

# 1 TOWARDS EQUALITY FOR WOMEN WITH DISABILITIES IN SOUTH AFRICA: THE IMPLEMENTATION OF ARTICLES 5 AND 6 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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## Summary

*The United Nations Convention on the Rights of Persons with Disabilities provides for various rights that must be prioritised by states parties which have signed and ratified it, with particular emphasis on the right to equality. The CRPD was signed and ratified by South Africa, and as such has become binding and requires implementation into the domestic legislation of the country. Article 5 of the CRPD provides generally for the principles of equality and non-discrimination of persons with disabilities. Article 6 then furthers this concept specifically for women with disabilities. The aim of this article is to determine whether the current legislative measures in place in South Africa, to realise the right to equality of women with disabilities, are compliant with international law. To this end, articles 5 and 6 of the CRPD along with the General Comments released by the Committee on the Rights of Persons with Disabilities will be analysed.*

## 1 Introduction

2021 marks the 15th anniversary of the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>1</sup> The CRPD was adopted as a result of the recognition of the unique nature of the obstacles faced by persons with disabilities in achieving equality with their non-disabled peers. The introduction of the CRPD in 2006 resulted in a heightened awareness of the adequacy of measures aimed at reducing the level of marginalisation experienced by persons with disabilities. The founding principle of the CRPD is the creation of conditions under which

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1 UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) UN Doc A/RES/61/106 (24 January 2007).

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persons with disabilities can participate equally in society, despite their individual disability.

The socio-economic rights of marginalised and previously disadvantaged persons have been prioritised by the South African government since the transition to democracy and the introduction of the Constitution of the Republic of South Africa, 1996. Examples of persons who have (and still are) experiencing the consequences of systemic discrimination include women, black people and persons with disabilities.<sup>2</sup> Legislation, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), has been enacted to provide clear guidelines on how the rights of these marginalised groups are to be advanced. Over the years, there has also been significant jurisprudence on this subject, with a focus on the right to equality of marginalised groups. Well-known examples of such cases include *Hoffmann v South African Airways*<sup>3</sup> and *National Coalition for Gay and Lesbian Equality v Minister of Justice*.<sup>4</sup> The prohibition of unfair discrimination in South Africa is extensive, and significant progress has been made on this front. However, one marginalised group continues to find itself on the outskirts of this prioritisation of socio-economic rights to which it is entitled, namely persons with disabilities and more specifically women with disabilities.

Statistics show that women with disabilities in South Africa remain extremely disadvantaged in many respects, ranging from inadequate medical care to facing a lack of suitable employment opportunities.<sup>5</sup> The compilation of statistics relating to women with disabilities is impacted by the lack of priority shown to this group, since the gathering of such statistical information is inadequate.<sup>6</sup> Women with disabilities experience lower levels of employment<sup>7</sup> and education<sup>8</sup> than women without disabilities and men with disabilities, and higher levels of poverty<sup>9</sup> than these peer groups which means that the constitutional imperative of substantive equality is not a reality for women with disabilities. This is a clear indication that women with disabilities in South Africa are not experiencing full and equal participation in society. The ongoing

2 This is not a numerus clausus. See sec 9(3) of the Constitution of the Republic of South Africa, 1996.

3 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

4 *National Coalition for and Lesbian Equality and Another v Minister of Justice* 2000 (2) SA 1 (CC).

5 'Initial reports of state parties due in 2009: South Africa' (26 November 2014) 59; World Health Organisation 'World Report on Disability' (2011) 237.

6 Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse & Western Cape Network on Violence Against Women 'South African Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women – Submitted to the CEDAW Committee's 48th Session, 17 January-4 February 2011' (2011) 67.

7 Commission for Employment Equity 'Annual Report 2019-2020' (2019) 17.

8 Statistics South Africa 'Marginalised groups indicator report' (2018) 96.

9 Commission for Employment Equity (n 7) 44.

marginalisation of women with disabilities must be addressed to achieve the ideal of full and equal participation in society for women with disabilities in South Africa.

The CRPD provides for various rights that must be prioritised by states parties which have signed and ratified it, with particular emphasis on the right to equality.<sup>10</sup> The CRPD was signed and ratified by South Africa,<sup>11</sup> and as such has become binding and requires implementation into the domestic legislation of the country.<sup>12</sup> Article 5 of the CRPD provides generally for the principles of equality and non-discrimination of persons with disabilities. Article 6 then furthers this concept specifically for women with disabilities. The aim of this article is to determine whether the current legislative measures in place in South Africa to realise the right to equality of women with disabilities are compliant with international law. To this end, articles 5 and 6 of the CRPD along with the General Comments released by the Committee on the Rights of Persons with Disabilities<sup>13</sup> will be analysed. Thereafter, a set of indicators will be distilled from this analysis to use as a yardstick against which to measure the legislative provision for women with disabilities in South Africa. If there are any lacunae in this legislation, recommendations will be made as to how these can be remedied.

## **2 Article 5 of the CRPD**

Article 5 of the CRPD was included to express the importance of equality and non-discrimination for women with disabilities.<sup>14</sup> These concepts are described as being at the heart of the CRPD.<sup>15</sup> The Committee on the Rights of Persons with Disabilities (the Committee) noted some concern over the use of outdated approaches to disability.<sup>16</sup> The medical model of disability in particular has become outdated, in that it considers disability a matter of medicine and welfare.<sup>17</sup> The focus, in terms of the medical model, is on the 'treatment' and 'assistance' of women with disabilities by others and, as such, creates the impression that women with disabilities

10 Preamble to the CRPD.

11 South Africa signed and ratified the CRPD on 30 March 2007 and 30 November 2007 respectively. See 'United Nations Treaty Collection' [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) (accessed 16 March 2021).

12 Art 6 of the CRPD.

13 The Committee on the Rights of Persons with Disabilities was created in terms of art 34 of the CRPD and is tasked with, inter alia, compiling General Comments on articles of the CRPD to provide clarity as to what is required of states parties to the CRPD.

14 While the original text of art 5 refers to 'persons with disabilities', for ease of reading this article will substitute that phrase for 'women with disabilities', since the former includes the latter.

15 Sec 7 of the UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment on article 6: Women with disabilities (2015) UN Doc CRPD/C/14/R.1 dated 22 May 2015.

16 Sec 2 of General Comment 6.

17 Office of the President 'Integrated National Disability Strategy White Paper' (1997) 13.

induce feelings of sympathy and are not ‘complete’ human beings as a result of their particular medical condition.<sup>18</sup> This effectively diminishes a woman with a disability’s free exercise of her inherent rights, since she is seen as needing assistance to care for herself,<sup>19</sup> which is in direct contrast with the approach taken in terms of the human rights model. According to this approach, women with disabilities are considered full rights holders and the emphasis is on the person, instead of their medical condition.<sup>20</sup> It is the human rights model which is preferred by the Committee and which has informed the content of article 5.<sup>21</sup>

## 2.1 Article 5(1)

Article 5(1) requires the recognition by states parties ‘that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’. This is an unequivocal statement that women with disabilities have the same rights as women without disabilities. The concept of equality before the law is not new and has been included in various international instruments predating the CRPD,<sup>22</sup> but article 5(1) is the first time that this equality has been stated in the context of the rights of persons with disabilities.<sup>23</sup> This statement is particularly important for women with disabilities considering that women all over the world have historically been disenfranchised and been unable to exercise the same rights as men.<sup>24</sup> Article 5(1) thus confirms and emphasises the entitlement of women with disabilities to all the same rights and freedoms as their peers. In considering the issue of equality, the intersectionality between disability, gender and race must be acknowledged. This is particularly relevant for a country like South Africa, where the lingering effects and practical consequences of systemic racism are still felt.<sup>25</sup> The impact of race on the availability of resources and opportunities for women with disabilities is a substantial obstacle to full and equal participation in society.

18 I Grobbelaar-Du Plessis ‘Gestremdeheidsreg: ’n Internasionaalregtelike en regsver-gelykende analise’ LLD thesis, University of Pretoria, 2010 at 32.

19 Quinn G & Degener T *Human Rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

20 Sec 8 of General Comment 6.

21 Sec 9 of General Comment 6.

22 Equality before the law has been included in inter alia the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A(III) on 10 December 1948 and the International Covenant on Civil and Political Rights adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966.

23 Sec 8 of General Comment 6.

24 A Cornwall ‘Women’s empowerment: What works?’ (2016) 28 *Journal of International Development* 342 at 345.

25 National Planning Commission ‘National Development Plan 2030: Our future – Make it work’ (2012) 24.

Equality before the law means that women with disabilities must not be discriminated against in any legislation or by the judiciary,<sup>26</sup> while equality under the law means that women with disabilities are free to use the law for their personal benefit.<sup>27</sup> The full legal capacity of women with disabilities is thus expressly recognised in this section of article 5. From this, it is evident that states parties must recognise in some way the fact that women with disabilities have the equal protection and benefit of the law. When measuring compliance with article 5(1), it is submitted that one must therefore ask 'does the State Party recognise that women with disabilities have the equal benefit and protection of the law?'

## **2.2 Article 5(2)**

According to article 5(2): 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'. This section can be split into two concepts for ease of explanation, as can be seen below. Both are peremptory, since the CRPD provides that states parties 'shall' take both measures that follow in the section.

The first concept in article 5(2) creates an obligation on states to prohibit all discrimination based on disability. This places a positive duty on states to prohibit all forms of discrimination not only against women with disabilities, but also persons associated with them.<sup>28</sup> The Committee recognises four specific forms of discrimination that must be prohibited, namely direct discrimination, indirect discrimination, denial of reasonable accommodation and harassment.<sup>29</sup> This means that any attempt to prohibit discrimination against women with disabilities must be framed in such a way that each of these types of discrimination are clearly prohibited.

The second concept in article 5(2) requires that '[e]qual and effective legal protection' against 'discrimination on all grounds' be implemented. The express inclusion of the phrase 'legal protection' makes it clear that states must enact anti-discrimination legislation.<sup>30</sup> The article then refers to the prohibition of discrimination on 'all grounds'. This section alludes to the fact that discrimination does not always occur based on a single ground, but that it can be compounded by the interaction of different grounds with each other.<sup>31</sup> This 'multiple discrimination' creates a unique set of circumstances which result in aggravated discrimination being experienced.<sup>32</sup> This is clearly the case with women with disabilities, where

26 Sec 14 of General Comment 6.

27 As above.

28 Sec 17 of General Comment 6.

29 Sec 18 of General Comment 6.

30 Sec 22 of General Comment 6.

31 Sec 19 of General Comment 6.

32 As above.

gender and disability operate and interact and create additional barriers to equal benefit of the law. As mentioned above, the intersection of race, gender and disability must be taken into consideration when attempting to remedy systemic marginalisation experienced by women with disabilities. In the context of article 5(2), the intersection of race, gender and disability must be addressed when considering the legislation that states must implement to prohibit discrimination against women with disabilities. The legislation that states are compelled to enact must thus be comprehensive to offset the compounding effect of grounds of discrimination

Having considered article 5(2), it is submitted that the questions one must ask to gauge whether a state has been compliant are: 'has the state taken legislative measures to facilitate equal protection of and benefit under the law?'; and 'has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination against women with disabilities on all grounds?'. The latter investigation should take into consideration the impact of multiple discrimination as well.

### 2.3 Article 5(3)

Article 5(3) reads: 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'. Reasonable accommodation is defined as the

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>33</sup>

Reasonable accommodation is an integral part of the elimination of discrimination against women with disabilities.<sup>34</sup> Examples of reasonable accommodation include modifying equipment, rescheduling work, and making facilities and information accessible. There is no *numerus clausus* of examples since reasonable accommodation is implemented on an individual basis, in response to an individual's needs or requests.<sup>35</sup>

According to the Committee, reasonable accommodation is an *ex nunc* duty.<sup>36</sup> This means that reasonable accommodation must be provided when the women with a disability wants to exercise her rights.<sup>37</sup> The

33 Art 2 of the CRPD.

34 Sec 17 of the UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment 3 (2016), article 6: Women and girls with disabilities (2016) UN Doc CRPD/C/GC/3 dated 2 September 2016.

35 Sec 23 of General Comment 6.

36 Sec 24 of General Comment 6.

37 Sec 15 of General Comment 3.

denial of reasonable accommodation may result in unfair discrimination, although the CRPD does not require that the provision of reasonable accommodation be disproportionate or unduly burdensome on the person receiving the request.<sup>38</sup> In other words, a request for reasonable accommodation does not need to be met if the provider would be bound by an excessive or unjustifiable burden through complying with such a request. In determining whether a request is disproportionate or unduly burdensome, a case-by-case determination must be made as to whether the requested reasonable accommodation is proportional to the ends it aims to achieve.<sup>39</sup> Examples of factors to consider include the financial cost, health and safety requirements and the impact on other persons. Again, this is not a *numerus clausus* because of the individual nature of reasonable accommodation requests.

Article 5(3) creates an obligation on the state to not only implement reasonable accommodation itself, but also to ensure that reasonable accommodation is provided by others. When determining whether a state has been compliant with this obligation, the question that should be asked is 'has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?'

## 2.4 Article 5(4)

The last subsection of article 5 deals with the issue of specific measures taken to achieve de facto equality for women with disabilities.<sup>40</sup> Such specific measures may include policies or legislation that appear to be unfair in that they unduly favour women with disabilities. However, these specific measures will not be considered as unfair discrimination, and this is clearly stated in article 5(4) of the CRPD. This section aims to promote measures that may be used by states to advance the rights of women with disabilities, such as targeted recruitment and hiring procedures and the reallocation of resources for better access.<sup>41</sup> The use of positive measures to achieve equality for women with disabilities may appear to provide additional advantages to women with disabilities but are not considered unfairly discriminatory since these measures target a marginalised group.<sup>42</sup> Article 5(4) therefore does not create any additional obligations for states and there is thus no need to consider whether states are compliant with it or not. It is, however, important to note that article 5(4) echoes article 5(2) in that states must use positive or affirmative measures to achieve equality for women with disabilities.

38 Sec 18(c) of General Comment 6.

39 Sec 17(d) of General Comment 3.

40 Sec 17 of General Comment 6.

41 Sec 28 of General Comment 6.

42 As above.

### 3 Article 6 of the CRPD

Article 6 deals specifically with the rights of women with disabilities within the broader context of the CRPD. It has been described as a ‘cross cutting’ article, which means that states must take into consideration the rights of women with disabilities when implementing each of the other articles in the CRPD.<sup>43</sup> Historically, the intersectionality of disability and gender has been neglected in international law.<sup>44</sup> Essentially this means that international laws dealing with gender have not properly addressed disability, and vice versa. In addition, the issue of multiple discrimination was not previously addressed in international law and article 6 of the CRPD is a direct response to this invisibility of women with disabilities in international law.<sup>45</sup>

#### 3.1 Article 6(1)

Article 6(1) provides that:

States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

The first part of article 6(1) consists of a direct acknowledgement of the intersection of different grounds of discrimination. This echoes the latter part of article 5(2) which requires that discrimination on ‘all grounds’ should be prohibited. The intent of these articles is clear – states cannot deny the existence or effect of the multiple discrimination experienced by women with disabilities.

Article 6(1) reasserts that women with disabilities experience discrimination on multiple grounds, and then requires that states take specific action to negate the effect of this multiple discrimination. The latter half of article 6(1) requires that states take measures to ensure the full and equal enjoyment of all human rights and freedoms by women with disabilities. Unlike article 5 which requires legislative provisions to be enacted, the kind of measures taken by states is not specified in article 6(1). This means that the measures taken are not limited to legislation but can include policies and programmes, as long as these further the desired outcome of full and equal participation in society.<sup>46</sup>

43 Sec 28 of General Comment 3.

44 Sec 3 of General Comment 3.

45 As above.

46 Sec 62 of General Comment 6.

Article 6(1) is similar to article 5(2) in that both subsections require measures to be taken to ensure that women with disabilities enjoy the same rights as others. However, there are two points of distinction. Article 6(1) requires measures to be taken that are not limited to legislation, which is different to the obligation created in article 5(2). Article 6(1) further requires that measures be put in place to enjoy equal rights and freedoms, which is substantially broader than the 'full and equal protection of the law' required by article 5(2). There will by necessity be overlap in these two articles, but the implication of article 6(1) is clear: states must put in place measures beyond the enactment of legislation to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms.<sup>47</sup> This then forms the basis of the question that must be asked when measuring compliance with article 6(1), which is concerned with whether the state has adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms.

### **3.2 Article 6(2)**

Article 6(2) provides some clarity as to the nature and purpose of the measures that must be taken by states to ensure full and equal participation in society of women with disabilities. The subsections read that:

States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

This subsection overlaps with the obligations to enact legislation aimed towards ensuring full and equal participation in society for women with disabilities, since it requires states to take 'appropriate measures' to ensure a particular set of outcomes. The 'appropriate measures' referred to in this subsection includes legislation and policies, as well as targeted programmes aimed at advancing the rights of women with disabilities.<sup>48</sup>

The duty to ensure the 'full development, advancement and empowerment of women with disabilities' clarifies the goals that these appropriate measures must aim to achieve. While article 5 and article 6(1) mostly refer to legislative intervention by states, it is submitted that article 6(2) applies to effecting the social change necessary to ensure the full and equal participation in society of women with disabilities. The full and equal enjoyment of rights and freedoms of women with disabilities is largely informed by social norms and attitudes towards gender and

47 Sec 12 of General Comment 3.

48 Sec 16 of General Comment 3.

disability.<sup>49</sup> A woman with a disability who lives in a society where women and persons with disabilities are systemically disenfranchised and diminished will have much greater barriers to overcome to achieve full and equal participation in such a society.<sup>50</sup> States are therefore compelled to take measures that aim at empowering these women and advancing and developing their social, economic and political status.<sup>51</sup> These measures must contribute towards the goal of achieving full and equal participation in society of women with disabilities.

The question of whether these measures are ‘appropriate’ as required in article 6(1) is one that can only be answered on a country-by-country basis.<sup>52</sup> Since perceptions of gender and disability vary so broadly across the world, what may be considered an appropriate measure in one country may be wholly inappropriate in another.<sup>53</sup> The obligations created in article 6(2) must therefore be applied to each state without implicitly comparing its approach to the approach of other states. Since article 6(1) requires action that is very similar to article 6(2), the questions for gauging compliance are similar as well. The question that one should ask to determine whether a state is compliant with article 6(2) is whether a state has taken measures to develop, advance and empower women with disabilities and whether these measures are appropriate for the state in question.

#### 4 Indicators for compliance with articles 5 and 6

The above analysis of articles 5 and 6 of the CRPD is the first of its kind and has consequently led to the generation of 6 indicators for compliance which have not been previously clarified. To determine whether a state is compliant with its duties in terms of these two articles, the following questions must be asked:

- (1) Does the state party recognise that women with disabilities have the equal benefit and protection of the law?
- (2) Has the state taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities?
- (3) Has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination against women with disabilities on all grounds?

49 World Health Organisation ‘Intimate partner violence’ [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;jsessionid=5A8C7ADC004F42B33F9D5336AAAAD110?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=5A8C7ADC004F42B33F9D5336AAAAD110?sequence=1) (accessed 1 October 2020).

50 United Nations Development Programme ‘Human development report 2019’ (2019) 147.

51 Sec 21 of General Comment 3.

52 Sec 20 of General Comment 3.

53 L Grönvik ‘Defining disability: Effects of disability concepts on research outcomes’ (2009) 12 *International Journal of Social Research Methodology* 1 at 3.

- (4) Has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?
- (5) Has the state adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms?
- (6) Has the state taken measures to develop, advance and empower women with disabilities and, if yes, are these measures appropriate for the state in question?

It is important to note that neither article 5 nor article 6 provide for 'adequate' or 'extensive' measures to be implemented in respect of women with disabilities, but only require that these measures be appropriate. Whether measures are appropriate is an altogether different question to whether they are adequate. It is submitted that the adequacy (or otherwise) of these measures would be measured when examining the extent of implementation of other rights in the CRPD. As mentioned above, article 6 must be taken into consideration in relation to all the other provisions of the CRPD. For example, the right to an adequate standard of living requires a qualitative analysis of the resources available to women with disabilities. This effectively means that the measures put in place in terms of articles 5 and 6 can be qualitatively assessed when assessing the implementation of other rights in the CRPD. What is clear from the language used in articles 5 and 6 is that the state party is required to implement extensive and comprehensive measures to eliminate discrimination against women with disabilities and promote full and equal participation in society.

## **5 Is South Africa compliant with articles 5 and 6 of the CRPD?**

As mentioned above, South Africa has signed and ratified the CRPD and its Optional Protocol and is therefore bound by its provisions. The CRPD monitoring process consists of states submitting a periodical Country Report to the Committee, which then makes Concluding Observations on that report.<sup>54</sup> After these Concluding Observations have been made, the state party is left to its own devices in implementing the recommendations made by the Committee, since these are not binding on the state party.<sup>55</sup> While the nature of the enforcement of the provisions of the CRPD is beyond the scope of this article, the Country Report and corresponding Concluding Observations are a source of information on the measures South Africa has taken to realise the rights in the CRPD. In the following

54 United Nations Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (accessed 4 April 2021).

55 Office of the High Commissioner for Human Rights 'Concluding Observations' <https://www2.ohchr.org/english/bodies/treaty/glossary.htm> (accessed 4 April 2021).

paragraphs, each of the indicator questions will be applied to South Africa's measures to implement articles 5 and 6 of the CRPD.

### **5.1 Does South Africa recognise that women with disabilities have equal benefit and protection of the law?**

South Africa has one of the most progressive Constitutions in the world. As a result of the legacy of apartheid in the form of systemic discrimination, great importance was placed on the right to equality in the Constitution. The equality clause, section 9 of the Constitution, is of particular importance for women with disabilities, since it underpins several laws related to improving the socio-economic position of women with disabilities in South Africa. Section 9 aims to protect not only society as a whole, but in particular those members of society who are deemed to require extra protection in order to ensure that their basic rights are not limited or infringed unjustifiably.<sup>56</sup> Section 9(1) provides that 'everyone is equal before the law and deserves the equal protection of the law'.

Section 9(1) is an outright acknowledgment that 'everyone' is entitled to equality before the law and that 'everyone' deserves the equal protection of the law. This 'everyone' must be interpreted generously<sup>57</sup> and it stands to reason that this 'everyone' includes women with disabilities, especially in the light of the sections that follow which prohibit discrimination on gender, sex and disability among others. South Africa does therefore recognise that women with disabilities are entitled to the equal benefit and protection of the law.

### **5.2 Has South Africa taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities?**

Other than the Constitution, the primary legislation dealing with equality and unfair discrimination is the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which was enacted to give effect to section 9 of the Constitution.<sup>58</sup> The aims of PEPUDA include 'the equal enjoyment of all rights and freedoms by every person' and 'the promotion of equality'. While PEPUDA does not expressly mention women with disabilities, this does not mean that women with disabilities are excluded from the provisions of PEPUDA.<sup>59</sup> Section 6 of PEPUDA echoes section

56 K Govender 'Power and constraints in the Constitution of the Republic of South Africa 1996' (2013) 13 *African Human Rights Law Journal* 82 at 84.

57 *S v Zuma* 1995 (2) SA 642 (CC) para 14. See also *S v Mhlungu* 1995 (3) SA 391 (CC) para 8.

58 Sec 2(a) of PEPUDA.

59 Y Wiid 'The right to social security of persons with disabilities in South Africa' LLD thesis, University of the Western Cape, 2015 at 83.

9(3) of the Constitution and provides that '[n]either the State nor any person may unfairly discriminate against any person'. The phrase 'any person' includes women and persons with disabilities. Women with disabilities are therefore entitled to the protection of PEPUDA generally, as well as the targeted protection of sections 8 and 9. It is submitted that any interpretation of PEPUDA that leads to the exclusion of women with disabilities from its scope of application would be contrary to the spirit and purport of PEPUDA.

Between the equality clause in the Constitution and the provisions relating to women with disabilities in PEPUDA, it is submitted that South Africa has taken legislative measures to facilitate equal protection of and benefit under the law for women with disabilities.

### **5.3 Has the state implemented comprehensive legislation that aims to prohibit all forms of discrimination (including multiple discrimination) against women with disabilities on all grounds?**

Section 9(3) of the Constitution provides that:

[T]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, *gender, sex*, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.<sup>60</sup>

Disability is expressly included in section 9(3), and a person may therefore not be discriminated against because of their disability. Similarly, sex and gender are also grounds upon which unfair discrimination may not take place. The drafters of the Constitution clearly recognised that persons with disabilities and women require legislative and other measures to ensure their full and equal participation in society.<sup>61</sup> There is also a direct recognition that discrimination can be based on 'one or more grounds'. There is thus an acknowledgement from that state that multiple discrimination exists, although the intersection of disability and gender is not expressly mentioned.

In addition to the recognition of the existence of multiple discrimination, section 9(3) also includes a prohibition on two forms of discrimination. Direct and indirect discrimination based on gender, sex and disability are expressly prohibited although the compounding effect of more than two concomitant grounds is not mentioned. Nonetheless, the

60 My emphasis.

61 This is reflected in section 9(2) of the Constitution which provides for the use of affirmative action measures in respect of these groups of persons.

Constitution should be considered the legislative spearhead in prohibiting all forms discrimination against women with disabilities on all grounds.

The primary legislation dealing with unfair discrimination is PEPUDA, as discussed briefly above. The blanket prohibition of unfair discrimination in section 6 of PEPUDA is expanded upon in sections 7-9, where unfair discrimination on specific grounds is emphasised. Sections 8 and 9 prohibit unfair discrimination on the grounds of gender and disability, respectively. These sections list examples of conduct that will be considered unfair discrimination when aimed at either women or persons with disabilities. Examples include denial of access to opportunities, gender-based violence, denying any enabling facility and failing to eliminate obstacles that unfairly limit persons with disabilities from enjoying equal opportunities. By necessity, there is some overlap between these sections in the context of women with disabilities.<sup>62</sup> Multiple discrimination is therefore acknowledged in PEPUDA. The definition of discrimination in section 1 includes the phrase 'on one or more grounds', which indicates that the legislature intended to include multiple discrimination in the scope of application of PEPUDA. It is submitted that this acknowledgment that multiple discrimination exists is not sufficient to meet the requirement that states must take measures to prohibit discrimination on all grounds. The issue of multiple discrimination must be explained, and examples should be given, so that multiple discrimination can be identified, and the effects of multiple discrimination can be eliminated.

In 2016, the Department of Social Development released the first South African policy document on the rights of persons with disabilities in the form of a white paper.<sup>63</sup> The purpose of a white paper is to inform the drafting of future legislation, and so the release of a white paper relating to persons with disabilities can be considered an indication that legislation may be forthcoming. The White Paper on the Rights of Persons with Disabilities (the White Paper) is described as a 'call to action for government, civil society and the private sector to work together to ensure the socio-economic inclusion of persons with disabilities'.<sup>64</sup> Two of the pillars of the White Paper are to promote and support the empowerment of women with disabilities and to protect the rights of persons at risk of compounded marginalisation.<sup>65</sup> The White Paper then outlines how these pillars are to be achieved. These will be discussed below, when enquiring as to which policies and programmes have been put in place by the state,

62 Examples of this overlap include the elimination of gender-based violence and pregnancy related resources.

63 Department of Social Development 'White Paper on the rights of persons with disabilities' (2016) GG No 39792 9 March 2016.

64 White Paper (n 63) 7.

65 White Paper (n 63) 9.

since no legislation has yet been drafted as a result of the adoption of the White Paper.

Upon examination of the legislation currently in force, it becomes clear that women with disabilities are included in equality legislation only by implication. There is no legislation that is aimed at the right to equality of women with disabilities. In fact, South Africa does not have disability specific legislation at all. Disability is included in different statutes in a piecemeal fashion, which leads to a fragmented legal framework on the rights of women with disabilities. There is also no legislation which expressly provides that women with disabilities experience multiple discrimination, and no indication of how such discrimination is meant to be eliminated. Both the Constitution and PEPUDA acknowledge the existence of multiple discrimination, but neither provide guidance on how this is to be dealt with.

It is submitted that the CRPD requires more from a state party than inclusion in existing statutes by implication. There should be a clear legislative directive on the elimination of unfair discrimination against women with disabilities, and such a directive is currently lacking in South African legislation. This means that South Africa has not taken comprehensive legislative measures to eliminate all forms of discrimination against women with disabilities on all grounds and is not compliant with article 5 of the CRPD.

#### **5.4 Has the state taken measures to ensure the provision of reasonable accommodation for women with disabilities?**

There are two pieces of legislation in South Africa that aim to ensure the provision of reasonable accommodation. The first is PEPUDA and the other is the Employment Equity Act (EEA).<sup>66</sup> PEPUDA provides for reasonable accommodation more generally, whilst the EEA applies to reasonable accommodation in the workplace.

Section 25(1)(c)(iii) of PEPUDA provides that the state must develop codes of practice relating to equality, including codes on reasonable accommodation. The only other mention of reasonable accommodation in PEPUDA provides that the Equality Court may make an order compelling the implementation of reasonable accommodation.<sup>67</sup> PEPUDA is silent on the exact types of reasonable accommodation and how these are to be implemented. PEPUDA does, however, place a clear obligation on the state to develop a code (or codes) on reasonable accommodation.

66 Employment Equity Act 55 of 1998.

67 Section 21(2)(i) of PEPUDA.

One such code has been adopted, namely the Code of Good Practice on Key Aspects of Disability in the Workplace (the Code of Good Practice).<sup>68</sup> This Code of Good Practice only finds application in the workplace, which means it applies only to persons with disabilities who are employed or who are applying for employment.<sup>69</sup> The scope of application is thus quite narrow. The Code of Good Practice provides that '[e]mployers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job'.<sup>70</sup> Further, employers are not required to provide reasonable accommodation if doing so would create unjustifiable hardship on the business of the employer.<sup>71</sup> This closely resembles the language used in article 5(3) of the CRPD.

The lack of legislation and policy documents dealing with reasonable accommodation outside of the workplace is concerning. By way of example, there are no clear obligations or guidelines in implementing reasonable accommodation in schools, which has an impact on the right of access to education.<sup>72</sup> Considering that there is a need for reasonable accommodation and an obligation to ensure same in terms of the CRPD, it cannot be said that the narrowly focused Code of Good Practice is sufficient to meet this obligation. The state therefore needs to address this lack of legislation to remedy the current non-compliance with the CRPD.

The only nationally applicable policy relating to reasonable accommodation for persons with disabilities is the National Disability Rights Policy (NDRP).<sup>73</sup> The NDRP still grapples with elementary issues such as the definition of disability and the medical and social models of disability.<sup>74</sup> Many of these issues have been dealt with expressly in the CRPD. It is submitted that these issues have largely been settled and dedicating further time to these is unnecessary. There should be more focus on the practical implementation of the policy goals instead of theoretical discussions. The NDRP provides extensively for the provision of reasonable accommodation in many spheres of life, including access to information, planning and public consultation processes and education.<sup>75</sup> However, the NDRP is not a binding document and does not create obligations on national or local government or other individuals to ensure the provision of reasonable accommodation.

68 Employment Equity Act Code of Good Practice on the Employment of Persons with Disabilities (2015) GG No 39383 of 9 November 2015.

69 Item 6.3 of the Code of Good Practice.

70 Sec 6.1 of the Code of Good Practice.

71 Sec 6.11 of the Code of Good Practice.

72 The only reference to reasonable accommodation for schools is in the South African Schools Act 84 of 1996, which provides that schools must be accessible.

73 Department of Social Development 'Draft White Paper on a National Disability Rights Policy' (2014).

74 Draft White Paper (n 73) 18.

75 Draft White Paper (n 73) 44.

The 2016 White Paper on the Rights of Persons with Disabilities<sup>76</sup> provides that reasonable accommodation is an area of concern and that substantial change is necessary on this front. The White Paper then goes on to list a very clear and extensive number of examples of reasonable accommodation.<sup>77</sup> This list is a good indication of the types of action persons may take to provide reasonable accommodation. Again, though, the White Paper is not binding since it has not passed through the full legislative process. Until such time as the White Paper becomes actual law, there is no incentive to implement its provisions nor are there penalties for non-compliance. The same is true of the NDRP. Unfortunately, these two documents are effectively toothless since neither of them create actual obligations in the sphere of reasonable accommodation.

It is also important to note that neither the Code of Good Practice, NDRP or the White Paper provide for reasonable accommodation specifically of women with disabilities. There is thus no inclusion of gender specific measures to ensure reasonable accommodation. This omission must be addressed in order to comply with articles 5(3) and 6 of the CRPD.

### **5.5 Has the state adopted policies and programmes to ensure that women with disabilities have full and equal enjoyment of their rights and freedoms?**

In 2019, the erstwhile Department of Women was amalgamated with elements of other government departments, to form the Department of Women, Youth and Persons with Disabilities.<sup>78</sup> According to its website,

[t]he mission of the Department of Women, Youth and Persons with Disabilities is to accelerate socio-economic transformation and implementation of the empowerment and participation of women, youth and persons with disabilities through oversight, monitoring, evaluation and influencing policy.<sup>79</sup>

This is a substantial and broad mandate. The efforts and resources of the Department must thus be split between three marginalised groups: women, youth and persons with disabilities.

There is no evidence of seminars, awareness campaigns, policies or any other programmes having been adopted by this Department since its creation in 2019.<sup>80</sup> In fact, there is currently no working website for this

76 White Paper (n 63).

77 White Paper (n 63) 16.

78 National Government of South Africa 'Department of Women, Youth and Persons with Disabilities' <https://nationalgovernment.co.za/units/view/31/departement-of-women-youth-and-persons-with-disabilities-dwypd> (accessed 22 March 2021).

79 As above.

80 As above.

Department.<sup>81</sup> It is submitted that this Department needs to be more intentional about focusing on the rights of women with disabilities, since it is currently neglecting this aspect of its mandate. This criticism may appear harsh at first glance. An examination of the activities of this Department since its inception shows that emphasis has been primarily on the effect of COVID-19 on women, youth and persons with disabilities.<sup>82</sup> However, the COVID-19 pandemic can and should not be used as an excuse for the lack of progress made for the advancement of women with disabilities. Considering that women with disabilities are historically more disadvantaged because of the intersection of gender and disability, measures to ensure that women with disabilities enjoy their full rights and freedoms during the pandemic should have been prioritised. This has not been the case, and the activities of the Department have largely been confined to the realm of releasing statements on current events.<sup>83</sup> Other than the Department of Women, Youth and Persons with Disabilities, there is no dedicated state department that is tasked with adopting policies or programmes aimed at the full enjoyment of rights and freedoms of women with disabilities.

There are currently no policies, white papers or programmes in place that deal specifically with the rights of women with disabilities. It appears as though women with disabilities are becoming invisible in the broader context of the rights of persons with disabilities and other marginalised groups. There are two general disability related policies, namely the NDRP and the White Paper as introduced above. Both provide that the rights of women with disabilities must be prioritised in order to ensure the enjoyment of all rights and freedoms. The sections of these documents dealing with the rights of women with disabilities are scattered throughout the documents, and there is no dedicated section dealing with the rights of women with disabilities in greater detail. This piecemeal inclusion of the rights of women with disabilities leads to the impression that these rights have not been paid due consideration. Since women with disabilities have been recognised as a historically neglected and invisible group,<sup>84</sup> it is submitted that this fragmented approach is no longer sufficient and that specific, contextualised policies relating to the rights of women with disabilities must be developed by the state.

81 The website [www.women.gov.za](http://www.women.gov.za) returns an error message when accessed.

82 South African Government 'Department of Women, Youth and Persons with Disabilities' <https://www.gov.za/taxonomy/term/881> (accessed 22 March 2021).

83 As above.

84 Sec 3 of General Comment 3.

## **5.6 Has the state has taken measures to develop, advance and empower women with disabilities and, if yes, are these measures appropriate for the state in question?**

In the only Country Report submitted by South Africa on the status of implementation of the rights of women with disabilities, it is stated that:

Women with disabilities are affirmed through a range of targeted programmes and events by a number of government departments, although it recognised that improved co-ordination and targeting of these efforts will significantly strengthen impact.<sup>85</sup>

Since both the CRPD and the Constitution are transformative instruments, mere affirmation of women with disabilities is not sufficient. The rights of women with disabilities must be prioritised and action must be taken to ensure the equal enjoyment of rights and freedoms.

As mentioned above, the Department of Women, Youth and Persons with Disabilities is not active in its mandate to advance the rights of women with disabilities. The only two nationally applicable policy documents that include the rights of women with disabilities are not binding on national or local government. It is therefore submitted that the South African government is not currently taking measures to develop, advance and empower women with disabilities. Women with disabilities are treated as an afterthought in many instances, and this can no longer be accepted if transformative equality for these women is to be achieved.

## **6 Recommendations**

The application of the indicators for compliance with articles 5 and 6 of the CRPD to South Africa results in a rather bleak picture being drawn. Women with disabilities are not currently being treated as a priority in either legislation or policy. There appears to be no real attempt to implement programmes and policies to develop, advance and empower women with disabilities in South Africa. Out of the 6 indicators distilled from articles 5 and 6, South Africa is non-compliant in four of them. Put bluntly, this is not good enough. What, then, is the solution?

It is submitted that the primary instrument for change would be legislation aimed at realising the rights of women with disabilities. South Africa currently has no disability specific legislation, and disability is dealt with in a piecemeal fashion throughout different pieces of legislation. The time is therefore ripe to introduce disability specific legislation that devotes sufficient attention to the rights of women with disabilities. Such a

85 Initial report (n 5) 68.

consolidation of the provisions relating to women with disabilities would not only clarify their rights, but national legislation is binding on all spheres of government and private individuals. A comprehensive and dedicated 'Disabilities Act' would be a critical tool in realising the right to equality of women with disabilities.

There are precedents for legislation aimed at promoting and protecting the rights of vulnerable groups. Older persons and children as groups both have legislation dedicated to their rights. The Older Persons Act 13 of 2006 and the Children's Act 38 of 2005 were enacted over 15 years ago. Why, then, have women with disabilities been neglected by the legislature for so long, especially in light of the signature and ratification of the CRPD, also 15 years ago? Enacting national legislation would also provide a sense of urgency to the prioritisation of the rights of women with disabilities.

The existing policy framework (as it is) could be used as a guideline when compiling new legislation, and the drafters need not start with a blank slate. Importantly, if such legislative processes were to be started now, women with disabilities could be consulted as to the contents of the legislation. Such participation is imperative in the movement towards full and equal participation in society,<sup>86</sup> since the direct needs of the subjects of the legislation would then be addressed.

The Department of Women, Youth and Persons with Disabilities is currently underutilised. Resources from this department need to be dedicated to prioritising the rights of women with disabilities, which is stated as one of the Department's duties. Education and awareness campaigns can be spearheaded by this Department in conjunction with non-governmental and non-profit organisations which often work at the grass-roots level to reach the most vulnerable members of a group.

The South African government needs to re-commit to implementing the provisions of the CRPD. As mentioned previously, there has only been one Country Report submitted on the status of the implementation of the CRPD in South Africa. This sends a clear message that such implementation is not a priority to the government. The lack of any further report points to neglecting the rights of persons with disabilities generally. There is also no way to gauge whether the Concluding Observations of the Committee have been applied. The overall impression is that the rights of women with disabilities is not a priority for the South African government. This invisibility is arguably the single biggest barrier to full and equal participation of women with disabilities in South Africa and must therefore be remedied as a matter of urgency.

86 Part (y) of the Preamble to the CRPD.