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# **ACCESS TO JUSTICE FOR PERSONS WITH PSYCHOSOCIAL DISABILITIES**

**A COMPARATIVE ANALYSIS OF PARTICIPATION IN THE  
KENYAN CRIMINAL JUSTICE SYSTEM**

**Paul Ochieng Juma**



# Access to Justice for Persons with Psychosocial Disabilities

Taking Kenya as a case study, this book examines the application of criminal procedure in the context of persons with psychosocial disabilities. It discusses how the right to participation of persons with psychosocial disabilities who have been declared unfit can be best protected during and after the criminal process in Africa and at the international level. In doing so, it hypothesises that the social model of disability is inadequate to respond to violations against the right to participation of persons with psychosocial disabilities in the criminal justice system and thus the need for other normative frameworks such as Foucauldian and decolonial theories. It recommends that legislative enactment and reform are imperative not only to promote participation in access to justice but also to remove the barriers inhibiting the legal capacity of persons with psychosocial disabilities. The study will encourage intercontinental dialogue on disability, unfitness declarations, and participation policy analysis, while also contributing to theory and legal development. The book will be of interest to academics, researchers, and policy-makers working in the areas of criminal procedure, disability studies, and international human rights law.

**Paul Ochieng Juma** is Lecturer in Law and Director, Center for Legal Aid and Clinical Legal Education, Kabarak University, Kenya.

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A Comparative Analysis of Participation in the Kenyan Criminal Justice System

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**Paul Ochieng Juma**

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This book is dedicated to all those who hope to awaken and strengthen an understanding of the human rights of persons with disabilities in Africa. You must win! Continue working, continue saving, continue sacrificing, continue enduring, continue fighting cheerfully and do your utmost as if the issue of the whole struggle depends on you alone.



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# Preface

This book appraises the adequacy of the social model of disability in responding to violations of declarations of unfitness during plea and proceedings (unfitness declarations) against persons with psychosocial disabilities in Kenya's criminal justice system. The volume hypothesises that the social model of disability is inadequate to respond to violations against the right to participation of persons with psychosocial disabilities in Kenya's criminal justice system.

The study argues that unfitness declarations violate the right of persons with psychosocial disabilities to participate in access to justice. It explores the legal framework of the declarations, the effects or consequences of unfitness declarations, possible causal factors of unfitness declarations, intervention strategies, and the different ways in which they can be reformed. These themes cannot be addressed solely by the social model of disability because it leaves many gaps in the holistic understanding of disability and society. I argue that the social model of disability is limited because it does not adequately address mental disabilities.

Taking into account the limitations of the social model of disability, this book draws from a syncretic archive of knowledge and normative frameworks such as the Foucauldian and decolonial theories of disability. The theories are employed because they focus more on the body thus shaping the discourse on mental impairment by seeking new ways and more progressive forms of action in the realisation of disabled persons' rights. The Foucauldian theory is a useful discourse for reforming the law on unfitness declarations in Kenya by improving the agency and visibility of persons with psychosocial disabilities. Decolonial theory serves to ensure that reforms of unfitness declarations are responsive to the legacy of colonial ideology and governance. The author also employed empirical research, to interrogate the factors that inhibit the participation of persons with psychosocial disabilities in Kenya's criminal justice system, which revealed that unfitness declarations are caused by attitudinal, social, and cultural factors. Accordingly, this book recommends that legislative enactment and reform are imperative not only to promote participation in access to justice but also to remove the barriers inhibiting the legal capacity of persons with psychosocial disabilities.

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I would like to express my heartfelt gratitude to the late Professor Charles Ngwena and Professor Michael Ashley Stein for their brilliant intellectual guidance during the preparation of this book. Through their guidance, they have assisted me attain a foothold on the academic ladder as a disability rights academic.

# Abbreviations and acronyms

AAMD	American Association on Mental Deficiency
AAMR	American Association on Mental Retardation
ACHR	American Convention on Human Rights
ADA	Americans with Disabilities Act
ADHD	Attention deficit hyperactivity disorder
ADR	Alternative Dispute Resolution
African Charter	African Charter on Human and Peoples' Rights
African Disability Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa
ALRC	Australian Law Reform Commission
AU	African Union
AOT	Assisted Outpatient Treatment
APA	American Psychiatric Association
APCOF	African Policing Civilian Oversight Forum
CAT	United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment
CCRP	Code of Criminal Procedure (Estonia)
CEDAW	United Nations Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CJRA	Criminal Justice Reform Act (Singapore)
CLA	Criminal Lunatics Act
CPA	Criminal Procedure Act (South Africa)
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DPO	Disabled Persons Organisations
DSM	Diagnostic Statistical Manuals
DTC	Drug Treatment Courts
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights

FGD	Focus Group Discussion
First Protocol	Convention for the Protection of Human Rights and Fundamental Freedoms
GFCC	Federal Constitutional Court of Germany
HALT Act	Humane Alternatives to Long-Term Solitary Confinement Act (New York)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Disease
IIED	International Institute for Environment and Development
IQ	Intelligence Quotient
JCBB	Judiciary Criminal Procedure Bench Book
LSK	Law Society of Kenya
MHC	Mental Health Court
MI Principles	Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care
MMR	Mixed Method Research
NALEAP	National Legal Aid and Awareness Programme
NCAJ	National Council on Administration of Justice
NCCJR	National Council on Administration of Justice Committee on Criminal Justice Reform
NCPWD	National Council for Persons with Disabilities
NDFPWD	National Development Fund for Persons with Disabilities
NGEC	National Gender and Equality Commission
NGO	Non-governmental Organisations
NI Act	Mental Capacity Act (Northern Ireland)
OHCHR	Office of the High Commissioner for Human Rights
ODPP	Office of the Director of Public Prosecutions
TJ	Therapeutic Jurisprudence
UK	United Kingdom
UN	United Nations
Universal Declaration	Universal Declaration of Human Rights
UPIAS	Union of the Physically Impaired against Segregation
US	United States of America
VLRC	Victorian Law Reform Commission
WHO	World Health Organisation



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section 2, 79

Universal Declaration of Human Rights (1948), 7, 8

Victorian Act, 223

Youth Justice and Criminal Evidence Act 1999, 198

Zambian Mental Disorders Act of 1951, 226



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# 1 Introduction and background

## 1.0 Introduction

Declarations of unfitness during plea and proceedings (unfitness declarations) are a fundamental component of many criminal legal systems around the globe, including Kenya.<sup>1</sup> The administration of criminal justice involves the institutional architecture, the procedures and apparatus used to process, adjudicate and ultimately decide criminal cases.<sup>2</sup> Unfitness declarations are orders, which are issued as part of the criminal process to determine whether an accused person with a psychosocial disability has the capacity to proceed with a criminal trial.<sup>3</sup> It is a judicial determination on whether a person has the ability under law to carry out a specific act or series of acts.<sup>4</sup> They are the criteria used by clinicians in order to determine the ability of an accused person with a psychosocial disability to participate in courtroom proceedings.<sup>5</sup> This is different from non-criminally responsible based verdicts, which are issued when persons who have been charged with the commission of crimes are acquitted after being found not criminally responsible on account of mental disability.

This book focuses on psychosocial disability and not intellectual disability. However, the discourse has relevance to mental disability in general which encompasses both psychosocial and intellectual disability. Disability relates to people, their living settings, nature of their treatment, and personality traits that define how they live with barriers and not the disease with which they are suffering from.<sup>6</sup> Psychosocial disability is produced by the social environment

1 L Anker et al. 'Fitness to stand trial: a general principle of European criminal law?' (2011) 7 *Utrecht Law Review* 120.

2 G Hezel *Judging civil justice* (2010) 17–24.

3 As above.

4 D Miller 'Dementia and competency in United States courtrooms: a case law review' [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj_etds) (accessed 10 September 2021) 13.

5 P Brown et al. 'Fitness to plead: development and validation of a standardised assessment instrument' (2018) 13(4) *PLoS One* 1.

6 N Sartorius 'Disability and mental illness are different entities and should be assessed separately' (2009) 8 *World Psychiatry* 1.

## 2 Access to Justice for Persons with Psychosocial Disabilities

that presents barriers to the equality of persons with psychosocial disabilities with others.<sup>7</sup> Psychosocial disabilities affect a person's feelings and behaviour.<sup>8</sup> They are not permanent but maybe episodic or cyclical.<sup>9</sup> However, intellectual disability is a permanent learning deficit, which is present from birth and will be evident before adulthood.<sup>10</sup> It was previously referred to as 'mental retardation'.<sup>11</sup> Persons with intellectual disabilities are at risk of developing psychosocial disabilities.<sup>12</sup>

According to the Convention on the Rights of Persons with Disabilities (CRPD),<sup>13</sup> the existence of a disability alone is not a justification for the deprivation of legal capacity.<sup>14</sup> Legal capacity is not related to mental disability that results in the inability of persons to understand or direct their actions.<sup>15</sup> Article 12 of the CRPD recognises that disabled persons<sup>16</sup> are 'persons before the law' and have legal capacity on an equal basis with others.<sup>17</sup>

The law on unfitness declarations in Kenya's criminal justice system is based on the mental capacity of an accused person with psychosocial disability, which is used to determine legal capacity.<sup>18</sup> It is important to note the difference between legal capacity and mental capacity. Legal capacity means the ability of a person to hold rights and duties and to exercise those rights and duties within the framework of a legal system, while mental capacity denotes the ability to make decisions.<sup>19</sup> Legal capacity relates to the ability of persons not

7 As above.

8 Inclusion Europe & Mental Health Europe 'The differences between mental illness and intellectual disability' [https://bapid.com/pdf/razliki\\_en.pdf](https://bapid.com/pdf/razliki_en.pdf) (accessed 27 August 2021).

9 Government of Western Australia 'Operational instruction 10: prisoners with disabilities' [https://www.correctiveservices.wa.gov.au/\\_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf](https://www.correctiveservices.wa.gov.au/_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf) (accessed 27 August 2021) 1.

10 Inclusion Europe & Mental Health Europe (n 8).

11 R Lakhan 'The coexistence of psychiatric disorders and intellectual disability in children aged 3–18 years in the Barwani district, India' (2013) *International Scholarly Research Notices* 1.

12 National Mental Health Consumer & Carer Forum 'Issue: Intellectual/developmental disability (ID) and mental health' (2012) 1.

13 Convention on the Rights of Persons with Disabilities (CRPD) Adopted on 13 December 2006 UN Doc A/61/611 (entered into force on 3 May 2008).

14 European Union Agency for Fundamental Rights *Legal capacity of persons with intellectual disabilities and persons with mental health problems* European Union Agency for Fundamental Rights (2013) 7.

15 European Union Agency for Fundamental Rights (n 14) 14.

16 In this study the term 'disabled persons' is used in a specific sense to mean the socio-construction of the phenomenon of disability as opposed to the physical or mental impairments. It implies that disability is created by a socio-economic environment that does not accommodate physical or mental impairments.

17 European Union Agency for Fundamental Rights (n 14) 8.

18 A Wambulwa 'Explainer: What "fit to stand trial" means' 21 December 2019 <https://www.the-star.co.ke/news/2019-12-21-explainer-what-fit-to-stand-trial-means/> (accessed 12 April 2021).

19 CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 par 12.

only to have, but also to act on the basis of their legally recognised rights and duties on an equal basis with others, while mental capacity is simply a person's putative psychological ability which varies from one individual to another.<sup>20</sup>

In Kenya, legal capacity is generally applied to persons who have attained the age of majority, which is pegged at 18 years.<sup>21</sup> However, this is not the position adopted for persons with psychosocial disabilities who are treated as objects of pity who cannot exercise their right to participate in the society, including in the criminal justice system.<sup>22</sup> Mental capacity determines whether accused persons with psychosocial disabilities will proceed with the trial, be granted an opportunity to defend themselves, and instruct an advocate.<sup>23</sup> All these determinations go to constrain the right of participation for persons with psychosocial disabilities, which is not only a recognised right under Kenya's domestic law, but also in international law.

The procedure on unfitness declarations violates the right of persons with psychosocial disabilities to participate in access to justice. Often, persons with psychosocial disabilities are not able to participate effectively in the criminal justice sector because of the procedural barriers following unfitness to plead declarations.<sup>24</sup> Unfitness declarations are criminal processes. Criminal procedural rules are instruments for the implementation of rights that are recognised and protected under substantive laws. According to Jeremy Bentham, evidence and judgements are connected by procedural rules.<sup>25</sup> Procedural rules, according to Robert Allen Sedler, are meant to guide judges in the application of substantive law, analysis of relevant evidence and when making determinations of law and facts.<sup>26</sup> Through procedural rules, the society is able to participate effectively in court. Therefore, effective access to justice requires that every individual who is engaged in criminal proceedings be accorded fair procedural rules.<sup>27</sup> Proper enforcement of substantive rights can only be guaranteed through fair procedural rules. Participation in access to justice of persons with psychosocial disabilities was alien to Kenya's legal system at the time of the promulgation of the Criminal Procedure Code in 1963.

Unfitness declarations are not designed with the needs and interests of persons with psychosocial disabilities in mind. They can be raised by any member

20 W Holness & S Rule 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 41.

21 Age of Majority Act Cap 33, Laws of Kenya, sec 2.

22 Kenya National Commission on Human Rights & the Open Society Initiative for Eastern Africa *How to implement article 12 of convention on the rights of persons with disabilities regarding legal capacity in Kenya: a briefing paper* KNHCR (2012) 16.

23 Wambulwa (n 18).

24 S Ortoleva 'Inaccessible justice: human rights, persons with disabilities and the legal system' (2011) 17 *ILSA Journal of International & Comparative Law* 282.

25 J Bentham in Hezel (n 2) 13.

26 RA Sedler *The Ethiopian civil procedure* (1986) 1.

27 Hezel (n 2) 17–24.

#### 4 Access to Justice for Persons with Psychosocial Disabilities

of the court when there is *bona fide* doubt as to the accused person's competency without due regard to their participation. Mental assessment reports are discriminatory as they only apply to persons with psychosocial disabilities.<sup>28</sup> Accused persons with psychosocial disabilities are not afforded an opportunity to participate during unfitness hearings. Unfitness declaration orders are made on the basis of documentary evidence, without hearing from the accused persons with disabilities thus, resulting into a breach of the principle of adversarial proceedings.<sup>29</sup>

The exclusion of persons with psychosocial disabilities from unfitness hearings makes it impossible for them either in person or through their representatives to challenge the experts' report recommending their unfitness status.<sup>30</sup> They are also precluded from scrutinising the allegations before the court due to their automatic indefinite detention in prisons and mental institutions following unfitness declarations without any procedural safeguards. Under Kenyan law, most accused persons with psychosocial disabilities are excluded from participating in the criminal process and instead are detained arbitrarily under sections 162 and 167 of the Criminal Procedure Code.<sup>31</sup> Their detention is solely based on the nature of their disability without considering any available alternatives and support mechanisms to ensure their legal capacity thus amounting to violations of their right to participation.<sup>32</sup>

Other than procedural barriers, persons with psychosocial disabilities also face attitudinal, social, and cultural barriers in Kenya's criminal justice process. These barriers relate to the attitude of judicial officers and lawyers towards persons with psychosocial disabilities. Judicial officers and lawyers in Kenya have a perception that persons with psychosocial disabilities are not capable of participating in criminal proceedings due to their impairment.<sup>33</sup> Social norms do not recognise persons with psychosocial disabilities as right holders because of the nature of their disabilities.<sup>34</sup> An accused person with a history of mental disability, will be subjected to several mental examinations before he or she can be declared fit or unfit to stand trial.<sup>35</sup> The condition of schizophrenia has led

28 Users & Survivors of Psychiatry in Kenya (USP-K) *Advancing the rights of persons with psychosocial disability in Kenya* USP-K (2017) 16.

29 *Shtukaturvov v Russia* (2008) ECtHR, para 73.

30 *Salontaji-Drobnjak v Serbia* (2009) ECtHR, para 127.

31 Criminal Procedure Code, Cap 75 of 1930 (Laws of Kenya).

32 B McSherry et al. *Unfitness to plead and indefinite detention of persons with cognitive disabilities: addressing the legal barriers and creating appropriate alternative supports in the community* Melbourne: Melbourne Social Equity Institute, University of Melbourne (2017) 26.

33 Article 48 Initiative (A48), Arthur's Dream Autism Trust (ADAT) & Southern Africa Litigation Centre *An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi, Kenya* (September 2021) 75.

34 UNICEF *Breaking down barriers: equitable access to justice for children with disabilities* UNICEF (2020) 8.

35 *Republic v GKN* (2018) eKLR.

to an accused being denied his or her right to participate because the court formed an opinion that the accused was of unsound mind and thus unable to understand the proceedings.<sup>36</sup>

Unsoundness of mind automatically results in accused persons being stripped of their legal capacity to participate in criminal trials and declared incapable of giving their defence.<sup>37</sup> Shouting in court is perceived as a sign of mental instability and will lead to an accused person being subjected to a mental assessment.<sup>38</sup> An accused person who at the time of examination cannot tell the time and hears voices or hallucinates is unfit to stand trial.<sup>39</sup> These perceptions affect not only the legal capacity of persons with psychosocial disabilities, but also how they participate in Kenya's justice sector. Such stigmatising attitude is what leads to persons with psychosocial disabilities being excluded from Kenya's criminal justice system.<sup>40</sup> The label of unfitness diminishes the ability of persons with psychosocial disabilities to act on their own capacity and contributes to the risk of stereotyping, objectification, and other forms of exclusion, which people with psychosocial disabilities disproportionately face in Kenya's criminal justice system.<sup>41</sup>

Recognition of violations of unfitness declarations on the part of states around the globe is not new. The social model of disability regards unfitness declarations as a widespread and serious problem.<sup>42</sup> The construction of unfitness declarations involves a number of themes, including the framework of the declarations, the effects or consequences of unfitness declarations, possible causal factors, intervention strategies and the different ways in which they can be reformed. However, these themes cannot be addressed solely by the social model of disability. One of the limitations of the social model lies in its origins. It is not really a theory but an approach and a praxis that was championed by middle-class activists who were wheelchair users.<sup>43</sup> Its main proponents were members of the Union of the Physically Impaired against Segregation (UPIAS), which originated in 1972 in the United Kingdom.<sup>44</sup>

36 *Republic v GKN*.

37 *Charles Mwangi Muraya v Republic* (2001) eKLR.

38 *Nyawa Mwajowa v Republic* (2016) eKLR.

39 *Charles Mwangi Muraya v Republic*.

40 G Barbaresch et al. "When they see a wheelchair, they've not even seen me" – factors shaping the experience of disability stigma and discrimination in Kenya' (2021) 18 *International Journal of Environmental Research & Public Health* 1.

41 Council of Europe *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* Council of Europe Publishing (2012) 12.

42 J Beqiraj et al. *Access to justice for persons with disabilities: From international principles to practice* International Bar Association (2017) 32.

43 C Ngweni 'Developing juridical method for overcoming status subordination in disablism: the place of transformative epistemologies' (2014) 30 *South African Journal of Human Rights* 283.

44 M Berghs et al. 'Do disabled people need a stronger social model: a social model of human rights?' (2019) 34 *Disability & Society* 1034.

Original members of UPIAS were Mike Oliver, Paul Hunt, Vic Finkelstein, and Ken and Maggie Davis who were all physically impaired.<sup>45</sup>

According to UPIAS, the foundation of the social model of disability is constituted by the binary distinction of disability and impairment/illness. On the one hand, impairment occurs when an individual lack either all, part, or has a defect on a limb, organ, or mechanism of the body. Disability on the other hand, was defined in terms of the society that takes little or no account of persons with physical impairments thus, creating an exclusive environment that constricts their ability to participate in mainstream social activities.<sup>46</sup> From this, it has been argued that the social model seeks only to interpret disability in materialistic terms without focusing on explanations regarding different bodily impairments and how they cause disability.<sup>47</sup> It was primarily developed to serve the environmental barriers experienced by persons with physical disabilities who can function like their enabled counterparts if the barriers are removed. When it was popularised, the model arrived divorced from its Marxist origins. In its beginnings, it had nothing to say about the body, especially the mental body. Also, it had nothing to say about the Global South and its colonial history. For these reasons, the social model leaves many gaps in the holistic understanding of disability and society. Therefore, there is need for drawing on other normative frameworks such as the Foucauldian<sup>48</sup> and decolonial<sup>49</sup> theories of disability.

### 1.1 Background

According to the common law tradition, no person should stand trial or be punished for an alleged offence unless they have the mental capacity to defend themselves and to commit the offence respectively.<sup>50</sup> One of the basis for this common law principle is the right to fair trial, which entitles all accused persons to participate in legal proceedings.<sup>51</sup>

The concept of unfitness declarations was transplanted to Kenya by force through colonisation.<sup>52</sup> Kenya was declared a Crown colony in 1920.<sup>53</sup> When

45 As above.

46 Union of the Physically Impaired Against Segregation *Fundamental principles of disability* (1976) 3.

47 Ngweni (n 43) 283.

48 H Baxter, 'Bringing Foucault into law and law into Foucault' (1996) 48 *Stanford Law Review* 449; J Nickolas 'Law and power: ten lessons from Foucault' (2018) 30 *Bond Law Review* 31.

49 H Meekosha 'Decolonising disability: thinking and acting globally' (2011) 26 *Disability & Society* 668; SA Nixon et al. 'Using postcolonial perspectives to consider rehabilitation with children with disabilities: the Bamenda-Toronto dialogue' (2015) 2 *Disability and the Global South* 571.

50 *Republic v GKN*.

51 Anker et al. (n 1) 120.

52 JF Sandra 'The evolution of the common law: legal developments in Kenya and India' (2006) 68 *Political Science Faculty Publications* 3.

53 As above.

the country attained independence in 1963, it inherited the colonial legal system, including the common law of England. Kenya's sources of law include the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1897, and the procedure and practice observed in courts of justice in England at that date.<sup>54</sup> Unfitness declarations are part of the common law of England and were being used as tools of domination against the indigenous Africans of Kenya.<sup>55</sup> Despite them being previously unknown and not representing the interest of the indigenous people, unfitness declarations were aimed at regulating their activities, denying them justice, and detaining them indefinitely in prisons.<sup>56</sup>

Article 2(5) of the Constitution of the Republic of Kenya 2010 (the Constitution) recognises international law as a source of law in Kenya. It provides that the 'general rules of international law shall form part of the law of Kenya'.<sup>57</sup> It means that Kenya has adopted the monist approach to international law. The monist approach regards international law and national law as part of a single legal order where international law is directly applicable in the national legal order without the need for any act of domestic incorporation.<sup>58</sup> However, legislative practice in Kenya suggests that domestic implementing legislation is nonetheless adopted in regards to specific treaties.<sup>59</sup> Kenya has adopted the Persons with Disabilities Act<sup>60</sup> in regards to domesticating the CRPD.

Historically, participation was mainly viewed from the perspective of political rights. Participation as popularly perceived was represented within the traditional notions of state sovereignty.<sup>61</sup> Prior to the Second World War, individuals were not viewed as subjects of rights and duties under international law.<sup>62</sup> Therefore, individuals were not allowed to vindicate their rights directly on the basis of a special international agreement.<sup>63</sup> After the Second World War, events such as the Nuremberg Trials, the founding of the United Nations (UN), and the passage of the Universal Declaration of Human Rights (Universal Declaration)<sup>64</sup> by the UN General Assembly in 1948 led to the recognition of individuals as subjects of rights and duties under international

54 Judicature Act 14 of 1977, sec 3.

55 Sandra (n 52) 3.

56 As above.

57 Constitution of the Republic of Kenya, 2010, art 2(5).

58 TP Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: progress after 5 years' (2011) 8 *International Journal on Human Rights* 145.

59 *David Njoroje Macharia v Republic* (2011) eKLR, para 45.

60 Persons with Disabilities Act (Act 14 of 2003), Laws of Kenya.

61 GH Fox 'The right to political participation in international law' (1992) 17 *Yale Journal of International Law* 544.

62 Fox (n 61) 545.

63 As above.

64 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 20.



law.<sup>65</sup> However, certain specific rights such as participatory rights emerged only after the development of the International Covenant on Civil and Political Rights (ICCPR) and with limitations.<sup>66</sup> Regrettably, even with the development of the right to participation, disabled persons were not listed among the groups explicitly protected against discrimination in the ICCPR and other later post-war human rights instruments that make up the International Bill of Rights.<sup>67</sup>

The right to participation in the context of access to justice is a fundamental human right guaranteed under international human rights law. It is protected under international and regional human rights instruments, including the Universal Declaration, the ICCPR, the Convention on the Rights of the Child (CRC),<sup>68</sup> the CRPD, the European Convention on Human Rights (European Convention),<sup>69</sup> the African Charter on Human and Peoples' Rights (African Charter),<sup>70</sup> and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol).<sup>71</sup> According to article 25 of the ICCPR, the right to participation is not an absolute right. It allows for limitation of the right to participation based on 'reasonable and objective' criteria. In fact, while it is considered unreasonable to restrict participation rights of persons with physical disabilities, General Comment 25 to the ICCPR permits restrictions based on 'established mental incapacity'.<sup>72</sup> Kenya acceded to the ICCPR in 1972.

The ICCPR contrasts with the CRPD which does not foresee any limitation to participation rights. The CRPD serves as an acknowledgement that the broad protections of the Universal Declaration and ICCPR were not designed to address needs and barriers of disabled persons thus, their limited utility in ensuring participation in access to justice.<sup>73</sup> It calls on states parties to not only protect disabled persons from discrimination, through 'negative rights',

65 Fox (n 61) 545.

66 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 21.

67 L Series 'The development of disability rights under international law: from charity to human rights' (2015) 30 *Disability & Society* 158.

68 Convention on the Rights of the Child, 20 November 1989 1577 UNTS. 3; 28 I.L.M 1456 (1989), art 15.

69 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS. No. 5, art 11.

70 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 11.

71 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol), adopted on 29 January 2018, entered into force on 5 May 2024.

72 UN Human Rights Committee (HRC) General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12/07/96 CCPR/C/21/Rev.1/Add.7, para 4.

73 A Raub et al. 'Constitutional rights of persons with disabilities: an analysis of 193 national constitutions' (2016) 29 *Harvard Human Rights Journal* 237.



but to also take positive measures to ensure their rights to live, work, and engage with their societies on equal terms as their non-disabled peers.<sup>74</sup> For example, article 29 guarantees the right of every disabled person to political participation, including persons with psychosocial disabilities. There is neither limitation nor restriction provided for under article 29. Therefore, apart from affirming the right to participation for persons with psychosocial disabilities, the CRPD recognises their freedom to be involved in all aspects of life, including certain specific areas of state action besides politics, such as access to justice. International courts have started to give recognition to the participation of persons with psychosocial disabilities in court proceedings.

In *Shtukaturov v Russia* the appellant was stripped of his legal capacity in domestic judicial proceedings without his participation. The European Court of Human Rights (ECtHR) held that persons with mental disabilities must have access to a court and the opportunity to be heard in person or through any form of legal representation.<sup>75</sup> Similarly, in the case of *Zagidulina v Russia*<sup>76</sup> the court made an order for the applicant to be hospitalised in her absence. However, in attendance were the prosecutor, a psychiatrist, and a representative of a psychiatric hospital. The ECtHR emphasised the need to ensure the applicant's right to be heard.<sup>77</sup> In *Proshkin v Russia*<sup>78</sup> the ECtHR stated that

although not having an absolute character, the right of being heard enjoys such a prominent place in a democratic society and has such a fundamental value for the protection of an individual against arbitrariness on the part of public authorities, that the mere fact of the individual suffering from a mental illness, as well as his being declared legally incapacitated, cannot automatically lead to the exclusion of the exercise of that right altogether. It is the very weakness of a mentally ill defendant which should enhance the need for supporting his rights. In this context, authorities must show requisite diligence in ensuring the accused's right to be present in an effective manner and must act particularly carefully when infringing upon that right, so as not to place the mentally ill at a disadvantage when compared with other defendants who do enjoy such a right.<sup>79</sup>

In *Proshkin*, the applicant had been detained in a psychiatric hospital solely on the basis of the doctor's examination. The ECtHR ruled that the participation of the applicant is key and that even the presence of the applicant's defence counsel and mother cannot compensate for the applicant's inability to present

74 As above.

75 *Shtukaturov v Russia*, para 73.

76 *Zagidulina v Russia* (2013) ECtHR.

77 *Zagidulina v Russia*, para 62.

78 *Proshkin v Russia* (2012) ECtHR.

79 *Proshkin v Russia*, para 102.

his own arguments in court.<sup>80</sup> In *Romanov v Russia*,<sup>81</sup> the applicant after being declared incompetent, was excluded from participating in court proceedings because under the law, the Russian remand centre was not obligated to bring him to court. Moreover, the testimony of a person who had been declared incompetent was not admissible. The ECtHR faulted state authorities for failing to take any steps to secure the applicant's attendance at the hearings.<sup>82</sup> What these cases establish is that mental disability cannot be used to automatically deny a person the right to participate in a trial.<sup>83</sup>

On 19 May 2008, Kenya ratified the CRPD.<sup>84</sup> The CRPD has partly adopted a social model of disability that regards the state and societal practices and attitudes as the disabler rather than a person's disability.<sup>85</sup> It highlights the need to actively remove obstacles to, and to promote, the full and equal enjoyment of human rights by persons with psychosocial disabilities.<sup>86</sup> The CRPD obliges states parties to provide the appropriate enabling environment so that disabled persons can fully enjoy their rights on an equal basis with others.<sup>87</sup>

Therefore, the objective of the principle of participation is to engage disabled persons in the wider society when making decisions that will affect them.<sup>88</sup> Under the CRPD, the right to participation in the context of access to justice rights is contained in article 13. States parties are obliged to safeguard and promote the realisation of the right of access to justice, including for those who are found unfit to plead, by taking a range of steps listed in article 13. The steps include provision of procedural and age-appropriate accommodations in order to facilitate their effective role as direct and indirect participants in access to justice. State parties are also required to provide training to those working in the administration of justice in order to help ensure effective access to justice for disabled people.<sup>89</sup> In essence, article 13 is an extension of the principles stated in previous UN human rights conventions such as the ICCPR.

80 *Proshkin v Russia*, para 104.

81 *Romanov v Russia* (2005) ECtHR.

82 *Romanov v Russia*, para 109.

83 Y Vasyly et al. 'Mental health of a person as a criterion of personal participation in the trial during criminal proceedings' (2020) LXXIII *Wiadomości Lekarskie* 2739.

84 Office of the High Commissioner for Human Rights 'Ratification status for CRPD' [http://tbinter.net/ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en](http://tbinter.net/ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en) (accessed 17 June 2021).

85 J Stavert 'Paradigm shift or paradigm paralysis? National mental health and capacity law and implementing the CRPD in Scotland' (2018) 7 *Laws* 2.

86 As above.

87 United Nations 'Chapter 2: the convention in detail – the rights and principles enumerated in the Convention' <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-two-the-convention-in-detail-3.html> (accessed 12 April 2021).

88 As above.

89 As above.

Other than being guaranteed in the CRPD and the abovementioned instruments, the right of participation in access to justice is also provided for in a majority of national constitutions, including the Constitution of Kenya. Article 48 provides that ‘the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice’.<sup>90</sup> The phrase ‘all persons’ includes disabled persons. It signifies that everyone, including disabled persons, are entitled to the rights and freedoms recognised under article 48 of the Constitution.

The obligation of the state to ensure that disabled persons participate at the same level stems from article 27(1) of the Constitution, which provides that every citizen is equal before the law and has the right to equal protection and equal benefit of the law.<sup>91</sup> Article 54 of the Constitution emphasises the participation of disabled persons as follows:

A person with any disability is entitled-a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning. b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; c) to reasonable access to all places, public transport, and information; d) to use sign language, Braille, or other appropriate means of communication; e) to access material and devices to overcome constraints arising from the person’s disability.

From the language of the Constitution, participation rights of disabled persons are guaranteed rights and not aspirational rights. Aspirational rights are either phrased in non-authoritative language, listed as non-enforceable goals for example when the enforcement of the right is subject to the state’s abilities or resources, or when the Constitution contains an article that states that particular rights are non-enforceable.<sup>92</sup> Terms used in this category include ‘promote’, ‘endeavours to’, or ‘directs its policy towards’. Guaranteed rights are phrased unambiguously or imposes duties or obligations on the part of the state.<sup>93</sup> In the case of the Constitution, the use of the term ‘entitled’ in the participation of disabled persons implies that the right is guaranteed. Therefore, disabled persons have a right on an equal basis with others, to effective access to justice at all phases of the administration of justice, and to be direct and indirect participants, including being witnesses to receive procedural and age-appropriate accommodations to facilitate access to justice.<sup>94</sup>

90 Constitution of the Republic of Kenya 2010, art 48.

91 Constitution of the Republic of Kenya 2010, art 27(1).

92 Raub et al. (n 73) 213.

93 As above.

94 A Roomaney ‘Assessing the right to physical access to justice, for persons with disabilities’ LLM Dissertation, University of the Western Cape, 2014, 16.

The principle of participation is an essential component of democracy and a vehicle for the exercise of many other civil, cultural, economic, political, and social rights. In discharging its legal obligation, the state must ensure that the right to participate for disabled persons is taken into account. This is because it is the custodian of the people's rights, including the right to participation. The Constitution's preamble affirms this by providing that: We, the people of Kenya – recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law.<sup>95</sup>

However, in spite of its importance, the actual exercise of the right to participation by persons with psychosocial disabilities in the context of the right of access to justice in Kenya exist only on paper and not 'in vivo', in realistic environments and with support.<sup>96</sup> Failure of the state to fulfil its obligations defeats the purpose of article 13 of the CRPD. Disability is a human rights issue.<sup>97</sup> In Kenya, unfitness declarations are among the disabling legal barriers.<sup>98</sup> They hinder persons with psychosocial disabilities from participating in the criminal justice system.<sup>99</sup>

The social model of disability assumes that disability is caused by the society and that it can be solved by the removal of societal and environmental barriers. However, such assumption neglects the body and the shifting power dynamics among disabled persons and between disabled persons and the state. The social model of disability is a useful political tool for the mobilisation of a movement. However, this materialistic-based framework is inadequate and unless it is supplemented, political action will continue to be based on an incomplete picture of disability. Central to this argument is the social model's refusal to engage with the body and its ignorance of how power relations among disabled persons and between them and the government can influence disability within the society. This runs the danger of continuing to exclude the participation of various groups such as persons with psychosocial disabilities. Therefore, the power dynamics among persons with psychosocial disabilities and between persons with psychosocial disabilities and the state should be investigated so as to determine whether persons with psychosocial disabilities who are generally classified as powerless fit this description or if there were some who were more powerful than others and, if so, in what ways. Understanding and addressing injustices and powerlessness can go a long way in

95 Constitution of the Republic of Kenya 2010, preamble.

96 As above.

97 L Waddington 'Disability: a human rights issue' (1994) 1 *Maastricht Journal of European & Comparative Law* 334.

98 E Flynn *Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities* (2016) 11.

99 L Series & A Nilson 'Article 12 CRPD: equal recognition before the law' in I Bantekas et al. (eds) *The UN Convention on the Rights of Persons with Disabilities, a commentary* (2018) 357.

enhancing the participation of persons with psychosocial disabilities in Kenya's criminal justice system.<sup>100</sup>

Apart from the social model, the CRPD has also adopted a human rights approach to disability. According to Stein, the human rights approach extends human rights to individuals, such as persons with psychosocial disabilities who were previously excluded by the social model.<sup>101</sup> However, human rights instruments such as the CRPD are expressed with a high degree of abstraction thus lacking concrete content to adequately deal with specific issues such as unfitness declarations.<sup>102</sup> To bridge this gap, this book has employed Foucault and decolonial theories of power and coloniality respectively because they provide a cogent space for understanding the scope of the rights of persons with psychosocial disabilities under the CRPD vis-à-vis unfitness declaration laws. The theories also offer a rich and normative platform for appraising psychosocial disabilities in relation to the concept of unfitness. Therefore, the provisions of the CRPD combined with Foucault and decolonial theories have the potential of bringing about holistic reforms of unfitness declaration laws and empowerment of persons with psychosocial disability in Kenya's criminal justice system as discussed throughout this book.

However, based on the conventional understanding of the social model of disability, governments are seen to be reacting to fixed and identifiable barriers while ignoring legal framework reforms that should be used to ensure the participation of persons with psychosocial disabilities in Kenya's criminal justice system. The social model of disability not only constrains, but also enables the non-participation of persons with psychosocial disabilities in Kenya's criminal justice system. It theorises away the body thus resulting in a failure to interrogate disabled people's differences. Therefore, drawing upon the CRPD's provisions, Foucault's work, and the decolonial theory, this book engages in discursive analysis of unfitness declarations in Kenya's criminal justice system. Its objective is to interrogate the limitations of the social model of disability in understanding as well as remedying the human rights violations arising from unfitness declarations against persons with psychosocial disabilities in Kenya's criminal justice system.

## 1.2 Aims and objectives of this book

The main aim of this book is to interrogate the limitations of the social model of disability in responding to violations of unfitness declarations against persons with psychosocial disabilities in Kenya's criminal justice system. In order to develop more socially responsive normative standards for combating ableism

100 EL Nuwagaba & PN Rule 'Power dynamics among PWDs during adult learning processes: motivator or demotivator?' (2015) 3 *Rwandan Journal of Education* 53.

101 MA Stein 'Disability human rights' (2007) 95 *California Law Review* 62.

102 Stein (n 101) 30.

and realising the right to participation of persons with psychosocial disabilities in access to justice, it is necessary to go beyond the social model of disability so as to also include the Foucauldian and decolonial theories. The Foucauldian and decolonial theories are used to strengthen the social model of disability in order to fully and effectively guarantee the participation rights of persons with psychosocial disabilities in access to justice. In the purview of critical exploration, unfitness declarations are discussed in relation to social construction of psychosocial disability, human rights jurisprudence, and pertinent domestic legislation.

The volume examines the concept of psychosocial disability with a view of deconstructing the ideologies inherent in Kenya's unfitness declaration laws. It also offers insights into the historical underpinnings of psychosocial disability in Kenya. A pervasive, if not dominant, methodological approach in this study is the treatment of all norms, including psychosocial disability norms as socially constituted. Social norms are the producers of unfitness declaration knowledge. The incipient danger with socially embedded unfitness knowledge in post-colonial Kenya is that the society can instinctively claim it as its own in the absence of critical reflection. Without an attempt to critically appraise the germaneness of psychosocial disability norms, there will be contradictions in the quest for transformative goals.

The author supports the view that it is not possible to treat psychosocial disability as objective phenomena. The book does not in any way assume that psychosocial disability norms exists as a monolith, but, instead, concedes that they exist in a plural form and are always open to contestation. Different paradigms of thinking about psychosocial disability, each with its own implications for participation have emerged over time. The book proceeds on the premise that to enhance the participation of persons with psychosocial disability under the Constitution, and under legislation, it is essential to begin with an understanding about how society and the stratifications within society understand psychosocial disability.

The writer contends throughout the study that unfitness declaration laws do not carry inherently neutral values and certainly have no neutral centre. Ultimately, it is the social construction of psychosocial disability that holds the key to interrogating unfitness declaration norms in a serious manner and not merely restating what the legislature and the judiciary proclaim about the participation of persons with psychosocial disabilities. Against this backdrop, the book aligns itself with the Foucauldian and decolonial theories. It captures how shifting power dynamics in Kenya's criminal justice system can operate to support the participation of persons with psychosocial disabilities in Kenya's criminal justice system.

International human rights jurisprudence is also an integral part of this work to the extent that it can both illuminate as well as inform domestic norms on the participation of persons with psychosocial disabilities. The earlier discussion on the advent of the CRPD, sought, *inter alia*, to capture a paradigm shift in the participation in access to justice of persons with psychosocial disabilities.

The Kenyan Constitution is receptive to international human rights. Kenyan constitutional jurisprudence domesticates international human rights norms in various ways by complementing, concretising, and even substantively expanding upon fundamental rights that are guaranteed in international human rights treaties. The aim of employing international human rights law in this study is to examine the legality of unfitness declarations under international human rights law and how the right to participation in access to justice of persons with psychosocial disabilities can be realised in Kenya. International human rights is also used to interrogate the normative content and the extent of the duty of states to accommodate persons with psychosocial disabilities in access to justice.

Legislation is often the immediate vehicle for implementing the Constitution. Without legislative and policy reforms, which unequivocally guarantees the participation of persons with psychosocial disabilities in access to justice, discrimination of persons with psychosocial disabilities through unfitness declarations will remain unchecked. Under Kenyan law, the Criminal Procedure Code is the main legislative instrument for protecting and promoting the participation of persons with psychosocial disabilities in the criminal justice system. Thus, the study aims to unpack the concept of participation in access to justice in Kenya's criminal laws.

Further, the book examined through empirical research, how legal, social, economic, and cultural factors prevent the participation of persons with psychosocial disabilities in Kenya's justice sector. The study aims to assess respondents' views on the participation of persons with psychosocial disabilities in terms of unfitness declarations and access to justice for persons with psychosocial disabilities. Ultimately, the book aims to make recommendations especially in terms of mechanisms apart from unfitness declarations, to empower persons with psychosocial disabilities in order to ensure their effective participation in Kenya's criminal justice sector.

### **1.3 Methodology**

This work utilises the mixed methods methodology, which employ desk research as well as empirical research comprising qualitative research methods. As part of the desk-based research, primary sources, including constitutions, laws, cases, and parliamentary hansards have been critically analysed. In order to understand Kenya's existing obligations, key global and regional human rights instruments have been gathered and analysed. This data sources are primarily from the UN, African Union (AU), European Union, and foreign case law. There is also an examination of national laws, including the Constitution of Kenya, the Criminal Procedure Code, the Evidence Act, and the Penal Code. A broad range of secondary publications have also been extensively examined. These include reports from various institutions, scholarly works, academic books, journal articles, newspapers, and other media materials. However, the fact that there is little or no data on the factors of the unfitness



declarations laws that lead to the limitation of persons with psychosocial disabilities' right to participation in the context of Kenya's criminal justice system necessitates the need for empirical research.

The empirical component of this study was carried out in Kenya. In order to address the issue of factors of the unfitness declarations laws that inhibit the participation of persons with psychosocial disabilities in the context of Kenya's criminal justice system, key research participants were magistrates, prosecutors, defence counsels, NGOs dealing with psychosocial disabilities, and doctors. The empirical research method involved the use of focus group interviews and discussions and the distribution of a semi-structured questionnaire.

The rights of respondents of the empirical component of this work were taken into account. Approval for the empirical research was sought from the Ethics Committee, Faculty of Law, University of Pretoria in accordance with the University of Pretoria's Ethics Policy. Approvals were also obtained from the relevant agencies and boards and ethics committees to enable the investigator conduct research in the designated state and non-state agencies. The empirical study is premised on complying with research ethics, including obtaining informed consent and assuring confidentiality.

#### 1.4 Theories of disability participation

Whereas this book draws its arguments from a syncretic archive of knowledge and theory, in conceptualising how we think about psychosocial disability, the work of Michel Foucault is the main influence. Foucault's theory is relevant because it seeks to reform the law on unfitness declarations in Kenya, which is hampered by centuries of common law theology, which holds that it is unfair and improper to subject persons with psychosocial disabilities to a criminal trial.<sup>103</sup> Moreover, Foucault and decolonial theories that underpin this research were conceptualised in order to complement the limitations of the social model of disability, which demands closer attention to social causes of disability as opposed to physical bodies. Since the theoretical background is discussed in further details in Chapter 2, this section provides a brief review of relevant research theories in the area of unfitness declarations.

The methodical analysis of disabled persons' rights in the larger disability studies owes much of its intellectual roots to the social model of disability. According to the social model of disability, disability is construed as a social construct as opposed to an inevitable consequence of a disease or dysfunction of the body.<sup>104</sup> The focus on impairment is the view of the medical model which, instead of removing social and legal barriers that restrict the participation

103 R Burt & N Morris 'A proposal for the abolition of the incompetency plea' (1972–1973) 66 *Chicago Law Review* 75.

104 J Sztobryn-Giercuskiewicz 'Critical disability theory as a theoretical framework for disability studies' (2017) <https://www.researchgate.net/publication/326353943> (accessed 1 April 2021).



of persons with disabilities in mainstream activities, relies mostly on interventions by health professionals in normalising deficits in the body so that it can conform with desirable ‘natural’ standards.<sup>105</sup>

The social model shifts the concept of disability from focusing on the impairment to focusing on the social processes and policies that constrict disabled people’s lives. It is premised on the adage that disabled persons are excluded by the society rather than by their bodies.<sup>106</sup> The social model refers to the interrelationships between a dysfunction, an individual response to this dysfunction, and the environment.<sup>107</sup> Ultimately, the social model of disability explains that disabilities are caused by the physical and institutional environment as well as by the attitudes in this environment towards disabled people who do not meet the social expectation of ‘normality’.<sup>108</sup>

As seen above, the social model of disability is related to the human rights model, which informs both the CRPD and the African Disability Protocol. However, despite the close affinity between the human rights and social model of disability, it has been argued that the former avoids the shortcomings of the latter.<sup>109</sup> According to Stein, while the social model of disability focuses on the underlying social factors that shape our understanding of disability, the human rights model expands this notion by emphasising the human dignity of disabled persons.<sup>110</sup> The human rights model of disability incorporates both first and second generation human rights, in the sense that ‘it encompasses both sets of human rights, civil and political as well as economic, social, and cultural rights’.<sup>111</sup>

Moreover, while the social model has been criticised for failing to appreciate the reality of pain and suffering in the lives of some disabled people, the human rights model respects the fact that some disabled persons are indeed confronted by such challenging life situations and argues that such factors should be taken into account in the development of relevant social justice theories.<sup>112</sup> A further difference relates to the importance of identity politics. On the one hand, the social model has been criticised for failing to pay adequate attention to the importance of identity politics. On the other hand, the human rights model has been hailed because of its ability to offer ‘room for minority and cultural identification’. Also, the social model is mostly critical of public health policies that advocate the prevention of impairment, however,

105 As above.

106 J Beaudry ‘Welcoming monsters: disability as a liminal legal concept’ (2018) 29 *Yale Journal of Law & the Humanities* 316.

107 A Twardowski ‘Controversies around the social model of disability’ (2019) 2/16 *Culture – Society – Education* 10.

108 Sztobryn-Giercuskiewicz (n 105).

109 Stein (n 101) 24.

110 Stein (n 101) 22.

111 As above.

112 M Retief & R Letšosa ‘Models of disability: a brief overview’ (2018) 74 *HTS Teologiese Studies/Theological Studies* 5.

human rights model promotes the adoption of properly formulated prevention policies which may be regarded as instances of human rights protection for disabled persons. Another difference between the social model and the human rights model is that while the former helpfully explains why so many disabled people are living in poverty, the latter offers constructive proposals for improving the life situation of disabled people.<sup>113</sup>

The Foucauldian theory is relevant because it aims at explaining the incorporation of unfitness declarations in our colonially-inherited laws using the power and knowledge paradigm. It is the main influence of this research because it enriches the social model of disability in the legal landscape by focusing more on the impairment as opposed to the social phenomenon. Like the social model, the Foucauldian theory's aim is to integrate disabled persons as talented social participants.<sup>114</sup> However, it goes a step further to provide the disability community with a language of resistance.<sup>115</sup> Disabled persons groups are urged to reject the subordinate place that the legal order, such as unfitness declarations and traditional liberal theories of justice give to disabled persons.<sup>116</sup>

The body plays a central role in the Foucauldian theory of disability thus shaping the discourse on psychosocial disability. It offers ways of understanding the creation of mental impairment in the society. The Foucauldian discourse supports the idea that there is a social hierarchy of health, whereby non-disabled bodies are privileged over disabled bodies and functions as a layer of social class. Foucauldian theory bases itself on Foucault's notion of modern power. Foucault defines power as 'a set of actions upon other actions', an individual exercises power through actions upon another individual and their responding actions.<sup>117</sup> Foucault explains that to understand power, is to see it as a form of governing, in which one individual (or power structure built by society) dictates how another should act in a particular situation.<sup>118</sup> This power is created and reinforced in disability and Foucault argues that scientific knowledge is the *par excellence* of such power.<sup>119</sup> Therefore, the notion of biopower is linked to control or governmentality.<sup>120</sup> It forms the basis for the medicalisation, classification, management, and measuring of people in terms

113 As above.

114 Beaudry (n 106) 319.

115 Beaudry (n 106) 320.

116 As above.

117 M Foucault 'The subject and power' in P Rabinow (ed) *Power: essential works of Foucault 1954-1984* (1994) 340.

118 S Wendy et al. 'From criminalisation to individual choice: policy responses to changing constructions of intellectual disability in Western Australia' (2019) 21 *Scandinavian Journal of Disability Research* 102.

119 A Anders 'Foucault and "the right to life": from technologies of normalization to societies of control' <https://dsq-sds.org/article/view/3340/3268> (accessed 17 April 2021).

120 Wendy et al. (n 118) 102.

of their variance from the 'norm'.<sup>121</sup> It has also informed the normalisation and legitimisation of certain procedures and practices in institutions.<sup>122</sup>

The legacy of power as popularly perceived is the one represented by the sovereign as law and prohibition.<sup>123</sup> However, Foucault posits that power is not a preserve of one class whose object is to maintain it, while another class struggles to win it.<sup>124</sup> In fact, power relations extend far beyond the confines of the state. According to him power has no essence, it is everywhere.<sup>125</sup> Social relationships between groups or individuals create power.<sup>126</sup> Therefore, disabled persons also can exercise power over other groups or individuals like any other able-bodied groups.

The Foucauldian theory is a transformative theory which can be used to reform the law on unfitness declarations in Kenya. This work seeks to argue that Kenya's unfitness declarations are used to regulate and discipline persons with psychosocial disabilities so as to conform with the criminal justice system of power. Foucauldian scholars examine the ways in which bodies and lives are constituted, regulated, governed, and violated. They seek not only to defy the practices and expectations of the abled body but also endeavour to highlight non-normativity as exposing alternative ways of living and being in the world. Foucauldian theory is both a political and methodological tool that exposes and critiques oppressive normative regimes and common *topoi* such as those governing the interactions of disabled persons and the criminal justice system. The latter is still permeated by policies based on ableism and disablism.

Decolonial theory was selected because it helps trace the historical underpinnings of unfitness declarations in Kenya's laws. Mental disability is the new colonialism. Decolonial theory can be used to examine unfitness declarations as part of colonial governance and ideology. Therefore, the researcher used the theory to critically assess the influence of colonialism in constraining the participation of persons with psychosocial disabilities in Kenya's criminal justice system following unfitness declarations.

The experience of colonisation, colonialism, and neo-colonial power have resulted in the disablement of vast numbers of people in the Global South.<sup>127</sup> Decolonial theory situates disability in a global context and makes a distinction between experiences of the Global North and Global South.<sup>128</sup> The North/South distinction was coined in the 1960s as reference to the complex inequalities and dependencies between industrialised versus raw material

121 As above.

122 As above.

123 F Branfield 'Not quite human: an exploration of power resistance and disability' PhD Thesis, University of York, 158.

124 Branfield (n 123) 157.

125 Branfield (n 123) 158.

126 As above.

127 Meekosha (n 49) 668.

128 Meekosha (n 49) 667.

producing countries, rich versus poor, those with military power versus those without, and high technology versus low technology.<sup>129</sup> Southern countries are those that were historically conquered or controlled by modern imperial powers thus leaving a continuing legacy of poverty, economic exploitation, and dependence.<sup>130</sup> Therefore, in political, economic, and social terms, this world is, 'the west and the rest of us'.<sup>131</sup> Kenya is part of the Global South.

The emergence of the decolonial theory as a critical disability theory was inspired by the tendency of the West to universalise disability discourses without regard to the experience and views of the Global South which is caught in social and economic marginalisation.<sup>132</sup> With survival being the major goal of the Global South, debates around disability and impairment, independent living, care and human rights often take a backseat.<sup>133</sup> As regards penal colonies, the decolonial movement is concerned not only with the detention of criminal classes, the poor, petty thieves and homeless, but also people with psychosocial disability.<sup>134</sup> In colonial Kenya, persons with psychosocial disabilities who were in conflict with the law were institutionalised in prisons and mental institutions.<sup>135</sup> This practice subsisted and was adopted in the period after colonialism.

### 1.5 The structure of this volume

This book is divided into nine chapters. Chapter 1 is this introduction which lays down the background for the study. It identifies the issues that will be investigated or considered, suggests the significance of the study, and describes the methodology used. The chapter also clarifies some of the relevant concepts and contexts. It also sets out the limitations of the study and ends by setting out the structure of the study.

Chapter 2 discusses the theoretical framework that guide the study. In this chapter, the Foucauldian and decolonial theories have been used to interrogate the legality of unfitness to plead declarations. These theoretical approaches have been selected because they are able to explore the difficult area of disability regulation in access to justice and complement the limitations of the social model of disability. Chapter 2 provides a constructive fusion of the Foucauldian and decolonial theories in order to complement the limitations of the social model of disability which demands closer attention to social causes of

129 Meekosha (n 49) 669.

130 As above.

131 S Zondi 'A decolonial turn in diplomatic theory: unmasking epistemic injustice' (2016) 41 *Journal for Contemporary History* 22.

132 Meekosha (n 49) 670.

133 As above.

134 Meekosha (n 49) 672.

135 R Keller 'Madness and colonization: psychiatry in the British and French empires, 1800–1962' (2001) 35 *Journal of Social History* 307.

disability as opposed to physical bodies. The two theories, through the principles of knowledge, power, and coloniality, leads to a rich analytical framework for realising disabled persons' right of access to justice in participation.

In Chapter 2, the book, mainly using the Foucauldian and decolonial theories provides a conceptual template for the cognition of psychosocial disabilities. The chapter presents the findings of a literature review of Foucauldian and decolonial theories, which includes not only a detailed description and development of the theoretical framework but also the principles that are applied during the critique of unfitness declarations. These theories are used as hermeneutics in subsequent chapters to advance the thesis that unfitness declarations in Kenya violate the right to participation in access to justice for persons with psychosocial disabilities.

Chapter 3 presents a conceptualisation of psychosocial disability. It examines how psychosocial disability has been constructed in Kenya from the pre-colonial era to the colonial and post-colonial eras. Issues surrounding the monopoly of the classification, eventual medicalisation and diagnosis of medical disabilities eminent in the social construction of psychosocial disabilities are discussed. It challenges the conceptualisation of psychosocial disability that is hard-wired in traditional customs, common law, and judicial decision-making process. The chapter is organised around interrogating representations of psychosocial disability and ultimately suggesting a philosophical way forward in the manner psychosocial disability is contested. It highlights that narratives which represent psychosocial disability should always be understood as being culturally and historically situated. They are representations constructed within the knowledge and power system(s) of a given polity at a particular historical time and location, together with a social and political dynamics for social stratification, domination, and status subordination. The chapter uses the representation of psychosocial disability in pre-colonial, colonial, and post-colonial discourses to point out the dominant discourses during different debates and shows how the influence of culture and other socio-legal frameworks underpinned the lack of textual standard on psychosocial disability. It proposes that judicial decision-making process must not be accommodative to negative public representations of persons with psychosocial disabilities.

Chapter 4 examines the concept of participation in access to justice and how it empowers persons with psychosocial disabilities. The chapter supports the role of the CRPD and other international and regional instruments for revolutionising the international law of participation for disabled persons, including persons with psychosocial disabilities. Chapter 4, also examines what participation entails for persons with psychosocial disabilities in Kenya's criminal justice system. It also discusses the extent of participation for persons with psychosocial disabilities in Kenya's criminal justice sector. The backdrop to Chapter 4, is the enhancement of disabled persons' participation in the criminal process. It analyses the extent to which Kenya's criminal justice laws have complied with international standards regarding the right to participation in access to

justice. It regards as landmark provisions that facilitate disabled persons right to participation in access to justice, which casts them beyond their traditional role of unfit witnesses, in which role commentators allege objectification. The chapter develops a framework for recognising the right to participation of persons with psychosocial disabilities in ways that are informed by a transformative understanding of participation. The framework seeks to deconstruct scripted knowledge about participation in order to build an understanding that reveals the complexity, diversity, and ultimately political nature of participation. The author argues that recognising the right to participation in the realm of criminal procedure requires a radical epistemology that is capable of moving beyond the mere involvement or engagement of persons with psychosocial disabilities.

Chapter 5 examines the scope and limits of states parties' duty to provide reasonable accommodation in access to justice under the CRPD. I argue that the principle of reasonable accommodation is related to Foucault's notion of power. Accommodation rights ensure the agency of persons with psychosocial disabilities and therefore function as a tool of inclusion and participation in access to justice. The chapter examines the aspects of reasonable accommodation. Drawing from international human rights law, this chapter explores how courts across the globe have interpreted the right of reasonable accommodation and its implication to persons with psychosocial disabilities.

Chapter 6 contains a detailed description of the empirical research methodology. It captures the research approach, type of research, the research design, population and sample of the study, data collection methods, analysis of data, the trustworthiness of the study, and the ethical aspects pertaining to the study. Furthermore, it indicates the limitations of the study.

Chapter 7 analyses the findings of the empirical study. The chapter elaborates on the results garnered from the data obtained from the empirical aspect of this research. It uses the research questions of the study as themes and sub-themes for reviewing the results. Research findings are presented, analysed, and interpreted with reference to prosecutors, defence counsels, doctors, and NGOs working in Kenya's criminal justice system. A discussion on empirical findings where themes and sub-themes from the quantitative and qualitative studies, which have been identified, are also included.

Chapter 8 analyses the manner and extent to which states have undertaken comprehensive legislative reforms to their unfitness declaration regimes in order to decolonise and remedy potential or actual violations of the rights of accused persons with psychosocial disabilities under the CRPD. It examines the extent of compliance of national laws on unfitness to stand trial in selected jurisdictions across the globe, with the demands of the CRPD. Some countries have adopted a passive transformation approach to the CRPD which occurs by assessing the compliance of already existing domestic laws with the Convention in order to determine whether there is need for any adjustment. In others, the CRPD has been used to set new standards for the protection of persons with psychosocial disabilities thus, providing the impetus for further and ever

deeper modifications to the regulation of active legal capacity. On the flipside, some states have specifically rejected the recommendation of the CRPD Committee to eliminate declarations that are based partly or exclusively on the disability of accused persons with psychosocial disabilities from criminal justice systems. It also problematises default positions such as the institutionalisation of persons with psychosocial disabilities following unfitness declarations.

Chapter 9 summarises the book's findings and provide key recommendations on what can be done to increase the space within which persons with psychosocial disabilities may be able to exercise their right of access to justice. The recommendations focuses on both legislative and institutional reforms aimed at preventing violations in the context of right to participation in access to justice.

## **1.6 Conclusion**

Against the above background, this book hypothesises that the social model of disability is inadequate to respond to violations of unfitness declarations against the right to participation of persons with psychosocial disabilities in Kenya's criminal justice system. Under conventional international law, states are under an obligation to respect and ensure the participation of persons with psychosocial disabilities in the context of their right of access to justice. In order for participation of persons with psychosocial disabilities in the context of their right of access to justice to be realised, there is need for a legal framework that adequately protects its exercise. The phenomenon of unfit declarations and the resultant indefinite detention of persons with psychosocial disabilities should be removed. In its stead, the state should put in place safeguards to protect the liberty and participation of persons with psychosocial disabilities in the criminal justice process.

This work uses the Foucauldian and decolonial theories to explore the limitations of the social model of disability in ensuring the participation of persons with psychosocial disabilities within Kenya's criminal justice system. By examining unfitness declarations, this volume identifies common threads of discussion and how these threads illustrate values, attitudes, and beliefs surrounding psychosocial disability in Kenya. A deeper understanding of the perception of psychosocial disability will help improve on the social model theory, which considers disability in relation to the society, therefore ensuring the full participation of disabled persons in the criminal justice system. This book presents an account of a systematic investigation of how power can be used by the state through reforms of unfitness declarations in Kenya's criminal legal system to ensure the participation of persons with psychosocial disabilities. Deciding how to respond to unfitness declarations depends on a normative framework that cannot be supplied by the social model. The framework might be libertarian, utilitarian, egalitarian, some combination thereof, or something else. The social model itself, however, has essentially nothing to say about which framework to use.



As such, the book interrogates the limitations of the social model of disability in responding to violations of unfitness declarations against the rights of persons with psychosocial disabilities in Kenya's criminal justice system. It also identifies how violations of accused persons with psychosocial disabilities human rights in the context of unfitness declarations can be prevented and redressed in the particular context of Kenya. To do so, it analyses the national legal framework on unfitness declarations and non-participation of accused persons with psychosocial disabilities in Kenya's criminal justice system and assess their compatibility with international standards. The book also examines the legality of the exclusion and non-participation of accused persons with psychosocial disabilities following the unfitness declarations. In addition, it assesses measures to enhance the participation of persons with psychosocial disabilities in Kenya's criminal justice process.

## References

- African Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force on 21 October 1986) '21 ILM 58' (1982).
- Age of Majority Act Cap 33 'Laws of Kenya'.
- Anders A 'Foucault and "the right to life": from technologies of normalization to societies of control' <https://dsq-sds.org/article/view/3340/3268> (accessed 17 April, 2021).
- Anker L et al. 'Fitness to stand trial: a general principle of European criminal law?' (2011) 7 *Utrecht Law Review* 120. <https://doi.org/10.18352/ulr.174>.
- Article 48 Initiative (A48), Arthur's Dream Autism Trust (ADAT) and Southern Africa Litigation Centre 'An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi, Kenya' (September 2021) 75.
- Barbaresch G et al. "'When they see a wheelchair, they've not even seen me" – factors shaping the experience of disability stigma and discrimination in Kenya' (2021) 18 *International Journal of Environmental Research & Public Health* 1. <https://doi.org/10.3390/ijerph18084272>.
- Baxter H 'Bringing Foucault into law and law into Foucault' (1996) 48 *Stanford Law Review* 449.
- Beaudry J 'Welcoming monsters: disability as a liminal legal concept' (2018) 29 *Yale Journal of Law & the Humanities* 316.
- Beqiraj J et al. *Access to justice for persons with disabilities: from international principles to practice* International Bar Association (2017).
- Berghs M et al. 'Do disabled people need a stronger social model: a social model of human rights?' (2019) 34 *Disability & Society* 1034. <https://doi.org/10.1080/09687599.2019.1619239>.
- Branfield F 'Not quite human: an exploration of power resistance and disability' PhD Thesis, University of York, 1997.
- Brown P et al. 'Fitness to plead: development and validation of a standardised assessment instrument' (2018) 13(4) *PLoS One* 1. <https://doi.org/10.1371/journal.pone.0194332>
- Burt R & Morris N 'A proposal for the abolition of the incompetency plea' (1972–1973) 66 *Chicago Law Review* 75.
- Charles Mwangi Muraya v Republic* (2001) eKLR.
- Constitution of the Republic of Kenya (2010).



- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS. No. 5.
- Convention on the Rights of Persons with Disabilities (CRPD) Adopted on 13 December 2006 UN Doc A/61/611 (entered into force on 3 May 2008).
- Convention on the Rights of the Child, Nov 20, 1989 1577 UNTS. 3; 28 I.L.M 1456 (1989).
- Council of Europe *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* Council of Europe Publishing (2012).
- Criminal Procedure Code, Cap 75 of 1930 (Laws of Kenya).
- CRPD Committee General Comment 1: article 12: equal recognition before the law (2014) UN Doc CRPD/C/GC/1 (19 May, 2014).
- David Njoroge Macharia *v Republic* (2011) eKLR.
- European Union Agency for Fundamental Rights *Legal capacity of persons with intellectual disabilities and persons with mental health problems* European Union Agency for Fundamental Rights (2013).
- Flynn E *Disabled justice? Access to justice and the UN Convention on the Rights of Persons with disabilities* (2016).
- Foucault M 'The subject and power' in Rabinow P (ed) *Power: essential works of Foucault 1954–1984* (1994).
- Fox GH 'The right to political participation in international law' (1992) 17 *Yale Journal of International Law* 544.
- Government of Western Australia 'Operational instruction 10: prisoners with disabilities' [https://www.correctiveservices.wa.gov.au/\\_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf](https://www.correctiveservices.wa.gov.au/_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf) (accessed 27 August 2021).
- Hezel G *Judging civil justice* (2010).
- Holness W & Rule S 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 41.
- Inclusion Europe and Mental Health Europe 'The differences between mental illness and intellectual disability' [https://bapid.com/pdf/razliki\\_en.pdf](https://bapid.com/pdf/razliki_en.pdf) (accessed 27 August 2021).
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR).
- Keller R 'Madness and colonization: psychiatry in the British and French empires, 1800–1962' (2001) 35 *Journal of Social History* 307. <https://doi.org/10.1353/jsh.2001.0126>
- Kenya National Commission on Human Rights & the Open Society Initiative for Eastern Africa *How to implement article 12 of convention on the rights of persons with disabilities regarding legal capacity in Kenya: a briefing paper* KNHCR (2012).
- Lakhan R 'The coexistence of psychiatric disorders and intellectual disability in children aged 3–18 years in the Barwani district, India' (2013) *International Scholarly Research Notices* 1. <https://doi.org/10.1155/2013/875873>
- McSherry B et al. *Unfitness to plead and indefinite detention of persons with cognitive disabilities: addressing the legal barriers and creating appropriate alternative supports in the community* Melbourne: Melbourne Social Equity Institute, University of Melbourne (2017).
- Meekosha H 'Decolonising disability: thinking and acting globally' (2011) 26 *Disability and Society* 668. <https://doi.org/10.1080/09687599.2011.602860>.
- Miller D 'Dementia and competency in United States courtrooms: a case law review' [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj_etds) (accessed 10 September 2021).
- National Mental Health Consumer and Carer Forum 'Issue: intellectual/developmental disability (ID) and mental health' (2012).

## Introduction and background

African Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force on 21 October 1986) '21 ILM 58' (1982).

Age of Majority Act Cap 33 'Laws of Kenya'.

Anders A 'Foucault and "the right to life": from technologies of normalization to societies of control' <https://dsq-sds.org/article/view/3340/3268> (accessed 17 April, 2021).

Anker L et al. 'Fitness to stand trial: a general principle of European criminal law?' (2011) 7 *Utrecht Law Review* 120. <https://doi.org/10.18352/ulr.174>.

Article 48 Initiative (A48), Arthur's Dream Autism Trust (ADAT) and Southern Africa Litigation Centre 'An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi, Kenya' (September 2021) 75.

Barbaresch G et al. "'When they see a wheelchair, they've not even seen me" – factors shaping the experience of disability stigma and discrimination in Kenya' (2021) 18 *International Journal of Environmental Research & Public Health* 1. <https://doi.org/10.3390/ijerph18084272>.

Baxter H 'Bringing Foucault into law and law into Foucault' (1996) 48 *Stanford Law Review* 449.

Beaudry J 'Welcoming monsters: disability as a liminal legal concept' (2018) 29 *Yale Journal of Law & the Humanities* 316.

Begiraj J et al. Access to justice for persons with disabilities: from international principles to practice International Bar Association (2017).

Berghs M et al. 'Do disabled people need a stronger social model: a social model of human rights?' (2019) 34 *Disability & Society* 1034. <https://doi.org/10.1080/09687599.2019.1619239>.

Branfield F 'Not quite human: an exploration of power resistance and disability' PhD Thesis, University of York, 1997.

Brown P et al. 'Fitness to plead: development and validation of a standardised assessment instrument' (2018) 13(4) *PLoS One* 1. <https://doi.org/10.1371/journal.pone.0194332>

Burt R & Morris N 'A proposal for the abolition of the incompetency plea' (1972–1973) 66 *Chicago Law Review* 75.

Charles Mwangi Muraya v Republic (2001) eKLR.

Constitution of the Republic of Kenya (2010).

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ETS. No. 5.

Convention on the Rights of Persons with Disabilities (CRPD) Adopted on 13 December 2006 UN Doc A/61/611 (entered into force on 3 May 2008).

Convention on the Rights of the Child, Nov 20, 1989 1577 UNTS. 3; 28 I.L.M 1456 (1989).

Council of Europe Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities Council of Europe Publishing (2012).

Criminal Procedure Code, Cap 75 of 1930 (Laws of Kenya).

CRPD Committee General Comment 1: article 12: equal recognition before the law (2014) UN Doc CRPD/C/GC/1 (19 May, 2014).

David Njoroge Macharia v Republic (2011) eKLR.

European Union Agency for Fundamental Rights Legal capacity of persons with intellectual disabilities and persons with mental health problems European Union Agency for Fundamental Rights (2013).

Flynn E Disabled justice? Access to justice and the UN Convention on the Rights of Persons with disabilities (2016).

Foucault M 'The subject and power' in Rabinow P (ed) *Power: essential works of Foucault 1954–1984* (1994).

Fox GH 'The right to political participation in international law' (1992) 17 *Yale Journal of International Law* 544.

Government of Western Australia 'Operational instruction 10: prisoners with disabilities' [https://www.correctiveservices.wa.gov.au/\\_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf](https://www.correctiveservices.wa.gov.au/_files/prisons/adult-custodial-rules/operational-instructions/oi-10.pdf) (accessed 27 August 2021).

Hezel G Judging civil justice (2010).

Holness W & Rule S 'Legal capacity of parties with intellectual, psycho-social and communication disabilities in traditional courts in KwaZulu-Natal' (2018) 6 *African Disability Rights Yearbook* 41.

Inclusion Europe and Mental Health Europe 'The differences between mental illness and intellectual disability' [https://bapad.com/pdf/razliki\\_en.pdf](https://bapad.com/pdf/razliki_en.pdf) (accessed 27 August 2021).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR).

Keller R 'Madness and colonization: psychiatry in the British and French empires, 1800–1962' (2001) 35 *Journal of Social History* 307. <https://doi.org/10.1353/jsh.2001.0126>

Kenya National Commission on Human Rights & the Open Society Initiative for Eastern Africa How to implement article 12 of convention on the rights of persons with disabilities regarding legal capacity in Kenya: a briefing paper KNHCR (2012).

Lakhan R 'The coexistence of psychiatric disorders and intellectual disability in children aged 3–18 years in the Barwani district, India' (2013) *International Scholarly Research Notices* 1. <https://doi.org/10.1155/2013/875873>

McSherry B et al. Unfitness to plead and indefinite detention of persons with cognitive disabilities: addressing the legal barriers and creating appropriate alternative supports in the community Melbourne: Melbourne Social Equity Institute, University of Melbourne (2017).

Meekosha H 'Decolonising disability: thinking and acting globally' (2011) 26 *Disability and Society* 668. <https://doi.org/10.1080/09687599.2011.602860>.

Miller D 'Dementia and competency in United States courtrooms: a case law review' [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj_etds) (accessed 10 September 2021).

National Mental Health Consumer and Carer Forum 'Issue: intellectual/developmental disability (ID) and mental health' (2012).

Ngwenya C 'Developing juridical method for overcoming status subordination in disablism: the place of transformative epistemologies' (2014) 30 *South African Journal of Human Rights* 283.

Nickolas J 'Law and power: ten lessons from Foucault' (2018) 30 *Bond Law Review* 31. <https://doi.org/10.53300/001c.5658>.

Nixon SA et al. 'Using postcolonial perspectives to consider rehabilitation with children with disabilities: the Bamenda-Toronto dialogue' (2015) 2 *Disability and the Global South* 571.

Nuwagaba EL & Rule PN 'Power dynamics among PWDs during adult learning processes: motivator or demotivator?' (2015) 3 *Rwandan Journal of Education* 53.

Nyawa Mwajowa v Republic (2016) eKLR.

Office of the High Commissioner for Human Rights 'Ratification status for CRPD' [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en) (accessed 17 June 2021).

Ortoleva S 'Inaccessible justice: human rights, persons with disabilities and the legal system' (2011) 17 *ILSA Journal of International & Comparative Law* 282.

Persons with Disabilities Act (Act 14 of 2003), Laws of Kenya.

Proshkin v Russia (2012) ECtHR.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) (29 January 2018).

Raub A et al. 'Constitutional rights of persons with disabilities: an analysis of 193 national constitutions' (2016) 29 *Harvard Human Rights Journal* 237.

Republic v GKN (2018) eKLR.

Retief M & Letšosa R 'Models of disability: a brief overview' (2018) 74 *HTS Teologiese Studies/Theological Studies* 5. <https://doi.org/10.4102/hts.v74i1.4738>.

Romanov v Russia (2005) ECtHR.

Roomaney A 'Assessing the right to physical access to justice, for persons with disabilities' LLM dissertation, University of the Western Cape, 2014.

Salontaji-Drobnjak v Serbia (2009) ECtHR.

Sandra JF 'The evolution of the common law: legal developments in Kenya and India' (2006) 68 *Political Science Faculty Publications* 3.

Sartorius N 'Disability and mental illness are different entities and should be assessed separately' (2009) 8 *World Psychiatry* 1. <https://doi.org/10.1002/j.2051-5545.2009.tb00220.x>.

Sedler RA The Ethiopian civil procedure (1986).

Series L 'The development of disability rights under international law: from charity to human rights' (2015) 30 *Disability and Society* 158. <https://doi.org/10.1080/09687599.2015.1066975>.

Series L & Nilson A 'Article 12 CRPD: equal recognition before the law' in Bantekas I et al. (eds) The UN convention on the rights of persons with disabilities, a commentary (2018).

Shtukaturv v Russia (2008) ECtHR.

Stavert J 'Paradigm shift or paradigm paralysis? National mental health and capacity law and implementing the CRPD in Scotland' (2018) 7 *Laws* 2. <https://doi.org/10.3390/laws7030026>.

Stein MA 'Disability human rights' (2007) 95 *California Law Review* 62.

Sztobryn-Giercuskiewicz J 'Critical disability theory as a theoretical framework for disability studies' 2017 <https://www.researchgate.net/publication/326353943> (accessed 1 April, 2021).

UN Human Rights Committee (HRC) 'General Comment 25: the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12/07/96 CCPR/C/21/Rev.1/Add.7'.

UNICEF Breaking down barriers: equitable access to justice for children with disabilities UNICEF (2020).

Union of the Physically Impaired Against Segregation Fundamental principles of disability (1976).

United Nations 'Chapter two: the convention in detail – the rights and principles enumerated in the Convention' <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-two-the-convention-in-detail-3.html> (accessed 12 April, 2021).

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

Users and Survivors of Psychiatry in Kenya (USP-K) *Advancing the rights of persons with psychosocial disability in Kenya* USP-K (2017).

Van Reenen TP & Combrinck H 'The UN convention on the rights of persons with disabilities in Africa: progress after 5 years' (2011) 8 *International Journal on Human Rights* 145.

Vasyl Y et al. 'Mental health of a person as a criterion of personal participation in the trial during criminal proceedings' (2020) LXXIII *Wiadomości Lekarskie* 2739. <https://doi.org/10.36740/WLek202012207>.

Waddington L 'Disability: a human rights issue' (1994) 1 *Maastricht Journal of European and Comparative Law* 334.

Wambulwa A 'Explainer: what 'fit to stand trial' means' (21 December 2019) <https://www.the-star.co.ke/news/2019-12-21-explainer-what-fit-to-stand-trial-means/> (accessed 12 April, 2021).

Wendy S et al. 'From criminalisation to individual choice: policy responses to changing constructions of intellectual disability in Western Australia' (2019) 21 *Scandinavian Journal of Disability Research* 102. <https://doi.org/10.16993/sjdr.571>.

Zagidulina v Russia (2013) ECtHR.

Zondi S 'A decolonial turn in diplomatic theory: unmasking epistemic injustice' (2016) 41 *Journal for Contemporary History* 22. <https://doi.org/10.18820/24150509/jch.v41i1.2>.

## Theoretical framework

Acha O 'The places of critical universalism: postcolonial and decolonial approaches in contexts' <https://doi.org/10.1515/9783110492415-008> (accessed 15 December 2021).

Arstein-Kerslake A & Black J 'Right to legal capacity in therapeutic jurisprudence: insights from critical disability theory and the convention on the rights of persons with disabilities' (2020) 68 *International Journal of Law and Psychiatry* 3. <https://doi.org/10.1016/j.ijlp.2019.101535>.

Beaudry J 'The vanishing body of disability law: power and the making of the impaired subject' (2018a) 31 *Canadian Journal of Family Law* 27.

Beaudry J 'Welcoming monsters: disability as a liminal legal concept' (2018b) 29 *Yale Journal of Law & the Humanities* 306.

Bednarz D 'Power, identity and social change as we enter degrowth' <https://www.resilience.org/stories/2013-08-14/power-identity-and-social-change-as-we-enter-degrowth/> (accessed 19 July 2022).

Bevir M 'Foucault and critique: deploying agency against autonomy' (1999) 27 *Political Theory* 73.

Carlen P *Magistrates' justice* (1976).

'Chapter 1: the Foucauldian concept of power' [https://www.lkouniv.ac.in/site/writereaddata/siteContent/202004021930365629saroj\\_dhal\\_socio](https://www.lkouniv.ac.in/site/writereaddata/siteContent/202004021930365629saroj_dhal_socio)

\_FOUCAULT.pdf (accessed 27 June 2021).

Chari T 'Decolonising conflict reporting: media and election violence in Zimbabwe' in B Karam & B Mutsaers (eds) *Decolonising political communication in Africa* (2022) 14.

Criminal Procedure Code, Cap 75 (Laws of Kenya).

Dirth TP & Adams GA 'Decolonial theory and disability studies: on the modernity/coloniality of ability' (2019) 7 *Journal of Social and Political Psychology* 269.

<https://doi.org/10.5964/jpspp.v7i1.762>.

Donaldson EJ 'The corpus of the madwoman: toward a feminist disability studies theory of embodiment and mental illness' (2002) 14 *NWSA Journal* 100.

<https://doi.org/10.1353/nwsa.2003.0003>.

Dubois M 'The governance of the third world: a Foucauldian perspective on power relations in development' (1991) 16 *Alternatives: Global, Local, Political* 1.

Foucault M *Madness and civilization: a history of insanity in the age of reason* (1965).

Foucault M *The order of things: an archaeology of the human sciences* (1970).

Foucault M *The birth of the clinic: archaeology of medical perception* (1973).

Foucault M *The history of sexuality: an introduction* trans R Hurley (1978) vol 1.

Foucault M *Discipline and punish: the birth of the prison* (1991).

Foucault M 'Va-t-on Extrader Klaus Croissant?' in Defert D & Ewald F (eds) *Dits et Ecrits III* 1978–1979 (1994) 362.

Foucault M *Abnormal. Lectures at the Collège de France 1974–1975* (2003).

Foucault M *The hermeneutics of the subject* G Burchell (2005).

Gahman L 'Crip theory and country boys: masculinity, dis/ability, and place in rural southeast Kansas' <https://core.ac.uk/download/pdf/169433775.pdf> (accessed 20 August 2021).

Glück A 'De-westernization and decolonization in media studies'

[http://eprints.bournemouth.ac.uk/34139/13/De-Westernization\\_acrefore-9780190228613-e-898.pdf](http://eprints.bournemouth.ac.uk/34139/13/De-Westernization_acrefore-9780190228613-e-898.pdf) (accessed 13 December 2021).

Gray A et al. 'Cognitive impairment, legal need, and access to justice' (2009) 10 *Justice Issues* 6.

Grosfoguel R 'The epistemic decolonial turn. Beyond political-economy paradigms' (2007) 21 *Cultural Studies* 212. <https://doi.org/10.1080/09502380601162514>.

Grosfoguel R 'Decolonizing post-colonial studies and paradigms of political economy: transmodernity, decolonial thinking, and global coloniality'

<https://dialnet.unirioja.es/descarga/articulo/3998080.pdf> (accessed 10 December 2021).

Hari KC 'Disability discourse in South Asia and global disability governance' (2016) 5 *Canadian Journal of Disability Studies* 39. <https://doi.org/10.15353/cjds.v5i4.314>.

Jackson MA 'Models of disability and human rights: informing the improvement of built environment accessibility for people with disability at neighborhood scale?' (2018) 7 *Laws* 3.

<https://doi.org/10.3390/laws7010010>.

James N 'Law and power: ten lessons from Foucault' (2018) 30 *Bond Law Review* 39.

Karras M et al. *On the edge of justice: the legal needs of people with a mental illness in NSW Sydney: Law and Justice Foundation of NSW* (2006).

Kezia PE 'A radical relational agency: Foucault, complexity theory and environmental resistances' PhD Thesis, University of Nottingham, 2010.

Kiuppisa F and Sooreniaan A 'Bridging continents, cultures, and crip theories: teaching comparative and international disability studies in education and sociology' (2017) 19 *Scandinavian Journal of Disability Research* 120.

<https://doi.org/10.1080/15017419.2016.1224200>.

Lacombe D 'Reforming Foucault: a critique of the social control thesis' (1996) 47 *The British Journal of Sociology* 338.

Legg S 'Subjects of truth: resisting governmentality in Foucault's 1980s' (2019) 37 *Environment and Planning D: Society and Space* 28. <https://doi.org/10.1177/0263775818801>.

Lombaard C 'Deus ex Machina? Religious texts, spiritual capital and inequalities: in continuation of a current debate (a response to colleague Farisani)' (2015) 36 *Verbum et Ecclesia* 6.

<https://doi.org/10.4102/VE.V36I1.1378>.

Louiza O 'Human rights, self-formation and resistance in struggles against disposability: grounding Foucault's 'theorizing practice' of counter-conduct in Bhopal' (2016) 30 *Global Society* 9. <https://doi.org/10.1080/13600826.2016.1141178>.

Lugones M 'Heterosexualism and the colonial/modern gender system' (2007) 22 *Hypatia* 186. <https://doi.org/10.1111/j.1527-2001.2007.tb01156.x>.

Mbembe A *Out of the dark night: essays on decolonisation* Columbia University Press (2021).

McIntyre K 'Foucault on freedom and domination' 31 January 2012 <https://partiallyexaminedlife.com/2012/01/31/foucault-on-freedom-and-domination/> (accessed 4 September 2022).

McSherry B et al. *Unfitness to plead and indefinite detention of persons with cognitive disabilities: addressing the legal barriers and creating appropriate alternative supports in the community Melbourne*: Melbourne Social Equity Institute, University of Melbourne (2017).

Mizutani S 'Hybridity and history: a critical reflection on Homi K. Bhabha's 'posthistorical' thought' (2009) 41 *Zinbun* 4.

Ndlovu S 'Obstacles and opportunities for students with disabilities in entering and in preparation to graduate into professions in higher learning: the case of a university in South Africa' PhD Thesis, University of South Africa, 2016.

Ndlovu-Gatsheni SJ *Decolonization development and knowledge in Africa: turning on a new leaf* (2020).

Ngwenya C 'Developing juridical method for overcoming status subordination in disablism: the place of transformative epistemologies' (2014) 30 *South African Journal of Human Rights* 283.

Ngwenya CG *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

Nixon SA et al. 'Using postcolonial perspectives to consider rehabilitation with children with disabilities: the Bamenda-Toronto dialogue' (2015) 2 *Disability and the Global South* 572.

Nuwagaba EL & Rule PN 'Power dynamics among PWDs during adult learning processes: motivator or demotivator?' (2015) 3 *Rwandan Journal of Education* 55.

Oliver M 'The politics of disablement' (1990) 11.

O'Malley P & Valverde M 'Foucault, criminal law, and the governmentalization of the state' in MD Dubber (ed) *Foundational texts in modern criminal law* (2014) 320.

Quijano A 'Coloniality of power, ethnocentrism, and Latin America' (2000) 1 *Nepantla* 543.

Rowlinson M & Carter C 'Foucault and history in organization studies' (2002) 9 *Organization* 533.

Ruiz E 'The oxford handbook of feminist philosophy: "Postcolonial and decolonial theories"' <https://philarchive.org/archive/RUZPAD> (accessed 15 December 2021).

Sherry M 'Intersecting gender and disability perspectives in rethinking postcolonial identities' (2007) 4 *Wagadu* 11.

Sirotych F 'The criminal justice outcomes of jail diversion programs for persons with mental illness: a review of the evidence' (2009) 37 *The journal of the American Academy of Psychiatry and the Law* 461.

Stein MA & Lord JE 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' [http://www.law.wisc.edu/m/zdq3n/2-20-09\\_steinlord\\_future\\_prospects\\_for\\_un\\_on\\_disability\\_rights.pdf](http://www.law.wisc.edu/m/zdq3n/2-20-09_steinlord_future_prospects_for_un_on_disability_rights.pdf) (accessed 14 January 2022).

Stienstra D 'For Michael Charlie: including girls and boys with disabilities in the global South/North' (2015) 2 *Disability and the Global South* 634.

Suntrup JC 'Michel Foucault and the competing alethurgies of law' (2017) 37 *Oxford Journal of Legal Studies* 301. <https://doi.org/10.1093/ojls/gqw019>.

Verovšek PJ 'The reluctant postmodernism of Jürgen Habermas: reevaluating Habermas's debates with Foucault and Derrida' (2022) 84 *The Review of Politics* 26. <https://doi.org/10.1017/S0034670522000316>.

Wendy S et al. 'From criminalisation to individual choice: policy responses to changing constructions of intellectual disability in Western Australia' (2019) 21 *Scandinavian Journal of Disability Research* 102. <https://doi.org/10.16993/sjdr.571>.

Zheng LE 'Colonial psychiatry in Africa: a distorted science? Practice, knowledge, and power' <https://www.researchgate.net/publication/328051535> (accessed 30 June 2021).

# Constructing psychosocial disability

- Alenaizi HN 'Disability and Kuwaiti society: a critical realist approach to participatory research in contemporary Kuwaiti society' PhD thesis, The University of Manchester, 2017.
- American Psychiatric Association (APA) Diagnostic and statistical manual of mental disorders DSM-5 (2013).
- Andreasen NC *The broken brain: the biological revolution in psychiatry* (1984).
- Baltrušaitytė G 'Theorising mental disorder: a sociological approach' (2003) 1 *Sveikatos sociologija* 117. <https://doi.org/10.15388/SocMintVei.2003.1.5934>.
- Bartlett P 'Legal madness in the nineteenth century' <http://eprints.nottingham.ac.uk/1667/2/SOURCES3.SHM.pdf> (accessed 10 February 2020).
- Benedet J & Grant I 'A situational approach to incapacity and mental disability in sexual assault law' (2013) 43 *Ottawa Law Review* 6.
- Berlim MT et al. 'Notes on antipsychiatry' (2003) 253 *European Archives of Psychiatry and Clinical Neuroscience* 64. <https://doi.org/10.1007/s00406-003-0407-8>.
- Bible, 2 John 9:2–3 New International Version.
- Bolen B 'How an organic disease differs from a functional disorder' <https://www.verywellhealth.com/organic-disease-1944921> (accessed 8 August 2021).
- Brown P 'Unfitness to plead in England and Wales: historical development and contemporary dilemmas' (2019) 59 *Medicine, Science and the Law* 190. <https://doi.org/10.1177/0025802419856761>.
- Bufford RK 'Demonic influence and mental disorders-Chapter 8 of "counseling and the demonic"' <https://digitalcommons.georgefox.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1011&context=counselingandthedemonic> (accessed 6 August 2021).
- Chanan S 'The Republican Constitution of Kenya: historical background and analysis' (1985) 14 *International and Comparative Law Quarterly* 883.
- Clark LA et al. 'Three approaches to understanding and classifying mental disorder: ICD-11, DSM-5, and the National Institute of Mental Health's Research Domain Criteria (RDoC)' (2017) 18 *Psychological Science in the Public Interest* 73. <https://doi.org/10.1177/1529100617727266>.
- Clemente M 'A reassessment of common law protections for "idiots"' 124 (2015) *The Yale Law Journal* 2776.
- Coene PD 'Therapeutic trajectories in 1950s Usumbura, Ruanda-Urundi. A historical research into colonial psychiatry and its limits' Masters Dissertation, Ghent University, 2020.
- Collins D 'Re-evaluating competence to stand trial' <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1002&context=mjs> (accessed 24 February, 2020).
- Conrad P 'Medicalization and social control' (1992) 18 *Annual Review of Sociology* 209.
- Constitution of Kenya (2010).
- Criminal Law (Amendment) Act, 2003, Laws of Kenya.
- Criminal Lunatics Act 1800 (CLA).
- Criminal Procedure Act Cap. 75, Laws of Kenya.
- Crossley N 'RD Laing and the British anti-psychiatry movement: a socio-historical analysis' (1998) 47 *Journal of Social Science & Medicine* 883.
- Dubois M 'The governance of the third world: a Foucauldian perspective on power relations in development' (1991) 16 *Alternatives: Global, Local, Political* 8.
- Edgerton RE 'Conceptions of psychosis in four East African societies' (1966) 68 *American Anthropologist* 408.
- Edwards MA 'The alignment of law and norms: of mirrors, bulwarks, and pressure valves' (2015) 10 *Faculty Scholarship* 21.
- Ellis v R (1965) EACA 751.
- Evidence Act, Cap 80, Laws of Kenya.
- Foot J 'Franco Basaglia and the radical psychiatry movement in Italy, 1961–78' (2014) 2 *Critical and Radical Social Work* 237. <https://doi.org/10.1332/204986014X14002292074708>.
- Foucault M *Madness and civilization: a history of insanity in the age of reason* (1965).
- Foucault M *Discipline and punish: the birth of the prison* trans A Sheridan (1977).
- Foucault M 'The subject and power' in Dreyfus HL & Rabinow P (eds) *M Foucault: beyond structuralism and hermeneutics* (1983) 223.

Foucault M *The history of sexuality* (1986).

Gahman L 'Crip theory and country boys: masculinity, dis/ability, and place in rural southeast Kansas' <https://core.ac.uk/download/pdf/169433775.pdf> (accessed 20 August 2021).

Girimaji SC & Pradeep AJ 'Intellectual disability in international classification of diseases-11--: a developmental perspective' (-2018-) 34 *Indian Journal of Social Psychiatry* 69. [https://doi.org/10.4103/ijsp.ijsp\\_35\\_18](https://doi.org/10.4103/ijsp.ijsp_35_18).

Goldberg D 'The classification of mental disorder: a simpler system for DSM-V and ICD-11' (2010) 16 *Advances in Psychiatric Treatment* 15. <https://doi.org/10.1192/apt.bp.109.007120>.

Gordon HL 'The mental capacity of the African' (1934) 33 *Journal of the Royal African Society* 228.

Gozi A 'Highlights of ICD-11 classification of mental, behavioral, and neurodevelopmental disorders' (2019) 13 *Indian Journal of Private Psychiatry* 14. <https://doi.org/10.5005/jp-journals-10067-0030>.

Hale M *The history of the pleas of the crown* (2007).

Hamel LA 'Mental illness and demonisation' (2015) 11 *Journal of Adventist Mission Studies* 48.

Hare-Mustin RT & Marecek J 'Abnormal clinical psychology: the politics of madness' in Fox D & Prilleltensky I (eds) *Critical psychology: an introduction* (1997) 105.

Helmchen H 'Different conceptions of mental illness: consequences for the association with patients' (2013) 4 *Frontiers in Psychology* 2. <https://doi.org/10.3389/fpsyg.2013.00269>.

Hogan N "'We're all mad here": power and identity in the modern era of mental illness' (2016) 10 *Intersect* 73.

Human Rights Watch 'Deportation by default: mental disability, unfair hearings, and indefinite detention in the US immigration system' <https://www.hrw.org/report/2010/07/25/deportation-gdefault/mental-disability-unfair-hearings-and-indefinite-detention-us> (accessed 9 August 2021).

Hutchison Reid v the United Kingdom (2003) ECtHR. Ibrahim M 'Mental health in Kenya: not yet uhuru' (2014) 1 *Disability and the Global South* 397. <https://doi.org/10.4324/9781003082583-25>.

Jiménez A & Elena A 'Criminalizing disability: the urgent need of a new reading of the European Convention on Human Rights' (2015) 30 *American University International Law Review* 307.

John Ruston's case (1786) 1 *Leach CC* 408.

Joranger L 'Psychology and the historical power-body conjunction: Foucault's different view of the history and philosophy of psychology' (2016) 26 *Theory & Psychology* 310. <https://doi.org/10.1177/0959354315623655>.

Keller R 'Madness and colonization: psychiatry in the British and French empires 1800-1962' (2001) 35 *Journal of Social History* 295.

Khamis MS, et al. 'The Swahilis traditional approach to mental health issues: a case of Swahilis of Mombasa' (2018) 23 *IOSR Journal of Humanities and Social Science* 60.

King v Jones (1773) 1 *Leach CC* 102.

The King v Steel (1787) 1 *Leach CC* 451.

Kirk S & Kutchins H *Making us crazy: DSM, the psychiatric bible and the creation of mental disorders* (1996) 71.

Laing RD 'What is schizophrenia?' (1964b) 28 *New Left Review* 64.

Leighton S & Dogra N 'Defining mental health and mental illness' [https://www.researchgate.net/publication/255657987\\_Defining\\_mental\\_health\\_and\\_mental\\_illness](https://www.researchgate.net/publication/255657987_Defining_mental_health_and_mental_illness) (accessed 5 August 2021).

Leonard Mwangemi Munyasia v Republic (2015) eKLR.

Loughnan A *Manifest madness: mental incapacity in the criminal law* (2012) 72.

Mahone S 'Forgotten histories: eugenics, racism and colonial mental doctors in Kenya' <https://www.theelephant.info/culture/2021/06/11/forgotten-histories-eugenics-racism-and-colonial-mental-doctors-in-kenya/TheElephant-Speakingtruthtopower> (accessed 3 September 2021).

Maithya HMK 'The awareness and management of mental illness among the Babukusu of Bungoma District' LLM dissertation, University of Nairobi, 1992.

McRuer R 'Composing bodies; or, de-composition: queer theory, disability studies, and alternative corporealities' (2004) 24 *JAC* 52.

Mental Health Act Cap 248 'Laws of Kenya'.

Mental Health Amendment Act of 2022 'Laws of Kenya'.



M'Naghten's Case (1843) 8 Eng Rep 718.

Morris HF 'A history of the adoption of codes of criminal law and procedure in British colonial Africa 1876–1935' (1974) 18 *Journal of African Law* 13.

Msipi D 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: an analysis of the approach taken in South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 64. <https://doi.org/10.17159/2413–7138/2015/v3n1a3>.

Mute L 'Moving from the norm to practice towards ensuring legal capacity for persons with disabilities in Kenya' (2012) 9 *The Equal Rights Review* 139.

Mute LM 'Shattering the glass ceiling: ensuring the right to vote for persons with intellectual disabilities in Kenya' (2010) 2 *A Journal of the Philosophical Association of Kenya (PAK) New Series* 5.

Ndeti DM et al. 'Kenya's mental health law' (2017) 14 *Bjpsych International* 97. <https://doi.org/10.1192/s2056474000002117>.

Ngui EM et al. 'Mental disorders, health inequalities and ethics: a global perspective' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2935265/pdf/nihms226164.pdf> (accessed 5 August 2021).

Ngweni CG What is Africanness? Contesting nativism in race, culture and sexualities (2018).

Ninnis D 'Foucault and the madness of classifying our madness' (2016) 21 *Foucault Studies* 125. <https://doi.org/10.22439/fs.v0i0.5016>.

Nyaga M 'Connectedness of cultural dynamics and mental health' [https://www.researchgate.net/publication/328513448\\_CONNECTEDNESS\\_OF\\_CULTURAL\\_DYNAMICS\\_AND\\_MENTAL\\_HEALTH](https://www.researchgate.net/publication/328513448_CONNECTEDNESS_OF_CULTURAL_DYNAMICS_AND_MENTAL_HEALTH) (accessed 7 August 2021).

Ojwang BO 'Linguistic conceptualizations of disease among the Luo of Kenya' (2018) 28 *Qualitative Health Research* 434. <https://doi.org/10.1177/1049732317747875>.

Osborn TL et al. 'The experience of depression among the Luo in western Kenya' <https://osf.io/qu9kb/> (accessed 7 August 2021).

Oxford English Dictionary 'Unsound definition' [http://www.oed.com/view/Entry/218175?rskey=BWCa8R&result=7&isAdvanced=false#\(accessed 2 September 2021\)](http://www.oed.com/view/Entry/218175?rskey=BWCa8R&result=7&isAdvanced=false#(accessed 2 September 2021)).

Oyaro LO 'Rearticulating ubuntu as a viable framework for the realisation of legal capacity in sub-Saharan Africa' (2018) 6 *African Disability Rights Yearbook* 85. <https://doi.org/10.29053/2413–7138/2018/v6a4>.

Pajević I & Hasanović M 'Antipsychiatry as the stigma' (2017) 29 *Psychiatria Danubina* 890.

Penal Code, Cap 63 'Laws of Kenya'.

Perlin ML 'The insanity defense in English-speaking African countries' (1969) *African Law Studies* 73. <https://doi.org/10.1080/07329113.1969.10756150>.

Pound R 'The need for a sociological jurisprudence' (1907) 19 *Green Bag* 615.

Priscilla Nyokabi Kanyua v AG (2010) eKLR.

Rex v Pritchard (1836) 7 C & P 303.

Roberts M 'The production of the psychiatric subject: power, knowledge and Michel Foucault' (2005) 6 *Nursing Philosophy* 34. <https://doi.org/10.1111/j.1466–769X.2004.00196.x>.

Sexual Offences Act 3 of 2006 'Laws of Kenya'.

Shah A 'Making fitness to plead fit for purpose' (2012) 1 *International Journal of Criminology and Sociology* 179. <https://doi.org/10.6000/1929–4409.2012.01.17>.

Simon RI et al. 'On sound and unsound mind: the role of suicide in tort and insurance litigation' (2005) 333 *Journal of the American Academy of Psychiatry and the Law* 177.

Singh D & Sinnott-Armstrong W 'The DSM-5 definition of mental disorder' (2015) 29 *Public Affairs Quarterly* 11.

Smith T 'Pathology, bias and queer diagnosis: a crip queer consciousness' Master's dissertation, Smith College, Northampton, 2012.

Stein DJ et al. 'What is a mental/psychiatric disorder? From DSM-IV to DSM-V' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3101504/pdf/nihms291831.pdf> (accessed 7 August 2021).

Szasz T 'The use of naming and the origin of the myth of mental illness' (1961) 16 *American Psychologist* 59. <https://doi.org/10.1037/h0040842>.

Szasz T *The manufacture of madness* (1970).

Szasz T *The myth of mental illness* (1974).

Szwed M 'The notion of 'a person of unsound mind' under article 5 § 1(e) of the European Convention on Human Rights' (2020) 38 *Netherlands Quarterly of Human Rights* 291. <https://doi.org/10.1177/0924051920968480>.

Tamanaha B *A general jurisprudence of law and society* (2001).

Telles-Correia D et al. 'Mental disorder – the need for an accurate definition' (2018) 9 *Frontiers in Psychiatry* 3. <https://doi.org/10.3389/fpsyt.2018.00064>.

Tesemma ST & Coetzee SA 'Conflicting discourses on conceptualising children with disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 63.

Trial of Samuel Adams , London Times, 29 May 1879.

Turner v Howerton et al. no. 22689-VA, April 2, 1997.

Vaughan M 'Idioms of madness: Zomba lunatic asylum, Nyasaland, in the colonial period' (1983) 9 *Journal of Southern African Studies* 233. <https://doi.org/10.1080/03057078308708058>.

Venning T 'Intellectual disability in the Australian criminal justice system what effect, if any, does general and specific deterrence play in sentencing offenders with an intellectual disability? How can these and the other sentencing principles be applied when sentencing Noel?' [https://espace.cdu.edu.au/eserv/cdu:46276/Venning\\_46276.pdf](https://espace.cdu.edu.au/eserv/cdu:46276/Venning_46276.pdf) (accessed 20 February, 2022).

Volpe U 'The development of the ICD-11 chapter on mental disorders' <https://sajp.org.za/index.php/sajp/article/view/1105/848> (accessed 20 August 2021).

Wakefield JC 'The concept of mental disorder: diagnostic implications of the harmful dysfunction analysis' (2007) 6 *World Psychiatry* 150.

Ward T 'Standing mute' (2012) 24 *Law & Literature* 3. <https://doi.org/10.1525/lal.2012.24.1.3>.

Winterwerp v Netherlands (1979) ECtHR Ser A 33.

Woodbridge F 'Some unusual aspects of mental irresponsibility in the criminal law' (1938–1939) 29 *American Institute of Criminal Law and Criminology* 823.

Woolfolk RL 'The concept of mental illness: an analysis of four pivotal issues' (2001) 22 *Journal of Mind and Behavior* 161.

Wurtzburg SJ & Thomson ND 'Antipsychiatry perspective of mental illness' [https://www.researchgate.net/publication/277668176\\_Anti-Psychiatry\\_Perspective\\_of\\_Mental\\_Illness](https://www.researchgate.net/publication/277668176_Anti-Psychiatry_Perspective_of_Mental_Illness) (accessed 6 August 2021).

X v Germany (1976) ECtHR.

Young IM *Justice and the politics of difference* (1990).

## Participation of persons with psychosocial disabilities in access to justice

African Policing Civilian Oversight Forum (APCOF) and the National Gender and Equality Commission (NGEC) *Pre-trial detention for persons with disabilities in correctional institutions* African Policing Civilian Oversight Forum (2017).

Anker L et al. 'Fitness to stand trial: a general principle of European criminal law?' (2011) 7 *Utrecht Law Review* 121. <https://doi.org/10.18352/ulr.174>.

Anonymous 'Incompetency to stand trial' (1967) 81 *Harvard Law Review* 460.

Arnstein S 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216. <https://doi.org/10.1080/01944366908977225>.

Arthur R 'Giving effect to young people's right to participate effectively in criminal proceedings' (2016) 28 *Child and Family Law Quarterly* 224.

Arturo Medina Vela v Australia (2019) CRPD/C/22/D/17/2013.

Aylett A 'Participatory planning, justice, and climate change in Durban, South Africa' (2000) 42 *Environment and Planning* 103. <https://doi.org/10.1068/a4274>.

Babulal GM et al. 'Measuring participation for persons with mental illness: a systematic review assessing relevance of existing scales for low and middle income countries' (2015) 3 *BMC Psychology* 2. <https://doi.org/10.1186/s40359-015-0093-0>.

Blackstone W *Commentaries* (1783).

Callus A & Camilleri A 'Nothing about us without us': disabled people determining their human rights through the UNCRPD' (2017) 1 *Mediterranean Review of Human Rights* 8.

Charles Mwangi Muraya v Republic (2001) eKLR.

Constitution of Kenya (1963).

Constitution of Kenya (2010).

Cooper P & Mattison M 'Intermediaries, vulnerable people and the quality of evidence: an international comparison of three versions of the English intermediary model' (2017) 21 *The International Journal of Evidence and Proof* 365.

CRPD Committee General Comment 1: Article 12: Equal Recognition Before the Law (2014) UN Doc CRPD/C/GC/1 dated 19 May 201.

DARU 'Understanding models of disability' <https://www.daru.org.au/wp/wp-content/uploads/2019/03/Human-rights-info-sheet-for-website.pdf> (accessed 13 August 2021).

Diderot D Rameau's nephew/D'Alembert's dream (1976) 50.

Doolan v Australia (2019) CRPD/C/22/D/18/2013.

Edwards MA 'The alignment of law and norms: of mirrors, bulwarks, and pressure valves' (2015) 10 *Faculty Scholarship* 23.

Flear ML & Vakulenko A 'A human rights perspective on citizen participation in the EU's governance of new technologies' (2010) 10 *Human Rights Law Review* 665. <https://doi.org/10.1093/hrlr/ngq039>.

Francis Ogoti Otundo v Republic (2012) eKLR.

Franklin-Hall A 'On becoming an adult: autonomy and the moral relevance of life's stages' (2013) 63 *Philosophical Quarterly* 251. <https://doi.org/10.1111/1467-9213.12014>.

Gooding P et al. 'Unfit to plead: imprisoned without conviction' <https://findanexpert.unimelb.edu.au/news/1005-unfit-to-plead-imprisoned-without-conviction> (accessed 9 March 2022).

Gray A et al. 'Cognitive impairment, legal need, and access to justice' (2009) 10 *Justice Issues* 5.

Grunseit A et al. *Taking justice into custody: the legal needs of prisoners* Law and Justice Foundation of New South Wales (2008).

Guidelines on the right to liberty and security of persons with disabilities, adopted September 201.

Gumbis J et al. 'Do human rights guarantee autonomy?' (2008) 62 *Cuadernos Constitucionales de la Cátedra Fadrigue Furió Ceriol* 77.

Halabi SF 'Participation and the right to health: lessons from Indonesia' (2009) 11 *Health & Human Rights* 49. <https://doi.org/10.2139/ssrn.1743704>.

Hawkins W Pleas of the crown (1973).

Herring J & Wall J 'Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act' (2015) 35 *Legal Studies* 711. <https://doi.org/10.1111/lest.12094>.

Hussan Hussein Yusuf v Republic (2016) eKLR.

Joseph Kamau Kirubi v Republic (2010) eKLR.

Joseph Melikino Katuta v Republic (2016) eKLR.

The Judiciary *Criminal procedure bench book* (2018).

Juma P 'Right to self-representation for people with mental disabilities in Kenya's courts' (2019) 7 *African Disability Rights Yearbook* 83. <https://doi.org/10.29053/2413-7138/2019/v7a4>.

Kaler J 'Understanding participation' (1999) 21 *Journal of Business Ethics* 37. <https://doi.org/10.1023/A:1006230712569>.

Karras M et al. *On the edge of justice: the legal needs of people with a mental illness in NSW* Sydney: Law and Justice Foundation of NSW (2006).

Kavanagh A 'Participation and judicial review: a reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 452. <https://doi.org/10.1023/A:1025450827929>.

Kennedy Chimwani Mulokoto v Republic (2011) eKLR.

Kenya National Commission on Human Rights 'Report to the Human Rights Committee to inform its review of Kenya's third periodic report on implementation of the provisions of the International Covenant on Civil and Political Rights' [https://www2.ohchr.org/english/bodies/hrc/docs/ngos/KNCHR\\_Kenya\\_HRC105.pdf](https://www2.ohchr.org/english/bodies/hrc/docs/ngos/KNCHR_Kenya_HRC105.pdf).

Kirby A et al. 'Effective participation or passive acceptance: how can defendants participate more effectively in the court process?' [https://howardleague.org/wp-content/uploads/2016/04/HLWP\\_9\\_2014\\_2.pdf](https://howardleague.org/wp-content/uploads/2016/04/HLWP_9_2014_2.pdf) (accessed 12 August 2021).

Legal Aid Act 6 of 2016.

Leo v Australia (2019) CRPD/C/22/D/17/2013.

MacKenzie C 'Relational autonomy, normative authority and perfectionism' (2008) 39 *Journal of Ethics & Social Philosophy* 512. <https://doi.org/10.1111/j.1467-9833.2008.00440.x>.

Marcus Muriuki v Republic (2009) eKLR.

Matata L 'Kenyans living with mental illness get lost in the criminal justice system' <https://pettyoffences.org/kenyans-living-with-mental-illness-get-lost-in-the-criminal-justice-system/>(accessed 16 August 2021).

Mbondenyi MK 'Entrenching the right to participate in government in Kenya's Constitutional order: some viable lessons from the African Charter on Human and Peoples' Rights' (2011) 55 *Journal of African Law* 39. <https://doi.org/10.1017/S0021855311000027>.

McSherry B et al. Unfitness to plead and indefinite detention of persons with cognitive disabilities: addressing the legal barriers and creating appropriate alternative supports in the community Melbourne: Melbourne Social Equity Institute, University of Melbourne (2017).

MM v Republic (2012) eKLR.

Moynihan DP 'Normative and instrumental perspectives on public participation: citizen summits in Washington, DC' (2003) 33 *The American Review of Public Administration* 168. <https://doi.org/10.1177/0275074003251379>.

Mubita A et al. 'The importance and limitations of participation in development projects and programmes (2017) 13 *European Scientific Journal* 241. <https://doi.org/10.19044/esj.2017.v13n5p238>.

Mudora H 'Review of Kenya persons with disabilities act overdue' <http://globaldisability.org/2016/04/01/review-kenya-persons-disabilities-act-2003-overdue>(accessed 12 August 2021).

Noble v Australia (2016) CRPD/C/16/D/7/2012.

Nyawa Mwajowa v Republic (2016) eKLR.

Nylund A 'Children's right to participate in decision-making in Norway: paternalism and autonomy' <https://munin.uit.no/bitstream/handle/10037/17526/article.pdf?sequence=2&isAllowed=y> (accessed 10 August 2021).

Persons Deprived of Liberty Act 23 of 2014 'Laws of Kenya'.

Persons with Disabilities Act (Act 14 of 2003) 'Laws of Kenya'.

Posner RA *The problems of jurisprudence* (1993).

Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities, 29 January 2018.

Puri E 'Understanding participation: theoretical foundations and practical implications' (2004) 39 *Economic and Political Weekly* 2511. <https://doi.org/10.2307/4415152>.

R v Karissa Chengo & 2 Others (2005) KESC.

Refugees Act (13 of 2006).

Republic v Elijah Weru Mathenge (2017) eKLR.

Republic v GKN (2018) eKLR.

Rex v Pritchard (1836) 7 C & P 303.

Rifkin SB & Kangere M 'What is participation?' <https://asksource.info/cbr-book/cbr03.pdf>(accessed 10 August 2021).

Ronner AD 'Songs of validation, voice, and voluntary participation: therapeutic jurisprudence, miranda and juveniles' (2002) 71 *University of Cincinnati Law Review* 94–95.

SC v the United Kingdom (2004) ECtHR.

Shikhelman V 'Access to justice in the United Nations Human Rights Committee' (2018) 39 *Michigan Journal of International Law* 457.

Stanford v the United Kingdom (1994) ECtHR.

Stern R 'The child's right to participation – reality or rhetoric?' PhD thesis, Uppsala University, 2006.

TCK v R (2010) eKLR.

United Nations 'Chapter two: the convention in detail – obligations of states parties under the convention' <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-two-the-convention-in-detail-4.html>(accessed 12 August 2021).

United Nations Human Rights Office of the High Commissioner 'OHCHR and equal participation in political and public affairs' <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx> (accessed 11 August 2021).

Universal Rights Group 'The right to participate in environmental decision-making' <http://www.universal-rights.org/wp-content/uploads/2015/02/EHRD-portal-Right-to-participation.pdf> (accessed 11 August 2021).

Users and Survivors of Psychiatry in Kenya (USP-K) *Advancing the rights of persons with psychosocial disability in Kenya* USP-K (2017).

Villa-Torres L & Svanemyr J 'Ensuring youth's right to participation and promotion of youth leadership in the development of sexual and reproductive health policies and programs' (2015) 56 *Journal of Adolescent Health* 552. <https://doi.org/10.1016/j.jadohealth.2014.07.022>.

Wabuke ES et al. 'Promoting access to justice in Kenya: making the case for law clinics' 11 October 2018 <https://theplatform.co.ke/promoting-access-to-justice-in-kenya-making-the-case-for-law-clinics/> (accessed 22 September 2020).

Waldron J 'Participation: the right of rights' (1998) 98 *Proceedings of the Aristotelian Society* 311. <https://doi.org/10.1111/1467-9264.00039>.

White RM et al. 'Transformative equality: court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* 2. <https://doi.org/10.4102/ajod.v9i0.651>.

Young IM *Inclusion and democracy* (2000).

## Realising participation in access to justice through reasonable accommodation in Kenya

Addadzi--Koom Me 'Of the women's rights jurisprudence of the ECOWAS Court: the role of the Maputo Protocol and the due diligence standard' (2020) 28- *Feminist Legal Studies* 161. <https://doi.org/10.1007/s10691-020-09432-4>.

B v A Company (2007) 'Norway, equality and anti-discrimination tribunal of Norway'.

Barras A et al. 'Rethinking Canadian discourses of "reasonable accommodation"' (2018) 6 *Social Inclusion* 166. <https://doi.org/10.17645/si.v6i2.1443>.

Bouchard G & Taylor C *Building the future: a time for reconciliation* abridged report Gouvernement du Quebec.

Broderick A 'The long and winding road to equality and inclusion for persons with disabilities: the United Nations Convention on the Rights of Persons with Disabilities' Doctoral Thesis, Maastricht University, 2015. <https://doi.org/10.26481/dis.20151120ab>.

Broderick A *Report on reasonable accommodation under the CRPD: the Georgian context* USAID (2017).

Central Okanagan School District No 23 v Renaud (1992) 2 SCR 970.

CIPESA 'Assessing the barriers to accessing ICT by people with disabilities in Kenya' [https://cipesa.org/?wpfb\\_dl=429](https://cipesa.org/?wpfb_dl=429) (accessed 16 February, 2022) 19.

Civil Justice Council *Vulnerable witnesses and parties within civil proceedings: current position and recommendations for change* Civil Justice Council (February 2020).

Comandé G 'Discrimination and reasonable accommodation: "insight" from a (non) zero sum game' (2010) 2 *Opinio Juris in Comparatione* 14. <https://doi.org/10.20935/AcadMed7615>.

Constitution of the Republic of South Africa Act 108 of 1996.

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

Courtis C 'Rationality, reasonableness, proportionality: testing the use of standards of scrutiny in the constitutional review of legislation' (2011) 4 *Constitutional Court Review* 35.

CRPD Committee 'Concluding observations on the initial report of Kenya' UN Doc CRPD/C/KEN/CO/1 (30 September 2015).

CRPD Committee 'Concluding observations on the initial report of Canada' UN Doc CRPD/C/CAN/CO/1 (8 May 2017).

CRPD Committee 'Concluding observations on the initial report of South Africa' UN Doc CRPD/C/ZAF/CO/1 (23 October 2018).

CRPD Committee General comment 2: article 9: accessibility (2014b) UN Doc CRPD/C/GC/2.

CRPD Committee General comment 4: article 24: right to inclusive education (2016b) (UN Doc CRPD/C/GC/4).

CRPD Committee General comment 6: article 5: equality and nondiscrimination (2018) UN Doc CRPD/C/GC/6 dated 26 April 2018.

CRPD Committee General comment 5: article 19: living independently and being included in the community (2017a) UN Doc CRPD/C/18/1.

CRPD Committee General comment 3: article 6: women and girls with disabilities (2016a) (UN Doc CRPD/C/GC/3).

Curtice M et al. 'The proportionality principle and what it means in practice' (2011) 35 *The Psychiatrist* 111. <https://doi.org/10.1192/pb.bp.110.032458>

Daly P & Whelan D 'Disability in employment equality law: a reappraisal of the reasonable accommodation duty and issues arising in its implementation' (2021) 28 *Maastricht Journal of European and Comparative Law* 757. <https://doi.org/10.1177/1023263X211035268>.

Downes G 'Reasonableness, proportionality and merits review' <https://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/ReasonablenessSeptember2008.pdf> (accessed 30 August 2022).

Dusky v United States (1960) 362 US 402.

Eaton v Brant County Board of Education (1997) 1 SCR 24.

Equal Employment Opportunity Act 1972 (amending Civil Rights Act 1964, 42 USC 2000e).

European Network of Equality Bodies *Reasonable accommodation for persons with disabilities: exploring challenges concerning its practical implementation* Equinet (2020).

Ferri D 'Reasonable accommodation as a gateway to the equal enjoyment of human rights: from New York to Strasbourg (2018) 6 *Social Inclusion* 43. <https://doi.org/10.17645/si.v6i1.1204>.

Finland, National Non-Discrimination and Equality Tribunal, 14 December 2015, YVTltk 21/2015.

Flynn E et al. *Final report: access to justice of persons with disabilities* OHCR (2019).

Foucault M 'The subject and power' in Dreyfus H & Rabinow P (eds) *Beyond structuralism and hermeneutics* (1983).

Foucault M *The hermeneutics of the subject* trans G Burchell (2005).

Fuente OP 'Reasonable accommodation based on religious beliefs or practices. A comparative perspective between the American, Canadian and European approaches' (2018) 10 *The Age of Human Rights Journal* 115. <https://doi.org/10.17561/tahrj.n10.5>.

Gazette Notice 189 *Laws of Kenya* Nairobi (14 January 2022).

*Gemma Beasley v Australia* Communication (2016) CRPD/C/15/11/2013.

Geoffrey Andare v Attorney General & 2 others (2016) eKLR.

GL v Italy (2020) ECtHR.

Gould K 'And equal participation for all . . . the Americans with disabilities act in the courtroom' (1993–1994) 8 *Journal of Law & Health* 141.

Government of the Republic of South Africa v Grootboom (2001) 1 SA 46 (CC) & *Minister of Health v Treatment Action Campaign* (2002) 5 SA 703 (CC).

Griffiths E 'The 'reasonable accommodation' of religion: is this a better way of advancing equality in cases of religious discrimination?' (2016) 16 *International Journal of Discrimination and the Law* 172.

Grobbeelaar-du Plessis I & Nienaber A 'Disability and reasonable accommodation: *HM v Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities)' (2014) 30 *South African Journal on Human Rights* 376. <https://doi.org/10.1080/19962126.2014.11865113>.

Guberina v Croatia (2013) ECtHR.

Holmes v Canada (Attorney General) (1997) CanLII 5101 (FC).

Holmes v Canada (Attorney General) (1999) CanLII 7869 (FCA).

Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others (2012) ZALAC 1.

The Judiciary *Criminal procedure bench book* (2018).

Kallehauge H 'General themes relevant to the implementation of the UN Disability Convention into domestic law: who is responsible for the implementation and how should it be performed?' in Arnardottir OM & Quinn G (eds) *The UN convention on the rights of persons with disabilities: European and Scandinavian perspectives* (2009) 211.

Karjalainen K & Ylhäinen M 'On the obligation to make reasonable accommodation for an employee with a disability' (2021) 12(4) *European Labour Law Journal* 562. <https://doi.org/10.1177/20319525211027430>.

Karras M et al. *On the edge of justice: the legal needs of people with a mental illness in NSW* Sydney: Law and Justice Foundation of NSW (2006).

Kijuki Kiambi Paul Kagia and 5 Others v Clerk Meru Municipal Council Municipal council (2012) eKLR.

Lawson A & Orchard M 'The anticipatory reasonable adjustment duty: removing the blockages?' (2021) 80(2) *Cambridge Law Journal* 319. <https://doi.org/10.1017/S0008197321000568>.

Lord J & Brown R 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: the UN Convention on the Rights of Persons with Disabilities' in Rioux MH et al. (eds) *Critical perspectives on human rights and disability law* (2011) 279.

Lurie G 'Proportionality and the right to equality' (2020) 21 *German Law Journal* 188. <https://doi.org/10.1017/glj.2020.8>.

Marie-Louise Jungelin v Sweden (2014) CRPD/C/12/D/5/2011.

Martel LV 'Reasonable accommodation: the new concept from an inclusive constitutional perspective' (2011) 8 *International Journal of Human Rights* 105.

McCallum R & Martin H 'A forgotten cohort: citizenship through work and persons with disabilities' (2016) 41 *Queen's Law Journal* 341.

MEC for Education and Others v Pillay and Others (2008) BCLR 99 (CC).

Melbourne Social Equity Institute *Addressing the indefinite detention of people with cognitive and psychiatric impairment due to unfitness to plead laws* Melbourne Social Equity Institute (2016).

Michael Lockrey v Australia Communication (2016) CRPD/C/15/D/13/2013.

Nano Nagle School v Marie Daly (2019) IESC 63.

New South Wales Jury Act of 1977.

Noble v Australia (2016) CRPD/C/16/D/7/2012.

Office of Director of Public Prosecutions Diversion Policy (2019).

Ontario Human Rights Commission, Theresa O'Malley v Simpsons-Sears (1985) 2 SCR 536.

Practice Directions to Standardize Practice and Procedures in the High Court of Kenya.

Pretorius JL et al. *Employment equity law* (2001, 2021 update).

Primor S & Lerner N *The rights of persons with intellectual, psychosocial and communication disabilities to access to justice: accommodations in the criminal process* Bizchut, The Israel Human Rights Centre for People with Disabilities.

R (on the application of N) v Ashworth Special Hospital Authority and another (2001) EWHC 339.

Rainey v Greater Glasgow Health Authority (1987) 1 All ER 65, 1 AC 224 (HL).

Robert Alai v Attorney General and another (2017) eKLR.

Roig RA 'Reasonableness in the concept of reasonable accommodation' (2016) 6 *The Age of Human Rights Journal* 48.

Runo M 'Independent living for persons with disabilities' (2012) 46 *Les Cahiers d'Afrique de l'Est / The East African Review* 11. <https://doi.org/10.4000/eastafrika.432>.

SA Clothing and Textile Workers Union and Others v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd (2012) 33 ILJ 972.

South West Africa (Ethiopia v South Africa; Liberia v South Africa) (1966) ICJ Rep 6, 305.

State v Cleary, (2003) 824 A.2d 509.

State v Ortiz-Abrego (2017) 387 P3d 638.

Szurlej C 'Reconciling competing human rights in Canada' (2015) 47 *Peace Research* 180.

Vande Zande v Wisconsin Department of Administration (1995) 44 F3d 538.

Waddington L 'Reasonable accommodation' in Schiek D et al. (eds) *Cases, materials and text on national, supranational and international non-discrimination law* (2007).

Waddington L 'When it is reasonable for Europeans to be confused: understanding a when disability accommodation is "reasonable" from a comparative perspective' (2008) 29 *Comparative Labor Law and Policy Journal* 339.

White R & Msipa D 'Implementing article 13 of the convention on the rights of persons with disabilities in South Africa: reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 103.

## Empirical research methodology

- Amakiri D & Kuroakegha BB 'Unveiling the validity and reliability rambles of research outcomes' (2018) 4 *International Journal of Social Sciences and Management Research* 46.
- Babbie E & Mouton J The practice of social research (2001).
- Cambridge Dictionary 'Research' <https://dictionary.cambridge.org/dictionary/english/research> (accessed 1 September 2021).
- Centers for Disease Control and Prevention 'Data collection methods for program evaluation: questionnaires' <https://www.cdc.gov/healthyyouth/evaluation/pdf/brief14.pdf> (accessed 1 September 2021).
- Clarke V et al. 'Thematic analysis' in Smith JA (ed) *Qualitative psychology: a practical guide to research methods* (2015).
- Cooper DR & Schindler PS *Business research methods* (2006).
- Creswell JW et al. 'Designing a mixed methods study in primary care' (2004) 2 *Annals of Family Medicine* 7.
- Denzin NK & Lincoln YS *The discipline and practice of qualitative research* (2005).
- Fink A *How to sample in surveys* (2003).
- Flick U *Designing qualitative research* (2007).
- Gachohi J et al. 'Epidemiology of East Coast fever (*Theileria parva* infection) in Kenya: past, present and the future' (2012) 5 *Parasites & Vectors* 4. <https://doi.org/10.1186/1756-3305-5-194>.
- Hussey J & Hussey R *Business research: a practical guide for undergraduate and postgraduate students* (1997).
- Jamieson L & Williams LM 'Focus group methodology: explanatory notes for the novice nurse researcher' (2003) 14 *Contemporary Nurse* 274. <https://doi.org/10.5172/conu.14.3.271>.
- Joppe M 'The research process' (2000) 8 *The Qualitative Report* 41.
- Kemper EA et al. 'Mixed methods sampling strategies in social science research' in Tashakori A and Teddlie C (eds) *Handbook of mixed methods in social and behavioural research* (2003) 274.
- Lietz CA & Zayas LE 'Evaluating qualitative research for social work practitioners' (2010) 11 *Advances in Social Work* 191. <https://doi.org/10.18060/589>.
- MacMillan JH & Schumacher S *Research in education: a conceptual introduction* (2001).
- Mastalgia B et al. 'Ensuring validity in instrument development: challenges and innovative approaches' (2003) 14 *Contemporary Nurse* 281. <https://doi.org/10.5172/conu.14.3.281>.
- Messick S 'Validity' in RL Linn (ed) *Educational measurement* (1989).
- Mohajan HK 'Two criteria for good measurements in research: validity and reliability' (2017) 17 *Annals of Spiru Haret University* 1. <https://doi.org/10.26458/1746>.
- ODI Toolkit 'Research tools: focus group discussion' <https://odi.org/en/publications/research-tools-focus-group-discussion/> (accessed 1 September 2021).
- Onwuegbuzie AJ & Leech NL 'Linking research questions to mixed methods data analysis procedure' (2006) 11 *The Qualitative Report* 479. <https://doi.org/10.46743/2160-3715/2006.1663>.
- QuestionPro 'Snowball sampling: definition, method, advantages and disadvantages' <https://www.questionpro.com/blog/snowball-sampling/#:~:text=Snowball%20sampling%20or%20chain-referral%20sampling%20is%20defined%20as,to%20recruit%20samples%20required%20for%20a%20research%20study> (accessed 16 February, 2022).
- Ranjit K *Research methodology: a step-by-step guide for beginners* (2005).
- Roberts P 'Planning and running a focus group' (1997) 4 *Nurse Researcher* 79.
- RZF Costa et al. 'Content validity, reliability and construct validity of a checklist for dive roll evaluation' <https://www.scielo.br/j/jpe/a/jmdM9ZQ36fdbkskmZ3J7R4P/?lang=en> (accessed 6 October 2021).



Sale JEM et al. 'Revisiting the quantitative – qualitative debate: implications for mixed methods research' (2002) 36 *Quality and Quantity* 46. <https://doi.org/10.1023/A:1014301607592>.

Saunders M et al. Research methods for business students (2007).

Saunders MN et al. Research methods for business students (1997).

Schurink W et al. 'Qualitative data analysis and interpretation' in De Vos AS et al. (eds) Research at grass roots for the social sciences and human service professions (2011) 397.

Schwardt TA The SAGE dictionary of qualitative inquiry (2007).

Stydom H 'The pilot study' in De Vos (ed) Research at grassroots: for social sciences and human sciences professions (2002).

Tyabashe B 'Assessing the relationship between food insecurity, the child support grant and child care arrangements' Masters Dissertation, The University of Western Cape, 2019.

University of Pretoria 'Research data management policy' [https://www.up.ac.za/media/shared/12/ZP\\_Files/research-data-management-policy\\_august-2018.zp161094.pdf](https://www.up.ac.za/media/shared/12/ZP_Files/research-data-management-policy_august-2018.zp161094.pdf) (accessed 10 August 2022).

Wilson S & MacLean R Research methods and data analysis for psychology (2011).

## Data analysis, presentation, and interpretation of results

African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/ LEG/67/3/Rev.5 (1981) (entered into force on 21 October 1986).

American Convention for the Protection of Human Rights, OAS TS No 36 at 1 OAS Doc OEA/Ser L/V/II 23 Doc 21 rev 6 (entered into force on 8 July 1978).

Amuyunzu-Nyamongo M 'The social and cultural aspects of mental health in African societies' (2013) 63 *Commonwealth Health Partnerships* 62.

Ashagre A 'Access to justice for PWDs in Civil Proceedings before the Federal Courts of Ethiopia: the law and practice' (2020) 14 *Mizan Law Review* 25.

Aylett A 'Participatory planning, justice, and climate change in Durban, South Africa' (2000) 42 *Environment and Planning* 103. <https://doi.org/10.1068/a4274>.

Ball JD & Kidd Am 'The relation of law and medicine in mental disease' (1920) 9 *California Law Review* 14.

Bamberger JA 'Confirming the constitutional right of meaningful access to the courts in non-criminal cases in Washington State' (2005) 4 *Seattle Journal for Social Justice* 383.

BenZeev N et al. 'The right of people with disabilities to legal justice: a view from Israel' in Bryen DN & Bornam J (eds) Stop violence against people with disabilities! An international resource (2014) 127.

Bowden P et al. 'Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation?' (2014) 37 *Melbourne Law Review* 539.

Cashmore J *The use of closed-circuit television for child witnesses in the ACT* (Children's Evidence Research Paper 1, Australian Law Reform Commission, 1992) (ALRC RP1).

Chauke v The State (2015) ZASCA 181.

Clarke N et al. 'Going to pot: nick's journey through the criminal justice system' in Flynn E et al. (eds) Global perspectives on legal capacity reform our voices, our stories (2020) 30.

Combrinck H 'Rather bad than mad? A reconsideration of criminal incapacity and psychosocial disability in South African law in light of the Convention on the Rights of Persons with Disabilities' (2018) 6 *African Disability Rights Yearbook* 23. <https://doi.org/10.29053/2413-7138/2018/v6a1>.

CRPD Committee 'Concluding observations on the initial report of Oman' CRPD/C/ OMN/CO/1 (17 April 2018).

CRPD Committee 'Concluding observations on the initial report of Senegal' CRPD/C/SEN/CO/1 (13 May 2019).

CRPD Committee 'Concluding observations on the initial report of the former Yugoslav Republic of Macedonia' UN Doc CRPD/C/MKD/CO/1 (29 October 2018).

CRPD Committee 'Concluding observations on the initial report of Vanuatu' CRPD/C/VUT/CO/1 (13 May 2019).

Disability Council of NSW A question of justice: access to participation for people with disabilities in contact with the justice system Sydney: Disability Council of NSW (2003).

Edwards MA 'The alignment of law and norms: of mirrors, bulwarks, and pressure valves' (2015) 10 *Faculty Scholarship* 23.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS (entered into force on 3/09/1953).

Farole DJ et al. 'Applying problem-solving principles in mainstream courts: lessons for state courts' (2005) 26 *The Justice System Journal* 202.

Flynn E Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities (2016).

Flynn E et al. *Final report: access to justice of persons with disabilities* OHCR (2019).

Foucault M 'Omnes et singulatim: towards a criticism of "political reason"' (1981) 2 *The Tanner Lectures on Human Values* 254.

Fourie E 'Constitutional values, therapeutic jurisprudence and legal education in South Africa: shaping our legal order' (2016) 19 *PER/PELJ* 5. <https://doi.org/10.17159/1727-3781/2016/v19i0a732>.

Freer JRR 'The tripartite intervention: breaking down attitudinal barriers in education' (2021) *Journal of Disability Studies in Education* 10. <https://doi.org/10.1163/25888803-bja10006>.

Gould K 'And equal participation for all . . . The Americans with Disabilities Act in the courtroom' (1993–1994) 8 *Journal of Law and Health* 139.

Griffiths SL et al. 'Vulnerability to psychosocial disability in psychosis' (2019) 28 *Epidemiology and Psychiatric Sciences* 140. <https://doi.org/10.1017/S2045796018000495>.

Human Rights Committee 'General Comment No 32 (2007) on the right to equality before courts and tribunals and to a fair trial'.

Human Rights Council 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth and persons with disabilities: study by the expert mechanism on the rights of indigenous peoples' (7 August 2014) A/ HRC/27/65.

Human Rights Council *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities* Report of the Office of the High Commissioner for Human Rights (2017).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR).

James N 'Law and power: ten lessons from Foucault' (2018) 30 *Bond Law Review* 39. <https://doi.org/10.53300/001c.5658>.

Janine B & Isabel G 'Taking the stand: access to justice for witnesses with mental disabilities in sexual assault cases' (2012) 50 *Osgoode Hall Law Journal* 29. <https://doi.org/10.60082/2817-5069.1031>.

Jonathan D & Luran D 'Non-verbal victims in the adversarial criminal process: communication, competency, and credibility' <https://shura.shu.ac.uk/18482/3/Doak-Non-verbalVictimsintheAdversarialCriminalProcess%28AM%29.pdf> (accessed 21 August 2021).

Karras M et al. On the edge of justice: the legal needs of people with a mental illness in NSW Sydney: Law and Justice Foundation of NSW (2006).

Kennedy L & Tait D Court perspectives: architecture, psychology and Western Australian Law Reform Western Australian Law Reform Commission (1999).

Kevin Kiprotich Amos alias Rotich v Republic (2016) eKLR.

Leiter B 'American legal realism' in Golding MP & Edmundson WA (eds) *Blackwell's guide to the philosophy of law and legal theory* (2004).

Leo v Australia (2019) CRPD/C/22/D/17/2013.

Liebreich v Germany (2009) ECtHR.

Mbote PK & Akech M Kenya: justice sector and the rule of law (2011).

Miller D 'Dementia and competency in United States courtrooms: a case law review' [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj_etds) (accessed 10 September 2021).

New South Wales Law Reform Commission *People with an intellectual disability and the criminal justice system* Sydney (1996).

Sahu KK & Sahu S 'Attitudinal barrier experienced by people with disabilities' (2015) 1 *Disability Studies* 1.

Stanford v UK (2002) ECtHR.

State v Ortiz-Abrego (2017) 387 P3d 638.

T v United Kingdom and V v United Kingdom (2000) ECtHR.

United Nations Human Rights Council 'Thematic study by the United Nations High Commission for Human Rights on enhancing awareness and understanding on the Convention on the rights of persons with disabilities' <https://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf> (accessed 19 March 2021).

Van Hout MC & Wessels J 'Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa' (2021) 2 *Forensic Science International: Mind and Law* 3.

Vasileiou K et al. 'Characterising and justifying sample size sufficiency in interview-based studies: systematic analysis of qualitative health research over a 15-year period' (2018) 18 *BMC Medical Research Methodology* 150. <https://doi.org/10.1186/s12874-018-0594-7>.

Wendy S et al. 'From criminalisation to individual choice: policy responses to changing constructions of intellectual disability in Western Australia' (2019) 21 *Scandinavian Journal of Disability Research* 102. <https://doi.org/10.16993/sjdr.571>.

White R et al. 'Court accommodations for persons with severe communication disabilities: a legal scoping review' (2021) 27 *Psychology, Public Policy and Law* 420. <https://doi.org/10.1037/law0000289>.

Wise PH 'Emerging technologies and their impact on disability. The future of children' [https://www.researchgate.net/publication/224886619\\_Wise\\_P\\_H\\_Emerging\\_technologies\\_and\\_their\\_impact\\_on\\_disability\\_Future\\_Child\\_22\\_169-191](https://www.researchgate.net/publication/224886619_Wise_P_H_Emerging_technologies_and_their_impact_on_disability_Future_Child_22_169-191) (accessed 23 February, 2022).

Wood ME et al. 'Reasonable accommodations for meeting the unique needs of defendants with intellectual disability' (2019) 47 *Journal of American Academy Psychiatry Law* 314. <https://doi.org/10.29158/JAAPL.003855-19>.

## Comparative analysis of reform approaches to the decolonisation of unfitness declaration laws in selected jurisdictions

Agnes F 'Law, ideology and female sexuality: gender neutrality in rape law' (2002) 37/9 *Economic and Political Weekly* 845. <https://doi.org/10.2307/4411809>.

Akbar AA 'Toward a radical imagination of law' (2018) 93 *New York University Law Review* 405. <https://doi.org/10.2139/ssrn.3061917>.

Akbar AA 'An abolitionist horizon for (police) reform' (2020) 108 *California Law Review* 1787. <https://doi.org/10.2139/ssrn.3670952>.

Australian Capital Territory 'New South Wales, Victoria, South Australia, Tasmania and Northern Territory. Crimes Act 1900 (ACT)'.

Australian Human Rights Commission 'Submission No 6 to the Senate Community Affairs References Committee, Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia' March 2016.

Australian Law Reform Commission Equality Capacity and disability in Commonwealth Laws (Report 124 of 2014).

Baldry E 'Disability at the margins: limits of the law' (2014) 23 *Griffith Law Review* 357, 370-388. <https://doi.org/10.1080/10383441.2014.1000218>.

Barsky BA & Stein MA 'The United Nations Convention on the Rights of Persons with Disabilities, neuroscience, and criminal legal capacity' (2023) 10/1 *Journal of Law and the Biosciences* 1. <https://doi.org/10.1093/jlb/lsad010>.

Bartlett P 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 25/5 *Modern Law Review* 752. <https://doi.org/10.1016/j.mppsy.2009.09.012>.

Bell M 'Abolition: a new paradigm for reform' (2021) 46 *Law and Social Inquiry* 42. <https://doi.org/10.1017/lsi.2020.21>.

Bennet T 'An integrated model for criminal responsibility in action: how Swedish criminal law operates without an insanity defence' (2024) 35 *Criminal Law Forum* 276. <https://doi.org/10.1007/s10609-024-09484-0>.

Blackstone W Commentaries on the laws of England, Volume 4 (1850).

Blake GA et al. 'Special considerations to the assessment of fitness to stand trial in Australia' (2023) 30/5 *Psychiatry, Psychology and Law* 682. <https://doi.org/10.1080/13218719.2022.2100839>.

Broderic A The long and winding road to equality and inclusion for persons with disabilities: the United Nations Convention on the Rights of Persons with disabilities (2015).

Brown P 'Modernising fitness to plead' (2019a) 59 *Medical Science Law* 131. <https://doi.org/10.1177/0025802419863937>.

Brown P 'Unfitness to plead in England and Wales: historical development and contemporary dilemmas' (2019b) 59 *Medical Science Law* 187. <https://doi.org/10.1177/0025802419856761>.

Byrd R "'Punishment's twin": theorizing prisoner reentry for a politics of abolition' (2016) 43/1 *Social Justice* 1.

C v Sevenoaks Youth Court (2010) 1 All ER 735.

Commonwealth of Australia (CoA) Royal commission into violence, abuse, neglect and exploitation of people with disability. Final report – Volume 8, Criminal Justice and People with Disability (September 29 2023).

Costa Rica's 2016 Law No. 9379.

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC).

Crimes Act 1914 (Cth).

Criminal Code (NT) s 43C; Criminal Code (WA).

Criminal Code 2002 (ACT).

Criminal Code Act 1983 (NT).

Criminal Justice (Mental Impairment) Act 1999 (Tas).

Criminal Law (Mental Impairment) Act 2023.

Criminal Law Consolidation Act 1935 (SA).

Criminal Law Consolidation Act 1935 (SA).

Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ).

Criminal Procedure Act 51 of 1977.

Criminal Procedure Amendment Act 4 of 2017.

CRPD Committee General Comment 1: article 12: equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014.

CRPD Committee Guidelines on article 14 of the convention on the rights of persons with disabilities: the right to liberty and security of persons with disabilities UNCRPD (2015).

CRPD Committee 2014e. Concluding observations on the initial report of New Zealand, 31 October CRPD/C/NZL/CO/1.

CRPD Committee Concluding Observations on the Initial Report of Australia, 10th sess, 118th mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013).

CRPD Committee Concluding observations on the initial report of Denmark, 12th sess, 169th mtg, UN Doc CRPD/C/DNK/CO/1 (30 October 2014).

CRPD Committee Concluding observations on the initial report of Ecuador, CRPD/C/ECU/CO/01 (27 October 2014).

CRPD Committee Concluding observations on the initial report of the Republic of Korea, 12th sess, UN Doc CRPD/C/KOR/CO/1 (29 October 2014).

Darjee R & Marsh T 'Arguments for the abolition of the defence of mental impairment' (2023) 30/1 *Psychiatry, Psychology and Law* 89. <https://doi.org/10.1080/13218719.2022.2112103>.

Davidson L 'From pipe dream to reality: a practical legal approach towards the global abolition of psychiatric coercion' in MA Stein et al. (eds) *Mental health, legal capacity, and human rights* (2021).

Dawson J & Szmukler G 'Fusion of mental health and incapacity legislation' (2006) 188 *British Journal of Psychiatry* 504. <https://doi.org/10.1192/bjp.188.6.504>.

Dawson J & Szmukler G 'The "fusion law" proposals and the CRPD' in MA Stein et al. (eds) *Mental health, legal capacity, and human rights* (2021). <https://doi.org/10.1017/9781108979016.009>.

De Vos NO v Minister of Justice and Constitutional Development (2015) SACR 217 (CC).

Degener T 'Disability in a human rights context' (2016) 5 *Laws* 35. <https://doi.org/10.3390/laws5030035>.

Department of Health 'Social services and public safety (Northern Ireland) and Department of Justice (Northern Ireland)' Draft Mental Capacity Bill (NI) Consultation Summary Report (2015).  
 Devandas-Aguilar C 'Report of Special Rapporteur on the rights of persons with disabilities' UNDoc. A/HRC/37/56, 12 December 2017.  
 Domański M & Lackoroński B (eds) Models of Implementation of article 12 of the Convention on the Rights of Persons with Disabilities (CRPD): private and criminal law aspects (2023).  
 Dusky v United States (1960) 362 US 402; 80 S Ct, 788.  
 Eagle K & Ellis A 'The widening net of preventative detention and the unfit for trial' (2016) 90 *Australian Law Journal* 172.  
 Edgar R & Sapire H African apocalypse: the story of Nontetha Nkwenkwe, a twentieth-century south African Prophet (2000).  
 Edwards v Indiana (2008) 554 US 164.  
 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS (entered into force on 3/09/1953).  
 Faretta v California (1975) 422 US 806.  
 Federal Constitutional Court (2016).  
 Fernandes de Oliveira v Portugal (2019) ECtHR.  
 Final Report of the Independent Review of the Mental Health Act 1983 'Modernising the mental health act'.  
 GAE v Western Australia (2011) EWCA Crim 443.  
 GAE v Western Australia (2015) WADC 5.  
 German Statement on the Draft General Comment on Article 12 CRPD. 20 February 2014.  
<http://www.ohchr.org/Documents/HRBodies/CRPD/GC/FederalRepublicOfGermanyArt12.pdf> (accessed April 18, 2015).  
 Gooding P & Bennet T 'The abolition of the insanity defence in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: human rights brinksmanship or evidence it won't work?' (2018) 21 *New Criminal Law Review* 141.  
 Gooding P & Flynn E 'Querying the call to introduce mental capacity testing to mental health law: does the doctrine of necessity provide an alternative?' (2015) 4 *Laws* 266.  
<https://doi.org/10.3390/laws4020245>.  
 Gooding P & O'Mahony C 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122.  
 Gooding P et al. 'Supporting accused persons with cognitive disabilities to participate in criminal proceedings in Australia: avoiding the pitfalls of unfitness to stand trial laws' (2017a) 35/2 *Law in Context A Socio-Legal Journal* 73.  
 Gooding P et al. 'Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: human rights challenges and proposals for change' (2017b) 40 *Melbourne University Law Review* 863.  
 Grisso T Evaluating competencies: forensic assessments and instruments (2003).  
 Guidelines on the right to liberty and security of persons with disabilities, adopted September 2015.  
 Hale M The history of the pleas of the Crown (1736).  
 Harmon L 'Falling off the vine: legal fictions and the doctrine of substituted judgment' (1990) 100 *Yale Law Journal* 1.  
 Heffernan v The Queen (2005) 194 FLR 370.  
 Human Rights Committee, General comment 35: article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014).  
 Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Cognitive Disabilities) (2005).  
 Julie Ann Nicholson and Others v Timothy Knaggs and Others (2009) VSC 64.  
 Juma PO & Ngweni C 'Decolonizing African mental health laws: a case for Kenya' (2024) 68 *Journal of African Law* 73. <https://doi.org/10.1017/S0021855323000311>.  
 Kanter A The development of disability rights under international law: from charity to human rights (2015).  
 Karakatsanis A 'The punishment bureaucracy: how to think about criminal justice reform' (2019) 128 *Yale Law Journal Forum* 848.

Kessi S et al. 'Decolonizing African studies' (2020) 12 *Critical African Studies* 271. <https://doi.org/10.1080/21681392.2020.1813413>.

Kronick K 'Intellectual disability, mitigation and punishment' (2024) 65 *Boston College Law Review* 1618.

Law Commission Unfitness to plead volume 1: report (Report No 364, January 2016).

Law Commission Unfitness to plead, vol 2: draft Legislation (Law Com No 364, London 2016).

Law Commission (England and Wales) Unfitness to plead (Report No 364, 2016, vol 1, Law Commission Report).

Law Commission of England and Wales Unfitness to plead: an issues paper (2014).

Law Commission of Ontario Legal capacity decision making and guardianship (Discussion Paper, 2014).

Laws of Malawi Chapter 34.02, Mental Treatment Act 2005.

Mackay R & Brookbanks WJ (eds) *Fitness to plead: international and comparative perspectives* (2018).

Maher G 'Unfitness for trial in Scots law' in Mackay R & Brookbanks WJ (eds) *Fitness to plead: international and comparative perspectives* (2018).

Marcantonio v R (2016) EWCA Crim 14.

Martin W et al. *Achieving CRPD compliance: is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?* (Report, Essex Autonomy Project, 22 September 2014).

Mental Capacity Act (Northern Ireland) 2016 (NI Act).

Mental Health (Forensic Provisions) Act 1900 (NSW).

Mental Health (Forensic Provisions) Act 1900 (NSW).

Mental Health Act 2007 (NSW).

Mental Health Act 2013 (Tas).

Mental Health Act 2014 (Vic).

Mental Health Act 2014 (WA).

Mental Health Act 2015 (ACT).

Mental Health Act 2015 (ACT).

Mental Health Act 2016 (Qld).

Mental Health Amendment (Statutory Review) Act 2014 (NSW).

Mwewa, Kasote and Katontoka v The Attorney General and Zambia Agency for Persons with Disabilities (2017) ZMHC 77.

Neuman GL 'Divergent human rights approaches to capacity and consent' in MA Stein et al. (eds) *Mental health, legal capacity, and human rights* (2021) 56.

Nilsson A *Compulsory mental health interventions and the CRPD: minding equality* Hart Publishing (2021).

Office of the Chief Psychiatrist 'Review of the mental health act 2009' (Report, Department of Health and Aging (SA), 23 May 2014).

Owusu-Bempah A & Wortley N 'Unfit to plead or unfit to testify? R v Orr [2016] EWCA Crim 889' (2017) 80/6 *The Journal of Criminal Law* 391. <https://doi.org/10.1177/0022018316670081>.

Peru's Legislative Decree 1384.

Purohit and Moore v Gambia (2003) 'African Commission on Human and Peoples' Rights'.

R v Cain (2010) QCA 373.

R v Fisher (2011) 210 A Crim R 199.

R v Haines (2013) NSWSC 1609.

R v JG (2014) ACTSC 120.

R v Mathews (2013) QCA 203.

R v Muller (2013) ACTSC 154.

R v Rivkin (2004) 59 NSWLR 284.

Rooman v Belgium (2019) ECtHR.

Series L & Nilsson A 'Article 12 CRPD: equal recognition before the law' in I Bantekas et al. (eds) *The UN convention on the rights of persons with disabilities* (2018) 339.

Slobogin C 'Eliminating mental disability as a legal criterion in deprivation of liberty cases: the impact of the Convention on the Rights of Persons with Disability on the insanity defense, civil commitment, and competency law' (2015) 40 *International Journal of Law & Psychiatry* 36. <https://doi.org/10.1016/j.ijlp.2015.04.011>.

Stanford v UK (1994) ECtHR.

Szmukler G 'Offenders with a mental impairment under a 'fusion law': nondiscrimination, treatment, public protection' (2020) 1 *International Journal of Mental Health and Capacity Law* 41. <https://doi.org/10.19164/ijmhcl.26.1093>.

UN General Assembly 'Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly' 24 January 2007 UN Doc A/RES/61/106 (2007) (CRPD) adopted on 13 December 2006 (entered into force on 3 May 2008).

United Nations High Commissioner for Human Rights (UNHCHR) 'Thematic study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities' (47, U.N. Doc. A/HRC/10/48 (26 January 2009).

Victoria, Parliamentary Debates, Legislative Assembly, 12 March 2014, 689–691 (Ted Baillieu).

Victoria, Parliamentary Debates, Legislative Assembly, 19 September 1997, 185 (Jan Wade, Attorney-General).

Victorian Law Reform Commission Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Report 28 of 2014).

Weller P 'Legal capacity and access to justice: the right to participation in the CRPD' (2016) 5(1) *Laws* 13. <https://doi.org/10.3390/laws5010013>.

Westbrook AH "Mental health legislation and involuntary commitment in Nigeria: a call for reform" (2011) 10 *Washington University Global Studies Law Review* 397.

<https://doi.org/10.5897/IJPC2015.0317>.

Williams JA 'Reassessing gender neutrality' (2020) 54/1 *Law and Society Review* 23.

<https://doi.org/10.1111/lasr.124>.

## Summary conclusion, and recommendations

African Policing Civilian Oversight Forum (APCOF) and the National Gender and Equality Commission (NGEC) *Pre-trial detention for persons with disabilities in correctional institutions* African Policing Civilian Oversight Forum (2017).

Anders A 'Foucault and "the right to life": from technologies of normalisation to societies of control' <https://dsq-sds.org/article/view/3340/3268> (accessed 8 August 2021).

Article 48 Initiative (A48), Arthur's Dream Autism Trust (ADAT) and Southern Africa Litigation Centre 'An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi, Kenya' September 2021.

Brookbanks W 'Therapeutic jurisprudence: conceiving an ethical framework' (2001) 8 *Journal of Law & Medicine* 329.

Brown P 'Unfitness to plead in England and Wales: historical development and contemporary dilemmas' (2019) 59 *Medicine, Science and the Law* 197.

<https://doi.org/10.1177/0025802419856761>.

Criminal Procedure Code, Chapter 75 of 1930.

CRPD Committee 'Report of the Committee on the Rights of Persons with Disabilities on its twelfth session, 12th sess' UN Doc CRPD/C/12/2 (5 November 2014) annex IV 15.

DARU 'Understanding models of disability' <https://www.daru.org.au/wp/wp-content/uploads/2019/03/Human-rights-info-sheet-for-website.pdf> (accessed 13 August 2021).

Dirth TP & Adams GA 'Decolonial theory and disability studies: on the modernity/ coloniality of ability' (2019) 7 *Journal of Social and Political Psychology* 266.

<https://doi.org/10.5964/jssp.v7i1.762>.

Dubois M 'The governance of the third world: a Foucauldian perspective on power relations in development' (1991) 16 *Alternatives: Global, Local, Political* 7.

Edwards MA 'The alignment of law and norms: of mirrors, bulwarks, and pressure valves' (2015) 10 *Faculty Scholarship* 22.

Foucault M 'The subject and power' in Rainbow P & Rose N (eds) *The essential Foucault* (1994).

Freer JRR 'The tripartite intervention: breaking down attitudinal barriers in education' (2021) *Journal of Disability Studies in Education* 2. <https://doi.org/10.1163/25888803-bja10006>

Gooding P & Bennet T 'The abolition of the insanity defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: human rights brinksmanship or evidence it does not work?' (2017) 21/1 *New Criminal Law Review: An International and Interdisciplinary Journal* 6. <https://doi.org/10.1525/nclr.2018.21.1.141>.

Gooding P et al. 'Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: human rights challenges and proposals for change' (2017) 40 *Melbourne University Law Review* 819.

Hussan Hussein Yusuf v Republic (2016) eKLR.

Juma P 'Right to self-representation for people with mental disabilities in Kenya's courts' (2019) 7 *African Disability Rights Yearbook* 86. <https://doi.org/10.29053/2413-7138/2019/v7a4>.

Kamundia E 'Choice, support and inclusion: implementing article 19 of the CRPD in Kenya' (2013) 1 *Africa Disability Rights Yearbook* 55.

Kevin Kiprotich Amos alias Rotich v Republic (2016) eKLR.

McNamara DM 'The insanity defence, indefinite detention and the UN Convention on the Rights of Persons with Disabilities'

[https://www.researchgate.net/publication/341264966\\_The\\_Insanity\\_Defence\\_Indefinite\\_Detention\\_and\\_the\\_UN\\_Convention\\_on\\_the\\_Rights\\_of\\_Persons\\_with\\_Disabilities](https://www.researchgate.net/publication/341264966_The_Insanity_Defence_Indefinite_Detention_and_the_UN_Convention_on_the_Rights_of_Persons_with_Disabilities)(accessed 20 August 2021).

McRuer R 'Composing bodies; or, de-composition: queer theory, disability studies, and alternative corporealities' (2004) 24 *JAC* 57.

Mégret F 'The disabilities convention: towards a holistic concept of rights' (2008) 12 *International Journal of Human Rights* 270. <https://doi.org/10.1080/13642980801954363>.

Miller D 'Dementia and competency in United States courtrooms: a case law review' [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1157&context=jj_etds) (accessed 10 September 2021) 13.

Ndlovu S 'Obstacles and opportunities for students with disabilities in entering and in preparation to graduate into professions in higher learning: the case of a university in South Africa' PhD Thesis, University of South Africa, 2016.

Nyawa Mwajowa v Republic (2016) eKLR.

Perlin M 'God said to Abraham/kill me a son: why the insanity defense and the incompetency status are compatible with and required by the Convention on the Rights of Persons with Disabilities and basic principles of therapeutic jurisprudence' (2017) 54 *Criminal Law Review* 480. <https://doi.org/10.2139/ssrn.2683480>.

Raha S & Sengupta S 'Rights of women with disabilities under Indian legislations' (2018) 14 *Socio-Legal Review* 196. <https://doi.org/10.55496/LVON2936>.

*Republic v SE* (2017) eKLR.

Weller P 'Legal capacity and access to justice: the right to participation in the CRPD' (2026) 5 *Laws* 18. <https://doi.org/10.3390/laws5010013>.

Wolman A 'Abortion in Korea: a human rights perspective on the current debate over enforcement of the laws prohibiting abortion' (2010) 9 *Journal of International Business & Law* 163.