rights law as it pertains to disability issues.

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Chapter 3: The meaning, role, and impact of the concepts of reasonable accommodation and accessibility in international human rights law as it applies to disability

1. Introduction

Chapter 3 is devoted to addressing the second research question, which involves a thorough examination of the content and scope of reasonable accommodation and accessibility within the framework of international human rights law, while also briefly touching on regional human rights law. This analysis will specifically emphasise their relevance to issues pertaining to disability. To accomplish this, the chapter will delve into the various international human rights principles and provisions outlined in the United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as “*the Convention*”).¹ Furthermore, engaging with what can be deemed reasonable in the African, and hence South African, context would not be complete without engaging the African Disability Protocol (hereafter referred to as the “*the Protocol*”).² This chapter will therefore explore the diverse regional human rights principles and provisions detailed in the Protocol.

2. The Convention on the Rights of Persons with Disabilities

2.1. History of the Convention

Throughout history, persons with disabilities have consistently experienced discrimination, a fact widely acknowledged. Instead of acknowledging their specific rights, this prolonged discrimination has led to the cultivation of sympathy rather than respect. However, the Convention signifies a momentous shift away from mere sympathy towards persons with disabilities, marking a significant move towards the actual recognition of their rights and full participation in society. Undoubtedly, the Convention represents a turning point in acknowledging the specific human rights of persons with disabilities. This shift, emphasising the recognition of rights, acknowledges that society’s perceptions of disability, in addition to environmental factors, create significant barriers for persons with disabilities. The Convention emerged as a pivotal international treaty aimed at addressing the rights and well-being of persons with disabilities on a global scale. This treaty was conceived against the backdrop of historical discrimination and marginalisation faced by persons with disabilities throughout history. These individuals encountered barriers to education, employment, healthcare, and full participation in society, which constituted violations of their fundamental human rights. The Convention was forged within the framework of existing international human rights instruments, such as the Universal Declaration of Human Rights, and represents a response to the pressing need to explicitly safeguard the rights of persons with disabilities. The treaty’s development involved extensive collaboration on a global scale, engaging governments, organisations, and experts worldwide.

In the early stages of international human rights development, persons with disabilities were not explicitly recognised in most international human rights instruments. While some general human rights principles

¹ United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024).

² The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, adopted by the African Union, 29 January 2018, available at <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>> (accessed 11 July 2024).

were applicable, there was no comprehensive framework specifically addressing the unique challenges faced by persons with disabilities. This lack of explicit protection led to a significant gap in the recognition and safeguarding of disability rights on a global scale. The turning point came with the declaration of the 1980s as the International Decade of Disabled Persons by the United Nations. This marked a period of heightened global awareness regarding disability issues and the urgent need for action. During this decade, substantial efforts were made to promote disability rights and inclusion, laying the groundwork for future initiatives. One crucial milestone in the lead-up to the Convention was the adoption of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993. These rules, while not legally binding, provided a comprehensive set of guidelines for governments to promote equal opportunities and inclusion for persons with disabilities. They served as a critical reference point for discussions on disability rights at the international level. Parallel to these developments, disabled persons' organisations emerged as influential advocates for the rights of persons with disabilities. These organisations played a pivotal role in calling for a legally binding international treaty that would explicitly address disability rights and provide a solid framework for protection and inclusion. Responding to these calls, the United Nations General Assembly established an Ad Hoc Committee in 2001. This Committee was tasked with the undertaking of drafting a comprehensive international treaty focused exclusively on the rights of persons with disabilities. From 2001 to 2006, the Ad Hoc Committee held multiple sessions to develop the text of the Convention. These negotiations involved representatives from Member States, organisations, and international experts. The Ad Hoc Committee also sought input and feedback from various stakeholders, making the treaty a collaborative effort that drew on diverse perspectives.

The first session of the Ad Hoc Committee occurred from 29 July to 9 August 2002.³ In preparation for the Committee's second session, it was decided to solicit recommendations and opinions from States and all relevant international, regional, and national organisations. During the second session, the Ad Hoc Committee resolved to establish a working group. The purpose of this working group was to consider all prior contributions and draft a conceptual convention to serve as the foundation for negotiations among Member States. The working group, consisting of representatives from United Nations Member States, non-governmental organisations, and national human rights institutions, convened from 5 to 16 January 2004.⁴ It produced a preliminary text, and in accordance with General Assembly Resolution 58/246, the Ad Hoc Committee initiated negotiations on a conceptual convention during its third session. The Ad Hoc Committee presented two draft versions during its third to sixth session.⁵ In the seventh session, the Ad Hoc Committee introduced a draft text. This draft text, along with an Optional Protocol, was unanimously adopted in its entirety during the eighth session.⁶ The Ad Hoc Committee established a drafting group to ensure that the terminology used in the Convention was consistent across all official languages of the United Nations. Upon the resumption of the eighth session, the chair of the drafting group provided an oral report on the group's work. The Ad Hoc Committee also submitted the final draft report, along with the conceptual Convention and the Optional Protocol, to the General Assembly. The Convention and the Optional Protocol were adopted by the General Assembly on 13 December 2006.⁷ It marked a historic breakthrough, as the Convention became the first comprehensive international treaty specifically addressing the rights of persons with disabilities. After over four years of negotiations, all States could sign this landmark Convention from 30 March 2007, following the ceremony where the Convention was made

³ Grobbelaar – du Plessis, I, *Gestremdebeidsreg: 'n internasionaalregtelike en regsvergelykende analise* (2010), University of Pretoria, pp. 1 – 644 at p. 199.

⁴ *Ibid.* at p. 200.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* at p. 201.

available for signature.⁸ Following signatures, the Convention required ratification by 20 Member States to enter into force. This milestone was reached on 03 May 2008, when the 20th country ratified the treaty. At this point, the Convention became legally binding for its signatories, ushering in a new era of disability rights advocacy and implementation on a global scale. South Africa signed the Convention and the Optional Protocol on 30 March 2007, and ratified them on 30 November 2007.

2.2. The content of the Convention: relevant articles

The focus centres on an examination of key elements within the Convention, encompassing the Preamble, definitions, general principles, various rights, and obligations. Emphasis is placed on Article 5 of the Convention, which intricately addresses the pivotal themes of equality and non-discrimination, with a specific lens on the concept of reasonable accommodation. Additionally, Article 7 of the Convention, which encapsulates the rights of children with disabilities are delved into. Furthermore, the analysis extends to Article 9 of the Convention, dedicated to the critical topic of accessibility, as well as Article 19 of the Convention, which revolves around the principles of living independently and being fully integrated into one's community. This subsection also scrutinise Article 21 of the Convention, a pivotal component dealing with freedom of expression and opinion, and access to information. Lastly, the examination extends to Article 25 of the Convention, which addresses health. These articles work together to create a holistic framework that promotes the rights, dignity, and inclusion of persons with disabilities. Therefore, the inter-relatedness of the articles will also be discussed. This analysis aims to offer a comprehension of the Convention's fundamental components pertinent to the subject matter and their associated implications.

2.2.1. Preamble

In the Preamble of the Convention, the participating States are reminded of the principles laid out in the United Nations Charter, which acknowledge the inherent dignity and worth of every individual and affirm the equal and inalienable rights of all, forming the cornerstone of freedom, justice, and global peace.⁹ Furthermore, the Preamble recognises the significance of the Universal Declaration of Human Rights, and the International Covenants on Human Rights, and other global instruments that grant all people the rights and freedoms outlined in these documents.¹⁰

Preambular paragraph (c) reiterates the universality, indivisibility, interdependence, and interconnectedness of all human rights and fundamental freedoms, and emphasises the imperative of ensuring the full enjoyment of these rights for persons with disabilities without discrimination.

The concept of disability, as explained in paragraph (e) of the Preamble, is portrayed as an evolving idea where disability is seen as an interactive concept.

⁸ *Ibid.*

⁹ Paragraph (a) of the Preamble of the Convention.

¹⁰ Paragraph (b) of the Preamble of the Convention.

- “(e) Recognizing that disability is an evolving concept and that disability results from the 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”.

This suggests that persons with disabilities are hindered due to their interactions with an environment that does not accommodate their needs and the societal perceptions that label them as disabled based on notions of normalcy. In this context, it highlights that the full participation of persons with disabilities in their communities is obstructed by these perceptions and environmental barriers. Furthermore, it is acknowledged that any form of discrimination against a person due to such a disability constitutes a violation of the fundamental dignity and value inherent to every human being.¹¹

Additionally, the Preamble underscores the importance of integrating disability-related issues into strategies for sustainable development, emphasising the need for international cooperation to improve the living conditions of persons with disabilities in all countries, particularly in developing nations.¹² The Preamble strongly condemns discrimination against any person based on their disability, considering it a violation of their inherent dignity and worth. It acknowledges the diversity among persons with disabilities and stresses the necessity of safeguarding and promoting their human rights.¹³ The Preamble acknowledges not only the imperative to advocate for and safeguard the human rights of all persons with disabilities, including those who necessitate heightened levels of assistance but also acknowledges the diversity of people.¹⁴

Expressing concern, the Preamble notes that despite various instruments and commitments condemning the violation of the human rights of persons with disabilities, such violations persist worldwide.¹⁵ The Preamble acknowledges the significance of global collaboration to enhance the quality of life for persons with disabilities in all nations, especially those in developing countries¹⁶

Paragraph (p) expresses further concern about the various forms of discrimination, including those related to “[r]ace, colour, sex, language, religion, political beliefs, nationality, ethnicity, indigenous status, property, birth, age, or other statuses”, experienced by persons with disabilities. It also highlights the increased risk faced by women and girls in terms of violence, abuse, neglect, harm, or negligent treatment, both within and outside their homes.¹⁷ To address these challenges, paragraph (s) underscores the importance of incorporating a gender perspective into efforts aimed at promoting the full enjoyment of all human rights and fundamental freedoms.

Moreover, the Preamble acknowledges that a significant number of persons with disabilities live in poverty, recognising the adverse impact of poverty on their lives.¹⁸ It emphasises the importance of providing access to environments that support the realisation of fundamental rights, including physical, social, economic,

¹¹ Paragraph (h) of the Preamble of the Convention.
¹² Paragraph (g) of the Preamble of the Convention.
¹³ Paragraph (h) of the Preamble of the Convention.
¹⁴ Paragraph (i) and (j) of the Preamble of the Convention.
¹⁵ Paragraph (k) of the Preamble of the Convention.
¹⁶ Paragraph (l) of the Preamble of the Convention.
¹⁷ Paragraph (q) of the Preamble of the Convention.
¹⁸ Paragraph (t) of the Preamble of the Convention.

and cultural aspects.¹⁹ This access should also encompass essential services like healthcare, educational opportunities, information, and communication means, enabling persons with disabilities to fully enjoy their human rights and fundamental freedoms. Recognising the family as the natural and fundamental unit within society, the Preamble stresses the need to protect both persons with disabilities and their families from violations of their rights.²⁰ It calls for providing necessary assistance to ensure that persons with disabilities and their family members can fully and equally enjoy their rights. The Preamble furthermore highlights that a comprehensive and integral international convention promoting and protecting the rights and dignity of persons with disabilities will contribute significantly to eliminating the social disadvantages faced by them.²¹ Lastly, this Convention aims to advance and safeguard the participation of persons with disabilities in civil, political, economic, social, and cultural activities, ensuring equality with other community members, both in developed and developing countries.

2.2.2. Definitions

Article 2 of the Convention defines the terms “communication”, “language”, “discrimination on the basis of disability”, “reasonable accommodation”, and “universal design”. Of these terms defined in Article 2 of the Convention, only the definition of “reasonable accommodation” and “universal design” is focused on for the purposes of this thesis and will be discussed in subsections below.

““[R]easonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

...

““[U]niversal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.

2.2.3. General principles

The Convention is based on a number of general principles outlined in Article 3 of the Convention. These principles include respecting the inherent dignity and individual autonomy of persons with disabilities, which includes the freedom to make independent choices.²² These principles emphasise the empowerment of persons with disabilities. Empowerment in this context is important because it grants persons with disabilities a greater role in decision-making on matters that directly affect them. Furthermore, the principles in Article 3 of the Convention require respect for human diversity and the acceptance of persons with disabilities as part of that diversity.²³ The same is required for children with disabilities, and therefore, they must be assisted in developing their abilities and preserving their identity.²⁴ Other principles laid out in the

¹⁹ Paragraph (v) of the Preamble of the Convention.

²⁰ Paragraph (x) of the Preamble of the Convention.

²¹ Paragraph (y) of the Preamble of the Convention.

²² Article 3(a) of the Convention.

²³ Article 3(d) of the Convention.

²⁴ Article 3(h) of the Convention.

Convention are related to the prohibition of discrimination,²⁵ equal opportunities,²⁶ accessibility,²⁷ and gender equality.²⁸

In the cases of *Bacher v Austria*²⁹ and *Gemma v Australia*,³⁰ the Committee stressed a crucial aspect related to Article 3 of the Convention. This emphasis stemmed from the general and overarching character of Article 3 of the Convention, which is foundational to the entire Convention.

“[t]he Committee recalls that, in view of their general character, those articles do not in principle give rise to free-standing claims and can only be invoked in conjunction with other substantive rights guaranteed under the Convention”.³¹

Importantly, the Committee clarified that Article 3 of the Convention, by itself, does not establish independent claims that can be pursued in isolation. Rather, Article 3 of the Convention operates in a complementary fashion within the Convention framework. It is not designed to stand alone but, instead, functions in conjunction with other substantive rights that are explicitly guaranteed under the Convention. This means that individuals cannot raise a claim solely based on Article 3 of the Convention. Instead, they must link their assertions under Article 3 of the Convention to specific rights and provisions within the Convention that pertain to their situation or circumstances. This approach underscores the interdependence and interconnectedness of the rights and principles articulated in the Convention. It acknowledges that Article 3 of the Convention serves as a foundational guiding principle that informs and reinforces the interpretation and implementation of other, more specific rights and obligations found within the Convention. In essence, Article 3 of the Convention acts as a lens through which the entire Convention is viewed, ensuring that the inherent dignity, autonomy, and empowerment of persons with disabilities remain at the forefront of all considerations within the disability rights framework.

The Article 3 principles reveal the Convention’s explicit social development dimension and its primary intent to be a human rights instrument.³² These principles develop a specific application field of existing rights that specifically address the needs and circumstances of persons with disabilities.³³ The recognition of these rights acknowledges the fact that, in addition to environmental factors, society’s perception of disability creates obstacles for persons with disabilities.³⁴ Characteristic of these principles is the complete revolution in the perception of persons with disabilities and the approach to disability.³⁵ This is particularly evident in the principles of inherent dignity, individual autonomy, and independence of the person with a disability and, in particular, the view of disability as part of human diversity.³⁶ These principles affirm the

²⁵ Article 3(b) of the Convention.

²⁶ Article 3(e) of the Convention.

²⁷ Article 3(f) of the Convention.

²⁸ Article 3(g) of the Convention.

²⁹ *Simon Bacher v Austria* Communication No. 26 *Committee on the Rights of Persons with Disabilities* (2014) CRPD/C/19/D/26/2014, pp. 1 – 16 at p. 13.

³⁰ *Gemma Beasley v Australia* Communication No. 11 *Committee on the Rights of Persons with Disabilities* (2013) CRPD/C/15/D11/2013, pp. 1 – 3 at p. 13.

³¹ *Ibid.*

³² Grobbelaar – du Plessis, (2010) at p. 210.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

conception of disability within the social model of disability and place primary emphasis on the human rights perspective on disability.³⁷

2.2.4. General obligations

Following this, the Convention continues with general obligations. According to the general obligations, States Parties undertake to ensure the full realisation of all human rights and fundamental freedoms for all persons with disabilities. To achieve this goal, all relevant legislative, administrative, and other measures must be taken for the implementation of the rights under the Convention.³⁸ States Parties further commit to taking appropriate steps to amend or repeal existing legislation, regulations, customs, or practices that may be discriminatory against persons with disabilities.³⁹

“[T]aking “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities””.⁴⁰

In this regard, States Parties must consider all policy directions and programs when addressing the protection and promotion of the human rights of persons with disabilities. Furthermore, States Parties must refrain from engaging in any action or practice that is inconsistent with the Convention.⁴¹ Appropriate measures must be taken to eliminate discrimination against persons with disabilities.⁴²

“[T]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”.⁴³

State Parties are to engage in or encourage research and development of universally designed goods, services, equipment, and facilities, as defined in Article 2 of the Convention.⁴⁴ These designs should necessitate minimal adaptation and cost to meet the specific needs of persons with disabilities, with the aim of enhancing their availability, utilisation, and the integration of universal design principles into the formulation of standards and guidelines.⁴⁵

State Parties should further foster research and development initiatives and promote the accessibility and utilisation of emerging technologies, including information and communication technologies, mobility aids, devices, and assistive technologies, tailored to the requirements of persons with disabilities.⁴⁶ Priority should be given to technologies that are affordable.⁴⁷ Furthermore, State Parties have to ensure persons with disabilities have access to comprehensive information regarding mobility aids, devices, assistive

³⁷ *Ibid.*
³⁸ Article 4(1)(a) of the Convention.
³⁹ Article 4(1)(b) of the Convention.
⁴⁰ *Ibid.*
⁴¹ Article 4(1)(d) of the Convention.
⁴² Article 4(1)(e) of the Convention.
⁴³ *Ibid.*
⁴⁴ Article 4(1)(f) of the Convention.
⁴⁵ *Ibid.*
⁴⁶ Article 4(1)(g) of the Convention.
⁴⁷ *Ibid.*

technologies, including emerging technologies, and various forms of assistance, support services, and facilities.⁴⁸

State Parties are also to encourage the education and training of professionals and personnel working with persons with disabilities, ensuring their proficiency in upholding the rights recognised in this Convention.⁴⁹

States Parties should collaborate closely with representative organisations of persons with disabilities to contemplate the enactment and advancement of legislation and policy directives that might be requisite for complying with the Convention. It is essential to conduct meaningful consultations with persons with disabilities and advocacy organisations to ensure their active participation in the legislative procedures.⁵⁰ According to the Convention, each States Party undertakes, within the limits of available resources, to take measures to progressively realise the economic, social, and cultural rights of persons with disabilities. The realisation of these rights should occur in cooperation with the international community. This cooperation should be carried out without prejudice and in accordance with the obligations imposed by the Convention.⁵¹

2.2.5. Equality and non-discrimination

In the Convention, States Parties explicitly recognise the fundamental principle of equality before the law for all persons.⁵² This means that every person, regardless of their disability, is entitled to the same legal protections and safeguards without facing any form of discrimination. Discrimination on the grounds of disability is strictly prohibited under the Convention,⁵³ and it establishes a clear mandate for States Parties to ensure that persons with disabilities receive equal and effective legal protection. To further advance the cause of equality and eliminate discrimination, States Parties are obliged to take appropriate measures, which include providing reasonable accommodation as defined in Article 2 of the Convention.⁵⁴ Reasonable accommodation entails making necessary adjustments and modifications to policies, practices, and environments, ensuring that persons with disabilities can fully participate in society on an equal basis with others. These accommodations are essential to level the playing field and remove barriers that might hinder the equal enjoyment of rights by persons with disabilities. It is important to note that the Convention recognises that certain measures, such as affirmative action, may be required to promote or achieve *de facto* equality between persons with disabilities and those without disabilities.⁵⁵ Importantly, these measures designed to address historical disadvantages and inequalities will not be considered discriminatory under the Convention. This recognition underscores the Convention's commitment to not only prohibiting discrimination but also actively promoting the advancement of persons with disabilities to ensure their equal participation and inclusion in all aspects of society.

Accessible labelling is a tangible manifestation of the fundamental principles of equality and non-discrimination enshrined in the Convention. The Convention mandates that all persons, regardless of

⁴⁸ Article 4(1)(h) of the Convention.

⁴⁹ Article 4(1)(i) of the Convention.

⁵⁰ Article 4(3) of the Convention.

⁵¹ Article 4(2) of the Convention.

⁵² Article 5(1) of the Convention.

⁵³ Article 5(2) of the Convention.

⁵⁴ Article 5(3) of the Convention.

⁵⁵ Article 5(4) of the Convention.

disability, are entitled to equal legal protections and safeguards. By adopting [universally designed] accessible labels that are accessible to persons with visual disabilities, companies and governments can ensure that all persons have equal access to product information. Moreover, the commitment to non-discrimination and the provision of reasonable accommodations, including accessible labelling, aligns with the broader goal of *de facto* equality. Therefore, integrating accessible labelling into national policies and practices is a crucial step towards fulfilling the Convention's mandates. It underscores the Convention's comprehensive approach to ensuring that persons with disabilities can participate equally and effectively in all aspects of life, thereby reinforcing the principles of equality, non-discrimination, and full inclusion.

2.2.6. Accessibility

As captured in Article 9(1) of the Convention, the purpose of accessibility is to “[e]nable persons with disabilities to live independently and participate fully in all aspects of life”. Article 9(1) continues by stating:

“[S]tates Parties shall *take appropriate measures to ensure to persons with disabilities access*, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and *elimination of obstacles and barriers* to accessibility, shall apply to, *inter alia*:

- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
- b) Information, communications and other services, including electronic and emergency services.”

Article 9(2)(a) of the Convention sets out a number of other obligations relating, *inter alia*, to the development, promulgation, and monitoring of the implementation of minimum standards and guidelines for accessibility. Minimum standards must be developed in close consultation with persons with disabilities and their representative organisations in accordance with Article 4(3) of the Convention. In circumstances where no relevant minimum standards are in place, adopting a suitable legal framework is the initial step States Parties must take.⁵⁶ States Parties ought to undertake a comprehensive review of accessibility legislation in order to identify, monitor and address any gaps in their legislation and its implementation.⁵⁷ In circumstances where relevant accessibility standards have already been enacted but cause blatant obstructions to accessibility or where new barriers are created as a result of a lack of adopting any accessibility standards after the ratification of the Convention can amount to a breach of the accessibility norm.⁵⁸ A range of more specific obligations relating to the accessibility of services and facilities offered to the public are set out in Article 9(2)(b)–(e). Paragraphs (f) and (g) go on to impose obligations on States Parties to promote the access of persons with disabilities to information and to new information and communication technologies (hereafter referred to as “*ICT*”), while paragraph (h) requires them to promote the design, development, production and distribution of accessible ICTs.

The responsibility of States Parties to guarantee access to the physical environment, transportation, information and communication, and public services for persons with disabilities should be interpreted

⁵⁶ General Comment No. 2 Committee on the Rights of Persons with Disabilities (2014) CRPD/C/ GC/2, pp. 1 – 14 at p 10.

⁵⁷ *Ibid.*

⁵⁸ Broderick, A, *Of rights and obligations: the birth of accessibility* Vol. 24(4), (2020), The International Journal of Human Rights, pp. 393 - 413 at p. 405.

within the framework of promoting equality and preventing discrimination.⁵⁹ The concepts of “equality and non-discrimination” are intimately intertwined with “accessibility” within the realm of disability rights. This intricate relationship underscores the foundational principles of disability rights, where accessibility serves as a pivotal mechanism for realising equality and non-discrimination. This interconnectedness manifests in several significant ways. Firstly, accessibility measures stand as indispensable tools in affording persons with disabilities equal opportunities across various spheres of life, encompassing education, employment, transportation, and access to public services. By eliminating the physical, informational, and communication barriers that often impede their full participation, accessibility measures foster equality, enabling persons with disabilities to engage on a level playing field with their counterparts. Secondly, accessibility initiatives are instrumental in dismantling the discriminatory barriers that persons with disabilities frequently encounter. These barriers, be they physical obstacles or information gaps, frequently give rise to discrimination. Through the implementation of accessibility measures, these barriers are systematically dismantled, thereby mitigating discrimination against persons with disabilities. Thirdly, the concept of reasonable accommodation, a fundamental component of disability rights, inherently involves ensuring accessibility. Reasonable accommodation obliges society to make necessary adjustments, such as providing accessible facilities and information in suitable formats, to guarantee that persons with disabilities can exercise their rights and freedoms at par with others. Fourthly, the legal framework governing disability rights consistently emphasises both accessibility and non-discrimination. The Convention stresses the imperative of both ensuring equal access for persons with disabilities and prohibiting discriminatory practices against them. Lastly, promoting inclusivity and active participation within the community hinges upon accessibility. By removing barriers, accessibility empowers persons with disabilities to actively engage in diverse social, cultural, educational, and recreational activities, mirroring the opportunities available to the wider population. Refusing access to these domains for persons with disabilities amounts to an act of discrimination based on disability, explicitly forbidden by Article 5 of the Convention. The pursuit of future-proof accessibility should be considered in the context of fulfilling the overarching obligation to develop universally designed goods, services, equipment, and facilities, as stipulated in Article 4(1)(f) of the Convention.

Just as Article 9 of the Convention advocates for equal access to information and communications, accessible labelling ensures that product information is available in formats that can be understood by persons with visual impairments. This includes using Braille, tactile elements, audio descriptions, or plain language to convey essential product details. By doing so, accessible labelling enables persons with visual impairments to make informed choices independently. Accessibility measures, including accessible labelling, aim to eliminate physical and informational barriers. In the context of product labelling, these barriers may include small fonts, complex language, or lack of alternative formats, which can prevent persons with visual impairments from understanding and using products effectively. By adopting accessible labelling practices, States Parties and businesses contribute to dismantling these barriers.

2.2.7. Living independently and being included in the community

Living independently and being included in the community, as defined in the Convention, are key in emphasising the rights and opportunities of persons with disabilities to live full and inclusive lives within their communities. This is outlined in Article 19 of the Convention and encompass several important aspects. Firstly, living independently. This aspect recognises the right of persons with disabilities to live

⁵⁹ General Comment No. 2 of 2014 at p. 10.

independently and make their own choices regarding where and with whom they live.⁶⁰ It means they should not be forced into institutionalised settings against their will. Instead, they should have access to a range of community-based support services and accommodations that enable them to live independently. Secondly, being included in the community. This emphasises the right of persons with disabilities to be fully integrated and actively participate in their communities. It implies that persons with disabilities should have the opportunity to engage in social, cultural, educational, and recreational activities, just like anyone else. They should not face discrimination, isolation, or segregation but should be included and accepted within the community. Therefore, persons with disabilities should have access to a range of services, such as personal assistance, housing support, healthcare, and transportation, which enable them to live independently and participate in community life.⁶¹ Communities and public spaces should be designed and made accessible to accommodate the diverse needs of persons with disabilities, ensuring they can move around freely and participate in all aspects of community life.⁶²

Accessible labelling supports the right of persons with disabilities to live independently by ensuring they have access to essential information about products. Labels that are accessible through formats like Braille, large print, or audio descriptions enable persons with visual impairments to make informed choices about the products they use in their daily lives. This independence in decision-making contributes to their ability to live autonomously and in accordance with their preferences, rather than being reliant on others for basic consumer decisions. Just as institutionalisation and restricted living arrangements represent discriminatory practices, inaccessible product labels also marginalise persons with visual impairments by denying them the information necessary for making informed choices. Living independently for persons with visual impairments implies having the autonomy to make choices regarding their place of residence, work, and daily activities – including consumer activities. To achieve this, accessible labels are essential.

2.2.8. Freedom of expression and opinion, and access to information

Article 21 of the Convention mandates that States Parties take appropriate measures to uphold the rights of freedom of expression and the right to form one's own opinions for persons with disabilities. This provision underscores the importance of ensuring that persons with disabilities have the same rights to freedom of expression and access to information as everyone else. States Parties are required to take specific measures to make this a reality. Firstly, they should provide information meant for the general public in formats that are accessible to persons with different disabilities, and this should be done promptly and without extra charges.⁶³ Secondly, they must support and facilitate the use of various communication methods such as sign languages, Braille, and augmentative and alternative communication in official interactions.⁶⁴ Thirdly, they should encourage private entities, including those on the internet, to make their information and services accessible to persons with disabilities.⁶⁵ Additionally, there is an emphasis on urging the mass media, including online information providers, to ensure their services are accessible to

⁶⁰ Article 19(a) of the Convention.

⁶¹ Article 19(b) of the Convention.

⁶² Article 19(c) of the Convention.

⁶³ Article 21(a) of the Convention.

⁶⁴ Article 21(b) of the Convention.

⁶⁵ Article 21(c) of the Convention.

persons with disabilities.⁶⁶ Lastly, recognising and promoting the use of sign language is also highlighted as an important aspect of facilitating communication and expression for persons with disabilities.⁶⁷

Article 21 of the Convention establishes that States Parties are obliged to take comprehensive measures to ensure that persons with disabilities can fully exercise their right to freedom of expression and opinion, and access to information.⁶⁸ This includes the freedom to seek, receive, and disseminate information and ideas on an equal footing with others, using their preferred means of communication. Article 21 of the Convention further outlines specific actions to guarantee the accessibility of information and communication for persons with disabilities.

“[S]tates Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention [...]”.⁶⁹

States Parties are required to provide information intended for the general public in formats and technologies that are accessible to persons with various disabilities.⁷⁰ Moreover, it necessitates the facilitation of the use of sign languages, Braille, augmentative and alternative communication, and other accessible modes and formats in official interactions.⁷¹ Private entities serving the public, including online services, are encouraged to deliver information and services in formats that are accessible and usable for persons with disabilities.⁷² Similarly, mass media, including online information providers, are urged to ensure the accessibility of their services to persons with disabilities.⁷³ Article 21 of the Convention also highlights the importance of recognising and promoting the use of sign languages, aligning with the provisions in Articles 24, 27, 29, and 30 of the Convention.⁷⁴

Freedom of expression encompasses the right to access information. Accessible labelling ensures that persons with disabilities can access the information they need from product labels, which is a fundamental aspect of their right to receive information. By having access to information through accessible labelling, persons with disabilities can make informed choices and express their preferences. This is a key aspect of exercising autonomy and freedom of expression. Freedom of expression under the Convention and accessible labelling are interconnected, with accessible labelling being a practical implementation of the right to seek, receive, and impart information.

2.2.9. Health

Article 25 of the Convention addresses health, affirming that States Parties recognise the right of persons with disabilities to enjoy the highest attainable standard of health without discrimination. It mandates that States Parties must take all necessary measures to ensure access for persons with disabilities to health services, including providing them with the same range, quality, and standard of free or affordable

⁶⁶ Article 21(d) of the Convention.

⁶⁷ Article 21(e) of the Convention.

⁶⁸ *Ibid.* at p. 11.

⁶⁹ Article 21 of the Convention.

⁷⁰ Article 21(a) of the Convention.

⁷¹ Article 21(b) of the Convention.

⁷² Article 21(c) of the Convention.

⁷³ Article 21(d) of the Convention.

⁷⁴ General Comment No. 2 of 2014 at p. 11.

healthcare as provided to others.⁷⁵ Additionally, States Parties are required to provide health services specifically needed by persons with disabilities due to their disabilities.⁷⁶ State Parties are to provide these health services as close as possible to the persons own community, including in rural areas.⁷⁷ State Parties are also to require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.⁷⁸ Furthermore, State Parties are to prohibit discrimination against persons with disabilities in the provision of health and life insurance.⁷⁹ State Parties should also prevent discriminatory denial of health care and services or food and fluids on the basis of disability.⁸⁰ General health facilities and services must be available, accessible, adaptable and acceptable for persons with disabilities in their communities.⁸¹ Moreover, all information and communications related to healthcare services must be accessible through various means such as sign language, Braille, accessible electronic formats, alternative scripts, and other modes of communication.⁸²

Article 25 recognises that persons with disabilities have the right to enjoy the highest attainable standard of health, which encompasses physical and mental health. States Parties are obligated to ensure that persons with disabilities have access to health services on an equal basis with others. This includes ensuring *access* to health facilities, goods, and services without discrimination. Health facilities, goods, and services must be *accessible* to persons with disabilities. This includes physical accessibility of buildings, as well as access to information and communication related to health care. Health services must be economically accessible, meaning they should be affordable for persons with disabilities. This principle emphasises the equitable distribution of health resources to ensure financial accessibility. States Parties must ensure that health services provided to persons with disabilities are of good quality. This involves ensuring that health care professionals are trained, that facilities and equipment are appropriate and safe, and that services meet medical standards. The right to health under Article 25 of the Convention is comprehensive, encompassing preventive, curative, and rehabilitative health care services. It also includes access to essential medicines, as well as health-related rehabilitation services. Article 25 of the Convention emphasises the participation of persons with disabilities in health-related decision-making processes at all levels, including policy-making and planning. The article recognises that certain groups of persons with disabilities, such as women and children, may face specific health-related challenges. States Parties are required to address these intersectional issues in their efforts to realise the right to health. Overall, Article 25 of the Convention serves as a critical instrument for promoting and protecting the health rights of persons with disabilities, emphasising equality, accessibility, affordability, and quality in health care provision.

The right to health has been enshrined in numerous international treaties apart from the Convention, such as the International Covenant on Economic, Social and Cultural Rights (hereafter referred to as “ICESCR”).⁸³ Article 12 encapsulates the right to health in ICESCR, stating in Article 12(1): “[T]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

The right to health should not be misconstrued as a guarantee of being healthy, but rather encompasses both freedoms and entitlements. Freedoms include the right to control one’s health and body,

⁷⁵ Article 25(a) of the Convention.

⁷⁶ Article 25(b) of the Convention.

⁷⁷ Article 25(c) of the Convention.

⁷⁸ Article 25(d) of the Convention.

⁷⁹ Article 25(e) of the Convention.

⁸⁰ Article 25(f) of the Convention.

⁸¹ General Comment No. 5 Committee on the Rights of Persons with Disabilities (2017) CRPD/C/ GC/5, pp. 1 – 18 at p 16.

⁸² General Comment No. 2 of 2014 at p. 12.

⁸³ International Covenant on Economic, Social and Cultural Rights, 1996, No. 16, U.N. Doc. A/6316.

encompassing sexual and reproductive freedom, and the right to be free from interference such as torture and non-consensual medical treatment.⁸⁴ In contrast, entitlements entail access to a health system that provides equal opportunities for individuals to achieve the highest attainable level of health.⁸⁵ The concept of “the highest attainable standard of health” under Article 12(1) of ICESCR considers both an individual’s biological and socio-economic conditions, as well as the resources available to the State. Certain factors affecting health, such as genetic predisposition, individual susceptibility to illness, and lifestyle choices, cannot solely be addressed by States.⁸⁶ Therefore, the right to health guarantees access to facilities, goods, services, and conditions necessary for achieving the highest attainable standard of health.⁸⁷ The Committee on Economic, Social and Cultural Rights (hereafter referred to as “CESCR”) interprets the right to health expansively, not limited to timely healthcare but also encompassing determinants like access to clean water, sanitation, safe food, adequate nutrition and housing, healthy work and environmental conditions, and health-related education and information, including sexual and reproductive health. Community participation in health-related decision-making, at local, national, and international levels, is also crucial.⁸⁸

The right to health comprises interrelated elements essential, known as the AAAQ framework which stands for availability, accessibility, acceptability, and quality. *Availability* of public health and healthcare facilities, goods, services, and programs must be sufficient within each State Party.⁸⁹ The specific nature of these facilities, goods, and services will vary depending on factors such as the developmental level of the State Party. Essential components include underlying health determinants like safe drinking water and adequate sanitation facilities, as well as hospitals, clinics, and other health-related infrastructure.⁹⁰ *Accessibility* of health facilities, goods, and services is a fundamental requirement under international human rights standards, ensuring that everyone within a State Party’s jurisdiction can access healthcare without discrimination.⁹¹ This concept encompasses four essential dimensions. Firstly, non-discrimination mandates that health services must be available to all individuals, especially vulnerable or marginalised groups, free from discrimination based on any prohibited grounds.⁹² Secondly, physical accessibility requires that health facilities and essential services like safe water and sanitation are within safe reach for everyone, including rural and marginalised populations, and that buildings are accessible for persons with disabilities.⁹³ Thirdly, economic accessibility underscores that healthcare services must be affordable for all, regardless of socioeconomic status, ensuring equitable access without placing undue financial burden on disadvantaged groups.⁹⁴ Lastly, information accessibility guarantees the right to seek, receive, and share health-related information while safeguarding the confidentiality of personal health data.⁹⁵ These principles collectively aim to ensure that health systems meet the diverse needs of populations and promote equal access to essential healthcare services and information. *Acceptability* of health facilities, goods, and services requires adherence to medical ethics and cultural appropriateness.⁹⁶ This entails respecting the cultural values of individuals, minorities, peoples, and communities, and being sensitive to gender-specific and lifecycle-related needs.⁹⁷ Services should be designed to ensure confidentiality and enhance the health outcomes of those utilising them. *Quality* of health facilities, goods, and services necessitates not only cultural

⁸⁴ General Comment No. 14 Committee on Economic, Social and Cultural Rights (2000) E/C.12/2000/4, pp. 1 – 21 at p. 3.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at p. 4.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at p. 5.

⁹⁷ *Ibid.*

acceptability but also scientific and medical appropriateness, and high standards.⁹⁸ This includes having skilled medical personnel, using scientifically approved and unexpired drugs and hospital equipment, ensuring access to safe and clean water, and maintaining adequate sanitation facilities.⁹⁹

In the context of Article 25 of the Convention, *availability* means that health services and products must be available to persons with disabilities without discrimination. This includes ensuring that accessible health care facilities, equipment, medications, and other health-related goods are widely available and adequately distributed across different regions. The availability of accessible labels is essential to ensure that individuals with disabilities can access and understand critical information about products and services. *Accessibility* under the framework requires that health services and facilities are physically accessible to all. This encompasses both the physical infrastructure and the provision of accessible information and communication methods. In the context of Article 25 of the Convention, accessibility means that health facilities should be designed and equipped to accommodate the diverse needs of persons with disabilities, ensuring they can reach and use these services effectively. Extending to the design of labels, it ought to be in formats that are usable. The *acceptability* component emphasises that health services must be respectful of medical ethics, culturally appropriate, and sensitive to the needs of diverse populations. In relation to Article 25 of the Convention, acceptability means that health care providers and facilities should offer services that respect the dignity and rights of persons with disabilities. This includes providing services in a manner that considers cultural backgrounds, gender considerations, and the specific health needs of persons with disabilities. Acceptability underscores that health services must align with medical ethics and cultural norms, necessitating labels that are culturally sensitive, maintain confidentiality, and respect the dignity of persons with disabilities. *Quality* within the framework requires that health services and goods meet medical and scientific standards and are of good quality. This involves ensuring that health care providers are adequately trained, that medical equipment and medications are safe and effective, and that health-related information is accurate and understandable. For Article 25 of the Convention, quality means that health services provided to persons with disabilities should be effective, safe, and appropriate to their health needs, contributing to improved health outcomes and well-being. Regarding labels, quality mandates that health information on labels be accurate, clear and understandable.

By applying the framework to the assessment of health care provisions under Article 25 of the Convention, policymakers, health professionals, and advocates can systematically evaluate the extent to which the rights of persons with disabilities to health care are being met. This structured approach helps identify gaps, advocate for improvements, and ensure that health systems are inclusive, equitable and responsive.

2.3. The Committee on the Rights of Persons with Disabilities: General Comments and Communications

2.3.1. Equality and non-discrimination

Equality and non-discrimination represent fundamental tenets within the realm of international human rights law. These principles, intrinsically tied to human dignity, form the bedrock upon which all human rights are constructed. The Convention consistently underscores the significance of equality and non-discrimination throughout its substantive articles, repeatedly emphasising the phrase “on an equal basis with others”. This linkage effectively binds all the Convention’s substantive rights to the principle of non-

⁹⁸ *Ibid*

⁹⁹ *Ibid*.

discrimination. Within the Convention, equality and non-discrimination are referred to as both principles in Article 3 and rights in Article 5 of the Convention. Furthermore, they serve as interpretative tools for elucidating the broader array of principles and rights enshrined in the Convention. These principles and rights, pertaining to equality and non-discrimination, constitute pivotal elements of the international protection assured by the Convention.

Article 5(1) of the Convention requires States Parties to acknowledge that every individual is equal before and under the law, and they are entitled to equal protection and benefits under the law without any form of discrimination. With regards to the first element, equal protection *before* and *under* the law, the Committee has noted that numerous international human rights treaties incorporate the principle of “equal before the law”,¹⁰⁰ signifying that individuals are entitled to impartial and equal treatment in the application of legal principles. To fully realise this right, it is imperative that the judiciary and law enforcement agencies refrain from discriminating against persons with disabilities during the administration of justice.¹⁰¹ A distinctive aspect introduced by the Convention is the concept of “equality under the law”. While “equality before the law” pertains to the right to legal protection, “equality under the law” extends to the right to utilise legal mechanisms for personal benefit.¹⁰² Persons with disabilities possess the entitlement to effective protection and active engagement within the legal framework. The legal system itself must ensure the substantive equality of all persons within its jurisdiction. Consequently, the recognition that all persons with disabilities are “equal under the law” necessitates the absence of laws permitting the specific denial, restriction, or limitation of their rights.¹⁰³ Furthermore, it underscores the importance of mainstreaming disability considerations into all legislation and policies.¹⁰⁴ This interpretation aligns with the principles outlined in Articles 4 (1) (b) and (c) of the Convention, which require States Parties to ensure that public authorities and institutions adhere to Convention standards, modify or eliminate existing discriminatory laws and practices, and incorporate the protection and promotion of the rights of persons with disabilities into all policies and programs.¹⁰⁵

With regard to the second element, “equal protection of the law” and “equal benefit of the law”, the Committee has noted that these concepts encompass interconnected yet distinct aspects of equality and non-discrimination. “Equal protection of the law” is a well-established term in international human rights treaty law, demanding that national legislatures refrain from upholding or introducing discrimination against persons with disabilities in the formulation of laws and policies.¹⁰⁶ When interpreting Article 5 of the Convention in conjunction with Articles 1, 3, and 4, of the Convention it becomes evident that States Parties are obligated to take affirmative measures to facilitate persons with disabilities’ equal enjoyment of the rights guaranteed by legislation.¹⁰⁷ These measures often encompass considerations such as accessibility, reasonable accommodation, and individual support. To ensure equal opportunity for all persons with disabilities, the concept of the “equal benefit of the law” comes into play. This implies that States Parties must eliminate impediments that hinder access to the full range of legal protections and the advantages of equitable access to the legal system and justice in order to assert one’s rights effectively.¹⁰⁸

¹⁰⁰ General Comment No. 6 of 2018 at p. 3.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at p. 4.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

Article 5(2) of the Convention requires States to prohibit discrimination based on disability. Disability-based discrimination, as defined in Article 2 of the Convention, encompasses “[a]ny distinction, exclusion, or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field”. This definition draws inspiration from legal definitions of discrimination in international human rights treaties, including Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter referred to as “CEDAW”).¹⁰⁹ However, it extends beyond these definitions in two critical ways. Firstly, it incorporates the concept of “denial of reasonable accommodation” as a form of disability-based discrimination.¹¹⁰ Secondly, the phrase “on an equal basis with others” introduces a new dimension. While CEDAW in its Articles 1 and 3 employs a similar but more restricted phrase, “on a basis of equality of men and women”, the phrase “on an equal basis with others” permeates the entirety of the Convention.¹¹¹ This phrase signifies two essential principles. On one hand, it ensures that persons with disabilities neither receive more nor fewer rights or benefits than the general population.¹¹² On the other hand, it mandates that States Parties must implement concrete, targeted measures to achieve genuine equality for persons with disabilities.

Article 5(2) establishes the legal prerequisites for upholding equality rights for persons with disabilities and those associated with them.¹¹³ This mandate to eradicate all forms of disability-based discrimination encompasses persons with disabilities and their affiliates, such as parents of children with disabilities.¹¹⁴ The duty to secure equal and effective legal protection against discrimination on all grounds for persons with disabilities is extensive and places affirmative responsibilities on States Parties.

“[S]tates Parties shall *prohibit all discrimination* on the basis of disability and guarantee to persons with disabilities *equal and effective legal protection against discrimination* on all grounds” (own emphasis).¹¹⁵

The term “equal and effective legal protection against discrimination” signifies that States Parties are under an obligation to actively safeguard persons with disabilities from discrimination, requiring them to enact specific and comprehensive anti-discrimination laws.¹¹⁶ These laws should explicitly forbid discrimination based on disability, along with other forms of discrimination against persons with disabilities.¹¹⁷ Furthermore, these legal provisions must be accompanied by the establishment of appropriate and effective legal recourse mechanisms and penalties for cases involving intersectional discrimination in civil, administrative, and criminal proceedings.¹¹⁸ In situations where discrimination is entrenched systemically, merely compensating an individual may not bring about substantial change in the broader context. In such instances, States Parties should incorporate “forward-looking, non-pecuniary remedies” into their legal frameworks.¹¹⁹ This entails the provision of additional, proactive safeguards against discrimination perpetrated by private entities and organisations, as ensured by the State Party.¹²⁰

¹⁰⁹ International Convention on the Elimination of All Forms of Discrimination against Women (adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981).

¹¹⁰ *Ibid.* at p. 6.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Article 5(2) of the Convention.

¹¹⁶ *Ibid.* at p. 6.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

According to Article 5(3) of the Convention, to advance equality and eradicate discrimination, States Parties must undertake all necessary measures to ensure the provision of reasonable accommodation. Failure to provide reasonable accommodation constitutes a form of discrimination as per Article 5(3) of the Convention.¹²¹ Therefore, in addition to the traditional forms of unequal and discriminatory treatment, the denial of reasonable accommodation that does not impose a disproportionate burden constitutes discrimination against persons with disabilities. In *HM v Sweden*, the first instance in which the Committee resolved a communication brought against a States Party under the Optional Protocol to the Convention, the Committee found that a failure to treat a person with disabilities differently when the situation necessitates it, such a failure amounts to discrimination as the definition of discrimination on the basis of disability in terms of the Convention includes the denial of reasonable accommodation.¹²² Article 2(3) of the Convention reads:

“[D]iscrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. *It includes all forms of discrimination, including denial of reasonable accommodation*” (own emphasis).

HM, a Swedish national, due to her condition has rendered her house-bound and bed-ridden.¹²³ As of the time she submitted her communication, HM’s disability had advanced to a stage where leaving her home or being transported to a hospital or rehabilitation care centre posed substantial risks to her safety. The only viable form of rehabilitation suitable for someone in HM’s condition is hydrotherapy, which, in her case, necessitates the construction of an indoor pool within her residence.¹²⁴ In December 2009, HM sought planning permission from the Örebo Local Housing Committee to build a hydrotherapy pool but the Local Housing Committee rejected her application. Subsequently, HM pursued appeals through various channels, including the Administrative Court of Appeal in Gothenburg. However, all her appeals were denied, including her petition to the Supreme Administrative Court in Stockholm for leave to appeal the decision of the Administrative Court of Appeal.¹²⁵ In response HM alleged that the actions of the States Party amounted to discrimination, as its administrative bodies and courts failed to recognise her rights to equal opportunities for rehabilitation and improved health.¹²⁶ HM contended that, despite the apparent neutrality of the planning permission rules, the States Party was indirectly discriminating against her. Sweden, in its submission to the Committee, argued that constructing a 125-square-meter addition would constitute a significant departure from the development plan and was not permissible under the Planning and Building Act. Instead, Sweden asserted that the laws applied neutrally to HM’s case were not discriminatory and did not violate Article 5 of the Convention.

Regarding Sweden’s argument that it applied building permission laws neutrally to all individuals, the Committee highlighted that a law applied neutrally could still have a discriminatory effect when the specific circumstances of persons with disabilities were not considered.¹²⁷ This failure to provide reasonable accommodation constituted discrimination under the Convention. Furthermore, the Committee determined that Sweden’s refusal to grant a departure from its development plan to allow the construction of a hydrotherapy pool, when such action would not impose a disproportionate burden, violated HM’s

¹²¹ Grobbelaar-Du Plessis, I, & Nienaber, A, *Disability and Reasonable Accommodation: HM v Sweden Communication 3/2011 (Committee on the Rights of Persons with Disabilities)* Vol. 30(2), (2014), South African Journal on Human Rights, p. 366 – 379 at p. 369.

¹²² Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 368.

¹²³ *HM v Sweden* at p. 4.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at p. 5.

¹²⁷ *Ibid.* at p. 12.

rights under Article 25 of the Convention, which ensures access to healthcare without discrimination.¹²⁸ The Committee concluded that Sweden had violated HM’s rights under several articles of the Convention and made recommendations for redress, including reconsidering her building permit application, covering her communication costs, ensuring compliance with the Convention in its legislation and court decisions, reporting to the Committee, and disseminating the Committee’s findings.

As shown above, failure to make reasonable accommodations where there is no disproportionate burden is regarded by the Convention as a form of discrimination. In other words, denial of reasonable accommodation for persons with disabilities is one kind of discrimination on the ground that the Convention covers disability. The definition and test for such discrimination carries two distinct implications for parties to the Convention. Firstly, including the duty to accommodate within the non-discrimination norm makes the implementation of the reasonable accommodation duty immediate and not progressive. Secondly, since the non-discrimination duty, and therefore the reasonable accommodation norm, covers all human rights contained in the Convention, a wide variety of modifications to existing policies, practices, or environments will be required to ensure that persons with disabilities can participate, and be included in, society. The duty bearers required to modify existing policies, practices or environments will consist of both public and private enterprises.

According to Article 5(4) of the Convention, the Convention does not categorise as discrimination any specific measures required to expedite or attain actual equality for persons with disabilities. It is essential to differentiate between reasonable accommodation in terms of Article 5(3) of the Convention and “specific measures”, including “affirmative action measures”, in terms of Article 5(4) of the Convention.¹²⁹ While both concepts aim to promote *de facto* equality, reasonable accommodation pertains to the duty of non-discrimination, whereas specific measures involve providing preferential treatment to persons with disabilities to address historical or systemic exclusion from the benefits of exercising their rights.¹³⁰ Similarly, reasonable accommodation should not be confused with the provision of support, such as personal assistants, in the context of the right to live independently and be included in the community, or support for the exercise of legal capacity.¹³¹

It is furthermore crucial to understand that reasonable accommodation is a unified term, and the word “reasonable” should not be misinterpreted as an exception clause. The concept of “reasonableness” should not serve as a distinct qualifier or modifier to the duty.¹³² Ergo, the concept of reasonable[ness] may not be a distinct qualifier or modifier to the duty. The Committee confirmed that “reasonable” is not a means to assess the cost implications or resources availability of the accommodation as this assessment must be undertaken in the second constituent part of the duty the accommodate.¹³³

The duty to provide reasonable accommodation in accordance with Articles 2 and 5 of the Convention can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation, which is a modification or adjustment that is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a

¹²⁸ *Ibid.* at p. 13.

¹²⁹ General Comment No. 6 of 2018 at p. 8.

¹³⁰ *Ibid.* at p. 7.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

disproportionate or undue burden on the duty bearer. “Disproportionate or undue burden” should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. The drafting history of the Convention seems to indicate that there was not intended to be a difference between the concepts of “disproportionate” or “undue” burden. The Committee itself appears to refer interchangeably to the terms in the case of *Jungelin v Sweden*.¹³⁴ In *HM v Sweden*,¹³⁵ the Committee commented on the duty to accommodate but did not elaborate on the precise meaning of the terms “disproportionate” or “undue burden” in that individual communication.¹³⁶ However, a handful of years later the Committee did in General Comment No. 6 confirm that “disproportionate” or “undue burden” should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation.¹³⁷

“[B]oth terms should be considered synonyms insofar as they refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party”.¹³⁸

To reasonably accommodate a rights holder is subject to the limitation that a duty bearer is not required to make a reasonable accommodation where such an accommodation would result in a disproportionate or undue burden. It is possible to make some general observations on the defence of the accommodation duty. From the test of disproportionate or undue burden, one can discern the types of measures that might be deemed (un)reasonable on the part of the duty bearers in the fulfilment of the duty to accommodate.

In *Jungelin v Sweden* and *Beasley v Australia*,¹³⁹ the Committee held that States Parties to the Convention enjoy a discretionary allowance when assessing the proportionality of accommodation measures. States Parties must however ensure that such an assessment is made in a meticulous and impartial manner, covering all the relevant elements or factors before they reach a conclusion that the respective measures would constitute a disproportionate burden for them.¹⁴⁰ The Committee in *Jungelin v Sweden* confirmed that the financial cost of a requested accommodation is a relevant factor in determining whether and to what extent the duty bearer is obligated to accommodate.¹⁴¹ The complaint made to the Committee was raised by Ms. Jungelin, a person with a visual impairment who, with the necessary qualifications, applied for a job at Sweden’s Social Insurance Agency, but was not hired because her potential employer’s intranet system was not accessible and could not be adjusted to accommodate her sight impairment.¹⁴² Ms. Jungelin claimed that this amounted to a denial of reasonable accommodation in terms of Article 5(3) of the Convention, and consequently a discrimination on the grounds of disability. Her complaints were rejected by the Swedish courts handing down a judgment which endorsed the defence of the employer that the cost of adjusting the computer system would have imposed a disproportionate burden on the employer.¹⁴³ The Committee concurred with the judgment of the Swedish court. Somewhat baffling is the fact that the Social Insurance Agency is a large public entity. Considering the context of employment, it should’ve been more difficult for such a large public entity to argue the cost and resources do not allow for such an accommodation.

¹³⁴ *Jungelin v Sweden* Communication No. 5 *Committee on the Rights of Persons with Disabilities* (2011) CRPD/C/12/D/5/2011, pp. 1 – 16.

¹³⁵ Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 367.

¹³⁶ *Ibid.*

¹³⁷ General Comment No. 6 of 2018 at p. 7.

¹³⁸ *Ibid.*

¹³⁹ *Gemma Beasley v Australia* at p. 3; *Jungelin v Sweden* at p. 5.

¹⁴⁰ *Jungelin v Sweden* at p. 5.

¹⁴¹ *Ibid.* at p. 6.

¹⁴² *Ibid.* at p. 3 – 4.

¹⁴³ *Ibid.* at p. 7.

Nonetheless, the Committee in Communication No. 4 confirmed the availability of resources and financial implications “[i]s recognized when assessing disproportionate burden”¹⁴⁴.

In *Sahlin v Sweden*,¹⁴⁵ the Committee noted several points with regard to reasonable accommodation. Mr. Sahlin, a deaf part-time lecturer at Södertörn University, a public institution, applied for a permanent position. The university however terminated the recruitment process citing the high cost of providing sign language interpretation as a means of ensuring the Mr. Sahlin’s equal employment rights.¹⁴⁶ It is worth noting that the university had a substantial staff budget and a surplus in its budget for that year. The university also did not explore alternative forms of workplace accommodation or reasonable adjustments, such as modified job tasks that would not require interpretation, such as supervising students or online instruction. Mr. Sahlin filed a complaint with the Discrimination Ombudsman, leading to a civil lawsuit on his behalf before the Swedish Labour Court. The Swedish Labour Court ruled that the university had not discriminated against the author, reasoning that the appointment was cancelled due to the university deeming the cost of sign language interpretation too high.¹⁴⁷ The Court found it unreasonable to expect the university to cover interpretation expenses amounting to 520,000 Swedish krona per year, despite its substantial staff budget. Mr. Sahlin subsequently argued that his rights were infringed due to an erroneous cost-benefit analysis by the university and the Labour Court.¹⁴⁸ Moreover, he claimed that alternative accommodation measures were not considered.¹⁴⁹

The Committee firstly underscored that States must employ persons with disabilities in the public sector and ensure reasonable accommodation in the workplace.¹⁵⁰ The Committee subsequently also confirmed that States Parties enjoy some discretion when assessing the reasonableness and proportionality of accommodation measures.¹⁵¹ Nonetheless, they noted that it is generally the responsibility of a State’s courts to evaluate case-specific facts and evidence unless “[s]uch evaluation is deemed arbitrary or an obstruction of justice”.¹⁵² Furthermore, the university’s failure to communicate the insufficiency of State-funded measures hindered a collaborative exploration of alternative accommodation options. This lack of dialogue impacted the legal proceedings, which primarily centered on the cost of sign language interpretation without considering alternative accommodations.¹⁵³ The Committee emphasised that the reasonable accommodation process should be collaborative and interactive, balancing the needs of both employees and employers. The author had proposed alternative accommodations, but inadequate information prevented the courts from exploring additional funding options.¹⁵⁴ Importantly, the Labour Court’s analysis focused on not only cost but its impact on the university, the author’s ability to perform the job, employment duration, and the influence of accommodations on others with disabilities.¹⁵⁵ The court ultimately deemed the expenses too burdensome. The Committee however noted that what the court did not consider was the potential positive impact of hiring a deaf lecturer would have on diversity and inclusion.¹⁵⁶ This approach, according to the Committee, could deter employers from considering

¹⁴⁴ General Comment No. 4 Committee on the Rights of Persons with Disabilities (2016) CRPD/C/GC/4, pp. 1 – 12 at p. 8.

¹⁴⁵ *Sahlin v Sweden* Communication No. 45 *Committee on the Rights of Persons with Disabilities* (2018) CRPD/C/23/D/24/2018, pp. 1 – 16.

¹⁴⁶ *Ibid.* at p. 2.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* at p. 3.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* at p. 14. The Committee also found in *JM v Spain* that State Parties have to ensure that reasonable accommodation is provided to persons who acquire a disability during the course of employment.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* at p. 15.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

individuals with hearing impairments for similar positions. Consequently, the Committee concluded that State authorities' decisions and interventions restricted opportunities for persons with disabilities in positions requiring workplace adaptations. Specifically, the Labour Court's assessment effectively endorsed the denial of reasonable accommodation, resulting in a *de facto* discriminatory exclusion of the author from the desired position, violating his rights under Articles 5 and 27 of the Convention.¹⁵⁷

Lastly, the duty to provide reasonable accommodation contained in Article 5(3) of the Convention, must be carefully distinguished from the legal obligation to achieve accessibility for persons with disabilities, contained in Article 9 of the Convention.¹⁵⁸ The Committee has summarised the main distinction between reasonable accommodation and accessibility as follows:

Accessibility duties are generalised and anticipatory. They are not immediately triggered by an individual request from a rights holder, whereas reasonable accommodation is. Furthermore, unlike reasonable accommodation, accessibility duties usually require compliance with set standards.¹⁵⁹ For example, installing wheelchair-friendly entrances in buildings that is required to comply with set building standards. Compliance with accessibility standards is intended to ensure an overhaul of the environment in general and “[t]o progressively ensure the transformation of social structures”.¹⁶⁰ The accessibility obligation, therefore, does not reflect the individualised, immediate character of the duty to reasonably accommodate. The individualised nature of reasonable accommodation logically relates to individuals, while accessibility is related to groups.¹⁶¹ The duty to provide accessibility is an *ex ante* duty. Duty bearers, therefore, have the duty to provide accessibility before receiving an individual request from a rights holder.¹⁶² By way of contrast, the duty to provide reasonable accommodation is an *ex nunc* duty. The duty to reasonably accommodate is, therefore, enforceable from the moment an individual with an impairment needs or requests a reasonable accommodation in a given situation.¹⁶³ Notably, persons with disabilities need not specifically request to be reasonably accommodated as the duty to provide reasonable accommodation is not limited to situations in which the person with a disability has asked for accommodation.¹⁶⁴ The duty also applies in situations where a potential duty bearer should have realised that the person with a disability might require accommodations to address barriers to exercising their rights.¹⁶⁵ The reasonable accommodation duty requires a dialogue between the duty bearer and the rights holder. This ensures that the modification addresses the disadvantage experienced by that specific rights holder, even if this involves taking measures that many individuals with the same impairment would find unhelpful. This relates to the part of the definition of reasonable accommodation which states that such an accommodation is required “[w]here needed in a particular case” as this emphasises the individualised nature of the reasonable accommodation duty. By way of contrast, the implementation of accessibility duties requires dialogue between the duty bearer and persons with disabilities and their organisations about the types of measures which would generally provide access as persons with disabilities and their organisations would be best suited to identify relevant barriers and obstacles. The obligation to implement accessibility is unconditional. The duty bearer is obliged to provide accessibility without being able to make a claim of disproportionate burden for providing access for persons with disabilities. Contrarily, the reasonable accommodation is

¹⁵⁷ *Ibid.* at p. 16.

¹⁵⁸ Broderick, A, (2020) at p. 402.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ General Comment No. 2 of 2014 at p. 7.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

conditional and only exists if the implementation of a specific measure will not constitute a disproportionate burden on the duty bearer.¹⁶⁶ The unjustified failure to provide reasonable accommodation is classified as a form of discrimination, whereas failure to ensure accessibility is not a form of discrimination under the Convention except for limited circumstances.¹⁶⁷ The denial of reasonable accommodation, according to Article 2 of the Convention, constitutes discrimination if the necessary and appropriate modification that do not impose a disproportionate burden are denied and are needed to ensure the equal enjoyment of a human right.¹⁶⁸

Compliance with accessibility standards and the provision of reasonable accommodation should be seen as complementary measures that ensure *de facto* equality for persons with disabilities. Providing accessibility can remove the need for many reasonable accommodations.¹⁶⁹

“[t]he provision of some reasonable accommodations may result in making a building or information system accessible to other disabled people as well as to the individual in whose favour the accommodation was made”.¹⁷⁰

2.3.2. Accessibility

Accessibility serves as a fundamental requirement for persons with disabilities to lead self-sufficient lives and participate fully and equitably in society. The absence of access to the physical environment, transportation, information, and communication, including information technology and systems, as well as other publicly available facilities and services, would deprive persons with disabilities of equal opportunities for involvement in their respective communities.¹⁷¹ It is not coincidental that accessibility stands as one of the core principles underpinning the Convention.¹⁷²

According to the Committee in General Comment No. 2,¹⁷³ accessibility as a right *per se* has not been established as part of international human rights law, whereas the right of access has. According to the Committee, Article 25(c) of the International Covenant on Civil and Political Rights (hereafter referred to as “ICCPR”), served as a basis for the incorporation of the right of access as a right *per se* into core human rights treaties. Furthermore, Article 5(f) of the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter referred to as the “ICERD”) also served as a basis for the incorporation of the right of access as a right *per se*. Article 5(f) of the Convention guarantees everyone the right of access to any place or service intended for use by the general public, “[s]uch as transport, hotels, restaurants, cafes, theatres, and parks”.¹⁷⁴ Thus, in the view of the Committee, international human rights law already established the right to access as a right *per se* some time ago. The Committee embedded accessibility in previous treaty law and confirmed the existence of the right to access as a right *per se* under the Convention.¹⁷⁵ The Committee further affirmed that based on the ICERD clearly establishing the right of

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ General Comment No. 2 of 2014 at p. 1.

¹⁷² Article 3(f) of the Convention.

¹⁷³ General Comment No. 2 of 2014 at p. 2.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

access as part of international human rights law, accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access and not as a [new] human right *per se*.¹⁷⁶

“[B]oth the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination unequivocally establish the right of access as part of international human rights law. Accessibility should be considered as a disability-specific reaffirmation of the social aspect of the right of access.¹⁷⁷

Accessibility should, therefore, be examined through the lens of the right of access, specifically from the perspective of disability. The right of access for persons with disabilities is guaranteed through the rigorous implementation of accessibility standards. Barriers to access to existing objects, facilities, goods, and services intended for or accessible to the public should be systematically and continuously eliminated, with the ultimate goal of achieving complete accessibility.

Article 9(1) of the Convention states that:

“[t]o enable persons with disabilities to live independently and participate fully in all aspects of life, States parties shall take appropriate measures to ensure persons with disabilities access, on an equal basis with others, to the physical environment, transportation, information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”.

It is crucial to address accessibility in its entirety, encompassing the physical environment, transportation, information and communication, and services. The focus should no longer be solely on legal personality and whether those owning buildings, transport infrastructure, vehicles, information and communication, and services are public or private entities. Goods, products, and services, when offered to the public, should be universally accessible without discrimination.

In *Bacher v Austria* an Austrian national with Down’s Syndrome and other medical conditions, alleged violations of various articles of the Convention by Austria. These alleged violations include, *inter alia*, Articles 3 containing the general principles, Article 9 concerning accessibility and Article 19 which surrounds living independently and being included in the community.¹⁷⁸ The communication highlighted the challenges faced by persons with disabilities and their families in securing their rights and access to essential services and facilities. Mr. Bacher faced significant mobility challenges due to the lack of accessible pathways to his family’s home in Austria.¹⁷⁹ Although his family received permission to build a roofed pathway for his safety, legal disputes with a neighbour led to the removal of the roof, leaving Mr. Bacher and his family in a precarious situation.¹⁸⁰ Despite efforts to find a solution, including legal actions, mediation attempts, and media attention, the pathway remained inaccessible and dangerous, especially in adverse weather conditions.¹⁸¹ The family’s repeated appeals for assistance and consideration of Mr. Bacher’s disability-related needs have been met with limited support or understanding from local authorities and neighbours.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Bacher v Austria* at p. 1 – 2.

¹⁷⁹ *Ibid.* at p. 2.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

Firstly, in addressing the violations of Article 3 of the Convention, the Committee emphasised that this article, due to its general nature, typically does not lead to independent claims and should be invoked in conjunction with other substantive rights guaranteed under the Convention.¹⁸² Secondly, while the States Party argued that a dispute between individuals (neighbours) did not directly involve State authorities, the Committee emphasised that the States Party holds an ultimate responsibility to ensure that rights under the Convention are respected, including access to homes, community life, and public services.¹⁸³ Therefore, the Committee disagreed with the State Parties argument that the case was purely a private matter. The Committee furthermore highlighted that States Parties are not only obligated to respect Convention rights but also to protect those rights, preventing individuals from interfering directly or indirectly with the rights of persons with disabilities.¹⁸⁴ Even disputes arising from private contracts should be interpreted through the Convention.

“[H]owever, the Committee also recalls that this type of dispute is governed by the legal order of the State party, which, in any event, bears the ultimate responsibility to ensure that the rights under the Convention are respected, including the right for a person with disabilities to have access to his or her home, but also to have access to community life and to public services, such as education and health. Accordingly, although disputes resulting from the construction of a roof on a path are between two individuals, the State party has an obligation, *inter alia*, to guarantee that the decisions adopted by its authorities do not infringe upon the rights of the Convention”.¹⁸⁵

Article 9(2)(a) sets out a number of other obligations relating, *inter alia*, to the development, promulgation, and monitoring of the implementation of minimum standards and guidelines for accessibility. Minimum standards must be developed in close consultation with persons with disabilities and their representative organisations in accordance with Article 4(3) of the Convention. In circumstances where no relevant minimum standards are in place, adopting a suitable legal framework is the initial step States Parties must take.¹⁸⁶ States Parties ought to undertake a comprehensive review of accessibility legislation in order to identify, monitor and address any gaps in their legislation and its implementation.¹⁸⁷ In circumstances where relevant accessibility standards have already been enacted but cause blatant obstructions to accessibility or where new barriers are created as a result of a lack of adopting any accessibility standards after the ratification of the Convention can amount to a breach of the accessibility norm.¹⁸⁸ In that regard, the Committee has made a distinction between existing barriers to accessibility and new or emerging barriers to accessibility.

Firstly, it is imperative that all *newly* designed facilities, goods and services are intentionally crafted to ensure equal accessibility for persons with disabilities. This obligation demands *immediate* implementation, ensuring that from the outset, these new offerings are inclusive and do not perpetuate discrimination. Conversely, when addressing *existing* barriers in older facilities, goods and services, the primary objective is to prevent these barriers from giving rise to new hindrances to accessibility. States Parties should maintain vigilant oversight of the emergence of fresh obstacles in the private domain. The *gradual* removal of these existing barriers in goods and services, which are already accessible to the public, is an obligation that must be

¹⁸² *Ibid.* at p. 13.

¹⁸³ *Ibid.* at p. 13 – 14.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ General Comment No. 2 of 2014 at p. 10.

¹⁸⁷ *Ibid.* at p. 7.

¹⁸⁸ *Ibid.*

fulfilled. This process acknowledges that achieving comprehensive accessibility for these pre-existing elements may require time and phased efforts.

The gradual implementation of the accessibility obligation, relating to all existing goods and services open to the public, was dealt with in the *Nyusti & Takacs v Hungary*. In this case, Nyusti and Takacs were visually impaired and had entered into contracts with OTP Bank in Hungary. As customers of the bank, they could use the bank's ATMs in the same manner as sighted customers. The matter at hand however surrounded the fact that the bank's ATMs were inaccessible to the visually impaired Nyusti and Takacs as not one ATM of OTP bank had brail keyboards or audible instructions and voice assistance for banking card operations. They could, therefore, not make use of the ATMs provided to the customers by the bank. Nyusti and Takacs decided to bring a civil action against OTP bank and argued that the bank violated their right to equality. After unsuccessfully exhausting their domestic remedies, Nyusti and Takacs submitted a communication to the Committee arguing that Hungary did not fulfil its equality and non-discrimination as well as their accessibility obligations in terms of the Convention.¹⁸⁹ Focusing on accessibility, the Committee found that Hungary had indeed failed to comply with its accessibility obligations.¹⁹⁰ The Committee acknowledged that Hungary already identified that, to solve the problem outlined by Nyusti and Takacs, there was "[a] great need for measures to be put in place to safeguard the gradual achievability of accessibility norms as provided for by Article 9 due to the costs involved in implementing accessibility norms and standards".¹⁹¹ The Committee distinguished between the obligation to ensure that all *new* facilities, goods, and services are accessible and the obligation to ensure that *existing* infrastructure and services are accessible.

The obligation to ensure accessibility for persons with disabilities should be proactive when it comes to newly designed facilities, goods and services, with immediate implementation. Conversely, for older facilities, goods and services, the focus should be on preventing the creation of new barriers while gradually removing existing ones, reflecting the commitment to promoting accessibility over time.¹⁹² The Committee's decision, finding the Hungarian government did not take adequate steps to implement accessibility standards gradually, was based on the latter. In other words, Hungary did not progressively realise their accessibility obligation regarding existing facilities. States Parties to the Convention should not be required to immediately eliminate barriers to existing facilities, goods, and services. Instead, they will be required to remove them systematically, with the aim of achieving full accessibility, by establishing a legislative framework with concrete, enforceable and time-bound benchmarks.

In a separate case, *Henley v Australia*, the Committee likewise determined that Australia had not adequately fulfilled its accessibility obligations in a progressive manner. The Committee explicitly highlighted the concept of progressive realisation, emphasising that States Parties have an ongoing and specific duty to advance swiftly and efficiently towards the complete realisation of rights.¹⁹³ The Committee firmly stated that actions aimed at achieving full rights realisation must be purposeful, tangible, and precisely tailored to

¹⁸⁹ *Nyusti & Takacs v Hungary* Communication No. 1 Committee on the Rights of Persons with Disabilities (2010) CRPD/C/9/D/1/2010, pp. 1 – 14 at p. 7.

¹⁹⁰ *Ibid.* at p. 11 – 12.

¹⁹¹ South Africa Disability Legislation and Policy Gap Analysis Centre for Human Rights (2015) University of Pretoria, pp. 1 – 402 at p. 133.

¹⁹² *Ibid.*

¹⁹³ *Lauren Henley v Australia* Communication No. 56 Committee on the Rights of Persons with Disabilities (2018) CRPD/C/27/D/56/2018 at p. 11.

fulfil the obligations outlined in the Convention.¹⁹⁴ In this case, the Committee assessed whether the Australia violated the Ms. Henley’s rights as a person with a visual impairment by not taking appropriate measures to provide audio description on free-to-air television. Ms. Henley argued that the measures implemented by the State were insufficient and did not meet the progressive realisation requirement, highlighting the lack of concrete plans, strategies, or legislation mandating audio description.¹⁹⁵ The State in turn argued that it had undertaken appropriate measures, including research and trials, and that introducing legislation mandating audio description would be burdensome for broadcasters.¹⁹⁶ It also asserted a margin of appreciation in allocating resources based on national priorities. Despite acknowledging the measures taken by the State, including trials and funding in 2020, the Committee found that these actions did not constitute a sustainable strategy to progressively provide audio description to persons with visual impairments.¹⁹⁷ The Committee stated that the State had not adopted specific legislation, policy frameworks, or sustainable budget allocations to demonstrate its commitment to advancing audio description services.¹⁹⁸ As a result, the Committee concluded that the State had failed to fulfil its obligations under the Convention’s relevant articles.

States Parties to the Convention are required, pursuant to Article 9(2)(b), to ensure that private entities that provide public facilities and services “[t]ake into account all aspects of accessibility for persons with disabilities”.¹⁹⁹ Persons with disabilities must have equal access to all goods, products and services that are open or provided to the public. According to the Committee, this approach stems from the prohibition against discrimination, as the denial of access should be considered to constitute a discriminatory act.²⁰⁰

According to Article 9(2)(c) of the Convention, a lack of accessibility is often the result of insufficient awareness and technical know-how, therefore it requires that States Parties provide training to all stakeholders on accessibility for persons with disabilities. Training should encompass not only individuals involved in the design of goods, services, and products but also those responsible for their production.²⁰¹ Furthermore, enhancing the active participation of persons with disabilities in the product development process would enhance the comprehension of existing requirements and the efficiency of accessibility assessments.²⁰² For instance, the individuals working on construction sites play a pivotal role in determining whether a building is accessible.²⁰³ Therefore, it is crucial to establish comprehensive training and monitoring mechanisms for all these stakeholders to guarantee the effective implementation of accessibility standards in practice.²⁰⁴

For some persons with disabilities, navigating buildings and public spaces can present significant challenges when there is insufficient signage, accessible information, communication options, or support services available.²⁰⁵ To address this concern, Article 9(2)(d) and (e) of the Convention emphasise the importance of ensuring that buildings and public venues have signage in Braille and easily comprehensible formats.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.* at p. 3.

¹⁹⁶ *Ibid.* at p. 4.

¹⁹⁷ *Ibid.* at p. 12.

¹⁹⁸ *Ibid.*

¹⁹⁹ Policy Gap Analysis at p. 7.

²⁰⁰ *Ibid.* at p. 4.

²⁰¹ General Comment No. 2 of 2014 at p. 6.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

Moreover, these provisions call for the provision of live assistance and intermediaries, such as guides, readers, and professional sign-language interpreters, to facilitate accessibility. The absence of such signage, accessible information, communication methods, and support services can render orientation and movement within buildings nearly impossible for many persons with disabilities, particularly those grappling with cognitive fatigue.²⁰⁶

The absence of access to information and communication can significantly curtail the exercise of essential rights and freedoms, such as freedom of thought and expression, for persons with disabilities. To address this concern, Article 9(2)(f) to (g) of the Convention underscore the importance of actions by States Parties. These actions include promoting live assistance and intermediaries like guides, readers, and professional sign language interpreters as outlined in Article 9(2)(e), endorsing various appropriate forms of support to ensure access to information, and facilitating access to new information and communication technologies and systems, including the Internet, through the enforcement of mandatory accessibility standards. Additionally, information and communication must be made available in easy-to-read formats and alternative modes and methods to cater to persons with disabilities who rely on these formats, modes, and methods.

The potential of new technologies to facilitate the full and equitable engagement of persons with disabilities in society hinges on their accessibility. To leverage these technologies for inclusivity, they must be designed and manufactured with accessibility in mind, ensuring that they do not inadvertently introduce new barriers. Article 9(2)(h) of the Convention emphasises the role of States Parties in promoting the early-stage design, development, production, and distribution of accessible information and communication technologies and systems. This proactive approach aims to make these technologies universally accessible at minimal cost.²⁰⁷ Technological innovations, such as hearing enhancement systems and ambient assistive systems for hearing aid and induction loop users, along with passenger lifts equipped for use by persons with disabilities during emergency evacuations, exemplify how technology can be harnessed to advance accessibility.

The development of comprehensive and standardised accessibility standards is crucial.²⁰⁸ These standards serve as essential guidelines for designing and constructing buildings, products, services, and information systems that are inclusive and accessible to everyone. To achieve this goal effectively, it is essential to involve key stakeholders in the development of these standards. Organisations of persons with disabilities play a pivotal role in this process because they bring firsthand experience and insights into the barriers and challenges faced by persons with disabilities. By consulting with these organisations, standards can be tailored to address the specific needs and requirements of different disability groups. Furthermore, it is important that these accessibility standards are not one-size-fits-all but are specific to various sectors, including service providers, builders, and other relevant stakeholders.²⁰⁹ This specificity ensures that standards are practical and actionable within each context. For example, accessibility standards for building construction might differ from those for web development or transportation services, reflecting the unique challenges and solutions associated with each sector.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* at p. 7.

²⁰⁸ *Ibid.* at p. 9.

²⁰⁹ *Ibid.*

Recognising the importance of accommodating persons with unique impairments or those who do not conform to prescribed accessibility methods is a fundamental aspect of promoting genuine inclusivity. In the pursuit of creating environments and services that are accessible to all, it is vital to acknowledge that some persons with disabilities may possess distinct needs or impairments that fall outside the scope of conventional accessibility standards. While comprehensive accessibility guidelines serve as valuable benchmarks for fostering accessible spaces and services, they may inevitably fall short of addressing every conceivable circumstance or individual necessity. This is where the concept of reasonable accommodation assumes a central role. Reasonable accommodation underscores the principle that, in specific situations, persons with disabilities may require particular adaptations or support that extend beyond the provisions of standard accessibility measures. This approach is guided by the principle that equality and non-discrimination mean not treating everyone the same but ensuring that everyone has an equal opportunity to participate fully in society. Furthermore, reasonable accommodation embodies a flexible framework that recognises the dynamic nature of disabilities and technological advancements. It enables adaptable responses to emerging impairments or evolving technologies, ensuring that persons with disabilities continue to enjoy equitable opportunities and access.

Moreover, it is imperative to underscore that States Parties cannot resort to austerity measures as a pretext for evading their responsibility to progressively enhance accessibility for persons with disabilities. The Committee confirmed this in the *Henley v Australia* case. The Committee noted that:

“[S]tates parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is unconditional; in other words, the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities”.²¹⁰

The obligation to ensure accessibility is unequivocal and should remain unwavering, even in the face of economic constraints or fiscal challenges. The principle of progressive realisation is central to understanding this obligation. It recognises that achieving full accessibility across all domains and sectors may require time and resources. However, it does not permit States Parties to use economic difficulties as a shield to justify inaction or neglect in making their environments and services more accessible. Instead, it emphasises a commitment to continuous improvement, ensuring that accessibility measures are gradually advanced over time. While the pace of progress may be influenced by economic conditions, this should not result in regressing on existing accessibility achievements or abandoning the pursuit of new accessibility goals. States Parties are still bound by their obligations to implement accessibility measures, albeit at a rate that aligns with their economic capabilities. It is essential to strike a balance between resource constraints and the imperative of ensuring that persons with disabilities can exercise their rights on an equal basis with others. In practical terms, this means that, even during periods of economic austerity, States Parties should allocate sufficient resources to preserve and advance accessibility initiatives. These resources can be channelled toward maintaining existing accessible infrastructure, developing targeted accessibility projects, and fostering innovation in assistive technologies. Additionally, efforts should be made to engage with organisations of persons with disabilities and relevant stakeholders to prioritise accessibility projects based on the most critical and immediate needs of the disability community.

²¹⁰ *Henley v Australia* at p. 11.

2.3.3. Living independently and being included in the community

For many years, persons with disabilities faced a lack of choice and control over their lives, often forced into segregated services rather than being provided support to live within their communities. This practice persisted, resulting in a dependency on others and restricted freedom, which in turn fostered discrimination, maltreatment, and abuse as their rights were disregarded. Persons with disabilities have frequently been deprived of their ability to make personal choices and maintain control over various aspects of their lives.²¹¹ Often, they have been unfairly assumed to lack the capacity for independent living within their preferred communities. Accessible support services have been scarce or linked to specific living arrangements, while community environments have not universally accommodated their needs.²¹² As a result, resources have been allocated to institutions rather than fostering opportunities for persons with disabilities to lead independent lives within their communities.²¹³

Additionally, many persons with disabilities experienced poverty due to limited opportunities for independent living and community involvement.²¹⁴ In the Preamble of the Convention, States Parties acknowledge that a significant number of persons with disabilities experience poverty and emphasise the importance of addressing its impact.²¹⁵ The consequences of social exclusion are substantial, as it fosters dependency and, consequently, interferes with individual freedoms.²¹⁶ Social exclusion also gives rise to stigma, segregation, and discrimination, which can result in violence, exploitation, and abuse, along with the propagation of negative stereotypes that contribute to a cycle of marginalisation for persons with disabilities.²¹⁷ The implementation of policies and concrete action plans to socially include persons with disabilities, with a focus on promoting their right to independent living, serves as a cost-effective approach to ensuring the enjoyment of their rights, fostering sustainable development, and reducing poverty.²¹⁸

Article 19 of the Convention encompasses two distinct but closely related concepts, which are explicitly indicated in its title: the right to independent living and the right to community inclusion. The right to independent living pertains to an individual dimension, signifying the right to self-determination and empowerment without encountering barriers or limitations.²¹⁹ In contrast, the right to be included in the community encompasses a social dimension, entailing the affirmative right to cultivate inclusive and accommodating environments.²²⁰ Article 19, as articulated in the Convention, encapsulates both of these fundamental concepts.

²¹¹ General Comment No. 5 of 2017 at p. 1.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Paragraph (t) of the Preamble of the Convention.

²¹⁶ General Comment No. 5 of 2017 at p. 1.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.* at p. 6.

²²⁰ *Ibid.*

Independent living means that persons with disabilities are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives.²²¹

“[I]ndependent living is an essential part of the individual’s autonomy and freedom and does not necessarily mean living alone. It should also not be interpreted solely as the ability to carry out daily activities by oneself. Rather, it should be regarded as the freedom to choose and control, in line with the respect for inherent dignity and individual autonomy as enshrined in Article 3 (a) of the Convention”.²²²

Human rights law, encapsulated in the Convention, asserts that all persons with disabilities possess the right to live independently and be integrated into their communities, irrespective of their background or location. This fundamental right encompasses freedom, choice, and control over decisions that impact their lives. Living and working alongside others in the community serves to dismantle barriers and foster mutual understanding, potentially mitigating discrimination and abuse against persons with disabilities. Moreover, persons with disabilities have the right to a decent standard of living, which encompasses access to food, suitable housing, essential necessities, support services, and assistive technology. Despite progress, this right is not consistently upheld due to various factors such as legal limitations, insufficient support for independent living, inadequate legislation and funding, coercive living arrangements, and societal misconceptions regarding the capabilities of persons with disabilities.

Countries are called upon to respect the right of persons with disabilities to live independently and be part of their communities, eliminate discriminatory laws or regulations, protect individuals from having their right to independent living infringed upon, prevent discrimination, implement comprehensive plans for closing large segregated institutions, conduct assessments and provide appropriate support, offer financial assistance to offset disability-related costs, ensure accessibility and informative standards, and enable persons with disabilities to access legal recourse when their rights are violated.²²³ Families and caregivers should also receive support to assist individuals in living within the community.

The obligations of States Parties must align with the nature of human rights, categorising them as either absolute and immediately applicable if they are civil and political rights or progressively applicable if they are economic, social, and cultural rights. Article 19(a) of the Convention falls into the category of immediately applicable rights as it pertains to civil and political rights.²²⁴ In contrast, Article 19(b) of the Convention, dealing with the right to access individualised, assessed support services, falls under economic, social, and cultural rights.²²⁵ Similarly, Article 19(c) of the Convention, addressing the right to access service facilities, also belongs to the realm of economic, social, and cultural rights.²²⁶ This is because many mainstream services, such as accessible information and communication technologies, websites, social media platforms, cinemas, public parks and sports facilities, serve both social and cultural purposes. Progressive realisation entails the immediate obligation to design and adopt concrete strategies, action plans, and allocate resources to develop support services. Additionally, it involves making existing general services, as well as new ones, inclusive for persons with disabilities. To achieve the progressive realisation of economic, social, and cultural rights, States Parties must take steps to the maximum extent of their available

²²¹ *Ibid.* at p. 4.

²²² *Ibid.* at p. 1.

²²³ *Ibid.* at p. 8–9.

²²⁴ *Ibid.* at p. 9.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

resources. These steps should be immediate or take place within a reasonably short period of time.²²⁷ They should be deliberate, concrete, targeted, and employ all appropriate means, especially when aiming for the systematic realisation of the right to independent living in the community, including deinstitutionalisation.²²⁸ States Parties bear an immediate obligation to engage in strategic planning, involving adequate time frames and resources. While States Parties have a margin of appreciation in programmatic implementation, they are not exempt from the obligation to replace institutionalised settings.²²⁹ Moreover, States Parties should develop transitional plans through direct consultation with persons with disabilities, facilitated by their representative organisations.²³⁰ These plans are essential to ensure the full inclusion of persons with disabilities in the community. Furthermore, States Parties are under an immediate obligation to eliminate discrimination against individuals or groups of persons with disabilities and guarantee their equal right to living independently and participating in the community.²³¹ This entails the need for States Parties to repeal or reform policies, laws, and practices that hinder persons with disabilities from making choices about their residence, securing affordable and accessible housing, renting accommodations, or accessing general mainstream facilities and services required for their independence.²³²

In cases where a States Party contemplates implementing retrogressive measures concerning Article 19 of the Convention, such as in response to economic or financial crises, the State must demonstrate that these measures are temporary, necessary, non-discriminatory, and in line with its core obligations.²³³ Retrogressive measures, which deprive persons with disabilities of the full enjoyment of the right to live independently and be included in the community, are considered a violation of Article 19 of the Convention. States Parties are prohibited from adopting retrogressive measures concerning the minimum core obligations of the right to live independently within the community, as outlined in this general comment.²³⁴

The obligation to *respect* mandates that States Parties must abstain from any form of direct or indirect interference, or any restrictions that could curtail the individual's right to live independently and be included in the community.²³⁵ This means that States Parties should not impose limitations or denials on anyone's access to independent living within the community. This includes refraining from enacting laws that directly or indirectly limit the choices of persons with disabilities regarding their place of residence, their living arrangements, and their autonomy. States Parties are urged to revise and amend laws that hinder the exercise of the rights outlined in Article 19 of the Convention.

“[T]he obligation also requires States parties to repeal and refrain from enacting laws, policies and structures that maintain and create barriers in access to support services as well as to general facilities and services”.²³⁶

The obligation to *protect* necessitates that States Parties must take actions to prevent family members and third parties from either directly or indirectly infringing upon the right to live independently within the community.²³⁷ To fulfil this duty, States Parties are required to establish and enforce laws and policies that

²²⁷ *Ibid.*
²²⁸ *Ibid.*
²²⁹ *Ibid.*
²³⁰ *Ibid.*
²³¹ *Ibid.* at p. 10.
²³² *Ibid.*
²³³ *Ibid.*
²³⁴ *Ibid.*
²³⁵ *Ibid.*
²³⁶ *Ibid.*
²³⁷ *Ibid.*

explicitly forbid actions by family members, third parties, service providers, property owners, or providers of general services that undermine the complete enjoyment of the right to be included and live independently within the community.²³⁸ States Parties should also avoid allocating public or private funds to maintain or establish institutional settings and should prevent the creation of institutions disguised as “community living”.²³⁹ Support for persons with disabilities should be tailored to individual needs rather than serving the interests of service providers.²⁴⁰ Monitoring mechanisms for service providers should be established to protect persons with disabilities from being secluded in families or institutions, prevent children from being abandoned or institutionalised due to disability, and detect instances of violence against persons with disabilities by third parties.²⁴¹ Moreover, discriminatory practices, such as excluding certain individuals or groups from services, should be prohibited. States Parties should ensure that practical or procedural barriers are not imposed by third parties to hinder independent living and community inclusion.²⁴² Public amenities must be made accessible to and accommodating of persons with disabilities in line with the principles outlined in the Committee’s General Comment No. 2 of 2014 on accessibility.²⁴³

The obligation to *fulfil* mandates that States must actively promote, facilitate, and implement a comprehensive range of measures, including legislative, administrative, budgetary, judicial, programmatic, and promotional actions, among others.²⁴⁴ These measures are aimed at ensuring the complete realisation of the right to live independently and be included in the community, as outlined in the Convention. These measures should address practical barriers like inaccessible housing, limited access to disability support services, and prejudice against persons with disabilities. Furthermore, the obligation to fulfil requires States Parties to take specific actions to eliminate practical barriers that hinder the full realisation of the right to live independently and be included in the community. These barriers may encompass issues like inaccessible housing, limited availability of disability support services, the lack of accessible facilities and services in the community, and prejudices against persons with disabilities.²⁴⁵ Furthermore, empowering family members to support persons with disabilities in realising their right to independent living and community inclusion is essential.²⁴⁶ Active involvement of a diverse range of persons with disabilities and their representative organisations is crucial when developing support services and allocating resources within the community. Moreover, deinstitutionalisation should be part of a comprehensive strategy involving structural reforms, improved accessibility, and awareness-raising efforts at all levels of government.²⁴⁷ Deinstitutionalisation requires a profound systemic transformation, including closing institutions, eliminating institutionalising regulations, and implementing a comprehensive strategy.²⁴⁸ This strategy involves creating various personalised support services, crafting individualised transition plans with budgets and timelines, and establishing inclusive support services. Achieving this necessitates a coordinated, cross-government approach, encompassing reforms, budget allocation, and fostering attitudinal changes at all government levels and sectors, including local authorities. Additionally, programs and entitlements should cover disability-related costs, provide accessible and affordable housing, and not impose conditions that reduce the autonomy of persons with disabilities.²⁴⁹ Additionally, ensuring an adequate supply of accessible and affordable housing units, including options for families, plays a pivotal role in deinstitutionalisation. It is

²³⁸ *Ibid.*
²³⁹ *Ibid.* at p. 11.
²⁴⁰ *Ibid.*
²⁴¹ *Ibid.*
²⁴² *Ibid.*
²⁴³ *Ibid.*
²⁴⁴ *Ibid.* at p. 11.
²⁴⁵ *Ibid.*
²⁴⁶ *Ibid.*
²⁴⁷ *Ibid.*
²⁴⁸ *Ibid.*
²⁴⁹ *Ibid.* at p. 12.

essential not to impose conditions on housing access that undermine the autonomy and independence of persons with disabilities. Public buildings, spaces, and transportation should be designed to meet the needs of all persons with disabilities.²⁵⁰ States must proactively and promptly redirect funds to fulfil the right of persons with disabilities to live independently in the community. Lastly, disability support services must be available, accessible, affordable, acceptable, and adaptable to all persons with disabilities.²⁵¹ The human rights model of disability firmly opposes the exclusion of persons with disabilities for any reason, regardless of the type or extent of support services needed.²⁵² Support services, including personal assistance, should only be shared with others if the decision is made freely and with informed consent. States Parties must include the following elements in the eligibility criteria for accessing assistance: the assessment should adopt a human rights perspective on disability, concentrate on the needs arising from societal barriers rather than the impairment itself, consider and adhere to the individual's will and preferences, and ensure the active participation of persons with disabilities in the decision-making process.²⁵³

In *SK v Finland*,²⁵⁴ SK claimed under Article 19 of the Convention that he had been denied personal choice and control over his life, particularly in his living arrangements.²⁵⁵ He asserted that he had been presumed incapable of living independently with personal assistance and that available support services are tied to particular living arrangements resembling institutions, leading to his dependence on family, isolation, and segregation.²⁵⁶ Furthermore, SK alleged that the authorities did not adopt a human rights-based approach but rather a medical one in assessing his need for personal assistance, which is contrary to the Convention.²⁵⁷ The Committee acknowledged the author's assertion that the absence of in-home personal assistance has hindered his ability to exercise his freedom of choice to live independently.²⁵⁸ Consequently, he had become reliant on his parents' support to avoid placement in a specialised health-care institution because the State Party has not provided suitable personal assistance to enable his independent living in the community.²⁵⁹ Article 19 of the Convention necessitates the exercise of freedom of choice and control over one's life decisions with maximum self-determination and interdependence within society. Furthermore, it requires that persons with disabilities have access to various in-home, residential, and community support services, including personal assistance. The Committee noted that persons with disabilities have the right to choose services, and all support services should be designed to facilitate community living, prevent isolation, and be genuinely suitable for this purpose.²⁶⁰ In this case, the Committee recognised the author's argument that personal assistance is the only suitable option for him to live independently in his own home.²⁶¹ The Committee noted that the State Party suggested service housing as an alternative form of support for independent living but did not demonstrate its practical suitability for the author's needs.²⁶² Moreover, the State Party rejected the author's request for personal assistance on the basis that he could not make choices, an argument inconsistent with the human rights model of disability.²⁶³ Therefore, the Committee found that the rejection of the author's personal assistance application deprived him of access

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *SK v Finland* Communication No. 46 *Committee on the Rights of Persons with Disabilities* (2018) CRPD/C/26/D/46/2018, pp. 1 – 11.

²⁵⁵ *Ibid.* at p. 3.

²⁵⁶ *Ibid.* at p. 4.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.* at p. 9.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

to a practical option to support his community living, violating his rights under Article 19(b) of the Convention.²⁶⁴

2.4. Implementation of the Convention

2.4.1. International implementation

According to Article 35 of the Convention, within two years of the Convention taking effect, every States Party is required to submit a comprehensive report to the Committee through the United Nations Secretary-General. These reports are meant to provide an account of the progress made in implementing the Convention, aligning with the standards outlined in the Convention itself.

“[E]ach States Party shall submit to the Committee, through the Secretary- General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the States Party concerned”.²⁶⁵

The initial report should also offer insights into the constitutional, legal, and administrative framework within the respective state. It should encompass the policies and programs put in place to facilitate Convention implementation and highlight the advancements achieved since ratification in establishing the necessary legal protections for persons with disabilities. The Committee will furnish Member States with guidelines on the content of these reports. Given the comprehensive nature of these initial reports, they are expected to cover all aspects of Convention implementation, ensuring careful consideration of each provision within the Convention.²⁶⁶

Subsequent to the initial report, each Member State must periodically submit follow-up reports every four years or upon request by the Committee.²⁶⁷ Member States that have already submitted comprehensive reports are not obliged to repeat the same information in subsequent reports. These reports may also address specific challenges encountered during the implementation of the Convention. It is crucial to emphasise that the submission of periodic reports serves not only as a monitoring mechanism but also motivates States to examine their domestic policies that could affect persons with disabilities and make necessary adjustments. This implies that authorities should engage in regular self-assessment of their compliance with the rights of persons with disabilities. The preparation of periodic reports encourages Member States to identify priorities and establish benchmarks for measuring progress in subsequent reports, thus fostering transparency and creating opportunities for public discourse regarding progress or any shortcomings. It is important to note that the submission of periodic reports under the Convention is likely to receive support from States Party to the Convention. These States voluntarily signed and ratified the Convention and its Optional Protocol, reflecting their genuine commitment to realising the ideals enshrined in the Convention. Consequently, one can reasonably expect enthusiastic support from these States in complying with the Convention.

²⁶⁴ *Ibid.*

²⁶⁵ Article 35(1) of the Convention.

²⁶⁶ Of significant importance, each report should be made accessible to the public within the respective country to encourage comments, suggestions, and recommendations. The States Party is responsible for facilitating this public participation.

²⁶⁷ Article 35(2) of the Convention.

The Committee meticulously reviews each report, providing suggestions and comments as deemed necessary and may pose inquiries.²⁶⁸ In response, the States Party can provide additional information, and the Committee may request further details concerning the application of the Convention. In cases where a report experiences substantial delays, the Committee has the authority to notify the States Party that an examination of Convention implementation may be initiated if the report is not submitted within three months of notification.²⁶⁹

2.4.2. National implementation: South Africa

When a State becomes a party to an international or regional human rights treaty, it voluntarily accepts the obligations outlined in that treaty. In the case of the Convention and the Optional Protocol, South Africa is bound by the provisions of these treaties and is subject to the oversight of its compliance by the Committee. The monitoring of treaty obligations involves various processes, including the submission and examination of periodic reports by State Parties. As mentioned, Article 33 of the Convention specifies that States Parties must establish national focal points, coordination mechanisms, implementation measures, and legal and administrative frameworks to promote and monitor the implementation of the Convention. States Parties are also required to ensure the active involvement of civil society in this process. Furthermore, each State Party is obligated to assist the Committee in fulfilling its mandate.²⁷⁰

Under the Convention, every State Party is required to submit a comprehensive report to the Committee within two years of the Convention coming into effect, through the United Nations secretary-general.²⁷¹ This report should detail the progress made in implementing the Convention in accordance with its standards. Each report should be made available to the public for feedback, suggestions, and recommendations, and the State should facilitate public participation in this regard.²⁷² Subsequently, States Parties are obliged to submit follow-up reports every four years or as requested by the Committee.²⁷³ Issues related to the Convention's implementation can also be addressed in these reports.²⁷⁴

On 26 November 2012, South Africa published a Draft First Country Report on the Implementation of the Convention on the Rights of Persons with Disabilities for public comment through the Department of Women, Children and People with Disabilities.²⁷⁵ The deadline for comments on the Draft Report was 25 January 2013. Following this, South Africa completed its First Country Report, which was subsequently received by the Committee on 24 November 2014.

²⁶⁸ Article 36(1) of the Convention.

²⁶⁹ Article 36(2) of the Convention.

²⁷⁰ Article 34 of the Convention sets out this mandate.

²⁷¹ See Article 35 of the Convention.

²⁷² Article 35(4) of the Convention.

²⁷³ Article 35(2) of the Convention.

²⁷⁴ *Ibid.*

²⁷⁵ Department of Women, Children and People with Disabilities *Draft First Country Report to the UN on the Implementation of the Convention on the Rights of Persons with Disabilities was published for Public Comment by the Department of Women, Children and People with Disabilities* (2012).

2.4.2.1. Country Report

The 1994 elections marked a transformative period for South African society, embracing principles of non-discrimination, democracy, and equality, extending to persons with disabilities. The African National Congress, during its preparations for governance, engaged in extensive consultations with the Disability Rights Movement chiefly represented by Disabled People South Africa.²⁷⁶ These consultations aimed to define the government's approach to safeguarding and advancing the rights of persons with disabilities. The consensus reached emphasised two key principles: the imperative of self-representation of persons with disabilities in all matters affecting their lives and the integration of disability considerations into all government functions.²⁷⁷ This consensus materialised through various initiatives, including, firstly, the inception of the Disability Programme within the former Reconstruction and Development Programme in the Presidency in 1995, which later evolved into the Office on the Status of Disabled Persons established in the Presidency in 1997, eventually culminating in the establishment of the Department of Women, Children and People with Disabilities in 2009, which later changed to the Department of Women, Youth and Persons with Disabilities.²⁷⁸ Secondly, the active participation of persons with disabilities in parliamentary, provincial legislative, municipal council, human rights institutions like the South African Human Rights Commission, the Commission on Gender Equality, the Public Service Commission, and development agencies such as the former National Youth Commission, subsequently restructured into the National Youth Development Agency.²⁷⁹ This participation extended to the Office on the Status of Disabled Persons established in the Presidency and across most provinces. Lastly, the publication of the White Paper on an Integrated National Disability Strategy in 1997 (hereafter referred to as the "*White Paper (1997)*"), resulting from extensive consultations and guided by the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities and the South African Disability Rights Charter.²⁸⁰

Furthermore, South Africa played a prominent role in advocating for and contributing to the development of the Convention.²⁸¹ The final format of the Convention encapsulated the principles and initiatives set in motion in South Africa since 1994 to progressively realise the rights of persons with disabilities as equal citizens.²⁸² Consequently, the implementation of the Convention in South Africa effectively commenced in 1994, well before its official ratification by South Africa in 2007 or its entry into force in May 2008.²⁸³

With regards to *equality and non-discrimination*, it is acknowledged that there exists a persistent gap between the theoretical framework and the effective implementation of these rights.²⁸⁴ While persons with disabilities theoretically have the ability to utilise the law to safeguard and pursue their interests on an equal footing with others, several barriers hinder the realisation of this.²⁸⁵ These barriers encompass deeply ingrained harmful traditional beliefs, entrenched stigmatisation leading to discrimination, as well as the interconnected challenges of disability and poverty.²⁸⁶ Numerous measures, in addition to the Constitution

²⁷⁶ *First Country Report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities*, (2014), South Africa, pp. 1 – 81 at p. 11 (hereafter referred to as "*First Country Report (South Africa)*").

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* Hereafter, the White Paper on the Rights of Persons with Disabilities of 2015 was published in the Government Gazette on 09 March 2016 (hereafter referred to as the "*White Paper (2015)*").

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* at p. 18.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

and the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter referred to as the “*Equality Act*”)²⁸⁷ have been implemented to create a society where all persons, including those with disabilities, are afforded legal protection against discrimination. Persons with disabilities are included as a designated group in affirmative action policies and programs aimed at addressing historical discrimination. This inclusion can be observed in various policies and legislations, such as the White Paper on Affirmative Action in the Public Service of 1998, the Broad-Based Economic Empowerment Act,²⁸⁸ and the Employment Equity Act.²⁸⁹ As already mentioned, despite the legal framework, there remains a gap between theory and effective implementation of these rights. Persistent traditional beliefs, stigma, discrimination, poverty, financial barriers, lack of information about Equality Courts,²⁹⁰ physical accessibility challenges, communication barriers, and the absence of a disability-sensitive judiciary and court staff hinder the realisation of equality as established by the law.²⁹¹ Furthermore, the court system in South Africa is underutilised, leading to a shortage of disability-related legal judgments each year. The South African Human Rights Commission (hereafter referred to as the “*SAHRC*”) plays a role in promoting, protecting, and monitoring the rights of all South Africans but faces capacity challenges that result in delays in addressing complaints. The SAHRC is mandated to report on the state of equality in the country, including the challenges faced by persons with disabilities. A 2012 Equality Report highlighted disparities in education, employment, and livelihoods between young persons with disabilities and their able-bodied peers.

Transitioning to the subject of *accessibility*, it is worth noting that the country presently lacks a regulatory framework governing universal access and design. Focus to date has been predominantly on accessibility in the physical environment, mainly on access for persons with physical disabilities and to a lesser extent for persons with visual impairments. I turn to discuss accessibility in relation to physical environments, ICTs, transport.

In its “Towards a Barrier-free Society Report” published in 2002, the SAHRC put forth several recommendations. It emphasised that legislation governing the accessibility of built environments should concentrate on enhancing conditions for equal participation and dignity, establishing governance, administration, and enforcement mechanisms. Additionally, it called for an urgent revision of the South African legislative framework for accessibility and the built environment to align with constitutional rights, ensure safe, healthy, and convenient use for all, and incorporate international standards for universal access.²⁹² Currently, the regulatory framework for accessibility to the built environment is based on the National Building Regulations and Building Standards Act,²⁹³ along with the National Guidelines for Accessibility. To comply with the National Building Regulations, any building open to the public must adhere to the standards and measurements outlined in the SANS 10400-S document, published in 2011. It is important to note that the current version of this document does not fully align with universal access principles as required by the Convention.²⁹⁴ The ongoing review of legislation governing access to the built

²⁸⁷ No. 4 of 2000.

²⁸⁸ No. 53 of 2003.

²⁸⁹ No. 55 of 1998.

²⁹⁰ The Equality Act designates all High Courts as Equality Courts. Magistrate Courts are designated as Equality Courts by the Minister of Justice and Constitutional Development. Equality courts are intended to provide accessible avenues for persons who believe they have experienced discrimination, including on the basis of disability. Importantly, a complainant only needs to establish a *prima facie* case of discrimination, after which the burden of proof shifts to the respondent to demonstrate that discrimination did not occur or, if it did, that it was not unfair.

²⁹¹ First Country Report (South Africa) at p. 18.

²⁹² *Ibid.* at p. 21.

²⁹³ No. 103 of 1977.

²⁹⁴ First Country Report (South Africa) at p. 21.

environment has been a protracted process, and concerns have been raised by the disability sector regarding both the pace and scope of this review. Historically, compliance with the existing regulatory framework has been inadequate due to various factors, including a lack of technical expertise, the absence of a regulatory system accrediting accessibility advisors and auditors, and deficiencies in monitoring and enforcement capacity.²⁹⁵ Given these weaknesses, audits of existing infrastructure conducted by various government departments and entities at all levels of government, sometimes in collaboration with the disability sector, have not followed a comprehensive audit scheme with defined scope, methodologies, and minimum norms and standards.²⁹⁶ There is limited evidence to suggest that audits conducted under these challenging circumstances were ever costed or translated into a comprehensive, targeted action plan.²⁹⁷

The Electronic Communications Act,²⁹⁸ (hereafter referred to as the “*ECA*”) constitutes umbrella legislation addressing the universality of accessibility and redress within the ICT sector in South Africa. As regulator for the South African electronic communications, broadcasting and postal services sector, the Independent Communications Authority of South Africa (hereafter referred to as “*ICASA*”), is mandated, through the *ECA*, to license operators and regulate activities in electronic communications and broadcasting services, and, by the Postal Services Act (hereafter referred to as “*PSA*”),²⁹⁹ to regulate postal services. Enabling legislation also empowers ICASA to monitor licensees’ compliance with licence terms and conditions, to develop regulations for the three sectors, to plan and manage the radio frequency spectrum as well as to protect consumers of these services. In terms of section 2(c) of the *ECA*, ICASA is required to promote the empowerment of historically disadvantaged persons, with particular attention to the needs of women, opportunities for youth and persons with disabilities. ICASA released a Code on Persons with Disabilities in 2009 (hereafter referred to as the “*Code*”) as required by section 70 of the *ECA* as well as section 2(h) of the *PSA*. This Code establishes and governs critical aspects of access to ICT services for persons with disabilities, imposing mandatory compliance with its provisions on ICT service providers. These provisions encompass the following (i) all service providers are obligated to fulfil specific targets related to the accessibility rights of persons with disabilities. This includes ensuring access to postal services and the built environment as integral components of their licenses; (ii) coordinating annual awareness programs concerning the universal access rights of persons with disabilities to ICT services facilitated through ICASA. Furthermore, (iii) the Code is made available in various formats throughout all nine provinces, and (iv) awareness initiatives are conducted on community radio stations in local languages to disseminate information on the rights of persons with disabilities to access ICT services universally.³⁰⁰ The South African Bureau of Standards subcommittee on ICT Accessibility Standards annually reviews standards as they relate to access for persons with disabilities.³⁰¹ Furthermore, the Department of Communications is currently finalising a Sector Strategy for Persons with Disabilities in consultation with organisations of persons with disabilities, experts, manufacturers of ICT equipment, regulators and standard-generating bodies.³⁰²

In 2008, the National Accessibility Programme (hereafter referred to as “*NAP*”), a disability portal, was launched as a collaborative effort between the government, the African Advanced Institute for Information

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ No 36 of 2005.

²⁹⁹ No. 124 of 1998.

³⁰⁰ First Country Report (South Africa) at p. 21.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

and Communication Technology, and the disability sector. Its primary objective was to become an integrated service provider catering to the disability community and industry. NAP aimed to offer a range of accessible technology services, communication services, data synthesis services, and other commercial services. Essentially, it was envisioned as a comprehensive resource hub designed to support various stakeholders in the disability field, including persons with disabilities, caregivers, medical professionals, and service providers within this domain. However, the initiative did not progress as initially planned and is presently undergoing a review. As a result, access to websites for persons with sensory and intellectual impairments, across both public and private sectors as well as within the disability sector, continues to present challenges.³⁰³ The South African Broadcasting Corporation, as the national public broadcaster, is mandated to disseminate information in an accessible manner to all citizens.³⁰⁴ While progress in this regard has been hampered by financial constraints, some daily television news bulletins now feature Sign language interpretation services and subtitles. Lastly, Blind SA receives an annual government grant to operate Braille services and offering affordable Braille materials to clients in South Africa and certain African countries.³⁰⁵

Efficient and accessible transportation is vital to enhance productivity and enable South Africans, particularly those in impoverished and rural areas, to access essential services. South Africa's extensive network of rural roads presents ongoing funding and management challenges when it comes to providing accessible transportation.³⁰⁶ These roads are often challenging to navigate for any type of vehicle, significantly limiting access to and from rural communities. A significant portion of the rural population must cover long distances on foot to reach crucial destinations such as crop-marketing points, centres for farm inputs, healthcare clinics, schools, sources of water, firewood, and other essential facilities and services that are integral to their daily lives. These challenges are even more pronounced for persons with disabilities, further trapping them in poverty and restricting their mobility outside of their homes.³⁰⁷ The state of public transportation in the country is underdeveloped and largely fails to provide accessibility and affordability for the majority of persons with disabilities. The most prevalent modes of public transportation include subsidised bus services, privately-operated minibus taxis, as well as subsidised rail and air services. Unfortunately, the country's public transportation infrastructure does not adhere to universal access principles.³⁰⁸ This lack of accessibility not only denies persons with disabilities transportation options but also indirectly hinders their ability to exercise a range of other rights. The Department of Transport has implemented a new formal system aimed at enhancing transportation infrastructure, encompassing both railways and road-based systems, to establish a comprehensive and universally accessible transportation network within larger municipalities.³⁰⁹ This approach incorporates the idea of a travel chain and includes criteria for assessing performance. Grants have been allocated to enhance road safety initiatives and promote the development of rural roads. Consultations on universal access in rural areas commenced in 2012, and a plan of action dedicated to rural regions is currently under development.³¹⁰ Lastly, the National Land Transport Act (hereafter referred to as the "*Land Transport Act*")³¹¹ regulates the transformation and restructuring of the national land transport system, which was initiated by the National Land Transport Transition Act.³¹² The Land Transport Act provides for the Minister, in consultation with members of the provincial executive councils responsible for transport, to publish regulations with regarding

³⁰³ *Ibid.*
³⁰⁴ *Ibid.* at p. 23.
³⁰⁵ *Ibid.*
³⁰⁶ *Ibid.*
³⁰⁷ *Ibid.*
³⁰⁸ *Ibid.*
³⁰⁹ *Ibid.* at p. 24.
³¹⁰ *Ibid.*
³¹¹ No. 5 of 2009.
³¹² No. 22 of 2000.

“[r]equirements and time-frames for vehicles and facilities to be made accessible to persons with disabilities, including principles for accommodating such persons in the public transport system [...]” These regulations have not been finalised.

Shifting the focus to the aspect of *living independently and being included in the community*, the definition of independent living, as articulated in the White Paper (1997), fully aligns with the principles delineated in Article 19 of the Convention.³¹³ Nevertheless, the challenge remains, especially in impoverished and rural communities, to establish comprehensive support services and access provisions that enable persons with disabilities to live within their communities while enjoying equal choices and opportunities.³¹⁴ The existing services at the community level lack sufficient structure and coordination to create an enabling environment. Supported or assisted living and independent living programs aim to transition individuals to more open, smaller, and community-based units or homes, promoting deinstitutionalisation. State subsidisation for such units is presently limited. The Social Assistance Act³¹⁵ allows for an additional grant-in-aid for disability grant recipients who require full-time care due to their physical or mental disabilities. Furthermore, the Road Accident Fund, responsible for compensating victims of road accidents, conducts home visits by qualified staff to assess required adaptations and living conditions for clients who have sustained disabilities from vehicle accidents.³¹⁶ This includes provisions for specialised assistive devices, home modifications, and the appointment of personal assistants, if necessary. Community-Based Rehabilitation (hereafter referred to as “CBR”), a critical component of independent living programs, is primarily driven by non-governmental organisations, with only two of the nine provincial governments offering CBR subsidies to organisations representing persons with disabilities. In the Western Cape, CBR services are provided through a disability service organisation. Additionally, the Mental Health Care Act³¹⁷ accommodates community-based care, treatment, and rehabilitation services, with associated regulations setting standards for residential and day care community-based mental health services. A review of the Act is necessary to ensure alignment with the Convention.³¹⁸ To enhance support services and establish minimum norms and standards for independent living within the community, there is a commitment to strengthening coordination, a cornerstone of the National Disability Policy currently under development.³¹⁹

Lastly, regarding *freedom of expression*, section 16(1) and (2) of the Constitution safeguards the freedom of expression and opinion. It is crucial to recognise that the value of opinions and ideas from persons with intellectual and psychosocial disabilities may be diminished by prevailing negative attitudes.³²⁰ Therefore, fostering closer collaboration between these user groups and the broader government is imperative. The Department of Arts and Culture has recently concluded an examination of the national Braille production requirements and related policy considerations, aiming to formulate a comprehensive Braille production strategy for the nation.³²¹ Furthermore, although sign language is not officially recognised as one of South Africa’s 11 official languages, the Constitution has entrusted the Pan South African Language Board with the responsibility of promoting the development, usage, and acknowledgment of sign language as the primary language for deaf South Africans.³²² The deaf community is actively involved with the Board, and

³¹³ First Country Report (South Africa) at p. 35.

³¹⁴ *Ibid.*

³¹⁵ No. 13 of 2004.

³¹⁶ First Country Report (South Africa) at p. 35 – 36.

³¹⁷ No. 17 of 2002.

³¹⁸ First Country Report (South Africa) at p. 36.

³¹⁹ *Ibid.*

³²⁰ *Ibid.* at p. 37.

³²¹ *Ibid.*

³²² *Ibid.*

deaf individuals are employed within the public entity to support the achievement of this mandate. Concerns have been raised by the deaf community regarding the adequacy of government measures in significantly promoting the linguistic identity of deaf individuals. This includes ensuring the availability of specialised skills-training services for children, adults, or educators who require sign language to exercise their rights effectively.³²³

2.4.2.2. Concluding Observations

On the one hand, the Committee has commended South Africa for several significant actions. Firstly, South Africa has taken the proactive step of conducting an audit of its laws and policies, with the aim of aligning them with the human rights model of disability.³²⁴ This commendable effort includes the development of the comprehensive White Paper on the rights of Persons with Disabilities in 2015 (hereafter referred to as “*White Paper (2015)*”). The White Paper (2015) serves as a catalyst for driving change and addressing issues related to the full inclusion, integration, and equality of persons with disabilities. Secondly, the State has initiated a process to establish a comprehensive set of universal design standards across its transportation system.³²⁵ These standards are designed to facilitate the implementation of the requirements laid out in the Land Transport Act.³²⁶ The Committee stated that this endeavour reflected the State’s commitment to enhancing accessibility and promoting equal access to transportation services for all persons.³²⁷

On the other hand, the Committee expressed concern over the presence of the medical model of disability, both in concept and assessment procedures, within certain national laws.³²⁸ This is notably evident in the education system and more specifically in the guidelines governing the licensing of residential and day-care facilities for persons with mental illness and severe and profound intellectual disabilities. To address these concerns, the Committee recommended that South Africa take measures to harmonise and align its laws and policies with the human rights model of disability outlined in the Convention.³²⁹ This alignment should encompass all areas. It was further recommended that persons with disabilities, in collaboration with their representative organisations, be actively involved in the design of disability assessments.³³⁰ Additionally, South Africa should work towards eliminating the need for multiple assessments, simplifying the process for applicants, and promoting consistency and transparency in the assessment procedures.³³¹

The Committee furthermore expressed its apprehension regarding the absence of effective consultation and participation mechanisms that would ensure the inclusion of the perspectives, opinions, and concerns of persons with disabilities, particularly young individuals, in policy formulation and decision-making processes at both the national and local levels.³³² The Committee stated that in line with its General Comment No. 7 of 2018 on the participation of persons with disabilities, including children with disabilities, through their representative organisations in the implementation and monitoring of the Convention, the Committee made the recommendation that South Africa should establish formal mechanisms to guarantee

³²³ *Ibid.*

³²⁴ Concluding observations on the initial report of South Africa *Committee on the Rights of Persons with Disabilities* (2018) CRPD/C/ZAF/CO/1, pp. 1 – 15 at p. 1.

³²⁵ *Ibid.*

³²⁶ Act No. 5 of 2009.

³²⁷ Concluding observations (South Africa) at p. 1.

³²⁸ *Ibid.* at p. 2.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

effective and meaningful participation and consultation with persons with disabilities, with a particular focus on young persons, through their representative organisations - adequate budgetary resources should be allocated to support these organisations – and public officials involved in the consultation process should receive regular training on principles of non-discrimination, dignity, respect, and the right to reasonable accommodation for persons with disabilities.³³³ This training should emphasise the human rights model of disability.³³⁴

The Committee raised various concerns about the state of disability rights in South Africa, including limited understanding and application of reasonable accommodation, persistent discrimination, the absence of legislation against multiple forms of discrimination, slow progress in enacting relevant legislation, and insufficient data on legal remedies and redress for victims of disability-based discrimination.³³⁵ Consequently, the Committee recommended actions such as raising awareness about reasonable accommodation, enacting explicit anti-discrimination laws, establishing effective redress mechanisms, and improving data collection and accessibility.

The Committee's recommendations and concerns regarding disability rights in South Africa underscore several key issues that can directly relate to accessible labelling. The Committee highlighted the need for increased awareness and understanding of rights among persons with disabilities and the general public. This includes concepts like reasonable accommodation and protections against discrimination. In the context of accessible labelling, awareness campaigns can educate both persons with disabilities and the public about their rights to access information in formats they can understand. The Committee recommended enacting effective legislation and policies to protect against multiple forms of discrimination, including intersectional discrimination. Legislation in this regard could explicitly require manufacturers and service providers to ensure their products and services are accessible. Establishing robust mechanisms for redress is crucial for addressing instances of discrimination. This includes providing compensation, rehabilitation, and sanctions for discriminatory actions. In the context of accessible labelling, effective redress mechanisms would ensure that persons with disabilities can seek recourse if they encounter inaccessible labels. The Committee highlighted the lack of data on discrimination, particularly disaggregated data by sex, age, and disability type. Improved data collection is essential for understanding the scope of accessibility issues, including barriers posed by inadequate labelling. Accessible data collection methods and reporting would enable policymakers to address gaps in accessibility effectively. Finally, integrating accessibility principles into national laws and policies, as recommended by the Committee, is crucial. This integration would ensure that accessibility considerations, including accessible labelling, are systematically addressed across all sectors. It would involve training public officials, manufacturers, and service providers on the importance of accessibility and the specific requirements for making information accessible through labels.

The Committee then expressed significant concerns regarding equality and non-discrimination in the State. Firstly, the Committee has stated that there is a limited understanding of the concept of reasonable accommodation, which is prevalent among public authorities and the general population. This limited understanding has resulted in the inadequate application of reasonable accommodation principles, particularly in cases involving persons with disabilities.³³⁶ Secondly, despite efforts to combat

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

discrimination, it persists widely, with a specific focus on targeting persons with psychosocial or intellectual disabilities and persons with albinism.³³⁷ Thirdly, there is a noticeable gap in specific legislation aimed at safeguarding persons with disabilities from instances of multiple and intersectional discrimination.³³⁸ This lack of legal protection raises concerns about the vulnerability of this demographic. Furthermore, the slow progress in enacting chapter 5 of the Equality Act is a matter of significant concern they stated. Chapter 5 imposes obligations on all members of society, including the private sector, to actively promote equality. The delay in its implementation raises questions about the commitment to addressing discrimination comprehensively. Lastly, the Committee indicated that there is a notable lack of information concerning the legal remedies and measures of redress and compensation available to persons with disabilities who have experienced discrimination.³³⁹ This lack of transparency extends to statistics on the number of investigations conducted, sanctions imposed, and remedies provided to victims, with a particular focus on women and girls with disabilities.³⁴⁰ This absence of data impedes efforts to address discrimination effectively and ensure justice for those affected.

The Committee has provided a series of recommendations to South Africa. Firstly, it has urged the implementation of concrete measures aimed at increasing awareness about the concept of reasonable accommodation. This effort should target not only the general public but also the private sector, ensuring the consistent application of these principles at all levels of government.³⁴¹ Secondly, the Committee advised the enactment of effective legislation and the formulation of policies explicitly designed to offer protection against various forms of multiple and intersectional discrimination.³⁴² This legal framework is essential for safeguarding the rights of persons with disabilities. Thirdly, there is a call to establish robust mechanisms that enable persons with disabilities who have experienced discrimination to access redress.³⁴³ This comprehensive redress should encompass compensation, rehabilitation, and the imposition of sanctions on those responsible for discriminatory actions. Fourthly, the Committee recommended the development of an integrated data collection system.³⁴⁴ This system should cover complaints submitted by persons with disabilities and offer disaggregated data by sex, age, and disability type across all sectors. Additionally, it is crucial to provide information in accessible formats, ensuring that persons with disabilities are well-informed about the legal remedies and measures of redress and compensation available to them when they have encountered disability-based discrimination.

The Committee has expressed concerns about accessibility in South Africa. These concerns include the absence of laws facilitating accessibility for persons with disabilities, which limits their inclusion and participation in the development and oversight of accessibility plans.³⁴⁵ Additionally, there is a lack of a comprehensive national strategy dedicated to accessibility, which should address various issues, including accessible facilities, online banking platforms, and public transportation in rural areas.³⁴⁶

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* at p. 3.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.* at p. 5.

³⁴⁶ *Ibid.*

To tackle these issues, the Committee recommended that South Africa establish and enforce legislation, a national strategy, and policies related to accessibility and services for persons with disabilities, with a focus on those with sensory impairments and psychosocial or intellectual disabilities.³⁴⁷ Adequate resources should be allocated, and penalties for non-compliance should be instituted.³⁴⁸ Accessibility criteria should also be integrated into public procurement processes.³⁴⁹ Furthermore, South Africa should ensure the full engagement and genuine consultation of persons with disabilities and their representative organisations in the formulation of accessibility plans to address their specific needs and challenges.³⁵⁰ Lastly, South Africa should intensify efforts to enforce the National Building Regulations and Building Standards Act,³⁵¹ closely monitor progress, and strengthen penalties for non-compliance with accessibility standards in both public and private sector structures.³⁵² These measures are essential to enhance accessibility and inclusion for persons with disabilities and promote their equal participation in society.

The concerns and recommendations from the Committee regarding accessibility in South Africa can be closely linked to the concept of accessible labelling. The Committee highlighted the absence of laws facilitating accessibility for persons with disabilities in South Africa. Establishing legislation and policies dedicated to accessibility, as recommended, could include provisions that mandate accessible labelling on products. A comprehensive national strategy for accessibility, as recommended by the Committee, should encompass various aspects, including accessible facilities and services. Incorporating accessible labelling into this strategy ensures that product information is universally accessible, regardless of disability type. This strategy would guide manufacturers and service providers in adopting standards that cater to diverse accessibility needs. Adequate resource allocation and penalties for non-compliance are critical aspects of enhancing accessibility. These resources could be utilised to support initiatives that promote accessible labelling practices. Penalties for non-compliance would incentivise manufacturers to prioritise accessibility thereby improving access. Integrating accessibility criteria into public procurement processes, as recommended, extends to the procurement of products with accessible labelling. This ensures that government purchases prioritise products that meet accessibility standards, benefiting persons with disabilities who rely on accessible information for product use. Genuine consultation with persons with disabilities and their representative organisations is crucial for formulating effective accessibility plans. In the context of accessible labelling, this consultation ensures that labels are designed in formats that meet the specific needs and preferences of persons with disabilities. It allows for feedback on label readability, content and usability.

In summary, South Africa faces significant challenges and has a considerable distance to cover concerning consumer labelling. One of the primary obstacles is the absence of comprehensive legislation that mandates accessible consumer labelling. While there are general consumer protection laws in place, specific provisions ensuring that product labels are accessible to persons with disabilities are lacking. This gap means that most products on the market do not provide information in formats that are easily understandable or usable by people with various disabilities, such as those with visual impairments or cognitive disabilities. South Africa also lacks universally accepted standards and guidelines for accessible consumer labelling. Without clear standards, manufacturers may not prioritise designing labels that cater to diverse accessibility needs. This results in inconsistency across products and industries, making it challenging for persons with disabilities. There is a notable lack of awareness among manufacturers and businesses about the importance of

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ No. 103 of 1977.

³⁵² Concluding observations (South Africa) at p. 5.

accessible labelling. Many may not fully understand the impact of inaccessible labels on persons with disabilities or the legal and ethical imperative to provide accessible information. This lack of awareness translates into a reluctance to invest in accessible design practices or to allocate resources for developing accessible formats of product information. Even where regulations or guidelines exist, enforcement mechanisms are weak or inadequately implemented. This can lead to non-compliance by manufacturers perpetuating the barrier to accessible consumer labelling. Without effective enforcement, there is little incentive for companies to invest in making their products accessible. Beyond legislative and regulatory aspects, there are practical challenges related to infrastructure and technological support for accessible labelling. For instance, ensuring that digital formats of labels are compatible with assistive technologies requires investment in technology and training, which may not be readily available or prioritised. Meaningful consultation with stakeholders, including persons with disabilities and their representative organisations, is crucial but often lacking in the development of policies and standards related to consumer labelling. Without involving those directly affected, there is a risk of overlooking specific needs and preferences, which undermines the effectiveness and inclusivity of any measures implemented. South Africa's journey towards improving labelling to be more accessible and inclusive for persons with disabilities is hindered by gaps in legislation, standards, awareness, enforcement, infrastructure, and inclusive stakeholder engagement. Addressing these challenges requires a concerted effort from policymakers, businesses, civil society, and the disability community to ensure that products are designed and labelled in a way that respects and supports the rights and needs of persons.

2.4.2.3. Implementation through institutional mechanisms

The issue of inaccessible labelling could gain more traction within the institutional mechanisms of the Convention through several avenues, involving the Committee, the Conference of States Parties, and national human rights institutions.

Starting with the Committee, it plays a crucial role in monitoring the implementation of the Convention by State Parties. It reviews periodic reports submitted by countries and provides recommendations and observations. In the context of inaccessible labelling, the Committee can assess and highlight gaps in national legislation, policies, and practices related to consumer labelling accessibility. It can recommend that State Parties adopt specific measures to ensure that product information is accessible. The Committee also issues general comments and guidance on various aspects of the Convention. By issuing specific guidance on accessible information and communication, including labelling, the Committee can provide clarity and set standards for State Parties to follow. This guidance can emphasise the importance of inclusive consultation with persons with disabilities and their representative organisations in developing accessible labelling standards.

Regarding the Conference of States Parties, this forum provides a platform for State Parties to share best practices and experiences in implementing the Convention. Discussions at the conference can include sessions on accessibility, where countries can showcase successful initiatives related to accessible labelling. This sharing of experiences can inspire other countries to adopt similar practices and foster international cooperation in advancing accessibility standards. During the conference, State Parties reaffirm their commitment to advancing disability rights. Issues such as accessible labelling can be included on the agenda for policy discussions and commitments. States can pledge to improve accessibility standards and report on progress in subsequent conferences, fostering accountability and continuous improvement.

Lastly, national human rights institutions (hereafter referred to as “NHRI’s”) such as the South African Human Rights Commission play a critical role in monitoring human rights within their respective countries. They can conduct independent assessments of accessibility in consumer products and report findings to the government and international bodies like the Committee. NHRI’s can advocate for legislative changes and policy reforms to improve accessibility in consumer labelling. NHRI’s often engage in public awareness campaigns and educational programs on human rights, including disability rights. They can raise awareness about the barriers posed by inaccessible labelling and advocate for inclusive practices among businesses and manufacturers. By collaborating with disability rights organisations, NHRI’s can amplify advocacy efforts and promote greater understanding of accessibility issues.

In conclusion, the institutional mechanisms of the Convention, including the Committee and the Conference of States Parties, along with national human rights institutions, can collectively advance the issue of inaccessible labelling. They can do so by monitoring compliance, providing guidance and best practices, fostering international cooperation, advocating for legislative reforms, and raising public awareness. These mechanisms play complementary roles in promoting inclusive practices and ensuring that persons with disabilities have equal access to essential information.

3. Applicable provisions within the Convention

This thesis places a significant and deliberate emphasis on the meticulous examination of two pivotal articles found within the Convention, namely Article 5, specifically Article 5(3), and Article 9. These articles carry substantial potential to serve as catalysts in the establishment of *de facto* equality for persons with visual impairments, with a particular focus on the critical aspect of accessible labelling. The foundational premise underpinning this thesis is that if there is a mandated requirement for accessible labelling, it has the inherent capacity to enact a profound transformation within the existing, predominantly inaccessible labelling framework. Such a transformation would result in a paradigm shift towards accessibility, thereby ensuring that persons with visual impairments can access and comprehend labels effectively. Conversely, if the measures aimed at enhancing labelling accessibility are not promptly implemented, the significance of reasonable accommodation provisions becomes unmistakably evident. These provisions become pivotal in bridging the accessibility gap and ensuring that persons with visual impairments are not left disadvantaged. To provide a solid contextual foundation for this exploration, this section undertakes a comprehensive historical overview, shedding light on the origins and evolution of these articles in the Convention. It further delves into the elucidation of the core principles of these articles, serving as guiding tenets in the pursuit of disability rights and accessibility. Additionally, this section meticulously outlines the multifaceted obligations enshrined within the treaty, which collectively form the framework for promoting and safeguarding the rights of persons with disabilities, particularly in the context of visual impairments and labelling.

3.1. Article 5 of the Convention: reasonable accommodation

3.1.1. Introduction

The reasonable accommodation duty is a personalised response to the needs of a person with disabilities to ensure equal opportunities.³⁵³ Article 5(3) of the Convention deals with reasonable accommodation and states that “[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”. Article 5(3) of the Convention defines the objectives of the reasonable accommodation duty as promoting equality and eliminating discrimination. Article 5(3) of the Convention should be read together with the definition of reasonable accommodation as contained in Article 2(4) of the Convention, which provides as follows:

“[R]easonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

The duty to provide reasonable accommodation for persons with disabilities under the Convention is not, however, absolute as it is subject to the limitation that a duty bearer is not required to provide an accommodation where such accommodation would result in a disproportionate or undue burden.³⁵⁴ At first glance, the concept of reasonable accommodation does not seem problematic or complex. Seemingly, duty bearers must use all reasonable mechanisms to modify and adjust, *inter alia*, “[p]ractices, materials, environments, general rules” and so forth where needed in a particular case to assure equal opportunities for persons with disabilities.³⁵⁵ However, uncertainty is created since it is unclear what “reasonable” mechanisms entail; what the parameters of “undue burden” are; and what the interplay between reasonable and undue burden is.³⁵⁶ The subsequent subsections are intended to explain the concepts and its relation to one another - beginning with the history and origins thereof.

3.1.2. History and origins of reasonable accommodation in human rights law

The concept of reasonable accommodation was successfully implemented in one jurisdiction to such an extent that it spread to other countries.³⁵⁷ Reasonable accommodation emerged domestically in the United States (hereafter referred to as the “USA or United States”), whereafter it was gradually internationalised through its adoption by other countries and its emergence in international instruments – such as in the International Covenant on Economic, Social and Cultural Rights (hereafter referred to as the “ICESCR”) and the Convention. Reasonable accommodation currently awaits re-domestication in many domestic jurisdictions of States Parties to the Convention due to the requirement of adherence to the various provisions in the Convention relating to providing reasonable accommodation.³⁵⁸

³⁵³ Waddington, L, & Broderick, A, *Promoting equality and non-discrimination for persons with disabilities* (2017), Council of Europe, pp. 1 – 61 at p. 12.

³⁵⁴ *Ibid*; Delia, F, *Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg* Vol. 6(1), (2018), *Cogitatio*, pp. 40 – 50 at p. 44; Maimela, C, *The Reasonable Accommodation of Employees with Cancer and their Right to Privacy in the Workplace* Vol. 21, (2018), *PERJ*, pp. 1 – 31 at p. 3; Lawson, A, *Reasonable Accommodation and Accessibility Obligations: Towards a more unified European approach?* Vol. 11, (2010), *European Anti-Discrimination Law Review*, pp. 1 – 80 at p. 14.

³⁵⁵ De Campos Martel Velho, L, *Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective* Vol. 8 (14), (2011), *SUR International Journal on Human Rights*, pp. 85 – 111 at p. 88.

³⁵⁶ *Ibid.* at p. 87.

³⁵⁷ Megret, F, & Msipa, D, *Global reasonable accommodation: how the convention on the rights of persons with disabilities changes the way we think about equality* Vol. 30(2), (2014), *South African Journal on Human Rights*, pp. 252 – 274 at p. 254.

³⁵⁸ *Ibid.* Provisions requiring States Parties to provide reasonable accommodation measures: Article 5(3); Article 13(1); Article 14(2); Article 24(2)(c) and 24(5); Article 25(e); and Article 27(1)(i) of the Convention. The National Strategic Framework on Reasonable Accommodation (2020) at p. 109 confirms South Africa and other countries who are signatories to the Convention and ratified the Convention bound themselves as a member state to the general application of international law on reasonable accommodation.

The United States and Canada are described as the countries of origin of the concept of reasonable accommodation.³⁵⁹ Although reasonable accommodation is mostly associated with disability rights, the term did not originate within the disability context.³⁶⁰ It was initially employed with respect to discrimination on the grounds of religious practice in the United States Civil Rights Act of 1964.³⁶¹ The Act required employers to show that they would be unable to reasonably accommodate the religious practices of their employees without undue hardship.³⁶² Reasonable accommodation was only later applied in the field of disability rights and disability-discrimination in the US Rehabilitation Act of 1973.³⁶³ Since then, the concepts of reasonable accommodation and undue hardship have figured prominently in the United States,³⁶⁴ and eventually became one of the central pillars of the Americans with Disabilities Act of 1990 (hereafter referred to as the “*ADA*”) as amended by the Americans with Disabilities Amendment Act of 2008. The ADA, as amended, became, and remains, a highly influential piece of legislation.³⁶⁵

While the concept of reasonable accommodation was further developed and legislatively introduced in the United States, Canada soon followed suit. Early Canadian cases dealing with the duty to reasonably accommodate, similar to that of the United States, also concerned accommodating religious practices.³⁶⁶ The concept of reasonable accommodation also only later began to be applied in the disability context.³⁶⁷ In Canada, the basis for reasonable accommodation is the case law relating to section 15(1) of the Canadian Charter of Rights and Freedoms (hereafter called “*the Charter*”), which provides for the right to “[e]qual protection and equal benefit of the law without discrimination”.³⁶⁸ Beyond these two countries - where its expansion can mainly be attributed to a particularly active and well-organised community of activists – years would pass before the gradual internationalisation of the concept started to make inroads in other jurisdictions.³⁶⁹

The concept eventually appeared, for the first time, despite the delay, at an international level in Article 2(2) of ICESCR. General Comment No. 5 of the Committee on Economic, Social and Cultural Rights (hereafter referred to as “*UNCESCR*”)³⁷⁰ recognised the importance of the concept of reasonable accommodation to the equality of persons with disabilities by emphasising that Article 2(2) of the ICESCR required States to ensure that the rights contained in the treaty were enjoyed by all persons - including persons with disabilities. The UNCESCR noted that disability-based discrimination included:

“[a]ny distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.³⁷¹

³⁵⁹ De Campos Martel Velho, L., (2011) at p. 89; Megret, F, & Msipa, D., (2014) at p. 255; Broderick, A, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (2015), Maastricht University, pp. 1 – 465 at p. 152.

³⁶⁰ Broderick, A, (2015) at p. 152.

³⁶¹ *Ibid.*

³⁶² De Campos Martel Velho, L., (2011) at p. 88.

³⁶³ De Campos Martel Velho, L., (2011) at p. 89; Megret, F, & Msipa, D., (2014) at p. 255; Broderick, A, (2015) at p. 152.

³⁶⁴ *Ibid.*

³⁶⁵ Megret, F, & Msipa, D., (2014) at p. 255; Broderick, A, (2015) at p. 152.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 5 (1995) E/1995/22, 19 pp. 1 – 11; Megret, F, & Msipa, D., (2014) at p. 257; Lord, J, & Brown, R, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities* 1, (2010), Social Science Research Network, pp. 1 – 24 at p. 4.

³⁷¹ General Comment No. 5 of 1995 at p. 5.

During the Convention's drafting process, the UNCESCR was relied on by many delegates in order to forge a link in the Convention between the duty to accommodate and the equality and non-discrimination norms.³⁷² The insertion of the concept of reasonable accommodation was consequently supported by most States and ultimately found itself in the final text of the Convention in Article 2.³⁷³ Currently, the Convention requires reasonable accommodation in various sectors - not only labour or employment to which it was traditionally applied.³⁷⁴ These sectors include education,³⁷⁵ employment,³⁷⁶ liberty and security of person,³⁷⁷ and access to justice.³⁷⁸

3.1.3. Influence of the Convention on disability and discrimination

Together with undue burden the term reasonable accommodation confers new legal meaning to instances of disability and discrimination in respect of persons with disabilities. The Convention influences a series of legal concepts which require further review prior to an analysis of the term "reasonable accommodation".

3.3.1.1. Disability

On disability, as discussed in Chapter 2, the Convention does not utilise the medical model of disability.³⁷⁹ Hirschberg & Papadopoulos write that the Convention, regarding persons with disabilities as subjects with the same human rights as others, shifted the paradigm from the medical model of disability to the human rights model of disability.³⁸⁰ It is the human rights model of disability that the Convention codifies, according to Degener.³⁸¹ The human rights model focuses on the inherent dignity of the human being and only refers to, if necessary, the person's medical characteristics.³⁸² Lawson & Beckett, in turn, opines a slightly different approach, writing that the human rights model is inseparably combined with, complementary to, and built upon the social model despite the differences between the human rights and social model.³⁸³ The social model can be summarised as not looking at the impairment and cure only – it contests that society imposes a disability on individuals with impairments.³⁸⁴ Broderick similarly contends that the social model, combined with the human rights model, ensures that persons with disabilities are viewed as holders of rights, entitled to exercise all human rights and fundamental freedoms on an equal basis with others, entailing the provision of material support where necessary.³⁸⁵ Following the argument of Broderick, the reasonable accommodation obligation in the Convention forms an integral part of the social and human rights models.³⁸⁶ Unlike direct discrimination, which requires identical treatment (in other words, formal equality), the reasonable accommodation duty requires different treatment for persons whose

³⁷² Broderick, A, (2017) at p. 18.

³⁷³ Lord, J, & Brown, R, (2010) at p. 4.

³⁷⁴ De Campos Martel Velho, L, (2011) at p. 87.

³⁷⁵ Article 24(2)(c) and 24(5) of the Convention.

³⁷⁶ Article 27(1)(i) of the Convention.

³⁷⁷ Article 14(2) of the Convention.

³⁷⁸ Article 13(1) of the Convention; Megret, F, & Msipa, D, (2014) at p. 258.

³⁷⁹ Lawson, A, & Beckett, (2021) at p. 349.

³⁸⁰ Hirschberg, M, & Papadopoulos, C, "Reasonable Accommodation" and "Accessibility": *Human Rights Instruments Relating to Inclusion and Exclusion in the Labor Market* Vol 6(1), (2016), Societies, pp. 1 – 16 at p 1.

³⁸¹ Degener, T, *Disability in Human Rights Context* Vol. 5(3), (2016), LAWS, pp. 1 – 24 at p. 6.

³⁸² *Ibid.* at p. 2.

³⁸³ Lawson, A, & Beckett, A, *The social and human rights models of disability: towards a complementarity thesis* Vol. 25(2), (2021), The International Journal of Human Rights, pp. 348 – 379 at p. 350.

³⁸⁴ Haegele, J. A, & Hodge, S, *Disability Discourse: Overview and Critiques of the Medical and Social Models* Vol. 68(2), (2016), Quest, pp. 193 – 206 at 197. Ngwena, C, *Developing juridical method for overcoming status subordination in disability: The place of transformative epistemologies* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 275 – 312 at p. 283.

³⁸⁵ Broderick, A, (2017) at p. 14.

³⁸⁶ *Ibid.* at 18.

circumstances are different (in other words, substantive equality).³⁸⁷ Equality of opportunities, as a general principle contained in Article (e) of the Convention marks the development from a formal model of equality to a substantive model of equality.³⁸⁸ The doctrine of substantive model of equality is well-placed to translate the social and human rights model of disability into an effective model for dismantling barriers against persons with disabilities.³⁸⁹

3.3.1.2. Discrimination

On discrimination, the Convention expands the concept.³⁹⁰ Article 5(2) of the Convention requires States to prohibit discrimination based on disability. By not offering reasonable accommodation, a form of discrimination is constituted.³⁹¹ Therefore, in addition to the traditional forms of unequal and discriminatory treatment, the denial of reasonable accommodation that does not impose an undue burden constitutes discrimination against persons with disabilities. Goldschmidt contends that making reasonable accommodations part of the prohibition of discrimination and not merely an exception to the principle of equal treatment transforms the legal definition of discrimination.³⁹² She states that one is “[n]ot asked anymore whether it was possible to hire [a] person in a situation where necessary accommodations were not already available; on the contrary, [one has to] demonstrate that the accommodations were not possible. This is a fundamental shift”.³⁹³ Article 5(3) of the Convention links the equality and non-discrimination norms with the duty to accommodate.³⁹⁴ Therefore, in order to promote equality and eliminate discrimination, States Parties must take all appropriate steps to *ensure* that reasonable accommodation is provided. In the context of the Convention:

“[T]his will require that States oversee the implementation of the duty to accommodate by public and private entities, and the entities should engage in a constructive dialogue with the disabled individual in order to determine the most appropriate accommodation in the circumstances of a particular case”.³⁹⁵

States Parties will also be required to undertake education and awareness-raising duties, particularly regarding all those involved in implementing the duty to accommodate.³⁹⁶ In addition, national authorities will be required to ensure that their legislative frameworks comply with the obligations engendered by the Convention.³⁹⁷

3.1.4. Reasonable accommodation in terms of the Convention

It is to various facets of reasonable accommodation to which I now turn. According to the Committee, the duty to provide reasonable accommodation in accordance with Article 2 and Article 5(3) of the Convention can be broken down into two constituent parts. The first part imposes a positive legal duty to provide a

³⁸⁷ *Ibid.*

³⁸⁸ General Comment No. 2 (2014) at p 3.

³⁸⁹ Ngwena, C, *Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue* Vol. 29(2), (2004), *Journal for Juridical Science*, pp. 167-197 at p. 193.

³⁹⁰ De Campos Martel Velho, L., (2011) at p. 87.

³⁹¹ *Ibid.*; Grobbelaar-Du Plessis, I, & Nienaber, A, (2014) at p. 369; Megret, F, & Msipa, D, (2014) at p. 272.

³⁹² Broderick, A, (2015) at p. 91, citing Goldschmidt, J, *Shifting the Burden of Proof: How the CRPD is Transforming our Understanding of Discrimination, Intersectionality and Priorities* Vol. 35, (2012), p. 57.

³⁹³ Broderick, A, (2017) at p. 16.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.* Article 4(1)(e) of the Convention.

³⁹⁶ Broderick, A, (2017) at p. 16.

³⁹⁷ *Ibid.*

reasonable accommodation.³⁹⁸ The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.³⁹⁹

3.4.1.1. Constituent part one: the reasonable accommodation duty

It is vital to outline five essential components of the definition of reasonable accommodation in order to understand the legal duty it imposes on duty bearers. The five components are as follows: (i) reasonable; (ii) accommodation; (iii) necessary and appropriate; (iv) where needed in a particular case; and (v) disproportionate or undue burden.

Firstly, regarding the term “reasonable”, ambiguity is created as it is unclear what constitutes a reasonable mechanism.⁴⁰⁰ Furthermore, the concept has different meanings nationally, regionally, and internationally.⁴⁰¹

“[T]he term ‘reasonable’ is in itself no stranger to rights language, but typically as a qualifier to limitations of rights. It is more rarely used as part of a right or of something that is very central to the definition of a right. As such, there is a priori something inherently contentious about what constitutes ‘reasonable’ accommodation.”⁴⁰²

During the Convention’s negotiations, the fourth session of the Ad Hoc Committee of the Convention, the view was expressed that the term “reasonable accommodation” is a “single term” and that the word “reasonable” is not intended to be an exception clause in and of itself.⁴⁰³ Instead, the reasonableness of an accommodation being sought is a reference to its relevance, appropriateness, and effectiveness for the person with a disability.⁴⁰⁴ De Campos Martel Velho write that three approaches to the term “reasonable” can be formulated. First, an accommodation will be reasonable if it does not impose excessive difficulties or costs on the duty bearer.⁴⁰⁵ Second, an accommodation will be reasonable if it is effective for the rights holder.⁴⁰⁶ Third, an accommodation will be reasonable if it is effective for the right holder while not imposing excessive difficulties or costs on the duty bearer.

Secondly, the term “accommodation” is generally uncontroversial to the extent that it is understood to mean adjustments or modifications to existing “[p]ractices, materials, environments, general rules” and so forth to facilitate the participation and inclusion of persons with disabilities.⁴⁰⁷ In this regard, the Office of the High Commissioner for Human Rights has compiled the following non-exhaustive list of examples of accommodations:

- (i) “[m]aking existing facilities and information accessible for the person concerned in a particular situation;
- (ii) adapting or acquiring equipment; reorganising activities;
- (iii) re-scheduling work; customising learning materials; adapting curricula to the capabilities of the person;

³⁹⁸ General Comment No. 2 of 2014 at p 7.

³⁹⁹ *Ibid.*

⁴⁰⁰ De Campos Martel Velho, L, (2011) at p. 88; Megret, F, & Msipa, D, (2014) at p. 265.

⁴⁰¹ Megret, F, & Msipa, D, (2014) at p. 265.

⁴⁰² *Ibid.*

⁴⁰³ Broderick, A, (2017) at p. 28.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ De Campos Martel Velho, L, (2011) at p. 99.

⁴⁰⁶ *Ibid.* Megret, F, & Msipa, D, (2014) at p. 267.

⁴⁰⁷ Broderick, A, (2015) at p. 105.

- (iv) adjusting medical procedures;
- (v) implementing specific communication modalities; and
- (vi) enabling access of support personnel to facilities restricted to the public”.⁴⁰⁸

Considering the individualised nature of the duty to accommodate, it is impossible to provide an exhaustive list of the types of accommodations that might be appropriate in any given scenario, but they illustrate the types of measures that may be deemed an “accommodation” for persons with disabilities. Accommodations under the Convention will most likely take a similar form as the accommodations listed by the Office of the High Commissioner.

Thirdly, the modifications and adjustments must be “necessary and appropriate” to remove the disadvantage for persons with disabilities.⁴⁰⁹ States Parties will be required to take “necessary” measures to give effect, at minimum, to the essence of human rights in order to ensure that the basic needs and capabilities of persons with disabilities are met.⁴¹⁰ The word “appropriate” implies that accommodations must be *effective* in ensuring that persons with disabilities can exercise their human rights on an equal basis with others.⁴¹¹ “[T]he focus under the accommodation duty is on the specific circumstances of each case, considering the *effectiveness of the modifications or adjustments* in removing the disadvantage for the particular disabled person and the practicality for the duty-bearer of providing an accommodation”.⁴¹² Lawson points to the fact that “[t]he individual-oriented nature of reasonable accommodation thus requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead, they engage in a dialogue with such a person about how the relevant disadvantages might most *effectively* be tackled”.⁴¹³

Fourthly, attention must be drawn to the words “where needed in a particular case” since this emphasises the individualised nature of the reasonable accommodation duty.⁴¹⁴ The reasonable accommodation duty is an individualised or specific response designed to meet the particular needs of the person with a disability to ensure equal opportunities in a given situation.⁴¹⁵ The focus under the accommodation duty is on the need of the person with a disability in the specific circumstances of a particular case, considering the effectiveness of the modifications or adjustments in removing the disadvantage for the particular person.⁴¹⁶

Lastly, the extent of the burden of the modification or adjustment (a matter to be discussed directly below) must be considered, as this is a determinant for the duty bearer. Since the duty to reasonably accommodate persons with disabilities under the Convention is not absolute, the extent of the duty bearers’ duty must be outlined.⁴¹⁷ The notion of “disproportionate” or “undue burden” establishes an outer limit of the duty to accommodate to which I now turn.⁴¹⁸

⁴⁰⁸ Waddington, L, & Broderick, A, (2017) at p. 12.

⁴⁰⁹ Broderick, A, (2017) at p. 14.

⁴¹⁰ Broderick, A, (2015) at p. 164.

⁴¹¹ Broderick, A, (2017) at p. 14.

⁴¹² *Ibid.*

⁴¹³ *Ibid.* at p. 22.

⁴¹⁴ Broderick, A, (2017) at p. 14.

⁴¹⁵ Waddington, L, & Broderick, A, (2017) at p. 12 – 13.

⁴¹⁶ Broderick, A, (2017) at p. 19.

⁴¹⁷ Broderick, A, (2017) at p. 27. Waddington, L, & Broderick, A, (2017) at p. 12; Delia, F, (2018) at p. 44; Maimela, C, (2018) at p. 3; Lawson, A, (2010) at p. 14.

⁴¹⁸ Broderick, A, (2015) at p. 163.

3.4.2.2. Constituent part two: limitation on the reasonable accommodation duty

To reasonably accommodate a rights holder is subject to the limitation that a duty bearer is not required to make a reasonable accommodation where such an accommodation would result in a disproportionate or undue burden. It is possible to make some general observations on the defence of the accommodation duty. From the test of disproportionate or undue burden, one can discern the types of measures that might be deemed (un)reasonable on the part of the duty bearers in the fulfilment of the duty to accommodate.⁴¹⁹ The essential question rests on what a disproportionate or undue burden entails. This subsection contains an analysis of the “disproportionate or undue burden” defence. For purposes of this thesis, the international concepts of a disproportionate and undue burden will be considered together under the overall heading of “disproportionate burden”.

3.4.2.2.1. The defence of disproportionate burden

As already stated, the duty to reasonably accommodate persons with disabilities, unlike the accessibility obligation, under the Convention is not absolute.⁴²⁰ It is subject to the limitation that a duty bearer is not required to make a reasonable accommodation where such an accommodation would result in a disproportionate burden.

First and foremost, when evaluating whether a burden is disproportionate, the intended purpose of the general measure for which the exception is sought must be considered. If the general measure sought by the rights holder is significantly encumbered, the burden will be considered disproportionate.⁴²¹ It will not be sufficient for the duty bearer to demonstrate that the measure sought was implemented in good faith, impartially or equally, as the defence will only be complete if it can be shown that the accommodation “obstructs the intended purpose”.⁴²² Waddington & Broderick note that, in most cases, once a disproportionate burden or lack of reasonableness has been established, the duty to accommodate seems to be removed. However, it is essential to note that the limitation in Article 2 Convention does not always exempt the duty bearer from the obligation to provide a reasonable accommodation - it simply limits the duty.⁴²³

According to Broderick, the decision to grant an accommodation in a particular case will rest on an underlying proportionality test.⁴²⁴ The proportionality test seeks to balance the rights, burdens, and benefits in respect of both the rights holder and the duty bearer regards to the sought accommodation – “[w]hether a reasonable accommodation is disproportionate requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned”.⁴²⁵ The Committee has stated that the definition of what constitutes “proportionate” will vary according to

⁴¹⁹ *Ibid.*

⁴²⁰ Broderick, A, (2017) at p. 27; Waddington, L, & Broderick, A, (2017) at p. 12; Delia, F, (2018) at p. 44; Maimela, C, (2018) at p. 3; Lawson, A, (2010) at p. 14.

⁴²¹ De Campos Martel Velho, L, (2011) at p. 104.

⁴²² *Ibid.*

⁴²³ Broderick, A, (2017) at p. 27.

⁴²⁴ Broderick, A, (2015) at p. 174.

⁴²⁵ General Comment No. 6 of 2018 at p. 7 – 8.

context.⁴²⁶ States Parties must however ensure that such an assessment is made in a meticulous and impartial manner, covering all the relevant elements or factors before they reach a conclusion that the respective measures would constitute a disproportionate burden for them.⁴²⁷ The relevant elements or factors to be considered within the disproportionate burden test will be elaborated upon hereunder.⁴²⁸

3.4.2.2.1.1. Financial and other resource considerations

The drafting history of the Convention reveals that most States associated the notion of “disproportionate burden” with the resource and financial implications aspect of the duty to accommodate.⁴²⁹ The Committee in General Comment No. 6 of 2018 and the European Disability Forum has stated that the duty to accommodate, under financial and other resource considerations, needs to be qualified by (i) the type of entity, the size and scale of the entity, (ii) the financial capacity or cost of the reasonable accommodation; (iii) the effect of the modification on the duty bearer and (iv) the resource availability to the duty bearer.⁴³⁰ Even though the final text of the Convention does not include these factors explicitly; these factors are generally subsumed within the defence of the reasonable accommodation duty.⁴³¹

Regarding the type of entity, a balancing act occurs in assessing whether a duty to accommodate should fall on a specific type of entity. Broderick refers to the approach to be taken in determining whether an accommodation constitutes an disproportionate burden for an entity;⁴³² for instance, it might be considered appropriate to require a state entity to accommodate a visually impaired employee by providing an assistive device, while it could constitute an disproportionate burden to impose such a requirement on a provider of a small enterprise.⁴³³ Consequently, costs by States Parties (or by public entities) will be less sympathetically received by the Committee than those raised by private entities due to the entity type.⁴³⁴ Regarding the size or scale of the entity’s operation, the entity’s nature is relevant in determining the extent of the burden.⁴³⁵ In the context of employment, it will be much more difficult for a large public employer to argue that resources do not allow for the provision of a sought accommodation compared to that of a small private employer.⁴³⁶ The nature of the entity in question was a relevant factor in the opinion of the Committee in the communication of *Jungelin v Sweden*.⁴³⁷

The Committee, Waddington, and Broderick note that one of the significant themes concerns costs. Broderick points out that the cost of a sought accommodation is the primary factor that has been considered in determining whether the duty bearer must provide the accommodation.⁴³⁸ The Committee in *Jungelin v Sweden* confirmed that the financial cost of a requested accommodation is a relevant factor in determining whether and to what extent the duty bearer is obligated to accommodate.⁴³⁹ Of note is that cost does not refer exclusively to the financial aspect of an accommodation. It also considers the level of

⁴²⁶ Broderick, A, (2017) at p. 29.

⁴²⁷ *Ibid*; Delia, F, (2018) at p. 44.

⁴²⁸ *Ibid*.

⁴²⁹ Broderick, A, (2015) at p. 164; Broderick, A, (2017) at p. 29.

⁴³⁰ General Comment No. 6 of 2018 at p. 8.

⁴³¹ Broderick, A, (2015) at p. 230; General Comment No. 6 of 2018 at p. 8.

⁴³² Broderick, A, (2015) at p. 167.

⁴³³ *Ibid*.

⁴³⁴ *Ibid*.

⁴³⁵ *Ibid*.

⁴³⁶ *Ibid*.

⁴³⁷ *Jungelin v Sweden* at p. 7; Broderick, A, (2015) at p. 167.

⁴³⁸ Broderick, A, (2015) at p. 164; Broderick, A, (2017) at p. 30; General Comment No. 6 of 2018 at p. 8.

⁴³⁹ *Jungelin v Sweden* at p. 9; Delia, F, (2018) at p. 44 – 45.

disruption that an accommodation might cause on an entity or the extent to which a requested accommodation would alter the nature of an entity's business.⁴⁴⁰ Costs will, therefore, not merely be financial in nature. How the accommodation either alters the nature of the entity's business or causes excessive difficulties for an entity must also be considered.⁴⁴¹ Thus, financial costs should be taken together with other factors such as the entity's activities, the size or scale of the entity's operation, and other organisational factors, including the negative impact of the requested accommodation on the entity.

Lastly, costs will also be balanced against the resource availability of public subsidies or any other assistance from the State to aid in the provision of reasonable accommodations or compensate the duty bearer.⁴⁴² The availability of public subsidies or the possibility of finding support from other sources is also a relevant consideration under the umbrella heading of costs. The duty bearer may be compensated for the duty to accommodate in the form of State immunities, exemptions, subsidies, or grants. Such compensatory measures will be relevant in determining whether the overall cost of the accommodation imposes a disproportionate burden. The cost will always be an essential factor in determining whether a sought accommodation is a reasonable one. The cost will determine whether such an accommodation is in proportion to the entity's resources or the entity's institutional capacity.⁴⁴³ Certain specific requested accommodations will, unfortunately, be too costly for the entity. In such circumstances, the provision of the requested accommodation will not be realistic unless State funding is available to alleviate the burden on the entity.⁴⁴⁴

3.4.2.2.1.2. Benefit to the person with a disability and third parties

In determining whether an accommodation constitutes a disproportionate burden or not, the cost factor may be weighed against the benefits that a person with a disability receives on the granting of a reasonable accommodation. Benefits to other parties may also be considered in the proportionality test.⁴⁴⁵ De Campos Velho Martel notes that “[a] serious cost-benefit analysis of reasonable accommodation includes more than just economic factors [...]. It must also include the costs of stigma and the benefits of inclusion, not only to the person requesting the accommodation but also to third parties”.⁴⁴⁶ Thus, on benefits, she notes that the benefit of a reasonable accommodation extends to third parties as well.

“[O]n the benefits, it is worth recalling that accommodation is not intended to benefit just one individual; its *raison d'être* is *far vaster*, consisting of a dynamic model of accommodation [...]. It includes direct and indirect benefits, taking into consideration first and second parties, and also third parties”.⁴⁴⁷

3.4.2.2.1.3. Non – financial consideration

⁴⁴⁰ Broderick, A, (2015) at p. 168.

⁴⁴¹ Broderick, A, (2017) at p. 30.

⁴⁴² Broderick, A, (2015) at p. 168; Broderick, A, (2017) at p. 30.

⁴⁴³ Broderick, A, (2015) at p. 174.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Broderick, A, (2015) at p. 164; Broderick, A, (2017) at p. 31; De Campos Martel Velho, L, (2011) at p. 104.

⁴⁴⁶ De Campos Martel Velho, L, (2011) at p. 104.

⁴⁴⁷ *Ibid.*

Non-financial considerations must also be considered. In the context of employment, there are some examples which demonstrate that financial cost is not the only matter that may justify a failure to accommodate persons with disabilities.⁴⁴⁸ Health and safety requirements will serve as a consideration relevant to establishing whether a requested accommodation would constitute a disproportionate burden.⁴⁴⁹ An arrangement with a rights holder may be unreasonable if it could endanger compliance with workplace safety legislation.⁴⁵⁰ For instance, allowing a visually impaired employee to be accompanied by a guide dog whilst on an active operational mining site in the presence of heavy tackles mobile machinery.

3.1.5. Conclusion

Based on the definition of reasonable accommodation, taken in conjunction with Article 5(3), the key features of the duty to accommodate are conveniently summarised by Broderick as follows:

- (i) “[T]he identification and removal of barriers that impact on the enjoyment of human rights for persons with disabilities;
- (ii) The ‘necessity and appropriateness’ of modifications or adjustments to address barriers specific to a particular individual;
- (iii) The adoption of modifications or adjustments that do not impose a disproportionate or undue burden on the duty-bearer;
- (iv) The requirement to find a response or solution which is tailored to the individual circumstances of the person with a disability; and
- (v) The fact that accommodations have as their essential objective the promotion of equality and the elimination of discrimination, by means of the enjoyment of all human rights by persons with disabilities on an equal basis with others”.⁴⁵¹

Ideally, the exact perimeters of the various facets of reasonable accommodation and its defence can be practically and useably outlined but until then, it is up to the international, foreign, and national courts to rule, on a case-by-case basis, who deserves accommodation, who has the duty to accommodate, what constitutes reasonable accommodation and what counts as an disproportionate burden, when dialogue between the parties involved is unsuccessful.⁴⁵²

3.2. Article 9 of the Convention: accessibility

3.2.1. Introduction

Simply put, accessibility is about creating universal designs for the “[p]hysical environment, transportation, information and communication, goods, and services that cater to a broad-ranging variety of persons”.⁴⁵³ It is the extent to which aspects of society can be equally, easily, safely, and appropriately used or reached by persons with disabilities and persons without disabilities, alike.⁴⁵⁴ The planning and designs are

⁴⁴⁸ Broderick, A, (2015) at p. 174; Broderick, A, (2017) at p. 32.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ Broderick, A, (2017) at p. 16.

⁴⁵² De Campos Martel Velho, L, (2011) at p. 104.

⁴⁵³ Create accessible products with inclusive design, *DLT Labs*, (2021), <<https://www.dlmlabs.com/blog/create-accessible-products-with-inclusive-design-910986>> (accessed 08 April 2022).

⁴⁵⁴ *National Strategic Framework on Universal Design* (2020) at p. 161. This framework provides a statutory reference for the promotion of universal design and access in South Africa. While a national strategic framework does not have the same authority as legislation, it plays a crucial role in shaping policy, guiding government action, and ensuring coordinated and effective responses to key issues. It acts as a

intentionally universally designed and made to be accessible to as many persons as possible without the need for adaptations or specialised designs. In an ideal world, it would include everyone and almost everything persons interact with.⁴⁵⁵ Accessibility provides persons with access to material and immaterial goods and conditions they would not have otherwise had equal access to if the goods and conditions were not accessible.⁴⁵⁶ Accessibility is unfortunately not as simple as seemingly presented. It is a complicated and multi-faceted concept that the below subsection will now turn to explain, starting with its historical development in international human rights law.

3.2.2. Historical overview of accessibility in international human rights law

Accessibility, contained in Article 9 of the Convention, is an innovative provision articulated for the first time in a United Nations human rights treaty specifically in a disability context. Notably, the concept of access and accessibility themselves are by no means a new or unfamiliar concept contained in international human rights law.⁴⁵⁷ A corroboration of this can be found in the General Comment No. 14 of the UNCESCR. In General Comment No. 14, the UNCESCR has delineated the obligations inherent in the notion of accessibility.⁴⁵⁸ The components of accessibility, as contained in General Comment No. 14, however, do not comprise of a disability-specific understanding of the term accessibility, unlike that contained in Article 9 of the Convention.⁴⁵⁹ The various elements of accessibility outlined by the UNCESCR do, however, find themselves mirrored in the components of accessibility contained in Article 9 of the Convention.⁴⁶⁰

Without access persons with disabilities would not live independently and have equal opportunities for participation in society. According to the Committee, accessibility is not coincidentally one of the principles upon which the Convention is based.⁴⁶¹ The Committee cites, as a rationale, regulations concerning (i) access to the physical environment and public transport as a precondition of freedom of movement in terms of Article 13 of the Universal Declaration of Human Rights (hereafter referred to as the “UDHR”) and (ii) access to information and communication as a precondition of freedom of opinion; freedom of speech as well as access to public service in terms of Article 12 and 19 of ICCPR, respectively.⁴⁶²

“[H]istorically, the persons with disabilities movement have argued that access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement, as guaranteed under Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights. Similarly, access to information and communication is seen as a precondition

roadmap for achieving specific national goals and can significantly influence legislative and regulatory developments. Its purpose is: “[t]o integrate universal design and access into all planning, designing, budgeting, implementation, monitoring, evaluation and reporting systems; to provide a framework and mechanism for integrated and multi-disciplinary coordination of universal design and access implementation; to establish priorities that will accelerate the removal of barriers to access and participation for all sectors of society; to guide the development and implementation of performance standards for the accessibility of services provided to the public; and to provide for specific roles, functions and responsibilities of relevant departments and other stakeholders; and to provide for matters connected therewith” - see p. 153.

⁴⁵⁵ Create accessible products with inclusive design, *DLT Labs*, (2021), <<https://www.dlmlabs.com/blog/create-accessible-products-with-inclusive-design-910986>> (accessed 08 April 2022).

⁴⁵⁶ Greco, G., *On Accessibility as a Human Right, with Application to Media Accessibility* in Matamala, Anna, & Orero, Pilar, (Eds.), *Researching Audio Description: New Approaches*, (2016), pp. 1 – 21 at p. 7.

⁴⁵⁷ Lawson, A., *Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v Hungary* Vol. 30(2), (2014), *South African Journal on Human Rights*, pp. 380 – 392 at p. 380; Broderick, A., (2015) at p. 237.

⁴⁵⁸ General Comment No. 14 Committee on Economic, Social and Cultural Rights (2000) E/C.12/2000/4, pp. 1 – 21 at p. 4.

⁴⁵⁹ Broderick, A., (2015) at p. 237.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Article 3(f) of the Convention; General Comment No. 2 of 2014 at p. 2.

⁴⁶² Roszewska, K., *Accessibility – One of the Human Rights or the Means of Their Implementation* Vol. 3(37), (2021), *Prawo i Więź*, pp. 158 – 176 at p. 162; General Comment No. 2 of 2014 at p. 2.

for freedom of opinion and expression, as guaranteed under Article 19 of the Universal Declaration of Human Rights and Article 19(2), of the International Covenant on Civil and Political Rights.”⁴⁶³

According to the Committee in General Comment No. 2,⁴⁶⁴ accessibility as a right *per se* has not been established as part of international human rights law, whereas the right of access has. The Committee embedded accessibility in previous treaty law and confirmed the existence of the right to access as a right *per se* under the Convention.⁴⁶⁵ The Committee further affirmed that based on the ICERD clearly establishing the right of access as part of international human rights law, accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access and not as a new human right *per se*.⁴⁶⁶

Notably, despite the comments of the Committee on the nature of accessibility there has much debate surrounding the nature of accessibility. The Convention formulates accessibility, *inter alia*, as a right – the right of access,⁴⁶⁷ a norm,⁴⁶⁸ a founding principle,⁴⁶⁹ as a measure,⁴⁷⁰ a precondition and as an overarching obligation.⁴⁷¹

“[T]here has been much debate about the nature of accessibility as defined in Article 9 of the CRPD. The question arises as to whether it is a principle, a right or an obligation of the Convention or rather a precondition for full and equal participation of persons with disabilities in society? One might ask whether it is all of the above?”⁴⁷²

3.2.3. Accessibility obligations: Article 9 of the Convention

Unlike reasonable accommodation, under the definitions in the Convention contained in Article 2, accessibility is not defined.⁴⁷³ As captured in Article 9(1) of the Convention, the purpose of accessibility is to “[e]nable persons with disabilities to live independently and participate fully in all aspects of life”. Article 9(1) continues by stating:

“[S]tates Parties shall *take appropriate measures to ensure to persons with disabilities access*, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and *elimination of obstacles and barriers* to accessibility, shall apply to, *inter alia*:

- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

⁴⁶³ General Comment No. 2 of 2014 at p. 2.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Broderick, A, (2020) at p. 393. The accessibility norm appears in Preamble para. (e) of the Convention, which reads:

“(v) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms”.

⁴⁶⁹ It is also a general *principle* in Article 3(f) and a general *obligation* contained in Article 4 (1)(h) of the Convention.

⁴⁷⁰ Article 9 of the Convention; General Comment No. 2 of 2014 at p. 4; Roszewska, K, (2021) at p. 161.

⁴⁷¹ See Article 9(1) – (2) of the Convention.

⁴⁷² Broderick, A, (2015) at p. 237.

⁴⁷³ Lawson, A, (2010) at p. 14.

- b) Information, communications and other services, including electronic and emergency services.”.

Obstacles and barriers to accessibilities are not defined, nor elaborated upon in the Convention or by the Committee. No examples of such are provided, but guidance can be lent from the Framework on Universal Design and Access. The Framework defines obstacles and impediments to accessibility as preventing persons from “[f]ree movement, decision making, association, and participation”. The Framework further identifies in its definition that barriers may be “[s]ocial (including high cost, lack of disability awareness, prejudice, cultural differences, communication difficulties), psychological (such as fear for personal safety) or structural (including infrastructure, operations and information)”.⁴⁷⁴ Article 9(1) of the Convention imposes immensely specific duties on States Parties.

States Parties are required to undertake a series of essential steps. First, they should identify the specific obstacles and barriers to accessibility. In this particular context, the barriers are predominantly legislative, and they hinder individuals from engaging in decision-making processes. Secondly, they must determine which measures are appropriate to implement. Appropriate measures, in the context of this article, include amending the legislative framework to eliminate the barrier to accessible information. Lastly, eliminate the identified obstacles and barriers to ensure accessibility.

Article 9(1) of the Convention requires States Parties to take appropriate measures to ensure accessibility. The specific measures that States are expected to take are listed in Article 9(2) of the Convention.⁴⁷⁵

“[A] range of more specific obligations relating to the accessibility of services and facilities offered to the public are set out in art 9(2)(a)–(e). Paragraphs (f) and (g) go on to impose obligations on States Parties to promote the access of disabled people to information and to new information and communication technologies (ICTs), while paragraph (h) requires them to promote the design, development, production and distribution of accessible ICTs”.⁴⁷⁶

3.2.3.1. Accessibility: lack and denial of access

A distinction must also be drawn between the “denial of access” and the “lack of access”. The “denial of access” means instances of systemic or deliberate discrimination.⁴⁷⁷ For example, where a person with a

⁴⁷⁴ Framework on Universal Design and Access (2020) at p. 161.

⁴⁷⁵ “2. States Parties shall also take appropriate measures:

- (a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
- (b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
- (c) To provide training for stakeholders on accessibility issues facing persons with disabilities;
- (d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
- (e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
- (f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- (g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- (h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost”.

⁴⁷⁶ Lawson, A, *Accessibility obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v Hungary* Vol. 30(2), (2014), South African Journal on Human Rights, pp. 380 – 392 at p. 380.

⁴⁷⁷ Broderick, A, (2017) at p. 24.

disability is ultimately denied access to a facility on the ground of disability *per se*. The denial of access [to the physical environment, transportation, information and communication, goods, products, and services] open to the public constitutes an act of disability-based discrimination that is prohibited by Article 5 of the Convention. The “lack of access” means a failure to fulfil accessibility obligations [inaccessibility]. According to the Committee, the “lack of access” is not the same as the “denial of access” as a lack of access [inaccessibility] should not be viewed as a prohibited act of disability-based discrimination, except (i) if a service or facility was made available to the open public after relevant accessibility standards were introduced and such service or facility still prevented persons with disabilities from accessing such service or facility or (ii) where access could have been, but was not, granted to the facility or service available to the open public for persons with disabilities through reasonable accommodation. In these two instances, a lack of access will also be regarded as constituting an act of disability-based discrimination.

3.2.4. Universal design as a constituent element of accessibility

The origin of the term universal design is attributed to the architect Ronald Mace, who defined it in the late 1990s as “[a] design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”.⁴⁷⁸ With the adoption of the Convention, the term “universal design” became internationally recognised, referring not only to products and environments but also to programmes and services.⁴⁷⁹ The objective and purpose of universal design is to ensure maximum accessibility by creating universally accessible products, environments, programmes, and services that every person can use,⁴⁸⁰ whether it be persons with disabilities or non-disabled individuals.⁴⁸¹ As previously mentioned, the Convention defines “universal design” in Article 2 as follows:

“[m]eans the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.

According to Article 9(2)(a), States Parties are obliged to adopt, promulgate, and monitor national accessibility standards based on the principle of universal design, as required by Article 4(1)(f) of the Convention. According to the Committee, all new goods, products and services have to be designed in a way that makes them fully accessible [for persons with disabilities] in accordance with the principles of universal design.⁴⁸² This is taken from Article 4(1)(f) of the Convention, which creates a general obligation for a States Party to:

“[u]ndertake or promote research and development of *universally designed* goods, services, equipment and facilities, as defined in Article 2 of the Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines”.

⁴⁷⁸ Micovic, M. A, *Consumer Right to Product Accessibility* Vol. 54(4), (2020), Zbornik Radova, pp. 1433 – 1452 at p. 1439.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Framework on Universal Design and Access (2020) at p. 169.

⁴⁸¹ Broderick, A, (2017) at p. 24 – 25.

⁴⁸² General Comment No. 2 of 2014 at p. 7.

States Parties must ensure that all goods, products, and services meet consistent accessibility standards.⁴⁸³ Compliance with such accessibility standards is intended to “[o]verhaul the environment in general and to ensure the transformation of social structures” in a consistent and progressive manner.⁴⁸⁴ The strict application of universal design ought to create unrestricted continuous movement for any individual with no barriers, as structures should “[b]enefit all, not merely accommodate the few”.⁴⁸⁵ Universal design, consequently, should result in a reduction in the need for individualised measures, such as reasonable accommodations.⁴⁸⁶ An illustration of this is the planning and construction of a building. Making a building universally accessible from the outset will cost less than having to subsequently adapt the building to make it accessible. Furthermore, the cost of adaptation (i.e. the subsequent removal of barriers) may not be used as an excuse to avoid the obligation to remove barriers to accessibility gradually.⁴⁸⁷

Universal design is based on seven principles and includes taking cognisance of the diverse access needs of persons. The seven principles can be summarised as follows:⁴⁸⁸ (i) equitable use - a design that is both useful and marketable; (ii) flexibility in use - a design that accommodates a wide range of preferences and needs; (iii) simple and intuitive use - a design that is easy to understand; (iv) perceptible information - a design that communicates necessary information as effectively as possible; (v) tolerance for error - a design that limits any hazards and adverse consequences resulting from an accident or an unintentional action; (vi) physical effort - a design that can be used efficiently, comfortably, and with minimum effort and; (vii) size and space for approach and use - a design that provides appropriate size and space for use irrespective of the body size, posture, or mobility of the person.

Applying universal design principles to product labelling means creating labels that are accessible and usable by all persons, including those with disabilities, whether the disability involves visual impairment or other types. Universally designed labels ensure that individuals with visual, cognitive, and other disabilities can independently access product information. By adopting universal design in labelling, duty bearers can better comply with the Conventions’ mandate and support the inclusion and equal participation of persons with disabilities. By clearly linking the principles of universal design from Article 2 of the Convention with the accessibility requirements in Article 9 of the Convention, one can argue that product labels must be universally designed to be universally accessible. When these principles are applied to product labelling, it becomes evident that universal design is not optional but a requirement for compliance with international legal standards. This approach not only ensures compliance with international legal standards but also promotes equal access to information for *all* persons, not just those with visual impairments.

3.2.6. Conclusion

Compliance with accessibility standards and the provision of reasonable accommodation can be seen as complementary measures that ensure *de facto* equality for persons with disabilities. The objective of analysing the accessibility obligation was to discern what the obligations of duty bearers are and to what extent such obligations can to be implemented. The objective of analysing reasonable accommodation was to determine the duty and defence, so as to determine when and in what instance an individual may request to be reasonably accommodated whilst the necessary accessibility standards are implemented. For purposes of

⁴⁸³ Gap Analysis Centre for Human Rights (2015) at p. 136.

⁴⁸⁴ Broderick, A, (2020) at p. 403.

⁴⁸⁵ Broderick, A, (2017) at p. 24 – 25; General Comment No. 2 of 2014 at p. 7.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Framework on Universal Design and Access (2020) at p. 176.

this thesis, the accessibility obligation relates to the universal design of product labels. In order to be able to participate in society equally and independently as a consumer of various products, persons with visual impairment need to be able to use products but in order to be able to use the product, they need to be able to intake the product's information. Determining the meaning of access and accessibility as well as a reasonable accommodation as found in a visually impaired person's right to equality⁴⁸⁹ will enable me to highlight the shortcomings South African product labelling laws as well as national standards relating to products and product labelling, which currently infringe on a visually impaired person's equality and consumer rights.⁴⁹⁰ The current application of the accessibility and reasonable accommodation measures will provide the foundation upon which the need and justification for legislative reform in Chapter 4 is discussed.

4. Protocol to the African Charter on Human and Peoples' Rights

To understand what can be considered reasonable in the African, and specifically South African, context, it is essential to conduct a comprehensive exploration of the Protocol. The Protocol, ratified by South Africa on 25 February 2020, plays a crucial role in contextualising international frameworks like the Convention to fit African realities. It introduces concepts such as reasonable accommodation and accessibility tailored to the socio-cultural and economic conditions prevalent across the continent. Addressing this gap is essential, particularly in scholarly discussions and policy comparisons, as it provides a nuanced perspective on disability rights that reflects local contexts and challenges. Incorporating the Protocol into such discussions enriches the understanding of what constitutes reasonable accommodation and accessibility within the African context, thereby ensuring more inclusive and relevant policy frameworks and scholarly analyses. The Protocol, officially known as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, is a landmark legal instrument adopted by the African Union (hereafter referred to as the "AU"). Adopted on 29 January 2018, during the 30th Ordinary Session of the AU Assembly of Heads of State and Government, the Protocol entered into force on 25 February 2019, following ratification by a sufficient number of AU Member States. Grounded in the principles of the African Charter on Human and Peoples' Rights, the Protocol aims to promote, protect, and ensure the full enjoyment of human rights and fundamental freedoms by persons with disabilities across Africa. It complements international frameworks such as the Convention and introduces specific provisions tailored to the African context. Key provisions of the Protocol include the promotion of reasonable accommodation, ensuring that persons with disabilities have equal access to rights and opportunities. It also emphasises accessibility in physical environments, information and communication technologies, and services, aiming to eliminate discrimination and facilitate full participation in society. The protocol guarantees political participation rights, including voting and candidacy, and promotes access to healthcare and rehabilitation services adapted to the needs of persons with disabilities. South Africa ratified the Protocol committing to align its laws and policies with the Protocol's provisions. Implementation and monitoring mechanisms, including reporting obligations to the African Commission on Human and Peoples' Rights ensure accountability and encourage collaboration among States Parties. Overall, the Protocol represents a significant advancement in disability rights in Africa, reflecting the AU's commitment to inclusivity, equality, and dignity for persons with disabilities on the continent. By acknowledging and integrating the Protocol into discussions on disability rights and standards, policymakers and advocates can better address the specific needs and challenges faced by persons with disabilities in Africa.4.1. The content of the Protocol: relevant articles

⁴⁸⁹ In terms of section 9 of the Constitution and Article 5 of the Convention.

⁴⁹⁰ Section 3, 22, 24, 49, 55, & 61 of the Consumer Protection Act, No. 68 of 2008.

4.1.1. Preamble

The preamble of the Protocol sets the stage for the Protocol’s objectives and underlying principles. It acknowledges the unique challenges faced by persons with disabilities in Africa and the necessity for specific measures to ensure their rights and inclusion.

The Preamble references international and regional human rights instruments, including the Convention, the African Charter on Human and Peoples’ Rights, and other relevant treaties. It underscores the necessity of complementing these instruments with a protocol tailored to the African context. The Preamble further notes that human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated, and that the rights of every individual are recognised in international human rights instruments. The Preamble acknowledges that persons with disabilities have inherent dignity and individual autonomy including the freedom to make own choices. The Preamble is cognisant of the importance of full and effective participation and inclusion of persons with disabilities in society. The Preamble recognises and appreciates the diversity and value of persons with disabilities whilst noting that many persons with disabilities experience extreme levels of poverty. The Preamble notes with concern that adequate effective measures have not been taken to ensure that persons with disabilities may exercise their full rights on an equal basis with others and that persons with disabilities continue to experience humans’ rights violations, social exclusion and prejudice within political, social and economic spheres. The Preamble further notes with concern that persons with disabilities face multiple forms of discrimination, high levels of poverty and great risk of violence, exploitation, neglect and abuse, specifically referring to women and girls with disabilities. The Preamble also recognises that families, guardians, caregivers and community play essential roles in the lives of persons with disabilities. The Preamble recalls the lack of a substantive binding African normative and institutional framework for ensuring, protecting and promoting the rights of persons with disabilities. The Preamble is conscious of the need to establish a firm legal African Union framework as a basis for laws, policies, administrative actions and resources to ensure the rights of persons with disabilities. Lastly, the Preamble notes that the rights and dignity of persons with disabilities should be promoted and protected.

4.1.2. Definitions

Among all the definitions contained in Article 1 of the Protocol, those of “persons with disabilities”, “reasonable accommodation”, and “universal design” are particularly relevant and will be discussed in subsections below.

“**[P]ersons with disabilities**” include those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others”.

...

“**[R]easonable accommodation**” means necessary and appropriate modifications and adjustments where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human and people’s rights”.

....

“**[U]niversal design**” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design, and shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.

4.1.3. General principles

Article 3 of the Protocol focuses on the general principles that underpin the Protocol. These principles guide the interpretation and implementation of the Protocol’s provisions and reflect the core values necessary for promoting and protecting the rights of persons with disabilities. These principles form the foundation of the Protocol, guiding the actions of State Parties in their efforts to create inclusive and equitable societies. Article 3 of the Protocol integrates respect for and protection of the inherent dignity, privacy, individual autonomy including the freedom to make one’s own choices, and independence of persons.⁴⁹¹ It states that the Protocol will be interpreted in accordance with the principles of non-discrimination;⁴⁹² full and effective participation and inclusion in society;⁴⁹³ respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;⁴⁹⁴ equality of opportunity;⁴⁹⁵ equality between men and women;⁴⁹⁶ the best interests of the child;⁴⁹⁷ respect for the evolving capacities of children with disabilities; and respect for the right of children with disabilities to preserve their identities.⁴⁹⁸

Article 3 of the Protocol specifically addresses accessibility and reasonable accommodation as general principles, with Article 3(f) relating to accessibility and Article 3(g) relating to reasonable accommodation. Accessibility emphasises the need to eliminate barriers that prevent persons with disabilities from participating fully in society. This encompasses physical accessibility, ensuring that buildings, transportation systems, and public spaces are designed or modified to be accessible to persons with disabilities. This includes features such as ramps, elevators, accessible restrooms, and appropriate signage. It also includes information and communication accessibility that involves making information and communication technologies accessible to persons with disabilities by providing alternative formats such as Braille, sign language interpretation, audio descriptions, and accessible websites. Furthermore, it refers to service accessibility ensures that services provided by public and private entities, including education, healthcare, and social services, are accessible to persons with disabilities. This might involve modifying policies, practices, and procedures to accommodate their needs.

Reasonable accommodation is another key principle highlighted the Protocol. It refers to the necessary and appropriate modifications and adjustments that ensure that persons with disabilities can enjoy and exercise their human rights and fundamental freedoms on an equal basis with others. This includes workplace accommodation, such as adjustments in the workplace to enable persons with disabilities to perform their jobs effectively, which could include flexible working hours, accessible workstations, and providing assistive

⁴⁹¹ Article 3(a) of the Protocol.

⁴⁹² Article 3(b) of the Protocol.

⁴⁹³ Article 3(c) of the Protocol.

⁴⁹⁴ Article 3(d) of the Protocol.

⁴⁹⁵ Article 3(e) of the Protocol.

⁴⁹⁶ Article 3(h) of the Protocol.

⁴⁹⁷ Article 3(i) of the Protocol.

⁴⁹⁸ Article 3(j) of the Protocol.

technologies. It also refers to educational accommodation which involves modifications in educational settings to ensure that students with disabilities can access the curriculum and participate fully in school activities, such as providing sign language interpreters, adapting teaching methods, and offering alternative formats for exams. Also, it encompasses public services and facilities accommodation which involves making necessary adjustments to ensure they are accessible such as training staff to better serve persons with disabilities and modifying public transportation to accommodate various impairments. Lastly, healthcare accommodation ensures that healthcare services are accessible and responsive to the needs of persons with disabilities, which could involve providing accessible medical equipment, ensuring effective communication between healthcare providers and patients with disabilities, and offering tailored health information.

4.1.4. General obligations

Article 4 of the Protocol aims to ensure that persons with disabilities enjoy their full range of human rights and freedoms on an equal basis with others. It sets out clear obligations for States Parties to take affirmative actions to eliminate discrimination, promote inclusion, and facilitate the active participation of persons with disabilities. To achieve this goal, all relevant legislative, administrative, and other measures must be taken for the implementation of the rights under the Protocol.

“[S]tates Parties shall take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to ensure, respect, promote, protect and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability, including by:

- a) Adopting appropriate measures for the full and effective implementation of the rights recognised in the present Protocol”.⁴⁹⁹

State Parties are furthermore instructed to mainstream disability in policies, legislation, development plans, programmes and activities.⁵⁰⁰ State Parties are to provide in their constitutions and legislation to abolish existing laws, regulations, customs and practices that constitute discrimination.⁵⁰¹ Along therewith is the obligation of modifying, outlawing, criminalising or campaigning against, as appropriate, any harmful practice applied to persons with disabilities.⁵⁰² State Parties shall promote positive representations and empowerment of persons with disabilities through training and advocacy.⁵⁰³ State Parties are to ensure that discrimination is eliminated by any person, organisation or enterprise.⁵⁰⁴ Importantly, State Parties are obliged to refrain from engaging in any act or practice that is inconsistent with the Protocol and must ensure that public authorities, institutions and private entities act in conformity with the Protocol.⁵⁰⁵ State Parties are simultaneously required to put in place adequate resources to ensure the full implementation of the Protocol.⁵⁰⁶ State Parties must ensure effective participation of persons with disabilities or their representative organisations including women and children with disabilities, in all decision-making processes including in the development and implementation of legislation, policies and administrative

⁴⁹⁹ Article 4(a) of the Protocol.

⁵⁰⁰ Article 4(b) of the Protocol.

⁵⁰¹ Article 4(c) of the Protocol.

⁵⁰² Article 4(d) of the Protocol.

⁵⁰³ Article 4(e) of the Protocol.

⁵⁰⁴ Article 4(f) of the Protocol.

⁵⁰⁵ Article 4(g) of the Protocol.

⁵⁰⁶ Article 4(i) of the Protocol.

processes to this Protocol.⁵⁰⁷ Lastly, where persons with disabilities are lawfully deprived of any rights or freedoms contained in the Protocol, State Parties must ensure that they are on an equal basis with others.⁵⁰⁸

Article 4 of the Protocol aims to ensure that persons with disabilities enjoy their full range of human rights and freedoms on an equal basis with others. States Parties are mandated to adopt comprehensive measures, including policy, legislative, administrative, institutional, and budgetary steps, to ensure the respect, promotion, protection, and fulfillment of the rights and dignity of persons with disabilities, without any form of discrimination based on disability. This includes abolishing discriminatory laws, regulations, customs, and practices, ensuring non-discrimination by any entity, and criminalising harmful practices. Moreover, States Parties must ensure that public authorities, institutions, and private entities act in accordance with the principles and provisions of the Protocol, allocating adequate resources to ensure its full implementation. Thus, Article 4 of the Protocol serves as a foundational framework for advancing disability rights.

4.1.5. Non-discrimination and the right to equality

The separation of “non-discrimination” and “equality” into two distinct articles in the Protocol, as opposed to the Convention where they are combined into one article, likely reflects regional considerations and the specific context in which the Protocol was developed. Non-discrimination is a fundamental principle under the Protocol. According to Article 5 of the Protocol, dealing with non-discrimination, Every person with a disability is entitled to enjoy the rights and freedoms recognised in the Protocol without any distinction of any kind, on any ground.⁵⁰⁹ State Parties are obligated to prohibit discrimination and ensure that persons with disabilities have equal and effective legal protection against discrimination on all grounds.⁵¹⁰ Additionally, States must take appropriate steps to provide specific measures aimed at eliminating discrimination against persons with disabilities.⁵¹¹ These measures are not considered discriminatory themselves. Furthermore, effective and appropriate measures should extend protection beyond persons with disabilities to include their parents, children, spouses, and other closely related family members, as well as caregivers or intermediaries.⁵¹² These individuals should not face discrimination based on their association with persons with disabilities. Not only may persons with disabilities not be discriminated against, but according to Article 6 of the Protocol, it is also made explicitly clear that they are equal before the law and have the right to equal protection and benefit of the law.⁵¹³ Equality includes the full and equal enjoyment of all human and people’s rights.⁵¹⁴ State Parties are also obliged take all appropriate measures, whether it be legislative, administrative or budgetary in order to promote equality for persons with disabilities.⁵¹⁵

To further advance equality and eradicate discrimination, States Parties are obligated to implement appropriate measures, including providing reasonable accommodation as defined in Article 1 of the Protocol. Reasonable accommodation involves making necessary adjustments and modifications to policies, practices, and environments to enable persons with disabilities to fully participate in society on an equal basis with others. These accommodations are crucial for levelling the playing field and eliminating barriers that could otherwise hinder equal enjoyment of rights by persons with disabilities. It is noteworthy

⁵⁰⁷ Article 4(j) of the Protocol.

⁵⁰⁸ Article 4(k) of the Protocol.

⁵⁰⁹ Article 5(1) of the Protocol.

⁵¹⁰ Article 5(2)(a) of the Protocol.

⁵¹¹ Article 5(2)(b) of the Protocol.

⁵¹² Article 5(2)(c) of the Protocol.

⁵¹³ Article 6(1) of the Protocol.

⁵¹⁴ Article 6(2) of the Protocol.

⁵¹⁵ Article 6(3) of the Protocol.

that the Protocol recognises the potential necessity of measures such as affirmative action to promote or achieve *de facto* equality between persons with disabilities and those without disabilities. Importantly, these measures aimed at addressing historical disadvantages and inequalities are not considered discriminatory under the Convention. This recognition underscores the Protocol's commitment not only to prohibiting discrimination but also to actively promoting the advancement of persons with disabilities, ensuring their equal participation and inclusion in all aspects of society.

4.1.6. Accessibility

According to Article 15(1) of the Protocol, every person with a disability has the right to barrier free “[a]ccess to the physical environment, transportation, information, including communications technologies and systems, and other facilities and services open or provided to the public”. Article 15(2) of the Protocol mandates that States Parties take reasonable and progressive measures to ensure that persons with disabilities enjoy their rights fully. These measures are specified to encompass both rural and urban settings, taking into consideration the diversity of populations.⁵¹⁶ They are required to address various aspects, including buildings, roads, transportation, and other indoor and outdoor facilities such as schools, housing, medical facilities, and workplaces.⁵¹⁷ The measures also extend to information and communication services, including sign language and tactile interpretations, as well as accessible formats like Braille and audio.⁵¹⁸ Additionally, they must encompass the provision of quality and affordable mobility aids, assistive devices or technologies, and forms of live assistance and intermediaries.⁵¹⁹ Lastly, the measures entail the modification of all inaccessible infrastructure and the universal design of all new infrastructure to ensure accessibility for persons with disabilities.⁵²⁰

The obligation of States Parties to ensure access to the physical environment, transportation, information and communication, and public services for persons with disabilities must be viewed through the lens of promoting equality and preventing discrimination. The concepts of “equality” and “non-discrimination” are deeply interconnected with “accessibility” within the framework of disability rights. Accessibility serves as a crucial mechanism for realising equality and preventing discrimination, illustrating the foundational principles of disability rights. This interconnectedness is evident in several significant ways. Firstly, accessibility measures are essential tools in providing persons with disabilities equal opportunities across various aspects of life, including education, employment, transportation, and access to public services. By removing physical, informational, and communication barriers that often hinder their full participation, accessibility measures promote equality, enabling persons with disabilities to engage on an equal footing with others. Secondly, initiatives aimed at improving accessibility play a key role in dismantling discriminatory barriers frequently encountered by persons with disabilities. These barriers, whether physical obstacles or information gaps, contribute to discrimination. Implementing accessibility measures systematically breaks down these barriers, thereby reducing discrimination against persons with disabilities. Thirdly, the concept of reasonable accommodation, integral to disability rights, inherently involves ensuring accessibility. Reasonable accommodation requires society to make necessary adjustments, such as providing accessible facilities and information in appropriate formats, to ensure that persons with disabilities can exercise their rights and freedoms on an equal basis with others. Fourthly, the legal framework governing disability rights consistently emphasises both accessibility and non-discrimination. The Protocol

⁵¹⁶ Article 15(2)(a) of the Protocol.

⁵¹⁷ Article 15(2)(b) of the Protocol.

⁵¹⁸ Article 15(2)(c) of the Protocol.

⁵¹⁹ Article 15(2)(d) of the Protocol.

⁵²⁰ Article 15(2)(e) of the Protocol.

underscores the importance of ensuring equal access for persons with disabilities while prohibiting discriminatory practices against them. Lastly, promoting inclusivity and active participation within the community hinges on accessibility. By eliminating barriers, accessibility empowers persons with disabilities to actively engage in various social, cultural, educational, and recreational activities, similar to opportunities available to the wider population. Denying access to these domains for persons with disabilities constitutes discrimination based on disability, expressly prohibited by Article 5 of the Protocol.

4.1.7. Health

Article 17(1) of the Protocol guarantees that every person with a disability has the right to the highest attainable standard of health. According to Article 17(2) of the Protocol, States Parties are obligated to take appropriate and effective measures to ensure that persons with disabilities enjoy access to health services on an equal basis with others. This includes ensuring that persons with disabilities receive the same range, quality, and standard of free or affordable healthcare and programs as provided to others.⁵²¹ It also involves providing health services specifically needed because of disabilities, or services aimed at preventing further disabilities.⁵²² States Parties must also prohibit discrimination by healthcare providers or insurers against persons with disabilities, ensuring that all health services are provided with free, prior, and informed consent, and use accessible formats for communication with persons with disabilities.⁵²³ Moreover, they must support persons with disabilities in making health decisions when necessary, ensure that healthcare provider training addresses disability-specific needs and rights, and ensure that formal and informal health services respect the rights of persons with disabilities.⁵²⁴

The right to health, as contained in Article 17 of the Protocol is critically important for several reasons. Article 17 ensures that persons with disabilities have equal access to healthcare services as everyone else. Historically, persons with disabilities have faced barriers to accessing healthcare due to physical, communication, and attitudinal barriers. This article mandates that such barriers be removed, ensuring that healthcare services are accessible and available without discrimination. Article 17(2)(a) of the Protocol guarantees that persons with disabilities receive healthcare services that are of the same range, quality, and standard as those provided to others. This provision is crucial in preventing disparities in health outcomes and ensuring that persons with disabilities receive adequate medical care tailored to their specific needs. Article 17(2)(b) of the Protocol underscores the importance of providing health services that prevent further disabilities or address disabilities specific to individuals. This includes interventions aimed at minimising the impact of disabilities and promoting overall well-being. The article explicitly prohibits discrimination by healthcare providers or insurers against persons with disabilities. This is essential for ensuring that persons with disabilities are treated with dignity and respect in healthcare settings and that their medical needs are met without prejudice. The article emphasises the right to free, prior, and informed consent in healthcare decisions for persons with disabilities. Additionally, it mandates support for persons with disabilities in making these decisions when necessary, ensuring their autonomy and agency in matters concerning their health. The requirement for healthcare providers to be trained on disability-specific needs and rights helps improve the competence of medical professionals in serving persons with disabilities effectively. This training fosters a healthcare environment that is sensitive to the diverse needs of patients with disabilities. Overall, Article 17 of the Protocol plays a pivotal role in promoting health equity, ensuring dignity and respect for persons with disabilities, and fostering inclusive healthcare systems that meet the needs of all individuals, irrespective of disability status.

⁵²¹ Article 17(2)(a) of the Protocol.

⁵²² Article 17(2)(b) of the Protocol.

⁵²³ Article 17(2)(c) – (d) of the Protocol.

⁵²⁴ Article 17(g) and (i) of the Protocol.

4.1.8. Access to information

Article 24(1) of the Protocol states that every person with a disability has the right to access information. Article 24(2) of the Protocol continues by stating that States Parties shall take policy, legislative, administrative and other measures to ensure that persons with disabilities can exercise these rights, on the basis of equality, including by:

- a) “[P]roviding information intended for the general public as well as information required for official interactions to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner, and without additional cost to persons with disabilities;
- b) Requiring private entities that provide services to the general public, including through print and electronic media, to provide information and services in accessible and usable formats for persons with disabilities;
- c) Recognising and promoting the use of sign languages and deaf culture; and
- d) Ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies”.

Access to information, as articulated in Article 24 of the Protocol, holds profound significance for persons with disabilities across various dimensions of their lives. Firstly, it empowers persons by facilitating informed decision-making in critical areas such as healthcare choices, educational pursuits, employment opportunities, and legal rights. This access ensures that persons with disabilities can actively participate in societal activities on equal footing with others. Secondly, accessible information is pivotal in supporting inclusive education practices, allowing persons with disabilities to access learning materials and engage effectively in educational environments. It ensures that educational resources are available in formats like Braille, audio, or digital text, thereby promoting equitable access to knowledge and skills acquisition. Moreover, in the realm of healthcare, accessible information about health conditions, treatments, and preventive measures enables persons with disabilities to manage their health effectively. It facilitates communication with healthcare providers and empowers persons to make informed decisions about their well-being, contributing to improved health outcomes. Legally, access to information about rights, laws, and procedures is crucial for advocating against discrimination, abuse, or exploitation. It equips persons with the knowledge needed to assert their rights and access legal protections, ensuring their safety and security within society. Technological advancements further enhance access to information, with tools like screen readers, captioning, and tactile interfaces making digital content and communication accessible to persons with disabilities. This technological inclusivity fosters greater social integration, raises awareness, and challenges societal stereotypes and misconceptions about disabilities. Ultimately, Article 24 of the Protocol underscores the fundamental right of persons with disabilities to access information in formats that accommodate their needs.

4.2. Implementation of the Protocol

The Protocol establishes a comprehensive framework for the implementation and enforcement of disability rights across African countries. States Parties are mandated to ensure the Protocol’s provisions are realised, requiring them to report periodically to the African Commission on Human and Peoples’ Rights on

legislative and other measures taken to uphold these rights in accordance with Article 62 of the African Charter on Human and People’s Rights.⁵²⁵ Article 62 of the African Charter reads as follows:

“[E]ach State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on legislative or other measures taken with a view to giving effects to the rights and freedoms recognized and guaranteed by the present Charter”.⁵²⁶

Additionally, each country must establish national mechanisms, including independent institutions, to monitor and evaluate the implementation of disability rights.⁵²⁷ The African Commission plays a pivotal role in interpreting the Protocol in alignment with the African Charter, providing guidance on its application.⁵²⁸ Disputes and matters requiring interpretation can be referred to the African Court on Human and Peoples’ Rights by the Commission, underscoring the judicial oversight and enforcement capabilities of the regional system.⁵²⁹

This multifaceted approach aims to bolster accountability, improve compliance with disability rights standards, and ensure that individuals have recourse against violations through regional mechanisms. These mechanisms collectively aim to strengthen the implementation and enforcement of the Protocol, fostering a framework where disability rights are respected, protected, and promoted across Africa. They promote accountability among States Parties and provide avenues for individuals and groups to seek redress in case of violations or inadequate implementation of disability rights.

⁵²⁵ Article 34(1) of the Protocol.

⁵²⁶ The African Charter on Human and Peoples’ Rights, adopted by the African Union, 27 June 1981, available at <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> (accessed 12 July 2024).

⁵²⁷ Article 34(2) of the Protocol.

⁵²⁸ Article 34(3) of the Protocol.

⁵²⁹ Article 34(4) of the Protocol.

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Chapter 4: How the legislative framework regulating product labelling of consumption-based, hazardous, poisonous, or inherently unsafe products unfairly discriminates against persons with visual impairment

1. Introduction

In Chapter 4, it address the third research question by determining which legislation, regulations, and standards regulate product labelling. Consumers expect and deserve health and safety protection against risks and harm found in medicines, food, beverages and hazardous, poisonous, and inherently unsafe products. Therefore, appropriate regulatory systems are essential, especially when consumers are particularly vulnerable. In South Africa, many regulatory systems relate to the labelling of these products to protect the consumer. To begin with, this chapter examines consumer protection laws to determine the rights of persons with visual impairment and how legislation may unfairly discriminate against them or infringe upon their rights. Subsequently, the various labelling regulations governing specific products are discussed, highlighting how they may also unfairly discriminate against persons with visual impairment. Legislation regulating product labelling in South Africa, especially when considering consumer protection legislation, is complex and must be looked at as a whole and not each part in isolation. Therefore, each legislative piece to be discussed regulates either consumer protection or the labelling of consumption-based, hazardous, poisonous, or inherently unsafe products.

2. Consumer Protection Act, No. 68 of 2008

The Consumer Protection Act (hereafter referred to as the “CPA”) provides consumers with a variety of rights related to their protection, particularly for those who may be vulnerable. The consumer has, *inter alia*, the right to equality and non-discrimination, disclosure and information,¹ fair, just, and reasonable terms and conditions² and the right to fair value, good quality and safety.³ Subsection 2 sets out the purpose of the provisions relating to the labelling of consumer products, and the safety of consumers - including the right to be protected against hazards and harm. The rationale for focusing on these specifically mentioned provisions in the CPA is not to analyse and determine the supplier’s liability but to enable me to highlight the shortcomings in realising its purpose, in addition to infringing on the rights of the consumers.

¹ Chapter 2, Part D of the CPA: section 22, the right to information in plain and understandable language; section 23, disclosure of price of goods and services; and section 24, product labelling and trade descriptions.

² Chapter 2, Part G of the CPA: section 49, notice the required for certain terms and conditions; section 50, written consumer agreements.

³ Chapter 2, Part H of the CPA: section 55, consumer’s rights to safe, good quality goods; section 58, warning concerning fact and nature of risks; and section 61, liability for damage caused by goods.

A “consumer” will be regarded as a visually impaired natural person exposed to, who can obtain, and purchase products in South Africa.⁴ “Accessible format” will mean information made available in an appropriate format.⁵ “Product information” concerns the information about the product and its contents. A “label” will be regarded as any product information written, printed, or graphic matter affixed to, applied to, attached to, embossed on, or appearing upon a package containing the product. On the other hand, a “leaflet” refers to any product information written, printed, affixed, applied, attached, or embossed on paper that provides information about the product or its contents and is either attached to or near the product.

The CPA’s promulgation attempts to promote a culture of consumer rights and responsibilities in an age of increasing consumerism. South Africa followed suit in the global realisation of the need for dedicated consumer protection legislation.⁶ The existing consumer protection framework had to be reviewed as the measures were outdated and fragmented.⁷ The CPA currently provides an extensive framework for consumer protection, which aims to develop and protect the rights of consumers.⁸ The CPA applies to every transaction for the supply and promotion of goods or services between a supplier and an occurring within the Republic unless the transaction is exempted from the application of the CPA.⁹ It will be assumed for this discussion that the CPA applies to the transaction and that the transaction is for the supply of goods marketed for human use to a consumer.¹⁰

The CPA aims to protect and develop consumers’ social and economic welfare, particularly vulnerable consumers.¹¹ Section 3(1)(a) – (h) of the CPA prescribes how these purposes are to be achieved. The CPA explicitly establishes an overall statement of purpose for achieving a consumer market that is “[f]air, accessible, efficient, sustainable and responsible for the benefit of consumers.”¹²

“[T]he Act now provides an extensive framework for consumer protection and aims to develop, enhance and protect the rights of the consumer and to eliminate unethical suppliers and improper

When discussing the CPA, I refer to persons with visual impairment as visually impaired consumers. A consumer is defined in the CPA as: “[i]n respect of any particular goods or services, means-

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5 (6) (b) to (e)”.⁵

⁵ Terras, M, Jarrett, D, & McGregor, S, *The Importance of Accessible Information in Promoting the Inclusion of People with an Intellectual Disability* Vol. 1, (2021), Disabilities, pp. 132 – 150 at p. 133, in which the authors write an appropriate format will include: “[...] [m]aking information easier for people with [...] disabilities, that firstly involves simplifying the linguistic message and secondly conveying the simplified message in different mode(s) of communication, i.e., not just the written words [...]”.

⁶ Glover, G, *Kerr’s Law of Sale and Lease*, (2014), (4th Ed.), at p.8.

⁷ W, Jacobs, P, N. Stoop, & R, van Niekerk, *Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis* Vol. 13(3), (2010), Potchefstroom Electronic Law Journal, pp. 302 – 398 at p. 304.

⁸ *Ibid.*

⁹ Section 5(1) of the CPA; see Glover, G, (2014) at p. 9; Stoop, P. N, *The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts* Vol. 18(4), (2015), Potchefstroom Electronic Law Journal, pp. 1092 – 1120 at p. 1092; W, Jacobs, P, N. Stoop, & R, van Niekerk, (2010) at p. 309 - 211.

¹⁰ According to section 1(a) of the CPA, “goods” includes anything marketed for human consumption.

¹¹ See section 3(1) of the CPA.

¹² Section 3(1)(a) of the CPA; De Stadler, E, & Du Plessis, J, in *Section 3: Purpose, Policy and Application of Act* Naudé, T, & Eiselen, S, (Eds.), *Commentary on the Consumer Protection Act*, (2015), at para 1.

business practices. [...] Section 3 sets out the purpose of the Act, which is to protect and develop the social and economic welfare of consumers, in particular, vulnerable consumers.”¹³

According to De Stadler & Du Plessis, section 3(1)(b)(i)–(iv) of the CPA does not contain a general unrestricted provision through which additional categories of vulnerable persons could be recognised. Instead, only persons who (i) are of low-income or persons from low-income communities; (ii) live in remote and rural areas; (iii) are minors, seniors, or other similarly vulnerable consumers; (iv) struggle to read and comprehend certain information due to low literacy, visual disability, or limited fluency in languages can be recognised as such.¹⁴ However, it should be noted that the wording of “other similarly vulnerable consumers” does, to an extent, broaden the scope of the provision. This means that additional vulnerable consumers, not explicitly mentioned in section 3(1)(b)(i)(iv) of the CPA, could theoretically be included. Even though persons with disabilities are not explicitly mentioned in section 3(1)(b)(iv) of the CPA, visually impaired consumers are. According to the authors, a note must be taken of two different sections concerning section 3(1)(b)(i) – (iv) of the CPA. These sections are section 40(2) and section 52(2)(b) of the CPA.¹⁵ Section 40(2) of the CPA provides that a supplier must not knowingly “[t]ake advantage of the fact that a consumer was substantially unable to protect the consumer’s interests because of physical [...] disability [...] inability to understand the language of an agreement or any other similar factor”. Section 52(2)(b) of the CPA provides that one of the factors which must be examined in a court of law when either considering the fairness of a provision or whether the supplier is guilty of unconscionable conduct is “[t]he nature of the parties to [the] transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position”. The CPA does not give vulnerable consumers, especially those who are visually impaired, any additional specific rights above others, but section 4(3) of the CPA does provide that where the CPA is ambiguous, the interpretation which best realises rights for persons with visual impairment must be preferred.¹⁶

Part D of Chapter 2 of the CPA provides the customer with the right to disclosure and information. Like everyone else, persons with visual impairments have the right to be informed and choose what they consume. South African consumer law must guarantee this right. It is, therefore, no coincidence that the CPA in section 3(1)(e) requires the promotion and advancement of improving consumer awareness and information. This encourages responsible and informed consumer choice and behaviour by consumers.¹⁷ Part D of Chapter 2, containing sections 22 to 24 of the CPA as discussed hereunder, must be read together to ensure and realise the consumer’s right to disclosure and information.

Section 22 of the CPA, a specific right embedded under the umbrella right of information and disclosure, contains the right to information in plain and understandable language.¹⁸ Section 22 of the CPA provides that any notice, document, or visual representation required in the CPA itself or any other law must adhere to the prescribed form. The prescribed form should be in “reasonably plain language”. Unfortunately, the CPA does not elaborate on the exact meaning thereof, and it is

¹³ W, Jacobs, P, N. Stoop, & R, van Niekerk, (2010) at p. 303 – 304.

¹⁴ Section 3(1)(b)(i) – (iv); De Stadler, E, & Du Plessis, J, (2017) at para. 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Section 3(1)(e) of the CPA.

¹⁸ W, Jacobs, P, N. Stoop, & R, van Niekerk, (2010) at p. 303.

subsequently presumed that “reasonably plain language” refers to, amongst others, “easily legible”; “clearly expressed”; “short” and without “Latin maxims”.¹⁹

“[I]t is language that is direct and straightforward, designed to deliver its message to its intended readers clearly, effectively and without fuss or *undue effort*. It avoids obscurity, inflated vocabulary and convoluted sentence construction and uses only as many words as are necessary. It is understood by the audience the first time they read or *hear it*” (own emphasis).²⁰

Much has been said about plain language in section 22 of the CPA,²¹ but the plain language in the context of a visually impaired consumer has yet to be addressed. The current interpretation of the CPA stipulates that a label, warning, notice, or visual representation is deemed to be in plain language if it is presented in a format understandable by an average person intended to receive it. This should allow them to comprehend the substance, importance, and meaning without encountering excessive difficulty. This excludes visually impaired consumers as the label, warning, notice, or visual representation may not be in a format that the average visually impaired consumer, for whom it is intended, can comprehend in terms of substance, importance and meaning. Section 22(2)(a) – (d) of the CPA reads as follows:

- “(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to-
- (a) the context, comprehensiveness and consistency of the notice, document or *visual representation*;
 - (b) the *organisation, form and style* of the notice, document or visual representation;
 - (c) the *vocabulary, usage and sentence structure* of the notice, document or visual representation; and
 - (d) the use of any *illustrations, examples, headings or other aids to reading* and understanding” (own emphasis).

The usage of the words display,²² visual representation,²³ visual illustration, examples, or other aids to reading confirms the requirement of sight. A visually impaired consumer can neither see nor read any displayed visual representations, illustrations, examples, or aids to reading. The CPA does not, as currently interpreted, determine that a label, warning, or notice is in plain language if it is presented in Braille or another legible format. This applies even when an ordinary visually impaired consumer from the intended class of consumers could be expected to comprehend the context, significance, and importance.

¹⁹ Gouws, M, *A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act* Vol. 22(1), (2010), South African Mercantile Law Journal, pp. 79 – 94 at p. 91.

²⁰ *Ibid.* at p. 81.

²¹ See Gouws, M, (2010) at p. 79 – 94; Newman, S, *The Application of the Plain and Understandable Language Requirement in terms of the Consumer Protection Act: Can We Learn from Past Precedent?* Vol. 33(3), (2012), *Obiter*, pp. 637 – 648; W, Jacobs, P, N. Stoop, & R, van Niekerk, (2010) at p. 530 – 540.

²² Display is defined in terms of the CPA as: “[i]n relation to any *goods*, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer; or in relation to a *price, mark, notice* or other visual representation, means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services”.

²³ A visual representation is defined in the CPA as: “[a]ny representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise, but does not include a trademark”.

To ensure compliance with section 22 of the CPA regarding labels, warnings, notices, or visual representations, guidance can be obtained from section 50(2)(b) of the CPA. This provision mandates that suppliers provide a written agreement in an accessible electronic format, indicating that technology can facilitate the production of a document or information in a “written” format. The Consumer Protection Act Regulations have also confirmed that “in writing” includes electronic information, which can be accessed through technological devices.²⁴ Thus, it is important to consider using technology as a potential solution to expand on the meaning of the requirement of “in writing” to include an accessible electronic format and not merely written words.²⁵ Regardless of the format used to make the label, warning, notice, or visual representation understandable for visually impaired consumers, the information must still be in plain language in order to comply with legal requirements. Failure to provide information in plain and understandable language would infringe upon a visually impaired consumer’s right to receive such information.

Section 23 of the CPA requires a supplier to *adequately* disclose the price of goods or services in a written manner expressed in South African Rands. A price is defined in the CPA as a representation required to be displayed.²⁶ It includes any marks, notices, or visual representations that may reasonably be inferred to indicate that the price displayed is the price of the product or service.²⁷ Displayed is defined in the CPA as a “[...] to place or publish anything in a manner that reasonably creates an association between that price [...] and any particular goods or services”. To comply with the CPA and adequately display the price, the price of the goods must be, amongst others, written on the label or reel of the goods: “[w]ritten, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, *label, package*, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale”. Visually impaired consumers are unable to benefit from the provision of price displays on goods and services, as it requires sight. Section 23 does not grant visually impaired consumers the right to be informed about the price of goods or services, in contrast to everyone else who enjoys this right.

According to Stoop, in interpreting section 23 of the CPA, consideration must be given to specific purposes set out in section 3 of the CPA, mainly the purposes relating to protecting the right to disclose the price of goods or services.²⁸ Such purposes include “[i]mproving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour”.²⁹ Stoop opines that if a price is adequately displayed as required in section 23 of the CPA, consumers can make informed and deliberate decisions without being pressured.³⁰ The price of a product is a crucial factor in the purchasing decision, particularly for low-income consumers. It enables vulnerable consumers, including those with disabilities, to compare prices and make informed

²⁴ Consumer Protection Act Regulations, GN R.293 of 1 April 2011 (Government Gazette No. 34180).

²⁵ For instance, providing an electronically scannable code on a label, warning, notice, or visual representation is a possible format that can be utilised. See Laura Ferrara, an Italian EMP, stating that the European Union should consider the use of modern technologies capable of implementing an audio – narrating label for food products in the following article: *EU urged not to overlook blind people in new food labelling rules*, EURACTIV, (2020), <<https://www.euractiv.com/section/agriculture-food/news/eu-urged-not-to-overlook-blind-people-in-new-food-labelling-rules/>> (accessed 18 November 2022).

²⁶ Section 1 of the CPA.

²⁷ *Ibid.*

²⁸ Stoop, P, in *Section 23: Right to disclosure and information* Naudé, T, & Eiselen, S, (Eds.), *Commentary on the Consumer Protection Act*, (2017), at para. 12.

²⁹ Stoop, P, (2017) at para 12; section 2(1) of the CPA.

³⁰ Stoop, P, (2017) at para 2.

decisions. Moreover, under section 23(6) of the CPA, a supplier cannot demand that a consumer pay more than the displayed price for any goods or services. If more than one price is displayed, the supplier cannot require payment of the higher price. Unfortunately, the visually impaired consumer is not protected by this provision as the display method is futile for them. For instance, when a visually impaired consumer is buying items independently at a store, and there are two prices presented, the supplier only needs to display the prices in an “adequate” way, not in an accessible way. As a result, the visually impaired consumer may not be able to differentiate between the prices shown since they are unable to see either of them. This leaves the vulnerable consumer without the same protection and rights as sighted consumers.

Section 24 of the CPA provides for product labelling and trade descriptions. This provision aims to protect consumers from misleading trade descriptions or modified goods and requires the labelling of products.³¹ Section 24(4) and (5) of the CPA gives the Minister the authority to prescribe additional labelling requirements in regulation of the Act.³² Section 24(4) and (5) of the CPA specify the regulations concerning trade descriptions and product labelling.³³ Regulations 1 and 6 of the Consumer Protection Act Regulations confirm that “in writing” must be used, meeting the requirements of section 22 of the CPA, and must be applied to goods in a *conspicuous and easily legible manner*.³⁴ For purposes of safeguarding consumer rights regarding product labelling, the CPA provides for “[i]mproving consumer awareness and information and encouraging responsible and informed choice behaviour” in section 3(1)(e) of the CPA. This objective can be said to relate to the overall right to disclosure of information in Chapter 2, Part D of the CPA. It is important to note that the requirement to make informed choices arose from concerns about health and safety. Therefore, accurate labelling is of the utmost importance.³⁵ Once again, the inadequate labelling of products creates an inequality for visually impaired consumers, which means that they are not granted the same rights and safeguards as those who are sighted. Proper product labelling is essential, especially for the health and safety of visually impaired consumers.

The purpose of Sections 23 and 24 of the CPA is to serve as a communication tool for consumers regarding products when disclosure is necessary, either with regard to price or product labelling. This applies to consumers in general, particularly those who are vulnerable, as these sections aim to provide consumers with crucial information about the products.³⁶ A communication tool that visually impaired consumers do not currently have access to. It is suggested that section 3(1)(e) of the CPA should be interpreted alongside section 22 of the CPA, as consumers have the entitlement to obtain information in clear and comprehensible language regarding the sufficient disclosure of the price of goods in section 23 of the CPA. This applies to the labelling and trade descriptions of products in section 24 of the CPA as well.³⁷ Regarding section 23 of the CPA, the CPA requires a supplier to “adequately display the price” and that the price of the goods must be, amongst others, “written on the label or reel of the goods”. In terms of section 24 of the CPA, a product label has been confirmed to be “in writing” and must be applied to goods “in a conspicuous and easily legible

³¹ The Consumer Protection Act Regulations (2011) are salient on what is regarded as a label – it merely requires a label to be on certain goods.

³² Reg. 6 of the Consumer Protection Act Regulations (2011).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Kamanga, V, *Product labelling and trade description: Failure to warn and the Consumer Protection Act 68 of 2008* (2017), University of Pretoria, pp. 1 – 108 at p. 42.

³⁷ *Ibid.*

manner”. “In writing” can be defined as any sequence of letters, words, or symbols marked on a surface, but for our purposes, usually paper.³⁸ In the most general sense, “writing” denotes a document, manuscript or any other printed format, as opposed to mere spoken words. However, the current meaning attached to writing seems not to include Braille or any other accessible format, and the latter conclusion is based on the fact that no reference is made thereof in any relevant authoritative textbook, case law, or journal articles. Writing, as understood in its “natural meaning”, does not provide visually impaired consumers equal protection as sighted consumers.

Notably, if a document or information is in an electronic format, it is also considered “in writing”.³⁹ For a visually impaired consumer to access a product’s label or price, it must be made available in a manner that is accessible to them.⁴⁰ Currently, producing, publishing, or presenting a label or price consists of doing so in the “natural meaning” of “in writing”. It is, however, possible for a product’s label or price to be produced, published, or presented in a manner that is not in the natural meaning of writing. When read in conjunction with section 22 of the CPA, a product’s label or the price can become accessible to visually impaired consumers through the use of, for instance, technological aids. It enables them to consume such information, as the information in an electronic format will be considered to be “in writing”.⁴¹ Therefore, with the assistance of technological aids and in conjunction with section 22 of the CPA, labels and prices can be made accessible to visually impaired consumers.⁴² This approach is in line with the goal of universal design, which seeks to develop products and, in this case, labels that are accessible to all consumers. If products and labels are designed with universal accessibility in mind, both consumers with disabilities and those without will be able to access them.

Part G of Chapter 2 of the CPA relates to the consumer’s right to fair, just, and reasonable terms and conditions. In section 50 of the CPA, the consumer has a right to receive a consumer agreement “in writing”. In section 50(2)(b) of the CPA, the supplier must provide the consumer with a free copy of the agreement. As previously mentioned, the phrase “free electronic access to a copy” can be utilised to fulfil the visually impaired consumer’s right to receive a consumer agreement. An electronic copy is more easily accessible for visually impaired consumers and could be of practical benefit to the consumer rather than having the agreement solely in written form. Unfortunately, there are two matters of concern that need to be addressed. Firstly, section 50 of the CPA does not indicate that a failure to provide “free electronic access to a copy” that complies with section 22 of the CPA prevents the terms referred to from being incorporated into the agreement.⁴³ Naudé suggests that section 50 of the CPA should be amended to clarify this. Secondly, section 50(2)(b) of the CPA does not indicate when such a copy must be provided.⁴⁴ Naudé argues that an unreasonable delay in providing a consumer with a copy constitutes prohibited conduct under section 4(5)(a) of the CPA, as this delay could be described as “[c]onduct contrary to or calculated to frustrate or defeat the purposes and policy of this Act”.⁴⁵ As such, the supplier could face the

³⁸ See *Jafra v Ezemvelo KZN Wildliffe* 2008 (10) BLLR 954 (LC) at para. [71].

³⁹ Reg. 1 of the Consumer Protection Act Regulation (2011).

⁴⁰ The price can be disclosed in an accessible manner on or near the product.

⁴¹ Reg. 1 of the Consumer Protection Act Regulation (2011).

⁴² Such technological electronic aids can, for instance, include a code that can be scanned and opened in an application on a technological device that can read aloud the information contained on the label or price.

⁴³ Naudé, T, in *Section 50: Written consumer agreements* N Naudé, T, & Eiselen, S, (Eds.), *Commentary on the Consumer Protection Act*, (2019), at para. 4.

⁴⁴ *Ibid.* at para. 2.

⁴⁵ *Ibid.*

consequences of prohibited conduct, such as an administrative fine imposed under section 112 of the CPA.⁴⁶

Part H of Chapter 2 of the CPA relates to the right to fair value, good quality and safety. According to De Stadler & Du Plessis, even though the Preamble of the CPA contains a reference to the protection of consumers against “hazards to their well-being and safety”, neither the long title nor section 3 containing the purpose of the CPA has a similar statement therein. However, it is clear from the provisions contained in Chapter 2, specifically Part H of the CPA, that the promotion of consumer safety is a purpose which the CPA aim to achieve.⁴⁷ According to the author’s commentary on the CPA, even if a purpose is not articulated in the long title, Preamble, or the purpose of the CPA, it could still be deduced from the content of a provision.⁴⁸

Part H of the CPA contains its definitions for the terms “hazard” and “unsafe”, which apply to that section of the CPA when they are used in relation to any goods, components of goods, or services. In terms of section 53(1)(c) of the CPA, a “hazard” refers to “[a] characteristic that has been identified or declared as a hazard in terms of any other law; or poses a significant risk of personal injury to any person, or property damage, when the goods are used”. In section 52(1)(d) of the CPA, the term “unsafe” means that “[d]ue to a characteristic, failure, defect or hazard, goods present an extreme risk of personal injury or property damage to the consumer or to other persons”.

Section 55 of the CPA contains the consumer’s right to safe quality goods. This includes the right to receive goods that are reasonably suitable for their intended purposes and of good quality. These goods should be in proper working condition and free of defects.⁴⁹ The consumer’s entitlement to secure safe and high-quality goods includes the right to receive goods that are functional and durable under regular use and in consideration of all relevant conditions surrounding their provision.⁵⁰ De Stadler & Naudé write in their commentary on the CPA that durability is an essential component of quality, which is absent when goods “[b]reak or show an inordinate amount of wear and tear before a reasonable time has lapsed”. They also argue that including both “useable” and “durable” in section 55(2)(c) of the CPA appears redundant, as the durability of goods inherently encompasses their usability over a period of time.⁵¹ While it could be argued that usefulness is inherently part of the durability of goods, it is not accurate to consider the inclusion of both terms in section 55(2)(c) of the CPA as redundant, as they carry separate meanings and implications. A product might be durable, but it does not mean it is useful. The inverse is also true. A product might be useful,⁵² but it does not necessarily mean it will be durable.⁵³ For a visually impaired consumer to be able to equally and independently exercise their right to receive safe, good quality goods, they need to be able to receive usable goods, despite their durability. Products will, however, only be usable, irrespective of their durability, if the product’s information on the label or leaflet is known to the consumer. For consumers with visual impairments, products are unusable

⁴⁶ *Ibid.* at para. 4; The CPA regards prohibited conduct as an act or omission in contravention of the CPA.

⁴⁷ De Stadler, E, & Du Plessis, J, (2017) at para. 11.

⁴⁸ *Ibid.*

⁴⁹ Section 55(2)(b) of the CPA.

⁵⁰ Section 55(2) of the CPA.

⁵¹ De Stadler, E, & Naudé, T, in *Section 55: Consumer’s rights to safe, good quality goods* Naudé, T, & Eiselen, S, (Eds.), *Commentary on the Consumer Protection Act*, (2022), at para. 23.

⁵² “Usable” is defined by the Oxford English Dictionary as “[a]ble to use or fit to be used”.

⁵³ “Durable” is defined by the Oxford English Dictionary as “[a]ble to withstand wear, pressure, or damage; hard-wearing”.

if they cannot determine the product's name, understand how to use it accurately, access critical warning information, or receive essential details such as the expiration date.

Furthermore, concerning the consumer's right to safe, good-quality goods, if a consumer has specifically informed the supplier about a particular purpose for acquiring or using the goods, the consumer has the right to expect that the goods are reasonably suitable for that particular purpose. This right applies when the supplier either (i) offers to supply such goods in its ordinary course of business or (ii) acts as if he is well-informed about the use of the goods.⁵⁴ To determine whether specific goods satisfy the requirements of sections 55(2) and 55(3) of the CPA, all circumstances of the supply of the goods must be considered.⁵⁵ These circumstances include, but are not limited to, how the goods were *marketed, packaged and displayed*,⁵⁶ as well as their intended purposes. Visually impaired consumers will not be afforded the same protection under this section if the goods are packaged or displayed exclusively in a written format that is not accessible to them. When considering cases where warnings and instructions were inadequate or missing, section 55 of the CPA should be read in conjunction with section 56(2) of the CPA. Similarly, when harm arises due to the supply of faulty or defective products, section 55 of the CPA should be read alongside section 61 of the CPA.⁵⁷

According to section 58(1) of the CPA, if a risk could result in severe injury or death⁵⁸, a supplier of any activity or facility is required to communicate the nature of that risk, its specific details, and its potential effects to consumers in a prescribed form and manner. This communication should adhere to the standards outlined in section 49 of the CPA. The consumer must be provided with a reasonable opportunity to receive and comprehend the notice⁵⁹ by agreeing to it through the means of signature, initialling, or other actions that acknowledge receipt of the notice, awareness of the risk, and acceptance of that risk.⁶⁰ The legislature did not consider visually impaired consumers, as these persons are unable to comprehend the notice and give their assent to it if it is in written form. In terms of section 58(2) of the CPA, a consumer who packages any hazardous or unsafe goods must display on or within that packaging a notice that meets the requirements of section 22 of the CPA and any other applicable standards⁶¹ that provide the consumer with adequate instructions for the safe handling and use of those goods.⁶² This section does not provide visually impaired consumers with equal protection unless the notice is presented in a format that is accessible to them, as opposed to solely in plain language and in writing. Section 58 of the CPA should also be read in conjunction with section 61 of the CPA, as liability can arise for harm caused by packaged goods that have not provided adequate instructions or warnings of any risks present.

In terms of section 61(1)(c) of the CPA, the producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of *inadequate instructions or warnings* provided to the consumer about any hazard arising from, or associated with the use of any

⁵⁴ Section 55(3) of the CPA.

⁵⁵ Section 55(4) of the CPA.

⁵⁶ Section 55(4)(a) of the CPA.

⁵⁷ Section 56(2) of the CPA indicates that “[w]ithin six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, *if the goods fail to satisfy the requirements* and standards contemplated in Section 55”; De Stadler, E., & Naudé, T., (2022) at para. 43.

⁵⁸ Section 58(1) of the CPA.

⁵⁹ Section 49(5) of the CPA.

⁶⁰ Section 49(2) of the CPA.

⁶¹ “Other applicable standards” may refer to section 24 on product labelling and trade descriptions.

⁶² Section 58(3) of the CPA provides that section 58(2) of the CPA does not apply should a largely similar label or notice have been applied in terms of any other Regulation. Medicine issued with patient information leaflets can be one such example in which the packager does not bear the onus to display adequate instructions on or in the packaging.

goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor, or retailer. The distinction between instructions and warnings should be noted.⁶³ The purpose of a warning is to inform the consumer of a risk, while instructions direct the consumer on how a product may be used in a way that will avoid that risk.

“[A] warning should be clear and straightforward, neither understating the risk nor obscuring it in levels of detail that cause their impact to be lost. Instructions should similarly be framed in terms which the average consumer of that product will understand and be capable of following through. Where instructions for safe use are required, a warning may also be necessary to alert consumers to the danger of not following the instructions”.⁶⁴

Nonetheless, the producer or importer, distributor or retailer of any goods can be held liable for harm caused by not having adequate instructions or warnings on the product that a visually impaired person could read and comprehend. Section 61(1)(c), however, refers to a situation where harm has been suffered due to an inherently dangerous product. This situation could have been prevented if the product had been made secure by appropriate instructions on its safe use or a warning that *was adequate to its risk*.⁶⁵ An example is [toxic] cleaning substances. Even though such products are hazardous, they are undoubtedly household products used by visually impaired consumers. Such a cleaning product presents a level of risk even if appropriately packaged, bearing a sufficient warning of toxicity and directions. Where adequate instructions or warnings are provided, the goods are not to be regarded as unsafe or defective for section 61(1), and “[t]he ultimate responsibility for accident prevention in effect shifts to the consumer”.⁶⁶ However, suppose it does not have adequate instructions or warnings, the goods will be regarded as unsafe for section 61(1), and the producer, importer, distributor, or retailer of any goods can be held liable for the harm caused.

The CPA was created to safeguard vulnerable consumers, particularly those with visual impairments, who are specifically mentioned in its purpose. However, the CPA falls short of its intended goal, as visually impaired consumers do not always receive equal treatment or protection in specific instances where harm is caused. Despite the CPA’s Preamble, emphasising the need to protect consumers from health, safety, and well-being hazards, it fails to comply with its stated purpose, resulting in violations of rights and unfair discrimination against visually impaired consumers.

3. South African, European Union, and Colombian legislation regulating product labelling

The South African and European Union legislation regulating the labelling of products that (i) can be consumed, (ii) are hazardous, (iii) are poisonous, or (iv) are inherently unsafe to use will be discussed in subsection 3. The labelling requirements for these products overlook a crucial aspect: they only protect literate, sighted persons. A visually impaired person can encounter all these products, which could harm their well-being, health, and safety. This subsection, therefore, turns to the current labelling requirements contained in South African law. This subsection will also identify how the labelling requirements in the specified legislation unfairly discriminate against

⁶³ De Stadler, E, & Naudé, T, in *Section 61: Liability for damage caused by goods* Naudé, T, & Eiselen, S, (Eds.), *Commentary on the Consumer Protection Act*, (2022), at para. 6.

⁶⁴ *Ibid.* at para. 4.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

persons with visual impairment while identifying which aspects of the European Union and Colombian legislation can be borrowed from and implemented in South Africa.

In October 2005, the European Union implemented a law that mandated all pharmaceutical products to have Braille on their packaging, making them a trailblazer in this area. This move not only ensured accessibility for persons with visual impairment but also sparked the idea of incorporating Braille on packaging and consumables for other countries and pharmaceutical companies to follow. Despite not sharing the same socio-economic status as South Africa, the European Union is still a valuable source for demonstrating the correct way to incorporate Braille into products. Although numerous countries encourage companies to include Braille on medicinal products, they need to mandate Braille on these products as effectively as the European Union does. Additionally, it's worth noting that Colombia is one of the few countries with a similar socio-economic status as South Africa, such as India and Brazil, that enforces the provision of Braille and accessible labelling, respectively.⁶⁷ Currently, in Brazil, the Brazilian Health Regulatory Agency is only discussing the inclusion of necessary product information for safe consumption without mandating any accessible information for persons with visual impairment. Similarly, India does not have such a mandate.⁶⁸

Colombia and South Africa have several similarities, including a shared history of European colonisation that has had a notable influence on their societies and cultures. Both nations also exhibit high levels of inequality, with marked disparities in income, wealth, and access to essential services. Additionally, both countries encounter similar economic challenges, such as elevated rates of unemployment, poverty, and informal labour. Regrettably, there are only a few countries with a similar socio-economic status as South Africa that require accessible labelling, and among those few countries is Colombia. Colombia published Law 2265 in 2022 to introduce the Braille reading and writing system for, *inter alia*, the packaging of food products, cosmetics, and medical products. Law 2265 aims to ensure access to information for persons with visual impairments through the implementation of mobile applications, other available technological, digital, and informative media, or the Braille system.⁶⁹ Colombia is a suitable reference point for implementing Braille labelling or utilising technological, digital, and informative media, as it shares a socio-economic position with South Africa while mandating accessible labelling.

3.1. South Africa

3.1.1. Medicines and related substances

3.1.1.1. Medicines and Related Substances Act, No. 101 of 1965

⁶⁷ Among the countries with a similar socio-economic status to South Africa, such as Brazil, Colombia, Mexico, Turkey, Thailand, the Philippines, Egypt, Peru, Indonesia, and Ukraine, only Colombia mandates accessible labelling.

⁶⁸ *Colombia introduces labelling in Braille*, FJS International Solutions, (2022), <<https://fjsinternationalsolutions.com/colombia-introduces-labelling-in-braille>> (accessed 22 March 2023).

⁶⁹ *Ibid.*

The Preamble of the Medicine and Related Substances Act (hereafter referred to as the “*Medicines Act*”) makes provision for the registration and control of medicines and scheduled substances for the protection of the general public.⁷⁰ Before any medicine or scheduled substance may be supplied to the public, it must be certified. It may also only be sold by certain classes of persons.⁷¹ To ensure the protection of the general public, risks are minimised by strictly regulating any medicine⁷² or scheduled substance.⁷³ This includes restricting who can obtain these products or substances,⁷⁴ disclosing the source from which they were obtained,⁷⁵ specifying how and when they can be acquired,⁷⁶ recording the date and quantity of sales, and enforcing penalties for possession or use outside statutory provisions, which may include criminal charges.⁷⁷ Furthermore, complying with mandated labelling requirements also promotes entities’ responsibility to provide accurate and compliant labels on the containers of medicines and scheduled substances, package inserts, and patient information leaflets.⁷⁸

The Medicines Act defines scheduled substance as “[a]ny medicine or other substance prescribed by the Minister under section 22A”⁷⁹ and defines medicine as follows:

“[m]edicine”—

- (a) means any substance or mixture of substances used or purporting to be suitable for use or manufactured or sold for use in—
 - (i) the diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof in humans; or
 - (ii) restoring, correcting or modifying any somatic or psychic or organic function in humans; and
- (b) includes any veterinary medicine”.⁸⁰

Section 22A of the Medicines Act regulates medicines and scheduled substances. In terms of section 22A(1) of the Medicines Act, no person may sell, have in their possession, or manufacture any medicine, scheduled substance, or medical device except in accordance with the prescribed conditions. In terms of section 22A(2) of the Medicines Act, the Minister may, on the recommendation of the South African Health Products Regulatory Authority (hereafter referred to as the “*Authority*”), prescribe the medicine and scheduled substances referred to in section 22A of the Medicines Act. Section 37A of the Medicines Act also empowers the Minister, again on the recommendation of the Authority, to amend the Schedules by notice in the Government Gazette. The official Schedules shall, therefore, always be those published or amended in the Government Gazette. All medicines are subject to a scheduling process based on the substances’ active pharmaceutical ingredients.⁸¹ The primary consideration in scheduling a substance is its safety in

⁷⁰ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at para. [24] & [74] – [76] (hereafter referred to as “*Prince*”). According to the Preamble of the Medicines Act, it is also “[t]o provide for the registration of medicines and related substances intended for human and for animal use, to provide for the establishment of a Medicines Control Council and to provide those labels be approved by the council”.

⁷¹ *Prince* at para. [24] & [74] – [76]; See the definitions in terms of the Medicines Act.

⁷² Section 1 of the Medicines Act.

⁷³ Section 1 of the Medicines Act defines it as follows: “[m]eans any medicine or other substance prescribed by the Minister under section 22A”. Under section 22A, there are 8 scheduled substances.

⁷⁴ *Prince* at para. [73].

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* See section 29 – 30 of the Medicines Act.

⁷⁸ Gordhon, Y, *Clean, concise and compliance* (2020), PSC Review, pp. 12 – 13 at p. 13.

⁷⁹ *Names and scheduling*, South African Health Products Regulatory Authority, (2022), <<https://www.sahpra.org.za/names-and-scheduling/>> (accessed 15 November 2022).

⁸⁰ Section 1 of the Medicines Act.

⁸¹ *Names and scheduling*, South African Health Products Regulatory Authority, (2022), <<https://www.sahpra.org.za/names-and-scheduling/>> (accessed 15 November 2022).

relation to its therapeutic indications.⁸² Substances may be listed in one or more of the eight Schedules.⁸³ The following eight Schedules are in terms of section 22A of the Medicines Act, prescribed by the Minister of Health on the recommendation of the Authority.

Schedule 0 substances refers to substances or mixtures that include salts and esters.⁸⁴ In terms of Schedule 0, substances are excluded when specifically packaged, labelled, or sold, and used for industrial purposes, if the products have no pharmacological action or medical purpose if they are applied as cosmetics in terms of the Foodstuffs, Cosmetics and Disinfectants Act,⁸⁵ and if they are to be ingested by humans or animals as food. Schedule 1 to 4 substances are excluded when specifically packaged, labelled or sold and used for industrial purposes that have no pharmacological action or medical purpose and are used in analytical laboratory processes.⁸⁶ Schedule 1 to 4 substances refers to substances or mixtures that include salts and esters.⁸⁷ Schedule 5 to 8 substances include (i) all preparations or mixtures of substances that are chemically related and incorporate structural fragments in its structure, (ii) exhibit “pharmacodynamic properties” similar to the salts and ethers of such substances, (iii) all preparations and mixtures of substances not expressly excluded in the Schedule, and (iv) all homologues of listed substances.⁸⁸ Schedule 5 substances listed in the schedule are subject to the provisions of the Convention on Psychotropic Substances of 1971.⁸⁹

In terms of section 18 of the Medicines Act, no person may sell any medicine or scheduled substance unless the immediate container or package bears a label, package inserts, and patient information leaflets stating the prescribed particulars. Section 1 of the Medicines Act defines a label as follows: “[w]hen used a verb, means as a brand, mark or otherwise designate or describe, and when used as a noun, means any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with and referring to any article or the package containing any article”. Section 18 (5) of the Medicines Act gives the Minister the authority to prescribe additional labelling requirements in a regulation of the Act. In regulation 10 of the General Regulations to the Medicines Act (hereafter referred to as the “*General Regulations*”),⁹⁰ it is stated that certain information must appear on every medicine container, package insert, and patient information leaflet in *clearly indelible letters and font size*, in *English*, and at least *one other official language* when the medicine is intended for human use and consumption. The container, package, package inserts, and patient information leaflets must also bear *clear instructions* and *warning signs*.⁹¹

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Medicines and Related Substances Act: Schedules, GN R.755 of 23 May 2019 (Government Gazette No. 42477) at p. 5; Consolidated Schedules of Medicines and Related Substances Act, No. 101 of 1965 (2022) Department of Health pp. 1 – 196 at p. 1 – 2.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Medicines and Related Substances Act: Schedules, GN R.755 of 23 May 2019 (Government Gazette No. 42477) at p. 7 – 11; See the Consolidated Schedules of Medicines and Related Substances Act, No. 101 of 1965 (2022) Department of Health at p. 30 – 57 for all the substances that fall within Schedule 2; at p. 58 – 95 can be referred to for observation of all the substances that fall within Schedule 3; at p. 96 – 163 can be referred to for observation of all the substances that fall within Schedule 4.

⁸⁸ See the Consolidated Schedules of Medicines and Related Substances Act, No. 101 of 1965 (2022) Department of Health at p. 164 – 178 for all the substances that fall within Schedule 5; at p. 179 – 188 can be referred to for observation of all the substances that fall within Schedule 6; at p. 189 – 195 can be referred to for observation of all the substances that fall within Schedule 7; at p. 196 can be referred to for observation of all the substances that fall within Schedule 8.

⁸⁹ Consolidated Schedules of Medicines and Related Substances Act, No. 101 of 1965 (2022) Department of Health at p. 164.

⁹⁰ Medicines and Related Substances Act: General Regulations, GN R.859 of 25 Augustus 2017 (Government Gazette No. 41064).

⁹¹ See Reg. 10(1)(i); Reg. 10(1)(t); Reg. 10(1)(u); Reg. 10(1)(v); Reg. 10(1)(w); Reg. 10(1)(x); Reg. 10(1)(y); Reg. 10(1)(z); and Reg. 10(1)(z)(cc)(iv) of the General Regulations (2017).

Interestingly, with regards to patient information leaflets, regulation 12(1) of the General Regulations states that each medicine must be accompanied by a leaflet. Regulation 12(2) of the General Regulations prescribes what must be included in the leaflet in English and one other official language. Unlike regulation 10 of the General Regulations, regulation 12(3) of the General Regulations states that the information contemplated in the leaflet may also be provided in an electronic format to enable its accessibility for persons with disabilities. The utilisation of the term ‘may’ in place of ‘must’ within the regulation notably indicates that ensuring the accessibility of the leaflet is not obligatory. Manufacturers have the authority to choose whether to comply with the requirement. While the inclusion of ‘may’ allows for flexibility, it also signifies that the idea of accessibility for medicines and scheduled substances has been considered, yet implementation remains optional. This issue raises concern as it implies a recognition of the needs of visually impaired persons, yet it falls unjustly short of translating that acknowledgement into tangible accessibility measures.

The information on every medicine container, package, package insert, and patient information leaflet is vital to the person intending to consume it. As medicines have inherent risks, it is imperative to provide instructions and warnings.⁹² Currently, the legislation regulating the labelling of medicine and scheduled substances goes into extreme depth and detail to ensure that all possible relevant information is contained within, on, or near every medicine container, package, package insert, and patient information leaflet. Furthermore, the Medicines Act and its regulations have a precise manner in which such information must be conveyed to the user of the product. Unfortunately, the information mandated by the labelling requirements in the Medicines Act and its regulations is only usable and accessible to [literate and illiterate] sighted persons.

Patients with visual impairments are most likely to have difficulty in managing medications when compared to people with normal vision. It was recorded in studies that persons with visual impairment using medicinal products and scheduled substances had three main obstacles. They were unable to read [or see] the information on the label and leaflet; they did not know the name of the medication; and they did not inform their healthcare provider when faced with difficulties in managing their medication.⁹³ Persons with visual impairment face considerable challenges in self-administering their medication.⁹⁴ Firstly, most persons with visual impairment rely entirely on a caregiver. This is a matter concerning a person’s right to equality, as labels are not available to them purely based on their disability of sight. Furthermore, it involves a person’s right to privacy, as some medications may be for ailments the visually impaired person would wish to keep to themselves. It is also highly problematic that they are at severe risk of consuming incorrect medication and dosage. The current methods for dispensing or providing medications do not sufficiently meet their health information needs.

With regards to penalties and offences for non-compliance, in terms of regulation 52 of the General Regulations, it is stipulated that any person who is (i) non-compliant, (ii) contravenes the provisions of, *inter alia*, regulation 10 of the General Regulations, or (iii) provides incorrect information, shall be guilty of an offence. Upon conviction, they will be fined or imprisoned for a period not exceeding ten years. There are three crucial points that should be addressed in this regard. Firstly, the severity and criminal nature of the penalties and offences associated with non-compliance in terms of labelling requirements highlight the gravity of the situation. Secondly, consumers with

⁹² Du Toit, K, & van Eeden, E, (2014) at p. 739.

⁹³ Shetty S, Sunita S, & Shetty I, (2021) at p. 1388.

⁹⁴ Almukainzi, M, Almuhareb, A, Aldwisan, F, & Alquaydhib, W, (2020) at p. 275.

sight are typically safeguarded as it is highly unlikely, given the potential consequences, for a person or entity to disregard the labelling requirements specified in the regulations. Thirdly, it is unlikely for the entity or person to be convicted solely on the grounds that the information was not visible, readable, or understandable to the consumer without sight. Technically, the entity or person has adhered to the regulations by presenting the words or pictograms in ink and in a written form, in English, and in another official language.

Furthermore, the CPA should also be read in conjunction with the Medicines Act and its regulations. The CPA, with certain exceptions, apply to all transactions for the supply of goods or services between a supplier and a consumer within the Republic. Since medicine and scheduled substances are regarded as products with such a risk that it could result in severe injury or death, a supplier must specifically draw the fact, nature, and potential effect of that risk to the attention of the consumer in terms of section 58(1) of the CPA. This requirement must be read in conjunction with section 49 of the CPA. Since medicine and scheduled substances are also inherently unsafe, according to the Preamble of the CPA, compliance with section 58(2) of the CPA is required. A person who packages any unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22 of the CPA. If the consumer subsequently suffers harm due to the supply of unsafe goods or a lack of inadequate warning and instructions, the producer, importer, distributor, or retailer could be held liable in section 61 of the CPA.

Considering that the Medicines Act aims to ensure the safety of the public by regulating the registration and use of medicines and scheduled substances and given that almost every individual in South Africa consumes medicines which are inherently risky, the current labelling requirements can only be viewed as behaviour that goes against the objectives of the Medicines Act and its associated regulations. The question of whether such medicine containers, packages, package inserts, and patient information leaflets ought to be legible to persons with disabilities must be put forward. Persons with visual impairment are placed in a particularly vulnerable position in this regard. They cannot see, read, or comprehend any of the information that could be lifesaving or, inversely, fatal. The labelling requirements for medicines and scheduled substances in South African legislation are a source of great concern, as they neglect the hazardous and precarious situation that persons with visual impairment face. This puts them at an unjust disadvantage, as sighted individuals, regardless of their literacy level, are not subjected to the same degree of risk or danger. The law, as it currently regulates the labelling of medicines and scheduled substances, is unfairly discriminating against visually impaired consumers. Visually impaired consumers are subject to discriminatory treatment based on their disability, as certain essential information is not required to be presented in an accessible format on the label or leaflet.

3.1.1.2. Pharmacy Act, No. 53 of 1974

According to the Pharmacy Act, its relevant regulations,⁹⁵ and the Good Pharmacy Practice (hereafter referred to as the “*Code of Conduct*”), pharmacies and registered personnel must familiarise themselves with the content of the Medicines Act and its regulations. This is because information requirements in terms of labelling information, package inserts, and patient information leaflets are laid down in the Medicines Act and its regulations. Furthermore, staff members of a pharmacy should act per the Good Pharmacy Practice guidelines provided by the South African Pharmacy

⁹⁵ Regulations Relating to the Practice of Pharmacy, GN R.1158 of 20 November 2000 (Government Gazette No. 21754).

Council.⁹⁶ Staff members dealing with consumers (hereafter referred to as “*persons or patients*”) should be sufficiently trained before advising such persons.⁹⁷

The Code of Conduct is published in accordance with the Pharmacy Act and must be adhered to when conducting business. The Code of Conduct is intended to set the standard of professional conduct for all registered personnel within the scope of the Pharmacy Act.⁹⁸ It is also regarded as governing the conduct of all persons registered in terms of the Pharmacy Act, including registered pharmacy owners.⁹⁹ The Code of Conduct sets out the fundamental duties of registered personnel. The South African Pharmacy Council (hereafter referred to as the “*Council*”) has indicated that registered personnel registered with the Council must always venture to act to promote *public health*, and adherence to the Code of Conduct will contribute to achieving this goal.¹⁰⁰ Furthermore, the Council has indicated that a breach of the Code of Conduct could serve as grounds for a complaint, which may result in disciplinary steps by the Council, leading to the revocation of the licence of the registered personnel and pharmacy.¹⁰¹ In terms of rule 1.1, with regards to the wellbeing of the patient, the principle that applies to a pharmacist is that their “[p]rime concern in the performance of his or her professional duties must be for the wellbeing of both the patient and other members of the public”.

In adhering to this principle, per rule 1.1.3, the following should be taken into consideration: “[W]hen appropriate, a pharmacist should ensure that the proposed user or purchaser of a medicinal product receives advice on its safe use”. Special needs may arise where the consumer has difficulty understanding the advice given. This may happen, *inter alia*, when the patient is visually impaired. According to rule 1.1.3, the person’s visual impairment must be considered, and reasonable efforts must be made to ensure that the person fully understands the advice given. The Code of Conduct uses the example of “pillboxes with braille” for visually impaired patients to assist in helping them understand. This example seems redundant as medication in South Africa is not required to be labelled in Braille, which can assist pharmacists in providing advice for the safe use of medicine and scheduled substances. However, even if the staff members of a pharmacy dealing with a visually impaired patient advise on the correct manner of consumption and safe use of the medicine or substance, it does not negate the fact that the patient (i) cannot even see what type of medication is given to them as most of the medication does not come in distinct containers or packages. The pharmacist will naturally advise the consumer of the different medications, prices, dosage and manner of use. However, when the patient leaves the pharmacy, they will not be able to differentiate between their medications or scheduled substances. This is because they (ii) cannot see and therefore heed the warning signs such as “[d]o not use continuously for more than ten days without consulting your doctor”¹⁰² or “[d]o not use more than 30 days after opening”.¹⁰³ Even if the pharmacist has informed the patient of a warning, it may be difficult for the patient to discern which container the pharmacist was specifically referring to, as they all have a similar textural feel. Furthermore, (iii) they cannot see and therefore follow the instructions on the container, such as “shake the bottle before use”.¹⁰⁴ Most importantly, (iv) they cannot read the prescribed dosage. In some cases, consuming an excessive or insufficient amount of a particular medication can have fatal

⁹⁶ Only certain staff members are authorised to dispense and advise customers in terms of the Pharmacy Act; Code of Good Practice: *Good Pharmacy Practice in South Africa*, BN.108 of 24 October 2008 (Government Gazette No. 31534).

⁹⁷ Du Toit, K, & van Eeden, E, (2014) at p. 739.

⁹⁸ Introduction of the Code of Good Practice (2008).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* Reg. 10(1)(u) of the General Regulations (2017).

¹⁰³ *Ibid.* Reg. 10(1)(x) of the General Regulations (2017).

¹⁰⁴ *Ibid.* Reg. 10(1)(l) of the General Regulations (2017).

consequences. Therefore, it is essential that persons with a visual impairment can use and consume their medications safely, which necessitates their ability to read labels and storage instructions.¹⁰⁵

According to rule 1.1.2, a pharmacist must ensure that all information on the package, container, or patient information leaflet for any medication or scheduled substance sold or dispensed to a patient is written in at least one official language. This is to prevent confusion and, more importantly, to act in the best interests of the patient. According to the Code of Conduct, the reason for doing so is because the information on the package, container or patient information leaflet is necessary for safe and effective use, as stipulated in the Medicines Act.¹⁰⁶ If the package, container, or patient information does not include Braille or another accessible format for visually impaired patients, confusion cannot be prevented. This would be against the best interests of visually impaired patients, as written words in any language would be ineffective and meaningless to them.

Even though the Pharmacy Act and its regulations do not directly deal with any labelling requirements, it remains relevant, as they are the suppliers of the medicines and scheduled substances that are regulated in terms of the Medicines Act and its regulations. The Code of Conduct showcases how a registered person cannot avoid confusion, provide advice regarding unsafe products, and act in the interest of visually impaired patients without the necessary tools to enable them to do so. To fully adhere to the Code of Conduct and its principles, an amendment in the labelling requirements of medicines and scheduled substances is needed. Furthermore, pharmacies and registered personnel may incur liability in terms of the CPA. Pharmacies must adhere to the CPA as they are deemed to be suppliers in certain instances under the CPA.¹⁰⁷ According to du Toit & van Eeden, for purposes of the supplier's liability for harm caused by defective products [product liability], "[i]t is irrelevant whether or not the person who has been harmed was a party to the transaction in which the goods or services were procured".¹⁰⁸ The result is that a supplier, including the manufacturer, an importer, a wholesaler, and the pharmacy, could be liable to the consumer for harm suffered due to inadequate warnings, instructions, and defects in the product.¹⁰⁹

3.1.2. Foodstuffs, Cosmetics and Disinfectants: South Africa

3.1.2.1. Foodstuffs, Cosmetics and Disinfectants Act, No. 54 of 1972

In an era of rising consumerism and a consumer culture that prioritises consumer rights, consumers are becoming increasingly conscious of the ingredients and composition of products that may be (un)desirable.¹¹⁰ Consumers may find the ingredients or composition of the product (un)desirable due to personal choice or the potential effects caused.¹¹¹ The Foodstuffs, Cosmetics and Disinfectant industry (hereafter referred to as the "*industry*") has also experienced a trend towards products containing ingredients considered more desirable, such as those that are "homemade", "free-range", "natural", or "organic".¹¹² Consumers have also become more aware of the label, its contents, and the claims on its packaging.¹¹³ The rise of consumerism has given modern consumers

¹⁰⁵ *Ibid.*

¹⁰⁶ Code of Good Practice (2008) at p. 17.

¹⁰⁷ Du Toit, K, & van Eeden, E, (2014) at p. 740.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at p. 739.

¹¹⁰ Gordhon, Y, (2020) at p. 12.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

access to more information, leading to an increased desire to question the claims and ingredients made by entities. However, persons with visual impairment in South Africa have not been provided with the same access to information by the industry.

The Foodstuffs, Cosmetics and Disinfectants Act (hereafter referred to as the “*Foodstuffs Act*”) ensures the control and regulation of, *inter alia*, the sale, labelling and packaging of foodstuffs, cosmetics, and disinfectants.

Section 1 of the Foodstuffs Act defines “foodstuffs” as follows:

“[m]eans any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) ordinarily *eaten or drunk by a person or purporting to be suitable*, or manufactured or sold, *for human consumption*, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance”.

Section 1 of the Foodstuffs Act defines “cosmetics” as follows:

“[m]eans any article, preparation or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body, including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs, for purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance”.

Section 1 of the Foodstuffs Act defines “disinfectants” as follows:

“[m]eans any article or substance used or applied or intended to be used or applied as a germicide, preservative or antiseptic, or as a deodorant or cleansing material which is not a cosmetic”.

Similar to the prohibition contained in section 18 of the Medicines Act, section 2 of the Foodstuffs Act prohibits the sale, manufacture, or importation of specific articles without a label. A “label” means “[a]ny brand, any written, pictorial, or other descriptive matter appearing on or attached to or packed with any foodstuff, cosmetic or disinfectant or its package”.¹¹⁴

Section 15(1) of the Foodstuffs Act gives the Minister the authority to prescribe additional labelling requirements in a regulation of the Act. In terms of section 15(1)(k) of the Foodstuffs Act, the Minister may prescribe how the packaging of any foodstuff, cosmetic or disinfectant must be labelled. This includes specifying the nature of the information to be included on the label, the manner or form in which such information must be reflected or arranged, and the information that is prohibited from being displayed on the label. The Minister has prescribed the Regulations Relating to the Labelling and Advertising of Foodstuffs (hereafter referred to as the “*Regulations Relating to the Labelling of Foodstuffs*”) in 2010, and Regulations Relating to the Labelling, Advertising, and Composition of Cosmetics (hereafter referred to as the “*Regulations Relating to the Labelling of Cosmetics*”) in 2017.

¹¹⁴ The Foodstuffs Act defines a “package” as follows: “[m]eans anything by or in which any foodstuff, cosmetic or disinfectant is covered, enclosed, contained, or packed”.

In terms of regulation 2¹¹⁵ of the Regulations Relating to the Labelling of Foodstuffs, enacted in terms of section 15(1) of the Foodstuffs Act, a person may not sell or offer any pre-packaged foodstuff for sale unless the container or the bulk stock from which it is taken is labelled by these regulations. Furthermore, according to regulation 4 of the Regulations Relating to the Labelling of Foodstuffs, conditioned by regulation 54(3),¹¹⁶ any pre-packaged foodstuff on display must bear the essential labelling particulars in its proximity. The information required to appear on any label must be in English and, where possible, one other official language. The label must be clearly *visible*, easily legible, and indelible.¹¹⁷ The labels of pre-packaged foodstuff must also be applied in such a manner that they cannot be separated from the container.¹¹⁸ The lettering on the label must be a specific size,¹¹⁹ indicate the country of origin of the foodstuffs,¹²⁰ contain the date marking,¹²¹ and have mandatory warning signs.¹²² The label must contain the name of the foodstuffs, accompanied by a description thereof. In certain instances, the label must include the name and address of the manufacturer, importer or seller, clear instructions for the use of the foodstuffs, a list of ingredients as required by regulations 16 to 29,¹²³ and the net contents of the container.¹²⁴ If the product contains allergens, it must be indicated in proximity to the list of ingredients.

Section 15(5) of the Regulations Relating to the Labelling of Foodstuffs may prescribe penalties for any contravention or failure to comply with its provisions. These penalties must not exceed those prescribed by section 18 of the Foodstuffs Act. As per section (1)(a) of the Foodstuff Act, any person convicted of an offence under this Act, on a first conviction, shall, according to section 18(2) of the Foodstuff Act,¹²⁵ be liable to either a fine, imprisonment for a period not exceeding six months, or both. Similarly, according to section 18(1)(b) of the Foodstuff Act, on a second offence, a person shall be liable to either a fine, imprisonment for a period not exceeding twelve months, or both. Section 18(1)(c) of the Foodstuffs Act, on a third or subsequent conviction, is liable to either a fine, imprisonment for a period not exceeding twenty-four months, or both. Similarly, firstly, it can be argued that the severity of the penalties and offences associated with non-compliance demonstrates the gravity of the matter. Secondly, sighted consumers are mostly protected as it is improbable that an entity or person will not comply with the labelling requirements outlined in the Foodstuffs Act and its Regulations Relating to the Labelling of Foodstuffs.

¹¹⁵ Regulations Relating to the Labelling and Advertising of Foodstuffs, GN R.116 of 01 March 2010 (Government Gazette No. 32975).

¹¹⁶ Reg. 54(3) of the Regulations Relating to the Labelling of Foodstuffs states that: “[T]he following foodstuffs are, unless otherwise provided in these regulations, exempted from the requirements regarding labelling except when a nutrition claim is made in which case the mandatory nutritional information referred to in sub-regulation 50(12) above shall appear on the label”.

¹¹⁷ Reg. 7(1)(a) – (b) of the Regulations Relating to the Labelling of Foodstuffs.

¹¹⁸ *Ibid.*

¹¹⁹ Reg. 8 of the Regulations Relating to the Labelling of Foodstuffs: “[U]nless otherwise stipulated by the Agricultural Products Standards Act, 1990 (Act No. 119 of 1990) and the National Regulator for Compulsory Specifications Act, 2008 (Act No. 5 of 2008)”.

¹²⁰ Reg. 10 of the Regulations Relating to the Labelling of Foodstuffs: “[T]he country of origin of a foodstuff shall be declared on the label”.

¹²¹ *Ibid.* Reg. 12 of the Regulations Relating to the Labelling of Foodstuffs.

¹²² *Ibid.* Reg. 15 of the Regulations Relating to the Labelling of Foodstuffs: “[T]he label of a foodstuff packaged in a pressurised container shall contain the following statement in bold uppercase letters of not less than 3,0mm in height: “Warning-Pressurised-do not puncture or store above 50°C””.

¹²³ According to Reg. 43 of the Regulations Relating to the Labelling of Foodstuffs, if the product contains allergens, it must be clearly indicated in “close proximity” to the list of ingredients.

¹²⁴ *Ibid.* Reg. 9(a) – (f) of the Regulations Relating to the Labelling of Foodstuffs.

¹²⁵ Section 18(2) of the Foodstuffs Act reads as follows: “[w]here a penalty is specifically prescribed by regulation for a contravention of or failure to comply with any regulation, a person convicted of any such contravention or failure shall be liable only to the penalty so prescribed”.

On 31 January 2023, a document was Gazetted by the Department of Health for public comment. The document proposes significant changes to the labelling of food items in South Africa. The Regulations Relating to the Labelling and Advertising of Foodstuffs (hereafter referred to as the “*Regulations Relating to the Labelling of Foodstuffs (2023)*”) propose changes that strengthen existing rules for product packaging in South Africa, including lists of ingredients and sell-by dates. Furthermore, it introduces several updates to modernise food advertising practices.¹²⁶ The proposed changes entail banning food descriptors such as “smart” or “intelligent” from product labelling. The regulations also prohibit any other words, logos, or images that suggest the food is superior or better in any way. This includes the product’s name or trade name. In addition, the department aims to curb potentially misleading claims on food packaging. The new regulations prohibit endorsements from celebrities, organisations, or medical practitioners, as well as claims of providing a nutritionally balanced diet. These labelling restrictions seek to improve the accuracy of information provided to consumers. As part of the proposed changes, the department is proposing that warning labels are to be attached to food items high in sugar and fat content. The new regulations mandate mandatory front-of-package labelling on all pre-packaged foodstuffs that contain added saturated fat, added sugar, or added sodium exceeding the nutrient cut-off values for total sugar, total sodium, or total saturated fatty acids. The front-of-package labelling must be prominently displayed, integrated into the packaging, and not partially or entirely obscured by other elements. Relevant foodstuffs must exhibit logos on the front of the package, occupying at least 25 percent of the front surface area.

Regulation, 2(1) of the Regulations Relating to the Labelling of Foodstuffs (2023) states that “[a] person may not manufacture, import, sell, donate or offer for sale any pre-packaged foodstuff, unless the foodstuff container, or the bulk stock from which it is sold or taken, is labelled in accordance with these regulations”. Regulation 2(2) of the Regulations Relating to the Labelling of Foodstuffs (2023) proceeds to mandate that a person contemplated in regulation 2(1) of the Regulations Relating to the Labelling of Foodstuffs (2023) must provide accurate information regarding the “[c]haracteristics, origin, composition, quality, nutritive value, nature or other properties of a foodstuff and the time and place of its manufacture to the consumer”. Regulations 3 to 10 of the Regulations Relating to the Labelling of Foodstuffs (2023) set out the requirements for the labelling of foodstuffs. It specifies how the label must be presented, which letter sizes are to be used, and what information must appear on the label. This information must include the country of origin of the product, batch identification, date marking, prohibited statements, and negative claims. Regulation 3 of the Regulations Relating to the Labelling of Foodstuffs (2023) reads as follows:

- (1) Subject to regulation 4, the information that must appear on any label must be—
 - (a) in English, and where label space permits, a second official language of South Africa of the manufacturer’s choice, Provided that the minimum letter size used for the required label information may not be reduced to accommodate various languages for local or export purposes; and
 - (b) indelible, clearly visible and easily legible with a significant contrast between font colour and background colour and the legibility thereof must not be affected by pictorial or any other matter, printed or otherwise; Provided that-

¹²⁶ *Big changes for food labels in South Africa – including sugar warnings and an end to ‘super-food’*, Businesstech, (2023), <<https://businesstech.co.za/news/lifestyle/662355/big-changes-for-food-labels-in-south-africa-including-sugar-warnings-and-an-end-to-super-food/>> (accessed 29 March 2023).

- (i) colours used on labels must not dominate or overwhelm nor used in such a way that any information, warning statement or FOPL logos, when applicable, become poorly visible, non-legible or undistinguishable from pictorial representations and information; and
- (ii) white lettering on any background colour except black is prohibited”.

At present, the Regulations Relating to the Labelling of Foodstuffs (2023) display an unfair bias against persons with visual impairments. Regulation 3(1) of the Regulations Relating to the Labelling of Foodstuffs (2023) requires information to be in English, indelible, clearly visible, and easily legible, thus perpetuating this bias. Despite the recent changes made through the 2023 Regulation, the label’s accessibility for persons with visual impairment has once more been overlooked.

In terms of regulation 4(1)(c) and (e) of the Regulations Relating to the Labelling of Cosmetics, no person may sell, manufacture, or import any cosmetic that may cause damage to human health when used under normal or reasonably foreseeable conditions of use, taking into account the labelling and any other indication or information provided. According to regulation 8(1) of the Regulations Relating to the Labelling of Cosmetics, the primary and secondary container of every cosmetic for sale in South Africa must have a label attached to it.¹²⁷ The *label* must contain, *inter alia*, the following information: the name of the cosmetic;¹²⁸ the name and business address of the responsible person;¹²⁹ the country of origin for imported cosmetics;¹³⁰ the date of minimum durability;¹³¹ the precautions and warning statements to be observed in use;¹³² and the list of ingredients.¹³³ According to regulation 18(2) of the Regulations Relating to the Labelling of Cosmetics, if a package [primary container] is too small or has a shape that precludes labelling with the information abovementioned, the information shall be mentioned on an attached leaflet, the label, inlay, tape, tag or card on the secondary container. According to regulation 8(14) and (15) of the Regulations Relating to the Labelling of Cosmetics, unless explicitly stated otherwise in regulations established in the Foodstuffs Act, the information required to appear on a label must be in at least English, visible,¹³⁴ legible,¹³⁵ and indelible.

As mentioned in section 18(1)(a) of the Foodstuffs Act, read in conjunction with regulation 12(1)(a) – (c) of the Regulations Relating to the Labelling of Cosmetics, any person convicted of an offence under or failure to comply with these regulations, on the first conviction, shall be liable to either a fine, imprisonment for a period not exceeding six months, or both. On a second conviction, they will be liable to either a fine, imprisonment for a period not exceeding twelve months, or both. On a third or subsequent conviction, they will be liable to either a fine, imprisonment for a period not exceeding twenty-four months, or both. Once again, the same argument regarding the seriousness of the offence and penalties and the likelihood of non-compliance with the Act and the Regulations

¹²⁷ The Regulations Relating to the Labelling of Cosmetics, GN R.1469 of 22 December 2017 (Government Gazette No. 41351) defines the “primary container” as a container which is in direct contact with the cosmetic; and the “secondary container” as a container which is not in direct contact with the cosmetic.

¹²⁸ Reg. 8(1)(a) of the Regulations Relating to the Labelling of Cosmetics.

¹²⁹ Reg. 8(1)(b) of the Regulations Relating to the Labelling of Cosmetics.

¹³⁰ Reg. 8(1)(c) of the Regulations Relating to the Labelling of Cosmetics.

¹³¹ Reg. 8(1)(e) of the Regulations Relating to the Labelling of Cosmetics.

¹³² Reg. 8(1)(f) of the Regulations Relating to the Labelling of Cosmetics.

¹³³ Reg. 8(1)(h) of the Regulations Relating to the Labelling of Cosmetics.

¹³⁴ The Regulations Relating to the Labelling of Cosmetics defines “legible” as: “[m]eans that the labelling should be of sufficient size, so that the details can be read by a person with *normal vision* at a distance of about 30 cm or by a person wearing normal corrective lenses without having to resort to aids such as magnification”.

¹³⁵ The Regulations Relating to the Labelling of Cosmetics defines “visible” as: “[m]eans the information on the label should not be obscured and should be seen without having to break open any component of packaging”.

Relating to the Labelling of Cosmetics can be made. Furthermore, along with certain medicines and scheduled substances, a note of the application of the Consumer Protection Act must be taken.

Under section 13(1) of the National Regulator for Compulsory Specifications Act (hereafter referred to as the “*Compulsory Specifications Act*”),¹³⁶ the Minister of Trade and Industry declared the Compulsory Specifications for Chemical Disinfectants (hereafter referred to as *Compulsory Specification*”). In terms of the requirements in section 13(6)(b) of the Compulsory Specifications Act, importers and manufacturers are obligated to label a commodity or product to which a compulsory specification applies in accordance with its origin, batch, date of manufacture, characteristics, or other particulars of the article. A “commodity” is defined by the Compulsory Specifications Act as “[a]ny substance or any element or characteristic of a commodity or a category or system of commodities”, and a “product” is defined as “[a]ny commodity that is manufactured or any agricultural product including fish and fish products.” According to section 14(1) of the Compulsory Specifications Act, no person may import, sell, or supply a commodity, product, or service to which a compulsory specification applies, except in accordance with that specification. Section 5 of the Compulsory Specifications deals with the markings and labelling of disinfectants. In terms of section 5 of the Compulsory Specifications, the manufacturer or supplier shall provide on a label¹³⁷ that is firmly attached to the packaging of a chemical disinfectant in a *legible* and *indelible* manner the spectrum of activity claimed,¹³⁸ the areas of application,¹³⁹ the names of the active ingredients in letters not less than 4mm in height,¹⁴⁰ the expiry date,¹⁴¹ instruction for storage,¹⁴² and any warnings.¹⁴³ According to section 7.1 of the Compulsory Specifications, no person shall advertise a chemical disinfectant in any manner which contains any information, claim, reference, or declaration not permitted on the label in accordance with the Compulsory Specification. Furthermore, the nominal volume or mass of the contents shall be marked in accordance with the applicable requirements of SANS 289: 2016 (as discussed below).

The information on every container or package is of vital importance to the person intending to consume or use the foodstuffs, cosmetics, or disinfectants without having seen, read or heeded the warnings and instructions for use. It can potentially cause extreme harm and, in some cases, be fatal. For example, when a person is deathly allergic to a particular product or specific ingredient and is subsequently unaware of the product containing such an ingredient, it can ultimately cause their death. Since foodstuffs are directly consumed, like medicines, they can be inherently unsafe. Therefore, information such as the list of fatal allergens contained within the ingredients [for example, “contains nuts”], the expiration date and warnings are critical. Disinfectants, however, can be toxic, dangerous, and unsafe. Instructions and warnings are critical before such a product can be used. The type of products regulated by the Foodstuffs Act and the Compulsory Specifications are not only unsafe but can also be poisonous. In the case of persons with visual impairment, being unaware of the product, warnings, instructions, and proper usage could lead to serious harm.

Persons with visual impairment face discrimination due to the lack of accessibility of certain information on product labels. The labelling must use visible, legible words or pictograms in either

¹³⁶ No. 5 of 2008.

¹³⁷ In terms of the Compulsory Specifications, a label is defined as: “[A]ny tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed upon, or permanently attached to a container of a disinfectant, including labelling for the purpose of promoting its sale or disposal”.

¹³⁸ Subsection 5.2.1 of the Compulsory Specifications.

¹³⁹ Subsection 5.2.2 of the Compulsory Specifications.

¹⁴⁰ Subsection 5.2.4 of the Compulsory Specifications.

¹⁴¹ Subsection 5.2.6 of the Compulsory Specifications.

¹⁴² Subsection 5.2.10 of the Compulsory Specifications.

¹⁴³ Subsection 5.2.14 of the Compulsory Specifications.

English, or another official language. However, the requirement of “legibility” only considers the ability of a person with normal vision or corrective lenses to read the information from a distance of about 30 cm, and according to the Regulations Relating to the Labelling of Cosmetics, leaving persons with visual impairment at a disadvantage. Persons with disabilities have the right to equal protection under the law, but the benefits and protection provided by the Foodstuffs Act and its regulations do not extend to them, resulting in unequal treatment.

3.1.3. Hazardous Substances

3.1.3.1. Hazardous Substances Act, No. 15 of 1973

Hazardous substances, through the different steps from their production to their handling, transport, and use, are a danger to human well-being, health, and safety. Persons with visual impairment are confronted daily with dangerous products such as chemicals, cleaning products and pesticides. Therefore, the Hazardous Substances Act ensures the control and regulation of, *inter alia*, substances that may cause injury, ill health, or death to a person.

The Hazardous Substances Act defines a label,¹⁴⁴ a package,¹⁴⁵ and a sealed package¹⁴⁶ for purposes of the Act. The labelling requirement for each specific group of hazardous substances is dealt with in various regulations. The Minister of Health has, in terms of section 2(1)(a) and section 29(1) of the Hazardous Substances Act, read in conjunction with section 29(10)(a) of the Hazardous Act, prescribed regulations related to, *inter alia*, labelling of Group I hazardous substances.¹⁴⁷ Regarding the Regulations on Hazardous Substances, the labelling requirements of Group I hazardous substances are divided into Category A or Category B.¹⁴⁸ In regulation 8(1)(a) Regulations on Hazardous Substances, any container¹⁴⁹ containing a Category A Group I hazardous substance imported, manufactured, or packed in South Africa must be *clearly and conspicuously labelled*.¹⁵⁰ Furthermore, the label must be placed on one or more surfaces of the container so that it can be read horizontally when the container is set down normally.¹⁵¹ Any container containing a Category B Group I hazardous substance imported into South Africa must also comply with the abovementioned regulations.¹⁵²

Along with medicine, scheduled substances, foodstuffs, cosmetics, and disinfectants, note must also be taken of the CPA. Since most hazardous substances carry the potential risk that may cause severe injury or even death, a supplier must explicitly inform consumers about the nature, potential

¹⁴⁴ Section 1 of the Hazardous Substances Act defines a “label” as follows: “[w]hen used as a noun, means any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with any grouped hazardous substance or its package, and referring to such substance, and, when used as a verb, means brand or mark or attach or provide in any other manner with, any written, pictorial or other descriptive matter”.

¹⁴⁵ Section 1 of the Hazardous Substances Act defines a “package” as follows: “[m]eans anything by or in which any substance is covered, enclosed, contained or packed”.

¹⁴⁶ Section 1 of the Hazardous Substances Act defines a “sealed package” as follows: “[m]eans an unopened package which cannot be opened without breaking or damaging such package or any seal, adhesive label or other part of or attachment to such package”.

¹⁴⁷ Regulations under the Hazardous Substances Act 15 of 1973, GNR .453 of 25 March 1977 (Government Gazette No. 5467).

¹⁴⁸ *Ibid.*

¹⁴⁹ Reg. 1(a) of the Regulations under the Hazardous Substances Act defines it as follows: “[m]eans the receptacle or package in which a product is offered for sale but does not include any outer wrapping or box that is not customarily displayed”.

¹⁵⁰ Reg. 1(b) of the Regulations under the Hazardous Substances Act defines it as follows: “[w]hen used as a noun, means any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with any grouped hazardous substance or its container, and referring to such substance, and, when used as a verb, means brand or mark or attach or provide in any other manner with any written, pictorial or other descriptive matter”.

¹⁵¹ Reg. 8(1)(c) of the Regulations under the Hazardous Substances Act.

¹⁵² Reg. 8(2)(a) of the Regulations under the Hazardous Substances Act.

effects, and risks associated with these substances. If the consumer subsequently suffers harm due to the supply of unsafe goods or a lack of inadequate warning and instructions, the producer, importer, distributor, or retailer could be held liable in terms of section 61 of the CPA. However, unlike medicines, scheduled substances and pharmacies, similar to foodstuffs, cosmetics and disinfectants, there are no registered personnel to give some or any assistance when purchasing hazardous substances. Neither the Hazardous Substances Act nor the regulations require anyone to assist a visually impaired person in heeding the warnings, explaining instructions, or pointing out potentially fatal ingredients. Again, even though section 61 of the CPA may be of some relief, it is simply not enough to wait for harm to befall such a visually impaired person before action can be taken.

The labelling requirements for hazardous substances aim to protect public and environmental health, but they fail to consider a portion of the population – persons with visual impairments. The Hazardous Substances Act and its regulations do not provide accessible formats for conveying information on labels to visually impaired end-users. This lack of consideration puts persons with visual impairment at risk of harm from handling and using hazardous substances, which can be inherently unsafe and poisonous. In contrast, sighted persons are afforded protection through detailed labelling and instructions.

3.2. European Union

3.2.1. Medicines and related substances: European Union

3.2.1.1. European Parliament and Council: Directive 2004 / 27 / EC

All medicinal products placed on the markets of the Member States of the European Union are required by law, in the form of a Directive, to be accompanied by labelling and package leaflets, which provide a set of comprehensible information enabling the use of the medicinal product safely and appropriately.¹⁵³ A Directive is a legislative Act that sets out a goal that all Member States must achieve. However, it is up to the individual Member State to enact their own laws in order to reach these goals. According to Article 54, Article 55, and Article 59 of Directive 2001/83/EC (hereafter referred to as “*Directive 2001*”), the Directive required that medicinal products for human use must be accompanied by outer or immediate packaging labelling and a package leaflet. Directive 2001 codified and consolidated in a single text the legislation on medicinal products “[f]or human use, in the interests of clarity and rationalisation for Member States of the European Union”.¹⁵⁴

According to Article 4 of Directive 2004/27/EC (hereafter referred to as “*Directive 2004*”), amending Directive 2001 [relating to medicinal products for human use], the primary purpose of any regulation on the manufacture and distribution of medicinal products for human use should be to *safeguard public health*. Article 56(a) of Directive 2004 states that the product’s name, as referred to in Article 54(a) of Directive 2004,¹⁵⁵ must be expressed in Braille format on the packaging. Furthermore, the “marketing authorisation holder” must ensure that the *package information leaflet* is made available *in formats appropriate* for persons with visual impairment. The European Union has

¹⁵³ European Union Directive 2001/83/EC (European Parliament and of the Council) of 6 November 2001.

¹⁵⁴ European Union Directive 2004/27/EC (European Parliament and of the Council) of 31 March 2004 at article 1.

¹⁵⁵ Article 54 of Directive 2004 states that “[t]he name of the medicinal product followed by its strength and pharmaceutical form, and, if appropriate, whether it is intended for babies, children, or adults; where the product contains up to three active substances, the international non-proprietary name (INN) shall be included, or, if one does not exist, the common name”.

recommended a Braille specification referred to as “Marburg Medium”,¹⁵⁶ which sets out the Braille cell dimensions, spacing, and dot size.¹⁵⁷ Unlike South African legislation, Directive 2004 considered persons with visual impairment to *safeguard public health* and provided accessible product information for medicines and scheduled substances.

3.2.2. Foodstuffs, Cosmetics and Disinfectants

3.2.2.1. European Parliament and Council: Regulation 1169/2011 & Regulation 1223/2009

With regard to foodstuffs, the European Union enacted regulation 1169/2011 (hereafter referred to as “*Regulation 1169*”). A regulation is a binding legislative Act that must be applied across the European Union. Regulation 1169 established the provision of food information to consumers.¹⁵⁸ Article 3(1) of Regulation 1169 establishes the general principles, requirements, and responsibilities governing food information, particularly food labelling. Furthermore, it confirms the guarantee of consumers’ right to information and procedures for providing food information. The regulation of 2011 improved the level of protection for consumers but failed to remove barriers to accessing such information for persons with visual impairment, as food labelling does not include information in Braille, as was done with medicines.¹⁵⁹ The current legislation only includes a provision for minimum font sizes for mandatory food information. This provision aims to enhance the legibility of food labels and improve the situation for short-sighted or elderly consumers.¹⁶⁰ The European Commission is expected to publish a proposal for a European Union-wide labelling system as part of its new food policy – the Farm-to-Fork Strategy.¹⁶¹ The new strategy aims to, *inter alia*, provide consumers with finer information on the nutritional aspects of foodstuffs. The European Commission has, however, supported research on using barcodes in combination with assistive devices to make product information available and accessible for visually impaired users.¹⁶² This will ensure that persons with visual impairment are also guaranteed the right to consumer information as required in Article 3(1) of Regulation 1169. Whether such barcodes or assistive devices will find themselves within the new food policy remains to be seen.

The European Union, in Regulation 1223/2009 (hereafter referred to as “*Regulation 1223*”), lays down the mandatory information that needs to be included on the labels of packages and containers of cosmetics products.¹⁶³ The regulation defines “cosmetic products” in Article 1(a) as follows:

“[m]eans any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them,

¹⁵⁶ *Pharmaceutical Braille*, PharmaBraille, (2022), <<https://www.pharmabraille.com/european-braille-guidance/the-eu-directive>> (accessed 18 November 2022). “[T]he dot diameter is 1.3-1.6 mm. The dot spacing is 2.5 mm from dot centre to dot centre. The character spacing is 6.0 mm from dot centre to dot centre. The line spacing is 10.0 mm”.

¹⁵⁷ *Ibid.*

¹⁵⁸ Amending Regulation 1924/2006; Regulation 1925/2006; Directive 87/250; Council Directive 90/496 Commission Directive 1999/10; Directive 2000/13; Commission Directives 2002/67; and Commission Regulation No 608/2004.

¹⁵⁹ *EU urged not to overlook blind people in new food labelling rules*, EURACTIV, (2020), <<https://www.euractiv.com/section/agriculture-food/news/eu-urged-not-to-overlook-blind-people-in-new-food-labelling-rules/>> (accessed 18 November 2022).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ In terms of Preambular paragraph 6 of the European Union Regulation 1223/2009 (European Parliament and of the Council) of 30 November 2009 (hereafter referred to as “*Regulation 1223*”), the Regulation relates only to cosmetic products and not medicinal products, medical devices, or biocidal products.

perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours”.

The regulation states in Article 1(2) that cosmetic products do not include a substance or mixture intended to be ingested, inhaled, injected, or implanted into a person’s body. Article 6 of Regulation 1223 requires that distributors must ensure that they comply with Article 19 of Regulation 1223. According to Article 19(1) of Regulation 1223, cosmetic products shall be made available on the market only where the container and packaging of cosmetic products bear the following information in indelible, easily legible, and visible lettering: the name and address of the responsible person;¹⁶⁴ the weight or volume at the time of packaging;¹⁶⁵ the date until which the cosmetic products will continue to fulfil its function and will remain safe for human health;¹⁶⁶ the particular and unique precautionary information in the [professional] use of the cosmetic product;¹⁶⁷ the batch number or the reference for identification of the cosmetic product;¹⁶⁸ the function of the cosmetic product;¹⁶⁹ and the list and term of ingredients [in descending order of concentration].¹⁷⁰ For imported cosmetic products, the country of origin also needs to be indicated on the label. In Article 19(2) of Regulation 1223, if a label containing the information cannot be utilised for practical reasons, the information shall be mentioned on an enclosed or attached leaflet, label, tape, tag, or card.

3.2.3. Hazardous substances: European Union

3.2.3.1. European Parliament and Council: Regulation 1272/2008

The European Parliament and Council adopted Regulation 1272/2008 (hereafter referred to as “*Regulation 1272*”) to regulate the classification, labelling and packaging of substances and mixtures (hereafter referred to as “*hazardous substances*”).¹⁷¹ Regulation 1272 sets general *packaging standards* to ensure the safe supply of hazardous substances. According to the regulation, with the goal of ultimately achieving sustainable development, a prominent level of human health [and environmental] protection should be ensured “in the approximation of legislation” for the labelling of hazardous substances.¹⁷²

In Title III, Chapter 1, Article 17 of Regulation 1272, the general label rules are set out. According to Article 17(1)(a) – (h), hazardous substances contained in packaging must bear a label with the following information thereon: the name, address, and number of the supplier; the quantity of the hazardous substance, unless the quantity is specified elsewhere on the package; product identifiers as specified in Article 18 of Regulation 1272; hazard pictograms by Article 19 of Regulation 1272; signal words by Article 20 of Regulation 1272; hazard statements by Article 21 of Regulation 1272;

¹⁶⁴ Article 19(1)(a) of Regulation 1223.

¹⁶⁵ Article 19(1)(b) of Regulation 1223.

¹⁶⁶ Article 19(1)(c) read with article 3 of Regulation 1223, which relates to the date of minimum durability.

¹⁶⁷ Article 19(1)(d) of Regulation 1223.

¹⁶⁸ Article 19(1)(e) of Regulation 1223.

¹⁶⁹ Article 19(1)(f) of Regulation 1223.

¹⁷⁰ Article 19(1)(g) of Regulation 1223.

¹⁷¹ Amending and repealing Directives 67/548 and 1999/45, as well as amending Regulation 1907/2006.

¹⁷² Introduction text item 1 of Regulation 1272/2008 (European Parliament and of the Council) of 16 December 2008.

the appropriate precautionary statements by Article 22 of Regulation 1272; and a section for supplemental information by Article 25 of Regulation 1272. Article 17(2) of Regulation 1272 states that a label must be written in the official languages of the Member States where the substance or mixture is placed on the market unless the Member State's law provides otherwise. Suppliers may use more languages on their labels than those required by the Member States, but only on condition that the exact details appear in all the languages used on the label.

In Title III, Chapter 2 of Regulation 1272, the general rules for the application of labels are set out. Labels must be securely affixed to one or more surfaces of the packaging that contain the hazardous substance and be positioned in a way that allows for horizontal readability.¹⁷³ Where the outer packaging of a package is not required to meet labelling provisions, both the outer and any inner packaging, including any intermediate packaging, must be labelled in accordance with this regulation.¹⁷⁴ However, if the outer packaging allows for the inner or intermediate labelling to be clearly visible, there is no requirement to label the outer packaging. Furthermore, the colour and presentation of any label must be done in such a manner that the hazard pictogram stands out clearly.¹⁷⁵ The labelling elements referred to in Article 17(1)(a) – (g) of Regulation 1272 shall be clearly and indelibly marked.¹⁷⁶ These elements must clearly stand out from the background and must be of an easily readable size and spacing. The shape, colour, and size of a hazard pictogram, as well as the dimensions of the label, must be integrated as outlined in section 1.2.1 of Annex I of Regulation 1272. However, a label will not be required when the label elements referred to in Article 17(1) of Regulation 1272 are shown clearly on the packaging itself.¹⁷⁷ Furthermore, the hazard pictograms, signal words,¹⁷⁸ hazard statements and precautionary statements shall be located together on the label.¹⁷⁹ The supplier may decide the order of the label's hazard statements, but they must be grouped.¹⁸⁰

3.3. Colombia

3.3.1. Medicines, foodstuffs, cosmetics, and disinfectants

In contrast to the European Union and South Africa, the labelling of medicines, cosmetics, and hazardous [household] products is addressed in a single legislative document. Therefore, I will

¹⁷³ Article 31 of Regulation 1272.

¹⁷⁴ Article 2(36) of Regulation 1272 defines a “package” as “[t]he complete product of the packing operation, consisting of the packaging and its contents”; and article 2(37) defines “intermediate packaging” as “[p]ackaging placed between inner packaging, or articles, and outer packaging”.

¹⁷⁵ Article 31 of Regulation 1272; article 2(3) defines a “hazard pictogram” as “[a] graphical composition that includes a symbol plus other graphic elements, such as a border, background pattern or colour that is intended to convey specific information on the hazard concerned”.

¹⁷⁶ Article 17(1) of Regulation 1272 defines “label elements” as: “[h]azardous substances contained in packaging must bear a label with the following information thereon: the name, address and number of the supplier; the quantity of the hazardous substance, unless this quantity is specified elsewhere on the package; product identifiers as specified in article 18; hazard pictograms in accordance with article 19; signal words in accordance with article 20; hazard statements in accordance with article 21; the appropriate precautionary statements in accordance with article 22; and a section for supplemental information in accordance with article 25”.

¹⁷⁷ “[I]n such cases, the requirements of this Chapter applicable to a label shall be applied to the information shown on the packaging”.

¹⁷⁸ Article 2(4) of Regulation 1272 defines a “signal word” as “[a] word that indicates the relative level of severity of hazards to alert the reader to a potential hazard; the following two levels are distinguished:

(a) ‘Danger’ means a signal word indicating the more severe hazard categories;
(b) ‘Warning’ means a signal”.

¹⁷⁹ Article 32 of Regulation 1272.

¹⁸⁰ *Ibid.*

address the labelling of medicines, cosmetics, disinfectants, and hazardous substances simultaneously. Law 2265 is a Colombian law that establishes rules and regulations related to consumer protection. The law requires companies to provide clear and accurate information about their products in a way that is accessible to persons with disabilities. The legal framework established by the law enables companies to ensure the accessibility of their products to all consumers, including those with disabilities.

According to Article 1 of Law 2265, the purpose of Law 2265 of 2022 is to ensure access to information for persons with visual impairments on food products, cosmetics, household pesticides, cleaning supplies, human and animal medicines, tourism services, and public places of interest.¹⁸¹ Both public and private entities have the responsibility, as stated in Article 2 of Law 2265, to perform the characterisation of needs and execute adjustments to guarantee information access for persons with visual impairments. Persons with visual impairment must have access to information about products and services for human [or animal use] through mobile applications, other available technological, digital, and informative means, through the Braille system, or personalised attention.¹⁸² Even if the packaging of products is not designed to support this type of labelling, they must still comply with the requirements set forth in this law until technological advancements make it possible.

The supervision of compliance with Law 2265 will be the responsibility of the institutions with inspection, surveillance, and control competencies in each case, depending on the nature of the goods and services whose information is made accessible to the visually disabled population.¹⁸³ In the case of food products, cosmetics, human and veterinary medicines, household pesticides and cleaning products, the National Government, through the Ministry of Health and Social Protection, will establish Technical Regulations on labelling that are applicable for compliance with this law.¹⁸⁴ In all cases, the National Institute for the Blind will accompany and support the implementation of these measures.¹⁸⁵ The Law mandates that the Technical Regulation should be released by July 2024. Colombia has yet to, along with the Technical Regulations, establish the minimum information, conditions, and packaging to be included. Although these regulations have yet to be developed and enforced, Colombia is still leading the way among countries with a similar socio-economic position as South Africa that demand accessible product information.¹⁸⁶

If two countries share a similar socio-economic status, and one of them, Colombia, can provide accessible product information, then there is no reason why South Africa cannot do the same.¹⁸⁷

¹⁸¹ Artículo 1° of Ley 2265 de 2022.

¹⁸² Artículo 3° of Ley 2265 de 2022.

¹⁸³ Artículo 3°, Parágrafo 2 of Ley 2265 de 2022.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Artículo 3°, Parágrafo 1 of Ley 2265 de 2022.

¹⁸⁷ Malaysia implemented an initiative that requires medication to include dosage and indication information in Braille, making it one of the earliest Asian countries to introduce visually-impaired-friendly medicine labelling. With a similar socio-economic position to South Africa, Malaysia can serve as a valuable reference point for the implementation of Braille labelling. Similarly to the European Union, Malaysia, in line with the objective under Malaysian Patient Safety Goals 2.0 Medication Safety: Medication without Harm (hereafter referred to as the “*Malaysian Safety Goals*”), initiated the requirement that medical products must contain Braille to enable persons with visual impairment to obtain accurate information about medicines and prescriptions for them. The Braille format for persons with visual impairment includes the medical product’s dosage and an indication of the use of the medical product. The Health Ministry’s new Braille label initiative launched on 06 January 2023. The initiative, unfortunately, only includes medical products and does not address the labelling of foodstuffs, cosmetics,

In fact, Colombia can serve as an excellent model for South Africa to follow in its efforts to revise labelling laws to ensure that visually impaired citizens have access to the information they need. However, unlike the European Union, Colombia still needs to establish the minimum information, conditions, and packaging requirements. Therefore, it is advisable to follow the guidelines provided by the European Union until Colombia has established its own. Colombia has demonstrated that even with financial limitations, a country with a comparable socio-economic status can still offer accessible product information on the labels of various products such as medicines, foodstuffs, cosmetics, or disinfectants.

4. National and International Standards regulating product labelling

In subsection 4, the topic of labelling is addressed and the relevant National and International Standards that apply are explored. Specifically, this subsection examine whether there are any applicable standards for labelling medicines and substances, foodstuffs and cosmetics, or hazardous substances on a global scale. To this end, reference is made to the South African Bureau of Standards (hereafter referred to as the “SABS”) as the governing body for standards applicable in South Africa and the International Organization for Standardization (hereafter referred to as the “ISO”) as the organisation responsible for establishing and enforcing international standards.

4.1. SABS and ISO labelling Standards

The SABS is an autonomous body established due to an Act of Parliament.¹⁸⁸ The SABS has a well-developed standards regime that has developed many standards over several decades.¹⁸⁹ The SABS is a specialised South African statutory agency responsible for promoting and maintaining standardisation and quality relating to goods and services.¹⁹⁰ The objects of the SABS are to develop, promote and maintain South African National Standards (hereafter referred to as “SANS”), promote the quality in connection with commodities, products, and services, and render compliance with conformity assessment services. The SABS belongs to the ISO and, therefore, issues pharmaceutical and industrial standards that conform to those of the ISO.¹⁹¹ According to

disinfectants, and hazardous substances. The initiative is expected to enhance Malaysia’s reputation on the global platform, aligning with the Convention on the Rights of Persons with Disabilities, as stated by the Minister of Health. Furthermore, even though the production of Braille labels is not mandated by legislation in Malaysia, unlike the European Union and Colombia, it can still serve as an example for South African legislation to follow suit as it indicates that South Africa, a country with a similar socio-economic status as Malaysia, can also in practice allow for labels containing Braille so as to also fall in line with the Convention. Furthermore, should South Africa implement a similar initiative or amend its legislation accordingly, it will ensure that there is a safe and effective manner to prevent medication errors and related problems.

¹⁸⁸ Standards Act, No 8 of 2008. The purpose of the Act is to provide -

- (a) a legal framework for the development, promotion and maintenance of South African National Standards in the Republic and the rendering of conformity assessment services and related activities;
- (b) for the continuation of the SABS as the peak national institution for the development, promotion, and maintenance of South African National Standards; and
- (c) for the establishment of the Board of the SABS”.

¹⁸⁹ *South Africa – Country Commercial Guide*, International Trade Administration, <<https://www.trade.gov/country-commercial-guides/south-africa-standards-trade>> (accessed 23 November 2022).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* British Industry Standards and the Deutsche Industry norm are favoured in the SABS systems for historic and technical reasons. Consequently, products sourced from these countries enjoy quasi – automatic accreditation.

the ISO, the SABS has an excellent record of participating in developing International Standards.¹⁹² Furthermore, the SABS, according to the ISO, is committed to providing standardisation services that “[i]mprove the competitiveness of South Africa through the understanding and development of standardisation products [and services] within South Africa and internationally”.¹⁹³

In section 24(1)(a) of the Standards Act,¹⁹⁴ the SABS must set and issue as a SANS, a standard developed through its processes and issue amendments to such a standard. Section 24(1)(b) provides the approval and issue as a SANS. According to section 24(2)(a) – (b) of the Standards Act, the notice contemplated in section 24(1) of the Standards Act must state the title and number of the SANS and contain a summary of the scope and purport of that SANS or the amendment thereof. Regarding the labelling of products in South Africa, the SANS is salient on almost all of the products mentioned above, specifically medicine and scheduled substances, but does provide limited foodstuffs, cosmetics, disinfectants, and hazardous substances. SANS 289, published by the SABS, contains labelling requirements for pre-packaged products and the general sale of goods subject to the Legal Metrology Act.¹⁹⁵

Section 1.1 (a) - (c) of SANS 289 stipulates that pre-packaged products must comply with certain labelling requirements, which include disclosing the product’s identity, the name and location of the manufacturer, packer, distributor, importer or retailer, and the net quantity of the product. This standard also outlines general requirements for the sale of goods and specifies the sizes in which certain products should be packaged. According to section 1.2.1 of SANS 289, all required markings must be in at least one of the official languages of the country in which the pre-packaged product is sold. Prior to being made available for sale, products must be labelled in accordance with SANS 289.¹⁹⁶ A pre-packaged product is defined as:

“[a]ny commodity that is made up as a unit or entity and for which its quantity has been determined and indicated on its label before being offered for sale, irrespective of whether such unit or entity is enclosed in a container, wrapped in any manner or unenclosed”.¹⁹⁷

A label is furthermore defined as:

“[a]ny written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed or moulded into, embossed on, or appearing upon a package containing any product for purposes of branding, identifying, or giving any information with respect to the product or to the contents of the package; however, an inspector’s tag or other non-promotional text affixed to or appearing on a product is not deemed to be a label that requires the label information prescribed by these requirements”.¹⁹⁸

¹⁹² *SABS South Africa membership: member body*, International Organization for Standardization, <<https://www.iso.org/member/1485.html>> (accessed 18 November 2022).

¹⁹³ *Ibid.*

¹⁹⁴ No 8. of 2008.

¹⁹⁵ No. 9 of 2014; SANS 289: 2016 *Labelling requirements for prepackaged products (prepackages) and general requirements for the sale of goods subject to legal metrology control* (hereafter referred to as “SANS 289”).

¹⁹⁶ Section 1.2.2 of SANS 289.

¹⁹⁷ Section 2.1 of SANS 289.

¹⁹⁸ Section 2.3 of SANS 289.

The written or printed label must (i) identify the product by including its name,¹⁹⁹ (ii) indicate conspicuously the name and address of the business of the person for making, manufacturing, packing, distributing, or importing the product,²⁰⁰ and (iii) the net quantity must be clearly visible.²⁰¹ Products that must be labelled include, *inter alia*, certain foodstuffs, cosmetics, disinfectants, and hazardous substances. The pre-packaged foodstuffs products relate to, *inter alia*, baby powder, bread, cake, candles, coffee, dairy products, fruit and vegetables, meat, milk, maize, and oils.²⁰² The pre-package cosmetics products relate to pastes, crèmes and viscous or other liquids in the form of solids or powders and deodorant sticks.²⁰³ The pre-packaged disinfectant products relate to cleaning materials. Hazardous pre-packed products include, for instance, petroleum gas.²⁰⁴ Medicines and scheduled substances are excluded from the ambit of SANS 289, except for medicines and drugs containing a maximum net quantity of 5 mg or 5 ml.²⁰⁵ Unfortunately, these products only require the name, responsible person, and net quantity to be on the product in a written form visible to sighted persons. It does not require a warning or director for use.

In South Africa, this is the only labelling standard related to the category of products discussed within this thesis. The current SANS 289 standard does not require product information on labels for products falling within its ambit to be accessible. Consequently, the standard only relates to providing product information on labels to promote and protect the general public, excluding persons with visual impairment, without due consideration. Therefore, even though SANS provide a National Standard in respect of pre-packaged goods, unfortunately, the application of SANS 289 is minimal, considering the number of products that ought to be regulated in terms of a standard.

The ISO is a worldwide federation of National Standards bodies [member bodies]. Preparing International Standards is usually carried out through the ISO's technical committees. Each member body interested in a subject [for which a technical committee has been established] has the right to be represented on that committee. International organisations, governmental and non-governmental, in consultation with the ISO, also take part in the work. The ISO's International Standards ensure that products and services are safe, reliable, and of good quality.

With regards to packaging, ISO 11156 is a set of guidelines for increasing accessibility when designing packages and packaged products.²⁰⁶ Accessible design is defined in terms of the standard as “[d]esign focussed on principles of extending the standard design to people with some type of performance limitation to maximize the number of potential customers who can readily use a product, building or service”.²⁰⁷ Packaging, in turn, is defined as “[a]ny product to be used for the containment, protection, handling, delivery, storage, transport and presentation of goods, from raw materials to processed goods, from the producer to the user or consumer, including processor, assembler or other intermediary”.²⁰⁸ This standard is intended to serve as a set of considerations for improving the accessibility of packaged products. It provides a framework for the design and evaluation of packages so that more persons can appropriately identify, handle, and use the contents. It considers varying aspects of the packaged product, including identification, purchase,

¹⁹⁹ Section 3.1 of SANS 289.

²⁰⁰ Section 4.1 of SANS 289.

²⁰¹ Section 5.1 of SANS 289.

²⁰² Section E.1 of SANS 289.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.* Section D.2. Neither the definition of “medicine” nor “drugs” are defined in terms of the Standard.

²⁰⁶ ISO 11156:2011 *Packaging — Accessible design — General requirements* (hereafter referred to as “ISO 11156”).

²⁰⁷ Section 3.1 of ISO 11156.

²⁰⁸ Section 3.3 of ISO 11156.

use and disposal. This standard does, however, not apply to dimensions, materials, manufacturing methods, or evaluation methods of individual packages.

Furthermore, with regard to package information and marketing, there is a growing recognition of the importance of promoting the full and effective participation of [older persons and] persons with disabilities on an equal basis. Packaging information is no longer limited to ensuring safety as it also adds value to the packaged products for these persons. When designing packaging that aims to provide accurate and appropriate information, particular attention is required to enhance accessibility for [older persons and] persons with disabilities. Such persons may encounter difficulties in accessing and comprehending information conveyed through labelling. To address this issue, ISO 19809 establishes requirements and recommendations for designing consumer packaging with respect to accessible information and marking.²⁰⁹ Consumer packaging is defined in terms of the standard as “[p]ackaging, constituting, with its contents, a sales unit to the final user or consumer at the point of retail”. This standard specifies considerations and techniques for designing and presenting information in a manner that makes consumer packaging accessible to persons with diverse sensory and cognitive abilities. The standard applies to all types of information presented on consumer packaging, except for information relating to medicinal products and medical devices, which are expressly excluded.

Information relating to medicinal products and medical devices is dealt with in ISO 17351.²¹⁰ The standard was formulated to standardise technical specifications for Braille on packaging for medicinal products, aiming to ensure uniformity in international regulations. The European Commission’s 2004 Directive necessitated the development of a standard for Braille on packaging for medicinal products. This Directive mandates the presence of Braille labelling on the outer packaging of medicinal products across the European Union. This requirement entails that the name of the medicinal product and, where necessary, its form and potency must be depicted in Braille to facilitate identification for persons with visual impairments.

Enhancing the accessibility of packages and their information is a matter of global concern, as it ensures that everyone can use them safely, comfortably, and with satisfaction, regardless of their age, perceptual and cognitive abilities, level of physical functioning, language, and culture. One of the critical challenges confronting the packaging industry is developing a package that conveys clear information necessary for use and purchase and is easily comprehensible by the broadest possible range of persons. Therefore, unlike in South Africa, the ISO International Standards mandate not only Braille for medicinal products but also accessible labelling for consumer packaging while also requiring the package itself to be accessible.

5. Unfair discrimination

In order to attack the South African legislation discussed in subparagraph 2 and 3, based on section 9 of the Constitution, it is necessary to analyse the facts and apply those facts to the law. The following analysis will proceed on the assumption that the equality jurisprudence and analysis

²⁰⁹ ISO 19809:2017 *Packaging — Accessible design — Information and marking* (hereafter referred to as “ISO 19809”).

²¹⁰ ISO 17351:2013 *Packaging — Braille on packaging for medicinal products* (hereafter referred to as “ISO 17351”).

developed for section 8 of the interim Constitution applies equally to section 9 of the 1996 Constitution, despite some differences in the wording of these provisions.²¹¹

It has been argued, in *Prinsloo* and *Harksen*, that an inquiry is necessary when an attack of constitutional invalidity is based on section 8 of the interim constitution.²¹² In *Harksen*, the approach was summarised as follows:

- “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant.

The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

- (c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).²¹³

First and foremost, the Constitutional Court deals with differentiation in two ways: differentiation, which does not involve unfair discrimination and differentiation, which does involve unfair discrimination.²¹⁴ Differentiation that does not involve unfair discrimination occurs when the ground on which persons are treated differently by the state is not covered by the provisions of section 9(3) of the Constitution.²¹⁵ On the other hand, differentiation on one of the specified grounds referred to in section 9(3) of the Constitution gives rise to a presumption of unfair discrimination. Therefore, if differentiation takes place on one of the specified grounds, it amounts to discrimination. If it does not but is based on attributes or characteristics that objectively have the potential to impair the fundamental dignity of persons as human beings, such differentiation will also amount to discrimination.²¹⁶

“[A]ccordingly, it is necessary to identify the criteria that separate legitimate differentiation from

²¹¹ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (hereafter referred to as “*Larbi-Odam*”); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para. [15] (hereafter referred to as “*Sodomy*”).

²¹² *Sodomy* at para. [17].

²¹³ *Harksen v Lane* 1998 (1) SA 300 (CC) at para. [52] (hereafter referred to as “*Harksen*”).

²¹⁴ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [23] (hereafter referred to as “*Prinsloo*”).

²¹⁵ *Ibid.*

²¹⁶ *Harksen* at para [46].

differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory ‘in the constitutional sense’²¹⁷

As soon as section 9 of the Constitution is invoked to challenge a legislative provision on the grounds that it discriminates between persons or categories of persons unfairly, the first question to be answered is whether the challenged provision does differentiate between persons or categories of persons.²¹⁸ If there is a differentiation which does not involve unfair discrimination, then to avoid breaching section 9(1) of the Constitution, there “[m]ust be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve”. In order to determine if a government action is constitutionally valid, it needs to be proven that there is no rational connection between the distinction the government has made and the reason they have given for making that distinction. If it is justified in that way, then it does not amount to a breach of section 9(1) of the Constitution.²¹⁹ Differentiation that does not constitute a violation of section 9(1) of the Constitution may, nonetheless, constitute unfair discrimination for the purposes of section 9(3) of the Constitution.²²⁰ If the differentiation bears no rational connection to a legitimate governmental purpose, then the provision in question violates the provisions of section 9(1) of the Constitution.²²¹ If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 9(3) of the Constitution to determine whether, despite such rationality, the differentiation amounts to unfair discrimination.²²² However, according to the Constitutional Court, it is important to note that not all cases require the rational connection inquiry of stage (a) to inevitably precede stage (b).²²³ In situations where a court deems discrimination to be unfair and unjustifiable, the rational connection inquiry may become unnecessary.²²⁴

The determination as to whether differentiation amounts to unfair discrimination under section 9(3) of the Constitution requires a two-stage analysis.²²⁵ Firstly, the analysis prompts questions about whether the differentiation amounts to discrimination, and secondly, if it does, whether it amounts to unfair discrimination.²²⁶ Section 9(3) of the Constitution contemplates two categories of discrimination. The first is differentiation on one or more of the grounds specified in section 9(3) of the Constitution. The grounds listed are currently contained in section 9(3) of the Constitution:

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

The second type is differentiation on a ground not specified in section 9(3) of the Constitution but comparable to such ground. There will be discrimination on an unspecified ground if it is “[b]ased on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner”.²²⁷ The

²¹⁷ *Ibid.* at para [43].

²¹⁸ *Ibid.* at para. [42].

²¹⁹ *Harksen* at para. [42].

²²⁰ *Ibid.* at para. [43].

²²¹ *Ibid.* at para. [44].

²²² *Ibid.*

²²³ *Sodomy* at para. [18].

²²⁴ *Ibid.*

²²⁵ *Harksen* at para. [45].

²²⁶ *Ibid.*

²²⁷ *Ibid.*

question is no longer relevant if the inquiry results in a negative conclusion in either case. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is unfair. In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established.²²⁸ In the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of section 9(3) of the Constitution has occurred.²²⁹

Once discrimination has been established, the subsequent enquiry is whether that discrimination is unfair. The nature of the unfairness contemplated by the provisions of section 9 of the Constitution was considered in the majority judgment in the *Hugo* case. The following was stated:

“[T]he prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked”.²³⁰

In *Harksen*, the focus of the unfairness enquiry was further explained as follows:

“[I]n [*Hugo*] dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner”.²³¹

The unfairness enquiry is “[c]oncerned with the impact of the impugned measures on the complainants”.²³² It is made clear in *Hugo* that this stage of the enquiry focuses primarily on the experience of the victim of discrimination. As was held in *Hugo*:

“[T]o determine whether that impact was unfair it is necessary to look not only at *the group who has been disadvantaged* but at *the nature of the power* in terms of which the discrimination was effected and, also at *the nature of the interests which have been affected* by the discrimination” (own emphasis).²³³

In order to determine whether the discriminatory provision has impacted complainants unfairly, various factors must be considered. These would include:

- “(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not.
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

²²⁸ *Ibid.* at para. [47].

²²⁹ *Ibid.*

²³⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para. [41] (hereafter referred to as “*Hugo*”).

²³¹ *Harksen* at para [49].

²³² *Larbi-Odam* at para. [17].

²³³ *Hugo* at para. [43].

- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature”.²³⁴

These factors, objectively assessed, will assist in giving “[p]recision and elaboration to the constitutional test of unfairness”.²³⁵ These factors, however, do not constitute a closed list, as others may emerge. It is the accumulating effect of these factors that must be examined, after which a determination must be made as to whether the discrimination is unfair.²³⁶

If the discrimination is held to be unfair, then the provision in question will be in violation of section 9(3) of the Constitution.²³⁷ In the final stage of the inquiry, one will determine whether the impugned provision can be justified under section 33 of the interim Constitution.²³⁸ Section 36(1) of the Constitution provides that a limitation of a constitutional right may be justified. Firstly, for section 36 of the Constitution to be applicable, there must be a limitation of a right that occurs “by law of general application”.²³⁹ It is an essential principle of the rule of law that rules be stated in a clear and accessible manner.²⁴⁰ It is because of this principle that section 36 of the Constitution requires that limitations of rights may be justifiable only if they are authorised by a law of general application. In respect of section 36 of the Constitution, it will be necessary to “[w]eigh both the purpose and the effect of the provision in question and determine its proportionality in light of the extent of its infringement on equality”.²⁴¹ Although section 36(1) of the Constitution differs in various respects from section 33 of the interim Constitution, its application still involves a process, described in *S v Makwanyane and Another* as the “[w]eighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests”.²⁴²

The relevant considerations in the balancing process are now expressly stated in section 36(1) of the Constitution. Section 36(1) of the Constitution reads as follows:

- “36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”.

²³⁴ *Ibid.* at para. [50].

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Harksen* at para. [51].

²³⁸ *Ibid.*

²³⁹ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 946 (CC) at para. [47].

²⁴⁰ *Ibid.*

²⁴¹ *Harksen* at para. [51].

²⁴² *Sodomy* at para. [33].

In *Makwanyane*, the relevant considerations in the balancing process were stated to include “[. . .] the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question”.²⁴³

According to the Constitutional Court in *National Coalition for Gay and Lesbian Equality*, section 36 does not in any material respect alter the approach expounded in *Makwanyane*, save that paragraph (e) requires that account be taken in each limitation evaluation of “[l]ess restrictive means to achieve the purpose [of the limitation]”.²⁴⁴ Although section 36(1) of the Constitution does not expressly mention the importance of the right, this is a factor which must, of necessity, be considered in any proportionality evaluation.

5.1. Consumer protection

5.1.1. Product labelling and trade descriptions

Next, this subsection will examine the constitutionality of regulation 6(1)(a) in the Consumer Protection Act Regulations. Regulation 6 of the Consumer Protection Act Regulations reads as follows:

- “(1) In order to assist consumers in making informed decisions or choices, for purposes of subsections (4) and (5) of section 24 of the Act and subject to subregulation (2), the importation into or the sale in the Republic of the goods specified in Annexure “D”, irrespective of whether such goods were manufactured or adapted in the Republic or elsewhere, is prohibited unless -
- (a) a *trade description*, meeting the requirements of section 22 of the Act, is applied to such goods in a *conspicuous and easily legible* manner stating *clearly*- [...]”;

“[T]o determine whether the discrimination in this case is unfair, regard must be had primarily to the impact of the discrimination on the appellants, which in turn requires a consideration of the *nature of the group affected*, the *nature of the power exercised*, and the *nature of the interests* involved”.²⁴⁵

Firstly, the group in question, which comprises persons with disabilities, is one of the largest minority groups worldwide. Furthermore, persons with disabilities have historically experienced discrimination and continue to face heightened vulnerability to further discrimination in conjunction with their lack of independence. The Constitutional Court has recognised that the more vulnerable the group affected by the discrimination, the more likely the discrimination will be unfair. Past patterns of disadvantage, stereotyping, and similar factors had a very significant influence on vulnerability.

²⁴³ *S v Makwanyane* 1995 (3) SA 391 (CC) at para. [104].

²⁴⁴ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. [34] (hereafter referred to as “*Immigration*”).

The power was exercised by the Minister of Trade and Industry, who has the duty to protect consumers and to promote responsible and informed consumer decision-making. The duty is given effect by regulation 6 of the Consumer Protection Regulations, which stipulates that accurate trade descriptions and labels must be provided when selling products to consumers.

Finally, the protection of consumers is of essential interest. Regulation 6 of the Consumer Protection Act Regulations plays a crucial role in safeguarding and ensuring that accurate and non-misleading trade descriptions and labels accompany certain products, thereby facilitating the protection of consumers. This regulation also serves as a means of communicating necessary product labelling information to consumers. However, visually impaired consumers are currently excluded from this communication tool, as regulation 6 of the Consumer Protection Act Regulations does not provide accessible information for them. Regrettably, regulation 6 of the Consumer Protection Act Regulations does not currently provide for the accessibility of trade descriptions or labels to consumers with visual impairments. The reason for this is that the regulation solely mandates the information to be displayed in a clear, noticeable, and legible format. This means that the current regulation prioritises making the information on product labels *visually* clear, noticeable (easily seen), and legible (easy to read) to those who do not have visual impairments. It does not require or address the need to make this information accessible in other formats or means that would be usable by consumers with visual impairments, such as scannable codes linked to auditory information. Given that labelling is crucial for health and safety reasons, it is imperative to ensure that all consumers, regardless of ability, have access to this information. Failure to provide accessible labelling can potentially result in personal harm. Additionally, visually impaired consumers are socially and economically excluded while being unable to make informed decisions as mandated by the CPA. The impact of discrimination, as mentioned above, warrants the conclusion that regulation 6 of the Consumer Protection Regulations is an instance of unfair discrimination.

Therefore, I now move on to the ultimate phase of the examination, where the evaluation will be conducted to establish if regulation 6 of the Consumer Protection Regulation can be justified under section 36 of the Constitution. For section 36 to be relevant, a limitation of a right must be established “by law of general application”. In this case, the prerequisite is satisfied, as regulation 6 of the Consumer Protection Act Regulations constitutes subordinate legislation that typically applies to all suppliers of goods within South Africa.

Section 36 of the Constitution requires a balance between different interests. This will involve a “[w]eighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality”.²⁴⁶ On the one hand, there is the right infringed, its nature, its importance in an open and democratic society based on human dignity, equality and freedom, as well as the nature and extent of the limitation.²⁴⁷ On the other hand, there is the importance of the purpose of the limitation.²⁴⁸ In the balancing process and in the evaluation of proportionality, one is enjoined to consider the relation between the limitation and its purpose, as well as the existence of less restrictive means to achieve this purpose.

²⁴⁶ *Harksen* at para. [51].

²⁴⁷ *Sodomy* at para. [35].

²⁴⁸ *Ibid.*

The focal point of our inquiry lies in the bedrock of our societal structure—the fundamental right to equality. Equality is of paramount importance because it seeks to address the underlying disparities and systemic barriers that can perpetuate inequality, even in the absence of overt discrimination. Its profound significance emanates from its inherent link to human dignity, affirming the intrinsic worth of every individual and their entitlement to equitable treatment. This cornerstone principle transcends the confines of simple justice, encapsulating the essence of a society that aspires to be both fair and inclusive. The limitation, in turn, revolves around the selective distribution of trade descriptions and labels solely to persons with sight, thereby influencing the right to equality for consumers with visual impairments. This restriction impedes the capacity of visually impaired consumers to acquire vital information, which serves as a crucial instrument for making informed decisions and safeguarding their well-being and safety. As a result, Regulation 6 of the Consumer Protection Regulations has a detrimental impact on social and economic inclusion, freedom of choice, and access to information for consumers with visual impairments.

Against this, it must be considered whether the limitation has any purpose and, if so, its importance. The primary purpose behind this limitation is to achieve cost-effectiveness. This is crucial because it helps ensure that resources are used efficiently and responsibly. By focusing on cost-effectiveness, the government aims to make the most out of the available financial resources, which is especially important in a context like South Africa, where fiscal responsibility is considered paramount. By mandating that product labels be legible to consumers without visual impairments, a significant number of financial resources can be conserved. This is because it eliminates the need for implementing additional, potentially costly accessibility measures. Focusing on ensuring the visibility of labels to those without visual impairments helps avoid the potentially exorbitant expenses associated with making products universally accessible. The argument is that by restricting accessibility to labels for persons with visual impairment and providing them only to sighted persons, the costs associated with producing labels are reduced. This restriction is seen as a cost-saving measure because producing labels with additional accessibility features, such as Braille or scannable codes, may be perceived as more expensive and complex. Therefore, the limitation is considered necessary to align with the goal of cost-effectiveness in label production. Another aspect pertains to the practicality of adapting labels for accessibility. The limitation is introduced as a response to the practicality concern, acknowledging that there are situations where it may not be feasible or practical to make labels accessible to visually impaired consumers. Enforcing accessible labelling can pose significant challenges when it becomes evident that implementing such measures is either impractical or entirely impossible.

While practicality presents a legitimate concern, it is not prudent to exclude all labels from accessibility simply because certain instances pose challenges. It is not reasonable to assert that because there are a few instances where implementing an accessible label may be impractical, the broader right to equality for visually impaired consumers can be disregarded, leading to the conclusion that no labels need to be accessible. Such an argument oversimplifies the issue. The impracticality of accessibility features in isolated cases does not negate the overarching principle of ensuring equal access. Instead, a more balanced approach is needed, one that acknowledges that while practical constraints may exist, they should not serve as a blanket justification for denying accessibility. In essence, the presence of practical challenges should trigger a search for practical solutions that uphold the principles of equality.

Although the consideration of costs is reasonable, it is imperative to emphasise that they should not serve as a justification for imposing significant hardships on visually impaired consumers. Access to product labels extends beyond matters of mere convenience; it directly relates to personal health and safety. Denying access to crucial information contained on labels can potentially lead to severe consequences. Although it is undoubtedly essential for the government and businesses to be financially responsible and prudent in managing resources, this responsibility should not come at the expense of fundamental rights. In the *Hoffman* case,²⁴⁹ the Constitutional Court confirmed that while costs and commercial requirements are important factors to consider, they should not be the sole or overriding concern. The Court cautioned against making decisions solely based on financial considerations if doing so would lead to unfairness, stereotyping, or prejudice. Striking a balance between economic considerations and the rights and needs of vulnerable populations is often a complex task. However, in many instances, less restrictive, innovative, and cost-effective solutions can be identified to accommodate the rights of visually impaired consumers without imposing an disproportionate burden on the government or businesses. It is, therefore, important to determine whether less restrictive means are available to achieve the same cost-effectiveness and practicality goals while ensuring equal accessibility for persons with visual impairment.

Traditionally, addressing accessibility for visually impaired consumers typically involves incorporating Braille on product labels or leaflets. However, a more cost-effective and pragmatic alternative presents itself: implementing a scannable code in conjunction with a website that can audibly convey the information. In terms of costs, Braille relies on tactile embossing, necessitating specialised equipment and materials, which inherently increases production expenses. This equipment includes embossing machines and specialised paper or materials designed to withstand the embossing process. In contrast, scannable codes, such as QR codes, employ relatively straightforward printing processes that are less resource-intensive. These codes can be easily generated and printed using standard printing equipment, reducing associated production costs significantly. Consequently, the streamlined production of scannable codes renders them a more cost-effective option compared to the specialised processes required for Braille. In terms of practicality, Braille poses challenges related to space constraints and significant design modifications. Notably, not all product labels can accommodate Braille due to space limitations or unsuitable materials. Conversely, scannable codes seamlessly integrate into existing label production processes and designs. Moreover, they minimise spatial demands on labels and packaging, facilitating the inclusion of more information without the need for substantial design alterations.

Opting for labels that exclude visually impaired consumers, especially when cost-effective and practical alternatives are available, appears to be a clear case of discrimination without any valid justification. It is accordingly held that the limitation by regulation 6(1)(a) of the Consumer Protection Act Regulations of the right entrenched in section 9(3) of the Constitution is not justified in terms of section 36 and, therefore, is inconsistent with the Constitution's provisions.

5.1.2. Disclosure of price and warning concerning fact and nature of risks

Section 23 forms the basis of discrimination as it neglects to cater to the specific requirements of visually impaired consumers. It imposes a requirement for price disclosure to be presented in *written* South African Rands. However, this approach inherently lacks accessibility for visually impaired

²⁴⁹ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para. [34].

consumers, as they rely on alternative means of accessing information due to their visual impairment. Consequently, visually impaired consumers are denied the right to access price information on an equal basis with others. This exclusion disrupts their ability to compare prices effectively and make informed choices, contributing to their economic vulnerability.

Section 49, in conjunction with Section 58, compounds the issue by mandating the use of *written* notices to inform consumers about potential risks associated with products or services. These written notices are inherently inaccessible to visually impaired consumers, placing them in a position of dependence and potential risk. Visually impaired consumers may struggle to comprehend these notices, thereby compromising their safety and well-being. This further perpetuates the unequal treatment of visually impaired consumers within the realm of consumer protection.

In essence, these sections—Section 23 and Section 49, read with Section 58—collectively create a discriminatory environment that systematically disadvantages visually impaired consumers. They overlook the unique needs and rights of this consumer group, depriving them of essential protections available to others. This pattern of discrimination runs counter to the principles of equality and non-discrimination that underpin constitutional and human rights frameworks, highlighting the urgent need for reform and greater inclusivity within consumer protection legislation.

5.2. Product labelling

With regard to medicines and scheduled substances, the relevant contents of regulation 10(1) of the General Regulations read as follows:

- “(1) Subject to subregulations (4) and (5), the immediate container of every medicine in which a medicine intended for administration to or use by humans is sold shall have a label attached to it on which the following particulars shall appear in *clearly legible indelible letters* in *English* and at least *one other official language* — [...]”.

With regard to foodstuffs, the relevant contents of Regulation 7(1) of the Regulations relating to the Labelling of Foodstuffs reads as follows:

- “(1) Subject to the provisions of regulation 8, information required to appear on any label shall be –
- (a) in English and where possible, at least one other official language of the Republic of South Africa;
 - (b) *clearly visible, easily legible and indelible* and the legibility thereof shall not be affected by pictorial or any other matter, printed or otherwise”.

With regard to cosmetics, the relevant contents of Regulation 8(1) of the Regulations relating to the Labelling of Cosmetics reads as follows:

- “(1) Save as provided in sub-regulation 2, the immediate container of every cosmetic for sale in the Republic of South Africa must have a label attached to it on which at least the following particulars must appear in *indelible, easily legible and visible lettering* in at least English – [...]”.

With regard to disinfectants, the relevant contents of Section 5(2) of the Compulsory Specifications for Disinfectants reads as follows:

- “5(2) The manufacturer or supplier shall provide on a label on or firmly attached to the packaging of a chemical disinfectant with at least the *legible and indelible* information [...]”.

With regard to hazardous substances, the relevant contents of Regulation 8(1) of the Regulations on Hazardous Substances read as follows:

- “8(1) (a) Each container of a Category A Group I hazardous substance imported, manufactured or packed in the Republic shall be *clearly and conspicuously labelled* with – [...]”.

These regulations draw a distinction between persons with visual impairments and those without. The differentiation arises from the failure to provide persons with visual impairment with the same circumstances as sighted persons. In accordance with these regulations a clear distinction is made between persons with visual impairments and those without, manifesting in the differential labelling requirements for products exclusively intended for sighted individuals. To ensure the legality and equity of this differentiation, it is imperative to scrutinise the underlying rationale of the government, assessing its validity and alignment with its intended purpose. Primarily, this distinction stems from economic considerations, particularly concerning cost management. The argument posits that failing to distinguish between products for sighted and persons with visual impairment would result in excessive expenses. Additionally, practical challenges related to label adaptability, especially on space-constrained products, contribute to this distinction. These constraints can introduce logistical difficulties, making it impractical to implement accessibility features on every label. Consequently, a rational link exists between the established differentiation and the financial and logistical justifications provided for its implementation. Given this rational connection, an evaluation of section 9(3) of the Constitution is necessary to determine whether, despite its rationality, the differentiation amounts to unfair discrimination.

The purpose of the current inquiry is to determine whether discrimination on the grounds of disability can be considered unfair. Section 9(3) of the Constitution includes disability as a form of discrimination. As per section 9(5) of the Constitution, any differentiation based on disability is considered unfair discrimination unless there is evidence to prove that it is fair.²⁵⁰ In the (un)fairness analysis, the discrimination’s impact on the complainant or the members of the affected group is the determining factor regarding the fairness of the discrimination. In the *Sodomy* case, the Court stated:

“[A]lthough, in the final analysis, it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the

²⁵⁰ *Sodomy* at para. [18].

discrimination, the approach to be adopted, as appears from the decision of this Court in *Harksen*, is comprehensive and nuanced”.²⁵¹

Firstly, the affected group, namely persons with disabilities, is one of the world’s most stigmatised and marginalised groups. They have been, and still are to this day, continuously stigmatised in society. Persons with disabilities are undervalued and unrecognised despite being the world’s largest minority group.

Secondly, in this case, the power was exercised by the Minister of Health the Minister of Trade and Industry, who has the duty to protect the general public. The duty is given effect by means of each individual regulation which mandates that the identified products must display a label that has been specifically approved for this purpose.

Finally, these regulations affect human health and consumer protection, which are undoubtedly of vital interest. The regulations provide for the regulation of various substances in order to ensure the general public is protected from bodily harm and other hazards. Persons with visual impairment not only form part of the general public – they also form part of the general public that is placed in a highly vulnerable position as a result of their disability. They cannot see, read, or comprehend any information that could be lifesaving or, inversely, fatal. Unfairly so, sighted persons, whether literate or illiterate, are not placed in a nearly similarly unsafe or dangerous position. These identified substances may not be sold without the appropriate labels or leaflets in order to protect the public’s health. This must include the part of the general public that cannot physically see the label or leaflet. If persons with visual impairment are not included as part of the general public, then they are the only ones not protected from harm. Due to their disability, the application of a label is equivalent to having no label whatsoever, and this cannot be deemed fair. It is only when everyone is protected that the purpose of protecting the general public is achieved. Persons with visual impairment are treated unequally based on their disability because certain information on the label or leaflet does not have to be in an accessible format to all. It must only be in words or pictograms, in ink, and written in English and one other official language that is visually clear and legible. This implies that the label must be designed with the assumption that consumers have sight. The term “clearly visible” suggests that the label must be visually noticeable, which, by default, excludes individuals who are visually impaired from benefiting fully from the information on the label. “Easily legible” means that the label’s text should be easy to read, again assuming that consumers can see and interpret the printed text. “Indelible” implies that the label’s markings should be permanent and not easily erased, which does not consider alternative formats like Braille or auditory information that might be necessary for people with visual impairments. While these requirements ensure that information on the label is clear and permanent, they do not account for the fact that persons with visual impairments may not be able to read standard printed text or interpret pictograms, irrespective of whether it is clear and legible. For persons with visual impairment, that label is not clear or legible as they cannot see the written words. Consequently, the impact of discriminating against persons with visual impairments is that information is accessible to everyone except them, which places them in an unsafe and dangerous position.

²⁵¹ *Ibid.* at para [19].

The effect of the aforementioned, particularly the impact of discrimination, justifies the conclusion that these regulations constitute unfair discrimination. Accordingly, the subsection now proceeds to the concluding phase of the investigation, where an assessment will be carried out to determine if these regulations can be justified under section 36 of the Constitution. A prerequisite for the relevance of section 36 of the Constitution is that the restriction of a right must be imposed “by the law of general application”. In this case, the condition is satisfied, as these regulations all constitute subordinate legislation that generally applies to all manufacturers or suppliers of these substances in South Africa.

The central focus of our examination centres on a fundamental aspect of our societal framework, namely the bedrock principle of the right to equality. This concept holds a position of paramount significance due to its role in addressing underlying inequalities and systemic barriers that can persist even in the absence of overt discriminatory practices. The profound importance of equality derives from its intrinsic connection to human dignity, which underscores the inherent value of every individual and their entitlement to equitable treatment. This fundamental principle extends beyond mere justice, encapsulating the essence of a society that aspires to be both equitable and inclusive. The limitation we are scrutinising pertains to the selective allocation of labels exclusively to individuals with sight, thereby impacting the right to equality for persons with visual impairments. This restriction hinders visually impaired person’s ability to access crucial information, which serves as a vital tool for making well-informed decisions and ensuring their overall well-being and safety. As a result, these regulations have a detrimental impact on the ability to participate and be included in society, access information, and achieve self-independence without the threat of injury or harm.

Against this, it must be considered whether the limitation has any purpose and, if so, its importance. At its core, this limitation is primarily driven by the imperative of achieving cost-effectiveness, a pivotal consideration rooted in the principles of efficient and responsible resource allocation. One instrumental approach in realising this optimisation lies in the mandate that product labels remain legible to persons without visual impairments. By doing so, it obviates the need for additional, potentially expensive accessibility enhancements. By honing in on the objective of preserving label visibility exclusively for persons without visual impairments, this strategy aims to mitigate the potential for incurring exorbitant costs associated with achieving universal product accessibility. The underlying argument contends that by restricting label accessibility solely to sighted individuals while excluding those with visual impairments, production costs are notably curtailed. This restriction is considered a prudent cost-saving measure, as the incorporation of supplementary accessibility features like Braille might be perceived as engendering higher expenses and introducing heightened complexity into the production process. Furthermore, it is pivotal to recognise that this limitation also grapples with the pragmatic dimension inherent in adapting labels for enhanced accessibility. It acknowledges that certain situations may render the endeavour infeasible or impractical when it comes to making labels accessible to persons with visual impairments. The enforcement of accessible labelling requirements can pose significant logistical challenges, particularly when it becomes evident that implementing such measures may not be practically viable or, in certain cases, completely unattainable. Balancing these considerations within the broader framework of cost-effectiveness and practicality presents a complex terrain demanding nuanced solutions.

While it is logical to consider costs in decision-making processes, it is imperative to emphasise that costs should not be utilised as a rationale for imposing significant hardships on persons with visual impairment. Access to product labels directly affects personal health and safety. Denying persons with visual impairment access to vital information found on labels can have severe consequences. While fiscal responsibility and prudent resource management are undoubtedly vital aspects of governance, these responsibilities should not take precedence over fundamental rights in this context. Furthermore, while acknowledging the importance of practicality is certainly a valid consideration, as it reflects the need for efficient and feasible solutions in various situations. However, it is essential to avoid an overly simplistic approach that categorically excludes all labels from accessibility merely because specific situations present challenges. Even though there may be a few instances where implementing accessible labels appears impractical, it would be unreasonable to use this as a basis for disregarding the broader principle of equality for persons with visual impairment. The existence of practical constraints in isolated cases should not serve as an overarching justification for denying accessibility. Instead, a more nuanced approach is required—one that acknowledges the presence of practical challenges but actively seeks practical solutions while upholding the fundamental principles of equality. This approach recognises that the pursuit of accessibility may encounter hurdles but remains committed to addressing them in a manner that respects the rights and needs of persons with visual impairment. Nevertheless, it is often possible to identify less restrictive, innovative, and cost-effective solutions that can accommodate the rights of persons with visual impairment without imposing an disproportionate burden on either the government or businesses. Therefore, it remains essential to thoroughly explore whether alternative, less restrictive means are available to achieve the dual goals of cost-effectiveness and practicality while ensuring that persons with visual impairment enjoy equal accessibility to product information. This approach aligns with the principles of equality and social inclusion, which should always be at the forefront of such considerations.

It is essential to recognise the conventional method employed for enhancing product accessibility among persons with visual impairment, primarily characterised by the inclusion of Braille on product labels or accompanying leaflets. However, recent advancements have introduced a more economically viable and operationally pragmatic alternative: the integration of scannable codes in conjunction with a web-based platform capable of delivering auditory information. This contemporary approach presents a multitude of advantages warranting scholarly attention. Firstly, from a financial perspective, this innovative approach exhibits enhanced cost-effectiveness when compared to the traditional utilisation of Braille. The production of Braille labels necessitates specialised equipment and materials, thus inherently escalating production costs. In stark contrast, the adoption of scannable codes is facilitated by widely available standard printing equipment, leading to substantial cost reductions. Secondly, the practicality of employing scannable codes distinguishes them as a superior alternative. While Braille often poses challenges related to spatial constraints and may require extensive modifications to product labels, scannable codes seamlessly integrate into existing label designs and production processes. Their compact size mitigates spatial demands on labels and packaging, enabling the inclusion of comprehensive information without necessitating substantial design alterations. These considerations underscore the critical relevance of exploring this cost-effective and operationally pragmatic approach as a means to ensure equitable access to product information for all persons.

The decision to employ labels that do not cater to persons with visual impairment, particularly when cost-effective and practical alternatives exist, can be unequivocally categorised as a form of

discrimination that lacks a substantiated rationale. The refusal to embrace such accessible solutions, despite their feasibility, can be seen as an unfair discriminatory practice. It is therefore opined that unfair discrimination is unjustified under section 36 of the Constitution. In these circumstances, it is concluded that these regulations do not meet the test of section 36 of the Constitution and is, therefore, inconsistent with the provisions of the Constitution.

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Chapter 5: The extent to which accessibility obligations and reasonable accommodation measures ought to be applied to ensure that persons with visual impairment are not unfairly discriminated against

1. Introduction

In Chapter 5, the discussion focuses on the application of accessibility, as explored in Chapter 3, to the South African legislative framework examined in Chapter 4. The primary objective is to ensure that persons with visual impairment are not subjected to unfair discrimination and that substantive equality, as discussed in Chapter 2, is effectively promoted. By considering the principles of accessibility and reasonable accommodation within the context of the legislative framework, the aim is to identify and address any existing barriers or limitations that may hinder the equal participation and inclusion of persons with visual impairment. This analysis seeks to evaluate the alignment of the legislative framework with accessibility and reasonable accommodation principles and propose any necessary amendments. Chapter 5 contributes to the broader understanding of how the legislative framework can be enhanced to eliminate discrimination in South Africa by analysing the interplay between accessibility, South African legislation, and substantive equality. It provides an analysis of the application of accessibility principles to the legislative framework, with the aim of promoting substantive equality. After that, the chapter explores the extent to which reasonable accommodation, as discussed in Chapter 3, ought to be applied to ensure *de facto* equality for persons with visual impairment, as explored in Chapter 2. Ultimately, Chapter 5 delves into the application of reasonable accommodation within the specific context of visual impairment and accessible labelling, comprehensively examining its principles.

2. Labelling: accessible information

Before discussing the importance of labels and leaflets¹ in providing accessible information, it is crucial to define these terms. The definitions of a label and leaflet are based on various provisions in the legislative framework discussed in Chapter 4. Generally, a “label” refers to any information about a product written, printed, affixed, applied, attached, or embossed on the packaging, including the product itself, its inner or outer container, which provides information about the product or its contents. On the other hand, a “leaflet” refers to any product information written, printed, affixed, applied, attached, or embossed on paper that provides information about the product or its contents and is either attached to or near the product.

¹ *Why is product labelling so important*, Luminer, <<https://www.luminer.com/articles/why-is-product-labeling-important/>> (accessed 13 December 2022); there are four main areas in which the importance of a label or leaflet can be broadly categorised. Firstly, the label or leaflet provides information about the product’s ingredients, including potential allergens, enabling the consumer to make informed decisions based on the product’s specifications. Secondly, the label or leaflet includes warnings about health risks associated with the product. In addition to allergens, other potential health risks must be identified and included. Thirdly, instructions related to usage are included on the label or leaflet, as incorrect usage can have severe consequences. Lastly, a product’s label serves as a marketing tool, with advancements in label manufacturing allowing for cross-brand marketing, recipe information, or couponing. In summary, a label or leaflet is required by law to provide complete information about the product, which is crucial for the consumer’s safety and informed decision-making.

Accessible information is provided in formats that, theoretically, allow a wider variety of users to access the content equally.² Accessible information can be defined as “[i]nformation which is able to be read or received and understood by the individual or group for which it is intended”.³ For the purposes of this thesis, the term “accessible information” solely pertains to product information, which provides for the mandatory details regarding a product as outlined in the labelling legislative framework deliberated in Chapter 4. If a product is intended for human use and consumption, the mandated product information must appear on the label or leaflet.⁴

Persons with visual impairment deserve protection from product-related risks and harm, making appropriate regulatory systems crucial, especially when consumers are vulnerable. In South Africa, numerous regulatory systems are in place to safeguard consumers. However, these regulations fail to consider persons with visual impairment, who are often uninformed due to a lack of accessible information. While sighted persons are inundated with information, persons with visual impairment are typically not fully informed.⁵ The current labelling legislative framework does not adequately consider the accessibility of product information, and private retailers tend to prioritise catering to persons without disabilities.⁶ As a result, persons with disabilities are often excluded from consumer participation opportunities, which can hinder, *inter alia*, their ability to make informed purchasing decisions.⁷

“[P]articipants with vision impairments further narrated how current practices of providing product information limit their consumer control and choice. [...]. This limits their shopping choices and consumer independency, and excludes them from making informed market decisions”.⁸

Additionally, visually impaired consumers have reported a sense of being treated as “inferior” or as “less important” customers.⁹ Therefore, it is essential to highlight the importance of accessibility and ensure that all individuals have access to comprehensive, comparable, reliable, and user-friendly information.

In theory, persons with disabilities, including those with visual impairments, are entitled to equal protection and benefits under the law.¹⁰ However, in practice, this is often different. Stating that the law offers equal protection despite the occurrence of physical harm, including the possibility of death due to inadequate information for persons with visual impairment, is an unjustifiable assertion.¹¹ Proper labelling laws mandating accessible product information are crucial to the legal, social and economic fibre of society.¹² The lack of information clarity and accessibility is by no means a recently developed problem for persons with a visual impairment.¹³ In fact, many countries have acknowledged that their existing labelling laws

² Accessible information was defined within a position paper from the Royal College of Speech and Language Therapists in 2010 as follows: “[A] supportive process of making information easier for people with disabilities, that firstly involves simplifying the linguistic message and secondly conveying the simplified message in different mode(s) of communication, i.e., not just the written word or spoken message”.

³ Terras, M. J. D., & McGregor, S, *The Importance of Accessible Information in Promoting the Inclusion of People with an Intellectual Disability* Vol. 1, (2021), Disabilities, pp. 132 – 150 at p. 133.

⁴ Guideline on the readability of the labelling and package leaflet of medicinal products for human use European Commission (2009), ENTR/F/2/SF/jr (2009)D/869, pp. 1 – 27 at p. 5 – 6.

⁵ Eskyte, I, *Disabled People's Vulnerability in the European Single Market: The Case of Consumer Information* Vol.4 (2019), Journal of Consumer Policy, pp. 521 – 543 at p. 521 – 543.

⁶ *Ibid.* at p. 533.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ White, R, & Msipa, D, *Implementing Article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable Accommodations for Persons with Communication Disabilities* Yearbook 7, (2019), African Disability Rights, pp. 99 – 120 at p. 100.

¹¹ White, R, & Msipa, D, (2019) at p. 100.

¹² Kamanga, V, *Product labelling and trade description: Failure to warn and the Consumer Protection Act 68 of 2008* (2017), University of Pretoria, pp. 1 – 108 at p. 3.

¹³ Terras, M. J. D., & McGregor, S, (2021) at p. 133.

addressing the accessibility of information need to be amended.¹⁴ Unfortunately, South Africa's existing labelling laws addressing the accessibility of product information remain unrealistically low.¹⁵

It is widely acknowledged that information accessibility has a significant impact on various aspects of our lives.¹⁶ Thus, it is generally agreed upon that accessible information should be provided to a diverse range of persons, particularly vulnerable groups such as the visually impaired, mentally impaired, children, the elderly, and illiterate individuals.¹⁷ Accessible information enables societal participation, enhances decision-making abilities, and promotes independence while also preventing inequality and protecting rights. Merely recognising the importance of accessible product information is insufficient. Instead, to make accessible product information a reality, changes to the South African product labelling regime must be implemented. To achieve this, it is necessary to discuss the grounds on which these changes must be made. Firstly, it is important to determine which information must be made accessible. In this thesis, the product information must be made accessible to promote equality, protect consumer rights, assist persons with visual impairment in their daily lives, and comply with international accessibility obligations.¹⁸ Secondly, a determination must be made of the extent to which accessibility obligations ought to be applied to the legislative framework explored in Chapter 4.

3. Accessibility related to labelling

Accessibility refers to creating, *inter alia*, products, environments, and services that can be used by a wide range of people.¹⁹ Accessibility provides persons with access to material and immaterial goods and conditions they would not have otherwise had access to if the goods and conditions were not accessible.²⁰ In this thesis, labelling provisions that mandate accessibility can provide visually impaired people with access to important product information they would not have otherwise had access to. This information allows them to, *inter alia*, identify the product,²¹ access health and safety information, and enjoy their rights on an equal basis with others.²² Despite South Africa having an extensive legislative framework for product labelling, further protection in this regard is still necessary. While current South African regulations concerning product labelling safeguard the public by mandating specific labelling requirements, these requirements are limited to written words or pictograms and do not include accessible formats. In the case of all the products discussed in Chapter 4, there is no provision for Braille or any other similar accessible

¹⁴ *How we can improve information accessibility*, European Agency for special needs and inclusive education, (2015), <<https://www.european-agency.org/news/directors-blog/how-we-can-improve-information-accessibility>> (accessed 08 April 2022). These countries include, *inter alia*, the United Kingdom, Canada, Japan, and member states of the European Union.

¹⁵ The only labelling provision requiring product information to be in an accessible format is found in regulation 12(3) of the Medicines and Related Substances Act: General Regulations, GNR. 859 of 25 Augustus 2017 (Government Gazette No. 41064), which provides that information may also be provided in an electronic format accessible in any of the other official languages and in any other format to enable its accessibility for persons living with disabilities.

¹⁶ *How we can improve information accessibility*, *European Agency for special needs and inclusive education*, (2015), <<https://www.european-agency.org/news/directors-blog/how-we-can-improve-information-accessibility>> (accessed 08 April 2022).

¹⁷ Terras, M, Jarrett, D, & McGregor, S, (2021) at p. 144.

¹⁸ Morozova, A, *Consumer's Right to Product Information: Issue of Harmonization of National Legislation in Accordance with European Union Law* Vol. 82, (2020), *Journal of Eastern European Law*, at pp. 193 – 197 at p 193: “[I]t is determined that ensuring consumer rights in general and the right to information about products, in particular, are important guarantees of democracy of the state, protection of human and civil rights and freedoms; play an important role in establishing the ability of consumers to freely choose a product according to certain characteristics among competitors in the market”.

¹⁹ *Create accessible products with inclusive design*, DLT Labs, (2021), <<https://www.dlmlabs.com/blog/create-accessible-products-with-inclusive-design-910986>> (accessed 08 April 2022).

²⁰ Greco, G, *On Accessibility as a Human Right, with Application to Media Accessibility* in Matamala, A, & Orero, P, (Eds.), *Researching Audio Description: New Approaches*, (2016), p. 11 – 13 at p. 12 – 13, “[a]ccessibility refers to material and immaterial goods, but it is neither an immaterial nor a material good per se. Accessibility is a condition or, [...] , a precondition for the enjoyment of material and immaterial goods”.

²¹ *The codes helping visually impaired people shop*, BBC News, (2021), <<https://www.bbc.com/news/business-57679943>> (accessed 09 April 2022).

²² The rights contained in Part D and Part H of the Consumer Protection Act, No. 68 of 2008 (hereafter referred to as the “CPA” in the footnotes).

format for product information. The rectification of this problem and the cessation of unfair discrimination can be achieved through accessibility as a facilitator of substantive equality.

3.1. Alternative accessible formats

In the context of accessible labelling, there are presently two prominent alternatives: Braille and scannable codes, such as QR codes or barcodes. On the one hand, Braille has traditionally been considered a primary method for making product information accessible to persons with visual impairments. Braille is a language system for persons who are visually impaired, used for reading and writing.²³ It consists of various combinations of raised dots that represent letters, numbers, punctuation, and symbols.²⁴ Each Braille character has a unique pattern that is identified by feeling the sequence of raised dots on paper with the fingertips.²⁵ The standard Braille “cell” is made up of six dots that resemble the number six on a die, allowing for a total of 64 possible characters to be created.²⁶ While most Braille characters are standardised and universal across countries, some may have special symbols that are unique to a specific language.²⁷ On the other hand, scannable codes, like QR codes or barcodes, rely on digital technology to provide information. These codes can be scanned using a smartphone or a specialised device, instantly converting the encoded data into an accessible format, such as speech or text. In the subsequent sections of this thesis, a thorough examination of both labelling options will be done, while taking into consideration their respective advantages and limitations in terms of accessibility, usability, and practicality. Through a comprehensive analysis, it will be argued that, in the specific context under investigation, scannable codes offer a more viable and efficient solution compared to Braille. This digital solution considers factors like ease of use, versatility, and the potential for real-time updates to product information.

In India, a study was conducted on one hundred persons with visual impairment who were all literate in Braille.²⁸ The study reported that 46 percent of the participants had taken an incorrect dosage of medication at least once, while 43.7 percent had missed a dose altogether.²⁹ Of the diabetic patients in the group, 8 percent had taken an incorrect dose of insulin due to reliance on memory for the prescribed dose.³⁰ Additionally, 15 percent of study participants had taken expired medication because they were unable to read the labelling on the products.³¹ The study identified the inability to remember the various frequencies and instructions for multiple medications as the most common cause of missed doses. However, when Braille labelling was introduced for a period of two years, 93 percent of the participants were able to manage their prescriptions without any reported incidents independently.³² Many persons with visual impairment reported feeling empowered by the use of Braille and felt reassured that they could safely use their medications because all necessary information regarding the product, such as the name, dose, route, frequency, and expiry dates, was available to them.³³

²³ Lim, B, *The Current State of Braille on Packaging in Canada and Whether it Should Change* (2020), Ryerson University, p. 1 – 26 at p. 4.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Shetty S, Sunita S, & Shetty I, *Empowering the visually impaired by customized Braille prescription and thus reducing medication errors* Vol. 69, (2021), *Indian J Ophthalmol*, pp. 1388 – 1390 at p. 1389 – 1390.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

In Saudi Arabia, a separate study was conducted on two hundred and fifteen persons with visual impairment to assess the need for Braille labelling on medicinal products that were dispensed to them.³⁴ Prior to receiving any Braille labelling, over 50 percent of the participants were unable to identify critical information such as the medication's name, dose, expiry date, instructions, and potential interactions.³⁵ As a result, persons with visual impairment reported a lack of independence and relied heavily on their caregivers.³⁶ This finding echoed the results of the aforementioned study conducted in India. The study emphasised the necessity of applying Braille labelling to medicinal products prescribed for persons with visual impairment.³⁷ Specifically, 86 percent of participants recommended the use of Braille on medication labels,³⁸ while only 11 percent of individuals preferred to have their medication dispensed in the presence of a caregiver, and the remaining 3 percent used assistive technology devices.³⁹ When asked whether Braille labelling could improve the quality of therapy and avoid the challenges faced without it, 91 percent of participants stated that Braille labels would significantly assist them and improve their overall quality of life.⁴⁰ According to the study, the use of Braille labelling on medications may improve "[d]rug treatment regimes, minimize medications errors, and promote independence in these individuals (through self-administration of medications)".⁴¹

Braille implementation on packaging offers several advantages, such as increasing inclusivity, accessibility, convenience, and independence for persons with visual impairment. However, it also has some disadvantages. Braille implementation can be costly, may statistically benefit a smaller population, and can be challenging to implement. Additionally, it has yet to be universal in its application.⁴² A study in Canada that involved visually impaired participants found that the quality of Braille on packages needed to be improved.⁴³ Moreover, most participants favoured new technology over Braille as it was more adaptable and familiar.⁴⁴ Introducing more Braille on packaging presents challenges as many persons are unwilling to learn Braille and prefer technological solutions. As a result, it is essential to consider more effective means of accessibility for persons with visual impairment. With the growing availability and affordability of technology and its accessibility features, Braille may become an obsolete means of legibility in the future.

The argument against utilising Braille as a viable solution instead of technology is based on several factors: the high illiteracy rate, the costs involved, and the lack of universality. It is estimated that only approximately one in ten persons with visual impairment worldwide can read Braille, making it an ineffective solution.⁴⁵ Labels or leaflets with Braille can be a significant deterrent in countries like South Africa due to the costs involved in their production. Additionally, there is a challenge in identifying a cost-effective protocol with a quick turnaround time.⁴⁶ Moreover, Braille is not universal, with each language having a different Braille script. Therefore, the introduction of Braille on all labels or leaflets has been met with criticism.⁴⁷ While Braille may be a temporary solution, it may become obsolete in the future due to advances in technology, making it essential to explore more effective means of accessibility for the visually impaired. Unfortunately, Braille alone can only assist (i) persons with visual impairment who are (ii) literate. The objective of universal

³⁴ Almukainzi, M, Almuhareb, A, Aldwisan, F, & Alquaydhib, W, *Medication use patterns in the visually impaired in Saudi Arabia and the importance of applying Braille labelling* Vol. 28, (2020), Saudi Pharmaceutical Journal, pp. 274 – 280 at p. 275.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at p. 276.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at p. 274.

⁴¹ *Ibid.* at p. 276.

⁴² Lim, B, (2020) at p. 2.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *The codes helping visually impaired people shop*, BBC News, (2021), < <https://www.bbc.com/news/business-57679943>> (accessed 09 April 2022).

⁴⁶ Shetty S, Sunita S, & Shetty I, (2021) at p. 1390.

⁴⁷ *Ibid.* at p. 1388.

design is to create maximum accessibility by providing universally accessible product information that everyone can use, regardless of their abilities. Therefore, creating a product label and leaflet that is universally designed requires the use of technology, not just Braille. The goal of technology is to create a barrier-free environment that requires less effort from both persons with visual impairment and society, bridging the gap between them. By using technology, the label and leaflet can be made available to both sighted and persons with visual impairment, regardless of their literacy level. In 2021, a study revealed that over 50 percent of South Africa's population, out of the current 60.1 million people, use smartphones, including many persons with visual impairment.⁴⁸ In contrast to the low Braille literacy rate in South Africa, smartphones offer a more accessible means of information dissemination. Braille requires physical touch and takes up a significant amount of space on product labels, limiting the amount of information that can be conveyed. Additionally, many persons with visual impairment cannot read Braille. Smartphones, on the other hand, are widely used and offer several accessibility features, including screen readers that do not require Braille literacy.⁴⁹ In addition, smartphones support various applications that offer helpful accessibility features.

QR codes are a widely used patent-free technology that can be printed on any surface, including product packaging.⁵⁰ They are commonly used to bridge the gap between print and digital media.⁵¹ A large number of contemporary smartphones are equipped with scanning applications that can easily capture audio notes of the embedded information, thus expanding the reach of QR codes to a broader range of users.⁵² However, visually impaired people may find it challenging to focus and frame QR codes correctly on a smartphone's camera, making them less accessible.⁵³ A new barcode technology has been developed in the United Kingdom to address this issue.⁵⁴ These barcodes, which contain various colours instead of just black and white, can be scanned from a distance of up to 12 meters away.⁵⁵ This new barcode technology is being used for the first time on food packaging, enabling persons with visual impairment to identify products and access health and safety information about foodstuffs. The accompanying smartphone application enables visually impaired people to scan and read all the information a sighted person can, and since the barcode triggers audio notes, the amount of information conveyed is potentially limitless.⁵⁶ At a minimum, products should be required to include a scannable code that directs users to the necessary information.

3.2. Application of accessibility obligations to the current legislative framework

As a party to the Convention,⁵⁷ South Africa must take positive and proactive steps to implement Article 9. South Africa must comprehensively review its legal framework to ensure compliance with Article 9 of

⁴⁸ *Top countries by smartphone users*, Newzoo, (2021), <<https://newzoo.com/insights/rankings/top-countries-by-smartphone-penetration-and-users>> (accessed 15 December 2022).

⁴⁹ It is called "VoiceOver" on the iOS platform and "TalkBack" on the Android platform.

⁵⁰ *Testing the Feasibility of QR Codes for the Independence of Visually Impaired People* (2019), A collaborative project between NPO Kobe Light House, NPO i collaboration Kobe, and Export Japan Inc at pp. 1 – 49.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *The codes helping visually impaired people shop*, BBC News, (2021) <<https://www.bbc.com/news/business-57679943>> (accessed 09 April 2022).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* "[T]he technology is developed by a company from Murcia, Spain called NaviLens. The NaviLens technology has been tested and validated by visually impaired associations around the world [...] and has been rapidly implemented in important public transport systems worldwide [...] among others. Its codes are already used in Spain across public transport networks and museums. [...]"

⁵⁶ *Ibid.* A few other technologies are already on the market, aiming to address similar problems. Google's Lookout application uses Artificial Intelligence. Supersense, developed at the Massachusetts Institute of Technology, is an application that reads out in a computer voice any text the camera over hovers over; and Itan also reads standard barcodes on foodstuffs packages.

⁵⁷ United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024).

the Convention.⁵⁸ Upon examining the legislative framework for labelling, it is evident that South Africa does not meet the requirements of Article 9 of the Convention because its labelling laws are not accessible. Since the legislative framework, as determined in Chapter 4, unfairly discriminates against persons with disabilities, taking all appropriate measures to *modify* existing laws that constitute discrimination against persons with disabilities constitutes the primary general obligation for all States Parties to comply with.⁵⁹

“[T]aking “all appropriate measures, including legislation, to *modify* or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities””.⁶⁰

To comply with Article 4(1)(b) of the Convention, the current legislative framework should be modified to make the product information accessible, as required by Article 9 of the Convention, by complying with minimum accessibility requirements set for labelling.

In addition to amending existing legislation, the Convention also includes provisions for declaring legislation as unconstitutional and repealing if necessary modifications are not made. The Convention explicitly states:

“[S]tates must enact legislation mandating accessibility, and they must *repeal* existing legislation which creates discriminatory barriers to the implementation of Article 9”.⁶¹

However, for the purposes of this thesis, declaring legislation unconstitutional would result in the removal of crucial and necessary provisions, which is not a practical solution.

Furthermore, the Convention makes provision for the adoption of new legislation. Parties have obligations to respect, protect, and fulfil the accessibility obligation. The obligation is fulfilled if appropriate legislative measures to uphold the rights of persons with disabilities are fully enacted.⁶²

“[T]he obligation to fulfil will require States Parties to the CRPD to *adopt* ‘appropriate legislative, administrative, budgetary, judicial, promotional and other actions’ towards the full realisation of the rights of persons with disabilities, including the implementation of Article 9”.⁶³

As the amendments will effectively address the deficiencies in the legislation and eliminate discriminatory aspects, there will be no need to pass new legislation.

It is imperative to engage in meaningful consultation with persons with disabilities and organisations that advocate for disability rights to ensure their participation in such a legislative process. Furthermore, the legislative measures must include a clear timeline for meeting the obligations set forth in Article 9 of the Convention, and non-compliance should be met with appropriate penalties.⁶⁴ Establishing robust monitoring mechanisms and accessible channels for recourse is also paramount in cases where Article 9 of the Convention is violated.

“[c]reate a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones”.⁶⁵

⁵⁸ General Comment No. 2 of 2014 at p. 10.

⁵⁹ Article 4(1)(b) of the Convention.

⁶⁰ *Ibid.*

⁶¹ Broderick, A, (2015) at p. 250.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ General Comment No. 2 of 2014 at p. 4.

⁶⁵ *Ibid.*

...

“[P]ersons with disabilities who have been denied access to the physical environment, transportation, information and communication, or services open to the public should have effective legal remedies at their disposal”.⁶⁶

4. Reasonable accommodation related to labelling

In the context of this thesis, reasonable accommodation is most relevant when there are no accessibility standards in place, when accessibility standards do not account for persons with uncommon impairments, or when a person with a disability does not utilise the methods provided by the accessibility standard. Currently, there are no accessibility standards in relation to accessible product information. Persons with visual impairment currently face an unaccommodating environment in terms of labelling laws. The question then arises, to what extent ought reasonable accommodation measures be applied to ensure that persons with visual impairment are not unfairly discriminated against? In this subsection of the thesis, the application of the reasonably accommodated duty will be discussed.

The duty to provide reasonable accommodation is a customised approach to addressing the needs of persons with disabilities and ensuring equal opportunities.⁶⁷ It is vital to outline five essential components in order to understand the legal duty reasonable accommodation imposes on duty bearers in this specific context. These are (i) accommodating the individual, (ii) assessing reasonableness, (iii) determining necessity and appropriateness, (iv) applying where needed, and (v) considering the possibility of a disproportionate burden.⁶⁸ Applying the standard of reasonable accommodation and disproportionate burden to a case involving persons with disabilities involves a fact-specific analysis of the circumstances. This means that each case will have unique circumstances, which must be carefully considered when determining whether an accommodation is reasonable or if it would impose a disproportionate burden on the party responsible for providing the accommodation.

It is crucial to establish both the holders of the right to reasonable accommodation and the party responsible for fulfilling the duty to accommodate. The Convention establishes a fundamental right to reasonable accommodation, which can be inferred from the concept of discrimination.⁶⁹ The absence of reasonable accommodation, if it exists, constitutes discrimination if there is no disproportionate burden. Thus, there is a right not to be discriminated against, and it correlates with a duty to refrain from discrimination. Consequently, there is a fundamental right to reasonable accommodation up to the point of disproportionate burden if one exists. The Convention identifies persons with disabilities as the holders of this right.⁷⁰ As a result, all persons with disabilities are entitled to reasonable accommodation provided they possess the necessary qualifications, skills, licenses, etc., required for the task or activity for which they are seeking accommodation.⁷¹ The duty to accommodate is unquestionably incumbent upon the States Parties in all their capacities, and private entities are also included when there is a connection with fundamental

⁶⁶ *Ibid.* at p. 9.

⁶⁷ Waddington, L, & Broderick, A, *Promoting equality and non-discrimination for persons with disabilities* (2017), Council of Europe, pp. 1 – 61 at p. 12.

⁶⁸ While Chapter 3 of this thesis provides an overview of these terms in different foreign jurisdictions, this subsection will focus specifically on the international concepts of disproportionate and undue burden, which will be collectively referred to as “disproportionate burden”.

⁶⁹ De Campos Martel Velho, L, *Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective* Vol. 8(14), (2011), SUR International Journal on Human Rights, pp. 85 – 111 at p. 101.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

rights.⁷² Employers, service providers, and other entities responsible for furnishing goods, services, or facilities to the public are among the duty bearers charged with accommodating.⁷³

“[U]nder the CRPD States Parties are under an obligation to respect the reasonable accommodation duty in their own actions and to pass on such a duty to private parties. As a result the duty should be passed on to employers, schools and universities; police; courts; public authorities; social services; transport providers; sellers of goods; designers of the built environment; designers of goods and services and many other private parties”.⁷⁴

For purposes of this thesis, the rights holder will be persons with visual impairment, and the duty bearer will be manufacturing companies responsible for producing items such as pharmaceuticals, food products, cosmetics, or hazardous materials.

4.1. Accommodation

The term “accommodation” generally refers to the adjustment or modification of existing policies, practices, or environments to enable the participation and inclusion of persons with disabilities in society.⁷⁵ This may involve employing various mechanisms, such as techniques and technologies, reviewing procedures, making exceptions, and modifying tasks and activities, among others.⁷⁶

“[T]he term ‘accommodation’ is understood generally to mean adjustments or modifications to existing policies, practices or environments in order to facilitate the participation and inclusion of the disabled person in society”.⁷⁷

In light of the individualised nature of the duty to accommodate, it is not possible to provide an exhaustive list of the types of accommodations that might be appropriate in any given scenario. Nonetheless, examples of accommodations include but are not limited to, for example, providing materials in accessible formats, providing assistive technology, modifying work hours or schedules, allowing for remote work, making physical modifications to a workspace, or providing additional training or support.

The abovementioned examples of accommodations are not exhaustive but rather serve as illustrations of the types of measures that may be considered appropriate accommodations for persons with disabilities [in the context of employment and occupation]. Accommodations under the Conventions take a similar form, even though the drafting history of Article 5 of the Convention does not provide much information about the meaning of the term “accommodation”.⁷⁸ However, the duty to accommodate in the Convention extends beyond the field of employment to include all the rights contained in the Convention, thereby imposing significant obligations on both private and public entities.⁷⁹

In the context of this thesis, an accommodation refers specifically to a modification or adjustment to an existing product label to make it more accessible and inclusive for persons with disabilities, in this case, for persons who are visually impaired. The proposed accommodation involves incorporating a scannable code (such as a QR code or barcode) on the label, along with an accompanying website containing

⁷² *Ibid.* at p. 104.

⁷³ *Ibid.*

⁷⁴ Waddington, L, *Reasonable Accommodation for Persons with Disabilities: Part of the Right to Equality and Non-Discrimination* (2018), Applying non-discrimination law, pp. 1 – 213 at p. 92.

⁷⁵ Broderick, A, (2015) at p. 107.

⁷⁶ De Campos Martel Velho, L, (2011) at p. 102.

⁷⁷ Broderick, A, (2015) at p. 107.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at p. 108.

comprehensive product information in various accessible formats, such as large print, audio descriptions, or text-to-speech. The decision not to include Braille as an accommodation is based on several factors. Firstly, a significant portion of persons with visual impairment have limited Braille literacy and rely solely on technology for assistance. Also, including Braille would limit the amount of information that could be provided due to space constraints on the label. Moreover, redesigning and reprinting Braille labels incur substantial expenses that may be considered a disproportionate burden. Lastly, there is a lack of universal standardisation for Braille, which can further complicate the accommodation process. In contrast, scannable codes can be seamlessly integrated into existing labels without significant redesign or reprinting costs. Printing scannable codes is cost-effective, using standard software and printers without requiring specialised equipment. The small size of scannable codes allows for efficient use of label space, making them a practical solution for providing accessible information. Furthermore, scannable codes offer flexibility in updating information on the accompanying website quickly, as opposed to Braille labels that require redesign for any changes. Additionally, scannable codes are not limited to persons with visual impairment but can be scanned by anyone with a smartphone, providing a third-party benefit. In conclusion, scannable codes as accommodations enhance accessibility for persons with visual impairment, offering a cost-effective, flexible, and inclusive solution for providing comprehensive product information.

Even though the use of scannable codes that read text aloud is suggested, additional support measures are still required on a case-by-case basis to fully ensure accessibility. These measures should be tailored to address the unique needs of each person with a disability and encompass a wide range of services and accommodations. To comprehensively address accessibility, support measures should be tailored to address the unique needs of each person with a disability and encompass a wide range of services and accommodations. This individualised approach is necessary because disabilities vary widely in type, severity, and impact on a person's ability to access information. For instance, while audio descriptions are beneficial for those with visual impairments, individuals with hearing impairments might require other formats. Providing information in multiple formats ensures that all individuals can access the information in a way that suits their needs. For some individuals, especially those with cognitive or severe physical disabilities, personal assistance services might be necessary to help interpret or understand product information. This could include trained personnel who can assist in explaining the information. The needs of persons with disabilities can be highly specific. For example, someone with a combination of visual and hearing impairments might require a unique combination of assistive technologies. Accessibility extends beyond the product labels themselves to the environment in which the products are used. Ensuring that the environments are accessible, with features like clear signage, adequate lighting, and accessible counters, is crucial for enabling persons with disabilities to navigate and make informed choices independently. Businesses and service providers should implement ongoing training programs for their staff, focusing on the importance of accessibility and how to implement effective support measures. The staff should be knowledgeable about the specific needs and preferences of persons with disabilities, allowing them to offer personalised support. This training should cover a range of disabilities and provide practical strategies for accommodating different needs. This support ensures that these persons can communicate effectively with service providers, understand important information, and complete transactions without barriers. Lastly, governments and organisations should establish funding mechanisms to support the implementation of additional support measures. This could include grants, subsidies, or tax incentives for businesses that invest in accessibility improvements and personalised support services.

Engaging with organisations representing persons with disabilities is essential for understanding their needs and improving support measures. Regular consultation and feedback loops ensure that the implemented measures remain effective and relevant, addressing any emerging issues or gaps in accessibility. Policies should be developed with both universal design and individualised support measures in mind, ensuring that

all aspects of accessibility are covered. This includes creating a legal frameworks that mandate these support measures and provide clear guidelines for their implementation.

4.2. Reasonableness

The Committee states that the term “reasonable accommodation” is a single term with a specific definition, and the word “reasonable” should not be interpreted as an exception clause.⁸⁰ The concept of reasonableness should not serve as a separate qualifier or modifier to the duty to accommodate.⁸¹ The assessment of the costs and availability of resources should not be determined by reasonableness.⁸² These considerations are evaluated at a later stage during the “disproportionate burden” assessment.⁸³ Instead, the reasonableness of an accommodation being sought refers to its relevance, appropriateness, and effectiveness. An accommodation can be considered reasonable if it effectively serves the purpose(s) for which it is being provided and is specifically designed to meet the needs of the person with a disability.⁸⁴

“[R]ather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made and is tailored to meet the requirements of the person with a disability”.⁸⁵

The purpose of the accommodation is to ensure that persons with visual impairments can access product information. In this context, using a scannable code is considered an effective method of fulfilling this purpose. By scanning the code, they can intake and understand the information provided, thus facilitating their access to the product information. The accommodation is specifically designed to meet the needs of a visually impaired person. Therefore, providing a label with a scannable code can be considered reasonable.

4.3. Necessary and appropriate

“[I]n the context of the duty to accommodate in the Convention, satisfying the needs and interests of persons with disabilities will require duty bearers to take the steps which are *necessary* to ensure that the person with a disability in question can enjoy their human rights and fundamental freedoms on an equal basis with others and which are *appropriate* in resulting in the realisation of the rights contained in the Convention”.⁸⁶

According to the Committee, it must be assessed whether the accommodation is “relevant or effective” in ensuring the realisation of the right in question.⁸⁷ This is highlighted in *Jungelin v Sweden*,⁸⁸ where the Committee referred to the effectiveness of accommodation measures in realising disability rights. To be effective means to accomplish a desired goal or objective and to produce the intended outcome or result. It involves achieving something in a satisfactory manner, often with a focus on achieving a specific goal. In this context, the effectiveness can be measured by the ability to provide persons with visual impairment with access to product information. Scannable codes are recognised as the most effective and cost-efficient

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ General Comment No. 6 Committee on the Rights of Persons with Disabilities (2018) CRPD/C/ GC/6, pp. 1 – 19 at p 7.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Broderick, A, (2015) at p. 160.

⁸⁷ General Comment No. 6 of 2018 at p 7.

⁸⁸ *Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF) v Sweden*, Communication No. 5 *Committee on the Rights of Persons with Disabilities* (2011) CRPD/C/12/D/5/2011, pp. 1 – 16.

method of providing accessible labels for persons with visual impairment, making them a preferred choice for accommodations in this context.⁸⁹

4.4. Where needed in a particular case

The term “where needed in a particular case” in the definition of reasonable accommodation implies that the responsibility to provide reasonable accommodation arises when a person with a disability requires such accommodation to exercise their human rights and fundamental freedoms effectively. Put simply, the obligation to provide reasonable accommodation is not a universal requirement for all persons with disabilities. Instead, it is situation-specific and relies on the unique circumstances of each case. This phrase highlights the personalised aspect of the reasonable accommodation obligation. The duty of accommodation centres on the unique circumstances of each situation, considering the impact of modifications or adjustments in alleviating the disadvantage for the person with a disability and the feasibility of the duty holder providing the necessary accommodation.

The entity providing the product information must engage in an interactive process with the person or persons requesting accessible product information to determine what accommodations are needed and what is reasonable. Broderick, citing Lawson, points to the fact that “[t]he individual-oriented nature of reasonable accommodation thus requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead, they engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled”.⁹⁰ This process involves a back-and-forth exchange of information between the parties to arrive at a reasonable accommodation that meets the needs of the person with a disability while minimising the impact on the entity. The obligation of duty bearers is not to provide every requested accommodation but to provide accommodations that are essential for persons with disabilities to benefit from the substantive rights in the Convention.

4.5. Disproportionate burden

As already stated, the duty to reasonably accommodate persons with disabilities, unlike the accessibility obligation under the Convention, is not absolute. It is subject to the limitation that a duty bearer is not required to make a reasonable accommodation where such an accommodation would result in a disproportionate burden. Essentially, the burden will be deemed disproportionate when the accommodation excessively undermines the purpose of the general measure, poses risks to safety, health, and well-being, or when the balance of costs and benefits shows that the accommodation is too expensive.⁹¹

In this section, the second part of the definition of reasonable accommodation, which pertains to disproportionate burden, will be reflected upon. By applying the test of disproportionate burden, we can determine the types of measures that are deemed reasonable or adequate on the part of public or private

⁸⁹ First, scannable codes can be scanned using smartphones, which are widely available and often used by persons with visual impairment for other purposes, such as accessing audio books or voice assistants. This means that scannable codes do not require any additional assistive technology or devices, making them highly accessible. Second, scannable codes can provide much more information than traditional Braille labels, which are limited by the amount of space available on the product. Scannable codes can contain links to detailed product information, instructions, and warnings that may not be possible to include in Braille. Additionally, scannable codes can be updated easily and inexpensively, which is especially important for products that require frequent updates or changes. Third, scannable codes are highly versatile and can be applied to a wide range of products and packaging types, including small or irregularly shaped items. This means that they can be used to provide accessible labels for a broader range of products than traditional Braille labels. Lastly, scannable codes are cost-effective, both in terms of initial implementation and ongoing maintenance. While redesigning and reprinting Braille labels for each product can be expensive and time-consuming, creating a single scannable code that can be used across multiple products and packaging types is relatively simple and cost-effective. The above makes the accommodation of providing scannable codes in order to have accessible labels effective.

⁹⁰ Broderick, A, (2017) at p. 14.

⁹¹ De Campos Martel Velho, L, (2011) at p. 106.

entities or States Parties to the Convention in fulfilling their duty to accommodate. The determination of whether a reasonable accommodation is disproportionately burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.⁹² Ultimately, the goal is to avoid causing a disproportionate burden to the entity or negatively impacting its operations in any significant way. It's a delicate balance, but one that must be struck in order to ensure that all persons have fair and equal access to the information they need.

4.5.1. Purpose of general measure

To determine whether a burden is disproportionate, various factors need to be considered, which can be divided into two categories.⁹³ The first category relates to the purpose of the general measure, for which an exception is being sought through accommodation.⁹⁴ If the purpose of the measure is significantly impeded or undermined, the burden will be deemed disproportionate.⁹⁵ Merely demonstrating that the measure was implemented in good faith, impartially or equally, will not be sufficient.⁹⁶ The defence will only be complete if it can be shown that the accommodation obstructs the intended purpose.⁹⁷

It is essential to determine whether accommodating a person with a disability is disproportionate. If the accommodation significantly hinders or undermines the purpose of the general measure, it may be considered disproportionate. The general measure refers to the task or activity for which an exception is being sought through accommodation. The use of a scannable code to make a label accessible does not significantly impede the purpose of the general measure, which is to provide information about the product. In fact, it enhances the purpose of the measure by ensuring that more people can access and understand the information provided. Therefore, in this instance, it is unlikely that the use of a scannable code as a reasonable accommodation would be deemed disproportionate or undue.

The second category involves a detailed evaluation of the costs and benefits.⁹⁸ A determination will be made as to whether a requested accommodation is in proportion to the resources of the entity in question.⁹⁹ Certain requested accommodations will inherently be too cost-prohibitive, given the individualised circumstances of the entity in question.¹⁰⁰

4.5.2. Costs and benefits analysis

4.5.2.1. Costs

It is important to note that the term “cost” in the context of accommodations does not solely refer to financial costs. Other factors such as the entity’s activities, the scale of the entity’s operations, financial capacity and resources, potential disruption caused by the accommodation, alteration of the entity’s business nature due to the accommodation, and negative impact of the accommodation on the entity,

⁹² General Comment No. 6 of 2018 at p. 7 – 8.

⁹³ De Campos Martel Velho, L, (2011) at p. 102.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Broderick, A, (2015) at p. 169.

¹⁰⁰ *Ibid.*

should also be considered.¹⁰¹ The cost of stigmatisation, humiliation, and isolation must also be considered, as well as the costs to third parties, if applicable.¹⁰² Hence, costs should not be limited to financial expenses alone, and other factors must be considered alongside financial costs.

“[P]otential factors to be considered include financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements”.¹⁰³

4.5.2.1.1. Type, size, and scale of entity

The *type* of entity, such as a small business or a large corporation, can be a pertinent factor in determining whether an accommodation is disproportionate because it can impact the resources available to the entity for providing such an accommodation. A small business with limited resources may face a more significant burden in providing an accommodation than a large corporation with substantial resources. Furthermore, the nature of the entity’s business may also play a role in determining whether an accommodation is disproportionate. For instance, a large pharmaceutical manufacturing company is expected to have more resources and expertise in providing accommodations than a small, family-owned pharmacy.

In assessing the ability of an entity to bear the costs and make the required adjustments, the *size* of the accommodating party might be relevant since larger firms generally have more resources than smaller firms. The entity’s size is relevant in determining whether an accommodation is disproportionate, as it can affect the resources available to provide the accommodation. A larger entity may have more financial resources, personnel, and expertise to provide accommodations than a smaller entity and, therefore, may be better equipped to provide reasonable accommodations without a disproportionate burden. On the other hand, as previously mentioned, a smaller entity with limited resources may face a more significant burden in providing accommodation. Ultimately, the goal is to balance the needs of persons with disabilities for reasonable accommodations with the legitimate needs and resources of the entity providing the accommodation. Generally speaking, a large manufacturing company would have a significant number of resources, including financial, human, and technological resources. This would allow the company to have a large workforce, multiple production facilities, and advanced technologies for production, quality control, and research and development. Given the context, it can be posited that a manufacturing company, being typically large in size, should have a greater financial capacity to undertake the redesign and reprinting of its labels.

The *scale* of an entity’s operations is also pertinent in determining the extent of the burden posed by the accommodation. The scale of an entity, which refers to the size and scope of its operations, is relevant in determining whether an accommodation is undue because it affects the impact that the accommodation would have on the entity’s overall operations and resources. The scale of the entity’s operations can impact the cost and feasibility of providing an accommodation, as well as the impact on the entity’s overall operations. In some cases, providing an accommodation that significantly impacts the entity’s operations may be deemed disproportionate, while in other cases, the same accommodation may be considered reasonable given the scale of the entity’s operations and resources. The scale of a large manufacturing company typically refers to the extent of its operations and production capacity. It can include factors such as the number of facilities, employees, and amount of revenue generated. In the case of a large

¹⁰¹ Broderick, A, (2015) at p. 168.

¹⁰² De Campos Martel Velho, L, (2011) at p. 104.

¹⁰³ General Comment No. 6 of 2018 at p. 8.

manufacturing company, the scale would likely involve multiple facilities across different regions or countries, a large workforce, and high levels of production and revenue.

4.7.2.1.2. Financial capacity of entity

In the context of providing accommodations, the financial capacity of a company is imperative because accommodating persons with disabilities can result in additional expenses. A company with more significant financial resources may be better equipped to absorb these costs and provide reasonable accommodations without experiencing a disproportionate financial burden. On the other hand, a company with limited financial resources may find it more difficult to bear the costs of providing accommodations and may be more likely to experience a disproportionate burden. The financial capacity of a company is one of the factors considered in determining whether an accommodation is (un)reasonable. The financial capacity of a large manufacturing company refers to its ability to bear the costs of providing accommodations. This is an important factor in the context of providing accommodations because the disproportionate burden standard considers the financial resources of the accommodating party. If an accommodation would impose significant financial hardship on the company, it may be considered a disproportionate burden and, therefore, not required. Large manufacturing companies often have significant financial resources, but the cost of providing accommodations can still be a factor in determining whether an accommodation is reasonable. In the context of accommodating persons with visual impairment by modifying labels, the financial capacity of a large manufacturing company is important. Pharmaceutical, foodstuffs, and cosmetic manufacturers are expected to have sufficient financial resources to accommodate such requests. Redesigning and reprinting a label would likely constitute a minor expense relative to their income. Therefore, a large manufacturing company should have the financial capacity to make such accommodations without causing a disproportionate burden or disruption to its operations.

4.7.2.1.3. Level of disruption

The level of disruption refers to the extent to which providing an accommodation would disrupt the normal operations of the entity. It is an important factor in determining whether a burden is disproportionate, as it helps to balance the interests of the individual seeking accommodation and the interests of the entity providing the accommodation. If the level of disruption is high, it means that providing the accommodation would significantly disrupt the normal operations of the entity, potentially causing significant economic or operational harm. In this case, it may be reasonable to conclude that the burden of providing the accommodation is disproportionate. On the other hand, if the level of disruption is low, it means that providing the accommodation would not significantly disrupt the normal operations of the entity, and therefore, it may be reasonable to conclude that the burden of providing the accommodation is not disproportionate. The level of disruption is particularly relevant in cases where the requested accommodation would require significant changes to the physical layout or operational procedures of the entity. In such cases, the entity may argue that providing the accommodation would be disproportionately burdensome because it would require significant disruption to their operations. In this context, physical modifications must be made to a label. The label must be redesigned and reprinted. The level of disruption would depend on the complexity of the redesign and the extent to which it affects the manufacturing process. If the redesign and printing process changes are minor, the level of disruption may be manageable. However, if the changes are significant, the level of disruption could be higher, and it may be more

challenging to argue that the accommodation is not disproportionate. It can be contended that the redesigning of the label is a relatively uncomplicated change, and the printing process will not be significantly altered. Therefore, it can be argued that the level of disruption to the entity's normal operations will not be disproportionately burdensome.

4.7.2.1.4. Alternation to entity business

Alterations to the entity's business are a significant factor in determining whether an accommodation is disproportionate, as they refer to changes that may need to be made to the entity's operations or practices to provide the accommodation. These changes may involve significant costs or disruptions to the business, which could be considered a disproportionate burden. For instance, if a small business is asked to install a ramp for wheelchair access, this may require significant alterations to the physical layout of the building, which could be costly and disruptive. However, if a large corporation is asked to provide a sign language interpreter for an employee who is deaf, this may not require significant alterations to the business operations and may be a reasonable accommodation. Therefore, the extent of the alterations that are required to provide an accommodation is an important factor in determining whether it would be considered an disproportionate burden on the entity. In this context, the concept of "alterations to the entity's business" refers specifically to changes in the label design rather than any physical modifications to the company's operations. Given the type, size, and scale of a large manufacturing company engaged in the production of pharmaceuticals, foodstuffs, cosmetics, or hazardous substances, such alterations can be considered proportionally minimal and not disproportionately burdensome.

4.7.2.1.5. Negative impact on a third party

When examining the scope of the Convention's obligation to accommodate, which is limited by the disproportionate burden defence, there are other factors to consider in determining the burden on an entity, including the negative impact on persons other than the person with a disability seeking the accommodation. It is necessary to balance the needs of persons with disabilities against the potential negative consequences of providing accommodations. The impact of accommodations on others should be assessed to determine whether it would impose a disproportionate burden on the entity. In some cases, accommodations may have a minimal or insignificant impact on some, while in others, the negative impact may outweigh the benefits. Therefore, it is important to consider the potential negative impact on others when assessing the overall burden of providing accommodations. In this context, the proposed accommodation of redesigning and reprinting a label will not have any negative impact on third parties. Third parties can refer to any group or individual that may be affected by the accommodation. Since the scannable code can be scanned by anyone with a smartphone, it can actually benefit third parties. Therefore, the proposed accommodation does not impose any additional costs or burdens on third parties and may even offer some advantages.

4.7.2.1.6. Resources available to entity

Under the umbrella heading of costs, the availability of public subsidies or alternative sources of support is a significant consideration.¹⁰⁴ The expenses will be balanced against the availability of public subsidies or any other assistance provided by the State to assist the duty bearer in the provision of reasonable accommodations.¹⁰⁵ The duty bearer may be compensated for the duty to accommodate in the form of state immunities, exemptions, subsidies, incentives, or grants.¹⁰⁶ These compensatory measures will be relevant in determining whether the cost of the accommodation overall imposes a disproportionate burden on the duty bearer.¹⁰⁷ The joint dissenting opinion of several Committee members in the case of *Jungelin v Sweden* highlights the importance of considering the availability of wage subsidies and assistance benefits in implementing measures to ensure the author's employment.

“[F]inally, the Labour Court did not take into account the wage subsidy and assistance benefits that the candidate and potential employer could have accessed should the candidate have been selected, while such subsidy and assistance benefits were clearly referred to in the Ombudsman's options”.¹⁰⁸

In this scenario, there will be no compensatory measures available. Therefore, the manufacturing company will shoulder the entire cost of reasonable accommodation without any offset from public subsidies or other state-provided assistance.

4.7.2.1.7. Cost of reasonable accommodation

The Committee, Waddington, and Broderick note that one of the significant themes concerns costs. The Committee in *Jungelin v Sweden* confirmed that the financial cost of a requested accommodation is a relevant factor in determining whether and to what extent the duty bearer is obligated to accommodate.¹⁰⁹ According to Waddington, determining whether an accommodating party can use the defence of disproportionate burden has been mainly based on the cost of the requested accommodation.¹¹⁰ Broderick, however, points out that the cost of a sought accommodation is the primary factor that has been considered in determining whether the duty bearer must provide the accommodation.¹¹¹

Determining whether the cost of an accommodation is undue, it is critical to balance the interests of persons with disabilities and the entity's financial viability. The cost of accommodation refers to the expenses incurred by the entity in providing the necessary adjustments or modifications to accommodate. In this regard, the cost of an accommodation is a relevant factor in determining whether the burden is disproportionate, especially if the cost is significant and will impact the entity's financial stability. If an entity is financially stable, it can bear the cost of the accommodation without a significant impact on its financial viability. However, if an entity is financially constrained, the cost of the accommodation may be disproportionate, and it may not be able to provide the necessary adjustments or modifications without significant financial hardship. By balancing the cost of an accommodation against the entity's financial capacity and resources, we can ensure that reasonable accommodations are provided without unduly burdening the entity or limiting its ability to provide accommodations to other persons with disabilities. Moreover, the cost of an accommodation can also have implications for the entity's competitiveness in the market. If an entity incurs significant costs to provide accommodations, it may result in a competitive

¹⁰⁴ Broderick, A, (2015) at p. 168.

¹⁰⁵ Broderick, A, (2017) at p. 30.

¹⁰⁶ Broderick, A, (2015) at p. 168.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Jungelin v Sweden* at p. 15.

¹⁰⁹ *Ibid.* at p. 9.

¹¹⁰ Broderick, A, (2015) at p. 165.

¹¹¹ *Ibid.* Broderick, A, (2017) at p. 30; General Comment No. 6 of 2018 at p. 8.

disadvantage compared to other entities that do not have to provide such accommodations. This can ultimately lead to reduced profits, loss of market share, and even potential closure of the entity, which highlights the need to balance the costs of providing accommodations against the entity's overall financial viability and sustainability.

The accommodation necessitates redesigning and reprinting a label and developing a website with essential label information. The associated costs for implementing this accommodation are expected to be reasonable and proportionate. Firstly, the one-time expense of redesigning the label and creating the website is inconsequential when compared to a large manufacturer's annual income. Secondly, the reprinting cost of the label is also negligible relative to the manufacturer's annual revenue, which often amounts to billions of Rands. Even for smaller manufacturing companies, the revenue typically remains in the millions of Rands annually. Consequently, the revenue remains significantly larger in proportion to the costs of redesigning and reprinting the label. Furthermore, the ongoing expenses associated with maintaining the accommodation are expected to be minimal. If the new label design includes a scannable code, the costs may not significantly exceed those of the previous label design, especially if the manufacturer can integrate the new design into existing production processes.

4.5.2.2. Benefits

4.5.2.2.1. Benefits to the person with a disability

In determining whether an accommodation constitutes a disproportionate burden or not, the cost factor may be weighed against the benefits that a person with a disability receives on the granting of a reasonable accommodation. Accommodating the needs of persons with visual impairment offers numerous advantages. By providing these accommodations, persons with visual impairment can, first and foremost, access vital product information. For instance, labels indicating allergens like peanuts can prevent accidental consumption and severe allergic reactions. Likewise, toxicity labels can avert unintentional poisoning. Furthermore, accommodating persons with visual impairment grants them increased privacy. They no longer need to rely on others for product purchases. Without accessible labelling, these individuals are often compelled to seek external assistance, leading to frustration and limitations. Accommodation signifies acknowledging and providing necessary tools for persons with visual impairment to participate in society. Through such provisions, they can engage with their surroundings in ways otherwise inaccessible to them. Moreover, accommodation challenges societal stigmas and stereotypes linked to visual impairment. By ensuring accessible product information, barriers are dismantled, dispelling misconceptions about the capabilities of persons with visual impairment. Embracing this inclusive approach conveys that persons with visual impairment play a significant role in society and are valued for their unique abilities and meaningful contributions.

4.5.2.2.2. Benefits to a third party

When assessing the boundaries of the duty to accommodate under the Convention and the disproportionate burden defence, it may be important to consider factors beyond just the burden on the accommodating

entity.¹¹² Benefits to other parties may also be considered in the proportionality test.¹¹³ These factors may include the potential benefits to other persons, including both persons with and those without a disability. Third-party benefits may not only accrue to the accommodating entity but also to fellow persons with comparative disabilities or to persons without a disability who may benefit from the measures.¹¹⁴ Overall, it is important to consider the potential benefits to third parties when assessing the reasonableness of accommodations.¹¹⁵ An accommodation intended for one person may ultimately assist future persons with comparable disabilities, resulting in increased accessibility for others – “[a]n accommodation that was originally intended for one person can also ultimately assist future employees with a comparable disability”.¹¹⁶

The dissenting Committee members in the individual communication of *Jungelin v Sweden* also emphasised the potential impact of alternative measures on the future employment of persons with visual impairments as an additional positive criterion to assess the requested measures. They noted that even if reasonable accommodations are typically individual measures, the benefit for other persons with disabilities must also be taken into account when assessing reasonableness and proportionality in compliance with Article 5 of the Convention.¹¹⁷

“[W]e are therefore of the view that, while reasonable accommodation is in principle an individual measure, the benefit for other employees with disabilities must also be taken into account when assessing reasonableness and proportionality, in compliance with articles 5, 9 and 27 of the Convention”.¹¹⁸

Thus, under the Convention, benefits to third parties could increase the likelihood that a specific accommodation may not be deemed to impose a disproportionate burden on the duty bearer, especially if the benefit accrues to a person with a comparable disability.¹¹⁹

“[I]f adopting a particular accommodation measure would result in tangential benefits to third parties, especially those with comparative disabilities – a consideration which would then be taken into account in the assessment of the reasonableness of measures – then this could potentially facilitate the implementation of the Convention’s socio-economic rights and obligations”.¹²⁰

In circumstances where the printed label may pose challenges in terms of readability or comprehension or when someone has limited literacy skills, accessible labels can be particularly advantageous to such a third party – whether visually impaired or not.

4.5.2.2.3. Benefits to the entity

The advantages are not confined solely to the individuals directly seeking the accommodation; they extend to the entity responsible for its provision. If the redesigned label renders the product more accessible to a wider market, it has the potential to yield increased sales and revenue for the manufacturer. Furthermore, honouring the accommodation request can lead to an enhancement of the manufacturer’s reputation and a

¹¹² Broderick, A, (2015) at p. 170 – 171.

¹¹³ Broderick, A, (2015) at p. 164; Broderick, A, (2017) at p. 31; De Campos Martel Velho, L, (2011) at p. 104.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at p. 172.

¹¹⁷ *Jungelin v Sweden* at p. 15.

¹¹⁸ *Ibid.*

¹¹⁹ Broderick, A, (2015) at p. 173.

¹²⁰ *Ibid.*

bolstering of customer loyalty. By affording persons with visual impairment access to vital product information, the manufacturing company showcases its dedication to inclusivity. This, in turn, contributes to heightened customer satisfaction, a stronger sense of loyalty, and an expansion of its market outreach. Furthermore, ensuring parity in accessing information cultivates a positive brand image and reputation, attracting a broader customer base that values and appreciates the embrace of inclusive practices. In essence, the benefits ripple beyond the immediate individual to enrich the entity's standing, relationships, and market presence.

4.5.2.3. Analysis

As previously mentioned, the determination of whether a reasonable accommodation is disproportionately burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.¹²¹ This statement essentially means that when evaluating whether providing a reasonable accommodation would create a burden that is too significant, it is necessary to weigh the relationship between the methods used to accommodate and the intended goal, which is ensuring the individual's right is upheld. To illustrate this concept in relation to accessible labelling, consider a scenario in which a person with visual impairment requires accessible labelling on medicinal products. The aim here is to guarantee their right to access information about the products they intend to purchase. A possible means to achieve this is by introducing a scannable code on the product packaging. When assessing the proportionality, it means looking at whether the effort and cost involved in implementing these accommodations are reasonable in relation to the goal of providing the visually impaired person with equal access to product information. In essence, the concept emphasises finding a balance between the efforts and costs needed to provide accommodations and the positive impact it has on the individual's ability to enjoy their rights. The assessment seeks to ensure that while accommodations are made, they should not unduly burden the entity responsible for providing them while still effectively enabling the person to exercise their rights.

When an entity accommodates requests, there are efforts and costs involved in implementing these accommodations. Such efforts and costs can relate to making physical changes to buildings and infrastructure, procuring and implementing assistive technologies, or conducting training for staff to understand and support persons with disabilities. These can, however, be offset by various benefits to the person with a disability, third parties, and the entity itself. Accessible labelling provides a myriad of benefits to persons with disabilities. It enhances their independence and privacy, enabling them to access vital information discreetly without relying on others for assistance. It also ensures safety, allowing persons with disabilities to accurately identify products and comprehend safety instructions or warnings associated with them. Furthermore, accessible labelling facilitates informed choice. Accessible labelling empowers persons with disabilities by providing the necessary tools and information for self-reliance. Lastly, it actively challenges stigmas and misconceptions surrounding disabilities. It is crucial to consider the benefits for both third parties and the entity itself. A practical example of a benefit for a third party is the installation of an elevator for a person with a disability. This accommodation not only aids the person with the disability but also benefits the third parties around them. Another example is if adjustments are required in a work schedule to accommodate a person with a disability, a third party affected by this can benefit by having the option to select a schedule that aligns with the preferences of both them and the person with a disability. In the context of this thesis, the required modification involves incorporating a scannable code into a label

¹²¹ General Comment No. 6 of 2018 at p. 7 – 8.

design with an accompanying website. The use of a scannable code provides benefits beyond persons with visual impairment since many individuals face difficulties in reading the small fine print on products. The suggested accommodation not only offers benefits to third parties but also does not place any extra expenses or burdens on them. As for the entity itself, the benefits are, first and foremost, its enhanced reputation. Entities that provide reasonable accommodations demonstrate their commitment to accessibility. This can enhance their reputation as an inclusive organisation, attracting positive attention from customers, employees, and the general public. They also access a broader customer base. When entities accommodate by providing accessible facilities, products, and services, they tap into a more extensive customer base. By tapping into this larger customer base, entities can increase their market reach and gain a competitive advantage in their industry. Moreover, fostering an inclusive environment sends a positive message to society, enhancing the entity's reputation and brand image. Ultimately, embracing accessibility is not just a social responsibility; it can also be a strategic business decision that yields substantial benefits.

Accommodating a person with disabilities can involve various costs depending on the specific needs and requirements of the individual and the extent of the accommodations needed. In this particular case, the costs involve two primary aspects: redesigning labels to incorporate a scannable code and creating a website. While there might be initial expenses associated with these redesign and website development processes, these costs are expected to be relatively small compared to the overall revenue generated by the manufacturing company. Manufacturing companies, in general, tend to have substantial revenue. This conclusion is based on several factors. Firstly, they benefit from economies of scale as they produce goods in large quantities. This bulk production reduces the cost per unit, making their products more cost-effective and profitable. Manufacturing companies also often have a broad market reach, distributing their products nationally or internationally, which allows them to tap into a broad customer base. This extensive market presence enables them to sell a significant volume of products, further contributing to their revenue. Additionally, many manufactured products, such as everyday consumer goods and industrial equipment, have a consistent and recurring demand. This predictable demand ensures a stable revenue stream for the company. Moreover, manufacturing companies often maintain control over their supply chain, enabling them to manage costs, quality, and production timelines effectively. Furthermore, the diversification of products in their portfolio contributes to revenue stability. By producing a wide range of goods, they reduce their reliance on a single product or market, mitigating potential risks. Lastly, certain industries may offer manufacturers advantages through government regulations or incentives that support their operations or protect domestic markets, further bolstering their revenue potential. Therefore, even though accommodating persons with disabilities might involve costs, manufacturing companies have the capacity to absorb these expenses given their substantial revenue resulting from scale and volume, broad market reach, recurring demand, supply chain control, diversification, and potential regulatory benefits. Moreover, in the broader context, the cost of implementing such modifications is not exorbitant or prohibitive, particularly when weighed against the benefits of providing accessible labels to persons with visual impairment.

It can be reasonably argued that the burden imposed on a manufacturing company, given its size and financial capacity, is not disproportionate when accommodating. The required modification is a relatively straightforward change that should not significantly disrupt the entity's normal operations. Given the nature and scale of all manufacturing companies involved in producing pharmaceuticals, foodstuffs, cosmetics, or hazardous substances, these alterations can be deemed proportionally minor and not excessively burdensome. Firstly, adding a scannable code to the label design is a technical adjustment that can be seamlessly integrated into the manufacturing process without causing significant disruptions to the entity's normal operations. Implementing this change should not require complex reconfigurations or substantial investments in new technologies, making it a relatively simple task for manufacturing companies.

Additionally, when we consider the nature and scale of manufacturing companies, the alterations necessary to incorporate accessible labelling can be deemed proportionally minor. These companies typically operate on a massive scale, producing vast quantities of products. As such, the cost of redesigning labels will likely be a fraction of their overall revenue.¹²² In sum, accommodating through accessible labelling should not be considered an excessively burdensome task for manufacturing companies. The potential benefits, coupled with the relatively minor nature of the required modification, make this a viable and socially responsible endeavour. In essence, the expense becomes a proportionate and responsible response to meeting the needs of persons with visual impairment.

Considering all the factors discussed, it is evident that the burden placed on the entity to accommodate persons with visual impairment is not disproportionate. While the company may bear the entire financial burden of incorporating the necessary modifications, it is opined that the advantages of such accommodations for persons with visual impairment, third parties, and the entity itself outweigh any associated costs or potential disruptions.

5. Conclusion

In conclusion, the analysis conducted in Chapter 5 highlights the critical importance of applying accessibility principles to South African legislation to ensure that persons with visual impairment are not unfairly discriminated against and that substantive equality is effectively promoted. It is evident that incorporating accessibility measures within the legal framework is not only necessary but also imperative to facilitate *de facto* equality and create an environment where persons with visual impairment can thrive and contribute to all aspects of life. By embracing accessibility as a fundamental principle, South Africa can take significant steps towards a more equitable and inclusive society that values and upholds the rights of all its citizens, regardless of their visual abilities. Furthermore, Chapter 5 sheds light on the crucial role of reasonable accommodation in ensuring *de facto* equality for persons with visual impairment. By recognising the specific needs and challenges faced by this group and by actively removing barriers and providing necessary support, we can create an environment that fosters equal participation, access, and opportunities. The principles of reasonable accommodation guide us in going beyond surface-level compliance and striving for meaningful inclusion. By embracing a proactive approach, we can address systemic barriers, promote accessibility, and empower persons with visual impairment to engage in society. It is through the application of these principles that we can move closer to achieving a society that values the rights and contributions of all its members, regardless of their visual abilities.

¹²² It should be noted, however, that while redesigning the label is suggested, it should not be the only measure available to persons with visual impairments. Additional support measures should also be provided on a case-by-case basis to ensure comprehensive accessibility. Other measures that can be used include service representatives that are trained to assist persons with visual impairments can greatly enhance accessibility, allowing them to offer personalised support and guidance. Implementing technology solutions like screen reader compatibility on websites and mobile apps ensures that digital information is accessible. Additionally, businesses can offer services such as personal shoppers to help visually impaired persons navigate stores and read labels. Providing tactile signage and audible alerts in physical spaces can further enhance accessibility. Regular consultations with organisations representing persons with visual impairments can help identify and address specific needs.

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Chapter 6: Conclusion

1. Introduction

Chapter 6 encompasses key findings, conclusions, and recommendations. Research and analysis have unfurled an irrefutable verity: persons with visual impairments encounter unfair discrimination entrenched within the existing legislative framework. This revelation underpins the imperative necessity for revisiting and revising prevailing laws. Embarking on this transformative journey, the expedition commences with an overarching synthesis and summation of principal revelations emanating from the closely scrutinised chapters of this thesis. This prelude sets the stage for the emergence of recommendations born from the crucible of the research process. In a comprehensive denouement, this chapter encapsulates a critical juncture in the scholarly voyage, epitomising its significance within this academic pursuit.

2. Summary and main findings

2.1. Chapter 1

Chapter 1 introduced the overarching topic and research objectives. It served as a roadmap, providing a guide to the fundamental aspects and structure of the thesis. The chapter commenced with a comprehensive overview of the contextual backdrop and the significance of the research, underscoring the critical need to address accessibility and reasonable accommodation for persons with visual impairments, particularly in relation to accessible labelling.

The chapter elucidated the rationale behind the research and underscored the importance of ensuring equal access to information and consumer rights for persons with visual impairments. It emphasised the significance of accessible labelling to empower and enable persons with visual impairments to make informed choices and actively participate in consumer activities. By highlighting the broader societal implications of accessibility and reasonable accommodation, Chapter 1 set the stage for the subsequent chapters, which delved into specific aspects of the topic in greater detail.

In addition to providing a comprehensive overview of the research context, Chapter 1 formulated the research questions that would be explored throughout the thesis. These questions were crafted to address the core issues surrounding accessibility and reasonable accommodation, with a specific focus on accessible labelling. By articulating these research questions, the chapter established a framework for the subsequent chapters, ensuring that the research would be conducted systematically. By setting out the research objectives, outlining the significance of the research, and formulating the research questions, this chapter provided a foundation upon which the subsequent chapters were built, enabling a comprehensive exploration of the topic at hand.

2.2. Chapter 2

Chapter 2 focused on the understanding and implementation of equality and disability in South African law.

The research explored the concept of equality within the country's jurisprudence, emphasising the adoption of a substantive understanding of equality. This approach recognises historical disadvantages and aims to achieve equitable outcomes for all. Substantive equality also acknowledges the historical context and systemic disadvantages that have perpetuated material inequality. South Africa rejects a purely formal approach to equality and upholds the importance of substantive equality in addressing disability issues and promoting inclusion.

Chapter 2 also examined different models of disability, including the medical, social, and human rights models. The medical model views disability as a medical condition to be fixed, while the social model emphasises the societal barriers that limit the full participation of persons with disabilities. The human rights model centres on the inherent dignity and rights of persons with disabilities. South Africa has embraced the social and human rights models, rejected the medical model, and incorporated human rights considerations into its approach to disability. With the medical model being expressly rejected, both the social and human rights models are valuable tools for achieving substantive equality. South Africa has joined progressive jurisdictions as its doctrine of substantive equality, and it is well-placed to translate the social model of disability into an effective model for dismantling barriers against persons with disabilities. The chapter also delved into the definition of disability, recognising the multifaceted nature of this concept. The definition of disability is recognised as complex and ever-evolving, making it challenging to formulate a universally applicable definition. While South Africa acknowledges disability as a protected ground of equality, it lacks a unified definition in its laws and regulations. This absence creates inconsistencies and hampers the effectiveness of policies and measures aimed at promoting inclusivity. A harmonised definition of disability is needed to ensure clarity and consistency in the legal framework governing disability rights.

By examining the theoretical models of disability and their impact on the definition of disability, we can understand when and why two mechanisms, namely reasonable accommodation and accessibility, are employed for persons with disabilities. These mechanisms are established through national legislation and international treaties to ensure equal treatment of persons with disabilities, with a particular focus on persons with visual impairment.

Reasonable accommodation obligates duty bearers to make necessary adjustments and modifications to accommodate the needs of persons with disabilities, promoting inclusivity and equal opportunities. Accessibility, on the other hand, focuses on removing barriers that prevent persons with disabilities from fully participating in society. By embracing these principles, South African law aims to dismantle barriers and empower persons with disabilities, fostering an inclusive environment for all citizens. These two measures were underscored as critical components of the legal framework concerning disability rights in South Africa.

Altogether, Chapter 2 provides an argument that showcases South African law's approach to equality and disability. They cover topics such as the understanding of equality, models of disability, the definition of disability, and the importance of reasonable accommodation and accessibility.

2.3. Chapter 3

The research conducted in this thesis has produced a second set of findings concerning the meaning, role, and impact of reasonable accommodation and accessibility in international human rights law. In addition, the research provides insights into the significance and implications of these concepts within the context of disability rights in international human rights law.

First, this chapter analysed the United Nations Convention on the Rights of Persons with Disabilities (hereafter referred to as the “*Convention*”) to establish its origins and history.¹ This examination aimed to provide insight into the historical background and origins of the Convention. By delving into the Convention’s history, it became possible to understand the context and circumstances that led to its creation. Following this historical overview, a detailed elaboration was conducted. This involved a comprehensive exploration of various aspects of the Convention, including the Preamble, general principles, definitions, rights, and obligations outlined within the treaty. The purpose of this phase was to gain a thorough understanding of the Convention as a whole and to grasp the foundational principles and concepts underpinning it. However, the focus of the analysis was then narrowed down to concentrate on two specific articles within the Convention: Article 5(3), which addresses the concept of reasonable accommodation, and Article 9, which pertains to accessibility. The role of these concepts in facilitating substantive equality for persons with disabilities was emphasised throughout the analysis. The chapter explored the theoretical foundations and practical implications of reasonable accommodation and accessibility, recognising their significance in promoting equal opportunities and eliminating barriers. By conducting this analysis, the chapter laid the groundwork for understanding how reasonable accommodation and accessibility can effectively contribute to the achievement of substantive equality, as further explored in subsequent chapters of the thesis.

Reasonable accommodation is a personalised approach that recognises the unique needs of persons with disabilities. It is guided by Article 5(3) of the Convention, which emphasises the duty of States to provide reasonable accommodation to promote equality and eliminate discrimination. An analysis of the duty to accommodate reveals several key insights. Firstly, the accommodation requested must be necessary and appropriate for the specific circumstances of each case. According to the Committee on the Convention it must be assessed whether the accommodation is “relevant or effective” in ensuring the realisation of the right in question. This criterion requires that the State measures effectively enable persons with disabilities to participate in the required activity and contribute towards the realisation of substantive rights and obligations outlined in the Convention. Effectiveness is closely tied to the principles of human dignity and equality.² To assess whether measures taken by private entities or States are effective, these values, along with the objective and purpose of promoting equality and eliminating discrimination, are crucial.³ Secondly, the requested accommodation should be situation-specific and tailored to the unique circumstances of the individual case. The duty to provide reasonable accommodation is not a blanket requirement for all persons with disabilities but is contingent upon the specific needs and challenges presented in each situation. The focus is on alleviating the disadvantage experienced by the person with a disability and assessing the feasibility of the duty holder to provide the necessary accommodation. The third insight relates to the

¹ United Nations Convention on the Rights of Persons with Disabilities, resolution/adopted by the UN General Assembly, 24 January 2007, UN Doc. A/RES/61/106, available at <www.refworld.org/docid/45f973632.html> (accessed 25 June 2024).

² Broderick, A, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (2015), Maastricht University, pp. 1 – 465 at p. 384.

³ *Ibid.*

application of the proportionality test. This test aims to balance the rights, burdens, and benefits of all parties affected by the proposed accommodation. While financial considerations are important, the assessment should extend beyond mere monetary costs. Factors such as the entity's activities, the scale of operations, financial capacity, resources, potential disruption caused by the accommodation, alteration of the entity's business nature, and potential impact on others should be considered. The concept of third-party benefits also plays a role, considering the broader effects that the requested accommodation may have on other persons, including those with similar disabilities and consumers of the entity.

Accessibility encompasses the creation of products, environments, and services that can be utilised by a diverse range of persons. It enables persons to access material and intangible goods and conditions that would otherwise be inaccessible to them. An analysis of accessibility also reveals several key insights. Firstly, States Parties have a critical responsibility to ensure that persons with disabilities have equal access to, *inter alia*, products, environments, and services. Secondly, to fulfil this duty, States Parties must determine and implement appropriate measures, including the elimination of obstacles and barriers that impede access to products, environments, and services. These obstacles and barriers can take various forms, such as social, legislative, psychological, structural, environmental, or technological, hindering the free movement, decision-making, association, and participation of persons with disabilities. Notably, the identification and elimination of these obstacles, as mandated by Article 9(1) of the Convention, necessitate the direct involvement of persons with disabilities and their organisations, as they possess the best understanding of the relevant barriers and obstacles. Thirdly, once identified, it is crucial to eliminate these discriminatory obstacles and barriers to ensure accessibility. Guaranteeing accessibility not only ensures access but also enables persons with disabilities to enjoy their rights to the fullest extent possible.

2.4. Chapter 4

The research conducted in this thesis has yielded a third set of findings concerning the manner in which legislation unfairly discriminates against persons with visual impairment. This set of findings directly addresses the third research question, which investigates how the legislative framework regulating consumer protection and product labelling unfairly discriminates against persons with visual impairment. The research has shed light on how the existing legislative framework creates unfair discriminatory barriers for persons with visual impairments in relation to consumer protection and product labelling, highlighting the need for further examination and potential reforms in these areas.

In Chapter 4, the third research question was addressed, which focused on determining the national legislative framework governing product labelling. The aim was to ensure that consumers receive the necessary health and safety protection against risks and harm associated with various products. Recognising the vulnerability of persons with visual impairment, the thesis emphasised the importance of appropriate regulatory systems. The examination of consumer protection laws sheds light on the rights of persons with visual impairment and the potential for unfair discrimination or infringement upon their rights within the existing legislation. Additionally, the discussion explored the various labelling regulations pertaining to specific products and their potential impact on persons with visual impairment. Therefore, the chapter highlighted the interconnected nature of the different legislative pieces, each addressing the labelling of consumption-based, hazardous, poisonous, or inherently unsafe products. Finally, the chapter explored the

issue of unfair discrimination encountered by persons with visual impairments within the legislative framework, employing the *Harksen* test for analysis.

2.4.1. Consumer protection

The Consumer Protection Act⁴ (hereafter referred to as the “CPA”) is a crucial legislative framework in South Africa that aims to protect the rights and interests of consumers. It grants consumers various rights, and these rights are essential for ensuring that consumers are treated fairly and provided with adequate information and protection when engaging in commercial transactions. However, it is important to acknowledge that these rights are not always granted to consumers on an equal basis. Some consumers, particularly those who may be vulnerable or have specific needs, may face barriers or limitations in fully exercising their rights under the CPA. This creates a disparity in the level of protection and benefits enjoyed by different consumer groups. The right to equality and non-discrimination is a fundamental principle enshrined in the Constitution of South Africa. It requires that all persons, regardless of their background or characteristics, be treated fairly and without prejudice. However, the current implementation of the CPA inadvertently results in discriminatory practices or outcomes which undermine the principle of equality. To address this, it is necessary to review and improve the implementation of the CPA and its regulations.

After a thorough examination of the *Harksen* test, it is my firm determination that the provisions outlined in all the legislative pieces exhibit clear indications of unfair discrimination. Considering the *Harksen* test, which serves as a benchmark for assessing the constitutionality of legislation, it is imperative to scrutinise the relevant sections of these legislative pieces with respect to their compliance with the overarching principles of equality and non-discrimination. This evaluation necessitates a careful examination of the impact and effect of the aforementioned provisions on visually impaired consumers who may be subjected to their application. Upon thorough analysis, it becomes evident that these sections of these legislative pieces unfairly discriminate on the ground of disability and fails to meet the requirements set forth in section 36 of the Constitution, which outlines the justifiable limitations of rights and freedoms. Section 36 of the Constitution stipulates that any limitation of rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. This provision established a rigorous standard that any legislation must meet in order to pass constitutional scrutiny. The *Harksen* test provides guidance on interpreting and applying this standard to assess the constitutionality of legislative provisions. The discrimination arising from these provisions does not serve a legitimate purpose that can be deemed compatible with the values of human dignity, equality, and freedom espoused by the Constitution. Consequently, it was concluded that these sections of these legislative pieces and their regulation, as currently formulated, are inconsistent with the provisions of the Constitution.

2.4.2. Product Labelling

The existing legislative framework in South Africa establishes labelling requirements for consumption-based products that are hazardous, poisonous, or inherently unsafe. These requirements are put in place to safeguard the health and safety of the general public. However, it is essential to recognise that these

⁴ No. 68 of 2008.

regulations do not adequately ensure the same level of protection and benefit for persons with visual impairment. Labelling plays a crucial role in providing vital information about products, including potential hazards and safety precautions. For persons with visual impairments, the current labelling requirements fall short of accommodating their needs. The omission of provisions that address the specific informational needs of persons with visual impairment creates a notable gap in the current regulatory framework. It indicates a failure to consider and accommodate the diverse needs of all persons, thereby perpetuating inequality and hindering their ability to make informed choices. To ensure equal protection and benefit for all persons, it is essential to review and revise the existing labelling requirements to incorporate accessibility features that cater to the needs of persons with visual impairment.

Regulation 10 of the General Regulations, specifically outlines that every *medicine* container, package insert, and patient information leaflet must display certain information in clearly indelible letters and font size, in both English and at least one other official language for medicines intended for human use and consumption. These containers, packages, inserts, and leaflets must also provide clear instructions and warning signs. The Regulations Relating to the Labelling of *Foodstuffs* and the Regulations Relating to the Labelling of *Cosmetics* specify the information that must be included on labels for pre-packaged foodstuffs and cosmetics, respectively. The labels must be in English and, if possible, in another official language and should be visible, legible, and in an indelible format. The Compulsory Specification, in turn, only requires the label of a *disinfectant* to be in a legible and indelible format – a language that is not specified. Regulation 8(1)(a) of the Regulations on Hazardous Substances stipulates that a container containing *hazardous substances*, whether imported, manufactured, or packed in South Africa, must have a clear and prominent label affixed to one or more surfaces. The label must be clearly and conspicuously labelled.

An analysis of the *Harksen* test reveals that these above regulations demonstrate clear indications of unfair discrimination. The provisions fail to meet the standards established in the Constitution and are inconsistent with its fundamental principles. The restriction imposed by these regulations lacks a valid justification and unjustly infringes on the right to equality for persons with visual impairment. Therefore, according to the *Harksen* test, these regulations fail to meet the required non-discrimination standard. The provisions, as currently formulated, perpetuate unfair discrimination by treating persons with visual impairment less favourably without a justifiable rationale. In conclusion, these regulations, as currently structured, exhibits signs of unfair discrimination. Revisions are necessary to ensure that medicine labelling practices consider the needs of persons with visual impairment in line with the principles of equality enshrined in the Constitution.

2.5. Chapter 5

The research conducted in this thesis has produced a fourth set of findings regarding the application of accessibility and reasonable accommodation. These findings address the fourth research question, which focused on determining the extent to which accessibility obligations and reasonable accommodation measures ought to be applied to prevent unfair discrimination against persons with visual impairment. The research findings provide insights into the importance of implementing robust accessibility obligations and reasonable accommodation measures to ensure equal treatment and inclusion for persons with visual impairment. Furthermore, by examining the scope and application of these measures, the research contributes to understanding how to address and mitigate practices.

In Chapter 5, the focus shifted towards the application of accessibility principles, which had been previously discussed in Chapter 3, within the South African legislative framework examined in Chapter 4. The main objective was to safeguard persons with visual impairment against unfair discrimination and actively promote substantive equality, as explored in Chapter 2. The legislative framework was evaluated through the lens of accessibility principles to identify and address any existing barriers or limitations. This analysis aimed to assess the alignment between the legislative framework and accessibility principles and proposed necessary amendments where needed. Chapter 5 contributed to a comprehensive understanding of the relationship between accessibility, South African legislation, and substantive equality, shedding light on the necessary enhancements to the legislative framework to eradicate discrimination. As revealed in Chapter 4, the existing legislative framework unfairly discriminates against persons with visual impairments, making it imperative for all States Parties to first undertake appropriate measures to modify discriminatory laws.

Furthermore, Chapter 5 delved into the application of reasonable accommodation, previously discussed in Chapter 3, within the specific context of visual impairment and accessible labelling. The comprehensive examination of reasonable accommodation principles aimed to ensure *de facto* equality for persons with visual impairment aligns with the discussions presented in Chapter 2. Chapter 5 sheds light on the practical application of the concept of reasonable accommodation within the South African legislative context, as discussed in Chapter 4. It explored how reasonable accommodation can be effectively implemented to address the unique challenges faced by persons with visual impairment in accessing information and participating in consumer activities. The principle of providing reasonable accommodation offers a personalised approach to addressing the needs of persons with visual impairments. This concept becomes particularly relevant in situations where there are no existing accessibility standards, where existing standards fail to consider the needs of persons with uncommon impairments, or when a person with a disability cannot utilise the methods outlined by the accessibility standard. In the specific context of accessible product information, there are currently no established accessibility standards. Therefore, it becomes necessary to provide accommodations that enable accessibility on an individual basis, considering the unique impairments of each person. These accommodations serve as temporary measures until comprehensive accessibility standards are developed, and the prescribed methods can be universally utilised.

Through the analysis of accessibility principles and the application of reasonable accommodation, Chapter 5 contributed to the overall goal of eliminating discrimination and fostering substantive equality for persons with visual impairment. By identifying areas within the legislative framework that require enhancement, the chapter proposed recommendations to bridge the gap between existing legislation and the principles of accessibility and reasonable accommodation.

3. Recommendations

As a party to the Convention, South Africa must take positive and proactive steps to implement Article 9. South Africa must comprehensively review its legal framework to ensure compliance with Article 9 of the Convention. Upon examining the legislative framework for labelling, it is evident that South Africa does not meet the requirements of Article 9 of the Convention. As determined in Chapter 4, the legislative

framework unfairly discriminated against persons with visual impairments. Therefore, the primary general obligation for all States Parties to comply with is to take appropriate measures for modifying existing laws that amount to discrimination against persons with visual impairments. To comply with Article 4(1)(b) of the Convention, the current legislative framework should be modified to make the product information accessible, as required by Article 9 of the Convention.

3.1. Modifications of existing laws

3.1.1. Consumer Protection Act

3.1.1.1. Disclosure of price of goods or services

The conclusion has been reached that sections 23(3) and (5) of the CPA, as they currently stand, are not in accordance with the provisions of the Constitution. These provisions result in unfair discrimination against consumers with visual impairments.⁵ It is crucial for the legislature to review and amend these sections to align them with the constitutional principles of equality and non-discrimination. By making these amendments, the CPA can be harmonised with the fundamental values enshrined in our Constitution. It is imperative to ensure that all consumers can access and comprehend pricing information on an equal basis. Therefore, it is proposed to include a definition of “displayed price” as referenced in section 23 of the CPA, outlined as follows:

“Displayed price” pertains to the intentional design and execution of the price presentation in a manner that guarantees a clear perception and understanding of the value or cost of a product or service for all consumers, including consumers with visual impairments.

Furthermore, it is suggested that the definition of “display” concerning prices be revised as follows:

“Display”, when used –

- (a) in relation to any goods, means placing, exhibiting, or exposing those goods in an accessible manner before the public in the ordinary course of business, in a manner consistent with an open invitation to members of the public to inspect and select those or similar goods for supply to a consumer; or
- (b) in relation to a price, mark, notice or other visual representation, means to place or publish anything in an accessible manner that reasonably creates an association between that price, mark, notice, or other visual representation and any particular goods or services.

As a third proposal, it is recommended that a definition for the term “in an accessible manner” be incorporated to enhance its interconnection with the definition of “display” and to ensure clarity as follows:

⁵ When discussing the CPA, I refer to visually impaired persons as visually impaired consumers. A consumer is defined in the CPA as: “[i]n respect of any particular goods or services, means-
(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);
(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5 (6) (b) to (e)”.

“In an accessible manner” refers to presenting information or content in a way that allows all consumers, including those with visual impairments, to easily access, perceive, understand, and interact with it effectively.

Since the terms “displayed price” and “in an accessible manner” specifically refer to consumers with visual impairments, and the CPA currently lacks a definition for this term, it is proposed that a definition for “consumers with visual impairments” be included as follows:

“Consumers with visual impairments” refers to a consumer who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

According to section 23(5) of the CPA, a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods. A price is adequately displayed to a consumer if, in relation to any particular goods, a *written* indication of the price is expressed in the currency of the Republic. Since the CPA currently lacks a definition for the term “written”, it is proposed that one be included:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for consumers with visual impairments.

Since the proposed definition of “written” emphasises the use of legibility, it is recommended that a definition for “legible” be added as follows:

“Legible” signifies that any content should be presented in a format that guarantees readability and understanding, satisfying the following conditions:

- (a) it can be read and comprehended by a consumer with normal vision at a distance of approximately 30 cm;
- (b) it can be read and comprehended by a consumer wearing regular corrective lenses without the need for aids like magnification; or
- (c) it can be read and comprehended by consumers with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

Once the amendments and insertions have been implemented, a price will be considered adequately displayed if two criteria are met: firstly, the method used to present the price must be accessible. This means that the way in which the price is displayed should be designed and executed in a manner that ensures easy perception and understanding by all consumers. Therefore, accessibility recommendations should be considered since they aim to provide an inclusive experience for everyone. Secondly, it is not sufficient for just the method of displaying the price to be accessible. The written indication itself must also be in an accessible format. This means that the actual content of the price information, such as the numbers, symbols, and any accompanying text, should be presented in a way that consumers with visual impairments can effectively access, perceive, and understand. The combined goal of these provisions is to ensure that consumers with visual impairments are not disadvantaged, excluded, or discriminated against when it comes to accessing and comprehending pricing information.

3.1.1.2. Warning concerning fact and nature of risks

While section 58 of the CPA, read in conjunction with section 49 of the CPA, established requirements for providing notice of risks to consumers, it has become apparent that the current provisions do not adequately protect visually impaired consumers. Under the current framework, the supplier of any activity or facility must specifically draw the facts, nature, and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49 of the CPA. A *notice*, as contemplated in section 49 of the CPA, must be *written* in plain language, as described in section 22 of the CPA. However, it is essential to address the accessibility needs of visually impaired consumers by revising the CPA to incorporate provisions that cater to alternative formats for notices. To address this aspect, it is imperative to introduce a definition of “notice” that aligns with the proposed definition of “written”. This definition should stipulate that notices are to be presented in accessible formats. Therefore, it is recommended that the following definition of “notice” be included in the CPA:

“Notice” refers to written, printed, or displayed communication that effectively conveys information, instructions, warnings, or announcements, presented in a manner that is easily accessible and understandable to all consumers, including those with visual impairments.

Additionally, given that the definition of “notice” refers to it being presented in a manner that is easily accessible, it is strongly recommended that the following definition for “accessible” be included:

“Accessible” refers to the state of being easily approachable, usable, and available to all consumers, including those with visual impairments, through the removal of barriers and provision of reasonable accommodation measures to ensure equal access to goods, services, and information.

The inclusion of a clear and comprehensive definition for “notice” that ensures it is “accessible”, coupled with the adoption of the proposed definition for “written”, would have substantial implications. Firstly, it would bring clarity to the meaning of a notice within the context of the CPA. The proposed definition provides a precise understanding of what constitutes a notice and highlights that it should be presented in accessible formats to accommodate consumers with visual impairments. This ensures that notices are designed with inclusivity in mind and can be effectively accessed by consumers with visual impairments. Secondly, incorporating the definition of “written”, as defined above, which emphasises the importance of clear and legible means of communication accessible to consumers with visual impairments, establishes a standard for the creation and presentation of notices. It underscores the necessity of designing notices in a way that enables consumers with visual impairments to comprehend the information effectively.

The definition of “accessible” refers to the removal of barriers and the provision of reasonable accommodation measures. It is proposed that the definition of “barrier” and “reasonable accommodation” be included as follows:

“Barriers” are obstacles and impediments that prevent consumers from free movement, decision-making, association, and participation. Barriers may be social, psychological, or structural.

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to consumers with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Furthermore, it is proposed that a definition of “conspicuous manner” should be included since section 49(4)(a)⁶ requires such for attracting attention to the fact, nature and effect of the notice contemplated in section 49(1):

“Conspicuous manner” refers to presenting information in a manner that is highly visible, easily noticeable, and readily accessible to visually impaired consumers.

If a law or regulation requires a notice to be provided in a conspicuous manner, it means that the notice must be displayed prominently, using a particular format, font size, or alternative format that draws the reader’s attention. Overall, presenting information in a conspicuous manner promotes transparency, clarity, and fairness in the context of receiving a notice that is accessible.

3.1.1.3. Product labelling and trade descriptions

Regulation 6 of the Consumer Protection Act Regulations stipulates that the trade description and label must comply with the provisions of section 22 of the CPA and be displayed on goods in a prominent and easily readable fashion. According to regulation 6(1)(a) of the Consumer Protection Act Regulations, a trade description must be applied to goods in a manner that is both *conspicuous* and easily *legible*, in accordance with the requirements outlined in section 22 of the Act. Nevertheless, since the existing regulation does not encompass a definition for the terms “trade description”, “label”, or “legible”, it is recommended that, firstly, the definition of a “trade description” be included as follows:

“Trade description” encompasses any form of communication, whether expressed verbally, in writing, or through visual representation, that is employed in conjunction with the sale or exchange of goods or services during commercial transactions. It encompasses a wide range of information pertaining to the attributes, features, origins, composition, applications, or other pertinent aspects of the goods or services being offered or rendered. These descriptions can be found on product labels, packaging, advertising materials, or in marketing communications.

Secondly, I propose the inclusion of the following definition for “label”:

⁶ “(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances [...]”.

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter that is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of goods in a manner that is legible, easily readable, and understandable for consumers, including those with visual impairments, and includes labelling for the purpose of promoting its sale or disposal.

Lastly, it is recommended that the abovementioned definition of “legible” be included to ensure the utmost clarity and comprehension. By including this definition, it will establish clear and precise standards for the readability of labels, ensuring that the information presented is easily discernible and understandable to all consumers. An amended definition for “legible” will guarantee that labels are designed and displayed in a manner that accommodates different levels of visual impairment, promoting accessibility and equal access to critical information.

3.1.2. Product labelling

3.1.2.1. Medicines and scheduled substances

The current provisions regulating the labelling of medicinal products and scheduled substances fail to adequately address the needs of visually impaired persons in accessing information. In order to rectify this and promote equal treatment, it is crucial to review and amend regulation 10(1) of the General Regulations. By eliminating any differentiation between persons with visual impairments and those without when it comes to labelling requirements for medicinal and scheduled substances, the regulation can align with the constitutional principles of equality and non-discrimination. The amendment of regulation 10(1) of the General Regulations is essential to ensure that visually impaired persons are not disadvantaged or excluded when it comes to accessing medication information. In terms of regulation 10(1), the immediate container of every medicine which is intended for human administration or use must have a label attached to it, on which the prescribed particulars must appear in clearly legible, indelible letters in English and at least one other official language. However, it is proposed that regulation 10(1) of the General Regulations be changed. It should read as follows:

“10(1) Subject to subregulations (4) and (5), the immediate container of every medicine in which a medicine intended for administration to or use by humans is sold shall have a label attached to it on which the following particulars shall appear ~~in~~ clearly legible and indelible ~~letters~~ in English and at least one other official language”.

Furthermore, since there is currently no definition for what constitutes a “label” or a “leaflet”, it is proposed that such definitions to the General Regulations be added as follows:

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter that is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of medicine or scheduled substances in a manner that is legible, easily readable, and understandable for persons, including those with visual impairments, and includes labelling for the purpose of promoting its sale or disposal.

“Leaflet” means any product information written, printed, affixed, applied, attached, or embossed on paper in a manner that is legible, easily readable, and understandable for persons, including those with visual

impairments, that provides information about the product or its contents and is either attached to or near the product.

The proposed interpretation of the terms “label” and “leaflet” offers explicit guidance on how descriptive content should be displayed to ensure accessibility for persons with visual impairments. This definition underscores the significance of legibility, readability, and comprehensibility. It accentuates the necessity for labels to adopt a format that is easily readable and understandable.

Since the definition of “label” and “leaflet” is, *inter alia*, referring to the term “written” and the General Regulations does not currently include such a definition, it is proposed that such a definition be added as follows:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for persons with visual impairments.

Furthermore, the definitions of a “label” and “leaflet” both specify that it should be legible, easily readable, and understandable for various persons, including those with visual impairments. However, the General Regulations lack a clear definition for persons with visual impairments. Therefore, it is proposed to add such a definition as follows:

“Persons with visual impairments” refers to a person who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

Lastly, in order to accurately define a label or leaflet that must be clearly legible, it is imperative to incorporate such a definition. The existing General Regulations already include a definition for “minimum legibility” as follows:

“Minimum legibility” means a printing in 6-point Helvetica typeface, in black ink, on white cartridge paper or the equivalent thereof.

Considering the existing discrepancy between the current definition of “minimum legibility”, which solely focuses on sight, and the proposed definition of “label” and “leaflet”, which emphasises legibility, it is recommended that the definition of “minimum legibility” be amended to align with the revised definition of “label”. The amended definition should ensure clarity and consistency between the two terms. The revised definition of “minimum legibility” should be as follows:

“Minimum legibility” signifies that any content should be presented in a manner that ensures readability and understanding for persons, including those with visual impairments. It should satisfy the following conditions:

- (a) It can be read and comprehended by persons with normal vision at a distance of approximately 30 cm;
- (b) It can be read and comprehended by persons wearing regular corrective lenses without the need for additional aids like magnification; or
- (c) It can be read and comprehended by persons with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

By aligning the definition of “minimum legibility” with the revised definition of “label”, we establish a cohesive framework that emphasises legibility for all persons. The definition of “minimum legibility” serves as a boon to those with visual impairments by establishing unequivocal standards for label readability. It sets forth criteria ensuring that label information is attainable and intelligible by individuals with diverse levels of visual impairment. The definition explicitly encompasses persons with visual impairments and underscores the prerequisite of legible labelling. Embedding these benchmarks within the definition assures that label design and presentation cater comprehensively to the assorted requirements of persons with visual impairments.

3.1.2.2. Foodstuffs, Cosmetics and Disinfectants

3.1.2.2.1. Foodstuffs

The existing regulations concerning the labelling of foodstuffs do not sufficiently cater to the information accessibility needs of persons with visual impairments. To address this and ensure equitable treatment, it is essential to examine and revise the regulation thoroughly. According to regulation 7(1)(a) – (b) of the Regulations Relating to the Labelling of Foodstuffs, the information required to appear on any label must currently be in English and, where possible, at least one other official language, it must be clearly visible, easily legible, and indelible. A label is defined in the regulation as:

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter, which is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of a foodstuff, and includes labelling for the purpose of promoting its sale or disposal.

It is proposed that the definition of a “label” be amended. It should be read as follows:

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter which is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of foodstuffs in a manner that is legible, easily readable, and understandable for persons including those with visual impairments, and includes labelling for the purpose of promoting its sale or disposal.

The crucial aspect of these labels is that they are designed in a manner that is legible, meaning the text or information can be easily discerned and read. Additionally, the labels should be easily readable, allowing persons, including those with visual impairments, to access and comprehend the information without

difficulty. The labels must also be understandable, ensuring that the content is clear and comprehensible. Furthermore, the definition explicitly includes labelling that serves the purpose of promoting the sale or disposal of the food product, indicating that all forms of labelling relevant to the product are covered within this definition. Overall, this definition emphasises the importance of creating labels that are accessible and accommodating to facilitate their understanding and engagement with food product information.

Given that the definition of “label” encompasses, *inter alia*, the term “written”, and considering the current void of such a definition within the regulation, my recommendation is to incorporate a definition for “written” in the following manner:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for persons with visual impairments.

Since the definition of a “label” and “written” refers to “persons with visual impairments”, but the regulation does not define it, it is proposed that one be added:

“Persons with visual impairments” refers to a person who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

Regulation 7(1)(b) of Regulations Relating to the Labelling of Foodstuffs requires a label to be “[c]learly visible, easily legible and indelible and the legibility thereof shall not be affected by pictorial or any other matter, printed or otherwise”. The absence of a definition for “legible” in the regulation highlights the need to provide clarity and establish a standard for readability. Therefore, it is recommended that a definition for “legible” be included that specifies the requirement for content to be presented in a format that enables clear and comprehensible reading, ensuring that the details can be easily perceived and understood by the intended audience. This definition will contribute to enhancing the accessibility and effectiveness of foodstuff labelling.

“Legible” signifies that any content should be presented in a format that guarantees readability and understanding, satisfying the following conditions:

- (a) it can be read and comprehended by a person with normal vision at a distance of approximately 30 cm;
- (b) it can be read and comprehended by a person wearing regular corrective lenses without the need for aids like magnification; or
- (c) it can be read and comprehended by persons with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

For visually impaired persons, the definition of “legible” in relation to labelling means that the information displayed on the label should be presented in a format that allows them to read the details comfortably.

Specifically, the label should be designed in a way that enables a person living with visual impairments to be able to read the label. This provision acknowledges that people may have specific visual requirements. This provision ensures that the label is accessible and legible to them regardless of their distance from the label. By setting these legibility standards, the definition aims to ensure that visually impaired persons can access and comprehend the information on the label without any significant barriers.

3.1.2.2.2. Cosmetics

The current regulations governing the labelling of cosmetics lack sufficient provisions to meet the information accessibility requirements of persons with visual impairments. To rectify this and promote equal treatment, it is crucial to undertake a comprehensive review and revision of this regulation. According to regulation 8(14) - (15) of the Regulations Relating to the Labelling of Cosmetics, unless expressly otherwise provided, the information currently required to appear on a label must be in at least English, visible, legible, and indelible. Within this regulation, the definition of “label” is currently absent, and it is recommended that the following definition be included:

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter that is written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of cosmetics in a manner that is legible, easily readable, and understandable for persons including those with visual impairments, and includes labelling for the purpose of promoting its sale or disposal.

In light of the fact that the definition of “label”, *inter alia*, encompasses the term “written”, and recognising the current absence of such a definition in the regulation, it is suggested that a definition for “written” be included as follows:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for persons with visual impairments.

These labels have a fundamental prerequisite: they must be designed to ensure legibility, making sure that the text or information is easily distinguishable and readable. Moreover, these labels should be effortlessly readable, enabling individuals to access and understand the content without difficulty. Furthermore, the labels need to be comprehensible, ensuring that the information is clear and understandable for those with visual impairments. In essence, this definition underscores the importance of crafting labels that are accessible and accommodating.

Despite the existing inclusion of the definition of “legible” in the regulation, there is a proposal to amend and refine the definition to better align with the intended purpose and ensure clarity. The proposed

amendment aims to provide a more comprehensive understanding of what constitutes legibility within the context of the regulation. It emphasises the importance of legibility as a criterion for effective communication, requiring that the content be presented in a format that allows for easy reading and comprehension. By refining the definition, it intends to promote consistent and standardised practices in labelling, ensuring that the information provided is accessible and understandable to all persons. The proposed amendment reflects a commitment to improving accessibility. The current definition of “legible” is as follows:

“Legible” means that the labelling should be of sufficient size so that the details can be read by a person with normal vision at a distance of about 30 cm or by a person wearing regular corrective lenses without having to resort to aids such as magnification.

The proposed amendment to the definition is as follows:

“Legible” signifies that any content should be presented in a format that guarantees readability and understanding, satisfying the following conditions:

- (a) it can be read and comprehended by a person with normal vision at a distance of approximately 30 cm;
- (b) it can be read and comprehended by a person wearing regular corrective lenses without the need for aids like magnification; or
- (c) it can be read and comprehended by persons with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

The definition of “legible” refers to “persons with visual impairments”, but the regulation does not define it. Therefore, it is recommended that such a definition be added as follows:

“Persons with visual impairments” refers to a person who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

3.1.2.2.3. Disinfectants

The existing regulations pertaining to the labelling of disinfectants inadequately address the information accessibility needs of persons with visual impairments. To remedy this disparity and ensure equitable treatment, it is imperative to initiate a thorough reassessment and modification of these specifications. According to section 5.2 of the Compulsory Specifications, unless expressly otherwise provided, the information currently required to appear on a label must be legible and indelible. Within this Compulsory Specification, despite the existing inclusion of the definition of “label”, it is proposed that the definition be amended to better align it with the intended purpose and ensure clarity. The current definition of “label” is as follows:

“Label” means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed upon, or permanently attached to a container of a disinfectant, including labelling for the purpose of promoting its sale or disposal.

The proposed definition of “label” reads as follows:

“Label” means any tag, brand, mark, pictorial, graphic or other descriptive matter written, printed, stencilled, marked, embossed, impressed upon, or permanently attached to a container of disinfectant in a manner that is legible, easily readable, and understandable for persons including those with visual impairments, and includes labelling for the purpose of promoting its sale or disposal.

This comprehensive definition emphasises the significance of creating labels that are both accessible and considerate of persons with visual impairments. The objective is to improve their understanding and engagement with information related to disinfectant products.

Given that the existing definition of “label” incorporates, *inter alia*, the term “written”, and considering the absence of such a definition within the current Compulsory Specifications, it is recommended that a definition for “written” be introduced as outlined below:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for persons with visual impairments.

Furthermore, the definition of “label” includes the word “legible”, and the Compulsory Specifications does not include such a definition. It is proposed that the definition of it be added as follows:

“Legible” signifies that any content should be presented in a format that guarantees readability and understanding, satisfying the following conditions:

- (a) it can be read and comprehended by a person with normal vision at a distance of approximately 30 cm;
- (b) it can be read and comprehended by a person wearing regular corrective lenses without the need for aids like magnification; or
- (c) it can be read and comprehended by persons with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

For persons with visual impairments, the definition of “legible” concerning labelling entails that the information exhibited on the label must be presented in a manner that facilitates comfortable reading for them. More precisely, the label’s design should accommodate the needs of persons living with visual impairments, ensuring that they can effectively read its contents. This provision recognises the unique visual demands of those with visual impairments and guarantees that the label remains accessible and readable for them, regardless of their proximity to it. By establishing these standards of legibility, the definition aims to ensure that persons with visual impairments can effortlessly access and comprehend the label’s information without encountering significant impediments.

The definition of “legible” refers to “persons with visual impairments”; however, this particular definition is presently absent from the Compulsory Specifications. In light of this, it is proposed that the definition be incorporated in the following manner:

“Persons with visual impairments” refers to a person who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

3.1.2.3. Hazardous substances

The existing regulations pertaining to the labelling of hazardous substances inadequately address the information accessibility needs of persons with visual impairments. Therefore, it is essential to conduct a thorough review and revision of the regulation, incorporating provisions that cater to the accessibility requirements of visually impaired persons. Currently, regulation 8 of the Regulations on Hazardous Substances requires that hazardous products must be clearly and conspicuously labelled. It is proposed that the definition of a “label” as currently contained in the regulation be amended to the following:

“Label”, when used as a noun, means any brand or mark or any written, pictorial or other descriptive matter that appears in a legible manner for all persons, including those with visual impairments, on or attached to or packed with any grouped hazardous substance or its container, and referring to such substance [~~and, when used~~]. When used as a verb, it means brand or mark or attach or provide in any other manner with any written, pictorial or other descriptive matter in a legible manner for all persons, including those with visual impairments.

In light of the existing definition of “label”, which incorporates, *inter alia*, the term “written”, and recognising the absence of a corresponding definition within the current regulation, it is advocated that a definition for “written” be included in the following proposed manner:

“Written” refers to the intentional inscription or display of information through marks, including letters, words, numbers, or symbols, on a surface in a formal and documented manner, created through clear and legible means. This encompasses both traditional and electronic forms of communication, such as text displayed on paper, screens, or digital devices, provided that it meets the criteria of legibility and comprehension for persons with visual impairments.

It is proposed that the term “legible” be included in regulation 8, specifically in relation to the labelling of hazardous products. This addition aims to emphasise the importance of ensuring that labels are clearly readable and understandable. This amendment will ensure that the labelling requirements encompass not only the presence of labels but also their legibility, thereby enhancing the effectiveness of hazard communication and minimising potential risks associated with improper handling or the use of hazardous substances.

“8(1)(a) Each container of a Category A Group I hazardous substance imported, manufactured or packed in the Republic shall be [~~clearly~~] legible and conspicuously labelled with –”

I subsequently propose adding the definition of “legible” to the Regulations on Hazardous Substances.

“Legible” signifies that any content should be presented in a format that guarantees readability and understanding, satisfying the following conditions:

- (a) it can be read and comprehended by a person with normal vision at a distance of approximately 30 cm;
- (b) it can be read and comprehended by a person wearing regular corrective lenses without the need for aids like magnification; or
- (c) it can be read and comprehended by persons with visual impairments using appropriate assistive technologies or alternative formats, such as audio.

It is proposed that the term “legible” be included in regulation 8 of the Regulations on Hazardous Substances. This addition ensures that each container of a Category A and B Group I hazardous substance, whether imported, manufactured, or packed in the Republic, is clearly readable and prominently labelled with essential information. The term “legible” emphasises the importance of legibility as a requirement for effective communication and promotes the accessibility and comprehensibility of the labelled information. By incorporating this term, the revised regulation 8 aims to enhance safety measures by ensuring that the hazardous substance containers are labelled in a manner that allows for easy reading and understanding of critical information. This amendment underlines the significance of providing clear and visible labelling to mitigate risks and enable persons to make informed decisions when handling hazardous substances.

The term “legible” in the definition includes a reference to “persons with visual impairments”, however, the regulation currently lacks a specific definition for this term. It is recommended that the definition for “persons with visual impairments” be included within the regulation. This addition aims to provide clarity and specificity regarding the scope and application of the term within the context of hazardous substance labelling.

“Persons with visual impairments” refers to a person who has varying degrees of visual impairments, which can range from partial to complete loss of vision, resulting in challenges in perceiving and comprehending visual information.

Concluding remarks

Concluding this thesis, one is inclined to highlight future research that may stem therefrom. This study identifies several crucial areas for future research concerning the accessibility of product labelling legislation in South Africa. While the thesis predominantly examines the challenges faced by persons with visual impairments, there remains significant scope to explore how other disabilities, including cognitive, hearing, and physical impairments, impact access to essential product information. Moreover, an intersectional approach that considers the compounded challenges faced by individuals with multiple disabilities can offer a more comprehensive understanding of accessibility needs. For instance, how does a person with both visual and cognitive impairments navigate product labels, and what multi-faceted solutions can be implemented to address such complex needs?

One avenue for further investigation lies in the integration of technological advancements designed for accessibility. These innovations have the potential to revolutionise how persons with disabilities interact with product labels, offering features like audio descriptions or simplified digital interfaces. For example, the development of mobile applications specifically designed to assist persons with disabilities in reading product

labels. These apps can employ optical character recognition technology to convert printed text into spoken words, allowing users to hear the information read aloud. Additionally, they can offer customisable settings, such as adjusting the speech rate or choosing different languages, to cater to diverse user needs. Augmented reality is another cutting-edge technology that holds significant potential for improving label accessibility. Augmented reality applications can overlay digital information onto the physical world using smartphones or smart glasses. When a user points their device at a product, the app can display large, high-contrast text, images, or symbols that are easier to understand. This can be especially useful for individuals with cognitive impairments or low literacy levels. -Activated assistants and smart speakers also offer new avenues for accessible labelling. By integrating product databases with these devices, individuals can simply ask for information about a product and receive spoken responses. This hands-free approach can be highly beneficial for those with physical disabilities who may have difficulty manipulating packaging or using a smartphone. Exploring these technological advancements opens the possibility of developing universal design standards for accessible labelling, ensuring that new technologies are integrated seamlessly into everyday products and services.

Understanding the specific challenges faced by persons with disabilities through empirical studies and surveys would offer firsthand data on the efficacy of current laws and the need for amendments. By gathering qualitative and quantitative data directly from persons with disabilities, researchers can identify gaps in the current legislative framework that impede access to product information. This data-driven approach ensures that the voices of those affected are heard, and their experiences inform the development of more inclusive policies. Surveys and studies can uncover practical issues such as the readability of labels, the availability of information in alternative formats, and the overall user experience. Moreover, future research could focus on developing legislative recommendations that align South Africa's product labelling laws with international accessibility standards. This could involve proposing specific amendments or drafting new legislation that ensures inclusivity and compliance with global norms.

Expanding the scope of disability rights law to encompass accessible product labelling intersects with broader societal implications, including consumer protection, healthcare access, and educational opportunities. Investigating the role of public awareness campaigns in promoting the adoption of accessible labelling practices by businesses and manufacturers is another critical area for exploration.

By addressing these research gaps, scholars can contribute to a more comprehensive understanding of accessibility in product labelling. Such efforts not only enhance compliance with international conventions but also promote a more just and accessible consumer environment in South Africa and beyond.

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