

**ADDIS ABABA UNIVERSITY  
COLLEGE OF LAW AND GOVERNANCE  
CENTER FOR HUMAN RIGHTS**

**THE PROTECTION OF THE RIGHTS OF PERSONS  
WITH DISABILITIES WITHIN THE AFRICAN UNION  
HUMAN RIGHTS FRAMEWORK**

**BY  
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## **LIST OF ACRONYMS**

ACHPR - African Commission on Human and Peoples' Rights

- African Court on Human Peoples' Rights

ADA - American with Disabilities Act

ADF - African Disability Forum

ARI - African Rehabilitation Institute

AU - African Union

AUC - African Union Commission

AUDA - African Union Disability Architecture

CAMSD - Conference of African Ministers for Social Development

CAT - Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW - United Nations Convention on the Elimination of All Forms of Discrimination against Women

CEN-SAD - Community of Sahel-Saharan States

CERD - Convention on the Elimination of All Forms of Racial Discrimination

COE - Council of Europe

COMESA - Common Market for Eastern and Southern Africa

CPOA - Continental Plan of Action

CRC - Convention on the Rights of the Child

DPOs - Disabled People's Organizations

DRM - Disability Rights Movement

DSA - Department of Social Affairs

EAC - East African Community

ECCAS - Economic Community of Central African States

ECOWAS - Economic Community of West African States

EEA - Employment Equity Act

FDRE - Federal Democratic Republic of Ethiopia

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social, and Cultural Rights

ICIDH - International Classifications of Impairment, Disability and Handicap  
IGAD - Inter-governmental Authority on Development  
ILO - International Labour Organization  
IYDP - International Year of Disabled People  
LDA - Lunatics Detention Act  
LSAC - Labor and Social Affairs Commission  
NGOs - Non-governmental Organizations  
OAS - Organization of American States  
OAU - Organisation of the African Unity  
PCRDP - Policy on Post-Conflict Reconstruction and Development  
PWDs - Persons/People with disabilities  
RECs - Regional Economic Communities  
SADC - Southern African Development Community  
SADPD - Secretariat of the African Decade of Persons with Disabilities  
SPF - Social Protection Floor  
UDHR - Universal Declaration of Human Rights  
UMA - Arab Maghreb Union  
UN - United Nations  
UNCRPD - United Nations Convention on the Rights of Persons with Disabilities  
UPDA - Ugandan Persons with Disabilities Act  
WPA - World Program of Action

## ***Abstract***

*This paper attempts to appraise the protection of the human rights of PWDs within the African Union human rights framework. Globally, the issue of disability has obtained a significant attention in recent years due to the fact that the rights of PWDs are not protected and promoted in all aspects of activities as equally as other non-disabled persons. In the African context too, negative attitude, distorted public assumptions and stereotypes have been demonstrated in forms, inter alia, of discriminations, segregation, neglect and abuse in access to employment, health, justice, and other social services. Despite abject challenges encountering PWDs, the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) by the United Nations General Assembly implies how the issue of disability is sensitive and increasing concerns of governments and the international community. Hence, the adoption of this Convention is a collective effort of all concerned organs as well as a critical response to a growing human rights pressure from many national and international organizations operating on human rights, mainly disabled persons organizations (DPOs).*

*As members of the United Nations, many African countries have ratified the CRPD at national level, taking into consideration the complex and unfavorable situations facing PWDs in their respective contexts. Albeit talks about human rights can be traced back to decades, the general attitudes of the society and the lack of awareness on the part of governments in Africa have negatively influenced the actual lives and rights of PWDs. Within the auspices of the Organization of African Unity/the African Union, fewer efforts have been exerted to bring about changes in the prevention and rehabilitation of disabilities in the Continent. At regional levels, a plethora of human rights instruments and institutions are adopted and organized to enforce the human rights of all human beings and peoples of Africa. However, neither binding instruments, nor specific institutions dealing with the human rights of PWDs have come in to reality, except certain movements are underway to establish legal and structural frameworks in this regard. Thus, this paper assesses the human rights of PWDs in light of international human rights instruments briefly and, most importantly, the general situations of PWDs in Africa including the human rights and institutional structures within the African Union human rights frameworks.*

# CHAPTER ONE

## 1. INTRODUCTION

### 1.1 Background

Human rights are considered and officially accepted as universal regardless of their genesis or cultural manifestations. History and experience shows, however, that respect for the dignity and rights of human beings cannot be taken for granted, they must be constantly nurtured and vigorously guarded.<sup>1</sup> In this contemporary globalization era, it is conventionally agreed that disability is a new area of action in the protection of human rights.<sup>2</sup> Disability affects us all, transcending class, nation and wealth. It is a natural fact; many people may at some point become disabled for known or unknown causes. According to current international estimates of the World Report on Disability (2011), there are more than 1 billion persons with disabilities throughout the world; constituting 15 to 20 percent of the population of any given nation.<sup>3</sup> Causes of disability involve a wide array of factors including diseases, malnutrition, inadequate/unscientific treatment or non-treatment, physical or mental violence and war, accidents due to insufficient protection at the workplace and in traffic situations, and age-related ailments.<sup>4</sup> It is obvious that disability exists throughout the world, irrespective of national, ethnic, or cultural boundary.

The history of the treatment of persons with disabilities has been one characterized by ignorance and isolation.<sup>5</sup> Persons with disabilities suffer from discrimination throughout the world and are frequently excluded from social, economic and political processes in their societies.<sup>6</sup>

However, there have been noticeable changes in the attention accorded to disability in recent years. As the disability movement has grown in strength and breadth, so has the language of the

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<sup>1</sup>Anton Bösl and Joseph Diescho, *Human Rights in Africa Legal Perspectives on their Protection and Promotion*, Publisher Macmillan Education 2009, P.146.

<sup>2</sup>Michael Ashley Stein, *Beyond Disability Civil Rights* available at <http://digitalcommons.ilr.cornell.edu/gladnetcollect/334> accessed on August 24 2012.

<sup>3</sup>The World Report on Disability, World Health Organization and World Bank, 2011 available at [www.who.int](http://www.who.int), accessed on Nov. 12, 2012.

<sup>4</sup> Ibid.

<sup>5</sup>Anna Lawson, *Disability Rights in Europe from Theory to Practice*, *University of Leeds* published by Oxford and Portland, Oregon 2005 P.54.

<sup>6</sup>Susan J. Peters, *Inclusive Education: Achieving Education for all by Including those with Disabilities and Special Education Needs* Prepared for the Disability Group, the World Bank, April 30, 2003.

mainstream establishment changed accordingly. Many governments have passed new legislations and/or pragmatic strategic interventions and are noting the need to include disabled people in their national, regional and international development engagements.<sup>7</sup> Having understood this global fact, this paper is devoted to address and examine whether the protection of human rights of persons with disabilities are guaranteed, and to what extent, under the African human rights protection system.

Africa is one of the largest continents comprising of fifty-four states with a highly diverse population of innumerable traditions, cultures, and languages. People with disabilities from diverse backgrounds live in this continent facing many problems, such a slow utilization of formal services; lack of information and knowledge about services; and isolation.<sup>8</sup> People with disabilities are vulnerable to neglect, superstition, stereotypes, and exploitation.<sup>9</sup> Likewise, the African cultural beliefs about disabilities and attitudes toward persons with disabilities often contribute to gross violations, connoting disabilities with shame, prejudice, and exclusion from community.<sup>10</sup>

It is estimated that over 68 million persons with disabilities live in Africa. The major causes of disability in Africa relate to poverty, which manifests itself through malnutrition, scarce or inaccessible health care, diseases, accidents, crime, and violent conflicts.<sup>11</sup> Due to this milieu, the number of persons with disabilities is growing faster in Africa than in any other part of the globe. These problems, coupled with inadequacies in infrastructure and socio-economic development in many African countries, make attaining equality by/for persons with disabilities difficult. Segregation and marginalization keep disabled individuals at the bottom of the political and economic ladder by denying equal opportunities and equal access in many aspects.<sup>12</sup> The disgrace and segregation of disability extends both to the individual and to the family. Since a

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<sup>7</sup> Supra Note at 5.

<sup>8</sup> Paul J. Magnarella, *Achieving Human Rights in Africa: The Challenge for the New Millennium*, *African Studies Quarterly* I Volume 4, Issue 2 I Summer 2000.

<sup>9</sup> David W. Anderson, *Human Rights and Persons with Disabilities in Developing Nations of Africa*, Presented at: The Fourth Annual Lilly Fellows Program National Research Conference “Christianity and Human Rights” Stamford University, November 13, 2004.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid

disabled person is seen as a curse, a horrific premonition or an incomplete person unworthy of life, many families abandon their members with disabilities to the care of basic public services and, in turn, they are impelled to lead their life in institutionalization and ostracization.<sup>13</sup>

There is an acute lack of reliable studies and data on the human rights situation of people with disabilities in Africa. Human rights as a legal concept is launched in Africa relatively late. The United Nations (UN) System, international law and the African Union have certainly all contributed to the establishment of a human rights system in Africa, which has positively and indispensably impacted on the advancement of human rights and of justice.<sup>14</sup>

The Organization of African Unity (OAU) was established in 1963 with a principal aim of doing away with the colonial legacies of the continent and apartheid regimes; to promote unity and solidarity among African states; to protect their sovereignty and territorial integrity; and to coordinate and intensify international cooperation for development.<sup>15</sup> The OAU was supplemented in 1994 by the African Economic Community (AEC), which had the general objective of promoting socio-economic development and integration of Africa.<sup>16</sup>

The OAU's success in upholding peoples' rights through its core role of addressing colonialism and apartheid has somewhat been diminished by its lack of serious concern for human rights violation in African states and its undue emphasis on the principle of non-interference.<sup>17</sup>

Different institutions were established by the member states of the OAU with different mandates vested upon them to fulfill responsibilities and continental obligations towards disability. Among these, an institution known as the "African Rehabilitation Institute" (ARI) was established taking the issue of disabilities into account with the objectives of assisting Member States of the OAU to:<sup>18</sup>

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<sup>13</sup>Ibid.

<sup>14</sup>Supra note at 1.

<sup>15</sup>Dr. Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford-Portland Oregon 2000, PP.200-234.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>African Rehabilitation Institute Establishment Agreement, Organization OF African Unity, 1988.

- Develop a unified approach for promoting the development of prevention and rehabilitation services;
- Create facilities to satisfy the needs of handicapped Africans who, because of their disability, find it difficult to adapt themselves to the rapidly changing world;
- Promote the development of rehabilitation centers in all the countries of the African continent: to assist them to harmonize as much as possible their basic conceptual principles and work out strategies in the field of rehabilitation of the disabled persons within the African region.

The African Union (AU) formation process began in 1999. Consequently, the Constitutive Act of the African Union (Constitutive Act) was adopted in 2000 and entered into force in 2001. After a transitional period of one year, the AU formally replaced the OAU in 2002.<sup>19</sup> Compared to its predecessor, the objectives and guiding principles of the AU have comprehensively included the promotion of democratic principles and institutions, popular participation and good governance; promotion and protection of human and peoples' rights.<sup>20</sup>

With the forgoing facts at hand, the researcher will investigate how the barriers and obstacles faced by people with disabilities affected their rights in Africa, by examining in particular four key human rights principles; namely: Dignity, Autonomy, Equality and Inclusion.

## **1.2. Statement of the Problem**

Throughout its history, practical realities have greatly hampered the ability of both the OAU and AU in the protection and promotion of the African human rights system. The main challenges to the African human rights system are known to have been lack of political will, lack of resources and commitment for true democracy, lack of good governance, violations and power struggle, etc.<sup>21</sup> As part of this existing reality, most persons with disabilities have long been neglected and marginalized by the states and societies of Africa. Persons with disabilities are among the most disadvantaged people and are over-represented among the poorest of the poor throughout the

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<sup>19</sup>Rachel Murray, *Human Rights in Africa from the OAU to the African Union*, Cambridge University Press, 2004, P.162.

<sup>20</sup>Ibid.

<sup>21</sup> Supra note at 19.

continent. Due to this fact, they experience material deprivation and social exclusion, which could be demonstrated in terms of lack of due attention by officials, systematic and non-systematic discriminatory practices, marginalization and inaccessibility in most of human rights and development activities.

Persons with disabilities frequently face various challenges which hinder them from accessing human rights services in Africa. Some of the problems include, *inter alia*:

- There is little or no recognition to disability as a key socio-economic and political theme in the African human rights framework;
- The major weakness of disability rights provisions under African constitutions can be traced to the widespread perception that disability rights are related to rehabilitation *ipso facto*, hence they are not justifiable;
- In most African constitutions, the rights of persons with disabilities are enshrined in the forms of progressive realization (attached with clauses stating the ‘availability of resources’ as a condition precedent) than addressing problems directly and vigorously;
- There is generalized categorization of disability within dubious phrasings and groupings, such as, "vulnerable", "others", etc., in the African human rights instruments, thus undermining the specificities of disability;
- There is a trend of setting aside matters of disability to be addressed solely within "social welfare/affairs" sections which preclude the cross-sectoral treatment of disability;
- There are also ambiguities associated with the definition of disability;
- There are constraints regarding representation and participation of disabled persons in the African Union;
- Unavailability of pertinent research/data of persons with disabilities in the African Union human rights system;
- Less acceptance and accessibility in the justice system;
- Less attention in emergency situations, mainly in cases of conflict and security problems;
- Deprivation of proprietary rights;
- Absence of a binding African instrument on the rights of PWDs which ensures adequate protection at the regional level;
- Inaccessibility to buildings and information.

## **1.3. Objective of the Research**

### **1.3.1. General Objective**

The overall objective of the research is to assess the protection of human rights of persons with disabilities in light of the African Union legal and policy framework *vis-à-vis* international human rights instruments, regional African human rights instruments and general existing situations.

### **1.3.2. Specific Objectives**

1. Assess to what extent and manner the rights of persons with disabilities are recognized under African human rights instruments;
2. Assess and analyze international human rights instruments, with a particular emphasis on the UN Convention on the Rights of Persons with Disabilities (UNCRPD);
3. Identify challenges that often encounter persons with disabilities in Africa that stem from cultural stereotypes, negative attitudes, and lack of good governance;
4. Elucidate the correlation of human rights and disability;
5. Critically examine the institutional role of the African Union in relation to persons with disabilities;
6. To raise the awareness of the community that persons with disabilities must be a part of social protection and enjoy their fundamental rights without any discrimination;
7. Appraise the interest, initiation and commitment of the African Union Commission to work together with organizations of persons with disabilities, otherwise known as DPOs (Disabled Peoples' Organizations);
8. Assess the overall mechanisms which are employed by the African Union institutions such as the African Human Rights Commission, African Court of Human Rights and different rules and procedures applicable on cases that persons with disabilities often encounter; and
9. Appraise the role of African sub-regional organizations in the protection of human rights of persons with disabilities.

## **1.4. Scope of the Research**

The research is primarily hinged upon analyzing the protection of the human rights of persons with disabilities within the African Union human rights framework. Thus, the overall research undertaking is limited to appraising existing legal framework(s) of (OAU/AU) in promoting and protecting the rights and interests of PWDs.

## **1.5. Methodology**

### **1.5.1. The Research Method**

The method adopted by this research is what is often referred to as the *legal research method*, which aims to explore available legal provisions (or the absence thereof) on a particular point/theme. The legal research method is, thus, a process of identifying and retrieving information necessary to support legal decision-making. It examines each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation.<sup>22</sup>

Besides, the qualitative research method is meticulously employed, through which relevant data were collected and analyzed.

### **1.5.2. Tools of Data Gathering**

The researcher has collected data through various techniques in which both primary and secondary sources of data have been utilized.

#### **A. Primary data:**

Under the primary data, the policy and legal framework which include AU Policy framework to social protection, the Charter of the OAU, the OAU Agreement for the Establishment of the African Rehabilitation Institute (ARI), the African Charter of Human and Peoples rights

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<sup>22</sup> Prof (Dr) Khushal Vibhute and Filipos Aynalem, *Legal Research Methods Teaching Material*, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p. 22.

(ACHPR), the African Charter on the Rights and Wellbeing of the Child and the African Youth Charter, and to some extent interviews, questionnaires and observation have been used.

### **B. Secondary data:**

Such as published books, journals, magazines, research, and accredited websites have been utilized as secondary sources.

In addition, comparative experiences of few African countries are considered to examine the system of protecting and promoting the human rights of PWDs. These countries are: Ethiopia, South Africa and the Republic of Uganda.

What's more, the researcher participated in various workshops conducted by the African Union, and has obtained input from the disability-related departments of the AU and from participants of the different meetings attended.

The researcher has exerted maximum effort to seek and indicate pertinent solutions and recommendations. In order to tackle the existing discriminations, marginalization and socio-economic and political exclusions affecting persons with disabilities in Africa, normative and institutional mechanisms are analytically studied, apart from international human rights instruments, so as to identify current organizational and practical challenges. Different cases brought before the African human rights court regarding the human rights of disabled persons are also reviewed in a bid to provide an assessment of the status-quo, as well as indicate potential ways forward.

## **1.6. Significance of the Research**

As existing facts indicate, only a limited extent and number of research has been conducted in relation to the protection of the human rights of persons with disabilities in Africa *vis-à-vis* the African Union framework. Thus, this research plays a vital role in providing relevant information and useful insights for different stakeholders that work together with African Union. Furthermore, it also serves as a source of alternative views in articulating the relationship between and among pertinent legal instruments, policies and strategies, international conventions and practical conditions that are directly and indirectly related to persons with disabilities in Africa. Having reckoned the aforementioned facts:

1. The author of this research indicates the gaps concerning the protection of the human rights of persons with disabilities which are visible in the African Union Commission, thereby assisting in seeking solutions;
2. The research serves as a baseline for further studies by students, instructors and researchers of higher learning institutions, as well as for policy makers, legislators and public service providers inside and outside the African Union to make policies and develop strategies;
3. It enables persons with disabilities to know the existing challenges of human rights in Africa, which stem from laws, culture, attitudes, thus indicating directions of taking action in maintaining their best interests;
4. It sensitizes concerned bodies to ensure the rights of persons with disabilities in all aspects of life.

### **1.7. Basic Research Questions**

1. Does the African Union policy framework incorporate the human rights protection of persons with disabilities?
2. How is the protection of rights of people with disabilities guaranteed in the African human rights system?
3. What institutional role is the African Union playing in reference to ensuring the rights and equality of PWDs?
4. What is the role of African sub-regional institutions are playing in the protection and promotion of the rights of PWDs?

### **1.8. Limitation of the Research**

Some of the limitation faced by the researcher include, but are not limited to: inaccessibility of relevant reference materials, given the fact that the researcher is a student with visual impairment. Thus, literature collection was extremely difficult due to the absence of Braille materials. In addition, reluctance of respondents to respond to interviews and questionnaires was another challenge. It was almost impossible to obtain information regarding the human rights

protection of PWDs from the African Union Commission itself. Finally, budget constraints were among the limitations that challenged the conduct this research.

## **1.9. Organization of the Thesis**

The research comprises five chapters, each discussing relevant themes in relation to protection of the human rights of persons with disabilities within the African Union human rights system. Accordingly, the first chapter consists of the introductory parts of the research which deals with the background information to the study, the statement of the problem and objective of the study, research methodology, scope and limitation, significance of the research, basic research question and organizational structure of the thesis.

The second chapter deals with literature review that discusses the definition, and concepts of human rights, definition of persons with disabilities, theoretical approaches to disability, correlation of human rights and disability and International human rights instruments in light of persons with disabilities.

The third chapter deals with the general situation of disability in Africa, examining pertinent policy frameworks and the African regional human rights instruments such as, the Charter of the Organization of African Unity, the OAU Agreement for the Establishment of the African Rehabilitation Institute (ARI), the African Charter of Human and Peoples rights (ACHPR), The African charter on the rights and wellbeing of the child and The African Youth Charter and the Protocol of the African Charter on Human and Peoples' Rights, the Protocol on Rights of Women in Africa. On top of this, AU institutional framework such as the African human rights commission, court of human rights and court of justice are examined. The fourth chapter deals with an African Union Disability Architecture and experiences of few African states regarding protection of disability under their respective constitutions. The final chapter then deals with conclusions and recommendations.

All the chapters are divided into different subtopics, followed by reviews and discussions. The paper also includes abstract of the thesis, list of acronyms, acknowledgements and bibliographies.

## CHAPTER TWO

### 2. DEFINITIONS, CONCEPTS, THEORITICAL APPROACHS TO DISABILITY AND THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK TO PERSONS WITH DISABILITIES

#### 2.1 Definition and Concepts of Human Rights

At the outset, it is imperative to analytically consider some definitions and conceptual theoretical framework of human rights thereby exploring the basic features of human rights which in turn imposes the direct and indirect obligations on states. Globally, the language of human rights is controversial phrase owing to political significance which in turn shaped ideological perspectives. Before the present concept of human rights is known, the historical growth of rights and dignity of every person has passed different stages. For instance, among the known stages such as civil liberties and natural rights are some of the instances.<sup>23</sup> The American Declaration of Independence, hold that people are "endowed by their Creator" with certain rights,<sup>24</sup> or, like the French Declaration of the Rights of Man, describe human rights as "natural" and "sacred."<sup>25</sup> However, the phrase human right is thought to have coined and widely got acceptance since the Second World War "while the struggle for freedom from oppression and misery is probably as old as humanity itself".<sup>26</sup>

#### What are Human Rights?

Various people hold different notions of human rights. This proposition might initially appear "somewhat at odds with the commonly heard assertion that human rights are both universal and obvious (in the sense that they are derived from reason), which may suggest that human rights are unambiguous and uncontroversial."<sup>27</sup> However, there is in practice a lack of agreement on what human rights are.

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<sup>23</sup>Charles beitz, what human rights mean?, source: daedalus, vol.132, no.1. on international justice(winter, 2003), pp.36-46 published by: the mit press on behalf of American academy of arts & sciences, available at <http://www.jstor.org>, accessed:08/05/2009 12:17

<sup>24</sup>Ibid

<sup>25</sup>Baets, history of human rights, Elsevier science ltd 2001, pp.143-198.

<sup>26</sup>Ibid

<sup>27</sup>Marie-benedicte demour, what are human rights?, human rights quarterly 32(2010) published by the Johns Hopkins university press, pp.15-20.

Human rights are rights a person has because he or she is a human being. According to Jacques Donley “Human rights are, literally, the rights that one has simply as a human being. As such they are equal rights, because we are all equally human beings. They are also inalienable rights, because no matter how inhumanely we act or are treated we cannot become other than human beings.”<sup>28</sup>

Presumably, we are able to deduce from the above definition that Human rights are typically presented in terms of entitlements, correlative duties, claims, Trumps and remedies.<sup>29</sup> in the contemporary world, human rights are held primarily as moral rights, as international legal rights, and, in a growing number of countries, as national legal rights.<sup>30</sup>

## **2.1.2 The Fundamental Features of Human Rights**

### **2.1.2.1 Universalism**

All people everywhere in the world have human rights. An individual cannot voluntarily give them up. Nor can others take them away from him or her.<sup>31</sup> It is the idea that every person anywhere in the world, irrespective of citizenship or territorial legislation, has some basic rights, which others should respect.<sup>32</sup>

### **2.1.2.2 Indivisibility**

Human rights are indivisible. Civil, cultural, economic, political and social rights are all fundamental to the dignity of every human being.<sup>33</sup>

Consequently, they all have equal status as rights, and cannot be ranked in a hierarchical order. The realization of one right often depends, wholly or in part, upon the realization of others.<sup>34</sup>

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<sup>28</sup>Jack Donnelly, Human Rights, Democracy and Development, available at <http://www.jstor.org> accessed: 12/12/2011 10:49 published by: the Johns Hopkins University Press source human rights quarterly, vol. 21, No. 3 (Aug. 1999), pp. 608-632.

<sup>29</sup>Ibid.

<sup>30</sup>Jack Donnelly, Human Rights and Social Provision, Journal of human rights 7:2, available at <http://www.informaworld.com>, downloaded by: [New York University] on: 13 April 2009, published by routledge informa ltd registered in England and Wales date: 01 April 2008, pp. 123-138.

<sup>31</sup>Dianne Otto, Rethinking the “Universality” of Human Rights Law, Columbia Human Rights Law Review, 1997, p. 24.

<sup>32</sup>Id. P. 30.

<sup>33</sup>Sally Engle Merry, human rights and gender violence translating international law into local justice, published by university of Chicago press 2006, pp. 135-189.

### **2.1.2.3 Equality and Non-Discrimination**

All individuals are equal as human beings and are entitled to their human rights without discrimination of any kind.<sup>35</sup> There are positive and negative types of discrimination. Positive discrimination is a kind of “preferential or differential treatment of a certain group of people in order to remedy the injurious effects of historical unfair treatments or practices”.<sup>36</sup> Positive discrimination thus, can be understood and properly practiced in relation to PWDs within the context of proper concept of disability and sound legislative grounds.

There are three kinds of negative discrimination: discrimination in law [direct discrimination], discrimination in practice and indirect discrimination. Direct discrimination is the first type of negative discrimination, existing “when unequal treatment stems directly from laws, rules or practices making an explicit difference on one particular ground.”<sup>37</sup> On the other hand, discrimination in practice is “the specific attitude of a public authority or a private individual that treats unequally, persons or members of a group on a prohibited ground”.<sup>38</sup> Indirect discrimination presupposes “apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics.”<sup>39</sup>

## **2.2. Definition of Persons with Disabilities**

There are many different ways of understanding and interpreting disability. Disability is not a subjective condition of people, but depends on environmental, social and individual factors. According to the contemporary World Report on Disability of 2011, “Disability is complex, dynamic, multidimensional, and contested.”<sup>40</sup> However, there is no single definition of disability that sufficiently encompasses all. The terminology used in the disability discourse changes over time and takes different meanings from one language and culture to another. Many states and international organizations use different terms or phrases to express disabilities in their

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<sup>34</sup> Ibid.

<sup>35</sup> Abreham Worku and Woldesenbet Brehanemesqel, employment of persons with disabilities in the civil service of Ethiopia, Addis Ababa: help for persons with disabilities-organization [2005], pp.38-75.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Supra note at 3.

contextual framework. Various terms are employed to refer disability such as “disabled”, “disabled people”, “the handicapped”, “persons/people with disabilities” and “physical impairment”.<sup>41</sup> Nonetheless, though the above terms are employed, the term “disability” is to refer to their individual limitations. These limitations may include the conditions not to see, conditions not to hear, conditions that make it difficult or impossible to walk or to speak and conditions that make it harder to understand or learn.<sup>42</sup>

Various countries have tried defining disability in their context. Also specialized agencies like the World Health Organization, International Labor Organization and DPOs defined disability in their respective contexts in relation to their operational objective. For the purpose of this research, we can look at glance definitions given by African states such as Ethiopia and South Africa and definitions given by USA as well as ILO, WHO, the Convention on the Rights of Persons with Disabilities (CRPD).

### **2.2.1 Ethiopia**

The legal instrument that provides a definition of persons with disability within the Ethiopian context is an employment proclamation dealing with the rights of PWDs, which commonly known as “the Right to Employment of Persons with Disability Proclamation No. 568/2008.”

According to Article 2 (1) of this proclamation the phrase person with disability is defined as,

“A person with disability is an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discriminations.”<sup>43</sup>

According to this definition, with regard to equal employment opportunity, an individual could be termed as person with disability where three situations met. The first is physical, mental or sensory impairment. The second is also social, economic and cultural discrimination. The third,

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<sup>41</sup>Equality commission for Northern Ireland, promotion and education division, definition of disability the disability discrimination act 1995 for Northern Ireland booklet, revised march 2007, available at <http://www.equalityni.org>, accessed on Nov. 14, 2005.

<sup>42</sup>Jane Maxwell, Julia Watts Belser, and Darlena David, a health handbook for women with disabilities, published by Hesperian foundation 2007, pp.5-7.

<sup>43</sup>The right to employment of persons with disability proclamation no. 568/2008 art.2.

which is the outcome of the previous two elements, is reduction of equal employment opportunity right.<sup>44</sup> Thus, should a person faces one of physical, mental or sensory impairments and suffered from the reduction of equal employment opportunity due to social, economical and cultural discrimination based on his impairment, he shall be assumed with in the category of persons with disability.

### **2.2.2 South Africa**

In the Employment Equity Act,(EEA) adopted in 1998, people with disabilities are defined as:

“People who have a long-term or recurring physical or mental impairment which is substantially limit their prospects of entry into, or advancement in, employment”.<sup>45</sup>

Disability is defined under the Employment Equity Act within the employment Context. The Act provides for inclusive measures to enable people with disabilities to access the mainstream work environment. Workplace accessibility (including Transport) or reasonable accommodations are included in this legislation.<sup>46</sup>

### **2.2.3 United States**

“The term "disability" means,” with respect to an individual a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such impairment.”<sup>47</sup>

### **2.2.4 The International labor organization (ILO)**

In the last 50 years, the ILO, particularly through its disability program, has been working on the promotion of employment opportunities for disabled persons based on the principles of equal treatment, mainstreaming and community involvement.<sup>48</sup> As issues related to disabilities have

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<sup>44</sup>Ibid

<sup>45</sup>The South African employment equity act (EEA), 1998.

<sup>46</sup>Ibid

<sup>47</sup>Americans with disability act of 1990 as amended in 2008.

<sup>48</sup>Labor legislation guidelines”, available at

<http://www.ilo.org/public/english/employment/gems/intro/eoo/> accessed on June 1, 2011.

come to be seen as human rights, the principle of non-discrimination as well as productive work in conditions of freedom, equity, security and human dignity are increasingly emphasized.<sup>49</sup>

In fact, all the standards developed by the ILO apply to persons with disabilities either explicitly or implicitly.

According to the ILO Code of Practice on Managing Disabilities in the Workplace, published and adopted in 2001, disability means “An individual whose prospects of securing, returning to, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual or mental impairment”.<sup>50</sup>

### **2.2.5 The World Health Organization (WHO)**

In 2001 the World Health Organization launched the International Classification of Functioning, Disability and Health (ICF), aimed to acknowledging the latest developments concerning disability and to recognizing the relevance of social-cultural, environmental and medical elements in its conceptualization.<sup>51</sup>

In 1980 the World Health Organization (WHO) launched the International Classification of Impairments, Disabilities and Handicaps (ICIDH), aimed at providing a standard language and a framework for the description of conditions leading to disabilities, for the purpose of diagnosis and rehabilitation. This framework is based on the conceptual separation and the interrelation between the terms impairment, disability and handicap.<sup>52</sup> As a result, WHO renders the following definition to impairment, disability and handicapped.

#### **A. Impairment:**

“Impairment: any loss or abnormality of psychological, physiological, or anatomical structure or function”.

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<sup>49</sup>Ibid

<sup>50</sup>The ILO code of practice on managing disabilities in the work place, published and adopted in 2001.

<sup>51</sup>World Health Organization, the international classification of functioning, disability and health (icf), 2001.

<sup>52</sup>The World Health Organization, the international classification of impairments, disabilities and handicaps (Icidh), of 1980.

## **B. Disability:**

**Disability means** an “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”.

## **C. Handicap:**

**Handicap means** “A disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.”<sup>53</sup>

### **2.2.7 The United Nations Convention on the Right of Persons with Disability (UNCRPD)**

The United Nations convention on the Right of Persons with Disability (CRPD) is a binding human rights document issued in the 21<sup>st</sup> century. This document expresses disability “Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. Thus, the definition given in the above convention implies that disability is an evolving concept that needs to be considered in connection with the cultural and material conditions of each country.<sup>54</sup>

As the preceding definitions imply, disability is leaned to attend around three major thesis, these are:

- How disability is *best* defined *or* conceptualized?
- what impact does disability (however defined) have on persons with disabilities, particularly in terms of their "quality of life"?; and
- How ought we to *respond* to disability, either at the individual level or at the social level (questions of public policy and social justice)?<sup>55</sup>

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<sup>53</sup>Ibid

<sup>54</sup>The United Nation Convention on the Rights of Personas with Disabilities, 2006, art.1, available at <http://www.un.org/disabilites/converntionfull.shtml>.

<sup>55</sup>D. Christopher Ralston and Justin Ho, Philosophical Reflections on disability, philosophy and medicine volume 104, 2010, pp. 80-102.

To summarize the above definitions: disability is a complex concept, and as yet there is no definition of disability that has achieved international consensus. Moreover, this research profoundly depended upon definitions of disability as recognized by legal instruments. As it is known, Legal definitions of disability have tended to focus on the functional characteristics of those with disabilities rather than social stigma and unfavorable attitudes.

From these definitions, one can easily understand that the way in which we understand disability sets the parameters for our response to people with disability. This necessitates deep examination of the various models of defining disability and the theoretical developments thereof throughout the history of disability rights movement (DRM), which the researcher attempts to do in the next subsections.

### **2.3 Theoretical Underpinnings and Approaches of Disabilities**

As it is widely known among scholars who are engaged in disabilities studies, they have distinguished ample philosophical perspectives of disability theories at international level. Thus, we will ponder upon some of the disability approaches in this section. Since ancient time, the past record of disability is full of segregation, prejudice and stigmatization. Persons with disabilities frequently are isolated from social life, development activities, and education and from other human rights and democratic rights.<sup>56</sup>

Disability advocates increasingly built up the disability rights movement (DRM) since 1960s and 1970s and beyond with a view to throw reflection and conduct research on PWDs, insisting the development of social policies regarding disability by themselves. Consequently, the (DRM) advocated for the establishment of a new academic field, one that would eventually come to be called "disability studies."<sup>57</sup>

Meanwhile, the debate about different conceptualizations of disability is thought to have emerged in the 1970s within the disability movement in the United Kingdom. The academic

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<sup>56</sup>Julia Sloth-Nielsen, children's rights in Africa a legal perspective, university of the western cape, published by ashgate publishing limited ashgate publishing company 2008, pp.78-94.

<sup>57</sup>International disability rights compendium of 2003, the international disability rights monitor project p. 167.

Michael Oliver was the first to speak about models of disability in his book *Social Work with Disabled People* in 1983.<sup>58</sup>

Different activist developed ways of conceptualizing disabilities , like "minority group approaches of disability," according to which disabled persons constitute a distinct, and oppressed, minority; the notion of "disability as culture," according to which particular groups of disabled persons (e.g., those who are deaf) constitute a discrete culture and possess a unique cultural heritage; and the idea that disability can be conceptualized as a "diversity category" similar to race, gender, or sexual orientation.<sup>59</sup> Therefore, taking the above facts in to consideration, we will examine approaches of disabilities as follows.

### **2.3.1 The Charity Approach of Disability**

Charity approach focuses on the perception that entails Persons with disabilities are dependent and powerless and need to be cared for. Its basic principles are based upon aid protection, compassion pity and charitable donations. People offer moral and material assistance to persons with disabilities in a sense of pity and charity to address the need or discomfort of persons with disabilities.<sup>60</sup> The implication of this approach is promotion of the idea of responsibilities of societies towards disabilities can be accomplished through generous donations and services. This approach is often is employed by different charity and non-profit organizations. Similarly, also many social policies which are designed to uphold the rights of persons with disabilities such as education, employment and social security policies adopt charity approach.<sup>61</sup>

The charity approach encounters criticisms owing to the fact that it restricts rights of persons with disabilities through encouraging social marginalization's, isolation and shifting the focus away from the promotion of an inclusive society based on the respect of the rights of all individuals.<sup>62</sup> Critics also view that the approach limits the power and responsibility for taking

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<sup>58</sup>Francesca biasiato, with the assistance of Barbara Murray, Debra Perry, Simonettacavazza), *Mainstreaming disability equality in development/disability equality training (det)*, ilo international training center, p.36.

<sup>59</sup> Supra note at 56, pp. 21-50.

<sup>60</sup> Doris Zames Fleischer and Frieda Zames, *The Disability Rights Movement*, Temple University Press, Philadelphia, 2001, 193.

<sup>61</sup>Ibid

<sup>62</sup>Ibid

charge of their own lives and asserting their rights on an equal basis with others. This charity-based approach persists in many areas and affects the perception and treatment received by persons with disabilities.<sup>63</sup> For this reason, section of the society such as children and women with disabilities has been regarded as objects of charity and beneficiaries of welfare. Therefore, the *charity approach* of disability) infringes upon the inherent human rights and productive value of PWDs this is why The (DRM) advocated a shift from "demands for charity" on behalf of persons with disability, to a focus on "demands for civil rights".<sup>64</sup>

### **2.3.2 Medical Approach:**

Medical approach focuses on the nature and severity of the impairment caused by adverse event.<sup>65</sup> According to this approach, disability is a medical problem that needs to be solved or an illness that needs to be treated. This concept implies that a person with a disability is by hook or by crook is assumed to be broken or ill which in effect requires fixing or healing.<sup>66</sup> Broadly speaking, those who adhere to the medical approach of disability hold that the harm associated with disability is the result of something (a defect, flaw, etc.) inherent in the person who has the disability.<sup>67</sup> What we understand from this approach of disability, the exact nature and the severity of the impairment itself is considered as the root cause for the economic and social problems faced by persons with disabilities. As a result, persons with disabilities have been considered as personal and family tragedies.<sup>68</sup> Since it is a health issue the sole reaction to be taken depends on medical field through rehabilitation, corrective surgery, home assistance or institutionalized care. Like that of the above approach, medical approach is strongly criticized by many disability activists.

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<sup>63</sup>Id. P. 210.

<sup>64</sup> Dagnachew Bogale Wakene, *The Role of Disability Right Movements in the Ethiopian Development Agenda*, university of Stellenbosch faculty of health sciences, centre for rehabilitation studies (crs)

<sup>65</sup> Wayne Thomas Oakes, *perspectives on disability, discrimination, accommodations, and law a comparison of the Canadian and American experience*, published by lfb scholarly publishing llc New York 2005, p.73.

<sup>66</sup>Katharina C. Heyer, *the ADA on the road: Disability Rights in Germany*, available at <http://www.justo.org,accesses:14/10/2012 06:30> Your

<sup>67</sup>Ibid

<sup>68</sup>Ibid

The critics view this approach principles of human rights are not incorporated. Thus, individuals, societies, and governments avoid the obligation and responsibility of addressing the human rights obstacles that exist in the social and physical environment.<sup>69</sup>

The great disadvantage of this approach is that it casts disabled people in a subordinate role in their encounters with doctors, rehabilitation professionals, psychologists, and social workers who aimed to "help them" adjust to a society structured around the convenience and interests of the non-disabled.<sup>70</sup>

In this approach, factors related to the environment and the society is disregarded, because this approach does not inquire into the existence of prejudice or an exclusionary physical environment. So, since it aimed to address the "needs" of the disabled rather than recognize their civil rights, the medical approach frequently led to government policies that viewed assistance for the disabled as a group of welfare.<sup>71</sup>

### **2.3.3 The Social Approach**

The development of disability rights movement by disabled persons themselves and the accompanying theoretical developments led to the growth of a new thinking which does not blame individuals with disabilities but locates the problem with the environment and the society. Social approach focuses on the process through which people with impairments are disadvantaged and oppressed by the operation of external societal barriers.<sup>72</sup> The transition from an individual, medical perspective to a structural, social perspective has been described as the shift from a "medical Model" to a "social model" in which people are viewed as being disabled by society rather than by their bodies.<sup>73</sup> Those who adhere to the social approach of disability understand this harm to be the product of unjust social structures. The social approach of disability hold opposing views to medical conception of disability illustrated above for the reason that social model draws attention to do away with external societal forces which operate to exclude and to marginalize PWDs.

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<sup>69</sup>Ibid

<sup>70</sup>Ibid

<sup>71</sup> Ibid

<sup>72</sup>Supra note at 3.

<sup>73</sup>Ibid.

Such barriers can be physical (exclusion from the built environment), institutional (discrimination in legal, educational or political institutions), attitudinal (stereotypes and negative attitudes by non-disabled people) and concerning communication and information.<sup>74</sup>

It is based on this fact why the proponents of social approach consider disability as “the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers.”<sup>75</sup>

The social approach has not been free from academic controversy. This has largely concerned its inability to address the entirety of the experience of, and the limitations imposed on, disabled people. From a social approach perspective, disability is therefore a socio-political issue, which implies a radical shift in priorities within policy-making and service provisions. The focus should no longer be on the individual with disabilities and her/his special needs, but rather on the individual citizen with a whole range of needs some of which may be determined by an impairment and on the removal of disabling barriers.<sup>76</sup>

#### **2.3.4 Human Right Approach to Disability**

Human rights Approach to Disability focuses on the inherent human rights of persons with disabilities.<sup>77</sup> This approach underlies a number of international and regional human rights instruments and development frameworks as recognized by various entities such as national and international organizations and institutions mainly the UN system and other intergovernmental organizations, NGOs and governmental development agencies. The human rights approach draws its attention on procedural and mechanisms that can bring change on the existing perception towards PWDs.<sup>78</sup> Hence, the approach significantly has gained a wider acceptance among scholars and disability movement activists because it:

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<sup>74</sup>Ibid.

<sup>75</sup>Anna Lawson, *Disability and Equality Law in Britain*, 2008.

<sup>76</sup> Giampiero Griffo and Francesca Ortali Ulaanbaatar, *Training Manual on the Human Rights of Persons with Disabilities*, the National Federation of DPOs of Mongolia in promoting and defending the rights of people with disabilities, published by “best colour international” printing house jamyangun street, sukhbaatar district, horoo #1, Ulaanbaatar 2007, pp. 57-90.

<sup>77</sup>Manfred Nowak and Ingeborg Schwarz, *Handbook for Parliamentarians*, office of the United Nations High Commissioner for Human Rights, printed in France by Sadag, Bellegarde-sur-Valserine 2005, pp.48-80

<sup>78</sup>Ibid

- Identifies persons with disabilities as rights holders and subjects of human rights law on an equal basis with all people
- Recognizes and respects person's with disability as an element of natural human diversity, on the same basis as race or gender, and addresses the disability-specific prejudices, attitudes and other barriers to the enjoyment of human rights
- Places the responsibility on society and governments for ensuring that political, legal, Social, and physical environments support the human rights and full inclusion and participation of people with disabilities.<sup>79</sup>

Thus, this approach insists on the fulfillment of all human rights and on the responsibilities to be exerted by the society in removing the existing barriers. The central part of this element is discussed here under which includes mainly participation, empowerment and accountability.<sup>80</sup>

#### **2.3.4.1 Participation:**

A human rights approach to disabilities refers that PWDs ought to be inquired and participate in the process of decision making and development activities to facilitate accessibility of PWDs to justice administration, social structure, economic and political affairs.<sup>81</sup> Therefore, all stakeholders need to consult PWDs in every stage of international, regional and national development agenda.

#### **2.3.4.2 Empowerment**

A human rights approach to disability aims to empower people with disabilities to make their own choices, advocate for themselves, and exercise control over their lives through their advocates or civil society organizations.<sup>82</sup> This concept empowers all PWDs as the owners of rights rather than the mere recipient of services thereby recognizing the need for a shift in power relations, in order for every individual to be able to enjoy her or his rights.<sup>83</sup>

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<sup>79</sup>Ibid.

<sup>80</sup>Ibid

<sup>81</sup>Ibid

<sup>82</sup>Ibid

<sup>83</sup>Ibid

### **2.3.4.3 Accountability**

This concept refers to the need for identifying the so-called duty-bearers namely State or non-State actors and holding them accountable for fulfilling their obligations towards rights-holders, whether that implies a positive effort (to protect, promote and provide) or simply a negative one to abstain from violations.<sup>84</sup>

## **2.4 Correlation between Human Rights and Disability**

As many disability movement activists stands for, disability is a human rights issue because PWDs struggle to maintain their values to be equally treated like that of other non-disabled persons in all kinds of entitlements and respective claims. There are core principles to be considered while engaging in the protection of the rights of PWDs. Among these principles: dignity, autonomy, equality and inclusion.<sup>85</sup> Examining these principles has a great importance in general terms and in the context of disability.

### **2.4.1 Human Dignity of Disability**

Human dignity refers the perceptions of a person's worth). It is the anchor norm of human rights. Each individual is deemed to be of inestimable value and nobody is insignificant.<sup>86</sup>This why the universal declaration of human rights here after “UDHR” utters "all human beings are born free and equal in dignity and rights" and are "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>87</sup>People are to be valued not just because they are economically or otherwise useful but because of their inherent self-worth.

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<sup>84</sup> Ibid

<sup>85</sup> A report presented by madameeva Jacqueline etonguemayer consultant, study on the rights of persons with disabilities in Cameroon, African union of the blind (Afub)and the Cameroon national association for the blind (cnab), august 2007, p.31.

<sup>86</sup> Ibid

<sup>87</sup> The United Nations Universal Declaration of Human Rights, Resolution 271 a (iii), 10 December 1948.

People with disabilities were often treated in the past as objects to be protected or pitied. The crucial change came when they saw themselves (and were seen by others) as subjects and not as objects.<sup>88</sup>

### **2.4.2 Autonomy**

Autonomy refers to ability to make choices and decisions on issues that affect one's own life.

It entails opening up a free space for voluntary action based on a person's conscience and freely made life choices, while preserving comparable liberty for others.<sup>89</sup>

The value of autonomy is based on the presumption of a capacity for self-directed action and behavior. It thus rests on the implicit image of a "morally free" person an image that has long been deeply contested.<sup>90</sup>

### **2.4.3 Equality**

Equality, having the respect for differences and handicaps and being able to participate fully on equal terms.<sup>91</sup> Human equality, a related value, is also central to the system of basic freedoms postulated by human rights law. Its core premise is that all persons not only possess inestimable inherent self-worth but are also inherently equal in terms of self-worth, regardless of their difference. Thus, distinctions between persons stemming from factors that are arbitrary from a moral point of view (race, gender, age, disability) should be treated as having no rational foundation and therefore invalid.<sup>92</sup>

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<sup>88</sup>Gerard Quinn and theresia degener with anna bruce, Christine burke, dr. Joshua castellino, padraickenna, Dr, Ursula kilkelly, shivaun quinlivan, human rights and disabilities, the current use and future potential or United nations human instruments in the context of disability, published by United Nations New York and Geneva, 2002,pp.89-149.

<sup>89</sup>Supra note at 86.

<sup>90</sup> Ibid.

<sup>91</sup>Ibid.

<sup>92</sup>Ibid.

This is not to say that there are no differences between people. In positive terms, it means that a genuinely equal society is one that has a positive approach to and positively accommodates human difference.<sup>93</sup>

#### **2.4.4 Inclusion**

Inclusion refers to being recognized and valued as equal participants and having needs understood as integral to the social and economic order and not identified as special needs.<sup>94</sup>

### **2.5 International Human Rights Instruments in Light of Persons with Disabilities**

International human rights instruments recognize range of human rights which guarantee fundamental freedoms and equality of human beings. These instruments encompass a variety of rights like civil and political rights, economic, social and cultural rights, environmental and developmental rights and the different mechanisms by which these rights should be implemented.<sup>95</sup> According to the United Nations treaty making system, human rights treaties are classified in to hard and soft law treaties. Hence, there are core hard human rights treaties formulated by the United Nations that lays obligations to protect, respect and promote upon states.<sup>96</sup> Among these hard laws, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)(1949); the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979); the Convention on the Rights of the Child (CRC) (1989); and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966) and Convention on the rights of persons with disabilities (CRPD).<sup>97</sup>

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<sup>93</sup>Ibid.

<sup>94</sup> Ibid.

<sup>95</sup>Thomas Pogge, the International Significance of Human Rights, Published by Columbia University New York, May 1999, p.12.

<sup>96</sup>Hermien kotze, status of disability rights in southern Africa, published jointly by the open society initiative for southern Africa, and the open society foundations disability rights initiative 2012, p.32.

<sup>97</sup> Ibid.

All the conventions stipulate the principle of non-discrimination. Each of these hard laws theoretically applies and with an exception of (CRPD) implicitly protects persons with disabilities, but to varying degrees.<sup>98</sup> The rights of people with disabilities are included under the umbrella of universal non-discrimination principles.<sup>99</sup>

## **2.5.1 The United Nations Charter and the Universal Declaration of Human Rights in the Context of Disability**

### **2.5.1.1 The United Nations Charter**

The Charter of the United Nations requires member States to respect human rights for all without any distinction as to race, sex, language or religion and forms the nucleus for the protection of rights for human beings.<sup>100</sup> Certain articles of the Charter provide the foundation for the protection of human beings. We may mention some of these articles as follows:

Article 1 (3) states that the purpose of the United Nations is " to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction ".<sup>101</sup>

Article 13 (1) (b) states that the General Assembly "shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational, and health field, and assisting in the realization of human rights and fundamental freedoms for all".<sup>102</sup>

Article 55 (a) states that the "United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development."<sup>103</sup> Furthermore, article 55 (c) provides that the "United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all."<sup>104</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> Supra note at 89.

<sup>100</sup> Paragraph 2 of Preamble of Charter of the United Nations, San Francisco, 1945.

<sup>101</sup> Ibid, art. 1.

<sup>102</sup> Ibid, art. 13.

<sup>103</sup> Ibid, art. 55.

<sup>104</sup> Ibid.

As we could have seen from the above specific provisions of the charter, no specific reference has been made to disabilities. Rather the UN Charter draws attention to collective affairs such as security, stability, and maintaining the peace of the member states.<sup>105</sup>

### **2.5.1.2 Universal Declaration of Human Rights (UDHR)**

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948. The Universal Declaration of Human Rights forms the fundamental normative basis on which international norms and standards where the principles of human rights have evolved.<sup>106</sup> It sets out the fundamental principle that “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”.<sup>107</sup> However, the UDHR is a statement of intent or a set of principles; it is not a legally binding document.<sup>108</sup>

The Universal Declaration contains a number of provisions, which constitute the foundation for resolutions regarding disabilities based on the principle of equal rights. They are as follows:

Article (1) states: “all human beings are born free and equal in dignity and rights.”<sup>109</sup>

Article 2 provides that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex or other status”<sup>110</sup>

Article 7 states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to protection against any discrimination and against any incitement to such discrimination.”<sup>111</sup> Furthermore, article 25 the sole provision which mentions disability in saying “everyone has “the right to security in the event of

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<sup>105</sup>Supra note at 101.

<sup>106</sup>Michael Ashley Stein, *Beyond Disability Civil Rights*, published by Cornell University 2007, available at <http://digitalcommons.ilr.cornell.edu/gladnetcollect/334>, accessed on 6.11.2012.

<sup>107</sup>Supra note at 88 para.2 of the preamble of the United Nations declaration of human rights of 1948.

<sup>108</sup>Supra note at 101.

<sup>109</sup> Supra note at 108 art. 1.

<sup>110</sup> Ibid art. 2.

<sup>111</sup>Ibid art. 7.

unemployment, sickness, disability, (...) or other lack of livelihood in circumstances beyond his control."<sup>112</sup>

## **2.5.2 The United Nations Hard Law Treaties and their Relevance to Disability**

### **2.5.2.1 International Convention on Civil and Political Rights (ICCPR)**

Although the drafters of the Covenant did not have people with disabilities in mind, they are clearly covered by its provisions. For one thing, the Covenant is universal in the sense that it covers all human beings. Unlike other treaties such as CEDAW or the CRC, it does not focus on a specific population group. Second, the statement in the Preamble to the Covenant that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" can certainly be interpreted to include persons with disabilities. Lastly, while it is true that disabled persons are not explicitly mentioned by the ICCPR, it is by now clear that disability is covered by the term "other status" in articles 2 and 26, which together constitute the non-discrimination clauses of the treaty.<sup>113</sup> The provisions on anti-discrimination in the ICCPR have special relevance to rights of persons with disabilities. These rights are as follows:

The right to life (article 6) and the right to freedom from torture and other cruel, inhuman or degrading treatment and punishment (article 7) have special relevance to disability.<sup>114</sup> The right to be recognized as a person before the law (article 16) too has special significance to persons with disabilities. Both articles 14 and 15 recognize the right to access to justice, including the right to the free assistance of an interpreter in court.<sup>115</sup>

### **2.5.2.2 International Convention on Economic, Social and Cultural Rights (ICESCR)**

The provisions of the ICESCR pertaining to anti-discrimination relate to rights of persons with disabilities. Article 2, paragraph 2 of the Convention encourages states parties to, "undertake to

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<sup>112</sup>Ibid art. 25.

<sup>113</sup>Supra note at 107.

<sup>114</sup>Art.6 and 7 of the International Covenant on Civil and Political Rights, Resolution 2200 a (xxi), 16 December 1966.

<sup>115</sup>Ibid. article 14, 15 and 16.

guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>116</sup> Like that of the above convention, it is hardly possible to see disability related provisions in explicit terms. However, this convention under its general comments recognizes the rights of PWDs as discussed here under.

According to General Comment No.3 of the Committee on Economic, Social and Cultural Rights, states must take steps which are deliberate, concrete and targeted and must be taken within a reasonably short time after the Covenant's entry into force in a particular country.<sup>117</sup> General Comment No.3 also emphasizes that “even in times of severe resource constraint the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted program.”<sup>118</sup>

General Comment No. 5 is a definitive analysis of the States party’s obligations under the ICESCR in the context of disability. It recognizes that:

"[t]hrough neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services."<sup>119</sup>

States parties are encouraged to take affirmative action to “reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.”<sup>120</sup> Further, states parties are, “required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from

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<sup>116</sup>Art.2 para.2 of International Covenant on Economic, Social and Cultural Rights, Resolution 2200 a (xxi), 16 December 1966.

<sup>117</sup>General Comment No.3 of the Committee on Economic, Social and Cultural Rights.

<sup>118</sup>Ibid.

<sup>119</sup>General comment no.5 of the Committee on Economic, Social and Cultural Rights,

<sup>120</sup> Ibid par 9.

their disability."<sup>121</sup> The General Comment No. 5 also states that, "it is also necessary to ensure that support services, including assistance devices are available for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights."<sup>122</sup>

However, the ICESCR is not merely about the non-discriminatory enjoyment of economic, social and cultural rights. It is also concerned with floor standards for the enjoyment of such rights. For example, in General Comment No. 4 on the right to adequate housing, the Committee states that disadvantaged groups, such as "the physically disabled" and "the mentally ill" must enjoy "full and sustainable access to adequate housing resources" and that "housing law and policy should take fully into account the special housing needs of these groups."<sup>123</sup>

### **2.5.2.3 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is of special importance in preventing disability as a result of torture. In furtherance of its obligations under the Convention, states parties are to take necessary steps under Article 2 of the convention.<sup>124</sup>

### **2.5.2.4 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

The Convention on the Elimination of All Forms of Discrimination against Women covers all women, whether disabled or not. Women with disabilities face discrimination both because of their gender and disability. Moreover, certain gender specific cultural or traditional practices can cause disability among women as well as cause further harm to disabled women.<sup>125</sup>

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<sup>121</sup>Ibid par 5.

<sup>122</sup>Ibid par 33,

<sup>123</sup>General Comment 4 of the Committee on Economic, Social and Cultural Rights

<sup>124</sup>The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1949.

<sup>125</sup>The United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1979.

### **2.5.2.5 Convention on the Rights of the Child (CRC)**

Unlike other human rights conventions, the Convention on the Rights of the Child in article 23 focuses directly on children with disabilities. Even though no direct obligations have been placed on state parties to take measures to ensure that children with disabilities enjoy a life of dignity, self-reliance and integration with the community, article 23, paragraph 1-4 recognizes the importance of participation in the community, education, training health care, rehabilitation employment and recreation opportunities for children with disabilities.<sup>126</sup> The Committee on the Rights of the Child has however established that the fact that article 23 is dedicated to children with disabilities should not mean that the rights of children with disabilities are confined to that article.

### **2.5.2.6 The International Convention on the Elimination of All Forms of Racial Discrimination**

The International Convention on the Elimination of All Forms of Racial Discrimination, like CEDAW is aimed at preventing double discrimination. Persons with disabilities of particular racial or minority groups are more vulnerable to discrimination on account of both race and disability.<sup>127</sup> The Convention, as noted by General Recommendation XXV of the Committee on the elimination of All Forms of Racial Discrimination covers gender related racial discrimination and by analogy, an inference could be drawn that it covers disabled persons of different racial or ethnic groups.<sup>128</sup>

### **2.5.3 United Nations Soft Laws and Programs**

In contrast to hard law treaties that do not enumerate specific disability protections, a number of soft laws expressly provide protection for PWDs.

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<sup>126</sup>, Art.23 para.1-4 the United Nations Convention on the Rights of the Child (CRC) of 1989.

<sup>127</sup>The United Nations International Convention on the Elimination of all Forms of Racial Discrimination

<sup>128</sup> Supra note at 89.

### **2.5.3.1 Declaration on Mentally Retarded Persons**

In 1971, the Declaration on the Rights of Mentally Retarded Persons was adopted by the General Assembly. Article 1 of the Declaration on the Rights of Mentally Retarded Persons proclaims that mentally retarded persons have the same rights as other human beings.<sup>129</sup> In addition, Article 2 states that mentally retarded persons have the right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable them to develop their ability and maximum potentials.<sup>130</sup> Also, mentally retarded persons have the right to economic security and a decent standard of living (article 3).<sup>131</sup> Article 6 provides that mentally disabled persons have a right to protection from exploitation, abuse and degrading treatment. Furthermore, the Assembly declared that there should be legal safeguards available to protect the mentally retarded from abuse.<sup>132</sup>

### **2.5.3.2 Declarations on the Rights of Disabled Persons**

Declaration on the Rights of Disabled Persons adopted in 1975. In the Declaration, the General Assembly called for "national and international action to ensure that it will be used as a common basis and frame of reference for the protection of [the rights contained within the Declaration]"<sup>133</sup> Article 4 asserts broad social and economic rights for disabled persons and provides that disabled persons have the same civil and political rights as other human beings.<sup>134</sup> Article 5 provides that "disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible."<sup>135</sup> Article 6 states that persons with disabilities have the "right to medical, psychological and functional treatment to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counseling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes

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<sup>129</sup> Art.1 the United Nations Declaration of the Rights of Mentally Retarded Persons, Resolution 2856 (xxvi), 20 December 1971.

<sup>130</sup> Ibid art 2.

<sup>131</sup> Ibid art 3.

<sup>132</sup> Ibid art 6.

<sup>133</sup> Preamble of the United Nations Declaration of Rights of Disabled Persons, Resolution 3447 (xxx), 9 December 1975.

<sup>134</sup> Ibid art 4.

<sup>135</sup> Ibid.art.5.

of their social integration or reintegration."<sup>136</sup> Article 10 states: "Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature." The Declaration further requires that disabled persons be "provided with qualified legal aid where such aid is indispensable for the protection of disabled persons themselves and their property"<sup>137</sup>

### **2.5.3.3 The World Program of Action Concerning Disabled Persons (WPA)**

One of the most important outcomes of the International Year of Disabled Persons was the formulation of the World Program of Action Concerning Disabled Persons, which was adopted by the General Assembly in 1982. The World Program represents the first worldwide international long-term policy in relation to disabled persons.<sup>138</sup> The Program proposed three actions:

1. Prevention of mental, physical and sensory impairments;
2. Rehabilitation to assist disabled persons to reach their optimum mental, physical, and social capacities;
3. Equalization of opportunities for persons with disabilities in areas including housing, transportation, education, social and medical well-being and recreation<sup>139</sup>

The purpose of the world Program is to promote effective measures for prevention of disability, rehabilitation and the realization of the goals of Full Participation of disabled persons in social life and development and of Equality. The Program adds a human rights dimension by recognizing the Equalization of Opportunities as an important objective for achieving full participation by disabled persons in all areas of life.<sup>140</sup>

The Program marks a shift towards a rights based model and an explicit recognition of the right of all persons to equal opportunity. In paragraph 12, the WPA defines "equalization of

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<sup>136</sup>Ibid art 6.

<sup>137</sup>Ibid.art.10.

<sup>138</sup>Michael Ashley stein, disability human rights reviewed work, published by California law review, vol. 95, no. 1(feb.2007), pp. 75-121, available at <http://www.jstor.org/stable/20439088>.accessed:19/07/201211.

<sup>139</sup>United Nations World Program of Action Concerning Disabled Persons, Resolution 37/52, 3 December 1982, Paragraph 69.

<sup>140</sup>Supra note at 139.

opportunities" as, "the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all".<sup>141</sup>

The General Assembly declared the period of 1983 to 1992 the United Nations Decade of Disabled Persons. The General Assembly encouraged Member States to use the decade to implement the World Program of Action.<sup>142</sup>

#### **2.5.3.4 The Standard Rules on the Equalization of Opportunities for Persons with Disabilities**

The Standard Rules consist of four major sections: 1) Preconditions for equal participation; 2) Target areas for equal participation, 3) Implementation measures; and 4) Monitoring mechanisms.<sup>143</sup>

The Rules summarize the message of the World Program of Action concerning Disabled Persons and are designed to provide Governments with policy guidelines and options, which can be incorporated into national legislation. The long-term strategy presents a framework for collaborative action at the national, regional and international levels to achieve the aim expressed by the Assembly in resolution 48/99 of a society for all by the year 2010.<sup>144</sup>

Although The Standard Rules on the Equalization of Opportunities for Persons with Disabilities are not legally binding and do not have the full force of law, they have been adopted by a large number of States and imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for disabled persons. The Standard Rules is, in fact, the first universal instrument to refer specifically to disabled persons, as well as to contain an extremely broad statement of the rights to equal opportunities.<sup>145</sup>

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<sup>141</sup> Supra note at 140, paragraph 12.

<sup>142</sup> Ibid

<sup>143</sup> The standard rules on the equalization of opportunities for persons with disabilities, 48/96, 20 December 1993.

<sup>144</sup> Ibid

<sup>145</sup> Ibid

## **2.6 The Convention on the Rights of Persons with Disabilities (UNCRPD)**

### **2.6.1 The Need for the Convention on the Rights of Persons with Disabilities**

As seen from the above discussions, the UN General Assembly has adopted various resolutions and declarations addressing the rights of disabled persons. Then, a question arises as to why the UN member states began to contemplate on the adoption of a binding international convention on disability. At this point, it will be important to mention some of the reasons for the need of adopting a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.

To begin with, the philosophical approach of many of the declarations concerning disabled persons (particularly the older ones) was inconsistent with the principle of equality and full societal inclusion of disabled persons, as they were based on a medical model of disability.<sup>146</sup> Secondly, the non-binding nature of these declarations meant that they were infrequently implemented by governments.<sup>147</sup> Thirdly, the measurement of the implementation of the documents related to disabled persons was not insured through monitoring mechanisms. It was only the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities that has a Special Reporter to monitor its implementation.<sup>148</sup> Finally, despite the fact that binding international law has always been equally applicable to persons with disabilities, governments and treaty monitoring bodies have not historically been attentive to the situation of persons with disabilities and the barriers they have faced.<sup>127</sup>

As a result of these factors, the international community began to realize that disabled persons have essentially been excluded even within the public international law system while disability being a necessary component in development. Historically, disability has been defined and treated solely as a medical condition. Now the global paradigm is shifting, in large part because people with disabilities are the subjects of profound political and social discrimination.<sup>149</sup> The international community is increasingly focused on those aspects of disability that is deeply

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<sup>146</sup>Dejong, independent living: from social movement to analytic paradigm”, archives of physical-medicine and rehabilitation, vol.60, no 10, (October 1979), 443.

<sup>147</sup>Ibid, p. 10.

<sup>148</sup> J. Morris, “feminism and disability”, feminist review, no.43, (spring 1993), p.68

<sup>149</sup>. Ibid p. 94.

interconnected with human rights. Therefore, the Convention on The Rights of Persons with Disabilities is adopted by the General Assembly on 13 December 2006.<sup>150</sup>

### **2.6.2 Specific Rights Guaranteed by the Convention on the Rights of Persons with Disabilities**

This convention specifically protects the civil and political, economic, social and cultural rights of PWDs. Among the first- and second-generation rights enumerated are: rights to life, equality, Expression, privacy, education, employment, health, habilitation and rehabilitation, social benefits, Political and social participation, access to public venues, mobility independence, recreation, as well as freedom from discrimination, torture and abuse.<sup>151</sup> The Convention tries to give emphasis to the widespread nature of disability-related discrimination and the need for its universal suppression. Here, it will be of great significance to understand that the Convention does not seek to create new rights for disabled persons. But rather, it is intended to help in the clarification of the obligations of governments related to disabled persons, and also to encourage the mainstreaming of disability throughout the public international law system.<sup>152</sup>

Unlike the previous non-binding instruments of the UN related to disability, the Convention establishes a committee of experts to monitor its implementation at the international level, and it also provides for the operation of independent national level monitoring mechanisms. Therefore, the provisions of the Convention serve as an authoritative commentary on the manner in which countries should fulfill their obligations towards disabled persons. Experience of countries that have legislations related to disability has shown that change comes more rapidly when laws are in place.”<sup>153</sup>

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<sup>150</sup>Malcolm MacLauchlan Leslie Swartz, disability & international development towards inclusive global health, center for global health group & school of psychology university of Dublin trinity college, printed by springer science +business media, llc 2009.p.107.

<sup>151</sup>. Id. P. 105.

<sup>152</sup> The United Nations the convention on the rights of persons with disabilities (CRPD) adopted by the general assembly on 13 December 2006.

<sup>153</sup> S. French, “disability, impairment or something in between?”, in swain, J.,finkelstein, v., French, s. and Oliver, M.(eds) disabling barriers-enabling environments,(1993) p.17.

As a result, the Convention is anticipated to bring about and guide the passage and reform of domestic legislation ensuring substantive equality and non-discrimination for persons with disabilities, thereby bringing about inclusive development that changes the lives of them.<sup>133</sup>

### **2.6.3 The Major Paradigm Shift of the Convention on the Rights of Persons with Disabilities CRPD from the Previous International Instruments on Disabilities**

The major shift of the CRPD from the previous international instruments concerning disabled persons (especially from older declarations) is in its understanding of the concept of disability. The Convention is based on an understanding that disability is an evolving concept that results from the interaction between a person and his/her environment, and that disability is not something that resides in the individual as the result of some impairment.<sup>154</sup> The most important implication of this understanding is that those interpreting and implementing the Convention are left free to utilize differing conceptualizations of disability as they evolve over time. At the same time, this provision is very important in identifying the obstacles that hinder the full realization of the rights of persons with disabilities and in determining appropriate remedies.

Again, one of the Preamble paragraphs of the Convention recognizes that disabled persons are a heterogeneous group encompassing people with a range of impairments/functional capacities from a wide variety of social, ethnic and religious contexts.<sup>155</sup> These heterogeneous persons with disabilities, however, continue to face human rights violations and barriers to their full inclusion and participation as equal members of society despite the existence of various instruments and undertakings.<sup>156</sup> In addition, the CRPD clearly stipulates that the majority of disabled persons live in “conditions of poverty.”<sup>157</sup> As a result, the CRPD prescribes that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.<sup>158</sup>

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<sup>154</sup> Id, p. 18.

<sup>155</sup> Id, p. 19

<sup>156</sup> Ibid.

<sup>157</sup> Id, p. 18.

<sup>158</sup> Id, p. 21.

On the top of the preamble, the provision of the CRPD worth considering here is the one dealing with awareness-raising. As can clearly be understood from the discussions of the above sections, one of the underlying causes of discrimination based on disability is the prevailing attitudes towards disabled persons in many societies. Public assumptions and stereotypes on disabled persons create great problems even in countries where anti-discrimination laws on disability exist. It is based on this fact that the provision has set forth the objectives of awareness-raising measures among which “to foster respect for the rights and dignity of persons with disabilities” is included.<sup>159</sup>

In addition to identifying the objectives of awareness-raising measures, the provision has envisaged examples of the measures in raising awareness. Among these measures, initiating and maintaining effective public awareness campaigns designed to develop receptiveness to the rights of persons with disabilities can be mentioned. The effective public awareness campaigns can also be used, according to this provision, to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labor market.<sup>160</sup>

The CRPD has also addressed the need of States Parties to recognize the right of persons with disabilities to work, on an equal basis with others.<sup>161</sup> As has been discussed previously, discrimination against disabled people and the misplaced belief that they cannot contribute fully to the economy are substantial barriers towards their employment. Therefore, this provision of the CRPD prohibits discrimination on the basis of disability in all matters of employment, including the “conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.”<sup>162</sup>

In addition, the provision has laid an obligation on States Parties to ensure the provision of reasonable accommodation, necessary and appropriate (not imposing a disproportionate or undue

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<sup>159</sup>Id, p. 24.

<sup>160</sup>Department of Economic and Social Affairs (UN-DESA), the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-Parliamentary Union (IPU), *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, Published by United Nations, Geneva, 2007, pp. 18-20.

<sup>161</sup>Ibid.

<sup>162</sup>Ibid.

burden on employers), to persons with disabilities in the workplace in order to insure to them the exercise or enjoyment of all freedoms and fundamental rights on an equal basis with others.<sup>163</sup>

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<sup>163</sup>Ibid.

## **CHAPTER THREE**

### **3. THE PROTECTION OF PERSONS WITH DISABILITIES (PWDs) WITHIN THE REGIONAL AFRICAN HUMANRIGHTS SYSTEM**

#### **3.1 General Situations of Disabilities in Africa**

Africa is not a homogenous whole. It encompasses multiple diversity, in terms of disability, culture, gender relations, geography, society, family, economy, and natural resources.<sup>164</sup>

It is an indisputable reality that all types of disabilities are found in the continent of Africa: blindness, physical-impairment, deafness, intellectual disabilities, albinism, vitiligo, leprosy, just to name a few. People living with all the aforementioned and other types of disabilities are always vulnerable to a myriad of societal stigma and discriminations. Millions of people with disabilities in Africa confront challenges of human rights violations from their respective societies and from different state organs. These violations of rights occur through direct and/or indirect exclusions and discriminations via systematic, bureaucratic, technical, covert and overt manners. Added to this, pitiable livelihood conditions manifested by poverty, malnutrition, low educational enrollment rates, inadequate or inaccessible health care, and lower employment rates are shared features of the daily lives of persons with disabilities throughout the continent.<sup>165</sup>

Disabled people in Africa represent the poorest of the poor as a consequence of their exclusion from school, health care, work, development endeavors and other societal benefits. In many African states, understandings about their interests, needs and identities is conceived inappropriately, thereby leading both the society and government officials to misrecognition of the fundamental rights of PWDs.<sup>166</sup>

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<sup>164</sup>Anne-Marie Mooney Cotter, *An International Legal Analysis of Disability Discrimination*, Published by Ashgate Publishing Limited Ashgate Publishing Company Gower House Suite 420 Croft Road 101 2007, P.121.

<sup>165</sup>Conference Report for the Afri NEAD Symposium, *The African Network on Evidence-to-Action in Disability*, UNCRPD\* principles into action for rights-based change 30 November 2009-4 December 2009, P.15.

<sup>166</sup>Supra note at 165. P.143.

As in other parts of the world, the social and environmental barriers are the main reasons that prevent a person with disability in Africa from realising her/his full potential. Policy and decision makers do not always consider that nearly all people with disabilities have limitations only in some functions while they have important capacities in many other functions. These capacities can be put into use with adequate accommodations of learning, working and living environments, so that the barriers prohibiting the full participation of people with disabilities are eliminated.<sup>167</sup>

Due to lack of awareness, infrastructures often exclude and isolate persons with disabilities, in a manner limiting their ability to attain services. Stairs or other physical barriers to service facilities are unfriendly to wheelchair and cane users. Services are provided by visual and audio mechanisms that absolutely neglect the overall considerations of blind and deaf persons.<sup>168</sup>In connection to this, the lack of sign language interpreters deters deaf persons from acquiring services, public health and educational access.

To a striking majority of PWDs in Africa, public facilities, transport, training, working opportunities, communication and even access to information, are unavailable and inaccessible. Furthermore PWDs are being stigmatized by reason of cultural and religious convictions and beliefs. We can say that PWDs assume Africa's largest minority group but also one of the most disadvantaged minority groups.<sup>169</sup>

Among PWDs, children and women with disabilities are the most vulnerable. Many children with disabilities are often hidden away from the public by their parents or relatives. This practice is premised upon the notion of many African traditional societies that disability is a curse or punishment from the gods.<sup>170</sup> For instance, if we consider a specific case, as Muthee Thuku indicates in his writing on albinism (Myths, Discrimination, and the call for Special Rights for Persons with Albinism in Sub Saharan Africa) “*albinism*’ is a genetic condition in which a person lacks the gene for producing melanin - the pigment that protects the skin from ultraviolet light from the sun), myths surrounding the genetic condition of albinism persist in many parts of sub-

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<sup>167</sup> Ibid.

<sup>168</sup> Supra note at 166.

<sup>169</sup> Ibid.

<sup>170</sup> Susan J. Peters, PH.D., Inclusive Education: Achieving Education for all by including those with Disabilities and Special Education Needs, the World Bank, April 30, 2003, PP.53-68.

Saharan Africa; superstition in some communities has led to the belief that persons with albinism either possess some special powers or are incomplete.”<sup>171</sup> Lack of sound knowledge on the condition has led to discrimination and stigma. States and communities have consistently neglected and shunned persons with albinism in employment and education. Their health status is largely overlooked by the healthcare systems.<sup>172</sup> This type of disability is prevalent in Africa, specially, in sub-Saharan Africa, where the condition traditionally is thought of as a curse or as some form of punishment from the gods or the ancestors for something wrong done by the parents. In some communities, it was thought that there was something wrong with the mother.<sup>173</sup> With this in mind, turning back to the discussion of PWDs in general, it is tacitly known that there are disparaging nomenclatures that describe impairments and indicate that a person has a more ambivalent moral status.<sup>174</sup> This in turn leads to segregation and stigmatization of PWDs. The knowledge, attitudes and practices of the general African population towards disability and disabled people have some components historically accumulated and based on the cultural and institutional heritage from the past.<sup>175</sup>

PWDs are found everywhere and in every aspect of life. There is also a general lack of reliable data on disability in many African countries, hampering efforts to document the relationships between poverty, social exclusion and disability.<sup>176</sup> This has resulted in a lack of awareness among policy and decision makers of the strong link between poverty reduction and promotion of equal participation opportunities of persons with disabilities in development contexts.<sup>177</sup> As a result, the disability dimension has not featured in general social development and poverty reduction strategies in many African countries.<sup>178</sup>

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<sup>171</sup>MutheeThuku. Myths, Discrimination, and the call for Special Rights for Persons with Albinism in Sub Saharan Africa. Published by M/s Virginia L. Small and M/s Ikponwosa ‘I. K.’ Ero. February 2011. P.14.

<sup>172</sup> Ibid.

<sup>173</sup> Albinism Foundation of East Africa -[www.albinismfoundationea.com](http://www.albinismfoundationea.com)

<sup>174</sup> Maria Berghs Myriam Dos Santos-Zingale. Everyday Experiences of Disabilities in Serra Leone A Comparative Analysis: Everyday Experiences of Disability in Sierra Leone. Africa Today, Volume 58, No. 2, winter 2011, pp. 18-40 (Article) Published by Indiana University P.15.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Baynton, Douglas C., Disability History, No Longer Hidden. Reviews in American History, Volume 32, Number 2, June 2004, pp. 282-292 Published by The Johns Hopkins University PP. 285-90.

Though a lot of challenges exist, there is a noticeable change on the part of governments with regards to the inclusion of disability in every development agenda. Disability issues appear to increasingly concern all government departments and ministries. To date, in many countries the leading ministry is often the Ministry of Health and/or the Ministry of Social Affairs.<sup>179</sup>

With the foregoing contextual analysis at hand, we will now try to examine whether the African policy framework and human rights instruments have given adequate protection for the rights of PWDs at the regional level.

### **3.2 African Union (AU) Policy Framework on Disability**

It is important to note that the presence of social policy frameworks serve as an instrument of social development in protecting vulnerable groups such as children, women and PWDs from marginalization in all levels of social development activities.<sup>180</sup> Social protection programs have a direct impact on poverty alleviation through promoting equitable access to employment opportunities, health services, and education, and are thus key to achieving sustainable development.<sup>181</sup> Generally speaking, there are three main features in the successful implementation of social protection policy schemes. These are: *legitimacy, institutionalization and typology*.<sup>182</sup> At the international level, recognizing the strategic importance and necessity of ensuring universal social protection, the United Nations System Chief Executives Board adopted in April 2009 a ‘Universal Social Protection Floor (SPF-I) as one of nine initiatives in response to the questions raised by various stakeholders.<sup>183</sup> At the regional level, the African Union endorsed in 2008 at Ministerial level in Windhoek, Namibia, a clear definition of social protection that “encompasses a range of public actions carried out by the state and others that

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<sup>179</sup>Supra note at 12.

<sup>180</sup>The S. Africa Policy on Disability Department of Social Development. Available at <http://www.socdev.gov.za> Accessed on 12<sup>th</sup> Dec. 2012.

<sup>181</sup> Ibid.

<sup>182</sup>Economic Commission for Africa Policy Brief ECA. African Social Protection Schemes: Implications for Achieving and Sustaining the Millennium Development Goals. Available at <http://www.uneca.org/policybriefs> accessed on 12<sup>th</sup> Dec. 2011.

<sup>183</sup> Ibid.

address risk, vulnerability, discrimination and chronic poverty. The right to social security in childhood, old age and at times of disability is expressed in the policy.<sup>184</sup>

To offer a glimpse at current social protection practices in Africa, it is clear that many governments have invested themselves directly and with external assistance in the following key types of schemes:

- a) Cash Transfer Programs (Both Conditional and Non-Conditional);
- b) Food Transfer Schemes;
- c) Old Age, War Veterans and Disability Support Programs;
- a) Food for Education Schemes/School Feeding Programs;<sup>185</sup>

Since disability is a cross cutting issue and it remains everybody's responsibility, the other AU policy framework that recognizes the disability rights is the Migration Policy framework for Africa which Member States agreed upon in Banjul, Gambia in 2006. This policy framework rhetorically stipulates that "safeguarding the human security needs of refugees (physical, material, legal and health), especially in the context of refugee camps and with particular attention to the needs of vulnerable groups (women, children, disabled, and the elderly), while at the same time ensuring that refugees are aware of national laws, regulations and their obligations to abide by these."<sup>186</sup>

In addition to the above mentioned policy frameworks, the other AU policy framework which accommodates the rights of disabled persons is Policy on Post-Conflict Reconstruction and Development (PCRD). At its 7th Ordinary Session held in Sirte, Libya, from 28 June to 2 July 2005, the Executive Council adopted decision Ex.CL/Dec.225 (VII) on the Report of the Chairperson of the Commission on Conflict Situations in Africa. In that decision, the Executive Council, inter alia, welcomed the significant progress made in the resolution of the crisis and conflict situations on the continent; and stressed the need for peace agreements to be effectively

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<sup>184</sup> Ibid.

<sup>185</sup> The African Union Migration Policy Framework for Africa 2006. Available at <http://www.africa-union.org> accessed on 12<sup>th</sup> Dec. 2012.

<sup>186</sup> Ibid.

complemented by sustained efforts towards post-conflict reconstruction and peace-building, with a view to addressing the root causes underlying their outbreak.<sup>187</sup>

In this policy framework, the promotion of the rights of PWDs is expressed in due regard. To that end, it says “PCRD activities promote the participation, and address the needs of marginalized and vulnerable groups such as women and girls; the elderly; disabled; and youth (especially child soldiers).”<sup>188</sup>

### **3.3 Normative and Institutional Protection of PWDs under the African Human Rights Framework**

#### **Introduction:**

Regional human rights systems, instruments and institutions have existed since the mid-20<sup>th</sup> Century. Such systems reflect a collective regional consciousness of the importance of multi-lateral actions to promote and protect human rights.<sup>189</sup> There are three main regional systems for the protection and promotion of human rights, namely: the African, the Inter-American and the European systems.<sup>190</sup> All three regional human rights systems mentioned above form part of regional integration systems with a much broader mandate than just human rights – in the case of Africa, the parent organization is the African Union (AU); in the Americas it is the Organization of American States (OAS); and in Europe it is the Council of Europe (COE).<sup>191</sup> Among these human rights systems, as many scholars pointed out, the African human rights system is the youngest regional system.

The expression African human rights system refers to the architecture of norms and institutions comprised in the core pan-continental human rights treaties adopted under OAU/AU. Included in this expression are the fledgling norms and institutions for human rights protection developed by

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<sup>187</sup> African Union on Policy on Post-Conflict Reconstruction and Development, Published by the Conflict Management Division, Peace and Security Department, Commission of the African Union Addis Ababa, Ethiopia. Available at <http://www.AFRICA-UNION.ORG> accessed on 12<sup>th</sup>, Dec., 2012.

<sup>188</sup> Ibid.

<sup>189</sup> El-Obaid Ahmed El-Obaid and Kwadwo Appiagyei-Atua. Human Rights in Africa ¾ A New Perspective on Linking the Past to the Present. McGill Law Journal 1996P.59.

<sup>190</sup> Christof Heyns, David Padilla and Leo Zwaak . Schematic Comparison of Regional Human rights Comparative overview systems. The African Human Rights Law Journal, vol. 5, pp. 308-320, 2005.

<sup>191</sup> Ibid.

African Regional Economic Communities (RECs). The African human rights system has given less recognition to the protection and promotion of disability rights. though not in a satisfactory manner, the rights of PWDs are incorporated in the AU human rights system in a piecemeal fashion, by including few provisions in the regional human rights instruments.<sup>192</sup> This mode of incorporating few provisions in different instruments seem to be how AU is negligent towards the rights of PWDs and to that end, yet, the few provisions recognizing the rights of PWDs scattered in various instruments are for the sake of not to be denounced by PWDs themselves and other funding international agencies.

As such, the existing principal human rights instruments are not consistently framed in a human rights language to PWDs. The progress towards framing disability-friendly instruments is very slow.<sup>193</sup>

According to Japhet Biegon, the existing African regional disability law regime is fragmented because the provisions relating to persons with disabilities are scattered in numerous instruments.<sup>194</sup> Compared to the AU, its member states have enacted more progressive legislations that go with the human rights based approach to disability.

Having discussed these facts in a nutshell, we will now specifically examine both the normative and institutional frameworks in the subsequent subsections, with a particular reference to key instruments.

### **3.3.1 The Rights of PWDs under the Charter of the Organization of African Unity (OAU)**

The Organization of African Unity (OAU) was established in Addis Ababa with a meeting of state parties on May 25, 1963, which brought forth the OAU charter, which is a founding legal and political instrument of the Pan-African Community. The Charter articulates the premises upon which it has been written and adopted.<sup>195</sup> Initially, this document draws attention on the

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<sup>192</sup>Buhle Angelo Dube. Forced Evictions and Disability Rights in Africa Published by Hauser Global Law School Program, New York University School of Law September 2008P. 35.

<sup>193</sup>Japhet Biegon, The Promotion and Protection of Disability Rights in the African Human Rights System. Published by Pretoria University Law Press (PULP) 2011. P.53-67.

<sup>194</sup>Id. P. 68.

<sup>195</sup>Preamble of the Organization of African Unity (OAU) Charter 1963 Para. 6.

objectives of safeguarding and consolidating the independence, sovereignty and territorial integrity of member states, and fighting apartheid and colonialism.<sup>196</sup> The philosophy of state sovereignty and non-interference in domestic affairs greatly affected the protection of human rights of the peoples in general and individual citizens in particular.<sup>197</sup> Nonetheless, the OAU Charter, contrary to principles of state sovereignty, had due regard to the principles of the Charter of the United Nations and Universal Declaration of Human Rights (UDHR).<sup>198</sup>

The OAU had neither the mechanism for the promotion and protection of human rights, nor the political will to include rights issues in its agenda. Therefore, it comes as no surprise that disability issues featured only remotely in the first two or so decades of OAU's existence. The UDHR, which OAU adhered to, recognizes universality, inalienability of rights, freedom, equality, justice and dignity of human beings, unlike the charter.<sup>199</sup>

Taking prompt from developments in international law, the Africa Regional Conference on the International Year of the Disabled Persons' was held in 1980, the outcome of which was the Recommendation to establish the African Rehabilitation Institute. Thus, the development of disability rights in Africa is related to the development of human rights within the Organization of African Unity (OAU) and its successor, the African Union (AU).<sup>200</sup>

### **3.3.2 The OAU Agreement for the Establishment of the African Rehabilitation Institute (ARI)**

This agreement was adopted with a view to harmonizing the principles and the strategy for disability prevention and the rehabilitation of the disabled and prevent disability in the region. At the African regional level, this agreement is the first ever established to rehabilitate disabled persons than protect their human rights.<sup>201</sup> In line with the agreement, an institute known as the "African Rehabilitation Institute" was established with a view to adopting measures to prevent disability and to rehabilitate disabled persons in Africa and, taking in to regard, the Resolution of

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<sup>196</sup>Ibid.

<sup>197</sup>Nsongurua J. Udombana,.Can the Leopard Change Its Spots? The African Union Treaty and Human Rights. Published by The Danish Center for Human Rights, Copenhagen, Denmark; P.1186.

<sup>198</sup> Ibid.

<sup>199</sup>Supra note at 194, P. 71.

<sup>200</sup>Id.P. 76.

<sup>201</sup>Preamble of the Organization of African Unity Organization de l' Unite Africaine Agreement for the Establishment of the African Rehabilitation Institute (ARI) 1981.

the Third Conference of the African Ministers of Social Affairs held in Addis Ababa, Ethiopia, in October 1980 as well as the Resolution of the OAU Labor Commission on the International Year of the Disabled Persons (IYDP), adopted in April 1981.<sup>202</sup>

(ARI) is mainly a social Institute which was charged with utilizing the various services and facilities existing in African countries to promote and develop regional or sub-regional training and research programs drawn up for rehabilitation and disability prevention.<sup>203</sup> However, though this agreement had a profound advantage for disabled persons in Africa, it solely recognized both the charity and medical models. On the other hand, it was arguable to determine the binding nature or status of this agreement because it was not a convention. Understanding the incompatibility of this institute with the language of human rights, the AU member states had, after two decades, initiated a process of changing the whole structure of ARI to what is known as the “African Union Disability institute (AUDI).”<sup>204</sup>

### **3.3.3 The African Charter of Human and Peoples Rights (ACHPR)**

At the African regional level, the principal instrument for the protection of the rights of persons with disabilities is the African Charter on Human and People’s Rights, as well as a few other conventions and some additional protocols to the African charter.<sup>205</sup>

The African Charter on Human and People’s Rights (ACHPR) was adopted by the OAU in 27 June 1981 and came in to force on the October 21 1986.<sup>206</sup> It remains the first normative instrument for the promotion and protection of human rights in the continent. ACHPR comprises special features which are often sources of controversy among scholars.

The first feature is the recognition of the indivisibility of all rights. All 'generations' of rights are recognized. Socio-economic rights are justifiable; collective rights, environmental rights and

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<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Report on the Restructuring of the African Rehabilitation Institute (ARI) 3rd session of the AU conference of ministers of social development CAMSD/EXP/4(III) Addis Ababa, Ethiopia, 26-30 November 2012.

<sup>205</sup> Supra note at 193.P.30.

<sup>206</sup> African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

economic and social rights are essential elements of human rights in Africa, according to this feature.<sup>207</sup>

The second feature of is the absence of derogation clause. The African Charter does not contain a derogation clause. Therefore the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in article 27(2).<sup>208</sup>

The third feature of this Charter is the recognition of peoples' rights such as the peoples' rights to development, free disposal of natural resources, and self-determination.<sup>209</sup>

The fourth feature contained in the charter is the Imposition of duties on both states and individuals. The enjoyment of rights and freedom also implies the performance of duties on the part of everyone.

Thus, the charter equally places obligations on individuals beside those placed on member States. It covers a wide range of human right aspects such as the: civic and political rights, socio-economic and cultural rights and the rights to development.<sup>210</sup>

It is unique in several respects including in its embodiment of an African conception of human rights which is traditionally perceived to be premised on a communitarian understanding of humanity, human society and the individual human being.<sup>211</sup>

Ideally, it is needless to say that PWDs enjoy all the rights provided under the African Charter equally with all other persons. However, this fact is not immediately manifest from a textual reading of the African Charter. Article 2 of the Charter guarantees non-discrimination in the enjoyment of the Charter rights but in keeping with the time of its adoption, it does not specifically list disability as prohibited ground of discrimination. Article 2 reads:

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<sup>207</sup>MALCOLM EVANS, *the African Charter on Human and peoples' Rights* 2nd Edition the System in Practice 1986-2006. Published in the United States of America by Cambridge University Press, New York Cambridge University Press 2002, P.86.

<sup>208</sup>Id.P.98.

<sup>209</sup>Id.P. 106.

<sup>210</sup>Id. P. 115.

<sup>211</sup>Tobias Pieter Van Reenen. *The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years*. Published by the University of the Western Cape, Bellville, South Africa 2007.P.5.

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>212</sup>

The failure of article 2 to specifically refer to disability as a prohibited ground of discrimination is unreasonable or absurd. The use of the words such as to introduce the listed grounds indicates that at the time of drafting this legislation, disability did not come to the mind of the drafters. And most significantly, in addition to the listed grounds,

Article 2 also prohibits discrimination on the basis of “other status”, which includes disability. However, the phrase “other status” enshrined in the provision of the (ACHPR) seems to be vague to understand whether the article indicates disability explicitly.<sup>213</sup> Disability is not recent phenomena in Africa rather an age-old lived with the human beings. Still there is no sound justification the reason why disability is disregarded from the non-discrimination provision of the charter.

Article 18 of the Charter recognizes this fact as it singles out women, children, the aged and the disabled as protected groups. In relation to PWDs the African Charter tries to incorporate what Article 18(4) provides that PWDs have the right to special measures of protection in keeping with their physical or moral needs.<sup>214</sup> Also 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.<sup>215</sup>

By requiring states to take ‘special measures of protection’ that are responsive to the ‘physical and moral needs’ of PWDs, article 18(4) reinforces the break with formal equality and puts emphasis on substantive equality. However, article 18(4) lumps together PWDs with the aged thereby combining the rights and situation of two distinct groups that should otherwise be treated separately.<sup>216</sup>

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<sup>212</sup>Supra note at 207. Art.2.

<sup>213</sup>Ibid.

<sup>214</sup>Ibid.Art.18.

<sup>215</sup>Ibid. Art. 16.

<sup>216</sup>Supra note at 215.

### 3.3.4 The African Charter on the Rights and Wellbeing of the Child

The African charter of the rights and wellbeing of the child was adopted in Addis-Ababa in July 1990.<sup>217</sup> The African Children's Charter is a regional legal response to the specific plight of the African child whose needs and interests were not adequately catered for and reflected in the CRC.<sup>218</sup>

The Charter defines a 'child' as every human being below the age of 18 years.<sup>219</sup> Four principles underpin the Charter. These are: non-discrimination, participation, the best interest of the child, and survival and development.<sup>220</sup> More specifically, the Charter prohibits child marriage, child labor and child abuse. It also addressed such children rights-related themes as juvenile justice, armed conflict, adoption, drug abuse, sexual exploitation and human trafficking.<sup>221</sup>

This charter contained provision that specifically focus on the rights of children with disabilities. In this regard, article 13 of the African Children's Charter builds upon and goes further than article 18(4) of the African Charter in its scope of protection of disability rights.<sup>222</sup> Article 13(1) begins by providing that a child with disabilities has the right to special measures of protection.

These measures should be provided not only in keeping with the physical and moral needs of the child, but also 'under conditions which ensure his dignity, promote his self-reliance and active participation in the community'.<sup>223</sup> Articles 13(2) and (3) enumerate specific positive actions that the state is obliged to take, subject to availability of resources, in ensuring the protection of children with disabilities. In particular, the state should ensure that a child with a disability has effective access to training, preparation for employment and recreation opportunities. These

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<sup>217</sup>African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Concept Note on the Commemoration of the Day of the African Child on 16 June 2012 African Union. Available at [www.au.int](http://www.au.int) accessed on 5Nov. 2012.

<sup>218</sup> Ibid.

<sup>219</sup>Centre for Human Rights, Faculty of Law, University of Pretoria, in collaboration with the African Commission. Celebrating the African Charter at 30: A guide to the African human rights system. Published by: Pretoria University Law Press (PULP)21 October 2011 P.12.

<sup>220</sup>African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

<sup>221</sup>Ibid. Art.13.

<sup>222</sup>Ibid.

<sup>223</sup>Ibid.

activities should be conducted in a manner conducive to the child achieving the fullest possible social integration, individual development and his or her cultural and moral Development.<sup>224</sup>

### **3.3.5 African Youth Charter**

In 2006 the AU adopted the African Youth Charter in recognition of the increasing calls and the enthusiasm of youth to "actively participate at local, national, regional and international levels to determine their own development and the advancement of society at large).<sup>225</sup>The document explicitly acknowledges the needs and aspirations of young displaced persons, refugees and youth with special needs one of the basic dispositions of the Charter is the entitlement of every young person to the enjoyments of the rights and freedoms recognized and guaranteed in the Charter irrespective of their race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth "or other status".<sup>226</sup>

The Charter devotes Article 24 to "mentally and physically challenged youth" States Parties recognize the right of mentally and physically challenged youth to special care and commit themselves to Pursuant to article 24 of the Charter, youth with disabilities are,

Firstly, guaranteed the right to special care and to equal and effective access to education, training, healthcare services, employment, sport, physical education, cultural and recreational activities.<sup>227</sup>Although not in so many words, the prohibition of discrimination and the requirement to attend to the special needs of mentally and physically challenged youth and youth with special needs are extended into a number of other provisions of the Charter, including those addressing training and skills development, education, poverty eradication and socio-economic integration of youth, sustainable livelihoods and employment, health, elimination of harmful social and cultural practices, and the responsibilities of youth.<sup>228</sup>

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<sup>224</sup>Ibid.

<sup>225</sup>The African Union, African Youth Charter July, 2006.

<sup>226</sup>Ibid. Preamble.

<sup>227</sup>Ibid. Art. 2.

<sup>228</sup>Ibid. Art. 24.

### **3.3.6 The African Charter on Democracy, Elections and Governance**

In the African Charter on Democracy, Elections and Governance, States Parties commit themselves to promote the universal values and principles of democracy, good governance, human rights and the right to development.<sup>229</sup> In terms of Article 8, States Parties are required to: eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as "any other form of intolerance"; and adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.<sup>230</sup>

According to this Charter, States Parties undertake to promote participation of "social groups with special needs" (including the youth and people with disabilities) in the governance process, and to ensure systematic and comprehensive civic education in order to encourage full participation of these social groups in democracy and development processes.<sup>231</sup> They further agree to provide and enable access to basic social services, for example, free and compulsory basic education to all, especially girls, rural inhabitants, people with disabilities and other marginalized social groups.<sup>232</sup>

### **3.3.7 The AU Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)**

This convention imposes a number of obligations on States Parties in respect of internally displaced persons. In particular, they are required to provide special protection for and assistance to internally displaced persons with special needs, including (amongst others) separated and unaccompanied children, the elderly and persons with disabilities.<sup>233</sup>

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<sup>229</sup>The African Charter on Democracy, Elections and Governance, African Union, 2007 Preamble.

<sup>230</sup>*Ibid.*

<sup>231</sup>*Ibid.* Art. 41.

<sup>232</sup>*Ibid.* Art. 43.

<sup>233</sup>The African Union, (AU) Convention for the Protection and Assistance of Internally Displaced Persons 2009 Art. 9.

### **3.3.8 Constitutive Act to the Establishment of African Union (AU)**

The OAU was succeeded by the AU in 2000.<sup>234</sup> Its Constitutive Act emphasizes the common need to build a partnership between governments and all segments of civil society, in particular "women, youth and the private sector" in order to strengthen solidarity and cohesion among their people and to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.<sup>235</sup> The functioning of the AU is to be guided by the principles in Article 4. A number of these principles directly refer to human rights: the right of the Union to intervene in a member state pursuant to a decision of the assembly in respect of grave circumstances (namely war crimes, genocide and crimes against humanity); the promotion of gender equality; and respect for democratic principles, human rights, the rule of law and good governance.<sup>236</sup> In terms of Article 13.1, the Executive Council of the AU must coordinate and take decisions on policies in areas of common interest to the Member States including social security, which incorporates "policies relating to the disabled and the handicapped".<sup>237</sup>

In 2003 the Protocol on Amendments to the Constitutive Act inserted under the Objectives (African Union, 2003, art. 3) a new subparagraph that requires the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas. This failure to explicitly list persons with disabilities in the same way shows the presence of negligence or discrimination for inclusion.<sup>238</sup>

### **3.3.9 The Protocol of the African Charter on Human and People's Rights Relating to Woman**

This Protocol was adopted on May 28th 2003 at Addis-Ababa, Ethiopia, during a meeting of Ministers of African Union.<sup>239</sup> The Protocol is nevertheless more elaborate than CEDAW in the

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<sup>234</sup>Constitutive act of the African Union, Preamble, Lomé, Togo, July 2000.

<sup>235</sup>Ibid. Art.

<sup>236</sup>Ibid.

<sup>237</sup>Ibid. Art. 13.

<sup>238</sup>Art. 3. The Protocol on Amendments to the Constitutive Act of African Union 2003.

<sup>239</sup>The African charter on human and people's rights, relating to the African woman.

range of substantive rights it guarantees the African woman.<sup>240</sup> Its provision on women with disabilities, which is conspicuously absent under CEDAW, is indicative of this attribute. In terms of article 23(1) of the Protocol, state parties have generally undertaken to ‘ensure the protection of women with disabilities’ and particularly to take specific measures to facilitate their access to Employment, professional and vocational training as well as their Participation in decision-making.<sup>241</sup> Article 23(2) further requires states to ‘Ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.’<sup>242</sup> Some of the issues covered in the African Women’s Protocol and not in the CEDAW include polygamy, medical abortion, domestic violence, and HIV and AIDS.<sup>243</sup>

### **3.4. Regional Institutional Frameworks for the Promotion and Protection of Disability Rights in Africa**

Two kinds of institutions are mandated to deal with disability rights at the African regional level. Firstly, there are those institutions that have developed within the institutional political structures of the OAU/AU. These are the Labor and Social Affairs Commission (LSAC) and ARI. Secondly, there are those institutions that have been established under regional human rights treaties and are, therefore, the main bodies that constitute the African human rights system’s institutional architecture. Each of these institutions is assessed in the following sections.

#### **3.4.1 The African Human Rights Commission**

This Commission was established in July 1987 at the twenty-third OAU Assembly of Heads of State and Government.<sup>244</sup>The African Commission is Africa’s key regional institution established pursuant to Article 30 of the African Charter with a view to promoting and protecting human rights throughout the continent.<sup>245</sup>The Commission is required, by Article 45, to promote,

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<sup>240</sup>Rachel Rebouché, *Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions*. Published by Washington & Lee University School of Law. Sept. 2009. Available at <http://scholarlycommons.law.wlu.edu/> accessed on 12<sup>th</sup> Dec. 2012.

<sup>241</sup>Supra note at 241 Art. 23.

<sup>242</sup>Ibid.

<sup>243</sup>Ibid.

<sup>244</sup>The Danish Centre for Human Rights, *Evaluation The African Commission on Human and Peoples’ Rights*. Published by University of Copenhagen, Denmark, NordiskaAfrikainstitutet, Dec. 1998.P.12.

<sup>245</sup>Supra note at 207. Art. 30.

protect and interpret the rights in the Charter and to carry out any other tasks assigned to it by the OAU.<sup>246</sup> This Commission has served the sole supervisory organ for the implementation of the African Charter on Human and Peoples' Rights before the establishment of the court.

The African Commission, a body of 11 members, is the oldest of the three treaty-based institutions, is charged with the function of supervising state compliance with the African Charter and the African Women's Protocol.<sup>247</sup> In this regard, the Commission has core functions as briefly discussed hereunder:

#### **3.4.1.1 Promotional**

The principal activities of the African Commission, which are promotional, are to collect documents, undertake studies, organize seminars, disseminate information, encourage national and local institutions concerned with human rights, formulate principles to resolve human rights problems, and interpret the African Charter.<sup>248</sup>

#### **3.4.1.2 Protection**

The Commission ensures protection of human and peoples' rights through its state reporting, communication procedure, friendly settlement of disputes, urgent appeals and other activities of special reporters and working groups and missions.<sup>249</sup>

#### **A. State Reporting**

State reporting procedure provides a forum for constructive dialogue between the treaty bodies and state parties on the extent to which the latter have guaranteed and afforded human rights.<sup>250</sup> Thus, it is a forum in which the treaty bodies should inquire about state's implementation of the rights of people with disabilities. Unfortunately, this has not always been the case.

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<sup>246</sup>Ibid. Art. 45.

<sup>247</sup>Supra note at 208. P. 25.

<sup>248</sup>Supra note at 247.

<sup>249</sup>Rachel Murray, African Commission on Human and Peoples' Rights. Published by Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press 2009. Available at <http://www.mpepil.com> accessed on Sept. 6 2012.

<sup>250</sup> Ibid.

Under the African Charter, state parties have undertaken to submit, every two years, reports on the legislative and other measures that they have taken to apply the Charter rights. They should also indicate in the same reports, the measures they have taken to implement the African Women's Protocol and the Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention).<sup>251</sup> In particular respect to the implementation of the rights of people with disabilities, the African Commission's 1998 Guidelines on State Reporting contain the following question to which states must respond: 'What is the state doing to improve the condition of the following groups mentioned in the Charter: women, children and the disabled?'<sup>252</sup> So far, detailed discussion on the special measures taken to protect people with disabilities is absent in the majority of the state reports.<sup>253</sup>

The failure of states to appropriately and consistently report on implementation of disability rights is partly attributed to the lack of clarity and precision on what exactly states should include in their reports.<sup>254</sup>

#### **A. Communication procedure**

The African Commission and the African Children's Committee are mandated to receive and determine communications alleging violation of rights respectively under the African Charter and its Protocol on the Rights of Women, and the African Children's Charter.<sup>255</sup> The Charter provides an expansive basis for lodging communications with the African Commission. The Commission has developed a generous standing and admissibility criteria which allow individuals and non-governmental organizations (NGOs) with observer status with the Commission to lodge communications on behalf of victims of human rights violations.<sup>256</sup>

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<sup>251</sup> Ibid.

<sup>252</sup> Ilze Grobelaar-du Plessis and Tobias van Reenen. Aspects of disability law in Africa, Published by Pretoria University Law Press (PULP). 2011. P. 56.

<sup>253</sup> Id.P. 78.

<sup>254</sup> Id.P.83.

<sup>255</sup> ACHPR Analytical Report Final, A Spotlight on Human Rights in Africa Developments at the NGO Forum & 49th Session of the African Commission on Human and Peoples' Rights.

<sup>256</sup> Ingange-wa-Ingange Jean Désiré, the African Human Rights System: Challenges and Prospects, Published by Faculty of Law, University of South Africa. pp. 64-79.

The inter-state communication procedure is set out in Articles 47 to 54 of the Charter.<sup>257</sup> This enables states to petition the Commission in the event of violations of the Charter. There is no indication from the Commission that this procedure has been used to its full extent, although there are a number of suggestions that it could be.<sup>258</sup>

In respect of communications from entities other than States, the only reference in the Charter is in Articles 55-59 which are merely entitled "other communications".<sup>259</sup> The communication must be compatible with the African Charter and the Charter of the OAU and is not submitted in disparaging language, it is not based exclusively on news from the media, should have exhausted local remedies and should be submitted within a reasonable time from this occurring, and without having been settled by other international organs.<sup>260</sup>

Despite its comparatively long existence, it is only until 2009 that the African Commission started to focus on disability issues as a matter of priority.

Thus far, the African Commission has decided only a single case alleging the violation of the rights of people with disabilities.<sup>261</sup> This case concerned the automatic and indefinite institutionalization of mentally disabled persons under the Gambian Lunatics Detention Act (LDA), which practice, the complainants averred, constituted discrimination on the basis of disability.<sup>262</sup> In its decision, the Commission affirmed disability as a prohibited ground of *Purohit and Another v The Gambia* discrimination notwithstanding that it is not explicitly mentioned under Article 2 of the African Charter. The Commission reaffirmed that all human beings regardless of their mental capabilities or disabilities are entitled to be treated with dignity which is an inherent basic right. As such, reference to mentally disabled persons as 'lunatics' and 'idiots' under the LDA was found to be both dehumanizing and an insult to their dignity.<sup>263</sup> The Commission stated that it: maintains that mentally disabled persons would like to

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<sup>257</sup>Solomon A. Dersso, *The Jurisprudence of the African Commission on People's Rights of the African Charter*, South Africa Institute for Advanced Constitutional Law, 15.

<sup>258</sup>*Ibid.*

<sup>259</sup>*Supra* note at 207. Art. 55-59.

<sup>260</sup>*Supra* note at 253.

<sup>261</sup>*Ibid.*

<sup>262</sup>*Purohit and others v The Gambia (2003) AHRLR 96 (ACHPR 2003)*.

<sup>263</sup>*African Human Rights Law Reports (2000–2008)* available online at [www.chr.up.ac.za/index.php/ahrlr-downloads.html](http://www.chr.up.ac.za/index.php/ahrlr-downloads.html) (accessed 11 January 2012).

share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity.<sup>264</sup> Finally, the Commission observed that states should take concrete and targeted steps to ensure the right to health is guaranteed to everyone including people with disabilities.<sup>265</sup>

### **3.4.1.3 Interpretation of the Charter**

The Commission is mandated to interpret the provisions of the Charter upon a request by a state party, organs of the AU or individuals.<sup>266</sup> No organ of the AU has referred any case of interpretation of the Charter to the Commission. However, a handful of NGOs have approached the Commission for interpretation of the various articles of the Charter. The Commission has also adopted many resolutions expounding upon the provisions of the Charter.<sup>267</sup>

### **3.4.2 The African Court of Human and Peoples' Rights**

This court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. It entered into force in 2004.<sup>268</sup> It is based in Arusha, Tanzania and has been in a position to receive cases since 2008 although it has to date issued only a few decisions and one judgment.<sup>269</sup>

The ACHPR has jurisdiction to consider all cases and disputes referred to it concerning the African Charter on Human and Peoples' Rights (the African Charter), the Court Protocol and any other relevant human rights instrument ratified by the state(s) concerned.<sup>270</sup> It also has an

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<sup>264</sup>Ibid.

<sup>265</sup>Ibid.

<sup>266</sup>Supra note at 150.

<sup>267</sup>Ibid.

<sup>268</sup>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ouagadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2.

<sup>269</sup>Carolyn Scanlon Martorana: the New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?

<sup>270</sup>Scott Lyons, the African Court on Human and Peoples' Rights, 10 ASIL INSIGHTS 24(2006), available at <http://www.asil.org/insights060919.cfm>.

advisory jurisdiction and may issue, at the request of a Member State of the African Union, any of the organs of the African Union, or any African organization recognized by the African Union, an opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples' Rights (the Commission).<sup>271</sup>

The Protocol provides that actions could be brought before it on the basis of any instrument, including international human rights treaties, which are ratified by the state party in question.<sup>272</sup>

Furthermore, the court can apply as sources of law any relevant human rights instrument ratified by the state, in addition to the African Charter.<sup>273</sup> Hearings will generally take place in public and parties are entitled to be represented by a legal representative of their choice. Free legal representation may be provided where the interests of justice require it.<sup>274</sup> The Rules of Court contain detailed provisions about the conduct of written and oral proceedings.

In ruling on admissibility of a case, the court must also take into account the requirements that communications must meet under the African Charter.<sup>275</sup> Decisions of the ACHPR are binding on the parties.

### **3.4.3 African Court of Justice and Human Rights**

The Court of Justice of the African Union was established by the AU's Constitutive Act.<sup>276</sup> In 2003 the AU adopted the Protocol of the Court of Justice of the African Union defining the statute composition and functions of the Court of Justice. However, both this Protocol and the ACHPR Court Protocol were superseded in 2008 when the AU adopted the Protocol on the

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<sup>271</sup>Supra note at 269.

<sup>272</sup>Makau Mutua, *The African Human Rights System a Critical Evaluation*. Published by State University of New York at Buffalo Law School 2011. P.15.

<sup>273</sup>Ibid.

<sup>274</sup>Ibid.

<sup>275</sup>Ibid.

<sup>276</sup>Protocol of the Court of Justice of the African Union Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.

Statute of the African Court of Justice and Human Rights.<sup>277</sup> This provides for a merged court with two chambers, namely a General Affairs Section and a Human Rights Section.<sup>278</sup>

The Human Rights Section shall have jurisdiction over the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and any other human rights instrument ratified by the parties. Individuals and NGOs accredited to the AU or its organs will be able to submit complaints to the court provided that the state concerned has made a declaration recognizing the court's competence to receive such complaints.<sup>279</sup>

### **3.5. The Role of African Sub-Regional Institutions in Safeguarding Disability Rights**

For purposes of harmonization, the AU has formally recognized eight regional economic communities (RECs): Economic Community of West African States (ECOWAS), East African Community (EAC), Southern African Development Community (SADC), Inter-governmental Authority on Development (IGAD), Common Market for Eastern and Southern Africa (COMESA), Arab Maghreb Union (UMA), Community of Sahel-Saharan States (CEN-SAD), and the Economic Community of Central African States (ECCAS).<sup>280</sup> The disability provisions in the regional treaties discussed above are supplemented at the sub-regional level by provisions in constituent instruments of African Regional Economic Communities (RECs) and in other instruments adopted under the auspices of these RECs. Although their primary objective is to foster economic integration, African RECs are also expanding their respective mandates to cover human rights in general and disability issues in particular.<sup>281</sup> Under the East African Community (EAC) Treaty, the member states have undertaken to closely co-operate amongst themselves in the development and adoption of a common approach towards the disadvantaged and

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<sup>277</sup>Supra note at 273.

<sup>278</sup>Ibid.

<sup>279</sup>Ibid.

<sup>280</sup>Solomon T.Ebobrah, Human Rights Developments in African Sub-Regional Economic Communities during 2010, African Human Rights Law Journal 233–239. Published by Centre for Human Rights, University of Pretoria, South Africa 2011; P. 233-239.

<sup>281</sup>Ibid.

marginalized groups including persons with disabilities. Thus, in December 2009, the EAC held a meeting the agenda of which was ‘matters relating to persons with disabilities in the region.’<sup>282</sup>

In the Southern African Development Community (SADC) region, the member states have undertaken not to discriminate against any person on several grounds including disability. The SADC Treaty is unique for it is the only treaty in the African region to explicitly prohibit discrimination on the basis of disability. Under the SADC Protocol on Gender and Development, member states have undertaken to adopt legislation and related measures to protect persons with disabilities. However, the potential of the Protocol to protect rights of people with disabilities is still limited for it is yet to come into force.<sup>283</sup> The Charter of Fundamental Social Rights in SADC deals specifically with the labor rights of people with disabilities in the sub-region. It requires SADC members to take ‘additional concrete measures’ aimed at improving the social and professional integration of people with disabilities. While the Charter understandably does not define people with disabilities, it exceptionally brings within its protection the widest range of people with disabilities, whatever their origin and nature of their disability.<sup>284</sup>

Unlike the EAC Treaty and the SADC Treaty, the Treaty of the Economic Community of West African States (ECOWAS Treaty) does not make any reference to the rights of people with disabilities. However, one of the fundamental principles of the Community is the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.<sup>285</sup> In this regard, ECOWAS member states are by implication required to recognize, promote and protect disability rights in accordance with Article 18(4) of the African Charter.<sup>286</sup>

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<sup>282</sup>F. Viljoen ‘The realization of human rights in Africa through sub-regional institutions’ (2001) 7 African Yearbook of International Law 186.

<sup>283</sup>SADC Treaty, art 6(2).

<sup>284</sup>SADC Social Charter, art 9.

<sup>285</sup>ECOWAS Treaty, art 4(g).

<sup>286</sup>S. Ebobrah A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice (2008).

## **CHAPTER FOUR**

### **4. THE AFRICAN UNION DISABILITY ARCHITECTURE (AUDA) AND EXPERIENCES IN SELECTED AFRICAN COUNTRIES**

#### **4.1 The African Union Disability Architecture (AUDA)**

African Disability Architecture is a mechanism that exclusively focuses on disability related human rights framework. As we have tried to discuss in the previous sections, regrettably the African human rights system has not recognized in due attention the rights of people with disabilities. As a result, people with disabilities have remained without focus in the system. Africa's regional focus on disability issues has a long history dating back to 1980 when the Africa Regional Conference on the International Year of the Disabled Persons was held in Addis Ababa, Ethiopia.<sup>287</sup> However, the idea of an African specific human rights instrument dealing with the rights of people with disabilities is relatively recent. It was first suggested in 2003 during the first AU Ministerial Conference on Human Rights in Africa which not only expressed its concern for the plight of vulnerable groups including persons with disability in general, but it also called upon member states to 'develop a Protocol on the protection of the rights of people with disabilities and the elderly'.<sup>288</sup>

Hence at regional level, specific legislations and institutions have come in place and some of the mechanisms are under the way to come after certain debates entered in to conclusion. Thus, when we refer African disability architecture, it comprises of programs, strategies, legislations and institutions that specifically and wholly devoted to disability.<sup>289</sup> Considering these realities, we will discuss all of the above indicated disability architecture mechanisms as follows.

##### **4.1.1 The First African Decade of Disabled Persons (1999-2009)**

The first African Decade of Disabled Persons was initiated by the Labour and Social Affairs Commission of the Organization of African Unity (OAU) in April 1999 and adopted by the OAU

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<sup>287</sup>Frans Viljoen, and Japhet Biegon, the Architecture for an African Disability Rights Mechanism. Published by the African Decade of Persons with Disabilities S. Africa P.41.

<sup>288</sup>Id.P.46

<sup>289</sup>Id.P.31.

Assembly of Heads of State and Government in July 1999 with a view to ensure improvement in, and equalization of, opportunities for disabled people.<sup>290</sup>

It was proclaimed by the OAU Assembly of Heads of State and government during their 35th session held in Algiers, Algeria in July 1999.<sup>291</sup> The goal of the decade is the full participation, equality and empowerment of people with disabilities in Africa. The Decade calls upon OAU member States to study the situation of persons with disabilities, with a view of Formulating measures favoring equalization of opportunities, full participation and the independence of Person with disabilities in society.<sup>292</sup>

The Continental Plan of Action (CPOA) is the outcome of the Pan-African Conference on the African Decade of Persons with Disabilities that took place in Ethiopia in 2002.<sup>293</sup> It serves as a set of guidelines to member states in formulating and implementing national disability strategies. The Plan of Action is primarily to serve as a guideline to Member States in the formulation of their national programs on disability issues as well as in putting in place mechanisms for the implementation of the Decade's objectives.<sup>294</sup>

Throughout the Plan of Action, the terms “people with disabilities”, “disabled persons” and “disabled people” are used interchangeably, reflecting accepted usage in different countries.<sup>295</sup>

The CPOA has 12 main objectives. The objectives are:

a) formulating and implementing national policies programs and legislation to promote the full and equal participations of persons with disabilities, b) promote participation of persons with disabilities in the process of economic and social development, c) promotes self-representation of persons with disabilities in all public decision-making structures, d) enhance support services for persons with disabilities, e) promote special measures for children, youth, women and elderly

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<sup>290</sup> Ibid.

<sup>291</sup> Anne-Marie Mooney Cotter, *An International Legal Analysis of Disability Discrimination*, Published by Ashgate Publishing Limited Ashgate Publishing Company 1988, PP. 335.

<sup>292</sup> Ibid.

<sup>293</sup> Report of the Commission on the Draft African Union Disability Architecture (AUDA), 3<sup>rd</sup> Session of the AU Conference of Ministers of Social Development (CAMSD3) Addis Ababa, Ethiopia 26-30 November 2012.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

persons with disabilities, f) ensure and improve access to education, rehabilitation, training, employment, sports, and the cultural and physical environment, g) to prevent causes of disabilities, h) promote and protect disability rights as human rights, i) support the development of and strengthening Disabled Peoples Organization (DPO), j) to mobilize resources, k) provide mechanisms for coordination, monitoring and evaluation of the activities of the African Decade of Persons with Disabilities, l) advocating and raising disability awareness in general and awareness of the African Decade of Persons with Disabilities in particular.<sup>296</sup>

#### **4.1.2 The Second African Decade of Persons with Disabilities (2010- 2019)**

In 2008 the AU extended the African Decade of Persons with Disabilities to 2019.<sup>297</sup> The first African Decade of Persons with Disabilities Action of the African Decade of Persons with Disabilities was revised based on the evaluation of the recorded successes and gaps in fulfilling the objectives as conducted by the AU in 2010.<sup>298</sup> Like that of first Decade, the second Decade has been ensued By the Continental Plan of (2010-2019). This continental plan of action contains information on the background and context of the Decade, its objectives and outlines eight (8) strategic thematic areas for implementation at national level, and includes priority action areas for each thematic area.<sup>299</sup> The first strategic thematic area is the establishment of coordination and mainstreaming focal point in national governments which will particularly mainstream as priority action areas youth, women and children with disabilities, as well as mobilize resources for disability inclusive development. The second thematic area deals with statistics, research and evidence gathering on disabilities in Member States. The third strategic thematic area concerns legislation regarding non-discrimination, equality before the law and freedom from exploitation and cruel treatment of persons with disabilities. The fourth area, that of health and rehabilitation highlights health and rehabilitation services identified as priority actions. The fifth thematic area

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<sup>296</sup>Ibid.

<sup>297</sup>The Second African Decade of Persons with Disabilities, (2010- 2019).

<sup>298</sup>Aïda Sarr and Kudak washe. Second African Decade of Persons with Disabilities 209-219. Secretariat of the African Decade of Persons with Disabilities, available at <http://www.africandecade.org.za> accessed on 26, Nov. 2012.

<sup>299</sup>Ibid.

has been identified as adequate standard of living and social protection for persons with disabilities, with social protection as priority action for the target group concerned.<sup>300</sup>

The promotion of inclusion of persons with disabilities in all sectors of society is the seventh strategic thematic area outlined in the Continental Plan of Action. Under this area, self-representation, education, livelihoods, work, employment, sport and culture are identified as priority action areas. The next thematic area for implementation is the development of institutions dealing with disability, including disability desks in all government ministries and advocacy, organizational support and strong roles of Disabled People's Organizations (DPO's). Lastly, the monitoring, evaluation and reporting on the implementation of the Continental Plan of Action are outlined as a strategic thematic area.<sup>301</sup>

#### **4.1.3 The Draft African Disability Protocol**

Among the regional human rights systems discussed in the previous chapter, the only region that issued a treaty attached to disability is the Organization of American States (OAS), known as the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, which was adopted in 1999, and that of a supervisory body (the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities) has been established under this treaty. Similar to this, there seems to be a movement of drafting an African self-standing treaty on disability which can be considered to be the other major component of the architecture. The idea to formulate an African regional treaty on the rights of PWDs was first expressed in 2003 during the first AU Ministerial Conference on Human Rights in Africa which called upon AU member states to develop a Protocol on the protection of the rights of people with disabilities and the elderly.<sup>302</sup>

Although Article 18(4) of the African Charter makes reference to both older Persons and PWDs, the African Commission initially established and appointed a focal point on older person's

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<sup>300</sup>The Mental Disability Advocacy Center, MDAC Written Submission to the Secretariat of the African Decade of Persons with Disabilities for the Development of the African Union Continental Disability Strategy (2010-2019) 31 August 2011.

<sup>301</sup>Ibid.

<sup>302</sup>Lawrence Mute, Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa Revised Draft as of 3 May 2012.

only.<sup>303</sup> This omission was rectified in 2009 during the Commission’s 45th ordinary session when it transformed the Focal Point on the Rights of Older Persons to a five-member Working Group on the Rights of Older Persons and People with Disabilities in Africa.<sup>304</sup> Members of the Working Group are inclusive of a spectrum of representatives of the disability sector, such as the AU Commission, experts and Disabled People’s Organizations (DPOs).<sup>305</sup>

The Working Group was mandated the following respective duties:

- a) “To hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;
- b) To draft concept papers for consideration by the African Commission that would serve as a basis for the adoption of the draft protocols on the rights of older persons and people with disabilities;
- c) To facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights;
- d) To collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development of member states; and
- e) To identify good practices to be replicated in member states.”<sup>306</sup>

A seminar was held on the rights of older persons and people with disabilities in Accra, Ghana, 26-28 August 2009. The outcome of this session was two draft protocols, one on the rights of older persons and the other on the rights of PWDs. In respect to the latter (hereinafter the Accra Draft), a sub-committee was established during the seminar and tasked with the role of enhancing the draft.

Since 2010, The African Human rights Commission has started to provide certain forums to discuss whether a specific treaty related to disability is significant or should be in place at the continental level. As a result, arguments are made for and against the importance of treaty sketching out options as a forward and recommendation. Among these theme of the arguments:

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<sup>303</sup>Ibid.

<sup>304</sup>Ibid.

<sup>305</sup>Ibid.

<sup>306</sup>Ibid.

The first of these, the prioritization of the UN treaty, is a given for states that have become party to the CRPD. The argument advanced here is that states and civil society have to take seriously and honour the obligations under this treaty and make the most of its potential for disability rights advancement.

The second option is related to the mainstreaming of disability rights into the existing African regional human rights system that mainly takes in to account to the African Charter and the activities of the African Commission.

The third avenue that of a separate treaty dealing with the rights of people with disabilities in Africa should be seen as an integral part of the way forward. In this regard, some of the main issues are: the need for identifying underlying rationale and philosophy of such a treaty; and the importance of substantially including people with disabilities in the process.

Is an African Union instrument on disability rights imperative? It is important to inquire whether it is at all necessary to have such a treaty considering that there is already a global treaty on disability rights from which PWDs in Africa can potentially draw protection. By 2009, when the Commission established the Working Group on the Rights of Older Persons and People with Disabilities, a global disability convention was already in force, arguably filling the normative gap that had hitherto prompted calls for an African disability treaty. Perhaps in light of this development, the Commission mandated the Working Group to draft a concept paper that would serve as a basis for The Protocol. This protocol is necessitated by the fact that by and large African human rights instruments fall short of the minimum standards established by the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol would provide an opportunity to adapt significant provisions which are applicable to Africa.<sup>307</sup>

However, the CRPD is not flawless. It fails to address certain issues that are Relevant to the promotion and protection of PWDs in Africa. For instance, the CRPD fails to comprehensively

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<sup>307</sup> ACHPR, Draft Protocol on the Rights of People with Disabilities in Africa, Prepared during the Expert Seminar on the Rights of Older Persons and People with Disabilities in Africa, Accra, Ghana, 26-28 August 2009.

highlight the effect of harmful traditional practices and beliefs on the rights of PWDs. The convention simply stipulates that states should take appropriate measures to modify or abolish customs and practices that constitute discrimination against persons with disabilities.<sup>308</sup> As mentioned earlier, African traditional societies associate disability with witchcraft and punishment from the gods.

Thus, PWDs, especially children, (PWA) are often subjected to unspeakable rituals to cleanse them of disability.

Thus, the draft protocol which is under way shall have the effect of protecting and promoting the rights of persons with disabilities to enable them enjoys all their human rights fully.<sup>309</sup>

#### **4.1.4 The Institutional Structure of the Africa Union Disability Architecture (AUDA)**

The institutional structure of the African Union Disability Architecture consists of the following: Bureau of the AU Conference of Ministers of Social Development (CAMSD), AU Commission Department of Social Affairs, the Secretariat of the Restructured African Rehabilitation Institute (ARI), its five regional offices and a Disability Consultative Committee, Eight African Regional Economic Communities (RECs) and Fifty-four AU Member States.<sup>310</sup>

Since the adoption of the Social Policy Framework for Africa by the First Session of the AU Conference of Ministers of Social Development, in Windhoek, Namibia, 27-31 October 2008, the AU Commission prioritised the area of disability and initiated, alongside stakeholder partners, a number of activities in developing a framework for concerted actions for the Continent to not only improve the lives of persons with disabilities, but to assist them in claiming their right, particularly regarding disability inclusive development.<sup>311</sup> A first draft of the framework, referred to as the African Union Disability Architecture (AUDA), particularly its institutional component, was presented to the 21<sup>st</sup> Session of the African Rehabilitation Institute

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<sup>308</sup>CRPD, art 4(b).

<sup>309</sup> Supra note at 307.

<sup>310</sup> 3<sup>rd</sup> Session of the AU Conference of Ministers of Social Development Paper by the Commission on Best Practices for Social Protection Measures Towards Vulnerable Groups in Member States (camsd3) Addis Ababa, Ethiopia 26-30 November 2012.

<sup>311</sup>Ibid.

(ARI) Governing Board.<sup>312</sup>The African Rehabilitation Institute (ARI) is the vital institutional structure to disability which is established upon the agreement provided in 1981 to assist governments and DPOs at continental, regional and national levels to implement the plan of action.

Upon considering the report of the session of the ARI Governing Board in 2011, the AU Executive Council in its Decision EX.CL/Dec.684 (XX), requested the AU Commission to conduct a further study “...to deepen the study regarding the integration of the functions of ARI into the Commission, including the transitional mechanism and the current financial situation relating to ARI”,<sup>313</sup> in view of the eminent restructuring of the African Rehabilitation Institute. Currently the focal Department for Disability in the AU Commission is, the Department of Social Affairs (DSA) has the responsibility to liaise with other Departments regarding mainstreaming of disability issues into their programs. The DSA and its specialized technical office, the Secretariat of the restructured African Rehabilitation Institute (ARI), interfaces with RECs and Member States regarding the implementation of CAMSD decisions, including the CPOA.<sup>314</sup>

The Restructured ARI shall be the instrument of the AUC to coordinate and assist efforts of Member States to bring about disability inclusive development in the Continent. In the medium-to-long term period it shall be the vehicle to implement the CPOA, and over time, it shall be the vehicle for facilitating the implementation of policies and programmes of the AUC in the domain of disability, including the provisions of the Protocol on the Rights of Persons with Disabilities. In addition, the AU commits to implement the priority strategies under the key thematic social issues spelt out in the Social Policy Frameworks for Africa, through empowering and providing persons with disabilities equal opportunities safeguarding their rights, enlisting their participation and mainstreaming them in all development programs. This allows for the participation of persons with disabilities, highlighted in Article 4(3) of the CRPD which places

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<sup>312</sup>Report on the Restructuring of the African Rehabilitation Institute (ARI) 3rd Session of the AU conference of ministers of social development Addis Ababa, Ethiopia 26-30 November 2012.

<sup>313</sup>Ibid.

<sup>314</sup> Ibid.

an obligation on the State to closely consult and actively involve people with disabilities in law and policy development and implementation.<sup>315</sup>

## **4.2 Experiences of Selected African Countries**

### **4.2.1 The Protection of Persons with Disabilities under the Human Rights System of the Federal Democratic Republic of Ethiopia (FDRE)**

The protection of human rights is copiously recognized under the FDRE constitution of 1995, making the document one of a kind in the African continent. As it is clearly stipulated under article 47 of the constitution, Ethiopia is a Federal State with nine regions and the two City Governments of Addis Ababa and Dire Dawa.<sup>316</sup>

Fortunately enough, the Constitution has given a unique place to international and regional human rights documents ratified by the country and rendered them an equal status with the Constitution. Hence, the aforementioned human rights instruments are recognized by the Constitution via modes of incorporation and interpretation.

With regard to the incorporation of the International Bill of Rights, into the FDRE Constitution, Article 9 (4), which deals with the supremacy of the Constitution, provides that international agreements ratified by Ethiopia "are an integral part of the law of the land".<sup>317</sup> This places Ethiopia squarely in the "monist" category. Furthermore, with regards to interpretations, Article 13(2) says "the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."<sup>318</sup>

The Constitution, under its Chapter 3, lays down fundamental rights and freedoms by dividing rights into human rights and democratic rights. Of course, plenty of the provisions of the FDRE

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<sup>315</sup>Gubela Mji, Malcolm Maclachlan, Natalie Melling-Williams & SiphokaziGcaza, *Realizing the Rights of Disabled People in Africa: an Introduction to the special issue*. Centre for Rehabilitation Studies, Stellenbosch University, Stellenbosch, South Africa, and Centre for Global Health & School of Psychology, Trinity College Dublin, Dublin, Ireland P.5.

<sup>316</sup>The Constitution of the Federal Democratic Republic of Ethiopia of 1995 Article 47.

<sup>317</sup>Ibid. Art. 9 (4).

<sup>318</sup>Ibid. Art. 13. (2).

Constitution under Chapter 3 protect human rights in generic terms, except a few articles. Some of the provisions relevant to persons with disabilities under Chapter 3 are:

Article 24 recognizes dignity of all human beings in general that undoubtedly apply to PWDs. It further states “everyone has the right to recognition everywhere as a person.”<sup>319</sup>

Similar to most bills of human rights, the Constitution, under Article 25, stipulates the principles of equality and non-discrimination clause in general terms. This provision recognizes equality before the law and prohibited discrimination on any grounds by saying “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>320</sup> In this respect, the law guarantees to all persons an equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status.”<sup>321</sup> Surprisingly, like that of ACHPR’s non-discrimination principle discussed in the previous section, the equality clause of the FDRE Constitution does not explicitly stipulate disability as ground of discrimination.

Article 41, which addresses economic, social and cultural rights, provides that the State must further, within the limits permitted by the economic capability of the country, care for and rehabilitate “the physically and mentally handicapped, the aged, and children who are left without parents or guardian.”<sup>322</sup> However, the justifiability and resource constraint arguments against the implementation of economic, social and cultural rights of PWDs is often not implemented due to prejudice and/or misunderstandings of the basic needs of this group attaching it solely to lack of funds and other resources.

The FDRE Constitution states that the legislative organ issues laws within the jurisdiction of Federal power. With regard to the domestication of the International Bill of Rights under Article 55 (12), the Constitution states that “it shall ratify international agreements concluded by the executive.”<sup>323</sup> Based on this constitutional framework, Ethiopia has ratified a plethora of international human rights instruments and regional human rights instruments. In relation to

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<sup>319</sup> Ibid. Art. 24 (3).

<sup>320</sup> Supra note at 315, Article 25

<sup>321</sup> Ibid. Art. 25.

<sup>322</sup> Ibid. Art. 41 (5).

<sup>323</sup> Ibid. Art. 55 (12).

PWDs, the Ethiopian legislative organ has ratified the UNCRPD by virtue of Proclamation No. 676/2010 to promote and protect the human rights of PWDs.

Also at regional levels, the government has ratified the African Charter on Human and Peoples' Rights (ACHPR) on June 15, 1998, and the African Charter on the Rights and Welfare of the Child (ACRWC) on December 27, 2002. Both of these instruments protect economic and social rights as well as first generation rights of PWDs.<sup>324</sup>

The judicial enforceability of constitutionally protected rights is found in Article 13(1) of the FDRE Constitution. It lays the responsibility to respect and enforce fundamental rights and freedoms on all Federal and State legislative, executive, and judicial organs and levels.<sup>325</sup> Article 71(2) of the Constitution states: "He [the President] shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives in accordance with the Constitution."<sup>326</sup> Also, Article 2(3) of the Federal Negarit Gazeta Establishment Proclamation states that all Federal or Regional legislative, executive, and judicial organs as well as any national or juridical person shall take judicial notice of laws published in the Federal Negarit Gazeta.<sup>327</sup>

In addition to the Constitution, the rights of PWDs are stipulated in a dispersed manner under few proclamations. For instance, the Federal Civil Servants Proclamation, under Article 13, stipulates about filling of vacancies guided by the non-discrimination principle that exclusively specifies female and workers with disabilities. To that end, it says that:

13(1) there shall be no discrimination among job seekers or civil servants in filling vacancies because of their ethnic origin, sex, religion, political outlook, disability, HIV/AIDS or any other ground.<sup>328</sup>

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<sup>324</sup>Ibrahim Idris, the Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution P.3.

<sup>325</sup>Ibid.

<sup>326</sup>Supra note at 318. Art. 71 (2)

<sup>327</sup>Art.2 of the Federal Negarit Gazeta Establishment Proclamation No. 3/1995.

<sup>328</sup>Federal Civil Servants (Proclamation No. 515/2007) Art.13.

13(3) in recruitment promotion and deployment, preference shall be given to:

- a) Female candidates;
- b) Candidates with disabilities; and,
- c) Members of nationalities comparatively less represented in the government office, having equal or close scores to that other candidates.<sup>329</sup>

Ethiopia has not enacted an all-encompassing national disability legislation. However, in 2008 it adopted an employment legislation relating to persons with disabilities. The Proclamation on "The Right to Employment of Persons with Disability" clearly states its objective in its Preamble. It notes that deeply-rooted negative perceptions of disability had affected the rights of persons with disability to employment and by reserving vacancies for persons with disabilities.<sup>330</sup> previous legislation on the right to employment of persons with disabilities had created an image that disabled persons were regarded as incapable of performing jobs based on merit, thus failing to guarantee their right to reasonable accommodation and to provide for proper protection.<sup>331</sup>

Contrary to the previous Proclamation, the current Proclamation provides an elucidation for "discrimination", "reasonable accommodation" and "undue burden".<sup>332</sup> It prohibits discrimination against persons with disabilities in employment practices and imposes concomitant responsibilities on employers, including taking measures to provide appropriate working and training conditions and materials for persons with disabilities, taking into account all reasonable accommodation and measures of affirmative action to women with disability, considering the multiple burdens that arise from their sex and disability and assigning assistants to enable persons with disabilities to perform their work or follow their training. Significantly, a duty is imposed on employers to protect women with disabilities from sexual violence that might occur in work places.<sup>333</sup>

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<sup>329</sup> Ibid. Art. 13 (3)

<sup>330</sup> The Proclamation on "The Right to Employment of Persons with Disability" (Federal Democratic Republic of Ethiopia, 2008, preamble).

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid. Article 6.

The other significant law which gives due attention for the protection of PWDs in Ethiopia is the Building Proclamation No. 624/2009.

Under Article 36, this Proclamation provides facilities for physically impaired persons. It reads as: “any public building shall have a means of access suitable for use physical impaired persons including those who are obliged to use wheelchairs and those who are able to walk but unable to negotiate steps.<sup>334</sup>“Where toilet facilitates are required in any building, adequate number of such facilities shall be made suitable for use by physically impaired persons and shall be accessible to them.”<sup>335</sup>

The other very important law that guarantees the rights of PWDs is Proclamation no. 691/ 2010 - a Proclamation to Provide for the Definition a Power and Duties of the Executive Organs of the Federal Republic of Ethiopia. Under Article 10 of the Proclamation, which dwells on common powers and duties, it insists all ministers to facilitate suitable conditions such as equal opportunities and participation to PWDs and victims of HIV/AIDS. The provision aims to “create, within its powers, conditions whereby persons with disabilities and HIV/AIDS victims benefit from equal opportunities and full participation.<sup>336</sup> Finally, this Proclamation entrusted the power in the Minister of Labor and Social Affairs to follow up the implementation of the rights of PWDs under Article 30.To that end, this provision provides for cooperation with the concerned stakeholders to undertake and facilitate the implementation of studies on insuring and improving the social well-being of citizens, particularly on the creation of enabling conditions for persons disabilities to benefit from equal opportunity and full participation.<sup>337</sup>

With regard to institutions, there are primarily two institutions, namely the Human Rights Commission and the Institute of the Ombudsman, which provide mechanisms for the enforcement of constitutionally or legislatively protected human rights. The Ethiopian Human Rights Commission was established through Proclamation 210/2000. This Proclamation provides substantive content for redress of victims. The powers and duties of the Human Rights Commissions are to ensure that human rights and freedoms recognized by the FDRE

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<sup>334</sup>Ethiopia building Proclamation no. 624/2009 Art. 36 (1)

<sup>335</sup>Ibid. (2).

<sup>336</sup>Proclamation to provide for the definition a power and duties of the executive organs of the federal republic of Ethiopia Art. 10.

<sup>337</sup> Ibid. Art. 30.

Constitution are respected by all citizens, organs of state, political organizations, and other associations, as well as by their representative officials.<sup>338</sup>

Another institution which is entrusted with preserving human rights is the Institution of the Ombudsman. It was established by proclamation No. 211/2000. The Institution considers cases concerning protection of human rights violations arising from administrative organs. Article 6(1) of the Proclamation states that the Institution of the Ombudsman “shall have powers and duties to ensure that directives and decisions given by executive organs do not contravene the Constitutional rights of citizens.”<sup>339</sup> Meanwhile, even though both the Ethiopian Human Rights Commission and the Institution of the Ombudsman are mandated to promote, protect, investigate complaints, and advise the relevant administrative authority on human rights issues, the establishment proclamations of these institutions do not mention disability in explicit terms like that of women and children.

#### **4.2.2 The Protection of PWDs under the Republic of South African Human Rights System**

Similar to Ethiopia, there is no comprehensive binding legislation enacted for the protection of the rights of disabilities in South Africa. However, the rights of PWDs are guaranteed in different parts of legislations. Among these legislations, the South African Constitution is the first legal framework that tries to protect the rights of PWDs from discrimination and marginalisation. The Constitution of the Republic of South Africa was first adopted by the Constitutional Assembly on 8 May 1996 (Act 108 of 1996), and was signed into law on 10 December 1996.<sup>340</sup> This Constitution contains an equality clause with an anti-discrimination provision that explicitly lists disability among the prohibited grounds of discrimination. In terms of disability equality, Section 9 goes on to outline and guarantee the important concept of equal protection as follows:

9(1) everyone is equal before the law and has the right to equal protection and benefit of the law.

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<sup>338</sup>Proclamation to Provide for the Establishment of the Human Rights Commission, Proclamation 210/2000, 4 July 2000.

<sup>339</sup>Proclamation to Provide for the Establishment of the Institution of the Ombudsman, Proclamation No. 211/2000, 4 July 2000 Art. 6.

<sup>340</sup>The Constitution of the Republic of South Africa was first adopted by the Constitutional Assembly on 8, May 1996 (Act 108 of 1996), and was signed into law on 10 December 1996.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>341</sup>

With regard to human dignity, Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>342</sup>

The Constitution is far-reaching in its inclusion of provisions defining the relationship between international and national law. Section 231 requires an act of incorporation by Parliament in order for an international agreement to become law in the country, unless it is inconsistent with the Constitution or national legislation.<sup>343</sup> Hence, in line with the above section, South Africa ratified the Disability Convention on 30 November 2007.<sup>344</sup> In addition, Section 233 of the Constitution states that every court, when interpreting legislation, must prefer any reasonable interpretation of such legislation that is consistent with international law.<sup>345</sup>

Over and above the constitutional provisions, South Africa has legislation aimed at redressing past imbalances faced by PWDs. Thus, the implementation of the rights of PWDs is dealt with in "generic" legal frameworks. These include, but are not limited to, the Social Assistance Act 1992, the Labour Relations Act 1995, the Employment Equity Act 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000.<sup>346</sup>

#### **4.2.3 The Protection of PWDs in the United Republic of Uganda**

The Constitution of Uganda was adopted in 1995 and amended in 2005. It includes a Bill of Rights (embodied in Chapter Four), which contains dedicated provisions on the rights of marginalized groups, i.e. women, children and persons with disabilities.<sup>347</sup>

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<sup>341</sup> Ibid. Section 9.

<sup>342</sup> Ibid. Section 10.

<sup>343</sup> Ibid. Section 231.

<sup>344</sup> Tobias Pieter van Reenen and Heléne Combrinck, *The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years*. Published by University of West cape 209 P.177.

<sup>345</sup> Supra note at 342

<sup>346</sup> Motseotsile Clement Marumoagae, *Disability Discrimination and the Right of Disabled Persons to Access the Labour Market*, Available at <http://dx.doi.org>. accessed on 15<sup>th</sup> Sept. 2012.

<sup>347</sup> The Constitution of the Republic of Uganda (1995,) art. 32-35.

The equality clause contains an anti-discrimination provision, which expressly lists disability as a prohibited ground of discrimination.<sup>348</sup> The State is required to take affirmative action in favor of groups marginalized on the basis of gender, age, disability, "or any other reason created by history, tradition or custom", for the purposes of redressing imbalances that exist against them.<sup>349</sup> Also, the Constitution provides that persons with disabilities have a right to respect and human dignity, and the State and society must take appropriate measures to ensure that they realize their full "mental and physical potential".<sup>350</sup> The Constitution recognizes the need to pay special attention to persons with disabilities, and reserves affirmative action seats for them in Parliament and at Local Government level.<sup>351</sup> This has played a pivotal role in improving their participation. In addition to the Bill of Rights, it is also important to look at the introductory section to the Constitution, entitled "National Objectives and Directive Principles of State Policy", which are intended to guide all organs and agencies of the State, citizens and all other bodies and persons in applying or interpreting the Constitution or any other law and in implementing policy decisions. Under the heading of "Social and Economic Objectives", the Directive Principles stipulate that society and the State are to recognize the rights of persons with disabilities to respect human dignity.<sup>352</sup> According to Principle XXIV, the State must promote the development of sign language for the Deaf. While providing guidance, the Directive.<sup>353</sup>

The Ugandan Constitution furthermore prescribes that the Parliament (at the national level) must be composed of one woman representative per district, and such representatives of other marginalized groups as the Parliament may determine.<sup>354</sup> In tandem with this provision, six seats have been designated for persons with disabilities; five representing each of the regions and one representing women with disabilities nationally.<sup>355</sup>

Regarding international law, the Ugandan system is a dualist one, requiring domestic incorporation of international treaties or agreements through 'enabling legislation'.<sup>356</sup>

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<sup>348</sup>Ibid. (Article 21(2)).

<sup>349</sup>Supra note at 349. Art. 32.

<sup>350</sup>Ibid. Art. 35.

<sup>351</sup> Ibid.

<sup>352</sup>Ibid. (Principle XVI).

<sup>353</sup>(Principle XXIV).

<sup>354</sup>Ibid. Article 78(1).

<sup>355</sup>Ibid.

<sup>356</sup>Ibid.

Unlike the case of Ethiopia and South Africa discussed in the previous sections, the Ugandan Parliament enacted the Persons with Disabilities Act (UPDA) in August 2006.<sup>357</sup> The objectives of the Act include, *inter alia*, the promotion of dignity and equal opportunities to persons with disabilities, encouraging the public and all sectors of government and society to recognize, respect and accept difference and disability as part of humanity and human diversity and promoting a positive attitude towards persons with disabilities as capable and contributing members of society.<sup>358</sup>

The UPDA addresses a broad range of areas, including education,<sup>359</sup> health services,<sup>360</sup> and rehabilitation.<sup>361</sup> It further contains provisions on employment rights,<sup>362</sup> accessibility (Articles 19-24) and discrimination in relation to goods, services and facilities.<sup>363</sup>

Part VI of the Act is significant in that it requires the Government to take affirmative action in favour of persons with disabilities for the purpose of "redressing imbalances" that exist against them.<sup>364</sup> It prohibits cruel, unusual or degrading treatment of a person with disability by any person or institution,<sup>365</sup> and provides that persons with disabilities, including those in institutions, are not to be subjected to arbitrary or unlawful interference with their privacy.<sup>366</sup>

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<sup>357</sup>The Ugandan Persons with Disabilities Act (UPDA) of August 2006.

<sup>358</sup>*Ibid.* (Article 3).

<sup>359</sup>*Ibid.* (Articles 5-6).

<sup>360</sup>(Articles 7-8).

<sup>361</sup>*Ibid.* (Article 10).

<sup>362</sup>*Ibid.* (Articles 12-18).

<sup>363</sup>*Ibid.* (Articles 25-31).

<sup>364</sup>*Ibid.* (art. 33).

<sup>365</sup>*Ibid.* (Article 34).

<sup>366</sup>*Ibid.* (Article 35).

## CHAPTER FIVE

### 5. FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 5.1 Findings

In this research valuable international and regional human rights instruments are analyzed and assessed whether the rights of PWDs are protected. After examining all the existing normative and institutional framework, the subsequent findings are duly drawn. The major findings are:

- The African union human rights instruments recognize the rights of PWDs in a fragmented or piece-meal fashion. Due to this fact, there is a lack of consistency and coherence in promoting the rights because the provisions relating to persons with disabilities are scattered in numerous instruments. This shows that no attention is bestowed to PWDs as one of the influential segments of the society. In addition, there is little or no recognition to disability as a key socio-economic and political theme in the African human rights framework. These human rights instruments do not cite PWDs in plain terms under the non-discrimination clause rather impliedly attempts to recognize PWDs in a form of generalized categorization of disability within dubious phrasings and groupings, such as, "vulnerable groups", "other status", etc. Thus, the OAU/AU human rights instruments undermine the specificities of disability. The Within the AUDA the terminology of PWDs is not utilized in a coherent way which falls under the right-based-approach. Terms such as Disabled peoples, handicapped, PWDs, physically-impaired persons are used in this structure. Thus it is possible to observe ambiguity in the definitions of PWDs in the continent.
- Lack of committed institution in AU to protect and promote and fulfill the fundamental rights of PWDs in the continent. As indicated under the institutional framework discussion of this research, there are two kinds of institutions are mandated to deal with disability rights at the African regional level. Firstly, there are those institutions that have developed within the institutional political structures of the OAU/AU. These are the LSAC and ARI. Secondly, there are those institutions that have been established under regional human rights treaties and they are, therefore, the main bodies that constitute the African human rights system. human rights institutions mentioned as the African

Commission on Human rights and Peoples' Rights, the African Court on Human and Peoples' Rights, Court of Justice have a great role in protection, promotion and interpreting the laws though nothing has been done in relation to PWDs except the commission which at least considered a single case on disability. In addition to the aforementioned general human rights architecture, there is African disability architecture, comprising of programs, strategies, legislations and institutions that specifically and wholly devoted to disability.

In order to execute the above mentioned disability-related programs, strategies and plans, the following institutional structure of the African Union Disability Architecture has been identified though not all are entirely working on disability matter as priority. The identified institutions are: AU Conference of Ministers of Social Development (CAMSD), Bureau of the AU Conference of Ministers of Social Development, AU Commission (Department of Social Affairs), the Secretariat of the restructured African Rehabilitation Institute (ARI), its five regional offices and a Disability Consultative Committee, Eight African Regional Economic Communities (RECs) and Fifty-four A U Member States. It is timely observable fact that the issue of disability is sensitive why the above all institutions are required to be incorporated within the disability architecture.

- Lack of awareness about the rights and commitment to solve problems of PWDs. The general situations of PWDs are not encouraging in all aspects due to the prevailing attitudes towards disabled persons in many societies. Public assumptions and stereotypes on disabled persons. All types of disabilities are found in the continent of Africa: blindness, physical-impairment, deafness, intellectual disabilities, albinism, vitiligo, leprosy, etc. the aforementioned and other types of disabilities are always vulnerable to a myriad of societal stigma and discriminations. Due to lack of awareness, infrastructures often exclude and isolate persons with disabilities, in a manner limiting their ability to attain services. Stairs or other physical barriers to service facilities are unfriendly to wheelchair and cane users. Services are provided by visual and audio mechanisms that absolutely neglect the overall considerations of blind and deaf persons. In connection to this, the lack of sign language interpreters deters deaf persons from acquiring services, public health and educational access. To a striking majority of PWDs in Africa, public facilities, transport, training, working opportunities, communication and even access to

information, are unavailable and inaccessible. Furthermore PWDs are being stigmatized by reason of cultural and religious convictions and beliefs.

There is also a general lack of reliable data on disability in many African countries, hampering efforts to document the relationships between poverty, social exclusion and disability. This has resulted in a lack of awareness among policy and decision makers of the strong link between poverty reduction and promotion of equal participation opportunities of persons with disabilities in development.

- The absence of an African-specific disability binding treaty is also one of the findings expounded in this research. Legislating a treaty on disability by the AU would be considered to be one step to protect and promote the rights as well as to improve the general situation of PWDs in Africa.
- Lack of appropriate representation in the AU disability architecture i.e., due to the absence of disability section in AU, attention is not conferred to PWDs as much as needed.
- Lack of strong DPOs to advocate for the rights and interests of PWDs in the continent. There are organizations operating on disability issues with a capacity constraints at continental level like the Secretariat of African Decades for persons with disabilities (SADPD). While conducting this research, there is a movement to form another organization at continental level known “The African Disability Forum (ADF)”.The presence of strong DPOs at continental level would have great meaning to the protection and promotion of the rights of disabilities in creating awareness, advocacy and representation in different issues of development, making policy and legal instruments.

## **5.2 Conclusion**

In this paper, much effort has been exerted to discussing and exploring the general protection of the human rights of persons with disabilities with a due emphasis to the African Union human rights and protection system. As one may very well grasp from this research, the study is more devoted to explore whether policy, legal and institutional frameworks exist to protect and safeguard the rights of PWDs within the OAU/AU legal and strategic approach. Of course, a

wide range of issues have been raised to examine and indicate available ways and means recognized in the AU human rights system through pinpointing challenges inflicted upon PWDs.

With this insight in mind, the paper discussed, in its First and Introductory Chapter, statement of the problem, objectives, methods, limitations and other related topics. The literature review in the Second Chapter, discussed in great details about the definitions and conceptual underpinnings of human rights and disability, the correlation between the two interrelated notions, as well as the general protection of the human rights of PWDs in light of international human rights instruments. In the Third Chapter, the author dwelt on the general situation of PWDs in Africa, normative and institutional framework of OAU/AUC and the role of sub-regional institutions in relation to PWDs. In the Fourth Chapter, the African Union Disability Architecture (AUDA) is discussed fairly briefly.

As it is noted at the very outset, the purpose of this research is to assess the protection of human rights of persons with disabilities in light of the African Union legal and policy framework *vis-à-vis* international human rights instruments, regional African human rights instruments and general existing situations. According to the World Report on Disability, published in 2011, one billion women, men and children live with a disability, most of them live in developing countries, excluded from access to health, education, social, economic, and political opportunities. As World Bank statistics clearly indicate, it is estimated that 82 percent of persons with disabilities live below the poverty line and encounter ample challenges in where both states and the public deny their rights such as economic rights, political rights, employment, legal capacity, education, health, access to information, infrastructures and facilities, as well as the very right to life.

The prevalence of disability is increasing due, *inter alia*, to ageing, health problems, climate change ramifications, alarming traffic accidents, natural disasters, conflict, and malnutrition. Having understood the ever-increasing rate of disability and challenges thereof, states in Africa are working hard to incorporate the rights of PWDs in all policy and legal frameworks, programs, strategies and plans. What is more, governments have established commitment to mainstream awareness on disability, thereby rectify the distorted attitudes, mis-beliefs and traditions, because of which many African societies disregard the rights and interests of PWDs

and believe that the cause of disability is a curse from the gods emanating from ancestral wrongdoings.

Similar to other Member States of the UN, African States had played an important role in both the drafting and adoption processes for the United Nations Convention on the Rights of Persons with Disabilities. Nonetheless, at the AUC level, no regional human rights instrument is wholly dedicated to disability as yet. Meanwhile, the AU, through the Commission for Human and Peoples Rights, is currently drafting its Protocol on the protection of the rights of people with disabilities. Provisions relating to disability are scattered in few African human rights instruments in apiece-meal fashion, and mostly merge disability with other social groups without an in-depth analysis pertaining to specificities.

Furthermore, terminologies used to describe PWDs in pertinent instruments of the continent lack uniformity; many societies use derogatory nomenclatures that disrespect and humiliate PWDs. Yet, in the near and remote past, futile attempts have been made mainly in the 1980's to adopt an agreement on establishment of the African Rehabilitation Institute which is now often criticized for not corresponding in line with accepted terminologies of international human rights. Thus, this has necessitated a contemporary African Union Disability Architecture that focuses wholly on the rights of PWDs in Africa. While conducting this study, the author understood from primary sources at the AU that a draft Protocol on Disability has been under initiation and is presented for deliberations among stakeholders in order to gather information and develop the work.

Besides, the selected African countries discussed in this research for purposes of comparative glimpse: namely, Ethiopia, the Republic of South Africa and Uganda, have legal and institutional framework that better fit for protection and promotion of the human rights of PWDs in comparison to the AU human rights framework.

Summing up, a thorough analysis of OAU/AU human rights instruments and experiences of selected three jurisdictions at continental level indicated that neither binding and specific legal instruments, nor strong and specialized institutions catering for the overall welfare and fundamental rights of PWDs are in place. Hence, taking notice of all these legal and institutional gaps, and challenges thereof encountering PWDs in the continent, the researcher has forwarded pertinent recommendations in the following subsection.

### 5.3 Recommendations

Based on the analysis of different literatures, international human rights instruments, appraising of the general situations of PWDs of Africa, examining the policy, human rights instruments and institutional frameworks of OAU/AU, evaluating AUDA, and so forth, the researcher would like to forward key and suitable recommendations as a contribution for the purpose of improving the rights of PWDs in the African Union human rights protection framework.

- **Strengthening Existing Institutions:**

The entire institutions found in AU have a great role in improving the general situations of PWDs in Africa through launching relevant mechanisms of monitoring, evaluation, capacity building and networking of all sectors within the AU to include disability issues in their programs. As discussed in this research, the major institutions working on human rights such as ACHPR, the African Court on Human Rights and Court of Justice should take into cognizance and include disability issues in all of their duties of protection, promotion and interpreting the rights set out in pertinent policies and human rights instruments. The DSA, as one of the institutions to facilitate and operate on social affairs in AU, should work effectively in monitoring and evaluating the globally ratified disability related instruments, mainly the CRPD, among states. All institutions falling within the auspices of AUDA should be given more attention because the strengthening of this structure would bring a meaningful change in mainstreaming the rights of PWDs. To that end, focal persons concerning disability should be established in all AU sectors rather than limiting the issue of disability only within the social affairs.

- **Enforcement of OAU/AU Human Rights Instruments:**

Provisions mentioning disability, already found under different AU human rights instruments in a scattered fashion, should be enforced between and among the entire AU Member States appropriately. These provisions should not remain without application only serving purposes of building chapters and pages of the documents.

- **Awareness about PWDs:**

As provided under article 8 of the CRPD, all concerned organs of State Parties are required to raise awareness on disability issues in order to realize the needs of people

with disabilities and recognize their ability to fully participate in all aspects of social and public activities. The obligation to create awareness should be practically executed by Member States of the AU, as well as non-governmental stakeholders, most importantly DPOs. All Member States ought to be committed to issue policies and laws targeting strategized improvements of the adverse situations of PWDs, so as to provide opportunities of education, employment, health, access to information, justice and buildings, etc. On top of this, in order to execute policies and laws, governments should establish appropriate disability supporting institutions to mainstream the rights of and provide services to PWDs. Likewise, DPOs should play an important role in raising the visibility of disability and the needs and concerns of disabled persons to governments, international bodies and other civil society groups. They should also raise awareness among disabled persons who might not even be aware of their basic rights, such as their right to education, training, employment or better quality of living. Systematic lobbying, advocacy and awareness creation, along with providing services for the PWDs, are supposed to be the key duties of DPOs and concerned stakeholders alike.

- **Facilitating Accessibility:**

Utilizing all the existing capacity, the AU should strive to facilitate the ways and means of providing accessible information and infrastructure to PWDs including within the AUC premises itself. For physically-impaired persons and blind persons, appropriate paths and ramps should be available on buildings, beginning from construction phases. Information and data in these institutions must be provided in Braille and augmented scriptures. Helpful adaptive technologies, such as Job Access for Windows and Speech (JAWS) should be adjusted on computers for blind persons to access information and pursue research at all levels. Also, hearing aid devices and sign-language interpretations should be provided for deaf persons to acquire information as equally as their non-disabled colleagues.

- **Representation:**

PWDs should be directly represented in the AUC, at all functions, to design policies, strategies, programs and implement grassroots activities. The AU should encourage PWDs to have equal participation and updates on all matters concerning them.

- **Management of Statistics and Data:**

All AU member states should urgently address the issue of lack of statistics and data of disabilities and analysis of the situations of PWDs in Africa. It goes without saying, managing statistics and data of PWDs facilitates knowledge of what services are to be provided and to identify problems encountering PWDs, thereby seek solutions for these problems. Thus, all possible measures ought to be taken immediately in terms of the collection and analysis of relevant statistics and data regarding PWDs.

- **Conducting Research:**

In tandem with the preceding point of recommendation, the AUC should encourage knowledge/evidence-based research to be conducted by scholars, DPOs, interested parties and by all institutions of the AU in accordance with their practical contexts. It must be mentioned here that while conducting this research, the researcher could not obtain the needed information due to absence of previously conducted research and compiled information analyses satisfactorily expounding the situations of disability in Africa.

- **Issuance of Specific Treaty on Disability:**

An African treaty on disability should, the researcher argues, be issued by the AUC that addresses the specific needs and conditions of PWDs. It is an undeniable fact that many African states have ratified the CRPD, followed by contextual domestications of the Convention. However, the CRPD, taken alone, is a universal instrument that does not embrace and recognize contextual differences in Africa. The CRPD also has some gaps of not covering African-specific disability abuses. Hence, The existence of an African-specific treaty on disability would have great meaning in practically consolidating respect for the rights and dignity of PWDs and in combating stereotypes, prejudices and harmful practices relating to PWDs.

- **Empowerment of PWDs and their Organizations:**

Since the issue of disability is obviously a crosscutting one, the AUC should strive to have a better understanding through empowering PWDs by initiating inclusive employment policies within AU, as is already the case for women and other minorities. Thus, PWDs and their organizations should be empowered, supported and coordinated

with direct technical, financial and systematic support by pertinent departments of the AUC.

- **Mainstreaming Disability in both Human Rights and Development Perspectives:**

To ensure the protection of the rights of PWDs, all the elements of the human rights/rights-based approach, such as accountability and full participation, should be meticulously implemented with an ultimate goal of mainstreaming disability in all ongoing and upcoming development schemes. As such, the voices of the voiceless can and will be effectively heard throughout Africa and the world at large.

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