



**An Intersectional Feminist Analysis of Issue Paper: No 39 Project 148-
Domestication of the United Nations Convention on the Rights of Persons with
Disabilities**

By

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DECLARATION

I **Mosa Moerane** declare that the mini dissertation titled, **An Intersectional Feminist Analysis of Issue Paper: No 39 Project 148- Domestication of the United Nations Convention on the Rights of Persons with Disabilities** is my own work and that all the sources which I have used have been appropriately referenced.

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DEDICATION

To....

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I am grateful to God, my source and centre. I am grateful for the unwavering and incomparable support of my parents, Bernice and Isaac Moerane, and my sisters, Neo and Khauhelo Moerane. My heartfelt gratitude to my supervisor in this study, Prof Karin Van Marle, for her extraordinary support and guidance. I am grateful for the encouragement of friends, mentors and colleagues who have kept me in their prayers, shared resources and heartening words, and/or extended a listening ear when the going got tough. Kea leboha le ho bohle ba neng re tsamaisana tsela yena le bona ba seng ba tsheletse ka lefatsheng le ka nqane.

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An Intersectional Feminist Analysis of Issue Paper: No 39 Project 148-Domestication of the United Nations Convention on the Rights of Persons with Disabilities

Chapter 1: Introduction

1. Research Problem

The main research problem of this study is to investigate the domestication of the United Nations Convention on Rights of Persons with Disabilities (CRPD) in South Africa currently under investigation by the South African Law Reform Commission (SALRC) through an intersectional feminist lens by specifically focusing on its impact on Black women with disabilities.¹ I probe whether legal reform is capable of sufficiently addressing the marginalisation of Black disabled women whose lives, when viewed through an intersectional lens, are confronted by multiple forms of oppression. That is, patriarchy and sexism as a result of their gender, racism on the grounds of their race and ableism because of their disability/disabilities. I explore through a decolonial perspective the limitations of a jurisprudential tradition founded on Euro-Western colonial hegemony to adequately respond to the unique forms of compounded, interconnected systems of oppression that Black women with disabilities contend with. While section 9 of the Constitution and other legislation that has been promulgated since 1994 has sought to address the discrimination and exclusion experienced by disabled people, historical stereotypes, negative attitudes and human rights violations persist especially for Black women with disabilities. Therefore, I look into what opportunities and limitations exist through the enactment of a disability-focused Bill.

South Africa, as a constitutional democracy since 1994, means that the Constitution serves as the supreme law of the land with which all policy and legislation must align as held under Chapter 1, section 2.² Chapter 2, section 9 of the Constitution of the Republic of South Africa enshrines the right to equality for all persons.³ It further

¹ Issue Paper: No 39, Project 148, Domestication of the United Nations Convention on the Rights of Persons with Disabilities. 9 December 2020. South African Law Reform Commission. (Hereinafter SALRC 2020).

² The Constitution of the Republic of South Africa, 1996.

³ The Constitution of the Republic of South Africa, 1996.

provides a list of grounds which would constitute unfair discrimination. Relevant to this exploratory study is unfair discrimination on the grounds of disability. The Constitution's preamble offers that South African society is based on "democratic values, social justice and fundamental human rights" and further commits to "improve the quality of life of all citizens and free the potential of each person".⁴

In its effort to give effect to these commitments, South Africa has employed various interventions, strategies, policies and international instruments, notably; the White Paper on the Rights of Persons with Disabilities (WPRPD) (most recently updated in 2016) and the ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) on 30 November 2007. It is against this background that the SALRC as mandated by the South African Law Reform Commission Act is investigating the incorporation of the UNCRPD into South African law including a draft bill if applicable.⁵⁶

Persons with disabilities are often classified as a "vulnerable group".⁷ This vulnerability is further exacerbated by other forms of marginalisation such as race, gender, class etc. Women and girls with disabilities are further disadvantaged on the basis of their race and gender, limiting their access to their rights to education, health, safety etc. With limited research and data available (focused on persons with disabilities in general), it is even more challenging to access accurate statistics related to women and girls with disabilities as a group as a result of their multiple, interconnected systems of oppression that they are confronted by.⁸

South Africa's history of racial subjugation under colonialism and Apartheid and the prevailing patriarchal norms, oblige the continuous monitoring and examination on the impact of all interventions on those who are most significantly affected by systemic marginalisation and exclusion.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ South African Law Reform Commission Act 19 of 1973.

⁶ SALRC 2020:191.

⁷ Domanska 2018: 3.

⁸ Basson 2023:221.

2. Research Questions

I address the research problem by posing the following research questions:

2.1 Research Question 1

How were persons with disabilities treated prior to 1994 and has their position/status changed under the current constitutional democracy?

2.2 Research Question 2

What does the issue paper and the proposed bill entail?

2.3 Research Question 3

Will the proposed bill respond fully to the needs for persons with disabilities?

3. Motivation

In South Africa, persons with disabilities are subjected to a unique level of social, political and economic subjugation due to their disabilities.⁹ Their exclusion is often heightened by other interconnected systems of oppression based on race, gender and class.¹⁰ The WPRPD states “women and girls with disabilities, along with the elderly, are most vulnerable to poverty. They also face multiple layers of stigma and discrimination.”¹¹

While one may recognise that a Disability Act is not a magic bullet to resolve all disability rights challenges, it is nevertheless significant for the following reasons:

- It ensures continuity.
- It protects specific groups or beneficiaries of legislation against unnecessary policy reforms that may occur as a result of change of context or political environment or even change of a Minister within the same government.

⁹ Watermeyer and Swartz 2006:1.

¹⁰ Emmet 2006:208.

¹¹ WPRPD 2016:23.

- A Disability Act is a more effective tool as it is not easy to be repealed as it is a process that is rather lengthy as well.¹²

The manifestation of the marginalisation of persons with disabilities is evidenced by their exclusion in various sectors of society, including limited access to justice. Flynn asserts that a significant hindrance to access to justice for people with disabilities is the lack of lawyers with adequate knowledge, training and awareness to sufficiently address the legal challenges confronting persons with disabilities.¹³ In essence, the legal system in and of itself is likely to fail persons with disabilities.

In both the Integrated National Disability Strategy of 1997 and 2016 White Paper on the Rights of Persons with Disabilities, it is admitted that there is insufficient disability specific data and information.¹⁴¹⁵ This study is a small contribution towards the growing body of legal scholarship on disability in South Africa particularly linking it with decolonial theory in the context of South African jurisprudence. However, and perhaps most significant, is the hope to contribute to the expansion of South African jurisprudence and decolonial discourse to meaningfully engage disability theory, discourse and praxis by divorcing epistemic endeavours that are committed to the emancipatory trajectory of those holding the pen to the exclusion of those without access to it.

An approach that centres the experiences of women and girls with disabilities challenges “the single axis analysis” that alters the experiences of those marginalised by multiple systems of oppression.¹⁶ Attending to these intersections strengthens the approach to disability rights mechanisms by ensuring that no-one is left behind. Because intersectionality is greater than the sum total of racism and sexism, any (legal) analysis that does not take into account the intersectional experience (of being a black woman with a disability/disabilities) cannot sufficiently account for the ways ableism and discrimination on the basis of disability impacts Black women, for example.¹⁷

¹² Kamga 2016:572.

¹³ Flynn 2016:72.

¹⁴ Integrated National Disability Strategy 1997:

¹⁵ White Paper on the Rights of Persons with Disabilities 2016:22. (Hereinafter WPRPD 2016 to be distinguished from the Integrated National Disability Strategy of 1997).

¹⁶ Crenshaw 1989:140.

¹⁷ Crenshaw 1989:140.

Women and girls with disabilities still do not enjoy all human rights and fundamental freedoms on an equal basis with boys and men with disabilities. Whilst all women with disabilities bear the brunt of inequality, black African women with disabilities are particularly affected by compounded marginalisation caused by the interconnectedness of race, disability, gender, socio-economic status and class.

Important to note in this study is that over the years, different approaches to disability have also been accompanied by continuous (re)evaluation of language and vocabulary related to disability discourse. Therefore, this study makes reference to such different terminology for historical accuracy particularly as it relates to names of organisations, terms used to refer to different conditions and direct quotations from literature and legislation in certain eras. There has been widespread conversation around the most appropriate terminology to adopt in modern times. The person-first approach has been the most widely accepted- as it is also reflected in the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁸ Therefore, throughout this study I make use of “persons with disabilities” and “people with disabilities” interchangeably. Together with this, I use “disabled people” to further reflect the criticism that continuously relying on euphemism has the effect of being patronising and ironically, exclusionary despite the well-meaning intentions behind the euphemisms. The word “disabled” is neither an insult nor a slur but used to describe a group of people.¹⁹

4. Method and Theoretical Approach

I conduct a literature analysis of the South African Legal Reform Commission’s Domestication of the UNCRPD issue paper through an intersectional feminist and decolonial lens. I will use critical analysis and desktop research to access legislation, case law, journal articles and case studies, which will be crucial to this study.

¹⁸ Flynn 2015:7.

¹⁹ UK Disability Unit “Inclusive language: words to use and avoid when writing about disability” <https://www.gov.uk/government/publications/inclusive-communication/inclusive-language-words-to-use-and-avoid-when-writing-about-disability> (Accessed on 10 November 2024).

5. Summary of Chapters

This study is divided into five chapters. The current chapter, chapter one, provides context and background for the necessity of the investigation currently underway of the domestication of the UNCRPD by the SALRC. It introduces some of the legislative steps already undertaken by the South African government to realise the mandate of the UNCRPD within South Africa. It sketches out some of the main arguments that underpin this study. It further outlines the intellectual frameworks from which this research paper draws and their relevance to the enquiry. The research questions in the study explore the impact of considering the multidimensional identities of persons with disabilities as a heterogeneous group within a South African jurisprudential tradition that has often been criticised of perpetuating systems of subjugation and social hierarchies that excludes already marginalised groups based on race, class, gender and, most relevant to this study, disability.

Chapter two of this study foregrounds the context and approaches that I use to analyse the bill, which are intersectional feminist theory, decolonialisation and critical disability theory.

Chapter three addresses the question of how people with disabilities have been addressed in the past. It focuses on the definition of disability particularly in historical and contemporary South African context. This chapter also outlines, the two most prominent approaches to disability scholarly analysis, namely the medical model and the social model, particularly because the SALRC explicitly states the social model as it resonates in its current research/ investigation- in line with the UNCRPD.²⁰

Chapter four provides an exposition of the proposed bill. It delves into the interconnected mandate of the Constitution and the CRPD to enact legislation that gives effect to the provisions of equality and non-discrimination on the basis of disability.

Chapter five is the conclusion of this research study. This chapter summarises the findings of the study by bringing together the previous chapters' main undertakings that demonstrate the value of an interdisciplinary approach to contemporary

²⁰ South African Law Reform Commission. 2020:17.

jurisprudential questions such as that of incorporating the UNCRPD into South African legislation.

Chapter 2: Context and Approaches

2.1 Introduction

The main research problem of this study is to investigate if the adoption of a Disability Act could better address the plight of disabled people, in particular black women. Black disabled women are marginalised on the basis of their race, gender and disability to the effect that their lives are impeded by the interwoven operation of the aforementioned systems of oppression thereby hindering the full realisation of their basic human rights and their participation in the legal systems meant to be their recourse. I work from the premise that the legal framework, including possible legislation, should be informed and approached by intersectional feminism, critical disability theory and a decolonial lense. In this chapter I consider these possible approaches. To take account of the context in which these approaches will come to the fore, I begin by outlining the benefits of a disability-focused Bill to address the legal gaps that exist within disability rights discourse. I then sketch out intersectional feminism, critical disability theory and decolonisation as possible approaches through which legislation should be informed and interpreted.

2.2 Why a disability-focused Act?

On 30 November 2007, South Africa ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) and its accompanying Optional Protocol without noting any objections. The ratification created obligations for South Africa to domesticate the CRPD.²¹ With the aim of addressing the legal gaps that hinder the full realisation of disability rights within South African jurisprudence, the South African Legal Reform Commission published Issue Paper No. 39 of project 148 on 9 December 2020. The issue paper outlined the current challenges, presented research on the CRPD and foreign law and set out the area of investigation.²² The issue paper was then released for public comment until 31 May 2021. Subsequent to this, the SALRC developed Discussion Paper 163 and published it for public comment on 1 October 2024. The deadline for public comment on the discussion paper is set for 4

²¹ SALRC Discussion Paper 163- Project 148:1.

²² SALRC Discussion Paper 163- Project 148:1.

December 2024. The discussion paper contains the process, history, mandate and overview of the investigation.²³ Public comments received from various organisations and individuals on the different areas it had solicited comment on. This is followed by a draft of the proposed Bill which seeks to provide a legal framework “to transform from a welfarist model to a human rights model of disability.”²⁴

While one may recognise that a Disability Act is not a magic bullet to resolve all disability rights challenges, scholars such as Kamga assert that it is nevertheless significant for various reasons, such as:

- An Act ensures continuity;
- Protects specific groups or beneficiaries of legislation against unnecessary policy reforms that may occur as a result of change of context or political environment or even change of a Minister within the same government;
- A Disability Act is a more effective tool as it is not easy to be repealed because it is a process is rather lengthy as well;
- An Act not only provides guidance for the implementation of policy but further strengthens its enforceability once the Bill is adopted.²⁵

The enactment of a Bill should not be viewed as the end-goal for the realisation of disability rights, particularly for women with disabilities. To enunciate this point, disability scholars such as Chalklen, Swartz and Watermeyer make the example that although specific reference to disability is made in the Constitution to prevent discriminatory practices, such principles are inadequate for securing the rights for persons with disabilities.²⁶ The promulgation of legislation is in fact only a starting point in giving effect to the realisation of the Constitutional imperative for equality and dignity for all people. An example can be drawn from the recent adoption of South African Sign Language (SASL) as the 12th official language of South Africa. While it took many years of arduous lobbying and campaigning by various individuals and interest groups for SASL to be included in the Constitution, in reality the final signature by the President only marked the beginning of the work of mainstreaming SASL in both public and private spheres. One can therefore deduce from this recent experience that the

²³ SALRC Discussion Paper 163- Project 148:1.

²⁴ SALRC Discussion Paper 163- Project 148:84.

²⁵ Kamga 2017:572.

²⁶ Chalklen, Swartz and Watermeyer 2006:101.

domestication of the CRPD in South Africa will have to follow an intersectional approach for it to provide maximum benefit to those often excluded in the imagination of a jurisprudence that has its roots in Euro-Western tradition.

2.3 The South African Disability Rights Movement and Black Disabled Women

Disability in South Africa ought to be read from its connection with the liberation struggle. This is because for every person that died in the struggle, three others became disabled.²⁷ During apartheid, persons with disabilities, specifically Black persons with disabilities, were discriminated against based on their race as well as physical impairments and/or cognitive limitations.²⁸

Persons with disabilities were recognised in South Africa before, during and after the rise and fall of apartheid.²⁹ This is evidenced by the establishment of the National Council for the Blind, the Blind Persons Act and the National Council for the Care of Cripples in South Africa in the twentieth century.³⁰ Their position in society was of course of extreme marginalisation and devoid of even the limited basic rights available during that era particularly if said persons were Black. Therefore, the history of disability rights in South Africa was influenced and shaped by various organisations, people and forces.³¹

The Disabled People of South Africa (DPSA) is a disability rights movement that was established in the 1980's to represent the interests of people with disabilities. The realisation and desire for self-representation and organisation was partly influenced by the Black Consciousness Movement.³² The disability rights movement resonated with the breakaway by Black students from the white-dominated National Union of South African Students by realising the importance of taking control of their own (disabled people) narratives and resisting the predominant practice of being spoken "on behalf of" by others as was prevalent during that era due to the wholesale embrace of the medical model.³³ The Disabled Women's Development Programme emerged

²⁷ Rowland 2004:7.

²⁸ Fagin 2011:1.

²⁹ Fagin 2011:7.

³⁰ Fagin 2011:7.

³¹ Howell *et al* 2006:49.

³² Howell *et al* 2006:51.

³³ Jagoe "The Disability Rights Movement: its development in South Africa", <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

out of the DPSA. In the transition period from apartheid to democracy, it became apparent to disabled women, especially disabled Black women that they had to organise themselves to advance their interests even among other women-led organisations such as the African National Congress Women's League and the Inkatha Freedom Party Women Brigade.³⁴

William Rowland's book *Nothing about us without us: Inside the Disability Rights Movement of South Africa* chronicles the history of the disability rights movement in South Africa from the movement's inception during apartheid rule in the 1980's to the movement's work in post 1994 South Africa.³⁵ It does this by sketching the experiences of persons with disabilities who were pivotal in the advancement of the movement and how their lives have grown and changed since their earlier years of disability activism. Fadila Lagadien is among the women interviewed in the book where she shares her personal account about her life as a woman with a disability including the circumstances that led to her disability.³⁶

Lagadien recounts that in 1986 she was travelling with three other people, one of them her boyfriend, from Johannesburg to Sun City, when they were involved in a head-on collision. Lagadien was the only Black woman in the vehicle while the other passengers were white men. The driver died on the scene, Lagadien sustained a broken neck and the other two passengers had minor injuries such as broken legs and dislocations.³⁷ The ambulance transported them to the nearest hospital in Rustenburg but the hospital would not admit her because she was Black. At the hospital in Rustenburg, they put a soft collar on her neck despite the fact that she had sustained a serious injury and put her on a stretcher where she laid in the hospital's passage until she was transported to H.F. Verwoerd Hospital in Pretoria the next day. Lagadien had sustained a C4 fracture which resulted in her paralysis. In the meantime, the staff urgently attended to her boyfriend's broken leg by taking him to theatre where they put pins in his broken leg. All the while, Lagadien laid in a stretcher in the hospital passage.³⁸

³⁴ Rowland 2004:85.

³⁵ Rowland 2004:1.

³⁶ Rowland 2004:107.

³⁷ Rowland 2004:107.

³⁸ Rowland 2004:107-108.

Apartheid had a particularly devastating effect on Black women, however, Black women with disabilities experienced a heightened expression of disregard and dehumanisation as illustrated by Lagadien as she further details her experiences following being discharged from hospital. She recalls that she was determined to carry on with her regular life soon after she left the hospital however, she was met with different kinds of barriers. The first barrier she faced was structural barriers. Structural barriers relate to obstacles in the physical environment that make it difficult for people with disabilities, in this case people with mobility impairments, to independently navigate buildings, constructed pathways and parking lots, furniture, noise and air pollution.³⁹ Lagadien found that buildings, including her own flat, were inaccessible to someone with a disability. Then she realised that she could not enter the majority of places that she used to frequent such as shopping centres and the movies. Despite the progress that has been made since apartheid, persons with physical disabilities are still often confronted with barriers in their physical environment such as sloped parking lots, lack of handrails on ramps and often neglected details such as the placement of paper/ soap dispensers in bathrooms.⁴⁰

The second major barrier that Lagadien was confronted with was attitudinal barriers. Attitudinal barriers relate to stereotypes and negative perceptions related to disability. She recalls that her first encounter with attitudinal barriers was right in her family. She observed that her sister never consulted her about what to cook or even invite her to cook with her. Lagadien later overheard her sister tell their aunt that she (Lagadien's sister) found it easier to do everything without involving her.⁴¹ This illustrates a prevailing attitude among non-disabled people who become fixated on a person's disability and fail to recognise or acknowledge disabled people's capabilities. This exacerbates the exclusion of persons with disabilities as they are infantilised, othered and invisibilised.⁴² Such attitudes result in the enduring subjugation and exclusion of people with disabilities from living their lives to their maximum potential.

³⁹ Evans *et al* 2017:226.

⁴⁰ Evans *et al* 2017:22.

⁴¹ Rowland 2004:109.

⁴² Evans *et al* 2017:72.

2.4 Intersectional Feminism

South African society during and post-apartheid has maintained what feminist theoretician bell hooks terms “imperialist-white-supremacist-capitalist-patriarchy”- where intersecting structures of power collaborate to undermine the humanity of those located on the system’s underside by virtue of their race, class and gender.⁴³ She illustrates the unified, intertwined nature of oppressive systems, particularly when they interact with adverse social, economic and political factors to strengthen one another for the subjugation and invisibilisation of those on the margins of these systems. Of course this results in even greater devastating consequences for Black poor disabled women, for example, when you include ableism to the equation. Feminism seeks to challenge and dismantle patriarchal articulations of political, social, economic and ecological systems of oppression that undermine the humanity of women. However, feminism has underwent its own evolution after being criticised for neglecting the experiences of women of colour at the hands of racist-patriarchal agenda. Black feminists questioned the efficacy and sincerity of feminism if it only responded to the challenges and experiences of White women. They further challenged the disconnection between feminism and critical race theory because, through them at least, the two co-existed through their simultaneous identities as women and Black. Thus, the theory of intersectionality was born.

Intersectionality has been described as a theory in progress that extends itself across multiple disciplines.⁴⁴ The theory was coined in 1989 by Kimberlé Crenshaw. She introduced this concept to describe how race, class, gender, and other individual characteristics intersect with one another and overlap to the effect that they prejudice those who occupy those identities in interconnected and compounded ways. Crenshaw used the term to explain the experiences of women of colour who face both racial and gender discrimination, arguing that their experiences cannot be fully understood by looking at race or gender independently but must be examined with the understanding of their interwovenness.⁴⁵ She challenges racist and sexist conceptions of social hierarchy that are advanced in the legal imagination which manifest as the

⁴³ Hooks 1992:

⁴⁴ Carbado et al. 2014:304.

⁴⁵ Crenshaw 1991:1243-1244.

inadequate prosecution of perpetrators of violence against Black women or the over-prosecution of Black men as the sole perpetrators of (sexual) violence.⁴⁶

Intersectionality exposes the hypocrisy of Euro-Western legal systems that for their complacency in advancing white supremacist ideation to the detriment of Black people. As a legal scholar herself, Crenshaw developed intersectionality to reveal the shortcomings of American jurisprudence and its fixation with determining anti-discrimination cases from a binary perspective that insisted on separating race from gender.⁴⁷ She examined several cases where the courts had relied on this racist-sexist logic to the detriment of Black women litigants.⁴⁸

Crenshaw criticised feminist theory for positioning white women's experiences as the assumed universal experience of all women. It is duplicitous to rely on a theory that purports to advance the rights of a marginalised community only to deny or ignore the variance that exists within that group socially, culturally and politically due to the presence of different embodied identities.⁴⁹ It is therefore necessary to extend this sentiment to Black disabled women whose experiences as well have been erased, ignored and/or side-lined in the pursuit of women's rights and gender justice. Black women with disabilities are therefore disadvantaged even in feminist scholarship when their experiences are assumed to either be identical to those of non-disabled women or excluded from gender discourse for lack of engagement, fear or ignorance by other women.

Women with disabilities have had to be deliberate in ensuring that their issues are tabled on the national agenda and not merely subsumed in general women's issues driven by non-disabled women. In Rowland's book, "Nothing About Us Without Us" another interviewee who offers valuable insight on deepening analysis on women's rights is Hendrietta Bogopane, a partially sighted disability activist whose career began as a co-ordinator for the Disabled People South Africa's Disabled Women's Development Programme.⁵⁰ She recalls that when the Gender Commission was established, she had to work had to advance disabled women's issues on the national

⁴⁶ Crenshaw 1991:1268 and 1271.

⁴⁷ Crenshaw 1989:140.

⁴⁸ Crenshaw 1989:141.

⁴⁹ Crenshaw 1989:154.

⁵⁰ Rowland 2004:79.

agenda. She had to debate and convince women who represented women's interests within their respective political structures such as the African National Congress Women's League and the Inkatha Freedom Party Women's Brigade regarding how the legislative processes parliament was engaging impacted women with disabilities.⁵¹ This is because, as Crenshaw asserts, when marginalised women are unacknowledged within the feminist articulations of transformation, not only are those women ignored, but their exclusion is further entrenched when non-disabled women speak for them.⁵² The theory has been a crucial interventional lens in discussing the politics of identity across its various categories of race, gender, sexual orientation, class, (dis)ability, age and citizenship. Women with disabilities' experiences of patriarchy, racism and ableism concurrently necessitates Black feminism as not only an intellectual response but also an activist one.⁵³ Black feminism acted as a precursor to Intersectional Feminism as sought to resist the oppressive practices and ideas that justify the systems of oppression that Black disabled women must contend with in their daily lives.⁵⁴ Tamale asserts therefore, that intersectionality is vital to the African decolonial and transformation agendas.⁵⁵

The CRPD emphasises that women and girls with disabilities are disproportionately vulnerable to violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.⁵⁶ It further states in Article 6 that:

1. 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.
2. 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.⁵⁷

⁵¹ Rowland 2004:85.

⁵² Crenshaw 1989:154.

⁵³ Collins 2000:25.

⁵⁴ Collins 2000:25.

⁵⁵ Tamale 2021:74.

⁵⁶ CRPD 2007:2.

⁵⁷ CRPD 2007:7.

Noting that people with disabilities do not constitute a homogenous group, experiences of women with disabilities are often omitted from both feminist scholarship and disability studies literature.⁵⁸ Tamale warns against viewing people's multiple identities as a rainbow of distinct separate colours running parallel to one another but instead invites that they are compounded to reflect their complexity, diversity, and constant morphing.⁵⁹

Women with disabilities are at higher risk of abuse than able-bodied women.⁶⁰ It is against this background that the CRPD emphasises the need for state parties to take measures to ensure that women with disabilities are afforded equal enjoyment of their human rights.

Black disabled women have endured a unique blend of subjugation based on their gender, race and disability during apartheid and in the post-1994 democratic dispensation. The law has perpetuated the marginalisation of Black women with disabilities, even in the post-1994 democratic dispensation, by failing to develop a legal framework that accounts for their intersecting identities, instead opting for a blanket approach that could be manipulated to advance a racist-capitalist-patriarchal agenda which is inevitable in a society based on a Euro-Western jurisprudence.

In the continued national effort toward transformation, Parliament has enacted legislation aimed at eliminating unfair discrimination practices and advancing equality through Acts such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.⁶¹ This Act aims to redress the inequities that persist within South African society which are a legacy of its history of Apartheid and Colonialism.

Another example of legislation promulgated to give effect to the Constitution's equality clause although aimed specifically at prohibiting unfair discrimination within workplaces is the Employment Equity Act 55 of 1998. This legislation acts as an instrument to redress the disadvantages suffered by designated groups through implementing progressively equal representation. It defines these groups as "black

⁵⁸ Flynn 2015:9.

⁵⁹ Tamale 2021:66.

⁶⁰ Holness and Rule 2014:1941.

⁶¹ Employment Equity Act 55:sec. 2.

people, women and people with disabilities”.⁶² It goes further to define black people as “a generic term which means Africans, Coloureds and Indians.”⁶³

Generic means “characteristic of or relating to a class or group of things; not specific.”⁶⁴ *Not specific*. Therefore, the Employment Equity Act regards these groups in broad terms and consequently fails to examine the violence experienced by those who experience two or more forms of oppression. Its vague definition undermines its own purpose by failing to recognise the unique forms of marginalisation suffered by those who are subjected to two or more social, political and economic exclusions such as black disabled women.

Intersectionality offers a valuable opportunity to interrogate the ways in which “neutrality”, as is often postured as a legal value, endangers efforts towards justice and redress when we fail to acknowledge black women’s susceptibility to continued marginalisation even within the legal processes and instruments that purport to champion equity, transformation and justice.⁶⁵

2.5 Disability Justice

The CRPD has highlighted the importance of disability human rights globally as the foremost international human rights instrument.⁶⁶ The phrase “disability justice” conjures images of formalistic legal systems such as the right to due process and legal representation.⁶⁷ However, Flynn cautions against such narrow interpretation of the concept and directs towards a more holistic approach that provides an indication of the issues facing persons with disabilities in their interface with systems, procedures and locations where justice is administered.⁶⁸ Persons with disabilities are for the most part invisible as subjects of human rights and equality law as a result of their exclusion

⁶² Employment Equity Act 55:sec. 1.

⁶³ Employment Equity Act 55:sec. 1.

⁶⁴ Oxford Dictionary

⁶⁵ De Sousa Santos 2007:48.

⁶⁶ Onazi 2020:43.

⁶⁷ Flynn 2015:11.

⁶⁸ Flynn 2015:12.

from mainstream legal systems due to the prevailing social and physical barriers to they are confronted with.⁶⁹

Article 13 of the UN Convention on the Rights of Persons with Disabilities addresses access to justice for persons with disabilities as follows:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.⁷⁰

Holness and Rule assert that prioritising the above article through ensuring accessible legal mechanisms is among the most important ways of ensuring that persons with disabilities attain their right to equality before the law. Litigation is one such mechanism.⁷¹ It is futile to merely inform people of their rights when the legal mechanisms to realise or assert those rights are inaccessible. The establishment of the Equality Courts, as established through the Promotion of Equality and Prevention of Unequal Discrimination Act of 2000, are an important legislative intervention to address discrimination claims that plague the country due to its history.⁷² Recognising the severe inequality that persists within South Africa, the legacies of colonialism, the apartheid system and patriarchy affect persons with disabilities- particularly disempowering women with disabilities in gaining access to the justice system.⁷³ They note that African women with disabilities are most likely to be “poor, destitute, malnourished and illiterate.”⁷⁴ Legislation alone is insufficient to ensure that their

⁶⁹ Holness and Rule 2014:1909.

⁷⁰ United Nations “Convention on the Rights of Persons with Disabilities” <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> (Accessed on 22 November 2024).

⁷¹ Holness and Rule 2014:1909.

⁷² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: S16(a)

⁷³ Holness and Rule 2014:1918.

⁷⁴ Holness and Rule 2014:1941.

human rights are secured. In fact, at best legislation can “only provide a framework of directives with which to begin a process of exploration and redress”.⁷⁵

In South Africa, persons with disabilities face different barriers to gaining access to justice. Holness and Rule highlight the following barriers to South African equality courts:

- Geographically inaccessible equality courts;
- Negative and insensitive attitudes of frontline workers; and
- Cultural norms limit disabled people’s access to justice.⁷⁶

Scholars such as Muruzi and Gutura have found that women and girls with disabilities are at even greater risk of abuse and different violations based on their disability. These types of violences are often under-reported due to stereotypes held about women with disabilities. This is corroborated by findings in a study by the Human Sciences Research Council (HSRC) published in 2024. Muruzi and Gutura’s study outlined the following::

- Structural/ systematic abuse
Women with disabilities are subjected to unequal access to education and employment opportunities as they are disregarded by employers as being capable of performing work tasks.⁷⁷
- Sexual abuse
Women with disabilities are often targeted as easy people to coerce into unwanted sexual activities by perpetrators who deem the girl or woman’s disability as justification for the violation. The HSRC found that 15.3% of women with disabilities had experienced sexual violence in their lifetime. This indicated a significantly higher prevalence in comparison to non-disabled women of whom 9.3% on the same indicator.⁷⁸⁷⁹
- Emotional abuse

⁷⁵ Chalklen, Swartz and Watermeyer 2006:101.

⁷⁶ Holness and Rule 2014:1933-1940.

⁷⁷ Muruzi and Gutura 2022:19372.

⁷⁸ Muruzi and Gutura 2022:19372.

⁷⁹ Human Sciences Research Council “New Insights into Gender-Based Violence in South Africa: A Focus on Women with Disabilities” <https://hsrc.ac.za/media-pack-first-south-african-national-gender-based-violence-study-2022/> (Accessed on 22 November 2024).

Women and girls with disabilities are exposed to different forms of humiliation and undignified speech on the basis of them both being women and having disabilities. This double discrimination has a negative effect on their mental health, therefore resulting in depression, anxiety and emotional distress.⁸⁰

- Financial abuse

The South African government issues social grants to persons with disabilities to assist with ensuring the well-being of people with disabilities. However, due to South Africa's poverty and unemployment levels, these funds are often also used to meet the needs of the household particularly in instances where the grant is the sole income in a family. Women with disabilities then have to sacrifice their needs for the upliftment of the upkeep of their family members who are either minors or unemployed.⁸¹

- Physical abuse

In a country like South Africa, with widespread gender-based violence and femicide rates, women and girls with disabilities are widely reported as being at even greater risk than their non-disabled counterparts as a result of the compounded vulnerability that their disability presents. 40.4% of women with disabilities in South Africa have experienced physical abuse in their lifetime, while 32.5% of non-disabled women indicated that they have been victims of physical violence.^{82 83}

The above contrasts are not meant to undermine the alarming rate of gender-based violence in South Africa against all women, however, it is important to highlight that while all women are vulnerable to abuse, disabled women are specifically susceptible to different forms of gender-based violence due to their disabilities. To this end, disabled women are also uniquely impacted by other types of abuse, violation and even institutional violence against women with disabilities which often go unaddressed by the law.. These abuses reveal the ways in which the law itself has been co-opted

⁸⁰ Muruzi and Gutura 2022:19372.

⁸¹ Muruzi and Gutura 2022:19372.

⁸² Human Sciences Research Council "New Insights into Gender-Based Violence in South Africa: A Focus on Women with Disabilities" <https://hsrc.ac.za/media-pack-first-south-african-national-gender-based-violence-study-2022/> (Accessed on 22 November 2024).

⁸³ Muruzi and Gutura 2022:19372.

in the marginalisation, exclusion and oppression of women with disabilities. These include:

- Sterilisation without the informed consent of persons with disabilities in health facilities⁸⁴
- Institutionalisation of persons with disabilities away from their communities and families⁸⁵

My contention is not whether or not medical interventions are necessary. The approach I am most aligned with in this study is, as articulated by Kafer, as follows: “rather than taking such (medical) interventions for granted, it recognises instead that medical representations, diagnoses, and treatments of bodily variations are imbued with ideological biases about what constitutes normalcy and variance”.⁸⁶ It is about considering disability beyond the dichotomy of disability approaches that are fixated with either/or readings and solutions because, like all of life, disabled lives are complicated. They are complicated by a wide variety of economic, political, social and environmental contexts and the subject of multiple forms of oppressive systems related to race, class, gender, disability and even the extent of disability. It is therefore necessary to account for the multidimensional nature of disabled lives. This approach advances the necessity for self-representation of disabled people as they are best positioned to articulate the intricacies and nuances of their daily experiences which are not immediately available through simply reading them from either the medical model or the social model or any other “model”.

Identifying disability as, for example, political, and therefore contestable, challenges the social model notion that “disabled” and “non-disabled” are always distinguishable categories. It instead allows for the recognition of the moments where these concepts fail to hold their supposed rigid or definite parameters.⁸⁷ It is also important to mention here that while disability has been framed as undesirable state, it is in fact necessary to deconstruct these public imaginations in order to address the challenges I have

⁸⁴ Kafer 2013:30.

⁸⁵ Kafer 2013:30.

⁸⁶ Kafer 2013:6.

⁸⁷ Kafer 2013:10.

listed above which, fundamentally, are manifestations of a corrupted hierarchy of worthy and unworthy bodies.

2.6 Decolonisation

The focus of this study is disability and the extent to which Euro-Western approaches can address the plight of Black disabled women by drawing on decolonial discourse in law and constitutional critique in South Africa. This is not the main focus of my study so I will only look at this aspect as background in order to think about the realisation of disability rights.

Colonialism and apartheid shaped South Africa's judicial system to reflect and uphold its Euro-Western roots. Colonialism went beyond political and cultural imposition and extended to development, export and legal systems.⁸⁸ This single-minded endeavour informed Western legal thinking which, as De Sousa Santos observed, is based on dichotomous meaning-making that draws hard lines as reflected in its fixation with the legal and illegal, and even dividing the human from the subhuman.⁸⁹ He emphasises this point by criticising the law for its incapacity to cope without its organising principle to respond to the social territory of "the lawless, the a-legal, the nonlegal and even the legal or illegal according to non-officially recognised law."⁹⁰ Disability has existed and been understood before the colonial encounter through diverse spatial, temporal, cultural, ideological and cosmological contexts.⁹¹ However, much of how disability is perceived and engaged with in modern society is from the historical vantage point of the coloniser.⁹²

To challenge and undo colonial legacies will require complex, methodical and creative approaches that will span lifetimes.⁹³ It requires recognising multiple hierarchical systems of power as Tamale eloquently phrases it, as "integrated heterogenous structural processes" as alluded to above in the discussion about intersectionality.⁹⁴ Therefore decolonisation requires divorcing from the binary traditions of western

⁸⁸ Tamale 2021:19.

⁸⁹ De Sousa Santos 2007:48.

⁹⁰ De Sousa Santos 2007:48.

⁹¹ Grech 2015:12.

⁹² Grech 2015:12.

⁹³ Tamale 2021:19.

⁹⁴ Tamale 2021:29.

epistemology towards a multi-pronged decolonial liberation imagination that considers beyond capitalism and race- but includes gender and able-ness.

Tamale considers Africa's position in the neoliberal geopolitical order as an assemblage point of different structural inequalities operating simultaneously in a push-pull of power on interconnected hegemonies of race, civilisation, markets, nation, gender, white supremacy, sexuality, language and others.⁹⁵ Mogobe Ramose observed that, "Colonization was predicated on the idea that the African was not a full and complete human being." According to this idea, the African was devoid of reason and could therefore not qualify as a human being beyond racial identification. This extends to gender and disability and any kind of difference that reflects The Other.⁹⁶ Othering involves constructing difference as a form of establishing power and dominance over an "inferior" or group thereby creating a division between "us" and "them".⁹⁷ This logic also transcends race and racism but be can also be seen through gender and patriarchy as well as disability and ableism. This is because systems of oppression adhere to familiar patterns of domination to sustain their stronghold. An example of this is the idea of the "ideal body" which finds its origins in slave trade history where the bodies of indigenous people were traded as labour in expansion of Europe's empires.⁹⁸ Slave traders viewed disabled people as holding less commercial value to the extent that the supposed infirmity would, where possible, be disguised for fear of having to concede to a lower selling price. However, this view was never simply limited to impairments, slave labourers were further valued against their gender, age and ethnicity- grounds which are all still listed in the current Constitution of South Africa against which discrimination is prohibited.⁹⁹

To this end, various decolonial scholars have challenged the effectiveness of democratic constitutionalism to drive meaningful social change in South Africa. Among them, Tshepo Madlingozi's criticism of democratic constitutionalism as only a vehicle

⁹⁵ Tamale 2021:67.

⁹⁶ Ramose 2001.

⁹⁷ Tamale 2021:246.

⁹⁸ Tamale 2021:19.

⁹⁹ The Constitution of the Republic of South Africa 1996: Sec. 9.

to sustain a system of apartness- with the only significant difference being the co-option of Black elites into the ruling class is a significant example.¹⁰⁰

Therefore, it is unsurprising that scholars such as Grech and Soldatic, have questioned the reluctance towards disability scholarship in (post)colonial discourse, given that disability has been and continues to be one of the most present and significant human conditions in human history, beyond space, time and geopolitics.¹⁰¹ They challenge the manner in which postcolonial theorists draw on disability only as a metaphor and conversely, disability theorists reflect on colonisation as a symbol of the subjugation of disabled people.¹⁰² Disability is used to describe the effect and impact of white supremacist patriarchal tyranny with little consideration for the lives that are only good for providing adjectives to the experiences of subjugation.

Grech and Soldatic further observe that “While postcolonial theory and associated fields (e.g. critical theory and cultural studies) have engaged with race, gender, and ethnicity in the exploration of themes of identity, representation, space, historicity and the neocolonial, they have almost wholly bypassed disability- paradoxically limited to the historical subjectification of the able-bodied, or rather disembodiment of colonialism and the postcolonial terrain.”¹⁰³ Decolonial discourse and scholarship has for the most part been a male-driven endeavour, relating to disability, at best, as a language tool to articulate the limitations, dehumanisation and undermining formulations of coloniality and colonialism. I therefore contend that any attempt at (re)claiming humanising and liberatory trajectories is incomplete until it actively engages and prioritises disabilities to comprehensively reconstruct the historical legacies of loss, dispossession (spatial and otherwise) and knowledges.

2.7 Critical Disability Theory

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) asserts that disability is an evolving concept which is complex and multi-faceted.¹⁰⁴

¹⁰⁰ Madlingozi 2017:125.

¹⁰¹ Grech and Soldatic 2015:2.

¹⁰² Grech and Soldatic 2015:1.

¹⁰³ Grech and Soldatic 2015:1.

¹⁰⁴ CRPD 2007; Evans *et al* 2017:67.

Critical Disability Theory draws from other critical discourses such as critical race theory, feminist theory, queer theory and others. This approach challenges the binary/ dichotomous assessment of disability through the social model which focuses on “individual/ society” or “impairment/ disability” as the basis of its analysis.¹⁰⁵ Instead, critical disability theory recognises the importance of cultural, social, historical and political contexts as part of meaning-making around disability.¹⁰⁶ Critical disability theory engages with questions of embodiment, identity and agency as they affect all living beings.¹⁰⁷ Therefore, any investigation of the South African context regarding disability must take into consideration the local knowledge, experience, culture and unique political history.¹⁰⁸

Scholars such as Grech contextualise disability discourse and locate it within the global history narrative of colonialism- where it was constructed and imagined.¹⁰⁹ “The coloniser had to conceptualise the ‘Other’ racially, culturally, bodily and spiritually.”¹¹⁰ This is further supported by Ramose’s assertion referred to above that the African was devoid of reason and could therefore not qualify as a human being.”¹¹¹ With the commercialisation of bodies during the slave trade, disability became yet another mark of difference so significant that disabled people were worth less to slave traders and therefore they would go to the extent of hiding their illnesses or impairments.¹¹²

Apartheid impacted disabled people in different ways particularly as it was a system that was predicated on embedding racial inequality and specifically white- domination. Therefore, Black people with disabilities endured oppression and marginalisation on the site of their disability and their race. Consequently, white people with disabilities had access to better healthcare facilities, superior quality treatment and higher social welfare than their Black counterparts. It is against this backdrop that some white people with disabilities (particularly within the Disabled Persons South Africa organisation) began to realise that exclusion and marginalisation extended beyond the site that they experienced which was their disability but began to realise that the

¹⁰⁵ Evans *et al* 2017:67.

¹⁰⁶ Ramaahlo 2021:35.

¹⁰⁷ Shildrick 2012:30.

¹⁰⁸ Ramaahlo 2021:35.

¹⁰⁹ Grech 2015:8.

¹¹⁰ Grech 2015:9.

¹¹¹ Ramose 2001.

¹¹² Grech 2015:10.

society around them was systematically unequal and unjust and therefore rejected the idea of being integrated into a society that was inherently unjust and discriminatory.¹¹³

Critical disability theory offers an approach that is rooted in transdisciplinarity and opens a plethora of resources that are not commonly deemed as relevant to the concerns of disability studies and discourse.¹¹⁴ It further offers unique opportunities for social justice.¹¹⁵

2.8 Conclusion

In this chapter I set out the approaches that guide my analysis in chapter 3 and chapter 4. I consider intersectionality, decolonisation and critical disability theory as my tools of analysis to investigate the suitability for a disability-focused bill in South Africa in addressing the myriad of challenges that persons with disabilities, particularly Black women with disabilities must contend with to realise their full potential.

The current investigation in South Africa to create a disability-focused legislation is a step to operationalise the UN Convention on the Rights of Persons with Disabilities in South Africa as committed in 2007 through the ratification of the Convention. Owing to the legal gaps that exist under the current legal systems, it is necessary to ensure that any legislation that will be promulgated does not further exclude those who are even further marginalised by the status quo due to the compounded disadvantage of their race, disability and/or gender. It is therefore necessary to take account of intersectional feminism interwoven with Critical Disability Theory and decolonisation when evaluating legal reform. This chapter provides a broad context for the study's analysis of Project 148.

¹¹³ Howell *et al* 2006:50.

¹¹⁴ Shildrick 2012:36.

¹¹⁵ Evans *et al* 2017:69.

Chapter 3: History of the Status of Persons with Disabilities in South Africa Pre-1994

3.1 Introduction

The main research problem of the study is to investigate whether Project 148 of the South African Legal Reform Commission (SALRC) to domesticate the United Nations Convention on the Rights of Persons with Disabilities (CRPD) through the enactment of a Bill dedicated to addressing disability-related legal issues can sufficiently respond to the plight of persons with disabilities to realise and affirm their full human rights. In this study, I focus particularly on Black disabled women as a marginalised population even within the disabled community as they must contend with the compounded effects of multiple systems of oppression, namely, racism, patriarchy and ableism.

The legal history of disabled people in South Africa prior to 1994 was largely characterised by exclusion, segregation, and institutionalisation.¹¹⁶ Apartheid legislation and policies, designed to enforce racial segregation, simultaneously perpetuated the marginalising of people with disabilities. In this chapter, I expand on this argument by tracing the history of persons with disabilities before the democratic dispensation of 1994 by examining the time periods where South Africa encountered colonialism and then Apartheid. I achieve this by outlining the various disability models that developed during these eras, their characteristics and their impact on disabled people and their families. The definition of disability in these periods was also obviously impacted by the disability models adopted in those times. This had an impact on the perspectives and attitudes society had towards persons with disabilities which had far-reaching consequences for disabled people as it significantly affected their participation in daily life, access to amenities and transport as well as their legal status. To conclude the chapter, I analyse the definition of disability as reflected in the CRPD to articulate the multifaceted and interconnected nature of disability. This is necessary as it will guide the proposed Bill as the bed-rock of South Africa's understanding of Disability. Prior to the proposed Act that is currently under investigation, South Africa's

¹¹⁶ Jagoe "The Disability Rights Movement: its development in South Africa", <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

legislative body had only ventured to define Disability under the Employment Equity Act No. 33 of 2000. I expand on this point further in chapter 4.

For centuries, persons with disabilities have been perceived as “poor helpless cripples, blind beggars, dumb idiots standing on street corners with contorted outstretched hands groping and spluttering for the small offerings their pitiable image could entice out of guilt-ridden passers-by.”¹¹⁷ To this end, there is limited literature about persons with disabilities in South Africa as far as their lives and challenges are concerned.¹¹⁸ Swartz and Watermeyer assert that considerations around disability seldom turn to an exploration of possible modes of systematic discrimination and disadvantage or social oppression.¹¹⁹

The literature available in disability and its histories has largely been shaped by scholars in the Global north.¹²⁰ Therefore, tracing the history of persons with disabilities in South Africa is especially challenging as little is known and recorded about such persons in order to provide a comprehensive account of disability.¹²¹ Regardless, it is well-documented that in South Africa, disability was historically viewed from a religious and/or cultural prism.¹²² Disability was understood as the will of a higher being seeking to punish an individual, family or ancestors. Therefore, disability was shrouded in negative stereotypes which resulted in persons with disabilities being deemed outcasts and excluded from their communities.¹²³

Various scholars note that disability has historically been deemed as an individual issue- that is, the individual’s issue pertaining to their impairment *and* an individual issue devoid of social, political and economic contexts.¹²⁴ As a result, there has been an evolution of approaches to disability over time. It should be noted that while the outline below is organised in a chronological order, each model is influenced by the preceding approaches and therefore one can still find the prevalence of the earliest

¹¹⁷Jagoie “The Disability Rights Movement: its development in South Africa”, <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹¹⁸ Mazibuko 2017:33.

¹¹⁹ Swartz and Watermeyer 2006:1.

¹²⁰ Berghs 2017:1.

¹²¹ Nxumalo 2017:33.

¹²² Nxumalo 2017:34; Ramaahlo 2021:24.

¹²³ Nxumalo 2017:34.

¹²⁴ Schneider 2006:8; Barnes 2012:12.

models/ attitudes/ approaches in contemporary times.¹²⁵ There are various models and approaches beyond those that follow below, however, it is beyond the scope of this study to go through every single one but I believe they still offer value for other investigations.

3.2 Models and Approaches

Disability models and approaches exist to provide ways of translating ideas into practice.¹²⁶ They are necessary because the ways we learn about and understand disability affects the way we interact with and respond to persons with disabilities in real life.¹²⁷ Disability studies has come a long way from its earlier political foundations and theoretical formulations in the 1960's and 1970's, to where it is now as a recognised academic discipline. Disability studies scholars have been instrumental in tracking the history of disability discourse as well as opening up new theoretical approaches that have impacted global understanding of disability.¹²⁸ Some of the most prevalent approaches that have had a significant impact on policies, legislation and practice can be attributed to the charity model, the medical model and the social model.¹²⁹ Therefore, definitions of disability developed within different models reflect the worldview of the particular eras and cultures in which the models developed.¹³⁰

3.2.1 Charity Model

As previously mentioned, persons with disabilities were regarded as outcasts or hidden away from their communities.¹³¹ Disability and its connected effects such as poverty and dependence on others were viewed as a result of fate, God's punishment or an individual's moral failure.¹³² This led to the development of what is known as the "charity model". According to Mazibuko, culture influenced perceptions of disability in South Africa.¹³³ An example of this is the IsiZulu term for persons with disabilities, "izidalwa", which implied a person who was incapable of doing anything for themselves

¹²⁵ Ramaahlo 2021:25.

¹²⁶ Oliver 2004:19

¹²⁷ Priestly 2006:19.

¹²⁸ Roulstone, Thomas and Watson 2012:3.

¹²⁹ Evans *et al* 2017:54-55.

¹³⁰ Evans *et al* 2017:54.

¹³¹ Jagoe "The Disability Rights Movement: its development in South Africa", <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹³² Evans *et al* 2017:56.

¹³³ Mazibuko 2017:34.

due to their condition.¹³⁴ The charity model emerged as a result of such religious or cultural outlooks. This approach was characterised by the establishment of charity homes and organisations that offered beds, food, activities, safety and activities for persons with disabilities through drawing donations from individuals, government funding and other funding organisations.¹³⁵ Donors regard persons with disabilities as passive recipients of their goodwill as these organisations came together as “society’s individual guilty conscience.”¹³⁶¹³⁷

This approach has been criticised for “keeping the problem out of sight” and serving to perpetuate the idea that persons with disabilities ought to be hidden away and confined to institutions.¹³⁸ A further criticism is that the perception that persons with disabilities are victims of tragic circumstances, underscores charity and benevolence as opposed to equality and justice.¹³⁹

3.2.3 Medical Model

The medical model emerged in the 20th century. This model arose as part of the advancements in the medical field in that era. The 20th century was the scene of some of the most pivotal political events in history. Some of the most globally significant conflicts included World War I and World War II in the first half of the century and the subsequent Cold War between the United States of America (USA) and the Union Socialist Soviet Unions (USSR) that occurred in the latter half of the century. This century was also important for the liberation agenda in Africa as the independence wave swept through the continent. African nations sought to rid themselves of European colonial rule to achieve their freedom and self-determine their futures as independent nations. South Africa ushered in the century with one of its most prominent wars- the Anglo-Boer war that took place between 1899-1902. The war was a result of decades-long tension between British imperialism and Afrikaner nationalism. Further, gold was discovered in the then Transvaal (current Gauteng

¹³⁴ Mazibuko 2017:34.

¹³⁵ Jagoe “The Disability Rights Movement: its development in South Africa”, <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹³⁶ Ramaahlo 2021:25.

¹³⁷ Jagoe “The Disability Rights Movement: its development in South Africa”, <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹³⁸ Jagoe “The Disability Rights Movement: its development in South Africa”, <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹³⁹ Ramaahlo 2021:25.

province)- further exacerbating the long-standing feud between the two groups over the control of the new-found minerals. By the end of 1902 the British had defeated the Afrikaner contingent through the use of concentration camps and the scorch earth policy, through which approximately 27000 women and children died. ¹⁴⁰

In 1912, a group of upper class Black men met in Bloemfontein to forge a way for the representation and freedom of the Black majority which at this point had been disenfranchised through various segregationist policies of the government. This meeting would result in the formation of the African National Congress on 8 January 1912. Two days short of exactly two years later, another nationalist political organisation was formed in the same city. The National Party was formed to advance the interests and establish Afrikaner dominance, on 7 January 1914. The National Party would go on to win the 1948 elections, thereby gaining the political platform to formalise Apartheid as its official government policy. This policy was aimed at ensuring the social, political, economic and legal subjugation of Black people by entrenching white superiority as official state policy. This development had an impact on people with disabilities, especially Black people with disabilities.

The 20th century was also characterised by extensive medical and technological advancements. The return of injured soldiers from war hastened investment into rehabilitative treatment programmes. The aim of these medical interventions was to cure or restore those disabled by war to as close to “normal functioning” as possible. Some scholars have criticised the concept of “normal bodies” as a construction of Euro-Western White supremacist ideology and patriarchy.¹⁴¹

In South Africa, as with the rest of the world, disability was viewed as a public health issue and was placed under the authority of medical and welfare professionals during this era.¹⁴² The National Conference on Handicap Persons was held in the Republic of South Africa in 1952. Characteristic of the prevalent medical model of that period, conference attendees comprised of non-disabled surgeons and medical professionals who had convened to hold discussions centred around the employment and integration of persons with disabilities into society.¹⁴³ Under apartheid, people with

¹⁴⁰ Van Der Westhuizen 2007:14.

¹⁴¹ Grech 2015:17.

¹⁴² Evans *et al* 2017:57.

¹⁴³ Fagin 2011:8.

disabilities were often excluded from mainstream education and employment opportunities. They were frequently institutionalised in overcrowded and underfunded facilities, where they faced neglect and abuse.

The segregationist nature of apartheid was legitimated by the promulgation of various legislation aimed at controlling the Black majority and undermining their humanity and citizenship. The Disability Grants Act of 1936 formalised social assistance for disabled people.¹⁴⁴ The application of this Act required a means test as part of its processes. The amounts paid out varied significantly between the different racial groups. White people were offered 60 pounds while Black people were offered only 12 pounds.¹⁴⁵ The Group Areas Act of 1950, which enforced residential segregation, also had a significant impact on people with disabilities. The Act was enacted to entrench apartheid spatial planning. Families with disabled members were often forced to relocate to areas designated for their specific racial group, regardless of their proximity to support services or family members.¹⁴⁶ Legislation such as the Mental Disorders Act of 1973 allowed for the involuntary detention of individuals deemed to be mentally ill, including those with intellectual disabilities.

According to the medical model, disabilities are caused by diseases, traumas or internal biological conditions that create pathologies defined as physiological or cognitive impairments that make persons different from those who are considered “normal”.¹⁴⁷ Under this view, persons with disabilities are perceived as social embodiments of their disabilities where said disabilities must either be cured or managed through medical intervention, therapy or other forms of treatment.¹⁴⁸

The medical model has been criticised for perpetuating a linear view of disabilities through advancing prejudicial attitudes against persons with disabilities as “pitiable outsiders, recipients of welfare and patients in the medical system.”¹⁴⁹ This perspective limited disability to an individualistic phenomenon that could only be addressed through rehabilitation or medical treatment- therefore removed from

¹⁴⁴ Kelly 2013:3.

¹⁴⁵ Kelly 2013:3.

¹⁴⁶ Department of Justice and Constitutional Development, 1950.

¹⁴⁷ Evans *et al* 2017:58.

¹⁴⁸ Evans *et al* 2017:58-59.

¹⁴⁹ Jagoe “The Disability Rights Movement: its development in South Africa”, <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

cultural, political, economic, social and/or environmental contexts.¹⁵⁰ The singular emphasis on the impairment as the sole determinant of disability led to the social isolation of persons with disabilities and, subsequently, dependence on the care of non-disabled people in society.¹⁵¹ These were either state welfare, institutions, charity organisation-led “homes”.

3.2.4 Social Model

Noting the abovementioned critiques of historical models and approaches to disability, a new way of thinking about disability emerged in the 1970’s-1980’s.¹⁵² Mike Oliver, a disability rights scholar and activist, who is widely credited for coining the social model, states that the social model was first introduced by the Union of the Physically Impaired Against Segregation (UPIAS)- a British disability rights organisation in their publication “The Fundamental Principles of Disability”.¹⁵³ It declared that “In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society.”¹⁵⁴ The social model, in contrast to the medical model, removes the “problem” from the individual to the society by analysing disability as a question of social transformation, equality and human rights.¹⁵⁵ According to this model, disability is a social construct.¹⁵⁶ Proponents of this model state that a person is disabled if the world in which they exist fails to take cognisance of their physical or mental impairment- therefore “discrimination and disability become one and the same thing.”¹⁵⁷ This is because disability is a consequence of social structures and mechanisms which result in oppression and discrimination against people with impairments.¹⁵⁸ With this perspective, there is less reliance on medical professionals and “caring” professions as it empowers those advocating for social transformation and civil rights to take the lead instead.¹⁵⁹ While some efforts were made to address the needs of disabled people during this period, such as the establishment of special

¹⁵⁰ Schneider 2006:8.

¹⁵¹ Priestly 2006:20.

¹⁵² Barnes 2012:21.

¹⁵³ Oliver 2004:1.

¹⁵⁴ UPIAS 1978:14 in Oliver 2004:1.

¹⁵⁵ Priestly 2006:22.

¹⁵⁶ Bolt 2012:301.

¹⁵⁷ DPSA “Pocket Guide on Disability Equity: An Empowerment Tool” <https://www.dpsa.org.za/wp-content/uploads/2013/05/Pocket-Guide-on-Disability-Equity.pdf> (Accessed on 22 October 2024).

¹⁵⁸ Bolt 2012:300.

¹⁵⁹ Priestley 2006:22.

schools and rehabilitation centres, these initiatives were often limited in scope and did not adequately address the systemic barriers faced by people with disabilities.

In 1981, the United Nations declared that year the International Year of Disabled Persons, followed by the announcement of the Decade of Disabled Persons commencing 1982-1992.¹⁶⁰ In South Africa, the 1980's saw the intensification of the Apartheid regime's racial tyranny through intensified police and military violence against Black people. Following its refusal to recognise the International Year of Disabled Persons, the South African government organised its own Year of Disabled Persons in 1986.¹⁶¹ This ironically coincided with the year the South African government pronounced a state of emergency. A little discussed fact is that apartheid was responsible for the disablement of countless Black people as it carries out its ferocious attack on Black people for the most trivial crimes as well as those it deemed as treasons. Sometimes inciting violence among Black people themselves towards one another. Therefore, the anti-apartheid, black consciousness and student movements within South Africa played an imperative role in stimulating disability activism in the 1980's. To the extent that it was a Black person, Phindi Mavuso who represented disabled people at a national conference organised by the apartheid government to articulate the compounded discrimination of apartheid and disability.¹⁶² This connection between disability and the political landscape indicated a shift by South African disabled people's perspective towards the embrace of the social model that was making waves worldwide.

As the social model grew across the globe as a socially responsive approach to disability, rumblings of the South African disability movement began in 1981, the year the United Nations declared the International Year of Disabled Persons. The internationally sanctioned South African government refused to recognise the year.¹⁶³ However, unbeknownst to them, a certain Mike du Toit, a paraplegic man, had attended the Rehabilitation International Congress in Winnipeg, Canada in 1980.¹⁶⁴ His time at the congress, seeing thousands of persons with disabilities from all over

¹⁶⁰ Howell, Chalken and Alberts 2006:47.

¹⁶¹ Rowland 2004:9.

¹⁶² Rowland 2004:9.

¹⁶³ Jagoe "The Disability Rights Movement: Its Development in South Africa" <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

¹⁶⁴ Rowland 2004:1938.

the world speaking positively about the disability rights movement, ignited something inside of him that inspired him to get involved in the South African disability rights movement. Due to the political context of that period, it was apparent to Du Toit that the disability rights movement would have to be situated in Soweto if it were to gain any legitimacy as a rights movement.¹⁶⁵ In a few months he met with Friday Mavuso, a Black paraplegic man based in Soweto who had become disabled when apartheid police shot him in the back.¹⁶⁶ Mavuso had established the Self Help Association of Paraplegics (SHAP) in Soweto. When the two men met, there was a mutual agreement between them for SHAP to operate as an empowerment workshop aimed at (up)skilling persons with disabilities to from across the country by training them for 6 months at no cost, and then they were to return to their communities to “pay it forward” by establishing SHAP workshops and training persons with disabilities in their communities. Within no time, SHAP was running between 40-50 self-help workshops across the country. These workshops later became the membership base of the Disabled Persons South Africa (DPSA) organisation when it was established in 1984.

DPSA was aware of the unequal political policy which affected persons with disabilities in various ways, such as through the discrepancy in the social welfare grant, unequal public healthcare facilities and the abject poverty and violence that Black disabled people were exposed to.¹⁶⁷ The DPSA had a particular aversion towards being spoken on behalf, particularly by state professionals such as social workers. This position was coherent with the prevailing social model posture of that time period as more and more persons with disabilities strived for the ideals of self-representation and independence. Jagoe, a disability activist in her own right, recalls that the disability rights movement was significantly influenced by the liberation movement, particularly the Black students who had walked out of the liberal white National Union of South African Students (NUSAS) to establish the Black Consciousness Movement which proudly advanced the social, cultural and political rights of Black people.

The social model distinguishes between impairment and disability. Flynn provides a comprehensive exposition, “Impairment is the term used to describe the medical

¹⁶⁵ Rowland 2004:146.

¹⁶⁶ Rowland 2004:147.

¹⁶⁷ Jagoe “The Disability Rights Movement: Its Development in South Africa” <https://www.independentliving.org/toolsforpower/tools6.html> (Accessed on 22 October 2024).

condition or functional limitation affecting a particular individual, whereas disability is the term given to the societal barriers experienced by people with physical or mental impairments.”¹⁶⁸ Disability may imply impairment, however the inverse is not always accurate.¹⁶⁹

However, some scholars have cautioned against relying solely on the social model to conceptualise disability. According to Vehmas, the social model approach tends to downplay the significance of the “inevitable physical foundation of social phenomena.”¹⁷⁰ Therefore, disregarding the physical basis of disability may result in an insufficient or even, flawed analysis or account.

The social model has also been criticised for treating persons with disabilities as a homogenous group by neglecting their various other identities such as age, sexual identity, race, religion and class.¹⁷¹ This approach therefore fails to adequately account for people with disabilities’ differences and subsequent intersections of the oppressive systems that they interface with- particularly in the context of South Africa’s extensive inequality.¹⁷² It was only after the end of apartheid in 1994 that significant legal and policy changes were implemented to protect the rights of people with disabilities. The Constitution of South Africa, adopted in 1996, guarantees equality and non-discrimination for all citizens, including those with disabilities. Subsequent legislation, such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, further strengthened the rights of disabled people by prohibiting discrimination on the basis of disability. This aspect will be addressed more in-depth in chapter 4.

3.3 Defining Disability

Understandings around disability have tended to rotate between to primary objectives. These are the right of persons with disabilities to participate equitably with others in society, and the societal responsibility to protect people who are vulnerable.¹⁷³ This

¹⁶⁸ Flynn 2015:6-7.

¹⁶⁹ Ramaahlo 2021:31.

¹⁷⁰ Vehmas 2012:300.

¹⁷¹ Ramaahlo 2021:31.

¹⁷² Ramaahlo 2021:31.

¹⁷³ South African Human Rights Commission “South African Human Rights Commission Equality Report”

view is associated with the disability models discussed above as they are often viewed from an adversarial viewpoint. Disability is not an either/or phenomenon that can only be ascribed to a particular model however well-meaning or technically accurate. This would result in a grossly insufficient analysis particularly as it relates to redress and disability justice. Disability continues to be viewed as an individual challenge that can be solved by strength of character and determination.¹⁷⁴ However, disability is neither monolithic nor static. Therefore, it is necessary to include approaches that incorporate both the physical origins of the impairment and the social factors that inform the experiences of people with disabilities. Scholars such as Soudien and Baxen challenge that defining disability is complicated as this exercise demonstrates that “definition is embedded within broader constructs of how society works, who is in and who is out, and under what conditions.”¹⁷⁵ They challenge the dominant discourse of limiting disability definitions to the dominant models, namely, the medical model and the social model by asserting that while these definitions are developed with the best of intentions to benefit persons with disabilities, they instead often have the opposite effect which is to exclude, categorise and/or make different.¹⁷⁶

The CRPD embraces a hybrid approach in its own definition of Disability articulated in Article 1, where it states that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁷⁷

It further defines “discrimination on the basis of disability” as:

Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental

<https://www.sahrc.org.za/home/21/files/Equality%20Report%2020%20Oct%202012%20Final.pdf>
(Accessed on 27 November 2024).

¹⁷⁴ Kafer 2013:4.

¹⁷⁵ Soudien and Baxen 2006:154.

¹⁷⁶ Soudien and Baxen 2006:154.

¹⁷⁷ CRPD 2007:4.

freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.¹⁷⁸

The CRPD definition acknowledges that disability is a combination of:

- Long-term;
- Physical, mental, intellectual or sensory impairments;
- Which interact with;
- Barriers;
- That create hindrances in;
- Full participation; and
- On an equal basis.

This reflects that disability transcends the limitations of prevalent disability models. Scholars such as Mike Oliver have criticised the overemphasis on explaining the benefits of one model over the other instead of prioritising the implementation of policies that advance the right of persons with disabilities to full participation in life on an equal basis as their non-disabled counterparts.¹⁷⁹ The definition of “discrimination on the basis of disability” includes political, economic, social and cultural rights which highlights the types of deprivations that persons with disabilities are subjected to. It underscores the limitation to the rights of disabled people by recognising that actions or omissions that have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of the human rights of disabled people is a violation under the CRPD. This enunciation of the barriers that persons with disabilities face expands understanding regarding the varied ways persons with disabilities basic human rights and freedoms are disregarded and undermined beyond the overt forms of violations that usually occupy public imagination.

The above definitions therefore embrace a hybrid approach that acknowledges that disability manifests at the point where a person’s individual impairment interfaces with a hostile, inaccessible and/or discriminatory environment. From a philosophical perspective, the distinguishing factor between impairment and disability is that disability can be disconnected from a person’s physical condition.¹⁸⁰ Therefore,

¹⁷⁸ Article 2: Definitions <https://social.desa.un.org/issues/disability/crpd/article-2-definitions> (Accessed on 27 November 2024).

¹⁷⁹ Oliver 2004:3.

¹⁸⁰ Bolt 2012:301.

disability is a term used to describe the societal barriers confronting people with physical or mental impairments.¹⁸¹ However, it is important to note that to simply classify a group by its predominant characteristics is limiting as it fails to account for the relationship(s) between race, class, gender and other types of societal inequities and the power relations that are a result of social, political and epistemological hierarchies.¹⁸²

3.4 Conclusion

In this chapter I provide a brief overview of the socio-political context that informed societal perceptions and legal understandings of disability in South Africa. As argued also by others the overview confirms that it is impossible to disconnect disability and law from the historical contexts in which they are located.¹⁸³ To this end, disability and law are gendered and raced as they intersect with other forms of identity.¹⁸⁴ People with disabilities were often viewed as a burden on society and were subjected to discriminatory practices in various aspects of life. They were denied access to public facilities, transportation, and other essential services. This stemmed from perspectives of disability related to the models that were prevalent during different time periods. These models informed public policy and legislation which often affected disabled people's lives and had an additionally devastating effect on those who were subjugated due to their race and disability.

¹⁸¹ Flynn 2016:6-7.

¹⁸² Soudien and Baxen 2006:159.

¹⁸³ Evans *et al* 2017:92.

¹⁸⁴ Evans *et al* 2017:92.

Chapter 4: Post-Apartheid Legal Reform Towards the Realisation of Disability Rights in South Africa

4.1 Introduction

With so many contested definitions and models utilised to determine who persons with disabilities are, the concept of disability justice is complex as it challenges social contractarian ideas of justice which are often based on deliberative processes, mutual agreement and reciprocity.¹⁸⁵ The main research problem of this study focuses on investigating whether a disability focused Bill as envisaged by Project 148 of the South African Legal Resource Commission (SALRC), in order to incorporate the UN Convention on the Rights of Persons with Disabilities (CRPD) into national legislation, can adequately respond to the challenges experienced by Black disabled women. I rely on intersectional feminism and decoloniality as approaches guiding my analysis of the proposed Bill and to the question if legal reform can respond fully to the plight of Black disabled women.

Article 12 subsection 1 of the United Nations Convention on Rights of Persons with Disabilities (CRPD) affirms that persons with disabilities have the right to recognition everywhere as persons before the law.¹⁸⁶ The article further states in subsection 2, that persons with disabilities shall enjoy legal capacity on an equal basis with others in all aspects of life.¹⁸⁷ This is a significant development given South Africa's historical context and the multiple sites of exclusion and marginalisation that people with disabilities endure(d) as explored earlier in this study.

In this chapter, I outline the legal interventions that have been developed in the democratic dispensation to advance disability rights in South Africa. There have been multiple documents published within various sectors to provide a policy framework relevant to those areas such as the White Paper 6- Building and Inclusive Education and Training System by the Department of Basic Education as well as the Strategic Policy Framework on Disability for the Post School Education and Training System.

¹⁸⁵ Flynn 2015:6.

¹⁸⁶ CRPD 2007:10.

¹⁸⁷ CRPD 2007:10.

However, for purposes of this study, I focus on the 1996 Constitution; the White Paper on an Integrated National Disability Strategy of 1997; the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000; Employment Equity Act No. 55 of 2000; and White Paper on the Rights of Persons with Disabilities developed in 2015. I also provide background information related to the South African Legal Reform Commission's Project 148 investigation looking into integrating the UN Convention on the Rights of Persons with Disabilities by discussing the Issue Paper published in 2021 and the subsequent Discussion Paper published in 2024. I further outline the process followed by the SALRC towards the adoption of the Act. Lastly, I explore the limitations of previous legislative measures that must be taken into consideration in order for the Act to effectively operate for the benefit of realising disability rights.

4.2 Disability Rights Policy in Post-Apartheid South Africa

Following the political demise of apartheid in 1994, South Africa pursued a path towards a reconciliatory trajectory underpinned by the Constitutional values of equality, human dignity and constitutional supremacy, among others.¹⁸⁸ To this effect, there has been a growing body of complementary legislation over the last 30 years that has been developed to strengthen key provisions of the Constitution and the Bill of Rights.¹⁸⁹ In the context of disability rights, these include, but are not limited to, the:

- White Paper on an Integrated National Disability Strategy in 1997;
- Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000;
- Employment Equity Act No. 55 of 2000; and
- White Paper on the Rights of Persons with Disabilities in 2015.

South Africa ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2007. The CRPD effectively legally binds South Africa to adopt all appropriate legislative, administrative and other measures to ensure the implementation of the rights articulated in the Convention.¹⁹⁰ It is further committed, by virtue of being a state party to the CRPD, to take any steps necessary, including

¹⁸⁸ The Constitution of the Republic of South Africa, 1996.

¹⁸⁹ Du Plessis 2011:95.

¹⁹⁰ CRPD 2007:5.

the enactment of legislation, to abolish and/or modify laws that amount to discrimination against persons with disabilities.

However, persons have endured continued marginalisation and dehumanisation despite these interventions. Perhaps disability challenges formal law as it complicates even the process of attaining legal recourse. From upending some of the principles that underpin court procedures such as “witness reliability” which speaks to the credibility and believability of the witness. However, when confronted with prosecuting the sexual assault of a person with an intellectual disability, these long-held principles are challenged and due to the failings of law and not of the complainants, such victims are left destitute. Such crimes often persist as they are essentially unpunishable by formal law.

4.3 The Constitution

South Africa, as a constitutional democracy since 1994, regards the Constitution as the supreme law of the land upon which all policy and legislation must align as held under Chapter 1, section 2.¹⁹¹ In chapter 2, section 8 the Constitution further asserts that the Bill of Rights is the cornerstone of South Africa’s democracy. Section 9 of the Constitution of the Republic of South Africa (the equality clause) enshrines the right to equality for all persons by stating

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.¹⁹²

It further provides a list of grounds which would constitute unfair discrimination. Section 9 states:

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

¹⁹¹ The Constitution of the Republic of South Africa, 1996.

¹⁹² The Constitution of the Republic of South Africa, 1996.

Relevant to this study is unfair discrimination on the grounds of disability as listed in section 3 above which prohibits unfair discrimination on one of the grounds of disability among others.¹⁹³ The Constitution's preamble offers that South African society is based on "democratic values, social justice and fundamental human rights" and further commits to "improve the quality of life of all citizens and free the potential of each person".¹⁹⁴ Subsection 4 of section 9 of the Constitution mandates that legislation ought to be passed that to ensure the prevention of unfair discrimination based on any of the grounds listed in subsection 3.

With reference to the UN Convention on the Rights of Persons with Disabilities, section 231(1) states that the negotiating and signing of all international agreements in South Africa is the mandate of the national executive. Section 231(4) states further that international agreements become law in the Republic when they are enacted into law by national legislation.¹⁹⁵ Therefore, the domestication of the CRPD by enactment of a Bill is a constitutionally authorised exercise for the prevention of unfair discrimination against people with disabilities as currently under investigation by the South African Law Reform Commission (SALRC).

4.4 Legislation (PEPUDA and EEA)

4.4.1 Promotion of Equality and Prevention of Unequal Discrimination Act No. 4 of 2000 (PEPUDA)

Section 7 of the Constitution provides that the Bill of Rights is the cornerstone of South Africa's democracy.¹⁹⁶ It further directs that the state must respect, protect, promote and fulfil those rights expressed in the Bill of Rights. Section 9 further states that all people are equal before the law and lists the grounds upon which unfair discrimination is prohibited. This list includes race, gender, class and disability amongst others.¹⁹⁷ To give effect to these provisions, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was enacted.¹⁹⁸ Chapter 2, Section 9 of

¹⁹³ The Constitution of the Republic of South Africa, 1996.

¹⁹⁴ The Constitution of the Republic of South Africa, 1996.

¹⁹⁵ The Constitution of the Republic of South Africa, 1996.

¹⁹⁶ The Constitution of the Republic of South Africa, 1996.

¹⁹⁷ The Constitution of the Republic of South Africa, 1996.

¹⁹⁸ SALRC 2020:29.

PEPUDA prohibits the unfair discrimination of any person based on their disability.¹⁹⁹ Interesting to note, however, is that neither the Act nor the Constitution provide definitions of disability.

The Act focuses on prevention, prohibition and elimination of unfair discrimination, hate speech and harassment. It states that neither the state nor any person may unfairly discriminate against any person on the ground of disability, including:

- denying or removing from any person who has a disability any supporting or enabling facility necessary for their functioning in society
- contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility
- failing to eliminate obstacles that unfairly limit or restrict those with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate their needs.²⁰⁰

While PEPUDA was an important articulation of the Constitution's substantive equality principle, it had some glaring limitations. Firstly, it failed to provide a definition of disability in order to properly frame unfair discrimination on the basis of disability. This limitation created a situation where different sectors, depending on their individual contexts, had to develop their own definitions as evidenced through legislation such as the Employment Equity Act. The second limitation relates to the fact that the Act was aimed at promoting the Equality clause in the Constitution and not necessarily advancing disability rights. This makes the Act difficult to rely on when raising issues specific to disability given the Act's generic iteration as it sought to prevent, prohibit and eliminate unfair discrimination, hate speech and harassment based on the grounds listed in section 9 of the Constitution.

4.4.2 The Employment Equity Act No. 55 of 2000

As previously mentioned, other legislation never endeavoured to provide a definition of disability. Therefore Chapter 1 of the Employment Equity Act 55 of 1998 is widely

¹⁹⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: sec.9.

²⁰⁰ Promotion of Equality and Prevention of Unequal Discrimination Act No. 4 of 2000:

relied upon for its characterisation of “people with disabilities”. It states that: “people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;”²⁰¹

Therefore, only people who satisfy all the criteria in the definition:

- (i) long-term or recurring;
- (ii) having a physical or mental impairment;
- (iii) which substantially limits,

are considered as persons with disabilities for purposes of employment practices and inclusion.²⁰²

4.4.3 White Paper on the Rights of Persons with Disabilities (1997-2015)

In 1997, the White Paper on the Integrated National Disability Strategy was developed to guide government services towards disability mainstreaming. This document was updated in 2015 when the White Paper on the Rights for Persons with Disabilities (WPRD) was adopted by government. This move was a reaction to criticism levelled against the infusion of disability rights into generic anti-discrimination legislation.²⁰³ Different sectors of society engaged in disability inclusion recognised that this initial approach was grossly inadequate to realising the full participation of persons with disabilities in democratic life. Previous negative attitudes still prevailed and perpetuated the marginalisation of the majority of persons with disabilities. The WPRD was viewed as a precursor to a disability-focused bill, aimed at enhancing disability rights.²⁰⁴

The WPRD is based on 9 strategic pillars²⁰⁵:

- Strategic Pillar 1: Removing Barriers to Access and Participation

²⁰¹ Employment Equity Act No. 55 of 2000: sec.1.

²⁰² Employment Equity Act 55 of 1998: sec. 1.

²⁰³ Kamga 2016:569.

²⁰⁴ Kamga 2016:569.

²⁰⁵ WPRD 2015:9.

- Strategic Pillar 2: Protecting the Rights of Persons at risk of Compounded Marginalisation
- Strategic Pillar 3: Supporting Sustainable Integrated Community Life
- Strategic Pillar 4: Promoting and Supporting the Empowerment of Children, Women, Youth and Persons with Disabilities
- Strategic Pillar 5: Reducing Economic Vulnerability and Releasing Human Capital
- Strategic Pillar 6: Strengthening the Representative Voice of Persons with Disabilities
- Strategic Pillar 7: Building a Disability Equitable State Machinery
- Strategic Pillar 8: Promoting International Co-operation
- Strategic Pillar 9: Monitoring and Evaluation

Pillar 2 aims at “Protecting the Rights of Persons at Risk of Compounded Marginalisation.”²⁰⁶ The WPRD asserts that women and girls with disabilities still do not enjoy all human rights and fundamental freedoms on an equal basis with boys and men with disabilities. Whilst all women with disabilities bear the brunt of inequality, black African women with disabilities are particularly affected by compounded marginalisation caused by the inter-connectedness of race, disability, gender, socio-economic status and class.²⁰⁷

The adoption of the WPRD in 2015 was viewed in 2015 as an important step in eventually realising the objective of a disability specific Act.²⁰⁸ This is because, as mentioned previously, Acts have binding power because their authors are vested with law-making authority.²⁰⁹ Therefore, the enactment of a Bill creates the opportunity to deepen judicial power against any form of discrimination as well as to protect and advance the human rights of persons with disabilities.

²⁰⁶ WPRD 2015:60.

²⁰⁷ WPRD 2015:60.

²⁰⁸ Kamga 2016:569.

²⁰⁹ Du Plessis 2011:94.

4.5 UN Convention on the Rights of Persons with Disabilities

On 30 November 2007, South Africa became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol. By ratifying the Convention without Project 148 of the South African Law Reform Commission (SALRC) is the process integrating the CRPD into South Africa's national legislation. According to section 231(1) of the Constitution, the negotiating and signing of all international agreements in South Africa is the mandate of the national executive. Section 231(4) states further that international agreements become law in the Republic when they are enacted into law by national legislation.²¹⁰ By ratifying the Convention, South Africa committed to be legally bound by the provisions of the Convention. The obligations created under the Convention include submitting a country report to the Convention Committee as well as taking steps to realise the rights of persons with disabilities under the Convention on a domestic basis.

Article 4 of the CRPD creates the following general obligations for state parties:

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
 - a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
 - b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
 - c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
 - d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

²¹⁰ The Constitution of the Republic of South Africa, 1996.

- e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- f. To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;
- g. To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
- h. To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;
- i. To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.²¹¹

The CRPD outlines various rights to give effect to the recognition of the human rights of disabled people. Several have been quoted throughout this study as it would not be possible to quote the document here. The CRPD recognises disability as an evolving concept and characterises persons with disabilities as people whose disability arises from the interaction between a person with impairment and the attitudinal and environmental barriers that limit their full and effective participation in society equally with others. Article 1 of the Convention states that the purpose of the CRPD is to promote and protect the full and equal enjoyment of all human right by persons with disabilities.

The above declaration aligns with South Africa's constitutional value of equality and its prohibition of unfair discrimination against anybody on the basis of their disability. The Convention appears to address the implementation gap that arose from South

²¹¹ United Nations "Convention on the Rights of Persons with Disabilities"
<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>
(Accessed on 22 October 2024).

Africa's more blanket approach to the human rights of persons with disabilities through PEPUDA, for example.

4.6 South African Law Reform Commission- Project 148

The SALRC is governed by the South African Law Reform Commission Act of 1973.²¹² The Commission is mandated to achieve the following objectives in section 4 of the Act:

To do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation or reform thereof, including –

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic;
- the consolidation or codification of any branch of the law; and
- steps aimed at making the common law more readily available.²¹³

The process towards the domestication of the CRPD by promulgation of a Bill has, is and will follow the following steps:

- Comments on the issue paper closed on 30 June 2021.
- On 1 October 2024 SALRC published a discussion paper with draft legislation for public comment. Closing date for comments is 4 December 2024.
- It will then be tabled in the legislature as a draft bill prior to its adoption as a Bill.
- It will then be sent to the Law Commission and the Cabinet for approval.
- It will then be circulated to the State Law Advisers who examine the legal and technical ramifications of the draft law
- Finally, it will be adopted as an Act by Parliament.

²¹² South African Law Reform Commission Act 19 of 1973.

²¹³ South African Law Reform Commission Act 19 of 1973: sec.4.

4.3.1.1 Issue Paper No. 39 Project 148

The Commission solicits public engagement in its investigations by publishing Issue Papers as part of its consultation process. The purpose of an issue paper is to announce an investigation, to clarify the aim and scope of the investigation, and to suggest the options available for solving existing problems.²¹⁴ Issue papers form the basis of discussion papers, specifically Commission deliberations. The challenges presented in an issue paper are later raised to identify and define issues which need further debate. Comment of any person on an issue contained in the issue paper or in respect of a related issue, which may need inclusion in the debate, is sought.

Relevant to this research study is Issue Paper No. 39 of Project 148. Issue paper no. 39 was published on the 9th of December 2020. The SALRC received a request from the Department of Justice and Constitutional Development to investigate “the efficacy of developing single disability legislation or a cut across statute to give effect to disability right and further proposals for the domestication of the CRPD.”²¹⁵ The issue paper invited public comment and responses to a questionnaire comprising a range of questions related to the issues identified by the SALRC.

The issue paper is an important part of the process particularly in the investigation currently underway as it invites persons with disabilities, their representative organisations and other stakeholders to provide input into the legislation, thereby strengthening the proposed Act’s efficacy because it will be informed by persons with disabilities themselves. It is of course unclear the extent to which the consultative process reached persons with disabilities disadvantaged by low literacy, lack of access to information and/or their geographic location, particularly those situated in peri-urban and rural communities.

4.3.1.2 Discussion paper 163 of Project 148

Discussion papers, previously referred to as working papers, are documents which contain the Commission’s preliminary research results. Discussion papers often also

²¹⁴South African Law Reform Commission <https://www.justice.gov.za/salrc/objects.htm> (Accessed on 22 October 2024).

²¹⁵ SALRC 2020:1.

contain draft legislation. The main purpose of these documents is to test public opinion on solutions identified by the Commission.²¹⁶

Discussion papers include important information on the investigation and the Commission's tentative proposals for reform. In particular, a discussion paper will include a statement of the existing legal position and its deficiencies, a comparative survey and a range of possible solutions. In most cases, as with Discussion Paper 163, the discussion paper will also include a draft Bill. Members of the public are informed of the availability of discussion papers through press releases and press conferences. In addition, copies are distributed to organisations and, sometimes, to individuals who the Commission seeks to solicit views on the subject under discussion. The responses to the provisional proposals are carefully studied before final decisions are made. The Commission also hears oral evidence in appropriate cases. Its recommendations are embodied in comprehensive reports, which are submitted to the Minister.²¹⁷

Discussion paper 163 of Project 148 was published on the 1st of October 2024. It comprises of the process, history, mandate and overview of project 148; international law by outlining articles from the CRPD; foreign law compliance with the CRPD; public responses to Issue Paper 39 of Project 148; South African national laws relevant to the proposed bill and then finally, the draft bill.²¹⁸

The discussion paper reveals that two schools of thought have emerged in the SALRC investigation, namely, either current legislation, including the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act ought to be amended, or a new disability-focused Bill should be developed.²¹⁹ The SALRC embraces a more hybrid approach as it proposes that a new Act should be used as a legal framework from which sector-specific laws will be developed to address the unique requirements of those sectors. The SALRC's hybrid approach is refreshing as it moves away from the limiting binary understandings often found in the law. This

²¹⁶South African Law Reform Commission <https://www.justice.gov.za/salrc/objects.htm> (Accessed on 22 October 2024).

²¹⁷ South African Law Reform Commission <https://www.justice.gov.za/salrc/objects.htm> (Accessed on 22 October 2024).

²¹⁸ SALRC 2024:1-119.

²¹⁹ SALRC 2024:IX.

approach is also proactive as opposed to the law's usual reactive posture. Following this method reduces the risk of later needing to effect arbitrary amendments as different cases arise.

4.5 Limitations of the Law

Some sections of the disability sector vocalised an apprehension towards the promulgation of another legislative document.²²⁰ They hold the view that the current legislation and policies require implementation and monitoring to adequately respond to the needs of persons with disabilities. Their argument is that, it is not the lack of policies and laws that has posed an obstacle to the attainment of disability rights, it is rather the incapacity of Euro-Western law to challenge prevalent negative beliefs and attitudes.²²¹ Part of the critique is that the law operates as a regulatory social mechanism which creates and enforces normality from a predominantly medical perspective.²²² From this perspective, disability needs to be proved and verified by a medical professional to legitimise the claim of disability. This is of course inherently exclusionary as it assumes that all people have access to medical facilities and the means to make use of these services. This affirms the criticism that current jurisprudence is merely a continuation of colonial iterations of power, domination and control.

Furthermore, legal rights do not always rectify inequality. From a social justice perspective, it is necessary to consider that the law faces significant limitations as a method of social change, and therefore equity cannot be achieved through legal measures.²²³ This is affirmed by Holness and Rule who raise several challenges that persons with disabilities are confronted with when interfacing with the judiciary even when the judicial body, ironically, the Equality Courts.²²⁴ Some of the challenges that persons with disabilities encounter include:

²²⁰ South African Law Reform Commission <https://www.justice.gov.za/salrc/objects.htm> (Accessed on 22 October 2024).

²²¹ Onazi 2020:10.

²²² Evans et al 2017:93

²²³ Evans *et al* 2017:93.

²²⁴ Holness and Rule 2014:PELJ.

- Physical accessibility of public facilities
- Justice personnel who have not been provided with training related to the needs of persons with disabilities;
- And a distrust in litigation as method to empower persons with disabilities to realise and affirm their own agency.
- Cultural and gender norms which further impede particularly African women with disabilities' autonomy and agency as they must constantly seek permission from others- either a traditional healer or a male partner- to pursue legal recourse.²²⁵

Legislation is inherently inadequate to address the challenges experienced by Black women with disabilities. Above I discuss several legislative interventions aimed at advancing disability rights. However, in an unequal society such as South Africa, the accessibility of these legal recourses are extremely out of reach for Black women with disabilities because they are often poor and uneducated. This means that they often lack the information to institute legal proceedings, appoint legal representatives and attend multiple court sittings. The barriers obscuring their ability to pursue legal recourse are both financial and related to their disabilities.²²⁶

For example, access to legal information is generally limited to the educated middle class. This suggests that poor people, especially those based in rural communities, have little to no access to this information. If the person is, for example, Blind, then the information is that much harder because most information is in print format and would require that it be made available electronically or in Braille for Blind people to have access to it.²²⁷

Furthermore, South Africa's constitutional democracy has been criticised for failing to provide redress to, particularly, Black people who continue to bear the economic, social and political remnants of apartheid 30 years after the first democratic election.²²⁸ Despite its widely held esteem around the globe, the harsh reality of poverty, disenfranchisement and subjugation persist. These experiences are even more severely amplified for Black disabled people as they continue to be denied equal

²²⁵ Holness and Rule 2014:1927.

²²⁶ Holness and Rule 2014:1947-1948.

²²⁷ *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33.

²²⁸ Madlingozi 2017:124.

opportunities to education and sustained employment- despite the fact that these are Constitutionally mandated rights.

4.6 An Intersectional and Decolonial Analysis of Project 148 Draft Bill

As South Africa transitioned into a constitutional democracy, the disability rights movement, through the Disabled Persons of South Africa (DPSA), represented the rights and interests of persons with disabilities, from the constitutional negotiations all the way to the subsequent government structures such as the Office on the Status of Persons with Disabilities from local government to the President's office.²²⁹ The prevalent view among representatives of the DPSA was that South Africa required an integrated human rights approach where disability is incorporated in every Bill either explicitly or by Constitutional implication as it is included in the Bill of Rights.²³⁰ However, as I have alluded earlier in this chapter and throughout this study, this approach has failed to adequately respond to the needs of persons with disabilities and to advance their human rights- hence the ratification of the CRPD as well as the current investigation into the enactment of a disability focused Bill. The CRPD is an important international human rights instrument particularly as it addresses the disability rights on a global scale and standardises basic rights for persons with disabilities worldwide. However, African philosophy scholars such as Onazi, is hesitant to embrace the Convention. He is of the view that it too cannot adequately respond to non-Western societies as it is based on a Euro-Western model of human rights which idealises principles of individualism under language of independence.²³¹ Often, negative attitudes and stereotypes towards disability are captured within the cultural ideations of personhood, where a legal instrument is premised on a foreign cultural landscape that is removed from African societies, it will inevitably fail to challenge the entrenched perceptions of that community. Furthermore, African communities are widely known for being rooted in a communal, group-based conception of being, which is different from the individualistic ideals of Western society and logic.²³² It is therefore necessary to continuously critically engage with even the most well-meaning of

²²⁹ Rowland 2004:146.

²³⁰ Rowland 2004:146.

²³¹ Onazi 2020:11.

²³² Onazi 2020:17

statutes as long as they are founded on a jurisprudence that is non-responsive to the majority of society who are located at the margins of power.

Feminism has itself been subject to such criticism where Black women have challenged it for lacking in the capacity to capture the nuances that exist among women as a non-homogenous group even as they stand in unison against a common system of oppression, namely, patriarchy. It is necessary that when it becomes clear that there is neglect and perpetuation of the very systems of oppression we seek to escape, that this realisation is not trivialised. Hence feminist scholars responded with different articulations ranging from Black feminism to intersectional feminism and ubuntu feminism as pronounced by Cornell and Van Marle.²³³ While the CRPD and the draft Bill assert that we are all equal before the law, I have sought to demonstrate the limitations of the law itself to uphold its own values for as long as it exists in inequality, or for inequality.²³⁴

4.7 Conclusion

The realisation of disability rights under South Africa's legal system requires a deliberate deviation from formal legal systems which are often "alien, adversarial, non-participatory, expensive and divided into civil and criminal silos".²³⁵ In this chapter I outline some of the significant legislative steps South Africa has taken since 1994 to protect and promote the rights of persons with disabilities. This includes the Bill of Rights and the equality clause enshrined in the 1996 Constitution. I also explore the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, together with Employment Equity Act No. 33 of 2000 and their individual limitations in protecting and advancing the rights of persons with disabilities. In 2007 South Africa ratified the UN Convention on the Rights of Persons with Disabilities, thereby committing to abide by the provisions of the Convention. Obligations under the CRPD include the domestication of the Convention into national legislation. To demonstrate its commitment to this obligation, the national assembly adopted the White Paper on the Rights of Persons with Disabilities which many hailed as an indication of a disability specific Act on the horizon. In 2019 the Department of Justice and Constitutional

²³³ Cornell and Van Marle 2015:6.

²³⁴ CRPD Art. 12.

²³⁵ Tamale 2021:135.

Development submitted a request to the South African Legal Reform Commission (SALRC) to investigate the domestication of the CRPD. The SALRC then published Issue Paper No. 39 of Project 148 to invite public comment on the topic and the issues identified by the SALRC. In 2024, the SALRC published Discussion Paper 163 of Project 148 to provide a consolidation of the public responses they received from the Issue Paper as well as a draft Bill. The SALRC proposes in the Discussion Paper, a hybrid approach to enactment of the Bill. That is, it seeks to incorporate both schools of thought that emerged from the Issue Paper, that is, either to amend existing legislation or to enact a new disability-focused Bill. The SALRC has elected to follow a hybrid approach by enacting a Bill but that will serve as a legal framework from which sectoral laws that will be developed to meet the unique needs of the different sectors. This is commendable as it indicates a broader perspective of law that challenges the traditional binary, either/or thinking that has become characteristic of South Africa's formal legal system. However, as mentioned above, the legal system is inherently inadequate to the task of driving social challenge particularly as it relates to a severely marginalised community such as persons with disabilities whose experiences and lives are further undermined at the crossroads of their race, gender and class.

Chapter 5: Conclusion

In this study, I provide an analysis of the on-going process to domesticate the UN Convention on the Rights of Persons with Disabilities by relying on intersectional feminism and decolonial theory to critique the impact a disability-focused bill will have on the lives of Black women with disabilities particularly as a result of the compounded and interconnected systems of oppression in operation against the realisation of their full humanity.

I rely on two theoretical approaches, namely, intersectional feminism and decolonisation as guides for my analysis. South African society is built on a history of multiple systems of oppression, namely white-supremacist-capitalist-patriarchy, and relies on a legal system founded by the very architects of the oppressive systems. It is therefore unsurprising that the vast majority of South Africans, specifically women with disabilities continue to bear the brunt of the continued injustice. However, I demonstrate throughout the study the involvement and agency that persons with disabilities struggled for, particularly during apartheid and the post-1994 dispensation to advocate for and articulate their experiences as the people directly impacted by the legal shortcomings of South Africa jurisprudence.

In chapter 1 I outline the study's main research problem and the research questions that I address in the research. I provide a brief synopsis of my argument as well as the legislation relevant to the study. The research questions in the study explore the impact of considering the multidimensional identities of persons with disabilities as a heterogeneous group within a South African jurisprudential tradition that has often been criticised of perpetuating systems of subjugation and social hierarchies that excludes already marginalised groups based on race, class, gender and, most relevant to this study, disability.

Chapter 2 is dedicated to the analysis of the research by critiquing it through a decolonial feminist lens. Here I begin by offering the advantages for a Bill such as this one that seeks to strengthen disability rights through an overt step such as this one. I further provide a historical account of Black women's involvement and marginalisation even within South Africa's disability rights movement as well as post-apartheid government. I use intersectional feminism to frame the necessity for the UNCRPD's

assertion of women and girls as group that is prone to compounded marginalisation and discrimination. I further relate the unique claims to disability justice that Black women with disabilities require beyond the generic approach that previous legislation has relied on. I also tie this in with criticism of decolonial scholarship that fails to include disability as a colonial consequence which has rendered persons with disabilities perpetually disregarded, undervalued and invisibilised even by the law. I also include a case study to demonstrate the real-life effect of apartheid law on the lives of Black women during apartheid.

In chapter 3 I give a historical exposition of the trajectory of disability approaches and models. I further link the approaches to South Africa's colonial and apartheid eras, necessary for providing a congruent account of an otherwise marginalised and hidden history. I discuss the charity model as the first approach, followed by the medical model, then the social model and finally, critical disability theory. I consider each of these models to give context to the current definition employed by the UNCRPD. I also connect these models with the history and trajectory of the South African disability rights movement in South Africa to provide context.

Chapter 4 I am concerned with the process currently underway towards domesticating the UNCRPD into national legislation. In this chapter, I investigate post-apartheid legislation enacted towards achieving the equal rights and participation of persons with disabilities with a focus on the Constitution, the Promotion of Equality and Prevention of Unequal Discrimination Act, the Employment Equity Act and White Paper on the Integrated National Disability Strategy, which later became the White Paper on the Rights of Persons with Disabilities. These legal developments have laid the foundation for a more inclusive society for people with disabilities in South Africa. However, challenges remain in terms of implementation and enforcement of these laws, as well as in addressing the deep-seated attitudes and prejudices that continue to perpetuate discrimination against disabled people. I further look into the limitations of these Bills and policies which have resulted in the current legal gap that has necessitated the adoption of a disability-focused Bill. I outline the role of the South African Law Reform Commission in the adoption of the Bill together with the process it has followed up to this point where they have issued a discussion paper that includes a draft legislation.

The draft bill under investigation through Project 148 of the South African Law Reform Commission (SALRC) that focuses on the protection and promotion of the lives of persons with disabilities as well as their rights, is a long-awaited legislative step to entrenching disability rights in South Africa. In Van Marle's article "Hold on to Critical Jurisprudence", she cautions against elevating people, however impactful, to monuments as this thwarts their critical potential.²³⁶ It is my view in this research study that the draft Bill should also be read and applied critically in order to preserve its transformative potential particularly for Black disabled women who have historically been excluded and even invisibilised from mainstream legal discourse. While the journey to promulgating this legislation has been protracted, it is nonetheless necessary to remain vigilant in sustaining its potential for change and redress as an overarching legal framework upon which a historically marginalised community will rely for the realisation of their human rights and equality.

²³⁶ Van Marle "Hold on to Critical Jurisprudence"
https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072019000100011#:~:text=At%20the%20heart%20of%20a,continuous%20rethinking%20of%20the%20political (Accessed on 22 October 2024).

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