

Chapter 14

Article 13

Handicapped children

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1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
2. State parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The state parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

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1 Introduction

Article 13 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) upholds the dignity of a part of humanity dehumanised for centuries. At the time of its adoption, it had unsettled the deeply-entrenched socio-cultural belief systems, which did not recognise persons with disabilities as rights holders.¹ It has, therefore, made an enduring mark on the African socio-cultural landscape, sowing the seeds of a disability rights culture in the African collective consciousness.

1 ST Tesemma & SA Coetzee 'Conflicting discourses on conceptualising children with disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 59-80.

At the time the Children's Charter was drafted, in the early 1990s, the level of awareness around the rights of persons with disabilities was very low and countries' laws related to disability were largely inherited from colonial times and – with very few exceptions – littered with dehumanising and criminalising provisions. At the time, most issues related to disability were addressed through criminal codes, hence with a totally different intent: to prevent crimes by persons with disabilities – mainly persons with mental disabilities – and to protect the lives and properties of the 'non-disabled' public. Therefore, their focus was not on the rights of persons with disabilities *per se*, but on their obligations. Their focus also was more on 'controlling' and 'restraining' persons with disabilities, who were considered a threat to the 'public'.²

Wherever the laws entertained other types of disabilities, they had a charity orientation and portrayed persons with disabilities as incapable of independent living. The title given to article 13 of the African Children's Charter, 'Handicapped children', echoes the thinking that was dominant at the time when the Charter was adopted. Most progressive disability rights Acts were enacted in Africa after the 2000s, which may be an indication that they took at least some inspiration from the Children's Charter. Article 13 of the Charter, therefore, has been valuable in introducing the notion that children with disabilities are rights holders and states have the obligation to ensure those rights.

With this background setting the scene, the chapter moves onto providing an overview of the current state of children with disabilities in Africa and, in subsequent parts, delves in to providing a section-by-section commentary of article 13. The substantive parts of the commentary begin by linking the article with other articles of the African Children's Charter and related human rights instruments. Part 4, especially, offers an in-depth analysis and legal interpretation of the various terminologies, concepts and discourses contained in or implied by the article.

2 Current relevant context

There are an estimated 240 million children with disabilities globally, out of whom close to 29 million live in Eastern and Southern Africa; 41,1 million live in West and Central Africa; and 21 million live in North Africa and the Middle East.³

In many communities, despite some commendable progress, there are negative attitudes and practices that marginalise and inflict harm on children with disabilities. For example, in many countries children with disabilities are hidden from public view; are denied access to immunisation services; and hence run the risk of succumbing to premature death.⁴

Many of these children lead a life subjected to physical, emotional and sexual abuse and exploitation, including online sexual exploitation.⁵ The absence of disability-accessible sexual and reproductive healthcare services means that children with disabilities are disproportionately exposed to teenage pregnancy and sexually-transmitted infections, including HIV.⁶

2 As above.

3 UNICEF 'Children with disabilities in the Middle East and North Africa: A statistical overview of their well-being', <https://data.unicef.org/resources/children-with-disabilities-in-the-middle-east-and-north-africa-a-statistical-overview-of-their-well-being/> (accessed 12 June 2024).

4 Tesemma & Coetzee (n 1).

5 African Child Policy Forum 'African report on children with disabilities' (2014), <https://africanchildforum.org/index.php/en/sobipro?sid=175> (accessed 12 June 2024).

6 African Child Policy Forum 'Sexual exploitation of children in Africa: A silent emergency' (2019), <https://violenceagainstchildren.un.org/content/sexual-exploitation-children-africa-silent-emergency-report-african-child-policy-forum> (accessed 25 May 2024).

Because of the negative attitudes about the ‘educability’ of children with disabilities and the inaccessibility of the school infrastructure, children with disabilities seldom are enrolled in school.⁷ Once at school, they are often excluded from accessing subject matter content because of ill-equipped teachers, ill-adapted curricula and an absence of pedagogic adaptations, and lack of access to assistive and adaptive devices.⁸

Accessibility of the physical environment, transportation and service centres is a huge challenge where educational and healthcare centres, child protection services, recreational facilities, hotels, banks, post offices and a host of other facilities and services remain largely physically inaccessible.⁹

3 Links to other Charter articles

Article 13 contains provisions that are also, directly or indirectly, covered by other articles of the African Children’s Charter. Notwithstanding the application of all other articles of the Charter to the rights of children with disabilities, certain articles closely complement article 13. These include articles on the general principles (articles 3,4 and 5); article 11 on education; article 12 on leisure, recreation and cultural activities; article 14 on health and healthcare services; article 16 on protection against child abuse and torture; article 17 on administration of juvenile justice; articles 19, 20 and 25 (related parental responsibilities for care and protection, especially in light of the high likelihood of children with disabilities being deprived of parental care); and article 21 on protection against harmful social and cultural practices.

For example, article 11(e) urges state parties to ‘take special measures in respect of female, gifted and *disadvantaged children*, to ensure equal access to education for all sections of the community’. The reference to ‘disadvantaged’ children can apply to a broad range of children who are educationally disadvantaged, including children with disabilities.¹⁰ Article 13, on the other hand, touches upon ‘training’ but fails to explicitly mention ‘education’.

The use of the term ‘disadvantaged children’ resonates well with the social model of disability, where ‘disadvantages’ are the result of ‘social structures’ and school practices that view children from certain social and cultural backgrounds or with particular physical or intellectual attributes as different.¹¹ Differences in physical or intellectual attributes, therefore, become a catalyst for educational disadvantage.¹² The article entitles these groups of children to benefit from ‘special measures’, a term that, interestingly enough, appears only in this article (article 11) and article 13.

The other issue mentioned under article 13 and invoked elsewhere in the Children’s Charter is the issue of protection. Children with disabilities are entitled, under article 13, to ‘special measures of protection’ to ensure their dignity, among others.

7 International Classification of Functioning, Disability and Health ‘Demographic and health surveys’ (2004-2017).

8 UNESCO ‘Education and disability: Analysis of data from 49 countries’ (2018), <https://uis.unesco.org/sites/default/files/documents/ip49-education-disability-2018-en.pdf> (accessed 27 May 2024).

9 ST Tesemma & SA Coetzee ‘Manifestations of spatial exclusion and inclusion of people with disabilities in Africa’ (2023) 10 *Disability and Society* 1934-1957.

10 K Vetrivel & RD Murthy ‘Education for disadvantaged children’ (2011) 6 *Golder Research Thoughts* 1-4 (my emphasis).

11 AJ Artiles ‘Toward an interdisciplinary understanding of educational equity and difference: The case of the racialisation of ability’ (2011) 40 *Educational Researcher* 431-445.

12 AJ Artiles ‘Beyond responsiveness to identity badges: Future research on culture in disability and implications for response to intervention’ (2015) 67 *Educational Review* 1-22.

Under article 21¹³ state parties are urged

to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child -on the grounds of sex or other status.

These provisions are relevant to the rights of children with disabilities and speak volumes to their daily challenges because of the abundance of customs and practices that are detrimental to their survival, health, dignity and development. A plethora of harmful practices exist, such as those that condone killings or bodily mutilations of children with disabilities; those that normalise their ‘concealment’ and confinement; and those that subject them to brutal ‘exorcism’ rituals.¹⁴ This has also been acknowledged by the report of the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) on its fact-finding mission conducted in 2022 on the situation of children with albinism in the republic of Malawi¹⁵ and in its report on the recent Day of General Discussion on the issue.¹⁶ The Committee’s Resolution 19/2022 on the Situation of Children with Albinism in Africa, developed by the External Expert Working Group on Children with Disabilities, is another document that urges to do more to protect children with albinism.¹⁷ Article 21, therefore, is a key provision in the African Children’s Charter to ensure the all-rounded protection of children with disabilities and needs to be read in conjunction with article 13.

4 Links to other human rights treaties

4.1 Terminologies

The drafters of the African Children’s Charter used the term ‘handicapped’ as the title of article 13, referring to children with disabilities, a vivid reflection of the attitudes of the time. The term was especially used in laws that existed before the Children’s Charter, the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); and the African Disability Protocol, most of which were subsequently revised and amended. This term depicts the begging gesture with the cap in hand and, therefore, is used for portraying people begging for alms.¹⁸ As a term with a charity orientation, it emphasises dependence of persons (children) with disabilities on non-disabled people while denying the fact that persons or children with disabilities are capable of self-reliance and independent living.¹⁹

13 See ch 22 of this volume.

14 Tesemma & Coetzee (n 1).

15 African Children’s Committee Report of ACERWC-Working Group on Children with Disabilities in Africa on the Fact-Finding Mission on the Situation of Children with Albinism in the Republic of Malawi and Status of Implementation of ACERWC’s Decision on Communication No 004/Com/001/2014 submitted by the IHRDA against the Republic of Malawi (2022).

16 African Children’s Committee Day of General Discussion on Solutions to Challenges Faced by Children with Albinism (2024), <https://www.acerwc.africa/en/article/activity/day-general-discussion-solutions-challenges-faced-children-albinism> (accessed 12 June 2024).

17 The external Expert Working Group on the rights of children with disabilities (one of the four such working groups established by the African Children’s Committee) technically supports the Children’s Committee’s mandate on the rights of children with disabilities, <https://www.acerwc.africa/en/special-mechanisms/working-groups/working-group-rights-children-disabilities> (accessed 13 June 2024).

18 DD Sage & LC Burrello *Policy and management in special education* (1986) 2.

19 ST Tesemma ‘A critical analysis of law and policy on the education of disabled children in South Africa’ PhD thesis, University of South Africa, 2013 54.

However, thanks to the rapid lexical evolution in describing persons with disabilities, such degrading terminologies are no longer in use, at least in expert discourses. This has mainly been the result of persons with disabilities gaining greater recognition as duty bearers, rights holders, and control over these terms and definitions over the years. Their enhanced capability to offer 'alternative, empowering conceptions' has improved the perceptions of disability and improved the protection of the rights of persons with disabilities.²⁰

For instance, in the body of article 13, like in CRC, the term 'disabled child' (disability-first language) is used instead of a 'child with disabilities' (person-first language). Arguments and counter-arguments have been put forth for and against each of these designations. The term 'children with disabilities' is the one used by CRPD. Such a formulation is said to maintain disability as a characteristic of the individual, instead of the attribute that defines the person's identity.²¹ However, not everyone agrees with the appropriateness of this terminology. Many disability rights activists are against such a formulation and instead prefer the term 'disabled persons' or 'disabled children'.²² In her strong critique of the term 'persons with disabilities', Titchkosky notes that it is an 'apolitical, individualised, and inappropriate means by which to dismember disability from the self'.²³ In a similar vein, the use of the preposition 'with' in the people-first designation is seen by some as having the potential to give the impression that the disability is of a second order nature. It is argued that, as we do not speak of 'persons with a gender' or 'persons with a race', both of which are social constructs (so is 'disability'), the term is simply inappropriate.²⁴ The preposition 'with' coming after 'person' also implies that the 'disability' is an attribute that belongs to the person or 'within' the person, instead of a socially-imposed attribute.

On the other hand, those who argue in favour of the term 'disabled children (persons)' argue that the term sends a strong message that these children are 'disabled' by society, by factors outside of or 'without' their individual circumstances.²⁵ 'Disability-first language' is also preferable for some because they want to have their disability stated first contrary to 'person first language' which separates the identity of the person from their disability, which is a significant aspect of who that person is.²⁶

4.2 Types/categories of impairments

Article 13 starts with a general protective clause for children who are physically or mentally disabled. In the same way as article 23 of CRC, article 13 singles out mental and physical disabilities. It also dichotomises physical and mental disability, even though children with mental impairments can also have physical impairments. The very important issue of children having multiple disabilities thus is neglected in this, as in other instruments.

The categories of impairments listed under article 13 contrast sharply with those in CRPD, which include physical, mental, intellectual or sensory impairments. The African Disability Protocol enriches the list by adding psychosocial, neurological and developmental impairments. Neurological

20 T Titchkosky *Disability, self, and society* (2003) 129, 134.

21 S Triano *The politics of naming. A note about language* (2003) 8.

22 L Clark & S Marsh *Patriarchy in the UK: The language of disability* (2002) 2.

23 Titchkosky (n 20) 134.

24 D Pothier & R Devlin 'Introduction: Toward a critical theory of dis-citizenship' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 3.

25 Tesemma (n 19).

26 C Seeberger 'Disabled person or person with a disability?' (2021), <https://www.sensoryfriendly.net/disabled-person-or-person-with-a-disability/> (accessed 15 January 2024).

impairments include ‘cerebral palsy, multiple sclerosis, Parkinson’s disease, epilepsy and Alzheimer’s disease’.²⁷ The inclusion of these impairments in the African Disability Protocol, hence their recognition as disabilities, is noteworthy, given the widespread inclination to view them under a purely medical/pathologising lens. The Protocol also uses the term ‘psychosocial impairments’ instead of ‘mental disabilities’, which is in line with the suggestion under CRPD General Comment 7.²⁸

Amidst this, it is important to recognise that, in contrast with CRPD (article 7) and African Disability Protocol (article 28),²⁹ both of which address ‘children with disabilities’ in the plural, article 13 of the African Children’s Charter – like CRC – uses the term ‘every child’ or ‘a child’. This is significant because it is a recognition of the fact that every child’s experience of an impairment is different, and it is also an acknowledgment of the child’s individuality and individual identity. Hence, we may conjecture that there was an attempt by the Charter drafters to distance themselves from homogenisation of impairments or oversimplification of the corresponding prescriptions. Every child with an impairment and even children with a particular type of impairment have a totally different set of experiences, although there are some collective, shared social barriers with which they wrestle.³⁰ Efforts at homogenisation of disabilities would not only risk generating stereotypical crowd identities but might also compromise efforts to design and implement individually-tailored responses.³¹

4.3 Dignity, self-reliance and active community participation

The article has laid out two aspirations that will be achieved through implementing the rights of children with disabilities, namely, (a) ensuring the child’s dignity; and (b) promoting the child’s self-reliance and active participation in the community.

The African Children’s Charter’s emphasis on ‘dignity’ goes a long way in ensuring all-rounded protection for children with disabilities considering prevalent attitudes and practices that negate that very principle. It, first and foremost, restores to the discourse the ‘humanness’ of which children with disabilities are routinely denied. The denial of the humanness, hence the dignity, of children with disabilities, opens the door for their rights to be trampled upon, for them to be abused and to be treated as worthy of discrimination. Traditions and practices abound that ‘dehumanise’ children with disabilities, which consider them as sub-human (or as incomplete or as animals) or super-human (as spiritual or demonic), depending on the nature of their impairment.³² A person who is perceived as not quite human will not be regarded as someone with human dignity and, consequently, they will be treated in a manner that is inconsistent with their intrinsic worth.³³ If a person is dehumanised, they are viewed as someone who falls outside the scope of morality, rights and justice, which makes it easy for others to regard any harm done to such a person as morally justified and warranted.³⁴

27 National Disability Services ‘Disability types and description’ <https://www.nds.org.au/index.php/disability-types-and-description> (accessed 20 January 2024).

28 CRPD Committee General Comment 7: The participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention (2018) paras 16, 46, 50.

29 CRPD, in its Preamble, duly recognises the ‘diversity of persons with disabilities’ (Preamble CRPD).

30 UNICEF ‘Definition and classification of disability: Including all children in quality leaning’ (2014), https://www.unicef.org/eca/sites/unicef.org.eca/files/IE_Webinar_Booklet_2.pdf (accessed 20 February 2024).

31 E Livingstone ‘Homogenising disability is harmful’ (2023), <https://www.linkedin.com/pulse/homogenizing-disability-harmful-emma-livingstone-bte8e> (accessed 27 January 2024).

32 D Kaplan *The definition of disability* (2005) 1-2.

33 C Sanger ‘Decisional dignity: Teenage abortion, bypass hearings, and the misuse of law’ (2009) 18 *Columbia Journal of Gender and Law* 415.

34 M Maiese *Dehumanisation* (2003), <http://www.beyondintractability.org/essay/dehumanization> (accessed 24 October 2019).

The notion of self-reliance is aligned with CRPD's recognition and affirmation of the 'disability is not inability' mantra by drawing one's attention to the fact that children with disabilities are capable of independent living and self-reliance and participation in community life. Besides promoting an inclusive culture, the article, through these principles, espouses the balance between protection and self-reliance. Protection becomes a crucial imperative because of the socially-imposed barriers, while self-reliance brings us back to the notion of autonomy and the fact that children with disabilities can do what other children are able to do. These principles are subscribed to by the African Disability Protocol under article 3(1) where the interrelated principles of 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' are mentioned. The African Disability Protocol (art 28(2)) seems to have borrowed the African Children's Charter' wording, where it calls upon state parties to 'ensure dignity, promote self-reliance and facilitate active participation in community life'.

The notion of 'self-reliance' is related to the notion of 'independent living', which views environmental barriers and societal prejudices as the factors that stand in the way of self-reliance of children or persons with disabilities. Accordingly, the concept of 'independent living' heralds a shift in both mindset and practice, away from a medicalised paradigm of social welfare where children or persons with disabilities are portrayed as being reliant on the social welfare system (erroneously believed to be financed by non-disabled persons) for survival to one of self-sufficiency and independent living.³⁵

The inclusion of the promotion of 'active participation' by children with disabilities is one of the most progressive aspects of article 28(2). The African Disability Protocol and CRC also contain provisions with a similar wording. In a world where children are not recognised as having agency and where children are expected to 'listen' and 'be seen', instead of 'communicate' and 'interact', the recognition of the right of children to participate in community life is laudable.³⁶ The inclusion of such a right for children with disabilities has been a deal-breaker. Its significance runs deep in disrupting prevalent practices that deny children with disabilities the opportunity to participate in education, community activities, play and recreations, festivities, weddings and funeral ceremonies.³⁷

Of course, besides the attitudinal and cultural barriers, the active participation of children with disabilities, unlike other children, in community life is determined by the availability or not of accessible roads, buildings, transport and services.³⁸ This is yet another indication of the inter-related nature of these rights.

4.4 Special measures of protection

Under article 13(1) the African Children's Charter urges state parties to take special measures of protection for children with disabilities. The corresponding term used in CRC is 'special care'. Such a phrase does not exist in CRPD. The term 'special protection measures' invokes another term related to it, namely, 'vulnerability' or 'vulnerable people'. In the human rights literature, those who require special measures of protection are often referred to as vulnerable people who are individuals or groups who, for various reasons, have traditionally been victims of violations, structural discrimination and exclusion, and consequently require special protection for the equal and effective enjoyment of

35 ST Tesemma 'Economic discourses of disability: An overview of lay and legislative narratives' (2014) 2 *African Disability Rights Yearbook* 121-147.

36 ACPF 'The African Report on Child Wellbeing: Progress in the child-friendliness of African governments' (2018) <https://africanchildforum.org/index.php/en/sobipro?sid=203> (accessed 15 March 2024).

37 Tesemma & Coetzee (n 1)

38 N Baboo 'The lives of children with disabilities in Africa: A glimpse into a hidden world' (2011), <https://africanchildforum.org/index.php/en/sobipro?sid=146> (accessed 10 March 2024).

their human rights.³⁹ Under these circumstances, ‘special protective measures’ aim at disrupting or eliminating structural barriers and redressing past and future injustices.⁴⁰

In its state party reporting guidelines, the African Children’s Committee requires states to report on ‘special protection measures’ which include ‘legislative, judicial, administrative and other measures’ taken to the realisation of the rights of specific groups of children. The Committee lists, among others, ‘children who need special protection on account of being in risky and vulnerable conditions’; and children who are ‘victims of harmful social and cultural practices affecting the child’s welfare, dignity, normal growth and development’. These groups of children – which can be read to include children with disabilities – are considered by the Committee to require special protection measures by the state.⁴¹

According to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, ‘measures’ in the formulation ‘special measures’ – in the context of women’s rights, but equally applicable to the rights of children with disabilities – consist of a wide spectrum of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach programmes.⁴²

Special measures of protection, therefore, might require more resources and involve some degree of prioritisation in resource allocations.⁴³ There were discussions about whether special protection measures, especially when involving prioritisation of certain groups over others, would amount to ‘discrimination’. This has been clarified by the Limburg Principles (paragraph 39), in the context of economic, social and cultural rights:

Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved.

4.5 Subject to available resources

Article 13(2) urges state parties

to ensure, *subject to available resources*, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

The first observation about this article relates to the clause ‘subject to available resources’ – a clause only found in article 13 of the African Children’s Charter and in both sub-articles 13(2) and 13(3).

39 Icelandic Human Rights Centre ‘The human rights protection of vulnerable groups’, <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups> (accessed 13 June 2024).

40 J O’Brien ‘Affirmative action, special measures and the Sex Discrimination Act’ (2004) 3 *UNSW Law Journal* 841.

41 African Children’s Committee *Compendium of working documents of the African Committee of Experts on the Rights and Welfare of the Child* (2022), https://www.acerwc.africa/sites/default/files/2022-11/Compendium_ACERWC%20Working%20Documents_English.pdf (accessed 22 March 2024).

42 O’Brien (n 40).

43 Victorian Equal Opportunity and Human Rights Commission ‘Special measures’, <https://www.humanrights.vic.gov.au/for-organisations/special-measures/> (accessed 18 April 2024).

Besides running the risk of putting hierarchies among rights, such a clause automatically puts the rights of children with disabilities at the very tail of the resource prioritisation and allocation queue. According to this, states are expected to address the rights of children with disabilities when they are left with 'extra change in their coffers'.⁴⁴

The CRC Committee expressed its concern on the issue when it stated:⁴⁵

Many states parties not only do not allocate sufficient resources but have also reduced the budget allocated to children over the years. This trend has many serious implications, especially for children with disabilities who often rank quite low, or even not at all, on priority lists.

It is repeatedly noted that the clause 'subject to available resources' cannot be taken as an excuse to abrogate one's responsibility to deliver on one's obligations entered into as a result of ratifying the instrument concerned. There is a core minimum of obligations beyond which states cannot regress, even when they have resource constraints. States are required to prioritise the provision of essential services in the use of the available resources.⁴⁶

In fact, in the context of the provision of 'special care and assistance' being subject to available resources, the CRC Committee urges states to prioritise children with disabilities by requiring State parties 'to make special care and assistance to children with disabilities *a matter of high priority* and to invest to the maximum extent of available resources in the elimination of discrimination against children with disabilities and towards their maximum inclusion in society'.⁴⁷

Equity and effectiveness considerations in the use of and access to the available resources are therefore required.⁴⁸ It is also noted that the term 'resources' may not refer only to financial resources,⁴⁹ but might also include natural, cultural, human, educational and regulatory resources.⁵⁰

Experts indicate that the use of the clause 'subject to available resources' in conjunction with the clause 'progressive realisation' in human rights instruments, including in the African Children's Charter, introduces practical difficulties in measuring and monitoring state compliance with those provisions. Two such challenges are particularly noted.⁵¹

The first is in determining what resources are 'available' to a particular state to give effect to the substantive rights under the Covenant. The second difficulty is to determine whether a state has used such available resources to the 'maximum'. It has been suggested that the word 'available' leaves too

44 RM Sillah & TE Chibanda 'Assessing the African Charter on the Rights and Welfare of the Child as a blueprint Towards the attainment of children's rights in Africa' (2013) 11 *Journal of Humanities and Social Science* 50-55.

45 CRC General Comment 9 para 20.

46 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights para 28.

47 CRC General Comment 9 para 14(a) (my emphasis).

48 Limburg Principles (n 46) para 27.

49 The Children's Charter under article 14(2(j)) recognises the need to mobilise 'local community resources' in the context of developing primary health care for children. This can be significant because it potentially expands the overall understanding of the concept of 'resources' in the Charter from the traditional sense of 'government resources' or the public budget to local community resources, which may include social capital, indigenous knowledge resources, socio-cultural and spiritual or religious resources as well as in-kind and financial community contributions (see C Gervin & KV Charles 'The value of social capital in resourcing community development in Africa' (2022) 1 *WAC Series* 1-6).

50 S Skogly 'The requirement of using the "maximum of available resources" for human rights realisation: A question of quality as well as quantity?' (2012) 3 *Human Rights Law Review* 393-420.

51 R Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 6 *Human Rights Quarterly* 693-714.

much ‘wiggle room for the state’, making it difficult to define the content of the progressive obligation and to establish when a breach of this obligation arises.

Therefore, it follows from this that states may advance the ‘resource constraints’ argument as a justification for any regressive steps taken.⁵² However, the ESCR Committee has on many occasions contested such types of arguments put forward by states.⁵³

For instance, the African Children’s Committee promises to diligently scrutinise claims of non-availability of resources for non-fulfilment of children’s rights and expresses its expectation of state parties to demonstrate ‘rapid forward progress in extending the reach and impact of rights deliverables to children, with a special focus on the most marginalised and excluded groups’.⁵⁴

4.6 Progressive achievement

On a similar note, the notion of ‘progressive realisation’ has been a cause for debate because of its potential to undermine commitment of state parties, in terms of the speedy implementation of the provision. This clause is mentioned under article 13 and only in one other place, namely, under article 11, in the context of secondary education.

‘Progressive achievement’ should involve ‘making continuous improvements’ and refraining from ‘taking “retrogressive measures”, which are backward steps that diminish people’s current enjoyment of their rights’.⁵⁵ The Limburg Principles have made it clear that such a clause is no excuse for regression or delay in implementation of the rights in question. Under paragraph 21, it is stated:

The obligation ‘to achieve progressively the full realisation of the rights’ requires states parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to deter indefinitely efforts to ensure full realisation. On the contrary all states parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

Similarly, African Children’s Committee General Comment 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection states that ‘progressive realisation should not mean postponement of implementation [of rights]. Progressive realisation must be understood in the context of the urgency required to fulfil children’s rights’.⁵⁶

Interestingly, the Limburg Principles make an important separation of the ‘subject to available resources’ clause from the ‘progressive realisation’ clause. Under paragraph 23, it states that ‘the obligation of progressive achievement exists *independently* of the increase in resources; it requires effective use of resources available’. Even with this principle in place, the two notions combined can have the potential to undermine all the important provisions contained in the African Children’s

52 Although beyond the scope of this *Commentary*, states have at their disposal measures to increase their national resource envelope, which include combating corruption, controlling illicit financial outflows, and reprioritising resources away from pro-rich sectors (eg fuel subsidies and military spending) to pro-poor sectors (eg cash transfers and free universal health care). See ACPF *The economic case for investing in children in Africa: Investing in our common future* (2021); also see African Children’s Committee General Comment 5 para 3.8.

53 ESCR Committee ‘Statement: An evaluation of the obligation to take steps to the “maximum of available resources” under an Optional Protocol to the Covenant’ UN Doc E/C.12/2007/1 (10 May 2007) para 9.

54 African Children’s Committee General Comment 5 para 3.10.

55 A Blyberg & H Hofbauer *Progressive realisation: Article 2 of ICESCR and government budgets* (2014).

56 Para 3.6.

Charter in advancing the rights of children with disabilities, most of which require resources, at times, more so than other sectors.

4.7 Assistance to parents/care givers

The extension of the right to those who care for and give assistance to the child is a progressive provision as it obligates state parties to ensure that care givers and parents or assistants are supported.

Families of children with disabilities incur extra expenses to cover for the ‘special’ needs of their children, such as medicines, hearing aids, glasses, sticks, wheelchairs, special diets (due to allergies), extra clothing, special beds, guide dogs, readers for the blind, incontinence pads, breathing apparatuses, and the like. Families also must pay for adaptations to the home, or personal care, as well as for items such as individualised cars and freezers. For example, households with persons with severe or very severe disabilities in Sierra Leone spent on average 1,3 times more on health care than their non-disabled counterparts, according to 2010 estimates.⁵⁷ Sometimes, children with disabilities have to pay more for some of the basic items. For instance, persons with limited mobility may have to use the nearest shops, rather than the cheapest shops.⁵⁸ These additional costs of living for a family with a child with a disability, coupled with household poverty, often forces parents and care givers to abandon their caregiving roles.⁵⁹ This may have contributed to many children with disabilities ending up in institutional care.⁶⁰

Care givers are mentioned in CRPD in the context of ensuring ‘assistance and support for persons with disabilities and their families and caregivers’. CRC makes a similar promise of assistance to ‘those responsible for the child’s care’. The CRC General Comment also stressed the need to support children with disabilities and their families to have an adequate standard of living and access to adequate food, clothing and housing, and to the continuous improvement of their living conditions.⁶¹ In a very concrete suggestion that would go a long way in alleviating household financial difficulties, the General Comment calls for the provision of ‘material support in the form of special allowances as well as consumable supplies and necessary equipment, such as special furniture and mobility devices that is deemed necessary for the child with a disability to live a dignified, self-reliant lifestyle, and be fully included in the family and community’.

The General Comment provides an extensive list of support to families, which includes ‘education of parent/s and siblings, not only on the disability and its causes but also on each child’s unique physical and mental requirements; psychological support that is sensitive to the stress and difficulties imposed on families of children with disabilities’.⁶²

57 J Trani and others *Disability in and around urban areas of Sierra Leone* (2010) 36.

58 L Reith ‘Exploring the link between poverty and disability’ in Combat Poverty Agency *Disability, exclusion and poverty: A policy conference* (1994) 24.

59 Tesemma (n 34) 124.

60 Human Rights Watch ‘Children with disabilities: Deprivation of liberty in the name of care and treatment’ (2017), <https://www.hrw.org/news/2017/03/07/children-disabilities-deprivation-liberty-name-care-and-treatment> (accessed 13 June 2024).

61 CRC General Comment 9 para 3.

62 CRC General Comment 9 para 41.

The General Comment also mentions care givers in relation to their right to have access to information on their child's impairment, including its causes, management and prognosis.⁶³

4.8 Right to access training versus 'education'

Article 13(2) of the African Children's Charter urges state parties to ensure that the child with disabilities gets effective access to training, preparation for employment and recreation opportunities. The fact that the term 'education' is not explicitly used in this sub-article problematises the article's intent and scope of application. The term is used in conjunction with 'preparation for employment and recreation opportunities' which might suggest that it was used to mean 'vocational training'.⁶⁴

Although in many instances the terms 'education' and 'training' are used interchangeably, the term 'training' often refers to short-term, narrow-focused skills transfer that aims at improving productivity or performance, hence implying the impartation of practical skills. Education, on the other hand, is a long-term engagement in learning, with a mostly theoretical orientation and having a broader scope in terms of developing knowledge, skills, moral values and understanding required in all aspects of life.⁶⁵ The term 'training' is used in CRPD (article 24(5)) and under article 27(1(d)) in the context of 'vocational training'. CRC (article 23(3)) referring to children with disabilities mentions the terms 'education' and 'training' one after the other, hence implying that they mean two different things.

However, the aim of 'training', as articulated in subsequent lines, sounds broader than what the meaning of the term implies, which is 'the fullest possible social integration, individual development and cultural and moral development'. Such wording invokes learning that enhances the child's personal development, including in moral and cultural values as well as their integration into society at large, which can be categorised as 'education'. Such characterisation is also in line with article 11 of African Child's Charter, General Comment 1 (2001) to CRC on the aims of education and under article 24 of CRPD, in reference to the objectives of education.

4.9 Movement and access to the physical environment

Article 13(3) emphasises 'movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to'. The emphasis on accessibility to the built environment and movement, which may be two different but interrelated issues, is noteworthy. While improving the disability-accessibility of the built environment might require improvements in the design and construction of roads, buildings and other infrastructure, 'movement' might further imply ensuring availability of assistive devices. In the same tone, CRPD in article 18 refers to liberty of movement, implying that disability should not be the ground for restricting the right to move within a country or outside of a country. Article 20 of CRPD also urges state parties to facilitate the personal mobility of persons with disabilities by, among others, facilitating access to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost.

The inclusion of the 'liberty of movement' provision is a very critical one, in light of the fact that children with disabilities are often denied outdoor interactions and are often concealed from public view. Studies have revealed that many children with disabilities are kept shackled in windowless storerooms, hot household courtyards or dark attics for weeks, months or years, often with little or no

63 Para 37.

64 L Wakefield 'Making progress. The African Committee of Experts on the Rights and Welfare of the Child and the rights of children with disabilities' (2013) 1 *African Disability Rights Yearbook* 369-374.

65 M Masadeh 'Training, education, development and learning: What is the difference?' (2012) 10 *European Scientific Journal* 62-68.

interaction, even with those within the household.⁶⁶ Partly the result of genuine fear for their safety, given the inaccessibility of the built environment littered with all sorts of barriers, and partly due to fear of stigma, these children are hidden away, excluded from immunisation and other essential healthcare and educational services.⁶⁷ The practice of hiding children with disabilities has also been driven by tendencies – among families and communities – to regard them as a sign of impurity, a curse and a shame⁶⁸ and by fear of stigma and ostracisation by association.⁶⁹

This is recognised by the African Disability Protocol, where states are urged to take measures ‘to eliminate harmful practices on persons with disabilities, including witchcraft, abandonment, concealment, ritual killings or the association of disability with omen’.⁷⁰

Children with mental disabilities were also the worst affected by the restriction of liberty of movement. In several countries there are reports of children with disabilities being kept in prisons or psychiatric centres or prayer camps. Common forms of restraint include being chained, tied up or locked in confined spaces such as sheds, huts, cages, chicken coops, pig pens or goat sheds.⁷¹

The African Children’s Charter’s inclusion of accessibility of the built environment can be lauded as a progressive move in comparison with CRC (article 23), where there is no reference made to accessibility, although it was subsequently elaborated in detail in CRC General Comment 9 in paragraphs 39 and 40. However, article 13 falls short of mentioning access to services, as well as access to media. On the contrary, the CRC General Comment mentions access to services, including health and education (paragraph 39), and access to all forms of media, including television, radio and printed material as well as new information and communication technologies and systems, such as the internet (paragraph 38).

On a positive note, the African Disability Protocol, under article 15, articulates details of what states should undertake to ensure barrier-free access to the physical environment, transportation, information, and other facilities and services.⁷² On the other hand, article 13(3) of the African Children’s Charter awkwardly injects the word ‘legitimately’ in the middle of this provision, further complicated by the fact that this is the only place in the whole Charter where this term appears. The inclusion of the word might give the impression that the child with physical or mental disabilities would enjoy those rights if their wants are ‘legitimate’. Legitimacy is defined in legal contexts as an action that is in accordance with the law, or permitted, authorised and sanctioned by law.⁷³ Legitimacy is also equated with social acceptance as embedded within particular social contexts.⁷⁴

This gives the impression that the enjoyment of the right to liberty of movement and access to the physical environment is not automatic: It is subject to legal requirements and social acceptability parameters. In a society where children with disabilities are excluded from public spaces through ‘concealment’ and by and through design of the built environment, hence through norms and practices

66 African Child Policy Forum (n 5).

67 K Bunning and others ‘The perception of disability by community groups: Stories of local understanding, beliefs and challenges in a rural part of Kenya’ (2017) 12 *Plos One* e0182214.

68 As above.

69 E Goffman ‘Stigma: Notes on the management of spoiled identity’ (1963), <https://www.arasite.org/goffstig.html> (accessed 13 June 2024).

70 Art 11(1) African Disability Protocol (my emphasis).

71 Human Rights Watch *Living in chains: S|hackling of people with psychosocial disabilities* (2020).

72 Art 5 African Disability Protocol.

73 ‘Legal explanations’, <https://legal-explanations.com> (accessed 20 January 2024).

74 J Weitzman, R Filgueira & J Grant ‘Dimensions of legitimacy and trust in shaping social acceptance of marine aquaculture: An in-depth case study in Nova Scotia, Canada’ (2023) 143 *Environmental Science and Policy* 1-13.

deemed socially acceptable,⁷⁵ the inclusion of the term ‘legitimately’ simply strips the article of its substantive power. However, this apparent hesitation of the Charter is rectified by the African Disability Protocol, which prohibits deprivation of liberty of persons with disabilities, which might also take the forms of confinement and concealment (article 9) and entitles them to an unconditional, free access to the physical environment (article 15).

5 Domestication of article 13 in national legal systems

National legal systems on the rights of children with disabilities can be said to have taken inspiration from article 13 of the African Children’s Charter. So far, 50 countries out of 54 have ratified the Charter. However, some laws on children with disabilities have gone well beyond domestication of the article’s substance, as they contain far more progressive and comprehensive provisions than the Charter. Examples of more progressive legislation, among others, include the *Zambian Persons with Disabilities Act 6 of 2012*, which criminalises concealment of children with disabilities; the *Persons with Disabilities Act 3 of 2020* of Uganda, which entitles children (persons) with disabilities to access to justice; and the *Persons with Disability Act 14 of 2003* of Kenya, which provides for an incentive for manufacturers of technical aids and appliances that facilitate mobility and spatial inclusion of persons with disabilities.⁷⁶ In their domestication efforts, countries have also benefited from the host of instruments – some more progressive – such as CRPD and the various General Comments and guidelines in terms of coming up-to-speed with contemporary human rights thinking and practice. This is appropriately recognised by the Children’s Charter, under article 1(2), where it is stated: ‘Nothing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a state party or in any other international convention or agreement in force in that state.’

A quick review of existing national laws and policies reveals that most are in line with the principles of the African Children’s Charter.⁷⁷ It is to be noted that countries now have at their disposal thematic child rights instruments to rely on in developing laws and policies on specific themes and issues, including the rights of children with disabilities. This might have created a situation where generic child rights instruments such as the African Children’s Charter and CRC inform consolidated children’s acts instead of thematic Acts such as disability Acts, which might risk glossing over some specific disability rights, under the generic headline of ‘children’s rights’.

It is also worth noting that the African Children’s Charter has expressed its adherence to the CRC principles, which means that it encourages state parties to be informed – in national law and policy-making processes – by CRC as much as by the Charter itself.⁷⁸ Domestication, under those situations, would, therefore, amount to making use of a host of relevant instruments, guidelines and state-of-the-art knowledge resources.

Beyond domestication, state parties have the obligation to implement the African Children’s Charter, which is monitored by the African Children’s Committee through various instruments, notable among which is the obligation of states to submit periodic reports. The Committee, through the Concluding Observations it makes upon reviewing state party reports, has, on many occasions, expressed its concern about the state of the rights of children with disabilities in various countries.⁷⁹

⁷⁵ Tesemma & Coetzee (n 9).

⁷⁶ As above.

⁷⁷ See Tesemma & Coetzee (n 1) for a detailed discussion of progressive laws on the rights of children with disabilities.

⁷⁸ Preamble African Children’s Charter.

⁷⁹ For details on the Committee’s Concluding Observations, see <https://www.acerwc.africa/en/states-parties/reporting/overview> (accessed 20 January 2024).

6 Conclusion

During the 25 years of its implementation, the African Children's Charter has inspired or informed child rights policy and practice at various levels, including on the rights of children with disabilities. The coming into being of the African Children's Committee in July 2001 has played a pivotal role in promoting the ratification and domestication of the Children's Charter. Countries that have ratified the Charter have taken positive steps to implement it, and this is evident in the growth in state party report submissions.

In addition, the African Children's Committee has used existing mechanisms and developed new ones to promote the rights of children with disabilities among state parties. Four such mechanisms are worth mentioning: investigative missions to state parties such as that to Tanzania in 2015 and to Malawi in 2022, both of which focused on the rights of children with albinism; the Day of the African Child, such as the one held in 2012, which was dedicated to the rights of children with disabilities; Days of General Discussion such as that held during Committee's forty-third ordinary session, dedicated to the rights of children with albinism; and the External Expert Working Group on Children with Disabilities, set up to technically support to the Committee in its mandate.⁸⁰

The dedication of selected themes for the Day of the African Child (DAC) commemorations has also contributed to generating visibility around those themes and has inspired national action. The theme for the 2012 DAC, dedicated to the Rights of Children with Disabilities, has generated greater visibility around the issue and triggered a series of public sensitisation campaigns and advocacy efforts at the national level.⁸¹

These achievements notwithstanding, there are a few areas where additional efforts are required, including in enhancing the capacity of the Secretariat of the African Children's Committee, both technically and operationally; engaging with organisations of persons with disabilities to advance the disability-rights agenda more meaningfully, and making the African Children's Charter available in widely-spoken local languages and disability-accessible language and formats.

80 For a detailed discussion of the Committee's past and ongoing efforts to advance the rights of children with disabilities, see MK Ande & BD Mezmur 'Progress, gaps and next steps: Mapping ACERWC'S work on the rights of children with disabilities (2012-2023)' (2023) 11 *African Disability Rights Yearbook* 169-182.

81 African Children's Committee, <https://www.acerwc.africa/en/dac/day-african-child-dac-2012> (accessed 11 February 2024).