

**PROTECTION OF THE RIGHTS OF PERSONS LIVING WITH
DISABILITIES UNDER THE AFRICAN HUMAN RIGHTS SYSTEM**

**Submitted in partial fulfilment of the requirements of the LLM (Human
Rights and Democratisation in Africa) of the University of Pretoria**

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DECLARATION

I, **Angelo Buhle Dube** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

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DEDICATION

This dissertation is dedicated to the Almighty God, through whose grace and love I made it through the trying times in 2007. It is also dedicated to my wife Andile Dube for sacrificing so much for this to become a reality.

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I am grateful to the staff, both academic and administrative at the Centre for Human Rights, University of Pretoria. Without their support and dedication to fine legal scholarship, I would not have come this far.

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May God Almighty bless you all.

PREFACE

The expectations of the people at home, even close relatives would always say something like, 'It was the spirit from the wife that caused the disability.' This attitude even threatened the marriage of my father and mother. They had to consult a traditional healer to say it was not their fault. Otherwise, it would have led to divorce. There are many divorces as a result of disablement in the villages.¹

The purpose of this work is to examine the nature or form of disability rights, and whether the African regional human rights system adequately protects them. In other words, the study tries to understand whether the current appalling status of people living with disabilities can be blamed on normative paucity of the African human rights system. The author will therefore comb the African human rights instruments to determine this, and based on the findings, will assess the propriety or otherwise of adopting a disability specific instrument for the continent and recommend accordingly.

¹ Ranga Mapindu a Zimbabwean, quoted in F Armstrong and L Barton, *Disability, Human Rights and Education: Cross-cultural perspectives* Open University Press, Buckingham (1999) 11.

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENTS	iii
PREFACE	iv
TABLE OF CONTENTS	v
LIST OF ABBREVIATIONS	viii
CHAPTER 1: INTRODUCTION	1
1.1. Background of the study	1
1.2. Research question	2
1.3. Rationale for research	2
1.4. Literature review	4
1.5. Limitation of study	5
1.6. Methodology	6
1.7. Chapter outline	6
CHAPTER 2: DEFINING DISABILITY	8
2.1. Disability – an elusive term	8
2.2. WHO definition of disability	9
2.3. Changing perceptions on disability	10
2.3.1. Human dignity as a value	10
2.3.2. Equality as a value	11
2.4. Disability and international law – the era of soft laws	11
2.4.1. Disability under the Convention	14
2.5. Disability rights in Africa	15
2.6. Conclusion	16

CHAPTER 3: UNDERSTANDING THE NATURE OF DISABILITY RIGHTS	17
3.1 Introduction	17
3.2 State's duty to respect, fulfil and protect disability rights	17
3.2.1 The nature of disability rights	19
3.2.2 Non-discrimination, the common thread in disability rights	21
3.3 Conclusion	24
CHAPTER 3: DISABILITY RIGHTS UNDER THE AFRICAN HUMAN RIGHTS SYSTEM	26
4.1 Introduction	26
4.2 The UN human rights system	26
4.3 The African human rights system	28
4.3.1 The African Charter	29
4.3.2 Non-discrimination under the Charter	29
4.3.3 How does the African Charter compare with the Inter-American Disability Convention	29
4.3.4 The African Children's Charter	32
4.3.5 The Women's Protocol	33
4.3.6 The African Democracy Charter	34
4.3.7 Declaration of Principles on Freedom of Expression in Africa	35
4.3.8 Principles and Guidelines on the Right to a Fair Trial	37
4.4 National Constitutions and disability rights	37
4.5 African Commission jurisprudence on disability rights	39
4.6 The Commission's view on discrimination	41
4.6.1 Human dignity as a human right	42
4.6.2 Jurisprudential limitation	43
4.7 Conclusion	43
CHAPTER 5: DOES AFRICA NEED A DISABILITY-SPECIFIC INSTRUMENT?	45
5.1 Introduction	45
5.2 Is there normative paucity as regards disability rights?	45
5.3 Is weak enforcement of instruments a threat to disability rights?	46
5.3.1 Is there lack of political will?	46
5.4 Lack of awareness	47
5.5 Jurisprudence of the Commission	47

5.6	Is a specific instrument the panacea?	48
5.7	Conclusion	49
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS		50
6.1	Introduction	50
6.2	Recommendations	50
6.2.1	Working groups and special rapporteurs	51
6.2.2	Promotional mandate of the African Commission	51
6.2.3	Awareness-raising through information technology	52
6.2.4	Use of state reporting mechanisms	52
6.2.5	Strategic partnerships with NGOs	52
6.2.6	Use of national human rights institutions	52
6.2.7	Use of the African Decade for PWDs	53
6.3	Conclusion	53

LIST OF ABBREVIATIONS

AIDS	Acquired Immuno-Deficiency Syndrome
AU	African Union
CEDAW	Convention for the Elimination of all forms of Discrimination Against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DoFE	The Declaration on Freedom of Expression
ECOSOC	Economic and Social Council
HIV	Human Immune Deficiency Virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICIDH	International Classification of Impairment, Disabilities and Handicaps
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
PWD	Person(s) Living with a Disability
StRE	Standard Rules on the Equalisation of Opportunities for Persons with Disabilities
UN	United Nations
WHO	World Health Organisation
WPA	World Programme of Action concerning the disabled

CHAPTER ONE

INTRODUCTION

1.1 Background of the study

Persons living with disabilities (PWDs) have since time immemorial been victims of human rights violations and social exclusion. An ancient sacred Indian poem written between 3500 and 1800 B.C. recounts the story of a warrior, Queen Vishpla who lost her leg in battle. She was fitted with an iron prosthesis and returned to battle. This is the first written record of a prosthesis.¹ The discrimination against PWDs emerged as early as 355 BC, where Aristotle was quoted as saying, 'those who are born deaf become senseless and incapable of reason'.² Today approximately 10 per cent of the world's population (about 600 million people) are PWDs,³ with over two thirds living in harsh conditions, and mainly in developing countries. There is a strong link between disability, poverty and social exclusion, and this link is spread throughout the world. Many policies for eliminating PWDs from society were carried out by governments,⁴ such as eugenic population policies for sterilization and killing of those deemed unwanted by reason of their disability.⁵

Partly linked to such annihilationist attitudes towards PWDs was the tendency to view disability as deviance, an undesirable yet incurable medical condition.⁶ Because human beings were valued for their economic input, PWDs were deemed incapable of carrying out most economic tasks, hence their rejection by society. Since societies felt PWDs were benefiting from an economy they were not contributing to, the interventions to assist PWDs were always based on welfare and charity, hence they were denied self-determination. They were viewed as objects of charity and were not consulted or allowed to participate in decision-making.

PWDs in Africa continue to suffer human rights violations due to their disability status. Although disability is a worldwide phenomenon, not much has been written on the subject in the African

¹ Disability History Timeline, accessed at http://www.disabilityhistory.org/timeline_new.html, (accessed 10 August 2007).

² As above.

³ Human Rights and Disability, accessed at <http://www.unhchr.ch/disability/intro.htm> (accessed 28 August 2007).

⁴ PWDs were the main and earliest victims of the Nazi concentration camps, to which the UN human rights machinery largely owes its existence. See G Quinn and T Degener, *Human Rights and Disability – The current use and future potential use of the United Nations human rights instruments in the context of disability* (2002), 33. See also S Yee & ML Breslin (Eds) *Disability rights law and policy* (2002), available at <http://www.dredf.org/international/bookintro.shtml> (accessed 20 October 2007).

⁵ As above, 11.

⁶ As above.

context. This lack of historical record on disability and disability rights in Africa manifests itself in the manner in which disability rights are protected under the African human rights system.

1.2 Research Question

Does the African human rights system adequately protect the rights of PWDs?

The paper seeks to address this question by contrasting the African human rights system with both international and regional human rights systems. It will also make reference to the Inter-American and European human rights systems and the major United Nations (UN) instruments.⁷

The central question this paper attempts to answer will require the consideration of the following sub questions:

- a) What is the nature of the rights of PWDs, i.e. are such rights socio-economic or civil and political, or a combination of the two?
- b) To what extent does the African human rights system protect the rights of PWDs?
- c) How does the level of protection guaranteed by the African human rights system compare with that of the UN and Inter-American and European human rights systems?
- d) Is there a need for a disability-specific African treaty?

1.3 Rationale for the research

Human rights jurisprudence has been gradually focusing on the rights of persons belonging to vulnerable groups. Members of these groups exhibit common characteristics and their situation makes them more vulnerable to discrimination. They are especially vulnerable because the grounds for discrimination have been overlooked or insufficiently addressed in general human rights instruments.⁸ New instruments are therefore needed to protect and promote the rights of vulnerable groups, focusing on specific characteristics and situations, such as age, gender, social situation etc. These groups include indigenous people, ethnic minorities, refugees, migrant workers, women, children, people with HIV/AIDS, old persons and PWDs.⁹

⁷ In particular the Inter-American Convention on the elimination of all forms of discrimination against PWDs will be used.

⁸ International Norms and Standards Relating to Disability, available at <http://www.un.org/esa/socdev/enable/comp500.htm> (accessed 13 May 2007).

⁹ As above.

The period from December 2000 to 2009 was declared by the African Union's predecessor, the Organisation of African Unity (OAU) in its Thirty-Sixth Session as the African decade for PWDs.¹⁰ Apart from the UN Convention on the Rights of People with Disabilities (Disability Convention), the rights of PWDs are protected mostly by provisions of non-discrimination under several treaties.¹¹ Even so, they fit under the prohibition of discrimination 'on any other status.'¹² The lack of clarity on whether these rights are socio-economic or civil and political in nature presents a difficulty when determining whether their realisation should be immediate or progressive.¹³ There is also a need to look at the necessity of having an African instrument on the rights of PWDs to ensure adequate protection at the regional level.

The African human rights system is the youngest regional system. One of the most distinctive features of the African Charter on Human and Peoples' Rights (African Charter) is its recognition of collective rights. It views individual and peoples' rights as linked. The African human rights system currently treats the rights of PWDs in piecemeal fashion, by way of a few provisions in the regional human rights instruments.

The African Charter under article 18(4) provides that PWDs have the right to special measures of protection in keeping with their physical or moral needs. Article 16(1) of the same Charter provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.

The African Charter on the Rights and Welfare of the Child¹⁴ (African Children's Charter) also includes special mention of PWDs by calling for adoption of special measures of protection, together with the principle of self-reliance, participation and access.¹⁵

To date, only one communication involving the rights of PWDs has come before the African Commission on Human and Peoples' Rights (African Commission). The case of *Purohit and*

¹⁰ In February 2002 the OAU organised at Addis Ababa, in collaboration with regional organisations of PWDs, the Pan African Conference on the Africa Decade of Disabled Persons to consider a Plan of Action for the Decade. The Action Plan called upon member states of the OAU to study the situation of PWDs with a view to formulating measures for the equalisation of opportunities, full participation and their independence in society. See *International Norms and Standards Relating to Disability*, <http://www.un.org/esa/socdev/enable/comp303htm> (accessed 28 August 2007).

¹¹ Such as the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Discrimination Against Women.

¹² Art 2 of the Universal Declaration on Human Rights, art 2(2) of the Convention on Economic Social and Cultural Rights.'

¹³ Unpublished: C Ngwena, Lecturer on Rights of PWDs, presentation made before LLM in Human Rights and Democratisation in Africa Class as part of lecturer notes, Pretoria 8 May 2007.

¹⁴ Entered into force in 1999.

¹⁵ Art 13.

*Others v The Gambia*¹⁶ was brought in regard to the legal and mental conditions of detention in a Gambian mental health institution. The African Commission in this communication explored the prohibition of discrimination on the basis of disability and the meaning of the right to health, as provided for under the African Charter. The Commission held that the Gambia fell short of satisfying the requirements of articles 16 and 18(4) of the African Charter and that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and should be accorded without discrimination.¹⁷ It went on to state that mental health patients should be accorded special treatment to enable them to attain their optimum level of independence and performance,¹⁸ and that this would be consistent with article 18(4), as well as the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (UN Principles).

The *Purohit* communication is significant for its attempt to bring clarity to the substantive content of article 16, by reading into it the obligation of state parties to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.¹⁹

The rationale for this paper therefore is to look at the extent to which the African system protects the rights of PWDs and whether a disability-specific instrument is necessary. It also investigates whether such a specific instrument would advance the cause of PWDs.

1.4 Literature review

Little seems to have been written on disability rights under the African system. The following books, articles and instruments have been used by the author:

The Disability Convention, together with other international instruments such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (CESCR), Universal Declaration on Human Rights (Universal Declaration), Convention on the Rights of the Child (CRC) and Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) have all been consulted.

African human rights instruments and cases have also been used to determine if there are any loopholes and make the necessary suggestions for reform. The main aim here was to address the question whether there is need for a disability-specific African treaty.

¹⁶ (2003) AHRLR 96 ACHPR 2003.

¹⁷ Para 83.

¹⁸ Para 81.

¹⁹ Para 84.

Several books on disability rights have been consulted. PD Blanck's book, *Disability Rights* (1957), tracks the historical development of the rights of PWDs in the 1950s, a period when disability was still viewed as a medical problem. However, as regards current social trends, the book has no direct application. G Quinn's *Current and Future Potential of the UN Human Rights Instruments in the Context of Disability* (2002) addresses the extent to which rights of PWDs are protected or guaranteed at the global level.

Writing prior to the Disability Convention, T Degener and Y Koster in *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (1995), explore the vulnerability of PWDs. However, they do not dwell much on the African system. ML Breslin's *Disability Rights Law and Policy* (2002) surveys the rise of the rights based approach to disability worldwide but does not elaborate on the African system.

J Despouy's *Human Rights and Disabled Persons* (1993) attempts to explain where the rights of PWDs can be located, and does this by surveying the international human rights instruments. M Sepúlveda's book, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) tries to explain the nature and normative content of disability rights. They both wrote prior to the adoption of the Disability Convention.

Several other books by F Armstrong (1999), M Nowak (2003), T Patrick (1991), A Conte (2004) and M Vandenhole (2005) have been used. It is worth reiterating that most of these works have scanty information on the African human rights system as regards disability rights.

1.5 Limitation of study

Most books deal with disability rights prior to the adoption of the Disability Convention. Further, most authors treat regional human rights systems and their relation to disability rights without much detail on Africa, hence the lacuna on the history of disability rights in Africa. African jurisprudence reveals only one case touching on disability.²⁰

1.6 Methodology

To answer all the sub-questions of this research paper, the author will have recourse to the writings of authors and jurisprudence of the treaty bodies. African human rights instruments, books, journals and internet sources will also be consulted.

²⁰ Purohit Case n16 above.

1.7 Chapter Outline

Chapter 1: Introduces the study, discusses the research question and methodology, sources consulted and limitations of the study.

Chapter 2: This chapter discusses the definitions of disability, the historical development of disability rights and also presents a picture of the situation of PWDs in Africa.

Chapter 3: This chapter tries to ascertain if the duty of states as regards disability rights is to respect, protect or fulfil obligations. It attempts to answer the question whether the rights of PWDs are immediately realisable or limited by progressive realisation and subject to availability of resources.

Chapter 4: The Chapter explores how the African human rights system protects disability rights. Other regional systems, that is, the Inter-American and the European systems are referred to here.

Chapter 5: The Chapter explores the possibility and desirability of adopting a disability-specific African treaty and whether this would advance the cause of PWDs in Africa.

Chapter 6: The final chapter contains the conclusion and recommendations.

CHAPTER TWO

DEFINING DISABILITY

2.1 Disability – an elusive term

Disability has been a feature of the human race for many millennia yet there is still ambivalence in the definition of the terms 'disability' and 'PWD'. The difficulty in adopting a single comprehensive definition is worsened by changing perceptions on disability over the years.

Defining disability is as elusive as finding the legendary needle in a haystack. There is no consensus on any one exhaustive and universally acceptable definition of disability. Disability has been defined as the state of being disabled, which definition introduces more obfuscation than enlightenment on the issue. The state of being disabled has been linked to deprivation or want of ability, the absence of competent physical, intellectual or moral power, means, fitness and the like.²¹ The recently adopted Disability Convention merely states that PWDs include those that have long-term physical, mental, intellectual or sensory impairments which in interaction with the environment hinder their equal participation in society.²²

The issues surrounding the definition of disability are knotty and complex.²³ Hence four different models of disability definitions exist today. There is a moral model which regards disability as a sin, a generational curse. The PWD is either paying for his or her own sin or those of his or her parents or ancestors. Many cultures still link disability with guilt, sin and shame.

The medical model regards disability as a defect or sickness which must be cured through medical intervention.²⁴ This view considers disability as an individual rather than a societal problem and thus seeks solutions in the individual sphere, through therapy and technical support. In essence, neither society nor the environment has to be changed. The transformation of the disability movement into a civil rights movement was triggered by two factors: the awareness that individual abilities and problems of PWDs depend on attitudinal, architectural and structural environmental barriers; and society's willingness to include or exclude the needs of PWDs in the designing process.²⁵

²¹ http://www.gulflink.osd.mil/medsearch/glossary/glossary_d.shtml (accessed 6 August 2007).

²² Art 1 of the Disability Convention.

²³ D Kaplan, *The definition of disability*, <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm> (accessed 6 August 2007).

²⁴ As above.

²⁵ T Degener and Y Koster-Dresse *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (1995) 13.

The third model, the rehabilitation model, is an offshoot of the medical model. It regards disability as a defect which must be cured medically.²⁶ The need to re-introduce World War II veteran PWDs into society fuelled this model. The growing emphasis on charity, medical treatment and rehabilitation left behind the brick and mortar institutions where PWDs are warehoused today.²⁷

The fourth model, the disability model, defines the problem as a dominating attitude by professionals and others. It resulted from the rights based approach to disability. It perceives inadequate support services when compared with society generally as well as attitudinal, architectural, sensory, cognitive and economic barriers as crucial elements of the definition of disability.²⁸ In other words, since all these factors coalesce to render any individual a PWD, it is society that disables an individual.

The disability model asserts that most people will experience disability at some point in their lives, whether permanent or temporary. It argues that if society would recognise and expect disability and incorporate it in the built environment, it would cease to be abnormal.

2.2 WHO definition

The World Health Organisation (WHO) in 1980 attempted to define disability in a three-fold manner that distinguishes between impairment, disability and handicap.²⁹ It defines impairment as any loss or abnormality of psychological, physiological or anatomical structure or function. It then defines a disability as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being. It further defines a handicap as a disadvantage for a given individual, resulting from an impairment or a disability, that prevents the fulfilment of a role that is considered normal (depending on age, sex and social and cultural factors) for that individual.³⁰

The WHO definition has been criticized for locating the problem within the individual. Further, there seems to be an overlap between impairment and disability, and this clouds the distinct difference between the two. Whilst impairment refers to physical or cognitive limitations that an individual may have, disability refers to socially imposed restrictions. Disability rights activists have criticized this

²⁶ Kaplan n23 above.

²⁷ S Yee & ML Breslin n4 above..

²⁸ As above.

²⁹ *International Classification of Impairments, Disabilities and Handicaps (ICIDH)*, Geneva: World Health Organisation, 1980. See also *Definition of Disability*, available at <http://www.ideanet.org/content.cfm?id=5B5F77> (accessed 14 July 2007).

³⁰ As above.

confusion for perpetuating the imbalances caused by contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from the mainstream of social activities.³¹

2.3 Changing perceptions on disability

Societal perceptions on what disability is seem to change with the experiences of each epoch. For example the first model that regarded disability as a sin was based on religious or cultural beliefs, and was influenced by the propensity of mankind through the ages to relate their everyday life with a deity. With each passing era and change in human thinking coupled with new experiences,³² society's understanding of disability changed, hence the progression through the different models. As human rights thinking developed and civil rights movements grew stronger, the indivisibility and interconnectedness of human rights, coupled with values such as equality and dignity took centre stage.³³

2.3.1 Human dignity as a value

Inherent in every human being is the anchor norm of human rights, the inviolable self-worth known as dignity.³⁴ Dignity requires that each individual be deemed to be of inestimable value, which is a sharp departure from the worldview that determined individual worth based on economic input, but rather focuses on inherent self-worth.³⁵

Dignity as a value has been a catalyst in the development of a human rights approach to disability. Because of their relative invisibility PWDs were often treated as objects to be pitied and protected. Global thinking changed when PWDs began to see themselves and convince others to see them as subjects and not as objects.³⁶ Because of activist movements by PWDs, global thinking shifted towards independent living,³⁷ which extols PWDs as the best experts in issues concerning their rights and responsibilities as citizens. For the first time civil society demanded civil rights rather than goodwill.³⁸

³¹ Quinn and Degener n4 above, 24.

³² Kaplan n23 above.

³³ The shift away from medical to social mode led to the proclamation of the Decade on Disabled Persons. See Yee & Breslin n4 above.

³⁴ *Purohit Case* n16 above, para 57.

³⁵ Quinn and Degener n4 above, 24.

³⁶ As above.

³⁷ Degener & Koster-Dresse n25 above, 10.

³⁸ As above.

The new model focused on the inherent dignity of human beings and not on the person's medical characteristics.³⁹ It emphasized the centrality of the individual in all decisions affecting him or her and located the problem outside the PWD and in society. It viewed disability problems as resulting from the state and civil society's unresponsiveness to the difference that disability represents.⁴⁰ At that stage disability movements were calling for the state to take up its responsibility to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons.

2.3.2 Equality as a value

As the disability movement gained strength, human equality was also introduced as a central value to the system of basic freedoms found in human rights law. In other words human beings, whether disabled or not, are inherently equal in terms of self-worth. In that regard, distinctions between persons stemming from factors that are arbitrary from a moral point of view, such as race, gender, age and disability, ought to be treated as having no rational foundation and therefore invalid.⁴¹ The push for non-discrimination on the basis of disability by civil rights movements contributed to a paradigm shift and the adoption of rules and other standards aimed at advancing the rights of PWDs.

2.4 Disability and international law - the era of soft laws

Although PWDs form the largest minority afflicted with serious human rights violations, for a long time they did not form part of the United Nations (UN) concept of minority. Only ethnic, linguistic and religious minorities were recognised.⁴² Even though they are not outrightly recognised as such, there exists today a convention on PWDs.⁴³ It is the author's opinion that this may compensate for the current lack of minority status.

That notwithstanding, the UN General Assembly and the Economic and Social Council (ECOSOC) have adopted a number of resolutions from the 1950s onwards dealing mostly with prevention and rehabilitation, such as the 1950 resolution dealing with social rehabilitation of the physically handicapped.⁴⁴ The 1970s saw two resolutions adopted by the UN's General Assembly: the

³⁹ n26 above.

⁴⁰ As above 24.

⁴¹ As above 26.

⁴² Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by General Assembly Resolution 47/135 of 18 December 1992.

⁴³ As at 27 September 2007, only two countries have ratified this Convention, Jamaica and Hungary.

⁴⁴ Quinn and Degener n4 above, 39.

Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

The Declaration on Rights of Mentally Retarded Persons⁴⁵ emphasises in article 1 that mentally retarded persons enjoy the same rights as all other human beings, before itemising rights that are important to PWDs. These include education, training and rehabilitation. It further provided that in protecting the interests or rights of PWDs by appointing guardians, due care must be exercised to avoid rendering the rights illusory. Whilst the 1971 Declaration must be hailed as one of the milestones in the disability movement, it had the unfortunate drawback of being too narrow and too specific, in the sense that it only focused on persons with a mental disability. It was also a non-binding instrument.

Four years later, the Declaration on the Rights of Disabled Persons was adopted,⁴⁶ which asserts that PWDs have the same civil and political rights as other human beings.⁴⁷ The Declaration identified a number of economic and social rights that are crucial to the development of capacities and social integration of PWDs.⁴⁸ It further provided for the right to protection against exploitation and treatment of an abusive or degrading nature as well as the need for PWDs to participate in matters regarding their rights.⁴⁹

The call by disability rights advocates for participation in decision making was slowly being recognised by the UN. Their slogan 'nothing about us without us' was slowly being given effect to. Of course the UN was comfortable with soft law at that stage, hence the number of resolutions and declarations that were adopted in that period. However, a complete paradigm shift was not to come until the early eighties, when 1981 was proclaimed as the International Year of the Disabled by the UN⁵⁰ with the theme 'full participation and equality'. The disability agenda was eventually getting some attention from the UN, hence in 1983 of the International Decade of Disabled Persons was launched.

In 1982 the World Programme of Action concerning the Disabled (WPA) was launched,⁵¹ whose aims were to prevent exclusion and marginalisation of PWDs; ensure rehabilitation; and equalization of opportunities. The first two aims lean towards the welfare or caring model that

⁴⁵ General Assembly Resolution 2856 (XXVI) of 20 December 1971.

⁴⁶ General Assembly Resolution 3447 (XXX) of 9 December 1975.

⁴⁷ Para 4.

⁴⁸ Para 6.

⁴⁹ Paras 10 and 12.

⁵⁰ Quinn and Degener n4 above, 40.

⁵¹ General Assembly Resolution 37/52 of 3 December 1982.

disability rights advocates were fighting vehemently. The third aim represents an ideological shift towards a rights based approach.⁵²

The WPA was also not binding on states, hence it could only be enforced via a monitoring mechanism through which it was reviewed periodically at the national, regional and international levels. In 1987 the first such review was undertaken⁵³ with a second one in 1992 which found that not much progress had been made.⁵⁴ The meeting recommended the drafting of a convention on the human rights of PWDs. Similar calls by Italy in 1987 and Sweden in 1989 went unheeded.⁵⁵ A report of the 1992 meeting of experts revealed that discrimination against PWDs still occurred, and that many member states had not enacted legislation to give effect to the rights of PWDs. Where such legislation existed, it was far removed from the broader socio-economic sphere as to render the rights of PWDs illusory. All these notwithstanding, there was still no consensus on the adoption of a disability-specific treaty.

In 1993, the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (StRE) were adopted.⁵⁶ Their main purpose was to achieve positive and full inclusion of PWDs in all aspects of society. The StRE are soft law, hence are unenforceable. Of note here is the relegation of rehabilitation and prevention to the rear in favour of a rights based approach. The StRE sought to ensure that PWDs exercise the same rights and obligations as others.⁵⁷

The StRE were drafted against the backdrop of the 1982 WPA. Under the WPA equalisation of opportunities was held to mean the processes through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services are made accessible to all.

2.4.1 Disability under the Convention

The Disability Convention's main purpose is the promotion, protection and ensuring of full and equal enjoyment of all human rights and fundamental freedoms by all PWDs. It also seeks to promote respect for their inherent dignity. The Disability Convention reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for PWDs to enjoy them fully without discrimination. It further recognises that

⁵² Quinn and Degener n4 above, 41.

⁵³ The Stockholm Global Meeting of Experts to Review the Implementation of the World Programme of Action concerning Disabled Persons.

⁵⁴ Quinn and Degener n4 above, 42.

⁵⁵ As above.

⁵⁶ General Assembly Resolution 48/96 of 20 December 1993.

⁵⁷ Para 15 of the StRE.

disability represents human diversity and is an evolving concept, and further that disability results from the interaction between persons with impairments and attitudinal and environmental barriers. These barriers hinder their full and effective participation in society on an equal basis with others.⁵⁸

The Convention has a Protocol accessory to it.⁵⁹ State parties to the Convention who further ratify the Protocol recognise the competence of the Committee on the Rights of Persons with Disabilities set up under article 34 of the Convention.⁶⁰ Both the Convention and the Protocol have not come into force yet, pending the deposit of the necessary ratifications for each.⁶¹

However, the Convention is of little assistance as regards the definition of a PWD. The Convention in article 1 provides a partial definition, where it says:

Persons with disabilities include those that 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.

The focus on 'long-term' overlooks society's penchant to discriminate even on the basis of short-term disability, and the fact that long-term is not always measurable. Hence the question whether a disability that comes and goes intermittently over a long period of time would qualify as a long-term impairment. It is not clear whether it would fail the test because it occurs for short sporadic terms.

2.5 Disability rights in Africa

Africa prides itself in its rich culture, traditions and customs. The perception of disability in African culture has caused many human rights violations as PWDs were thought to bring bad luck on their villages. In some cases the most appropriate solution to handle PWDs was by killing or excluding them socially to purge curse. Recently a disabled man was prevented from seeing the Swazi king by his bodyguards because they believed that interacting with a PWD would bring a curse to the king and the whole nation.⁶² Swazi history also recounts the experience of a young heir to the throne who had his right hand dipped in boiling broth by his mother to prevent him from taking office.

⁵⁸ Preamble of the Convention.

⁵⁹ Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted by General Assembly Resolution 61/106 of 13 December 2006.

⁶⁰ The Committee is mandated to receive individual communications and reports by state parties.

⁶¹ Art 13(1) of the Protocol provides that the Protocol shall enter into force thirty days after tenth instrument of ratification is deposited.

⁶² Times of Swaziland accessed from <http://www.times.co.sz/031.html-30k> (accessed 14 August 2007).

Today many constitutions in Africa prohibit discrimination on the grounds of disability. Several countries also have laws that focus on the rights of PWDs, and some go an extra mile to provide for affirmative action and promoting inclusive education for children with disabilities⁶³ and elimination of social exclusion of PWDs.⁶⁴

However, there are still African countries where disability rights have not gained a high level of recognition. The Constitution of Lesotho⁶⁵ in article 25 under the Principles of State Policy provides thus:

The principles contained in this Chapter shall form a part of the public policy of Lesotho. These principles shall not be enforceable by any court, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise the full realisation of these principles.

Even though in article 33 the Lesotho Constitution provides for the inclusion of PWDs in social institutions and the employment sphere, these are not rights that can be enforced. In such circumstances where disability-specific rights are not justiciable, resort should be had to the principle that human rights apply to all human beings including PWDs. This can also be cured by affirmative action provisions in constitutions and national legislation.

South Africa's Constitution offers a lifeline to the seemingly lost cause on disability rights on the continent, particularly for those with speech impairment. Whilst sign language is not listed as an official language, it does have special protection as the Constitution calls for its promotion and protection.⁶⁶ This recognition is important for the advancement of disability rights, because today language proficiency determines access to employment and education and general social services.

2.6 Conclusion

The history of disability rights is marred with social exclusion of and denial of fundamental entitlements for PWDs. While states seemed eager to be morally bound by soft law on disability rights, there was no consensus on the adoption of legally binding instruments. States were for a long time not ready for a disability-specific instrument, and this could be attributed to the delay by disability advocates to push for equality and dignity as the basis of disability rights. Status-specific

⁶³ For example the Constitution of the Gambia, arts 31 and 33.

⁶⁴ Quinn and Degener n4 above 232. See also art 29 of the Ghana Constitution of 1992.

⁶⁵ Which came into force after publication of the Lesotho Constitution Commencement Order of 1993.

⁶⁶ Sec 6(5)(a) establishes a Pan South African Language Board to promote and create conditions for the development and use of all official languages including sign language.

instruments require a strong civil rights movement to lobby. A good example here would be gender based conventions, such as CEDAW.

Although a disability-specific convention was finally adopted in 2006, there remains very little commitment to it and only two countries have ratified this convention.⁶⁷

⁶⁷ n40 above.

CHAPTER THREE

UNDERSTANDING THE NATURE OF DISABILITY RIGHTS.

3.1 Introduction

The promotion of human rights implies the inculcation of a greater respect for the value and meaning of human rights in society. The protection of human rights implies taking specific measures to secure respect for them.⁶⁸ There is therefore an assumption that civil and political rights only require state abstention (negative obligations) and that economic, social and cultural rights require states to take action (positive obligations).⁶⁹ The prime responsibility and duty to promote and protect human rights and fundamental freedoms therefore lie with the state.⁷⁰

Hence the obligations of states under international human rights law are often summarised under three categories: obligations to respect, protect and fulfil.⁷¹ This categorisation of state responsibility draws inspiration from the status theory of Georg Jellinek (status negativus - liberal rights of non-interference, status activus - democratic participation rights, status positivus - social rights requiring positive state action) coupled with the theory of the three generations of human rights.⁷² It posits that states, with regard to civil rights are merely obliged not to intervene whereas concerning economic and social rights they are obliged to perform services only.⁷³ Only since it was made apparent that human rights are indivisible and interdependent⁷⁴ has it become accepted that in principle states are obliged to respect, fulfil and protect all human rights.⁷⁵

⁶⁸ L Le Blanc *The OAS and the promotion and protection of human rights* (1977) 91.

⁶⁹ M Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 123.

⁷⁰ Art 2 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, General Assembly Resolution 53/144 of 8 March 1999.

⁷¹ Amnesty International, *Respect Protect Fulfil – Women’s Human Rights*, AI Index:IOR 50/01/00, September 2000. available at [http://www.amnesty.org.ru/library/pdf/IOR500012000ENGLISH/\\$File/IOR5000100.pdf](http://www.amnesty.org.ru/library/pdf/IOR500012000ENGLISH/$File/IOR5000100.pdf) (accessed 6 September 2007).

⁷² M Nowak *Introduction to the International Human Rights Regime* (2003) 48.

⁷³ As above.

⁷⁴ Art 5 of the Vienna Declaration and Programme of Action.

⁷⁵ Nowak n69 above.

3.2 State's Duty to Respect, Fulfil and Protect disability rights

The obligation to respect focuses on what the government does through its organs, agents and the structures of its law.⁷⁶ It refers to the obligation to refrain from state intervention, provided the latter is not admissible under any relevant legal limitation and reservations clause. In other words, the import of this duty is to determine if the law precludes PWDs from, for example, employment. Unjustified state intervention in the enjoyment of these rights is considered a violation of the human right in question.⁷⁷ For example the right to life corresponds to the state's obligation not to kill.⁷⁸ The right to vote corresponds with the state's obligation not to arbitrarily exclude anyone from democratic elections, by, for example, failing to provide election information to PWDs in Braille and sign language.

States also have the obligation to fulfil human rights, including disability rights. Each state is obliged to take measures to ensure for each person within its jurisdiction, opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts.⁷⁹ This obligation entails the adoption of legislative, administrative, judicial and practical measures necessary to ensure that the disability rights are implemented to the greatest extent possible.⁸⁰ For example, the rights to work, social security, health and education require the state to issue laws and establish a suitable administration of the labour market, and of social, health and educational services that will enable PWDs to have non-discriminatory access to the labour market, hospitals, medical services, schools, universities and appropriate social institutions.⁸¹

The obligation to protect human rights requires from the state and its agents measures for the prevention of other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual.⁸² This requires positive action on the part of the state to protect disability rights.⁸³ Thus the state undertakes to for example, to prevent acts of direct and indirect discrimination against PWDs.⁸⁴ This could include preventing discriminatory acts that restrict the access of PWDs to public places such as schools, hospitals, etc by not allowing continued construction of inaccessible buildings.

⁷⁶ AI Index n68 above.

⁷⁷ Nowak n69 above, 48.

⁷⁸ As above.

⁷⁹ AI Index n68 above.

⁸⁰ Nowak n69 above 49.

⁸¹ As above.

⁸² AI Index n68 above.

⁸³ Nowak n69 above, 50.

⁸⁴ AI Index n68 above.

3.2.1 The nature of disability rights

As mentioned above, this categorisation of human rights draws inspiration from the theory of three generations of human rights, and this has influenced the global perceptions regarding the nature of human rights in general, and disability rights in particular. It has also influenced the worldview on whether disability rights are immediately realisable or progressively realisable and subject to availability of resources.

The Universal Declaration⁸⁵ guarantees the full range of rights, civil, political, economic, social and cultural.⁸⁶ Between 1948 and the 1960s when the ICCPR⁸⁷ and CESCR⁸⁸ were adopted, there was a move to adopt a binding international instrument that espouses these rights, hence prior to the adoption of the ICCPR and CESCR, a single legal instrument containing the whole cluster of rights was envisioned.⁸⁹ However the drafters were divided and this influenced the wording of the two instruments. This was due to the perception that civil and political rights are capable of immediate implementation since they 'cost' the state nothing, whilst socio-economic rights require economic resources for their enforcement.

As a result the two articles 2(1) of the ICCPR and CESCR differ significantly. The ICCPR provision establishes the obligation 'to respect and to ensure' all the rights contained in Part III of the Covenant. It provides as follows:

Each state party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) CESCR provides that:

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

⁸⁵ Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

⁸⁶ From art 1 to 30, the Universal Declaration lists fundamental entitlements without differentiation as to their socio-economic or civil and political nature.

⁸⁷ Entered into force 23 March 1976.

⁸⁸ Entered into force 3 January 1976.

⁸⁹ Sepúlveda n66 above, 115.

The difference in terminology is not merely cosmetic but is relevant since article 2 of both Covenants specifies the general obligations of state parties in relation to each of the substantive rights protected therein.⁹⁰ Both articles are contained in Part II of each Covenant which contains provisions establishing the general obligations applicable to all the rights contained in Part III of each Covenant (articles 6 to 27 ICCPR and 6 to 15 CESCR).⁹¹

The difference in wording reflects the drafters' perception regarding the implementation of these two sets of rights. This unfortunate line of thinking has permeated human rights thinking and has survived to this day. It was assumed that the two sets of rights required different implementation methods due to their different nature.⁹² Civil and political rights were viewed as requiring merely non-interference by the state and could easily be achieved by enacting legislation and adopting administrative measures to achieve such non-interference. The majority of the drafters considered these measures non-resource dependent and of an immediate nature. Consequently, all states were considered able to undertake them immediately without regard to their level of resources. In other words, these rights were thought to be achievable immediately without reference to the socio-economic conditions of a state.⁹³

The implementation of socio-economic and cultural rights on the other hand was seen as gradual. They required from the state not merely positive state actions, but also depended on available state resources for their fulfilment.⁹⁴

The dichotomised view of the two sets of rights has led to the mistaken belief that rights can be severed and enforced or implemented differently because some, like socio-economic rights deserve much more from the state, and are subject to availability of state resources. Article 26 of the ICCPR, which is an autonomous right in itself prohibits discrimination of any kind.⁹⁵ Thus although the ICCPR does not provide for a right to own property if a state decided to enact laws which discriminated in favour of some people being able to own property while denying this right to

⁹⁰ As above, 119.

⁹¹ As above.

⁹² As above.

⁹³ See ICCPR Committee General Comment No.31 [80] *Nature of the General Obligation Imposed on States Parties to the Covenant*: 26/05/2005, para 14, where the Committee states that the requirement under art 2(2) to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the state.

⁹⁴ Sepúlveda n66 above, 120.

⁹⁵ A Conte *et al Defining Civil and Political Rights: the jurisprudence of the United Nations Human Rights Committee* (2004) 162.

others on the basis of physical disability, this would violate article 26.⁹⁶ The Human Rights Committee (HRC) in General Comment 18 states:⁹⁷

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations[It] provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. [It] does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right.... [It] is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. ...In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

This position buttresses that laid down by the Committee on CESCR where it stated that the concept of other status clearly applied to discrimination on the grounds of disability, both mental and physical.⁹⁸

3.2.2 Non-discrimination, the common thread in disability rights

The prohibition of discrimination is part of the human right of equality yet at the same time it is a principle applicable to all human rights alike.⁹⁹ Although discrimination is not defined by the major UN conventions, it can be deduced from the texts of the various instruments that discrimination refers to treatment which offends against the principle of equality and dignity of human beings.¹⁰⁰ The HRC in General Comment 18 held that discrimination:¹⁰¹

... should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms.

⁹⁶ As above.

⁹⁷ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-Seventh Session, 1989), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRIGEN1REV at 26 (1994), para 12.

⁹⁸ Committee on Economic, Social and Cultural Rights, General Comment No.5, *Persons with Disabilities*, (Eleventh Session, 1994) UN DOC E/1995.22 at 19 (1995), para 5.

⁹⁹ Nowak n69 above, 61.

¹⁰⁰ P Thornberry *International Law and the Rights of Minorities* (1991) 258.

¹⁰¹ At para 6.

Anyone who receives less favourable treatment on one of the grounds of distinction listed in article 26 will be a victim of discrimination.¹⁰²

Article 26 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Whilst most instruments do not specify disability as a prohibited ground of discrimination, other treaties do include an accessory prohibition of discrimination whereby state parties undertake to ensure the rights of the relevant treaties for everyone without any discrimination whatsoever.¹⁰³ These include the CRC,¹⁰⁴ the European Human Rights Convention,¹⁰⁵ the Inter-American Human Rights Convention,¹⁰⁶ and the African Charter.¹⁰⁷ Furthermore, states undertake to counteract certain forms of discrimination which because of past experience are highly disapproved of, such as distinction grounds of race, colour, language, birth and religion, gender, national or social origin.¹⁰⁸

Provisions such as article 13 of the Children's Charter give the impression that disability rights ought to be progressively realised. It provides that state parties shall use their available resources progressively to advance PWDs' access to public highways and buildings.

The freedom of movement and access to buildings were understood by the drafters of the Charter to require progressive realisation and to be subject to availability of resources. Such a view overlooks the fact that all human rights are interdependent. PWDs require unhindered access to buildings and other places in order to exercise their other rights, such as the right to vote and to be voted for, the right to participate in the governance process, the right to access information and the right to work. Surely these rights cannot be subjected to progressive realisation, for to hold otherwise would be to deny PWDs rights that accrue to them as human beings. It would in other words amount to discrimination since it would defeat the equality principle.

¹⁰² Conte n92 above, 165.

¹⁰³ Nowak n69 above, 61.

¹⁰⁴ Art 2.

¹⁰⁵ Art 14.

¹⁰⁶ Art 1.

¹⁰⁷ Art 2.

¹⁰⁸ Nowak n69 above, 61.

The grounds of discrimination contained in articles 2(1) and 26 of the ICCPR and article 2(2) CDESCR are not exclusive but are capable of extension. They are susceptible to interpretation, resulting in extension of the ambit of the listed grounds.¹⁰⁹ Illustrative in this regard is the Australian case of *Toonen*¹¹⁰ involving a complaint by an adult male that two provisions of the Tasmanian Criminal Code which criminalised all forms of sexual contacts between consenting adult homosexual men in private violated his rights. The Committee on ICCPR was approached by the Australian government during the proceedings, for guidance on whether sexual orientation could be implied in the word sex in article 26 ICCPR. The Committee noted that the same issue could arise under article 2(1) ICCPR, and further observed that reference to sex in both articles should be taken to include sexual orientation.¹¹¹

3.3 Conclusion

The provision in article 2(1) CDESCR and the interpretation that it requires progressive realisation of socio-economic rights have given rise to much uncertainty about the nature and extent of the legal obligations imposed by CDESCR.¹¹² Hence in some quarters this provision has been interpreted as a mere aspiration without creating a real obligation for states, and this interpretation is popular amongst government representatives.¹¹³ Such interpretations apart from going against current developments in international law and undermining the object and purpose of CDESCR, are also contrary to the intention of the drafters. Hence they can no longer be tenable.¹¹⁴ Further, the Committee on ESCR indicated that all provisions contained in Part II of CDESCR apply to all substantive rights of the Covenant. States are therefore expected without delay to implement each of the rights enumerated in Part III by taking steps which are deliberate, concrete and targeted toward the full realisation of the rights.¹¹⁵

Whilst disability rights can be classified into socio-economic and civil and political, due to the historical disadvantage of PWDs, their implementation may require dispensation with the notions of progressive or immediate realisation. The nature of disability rights, like all human rights is

¹⁰⁹ Conte n92 above, 167.

¹¹⁰ *Toonen v Australia* Communication 488/1992 UN Doc CCPR/C/50/D/488/1992 (1992).

¹¹¹ Para 8.7.

¹¹² Sepúlveda n66 above, 311.

¹¹³ Above.

¹¹⁴ Committee on ESCR General Comment 3, *The Nature of States Parties' Obligations*, (Fifth Session 1990), UN DOC./E/1991/23, Annex III at 86 (1991), para 9.

¹¹⁵ General Comment No.3 at para 2. in paragraph 12 the Committee stressed that: 'Even in times of severe resources constraints whether caused by a process of adjustment, economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.' People living with disabilities fall amongst this category of vulnerable members of society and hence should be protected, even if state resources seem meagre and unavailable.

dichotomised, but this dichotomy should not hinder the enjoyment of rights and fundamental freedoms by PWDs, given their past marginalisation. States have a duty to provide when individuals or groups are unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.¹¹⁶ One mechanism that can be used is affirmative action, which corresponds with the obligation to fulfil-provide. Affirmative action does not contravene the principle of equality if used only to the extent necessary to achieve the objective of equality by addressing de facto discrimination. The Committee on ESCR has asserted the need for affirmative action holding that there is an obligation to take positive action to reduce structural disadvantages and to give preferential treatment to PWDs to ensure their full participation in society.¹¹⁷

¹¹⁶ Wouter Vandenhoele *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005)

237.

¹¹⁷ n95 above, para 9.

CHAPTER FOUR

DISABILITY RIGHTS UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

4.1 Introduction

The major human rights body under the African regional human rights system, the African Commission has to consider, amongst others, international law, the Charter of the UN as well as the Universal Declaration and other UN instruments on human rights in its work.¹¹⁸ Thus there is a need to look at the protection of disability rights under the UN system, albeit in a cursory manner before surveying the African scene.

4.2 The UN human rights system

There is an argument in some quarters that the drafting of the UN human rights instruments did not consider PWDs, hence the failure to mention them or to mention disability as a prohibited ground for discrimination. This notion is misleading since these instruments were intended to have general applicability to all human beings.¹¹⁹ The lack of specific mention of the situation of PWDs in these instruments should not operate to preclude their application to PWDs. Any other conclusion would go against the interrelatedness and indivisibility of human rights, and the whole edifice of rights would collapse.

Generally, most international instruments protect the rights of PWDs through the principles of equality and non-discrimination. The Universal Declaration refers to PWDs expressly in article 25(1). However, its derivatives do not contain any explicit reference to PWDs. That notwithstanding, the provisions of the ICCPR and CESCRC remain relevant to ensuring equal opportunities and full participation of PWDs in society.¹²⁰ The ICCPR for example provides for the right to life, and the right to freedom from torture and other cruel, inhuman or degrading treatment and punishment.¹²¹ Interestingly the CRC makes special mention of the rights of handicapped and disabled children in article 23.

Most official UN documents in the field of disability assume the general applicability of human rights norms, even to PWDs.¹²² The 1975 Declaration emphasised that civil and political rights

¹¹⁸ Art 60 of the African Charter.

¹¹⁹ See art 1 Universal Declaration: All human beings are born free and equal in dignity and rights.

¹²⁰ Sepúlveda n66 above, 414.

¹²¹ Arts 6 and 7.

¹²² Such as art 2 CESCRC which contains the general non-discrimination norm.

apply equally to PWDs as to other human beings.¹²³ The WPA also emphasised the generality of civil and political rights. It relied on the Universal Declaration to espouse the concepts of equality and full participation,¹²⁴ and specifically assumed the relevance of the ICCPR.¹²⁵ The StRE also followed suit, emphasising that all human rights¹²⁶ including civil rights¹²⁷ apply and called for the relevance of the ICCPR in its preamble.¹²⁸

The Disability Convention further underscores the general applicability of all human rights to PWDs. In its preamble it recalls the UN Charter, the Universal Declaration and other UN human rights instruments and further reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and the need for PWDs to be guaranteed their full enjoyment without discrimination. In its operative provisions, the Disability Convention reaffirms that PWDs have the right to recognition everywhere as persons before the law and calls for their equal treatment.¹²⁹ Although the Disability Convention is not in force yet, it is encouraging to note that some African countries have signed it.¹³⁰

The Committee on ESCR has adopted a general comment on PWDs,¹³¹ which establishes that disability falls under the heading, 'other status' in article 2 CDESCR and is therefore regarded as a prohibited ground for discrimination.¹³² The Committee further commends the three African human rights instruments¹³³ as espousing an understanding of disability rights, due to their mention of the subject in their operative provisions.¹³⁴ Similarly the Committee on CEDAW has adopted General Recommendation 18 on disabled women.¹³⁵

¹²³ Declaration on the Rights of Disabled Persons, UN GA Resolution 3447 (XXX), 9 December 1975.

¹²⁴ WPA para 71.

¹²⁵ WPA para 165.

¹²⁶ StRE para 9.

¹²⁷ StRE para 140.

¹²⁸ Degener & Koster n25 above, 81.

¹²⁹ Art 12 of the Disability Convention.

¹³⁰ As at 26 September 2007, 24 African countries had signed both the Convention and its Protocol, with 16 countries signing both instruments while 8 signed the Convention only. None of the African countries had ratified either instrument.

¹³¹ n98 above.

¹³² Para 5.

¹³³ These are the African Charter, the African Children's Charter and the African Women's Protocol.

¹³⁴ General Comment No. 5, para 6.

¹³⁵ M Sepúlveda *et al Human Rights Reference Handbook* (2004) 414.

4.3 The African Human Rights System

Since pre-colonial times, Africa has largely subscribed to the moral model of disability, which views disability as a curse, a punishment by ancestral spirits. Some disabilities such as speech defects were seen as manifestations of demon possession.¹³⁶ Many cultures disapproved of socialisation or interaction between 'normal' people and PWDs,¹³⁷ and this fuelled the exclusion of PWDs from mainstream society. This opened floodgates to human rights violations that still continue to this day.¹³⁸

The African regional system was initiated under the former OAU, which was concerned more with African self governance than human rights. The AU succeeded the OAU in 2000 when the AU Constitutive Act was adopted. Three bodies are most relevant to human rights protection under the African system, viz the African Commission,¹³⁹ the African Court on Human and Peoples' Rights¹⁴⁰ and the African Committee on the Rights of the Child.¹⁴¹

Several instruments are relevant for protecting the rights of PWDs, and these include the African Charter, the African Children's Charter, the African Women's Protocol and the African Charter on Democracy, Elections and Governance (Democracy Charter).¹⁴²

4.3.1 The African Charter

When the African Charter was drafted, Africa faced a number of maladies,¹⁴³ which included apartheid in South Africa; the struggle for a new international economic order and despotism in Africa.¹⁴⁴

¹³⁶ F Armstrong and L Barton *Disability, Human Rights and Education: Cross-cultural perspectives* (1999) 11.

¹³⁷ As above.

¹³⁸ Armstrong n14 above, captures the experience of a disabled Zimbabwean who was ostracised for pulling out of leather-work vocational training and enrolling herself for secondary school. Handiwork training was deemed to be the best kind of training for her, and her chances of gaining access to education like the mainstream society were impinged.

¹³⁹ Established by art 30 of the African Charter, adopted 27 June 1981.

¹⁴⁰ Established by art 1 of the Protocol to the African Charter on the establishment of an African Court on human and peoples' rights, adopted 9 June 1998.

¹⁴¹ Established by art 32 of the African Children's Charter.

¹⁴² Adopted by the 8th Ordinary Session of the Assembly of African Heads of States and Governments, Addis Ababa, Ethiopia on 30 January 2007. The Charter will enter into force thirty days after the 15th instrument of ratification is received.

¹⁴³ E Kodjo, 'The African Charter on Human and Peoples' Rights' (1990) 11
No 3-4 *Human Rights Law Journal* 272.

¹⁴⁴ The 1970s saw the fall of dictatorships in Equatorial Guinea (under President Nguema Macias) and Uganda (under Field Marshal Idi Amin Dada).

The Preamble of the African Charter espouses freedom, equality, justice and dignity for the African people. The member states reaffirm their adherence to UN human rights instruments and their willingness to be bound by these instruments. It further highlights member states' consciousness of the historical past, and their resolve to liberate Africa. The Preamble also highlights the need to uproot all forms of discrimination particularly those based on race, ethnic group, colour, sex, language, religion or political opinion. It however, does not mention disability.

The Preamble reflects the intention of the drafters of the Charter and the social ills it sought to remedy. The fact that discrimination on grounds of disability is not mentioned as part of historical imbalances that motivated the adoption of the African Charter speaks volumes on its own. It also highlights Africa's obsession with independence while giving casual attention to the plight of PWDs.

4.3.2 Non-discrimination under the Charter

The African Charter contains several prohibited grounds of discrimination in article 2, *viz* race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status. The African Charter does not specifically address disability as a prohibited ground of discrimination, save for the inclusion of an open ended category in the form of 'other status'.¹⁴⁵ Thus non-discrimination on the basis of disability could be read into the category of 'other status', and also based on the wording of the article which prohibits discrimination of 'any kind', which should be read to include disability.¹⁴⁶ Since the interpretation of the African Charter makes use of inspiration drawn from international human rights law,¹⁴⁷ the Committee on ESCR's understanding of disability as falling within 'other status' can be applied here.

Apart from article 2, the most explicit reference to disability first appears in article 16 which provides for every individual's right to enjoy the best attainable state of physical and mental health. It further enjoins state parties to ensure the health of their people and make available medication when they are sick. This provision does not seem to have helped PWDs much as most states

¹⁴⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No.11) has a similar provision in art 14, where it prohibits discrimination on any of the listed grounds, including 'other status'. There is no mention of disability as a prohibited ground for discrimination. Protocol No.12 to the Convention in art 1(1) emphasises the same prohibited grounds for discrimination as appear in art 14 of the Convention. It further states in art 1(2) that 'No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

¹⁴⁶ See General Comment No.5, n14 above, para 5.

¹⁴⁷ Art 60 of the African Charter.

resorted to building mental asylums for internment of people with mental disabilities. In some countries convicted criminals who are found to have been insane at the time of committing the offence are jailed indefinitely at the state's pleasure.¹⁴⁸

A fleeting but specific mention of disability appears for the first time in the African Charter in article 18(4), where it provides that PWDs have the right to special measures of protection in keeping with their physical or moral needs.

The African Commission is charged with the interpretation of the provisions of the African Charter and other international law instruments. Hence under the African system, the African Commission together with similar bodies have the competence to receive and deliberate on communications involving violation of human rights, including rights of PWDs. Unlike in other regional systems, there is no disability-specific instrument under the African system, hence no specialised monitoring body. The African Commission remains the main enforcement mechanism for disability rights. Regional systems like the OAS have a disability-specific convention, the Convention on Elimination of All Forms of Discrimination Against Persons with Disabilities (OAS Disability Convention) as well as a specialised monitoring body for disability rights.¹⁴⁹ This body comprises one representative from each state party and reviews state reports submitted every four years.¹⁵⁰

The African Charter's minimal reference to disability rights is indicative of the continent's preoccupation with independence as opposed eradicating marginalisation. Although articles 3 to 5 of the African Charter deal with equality, inviolability of human integrity and dignity which apply equally to all human beings, there was still a need for particular provisions that would protect marginalised groups like PWDs.

The European Social Charter in this regard has a more elaborate provision in which it stipulates that PWDs have the right to independence, social integration and participation in the life of the community.¹⁵¹ Hence state parties undertake to adopt the necessary measures to provide PWDs with guidance, education and vocational training, and to promote their access to employment by encouraging employers to adjust the working conditions to the needs of PWDs.¹⁵²

¹⁴⁸ For example the Criminal Procedure and Evidence Act of 1937 of Swaziland it is found that the accused was insane at the time of committing the offence, he or she shall be interned at a mental asylum at the King's pleasure, which translates to an indefinite period of incarceration.

¹⁴⁹ Art 6 OAS Disability Convention.

¹⁵⁰ Art 6(3).

¹⁵¹ Part I No.15.

¹⁵² Art 15(2).

In the absence of a specific instrument under the African system, provisions on disability rights can be gleaned from the equality and non-discrimination clauses and other general provisions of the instruments in force under both the African system and other international instruments.

4.3.3 How does the African Charter compare with the Inter-American Disability Convention?

As stated above, the OAS¹⁵³ does have a disability-specific instrument.¹⁵⁴ The OAS Disability Convention's Preamble refers to a wide range of international instruments that protect PWDs, whether their disability is permanent or temporary.¹⁵⁵ It is worth noting however that the Preamble refers largely to soft law and few binding international instruments. The Convention does redeem itself by reaffirming that PWDs have the same human rights and fundamental freedoms as other persons, and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person.

In the operative part of the OAS Disability Convention, state parties undertake to take all the necessary measures, including making laws, to promote the integration of PWDs into society, to be done under conditions of equality.¹⁵⁶ Hence state parties undertake to ensure that buildings and vehicles are designed to allow access by PWDs.¹⁵⁷

State parties under the OAS Disability Convention undertake to increase public awareness campaigns to eliminate stereotypes, prejudices and discrimination in employment, which are some of the key hindrances in the enjoyment of human rights by PWDs.¹⁵⁸ The advantage of such a convention is its ability to put disability rights into sharp contrast, giving them clarity thus allowing disability rights advocates to effectively fight for their protection.

4.3.4 The African Children's Charter

¹⁵³ The OAS is also a regional intergovernmental organisation, established in 1948 when the Ninth International Conference of American States adopted the OAS Charter, but only came into force in 1951. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are two of the principal organs of the OAS.

¹⁵⁴ Adopted on 7 June 1999 and came into force on 14 September 2001.

¹⁵⁵ They include International Labour Organisation Convention 159, Declaration on the Rights of Mentally Retarded Persons, Declaration on the Rights of Disabled Persons, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, the Declaration of Caracas of the Pan American Health Organisation, and the Vienna Declaration and Programme of Action.

¹⁵⁶ Art 3.

¹⁵⁷ Art 3(1)(b).

¹⁵⁸ Art 3(2)(c).

Almost two decades passed between the coming into force of the African Charter and the passing of an instrument that clearly addressed disability rights under the African system. The African Children's Charter¹⁵⁹ provides for special protection of PWDs since it refers to handicapped children, both mentally and physically disabled and provides for special measures of protection, together with the principle of self-reliance, participation and access.¹⁶⁰ Further, that such children must be ensured active participation in the community and their physical or moral needs and their dignity must be ensured.¹⁶¹

The Children's Charter enjoins state parties to assist those responsible for a disabled child's upkeep.¹⁶² It provides state parties shall ensure such assistance subject to available resources, and must take care of the child's access to training, preparation for employment and social integration.

The Children's Charter further seeks to ensure an enabling environment for PWDs. It provides that:

The state parties shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access.¹⁶³

Whilst these last two provisions under article 13(2) and (3) seem progressive and aimed at addressing past imbalances, it is worth noting that they are subject to available resources and progressive realisation. Only the rights under article 13(1) are immediately realisable, since there is no reference to progressive realisation.

A Committee of Experts on the Rights of the Child (Committee of Experts) has been set up to monitor the implementation of the Children's Charter.¹⁶⁴ The Committee of Experts receives communications from any person or non-governmental organisation alleging violation of the Children's Charter.¹⁶⁵ The Committee also receives state reports every three years on the steps taken by states parties to implement the provisions of the Children's Charter.¹⁶⁶

¹⁵⁹ Entered into force in 1999.

¹⁶⁰ Art 13(1)

¹⁶¹ As above.

¹⁶² Art 13(2).

¹⁶³ Art 13(3) of the African Children's Charter.

¹⁶⁴ Art 32.

¹⁶⁵ Art 44.

¹⁶⁶ Art 43.

4.3.5 The Women's Protocol

The African Women's Protocol is the second regional human rights treaty aimed at protecting the rights of women after the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Inter-American Women's Convention). Since the Inter-American Women's Convention is limited to the eradication of violence against women, the African Women's Protocol is the first regional human rights treaty to provide specifically for a range of women's rights, including disabled women.¹⁶⁷

Although the Women's Protocol was concluded to deal with issues affecting a particular vulnerable group, it recognises that some members of this group suffer double jeopardy, and these are women with disabilities. First they suffer discrimination based on sex, and second as PWDs. State parties undertake to ensure the protection of women PWDs and to take specific measures to facilitate their access to employment, professional and vocational training. They also undertake to ensure the participation of disabled women in decision-making.¹⁶⁸

Because of the extreme vulnerability of women PWDs, the Protocol further enjoins state parties to ensure their freedom from violence, discrimination based on disability and the right to be treated with dignity.¹⁶⁹

4.3.6 The African Democracy Charter

The Democracy Charter is relevant to disability rights on the continent. Article 3(1) of the Charter emphasises respect for human rights and democratic principles. The Charter also provides for the promotion of a representative system of government,¹⁷⁰ with effective citizen participation in the democratic, development and governance processes.¹⁷¹

In article 8(1) state parties undertake to eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds and any other form of intolerance. It is the author's opinion that the intolerance or discrimination proscribed here would

¹⁶⁷ MA Baderin 'Recent Development in the African Regional Human Rights System' (2005) 5 *Human Rights Law Review* 118.

¹⁶⁸ Art 23(a) of the African Women's Protocol.

¹⁶⁹ Art 23(b).

¹⁷⁰ Art 3(3) of the African Democracy Charter. Under art 4 state parties recognise that universal suffrage is an inalienable right.

¹⁷¹ Art 3(7).

include that based on disability. Sub-article (2) thereof throws more light on this view when it provides that state parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, PWDs and other marginalised and vulnerable social groups. PWDs are much a part of the democratic and governance process and therefore the rights enumerated here apply equally to them. This becomes clearer when viewed in light of article 6 of the same Charter which provides that state parties shall ensure that citizens enjoy fundamental freedoms and human rights, taking into account their universality, interdependence and indivisibility.

All the above provisions notwithstanding, many PWDs still cannot access voting stations during elections, or embark on campaigns due to physical barriers. Visually impaired persons also have their rights to participate in government hindered by lack of information in Braille. Sign language users are also prevented from equal participation in the governance process due to non-availability of information in a format that is friendly to them. PWDs in many African states remain outside the realm of participation in governance despite the adoption and coming into force of the Democracy Charter.

4.3.7 Declaration of Principles on freedom of expression in Africa

The Declaration on Freedom of Expression (DoFE) is not a binding instrument.¹⁷² It was preceded by the Resolution on the Right to Freedom of Expression,¹⁷³ which called for the development and adoption of a declaration on principles of freedom of expression and to expound the nature and extent of the right to freedom of expression under article 9 of the African Charter.¹⁷⁴

Despite the non-binding nature of the DoFE, it remains important to the cause for disability rights since freedom of expression as a fundamental human right is also a cornerstone of democracy and serves to ensure respect for all human rights.

Article 1(1) of the DoFE combines freedom of expression and information with the right to seek, receive and impart information and ideas. This article recognises that the foregoing constitute a fundamental and inalienable human right and is an indispensable component of democracy. This right is to be exercised without discrimination of any kind.¹⁷⁵

¹⁷² Adopted by the African Commission at its 32nd Session, 19-23 October 2002.

¹⁷³ Adopted by the African Commission at its 29th Ordinary Session on 23 April to 7 May 2001.

¹⁷⁴ Para 1 of the Resolution.

¹⁷⁵ Art1(2).

The DoFE also calls for states to embrace diversity and ensure pluralistic access to media and other means of communication by marginalised groups.¹⁷⁶ It further calls for promotion of African voices and use of local languages in public affairs, including courts.¹⁷⁷

The DoFE is relevant to disability rights when issues of access to information and freedom of expression by the visually impaired and the hearing impaired are considered. For these PWDs, it is crucial that they access information and freely express themselves in Braille and sign language respectively. Despite such elaborate provisions in both the binding and the non-binding instruments, freedom of expression for PWDs is still largely restricted.

Despite the non-binding nature of the DoFE, the African Commission, when presented with a case of violation of the right to freedom of expression by PWDs would still have to consider international law.¹⁷⁸ The Inter-American Court of Human Rights' understanding of freedom of expression can be gleaned from its advisory opinion, where it held that:¹⁷⁹

Freedom of expression is a cornerstone upon which the very existence of a society rests. ... It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public.

The Court went on to state that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of others to receive information. Although the African Commission has clearly established that the right to freedom of expression is integral to participation in society and governance,¹⁸⁰ the failure by African governments to embrace sign language and Braille continues to deny PWDs such rights. None of the African constitutions recognise sign language as an official language, and very few mention it as a language. Because of the non-dominance of sign language both in law and in practice, people with hearing or speech disabilities cannot express themselves, neither can society benefit from the expression of their ideas.

¹⁷⁶ Art 3.

¹⁷⁷ As above.

¹⁷⁸ See art 60 of the African Charter. The Commission has already referred to relevant decisions and observations of both the European and Inter-American Courts of Human Rights, such as in the case of *The Law Offices of Ghazi Suleiman v Sudan*, African Commission on Human and Peoples' Rights, Communications No.222/98 and 229/99 (2003).

¹⁷⁹ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (American Convention on Human Rights, Arts 13 and 29), Advisory Opinion OC-5/85, 13 November 1985, IACtHR Series A N 5 at para 70.

¹⁸⁰ *Ghazi Suleiman v Sudan*, para 48.

4.3.8 Principles and Guidelines on the Right to a Fair Trial

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles) were adopted by the African Commission in May 2003.¹⁸¹ The guarantee of a fair trial ensures that victims of human rights violations can claim redress through due process of law, and also that litigants' rights are protected.¹⁸² These guarantees are a rare commodity in the judicial processes of many African states, even much so for PWDs. Although the Principles are not legally binding, they serve as an important normative reference and for interpreting the relevant provisions on the right to a fair trial under the African Charter.

Amongst other things, the Principles provide that court records must be published and available to everyone.¹⁸³ It is hoped that African states will interpret this to mean publication of such decisions and records in accessible formats to all human beings, including Braille and interpretation and translation of court proceedings and legal documents into sign language for the benefit of PWDs.

4.4 National constitutions and disability rights

Disability rights at the domestic level are often shrouded in assumptions and outdated clichés. Legislation and policies on the subject usually focus on rehabilitation and social security. Such legislation often fails to address all aspects of the human rights of PWDs, such as ensuring their full participation in society. In fact such legislation is hardly aimed at eliminating discrimination.

Many national constitutions provide for some level of protection of the rights of PWDs. The general non-discrimination and equality clauses are the first point of reference in the protection of these rights,¹⁸⁴ since they extend to PWDs as well. Some constitutions have disability-specific clauses, such as the Mozambican Constitution which provides that:¹⁸⁵

Disabled citizens shall enjoy fully the rights enshrined in the Constitution and shall be subject to the same duties, with the exclusion of those rights and duties which their disability prevents them from undertaking.

¹⁸¹ Baderin n167 above, 124.

¹⁸² As above.

¹⁸³ Section D(a).

¹⁸⁴ Such as the constitutions of Eritrea (art 14), Democratic Republic of Congo (art 12), South Africa (art 9(3)) and Ghana (art 31 and 33).

¹⁸⁵ Art 68 of the 1990 Mozambican Constitution.

The Constitution of Ghana¹⁸⁶ also has provisions aimed at facilitating the integration of PWDs into society, and ensuring their participation in daily life.¹⁸⁷ The Ghanaian Constitution further proscribes any form of exploitation and discrimination against PWDs,¹⁸⁸ and calls for improved access to public places and buildings for PWDs. It further calls for the use of disability-friendly legal procedure during judicial proceedings.¹⁸⁹

Despite such elaborate provisions in both national constitutions and African instruments, disability-conducive communication media is still largely unavailable. No African country has designated sign language as an official language. A model provision on the use of sign language in Africa is to be found in article 6 of the South African Constitution. Although article 6 does not list sign language amongst the 11 official languages, it recognises the historically diminished use and status of certain languages, and the need to take practical and positive measures to elevate the status and use of these languages. It further provides for the establishment of a Pan South African Language Board whose responsibility shall be to promote and create conditions for the development and use of all official languages, including sign language.¹⁹⁰ The South African constitution clearly recognises the need for PWDs to express themselves in a language of their own, sign language and further prohibits discrimination on the basis of disability in article 9(3).

Apart from national constitutions, several African countries have disability-specific legislation. Some of these are old and based on the welfare or medical model of disability. The Malawian Handicapped Persons Act of 1972 contains provisions to improve the care, assistance and education of PWDs in that country. It establishes a Council for PWDs, and provides for the voluntary registration of PWDs. The Act focuses more on welfare for PWDs and the control of organisations representing them than fundamental rights and freedoms. Zambia has similar legislation to the Malawian Act.¹⁹¹ Ghana also enacted the Persons with Disability Act in 2006, which lays down the rights of PWDs.¹⁹² The Ghana Act, enacted almost four decades after the Zambian and Malawian Acts seems more progressive and more detached from the welfare approach and inclined towards independent living.

¹⁸⁶ Constitution of the Republic of Ghana, 1992.

¹⁸⁷ Art 29(1) of the Ghana Constitution.

¹⁸⁸ Art 29(4).

¹⁸⁹ Arts 29(5) and (6).

¹⁹⁰ Art 6(5).

¹⁹¹ The Handicapped Persons Act 1968 of Zambia mirrors the Malawian Act in every respect.

¹⁹² Civil society began using the Act immediately, with Commonwealth Human Rights Initiative publishing a simplified version of the Act in easy to read language.

4.5 African Commission jurisprudence on disability rights

To date, only one communication has been brought before the African Commission dealing with disability rights.¹⁹³ A cursory look at this implies that the rights of PWDs are adequately provided for under the African human rights system, hence there are no complaints brought before the Commission for redress. However, careful scrutiny reveals that Africa is still afflicted with widespread human rights violations, especially for PWDs. This is compounded by the current focus by governments on combating deadly diseases like the Human Immuno-Deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS).¹⁹⁴ Today HIV/AIDS has occupied the national development agenda of governments. This shift has left many other social ills unattended to, and amongst these is the inadequate protection of the rights of PWDs.¹⁹⁵

In many African countries, disabled children still cannot gain access to education. PWDs still cannot access employment or participate in governance. By and large PWDs are still invisible, despite such elaborate provisions under international and regional instruments.

The *Purohit* Communication offered the only opportunity under the African regional system for disability rights to be deliberated upon. The case centred around violation of articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4) of the African Charter involving some mental health patients in the Gambia. The *Purohit* Communication is relevant to disability rights in that it deliberated on the rights of PWDs within the general rubric of fundamental rights and freedoms under the African Charter. In summary, the facts of the communication involved a section of the community whose human rights are not considered top of the list in African human rights discourse – mental patients.¹⁹⁶ The violations alleged in the communication related to the internment of mental health patients in a psychiatric hospital in the Gambia and the communication was submitted by a disability rights advocate on behalf of existing and future patients detained in the hospital.¹⁹⁷ The communication alleged that the Lunatics Detention Act of 1917 was outdated and contained no provisions on safeguards during diagnosis, certification and detention of the patient.¹⁹⁸ It further alleged that the Act failed to provide for the patients' consent to treatment or subsequent review of continued treatment and there was no provision for a patient to seek compensation if his or her rights were violated.¹⁹⁹

¹⁹³ *Purohit* Case n16 above.

¹⁹⁴ Report on the needs assessment of the current life situation of people with disabilities in Zimbabwe, prepared by the National Association of Societies for the Care of the Handicapped (NASCOH), W.O. 4/80, 4.

¹⁹⁵ As above.

¹⁹⁶ Baderin n167 above, 137.

¹⁹⁷ Para 1.

¹⁹⁸ Para 4.

¹⁹⁹ Paras 5 and 8.

In handling the communication, the African Commission treated the issue of admissibility of the communication with reference to the interests of justice. It took into consideration the nature of the persons whose rights were involved and steered clear of a literal interpretation of the admissibility requirements which could have resulted in the inadmissibility of the communication.²⁰⁰ The Commission looked at the nature of people that would be detained as voluntary or involuntary patients under the Gambian Lunatics Detention Act and asked whether or not these patients could access legal procedures available without legal aid.²⁰¹ In other words, the Commission took into account the lack of legal aid offered to this category of persons, and concluded that any remedies under the Gambian courts would not be realistic.²⁰² Because the remedies were not realistic for this category of people and therefore not effective, the African Commission declared the communication admissible.²⁰³

This innovative and progressive thinking by the African Commission established that the African Commission will not be restricted to literal interpretation of the Charter provisions where it will not be in the interests of justice to do so.²⁰⁴ Such jurisprudence could be very useful in the protection of disability rights in Africa. The *Purohit* communication also reveals the African Commission's amenability to rely on other sources and not only on its jurisprudence to interpret disability rights.²⁰⁵

4.6 The Commission's view on discrimination

The African Commission dealt with the non-discrimination provisions of the African Charter as applied to PWDs. Articles 2 and 3 basically form the anti-discrimination and equal protection provisions of the Charter. It stated that article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises.²⁰⁶ The reference to discrimination in all its different forms must be understood to incorporate disability as a ground of discrimination too.²⁰⁷ It also emphasized the importance of article 3, which it held,

²⁰⁰ Art 56 of the African Charter lays down requirements to be fulfilled before communications can be admitted for consideration by the Commission. These include (a) that the authors are indicated, even if they request anonymity; (b) communications are compatible with the Charter of the OAU or the African Charter; and (c) are sent after exhausting local remedies.

²⁰¹ Para 35.

²⁰² Para 37.

²⁰³ Para 38.

²⁰⁴ Baderin n55 above, 139.

²⁰⁵ Para 47.

²⁰⁶ Para 49.

²⁰⁷ General Comment No. 5 n14 above.

guarantees fair and just treatment of individuals within a legal system of a given country.²⁰⁸ The Commission went on to state that these provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the Charter.²⁰⁹

The African Commission also found that the respondent state's arguments that mental patients could challenge their detention in court fell short of the standards of anti-discrimination and equal protection of the law contained in the African Charter. It also drew inspiration from the UN Principles²¹⁰ and held that the state's behaviour also fell short of Principle 1(4) thereof.²¹¹

4.6.1 Human dignity as a human right

According to the African Commission, human dignity is an inherent basic right for every human being, regardless of their mental capabilities or disabilities. It confers a duty on every human being to respect this right.²¹² Hence every human being whether disabled or not, is entitled to human dignity without discrimination.

The complainants in the communication had further submitted that the legislative scheme of the Lunatics Detention Act, its implementation and the conditions under which they were held, constituted violations of respect for human dignity in article 5 and the prohibition against subjecting anybody to cruel, inhuman or degrading treatment.

The African Commission stated that the branding of mental patients as lunatics and idiots deprives them of dignity. The African Commission here was guided by Principle 1(2) of the UN Principles, which provides that all persons with mental illness, or who are being treated as such shall be treated with humanity and respect for the inherent dignity of the human person.²¹³

In paragraph 61, the African Commission captured the rights of PWDs when it referred to mentally disabled people's hopes, dreams and aspirations. It stated that the mentally disabled have the same rights to pursue those hopes, dreams and goals just like any other human being. This right to enjoy life is at the core of the right to human dignity, and as such state parties should zealously

²⁰⁸ Art 3 provides that (a) every individual shall be equal before the law; and (b) every individual shall be entitled to equal protection of the law.

²⁰⁹ Para 49.

²¹⁰ Principle 1(4) defines as discrimination any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.

²¹¹ Para 54.

²¹² Para 57.

²¹³ Paras 59 and 60.

guard and forcefully protect it, in accordance with the principle that all human beings are born free and equal in dignity and rights.

The African Commission also drew inspiration from relevant UN instruments and decisions of the Human Rights Council to buttress its views on this premier consideration of the human rights of mental health patients under the African system. In the light of poor attention paid to the protection of the fundamental human rights of mental health patients in Africa, as well as in other parts of the world, the observations of the Commission are highly commendable and should serve as inspiration in calling necessary attention to this aspect of human rights guarantees.²¹⁴

4.6.2 Jurisprudential limitations

The *Purohit* decision was the first decision in which the African Commission made a serious effort to eke out the substantive content of article 16. The African Commission however appears to have limited the obligation of a state to progressively realise rights and to do no more than the maximum that its available resources permit even though there is no such qualification in the text of article 16. This is arguably a significant weakening of the obligation imposed on states under article 16 of the African Charter. In addition the African Commission did not clearly specify the details of this exception to a state's general obligations under the Charter.

That notwithstanding, the *Purohit* decision is a milestone in the promotion and protection of disability rights in Africa. The case offered the opportunity to test the extent to which disability rights are protected under the African system as well as allowed the African Commission to expound the understanding of disability rights by relying on international law, name. It also paved way for future challenges to violations disability rights when it dispensed with the strict rigours of admissibility based on the particular circumstances of the complainants. Although the disability rights in the *Purohit* communication involved persons with a mental disability, the rich jurisprudence that came out remains relevant to other communications alleging discrimination on the basis of disability. In the absence of other jurisprudence dealing with disability rights on the continent, the decision in *Purohit* remains a beacon of hope for PWDs, and may encourage similar communications in the future.

4.7 Conclusion

The foregoing discussion has revealed that theoretically disability rights under the African human rights system are adequately provided for. What is lacking is an effort on the part of governments

²¹⁴ Baderin n55 above, 140.

to implement fully their national constitutions as well as the regional and international human rights instruments, to ensure enjoyment of fundamental rights by PWDs.

CHAPTER 5

DOES AFRICA NEED A DISABILITY-SPECIFIC INSTRUMENT?

5.1 Introduction

The foregoing chapters have established that PWDs are subjects of the international human rights system and are entitled to full enjoyment of all human rights contained in human rights instruments. However, human rights violations remain a daily reality for PWDs in Africa.²¹⁵ The values contained in these instruments are either not applied at all or applied differently to PWDs. This stems from the period when PWDs were often virtually invisible citizens.²¹⁶ Society's reaction to PWDs has always been either pity or revulsion and the relative invisibility of PWDs was either taken for granted or accepted as natural.²¹⁷

Today PWDs remain invisible subjects of the international human rights system, despite recent developments, such as the adoption of the Disability Convention. The situation of PWDs in Africa is worsened in part by what seems to be a lack of awareness on disability rights by PWDs themselves.

Although Africa has four major instruments that are relevant to disability rights, the plight of PWDs remains appalling. The continued violation of the human rights of PWDs in Africa can be blamed on a number of factors, including lack of awareness, lack of a disability-specific instrument and lack of political will.

One of the grounds for calling for the adoption of a disability-specific instrument would be lack of normative content.²¹⁸ The advantage of a specific instrument would be to give these rights specific content, so that their nature and form are clear, and they can then be easily enforced. It would reaffirm that PWDs have the same human rights and fundamental freedoms as others, and that these rights flow from the inherent dignity and equality of each person.²¹⁹

²¹⁵ P Masakhwe, Kenya Forum Held on African views on UN Disability Convention, available at http://www.disabilityworld.org/04-05_04/news/kenya/shtml (accessed 20 September 2007).

²¹⁶ Quinn and Degener n4 above.

²¹⁷ As above.

²¹⁸ The OAS Disability Convention, a regional normative development, aims at the prevention and elimination of discrimination against PWDs and the promotion of their full integration into society in art 2. It also provides for affirmative action for PWDs. The UN Disability Convention also makes provision for awareness raising, protection of women and children with disabilities, as well as equality and non-discrimination. The UN Convention thus sets out in clear terms the normative content of disability rights at the international level.

²¹⁹ Preamble to the OAS Disability Convention. See also the Preamble to and art 5 of the UN Disability Convention.

In determining the propriety or otherwise of adopting a disability-specific regional instrument for Africa, the following indices will be analysed.

5.2 Is there normative paucity as regards disability rights?

The third chapter attempted to look at the normative content of disability rights. Normative paucity has been blamed for the relegated status of disability rights in Africa. This has been based mainly on the failure of the major regional instruments to mention disability rights specifically, save for the African Children's Charter and the Women's Protocol.

However, there has been significant normative development on the continent in the past decades. Several standard setting instruments that are relevant to disability rights have been adopted, such as the African Women's Protocol, the African Democracy Charter, and the African Children's Charter. The first counter argument to paucity of norms here is that the human rights set out by these instruments apply equally to all human beings, including PWDs. Hence the normative content of disability rights is the same as that of others. Secondly, apart from the African normative developments, the UN catalogue of human rights consists of numerous normative propositions enumerated in the international bill of human rights, extended by a number of specialised UN treaties, and also in the regional human rights treaties of the Inter-American and European human rights systems.²²⁰ Programmes of action, declarations and other formulations of human rights in the process of becoming legally binding, contain norms that properly fall within the category of disability rights.²²¹

The African Commission in carrying out its mandate is empowered consider international law.²²² Hence in determining violation of the rights of PWDs, the African Commission can rely on the regional instruments under the African Union. The Commission can further rely on other instruments, international and regional that are relevant to disability rights.

5.3 Is weak enforcement of instruments a threat to disability rights?

Disability rights still do not sufficiently form part of the human rights agenda at the international level in spite of the many instruments adopted. The question that begs an answer is whether the current situation is a result of lack of clear provisions or weak enforcement mechanisms?

²²⁰ SP Marks, *Human rights from a health perspective*, 7. Available at http://www.hsph.harvard.edu/xfbcenter/FXBC_WP14--Marks.pdf (accessed 22 September 2007).

²²¹ As above.

²²² Arts 60 and 61.

It has been established that all human rights enshrined in the African and UN instruments apply to all human beings. Hence clear provisions on the human rights of PWDs are abundant. It is the author's opinion that were the elaborate provisions in these various instruments adequately enforced, the violation of the human rights of PWDs would not be so widespread.

5.3.1 Is there lack of political will?

Many African states subscribe to the dualist school of thought as regards international law. Hence treaties signed by these states do not form part of national law unless they are domesticated by an Act of Parliament. Most states either sign these treaties and fail to ratify, or fail to enact domestic legislation after ratification. This lack of political will on the part of states affects the interpretation and application of disability rights. Despite many constitutional provisions on disability rights in Africa today, the rights of PWDs continue to be violated, because states lack the political will to commit to addressing issues involving PWDs.

This lack of political will seems to have robbed the disability fraternity of the necessary attention since the WPA. Even though the WPA was a global initiative, there was no noticeable improvement in the quality of life of PWDs in Africa. Only countries in the northern hemisphere appeared to benefit from the decade. Lack of political will for most countries in the southern hemisphere and in Africa led to non-implementation of the WPA.²²³ Today, with a few years before the end of the decade, only a handful of African states have disability programmes in place. Ghana and South Africa are good examples of governments that have adopted disability policies to uphold the rights of PWDs.²²⁴

5.4 Lack of awareness

Both the OAS and the UN Disability Conventions seek to ensure awareness-raising on disability rights. The lack of awareness on disability rights can be attributed to the earlier perceptions of disability as a welfare issue rather than a right. A majority of civil society working on disability issues are themselves not *au fait* with the terrain. This lack of awareness impedes advocacy and lobbying efforts, thus impeding enjoyment of human rights by PWDs. It is the author's opinion that if the current regional and UN instruments are popularised, the public, including PWDs, would begin to demand their rights. A disability-specific instrument for Africa without the necessary awareness is like a toothless shark.

²²³ AM Phiri, *African Decade (2000-2009)...The Challenge of the Decade*, available at http://www.safod.org/African%20Decade/african_decade.html (accessed 25 September 2007).

²²⁴ As above.

5.5 Jurisprudence of the Commission

The African Commission has embraced progressive interpretation of the provisions of the African Charter. The jurisprudence of the African Commission and other regional bodies can be employed to draw inspiration for application to the African situation in the fight for better recognition and promotion of disability rights through articles 60 and 61 of the African Charter. Declarations and resolutions have been issued interpreting disability rights,²²⁵ and these could prove useful in the promotion and protection of disability rights. The African Commission has already had recourse to international law in the *Purohit* communication.²²⁶ Based on this progressive approach, disability rights advocates bringing communications to the Commission can petition it to consider other international law, such as the UN Disability Convention.

5.6 Is a specific instrument the panacea?

The adoption of a human rights instrument, whether regional or international often involves a long and drawn process, sometimes spanning decades.²²⁷ The adoption of a gender specific protocol for women under the African Charter only occurred more than two decades after the adoption of the Charter.²²⁸ The major African instrument, the African Charter itself took about two years to negotiate.²²⁹ Conceived at the XVIth ordinary conference of the Assembly of Heads of State and Government of the OAU in Monrovia in July 1979, the Charter was negotiated for the next two years.²³⁰ The speed with which this Charter was negotiated and adopted could be attributed to the Africa's pressing problems at that moment, such as apartheid and foreign domination. It is the author's view that governments were eager to debate and adopt the Charter because failure to do so would have had dire consequences for African states. The quick adoption of the Charter was motivated more by a desire to protect their sovereignty, than the protection of human rights. This is

²²⁵ Such as the 1975 Declaration on the Rights of Persons with Disabilities, which set out in para 4 that PWDs have the same civil and political rights and in paragraph 3 that they are entitled to the same respect for their human dignity as other persons. See also article 2 of the UN Principles.

²²⁶ n16 above.

²²⁷ For example, the Convention on the Rights of Persons with Disabilities took over twenty years to negotiate. It was finally adopted in March 2007, but will not come into force until the twentieth ratification. Although currently 100 countries have signed the Convention, only one has ratified, Hungary. Until the necessary ratifications are received, the instrument remains unenforceable.

²²⁸ The African Charter was adopted in 1981, came into force in 1986, but the Protocol was only adopted in August 2003.

²²⁹ Kodjo, n144 above, 271.

²³⁰ It was finally adopted on 26 June 1981.

evidenced by the length of time it took to adopt a protocol that is specific to the rights of women.²³¹ It took women's rights NGOs almost a decade and a half to get the work started on the drafting of a gender-specific protocol, and it was not approved until almost another decade later.²³² The Children's Charter also came into force almost a decade after its adoption.²³³

The other challenge posed by the adoption of further instruments is the straining of already over-stretched resources. Specific instruments usually make provision for the establishment of new monitoring bodies,²³⁴ and this could lead to duplication and overlap of functions. Because of lack of resources, some of the new bodies being set up may lose their functionality and effectiveness. The Committee of Experts on the Rights and Welfare of the Child is a striking example here. Although the Committee has existed since July 2001,²³⁵ it has only recently adopted its rules of procedure and its work is already being impeded by insufficient funds.²³⁶

5.7 Conclusion

The foregoing discussion has highlighted the fact that disability rights in Africa are adequately protected normatively. It is weak enforcement of those norms that has led to the widespread violation of disability rights. The adoption of a disability-specific regional instrument would clutter the system, and put a strain on the scarce resources. Hence such adoption will not be recommended here.

²³¹ The African Commission initiated work on the Protocol at its 17th Session in 1995 after NGOs expressed concern about the abuses of women's rights on the continent, and this was endorsed by the OAU Assembly the same year.

²³² The Protocol was eventually adopted in 2003.

²³³ It was adopted on 11 July 1990 and came into force on 29 November 1999.

²³⁴ Such as the Committee of Experts on the Rights and Welfare of the Child set up under arts 32 to 46 of the African Children's Charter.

²³⁵ See About *the African Committee of Experts on the Rights and Welfare of the Child*, <http://www.africa-union.org/child/home.htm#> (accessed 23 September 2007).

²³⁶ Para 13(e) of the Report of the 8th Meeting of the African Committee of Experts on the Rights and Welfare of the Child, Addis Ababa, Ethiopia, 27 November – 1 December 2006.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The following recommendations are advanced not as the ultimate panacea, but as possible solutions to the current problems facing Africa's PWDs.

Human rights apply to every human being by virtue of their humanity. They are neither created nor taken away by the international or national instruments they are enshrined in. While much has been done at the global level in terms of developing the normative content of disability rights, including the adoption of a binding disability-specific instrument, Africa does not seem to have benefited much. The WPA came and passed, and so did the UN Decade for PWDs. The African Decade on Disabled People is nearing its end, yet not much has been done. Very few states have demonstrated the political will to implement recommendations made in line with this decade.

The African Commission has also been underused. It has dealt with only one communication based on discrimination on grounds of disability.²³⁷ Despite the African Commission's progressive approach to disability rights, and its readiness to employ articles 60 and 61 of the African Charter to draw inspiration from the normative content already laid down in international law, disability advocates have not fully utilised this leverage. Unlike the northern hemisphere which benefited from strong civil rights movements, disability issues in Africa remain largely in the realm of charity.

6.2 Recommendations

Human rights are viewed with contempt in most African societies. To many the human rights philosophy is a western conceptual contrivance wholly irrelevant to Africa. This is sometimes fuelled by the cultural differences between the West and Africa and the prevailing socio-economic realities in most African states.²³⁸ Such contempt has led to lack of awareness on human rights in general and disability rights in particular.

²³⁷ n16 above.

²³⁸ B Thompson, 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432.

6.2.1 Working groups and special rapporteurs

One effective way to raise awareness on disability rights is through working groups or special rapporteurs.²³⁹ The value of the work of special rapporteurs cannot be gainsaid. Africa can take a leaf from two former special rapporteurs whose work contributed to a shift in human rights thinking as regards disability rights. Erica-Irene A Daes'²⁴⁰ 1986 report²⁴¹ may have led to the adoption 6 years later by the UN of a resolution on mentally disabled people.²⁴² Similarly, the Committee on ESCR's famous General Comment No.5²⁴³ was adopted following strong recommendations from a study carried by Leandro Despouy, then Special Rapporteur, in his 1993 report.²⁴⁴ Working groups and special rapporteurs thus place disability issues into sharp focus, taking them out of the blanket of invisibility currently overshadowing them.

6.2.2 Promotional mandate of the African Commission

To circumvent the lack of awareness on disability rights, the African Commission's mandate to promote and protect human rights must be fully utilised. The Commission is mandated to collect documents, undertake research on human rights problems as well as organise seminars on human rights issues.²⁴⁵ Since the Commission has a duty to disseminate pertinent information on human rights, by the same token it ought to disseminate information on disability rights. This is the promotional mandate of the Commission and if effectively carried out, it may be a solution to the current lack of appreciation of the nature and content of disability rights. The Commission could popularise the existing instruments, in particular the African Charter by making good practices and experiences available in order for state parties to benefit from them.

²³⁹ For example, it was the Global Meeting of Experts to Review the Implementation of the World Programme of Action in Stockholm in 1987 that recommended the drafting of a convention on the human rights of PWDs. See Quinn and Degener, n4 above, 42.

²⁴⁰ Then Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

²⁴¹ The Report was titled Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental ill-Health or Suffering from Mental Disorder.

²⁴² The Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care.

²⁴³ Para 5 of the General Comment recognises that all human rights apply to PWDs by virtue of their humanity.

²⁴⁴ *Human Rights and Disabled Persons*, (1993) United Nations Publication, Sales No. E.92.XIV.4. Despouy recommended that the treaty monitoring bodies should supervise the application of their respective human rights treaties to PWDs. He further recommended that the Committee on ESCR be given the lead role in that regard. See Quinn and Degener n4 above, 44.

²⁴⁵ Art 45(1)(a).

6.2.3 Awareness-raising through information technology

Important documents, good experiences and the value of the African Charter and other instruments relevant to disability rights should be publicised and put on the African Union website. A database on disability issues should be established and made easily accessible.²⁴⁶ The AU website should be updated regularly to give more visibility to disability issues. The UN website <http://www.un.org/esa/socdev/enable> should be used as a template for such information dissemination. The dissemination of information should take into account the peculiar situations of PWDs, and thus make provision for communication in Braille and sign language.

6.2.4 Use of state reporting mechanisms

The Commission could also request state parties to the African Charter to include data on PWDs in their state reports. This could help eliminate the current invisibility that this vulnerable group is subjected to.

6.2.5 Strategic partnerships with NGOs

The Commission could further collaborate with human rights NGOs working particularly on disability rights. Such partnerships are very useful in disseminating information, for example through training workshops on the African Charter for NGOs and civil society at large.²⁴⁷

6.2.6 Use of national human rights institutions

National human rights institutions can also be very helpful in the protection of human rights. Given the ease of access and minimal cost of bringing cases to these institutions, they can come in handy for addressing disability rights violations.²⁴⁸

²⁴⁶ n241 above, para 14(e).

²⁴⁷ E.g. the partnership between the Committee of Experts on the Rights and Welfare of the Child and the Institute for Human Rights and Development in Africa. See para 17 of the Report of the Committee of Experts, above.

²⁴⁸ The Swaziland Constitution however presents a bar to the effectiveness of the national human rights institution. By virtue of article 162 of the Swaziland Constitution the Commission on Human Rights and Public Affairs has no jurisdiction to determine a matter done under royal prerogative. This means that where disability rights are violated under customary law, where royal prerogative reigns supreme, PWDs cannot approach the Commission for a remedy. See BA Dube & AS Magagula *The law and legal research in Swaziland*, available at <http://www.nyulawglobal.org/Swaziland.htm> (accessed 12 October 2007).

6.2.7 Use of the African Decade for PWDs

Although the African Decade (2000 to 2009) is close to the end, it could still be used to put disability rights on the human rights agenda at the regional level. The decade can be used to facilitate meeting and sharing of experiences by PWDs, and also to create awareness. Hopefully this would result in more people demanding their rights.

6.3 Conclusion

Disability rights are human rights. Both the UN and the African regional human rights systems set out the normative content of these rights. That notwithstanding, it is only when these rights and the instruments providing for them are popularised that there will be a shift in the lives of PWDs in Africa. Given the lack of political will afflicting African governments, they will not begin to take these rights seriously unless disability rights advocates begin to demand them more forcefully. For that to happen, it must be recognised that current human rights instruments apply equally to the PWDs and must be enforced as such.

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