



Promises of protection? Article 16 of the Convention on the Rights of Persons with Disabilities and gender-based violence in South Africa[☆]



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ABSTRACT

Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees persons with disabilities freedom from exploitation, violence and abuse. This article explores the current status of implementation of article 16 in South Africa, with specific reference to the legislative framework underpinning protection from exploitation, violence and abuse. This investigation is done specifically in the context of gender-based violence, which remains a cause of great concern in this country.

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1. Introduction

South Africa has gained notoriety internationally for its high rates of gender-based violence¹ (KPMG, 2014; see also Šimonović, 2016). Although considerable attention has been paid to this issue in recent years (in terms of legislation, research and advocacy), persons with disabilities have largely remained invisible and little information is available on the nature and extent of violence they may experience (Meer & Combrinck, 2015). Official South African police statistics, for example, are not disaggregated according to disability, which means that it is not currently possible to establish whether either the victim or the offender in reported sexual assault or domestic violence cases is a person with a disability.

It is now generally accepted that women with disabilities are more likely to experience gender-based violence than non-disabled women. This is recognised in the Preamble to the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), which states that ‘women and girls with disabilities are often at

greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation’ (UN, 2006: paragraph q). The reasons for this are multifaceted, and range from dependence on caregivers (who may also be the perpetrators of violence) to inaccessible services for victims of violence and negative stereotypes about women with disabilities. It is further reported that, for example, persons with intellectual disabilities, and persons living in institutional settings face a greater risk for violence, including sexual violence (Heumann, 2016; see also OHCHR, 2012: paragraph 24).

For some decades now, gender-based violence has progressively compelled international attention, both as a human rights and a public health concern (Krug, Dahlberg, Mercy, Zwi, & Lozano, 2002). In terms of human rights law, significant progress has been made in the development of a normative framework supporting a greater understanding of this phenomenon as well as, importantly, setting out how states are expected to respond to such violence. For example, in its General Recommendation No. 19, which deals with violence against women, the Committee on the Elimination of Discrimination against Women (‘CEDAW’) clarified that gender-based violence constitutes discrimination against women within the meaning of article 1 of the Convention (CEDAW, 1992: paragraph 6) and also recommended a number of state actions to address this (paragraph 24).

At the same time, disability rights were increasingly gaining recognition at international level (see Quinn & Degener, 2002). This evolution culminated in the adoption of the United Nations Convention on the Rights of Persons with Disabilities (‘CRPD’) in 2006. This Convention significantly contributes to the above normative framework through the inclusion of an article expressly guaranteeing persons with disabilities

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¹ This article makes use of the following definition: Gender-based violence is violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. (CEDAW, 1992, para 6).

freedom from violence, exploitation and abuse,² with concomitant state obligations (Article 16).

The question that arises is whether South Africa, given the high levels of gender-based violence, is doing enough to comply with Article 16 of the CRPD and related provisions of international and regional law.³ This article, which specifically focuses on the position of adult women⁴ with intellectual or psychosocial⁵ disabilities, accordingly examines legislative compliance with these human rights standards on the part of the South African state. It first considers the international and African regional human rights framework, and then analyses the South African legislative structure. Finally, it aims to draw a set of conclusions in response to the above question and to make recommendations, where necessary.

2. Background

Although there is still a lack of research on the extent and nature of violence against women with disabilities, there is a growing body of international literature exploring this area (see e.g. Breiding & Armour, 2015; Hughes et al., 2012; McCarthy, Hunt, & Milne-Skillman, 2015; OHCHR, 2012; Ortoleva & Lewis, 2012; Rosen, 2006). This body of work suggests (although statistics vary) that at the very least women with disabilities experience violence at similar or increased rates compared to the general population – see, for example, the meta-analysis conducted by Plummer and Findley (2012) of research studies relating to violence against women with disabilities completed in the United States.

Ballan and Freyer (2012) explain that violence against women with disabilities is an intersectional category dealing with both gender-based and disability-based violence; it is therefore not merely a sub-category of gender-based violence (see also Ortoleva & Lewis, 2012). The United Nations Special Rapporteur on violence against women similarly observes that women with disabilities ‘face an intersecting confluence of violence which reflects both gender-based and disability-based violence’ (Manjoo, 2011: paragraph 28). Nixon (2009) notes the complexity of experiences of women with disabilities, and the importance of recognising that violent or abusive acts are not limited to those usually seen as, for example, ‘domestic violence’.

² The phrase ‘all forms of exploitation, violence and abuse’ is not defined in the CRPD and covers a wide range of violations (Schulze, 2009). The intersection between gender-based violence and violence against women with disabilities is clarified by the Committee on the Rights of Persons with Disabilities in its General Comment No 3 (2016), where it explains that acts of violence, exploitation and/or abuse against women with disabilities that violate article 16 includes, but is not limited to: physical force; economic coercion; trafficking; abandonment; the absence of free and informed consent and legal compulsion; neglect, including the withholding or denying access to medication; removing or controlling communication aids or refusal of assistance to communicate; denying personal mobility and accessibility such as removing or destroying accessibility features such as ramps or mobility devices such as a wheelchair; refusal of caregivers to assist with daily living such as bathing, dressing and eating; denial of food or water, or threat of any of these acts; bullying, verbal abuse and ridicule on the grounds of disability causing fear by intimidation; harming or threatening to harm or removing pets or assistance dogs; psychological manipulation; and controlling behaviours involving restricting face-to-face or virtual access to family, friends or others (para 31). See also OHCHR (2012) para 22.

³ South Africa has ratified the CRPD and is therefore bound to compliance in terms of international law.

⁴ Violence against men with disabilities is an under-developed area. However, empirical evidence suggests that women with disabilities are more likely to experience violence than men with disabilities (OHCHR, 2012). This is a result of women with disabilities being more likely to experience poverty and isolation, and then to have lower salaries and be less represented in the work force.

⁵ The term ‘psychosocial disability’ denotes the interaction between the psychological and social/cultural components of this disability (World Network of Users and Survivors of Psychiatry, 2008). The psychological component indicates ways of thinking, processing experiences and perceptions of the world. The social/cultural component refers to societal and cultural limits for behaviour that interact with the psychological aspect as well as the stigma that society attached to people as disabled. Psychosocial disabilities are also occasionally referred to as ‘psychiatric disabilities’, ‘mental disabilities’ or ‘mental health problems’. See also Combrinck, 2014b.

Key risk factors that have been identified include isolation of the victim (lack of accessibility, lack of mobility and social isolation) as well as physical, emotional and financial dependency on an abuser (Nixon, 2009; Plummer & Findley, 2012). In addition, it has been observed that women with disabilities who want to make use of services are met with a lack of accessible resources and those who do attempt to report abusers encounter insensitive behaviour by service providers and first responders (Plummer & Findley, 2012). These systemic barriers are exacerbated by cultural barriers, such as the oppression and devaluation of women with disabilities. Negative stereotypes (to the effect that women with disabilities are asexual and undesirable – OHCHR, 2012) may adversely impact women’s self-esteem, which may translate into a fear of being alone or even blaming themselves for the abuse (Plummer & Findley, 2012).

The findings of a small-scale exploratory study on violence against women with disabilities, published in South Africa in 2005, confirm that women with disabilities are extremely vulnerable to gender-based violence, that the violence and abuse they experience is shaped by the nature and form of their particular disability, and that they are especially disadvantaged in their access to the criminal justice system and gender-based violence support services, as compared to women without disabilities (Naidu, Haffeejee, Vetten, & Hargreaves, 2005). (Although this study focused on women with physical and sensory disabilities and expressly excluded women with intellectual and psychosocial disabilities, certain of the findings may apply by analogy.)

As noted above, little information is available on the extent of gender-based violence against women with disabilities in South Africa. A study of rape cases reported in Gauteng province in 2003 showed 1.9% of victims in the study (or 41 out of the 2068 cases studied) to have some form of disability (Vetten et al., 2008). These figures fell below the prevalence of disability in the female population of the province (calculated at the time by Statistics South Africa as 3.8%). It was not possible to establish whether these findings reflect under-recording of disability on the medical examination report and case dockets, under-reporting of rape of victims with disabilities, or a lower vulnerability to rape amongst persons with disabilities. (The authors add that the latter explanation seems unlikely – Vetten et al., 2006: 28). It is clear that this lack of information would problematise the formulation of appropriate state action, be it preventive or reactive.

3. International human rights standards

This section examines the connections between the CRPD and the Convention on the Elimination of All Forms of Discrimination against Women – ‘the Women’s Convention’ (United Nations, 1979).⁶ The focus here is in line with an understanding of gender-based violence against women with disabilities as an instance of multiple⁷ and intersectional⁸ discrimination.

3.1. Convention on the Rights of Persons with Disabilities

The adoption of the CRPD ten years ago marked a paradigm shift in international law (see Harpur, 2011; Kanter, 2007; Quinn, 2009). As the first legally binding instrument setting out how human rights

⁶ This article does not present an exhaustive discussion of international human rights documents relating to gender-based violence against women with disabilities. For more in this regard, see OHCHR, 2014 paras 6–11; Ortoleva & Lewis, 2012. Additional instruments that may, for example, be relevant in this regard include the Convention on the Rights of the Child; however, due to the specific *adult* focus of the article, it has not been included in this discussion.

⁷ Multiple discrimination is a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated – Committee on the Rights of Persons with Disabilities, 2016.

⁸ According to the Committee on the Rights of Persons with Disabilities (2016), ‘intersectional discrimination’ refers to a situation where several grounds of discrimination (for example, gender and disability) operate and interact with each other at the same time in such a way that they are inseparable – para 4.

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