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**Domestic Courts' Guidelines Framework on Disposition of Children
with Disabilities in Conflict with the Law**

Thesis submitted by:

for the final examination of the Advanced L.L.M. in International Children's Rights



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Declaration Statement

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List of Abbreviations and Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
African Disability Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa
CRC Committee	UN Committee on the Rights of the Child
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Persons with Disabilities
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
UN	United Nations
UNCRPD	UN Committee on the Rights of Persons with Disabilities

Executive Summary

Children with disabilities, a vastly diverse population group, come into contact with the law and justice system in various ways, including as children in conflict with the law. It is undisputable that their interaction with the justice system leads to poor disposition outcomes by domestic courts.

Nonetheless, due to adoption of a narrow understanding of disability in attempts to discuss disposition of children with disabilities in conflict with the law, there has been no dedicated wholistic analysis of children's rights vis-à-vis disability rights perspectives in that regard. Furthermore, no clear guidelines framework, in line with the human rights of children and the human rights of children with disabilities, have been provided to assist domestic courts in proper disposition of children with disabilities in conflict with the law. It was, therefore, the aim of this study to devise, through a critical analysis of international and regional standards, and relevant domestic practices, specific guidelines for domestic courts in disposition of children with disabilities in conflict with the law.

The study adopted a doctrinal research philosophy and followed a qualitative research paradigm. The data, which was analysed in a thematic manner, was collected using a desk-based research method from the libraries and internet search.

As a limitation to the study, with respect to domestic practices, it was beyond the scope of this study to collect and analyse data from all the countries. Hence, the study relied much on literature specifically dealing with the treatment of children with disabilities in conflict with the law under selected domestic frameworks of Australia, Singapore and New Zealand. A further limitation to the study from the selected domestic practices was that they focus on neuro-disabilities or intellectual disability and exclude other forms of disability. Therefore, to address that limitation, the research broadly analyses the domestic practices in order to adapt the applicability of key standards therein to disposition of all children with disabilities in conflict with the law.

Chapter two analyses and formulates the conceptual and theoretical frameworks relevant to the study. Conceptually, it looks at the following terms: children, children with disabilities, children with disabilities in conflict with the law, and disposition. To frame the theoretical framework, it analyses various approaches to children with disabilities in conflict with the law. It specifically looks at the human rights model of disability, two-tier vulnerability approach to children with disabilities, double disadvantage, and the intersectionality approach to vulnerability. Through that analysis, the chapter formulates a children's human rights approach to children with disabilities as the overall theoretical framework for the study.

The third chapter looks at various instruments, international and regional, that explicitly and/or implicitly provide for and enshrine rights of children with disabilities in conflict with the law and their disposition in the child justice system. The chapter examines relevant standards on disposition of children with disabilities in conflict with the law, in consideration of both children's rights and disability rights. It analyses the following instruments: the CRC, CRPD, ACRWC, International Principles and Guidelines on Access to Justice for Persons with Disabilities, African Disability Protocol, and the Council of Europe Guidelines on Child-friendly Justice.

Chapter four succinctly examines relevant domestic practices on disposition of children with disabilities in conflict with the law. It presents and analyses case studies of the domestic practices of Australia, Singapore, and New Zealand by looking at their relevant legislative and policy frameworks, case law, as well as reports and academic literature concerning the said jurisdictions.

Building on the preceding chapters, chapter five aims at formulating a clear and comprehensive guidelines framework for domestic courts concerning disposition of children with disabilities in conflict

with the law. It achieves that aim by presenting pillars, relevant for disposition hearing and issuing of disposition orders, as composing the framework for disposition of children with disabilities in conflict with the law. In that endeavour, the chapter outlines the following four pillars: identification and evaluation of disability; procedural and age-appropriate accommodations; framing of restorative justice as the dominant objective; and appropriate disposition determination.

Finally, chapter six outlines the conclusions of the study and sets the agenda for further study and articulation on the matters. Regarding the future agenda, the author recommends further and more comprehensive guidance, by the treaty bodies, on disposition of children with disabilities in conflict with the law. Furthermore, the scholar states that for proper understanding of the application of the multidisciplinary approach to disposition of children with disabilities in conflict with the law, there is need for further study that fully adopts a multidisciplinary research methodology.

Overview of the Main Findings

First, the study offers a comprehensive and holistic analysis of disposition of children with disabilities in conflict with the law. It links disposition of children with disabilities in conflict with the law and the child justice system under a broad conceptualisation of 'disability'. The paper presents a proper balance of children's rights and disability rights perspectives. Furthermore, beyond the prevailing focus on children with disabilities in detention centres, the study systematically examines domestic practices on the process of disposition of children in conflict with the law.

Second, a proper discussion of disposition of children with disabilities in conflict with the law requires a proper understanding of 'disability' as a central concept. The study finds that the human rights model of disability, through its recognition of interdependency, interrelation, and indivisibility of human rights, perfectly relates to 'two-vulnerability', 'double disadvantage', and 'intersectionality' approaches to children with disabilities in conflict with the law. They all underline that when dealing with children with disabilities in conflict with the law, the children's rights standards and disability rights standards must be safeguarded.

Third, this paper devises the phrase "a children's human rights approach to disability" to underscore that dealing with children with disabilities at all child justice system stages (including disposition), demands a consideration of both the human rights model of disability and children's rights approach. It further finds that, as subsets to this wholistic conceptualisation, regard must be had to other specific concepts including child-friendly justice, developmental approach, and procedural and age-appropriate accommodations.

Fourth, underlining the standards in the CRC, CRPD, International Principles and Guidelines on Access to Justice for Persons with Disabilities, ACRWC, African Disability Protocol, and the Council of Europe Guidelines on Child-friendly Justice, is the children's human rights approach to children with disabilities in the child justice system. Hence, per the standards, disposition of children with disabilities in conflict with the law requires consideration of the rights and provisions applicable to children, and children with disabilities.

Fifth, per the standards the following are the key elements of disposition of children with disabilities in conflict with the law: 1) non-discrimination; 2) specialised staff and facilities; 3) multidisciplinary approach; 4) proportionality principle; 5) availability of a variety of dispositions; 6) deprivation of liberty as a measure of last resort and for the shortest appropriate period of time; 7) prohibition of torture or other cruel, inhuman or degrading treatment; and 8) age-appropriate and procedural accommodations.

Sixth, the analysis of the domestic practices of Australia, Singapore and New Zealand, the study finds three key elements. There is need for pre-sentence (evaluation) reports given by experts in relation to disposition of children in conflict with the law with disabilities. A 'two-step framework' requires examining whether rehabilitation should be the dominant aim of disposition of children with disabilities in conflict with the law; and then, choosing the appropriate disposition option. Last, identification of disabilities of children in conflict with the law at all stages of criminal trial, including at disposition stage, is crucial as that contributes to effective and appropriate disposition measures.

Finally, the study proposes a 'Four-Pillar Model Framework' for disposition of children with disabilities in conflict with the law. The said pillars are as follows: 1) identification and evaluation of disability; 2) procedural and age-appropriate accommodations; 3) framing of restorative justice as the dominant objective; and 4) appropriate disposition determination. Each of the pillars has key elements. The pillars are closely related and support each other in ensuring proper disposition of children with disabilities in conflict with the law. Similarly, the elements are closely linked.

Keywords

Children – Children with disabilities – Children with disabilities in conflict with the law – Children’s human rights approach to disability – Disposition

Chapter One

Disposition of Children with Disabilities in Conflict with the Law in the Child Justice System

1.1. Introduction

Children with disabilities are a vastly diverse population group. According to a meaningful and inclusive conceptualisation of disability, they are estimated to be 240 million in the world.¹ In terms of a ratio presentation, 1 to 10 of all children worldwide have disabilities.²

These children come into contact with the law and justice system in various ways, including as children in conflict with the law, victims, and witnesses. It is the form of their contact with the law and justice as children in conflict with the law this paper is concerned about. This is in line with the definition of 'child justice system', by the Committee on the Rights of the Child ('CRC Committee'), as "the legislation, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, children considered as offenders."³

In general, persons with disabilities suspected of committing crimes are particularly vulnerable as their special needs are mostly not met.⁴ With specific reference to children, in some domestic jurisdiction, it has been found that there is a large proportion of children with disabilities in the child justice system.⁵ Unfortunately, the common trend is that their interaction with the child justice system leads to poor outcomes in terms of their disposition or sentencing (hereinafter solely referred to as 'disposition') by the domestic courts.

There are many factors that affect child justice outcomes. One of such factors, usually not given attention, is disability. Disability can place children at great risk for contact with the child justice system, as well as lead to poor dispositions once they are into contact with the child justice system.⁶ One clear explanation given for that is that most of the professionals involved in the child justice system are insufficiently aware, not properly trained, or lack the resources to enable them respond appropriately to children with disabilities who come into contact with the law.⁷

Aside the poor dispositions of children with disabilities in conflict with the law, it is important to note that various international and regional instruments guarantee the rights of children with disabilities. These instruments include the UN Convention on the Rights of the Child, 1989 ('CRC'); UN Convention on the

¹ UNICEF, 'Children with Disabilities Overview' (December 2021) < <https://data.unicef.org/topic/child-disability/overview/> > accessed 26 March 2022.

² Ibid.

³ UN Committee on the Rights of the Child ('CRC Committee'), General Comment No. 24 (2019) on Children's Rights in the Justice System [8] < <https://digitallibrary.un.org/record/3899429?ln=en> > accessed 25 March 2022.

⁴ The Australian Human Rights Commission, 'The Rights of People with Disabilities: Areas of Need for Increased Protection: Chapter 5: Criminal Justice System' < <https://humanrights.gov.au/our-work/rights-people-disabilities-areas-need-increased-protection-chapter-5-criminal-justice> > accessed 22 March 2022.

⁵ Katherine Taylor, 'A Summary of Research on Youth with Disabilities and the Juvenile Justice System' (National Center for Special Education Research FY 2006 - FY 2016) 2 < <https://ies.ed.gov/ncser/pdf/JuvenileJustice.pdf> > accessed 26 March 2022.

⁶ David Osher and others, 'Addressing Invisible Barriers: Improving Outcomes for Youth with Disabilities' Washington, DC: Center for Effective Collaboration and Practice, American Institutes for Research (2002) 3.

⁷ Ibid.

Rights of Persons with Disabilities, 2006 ('CRPD'); OAU African Charter on the Rights and Welfare of the Child, 1990 ('ACRWC'); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 2018 ('African Disability Protocol'); International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020; and the Council of Europe Guidelines on Child-friendly Justice, 2010. However, there is lack of a clear guidelines framework to assist domestic courts issuing fair and appropriate dispositions when faced with children with disabilities in conflict with the law. In the absence of such framework, this study finds it imperative to derive a framework of guidelines to assist domestic courts in disposition of children with disabilities in conflict with the law.

1.2. Statement of the Problem

Children with disabilities in conflict with the law are both persons with disabilities and children. Hence, they are entitled to rights, as enshrined in the international and regional instruments, generally and specifically for children with disabilities and children. But there is little attention on the understanding of the standards concerning the rights of children with disabilities in conflict with the law, and their applicability in the child justice system. Even the little attention given focuses on access to justice without substantively extending that to disposition of children with disabilities in conflict with the law. Furthermore, attempts to address disposition of children with disabilities in conflict with the law have adopted a narrow understanding of 'disability'; by focusing on intellectual or neuro-disability while neglecting other forms of disability. Consequently, there is lack of a dedicated wholistic analysis of children's rights vis-à-vis disability rights perspectives in relation to the standards and domestic practices on disposition of children with disabilities in conflict with the law. No clear guidelines (framework), in accordance with the human rights of children and the human rights of children with disabilities, are spelt out to assist domestic courts in proper disposition of children with disabilities in conflict with the law. It is, therefore, imperative to frame clear guidelines, based on the relevant standards and domestic practices, on disposition of children with disabilities in conflict with the law.

1.3. Aim of the Research

To devise, through a critical analysis of international and regional standards, and relevant domestic practices, specific guidelines for domestic courts in disposition of children with disabilities in conflict with the law.

1.4. Research Questions

1.4.1. Main research question

What specific guidelines can be derived from international and regional standards and relevant domestic practices to guide domestic courts in disposition of children with disabilities in conflict with the law?

1.4.2. Sub research questions

- 1) What does a children's human rights-based approach to disability in the child justice system entail?
- 2) What are the applicable children's rights standards on disposition of children with disabilities in conflict with the law?
- 3) What are the relevant domestic practices on disposition of children with disabilities in conflict with the law?
- 4) How can the relevant children's rights standards and domestic practices, in light of the children's human rights-based approach to disability, best be used to frame a comprehensive guidelines framework on disposition of children with disabilities in conflict with the law?

1.5. Significance and Justification of the Study

Children with disabilities in conflict with the law are particularly vulnerable in practice in the child justice system including at disposition stage. To safeguard the rights of children with disabilities in conflict with

the law in the child justice, a clear guidelines framework for courts on disposition of such children is key. Clear guidelines framework for disposition of children with disabilities in conflict with the law must recognise such children as rights holders with special rights as both children and persons with disabilities.

Much as there are relevant international and regional standards guaranteeing the rights of children with disabilities, without proper guidelines framework on disposition of children with disabilities in conflict with the law, the children are prone to suffer injustice. This study will, therefore, contribute to that knowledge by analysing relevant international and regional standards, and domestic practices, in light of a framed children's human rights approach to children with disabilities in conflict with the law; looking at all forms of disabilities. That analysis will lead to guidelines framework for domestic courts in disposition of children with disabilities in conflict with the law. Hence, the study will contribute to policymaking concerning disposition of children with disabilities in conflict with the law. Furthermore, it will contribute to the academic knowledge through its integrated approach to the issue.

1.6. Methodology and Research Techniques

1.6.1. Research philosophy

The study adopts a doctrinal research philosophy. It involves formulation of guidelines framework on disposition of children with disabilities in conflict with the law, through an analysis of legal rules in light of relevant international and regional standards, including the CRC, CRPD, ACRWC, African Disability Protocol, International Principles and Guidelines on Access to Justice for Persons with Disabilities, and the Council of Europe Guidelines on Child-friendly Justice; hence, doctrinal in nature.

1.6.2. Research paradigm

A qualitative research paradigm will be followed as the study will involve a highly subjective analysis of legal rules through relevant treaties and associated general comments, recommendations, and commentaries, decided cases, authoritative literature, reports, submissions, guidelines, and other publications. The study is not necessarily concerned with statistics of children with disabilities in conflict with the law and their disposition. Rather, the study seeks to explore the relevant international and regional standards, and domestic practices, with an aim of determining courts' guidelines framework on disposition of children with disabilities in conflict with the law.

1.6.3. Data collection method and analysis

The data will be collected using a desk-based research method from the libraries and internet search. Collection of the data will focus on children with disabilities in conflict with the law and their interaction with the justice system, especially concerning their disposition in criminal matters after proceedings.

In a thematic manner, the study will analyse the specific data on the human rights of children with disabilities in line with the general data on children in the child justice system with an aim of devising guidelines framework on disposition of children with disabilities in conflict with the law. In addition, content analysis will be employed to determine specific considerations that courts must duly consider at disposition stage, after proceedings, in respect of children with disabilities in conflict with the law.

With respect to domestic practices, it is beyond the scope of this study to collect and analyse data from all the countries. Hence, the study will rely much on literature specifically dealing with the treatment of children with disabilities in conflict with the law under selected domestic frameworks. In that regard, the study will specifically look at the domestic practices of Australia, Singapore and New Zealand. The reason for choosing Australia is that it represents a domestic framework explicitly legislating disposition of children with disabilities in conflict with the law. This has been identified through the country's submission in relation to the 2018 United Nations High Commissioner for Human Rights report on the

right to access to justice under article 13 of the CRPD.⁸ The submission highlighted the Children, Young and Families Act 2005 that specifically provide for disposition of children with (intellectual) disabilities in conflict with the law. Singapore and New Zealand have both been selected because of relevant recent jurisprudence, from their appellate courts, specially addressing disposition of children with (intellectual/neuro-disability) in conflict with the law. As for New Zealand, a further basis of its selection is due to the prevalence of the science of brain development and generally the recognition of neuro-disability in the country's criminal justice system.⁹

It is important to mention that, as a limitation to the study, there is lack of domestic practices relevant data generally covering disposition of children with disabilities in conflict with the law including children with physical disabilities. The selected domestic practices focus on neuro-disabilities or intellectual disability. Therefore, to address that limitation, this research will broadly analyse the domestic practices so as to adapt the applicability of key standards therein to disposition of all children with disabilities in conflict with the law.

1.7. Literature Review

Some authors have argued that if professionals and staff in the child justice system “receive support in understanding the cognitive and behavioral problems of youth disabilities, the system will better serve these children.”¹⁰ Hence, the authors contend that at the disposition stage of children with disabilities in conflict with the law, the court must consider, inter alia, the following information concerning disability characteristics and effective approaches when deciding appropriate settings: (1) whether there is need for an updated or more comprehensive disability evaluation; (2) whether the correctional setting under consideration for the child has programs that can specifically address and accommodate his or her disability; (3) whether parents, correctional program staff, and others involved in the justice system understand the child's disability-related needs; and (4) how can those involved in the justice system collaboratively provide the child with supports to ensure his or her successful transition back into the community?¹¹ In essence, the authors emphasised the connection between cognitive and/or behavior disabilities of children, and the child justice system. They also focused on the needs of children with disabilities in conflict with the law, without a proper analysis of the children's rights vis-à-vis disability rights frameworks. Still, this paper will critically consider, in light of the relevant children's rights and disability rights standards, how best the proposed “disability characteristics and effective approaches” can be used to frame specific guidelines to assist domestic courts in disposition of children with disabilities in conflict with the law.

One scholar observed that detention centres carry out sentences imposed by the courts, and that the sentencing by courts is based on penal policies and society's sentencing principles.¹² On that basis, the author analyses how the courts do impose sentences when the offender has a disability.¹³ However, the

⁸ Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (2018) < <https://undocs.org/A/HRC/37/25> > accessed 5 March 2022.

⁹ Nessa Lynch, ‘Case Note: The Sentencing of Vulnerability: *P v R*’ [2016] New Zealand Criminal Law Review 1 108 < <http://www.nzlii.org/nz/journals/NZCrimLawRw/2016/12.html> > accessed 15 April 2022.

¹⁰ Osher and others (n 6) 4.

¹¹ Ibid 3.

¹² Jane Dullum ‘Sentencing Offenders with Disabilities’ (2015) 17(1) Scandinavian Journal of Disability Research 60 < <https://doi.org/10.1080/15017419.2014.998272> > accessed 22 March 2022.

¹³ Ibid.

study addressed the issue without particular reference to disposition of children with disabilities in the child justice system. Nevertheless, the observations, findings and insights thereto justify and are to a great extent relevant to this study.

In a somehow similar approach, the Sentencing Council for England and Wales recently devised sentencing guidelines which, among others, address the issue of how a sentencing court factor in an offender's disability.¹⁴ They look at sentencing considerations for mental and physical disabilities.¹⁵ The guidelines provide that a sentencing court can factor in an offender's disability, whether mental or physical, in appropriate circumstances.¹⁶ However, the guidelines lack a specific approach in respect of disposition of children with disabilities in conflict with the law. Nevertheless, the discussion and the proposed considerations provided thereto are valuable to this paper.

With particular reference to offenders with mental or intellectual disability, it has been observed that such offenders are more likely to be imposed custodial sentences and of longer duration than offenders without disabilities.¹⁷ It has been argued that this trend may be the result of lack of alternatives available to a sentencing court.¹⁸ Therefore, it has been recommended that there should be increased support to judicial officers in understanding the particular difficulties of persons with disabilities, and that State authorities must ensure availability of a greater variety of sentencing options.¹⁹ Based on that, this study will consider how best courts must approach disposition of children with disabilities in conflict with the law in light of conditions in detention centre, and available alternatives.

It has also been contended that restorative justice is one way of reducing the number of children with disabilities in detention centres.²⁰ It is argued that restorative justice, encompassing, inter alia, victim-offender mediation, restorative community service, and restitution, redefines the justice systems.²¹ The study, however, discusses restorative justice vis-à-vis communities and schools when addressing the involvement of youth with disabilities in criminal activities.²² Even though the paper does not analyse restorative justice within the framework of child justice system at disposition stage, this study will consider these propositions in the analysis of clear and comprehensive framework considerations on disposition of children with disabilities in conflict with the law.

The United Nations 2019 global study on children deprived of liberty, which, among others, focused on children with disabilities deprived of liberty,²³ is also relevant on the issue of imposition of custodial

¹⁴ Jill Gramann, 'How does Sentencing Take into Account an Offender's Disabilities?' (Sentencing Council 2022) < <https://www.sentencingcouncil.org.uk/blog/post/how-does-sentencing-take-into-account-an-offenders-disabilities/> > accessed 26 March 2022.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ The Australian Human Rights Commission (n 4).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Pamela Stenhjem, 'Youth with Disabilities in the Juvenile Justice System: Prevention and Intervention Strategies' (2005) 4(1) NCSET Issue Brief < <https://hdl.handle.net/11299/172867> > accessed 22 March 2022.

²¹ Ibid.

²² Ibid.

²³ Manfred Nowak (Independent Expert leading the UN Global Study), The United Nations Global Study on Children Deprived of Liberty 181-221 < <https://bim.lbg.ac.at/en/project/completed-projects-projects-human-dignity->

sentences to children with disabilities in conflict with the law. The study's report espouses the human rights model of disability stating that that approach aligns with the child rights approach.²⁴ According to the global study, children with disabilities, especially children with intellectual and/or psychosocial disabilities, are greatly overrepresented in detention in criminal justice systems.²⁵ This, according to the report, is due to the failure by States to ensure that children with disabilities enjoy their rights in accordance with the human rights model of disability based on the CRPD.²⁶ The report identifies structural shortcomings of the justice systems where children with disabilities are not provided with necessary procedural accommodations and support.²⁷ Therefore, the report recommends a radical different approach to penal punishment of children so as to avoid the high ratio of children with disabilities in detention centres.²⁸

To that end, the report proposes exploring the restorative justice approach, focusing on the rehabilitation of children with disabilities in conflict with the law through direct amends to concerned victims and the community at large.²⁹ Furthermore, the report states that States must ensure that children with disabilities enjoy the right to access to justice on an equal basis with other children through, inter alia, provision of procedural and age-appropriate accommodations.³⁰

However, the report expounds the concept of procedural and age-appropriate accommodations in respect of the detention itself and not necessarily the disposition process. Hence, the report lacks a special focus on disposition of children with disabilities in conflict with the law. Nonetheless, the report's specific mention of the human rights model of disability and the concept of procedural and age-appropriate accommodations in respect of deprivation of liberty of children with disabilities forms a basis of this study's analysis and application of the model with regard to courts' disposition of children with disabilities in conflict with the law.

A recent study by the United Nations High Commissioner for Human Rights ('OHCHR') focused on the right to access to justice, as provided for under article 13 CRPD, in relation to the implementation of the treaty.³¹ According to the report, persons with disabilities face significant barriers in accessing justice, including proceedings of criminal nature.³² In preparation of the study, States and relevant stakeholders were invited to present submissions guided by a set of questions related to existing legislative and policy frameworks and practices regarding access to justice by persons with disabilities, particularly children

[and-public-security-projects-childrens-rights/united-nations-global-study-children-deprived-liberty](#) > accessed 25 March 2022.

²⁴ Ibid 185.

²⁵ Ibid 186.

²⁶ Manfred Nowak, Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty [30] < <https://undocs.org/A/74/136> > accessed 25 March 2022.

²⁷ Nowak (n 23) 188.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid 210.

³¹ OHCHR (n 8) [1-2].

³² Ibid [4].

and women with disabilities.³³ Although the questions required special focus on, apart from women, children with disabilities with respect to access to justice, the discussion of sentencing in the report falls short of a thorough children's rights-based analysis of disposition of children with disabilities in conflict with the law.

Nevertheless, related to sentencing, the report indicates that lack of safeguarding procedural accommodations for persons with intellectual and psychosocial disabilities in criminal proceedings leads to their overrepresentation among persons sentenced by courts to the death penalty.³⁴ The study found that lack of procedural accommodations not only violates the right to a fair trial, but may also lead to being subjected to unfair sentences.³⁵ Thus, the report highlights the central role of procedural accommodations with respect to the right to access to justice for persons with disabilities.³⁶ Notably, the report states that procedural accommodations should be age appropriate.³⁷ This study will duly take into account these propositions; therefore, not only looking at the final disposition issued by the court, but also the disposition procedure itself.

Similarly, one author has argued that, in so far as the realisation of the rights of children with disabilities is concerned, States would achieve the ideal results if children with disabilities are able to access justice and effective remedies on an equal basis with others.³⁸ In that regard, the author highlights the key role of procedural and age-appropriate accommodation to all stages of the justice system and its processes in respect of children with disabilities in their various capacities including as children in conflict with the law.³⁹ However, the author does not discuss the implications of this to courts at the disposition stage of children with disabilities in conflict with the law. In fact, the author acknowledges the complex nature of the issue of access to justice in respect of children with disabilities and, therefore, recommends further research and scholarship.⁴⁰

Access to justice for children with disabilities has also been studied by analysing it in a clear consideration of children with disabilities as being both children and persons with disabilities. It has been observed that children with disabilities, in having to be subject to challenges experienced by both children (in general), as well as persons with disabilities, are likely to experience the combined effect of being denied their equal rights enjoyment because of their two-tier vulnerability.⁴¹ On that basis, it is contended that the unique two-tier vulnerability of children with disabilities necessitates application of a two-tier vulnerability principle which entails "one leg in the discourse of the rights of children and another

³³ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Thematic report on the right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' (2017) <<https://www.ohchr.org/en/disabilities/thematic-report-right-access-justice-under-article-13-convention-rights-persons-disabilities>> accessed 22 March 2022.

³⁴ OHCHR (n 8) [31].

³⁵ Ibid.

³⁶ Ibid [27].

³⁷ Ibid.

³⁸ Enoch MacDonnell Chilemba, 'International Law on the Rights of Children with Disabilities' in Ursula Kil Kelly and Ton Liefwaard (eds), *International Human Rights of Children* (2019) 381.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Eileen Izette Carter, 'Access to Justice for Children with Disabilities: The South African Context' (LL D thesis, University of Pretoria 2015) 18 <<http://hdl.handle.net/2263/53393>> accessed 25 March 2022.

in the realm of the rights of people with disabilities.”⁴² Hence, addressing the rights of children with disabilities with regard to access to justice requires an application of a permutation approach or combination of the two approaches.⁴³

The two-tier vulnerability approach is key, throughout this paper, to the analysis of disposition of children with disabilities in conflict with the law. The approach will be instrumental in framing the conceptual and theoretical framework of this paper, outlining applicable international and regional standards, analysing relevant domestic practices, and in devising courts’ guidelines framework on disposition of children with disabilities who are in conflict with the law.

Other scholars have explored a developmental approach in respect of children who have committed serious violent offences and, in that way, also scrutinised the rights of children with neuro-disabilities on the basis of it being an under-researched aspect within the evolution of developmental approach.⁴⁴ However, the authors focused on the criminal capacity of such children, analysing the issue of minimum age of criminal responsibility (‘MACR’)⁴⁵ and the related practice of automatic referral to mental health facilities or compulsory institutionalisation in instances where children with neuro-disabilities are found to lack criminal capacity⁴⁶. The authors recommend formulation of a comprehensive approach to criminal capacity of children with neuro-disabilities that considers the CPRD provisions.⁴⁷ Even though the authors’ recommendation for further research is in respect of criminal capacity of children with neuro-disabilities, this study will build on the evolution of the developmental approach with regard to disposition (after proceedings) of children with disabilities in conflict with the law.

In a related relevant study approach, other scholars have looked at access to justice with respect to children with neuro-disabilities.⁴⁸ The scholars argued that once children with neuro-disabilities are in the criminal justice system they face a ‘double disadvantage’ as both children and persons with disabilities.⁴⁹ They are confronted by various barriers to realisation of their rights as set out in the CRC and CRPD.⁵⁰ The authors observe that this may lead to inappropriate sentenced being imposed on children with neuro-disabilities who came into contact with the law as offenders.⁵¹ Hence, they recommend that sentencing judicial officers must consider the relevance of neuro-disability to offending behavior.⁵² However, the scholars offer no thorough discussion on the disposition process in respect of children with neuro-disabilities in conflict with the law. Furthermore, while their research adopts a narrow

⁴² Ibid 4.

⁴³ Ibid.

⁴⁴ Eva Schmidt and Ann Skelton ‘A Developmental Perspective on Children who Commit Serious Violent Offences: From Science to Standards’ in Yannick van den Brink, Nessa Lynch and Louise Forde, Responses to Serious Offending by Children (Routledge: forthcoming 2022) 1.

⁴⁵ Ibid 6.

⁴⁶ Ibid 7.

⁴⁷ Ibid.

⁴⁸ Frances Sheahan and Huw Williams, ‘Breaking Down Barriers: Children, Neuro-disability and Access to Justice’ (July 2019) < <https://www.penalreform.org/blog/breaking-down-barriers-children-neuro-disability-and-access/> > accessed 26 March 2022.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

approach by only looking at children with neuro-disabilities in conflict with the law, this research adopts a broader approach by looking at generally children with disabilities in conflict with the law. Nevertheless, the insights on children with neuro-disabilities as facing a 'double disadvantage' and being confronted with barriers, will guide this study's examination of a court's disposition process in respect of, generally, children with disabilities in conflict with the law.

Another approach has been to link the concept of child-friendly justice to children with disabilities who are in contact with the law. It has been observed that following the adoption of the CRC, the concept of child-friendly justice has emerged.⁵³ According to the concept, children's effective participation in justice systems is the focus.⁵⁴ Hence, child-friendly justice is a key element of the implementation of children's rights.⁵⁵ It is argued that the concept of child-friendly justice has implications for various aspects and stages of the child justice system, including disposition.⁵⁶ However, the author observes that there is need for more research on the concept of child-friendly justice in respect of specific groups of children in contact with the law, including children with disabilities.⁵⁷ It is an aspect of this highlighted gap that this paper aims to address. The paper will build on this literature in order to conceptualise a child-friendly justice with respect to disposition of children with disabilities in conflict with the law.

The monitoring bodies of the CRC and the CRPD have separately and jointly, through their general comments and joint statement, to some extent also addressed the issue of children with disabilities in conflict with the law. The Committee on the Rights of the Child ('CRC Committee') General Comment No. 9 on the rights of children with disabilities contains a specific section on juvenile justice system.⁵⁸ The section outlines States Parties' obligations in respect of children with disabilities who are in conflict with the law.⁵⁹ The CRC Committee stated that States Parties are obliged to ensure that children with disabilities in conflict with the law enjoy all the CRC provisions without restriction to the specific provisions relating to the child justice.⁶⁰ Analysis of the issues in this study will follow this broad perspective.

Furthermore, the CRC Committee proposed that children with disabilities in conflict with the law must not be placed, by way of punishment, in a regular juvenile detention centre.⁶¹ The study will critically analyse the assertion in light of the relevant international and regional standards, as well as in consideration of its feasibility according to domestic child justice systems. Specifically, the study will consider whether according to the applicable standards this applies to all children with disabilities, covering all forms of disabilities. Furthermore, the study finds it pertinent to examine the feasibility of not placing children in conflict with the law in a regular juvenile detention centre without infringing their right to non-discrimination.

⁵³ Ton Liefwaard, 'Child-Friendly Justice and Procedural Safeguards for Children in Criminal Proceedings: New Momentum for Children in Conflict with the Law?' (2020) 8(1) Bergen Journal of Criminal Law and Criminal Justice 1 < <https://doi.org/10.15845/bjclcj.v8i1.3188> > accessed 25 March 2022.

⁵⁴ Ibid.

⁵⁵ Ibid 2.

⁵⁶ Ibid.

⁵⁷ Ibid 17.

⁵⁸ UN Committee on the Rights of the Child ('CRC Committee'), General Comment No. 9 (2006): Rights of Children with Disabilities [73-74] < <https://www.refworld.org/docid/461b93f72.html> > accessed 25 March 2022.

⁵⁹ Ibid [73].

⁶⁰ Ibid.

⁶¹ Ibid [74(c)].

The CRC Committee stated that deprivation of liberty must only be resorted to, if necessary, with an aim of providing the concerned child with adequate treatment for tackling his or her problems which led to the commission of the crime.⁶² Hence, in the view of the CRC Committee, children with disabilities in conflict with the law must be placed in an institution that has staff who are specially trained, and has special facilities to provide this specific treatment.⁶³ In summing up on the issue, the CRC Committee recommends that, in the decision process, the competent authority must ensure that the human rights and legal safeguards are fully adhered to.⁶⁴ There is need to analyse and clearly frame what these human rights and legal safeguards are that a court must have due regard to at the disposition stage in respect of children with disabilities in conflict with the law.

The CRC Committee's General Comment on children in the justice system contains a special section on dispositions by the child justice court.⁶⁵ The section lays out principles on sentencing of children. The Committee called for a wide variety of non-custodial, including restorative justice, measures.⁶⁶ Furthermore, the CRC Committee emphasises the principles of proportionality, the usage of detention as a measure of last resort and for the shortest appropriate period of time, at the disposition stage.⁶⁷ However, the General Comment lacks a dedicated discussion of disposition of children with disabilities in conflict with the law. The only attempts to specifically provide for children with disabilities in conflict with the law are with respect to fair trial⁶⁸ and children with developmental delays or neurodevelopmental disabilities as lacking criminal responsibility.⁶⁹

Finally, the CRC Committee and the Committee on the Rights of Persons with Disabilities recently released a joint statement on the rights of children with disabilities.⁷⁰ The statement emphasises the human rights approach to disability, refuting the medical and charity disability models.⁷¹ Furthermore, the joint statement underscores the intersectionality of the CRC and CRPD.⁷² The statement briefly addresses specific themes, namely, non-discrimination,⁷³ bests interests of the child,⁷⁴ respect for the

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ CRC Committee, General Comment No. 24 (n 3).

⁶⁶ Ibid [74].

⁶⁷ Ibid [76 & 78].

⁶⁸ Ibid [40].

⁶⁹ Ibid [38].

⁷⁰ UN Committee on the Rights of the Child (CRC Committee) and UN Committee on the Rights of Persons with Disabilities (UNCRPD) (2022), Joint Statement: The Rights of Children with Disabilities <<https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations> > accessed 26 March 2022.

⁷¹ Ibid [1].

⁷² Ibid.

⁷³ Ibid [2-3].

⁷⁴ Ibid 4.

views of children,⁷⁵ elimination of violence, abuse and exploitation,⁷⁶ right to inclusive education,⁷⁷ and right to family life.⁷⁸ The issue of children with disabilities in conflict with the law, particularly with regard to disposition, is not expressly addressed in this joint statement. Nevertheless, the intersectionality approach and the human rights disability model espoused by the monitoring bodies in the statement is key in addressing the research gap identified in this paper.

As an overview of the reviewed literature, it is clear that there has been no comprehensive and holistic analysis of disposition of children with disabilities in conflict with the law. The linking of disposition of children with disabilities in conflict with the law and the criminal justice system or child justice system has dominantly been done under a narrow conceptualisation of 'disability'. Most studies which attempted to address the issue have focused on children with mental/intellectual/cognitive disability or neuro-disabilities. Those that addressed all forms of disabilities in respect of the criminal justice system have done so in a general manner (generally looking at persons with disabilities) without a proper focus on children. There has been no dedicated study on disposition of children with disabilities in conflict with the law as the issue is only addressed indirectly and not holistically or without a proper balance of children's rights and disability rights perspectives. Furthermore, there has been no systematic examination of domestic practices on the process of disposition of children in conflict with the law as the focus has been on children with disabilities in detention centres. Hence, this study aims at filling that gap, building on the existing literature and key concepts, such as the human rights approach to disability, procedural and age-appropriate accommodations, child-friendly justice, developmental approach, and two-tier vulnerability, as expounded by the various authors and the treaties monitoring bodies.

1.8. Overview of the Chapters

Chapter one has presented the introduction, problem statement, aim of the research, research questions, significance and justification of the study, methodology and research techniques, and the literature review.

Chapter two will analyse and formulate the conceptual and theoretical frameworks of the study. The following key concepts will be looked at: children, children with disabilities, children with disabilities in conflict with the law, and disposition. Then, to frame the theoretical framework of the paper, the chapter will, with an aim of espousing the scope of a children's human rights approach to disability in the child justice system, analyse various approaches to children with disabilities in conflict with the law. It will specifically look at the human rights model of disability, two-tier vulnerability approach to children with disabilities, double disadvantage, and the intersectionality approach to vulnerability.

Chapter three will present applicable international and regional standards on children with disabilities, focusing on those in conflict with the law. For the standards, the chapter will analyse the following instruments: the CRC, CRPD, ACRWC, International Principles and Guidelines on Access to Justice for Persons with Disabilities, African Disability Protocol, and the Council of Europe Guidelines on Child-friendly Justice.

The fourth chapter of this paper will briefly examine relevant domestic practices on disposition of children with disabilities in conflict with the law. This will be done through case studies of the domestic practices

⁷⁵ Ibid [5-6].

⁷⁶ Ibid [7-8].

⁷⁷ Ibid [9].

⁷⁸ Ibid [10].

of Australia, Singapore, and New Zealand by looking at their relevant legislative frameworks, case law, as well as reports and academic literature concerning the said jurisdictions.

Chapter five will delve into the research question of devising courts' guidelines framework on disposition of children with disabilities who are in conflict with the law. To devise that framework, the chapter will synthesise the pertinent points from the preceding chapters.

Finally, chapter six will outline the conclusion based on the discussions in chapters 1-5. The chapter also gives recommendations on the disposition of children with disabilities in conflict with the law and sets the agenda for further study on the subject.

Chapter Two

Key Concepts and Applicable Approaches: Children with Disabilities in Conflict with the Law and their Disposition

2.1. Introduction

A proper discussion of disposition of children with disabilities in conflict with the law requires a proper understanding of 'disability' as a central concept. This necessitates analysing approaches to or models of disability with regard to children with disabilities in conflict with the law. Furthermore, since the study deals with disposition of children with disabilities in conflict with the law, it is necessary to present what the following terms entail: children, children with disabilities, children with disabilities in conflict with the law, and disposition. It is on that basis that this chapter examines the key concepts and applicable approaches to children with disabilities in conflict with the law, respectively. Through that examination, the chapter presents the meaning and scope of the children's human rights approach to children with disabilities in the child justice system.

Before proceeding with the analysis, it must be mentioned that although chapter three of this paper will present a thorough discussion of the relevant provisions of international and regional instruments, this chapter briefly refers to the CRC, ACRWC, and CRPD provisions with respect to the conceptualisation of 'children', 'children with disabilities', and 'disability'.

2.2. Children, Children with Disabilities, Children with Disabilities in Conflict with the Law, and Disposition

2.2.1. Children

Article 2 of the CRC defines a child as a person below the age of eighteen years except where the law applicable to the child states that "majority is attained earlier." At the African regional level, in contrast to the international level provision of article 1 CRC, the ACRWC article 2 just defines a child as a person below the age of eighteen years. This, some scholars have observed, means that the ACRWC provision is progressive for being clear and without giving any room for limitations.⁷⁹ Nevertheless, for the purposes of this study, children or a child are persons or is a person below the age of eighteen years unless the applicable law provide that majority is attained earlier.

2.2.2. Children with disabilities

Neither the CRC nor the CRPD specifically define the term 'children with disabilities' in an explicit manner. Nevertheless, according to paragraph 2 of article 1 of the CRPD:

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

It has been rightly observed that this conceptualisation of disability by the CRPD emphasises that 'persons with disabilities' is a broad term covering a wide range of persons with different types and degrees of functional impairment and different genders, ages, cultures, languages, ethnicities and a full

⁷⁹ Michael Gose, 'The African Charter on the Rights and Welfare of the Child: An Assessment of the Legal Value of its Substantive Provisions by Means of a Direct Comparison to the Convention on the Rights and Welfare of the Child' (Community Law Centre 2002) 27 < <https://dullahomarinstitute.org.za/childrens-rights/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> > accessed 28 March 2022.

range of other characteristics.⁸⁰ Furthermore, there is no doubt that the term ‘persons with disabilities’ includes ‘children with disabilities.’ Hence, the understanding of ‘children with disabilities’ in this paper is in line with the provision of paragraph 2 of article 1 of the CRPD.

2.2.3. Children with disabilities in conflict with the law

To begin with, the term ‘children in conflict with the law’ is defined broadly. It refers not only to children who come into contact with the justice system due to being accused or suspected of committing an offence, but also children who come into contact with the justice system and have been found liable or responsible for crime commission.⁸¹ This study is concerned with disposition of children with disabilities in conflict with the law after proceedings and having been found liable for crime commission. Hence, for the purposes of this paper, “children with disabilities in conflict with the law” are children with disabilities who come into contact with the law and have been found liable for crime commission after proceedings.

2.2.4. Disposition

This study uses the word ‘disposition’ broadly. It is used to denote both the disposition (sentencing) hearing, and the sanctions and/or services ordered by courts in respect of children with disabilities in conflict with the law. The sanctions and/or services encompass both custodial and non-custodial orders or measures imposed by the courts in respect of the children. Conceptually, disposition in this sense is the same as sentencing. However, the term disposition is preferred as the author consider it more child-friendly than the term sentencing which is usually associated with the mainstream criminal punitive justice system.

2.3. Understanding Approaches to Children with Disabilities in Conflict with the Law

2.3.1. Human rights approach to disability

Disability is regarded as “as a complex, dynamic, multi-dimensional and contested concept.”⁸² It is important to already state that disability was initially not considered as a human rights issue.⁸³ The religious or moral model of disability, found in a number of religious traditions, is the oldest model of disability.⁸⁴ According to this model of disability, disability was perceived as a punishment from God due to a particular sin or sins committed by the person with disability and also attributed to sins committed by their parents and/or ancestors.⁸⁵ The religious or moral model of disability was heavily criticised by scholars and is no longer prevalent.⁸⁶

⁸⁰ Mwiza Nkhata, ‘Access to Justice for Persons with Disabilities in Malawi: Exploring Challenges and Possibilities in the Criminal Justice System’ (2020) 8 African Disability Rights Yearbook 129 <<http://doi.org/10.29053/2413-7138/2020/v8a6>> accessed 10 February 2022.

⁸¹ International Institute for the Rights of the Child, ‘Children in Conflict and in Contact with the Law’ (2016) 2 <https://www.childsrightrights.org/documents/sensibilisation/themes-principaux/juvenile_justice.pdf> accessed 28 March 2022.

⁸² Nkhata (n 80) 128.

⁸³ Chilemba (n 38) 362.

⁸⁴ Marno Retief and Rantsoa Letšosa, ‘Models of Disability: A Brief Overview’ (2018) 74(1) HTS Theologiese Studies/Theological Studies 2 <<https://doi.org/10.4102/hts.v74i1.4738>> accessed 27 March 2022.

⁸⁵ Ibid.

⁸⁶ Ibid.

From the mid-1800s onwards, the medical model of disability, inspired by significant advances in the of medical science, gradually replaced the religious and/or moral model of disability.⁸⁷ The medical (and welfare) model of disability, focused on medical-, clinical-, and welfare-based interventions, hence, attributing the challenges faced by persons with disabilities to their impairments.⁸⁸ Due to this conceptualisation of disability, the earlier United Nations human rights treaties that were adopted before the CRC contained no provisions on the rights of persons with disabilities.⁸⁹

Later, inspired by the British disability movement activism in the 1960s and the 1970s, the social model of disability emerged in reaction to perceived limitations of the medical model of disability.⁹⁰ Then, a shift occurred in the conceptualisation of disability from the medical to the social and human rights models.⁹¹ This shift led to the understanding of disability as a human rights issue.⁹² In contrast to the medical model, the social and human rights models to disability consider the challenges faced by persons with disabilities as being due to the barriers existing in the environment which hinder persons with disabilities from enjoying participation in the society on an equal basis with others.⁹³ As in between the social model and human rights model, the latter further recognises that the state is obliged to eliminate the barriers and ensure accommodating environments so that persons with disabilities can participate in the society and fully enjoy their human rights on an equal basis with others.⁹⁴

Following this shift in conceptualisation of disability, human rights treaties began providing for the rights of persons with disabilities.⁹⁵ Notably, the adoption of the CRPD is said to be a product of the development of the human rights model of disability.⁹⁶ The CRPD Preamble's paragraph 5 recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. According to the CRC Committee and the Committee on the Rights of Persons with Disabilities, the human rights model of disability as espoused in the CRPD is based on the inherent dignity of persons with disabilities and acknowledgment that impairments should not be regarded as a legitimate basis for restriction or denial of human rights.⁹⁷

2.3.2. Two-tier vulnerability approach to children with disabilities

Closely linked to the human rights model of disability is the two-tier vulnerability approach to children with disabilities. The two-tier vulnerability approach to children with disabilities comprises of two limbs. First, according to the two-tier vulnerability principle, children with disabilities may be denied equal enjoyment of the human rights of children as a result of their disability.⁹⁸ Second, in a similar manner,

⁸⁷ Retief and Letšosa (n 84) 2.

⁸⁸ Chilemba (n 38) 362.

⁸⁹ Ibid 362-363.

⁹⁰ Retief and Letšosa (n 84) 3.

⁹¹ Chilemba (n 38) 363.

⁹² Ibid 363-364.

⁹³ Ibid 364.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ CRC Committee and UNCRPD, Joint Statement (n 70) [1].

⁹⁸ Carter (n 41)18.

where the disability of the child is taken into account and responded to, the child's age may not be taken into account in the related service or response.⁹⁹ The logical conclusion of the consideration of these two limbs is that children with disabilities may be denied equal enjoyment of rights not once, but twice due to their particular vulnerabilities as children and persons with disabilities.¹⁰⁰ It is also clear that equality is central to the two-tier vulnerability approach to children with disabilities. Hence, it is crucial that the right to equality is not only recognised but also respect by, inter alia, a court.¹⁰¹

The two-tier principle is closely linked to what some scholars have called 'double disadvantage', and what others have conceptualised as 'intersectional approach to vulnerability'.

2.3.3. 'Double disadvantage'

Just like the two-tier approach, the 'double disadvantage' concept to children with disabilities in the criminal justice is based on two limbs. It underscores recognising and respecting children with disabilities in the criminal justice as both children and persons with disabilities who are at risk of being disadvantaged twice due to their double particular vulnerabilities.¹⁰²

2.3.4. Intersectionality approach to vulnerability

Intersectionality approach, mainly used in the fields of development and humanitarian assistance, counters "one-size-fits-all approaches."¹⁰³ Disability is thus considered an intersectionality issue and accordingly looked at as a cross-cutting concept with, inter alia, age.¹⁰⁴ Even though the approach has predominantly been considered in the fields of development and humanitarian assistance, it is equally applicable in the consideration of children with disabilities in conflict with the law. It is, thus, interesting to note that the CRC Committee and the Committee on the Rights of Persons with Disabilities, by reaffirming "that all principles and rights enshrined in the CRC and the CRPD are interrelated with respect to children with disabilities and are underpinned by the human rights model of disability," have highlighted the intersectionality of the CRC and CRPD with regard to children with disabilities.¹⁰⁵

2.3.5. Appraisal of the approaches to disability: Holistic conceptualisation through a children's human rights approach to disability

This section has highlighted the models of disability because, as observed by some scholars, such models serve various important purposes, including providing definitions of disability, and guiding policy formulation and implementation.¹⁰⁶ Furthermore, the human rights model of disability recognises

⁹⁹ Ibid.

¹⁰⁰ Ibid

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Daniel Chaplin, John Twigg and Emma Lovell, 'Intersectional Approaches to Vulnerability Reduction and Resilience-building' (2019) 12 Resilience Intel 2-3 < https://www.researchgate.net/profile/Emma-Lovell-2/publication/332300885_Intersectional_approaches_to_vulnerability_reduction_and_resilience-building/links/5cacb669458515cd2b0bea22/Intersectional-approaches-to-vulnerability-reduction-and-resilience-building.pdf > accessed 28 March 2022.

¹⁰⁴ Ibid 6.

¹⁰⁵ CRC Committee and UNCRPD, Joint Statement (n 70) [1].

¹⁰⁶ Retief and Letšosa (n 84) 3.

interdependency, interrelation and indivisibility of human rights.¹⁰⁷ This understanding perfectly connects to the two-vulnerability, double disadvantage, and intersectionality approaches to children with disabilities in conflict with the law which recognises the interdependency, interrelation and indivisibility of the human rights of children and the human rights of persons with disabilities.

This paper uses the phrase “a children’s human rights approach to disability” to emphasis that when dealing with children with disabilities, in all fields such as the criminal justice system (and at all stages including disposition), a combination of the human rights model of disability and children’s rights approach comes into play. As subsets to this wholistic conceptualisation, regard must be had to other specific concepts including child-friendly justice, developmental approach, and procedural and age-appropriate accommodations.

2.4. Conclusion

Children with disabilities in conflict with the law include children with all forms of disabilities according to the broad conceptualisation of disability. Disposition of children with disabilities in conflict with the law must, therefore, be guided by this broad understanding of disability. To effectively achieve that, dealing with children with disabilities in conflict with the law must be in line with applicable models or approaches. Broadly, a child justice system’s foundation with respect to children with disabilities in conflict, ought to be the children’s human rights approach to disability. The following are the key pillars of that children’s rights approach to disability in the child justice system: human rights model of disability, two-tier vulnerability approach to children with disabilities, double disadvantage, and intersectionality approach to vulnerability. To highlight the double disadvantage approach, it may be strongly argued that children with neurodisabilities or mental/intellectual disability are more disadvantaged than other children with disabilities due to their even more particular vulnerabilities in relation to the justice system.

Further emerging from the mentioned pillars are concepts such as child-friendly justice, developmental approach, and procedural and age-appropriate accommodations. Central to all these pillars, considered together with the concepts, is the recognition of children with disabilities in conflict with the law as being both children, and children with disabilities. They all underline that when dealing with children with disabilities in conflict with the law, the children’s rights standards and disability rights standards must be safeguarded. Thus, it is necessary, which is the focus of the chapter to follow, to analyse the relevant standards on disposition of children with disabilities in conflict with the law.

¹⁰⁷ UN Committee on the Rights of Persons with Disabilities (UNCPRD), General comment No. 6 (2018) on Equality and Non-discrimination [9] < <https://digitallibrary.un.org/record/1626976?ln=en> > accessed 27 March 2022.

Chapter Three

Children's Rights and Disability Rights Relevant Standards on Disposition of Children with Disabilities in Conflict with the Law

3.1. Introduction

There are various instruments, at both international and regional levels, that specifically and/or generally set standards on how to deal with children with disabilities in conflict with the law. But, as observed in chapter one of this paper, there is so far lack of a comprehensive analysis of these standards in respect of disposition of children with disabilities in conflict with the law. To, therefore, build on the preceding chapter, this chapter examines relevant standards on disposition of children with disabilities in conflict with the law, in consideration of both children's rights and disability rights.

The chapter is divided into two main sub-divisions: international standards and regional standards, respectively. Under international standards, it looks at the CRC, CRPD, and the International Principles and Guidelines on Access to Justice for Persons with Disabilities. Regional standards sub-division considers the ACRWC, African Disability Protocol, and the Council of Europe Guidelines on Child-friendly Justice.

3.2. International Standards

3.2.1. Convention on the Rights of the Child (CRC)

To begin with laying the relevant provisions of the CRC, the Convention generally applies to children with disabilities like other children. Furthermore, it is important to note that the CRC makes express reference to children with disabilities in some of its provisions. Article 2(1) CRC requires States Parties to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's, inter alia, disability. In that regard, as observed by some authors, the CRC was the first human rights treaty that expressly included disability within its outlined prohibited grounds of discrimination.¹⁰⁸

Then, article 23 of the CRC specifically provides for the rights of children with disabilities as follows:

1. *States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*
2. *States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.*
3. *Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the*

¹⁰⁸ Ignacio Campoy Cervera, 'Legal Analysis of Article 7 of the Convention on the Rights of Persons with Disabilities: Children with Disabilities' (2017) 9 The Age of Human Rights Journal 118 <<http://dx.doi.org/10.17561/tahrj.n9.6> > accessed 30 March 2022; Maya Sabatello, 'Children with Disabilities: A Critical Appraisal' (2013) 21(3) International Journal of Children's Rights 465 <<http://dx.doi.org/10.1163/15718182-02102007> > accessed 25 March 2022.

parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

The CRC Committee regards paragraph 1 of article 23 CRC as “the leading principle for the implementation of the Convention with respect to children with disabilities.”¹⁰⁹ However, article 23 CRC has been criticised for its focus on the welfare needs of children with disabilities, hence, not necessarily in line with the human rights model of disability, but reflects the outdated medical and welfare model of disability.¹¹⁰ Nevertheless, some scholars have downplayed this concern by highlighting that the CRC Committee, through its concluding observations to States Parties, has consistently called for adoption of the human rights approach to disability as opposed to the welfare model of disability.¹¹¹ This represents a progressive interpretation approach adopted by the Committee. Still, the concern may be that the concluding observations are non-binding and that, without any amendment, the wording of article 23 CRC retains the medical and welfare approach.

Again, it has been argued that the model of disability as reflected in the CRC may be the reason why children with disabilities are usually excluded from ‘rights talk’ because “it is based on the principle of non-discrimination which is insufficient to advance the rights of children with disabilities.”¹¹² The article's overall emphasis on welfare than rights can be utilised by those who wish to advance segregation over inclusion.¹¹³ On that note, it has further been argued that, for relying on the language of anti-discrimination without specifically adopting the inclusion principle, the CRC leaves room for an interpretation which leads to denying rights of children with disabilities.¹¹⁴

With regard to the child justice system, the CRC Committee is of the view that, per article 2 CRC, States Parties must ensure that children with disabilities in conflict with the law are protected by not only the Convention's provisions specifically dealing with child justice (articles 40, 37 and 39) but also all other

¹⁰⁹ CRC Committee, General Comment No. 9 (n 58) [11].

¹¹⁰ Sabatello (n 108) 468; Chilemba (n 38) 368.

¹¹¹ Chilemba (n 38) 368.

¹¹² Sabatello (n 108) 469.

¹¹³ Melinda Jones and Bassier Marks, ‘Beyond the Convention on the Rights of the Child: The Rights of Children with Disabilities in International Law’ (1997) 5(2) International Journal of Children’s Rights 184 <<https://doi.org/10.1163/15718189720493618> > accessed 30 March 2022.

¹¹⁴ Ibid 180.

applicable provisions and guarantees founded in the treaty.¹¹⁵ Referring to article 23 CRC and considering the high level of vulnerability of children with disabilities, the Committee has made specific recommendations on the elements of treatment of children with disabilities in conflict with the law that must be considered, including:

a) A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard;

....

c) Children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by ... way of a punishment. Deprivation of liberty should only be applied if necessary with a view to providing the child with adequate treatment for addressing his or her problems which have resulted in the commission of a crime and the child should be placed in an institution that has the specially trained staff and other facilities to provide this specific treatment. In making such decisions the competent authority should make sure that the human rights and legal safeguards are fully respected.¹¹⁶

In the paragraph (a), the CRC Committee calls for specialisation of professionals involved in the treatment of children with disabilities who come into contact with the law, including children with disabilities in conflict with the law. That requirement extends to disposition of children with disabilities in conflict with the law.

From the element under paragraph (b), four sub-elements can be deduced. First, the Committee is of the view that children with disabilities in conflict with the law must not be placed in a regular child detention centre as a way of punishment. It may be argued that, with this approach, the CRC Committee is entrenching the outdated welfare model of disability. However, it is important to read this view together with the other three sub-elements. Hence, to proceed with the second sub-element, the Committee highlights the principle of necessity when it comes to deprivation of liberty of children with disabilities in conflict with the law. Where the necessity element is considered, as a third sub-element, the Committee emphasises the significance of specialised staff and facilities when making decisions on the placement of children with disabilities in conflict with the law. Last, there is need to have full regard to applicable human rights and legal safeguards.

As hinted to by the CRC Committee, articles 40 and 37 CRC are relevant when dealing with children with disabilities in conflict with the law. Article 40(1) CRC requires States Parties to recognise the right of every child in conflict with the law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which considers the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Then, according to article 40(3) CRC, States must seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. Specifically dealing with the issue of disposition of children in conflict with the law, article 40(4) CRC requires availability of a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care, to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

¹¹⁵ CRC Committee, General Comment No. 9 (n 58) [73].

¹¹⁶ Ibid [74].

Article 37(a) CRC prohibits subjecting children to torture or other cruel, inhuman or degrading treatment or punishment. It further states that neither capital punishment nor life imprisonment without possibility of release should be imposed in respect of offences committed by children in conflict with the law. In light of article 37(b) CRC, children in conflict with the law should not be deprived of their liberty unlawfully or arbitrarily. The provision further requires that the detention or imprisonment of a child must be in conformity with the law and should be used only as a measure of last resort and for the shortest appropriate period of time. Per article 37(c), children in conflict with the law who have been deprived of liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which considers the needs of persons of their age. In particular, the provision requires that every child deprived of liberty should be separated from adults unless it is considered in the child's best interest not to do so and should have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

In connection to the above provisions of articles 40 and 37 CRC, the CRC Committee encourages existence and usage of wide range non-custodial measures including restorative justice.¹¹⁷ According to the Committee, restorative justice should be understood as:

*any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing, conciliation and sentencing circles.*¹¹⁸

The CRC Committee also highlighted the principle of proportionality. The Committee emphasised that the reaction to an offence must always be proportionate to the circumstances and the gravity of the offence, personal circumstances such as age, lesser culpability, "circumstances and needs, including, if appropriate, the mental health needs of the child," and considerations of the society.¹¹⁹ It is the view of the Committee that a strictly punitive approach contradicts the principles of child justice as stipulated in article 40 (1) CRC.¹²⁰ For serious offences committed by children, the Committee recommends that measures proportionate to the offender's circumstances and to the gravity of the offence may be taken into account, including considerations of the necessity of public safety and sanctions.¹²¹ Overall, the Committee underscored that weight must be given to the best interests of the child as a primary consideration and the need to promote reintegration of the child into society.¹²²

3.2.2. Convention on the Rights of Persons with Disabilities (CRPD)

It is clear that the adoption of the CRC in 1989 was meant to deal with the neglect of the human rights of children, including children with disabilities, in international human rights law.¹²³ However, practice revealed still little attention given to the rights of children with disabilities.¹²⁴ The aim of the adoption of

¹¹⁷ CRC Committee, General Comment No. 24 (n 3) [74].

¹¹⁸ Ibid [8].

¹¹⁹ Ibid [76].

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Sabatello (n 108) 464.

¹²⁴ Ibid.

the CRPD in 2006 was to remedy, among others, the continued neglect with respect to children with disabilities.¹²⁵ The CRPD raises a concern that, despite the various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.¹²⁶ Therefore, the paragraph 1 of article 1 of the CRPD expressly stipulate its purpose as to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

There is no doubt that the CRPD represents a crucial step in the advancement of the human rights of children with disabilities.¹²⁷ The rights of children with disabilities are very much visible in this treaty even though generally meant for persons with disabilities. Paragraph 18 of the CRPD Preamble expressly recognises that children with disabilities must have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalls obligations to that end undertaken by States Parties to the CRC. Furthermore, the CRPD Preamble raises a concern about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of, *inter alia*, age.¹²⁸ Hence, the CRPD underlines the (children's) human rights, two-tier vulnerability, double disadvantage, and intersectionality approaches to children with disabilities as highlighted in the previous chapter of this paper.

The Convention expressly recognises children with disabilities as rights holders and considers their disability as a human rights issue.¹²⁹ The CRPD Preamble, paragraph 3, reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination. In that way, it underscores the universality, interdependency and interrelatedness of human rights.

The CRPD has a dedicated article 7 on children with disabilities. Article 7(1) CRPD requires States Parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. Paragraph 2 of article 7 CRPD, in a similar manner like the CRC article 3(1), states that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. Then, article 7(3) reaffirms the child's right to be heard principle as stipulated in CRC article 12(1), by providing that States Parties must ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right. It is clear, therefore, that the CRPD article 7 is the result of the application of the principles under the "paradigm of children's rights to children with disabilities, in accordance with the modifications required by the social model of disability."¹³⁰

Article 13 CRPD contains dedicated provisions on access to justice for persons with disabilities. Here it must be mentioned that CRPD is said to be the first international human rights treaty that expressly

¹²⁵ *Ibid* 464, 470.

¹²⁶ UN Convention on the Rights of Persons with Disabilities (CRPD), Preamble, paragraph 11.

¹²⁷ Sabatello (n 108) 465.

¹²⁸ CRPD (n 126) Preamble, paragraph 16.

¹²⁹ Chilemba (n 38) 373.

¹³⁰ Cervera (n 108) 117.

enshrines the right to access to justice.¹³¹ Though not mentioned in its wording, article 13 CRPD regulates a matter directly affecting children with disabilities.¹³² Hence, it is another important article that must be highlighted in respect to the discussion in this paper, based on the understanding that the CRPD provisions generally apply to children with disabilities.

Article 13(1) CRPD stipulates that States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Then, article 13(2) emphasises the need of ensuring proper capacities for professionals in relation to the justice systems. The provision requires that, in order to help to ensure effective access to justice for persons with disabilities, States Parties must promote appropriate training for those working in the field of administration of justice, including police and prison staff. The phrase 'working in the field of administration of justice', as used in article 13(2) CRPD, has been interpreted to be a broad term extending to all personnel who have been entrusted with the application of law, irrespective of whether the matter before them has criminal, civil, or administrative aspects.¹³³

A proper reading of article 13 CRPD indicates that its provisions of the right to access to justice has two prongs.¹³⁴ On the one hand, article 13 CRPD guarantees a right to a fair trial and to an effective remedy in the justice system.¹³⁵ On the other hand, the article enshrines a right to effective participation in the justice system.¹³⁶

Apart from the highlighted two prongs, reference by the CPRD's article 13(1) to the concept of 'procedural and age-appropriate accommodations' is vital to the right to access to justice for persons with disabilities, including children with disabilities. Procedural accommodations underline an obligation of putting measures in place aimed at removing barriers that prevent or restrict persons with disabilities from exercising their procedural rights.¹³⁷ The phrase 'age-appropriate' emphasises that to ensure effective access to justice for persons with disabilities, individual requirements such as age of the parties must be considered in the designing and implementation of procedural rights.¹³⁸

In a broad manner, article 13 CRPD ensures "effective access to justice."¹³⁹ The two prongs, considered together with the concept of procedural and age-appropriate accommodations, embrace the human rights, two-tier vulnerability, double disadvantage, and intersectional approaches to children with disabilities.

¹³¹ Markus Schefer, 'The Right to Access to Justice - Art. 13 CRPD (Convention on the Rights of Persons with Disabilities)' (Annual Conference on the Rights of Persons with Disabilities 2020: Access to Justice, online conference, 21 October 2020) 2 <https://www.markusschefer.ch/admin/data/files/asset/file_en/47/presentation-on-access-to-justice-2020-10-21.pdf?lm=1626280674 > accessed 5 March 2022.

¹³² Cervera (n 108) 134.

¹³³ Schefer (n 131) 7.

¹³⁴ *Ibid* 3.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* 5.

¹³⁸ *Ibid*.

¹³⁹ *Ibid* 4.

3.2.3. International Principles and Guidelines on Access to Justice for Persons with Disabilities

The International Principles and Guidelines on Access to Justice for Persons with Disabilities were, in 2020, adopted jointly by the Committee on the Rights of Persons with Disabilities, the UN Special Rapporteur on the rights of persons with disabilities, and the Special Envoy of the UN Secretary-General on Disability and Accessibility.¹⁴⁰ Notably, the International Disability Alliance and the International Commission Jurists ('ICJ') have endorsed the Principles and Guidelines.¹⁴¹

The Principles and Guidelines offer a practical framework for States in designing and implementing justice systems that ensure equal access to justice for persons with disabilities, in compliance with international human rights standards.¹⁴² Building on the CRPD provisions and their interpretations, and on other international standards and best practices, the Principles and Guidelines affirm ten key principles of access to justice for persons with disabilities and provide detailed guidelines on how to implement the principles.¹⁴³ The principles equally apply to children with disabilities

According to Principle 3, persons with disabilities, including children with disabilities in conflict with the law, have the right to appropriate procedural accommodations. To achieve non-discrimination and ensure the effective and equal participation of persons with disabilities in all legal proceedings, States must make provision for age-appropriate individualised procedural accommodations for persons with disabilities.¹⁴⁴ In this context, procedural accommodations comprise of all the necessary and appropriate modifications and adjustments that may be needed in an individual case, including facilitators or intermediaries, procedural modifications and adjustments, adjustments to the communication support and environment, aimed at ensuring access to justice for persons with disabilities.¹⁴⁵ Furthermore, States must provide a range of procedural accommodations, while also ensuring that implementation of such accommodations properly balances and respects the rights of all concerned parties by, inter alia:

*Ensuring a process for determining the need for and providing procedural accommodations, including communication assistance, to children with disabilities, as well as additional safeguards, when necessary, according to their evolving capacities and their right to have their views heard.*¹⁴⁶

Principle 5 states that persons with disabilities must enjoy, on an equal basis with others, all substantive and procedural safeguards recognised in international law, and States are required to provide the necessary accommodations so as to guarantee due process. Principle 10 underscores the requirement of having properly trained professionals. It states that all those working in the justice system must be

¹⁴⁰ ICJ – International Commission of Jurists, 'Groundbreaking New UN Guidance on Access to Justice for Persons with Disabilities' (2020) < <https://www.icj.org/a2jpwd/> > accessed 31 March 2022.

¹⁴¹ Ibid.

¹⁴² Office of the UN High Commissioner for Human Rights (OHCHR), Special Rapporteur on the rights of persons with disabilities, 'International Principles and Guidelines on Access to Justice for Persons with Disabilities' (2020) < <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities> > accessed 31 March 2022.

¹⁴³ ICJ – International Commission of Jurists (n 140).

¹⁴⁴ International Principles and Guidelines on Access to Justice for Persons with Disabilities, Guideline 3.1.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, Guideline 3.2 (m).

provided with awareness-raising and training programmes addressing the rights of persons with disabilities, especially in the context of access to justice.

3.3. Regional Standards

3.3.1. African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC is the only child-specific regional human rights treaty. The Charter enshrines the rights of children with disabilities. Like the CRC, it does so by both specifically providing for children with disabilities, and by generally providing for all children which includes children with disabilities. In a similar manner to the provision of article of the CRC, article 13 of the ACRWC specifically provides for children with disabilities. Hence, the observations and comments made in respect of the CRC article 23 generally apply with regard to article 13 of the ACRWC. However, in contrast to the CRC, the ACRWC's article 3 non-discrimination provision does not expressly include disability as a prohibited ground of discrimination. Nevertheless, some scholars have argued that this does not mean that the treaty sanctions disability-based discrimination because the provision states that 'every child' shall be entitled to the enjoyment of the rights and freedoms guaranteed in the Charter.¹⁴⁷

Article 17 ACRWC is specific on the administration of justice. Article 17(1) ACRWC states that children in conflict with the law have the right to special treatment in a manner consistent with their sense of dignity and worth and which reinforces their respect for human rights and fundamental freedoms of others. Article 17(2)(a) ACRWC requires States Parties to ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment. The provision does not expressly prohibit capital punishment or life imprisonment in respect of children, in contrast to article 37(a) CRC. Otherwise, the provisions are materially similar. Like the CRC article 37(c), article 17(2)(b) of the Charter obliges States to ensure that children are separated from adults in their place of detention or imprisonment. Instead, article 17(3) ACRWC provides that the essential aim of treatment of children in conflict with the law should be their reformation, re-integration into their family, and social rehabilitation.

3.3.2. African Disability Protocol

Adopted in 2018, the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities is yet to enter into force as only two countries out of the required 15 have ratified the Protocol.¹⁴⁸ Nevertheless, the Protocol is an important instrument for the discussion in this paper as it sets a legal framework to support member states of the African Union in the formulation of disability laws and policies with a goal of promoting disability rights in their countries.¹⁴⁹ The African Disability Protocol duly considers the CRPD and its interpretations through general comments, recommendations and observations.¹⁵⁰ It adopts a human rights-based approach to disability, like the CRPD; but the Protocol is "more detailed and illustrative in representing the uniqueness of the African

¹⁴⁷ Chilemba (n 38) 375.

¹⁴⁸ Collaboration on International ICT Policy for East and Southern Africa (CIPESA), 'CIPESA Submission to the ACHPR on Ratification of the African Protocol on Disability Rights' (2022) < <https://cipesa.org/2022/05/cipesa-submission-to-the-71st-ordinary-session-of-the-achpr-calls-upon-states-to-ratify-the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-persons-with-disability/> > accessed 16 June 2022.

¹⁴⁹ Grace Antwi-Atsu, 'The African Disability Protocol: A Call to Leave No One Behind' (2021, Sightsavers) < <https://www.sightsavers.org/blogs/2021/08/the-importance-of-the-african-disability-protocol/#:~:text=The%20African%20Disability%20Protocol%20is,one%20is%20truly%20left%20behind> > accessed 31 March 2022.

¹⁵⁰ Ibid.

context.”¹⁵¹ According to article 2, the purpose of the African Disability Protocol is to promote, protect and ensure the full and equal enjoyment of all human and people’s rights by all persons with disabilities and ensure respect for their inherent dignity.

Like article 2(1) CRPD, article 1 of the African Disability Protocol adopts a broad conceptualisation of persons with disabilities. Article 1 of the Protocol defines ‘persons with disabilities’ as including those who have physical, mental, psycho-social, intellectual, neurobiological, development or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.

To highlight the African Disability Protocol’s general provisions but applicable to children with disabilities in conflict with the law, article 9(5) prohibits deprivation of liberty on the basis of the existence of a disability or perceived disability. Article 10(1) of the Protocol states that every person with disability shall have the right to the respect or his/her inherent dignity and to be free from torture or cruel, inhuman or degrading treatment or unlawful punishment. Then, the Protocol’s article 13 provides for the right to access to justice for persons with disabilities. Paragraph 1 of that article requires States to take measures aimed at ensuring that persons with disabilities have access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective roles as participants in legal proceedings. Article 13(3) of the Protocol provides that all law enforcement and justice personnel must be trained at all levels to effectively engage with and ensure the rights of persons with disabilities are recognised and implemented without discrimination.

As for specific provisions, article 28 of the African Disability Protocol has dedicated provisions for children with disabilities. However, it must be pointed out that the articles 28 and 1 (definition article) of the Protocol do not define ‘child’ or ‘children’. Article 1 only defines ‘youth’, whose specific rights are provided for under article 29, as every person between the ages of 15 and 35 years. However, in light of the Preamble to the Protocol which recognises regional and international human rights instruments as important reference points for its application and interpretation, ‘children’ should be interpreted in line with the definitions under the ACRWC and CRC, preferably the former considering the Protocol’s African context.

Article 28(1) of the African Disability Protocol demands States to ensure that children with disabilities fully enjoy human and people’s rights on an equal basis with other children. Per article 28(3) of the Protocol, States must ensure that the best interests of the child are the primary consideration in all actions undertaken by any person or authority concerning children with disabilities. Article 28(4) of the Protocol provides that States must (a) ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children; (b) provide children with disabilities, disability and age-appropriate assistance to realise their rights; and (c) ensure the life, survival and development of children with disabilities.

3.3.3. Council of Europe Guidelines on Child-friendly Justice, 2010

The Council of Europe has formulated various standards and guidelines in the field of child-friendly justice aimed at improving the justice system and adapting it to children’s specific needs.¹⁵² This necessitates devising a justice system which ensures respect for and the effective implementation of all

¹⁵¹ Ibid.

¹⁵² Council of Europe, ‘Child-friendly Justice’ (2022) < <https://www.coe.int/en/web/children/child-friendly-justice> > accessed 13 April 2022.

rights of children.¹⁵³ The 2010 Council of Europe Guidelines on Child-friendly Justice are the most extensive set of standards on child-friendly justice.¹⁵⁴

The Guidelines apply to children who come into contact with the justice system in many different ways, including as offenders. In the Preamble to the Guidelines, the Committee of Ministers considers the necessity of ensuring the effective implementation of existing binding universal and European standards protecting and promoting children's rights, including in particular, *inter alia*, CRC, CRPD, and the 1996 European Convention on the Exercise of Children's Rights.

The Council of Europe Guidelines on Child-friendly Justice specifically and implicitly provide for children with disabilities. Guideline III(D)(2) specifically calls for protection from discrimination and assistance to be granted to more vulnerable children including children with disabilities. Guideline IV(A)(4) provides that all professionals working with and for children must receive necessary interdisciplinary training on the rights and needs of children of different age groups, as well as on proceedings that are adapted to them.

Guideline IV(A)(6) Council of Europe Guidelines on Child-friendly Justice provides for deprivation of liberty. It has similar provisions as the ones under the CRC article 37. According to Guideline IV(A)(6)(19) Council of Europe Guidelines on Child-friendly Justice, any form of deprivation of liberty of children must be a measure of last resort and be for the shortest appropriate period of time. When deprivation of liberty is imposed, children should, as a rule, be held separately from adults; save for exceptional reasons and based solely on the best interests of the child adults.¹⁵⁵ In all circumstances, however, children must be detained in premises suited to their needs.¹⁵⁶ Considering the vulnerability of children deprived of liberty, the Council of Europe Guidelines on Child-friendly Justice underscore the importance of family ties and promoting the reintegration into society, hence, requires competent authorities to ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments.¹⁵⁷

Expressly dealing with disposition of children in conflict with the law, is Guideline IV(E)(82). It stipulates that measures and sanctions for children in conflict with the law should always be constructive and individualised responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental well-being and development and the circumstances of the case. The Guideline further states that the right to education, vocational training, employment, rehabilitation and reintegration must be guaranteed.

3.4. Conclusion

This chapter has looked at the various instruments that provide for and enshrine rights of children with disabilities in conflict with the law and their disposition in the child justice system. However, there is still lack of specific focus on disposition of children with disabilities in conflict with the law. For the CRC, CRPD, International Principles and Guidelines on Access to Justice for Persons with Disabilities, ACRWC, and the African Disability Protocol, it may be understandable as regards their lack of that special as they are more general instruments. But the Council of Europe Guidelines on Child-friendly

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Guideline IV(A)(6)(20) Council of Europe Guidelines on Child-friendly Justice.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, Guideline IV(A)(6)(21).

Justice being a more specific instrument on child-friendly justice is to be singled out for offering relatively less focus on standards specifically dealing with children with disabilities in conflict with the law.

Nonetheless, underlining the standards, as stipulated in the instruments and as construed by the treaty monitoring bodies and renowned scholars, in relation to disposition of children with disabilities in conflict with the law, is the children's human rights approach to children with disabilities in the child justice system. While the CRPD cements the human rights model of disability, the CRC and the ACRWC strengthen the children's rights approach. These taken together, and in light of the provisions of the other instruments, formulate standards based on the children's human rights approach to children with disabilities in the child justice system. Hence, per the standards, disposition of children with disabilities in conflict with the law requires consideration of the rights and provisions applicable to children, and children with disabilities.

Prohibition of discrimination against children with disabilities, including children with disabilities in conflict with the law, is instrumental to the approach. Furthermore, the several other elements, which are key to disposition of children with disabilities in conflict with the law, can be deduced from the standards, including the following: 1) specialised staff and facilities; 2) multidisciplinary approach; 3) proportionality principle; 4) availability of a variety of dispositions; 5) deprivation of liberty as a measure of last resort and for the shortest appropriate period of time; 6) prohibition of torture or other cruel, inhuman or degrading treatment; and 7) age-appropriate and procedural accommodations. These elements must be present in an effective domestic framework in relation to disposition of children with disabilities in conflict with the law. The issue, then, as addressed in the next chapter, is how these standards are reflected in domestic jurisdictions.

Chapter Four

Relevant Domestic Practices on Disposition of Children with Disabilities in Conflict with the Law

4.1. Introduction

Having looked at the relevant international and regional standards, this chapter analyses domestic practices on disposition of children with disabilities in conflict with the law. It examines the domestic practices of three countries, namely, Australia, Singapore, and New Zealand, respectively. The phrase 'domestic practices' here refers to both legislative and policy frameworks and practices regarding access to justice by persons with disabilities, particularly children,¹⁵⁸ as well as case law in that respect. Furthermore, as already indicated in this paper's first chapter, whereas the selected domestic practices focus on neuro-disabilities or intellectual disability, it is still the aim of this research to broadly construe that so as to extend application of key elements therein to disposition of all children with disabilities in conflict with the law.

4.2. Domestic Practices on the Disposition of Children with Disabilities in Conflict with the Law: Case Studies of Australia, Singapore, and New Zealand

4.2.1. Australia: Specific Legislative Disposition Framework of Children with Intellectual Disability in Conflict with the Law

Australia, through its Children, Young and Families Act 2005 ('the Act'), represents a domestic legal framework with particular, but partial, disposition framework of children with disabilities in conflict with the law; it does so by focusing on intellectual disability. Section 571(3) of the Act states that if it appears to the Court that a child in conflict of the law has intellectual disability, the Court must, before passing sentence, order a pre-sentence report in respect of the child and adjourn the proceeding to enable the report to be prepared. The process involves conducting an assessment as to whether the child has intellectual disability¹⁵⁹. Unfortunately, for the Report to be prepared, it is usually necessary to have the proceedings adjourned for a period of between 3 and 4 months.¹⁶⁰

In light of section 571 (4) of the Act, if the Secretary has issued a statement in respect of the child that the child has an intellectual disability within the meaning of the Disability Act 2006, a pre-sentence report prepared in accordance with an order under subsection (3) must meet the following requirements: (a) include a copy of the statement; and (b) specify disability services which are (i) available under that Act and appropriate for the child; and (ii) designed to reduce the likelihood of the child committing further offences.

Section 358 of the Act outlines specific reports and matters a court may consider at sentencing stage. According to the provision, if the court finds a child guilty of an offence, the court may, in considering sentence, take into account, inter alia, (a) a pre-sentence report prepared by the Secretary, if any, of the author. Per section 410(1)(e) of the Act, before issuing a detention order in respect of a child in

¹⁵⁸ OHCHR (n 33).

¹⁵⁹ Jenniffer Bowles, 'Sentencing in the Children's Court of Victoria' (2013) 12 <<https://www.childrenscourt.vic.gov.au/file/sentencing-childrens-court-victoria-0> > accessed 14 April 2022; Sentencing Advisory Council – Australia, 'Sentencing Children and Young People in Victoria' (2012) <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-children-and-young-people-victoria> > accessed 14 April 2022.

¹⁶⁰ Ibid.

conflict with the law, including a child with mental disability, the court must have ordered and considered a pre-sentence report.¹⁶¹

4.2.2. Singapore: Court of Appeal's Jurisprudence on Disposition of Children with Intellectual Disabilities in Conflict with the Law

In its recent decision, in the case *Public Prosecutor v ASR*,¹⁶² the Court of Appeal of Singapore dealt with, among others, the disposition framework of children with intellectual disabilities in conflict with the law. The case concerned a child in conflict with the law ('ASR'), who committed serious offences, including rape of aggravated nature and sexual abuse against a girl with an intellectual disability, but who was also himself with an intellectual disability.¹⁶³ ASR committed the offences when he was 14 years old.¹⁶⁴ He was 17 years old at the time of his disposition before the High Court.¹⁶⁵

In light of the minimum sentences in respect of the charges to which he pleaded guilty, the number of the charges, and the then existing sentencing regime presenting the disposition court with two alternatives of either a lengthy imprisonment term with caning, or reformatory training, the High Court ordered the later disposition option.¹⁶⁶ It was the view of the High Court that the main issue before it was whether ASR ought to be sentenced to reformatory training.¹⁶⁷ The High Court answered this in the affirmative, reasoning that rehabilitation was the dominant disposition consideration, and that this meant that reformatory training was the more appropriate disposition compared to the imprisonment with caning.¹⁶⁸

The Prosecution appealed against the High Court's decision. As was its case in the High Court, the thrust of the Prosecution's factual case on appeal was that the child was "too intellectually disabled to undergo reformatory training, which required a certain minimum level of cognitive ability."¹⁶⁹ In the view of the Prosecution, considering that the conditions which made reformatory training possible did not exist, rehabilitation could not be the dominant sentencing factor.¹⁷⁰ Hence, one of the issues before the Court of Appeal was appropriate disposition framework for young offenders with intellectual disability who have been convicted of serious offences.¹⁷¹

In addressing the issue, the Court of Appeal referred to and applied "the two-step framework", as articulated in *Public Prosecutor v Mohammad Al-Ansari bin Basri* ('*Al-Ansari*'),¹⁷² generally meant for

¹⁶¹ Also see: Bowles (n 159) 24.

¹⁶² *Public Prosecutor v ASR* [2019] SGCA [16] <https://www.elitigation.sg/gdviewer/SUPCT/gd/2019_SGCA_16> accessed 14 April 2022.

¹⁶³ *Ibid* [1].

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* [3].

¹⁶⁶ *Ibid* [1-2, 19, 28].

¹⁶⁷ *Ibid* [19].

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* [98].

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* [39].

¹⁷² *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449.

sentencing young offenders convicted of serious offences.¹⁷³ According to the *Al-Ansari* two-step framework, the court is required to first consider whether rehabilitation should be the dominant objective of sentencing, and, as a second step, the court must choose the appropriate sentencing option in accordance with the answer at the first step.¹⁷⁴ The Court of Appeal stated that the question of whether it is appropriate that an offender should be rehabilitated must be distinguished from asking whether the offender is suitable for reformatory training.¹⁷⁵ The Court stressed that it is the former, and not the latter, question which should determine whether rehabilitation be the dominant sentencing factor in the offender's case.¹⁷⁶ Thus, according to the Court of Appeal,

*... the existence of practical constraints on achieving rehabilitation which are external to the offender does not entail that he should not be rehabilitated. The existence of such constraints properly influences the process of deciding the appropriate sentencing option, and not the process of deciding whether rehabilitation should be the dominant sentencing objective.*¹⁷⁷

In other words, "limitations in the sentencing regime are no justification for disproportionate sentencing."¹⁷⁸ The significance of this approach, in the Court's view, is that establishing rehabilitation as the dominant sentencing objective at the first step despite the constraints in its implementation, drives the court to adopt a sentencing option that gives effect to it regardless of those challenges.¹⁷⁹

Applying the *Al-Ansari* framework, the Court of Appeal considered, for the first step, that ASR's state of mind at the time of his offences made it clear to the Court that deterrence was of less significance.¹⁸⁰ The Court also formed the view that even though it also showed that ASR posed a high risk of reoffending, regard being to his youth and mental impairment, rehabilitation, and not incapacitation, was the preferred crime prevention objective.¹⁸¹ Then, the Court considered that retribution was relevant on the basis that it is an abiding factor in sentencing that the sentence being imposed should be proportionate to the gravity of the offence.¹⁸² In the view of the Court of Appeal, the gravity of ASR's offences in this matter was significantly weakened by his reduced culpability due to his inability to control impulses because of the extent of his intellectual disability, and that this was a crucial factor at the second step of the *Al-Ansari* framework.¹⁸³ The Court, therefore, concluded that reformatory training was, as a matter of principle, the only justifiable sentencing option.¹⁸⁴ Consequently, the Court of Appeal upheld the High Court's decision by dismissing the appeal.

¹⁷³ *Public Prosecutor v ASR* (n 162) [96].

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid* [99].

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* [158].

¹⁷⁹ *Ibid* [99].

¹⁸⁰ *Ibid* [103].

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid* [103], [107], [148].

¹⁸⁴ *Ibid* [146].

4.2.3. New Zealand: The Prevalence of the Interaction of the Science of Brain Development and Neuro-disability in the Child Justice System

New Zealand has witnessed a growing attention to the interaction of neurodisability and the child justice system, including on matters of disposition. Concerned practitioners and professionals have become more aware that the science of brain development is relevant both in terms of age appropriateness, and where children have neuro-disabilities such as traumatic brain injury, learning difficulties, and foetal alcohol spectrum disorder.¹⁸⁵ It is not surprising that New Zealand has been recognised "as world-leading in a pioneering response to the neurodisability issue," and said to be the best place to deal with children and young people who are vulnerable due to their neurodisability.¹⁸⁶

In 2016, the Neurodisabilities Forum was held in the country to discuss the matter of neurodisabilities in the child justice system.¹⁸⁷ More than 60 key stakeholders in the disability, justice, education, health and social development sectors attended this 'groundbreaking' event.¹⁸⁸ This signifies a multisectoral approach to children with disabilities in conflict with the law.

The Forum acknowledged that young people with neurodisabilities commit offences, they cause harm to others (victims and society) and, hence, there is need that they be held accountable.¹⁸⁹ However, it was emphasised that holding young people with neurodisability who have committed offences "must be done in a manner that they understand, reflects their disability, and where appropriate support/rehabilitation/reintegration can be ensured."¹⁹⁰ According to the Forum discussions, public safety is enhanced where such young persons are dealt with in a proper manner by the justice system, and where appropriate reintegration and minimising the likelihood of a repeat offence/behaviour is the focus.¹⁹¹

An interesting case example was provided at the Forum, highlighting the significance of identification of disability in respect of children in conflict with the law at disposition stage; that if the disabilities of children with disabilities in conflict with the law are not identified, disposition measures ordered for them may be in vain even if issued with an aim of rehabilitating the children. In the given example, a child was ordered by the Youth Court to residence supervision, coupled with an element of a military style camp activity.¹⁹² Whereas he did well in the structured residence supervision and left the residence, he committed three very serious crimes only two days later.¹⁹³ Before a different Youth Court Judge and with a new Youth Advocate, the child was referred for assessment and he was diagnosed with foetal alcohol syndrome disorder which falls under Neurodisability.¹⁹⁴ Based on the diagnosis, it was concluded that the previous

¹⁸⁵ Lynch (n 9) 1.

¹⁸⁶ Nessa Lynch, 'Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice' (May 30, 2016). Dyslexia Foundation of New Zealand. Summarising the Contributions of Participants at the 2016 Neurodisabilities Forum, Hosted by DFNZ in Wellington, 12 May 2016, Victoria University of Wellington Legal Research Paper No. 16/2018, 5 < <https://ssrn.com/abstract=2869502> > accessed 15 April 2022.

¹⁸⁷ Ibid 3.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid 4.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid 10.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

rehabilitative order had most likely been in vain because his condition was not known.¹⁹⁵ Therefore, a very structured environment with a rigorous supervision regime was developed for him and this assisted him in desisting from offending.¹⁹⁶

The Forum outlined several recommendations on outcomes, sanctions and services. Among others, it was highlighted that placing young persons with neurodisabilities in custody may not be appropriate as they are especially prone to the effects of young offenders' aggregation.¹⁹⁷ It was also pointed out that appropriate rehabilitation, reintegration and support is strongly in the public interest on the basis that the neurodisability may make the concerned young person vulnerable to misinterpret situations while in stress and does increase the risk of violent or aggressive behaviour.¹⁹⁸

Now to proceed by specifically focusing on the justice sector, there is emerging significant jurisprudence from the courts in New Zealand. It is important, in this regard, to mention the case *P v R*.¹⁹⁹ The case concerned a child ('P') who was aged 13 at the time of crime commission. P had neurodisabilities; symptoms of foetal alcohol spectrum disorder, and traumatic brain.²⁰⁰ He was charged with murder but was convicted of the offence of manslaughter based on the jury's view that P lacked murderous mental element when he delivered the fatal wounds.²⁰¹ Despite acknowledging P's brain injury in its assessment of culpability, the High Court concluded that this factor had already been taken into account in the manslaughter verdict.²⁰² Hence, it sentenced P to a six-year imprisonment term, with a three years and three months imprisonment period.²⁰³ As for the minimum non-parole period of three years and three months, the High Court was of the view that placing P in a secure environment for a reasonable period of time was necessary to protect the community.²⁰⁴ Furthermore, the High Court recommended that P should not serve his sentence in a prison, but in a youth justice residence so as to better his chances of reintegration.²⁰⁵

In consideration of P's appeal against the High Court's sentence, guided by a principled approach as to the level of culpability of P, considering his particular characteristics of neuro-disability and extreme youth, the Court of Appeal set aside the lower court's sentence, and instead fixed a sentence of four years and six months imprisonment.²⁰⁶ The Court of Appeal rejected the High Court's approach of not taking into account P's neurodisability on the basis of that having had been factored when convicting of

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid 14.

¹⁹⁸ Ibid.

¹⁹⁹ Lynch (n 9) 103; *P* (CA479/2015) v *R* [2016] NZCA 128.

²⁰⁰ Lynch (n 9) 103.

²⁰¹ Ibid 104.

²⁰² Ibid 106.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid 104.

manslaughter and not murder.²⁰⁷ The Court emphasised the need to distinguish trial, and any resulting sentence.²⁰⁸ Thus, in the view of the Court of Appeal:

When it came to sentencing P, Lang J's task was to impose a sentence appropriate both for P's crime of manslaughter and for P as the person who had committed that crime. When considering the mitigating factors personal to P, the Judge needed to factor in, fully, P's traumatic brain injury.²⁰⁹

The Court of Appeal was also of the view that a 40% discount as P's personal mitigating factors was suitable. In arriving at that conclusion, the Court considered and approved an opinion by an expert assessor who had issued a report for the High Court sentencing process.²¹⁰ Also based on the expert's opinion, emphasising on rehabilitation, the Court of Appeal held that a minimum term is not required and because deterrence and denunciation has less relevance in the case of a young child.²¹¹ As such, the Court of Appeal considered:

P is a young person who is developing, and whose rehabilitative needs are therefore changing. We view imposition of an MPI as inconsistent with the flexibility required best to facilitate P's rehabilitation.²¹²

With this approach, it is safe to conclude that the Court of Appeal devised an impressive view of the interests of the society and the need for public protection, holding that the safety and welfare of the public is better safeguarded not through a punitive response, but the successful reintegration of children with disabilities in conflict with the law.²¹³

4.3. Conclusion

The domestic practices of Australia, Singapore and New Zealand, focus on disposition of children with neuro-disabilities or intellectual disability who have been found in conflict with the law. To further note, the domestic practices do not expressly refer to the instruments scrutinised in the preceding chapter. Nonetheless, the practices highlight key elements generally applicable to disposition of children with disabilities in conflict with the law, and these elements support those deduced in the previous chapter. According to the domestic practices, there is need for pre-sentence (evaluation) reports given by experts in relation to disposition of children in conflict with the law with disabilities. That element is in line with the multidisciplinary approach, and the requirement for specialised staff and services.

The *Al-Ansari* 'two-step framework' which, though, not specifically applicable to children with disabilities in conflict with the law, perfectly fits that specific application as expounded and applied by the Court of Appeal of Singapore. In the context of this paper, a key element to be drawn from the 'two-step framework' is that of requiring examining whether rehabilitation should be the dominant aim of sentencing children with disabilities in conflict with the law; and then, choosing the appropriate sentence

²⁰⁷ Ibid 107.

²⁰⁸ Ibid.

²⁰⁹ Ibid. Note: 'Lang J' mentioned in the quotation was the Judge who presided over the matter before the High Court and issued the sentence.

²¹⁰ Ibid 108.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid 109.

option. This element underlines the requirements of availability of a variety of dispositions, and that deprivation of liberty of children with disabilities in conflict with the law must be a measure of last resort and for the shortest appropriate period of time. Connected to that, the domestic practices point to the proportionality principle by requiring that even though children with disabilities in conflict with the law have to be held accountable, that should be proportional with regard to their disability and appropriateness of disposition measures such as rehabilitation coupled with reintegration objective. The final key element to note from the domestic practices is that identification of disabilities of children in conflict with the law at all stages of criminal trial, including at disposition stage, is crucial as that contributes to effective and appropriate disposition measures.

All these elements and requirements, based on the domestic practices (as analysed in this chapter) and the international and regional instruments (as examined in previous chapter), in light of the children's human rights approach to children with disability in the child justice system, are vital in the devising of clear and comprehensive specific guidelines framework for domestic courts in disposition of children with disabilities in conflict with the law. That is exactly what the next chapter delves into.

Chapter Five

A Children's Human Rights-Based Framework for Disposition of Children with Disabilities in Conflict with the Law

5.1. Introduction

At the core of this paper is the assertion that for domestic courts to issue fair and appropriate dispositions, in light of the relevant standards, in respect of children with disabilities in conflict with the law, there is need for clear guidelines framework. Therefore, having analysed the key concepts and applicable approaches: children with disabilities in conflict with the law and their disposition; relevant children's rights and disability rights standards on disposition of children with disabilities in conflict with the law; and relevant domestic practices on disposition of children with disabilities in conflict with the law, in chapters 2, 3 and 4, respectively, it is the aim of this chapter to formulate a clear and comprehensive guidelines framework for domestic courts with regard to disposition of children with disabilities in conflict with the law. This chapter intends to achieve that goal by presenting pillars, relevant for disposition hearing and issuing of disposition orders, as forming the framework for disposition of children with disabilities in conflict with the law.

Based on the international and regional standards, as analysed together with the selected domestic practices, there are four key pillars framing a model for disposition of children with disabilities in conflict with the law. The said pillars are as follows: identification and evaluation of disability; procedural and age-appropriate accommodations; framing of restorative justice as the dominant objective; and appropriate disposition determination. The following section presents the pillars, respectively.

5.2. Four-Pillar Model Framework for Disposition of Children with Disabilities in Conflict with the Law

5.2.1. Identification and evaluation of disability

Identification of disability when it comes to disposition of children with disabilities in conflict with the law is crucial because without that identification there is no discussion of the appropriate disposition framework for such children. It is also an important aspect because any form of disability in respect of children in conflict with the law must be considered during disposition.²¹⁴ Failure to identify any form of disability in respect of children with disabilities in conflict with the law may lead to inappropriate disposition measures ordered for them even if issued with an aim of rehabilitating the children.

Specialisation of professionals or staff is an important element of the identification and evaluation of disability pillar. Capacity or specialisation of concerned professionals in the child justice system is key in ensuring fair and appropriate disposition of children with disabilities in conflict with the law.²¹⁵ Here the understanding of "professionals" is a broad one as including not only judges or magistrates, but also court support staff, probation officers, enforcement personnel, youth guidance educators, correctional custody and treatment personnel, and law enforcement personnel.²¹⁶ The staff in the child justice system must have a proper understanding of the standards applicable to children with disabilities and to children in general.

A multidisciplinary approach is central to the identification and evaluation of disability through specialisation of professionals, pre-disposition (evaluation) reports. This is as reflected in the analysis

²¹⁴ Gramann (n 14).

²¹⁵ Osher and others (n 6) 4.

²¹⁶ Ibid.

of domestic practices in the previous chapter according to which there is need for the reports issued and, where possible, presented by experts from various relevant fields in relation to disposition of children in conflict with the law with disabilities. The pre-disposition reports must clearly state the disability (if any identified) and further specify available and appropriate disability services.

The children's human rights approach to disability as expounded in chapter two of this paper is key in the identification and evaluation of disability as an element of disposition of children with disabilities in conflict with the law. In this context, the children's human rights approach to disability requires identification and evaluation of disability in view of both the human rights model of disability and children's rights approach. Applying that approach, disability is to be understood as a broad concept. This is in line with the broad understanding of disability under the relevant international and regional standards, in particular the provision of paragraph 2 of article 1 of the CRPD as discussed in chapter two of this paper. Additionally, per the 'two-tier vulnerability', 'double disadvantage', 'intersectionality', and 'developmental' approaches as explained in chapters one and two of this paper, as aspects of children's human rights approach to disability, identification and evaluation of disability is to be framed and employed with due regard to children with disabilities in conflict with the law as being both children and children with disabilities.

To further explicate the developmental approach in this framework, an increasing attention to the approach in international children's rights,²¹⁷ there is a proper justification for its inclusion as a sub-element of the children's human rights approach to disability. A developmental approach to disposition of children with disabilities in conflict with the law is to be based on the recognition of an important aspect that differences between children with disabilities and other children can be as profound as the differences between children and adults with regard to the criminal justice system.²¹⁸ The approach is key in the evaluation of the identified disabilities of children in conflict with the law at the disposition stage. With that conceptualisation, the developmental approach is to be framed and applied beyond the current literature's focus on children with cognitive, mental, or behavioural disabilities; its consideration and application must encompass disposition of all children with disabilities in conflict with the law.

5.2.2. Procedural and age-appropriate accommodations

Provision of procedural and age-appropriate accommodations during the disposition of children with disabilities in conflict with the law ensures their enjoyment of the right to access to justice on an equal basis with other children.²¹⁹ The requirement for such provision is clearly stated in articles 7(3) and 13(1) CRPD. On the one hand, 'procedural accommodations' fulfilment necessitates removing barriers that prevent or restrict children with disabilities from exercising their procedural rights.²²⁰ On the other hand, 'age-appropriate accommodations' realisation compels consideration of individual requirements, such as age of children with disabilities in conflict with the law, in the designing and implementation of procedural rights.²²¹ The two construed together may require, inter alia, modified courtroom procedures and practices, age-appropriate assistance, and specific settings.²²² The process of provision and request of procedural and age-appropriate accommodations to children with disabilities in conflict with the law at all

²¹⁷ Schmidt and Skelton (n 44) 4-6.

²¹⁸ Osher and others (n 6) 4.

²¹⁹ Nowak (n 23) 210;

²²⁰ Schefer (n 131) 5.

²²¹ Ibid.

²²² OHCHR (n 8) [27].

stages of criminal proceedings including disposition must be clearly entrenched in domestic legislation, confidential, always available and should be free of charge.²²³

Closely related to procedural and age-appropriate accommodations as summarised above in its application to disposition of children with disabilities in conflict with the law, is the advancement of child-friendly justice. In this regard, disposition of children with disabilities in conflict must be one based on child-friendly justice. To that extent disposition of children with disabilities in conflict with the law is to be more child-specific and fair, especially if done in a comprehensive manner,²²⁴ with due regard to the procedural and age-appropriate accommodations aspects highlighted above.

5.2.3. Framing of restorative justice as the dominant objective

Restorative justice is one radical alternative to punishment of children with disabilities in conflict with the law.²²⁵ With restorative justice framed as the dominant objective in the disposition of children with disabilities in conflict with the law, a court will have to balance the needs of the child in conflict with the law, victim, and the community.²²⁶ Adoption of this approach is to focus on rehabilitation of children with disabilities in conflict with the law through direct amends to the community and victims.²²⁷ Hence, the dominant considerations must be, inter alia, restorative community service, victim-offender mediation, restitution, victim awareness panels, victim and community impact statements, and various decision-making processes in the community.²²⁸

Examination of restorative justice as the dominant objective will usually lead to analysis of rehabilitation vis-à-vis constraints in the child justice system with regard to disposition of children with disabilities in conflict with the law. In that analysis, courts must ensure that existence of practical constraints on attaining rehabilitation which are external to children with disabilities in conflict with the law properly influences the process of appropriate disposition determination and not the process of framing restorative justice as the dominant objective.²²⁹

5.2.4. Appropriate disposition determination

Having regard to restorative justice as the dominant objective, appropriate disposition determination must be guided by “disability and effective approaches.”²³⁰ That requires that a domestic court addresses the following issues: (1) whether an updated or more comprehensive disability evaluation is needed; (2) whether the disposition setting being considered for the child with disability in conflict with the law has programs that can accommodate the child; (3) whether parents or guardians, and concerned staff comprehend the relevant rights and needs of the child as both a child and a child with disability; and (4) how can the staff and the parents or guardians collaborate to support the child's successful reintegration into the society.²³¹

²²³ Ibid [28-29].

²²⁴ Liefwaard (n 53)16.

²²⁵ Nowak (n 23) 188; Stenhjem (n 20) 3.

²²⁶ Stenhjem (n 20) 3.

²²⁷ Nowak (n 23) 188; Chilemba (n 38) 381.

²²⁸ Stenhjem (n 20) 3.

²²⁹ *Public Prosecutor v ASR* (n 162) [99].

²³⁰ Osher and others (n 6) 3.

²³¹ Ibid.

It is also important point to highlight here is that lack of disposition options to a court or its inadequate consideration of disposition options available to it may lead to inappropriate disposition of children with disabilities in conflict with the law.²³² Therefore, it is imperative that a court duly examines a wide variety of disposition options including non-custodial measures. A proper reading of article 40(4) CRC is to the effect that a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care, must be available to ensure disposition of children in conflict with the law, including children with disabilities in conflict with the law, per the 'necessity principle' and 'proportionality principle' requirements.

Under the necessity principle, consideration of a variety of non-custodial measures must be prioritised so that detention orders are used only as a measure of last resort and for the shortest appropriate period of time.²³³ Per the proportionality principle, disposition of children with disabilities in conflict with the law must always be proportionate to the circumstances of the offence, circumstances of the children, and circumstances and needs of the society and victims.²³⁴ Through this consideration, courts are to give weight to the best interests of the child as a primary consideration as well as to the need to ensure their reintegration into community.²³⁵ The proportionality principle applies to all disposition options, whether custodial or non-custodial measures. Therefore, evaluation of the interests of the society and the need for public protection should not be aimed at safety and welfare of the public through punitive disposition, but through successful reintegration of children with disabilities in conflict with the law.²³⁶

Where detention orders are considered the appropriate disposition in respect of children with disabilities in conflict with the law, consideration must be to availability of specially trained staff and special facilities to provide the children with adequate treatment for addressing their problems which led to their crime commission.²³⁷ Furthermore, children with disabilities in conflict with the law must be separated from adults while in detention unless there are exceptional circumstances based on the best interests of the child considerations.

Finally, prohibition of cruel, inhuman or degrading treatment or punishment is crucial in the framework of disposition of children with disabilities in conflict with the law. Based on article 37(a) CRC, torture or other cruel, inhuman or degrading punishment should be clearly prohibited and courts should not impose such forms of treatment or punishment in disposition of children with disabilities in conflict with the law.

5.3. Conclusion

To sum up the analysis of this chapter, as illustrated in diagram 1 below, a comprehensive guidelines framework on disposition of children with disabilities in conflict with the law must be based on the following four pillars: 1) identification and evaluation of disability; 2) procedural and age-appropriate accommodations; 3) framing of restorative justice as the dominant objective; and 4) appropriate disposition determination. Each of the pillars consists of key elements. The pillars are closely related and support each other in ensuring proper disposition of children with disabilities in conflict with the law. Similarly, the elements under the pillars are closely linked.

²³² The Australian Human Rights Commission (n 4).

²³³ CRC Committee, General Comment No. 24 (n 3) [73].

²³⁴ *Ibid* [76].

²³⁵ *Ibid*.

²³⁶ Lynch (n 9) 109.

²³⁷ CRC Committee, General Comment No. 9 (n 58) [74(c)].

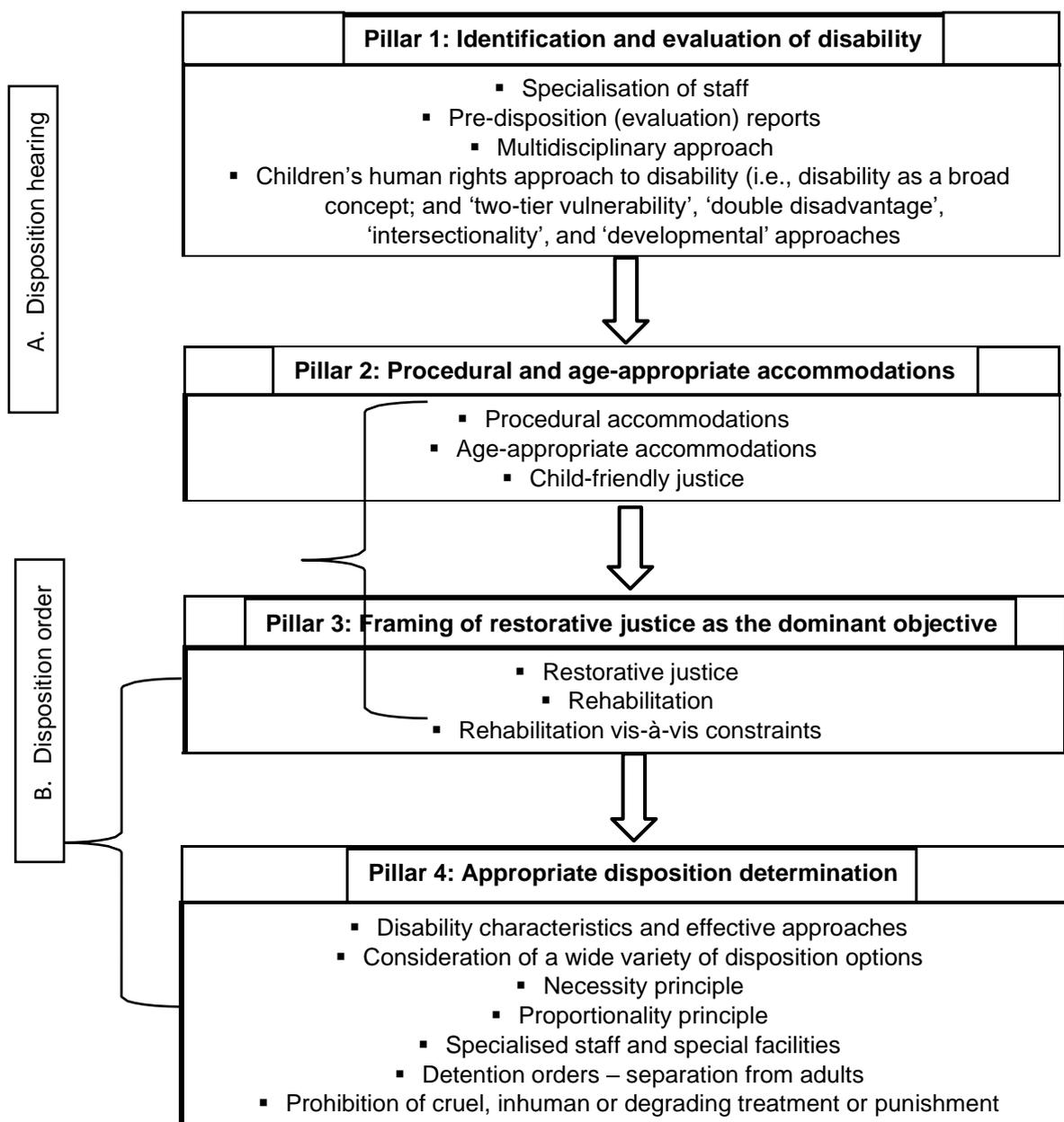


Diagram 1: Illustration of the Four-Pillar Model Framework for Disposition of Children with Disabilities in Conflict with the Law

Chapter Six

6.1. Conclusion and Moving Forward

Children with disabilities come into contact with the law as, among others, children in conflict with the law. Unfortunately, their interaction with the justice system usually ends with unfair and inappropriate disposition. This is despite existence of various international and regional instruments making provisions for the rights and standards applicable to children with disabilities. One major contribution to that status is that there are still no clear guidelines framework for disposition of children with disabilities in conflict with the law. The reviewed literature is also guilty of that omission. There has been a narrow construing of disability in relation to disposition of children with disabilities in conflict with the law; the focus has been on children with mental or neuro-disabilities. As a result, there has been no comprehensive examination and recommendations as regards ensuring fair and appropriate disposition of children with disabilities in conflict with the law. Hence, the study proceeded on the basis that for domestic courts to issue fair and appropriate dispositions, in light of the relevant standards, in respect of children with disabilities in conflict with the law, there is need for clear guidelines framework.

The paper, in chapter two, construed 'children with disabilities in conflict with the law' to include children with all forms of disabilities as per the broad conceptualisation of disability in the CRPD. The approach suggested in that chapter is that disposition of children with disabilities in conflict with the law should be clearly guided by this broad understanding of disability. Under that approach, human rights model of disability, two-tier vulnerability approach to children with disabilities, double disadvantage, and intersectionality approach to vulnerability compose the children's rights approach to disability in the child justice system. Furthermore, the analysis in the chapter identified concepts such as child-friendly justice, developmental approach, and procedural and age-appropriate accommodations as being central supporting pillars to that approach. Consequently, there is a clear recognition of children with disabilities in conflict with the law as being both children, and children with disabilities during disposition.

Through the lens of the children's human rights approach to disability, chapter three proceeded to analyse the CRC, CRPD, International Principles and Guidelines on Access to Justice for Persons with Disabilities, ACRWC, African Disability Protocol, and the Council of Europe Guidelines on Child-friendly Justice. Even though lacking in terms of specific provision for disposition of children with disabilities in conflict with the law, the following principles were deduced from the standards: 1) specialised staff and facilities; 2) multidisciplinary approach; 3) proportionality principle; 4) availability of a variety of dispositions; 5) deprivation of liberty as a measure of last resort and for the shortest appropriate period of time; 6) prohibition of torture or other cruel, inhuman or degrading treatment; and 7) age-appropriate and procedural accommodations.

Chapter four analysed the domestic practices of Australia, Singapore and New Zealand. However, a limitation to the study emerged in that it was not possible to find data generally dealing with children with disabilities including children with physical disabilities. To deal with that, the domestic practices were analysed in a broad manner, beyond their focus on disposition of children with neuro-disabilities or intellectual disability who have been found in conflict with the law. Through that analysis, the chapter identified three key elements. The first element is the significance of pre-sentence (evaluation) reports given by experts in relation to disposition of children in conflict with the law with disabilities. The second element is the *Al-Ansari* 'two-step framework'; necessitating examining whether rehabilitation should be the dominant aim of disposition of children with disabilities in conflict with the law; and then, choosing the appropriate disposition option. The final identified key element is that identification of disabilities of children in conflict with the law at all stages of criminal trial, including at disposition stage, is vital as that has a major bearing to effective and appropriate disposition measures.

In chapter five, the researcher delved into the devising of a clear and comprehensive guidelines framework for disposition of children with disabilities in conflict with the law. Having critically analysed the relevant international and regional standards, and selected domestic practices, the following specific guidelines for domestic courts in disposition of children with disabilities in conflict with the law are to be drawn: 1) adequate identification and evaluation of disability; 2) due regard to procedural and age-appropriate accommodations; 3) thorough consideration of restorative justice (and rehabilitation) as the dominant objective; and 4) appropriate disposition determination in light of standards applicable to children with disabilities in conflict with the law as both children and children with disabilities.

As highlighted above, there has been lack of a broad conceptualisation of disability as regards disposition of children with disabilities in conflict with the law. This is reflected in both the reviewed literature as well as the international and regional standards, and domestic practices. In light of that, the author recommends further and more comprehensive guidance, by the treaty bodies, on disposition of children with disabilities in conflict with the law.

Furthermore, even though this study emphasized a multidisciplinary approach to disposition of children with disabilities in conflict with the law, it did not adopt a multidisciplinary research methodology. For proper understanding of the application of the multidisciplinary approach to disposition of children with disabilities in conflict with the law, there is need for further study that fully adopts a multidisciplinary research methodology.

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