



**Duties of Persons with Disabilities under the African
Disability Rights Protocol: A Sceptical Argument**

Journal:	<i>Human Rights Law Review</i>
Manuscript ID	Draft
Manuscript Type:	Article
Keywords:	African disability rights protocol, African philosophy of human rights, duties, disability justice, people with disabilities, taxation

SCHOLARONE™
Manuscripts

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60

ABSTRACT

Although the Protocol to the African Charter on Human and Peoples Rights on the Rights of Persons with Disability 2018 (‘African disability rights protocol’) is inspired by the Convention on the Rights of Persons with Disabilities 2006 (CRPD), it departs from it by grounding disability rights in an African philosophy of human rights. It achieves this in various ways, particularly by assigning duties to people with disabilities, which is generally uncharacteristic of disability human rights discourse. This article explores what the allocation of these duties implies for people with disabilities. It argues that while such recognition may uphold the equal humanity and belonging of people with disabilities, the African disability rights protocol is not sufficiently attentive to duties owed to them by other individuals. Given the widespread exclusions and injustices faced by disabled people across Africa, it is argued that the priority should be individual duties to (rather than of) people with disabilities. The significance of individual duties to people with disabilities is not only underemphasised by the African disability rights protocol but is insufficiently addressed by the CRPD and under-theorised in disability justice literature. A duty-based approach remains a significant yet an unexplored approach to disability justice.

KEYWORDS: African disability rights protocol, African philosophy of human rights, duties, disability justice, people with disabilities, taxation.

1.INTRODUCTION

The African disability rights protocol was formally adopted on the 29th of January 2018, by the Assembly of Heads of States and Governments of the African Union (AU). It serves as a normative and legally binding framework for the promotion and protection of disability human rights. Celebrated for its ‘great potential to strengthen the implementation of universal human rights for 84 million Africans with disabilities’,¹ it embraces the social and human rights model of disability justice.² 53 African states signed the instrument immediately after its adoption. However, despite its entry into force, only 15 states have followed through on the commitment to formally ratify it to date.³ Compared to the widespread acceptance and ratification of the CRPD by African states, the African disability rights protocol has not garnered the same level of response. The slow and hesitant response vindicates certain positions that questioned the rationale for the instrument, seeing it as an obstacle to strengthening the CRPD’s impact in

¹ Devandas, ‘African States affirm the Rights of Persons with Disabilities in a New Landmark Protocol’ 15 February 2018, available at: [African states affirm the rights of persons with disabilities in a new landmark Protocol | OHCHR](#) [last accessed 7January 2025].
² Msipa and Juma, ‘The African Disability Protocol: Toward a Social and Human Rights Approach to Disability in the African Human Rights System’ in Rioux et al (eds), *Handbook of Disability: Critical Thought and Social Change in a Globalizing World* (2023) at 1-18.
³ Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa (‘African disability rights protocol’). Adopted on the 29 January 2018, entered into force on the 24 June 2024. Article 58(1) of the African disability rights protocol requires 15 states to ratify it to enter into force. To date, the states that have ratified the African disability rights protocol include Angola, Burundi, Cameroon, Republic of Congo, Kenya, Malawi, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, South Africa, Uganda and Zimbabwe.

Africa.⁴ With the emergence of the African disability rights protocol, the scepticism toward the instrument appears to have been superseded by an alternative argument. This argument regards the African disability rights protocol as the most appropriate way to recognise and respond to specific problems experienced by African people with disabilities – problems that were raised and overlooked in negotiations for the CRPD, such as disability discrimination stemming from negative cultural perceptions and beliefs, as well as issues related to poverty and development, among others.⁵ While doubts about the CRPD's ability to deal with these problems can be debated, including the uniqueness of discriminatory experiences of African disabled people, the African disability rights protocol mirrors the CRPD in many ways. It includes provisions for rights to equal recognition before the law,⁶ equality and non-discrimination,⁷ life,⁸ liberty and security of person⁹, freedom from torture or cruel, inhuman or degrading treatment,¹⁰ access to justice,¹¹ work,¹² freedom of expression,¹³ adequate standard of living and social protection,¹⁴ and accessibility¹⁵ amongst other rights.

Apart from subtle differences in the way the above provisions have been articulated,¹⁶ the African disability rights protocol is notably distinct from the CRPD. It grounds disability rights in an African philosophy of human rights,¹⁷ which emphasises collective or group rights¹⁸ and places significant importance on individual duties.¹⁹ The African disability rights

⁴ Viljoen and Biegon, 'The Feasibility and Desirability of an African Disability Rights Treaty: Further Norm-Elaboration or Firmer Norm-Implementation' (2014) 20 *South African Journal of Human Rights* at 345-365. A similar question has been raised in relation to the 'responsibilities of the child' in the African Charter on the Rights and Welfare of the Child 1990. For a good discussion, see Sloth-Nielsen and Mezmur, 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* at 159-198.

⁵ Mostert and Weich, 'Albinism in Africa: A Proposed Conceptual Framework to Understand and Effectively Address a Continental Crisis' (2017) 5 *African Disability Rights Yearbook* at 101-117; Kamga, 'A Call for a Protocol to the African Charter on Human and Peoples Rights of the Rights of Persons with Disabilities' (2013) 21 *African Journal of International Comparative Law* at 219-580; Oyaro, 'Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities' (2015) 30 *American International Law Review* at 347-376; Combrinck and van Reenan, 'The United Nations Convention on the Rights of Peoples with Disabilities in Africa: Progress after 5 years' (2011) 14 *SUR: International Journal of Human Rights* at 143; Mureriwa, 'Some reflections on the African Disability Protocol and Socio-Economic Justice for Persons with Disabilities' (2011) 12 *Economics Social Rights Review* at 3-6; *ibid*, (Viljoen and Biegon)

⁶ Article 12 Convention on the Rights on Persons with Disability 2006 (CRPD), UNTS 2515; African disability rights protocol I supra n 3 at Article 7.

⁷ *ibid*, (CRPD) Article 5; *ibid*, (African disability rights protocol) Articles 5 and 6.

⁸ *ibid*, (CRPD) Article 10; *ibid*, (African disability rights protocol) Article 8.

⁹ *ibid*, (CRPD) Article 14; *ibid*, (African disability rights protocol) Article 9.

¹⁰ *ibid*, (CRPD) Article 15; *ibid*, (African disability rights protocol) Article 10. A notable difference here is that Article 10(2)(c) of the African disability protocol includes protections against sterilisation and invasive procedures without free, prior, and informed consent.

¹¹ *ibid*, (CRPD) Article 13; *ibid*, (African disability rights protocol) Article 13. Article 13(2) of the African disability rights protocol can be differentiated from the CRPD for its inclusion of customary forms of justice.

¹² *ibid*, (CRPD) Article 27; *ibid*, (African disability rights protocol) Article 19.

¹³ *ibid*, (CRPD) Article 21; *ibid*, (African disability rights protocol) Article 23.

¹⁴ *ibid*, (CRPD) Article 28; *ibid*, (African disability rights protocol) Article 20.

¹⁵ *ibid*, (CRPD) Article 15; *ibid*, (African disability rights protocol) Article 9.

¹⁶ Notable differences that reflect distinct African problems include Articles 1 (Ritual Killings), Article 11(1) (Harmful Practices), Article 29 (Youth with Disabilities) and Article 30 (Older Persons with Disabilities) among others. Msipa and Juma supra n 2 at 14-15 offer a good discussion of the unique African issues recognised in the protocol.

¹⁷ Viljoen and Biegon supra n 4 at 345-365; Sloth-Nielsen and Mezmur B supra n at 159-198.

¹⁸ Dersso, 'The Jurisprudence of the African Commission on Human and Peoples Rights in Respect to People's Rights' (2006) 6(2) *African Journal of Human Rights* at 333-357.

¹⁹ Metz, 'African Values, Group Rights and the Banjul Charter' in Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (2014) at 131-132; Diagne, 'Individual, Community and Human Rights:

protocol mirrors these features by its preference for the term community living²⁰ instead of independent living,²¹ access to customary forms of justice,²² the educational imperative to promote positive African values,²³ and more vividly, by assigning duties to people with disabilities.²⁴ As much as duties appear to be inconsistent with the underlying objective of the African disability rights protocol to promote and protect the human rights of people with disabilities, it has not received sufficient scholarly attention in the emerging literature on the regional instrument. The article seeks to fill this gap in the literature by examining the implications of allocating duties to people with disabilities. It argues that, while such recognition may uphold the equal humanity and belonging of people with disabilities, it neglects the much-needed duties owed to them by other individuals. Part of the problem is that based on the duties outlined in the African Charter on Human and Peoples Rights 1981 (ACHPR) and interpretations by some leading writers, duties often manifest as mutually reciprocal social roles or civic responsibilities necessary for community belonging and personhood. Duties are predicated on a rigid model of mutual reciprocity, which may pose challenges for certain people with disabilities, especially those with extreme physical and cognitive disabilities.

In this article, I argue that tackling the significant challenges of disability injustice requires not just an emphasis on human rights, but also, more importantly, the duties of individuals towards people with disabilities. While the emphasis has rightly been placed on state duties, individual duties are crucial to complement state actions in addressing the widespread societal exclusion and discrimination faced by people with disabilities across Africa. As a rare international treaty that recognises individual duties to others among other duties, the ACHPR offers a unique opportunity to emphasise and prioritise individual duties towards people with disabilities. Conversely, the African disability rights protocol falls short by extending duties to people with disabilities without sufficiently recognising the individual duties owed to them. Therefore, the objective of this article is not to demonstrate how people with disabilities can perform their duties, but rather to advocate for the duties that should be owed to them. To the extent that I discuss how people with disabilities should perform their duties, it is to emphasise that their ability to do so is highly contingent on the duties owed to them by others. The often-cited maxim associated with the Southern African concept of ubuntu: ‘a person is a person through other people’,²⁵ is a useful way to explain the article’s central aim. My focus is on how ‘other people’ contribute to or support the ‘person’, rather than how the ‘person’ supports ‘other people’. Without the contribution and support of ‘other people’, the ‘person’ cannot, in turn, support others or live a dignified life.

Therefore, to prioritise duties owed to people with disabilities, a compassionate or altruistic²⁶ and asymmetrical conception of duties is proposed in this article. It argues that duties should be viewed as fundamentally altruistic or compassionate to better address the

A Lesson from Kwasi Wiredu’s Philosophy of Personhood’ (2009) 101 *Transition* at 8-15; Murray and Wheatley, ‘Groups and the African Charter on Human and People’s Rights’ (2003) 25 *Human Rights Quarterly* at 213-236; Kiwanuka, ‘The Meaning of ‘People’ in the African Charter on Human and Peoples Rights’ (1988) 82 *American Journal of International Law* at 80-101; Cobbah, ‘African Values and the Human Rights Debate: an African Perspectives’ (1987) 9 *Human Rights Quarterly* at 309-331; Sloth-Nielsen and Mezmar supra n 4 at 159-198.

²⁰ African disability rights protocol supra n 3 at Article 14.

²¹ CRPD supra n 6 at Article 19.

²² African disability rights protocol supra n 3 at Article 13(2)

²³ Ibid, Article 16(4) d.

²⁴ ibid, Article 31.

²⁵ Tutu, *No Future Without Forgiveness: A Personal Overview of South Africa’s Truth and Reconciliation Commission* (1999) at 34-35.

²⁶ Although there are differences between compassion and altruism, they are used interchangeably for purposes of the argument in this article.

needs of people with disabilities. This approach places an onus on capable community members to assist the most vulnerable, especially those unable to reciprocate or reciprocate equally. The article contends that a compassionate or altruistic and asymmetrical conception of duties provides a better understanding of diverse community needs and abilities. It underscores how individuals can support and be supported by each other due to inherent human vulnerability and dependency. This is not to suggest that people with disabilities are merely passive recipients of care and compassion, or that they are incapable of fulfilling such duties themselves. Instead, it underscores the inherent vulnerability of individuals, highlighting the fundamental asymmetrical nature of human relationships. Drawing on Kwame Gyekye's seminal work, which defines duties as practical expressions of care and concern for others' well-being, the article explores practical ways to implement this approach to support people with disabilities and other vulnerable groups. Given that compassionate or altruistic duties prioritise the role of duty-bearers (i.e., individuals capable of fulfilling duties) in assisting duty-beneficiaries (i.e., individuals to whom duties are owed) the article explores ways the former can fulfil their duties to support the latter, particularly the most vulnerable people with disabilities. It proposes that taxation provides a practical mechanism for individuals to meet their duties towards people with disabilities. This proposal focuses less on the effectiveness or distributive consequences of tax and more on the opportunities it presents to animate the kind of compassionate or altruistic duties promoted in this article. While questions of the effectiveness or distributive consequences of tax in achieving disability justice are important, they are secondary to the argument in this article. The primary aim is to demonstrate that tax is the most feasible way to understand and practice compassionate and altruistic duties. Put differently, tax provides an institutional mechanism to replicate compassionate or altruistic duties amongst a wide spectrum of individuals. It acts as a bridging concept or placeholder, uniting and transforming individual duties into collective, legally binding commitments to people with disabilities. Given the impracticable nature of compassionate or altruistic dispositions anticipated by the idea of duties promoted in this article, focusing solely on the effectiveness or distributive consequence of tax will only mask the importance of understanding the role it can play in facilitating individual duties to people with disabilities.

Considering that the duties owed to people with disabilities are often an under-explored aspect of the CRPD²⁷, the central argument advanced here is potentially relevant to audiences beyond Africa. The African disability rights protocol surpasses the CRPD by incorporating individual duties within disability human rights discourse. This raises the question of whether people with disabilities should owe duties as well as what duties should be owed to them. By elevating the question of individual duties, the article explores whether they should represent a type of second-generation thinking derived from the CRPD-inspired disability human rights discourse. My intention is not to settle these issues, but rather indicate how certain aspects of the argument in this article may be relevant for the CRPD-inspired disability justice discourse.

The article begins with a critique of the provisions on duties in the African disability rights protocol, which applies the list of duties in the ACHPR to people with disabilities. It speculates and questions the most plausible rationale behind imposing duties on people with disabilities, arguing this approach fails to prioritise individual duties towards people with disabilities. It attributes part of the problem to the narrow conceptualisation of duties in the ACHPR, where duties are defined as social roles without adequate emphasis on their ethical and moral compassionate or altruistic foundations, and are framed in mutually reciprocal terms. In Section 3, the article argues for a more inclusive understanding of duties through Kwame Gyekye's seminal work, which anchors duties in a compassionate and asymmetrical

²⁷ CRPD supra n 6 at Preamble (w). The Preamble of the CRPD refers to individual duties to others and to the community, but there is insufficient understanding of their scope and content.

framework. It explores the possibilities and difficulties of implementing such asymmetrical duties in practice through the African disability rights protocol and taxation. The article suggests that compassionate or altruistic duties, which originated in historic small-scale traditional African societies and still prevalent in many communities today, can be amplified or made universal through taxation in the context of the modern African state. To be clear, I refer to the origins of these duties in historic small-scale traditional African societies. This is not to suggest that such practices are absent among contemporary African communities; rather, it highlights the challenge of replicating these duties at the scale of modern African states or as practicable legal concepts across a wide spectrum of society. Compassionate duties aim to encourage altruistic behaviour, such as benevolence, generosity, kindness and care. However, legally implementing these behaviours or promoting societal adherence to them poses significant challenges. Discriminating against a person with a disability due to lack of compassion or generosity is one issue, but treating the failure to show these qualities as legally enforceable claims is an entirely different matter. In other words, the challenge lies in adapting traditional practices of compassionate duties to new and broader contexts. The article concludes in Section 4 by reflecting on the proposed approach, including its limitations and potential solutions.

2. DUTIES OF PEOPLE WITH DISABILITIES

The African disability rights protocol stands out from other disability human rights instruments in imposing duties on people with disabilities.²⁸ Duties of people with disabilities are outlined in Article 31 of the protocol, which states that ‘...persons with disabilities have duties on an equal basis with others as elaborated in the African Charter’²⁹ and should be ‘... rendered the forms of assistance and support, including reasonable accommodations, which they may require in performance of such duties.’³⁰ In addition to recognising that people with disabilities may require assistance in discharging their duties, Article 31(1) of the protocol does not outline specific duties to people with disabilities. Instead, it applies the existing list of duties in the ACHPR, without necessarily adapting them to take the experiences of people with disabilities into account. To sufficiently appreciate the implications of the duties now assigned to people with disabilities, they are outlined in detail as follows:

People with disabilities now owe duties to the ‘family, society, the State, other legally recognised communities and the international community’³¹ and to exercise their ‘rights and freedoms...with due regard to the rights of others, collective security, morality and common interest’.³² People with disabilities are also imposed with ‘... the duty to respect and consider...fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance , as well as the duty to respect and consider other fellow beings without discrimination’. ³³ The also have the duty to ‘preserve the harmonious development of the family and to work for the cohesion and respect of the family;

²⁸ The African disability protocol is not unique in this respect. See Article 37 Constitution of Mozambique 2004 (Amended in 2007), which assigns duties to people with disabilities.

²⁹ African disability rights protocol supra n 3 at Article 31(1).

³⁰ *ibid.*, Article 31(2).

³¹ Article 27(1) African Charter on Human and Peoples’ Rights 1981 (ACHPR), UNTS 1520.

³² *ibid.*, Article 27(2).

³³ *ibid.*, Article 28.

to respect his [and her] parents at all times, to maintain them in case of need'.³⁴ Additionally, they also owe a duty to their '...national community by placing his[and her] physical and intellectual abilities at its service'³⁵ and duty 'not to compromise national security of the State whose national or resident he[and she] is'.³⁶ Disabled people have a duty to 'preserve and strengthen social and national solidarity'³⁷ as well as to 'preserve and strengthen national independence and the territorial integrity of his [and her] country and to contribute to its defence in accordance with the law'.³⁸ They also have the duty to '...work to the best of his [and her] abilities and competence, and to pay taxes imposed by law in the interest of society'³⁹ and to 'preserve and strengthen positive African cultural values in his [and her] relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society'.⁴⁰ Finally, disabled people have been imposed with the duty to 'contribute to the best of his [and her] abilities, at all times and at all levels, to the promotion and achievement of African unity'.⁴¹

It may be obvious from the above duties that they are not correlative of any human rights in the ACHPR. Furthermore, except for the duties to the family⁴² and of non-discrimination,⁴³ most duties appear to be conceptualised vertically, as they proceed from individuals to the state, other groups, and to the international community among others. It is no surprise that duties have attracted a range of criticisms,⁴⁴ especially that they could lead to the unintended consequences of endorsing oppressive family structures that tend to exclude or marginalise women from various domains of life.⁴⁵ There have also been criticisms about how the duty to the national community could provide another tool in the armoury of authoritarian African states to violate individual rights,⁴⁶ or how the duty to 'work to the best of his [and her] abilities and competence'⁴⁷ could be used by the state to promote forced labour.⁴⁸ Similar criticisms to the above can be made about the possible effect the imposition of duties might have on people with disabilities, particularly their human rights.⁴⁹

Another notable criticism of the ACHPR is the difficulty of implementing and enforcing its duties due to the overly general language used in articulating them. While various interpretations of the term 'society' in Article 27 have been noted,⁵⁰ the phrase 'other legally recognised communities' raises questions about its precise meaning. It is unclear whether this refers to neighbourhoods, localities, or ethnic, religious, virtual, workplace or all these communities, and how duties to such communities should be implemented and enforced under

³⁴ *ibid*, Article 29(1).

³⁵ *ibid*, Article 29(2).

³⁶ *ibid*, Article 29(3).

³⁷ *ibid*, Article 29(4).

³⁸ *ibid*, Article 29(5).

³⁹ *ibid*, Article 29(6).

⁴⁰ *ibid*, Article 29(7).

⁴¹ *ibid*, Article 29(8).

⁴² Article 27 and 29(1).

⁴³ *ibid*, Article 28

⁴⁴ Alston and Goodman, *International Human Rights* (2013) at 519.

⁴⁵ *ibid*

⁴⁶ Sloth-Nielsen and Mezmur *supra* n 4 at 167.

⁴⁷ *ibid*

⁴⁸ *Ibid*, 167

⁴⁹ Mute and Kalekye, 'An appraisal of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2016) *East African Law Journal* at 88.

⁵⁰ Alston and Goodman *supra* n 44 at 520.

international or domestic law⁵¹. Although there was some debate about whether Article 27(2) could be interpreted to limit the human rights of those who do not fulfil their duties, the African Commission on Human Rights (ACHR) and the African Court of Human Rights (ACtHR) have made it clear that the only legitimate basis for limiting human rights is ‘due regard to the rights of others, collective security, morality and common interests.’⁵² As much as it is not clear how Article 27(2) is a duty, it does create a prospect of limiting the human rights of people with disabilities among others if they conflict with the requirements set out in the provision. There is also uncertainty whether Article 28, which outlines a general principle of non-discrimination, applies to the private or public sphere, which is more common in international law.⁵³ Additionally, the non-discrimination principle in Article 28 lacks specific details on prohibited grounds of discrimination.⁵⁴

Given the significance of the extended family in the African context, it is reasonable to assume that family related duties in the ACHPR include this relation. However, the extended family is not specifically mentioned in the ACHPR.⁵⁵ For example, Article 29(1), which outlines the family relationship, seems more aligned to a nuclear family context.⁵⁶ Although some argue this duty can be legally implemented,⁵⁷ it is unclear what precise legal or institutional form this would take. Similar issues about implementation arise with the duty to preserve the harmonious development of the family⁵⁸ or others like the duty to preserve and strengthen African cultural values⁵⁹ and duty to promote African unity.⁶⁰ There have even been questions about whether these duties can be aligned with the human rights outlined in the ACHPR⁶¹. Individual duties to the family also raise questions about their relationship with state duties to the family. For instance, it’s unclear whether the individual duty to maintain parents excludes or exempts the state’s duty to assist the family under Article 18(2) of the ACHPR. Given these complexities, some commentators suggest that it might be more practical to view this and other duties as optional moral obligations rather than legally binding ones.⁶² General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child 2017 (ACRWC), which provides practical guidance on the content of similar duties for children, also concludes that these duties are not legally binding. It even replaces the term ‘duties’ with ‘responsibilities’ to emphasise that these are not legal duties subject to penal

⁵¹ The African Commission on Human and Peoples’ Rights suggests that there is a very strong legal and moral basis to impose this duty on corporations and companies. See African Commission on Human and Peoples’ Rights ‘Advisory note to the African Group in Geneva on the Legally Binding Instrument to Regulate in International Human Rights Law, the activities of Transnational Corporations and Other Business Enterprises (Legally Binding Instrument)’ (2021) at 4. African Commission on Human and Peoples’ Rights, General Comment 7: State Obligations under the African Charter on Human and Peoples’ Rights in the Context of Private Provision of Social Services (2022) at 48. Adopted during the 72th Ordinary Session of the African Commission on Human and Peoples’ Rights on 28 July 2022 in Banjul, The Gambia.

⁵² 105/ 93, 128/ 94, 130/ 94 and 152/ 96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, 12th Annual Activity Report of the ACHPR (1998-9) at paras 68 and 69. See also *Lohé Issa Konaté v Burkina Faso*, App. No. 004/ 2013, Judgment on the Merits, 5 December 2014 at para 134.

⁵³ Alston and Goodman supra n 42 at 520.

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ D’Sa, ‘Human and Peoples’ Rights: Distinctive Features of the African Charter’ (1985) 29 *Journal of African Law* at 77.

⁵⁸ ACHPR supra n 31 at Article 29(1)

⁵⁹ *ibid* at Article 29(2)

⁶⁰ *ibid* at Article 29(8)

⁶¹ Alston and Goodman supra n 44 at 520.

⁶² Boot, *Human Duties and the Limits of Human Rights Discourse* (2017) at 28; Heyns, ‘The African Human Rights Systems: In Need for Reform’ (2001) 1 *African Human Rights Law Journal* at 155-174.

sanctions.⁶³ The African disability rights protocol does not currently make this distinction. Thus, it would not be incorrect to suggest that these duties could potentially be legally binding for people with disabilities. While the current concerns may seem academic and not have real-life effects on Africans with disabilities at present, the possibility of clarifying, implementing, and enforcing duties in the future cannot be entirely dismissed.

A. Scepticism about imposing duties on people with disabilities

As previously mentioned, Article 31(1) does not list the duties in the ACHPR or tailor them to the experiences of people with disabilities. Instead, Article 31(2) suggests that people with disabilities should be provided with the necessary assistance and support, including reasonable accommodations, to enable them perform such duties. Although there is no immediate reason why people with disabilities should be unable to fulfil their duties, this will largely depend on the type of disability and the specific duty in question, including its interpretation and practical implementation. The diversity and extent of disabilities make generalisations difficult. Support or reasonable accommodation can help people with disabilities perform their duties. For those with physical or sensory impairments, reasonable accommodations may be sufficient.⁶⁴ However, for individuals with cognitive disabilities, severe mental health disorders, chronic fatigue syndrome or similar conditions, reasonable accommodations may not be sufficient to enable them to fulfil their duties. In some cases, these individuals may never be able to completely discharge their duties.⁶⁵

This is precisely the issue overlooked by the disability rights protocol. It only envisages that some people with disabilities would require assistance or reasonable accommodations to discharge their duties, but it does not entertain the possibility that they would be unable to perform duties, even with the best forms of support available. Article 31 of the African disability rights protocol can be contrasted with Article 37 of the Mozambican Constitution, which provides that ‘citizens with a disability shall fully enjoy the rights enshrined in the Constitution, and shall be subject to the same duties, except those which their disability prevents them from exercising or fulfilling.’⁶⁶ The Mozambican Constitution is more accepting of the possibility that some people with disabilities may be unable to perform their duties. This critique is not meant to reject the allocation of duties to people with disabilities or to deny that many disabled people would be able to perform duties.⁶⁷ Instead, it highlights the inflexible and binding nature of the African disability rights protocol. Assuming all people with disabilities can meet their duties with reasonable accommodations only emphasises the importance of the duties that the state and individuals have to support them.

Additionally, it seems inconsistent to impose duties on people with disabilities when the African disability rights protocol’s primary goal is to address pressing problems, needs and the abuses they endure due to widespread poverty, societal exclusions and the various harmful practices identified in the instrument.⁶⁸ It is unclear why the African disability rights protocol imposes duties on people with disabilities when, to effectively address the exclusions and injustices, the opposite is needed. Except for the general obligations imposed on states,⁶⁹ the

⁶³ African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the “Responsibilities of the Child” (ACRWC), 1 October 2017 at para 9.

⁶⁴ Shakespeare, ‘Deeping Disability justice: Beyond the Level Playing Field 2014 29(4) *Tikkun* at 21-24.

⁶⁵ *ibid* at 23. Shakespeare makes a similar point concerning reasonable accommodations in the context of work.

⁶⁶ Emphasis in original.

⁶⁷ Onazi, *African Path to Disability Justice: Community, Relationships and Obligations* (2020) at 20.

⁶⁸ African disability rights protocol *supra* n 3 at Articles 1, 11.

⁶⁹ *ibid*, Article 4. The Preamble, which recognises the role of families, carers and communities in the lives of disabled people, may also be relevant in this context.

African disability rights protocol fails to explicitly impose special positive and negative duties on people without disabilities towards those with disabilities. It seems unusual that the expectations for duties from people with disabilities are clearer than the duties owed to them by states and people without disabilities. For instance, there are no corresponding duties to the harmful practices that served as a justification for the creation of the African disability rights protocol and contribute to the societal exclusion of people with disabilities across Africa. The harmful practices defined in Article 1 of the African disability rights protocol require imposing duties not only on the state but also on people without disabilities to refrain from such practices. Hence, my argument is that duties must be tailored, including those of people without disabilities, to address the exclusions experienced by people with disabilities. There is an important need to specify and impose duties on people without disabilities to treat people with disabilities with respect and to refrain from discriminating or violating their rights.

As previously mentioned, where duties to people with disabilities have been recognised, they are primarily state obligations, distinct from the individual duties promoted in this article. States are tasked with several ‘general obligations’⁷⁰, especially to modify, outlaw, criminalise or campaign against, ‘as appropriate, any harmful practice applied to persons with disabilities’.⁷¹ They are also responsible for constitutionalising, legislating and taking ‘other measures to modify existing policies, laws, regulations, customs and practices that constitute discrimination against persons with disabilities.’⁷² The question is whether these state obligations alone will sufficiently address the issues that justified the introduction of the African disability rights protocol without assigning specific duties to people without disabilities. Article 28 of the ACHPR on the individual ‘duty to respect and consider his [and her] fellow beings without discrimination’ may be one way of extending duties to people without disabilities. However, the African disability protocol primarily allocates this duty to people with disabilities. Addressing many questions of disability injustice require more specific duties than general duties of non-discrimination. In this context, it may be necessary to impose more specific duties on people without disabilities to refrain from specific practices that discriminate against people with disabilities. The state’s general obligation in Article 4(f) of the African disability rights protocol ‘to take measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise,’ comes close to addressing this issue but it largely remains unspecified. As discussed below, this is not necessarily a shortcoming of the African disability rights protocol, but a common feature of international human rights treaties. These treaties often assign general obligations to states, requiring them to define, allocate, and enforce the duties of individuals and institutions in respecting the human rights of others.⁷³

It generally remains unclear what duties individuals (or people without disabilities) owe people with disabilities. There may be duties of maintenance owed to people with disabilities who are parents, part of a family network or cared for by caregivers or communities, as highlighted in the Preamble to the African disability rights protocol. However, the specific nature of the essential roles indicated in the Preamble needs to be clarified or specified to prioritise disability justice. While allocating duties to people with disabilities in the same way as others might contribute to their sense of belonging, equality, and ultimately disability justice, it should not take precedence over the duties that individuals in their various communities owe to them as part of addressing historic and contemporary forms of exclusion, marginalisation, and injustice.

⁷⁰ *ibid*, Article 4 (a)-(f).

⁷¹ *ibid*, Article 4 (c).

⁷² *ibid*, Article 4 (d).

⁷³ O’Neill, ‘The Dark Side of Human Rights’ (2005) 81 *International Affairs* at 433.

The lack of attention to individual duties to people with disabilities is not solely an issue with the African disability rights protocol but also under-emphasised in the CRPD and the broader human-rights based disability justice discourse. Disability justice overwhelmingly focuses on human rights and tends to consider duties primarily in terms of state obligations. The challenge is that individual duties are only possible through state obligations. In addition to general obligations imposed on states to respect human rights, states have general obligations to outline, impose and enforce duties on individuals and institutions to ensure human rights are respected.⁷⁴ However, states have a degree of latitude in defining and enforcing these duties on individuals and institutions, leaving it unclear how authoritarian, weak, or fragile states can be held accountable for failing to fulfil their general obligations.⁷⁵ The compassionate or altruistic duties outlined in Section 3 of this article must also navigate these issues. This problem is indeed complex and does not have straightforward solutions. However, understanding the significance of the state and its institutions in upholding and promoting individual duties to one another is crucial to ensuring that everyone in our communities, especially the vulnerable can live dignified lives. The nature of compassionate or altruistic duties, which closely resemble imperfect or voluntary duties, makes the role of the state even more critical. Without the state's involvement, it is unclear how these duties will be broadly embraced and supported by a diverse range of individuals. Consequently, the central and coordinating mechanisms of the state are essential to ensure these duties are widely applicable. This means that, in addition to direct duties to people with disabilities, the state also has duties to design and enforce mechanisms that ensure citizens fulfil their obligations to people with disabilities. To hold the state accountable for its duties, it is imperative that members of the public, including disabled people's organisations and non-governmental organisations – engage through formal democratic channels, activism, advocacy and public awareness campaigns to ensure the state lives up to its duties.⁷⁶

B. Speculating on reasons for the failure to prioritise duties towards people with disabilities

Without details of the official record of negotiations for the African disability rights protocol⁷⁷, I can only speculate about possible reasons for imposing duties on people with disabilities and failing to prioritise duties owed to them. A plausible explanation is that the compassionate and altruistic nature of duties are under-represented in the ACHPR. Duties bear a striking resemblance to a species of social roles⁷⁸ that all individuals should discharge to their families, communities, states, and the African and the international community. This inference can be drawn from duties such as preserving the harmonious development, cohesion and respect of

⁷⁴ *ibid.*

⁷⁵ *ibid* at 435.

⁷⁶ Simon Caney discusses first and second-order duties in the context of climate change responsibilities. Caney, 'Climate Change and Duties of the Advantaged' (2010) 13(1) *Critical Review of International Social and Political Philosophy* at 203-228; Caney, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' (2014) 22(2) *Journal of Political Philosophy* at 125-149.

⁷⁷ Mute and Kalekye *supra* n 49 at 88. Mute and Kalekye highlighted that there were objections to imposing duties on people with disabilities during the drafting of the African disability Rights protocol. Delegates were concerned that these duties would limit the attainment of disability human rights. However, the consensus reached was that people with disabilities should not be exempt from performing their duties solely because of their disabilities. Provisions on reasonable accommodations in the African disability rights protocol were used to assure those sceptical of duties that people with disabilities will receive the necessary support to fulfil these requirements.

⁷⁸ See Hardimon, 'Role Obligations' (1994) 91 *The Journal of Philosophy* at 334, who defines social roles as 'constellations of institutionally specified rights and duties organized around an institutionally specified social function'

the family;⁷⁹ placing one's physical and intellectual abilities at the service of the national community;⁸⁰ not compromising state security; strengthening social and national solidarity when threatened;⁸¹ preserving and strengthening national independence, territorial integrity and the defence of one's country;⁸² and working to the best of one's abilities and competence and paying taxes.⁸³ These duties resemble social roles and, to some extent, civic duties, which all individuals should perform as a condition of community membership. The idea that duties can be likened to social roles would appear to be supported by the work of Mutua,⁸⁴ who has written one of the most influential articles on the ACHPR. Mutua suggests that the list of duties in the ACHPR attempts to replicate the kinship structures of precolonial Africa, particularly the roles distributed according to age and gender among clan members.⁸⁵ Although Sloth-Nielsen and Mezmur focus on individual duties to the family, they emphasise that duties are not ethical and moral in nature, but rather an instantiation of the 'allocation of roles that define and institutionalize social organization and public life.'⁸⁶ Even human dignity, as Devereux shows, is understood as 'a product of fulfilling one's role in society'.⁸⁷ This is perhaps why D'sa⁸⁸ in her influential article, described duties in the ACHPR as rules of behaviour or codes of conduct. Consequently, all members of a community are under a binding requirement to carry out their social roles according to age and gender.

While there is a plausible contrary argument that social roles, such as the familial, political, and occupational roles in the ACHPR, are a species of duties, it is difficult to interpret all duties in the regional instrument as such. According to this alternative argument, social roles are understood as role duties or obligations, which are moral requirements attached to institutional roles, 'whose content is fixed by the function of the role, and whose normative force flows from the role.'⁸⁹ For example, the ACHPR attempts to assign moral and normative content to the roles of parents and children, or even that of employees, and citizens. However, with exception to role duties assigned to family members, the compassionate and ethical or moral underpinnings of citizens and employees are unclear in the ACHPR. While duties assigned to children to maintain their parents in times of need and vice versa,⁹⁰ as well as duties to respect and consider fellow beings without discrimination,⁹¹ or to adopt African cultural values in the sense of '...the spirit of tolerance, dialogue and consultation...' ⁹² in relations with others, implicitly have compassionate and moral foundations, this is not the case with the range of duties between individuals and the state. ⁹³ For instance, the duty to defend one's country may involve an unprovoked war of aggression. Although these provisions reflect the continent's historical experience of slavery and colonialism, they do not adequately capture the

⁷⁹ ACHPR supra n 31 at Article 29(1).

⁸⁰ *ibid*, Article 29(2).

⁸¹ *ibid*, Article 29(4).

⁸² *ibid*, Article 29 (5).

⁸³ *ibid*, Article 29(6).

⁸⁴ Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) *Virginia Journal of International Law* at 359

⁸⁵ *ibid*

⁸⁶ Sloth-Nielsen and Mezmur supra n 4 at 174.

⁸⁷ Devereaux, 'Should Duties Play a Larger Role in Human Rights' (2017) 18(2) *University of New South Wales Law Journal* at 474.

⁸⁸ D'Sa supra n 57 at 77.

⁸⁹ Hardimon supra n 78 at 334.

⁹⁰ Mutua supra n 84 at 359. Sloth-Nielsen and Mezmur, supra n 4.

⁹¹ ACHPR supra n 31 at Article 28.

⁹² *ibid*, Article 29(7).

⁹³ *ibid*, Articles 27(1), 29(2), 29(3), 29(4), 29(5).

type of horizontal ethical and moral duties necessary for citizens to live together in the postcolonial era.⁹⁴

Surveying different accounts of duties in African communitarian philosophy, Devereaux highlights an overwhelming focus on duty-bearers.⁹⁵ This might explain the emphasis on duties owed by people with disabilities in the African disability rights protocol, while underappreciating the need for individual duties owed to them. In this body of work, the emphasis is on the duty-bearers within a reciprocal system of duties.⁹⁶ Duties are considered the highest form of virtue and excellence that individuals can attain,⁹⁷ intrinsically linked to belonging.⁹⁸ They are akin to a type of Aristotelian virtue, centred on self-realisation and perfectionism.⁹⁹ However, African morality is different from Aristotelean virtues because it is robustly relational and defined in communitarian terms.¹⁰⁰ A clear example of this perspective is found in the work of Drucilla Cornell, who rejects the idea that duties are altruistic. Cornell states,

‘...what makes us human is not just the reality of our social connectedness, but the way in which each of us lives up to the obligations to those who have supported us, and to the broader community in which we live. But this living up to the obligation is not altruism or sacrifice, because the other side of it is that others must live up to their obligation to us [...]’¹⁰¹

Although this is speculative, it offers a perspective on the significance and consequences of duties emphasised in the African disability rights protocol. Cornell’s work suggests an even more profound meaning for these duties, providing a compelling explanation for why the African disability rights protocol does not consider that certain people with disabilities may be unable to fulfil their duties. The importance of duties extends beyond establishing social connectedness; it also encompasses what it means to be human. The Southern African indigenous concept of ubuntu expressed by the maxim ‘*a person is a person through other people*’¹⁰² can be used to illustrate this point, along with the issues associated with the prevailing conception of duties. As explained by Metz, a leading African philosopher, ‘*a person is a person*’ implies that a deliberate agent, such as a normal human being, should strive to become a genuine person by exhibiting, moral value.¹⁰³ This means that ‘*a person is a person through other people*’ means that an individual’s existence is intertwined with that of others, and only those capable of displaying moral value, often through mutual reciprocal duties, qualify for personhood. The problem arises when individuals cannot display moral value or

⁹⁴ Onazi, ‘What does Citizenship require of Africans, or What do Africans require of Citizenship?’ in De Sousa Santos and Cunha (eds), *International Colloquium Epistemologies of the South: South-South, South-North and North-South Global Learnings—Proceedings* (2015) at 267-283.

⁹⁵ Devereaux supra n 87 at 475

⁹⁶ *ibid.*

⁹⁷ Menkiti, ‘On the Normative Conception of a Person’ in Wiredu (ed), *A Companion to African Philosophy* (2004) at 324-331.

⁹⁸ Chabal, Africa: *The Politics of Suffering and Smiling* (2009). Praeg, *A Report on Ubuntu* (2014) at 36-46.

⁹⁹ Metz and Gaie (2010) ‘The African Ethic of Ubuntu/ Botho: Implications for Research on Morality’ (2010) 39(3) *Journal of Moral Education* at 273-290. Okeja, ‘Justification of Moral Norms in Etieyibo (ed), *Method, Substance and the future of African Philosophy* (2018) at 209-22.

¹⁰⁰ *ibid* (Metz and Gaie)

¹⁰¹ Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (2014) at 69.

¹⁰² Tutu supra n 25 at 34-35.

¹⁰³ Metz, ‘An African Egalitarianism: Bringing Community to Bear on Equality’ in Hull (ed), *The Equal Society: Essays on Equality in Theory and Practice* (2015) at 187.

fall short of the standards of personhood. The concept of ubuntu distinguishes between persons and human beings, assigning a superior status to persons. This distinction present significant challenges for people with disabilities, especially those with cognitive and severe physical disabilities. While those unable to fulfil their duties are still regarded as human beings, they hold an inferior status and are considered less worthy of moral consideration. Consequently, human beings are not treated as equals, with their claims being subordinate to those of persons. Considering the above analysis, the significance of duties can be seen as an attempt by the African disability rights protocol to recognise people with disabilities as equals.¹⁰⁴ Duties are understood as a yardstick for measuring equality, much like rights in Western liberal traditions.¹⁰⁵ Only individuals who fulfil their duties are considered equals and benefit from community membership.¹⁰⁶

There is a further reason why assigning duties to people with disabilities holds significant importance. These duties not only acknowledge the equal humanity of people with disabilities but also recognise their capacity and agency. By involving people with disabilities in fulfilling their duties, it not only acknowledges their equal humanity¹⁰⁷ but also affirms their ability to contribute to their communities and various aspects of life. Drawing from the social model, it shifts the narrative from viewing disabilities as individual limitations to appreciating the valuable contributions that people with disabilities bring to their communities. Commenting on an early draft the African disability rights protocol, Appiagyei-Atua suggests among other things that

‘.... placing duties on persons with disabilities confirms that they possesses [sic] capacity and agency, which when facilitated by the appropriate rights ambience, will enable them to contribute to their own self-development as well as community development’.¹⁰⁸

Two observations can be made from these comments. First, they highlight the need to correlate duties with rights, a point drafters of the protocol may have overlooked or left for states to determine through their general duties. Secondly, and more importantly, the comments draw a correlation between duties and the capacity and agency of disabled people. Although this is not my argument, it could be suggested that the formal legal recognition of duties is the most authoritative way to affirm not just the equality of disabled people, but their capacity¹⁰⁹ and agency. Consistent with the formal legal recognition of equality, Article 31(2) of the protocol, which recognises that some disabled people require assistance, or reasonable accommodations or adjustments to perform their duties, implies that some disabled people would be dependent on others to be able to discharge their duties. Therefore, states need to implement a range of support mechanisms, particularly intensive support for disabled people who will be permanently dependent on others.

This is a plausible interpretation of the provisions on duties, but it raises questions about whether the formal equal recognition of duties, especially of people with extreme physical and cognitive disabilities, is merely symbolic or idealises their agency and capacity. My concern

¹⁰⁴ Plagis and Riemer, ‘From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples Rights and the Enigma of Article 7’ (2021) *History of International Law* at 571. Mutua, supra n 89 at 339–38; Chabal supra n 98; Menkiti supra n 97.

¹⁰⁵ Onazi supra n 67

¹⁰⁶ Chabal supra n 98; Menkiti supra n 97.

¹⁰⁷ Mute and Kalekye supra n 49 at 88. Mute and Kalekye suggest that equality provided the strongest justification for imposing duties on people with disabilities during the drafting of the African disability rights protocol.

¹⁰⁸ Appiagyei-Atua, ‘A Comparative Analysis of the United Nations Convention on the Rights of Persons with Disabilities and the African Draft Protocol on the Rights of Persons with Disabilities’ (2017) 21 *Law, Democracy and Development* at 171.

¹⁰⁹ African disability rights protocol supra n 3 at Article 1 defines legal capacity as the ‘ability to hold rights and duties and to exercise those rights and duties’.

with the comments in the above passage is that they may mischaracterise and disparage duties while unintentionally elevating independence or autonomy as the norm of the African disabled person.¹¹⁰ The emphasis on capacity and agency is a myth for all Africans, not just those with disabilities. Capacity and agency align more with human rights¹¹¹ and disability studies than with certain versions of African communitarianism, which fundamentally recognise the insufficiency, vulnerability, and dependency of individuals. As will be demonstrated in Section 3 of this article, duties to others stem from the need for communion with or help, symptomatic of the natural insufficiency and vulnerability of all human beings. This reasoning resonates with relational feminists¹¹² in Western legal and political philosophy, but African communitarianism distinctively nests human dependency in broader partial and impartial communal relationships.¹¹³ Although the literature on African communitarianism tends to take human dependency and vulnerability for granted, Kwasi Wiredu's account of the Akan concept of person unequivocally acknowledges these features. Human dependency, according to Wiredu, is essential to the human condition. While dependency may vary with age and maturity, as it is heightened at birth than at a certain level of growth and maturity, it is present throughout life. Self-reliance is recognised but it is '... predicated upon the ineliminable residue of human dependency'.¹¹⁴ Wiredu calls readers to appreciate that, '[H]uman beings... at all times, in one way or another, directly and indirectly, need the help of their kind'.¹¹⁵ Molefe generalises Wiredu's work beyond Akan philosophy, asserting that individuals can never reach a state of complete self-sufficiency and '... should never be independent of others...'.¹¹⁶ This perspective implies that an alternative, which does not disparage dependency and treats it as a feature of the human condition, is a better way to understand and respond to the needs of people with disabilities, especially people with extreme physical and cognitive disabilities. While the African disability rights protocol could be seen as a remedy to the distinction between persons and human beings in orthodox interpretations of ubuntu by formally recognising the duties of

¹¹⁰ Msipa and Juma supra n 2 at 9. Msipa and Juma offer a different, but similar type of argument. They are critical of the terminology of 'protection' and 'needs' of women with disabilities in Article 23(a) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women (2003), as well as 'special care of children with disabilities' in Article 24 (1) of the African Charter on the Rights and Welfare of the Child (1990). Msipa and Juma suggest that both treaties fail to recognise the capacity of women and children to hold human rights.

¹¹¹ For a good critique of the emphasis on individual autonomy in the CRPD, see Lid, 'The Significance of Relations: Rethinking Autonomy in a Disability Perspective' in Fjetland et al (eds), *Lived Citizenship for Persons in Vulnerable Life Situations. Theories and Practices* (2022) at 100. Celik, 'The role of CRPD in Rethinking the Subject of Human Rights' (2017) 21(7) *The International Journal of Human Rights* at 933-955. Silvers, 'Book Review: Rights are still Right—the Case for Disability Rights' (2004) 34(6) *Hastings Center Report* at 39-40. Malinga, 'The African View of Independent Living' (2003) available at: [The African View of Independent Living Independent Living Institute](https://www.independentlivinginstitute.org/AfricanViewofIndependentLiving.pdf) [Last Accessed 17 November 2024]. Smith, 'The 'Problem of Dependency' and the Mythology of Independent Living' (2001) 27(4) *Social Theory Practice* at 579-598.

¹¹² Kittay, *Love's Labor: Essays in Women, Equality and Dependency* (1999); Kittay, 'The Ethics of Care, Dependence, and Disability' (2011) 24 *Ratio Juris* at 49-58. Morris, 'Impairment and Disability: Constructing an Ethics of Care that promotes Human Rights' (2001) 16 *Hypatia* at 157-166; Silvers et al, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (1999); Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (1996); Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs* at 644-661.

¹¹³ Wiredu, 'Moral Foundations of African Culture' in Morrow (ed.), *Moral Reasoning: A Text and Reader on Ethics and Contemporary Moral Issues* (2018) at 222.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ Molefe, *An African Philosophy of Personhood, Morality, and Politics* (2019) at 159.

people with disabilities it fails to account for the centrality of human dependency and vulnerability, risking the failure to recognise the duties owed to people with disabilities.

3. DUTIES TO PEOPLE WITH DISABILITIES

In this section, I propose an alternative conception of duties that is more inclusive and capable of catering for the diverse needs of people with disabilities, especially those who are dependent on others and unable to reciprocate. Here, duties are seen as stemming from a fundamentally altruistic and moral-based civic order that prioritises care and concern for others as the highest values, grounded in love, care, and compassion.¹¹⁷ Duties are inherently altruistic in nature and encourage individuals – particularly those who are able – to care for and show concern for vulnerable members of their communities. To elaborate on this argument, I refer to the seminal work of African philosopher Kwame Gyekye, who presents duties as an ‘altruistic freighted morality’.¹¹⁸ In this framework, duties are deeply ethical and incomprehensible outside the context of human sociability or relationality. Duties are enacted through an ethic and practically expressed in social and moral roles, such as obligations, responsibilities, and commitments to others. In Gyekye’s conception of duties, there is a direct link between the ethic of duty and instrumental social roles,¹¹⁹ something that is not sufficiently obvious in the ACHPR. Therefore, social and community life is defined by a morality that orients individuals to care for or show concern for the welfare of others. This is also based on the understanding that duties stem from the need to commune with others or to help and be helped by others, which is indicative of the insufficiency and vulnerability of all human beings.¹²⁰ Constituting an ‘altruistically freighted morality’¹²¹ oriented to an ethic of care and concern for others, duties are defined by Gyekye as ‘a caring attitude or conduct that one feels one ought to adopt with respect to the well-being of another person or other persons’.¹²² Gyekye suggests that this ethic is practically rendered through three core duties among others: ‘the duty to help others in distress, the duty to show concern for the needs and welfare of others, and the duty not to harm others’,¹²³ which are binding on all individuals and not contingent on the rights of the person in distress or need. In other words, duties in this sense are not acts of supererogation or correlative of rights. Rather, as Gyekye emphasises, the performance of such duties requires a conscious attitude towards the needs and welfare of the vulnerable or those in distress. In addition to emphasising that duties are not optional or acts of supererogation,¹²⁴ Gyekye is overall sceptical of rights-based conceptions of justice because they are not always oriented to people’s needs and welfare and may lack compassion. Accordingly, an altruistic moral order based on love and compassion is better equipped to respond to the needs and welfare of others

¹¹⁷ Masolo, *Self and Community in a Changing World* (2010); Bell, *Understanding African Philosophy: A Cross-Cultural Approach to Classical and Contemporary Issues* (2002) at 59; Gyekye, ‘Person and Community in African Thought in Gyekye and Wiredu K (eds), *Person and Community: Ghanaian Philosophical Studies* (1997) at 70

¹¹⁸ *ibid.*, (Gyekye)

¹¹⁹ *ibid* at 67.

¹²⁰ Wiredu *supra* n 113.

¹²¹ Gyekye *supra* n 117at 67.

¹²² For similarities, see Metz *supra* n 132 at 189 and 199; Bell *supra* n 117 at 59; Matolino and Kwindigwe, ‘The End of Ubuntu’ (2010) 32 *South African Journal of Philosophy* at 197-205.

¹²³ Gyekye *supra* n 117 at 66.

¹²⁴ *ibid* at 71–72

than a liberal individualistic one. Gyekye's point here is that duties are not necessarily correlatives of rights.¹²⁵

The correlation Gyekye draws between duties, needs and well-being is similar to a recent view expressed by contemporary legal theorist, Scoth Veitch.¹²⁶ Veitch argues that duties have a dual function: they can constrain and limit, but also provide a means to express 'loyalty, solidarity and love'.¹²⁷ He suggests that duties are more enduring than rights, noting that rights are permeated with duties and operate within multiple societal commitments.¹²⁸ In other words, taking rights seriously entails taking duties even more seriously.¹²⁹ Influenced by the writings of Simone Weil,¹³⁰ Veitch suggests that the tendency to correlate rights and duties in the literature fails to capture the latter's role in various social practices. Furthermore, conventional accounts often overlook the multiple duties or 'waves of duties' (echoing Jeremy Waldron),¹³¹ necessary to realise rights. For instance, the right not to be tortured entails numerous duties, such as educating people about the injustice of torture, anticipating circumstances where torture might occur, and investigating, persecuting, and providing remedies for torture.¹³² A similar point applies to social and economic rights. The right to education involves several duties imposed on diverse actors, including government officials, local authorities, schools and teachers. Duties are not static, but temporal and dynamic, involving multiple actors that may change over time.¹³³ Veitch argues that 'taking obligations seriously in institutional practices... means taking other *obligations* seriously' as well.¹³⁴ Therefore, taking multiple duties seriously does not depend on understanding their correlation with rights, but rather with human need, vulnerability, and dependency. A greater appreciation of needs is predicated on understanding the universality of human vulnerability and dependency. All human beings are vulnerable to material, emotional and intellectual needs, which they cannot satisfy on their own, and must depend on others, especially the need to relate to other people.¹³⁵ As Veitch eloquently puts it,

'...needs are not something that we can overcome when a certain degree of maturity or relative independence is reached; needs have an enduring presence. For it is an ineliminable part of the human condition to be vulnerable and dependent throughout our lives. This is something from which no one is exempted since everyone, albeit in different ways and at different times in their lives, will have needs as a consequence of illness, injury, disability, or infirmities of old age. With respect to all these, there is little possibility but to rely on others for help in meeting our needs.'¹³⁶

Although Veitch discusses Western societies (or 'complex societies' as he puts it), clear parallels can be drawn between his work and the correlations Gyekye establishes between duties, needs and well-being. This suggests that these are universal features of all human beings and human societies. Gyekye's emphasis on well-being sets his work apart from Veitch, as does his fundamental relational communitarian perspective. Duties arise from the concern for

¹²⁵ Molefe supra n 116; Menkiti supra n 97.

¹²⁶ Veitch, *Obligations: New Trajectories in Law* (2021).

¹²⁷ *ibid* at 80.

¹²⁸ *ibid*

¹²⁹ *ibid* at 97.

¹³⁰ Weil, *Simone Weil: An Anthology* (2005).

¹³¹ Waldron, 'Rights in Conflict' (1989) 99 *Ethics* at 503-519.

¹³² Veitch supra note 126 at 94.

¹³³ *ibid*

¹³⁴ *ibid* at 97.

¹³⁵ *ibid* at 98.

¹³⁶ *ibid* at 98.

the needs and well-being of others, fundamentally rooted in community relationships and the inherent sociability or relationality of human beings. The prominence of compassion and altruism in Gyekye’s conception of community, which is centred on meeting the needs and welfare of others, reflects an appreciation of human vulnerability and dependency, particularly the need to connect and commune with others. The human need for relationships transforms individuals into a community focused on caring for its members’ needs and well-being. The work of relational feminists,¹³⁷ which highlights human dependency and critiques the dominance of autonomy and rationality as species norms, also underscores the importance of relationships, albeit not necessarily community relationships. This body of work does reference duties, though not as prominent as African philosophy literature. Noteworthy examples include Marta Fineman’s work,¹³⁸ which underscores human dependency as a universal and vulnerable feature of human existence and calls attention to the state’s duty to address ongoing human vulnerabilities. Similarly, Kittay’s work proposes a two-tiered system of nested duties to support care work publicly, an approach modified by Laura Black into a single-tier system that extends support to care recipients based on civic membership and a corresponding primary and collective duty.¹³⁹ While human dependency and vulnerability are not as prominently featured in African philosophy literature, these themes are not entirely absent. As seen in Wiredu’s work in Section 2B these perspectives reflect the implicit assumption of natural sociability and relationality among human beings.

Revisiting Gyekye’s conception, while duties do have a mutual reciprocal aspect, his emphasis on their underlying compassionate and other-regarding foundations sets his perspective apart. Though altruism has its limitations¹⁴⁰ and can be paternalistic or misused,¹⁴¹ it still plays a crucial role in transforming duties into a more inclusive concept and challenging common assumptions in African communitarian philosophy about mutuality and reciprocity. From this perspective, duties are not symmetrical but rather asymmetrical. This not only broadens the range of individuals to whom duties are owed (i.e., duty-beneficiaries), but also emphasises the unique role of duty-bearers (i.e., those capable of fulfilling duties) in carrying out these duties. Although reciprocity remains relevant, it is not seen in a mutual light. Duty-bearers perform their duties without expecting reciprocity. Emphasising reciprocity often stems from not fully recognising the diverse and heterogenous nature of most communities. Communities are far from homogenous; they consist of individuals with varying needs, talents and abilities. Hence, it is best to view reciprocity in indirect and flexible terms, which may occur occasionally, at different life stages, or and in various contexts of need and distress. Viewing reciprocity within a broader model of asymmetrical duties provides duty-beneficiaries with the assurance that their needs will be addressed by duty-bearers. While the concept of asymmetrical duties is not always prominent in African philosophy, Stuit’s¹⁴² work on *ubuntu* acknowledges this aspect. Stuit suggests that

¹³⁷ Kittay supra n 112.

¹³⁸ Fineman, ‘The Vulnerable Subject and Responsive State’ (2010) 60 *Emory Law Journal* at 251.

¹³⁹ Black, ‘Private Dependence, Public Personhood: Rethinking “Nested Obligations”’ (2015) 30 *Hypatia* at 115.

¹⁴⁰ Ten, ‘Altruism and Limits’ in Kapur and Chong (eds), *Altruistic Reveries: Perspectives from the Humanities and Social Sciences* (2002) at 13-22.

¹⁴¹ The effective altruism movement is a good illustration of this point. See MacAskill, *Doing Good Better: how Effective Altruism can help you make a difference* (2015), Singer, *The Most Good You Can Do: How Effective Altruism is changing ideas about Living Ethically* (2015). For a good critique of the movement, see Cary, ‘Against Effective Altruism’ in Adams et al (eds), *The Good It Promises, The Harm It does* (2023) at 225-245.

¹⁴² Stuit, ‘Ubuntu and Common Humanity in the South Arican Truth and Reconciliation Commission’ in Stuit (ed), *Ubuntu Strategies: Constructing Spaces of Belonging in Contemporary South African Culture* (2016) at 39-92.

To help, give, from this perspective, is thus not based on the assumption that the person giving will be reciprocated, but emphatically hinges on the possibility of non-reciprocity.... If reciprocity does not occur, the system will still work, in a literal sense, for those who need it'¹⁴³

Stuit's point about the system catering to those in need it the most cannot fully be appreciated if mutual reciprocity is understood as the central element of duties. It is worth emphasising that some people with disabilities would certainly count amongst those whose needs should be met by the system. Non-reciprocity implies that the system is based on altruistic values, such as compassion, empathy, help, kindness, benevolence, generosity, love, care, and concern for others. Taking altruism seriously not only demonstrates how duties are asymmetrical and inclusive but also their capacity to respond to people with disabilities, especially people with cognitive and extreme physical disabilities, who often cannot reciprocate. Apart from expanding the category of duty-beneficiaries, an altruistic conception of duties aligns more closely with the moral and other-regarding foundations of African communitarian philosophy.

An asymmetrical conception of duties, borrowing from Veitch's terminology, can be characterised as a type of 'uncalculated giving and receiving.'¹⁴⁴ Duties are not mutual; they are not based on a '... strict proportionality of giving and receiving'.¹⁴⁵ This is also because needs and well-being change over time, just as the capacity or ability to respond to them does. A static or binary understanding of duties is inflexible.¹⁴⁶ Symmetrical duties do not capture the temporality and dynamism required to respond to, or learn how to respond to, changes in peoples capacities and circumstances.¹⁴⁷ One could argue the dynamism necessary to respond to the needs of different people, especially people with disabilities, cannot be successfully achieved without the core duties in Kwame Gyekye's work: the duty to help others in distress, the duty to show concern for the needs and welfare of others, and the duty not to harm others. Gyekye's account of duties offers a superior representation of the compassionate and other-regarding nature of duties compared to the ACHPR and can serve as a model for expanding its duty framework. Although the family related duties in the ACHPR include some altruistic elements, they are less inclusive because they presume reciprocity only among family members.

A. Duty not to harm people with disabilities

It must be recognised from the outset that the core duties listed in Gyekye's account generally pose significant problems for practical implementation. This issue is also present with the duties in the ACHPR, which generally attempts to replicate features of traditional pre-colonial societies within the context of modern African nation states. While discharging these duties may have been relatively straightforward in small scale precolonial societies, this is not the case today, especially due to the scale and complexity of the modern state.¹⁴⁸ To the extent that these duties are practiced today, these are usually observed by members of kinship, religious or other groups. It is uncommon to find laws or policies that have institutionalised these duties

¹⁴³ *ibid* at 31

¹⁴⁴ Veitch *supra* note 126 at 98.

¹⁴⁵ *ibid* at 98.

¹⁴⁶ *ibid*

¹⁴⁷ *ibid*

¹⁴⁸ Onazi, 'What Obligations should be Owed to [African] People with Disabilities?' (2022) 18 *Review of Disability Studies: An International Journal* at 15-16.

on a national scale, although it is not impossible. As mentioned in the introduction of this article, the nature of compassionate duties presents a huge challenge for practical implementation or enforcement. It is worth noting that it would be mistaken or nearly impossible to practice these duties authentically in modern contexts. A more realistic objective is to explore ways in which the ethos underpinning some of these pre-colonial moral and ethical practices can be replicated in different modern institutional forms and at different levels of society.

Arguably, the duty not to harm others is the easiest to implement or practice because it is a negative duty.¹⁴⁹ Negative duties, generally understood as duties of noninterference – i.e., duties not to harm or injure others – are not only well established, but also, with certain exceptions,¹⁵⁰ relatively straightforward to discharge. Like the idea of negative duties, Gyekye describes them as negative moral imperatives.¹⁵¹ The duty not to harm others in his work is directly relevant to the provisions of harmful practices in the African disability rights protocol. Article 1 of the African disability rights protocol defines harmful practices as the type of ‘...behaviour, attitudes and practices, based on tradition, culture, religion, superstition or other reasons, which negatively affect the human rights and fundamental freedoms of persons with disabilities or perpetuate discrimination’. In response to these harmful practices, Article 4(d) of the African disability rights protocol imposes a general obligation on state parties to modify, outlaw, criminalise, campaign against, ‘as appropriate, any harmful practice applied to persons with disabilities.’ Furthermore, Article 1(1) requires state parties to take appropriate ‘measures and offer support and assistance to victims of harmful practices, including legal sanctions, educational and advocacy campaigns, to eliminate harmful practices...’, which includes ‘...measures to discourage stereotyped views or the capabilities, appearance or behaviour of persons with disabilities...’¹⁵² In support of these measures (and mindful of earlier arguments about the limit of general obligations), states can translate the duty not to harm others into a duty imposed on its citizens not to engage in harmful practices against people with disabilities. Apart from devising legal penalties specific to the diverse range of harmful practices, states can use this duty to promote positive attitudes and behaviour among citizens to avoid habits and practices that harm people with disabilities through educational and advocacy campaigns.

B. Duty to help people with disabilities in distress and to show concern for their needs and welfare

The duty to help others in distress and to show concern for their needs and welfare is more challenging to institutionalise or practically implement. Gyekye describes these as positive moral imperatives, closely resembling positive duties, such as duties of aid or beneficence. In Western legal and political philosophical traditions, these duties are often considered overbearing or burdensome on individual lives and require demanding acts of sacrifice, apart from the difficulty of defining their boundaries.¹⁵³ Gyekye’s account of duties, and duties in African philosophy generally attempts to avoid this issue by correlating needs (as opposed to rights) and duties, as well as dispensing with the distinction between a binding moral duty and optional supererogatory acts.¹⁵⁴ Gyekye questions the individualist rationale underlying accounts of supererogation and the dual nature of morality, which presumes only a minority of

¹⁴⁹ Lichtenberg, ‘Negative Duties, Positive Duties, and the New Harms’ (2010) 120 *Ethics* at 559.

¹⁵⁰ *ibid* at 558.

¹⁵¹ Gyekye *supra* n 117 at 69.

¹⁵² African disability rights protocol *supra* n 3 at Article 1(d).

¹⁵³ Murphy, ‘The Demands of Beneficence’ (1993) 92 *Philosophy and Public Affairs* at 266 and 268.

¹⁵⁴ Gyekye *supra* n 117.

individuals can achieve moral ideals of love, compassion, and benevolence.¹⁵⁵ On the contrary, he argues that African communitarian morality, based on love, compassion and benevolence, prioritises human need and welfare, and does not distinguish between moral duties and moral ideals, treating all individuals as capable of exhibiting these ideals.¹⁵⁶ As a strictly philosophical account Gyekye's objective is not to address its application, but the challenge is demonstrating that such binding duties can be widely practiced, particularly in the context of modern African nation-states. While duties have a perfectionist or individualistic dimension, they are not disaggregated and optional individual duties. Instead, they are collective duties through which individuals contribute to the well-being of society. This requires that individuals have opportunities to discharge their duties in different areas of life, as well as hierarchical institutional arrangements that can connect all duties for the collective well-being of all members of society, especially the most vulnerable. The difficulty is finding modern institutions that can unite the various individual duties of community members into a collective societal duty to help people with disabilities in distress and to show concern for their needs and welfare.

In my previous work,¹⁵⁷ I argued that taxes provide a mechanism, embodying both individual and collective elements, to make duties to people with disabilities a practical reality. In this context, I want to reaffirm the justificatory arguments for taxes to foster a better appreciation of their role in concretely realising duties, and demonstrate how certain aspects of these proposals can work within the CRPD and African disability rights protocol. This is primarily because those proposals were initially designed to function outside the human rights disability justice framework. My argument is that, since paying taxes is both a moral and legal duty,¹⁵⁸ it possesses a binding nature that can animate the kind of altruistic duties articulated above. Thus, taxes should be seen as 'a placeholder of the altruistic [duties]¹⁵⁹ of people without disabilities to be generous, benevolent, compassionate, and friendly, or to help, love, and respect the most vulnerable people with disabilities.'¹⁶⁰ Taxes can transform and translate elemental moral duties of individuals into legally binding and collective commitments to people with disabilities. In other words, taxes consolidate individual duties into legal and collective commitments to people with disabilities. This interpretation and function of tax is unconventional. Here, tax is not merely an institutional mechanism to finance state expenditures but is viewed as profoundly ethical.¹⁶¹ It is understood '...as a means through which citizens in a political community share the burdens of living together...'.¹⁶² While this has various implications, it certainly includes a collective duty to create institutions to care 'for the sick, elderly, poor'¹⁶³ and vulnerable. In Africa, as in other parts of the worlds, people with disabilities are often among the poorest and most vulnerable, making them individuals to whom duties are owed to support their physical, mental, biological, and social needs and welfare.¹⁶⁴ This could include removing the barriers to community participation, providing access to

¹⁵⁵ *ibid* at 75

¹⁵⁶ *ibid*

¹⁵⁷ Onazi *supra* n 65.

¹⁵⁸ *ibid*

¹⁵⁹ *ibid* (word substitute mine).

¹⁶⁰ *ibid*

¹⁶¹ My account of tax here would align with writers that treat it as an instrument of distributive justice. See James, 'The Justice of the Tax Base and the Case for Income Tax' in Bandari (ed) *Philosophical Foundation of Tax Law* (2017) at 125–166; Murphy and Nagel, *The Myth of Ownership: Taxes and Justice* (2001)

¹⁶² Saffie, *Taxes as Practices of Mutual Recognition: A General Theory of Tax Law* (PhD Thesis, University of Edinburgh, 2014) at 199.

¹⁶³ Curran, 'Just Taxation in the Roman Catholic Tradition' (1985) 13 *The Journal of Religious Ethics* at 113–133.

¹⁶⁴ Onazi *supra* n 67.

public goods and services, creating employment opportunities, and meeting the most basic needs of people with disabilities.

To better appreciate how these objectives can be achieved, I propose a hypothecated tax scheme¹⁶⁵ to facilitate the duties of a wide range of community members towards people with disabilities. By earmarking tax revenue from various sources (such as income or consumer tax), funds can be specifically allocated to meet the diverse needs of people with disabilities. This approach can be used to establish or fund institutions at different levels of society, directly addressing their needs and fostering their participation in all aspects of community life. For instance, hypothecation can support existing disability services in African states or help create new ones where they are lacking. It is crucial to implement hypothecation to create or support national disability services responsible for fulfilling duties towards people with disabilities on behalf of the community. These services should take the lead in addressing the diverse and urgent critical needs, including making structural changes to public infrastructures and the physical environment (such as public transportation, buildings, and ramps) to make them more inclusive. For example, funding would support healthcare services, scholarships, housing, assistive devices (like wheelchairs and technologies), and establish welfare programmes for the poor and destitute, as well as institutions with professionally trained staff for individuals with extreme physical and cognitive impairments.¹⁶⁶

The key point is to view taxes as a vital ally to disability justice by providing resources that can alleviate immediate and drastic exclusions faced by people with disabilities. Removing barriers to the full participation of people with disabilities in community life depends on resources, which can be partially supplied by a tax scheme that consolidates the various duties of the public to show solidarity with vulnerable people with disabilities. While those who can pay would bear a primary duty, hypothecated tax schemes should also encourage economically disadvantaged community members to contribute as they are able, for example, through consumer or income taxes. Not everyone with the financial capacity will be motivated by altruism or understand the rationale behind the tax scheme, especially its origins as an African moral duty to care for the vulnerable. Without understanding its compassionate or altruistic foundations in African moral philosophy, many may view the hypothecated tax scheme as coercive or instrumental. Without this context, it becomes difficult to distinguish these proposals from other countries' disability support systems funded from general taxation, where connections between individual taxpayers and beneficiaries are not apparent. Even when such connections exist, some might believe that contributing to the tax scheme absolves them from further duties towards people with disabilities they encounter daily. Therefore, the proposed tax scheme differs from general taxation-funded disability support funds by directly linking the duties of people without disabilities to the needs and welfare of people with disabilities. This implies the need for public education and awareness campaigns to demonstrate how the tax contributions of people without disabilities directly impact the lives of people with disabilities.

State corruption, which is widespread in Africa, is another significant issue to consider when evaluating these proposals. Combined with the colonial origins of tax in Africa, state corruption may explain the relatively poor record of tax institutions across the continent, often

¹⁶⁵ Halliday, 'Egalitarianism and Consumption Tax' in Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (2015) at 119-133; Barret, 'Democratic Discourse, Taxation and Hypothecation' (2012) 14 *Journal of Australian Taxation* at 89-117; Buchanan, 'The Economics of Earmarked Taxes' (1963) 71 *Journal of Political Economics* at 457-469; Wilkinson, 'Paying for Public Spending: Is there a role for Earmarked Taxes?' (1945) 15 *Fiscal Studies* at 119-135.

¹⁶⁶ Onazi supra n 67 at 160.

characterised by low compliance rates.¹⁶⁷ While addressing state corruption is undoubtedly challenging, its long-term resolution hinges on improving the democratic quality of African states. This includes encouraging the participation of people with disabilities in designing and managing hypothecated tax schemes and holding state officials accountable. The magnitude of the corruption problem should not deter the creation of tax-supported disability support services, especially in Africa, where such institutions are scarce. Unlike Western countries, where various forms of disability support services are well established, families in Africa have borne the primary responsibility for caring for and supporting people with disabilities. The mixed record of disability support services in the West, particularly their involvement in the oppression of people with disabilities, provides another reason for scepticism about establishing similar services in Africa. While removing discriminatory societal barriers, as suggested by the human rights model, is crucial for disability justice, it has proven challenging, particularly in demonstrating how the most vulnerable and dependent people with disabilities can be supported without the compassion and altruism of others.¹⁶⁸ The reality is that many people with disabilities cannot work or live independently without the support and care of others.

C. Implications of individual duties on the CRPD

The strongest objection to the duty-based approach so far articulated is its incompatibility with the dominant rights-based orientation of the CRPD. Since human rights uphold the independence or autonomy of individuals, they are considered superior to duties, especially the compassionate and altruistic duties advocated in this context. Compassionate or altruistic duties may be mistakenly associated with acts of charity¹⁶⁹ or pity, which reinforce the dependence of people with disabilities on others. It is questionable whether the type of compassionate or altruistic duties discussed in this article had anything to do with the discredited Western institutions and support services of the past. In any event, the proposals here clearly align with the objectives of the social model of disability to remove barriers that exclude people with disabilities from community life than approaches endorsed by the medical or charity model of disability. The compassionate or altruistic duties being promoted are really about solidarity, rather than condescension and superiority.¹⁷⁰ Although there is limited consensus about what solidarity means,¹⁷¹ there is some agreement that it involves fostering community, asymmetrical mutuality and collaboration. It means building genuine and durable connections between people, not ad hoc distant exchanges that assert the superiority or power of the giver over the receiver.

As Metz defines it, solidarity is ‘the combination of exhibiting certain psychological attitudes and engaging in helpful behaviour...positively oriented towards the other’s well-being’.¹⁷² While solidarity does not exclude charitable and compassionate or altruistic

¹⁶⁷ Kouame, ‘Trust to Pay? Tax Morale and Trust in Africa’, (2021) 57(7) *The Journal of Development Studies* at 1086-1105

¹⁶⁸ Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (2009) at 32.

¹⁶⁹ Citing Kant, Campanelli’s important work demonstrates that solidarity is either a moral obligation or unconditional duty, making it an act of justice and not charity. See Campanelli, ‘Principle of Solidarity’ in *Max Planck Encyclopaedia of Public International Law* (2011) at 3.

¹⁷⁰ Weber, ‘Compassion and Pity: An Evaluation of Nussbaum’s Analysis and Defence’ (2005) 7(5) *Ethical Theory and Social Practice* at 488.

¹⁷¹ Ashley, ‘Solidarity, Obligations and Expressions’ (2015) 23(2) *The Journal of Political Philosophy* at 128-145

¹⁷² Metz *supra* n 103 at 189.

dispositions, it is often viewed more favourably because it involves actions aimed at enhancing the biological, psychological, social, and general welfare of others, as well as supporting their self-realisation.¹⁷³ Solidarity with others is nurtured by ‘prior conditions of roughly empathetic cognition and sympathetic emotion’,¹⁷⁴ which in turn generate compassionate or altruistic responses. Solidarity encompasses the empathic consciousness of others, including sympathetically responding to their positive or negative experiences.¹⁷⁵ This is what Article 76(b) of the Cape Verde Constitution¹⁷⁶ distinctively calls on Cape Verdeans to do when it imposes duties of respect and solidarity with people with disabilities by supporting and prioritising them in various ways. Understanding duties or obligations as an expression of solidarity to people with disabilities is not only what is novel about Article 76(b) of the Cape Verde Constitution, but also a means of appreciating its compelling and attractive nature. Despite the novelty of this provision, especially in the African context, it remains unclear whether it has succeeded in encouraging positive dispositions towards Cape Verdean people with disabilities. It is also unclear what practical and institutional mechanisms have been put in place by the Cape Verdean government to support people with disabilities. Arguments made in the previous section about the hypothecation of taxes can provide a useful means for Cape Verdeans to express their solidarity to people with disabilities. The duty to pay taxes in the interest of society in the ACHPR is also relevant in this context,¹⁷⁷ if it aligns with the argument developed in the previous section. Not much is known about the duty to pay taxes except that it is legally binding,¹⁷⁸ and gives rise to a corresponding state obligation to establish an effective and fair tax and budgetary system capable of delivering economic and social and cultural rights.

Article 76(b) of the Cape Verde Constitution should be celebrated as a rare example of the precise legal recognition of duties of individuals towards people with disabilities. Individual duties occupy a marginal place in disability studies and disability justice discourse. As suggested above, there appears to be a strong aversion to duties or obligations in disability activism. Duties run contrary to much of the disability activism in the West and the values now enshrined in the CRPD, which implicitly amplify individualism. Couched in the language of universal human rights, values of independence, autonomy or self-sufficiency are presented through the CRPD as a reflection of the species norm. Dependence and vulnerability¹⁷⁹ are devalued as fundamental features of what it means to be a human being. As Joan Tronto puts it

...neediness is conceived as a threat to autonomy, those who have more needs than us appear to be less autonomous and hence less powerful and less capable. The result is that one way in which we socially construct those who need care is to think of them as pitiful because they require help.¹⁸⁰

¹⁷³ *ibid*

¹⁷⁴ *ibid* at 96.

¹⁷⁵ Metz, *An African Moral Theory: African Ethics in and Beyond the Continent* (2022) at 93-95.

¹⁷⁶ Constitution of the Republic of Cape Verde 1992 (Amended in 2010).

¹⁷⁷ ACHPR *supra* n 31 at Article 29(6).

¹⁷⁸ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2011) at para 15.

¹⁷⁹ Shakespeare, *Help* (2000) at 63-84.

¹⁸⁰ Tronto, *Moral Boundaries: A Political Argument for the Ethic of Care* (1993) at 120.

While not all disability rights activists in the West support this mindset,¹⁸¹ the CRPD's emphasis on individualism was a significant part of the objections raised by African representatives at negotiations for the instrument. This later became one of the justifications for the African disability rights protocol.¹⁸² Objections were specifically raised about the independent living terminology in Article 19 of the CRPD, which African and Southern representatives associated with radical notions of autonomy and self-sufficiency advocated by the independent living movement in the United States of America (USA).¹⁸³ Mali's representatives at the CRPD negotiations eloquently captured this objection questioning 'whether anyone living in a community can be truly independent, given the necessary interdependence between members of the community'.¹⁸⁴ Despite the opposition to values of the independent living movement during the CRPD's drafting, individual autonomy, independence and choice are surprisingly included in the African disability rights protocol.¹⁸⁵ Beyond terminological differences, the community living provisions in the African disability rights protocol partially differ from the CRPD's independent living provisions by granting rights to caregivers and respite services,¹⁸⁶ establishing and organising community living services¹⁸⁷, and aligning community-based rehabilitation services with the social model of disability.¹⁸⁸

It is common for international and regional human rights instruments to vary in how they articulate or interpret rights to fit local contexts. Different regional human rights treaties occasionally articulate rights differently or omit them altogether. While conflicts may arise, regional instruments can foster universal human rights norms and create incentives for their enforcement through historical and geographical ties.¹⁸⁹ Individual duties may present an entirely different proposition, but it does appear that the CRPD is not averse to them, as may be presumed on the surface. This is mainly on account of its Preamble, which recognises that individuals owe 'duties to other individuals and to the community to which he or she belongs...' ¹⁹⁰ While this indicates some synergy between the African disability rights protocol and the CRPD, it is clear that the presence of duties in the latter instrument was not

¹⁸¹ Mingus, 'Access intimacy, Interdependence and Disability Justice', 11 April 2017, available at: [Access Intimacy, Interdependence and Disability Justice | Leaving Evidence](#) [Last Accessed 8 January 2025]. Mingus, 'Changing the Framework of Disability Justice: How our Communities can move Beyond Access to Wholeness', 12 February 2011, available at [Changing the Framework: Disability Justice | Leaving Evidence](#) [Last accessed 8 January 2025]; Murphy, *The body silent* (1990).

¹⁸² Viljoen and Biegon *supra* n 4

¹⁸³ It appears that General Comment 5 of the Committee on the Rights of Persons with Disability, which suggests that Article 19 'reflects the diversity of cultural approaches to human living and ensures that its content is not biased towards certain cultural norms and values', failed to allay these concerns. Committee on the Rights of Persons with Disabilities, General comment 5: Living Independently and being included in the Community (Article 19), 27 October 2017.

¹⁸⁴ United Nations General Assembly Ad Hoc Committee On a comprehensive and integral international convention on protection and promotion of rights and dignity of Persons with Disabilities. Fourth Session of the Ad hoc Committee UN Convention on the Rights of People with Disabilities. United Nations Department of Economic and Social Affairs, New York, 23 August – 3 September 2004, A/59/360.

¹⁸⁵ African disability rights protocol *supra* n 3 at Article 3(a).

¹⁸⁶ *Ibid* at Article 14(b).

¹⁸⁷ *Ibid* at Article 14(f)

¹⁸⁸ *Ibid* at Article 14 (e)

¹⁸⁹ Huneeus and Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems' (2018) *International Journal of Constitutional Law* 16, 1 at 36-160. Weston et al, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 (4) *Vanderbilt Journal of Transnational Law* 585-637.

¹⁹⁰ CRPD *supra* n 6 at Preamble (w)

inspired by the former. Rather, duties are a vivid attempt to give disability human rights discourse the African voice not sufficiently accounted for in the CRPD. Nevertheless, I have argued that assigning duties to people with disabilities is currently the wrong priority in the absence of individual duties towards people with disabilities, and only partially representative of the African voice.

While the proposed duty not to harm people with disabilities can directly complement provisions on harmful practices in the African disability rights protocol, I am overall sceptical about whether my proposals for tax can work within the framework of the African disability rights protocol and the CRPD. Nevertheless, it can be argued that the proposals can contribute to the state's general duties under the CRPD and the African disability rights protocol. Proposals made about tax in meeting the needs of people with disabilities clearly resonate with the state's general obligation to provide disabled people with an adequate standard of living and social protection¹⁹¹ and to '.... take measures to the maximum of its available resources.... with a view to achieving progressively the full realization of economic cultural and social rights'¹⁹² among other obligations. This is also the case with the general obligation of states under the African disability rights protocol to provide '...resources, including through budget allocations, to ensure the full implementation...' ¹⁹³ of the African disability rights protocol. Additionally, states can take 'special measures where necessary to accelerate or achieve de facto equality of people with disabilities' under the CRPD¹⁹⁴ and African disability rights protocol.¹⁹⁵ Special or specific measures involve the 'preferential treatment of people with disabilities over others to address systematic/ systemic exclusion from the benefit of exercising rights'.¹⁹⁶ General Comment No. 6 of the CRPD Committee suggests that special measures are diverse in nature, ranging from outreach and support programmes, and quota systems, to empowerment measures and resource allocation. While special measures are usually temporary, permanent measures may be justified in relation to certain impairments or structural issues.¹⁹⁷ Special measures requiring resources could justify establishing hypothecated tax schemes, as discussed in the previous section. Although hypothecation often faces objections on the grounds that it prioritises specific interests over the collective well-being or common good, special measures offer solid justifications for this approach. It is not difficult to justify why earmarking revenue to support people with disabilities serves the common good.

4.CONCLUSION

The article has critiqued the introduction of duties of people with disabilities by the African disability rights protocol. In doing so, the African disability rights protocol has not sufficiently recognised the corresponding duties owed to them by other individuals. I offered an alternative, more inclusive way of understanding duties to address some of the concerns raised, and I have

¹⁹¹ ibid at Article 28.
¹⁹² ibid at Article 4 (2); African disability rights protocol supra n 3 at Article 4(d).
¹⁹³ ibid, African disability rights protocol at Article 3 (c) (i). On the relationship between tax and human rights, particularly economic, social and cultural rights, see Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona (2014) A/HRC/26/28 at para 2; Alston and Reisch, *Tax, Inequality and Human Rights* (2019). Holmes & Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999)
¹⁹⁴ CRPD supra n 6 at Article 5(4)
¹⁹⁵ African disability rights protocol supra n 3 at Article 5(2)
¹⁹⁶ Special measures are also listed in Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women and Article 1(4) of the Convention on the Elimination of Racial Discrimination.
¹⁹⁷ ibid

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60

sketched a few ideas about how my proposals can be realised in practice. It is likely that these proposals would prove unpopular in many African states, whose citizens are relatively poor and can hardly afford to pay taxes. The proposals must contend with the aversion to tax across Africa, due to its colonial antecedents, its association with the corruptions of contemporary African nation states, or the perception that it is simply a coercive and instrumental levy. Therefore, citizens of various African countries would have to be convinced about the proposals. A citizenship education or publicity campaign could be a useful way to address these issues and to nurture the ability of citizens to better understand their duties to people with disabilities. As was argued in Section 3C of this article, a duty similar to Article 76(b) of the Cape Verde Constitution, which imposes a duty of respect and solidarity with people with disabilities, may provide the legal foundation for an educational or publicity campaign to promote tax as a way of discharging duties to people with disabilities.

Furthermore, there may be significant doubts about whether the hypothecation of taxes can reliably raise and sustain the revenue necessary to satisfy the needs of a diverse range of people with disabilities.¹⁹⁸ It is also uncertain whether hypothecation can survive periods of economic recession, regardless of the wealth of the country concerned. Such issues may be addressed by considering tax as one of several sources of revenue within a given African state. In other words, a weak version of hypothecation, rather than a strong one, may be a viable option to pursue. While states have a wide degree of liberty to generate resources from different streams of revenue, including through international cooperation or from natural resources, it is important not to lose sight of the objective. The reference to taxation aims to provide a practicable mechanism to direct the compassionate and altruistic duties of individuals in various societies toward people with disabilities. My argument has been less on the effectiveness of tax and more on the opportunities it presents to bring compassionate or altruistic duties to life. The main goal has been to demonstrate that tax is the most tangible way to understand and practice compassionate or altruistic duties in contemporary African societies. In other words, tax provides an institutional mechanism to replicate compassionate and altruistic duties in the context of modern African states. It provides citizens of various African countries with a practical way to discharge their duties to assist people with disabilities. Tax acts as a bridging concept or placeholder, transforming individual duties into collective, legally binding commitments to people with disabilities. Therefore, it is not simply a source of state revenue or an instrument of distributive justice, but a direct and intrinsic means by which individuals can substantively impact the lives of people with disabilities.

¹⁹⁸ Onazi *supra* 65 at 162.