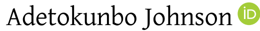
Politics & Gender (2024), **20**: 3, 751–756
doi:10.1017/S1743923X24000229

CRITICAL PERSPECTIVES ARTICLE

Construing "Disability" into Article 14(2)(C) of the Maputo Protocol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(Received 31 May 2024; accepted 12 June 2024)
Keywords: Africa; Women with disabilities; Intersectionality; Maputo Protocol; Sexual Reproductive Health Rights (SRHR); Medical abortions

This article analyses the possibility of an intersectional understanding of "disability" in relation to Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Adopted in July 2003 and enforced since November 2005, the Maputo Protocol is considered a ground-breaking international human rights instrument (Johnson 2023, 329). It is the first treaty to comprehensively protect the reproductive rights of African women, including the contentious issue of abortion (Maputo Protocol 2003, Article 14(2)(c); Banda 2006, 82).

Given restrictive African abortion laws, Article 14(2)(c) of the Maputo Protocol is pioneering because it upholds women's reproductive autonomy by allowing for medical abortions in specific situations (Banda 2006,.82). These situations may arise from sexual assault, rape, incest, and threats to the mother's physical or mental health or to the life of the mother or fetus (Maputo Protocol; 2003; Article 14(2)(c)). By enshrining this provision, the Maputo Protocol obligates the 44 African states that have ratified it to legalize abortion, thereby decriminalizing it (AU 2023). This influential provision has played a significant role in catalyzing abortion legislation reforms throughout Africa, with reported decline in the incidences of unsafe and unlawful abortions on the continent (Ngwena 2010, 164-165). However, the implementation of this abortion provision creates tensions relating to the intersection between the sexuality of women with disabilities and their reproductive rights in Africa. These tensions prompt a crucial question: Does Article 14(2)(c) truly ensure reproductive choice and autonomy for African women with disabilities?

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https://doi.org/10.1017/S1743923X24000229 Published online by Cambridge University Press

Women with Disabilities and the Intersectional Dilemma of Abortion Discourse in Africa

For a long time, women around the world have struggled to assert their reproductive autonomy, including childbearing decisions (Budoo and Parsad Gunputh 2014,108). Like their counterparts without disabilities, women with disabilities in Africa encounter numerous barriers when trying to access sexual and reproductive services, including safe and legal abortions (Mavuso and Pranitha Maharaj 2015, 86). However, unlike African women without disabilities, women with disabilities also face unique challenges associated with their intersecting identities of gender and disability.

For instance, women with disabilities frequently face societal denial of their reproductive autonomy based on prejudices and stereotypes surrounding their disabilities. These stereotypes are evident where, although African women without disabilities are viewed as sexual objects, women with disabilities are considered "asexual," "hypersexual," or "unfit mothers" (Grobbelaar-du-Plessis 2007,.406). These prevailing disability related stereotypes and stigma explain the distinct challenges women with disabilities encounter in obtaining sexual and reproductive health information and services.

Available evidence from African contexts, in South Africa for instance, indicates that health care providers frequently deny women with disabilities access to essential contraceptive methods, family planning resources, and safe abortion services due to the disbelief that women with disabilities can have sexual relationships (Mavuso and Pranitha Maharaj 2015, 86). Consequently, women with disabilities are unable to protect themselves from unintended pregnancies and the potential risks of infectious diseases, such as HIV/AIDS and sexually transmitted infections.

For women with disabilities, abortion often takes the form of legally sanctioned, non-consensual coerced treatment and serves as a mechanism for exerting control over their bodily autonomy and sexuality (United Nations General Assembly 2017; CRPD Committee's concluding observations to Kenya 2015, para 33-34; and South Africa 2018, para. 29, 32-33). These procedures are mostly "coerced" for African women, particularly those with intellectual disabilities, due to prevailing stereotypes about their sexuality, the severity of their impairments, and stigmatization surrounding the pregnancies of women with disabilities (Ortoleva and Lewis 2012, 41; Haihambo and Lightfoot 2010, 6.). As a result, decisions regarding terminating pregnancies are made by others without seeking their explicit consent (Kanter and Villarreal 2018, 129-130).

Evidence from Kanter and Villareal Lopez (2018) shows how medical practitioners, supported by parents and caregivers doubtful about the reproductive capacity and autonomy of women and young girls with disabilities, often take charge of reproductive decisions and choices on their behalf. This includes making determinations regarding the use of contraceptives and the seeking of abortion services. In such instances, these individuals consider women, especially those with intellectual disabilities, incapable of comprehending appropriate sexual behavior, engaging in healthy sexual relationships, or making rational decisions regarding sexual and reproductive matters.

https://doi.org/10.1017/S1743923X24000229 Published online by Cambridge University Press

Accordingly, African women with disabilities frequently face the imposition of legally sanctioned forced treatments, which encompass the obligatory use of contraceptives, coerced abortions, and sterilizations (Johnson and van Marle 2023, 401-403). These actions are purportedly justified as being in the women's "best interests" and as a means of safeguarding them from the perceived burdens associated with menstruation, pregnancy, and childbirth (United Nations General Assembly 2017: United Nations General Assembly 2018).

Thus, women with disabilities often find themselves caught in an intersectional dilemma, where tensions arise between their rights as individuals with disabilities and their rights to reproductive autonomy as women. Society tends to erase their womanhood based on their disabilities, viewing them as unfit for motherhood and lacking reproductive capacity and choice. Consequently, their reproductive rights as women are frequently sidelined. This occurs despite women with disabilities simultaneously striving for recognition as women, with acknowledged sexuality and reproductive capabilities, while also seeking liberation from gender stereotypes that restrict their agency (Lloyds 2001,718).

An Intersectional Reading of "Disability" in the Maputo Protocol

Article 23 of the Maputo Protocol focuses on safeguarding the rights of women with disabilities in Africa. This provision is praised for its clear and direct acknowledgement of the rights of women and girls with disabilities. Bond (2021, 82) describes how by specifically mentioning and protecting the rights of women with disabilities, the Maputo Protocol recognizes the intersectional discrimination faced by women with disabilities because of the intersecting and mutually constitutive nature of their gender and disability identities.

However, Murungi and Durojaye (2015, 10) have raised concerns about the (in) adequacy of Article 23 to fully address the distinct sexual and reproductive needs of women with disabilities comparable to the comprehensive provisions outlined in Article 14. This concern stems from Article 23's protective stance, which does not adequately acknowledge, respond to, or address the unique challenges encountered by women with disabilities in exercising their sexual and reproductive rights. As an example, the authors draw attention to the prevalent denial of contraceptive and abortion services in Africa, which undermines the ability of women with disabilities to fully enjoy their sexual rights.

Following from the inadequacies of Article 23 to fully address the distinct sexual and reproductive needs of women with disabilities, the question is: Does Article 14(2)(c) on women's health and reproductive rights truly ensure reproductive choice and autonomy for African women with disabilities? Scholars, including Rebouche (2009), Viljoen (2009), and Murungi and Durojaye (2015), have widely praised the explicit protection of women's sexual and reproductive rights afforded by Article 14 of the Maputo Protocol. However, Article 14(2)(c) has implications for African women with disabilities, in at least three ways.

First, it "authorizes" medical abortion. The African Commission on Human and Peoples' Rights (African Commission) adopted General Comment (GC) 2 in 2014 to provide clarification on the obligations outlined in the article and to

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extend the sexual and reproductive protections to include women with disabilities. Despite not explicitly mentioning intersectionality, the African Commission implicitly recognizes the ways in which disabled women's enjoyment of their sexual and reproductive health rights can be impacted by intersecting identities of gender and disability.

However, as Murungi and Durojaye (2015, 10) have rightly pointed out, the merely persuasive (as opposed to binding) nature of the GC and its limited focus on the unique challenges faced by women regarding their sexual and reproductive health rights limits its potential in addressing their intersectional issues effectively. Nonetheless, by prohibiting non-consensual and forced medical or scientific experiments under Article 4, the Maputo Protocol does acknowledge the multifaceted nature of the reproductive rights of women with disabilities while striking a delicate balance in addressing abortion rights.

Second, the language used in Article 14(2)(c) imposes restrictions on medical abortions based on specific grounds. This restrictive language creates the perception that abortions are only acceptable if they fall within the listed grounds, rendering abortions on any ground that is not listed as unacceptable. Such provisions reinforce motherhood stereotypes by seemingly accepting medical abortions in cases of undesired or stigmatized motherhood, such as when women are victims of sexual assault, incest, or rape (Rebouche 2009, 103-105, 108). However, this unintended consequence could potentially permit selective or forced abortions for women with disabilities, who have already been labelled and stigmatized as unfit or undesired mothers.

Third, Article 14(2)(c) allows medical abortion in cases where the woman's physical or mental health is at risk, or when the pregnancy becomes a threat to the life of the mother or the fetus. In the context of the listed grounds for abortion, the allowance for termination based on fetal impairment is the most disputed. The African Commission, in its GC 2 of 2014, clarifies this clause by stating that it encompasses situations where the fetus possesses "deformities that are incompatible with survival" (African Commission GC 2 2014, para.40).

The Committee on the Rights with Persons with Disabilities (The CRPD Committee) has expressed reservations to Article 14(2)(c)'s approach (Women Enabled International 2020, 17). The main concern is the potential reinforcement of disability-related stigma and discrimination through the inclusion of fetal impairment as a ground for abortion. The CRPD Committee rightly argues that this approach may promote disability-selective abortions, thereby perpetuating the negative perception that lives with disabilities are devoid of value and unworthy of preservation. Moreover, the language used to describe the potential risks to a woman's mental and physical health perpetuates the notion that giving birth to a child with disabilities poses significant burdens and health risks to the mother. This is particularly problematic in African countries where women are often disproportionately responsible for the care of individuals with disabilities. Finally, the reliance on fatal fetal impairment as a basis for allowing abortions is concerning in African countries where the pregnancies of women with disabilities are often erroneously and stereotypically viewed as endangered. It also creates ambiguity and the potential for bias implementation in African

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countries, particularly in situations where prenatal and genetic testing is either prohibitively expensive, underdeveloped, or unavailable.

Conclusion

The ground-breaking nature of Article 14(2)(c) lies in its recognition and support of African women's reproductive autonomy, enabling them to make informed decisions about their own fertility and family planning choices. However, Article 14(2)(c) hold significant implications in perpetuating prevalent stigma and discrimination against women with disabilities, due to key assumptions and overnights that have a potentially negative impact on women with disabilities. The effectiveness of the Maputo Protocol on ensuring the sexual and reproductive rights of women with disabilities will thus depend on a deliberate and consistent progressive judicial intersectional interpretation of the Protocol across Africa.

References

African Commission on Human and Peoples' Rights. (2014) General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Banda, Fareda. 2006. "Blazing a trail: The African Protocol on Women's Rights comes into force." *Journal of African Law* 50 (1): 72–84.

Bond, Johanna. 2021. *Global Intersectionality and Contemporary Human Rights*. Oxford University Press

Budoo, Ashwanee and Gunputh, Rajendra Parsad. 2014. "Termination of Pregnancy of Persons with Mental Disabilities on Medical Advice: A Case Study of South Africa." *African Disability Rights Yearbook* 2:101–20.

Grobbelaar-du-Plessis, IIze. 2007. "African Women with Disabilities: The Victims of Multi-Layered Discrimination." *South African Public Law Journal* 22: 405–21.

Haihambo, Cynthy. and Lightfoot, Elizabeth. 2010. "Cultural Beliefs regarding People with Disabilities in Namibia: Implications for the Inclusion of People with Disabilities." *International Journal of Special Education* 25 (3): 76–87.

Johnson, Adetokunbo. 2023. "Beyond the Universalist and Cultural Relativist Debate: Using the African Women's Protocol to Realize Gender Equality in Customary African Marriages." *African Journal of Legal Studies* 15 (3): 321–44.

Johnson, Adetokunbo and van-Marle, Karin. 2023. "Exploring Intersectional and Ethical Feminist Perspectives as a Possible Framework for Understanding Violence Against Women with Disabilities in Africa with Specific Reference to Forced Sterilization." (eds) Meyers, Stephen, McCloskey, Megan and Petri, Gabor. *The Routledge International Handbook of Disability Human Rights Hierarchies*: 398–419.

Kanter, Arlene, and Lopez, Carla Villarreal. 2018. "A Call for an End to Violence Against Women and Girls with Disabilities under International and Regional Human Rights Law." *Northeastern University Law Review* 10 (2): 583–653.

Lloyd, Margaret. 2001. "The Politics of Disability and Feminism, Discord, or Synthesis." *Sociology* 35 (3): 715–28.

Mavuso, Sibusisiwe Siphelele. and Maharaj, Pranitha. 2015. "Access to Sexual and Reproductive Health Services: Experiences and Perspectives of Persons with Disabilities in Durban, South Africa." *Agenda* 29 (2): 79–88.

https://doi.org/10.1017/S1743923X24000229 Published online by Cambridge University Press

Murungi, Nkatha and Durojaye, Ebenezer. 2015. "The Sexual and Reproductive Health Rights of Women with Disabilities in Africa: Linkages Between the CRPD and the African Women's Protocol." *African Disability Rights Yearbook* 3: 1–30.

Ngwena, Charles. 2010. "Protocol to the African Charter on the Rights of Women: Implications for Access to Abortion at the Regional Level." *International Journal of Gynaecology and Obstetrics* 110 (2): 163–6.

Ortoleva, Stephanie. and Lewis, Hope. 2012. "Forgotten Sisters - A Report on Violence Against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences." *Northeastern University School of Law Research Paper* No. 104 2012: 12–160.

Rebouche, Rachel. 2009. "Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions." *Washington. & Lee Journal of. Civil. Rights. & Social Justice* 16: 79–112.

Viljoen, Frans. 2009. "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa." *Washington & Lee Journal of Civil Rights & Social Justice* 16 (11): 11–46.

United Nations General Assembly. 2017. Report of the Special Rapporteur on the Rights of Persons with Disabilities: Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities A/72/133.

United Nations General Assembly. 2018. Report of the Special Rapporteur on Persons with Disabilities A/73/161.

United Nations Committee on the Rights of Persons with Disabilities' Concluding Observations on the Initial Report of Kenya. 2015. CRPD/C/KEN/CO/1.

United Nations Committee on the Rights of Persons with Disabilities' Concluding Observations on the Initial Report of South Africa. 2018 CRPD/C/ZAF/CO/1.

Women Enabled International (WEI). 2020. Abortion and Disability: Towards an Intersectional Human Rights-Based Approach. https://womenenabled.org/wp-content/uploads/Women%20Enabled%20International%20Abortion%20and%20Disability%20-%20Towards%20an%20Intersectional%20Human%20Rights-Based%20Approach%20January%202020.pdf

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Cite this article: Johnson, Adetokunbo. 2024. "Construing 'Disability' into Article 14(2)(C) of the Maputo Protocol." *Politics & Gender* **20**, 751–756. https://doi.org/10.1017/S1743923X24000229

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