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The Right of Access to Information for Visually Disabled and Hearing Impaired Persons in South Africa

By:

Alphonse Landry Nouck

Student No: 2973906

Supervisor: Prof J Sloth-Nielsen

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Declaration

I Alphonse Landry Nouck hereby declare that this dissertation is original. It has never been presented to any other university or institution. Where other people’s ideas have been used, proper references have been provided. Where other people’s words have been used, they have been quoted and duly acknowledged.

Student Name:
Signature:
Date:
Dedication

This thesis is dedicated to the Lord Jesus who has been my help in ages past and who is also my hope for years to come. It is also dedicated to my mother for all her love and moral support. Without all the breath of fresh air I could have never made it thus far.
Acknowledgment

My sincere appreciation goes to God Almighty for endowing me with strength to undertake a research work of this nature. Special thanks to my supervisor, Pr J Sloth-Nielsen, for her immense attention, patience, who has been for me as a second mother during this redaction.

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Abbreviations

ACHPR: African Charter on Human and Peoples' Rights
ACPF: African Child Policy Forum
APAI: African Platform on Access to Information
CEDAW: Convention on Elimination of All Form of Discrimination Against Women
CRC: Convention on the Rights of the Child
CRPD: Convention on the Rights of Persons with Disabilities
DEAFSA: Deaf Federation of South Africa
DPO: Disabled Peoples Organization
DPW: Department of Public Works
ECA: Electronic Communication Act
ECHR: European Convention on Human Rights
ECJ: European Court of Justice
ECT: Electronic Communication and Transactions Act
ECtHR: European Court of Human Rights
EEA: Employment Equity Act
HIV-AIDS: Human immunodeficiency virus- Acquired Immune Deficiency Syndrome
HRC: Human Rights Committee
IACEDPD: Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities
IACHR: Inter-American Convention on Human Rights
IBA: Independent Broadcasting Authority
ICASA: Independent Communication Authority of South Africa
ICCPR: International Covenant on Civil and Political Rights
ICESCR: International Covenant on Economic Social and Cultural Rights
ICT: Information and Communications Technology
IHRL: International Human Rights Law
ILO: International Labour Organization
INDS: Integrated National Disability Strategy
WWW: World Wide Web
Chapter one

Introduction

1.0 Background

In the modern era, the predominant ideology of the notion of disability was considered in “a medical paradigm,” in way that people with disabilities were considered as persons unable to perform any social expectation, in other words they were perceived as a problem for society.\(^1\) The policies and the rules of society were dominated by discrimination against people with disability on the ground that they cannot be assimilated or cope with standards of the mainstream society.\(^2\)

The adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)\(^3\) is an important step towards effective protection and promotion of human rights of disabled persons throughout the world, and even more importantly in the case of Africa.\(^4\) The promotion and protection of the rights of persons with disabilities reinforces the basic socio-economic and civil rights guaranteed in the mainstream human rights documents.\(^5\) However, instruments such as the CRPD serve to emphasize and give special protection to the rights of persons with disabilities.\(^6\) The CRPD provides for rights such as the right to life, the right to education, the right to personal mobility, the right to work and the right to freedom of expression and opinion, and access to information and disabled persons shall not be discriminated on the ground of their disability.\(^7\)

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\(^3\) The CRPD was adopted by the United Nations general assembly on 13 December 2006, and opened for signature on 30 March 2007; it came into force on 3 May 2008.


\(^7\) Although the concept of disability is not clearly expressed or mentioned by the Universal Declaration of Human Rights (UDHR) of 10 December 1948, prohibits any kind of discrimination against the person and in Article 1 it
Article 3 of the International Covenant on Economic Social and Cultural Rights (ICESCR)\(^8\) recognized the responsibility of the States to ensure the equal rights of all persons for the enjoyment of their full social, economic and cultural rights. These rights shall benefit all, without any distinction based on race, gender or political opinion.\(^9\) International human rights instruments present the right of access to information as a basic and a fundamental right.\(^10\) According to international human rights instruments, this right also underpins the basic principles of democracy that support a country and are as such core to a functional democracy.

While beset with some challenges to effectively realize the rights of persons with disabilities, the South African government has taken important measures in terms of legislation and expression of willingness to improve measures taken to protect the rights of persons with disabilities.\(^11\) However, with all the measures taken and willingness to improve the conditions of persons with disabilities, South African society still displays discrimination against disabled persons at the level of their right of access to information and mass media concerning respectively visually and hearing impaired persons.\(^12\) While South Africa, Tanzania and Kenya have taken some steps in protection of persons with disabilities, the same cannot be said of most of the other African countries.\(^13\) The situation of the other African countries, is the result of the lack of legal frameworks for the protection of the rights of persons with disabilities, and in most of these countries, a majority of disabled children still do not have access to education.\(^14\)

\(^8\) The ICESCR was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 3 January 1976.

\(^9\) Article 2(2) of the ICESCR; see also Article 3 of the ICCPR.

\(^10\) Article 19(2) of the ICCPR. See also ‘The Danish Institute for Human Rights. Access to Information’ Available at: [http://www.humanrights.dk/international/themes+and+activities/access+to+information](http://www.humanrights.dk/international/themes+and+activities/access+to+information) (accessed on 16 March 2011).


The right of access to information however, is not only limited to the rights to receive information from the government or from a private body, relating to the administration of the public or private sector. The new developments in Information and Communications Technology (ICT) extend to the fields of other media like television, radio and internet. For the full enjoyment and the respect of fundamental rights of the person, every human being shall benefit and have equal access to ICT. 15 The preamble of the CRPD however reaffirms the:

“importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”

In other words, access to ICT is also protected by human rights instruments and according to the CRPD, access shall not be subject to discrimination based on disability. 16 However, the discrimination faced by disabled persons in South Africa, and especially the situation of visually disabled and hearing impaired persons to access to information through ICT, has led to this research to examine this challenge in South Africa’s society.

Section 7 of the South African Constitution of 1996 17 states that: “the Bill of Right is the cornerstone of the society” therefore, the South African society shall respect the full human rights of persons with disabilities and every one shall have equal rights of access to information without any qualification or disability based-discrimination. 18 Further, Section 32 of South African Constitution of 1996 guarantees the right of access to information to all persons. However, full implementation of the Bill of Rights, especially in regards to persons with disabilities, is beset with challenges. This research seeks to highlight challenges relating to the rights of persons with disabilities related to visually disabled and hearing impaired persons to access information in South Africa.

15 The accessibility of information through the ICT is not only perceived as a development targeted by western countries. This issue however also targets African countries, and the African Union (AU) during his 14th summit held in Addis Ababa, in Ethiopia on 25 January - 02 February 2010 was encouraging the promotion of ICT, as a factor for the development of Africans countries, through his Theme: ‘Information and Communication Technologies (ICT) in Africa: Challenges and Prospects for Development’ Available at: http://www.africa-union.org/root/au/conferences/2010/january/summit/14thsummit.html (accessed on 09 April 2011).
17 The South African Constitution of 1996 was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997.
18 Section 32 of the South African Constitution of 1996.
1.1 Research question

What are the implications of the right of access to information for visually disabled and hearing impaired persons in South Africa in the light of international human rights treaty law and the South African Constitution?

1.2 Rationale

The study seeks to explore the challenges of persons with disabilities who have visual and hearing disabilities and specifically, to look at the treatment of their right of access to information in South Africa. Using human rights treaties, the CRPD and specifically article 21\(^\text{19}\) as the point of reference, the study will analyse the legal framework relating to access to information for persons with disabilities in South Africa. Additionally this study will come up with recommendations to overcome some of the challenges identified above in order to ensure that the right to access of information for visually and hearing impaired persons is fully implemented.

1.3 Methodology

The method employed in order to highlight this research, will require the use of International Human Rights Law (IHRL) and regional human rights law relating to the right of access to information. This study will also explore South African legislation and constitutional provisions relating to the rights of access to information for visually disabled and hearing impaired persons.

1.4 Literature review

Stadler in her chapter entitled ‘Media and Disability’ presents the pejorative connotation by which the concept of disability is used by the mass media and more especially by television.\(^\text{20}\) The author tries to denounce the inferior situation in which the television is always presenting persons with disabilities as “object of charity” within the South African society. That connotation according to the author generates inequalities between able and disabled persons, by presenting persons with disabilities as disadvantaged in a class-based society.\(^\text{21}\)

\(^{19}\) Article 21 of the CRPD relates to freedom of expression and opinion, and access to information.


Stadler’s proposal involves introducing at the level of television a “special media programme”, which will take in consideration the needs of visually disabled and hearing impaired persons. The author views the sign language, text and image used by the South African Broadcasting Corporation (SABC) as a way to facilitate communication for hearing impaired persons.\(^{22}\)

The approach of Stadler is different to my approach in the fact that her approach is focused on the negative impact created by the television vis-à-vis disabled persons, and on the importance of sign language as an instrument of communication for hearing impaired persons. In addition the approach of the author seems to be more social than juridical, while my research is essentially focused on the juridical approach.

Brading and Curtis in their book *Disability Discrimination: A practical guide to the new law* present the situation of the persons with disabilities and especially at work place, in the United Kingdom (UK). In the first part of their framework, the authors deal with communication and disability. This approach in the first instance seems to be very close to my approach but, however Brading and Curtis’ approach to communication is analysing the work relationship between manager or employer and disabled employees in the work place.\(^{23}\)

In their framework both authors illustrate and describe the training and the organization of some workshops between the employer and disabled employees, as a strategy intended to eradicate discrimination among able and disabled employees. This strategy aims to put all the workers on an equal level and to eradicate any kind of discrimination. According to Brading and Curtis, disabled persons are also facing discrimination at the level of education and transport.\(^{24}\)

This approach however differs to my approach in the sense that it seems broader and is relating to the discrimination against disabled persons specifically in UK society. Contrary to Brading and Curtis’ approach, my approach is limited only to the right of access to information for persons with disability, and more especially visually disabled and hearing impaired persons in South African society.

Another author, Blanck, also writing on rights of persons with disabilities, takes a comparative approach to the general rights of disabled persons. However, as noted, he takes a general approach and there is no specific focus. Further, Blanck’s comparative work does not touch on any African country and is thus limited on the African situation on this issue.

Currie and Klaaren analyse the right of access to information in South Africa. Currie and Klaaren in their publication entitled *The Promotion of Access to Information Act: Commentary*, examine only the right to information as promoted by the Act 2 of 2000. Both authors examine and try to explain the content and the substance of the Act 2 of 2000; however contrary to my approach, they are not targeting especially visually disabled and hearing impaired persons who experience challenges to access to information although their approach is dealing with access to information.

Calland in his chapter ‘Illuminating the Politics and Practice of Access to Information in South Africa’, in an extract from *Paper Wars: Access to Information in South Africa*, tries to describe the right of access to information in South Africa. In this chapter Calland presents the right of access to information as a part of the law and a fundamental human right, able to reinforce socio-economic rights of persons. The author presents at the same time the obstacles faced in implementing the right of access to information in South Africa. Calland’s approach although it seems similar to my approach, does not however focus his analysis on article 21 of the CRPD.

Ackermann and Britz in their book entitled *Information, Ethics and the Law*, are presenting how the Constitution of South Africa through Section 32 guaranteed the right of access to information for all. The authors also present Act 2 of 2000 which is relating to the Promotion of Access to Information as an instrument enacted to reinforce the freedom of information in South Africa. The authors demonstrate the accessibility of the right to information, and under which conditions this right can be restricted. While their work touches on access to information in South Africa, there is no disability-specific focus. Further, this research will look at the international human rights framework on disability, and also on the access to ICT for disabled persons, an aspect that

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this book does not touch on. Several other writers have written on access to information in South Africa but there has been no specific focus on the disabled persons with a human rights based approach.

1.5 Limitation of the study

The scope of this research will be essentially focused on the study and analysis of the right of visually disabled and hearing impaired persons to access to information. This means my study will be limited at those two categories of persons with disabilities in the South African sphere.

1.6 Overview of chapters

- Chapter one, which is the introduction, poses the basic issues to be discussed.

- Chapter two will deal with the International and regional human rights law framework on the right of access to information, which will obviously include the examination of the article 21 of the CRPD.

- Chapter three will describe the South African framework on the right of access to information; specifically, the chapter will explore the constitutional and legislative framework on the right of access to information for disabled persons.

- Chapter four will analyse the implications of international and South African human rights law framework on the right of access to information, vis-à-vis to visually disabled and hearing impaired persons in South African society.

The basic issues on the right of access to information for visually disabled and hearing impaired persons aim to provide a brief perception of this right, and to set up the methodology of this research. For a better understanding of this research, the next task will explore the right of access to information as enshrined by international and regional human rights instruments.
Chapter two

The International and Regional human rights law framework on the right of access to Information
2.0 Introduction

The right of access to information constitutes a fundamental human right. It aims to ensure respect for human rights and transparency in the administration of the State. The right of access to information is a universal right protected by both international and regional human rights instruments. In order to analyze the protection of the right of access to information, this chapter is divided in two parts. The first part commences with the study of the right of access to information in the light of international human rights treaties. These international treaties are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). The analysis of this international framework also takes into consideration the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). In the second part, the task of this research is to explore the protection of the right of access to information in European, Inter-American and African systems respectively.

2.1.1 The International human rights law framework on the right to access to information

2.1.2 The Universal Declaration on Human Rights’ (UDHR) protection of the right of access to information

The UDHR represents the first international human rights instrument under the United Nations (UN) system. Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”\textsuperscript{31} The right of access to information as presented by the UDHR constitutes a cornerstone for any democratic society under the UN System.\textsuperscript{32} This means that the right of access to information benefits all, without discrimination.\textsuperscript{33} Lor and Britz demonstrate the importance of information in a society by arguing that a society without access to information is a society without development.\textsuperscript{34}

The right access to information is therefore a basic human right, and States and governments should take adequate and appropriate measures to ensure that this basic right is guaranteed to all citizens.\textsuperscript{35} Although the UDHR is not binding on States as an international treaty, many rights in its corpus are accepted as general principles of International Law.\textsuperscript{36} This means that in the light of the Vienna Convention on the Law of Treaties, the UDHR constitutes a form of customary international law which is an important source of International Law.\textsuperscript{37} The UDHR lays down basic principles for the protection of the right of access to information in any society. In order to analyze in depth the content of this right, the next subheading deals with the right of access to information under the ICCPR.

\textsuperscript{31} Keller P \textit{European and International Media: Law Liberal Democracy, trade and the New Media} (2011) 205.
\textsuperscript{33} Lor P J & Britz J J \textquoteleft Is a knowledge society possible without freedom of access to information?’ (2007) 33 \textit{J IS} 387-397.
\textsuperscript{34} Lor P J & Britz J J \textquoteleft Is a knowledge society possible without freedom of access to information?’ (2007) 33 \textit{J IS} 387-397.
\textsuperscript{35} Lor P J & Britz J J \textquoteleft Is a knowledge society possible without freedom of access to information?’ (2007) 33 \textit{J IS} 387-397.
2.1.3 The ICCPR and the protection of the right to access to information

The ICCPR is an international human rights treaty which was enacted in order to give “legal force to terse” human rights non-binding instruments such as the UN Charter and the UDHR. The right of access to information is protected by the ICCPR in Article 19, which states:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

The freedom of expression which entails the right of access to information appears to be a fundamental human right “that draws on values of personal autonomy and democracy.” In other words the right of access to information under the dispensation of Article 19 of ICCPR, allows the individual the possibility to “gather”, to “seek” and to “distribute information” through all possible lawful sources. It is also relevant to mention that the right of access to information under the ICCPR is also applicable to the media.

For Nowak the right of access to information “in any event relates to all generally accessible information.” This means that the right of access to information appears as a valuable right which guarantees the “individual’s self-fulfillment, as well as a pluralistic, tolerant society with access to differing ideas and philosophies.” States must therefore implement this right at the domestic level, and ensure its full enjoyment to all without government interference. The right of access to information plays a pre-eminent role in the respect and sustenance of democracy. This ideal system of governance cannot shine nor be observed in a society operating in absolute secrecy. In other words, the disclosure of information by States and governments testifies to the

accountability of their administration, good governance and transparency of their system. This means States should disclose, and make available to citizens relevant information and data regarding to the administration of the State and public services.

Weissbrodt and De la Vega note that the right of access to information is subjected to the restriction in Article 19(3) of ICCPR. This means that the right of access to information can be limited to ensure respect for the rights or reputation of others, and also to ensure the protection of national security, public order, public health or morals. In Hertzberg case, a censorship of radio and TV programmes on homosexuality was imposed by Finland on the ground of the protection of public morals. The Human Rights Committee (HRC) concluded that a “certain margin of discretion must be accorded to the responsible national authorities relating especially to the issue of public morals”, due to the fact that public morals are not universal. Furthermore, Jorgensen mentions that restrictions must be prescribed by the law, in conformity to international human rights standards and in obedience to rules and principles of a democratic society. In other words, any other restrictions or limitations applicable to this right by a State which is party to the ICCPR constitute a violation of Article 19.

The UN Special Rapporteur on Freedom of Expression reaffirms also the importance of the right of access to information, and notes that freedom of expression includes also the right of access to information held by government. For that, the UN Special Rapporteur recommends States to implement legislation facilitating access to public body’s records. This means States should make available to citizens information irrespective of the form in which it is stored. The right of access to information in Article 19 of ICCPR reinforces the freedom of the citizen, and allows him to actively participate in society. In order to explore the protection of the right of access to information in other international human rights instruments, the following section analyzes the CRC.

2.1.4 The CRC protection of the right to access to information

The CRC appears as a main UN framework relating to the protection and promotion of the rights of the child, and it deals with all issues and matters affecting the child. The right of access to information is enshrined by the CRC under the disposition of Article 13, while Article 17 guarantees access to mass media for the child. The CRC recognizes the right for the child to seek and receive information and ideas, and this is regardless of frontiers. For Van Bueren, “the concept of seeking information implies an active inquiry with an element of probing.” This means that the right of access to information must allow the child to seek and obtain important information relating also to his/her privacy.

In *Odièvre v France*, the European Court of Human Rights (ECtHR) however found that the French law restricting information to an adopted woman about the identity of her natural mother did not violate Article 8 of the European Convention on Human Rights. The latter Article is related to the right of respect for private life. It is therefore relevant to note that such acts of secrecy, relating to the disclosure of the identity of the family of an adopted child, are rarely observed under domestic laws of States. In this respect, the CRC Committee encourages States to keep data and information relating to parents of the adopted child, in order to make them available for him/her. The right of access to information seeks to improve children’s participation within the society. In other words, through this right, the child can take part in social and cultural events and be better informed of happenings within his society.

The CRC however encourages the involvement of the child in all the matters and situations concerning their lives directly, through their participation. This means that the right of access to

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62 Narayan O P *Harnessing Child Development: Children and the access to information* (2005) 7. See also United Nations, Committee on the CRC ‘General Comment No. 12 The right of the child to be heard’ CRC/C/GC/12 Fifty-first Session, 25 May-12 June 2009 at para 68.
information secures and protects the child and teenagers by providing them with more knowledge about their health. It also offers protection against certain pandemics, such as HIV-AIDS, and other sexual infections.63 Thorgeirsdottir explains that the right of access to information, as enshrined in Article 13(1) of the CRC, can be restricted by Article 13(2) for the “respect of the rights and reputations of others” and also for the reasons relating to the “protection of national security or of public order, or of public health or morals.”64

The CRC also guarantees access to adequate information for the child through media in Article 17 of CRC.65 This right to information must therefore contribute to the welfare of the child, with the aim of increasing his knowledge and his ability to impart and receive useful and important information.66 Furthermore, the CRC Committee also recognizes traditional print-based media as well as the new Information Communications Technology (ICT) as playing an important role for the development and education of the child.67 This means that the child receives information, from both national and international sources through the media; radio and ICT in general, as long as accessing such information is not harmful to his/her mental health and welfare.68 In other words the access to information through media and ICT must not expose the child to pornography or harmful consequences for his/her mental health.69

In the Handyside case, the applicant was summoned for publishing a schoolbook containing obscene images.70 In the case regarding the sex issue, the European Court held that “children at the critical stage in their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences.”71

71 Handyside v the United Kingdom, (5493/72) [1976] ECHR 5 (7 December 1976) at para 43.
Thorgeirsdottir seems also to share this view by arguing that States parties to CRC have the duty and responsibility to regulate and protect the child against harmful information.\textsuperscript{72}

The CRC recognized the right of access to information for the person of the child and also protects the rights of the disabled child under Article 23. The CRC encourages States parties to the Convention to recognize and to guarantee full enjoyment of the rights of the disabled child in the society.\textsuperscript{73} For Jones and Marks this means the disabled child must benefit from all the socio-economic and political rights offered to non-disabled children within the society.\textsuperscript{74} In other words the disabled child like a non-disabled child must be able to enjoy the full benefits of the right to information and access to the media as enshrined in Article 13 and 17 of the CRC.\textsuperscript{75} States must make available to the disabled child adequate facilities such as braille and accessible technology with a view to facilitating their access to information.\textsuperscript{76} It is therefore relevant to keep in mind that, for the disabled and the non-disabled child, States must regulate access to information for the child.\textsuperscript{77}

Although the CRC permits restrictions to the right of access to information to the child, this right contributes to reinforce education, participation and the emancipation of the child in society.\textsuperscript{78}

Next, this research analyzes the right of access to information in the light of CEDAW.

\subsection*{2.1.5 The CEDAW’s protection of the right to access to information}

The framework on the right of access to information is enshrined in the CEDAW under the Articles 10(h), 14(2) and 16(e).\textsuperscript{79} It is pertinent to mention that the right of access to information

\begin{itemize}
  \item \textsuperscript{74} Jones M & Marks L E B ‘Beyond the Convention on the Rights of the Child: The Rights of Children with Disabilities in International Law’ (1997) 5 \textit{I J C R} 177-192.
  \item \textsuperscript{75} Lansdown G ‘Rights of Disabled Children: The Practice and Implementation’ (1998) 6 \textit{I J C R} 221-229. See also Paragraph 37 of CRC General Comment No. 9 (2006) relating to the child with disabilities.
  \item \textsuperscript{76} Paragraph 37 of CRC General Comment No. 9.
  \item \textsuperscript{78} Narayan O P \textit{Harnessing Child Development: Children and the access to information} (2005) 6.
  \item \textsuperscript{79} Packer C A A \textit{The Right to Reproductive Choice: A Study in International Law} (1996)14.
\end{itemize}
as described by the CEDAW is focused on the right of women to access information relating to their reproductive health. Eriksson argues that access to information and education play an important role for a woman’s reproductive health, because it strengthens her right to “know” more about herself.\textsuperscript{80}

In other words the possession of such information aims to provide to women with the “power” and “ability” to manage their own lives.\textsuperscript{81} This means that in the issues of health reproduction, such as family planning or abortion, women must have the right to choose and make decisions, without family or government interference.\textsuperscript{82} For the attainment of this right, the CEDAW encourages States to make available relevant information and advice relating to women’s reproductive health and family planning.\textsuperscript{83}

In \textit{Ireland Ltd v Grogan et al} the European Court of Justice (ECJ) acknowledged that: “there is a corollary right to receive information about a service including abortion clinics.”\textsuperscript{84} Similarly, in \textit{Open Door and Dublin Well Women} case the ECtHR held that: “the existing ban in Ireland on counseling women on the availability of abortion services abroad violates Article 10(1) of the European Convention.”\textsuperscript{85} In other words, the access to reproductive health information for women constitutes a fundamental human right in international law. However the CEDAW, which represents the first and most important human rights Convention on the protection and promotion of the rights of women, does not directly deal with the situation of disabled women, nor of her right of access to information.\textsuperscript{86} In order to protect human rights and the right of access

\textsuperscript{80} Eriksson M K \textit{Reproductive Freedom: In the Context of Human Rights and Humanitarian Law} (2001) 244.


\textsuperscript{83} Alfredsson G & Tomasevki K \textit{A Thematic Guide to Documents on the Human Rights of Women} (1995). The right of women of access to information relating to their reproductive health and family planning has been debated in many internationals conferences under UN System. See Article 14(f) of the World Population Plan of Action of 1974; see also the World Conference on Human Rights in Vienna of 1993: UN Doc.A/CONF.157/6, p.3; see also the International Conference on Population and Development of Cairo of 1994: UN Doc.A/conf.171/13 para 7.1 to 7.40; see also Beijing Platform for Action of 1995: UN Doc.A/CN.6/CRP.2, section 71; see also CEDAW General Comment 21 para.22; see also Article 13 of CEDAW General Comment No 24.

\textsuperscript{84} \textit{Ireland Ltd v Grogan, et al} (C-159/90, 4. October 1991) at para 21.

\textsuperscript{85} \textit{Open Door and Dublin Well Woman v Ireland}, (14234/88) [1992] ECHR 68 (29 October 1992). However in \textit{Bravery Case} it was demonstrated that a sterilization of a women following on the consent of her husband was lawful. See \textit{Bravery v Bravery} [1954] 1 W.L.R.1169 at 1180.

to information for disabled women relating to their reproductive health, the CEDAW Committee adopted the General Comment 18 on the rights of disabled women.\textsuperscript{87}

The CEDAW Committee encourages States to make available to disabled women adequate and equal access to health services and useful information regarding to their reproductive health and family planning.\textsuperscript{88} In order to ensure non-discrimination based on disability, the CEDAW Committee recalls States to report on measures taken to ensure equal access to reproductive health relating to disabled women.\textsuperscript{89}

The General Comment 18 merely provides access to reproductive health information for disabled women, and protects them especially against forced sterilization without consent and notification.\textsuperscript{90} Although a General Comment does not legally bind States as do international treaties and conventions, General Comment 18 appears as an important instrument protecting disabled women under the CEDAW.\textsuperscript{91} The right of access to information as enshrined by the CEDAW aims to reinforce the human rights of the women relating to the control of their reproductive health. Furthermore the General Comment 18 also takes into consideration the needs of disabled women for access to information relating to her reproductive health. The next task of this study will explore the right of access to information as enshrined in the CRPD.

\textsuperscript{87} Degener T M ‘ Disabled Women and International Human Rights’ in Askin K D & Koenig D M (ed) \textit{Women and International Human Rights Law} Vol 3(2001) 279. It is also relevant to acknowledge that before the adoption of the General Comment 18, the right of access to reproductive health information has been adopted by the UN Seminar on disabled women of 1990 in Vienna, UN.Doc. SDW/1990/wp.1 (1990) para.51 which states that: “Disabled women should have access to family planning methods as well as to information about the sexual functioning of their bodies. That information should be provided on cassette, in large print, in Braille and in sign language or by counselors in public services on a local basis.”


\textsuperscript{89} CEDAW General Recommendation No. 18.


2.1.6 The CRPD and the right of access to information for disabled persons

The CRPD appears as the first international human right treaty protecting the rights of six hundred and fifty million disabled persons throughout the world. The CRPD does not only protect disabled persons against non-discrimination, but also sets up steps to be observed by States parties for the achievement of equal rights of disabled persons in society. The right of access to information is enshrined in Article 21 of CRPD. Article 21 of CRPD seeks to ensure and guarantee equal access to information for disabled persons in society. Disabled persons must have the right to receive, to seek and to impart information at the national and international level. The right of access to information allows disabled persons to participate in the political and public life of the society, through the use of appropriate communication.

The CRPD take into consideration the special needs of disabled persons and encourages States to facilitate access to information for them. For that, the CRPD urges States parties to make available “the use of sign languages, braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.” Petersen notes that in order to realize an equal access to information, disabled persons must be protected against States interference. This means under the dispensation of Article 21 of the CRPD, States should disclose information in an accessible format to disabled persons exercising their rights of access to information. In order to guarantee non-discrimination against disabled requesters, the information delivered in adequate format to a disabled person shall not be subjected to an extra charge.

95 Stephanidis C Universal Access in Human-Computer Interaction: Design for All and Inclusion. (2011) 481.
99 Article 21(a) of CRPD.
Article 21 of CRPD provides also the equal right of access to media and new ICT for disabled persons. In order to implement this right available to disabled persons, States and governments, shall adopt “broadcasting program[s] with captioning” or sign language for hearing impaired persons, and commentaries for the needs of visually disabled persons. These measures seek to guarantee equal accessibility to information for disabled persons.

Further, this accessibility requires that hardware and software such as the World Wide Web (WWW), which is responsible for facilitating internet access, shall be set-up and take into consideration the needs of disabled persons. This shall be done by adapting, for instance, “screen reading programs” or “refreshable Braille displays” for visually impaired persons. Considering the fact that ICT constitutes an important channel of access to information, computers allocated to disabled persons shall also conform to the evolution of technology.

Article 21 of the CRPD clarifies and guarantees the effectiveness of the right of access to information for disabled persons through a binding international human rights instrument. The right of access to information is recognized by international human rights instruments as being a fundamental right. The regional framework of the right of access of information also contributes to reinforce this human right of the citizen. This leads this research to analyze, in the next step, the regional right of access to information, introduced by the European human rights system.

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100 Stephanidis C *Universal Access in Human-Computer Interaction: Design for All and Inclusion.* (2011) 481.
103 Dobransky K & Hargittai E ‘The Disability Divide in Internet Access and Use’ (2006) 9 *JI C S* 313-334. The G3ict (Global Initiative for Inclusive Information and Communication Technology) encourages also States parties to provide via their web sites services and information, including e-government. Privates sectors also are encouraged to make available “essential commercial services” through the internet. See G3ict Convention on the Rights of Persons with Disabilities 2010 ICT Accessibility Progress Report page to add
2.2 The Regional human rights law framework on the right to access to information

2.2.1 The Right of access to information under the European system

The right of access to information under the European human rights system is enshrined in Article 10 of the European Convention on Human Rights (ECHR).\(^\text{105}\) Article 10 of ECHR encompasses the right to “receive and impart information and ideas without interference by public authority and regardless of frontiers.”\(^\text{106}\) For Jacobs and White the concept of information as presented under Article 10 of ECHR includes books, films, paintings, information on medical services, and information through media.\(^\text{107}\) Article 10 of the ECHR like Article 19 of ICCPR perceives the right of access to information as an important tool in democratic societies.

In *Handyside’s* case the Court held that the right of access to information “constitute[s] one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”\(^\text{108}\) In other words the right of access to information allows citizens to participate in the administration of the State, by breaking-down government secrecy.\(^\text{109}\) It is also relevant to mention that the right of access to information under Article 10 does not oblige States to disclose information requested by the citizenry.

This means that States have a great margin of discretion with respect to the disclosure of information to citizens.\(^\text{110}\) In *Gaskin’s* case, the Court emphasized that: “Article 10 did not embody an obligation on the Government to impart the information in question to the


individual.” Similarly in Leander case, the complainant saw his job application refused after being submitted to a security check control aiming to investigate personal information on him. In this case the ECtHR emphasized that refusal to disclose information held on Mr Leander to him by Sweden does not violate Article 10 of ECHR.

Article 10 of ECHR enshrined the right of access to information without interference, and also certain restrictions. The first paragraph of Article 10 of ECHR allows the restriction regarding the license of broadcasting enterprises, films or cinema. The second paragraph lays down several grounds by which the right of access to information can be restricted to a citizen. As Article 19 of ICCPR states, access to information can be restricted for protection of national security, public safety, territorial integrity, health, morality and also for the protection of the reputation of others. In Hadjianastassiou’s case, after being convicted of disclosing military secret information by the Greek government, the Court held that the disclosure of State secrets compromised national security. It is also relevant to mention that the limitation of the right of access to information shall be however prescribed by the law and be necessary for a democratic society.

The right of access to information enshrined in Article 10 of ECHR however remains silent regarding access for disabled persons. Under the European human rights law system, the right of

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111 Gaskin v United Kingdom, ECtHR 7 July 1989 at para 52.
112 Leander v Sweden, ECtHR 26 March 1987 at para 74.
113 Leander v Sweden, ECtHR 26 March 1987 at para 75.
access to information for disabled persons results in the framework of the Council of Europe (COE). Although Article 10 of ECHR recognizes certain limitations to the right of access to information, it also guarantees the respect of the human rights of the citizen. Attention shall now be turned to examine the right of access to information under the Inter-American system.

2.3 The right of access to information under the Inter-American system

2.3.1 The Inter-American Convention on Human Rights (IACHR)

The right of access to information is enshrined in Article 13(1) of the IACHR. This right provides the capacity to receive, seek and impart information of all kinds. This means in the light of Article 13 of IACHR, that the right of access to information allows citizens to access records held by public bodies.

The right of access to information within the Organization of American States (OAS) aims to institute transparency within government and State administration. In other words the right of access to information is targeted to eradicate corruption within States and private bodies’ administration. States members of OAS have the obligation under Article 13 of IACHR, to make available information requested by citizen, for the full enjoyment of their civil and political

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120 The COE encourages States members of the European Union (EU) to adopt adequate legislation, in order to ensure access to information to disabled persons, including newspaper in accessible format. See Preamble, Part IX Paragraph 4(2) & 4(3) and Part XI of the Recommendation No.R (92) 6 of CE known as ‘The Recommendation on a Coherent Policy for the Rehabilitation of People with Disabilities’. The CE also promotes access equal access to new technology of ICT for disabled persons in Europe under accessible format among all States members. See Paragraph 1, and Paragraph 3(1) & 3(2) Resolution ResAP (2001)3 of CE, known as the Resolution “Towards full citizenship of persons with disabilities through inclusive new technology.” See also Recommendation 1598 (2003)1 of COE relating to the protection of Sign language for disabled persons. See also Part 3. Key action lines No. 3 relating to information and communication of the Recommendation Rec(2006)5 Committee of Ministers to members states on the Council of Europe; dealing with the Action Plan for disabled persons in Europe 2006-2015. See also Article 15(3) of European Social Charter (revised) of 1996.


rights. The Inter-American Court took that position in Claude Reyes case and held that State shall enact adequate legislation in order to guarantee the right of access to official information to all as prescribed by the IACHR. The Inter-American Court notes that: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests…Consequently, it can be said that a society that is not well informed is not a society that is truly free.”

The OAS system of human rights recognizes the dualism of the rights consecrated in Article 13 of IACHR. The Inter-American Court in it Advisory opinion held that the violation of Article 13 of IACHR violates not only the personal right of the individual, but also the “collective” rights of others to receive information. The Inter-American Commission has also considered article 13 as providing indivisible rights in Miranda’s case by emphasizing that freedom of disseminating ideas, encompass also the right to receive information without interference.

The IACHR prohibits prior censorship of the right of access to information. In other words measures taken by a government such as confiscation of publication or interference to the commercialization of broadcasting or films violates Article 13 of the IACHR. According to Article 13(2) of IACHR the right of access to information can be restricted “for the protection of national security, or public order”, for the respect of the rights of other persons or in case of situations protecting moral or public health.

In order to avoid State abuse of the right of access to information on the ground of authorized limitations, the Inter-American system takes certain elements into consideration. This means that the restrictions on the right of access to information must be prescribed by the law.

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128 Inter-American Court of Human rights Advisory Opinion OC-5/85 of 13 November 1985 at para 70.
131 Miranda v Mexico, Case 11.739 Inter-Am. C. H. R., at para 3.
Likewise, the Inter-American human rights system also stipulates that such limitation of the right of access to information must be necessary in democratic society.\textsuperscript{135}

The limitation of the right of access to information required shall be proportional and thereby justify such measures.\textsuperscript{136} The right of access to information in Article 13 of IACHR, although it requires a relevant and legal justification for censorship, condemns hate speech and war propaganda.\textsuperscript{137} The Inter-American system qualifies acts amount to racism, religious hatred or “any propaganda for war” as acts criminally punishable by the law, and not covered by the protection of Article 13 of IACHR.\textsuperscript{138}

In order to reinforce violation of the right of access to information, a Special Rapporteur for freedom of expression was appointed within the OAS. The OAS Special Rapporteur’s task consists among others of assisting members States of OAS to implement access to information at the domestic levels.\textsuperscript{139} Furthermore, the OAS Special Rapporteur helps member states to challenge obstacles faced for the implementation of this right.\textsuperscript{140} Consequently the Inter-American system has adopted several Declarations on freedom of expression to reinforce access to information in OAS regions.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{137} Bertoni E ‘Hate Speech under the American Convention on Human Rights’ (2006) 12 ILSA J. Int’l & Comp L 569-574.
\item \textsuperscript{138} Bertoni E ‘Hate Speech under the American Convention on Human Rights’ (2006) 12 ILSA J. Int’l & Comp L 569-574.
\item \textsuperscript{141} The Declaration on Principles of Freedom of Expression is approved in 2000 by the Inter-American Commission. According to it preamble the Declaration aims to reaffirm: “the need to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law.” See ‘Inter-American Convention on Human Rights: The Organization of American States’ Available at: \url{http://www.cidh.oas.org/declaration.htm} (accessed on 19 May 2011). See also the OAS Resolution AG/RES. 1932 (XXXIII-O/03), adopted at the 4th plenary session, held on 10 June 2003 and known as “Resolution on Access to public Information: Strengthening Democracy.” The Resolution reaffirms the importance of access to States information as sine qua non element in democracy society. Furthermore it mandated in Paragraph 5 the Permanent Council of the OAS to guarantee the respect and effectiveness of the right to access to information. See also the Principles on the rights to access to information: OAS/Ser.Q/ CII/RES.147 (LXXIII-O/08) adopted in 2008 at Rio during the 73\textsuperscript{rd} Regular Session of OAS. The Principles on the rights to access to information of 2008 adopt 10 principles regulating the right of access to information. The Principles on the rights to access to information of 2008 is inspired by \textit{Claude Reyes et al v Chile}, and reaffirms that: “the right to the freedom of expression enshrined in Article 13 of the American Convention on Human Rights comprises the right to access to information.” See also
\end{itemize}
The right of access to information under Article 13 of the IACHR has been qualified as a
fundamental right in a joint declaration by the European “OSCE Representative on freedom of
the media”, the OAS Special Rapporteur and the UN Special Rapporteur.\textsuperscript{142} However the
protection covered by Article 13 of IACHR does not include access to information for disabled
persons. The Protocol of San Salvador adopted by the OAS lays down in Article 18, social
protection of disabled persons within the region.\textsuperscript{143} But the Protocol of San Salvador is based on
a social model of disability, which means it does not guarantee human rights protection for the
disabled persons.\textsuperscript{144} In order to explore the human right of access to information for disabled
persons within OAS region, this research now focuses on the Inter-American Convention on the
Elimination of all forms of Discrimination Against Persons with Disabilities.

2.3.2 The Inter-American Convention on the Elimination of all forms of Discrimination
Against Persons with Disabilities (IACEDPD)

The IACEDPD adopted in 1999 by the General Assembly of States members of OAS represents
the first regional human rights treaty protecting the rights of disabled persons.\textsuperscript{145} The IACEDPD
defines the concept of disability as “a physical, mental, or sensory impairment, whether
permanent or temporary, that limits the capacity to perform one or more essential activities of
daily life, and which can be caused or aggravated by the economic and social environment”\textsuperscript{146}
The member States of the OAS, by adopting the IACEDPD seek to reinforce the protection of
disabled persons within the region.\textsuperscript{147} The IACEDPD aims at eliminating and eradicating
consideration based on disability stereotype, by encouraging States members of the OAS to enact
domestic legislation in view to guarantee the full enjoyment of the rights of disabled persons.\textsuperscript{148}

\textsuperscript{142} Pasqualucci J M ‘Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in
Transnat’ I L 379-433.
\textsuperscript{143} Acevedo D E ‘Organization of American States: Additional Protocol to the American Convention on Human
\textsuperscript{144} Acevedo D E ‘Organization of American States: Additional Protocol to the American Convention on Human
\textsuperscript{145} Goyal O P Understanding and Scouting with Physically Handicapped (2005) 32.
\textsuperscript{146} Doebbler C F J The Principle of Non-Discrimination in International Law (2007) 52.
\textsuperscript{147} Angarita M M & Gabel S L ‘Politics, Inclusion, and Disabled Children: The Colombian Context’ in Gabel S L &
\textsuperscript{148} Cooper J Law, rights, and disability (2000) 75.
The IACEDPD does not directly target the right of access of information for disabled persons as does the CRPD, but encourages in Articles 3(c) and 3(d) the equal and full participation of disabled persons in all domains of society.\textsuperscript{149} This means that with regard to the respect of non-discrimination, disabled persons shall also benefit from the right of access to information and new technology of ICT. This view has been shared by the Federal Court of Canada in \textit{Jodhan’s} case, a case involving a visually disabled woman.\textsuperscript{150} In this case, the Federal Court of Canada emphasized that inaccessibility of the government web site to a visually disabled person violated the equal rights of disabled persons under Article 15(1) of the Canadian Charter on Fundamental Rights.\textsuperscript{151}

Similarly the Human Rights Tribunal of Ontario took an identical position in \textit{Scott Simser’s} case, for the failure to subtitle a film for the sake of hearing impaired persons.\textsuperscript{152} The OAS human rights system, in order to ensure a follow-up and an effective implementation of the IACEDPD among member States, in 2006 appointed a Committee for the elimination of discrimination against disabled persons.\textsuperscript{153} The role of the Committee aims to evaluate reports submitted by States relating to the implementation of the Convention. Additionally, the Committee examines difficulties faced by States in implementing the Inter-American disability convention.\textsuperscript{154}

The Inter-American system unlike the European system guarantees and offers adequate protection to disabled persons for access to information, through the adoption of the IACEDPD. In order to cover the study on the right of access to information among all human rights in the African region, the following subheading deals with this right in African system.


\textsuperscript{150} \textit{Jodhan v Attorney General of Canada} (2010), FC 1197 at para179.

\textsuperscript{151} \textit{Jodhan v Attorney General of Canada} (2010), FC 1197 at para179.


\textsuperscript{153} ‘The Organization of American States’ Available at: \url{http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/humanrightsfora/theorganizationofamericanstates/} (accessed on 6 June 2011).

\textsuperscript{154} ‘The Organization of American States’ Available at: \url{http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/humanrightsfora/theorganizationofamericanstates/} (accessed on 6 June 2011).
2.4 The right to access to information on the light of the African regional system

2.4.1 The African Charter on Human and Peoples' Rights (ACHPR)

The right of access to information under the African human rights system is governed by Article 9 of ACHPR which states that: “Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinion within the law.”

The right of access to information as enumerated under Article 9 of ACHPR gives every African person the freedom to express him/herself freely, and also the capacity to receive information. This means that Article 9 of ACHPR allows the individual the right to disseminate opinions within society. In Africa, as in Europe and America, the right of access to information “oils the engine of the representative democracy.” In other words the right of access to information under the African regional system enables individuals to fulfill their human rights, as non-respect for the right will be seen as a violation of these rights.

However the right of access to information in Africa appears to be influenced by the political regime in place. This is observed in the control of the press, and the constant interferences on the freedom to impart or to disseminate information on the activities of the journalists and certain broadcasters’ media. The Communication of the African Commission in the case *Commission nationale des Droits de l’ Homme et des Libertes v Chad*, urged member States to end such abusive practices against journalists.

The jurisprudence of the African Commission is stigmatized by an important violation of Article 9 of the ACHPR. In *International Pen’s* case, the African Commission closed the case on the ground of the release of the convict by his government. Furthermore in the case the Commission fail to analyze the legality of Article 9 of ACHPR, nor the extent of “what” could be considered to be a violation of the freedom of expression and information. Likewise, the African

Commission also took a controversial position relating to the applicability of Article 9 of the ACHPR in Media Rights’ case.163

In order to eliminate the violation of the freedom of expression and access to information within the continent, the African system adopts the Declaration of Principles on Freedom of Expression.164 The Declaration of Principles on Freedom of Expression redefines the concept of the right of access to information in Africa in the light of Article 19 of ICCPR. This means granting the right to all African citizens to “seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.”165

The Declaration also reaffirms that for the respect of the public service and the full enjoyment of human rights of African citizens, everyone shall have the right to receive information held by public or private bodies.166 For appropriate access to information, the African Commission request States and governments to put information at the disposal of their citizens even without any request formulated by them.167 Furthermore, in order to protect the personal and physical integrity of persons regarding their right of access to information, the Declaration prohibits any unlawful sanction or any measures of coercion against persons or officials.168 The Declaration of Principles on Freedom of Expression creates a safeguard to the right of access to information, in the way that a refusal of deliverance of information shall be subject to appeal to an independent court.169

Furthermore, the appointment of a Special Rapporteur on Freedom of Expression in 2004 within the continent represents an important step for the protection of this right in Africa.170 The

166 Part IV (2) of ACHPR /Res.62 (XXXII) 02.
168 Part IV (2) of ACHPR /Res.62 (XXXII) 02.
169 Part IV (2) of ACHPR /Res.62 (XXXII) 02.
170 The mandate of the Special Rapporteur will be extent during the 42nd Ordinary session of the AU held in Brazzaville in 2007. See ACHPR/Res.122 (XXXXII) 07: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa. In order to guarantee the effectiveness of this right, the African Commission adopted in Banjul during the 48th Ordinary
mandate of the Special Rapporteur was given by the African Commission and involves the examination and monitoring of the respect for, and the implementation of, the right of access to information by African States and governments. The Special Rapporteur’s task consists also of submitting reports to African Commission relating to the respect or violation of the right of access to information in Africa.

Additionally, the Special Rapporteur formulates recommendations to the African States and governments with a view to guarantee the respect for, and the effective implementation of the right of access to information in Africa. For that the Special Rapporteur controls and examines “national media legislation” in order to ensure that African States and governments are regulating and observing access to information in the light of the Declaration of Principles and international human rights instruments.

The ACHPR states that “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.” Despite the provisions of Article 18(4) of ACHPR, the African regional system does not really offer special protection to disabled persons, nor ensure their rights of access to information. Although declarations are not legally binding in States as treaties are, the adoption of these declarations on freedom of expression and information in Africa has been seen to contribute reasonably to the protection of this right.

The right of access of information in Africa nonetheless still has a lot to achieve, for non-disabled and especially for disabled persons within the continent. This is justified by the fact that of fifty four countries present in Africa, only eight have presently adopted an information Act at the domestic level.

Session of the AU in 2010 a Resolution on Securing the Effective Realization of Access to Information in Africa. See ACHPR/Res.167 (XLVIII) 2010.

173 ACHPR/Res.122 (XXXXII) 07.
174 ACHPR/Res.122 (XXXXII) 07.
175 Article 18(4) of ACHPR.
2.5 Conclusion

The right of access to information is protected by both international and regional human rights law instruments. This right is a cornerstone for democratic societies, without which a society cannot enjoy its full civil and political rights. Although the right of access to information can be subjected to certain restrictions, these restrictions must conform to the principles of democracy. The CRPD strengthens this right and ensures equal access to information and ICT for disabled persons in an appropriate format. The right of access to information for its implementation must also be protected at the domestic level by States. Based on this, the next chapter analyses the right of access to information for visually disabled and hearing impaired persons in the light of South Africa’s law and policies.

Chapter Three

The description of South African legal framework and policies on the right of access to information for visually disabled and hearing impaired persons
3.0 Introduction

The right of access to information for disabled persons in South Africa seeks to present a South African framework for equal access and protection of this right through its legislation. This chapter presents the right of access to information for visually disabled and hearing impaired persons in South Africa. This chapter aims to describe the South African law and policies on the equal protection of human rights of disabled persons with regards to their right of access to information. It will also contextualize the concept of visually disabled and hearing impaired as totally blind and deaf. The chapter is divided in three different parts. The first part describes the constitutional and legislative right to equal access to information in South Africa, while the second part presents mechanisms reinforcing this right for visually disabled and hearing impaired persons. The third part examines the equal right of access to ICT and media for visually disabled and hearing impaired persons in South Africa.

3.1 The Constitutional rights of access to information

The right of access to information in South Africa is guaranteed under Section 32 of the South African Constitution of 1996. In light of Section 32(1) of the South African Constitution, “everyone has the right of access to - any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.” The Constitution of South Africa upholds equality of the rights among all citizens, and seeks to build a society in which disabled persons can also enjoy and benefit from equal rights.

In order to fulfill and guarantee the respect of the right of everyone to access to information in society, the Constitution of South Africa guarantees vertical and horizontal access to

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180 The Constitution of South Africa of 1996 was adopted on 8 May 1996 by the Constitutional Assembly, by a majority of 86 per cent of its members.
The vertical right of access to information is enshrined under the provisions of Section 32(1)(a), and the horizontal access on the light of Section 32(1)(b) of the Constitution. The right of access to information as enshrined under Section 32(1)(a) of the Constitution of South Africa, relates to the right of access to information held by public bodies. This means access to records held by public bodies.

The Section 32(1)(b) of the Constitution of South Africa of 1996 in contrast to the Section 32(1)(a) guarantees the right to the individual to have access to information held by private bodies. In other words information related to Section 32(1)(b) concerns respectively access to information relating to his “medical or banking records, credit bureau, insurance company or the information in the personnel files of the person’s employer.”

As mentioned above Section 32 of the Constitution of South Africa of 1996 recognizes the right of access to information to “everyone.” Additionally the same Constitution grants under the provision of Section 9, the rights of freedom from discrimination on grounds of social criteria, and disability. The Section 9 of the Constitution guarantees the full and equal enjoyment of the rights by the disabled persons in South Africa. This means visually disabled and hearing impaired persons must also benefit to equal rights consecrated by the Bill of Rights and protected in Section 9 of the Constitution of South Africa. The South African Constitution of 1996 strengthens the equal right of access to information. The Section 32(2) of the Constitution requires the implementation of this right in legislative form. The right of access to information enshrined by Section 32 of the Constitution of South Africa reinforces an equal right to information in a democracy society. The next step of this research is focused on the description of the legislation of South Africa on the right of access to information.

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of legislative mechanisms relating to the effectiveness of the Constitutional right of access of information in South Africa.

3.2 The South African legislative rights of access to information and equality for disabled persons

3.2.1 The Promotion of Access to Information Act 2 of 2000 (PAIA)

3.2.1.1 The scope of the PAIA

The PAIA aims to give life to Section 32 of the Constitution of South Africa of 1996, dealing with the right of access to information.\textsuperscript{190} The PAIA seeks to facilitate the access to information held by both public and private bodies.\textsuperscript{191} In other words the PAIA breaks down a “secretive and unresponsive culture in public and private bodies” of South African society.\textsuperscript{192} This means the PAIA promotes a climate of transparency and good governance in South Africa.\textsuperscript{193} For that the PAIA encourages the disclosure of information held by both public and private bodies.\textsuperscript{194}

Access to information is the rule of principle by the PAIA. In other words the PAIA prohibits unlawful restriction of the right of access to information.\textsuperscript{195} The PAIA does not replace or substitute the provisions of Section 32 of the Constitution, but strengthens the protection and applicability of this Section in legislative form.\textsuperscript{196} The PAIA guarantees an adequate mechanism allowing citizens to access records as “swiftly, inexpensively and effortlessly as reasonably possible.”\textsuperscript{197}

\textsuperscript{191}Burns \textit{Y Administrative law under the 1996 constitution} (2006) 85.
\textsuperscript{192}Preamble of PAIA of 2000.
\textsuperscript{193}Burns \textit{Y Administrative law under the 1996 constitution} (2006) 85.
\textsuperscript{196}Hoexter C \textit{Administrative Law in South Africa} (2007) 93.
\textsuperscript{197}Section 9(d) of PAIA of 2000.
The right of access to information can be limited for protection of privacy and under specific provisions of the PAIA.\textsuperscript{198} These limitations will be explored later in this work.

However, it must be mentioned that, more recently on September 2011, the South African Parliament was facing a controversial position for the adoption of a Secrecy Bill. The Secrecy Bill is characterized by non-protection of whistle blowing of information in South Africa.\textsuperscript{199} Moreover, the Secrecy Bill reinforces the use of secrecy within South African public services, this by encouraging classification of information if that latter is judged secret or for protecting national security.\textsuperscript{200}

The right of access to information as enshrined by the PAIA protects the fundamental right of every person in South Africa. The following step describes the right of access to information held by public bodies by the PAIA.

\subsection*{3.2.1.2 Access to information held by public bodies}

The right of access to information held by public bodies is stated under Part 2 of PAIA. The notion of public body can be understood to mean; any department of State or administration at the national, provincial and local level.\textsuperscript{201} A public body is also defined according to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), as any institution or service which accomplishes a public service or any service or institution which performs a public service under legislative or Constitutional dispensation.\textsuperscript{202} The right of access to information held by the State or public bodies can be exercised by any citizen. However the exercise of this right cannot be exercised by citizens working for the State Department and those exercising constitutional

\begin{flushleft}
\textsuperscript{198} Hoexter C \textit{Administrative Law in South Africa} (2007) 94.
\textsuperscript{199} Business Day: ‘Secrecy bill’ shelved as ANC seeks more talks’ Available at: \url{http://www.businessday.co.za/articles/Content.aspx?id=153789} (accessed on 6 November 2011).
\textsuperscript{200} IDASA: Do we Have Concerns about the Secrecy of Information and Media Freedom? Available at: \url{http://www.idasa.org/our_products/resources/output/do_you_have_concerns_about/} (accessed on 6 November 2011).
\textsuperscript{202} Section 1(a) of PAJA of 2000.
\end{flushleft}
powers.\textsuperscript{203} In other words the right of access to information held by public bodies can also be exercised by visually disabled and hearing impaired persons.

In order to access records held by public bodies the requester must respect the procedural requirement of access to information.\textsuperscript{204} Additionally as mentioned by the PAIA the request submitted by the citizen must not target records exempt from disclosure.\textsuperscript{205} The fulfillment of the procedural requirement, imposes the duty on the information officer to disclose information to the requester.\textsuperscript{206} The right of access to information held by public bodies allows citizens to be informed about public service administration in South Africa. Although subjected to procedural requirements for access to record, the right of access to information can be exercised by all citizens. Following is a description of access to public records by a visually disabled or hearing impaired person.

\subsection{Access to public records by a visually disabled or hearing impaired requester}

The PAIA describes in Section 18, the accessible form by which the request should be made to the information officer.\textsuperscript{207} In regard to disability, the PAIA lay down in Section 18(3) the prescribed form of request to be used by a disabled requester. For that the PAIA mentioned that the requests must be made orally for disabled requesters and be answered in prescribed form to him.\textsuperscript{208}

Furthermore, the PAIA provides for assistance from the information officer to a citizen who wants to exercise his right of access to information.\textsuperscript{209} In Section 19(1) the drafter of the PAIA recognizes the duty of the information officer to assist a requester facing difficulties to exercise his right of access to information. The PAIA affirms that such assistance from the information officer to a visually disabled or hearing impaired person needs to be provided in an accessible manner.

\begin{footnotesize}
\textsuperscript{204} Section 18 of PAIA of 2000.
\textsuperscript{205} Currie I & Klaaren J \textit{The Promotion of Access to Information Act Commentary} (2002) 61. See also Chapter 4 of PAIA of 2000, relating to the ‘ground for refusal of access to records.’
\textsuperscript{207} Currie I & Klaaren J \textit{The Promotion of Access to Information Act Commentary} (2002) 61.
\textsuperscript{208} Section 18(3) of PAIA of 2000.
\end{footnotesize}
The information officer must be “free” of charge and must aim to avoid the request for information to be refused.210

The language and the form by which information is released also constitute an important channel for access to information of a disabled requester. PAIA recommends that the information officer, in the light of Section 29(5), (6) and Section 31, discloses information in an accessible language and in a form by which the disabled requester can read or hear such information. Moreover the respect of the timeframe for access to information also plays an important element under the PAIA.211

This means in the light of Section 25 of PAIA that the information officer enjoys of a period of 30 days to answer the request for information submitted by a citizen.212 The information officer, who fails to comply with the disclosure of information requested within the normal period of disclosure, can extend this period by 30 additional days. Regarding such extension, Section 26(2) of PAIA mentioned that it must be made with the written consent of the requester of the record.213 The PAIA also allows the requester in Section 26(3)(c) to formulate an internal appeal or “an application with a Court” if he/she judges the extension to be unlawful.214

The PAIA rebuilt the concept of the right of access to information held by public bodies through the incorporation of the needs of disabled requesters in South Africa. The following section will describe the right of access to information held by private bodies.

3.2.1.4 The access to information held by private bodies

The right of access to information held by private bodies is enshrined in Part 3 of PAIA. The PAIA define private bodies as “a natural person who carries or has carried on any trade, business or profession, but only in such capacity; a partnership which carries or has carried any trade,
business or profession."215 The right of access to information held by private bodies, in contrast to the information held by public bodies is exercised on a “need to know” basis.216

This means the right of access to information held by private bodies is exercised for the purpose of protecting his rights.217 In order to access information held by the private body, the requester shall fulfill and respect the procedural requirement listed in Section 50(1) of PAIA.218 The PAIA recognizes that a citizen who fulfills the entire procedural requirement cannot have his request declined on grounds of the provisions of Chapter 3 part 3 of the PAIA.219

It is also relevant to mention that according to Section 52 of PAIA, the head of a private body can voluntarily decide to disclose and make available certain records to citizens.220 According to the PAIA the right of access to information held by private bodies seeks to strengthen fundamental freedom of citizens. Thus the next step will present the equal protection of the rights of disabled persons in South Africa as enshrined by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

3.2.2 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The democratic era in South Africa is characterized by the reinforcement and the protection of human rights of disabled persons under Section 9 of the Constitution of 1996.221 The PEPUDA gives effect to Section 9 of the Constitution, and sets up an adequate mechanism promoting the equality of rights among citizens.222 In order to fulfill its objectives, Section 9 of PEPUDA protects disabled persons in South Africa against unfair discrimination.223 The PEPUDA seeks

215Section 1 of PAIA of 2000.  
not only to protect disabled persons against discrimination, but moreover targets the prohibition and prevention of unfair discrimination against disabled persons.\textsuperscript{224}

The PEPUDA therefore outlaws unfair discrimination against disabled persons as elaborated in Section 9. The PEPUDA grants an adequate protection for persons with disabilities by addressing “issue[s] around environment accessibility as well as reasonable accommodation in the work place” in society.\textsuperscript{225} The protection of human rights of disabled persons in the South African sphere can be mentioned also by the adoption of the Employment Equity Act 55 of 1998 (EEA), protecting them against unfair discrimination at the workplace.\textsuperscript{226}

PEPUDA underscores an explicit understanding about fair and unfair discrimination in the light of Section 14. For Section 14(1) of PEPUDA measures of discrimination taken for the protection of a disadvantaged class or group do not amount to unfair discrimination.\textsuperscript{227} Additionally such measures should not be based on the ground of Section 9(3) of the Constitution of 1996.\textsuperscript{228} Moreover the PEPUDA guarantees equity of the courts to a person who is unfairly discriminated against, to take legal action regarding prosecution for legal remedies.\textsuperscript{229}

The PEPUDA appears as an important legislation strengthening the mainstream of equal human rights of disabled persons in South Africa. The limitations of the right of access to information in South African legislation will be explored in the section below.

\subsection*{3.2.2.1 The limitations of the right of access to information under the PAIA}

The right of access to information constitutes a fundamental right, but not an absolute right under the PAIA.\footnote{Michael J ‘Freedom of Information: Where We Were, Where we are (and Why), Where We Are Going (and How)’ in Chapman R A & Hunt M (ed) Open Government in a Theoretical and Practical Context (2006) 105.} It is relevant to point out that the right of access to information is applicable to records.\footnote{Section 3 of PAIA of 2000.} This means only records are subjected to limitation. In other words the limitations applicable to a non-disabled requester are also relevant to a visually disabled and hearing impaired requester. The limitations of the right of access to information are applicable to both public and private bodies.\footnote{Arko-Cobbah A ‘The Right of Access to Information: opportunities and challenges for civil society and good governance in South Africa’ (2008) 34 IFLA Journal 180-191.}

The PAIA in Section 12(a) - (b) restricts the right of access to information regarding records held by the Cabinet and its committees.\footnote{Roberts B ‘Scope of the Promotion of Access to Information Act 2 of 2000: A comparative perspective’ (2006) 25 Politeia Journal 116-130.} Furthermore the PAIA also limits the right of access to records held by the courts and records of members of parliament.\footnote{Section 12 of PAIA of 2000.} The limitations of the right of access to information by the PAIA are also applicable in criminal matters. For that Section 7(1)(a) and 40 of PAIA restricts access to information to public or to private records requested for the purpose of criminal or civil suits.

These limitations of the right of access to information aim to guarantee and respect principles of a democratic society.\footnote{Hoexter C Administrative Law in South Africa (2007) 94.} Regarding such purpose, Section 41 of PAIA lays down a list of restrictions exempting the disclosure from the right of access to information. Section 41 of PAIA restricts access to information relating to “the defense, security and international relations of the Republic.”\footnote{Hoexter C Administrative Law in South Africa (2007) 96.} Furthermore, records relating to South Africa Revenue Services (SARS) and commercial information are also exempt from disclosure by the PAIA.\footnote{Devenish G E, Govender K. & Hulme D Administrative Law and Justice in South Africa (2001) 203.} However it is also relevant to mentioned that Section 33(1) of the PAIA confers a large discretionary power to the information officer for the disclosure of information.\footnote{The Sections cover by Section 33(1)(b) are listed as follows: Sections 37(1)(b); 38(b);39(1) (b); 41(1)(a) or (b); 42(1) or (3); 43(2); 44(1) or (2) or 45 of the PAIA of 2000.}
To that list of restrictions it must be noted that the Secrecy Bill Act on the Right of Access to Information of 2011, could be also be considered as restricting access to information in South Africa. This is justified by the promotion of classification of records as violating the rights of access to information in South Africa.239 Thus, this led to an active opposition by the African National Congress reinforced by civil society for the rejection of the Secrecy Bill by the Parliament.240

The right of access to information in South Africa is subjected to various exemptions under the PAIA framework. It is important to note that such exemptions aim to protect society. For an effective implementation in society, the right of access to information must be reinforced by civil society through Non-Governmental Organizations (NGO).241 A description of a mechanism reinforcing the right of access to information in South Africa, initiated by the Open Democratic Advice Centre (ODAC) will be detailed in the following section.

3.3 Mechanisms strengthening the right of access to information in South Africa

3.3.1 The Open Democratic Advice Centre (ODAC) and the Protected Disclosures Act (PDA)

Minow affirms that “the meaning of a right cannot be determined unless we know how and when it is enforced.”242 In other words the value of the right of access to information in South Africa

can only be recognized if it is reinforced by adequate mechanisms such as ODAC. The ODAC mission aims to promote transparency and democratic values in South African society. For that ODAC promotes the right of access to information and the disclosure of information by public and private bodies.

The ODAC source dates from the appointment of the Task Group on Open Democracy, instituted after the apartheid era in South Africa. The aim of the Task Group was targeting the implementation of an open democracy in South Africa after the period of the interim Constitution. This means a democracy which takes into consideration the respect of freedom of information and the protection of whistleblowers. As a promoter of the right of access to information, ODAC also assists citizens towards the accomplishment of this right.

In order to strengthen the protection of citizens against whistleblowing, the legislator adopted the Protected Disclosures Act (PDA). Known also as Act 26 of 2000, it aims to reinforce protection of whistleblowing at the work place. The Act 26 of 2000 is applicable to public and private employment. The Act 26 of 2000 protects employees “who make a disclosure” of information against his employer under the Act.

The ODAC reinforces the respect for an applicability of the right of access to information in South Africa. Furthermore, the PDA also plays an important role for the promotion of the right

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244 Open Democracy Advice Centre’ Available at: http://www.opendemocracy.org.za/access-to-information/ (accessed on 7 July 2011).
of access to information. Following is the description of the framework of the South African Human Rights Commission (SAHRC) on access to information.

### 3.3.2 The South African Human Rights Commission (SAHRC)

The SAHRC aims to promote and monitor socio-economic and civil rights of citizens in South African society.\(^{251}\) The SAHRC mission seeks to ensure the full enjoyment of the rights and freedom enshrined in the Bill of Rights to all, including visually disabled and hearing impaired persons. In order to promote and guarantee human rights protection of disabled persons the SAHRC works in collaboration with the South African Federation Council on Disability (SAFCD).\(^{252}\)

The SAHRC’s task according to the PAIA consists of supervising, and reporting on the respect for the right of access to information for all South African citizens.\(^{253}\) For that SAHRC promotes and monitors the right of access to information, and the implementation of the PAIA at the level of public and private bodies.\(^{254}\) This initiative of the SAHRC ensures compliance relating to the disclosure of information by these bodies, in the fulfillment of their obligations.\(^{255}\) In that respect the SAHRC has the responsibility to produce guides aiming to teach the citizens how to use their right of access to information.\(^{256}\) In order to be accessible to every citizen, the guides should be translated to an official language accessible to them.\(^{257}\) Furthermore the SAHRC assists requesters, including visually disabled and hearing impaired requesters who may be facing difficulties to access information. Consequently as part of its objective, the SAHRC

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\(^{252}\) Chapter 4 of INDS (Integrated National Disability Strategy), relating to the effective monitoring of the INDS at para 5.


\(^{256}\) Section 10 of PAIA of 2000.

\(^{257}\) Section 10 of PAIA of 2000.
also assists a citizen who requests access to information, if this is refused by the information officer.\textsuperscript{258}

Furthermore the SAHRC recognizes and provides the option to a disabled person or a visually disabled or hearing impaired person whose right under the Constitution is violated, to formulate a complaint on its behalf.\textsuperscript{259} Since the SAHRC protects the civil, political and socio-economic rights of the complainant, it can initiate a “speedy investigation” and better take action to the Court for the reparation of this prejudice.\textsuperscript{260} Such action of the SAHRC seeks to promote and multiply disability jurisprudence at the national level, this in order to strengthen protection of disability rights.\textsuperscript{261}

In respect of the equality of the right of access to information for all, the SAHRC can formulate recommendations about any “legislation or common law” relating to the right of access to information.\textsuperscript{262} The SAHRC also has the power to submit report on the compliance with the right of access to information by both public and private bodies to the National Assembly.\textsuperscript{263} The SAHRC plays an important role for the protection of human rights and access to information for a visually disabled and hearing impaired person in South Africa. As with the SAHRC, the South African History Archive (SAHA) reinforces the right of access to information in South Africa.

\subsection*{3.3.3 The South African History Archive (SAHA)}

The SAHA is “an independent human rights archive committed to recapturing lost and neglected histories, documenting past struggles against apartheid, as well as ongoing struggles in the making of democracy in South Africa.”\textsuperscript{264} The SAHA, similar to the ODAC and SAHRC, seeks

\begin{thebibliography}{99}
\item \textsuperscript{258}Currie I & Klaaren J \textit{The Promotion of Access to Information Act Commentary} (2002) 222.
\item \textsuperscript{259}Lorenzo T ‘Collective Action for Social Change: Disabled Women in the Western Cape’ (2001) 47 \textit{Agenda Feminist Media} 89-94.
\item \textsuperscript{262}Currie I & Klaaren J (2002) \textit{The Promotion of Access to Information Act Commentary} (2002) 222.
\item \textsuperscript{263}SAHRC Annual Report 2010 .9.
\item \textsuperscript{264}SAHA Audiovisual Audit Report 2010.
\end{thebibliography}
to promote the right of access to information to all South African citizens including visually disabled and hearing impaired persons. The SAHA promotes the right of access to information under the provision of the PAIA. In so doing, it helps citizens who are willing to exercise their right of access to information to receive such information.\textsuperscript{265}

Furthermore, the SAHA seeks to study the different grounds of refusal upon which the access to information is commonly rejected, and to create public awareness.\textsuperscript{266} Thus the duty of the SAHA is to seek to inform citizens about the administration of State affairs, and private sector’s interactions.\textsuperscript{267} In this way the SAHA promotes the right of access to information and strengthens the administration of justice in South African society.\textsuperscript{268} In order to fulfill his goal the SAHA can request information held by both public and private bodies.

The SAHA, by encouraging access to information in South Africa, contributes to building and strengthening the respect of democracy and the equal rights for all through information.\textsuperscript{269} However media and Information Communications Technology (ICT) also represent a useful way for access to information to occur.\textsuperscript{270} The next part of this research will describe the South African legislation on access to ICT for visually disabled and hearing impaired persons in South Africa. This description is initiated by the exploration of the South African broadcasting legislation.


\textsuperscript{270} Lor P J & van As A ‘Work in progress: Developing policies for access to government information in the New South Africa’ (2002) 19 \textit{G IQ} 101–121.
3.4 The South African legislation on media and ICT for visually disabled and hearing impaired persons

3.4.1 The South African Broadcasting legislation

In South Africa broadcasting media is regulated by the Act 153 of 1993, relating to the Independent Broadcasting Authority Act.\textsuperscript{271} This Act established the Independent Broadcasting Authority (IBA).\textsuperscript{272} The IBA Act mission consists of providing adequate broadcasting services and information.\textsuperscript{273} This means to regulate broadcasting services and to “promote the provision of a diverse range of sound and television services” at national and local level.\textsuperscript{274} For that reason the objectives of the IBA Act are to establish and develop broadcasting policy for the public interest of all.\textsuperscript{275}

In order to strengthen broadcasting legislation, the Broadcasting Act 4 of 1999 was adopted in 1999.\textsuperscript{276} The latter Act was “corporatized the SABC and restructured it into two sets of services: public services and public commercial services.”\textsuperscript{277} The Preamble of Act 4 of 1999 provides broadcasting services accessible to all and in all South African official languages. In order to ensure equality of the broadcasting service provider, Sections 2 and 10(g) of Act 4 of 1999 ensure broadcasting services must be provided for the needs of disabled persons in South Africa.\textsuperscript{278}

Furthermore, it is important to mentioned that Sections 30(1)(a) – (c) of Act 4 of 1999 allow private broadcastings to broadcast in other languages “if such service can be commercially viable.”\textsuperscript{279} Likewise the legislator, for the harmonization of broadcasting and telecommunication, adopted the Independent Communication Authority of South Africa (ICASA).\textsuperscript{280} ICASA was

\textsuperscript{272} Buys R The Law of the Internet in South Africa (2000) 413.
\textsuperscript{273} Brand R Media Law in South Africa (2011) 98.
\textsuperscript{275} Burns Y Communications Law (2001) 314.
\textsuperscript{277} Brand R Media Law in South Africa (2011) 99.
\textsuperscript{278} Brand R Media Law in South Africa (2011) 101.
\textsuperscript{279} Burns Y Communications Law (2001) 321.
adopted by the Act 13 of 2000, succeeding the IBA and the South African Telecommunication Regulatory Authority (SATRA). The ICASA Act 13 of 2000 was amended in 2002 by Act 64.

It must be highlighted that the ICASA Amendment Act of 2002 aimed to make clear the competences of the Minister of Communication, with a view to reinforcing democracy and equality values in South African society through its broadcasting services.

The ICASA mission seeks to monitor telecommunication and broadcasting for the public interest of all in South Africa. ICASA also ensures and provides equal access to services for disabled persons in South Africa. Despite the evolution of broadcasting law in South Africa, the legislation put a specific accent on access to services for visually disabled and hearing impaired persons. As highlighted above ICT also plays an important role for disabled persons. The next section describes the South African Telecommunication legislation for visually disabled and hearing impaired persons.

3.4.2 The South African Telecommunication legislation

The South African telecommunication law is regulated by the Act 103 of 1996. The Act 103 of 1996 aims to promote and to develop telecommunications in South African society. This means to put an accent on the development of services responding to the satisfaction and needs of all users and consumers. In other words the Telecommunication Act 103 of 1996 guarantees accessible services to disabled persons in South Africa. Act 103 of 1996 calls for public and

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282 Brand R Media Law in South Africa (2011) 100.
private broadcasters in South Africa “to ensure that the needs of disabled persons are taken into account in the provision of telecommunications services.”

The Act 103 of 1996 established two juridical bodies consisting of the South African Telecommunication Regulatory Authority (SATRA) and the Universal Services Agency (USA). The SATRA aims to promote and regulate universal service and access to electronic infrastructure in South Africa. For that Section 2(h) of the Act ensures effective telecommunication services for the needs of disabled persons.

In order to improve and strengthen digital communication, the South African legislator adopted the Electronic Communication and Transactions Act (ECT) Act 25 of 2002. The ECT does not aim to regulate telecommunication, but facilitates access to telecommunication for the public interest. The ECT was reinforced in 2005 by Electronic Communication Act 36 of 2005 (ECA). The ECA goal is to ensure the promotion and also the improvement of inter-operable and interconnection among electronic networks within the South African society. The ECA reaffirms the equal access to telecommunication services for disabled persons in South Africa.

The ECA covers the needs of disadvantaged classes of persons in society such as youth and mature disabled persons. The Telecommunication Law appears as a non-discriminatory legislation based on the equality of service providers of ICT for disabled and non-disabled users. The next step is therefore to describe the framework of the Integrated National Disability Strategy (INDS) for access to ICT in South Africa.

3.4.3 The Integrated National Disability Strategy

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290 Chapter 1, 2(h) of Act 103 of 1996.
296 Section 2(h) of Act 36 of 2005.
The Integrated National Disability Strategy (INDS) was adopted in 1997 by the South African government with the participation of Disabled Peoples Organization (DPO).\textsuperscript{297} The INDS seeks to introduce and to take into consideration the needs of disabled persons in all facets of society.\textsuperscript{298} In other words the INDS “provide[s] a blueprint for integration and inclusion of disability into every aspect of governance” in South Africa.\textsuperscript{299} In order to strengthen the full enjoyment of human rights of disabled persons in South Africa, the INDS ensures access to media for disabled persons.

Therefore, the INDS recommends that the media “increase visibility” on matters and aspects relating to disabled persons in society.\textsuperscript{300} Regarding to public media such as SABC, the INDS encourages them to re-conceptualize the pejorative connotation attributed to disability in society.\textsuperscript{301} Furthermore Chapter 3 of INDS promotes equal access to communication for a disabled persons and the right to assistive devices or technology.

In order to strengthen the INDS and easy accessibility to ICT for disabled persons in South Africa, the government adopted the National Accessibility Portal (NAP) as an answer to that concern.\textsuperscript{302} The NAP project aims to give disabled South African persons easy access to ICT through internet and adequate software accessible to their needs.\textsuperscript{303}

### 3.5 Conclusion

The right of access to information for visually disabled and hearing impaired persons in South Africa is protected in the Constitution of 1996. This right is also reinforced by the PAIA and the


PEPUDA guarantying access to information and equal rights to disabled persons. Although the right of access to information can be limited, it is also promoted by mechanisms of SAHRC, ODAC and SAHA. The South African legislation also seeks to ensure equal access to ICT and Media, responding to the needs of visually disabled and hearing impaired persons for the full enjoyment of their rights. However, it is important to bear in mind that this chapter was only focused on the description of the right of access to information for visually disabled and hearing impaired persons on the light of South African law and policies. This leads to the next chapter which will be a critical analysis of the international and South African framework on the right of access to information for a visually disabled and hearing impaired person in South Africa.
A Critical Analysis of the international and South African framework and policies on the right of access to information for visually disabled and hearing impaired persons in South Africa

4.0 Introduction

Visually disabled and hearing impaired persons represent a considerable portion of the South African population. The right of access to information, as enshrined in the South African Bill of Rights, therefore represents an important right which should also benefit disabled persons. This chapter seeks to critically analyse the right of access to information for visually disabled and hearing impaired persons in the light of South African law and policies, as well as the International Human Rights Law (IHRL). This approach aims to examine the South African legislation on the right to information and also examine the challenges faced by visually disabled and hearing impaired persons with respect to the equal access to information in South Africa. Additionally, this chapter analyses the accessibility to media and Information and Communications Technologies (ICT) by visually disabled and hearing impaired persons in South Africa. This chapter is divided into three different parts. The first part critically analyses South Africa’s law and policies on the right of access to information for visually disabled and hearing impaired persons. The second part deals with the implication of the ratification of the IHRL by South Africa. This part also highlights the binding obligations resulting from the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) by South Africa. The third part explores the legal perspective of the implementation of the CRPD in South African domestic laws and policies.

4.1 South African legislation and policies on the right of access to information for visually disabled and hearing impaired persons

4.1.1 The Constitution of South Africa

As mentioned in the previous chapter, the right of access to information enshrined in Section 32 of the Constitution strengthens human rights of citizens. According to Joubert, the right to access to information is a fundamental right recognized for democratic societies.\textsuperscript{305} This is because this right guarantees transparency and good governance of the State.\textsuperscript{306} An authoritarian “regime as opposed to a democratic regimes are characterized by secrecy of information” regarding State administration vis-à-vis their citizens.\textsuperscript{307}

The new Constitution of the South African seeks to consider and guarantee equal rights to disadvantaged groups of the past.\textsuperscript{308} Thus it can be understood that black, women and disabled persons must also enjoy of the same right of access to information. According to Howell, Chalklen and Alberts, this is justifiable by the struggle and by discrimination against disabled persons during apartheid regime in South Africa.\textsuperscript{309}

Arko-Cobbah describes a democratic society as a society governed according to the will of its citizens.\textsuperscript{310} The Constitution of South Africa seeks to promote a responsible government and wise administration. This goal can only be reached through a government working transparently evidenced by the disclosure of information to citizens.\textsuperscript{311} The apartheid regime on the contrary was dominated by the recurrent use of secrecy relating to State affairs.\textsuperscript{312} Likewise, the right of

\textsuperscript{307} Currie I & De Waal J \textit{The Bill of Rights Handbook} 5 ed (2005) 691.
\textsuperscript{312} The following legislation constituted by the official Secrets Act (Act 2 of 1956), the Publications Act (Act 42 of 1974) and the Protection of Information Act (Act 84 of 1982), were relating with the right of access to information during apartheid regime. However these legislations were not recognizing as Section 32 of the Constitution of 1996.
access to information was almost non-existent for disadvantaged groups. This entailed that access to information by visually disabled and hearing impaired persons was impossible since they were considered ill.\textsuperscript{313} It is argued that the South African legislative framework during apartheid regime was a gross violation of disability rights.

Section 32 of the Constitution of South Africa constitutes an important step for the right of access to information in the new South African democratic society.\textsuperscript{314} Indeed the right of access to information previously considered as the “need to know” can be now presented as the “right to know.”\textsuperscript{315} Moreover it is submitted that Section 32 of the Constitution of 1996, rebuilt the right of access to information as a “normal” and independent right for all citizens.

The Constitution of South Africa, seen from another angle, condemns unfair discrimination based on the provisions of the Section 9(3) of the Constitution.\textsuperscript{316} This means that Section 9(3) of the Constitution condemns discrimination based on race, sex, religion and disability.

However Article 32 of the Constitution does not refer to visually disabled or hearing impaired persons. Moreover the concept of “disability” is totally non-existent in Article 32 of the Constitution. The Constitution states: “Everyone has the right of access to...any information.”\textsuperscript{317} It is arguable that the absence of the concept of “disability” in Section 32 of the Constitution appears very problematic for a Constitution which is based on equal rights.

Section 32 of the Constitution structures the right of access to information in South African society; however more still needs to be done concerning disability. The next section will analyze the right of access to information for visually disabled and hearing impaired persons. The

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\textsuperscript{317} Section 32 of the South African Constitution of 1996.
\end{flushright}
following analysis will be based on the study of the Promotion of Access to Information Act 2 of 2000 (PAIA).

4.1.2 The Promotion of Access to Information Act 2 of 2000 (PAIA)

According to Dick, “the PAIA of 2000 is a landmark for access to information.” The PAIA appears as important legislation giving life to Section 32 of South African Constitution. The PAIA also guarantees access to information for disabled persons in South Africa under the provisions of Section 18(3), 29(5) and 29(6).

Section 18(3)(a) of PAIA states as follow: “an individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with subsection (1), may make that request orally.” Section 18(3)(a) of PAIA omits therefore to mention the South African Sign Language (SASL) for access to records held by public bodies for a disabled person. However as mentioned by Reagan, the SASL and braille are the languages and channels use by the Deaf community (DEAFSA) and the South African National Council for Blind (SANCB). This means an equal access to information held by public body should take into consideration the importance of the language. These access and forms of access to information for disabled persons who request access to information held by public bodies are enshrined in Section 29(5) of PAIA. This Section appears more favorable to the right of access to information for a disabled requester. However Section 29(5) does not expressly mention the use of SASL and braille as an adequate form of access. The author argues that Section 29(5) of PAIA seem to be incomplete regarding to the needs of visually disabled and hearing impaired persons.

321 Section 30 of PAIA of 2000.
322 Section 29(5) of PAIA of 200 states: “If a requester with a disability is prevented by that disability from reading, viewing or listening to the record concerned in the form in which it is held by the public body concerned, the information officer of the body must, if that requester so requests, take reasonable steps to make the record available in a form in which it is capable of being read, viewed or heard by the requester.”
It is relevant to bear in mind that braille and SASL are not expressly mentioned as part of the eleven languages by the South Africa Constitution of 1996. However the Constitution encourages the Pan South African Language Board (PSALB) to promote and develop sign language in South Africa society.

The UNAIDS describes that in relation to HIV/AIDS and disability in South Africa, an important step has been made for access to information. According to UNAIDS “In order to improve access to information and services for deaf person[s], sign language interpreters have been trained in matters related to HIV.” Furthermore, the UNAIDS encourages also production of information in braille for the needs of visually disabled. This improvement does not reflect at the level of the right of access to records held by States.

According to the author, visually disabled and hearing impaired person do not benefit from equal access to records held by public bodies. In the Nomala case, relating the failure of notification of a disabled person for the suspension of its disability grant, the High Court of Eastern Cape found that the non-respect of the right of a disabled person, constitutes a breach to the Constitution. Consequently in this constitutional matter concerning access to information, the “court may make any order that is just and equitable” for the respect of the Bill of Rights.

In order to eliminate discrimination against disabled persons, the PAIA does not charge extra fees for disclosing information in accessible format to a disabled requester. It is important to remember that a disabled requester is a disabled person who exercises his right of access to information held by public bodies.

Moreover, the PAIA also allows citizen to access to information held by private bodies. The right of access to information held by private bodies creates an obligation on the head of a

327 Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government et al [2001] JOL 8445 (E) at para 2.
328 Section 29(6) of PAIA of 2000.
private body to disclose information requested.\textsuperscript{329} Furthermore, it is important to mention that disclosure of records held by private bodies must be motivated by the protection of his rights or protection of public interest.\textsuperscript{330} Likewise, the request must not target records exempt from disclosure.\textsuperscript{331} For an equal access to information to all, Section 19 of the PAIA recognizes assistance for requesters who are facing certain obstacles in making their request. Likewise, the information must be disclosed in a normal period to a visually disabled or a hearing impaired requester. This means, according to Devenish, Govender and Hulme, in a period of 30 days from the formulation of the request.\textsuperscript{332} It is argued that the imposition of this time frame aims to guarantee the efficacy of the private body to give due regard to its obligations.

However, illiterate persons and disabled requesters such as visually disabled and hearing impaired persons still face difficulties to access information.\textsuperscript{333} This results in a lack of adequate assistance to disabled persons by public bodies to formulate their request on access to information.\textsuperscript{334} For the author such difficulties faced by disabled persons rise questions about the importance of Article 19 of PAIA. Additionally, Dimba notes that the right of access to information held by public bodies in South Africa suffers from a lack of implementation.\textsuperscript{335}

This is also justified by the fact that public bodies are dominated by a reluctance to disclose information, especially if such information can be used to litigate against the public service.\textsuperscript{336} Consequently it is submitted that, this tardiness of the public bodies to comply with the PAIA does not facilitate access to information by a disabled requester.

\textsuperscript{331} Currie I & Klaaren J \textit{The Promotion of Access to Information Act Commentary} (2002) 66.  
The PAIA apparently does not mention what the appropriate form or manner of access to information for a disabled requester is, and it is totally silent regarding the right of access to information held by private bodies for visually disabled and hearing impaired persons. It is argued that this silence of the PAIA constitutes an unfair discrimination against disabled persons, representing least 10% of the South African population.337

The right of access to information under the PAIA reinforces the human rights of all citizens in South Africa. However the PAIA fails to comply fully with the requirement of equal access to information for visually disabled and hearing impaired persons in South Africa. The next stage of this research will analyze the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The PEPUDA is also discussed because it guarantees enjoyment to fundamental rights to disabled persons as enshrined by the Bill of Rights.

4.1.3 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The PEPUDA aims to break the barriers of the South African society established before 1994.338 The PEPUDA encourages the government and authorities to prevent unfair discrimination against disabled persons. It must be remember that the PEPUDA gives legislative form to Section 9 of the Constitution and also sets up an adequate implementation mechanism to promote the equality rights of citizens.339 The PEPUDA contrary to the PAIA does not essentially target equal access to information. But, the PEPUDA condemns unfair discrimination upon the rights contained in the South African Bill of Rights.340 This by implication includes unfair discrimination making to the right of access to information help by public and private bodies.341 It is submitted that the PEPUDA approach aims to rebuild equality of human rights of visually disabled and hearing impaired persons. According to Bhabha the PEPUDA allows the

government to respect its international obligations by targeting unfair discrimination against disability at national level.\textsuperscript{342}

If the PEPUDA grants equal rights for disabled persons, its applicability with respect to the right of access to information for visually disabled and hearing impaired persons is still subject to discrimination.\textsuperscript{343} Such discrimination is demonstrated by DEAFSA, which confirms facing barriers to equal access to information for the hearing impaired, due to insufficient SASL translators in the public services.\textsuperscript{344} The author argues that the PEPUDA has a long way to go for effective implementation by the South African government.

The PEPUDA recognizes and attributes human rights protection for disabled persons in society.\textsuperscript{345} Still the implementation of this legislation appears as a huge dilemma for the government. The following part of this research is focused on the analysis of the mechanisms reinforcing the right of access to information in South Africa. This analysis ought to be initiated by the South African Human Rights Commission (SAHRC) as an independent body established by Chapter 9 of the Constitution of South Africa, responsible for promoting human rights for all.\textsuperscript{346} However, the SAHRC will be analysed latter in this work during the examination of monitoring mechanisms of the CRPD in South Africa. This study targets the Open Democratic Advice Center (ODAC), above other NGOs because of its aims, which consist, among others, of protecting the right of access to information in South Africa.\textsuperscript{347}

\textsuperscript{346} Fourie P J \textit{Media Studies: Institutions, theories, and issues} Vol 2 (2001) 70.
4.2 Mechanisms reinforcing access to information

4.2.1 The Open Democracy Advice Centre

As mentioned in the previous chapter, ODAC aims to promote the right of access to information and protection against whistleblowing in South Africa. By promoting the right of access to information, ODAC “fosters a culture of corporate and government accountability.”

Regarding its mission, the ODAC assists citizens to accomplish and to realize their human rights goals in society by breaking down secrecy in South Africa. This means the ODAC promotes access to information for all, including visually disabled and hearing impaired persons. It is discussed that the ODAC aims to ensure access to information for visually disabled and hearing impaired persons in South Africa.

However, according to Darch and Underwood, public bodies prefer more often to just ignore the request in lieu of rejecting it. This is demonstrated by ODAC’s analysis of access to information at domestic level, where it describes a low participation of citizens in the exercise of their right of access to information. Furthermore the latter analysis also reveals a non-follow-up by public bodies of requests submitted. Additionally, Seedat also notes the non-compliance of public bodies regarding disclosure of information, and their failure to develop adequate manuals to strengthen the right of access to information. It is interpreted that the lack of adequate manuals penalizes not only the ODAC mission, but also the access to information for visually disabled and hearing impaired persons.

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352 In 2007 in the study lead by ODAC, 21% of peoples had made requests for exercising their right to access to information from public bodies; however 37% affirm having not received information requested from the public body. See Seedat S ‘Political Freedom and Democracy’ in Misra-Dexter N & February J Institute for Democracy in South Africa (ed) Testing Democracy: Which Way is South Africa Going? (2010) 233.
The promotion of the right of access to information by the ODAC strengthens the civil and political rights of citizens in South Africa. However, the right of access to information in South Africa is still subject to secrecy. This is observable in the silence of public bodies with respect to the disclosure of certain pieces of information as requested by citizens.\textsuperscript{354} The analysis of the promotion of the right of access to information by the South African History Archive (SAHA) for visually disabled and hearing impaired persons will be discussed in the section below. As the ODAC, the SAHA does not belong to Chapter 9 institution of the Constitution. However it also seeks to reinforce the right of access to information in South Africa.

4.2.2 The South African History Archive (SAHA)

The SAHA also aims to promote the right of access to information in South Africa. In doing so, the SAHA recaptures the “lost a neglected history” of South Africa dating especially to the apartheid regime.\textsuperscript{355} The object of such recapturing seeks to make these archives available to all South Africans. The requests formulated by the SAHA target among others, information relating to the “policies and programmes relating to homosexual[s]” in the military apartheid regime.\textsuperscript{356} Furthermore the SAHA request targets also the records held by the Truth and Reconciliation Commission (TRC) and those relating to “the surviving apartheid era security establishment.”\textsuperscript{357} It is argued that SAHA allows South Africans to know more about their history and such initiative must also benefit to visually disabled and hearing impaired persons. In order to promote access to information in society, the SAHA lodges requests to public and private bodies.\textsuperscript{358}

The SAHA requested information from the Bosasa Operations (Pty) Ltd in 2007 about the disclosure of records relating to the fact “that it was contracted to manage operation of the Lindela Detention Centre for undocumented migrants.” In response to that request, Bosasa Operations (Pty) Ltd refused to disclose information to the SAHA. Bosasa justified such refusal to disclose information to SAHA on the grounds that it was a private entity. The information requested by SAHA was disclosed after it attempted legal action against Bosasa Operations (Pty) Ltd. It is noteworthy that the reluctance of the disclosure of information by private bodies is in contradiction with the aims of PAIA.

Similarly, the SAHA was confronted with a refusal for accessing of data held by the TRC with respect to human rights violations perpetrated during the apartheid regime. This was with respect to a request formulated since 2001. As noted by Klaaren, information is disclosed to SAHA by public or private bodies after a long waiting period of time.

Despite efforts made to ensure transparency and the implementation of the right of access to information in the light of the PAIA, the SAHA is still facing major difficulties from both private and public bodies. Additionally the right of access to information in South Africa seems to suffer from the lack of implementation at the level of the society. From that angle, the SAHA notes that in South Africa an important number of the population are ignorant about the use of PAIA. It is debated that the lack of implementation of the PAIA, and especially ignorance by citizens, constitutes a major root of its violation.


The SAHA plays an important role as promoter of the right of access to information in South Africa. The SAHA in its mission is confronted by the reluctance of public and private bodies to disclose information. This situation does not facilitate equal access to information for a visually disabled and hearing impaired person in South Africa. The analysis of the South African legislation on telecommunication constitutes the next step of this research. This methodological approach seeks to explore the challenges faced by visually disabled and hearing impaired persons with respect to access to media and ICT.

4.3 The South African legislation on Telecommunication on access of ICT and media for visually disabled and hearing impaired persons

In South African society, telecommunication and media law are regulated by the Independent Communication Authority of South Africa (ICASA). The ICASA aims to guarantee accessibility to different broadcasting media of South Africa, such as radio, television and webcasting. For that reason ICASA reinforces the right of access to media and ICT to disabled persons in South Africa, including visually disabled and hearing impaired persons. Furthermore the Electronic Communications Act 36 of 2005 ensures under the provision of Section 2(h) access to equal telecommunication services for disabled persons.

Access to ICT plays an important role in society. According to UNESCO, access to ICT strengthens the right of access to information and the participation of citizens in society. It is proposed that the ICT constitutes an important channel of emancipation and evolution for the twenty first century. In order to guarantee equal access to telecommunication all, the Universal Services Agency (USA) was instituted by the IBA, which has now been replaced by the ICASA. The task of the USA was intended to promote the adoption and the use of

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telecommunication and new ICT by disadvantaged groups.⁷² The USA can formulate recommendations on behalf of the Minister of Communication in order to describe or to present “what will constitute universal service and what will be considered universal access.”³⁷³

Relating to South Africa, hearing impaired persons’ access to ICT or the media can be through SASL, or through captioning information placed on the bottom of the television screens.³⁷⁴ Furthermore, the South African television broadcasters take into consideration the needs of hearing impaired persons by introducing educational programmes involving hearing impaired persons.³⁷⁵ In the Simser case, relating to the failure of subtitling a film for the needs of hearing impaired persons, the Human Rights Tribunal of Ontario held that such an act violated disabled persons’ rights under the principle of non-discrimination.³⁷⁶

For Stadler, despite the fact that certain broadcasting programs include the needs of hearing impaired persons, the majority of them are still not responding to the needs of the hearing impaired South African population.³⁷⁷ Consequently, new technologies of ICT are only responding to the needs of non-disabled persons, depriving the visually disabled access to internet or adequate soft and hardware.³⁷⁸ It is important to mention that such discrimination may also affect the right of the visually disabled to access government information through e-Government web sites. The author argues that ICT ought to benefit all without disability-based discrimination.

⁷⁶ Simser et al v Paramount Pictures Canada (2006), Human Rights Tribunal of Ontario. However in Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312 - Dist. Court, SD Florida 2002 the court decided that the complainant right of access to ICT has not been violated, by the failure to provide him equal access to computer in accessible format by the Airlines company.
The South African legislative framework sets up mechanisms on access to information and ICT to visually disabled and hearing impaired persons in South Africa. Besides this framework, the South African legislation remains inadequate for equal protection and promotion of access to information and ICT for visually disabled and hearing impaired persons in South Africa. Consequently, the next part of this work analyzes the implications of the IHRL treaties on the access to information for visually disabled and hearing impaired person in South Africa. This approach aims to examine the South African compliance with IHRL for equal access to information for disabled persons.

4.4 Towards an equal right of access to information: The implications of the ratification of the CRPD and IHRL treaties by South Africa

4.4.1 South African obligation under IHRL treaties

South Africa is party to a great number of IHRL treaties, among others the CRPD. Under the provisions of Article 2(1)(a) of Vienna Convention on the Rights of Treaties, the treaty binds and creates obligations upon the States parties that treaties must be respected. Consequently Section 231(2) of the Constitution of South Africa encompasses that “An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.” Moreover it is argued that in international law, an international obligation of treaty law creates rights in domestic law which shall benefit all citizens, include disabled persons. However, in the matter relating to the interpretation of the law, Section 39(1) of the Constitution affirms that: “When interpreting the Bill of Rights, a court, tribunal or forum – must considered international law; and may considered foreign law.” In other words in situations relating to the interpretation of the legislation, the court must “promote the spirit of the Bill of Rights.” Thus for an interpretation of the right of access to information for visually disabled and hearing impaired persons, South Africa must considered IHRL treaties.

382 Section 39(2) of the Constitution of South Africa.
South African legislation sets up provisions for the interpretation and application of IHRL treaties at domestic level. This following subheading will analyse the implication of the ratification of the CRPD for equal access to information for visually disabled and hearing impaired persons in South Africa.

4.4.2 Implications of South Africa ratification of the CRPD

The South African government is Party to the CRPD and therefore shall guarantee the right of access to information for visually disabled and hearing impaired persons as enshrined in Article 21 of the Convention. In other words under the provisions of Article 21 of CRPD information shall be disclosed in accessible format. This means accessible in braille for the need of a visually disabled and in sign language for a hearing impaired person.\textsuperscript{383}

According to Dimopoulos, States have the obligation to ensure access to information for disabled persons in adequately available in accessible format.\textsuperscript{384} In other words Article 21 of the CRPD encourages disclosure of information. Similarly, the International Labour Organization (ILO) provides that: “States must not withhold information and stop disabled persons from freely expressing his/her views…States have the obligation to prevent private bodies or authorities to restrict the right of access to information to disabled persons.”\textsuperscript{385}

In the \textit{Eldridge} case the Canadian Court concluded that the failure to provide sign language translation to a deaf patient exposed him to receive inadequate medical treatment.\textsuperscript{386} Thus, omitting to provide adequate tools of communication to a hearing impaired person, constitutes a violation of his human rights and therefore deprives him of equal benefit of the law.\textsuperscript{387} In the


\textsuperscript{386} Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R.

\textsuperscript{387} Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R.
same vein, the World Federation of the Deaf (WFD) recognizes the use of sign language as an important tool for access to information and implementation of the CRPD by members States.\(^{388}\)

The author argues that the right of access to information as enshrined in Article 21 of the CRPD also allows the disabled persons to fulfill their fundamental rights. In the *Jodhan* case, relating to the inaccessibility of government information to a visually disabled woman, Supreme Court of Canada concluded that such inaccessibility constituted a discrimination against the complainant.\(^{389}\) In its decision, the Supreme Court of Canada emphasized that the right of access to information must provide to visually disabled person “independence, self-reliance, control, ease of access, dignity and self-esteem.”\(^{390}\)

Consequently, the UN Human Rights Committee recognized that this right ensures total and active participation in society.\(^{391}\) It is argued according to the author that such participation must reinforce the involvement of visually disabled and hearing impaired person for the good administration of the State.

The INDS White Paper policy adopted in view to ensure equal rights and participation to disabled persons in South Africa, including visually disabled and hearing impaired person, also guarantees access to information for disabled persons in South Africa.\(^{392}\) The INDS promotes access to information for disabled persons in South Africa, through an active cooperation among the DPOs, such as DEAFSA and SANCB, together with the government Communication and Information System.\(^{393}\)

However, beside the adoption of that policy, visually disabled and hearing impaired persons are still subjected to barriers for access to information in South Africa.\(^{394}\) Such obstacles have been generated by the lack of implementation of the INDS by the Office on the Status of Disabled


\(^{392}\) Recommendation 7d of the INDS.

\(^{393}\) Recommendation 7d of the INDS.
Persons (OSDP), and also by a lack of collaboration with DPO of South Africa. It is submitted that, without adequate collaboration, the OSDP cannot be informed about obstacles faced by the DEAFSA and SANCb in order to access information.

The ratification of the CRPD, has not yet been characterised by appropriate access to information for visually disabled and hearing impaired persons, due to a non-effective disability policy. The next step is to explore implication of the ratification of the CRC by South Africa. This analysis aims to explore South Africa’s compliance with the CRC regarding equal access to information for disabled children.

### 4.4.3 Implication of South Africa ratification of the CRC

The CRC recognizes important rights for all children without distinction. The right of access to information for the child is enshrined in Article 13 of CRC. Article 13 of the CRC gives the ability to the child to “seek” “receive” and “impart” information of all kinds at national and also at international levels. According to Thorgeirsdottir, Article 13 of the CRC reinforces child participation in social, political matters and all relevant situations in society, which affects his person. However it is relevant to recall that Section 28 of the Constitution of South Africa enshrines a general protection of the basic human rights of the child in South Africa.

Beside the Constitutional framework on the protection of the rights of the child, the South African parliament has also adopted the Children Act 38 of 2005. Section 11(1)(c) of the

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400 UNICEF: The State of the World’s Children Special Edition Celebrating 20 years on the Convention on the Rights of the Child (November 2009) 14. South Africa has also adopted others legislation relating to the protection of the child. See Films and Publications Act, the Basic Conditions of Employment Act, the Domestic Violence Act,
Children Act 38 of 2005 lays down protection for the disabled child and states that: “In any matter concerning a child with a disability due consideration must be given to providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.” Similarly the Act encourages South Africa to provide information in an appropriate format for the needs of disabled child.\textsuperscript{401} In others words the disabled child, as the non-disabled, ought to enjoy the full socio-economic and civil rights in society to break down disability-based discrimination in South Africa.\textsuperscript{402} Thus, this shall also allow the visually disabled and hearing impaired children to benefit from the same access to information. It is argued that, for such legislation to reinforce the rights of the disabled child, its effectiveness, as mentioned by UNICEF, requires more efforts.

Regarding to the access to information for visually disabled and hearing impaired children, equal access requires taking into consideration the special needs of the disabled child.\textsuperscript{403} In others words, according to Jones, a visually disabled child will require a braille, while a hearing impaired person will require the sign language for equal access to information.\textsuperscript{404} According to the author, it is submitted that the equal access to information for a disabled child must be synonymous with equal needs and accessible format.

However the African Child Policy Forum (ACPF) notes that the disabled South African child is still facing huge discrimination in society.\textsuperscript{405} According to the ACPF these results, emanate from an inadequate framework of the government.\textsuperscript{406} Furthermore the ACPF highlights that the

\textsuperscript{401} Section 13(2) of the Children Act 38 of 2005.
\textsuperscript{402} Guidelines for Early Childhood Development Services: Every Child Has the Right to the Best Possible Start in Life Available at: \url{http://www.unicef.org/southafrica/SAF_resources_guidance.pdf} (accessed on 10 November 2011).
disabled child in South Africa suffers a lack of access to information regarding health care and general information in society.\textsuperscript{407}

It is argued that the inaccessibility of information to a disabled child constitutes a violation of human rights and therefore exposes such a child to certain pandemics such as HIV/AIDS. As enshrined in Article 3 of the CRC, the best interest of the child shall be the primary consideration. In \textit{Western Cape Forum for Intellectual Disability v Government of The Republic of South Africa} relating to the lack of access to government education to children with severe intellectual disabilities, the Western Cape High Court acknowledged that:

\begin{quote}
“the respondents have failed to take reasonable measures to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape, in breach of the rights of those children to: 1.1 a basic education 1.2 protection from neglect or degradation 1.3 equality 1.4 human dignity” \textsuperscript{408}
\end{quote}

It is also relevant to highlight that the access to education represents an important channel for access to information and knowledge for the child, to contribute to ensuring his development in society.\textsuperscript{409} Abramson considered discrimination against a child based on impairment as a child rights violation.\textsuperscript{410} In order to break down and guarantee equal access to information for a disabled child, the CRC Committee adopted the General Comment 9 relating to the protection of the disabled child.

The CRC Committee encourages States to disclose information to visually disabled and hearing impaired child in an accessible format.\textsuperscript{411} Moreover it is argued that although the General Comment 9 of the CRC does not legally bind States as does the CRC, it merely sets up an equal access opportunity to information for visually disabled and hearing impaired children.

\begin{footnotes}
\item[408] \textit{Western Cape Forum for Intellectual Disability v Government of The Republic of South Africa} 2011 JDR 0375 (WCC) at para 52.
\item[409] Boezaart T \textit{Child law in South Africa} (2009) 456
\item[411] UN.Doc/CRC General Comment No. 9.\textit{The rights of children with disabilities} CRC/C/GC/9 (27 February 2007) at para 37.
\end{footnotes}
Furthermore, Article 17 of the CRC also enshrines the rights of access to media to the child. This means, according to the CRC Committee that the disabled child shall enjoy equal access to media in the same way as the non-disabled child.\footnote{UN.Doc/CRC General Comment No. 9. The rights of children with disabilities CRC/C/GC/9 (27 February 2007) at para 37. See also UN.Doc/CRCGeneral Comment No. 7 Implementing child rights in early childhood CRC/C/GC/7/Rev.1 (20 September 2006) at para 35.}

It is relevant to remember that South Africa is party to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.\footnote{Boezaart T \textit{Child law in South Africa} (2009) 330.} It is argued that access to media and ICT must not expose the child to pornography through harmful information. Consequently, the Protocol on Child Pornography enjoins States to take adequate legislative measures or cooperative efforts to protect the child, disabled or non-disabled, from pornography.\footnote{Article 10(1) of the CRC Optional Protocol on the sale of children, child prostitution and child pornography.}

The CRC and its General Comment 9 ensure the right of access to information, media and ICT for a disabled child. Although South Africa is party to that treaty, the right of access to information for visually disabled and hearing impaired children still faces obstacles for its implementation. The following part of this analysis examines South Africa compliance with regard to access to information for disabled women on the light of the CEDAW.

\subsection*{4.4.4 Implication of South Africa ratification of the CEDAW}

The South African government has ratified the Convention on Elimination of all forms of Discrimination against Women (CEDAW) on 15 December 1995.\footnote{Dugard J \textit{International Law: A South African Perspective} 3ed (2005) 324.} However, it must be mentioned that the right of access to information as enshrined by the CEDAW relates to access to information relating to women’s reproductive health.\footnote{Article 10(h) of the CEDAW.} In other words, this right of access to information shall also benefit visually disabled and hearing impaired women in South Africa.

It is also relevant to acknowledge that Section 9 of the Constitution of South Africa outlaws unfair discrimination based on gender.\footnote{Jagwanth S & Murray C \textquoteleft “No Nation Can Be Free When One Half of It Is Enslaved” Constitutional Equality for Women in South Africa\textquoteright in Baines B & Rubio-Marín R (ed) \textit{The gender of constitutional jurisprudence} (2005) 233.} It is submitted that Section 9 of the Constitution of
South Africa must reflect CEDAW obligations. The CEDAW guarantees the right to reproductive health to women, and encourages States to take adequate measures and legislation for reinforcing this right among others.\textsuperscript{418} This means under Article 10(h) of the CEDAW, the CEDAW Committee recognizes access to education and information for women in relation to family planning and reproductive health.\textsuperscript{419}

This includes also her right to decide freely about her reproductive health in the same way as non-disabled women, without discrimination.\textsuperscript{420} The author argues that the promotion of education and information relating to reproductive health and family planning to disabled women by the CRPD constitutes an important step for protection of the rights of disabled women.

The South African government has adopted national policies targeting to guarantee access to reproductive health care to disabled women in society. In order to guarantee equal rights to disabled women, among others access to reproductive health, the South African government has also established the Ministry for Women, Children and People with Disabilities (MWCPD).\textsuperscript{421}

However, beside this national framework targeting to ensure equal rights of disabled women, the CEDAW Committee denounce a lack of implementation of the CEDAW protection for disabled women in South Africa.\textsuperscript{422} It is discussed that such weaknesses could affect access to reproductive health to visually disabled and hearing impaired women. The difficulties facing the implementation of the CEDAW are justified by the lack of awareness of the disabled women and even South African women in general about the existence of their rights under the CEDAW.\textsuperscript{423}

\textsuperscript{418} Gupta I S Human Rights of Minority and Women's vol 4 (2005) 209. See also Article 6 of the CRPD, relating to the rights of disabled woman.

\textsuperscript{419} Gupta I S Human Rights of Minority and Women's vol 4 (2005) 209.


Furthermore, the South African Shadow report on the Implementation of the CEDAW also reveals a lack of accountability on the part of the South African government. This is shown by inadequate mechanisms able to hold the State accountable with compliance of the CEDAW at provincial, local and traditional level.\(^{424}\) By interpretation, it is argued that the South African legislation on the promotion of equality of disabled women remains without practical effect.

Although party to these treaties, South Africa still faces difficulties in implementation at domestic level. The analysis of equal access of ICT resulting from the ratification of IHRL treaties and the CRPD obligations will be explored in the section below.

4.5 Towards an equal right of access to ICT and media for visually disabled and hearing impaired persons in South Africa

As mentioned above, the ICASA regulates media and telecommunication in South Africa. The rights of access to ICT and media for disabled persons are enshrined in Article 9 and 21 of the CRPD.\(^{425}\) In regard to the provisions of the CRPD, visually disabled and hearing impaired persons must have the equal right of access to media and ICT through the internet.\(^{426}\) In *Maguire v Sydney Organizing Committee for the Olympic Games (SOCOG)*, the complainant (a visually disabled person) sued the SOCOG for the inaccessibility of the Olympic Games website.\(^{427}\) In this matter, the Human Rights & Equal Opportunity Commission (HREOC) emphasizes that the inaccessibility of the SOCOG website to a visually disabled person constitutes an act of discrimination.\(^{428}\) In other words on the light of HREOC, a visually disabled person must benefit from equal access to ICT through adequate assistive technology.\(^{429}\)

Similarly, Article 2 of the CRPD requires that universal design and access “shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.” This means according to Dobransky and Hargittai that computer use for a visually disabled person


\(^{426}\) Stephanidis C *Universal Access in Human-Computer Interaction: Design for All and Inclusion* (2011) 481.

\(^{427}\) *Maguire v SOCOG* [2000] FCA 1112 (3 August 2000).

\(^{428}\) *Maguire v SOCOG* [2000] FCA 1112 (3 August 2000).

must be designed with a “screen reading programs” or be equipped of “refreshable braille displays.”

It is argued that Article 2 of CRPD aims to guarantee an appropriate access to a visually disabled and hearing impaired person. Regarding to equal access to ICT and media for visually disabled and hearing persons, the UN Special Rapporteur on Freedom of Expression, states that:

“without Internet access, which facilitates economic development and the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States.”

It is argued that equal access to ICT through internet for a visually disabled and hearing person could allow them to achieve their equal human rights in society. This means States parties shall ensure equal access to ICT in accessible format for visually disabled and hearing impaired persons. As explained earlier in the previous chapter, the National Accessibility Portal (NAP) aims to take into consideration access to ICT and media for disabled persons in South Africa. This means the NAP targets also equal accessibility to visually disabled and hearing impaired persons. In order to eliminate barriers targeting marginalization against disabled persons, the NAP works in collaboration with the OSDP and with DPO such as DEAFSA and South African

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National Council for Blind (SANCB). According to the author, it is suggested that, the NAP accessibility of ICT for visually disabled and hearing impaired persons must also take into consideration the designing of a website for equal access.

However, beside that the requirements of Articles 2 and 9 of the CRPD for accessibility to media and ICT, visually disabled and hearing impaired persons are still facing barriers in enjoying equal access to ICT in South Africa. The CRPD sets up adequate protection promoting access to ICT and media for visually disabled and hearing impaired persons; however accessibility at the country level is still discriminatory against disabled persons. The following section analyzes monitoring mechanisms of the CRPD for access to information for visually disabled and hearing impaired persons in South Africa.

4.6 Towards a perspective of implementation of the CRPD by South Africa

4.6.1 National implementation of the CRPD

The ratification of the CRPD and its Optional Protocol by South Africa generates an active obligation to comply with the provisions of the treaty as recommended by Article 4(1) of the CRPD. This goal can be achieved in South Africa through the implementation and the monitoring mechanisms of the CRPD at domestic level. In the same vein Section 231(4) of the Constitution of South Africa establishes that an international treaty became part of domestic law in South Africa once it is endorsed by the National Assembly. Similarly in Grootboom case, although relating to State’s obligation regarding housing for citizens, the Constitutional Court held that:

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435 ‘South Africa's portal for the disabled’ Available at: http://www.southafrica.info/about/science/nap.htm (accessed on 13 November 2011).


"The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive...An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State’s obligations." 

In order to implement the CRPD at domestic level, Article 33 of the CRPD encourages State to adopt a focal point[s] at governmental level. Furthermore, this focal point must be accompanied by monitoring mechanisms for the implementation of the CRPD. It is argued that adoption of an appropriate focal point must aim to facilitate equal rights of access to information for visually disabled and hearing impaired person by South Africa. The analysis of the South African focal point for the national implementation of the CRPD will be discussed in the next section.

4.6.2 Focal point and coordination mechanisms for implementation

The focal point must take into consideration legislative, executive and administrative mechanisms undertaken by the State for the protection of human rights enshrined by the CRPD. In South Africa, the focal point for the implementation of the CRPD at domestic level is the Ministry of Women, Children and Persons with Disabilities (MWCPD). However it is necessary to remember that the MWCPD replaces the Office on the Status of Disabled Persons (OSDP). The author argues that measures and strategies undertaken by the MWCPD must aim to strengthen the rights of disabled persons in society.

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438 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para 42.
The MWCPD promotes equality and non-discrimination against disabled persons in South Africa. Additionally, the MWCPD seeks to ensure South Africa respects its international obligations as enshrined in the CRPD. In order to achieve the full enjoyment of the right of access to information, for visually disabled and hearing impaired person in South Africa, the MWCPD must promote and regulate national strategy.

The focal point for the implementation of the rights of access to information for visually disabled and hearing impaired persons represents the point of departure for domestic implementation. The next step is to examine the national strategy to implement the CRPD through access to information for visually disabled and hearing impaired person in South Africa.

### 4.6.3 National Strategy to Implement the CRPD

The National Strategy to Implement (NSI) the CRPD in South Africa was adopted in 2007 under the National Disability Policy (NDP). It is relevant to acknowledge that, for equal access to information for visually disabled and hearing impaired person, the MCWPD must coordinate a framework with the NDP and others ministries. The NDP promotes human rights for disabled person in South Africa in the light of the CRPD and its Optional Protocol. To achieve this, the NDP aims to implement the CRPD and its Optional Protocol at national, governmental and local level in South Africa.

The NDP recognizes the right of access to information as a fundamental right for visually disabled and hearing impaired persons. The NDP encourages DEAFSA and the government to

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449. Chapter 1 Paragraph 1.5 of the NDP of 2007.
reinforce the use of SASL at the level of public and private services.451 This should be facilitated with the SASL interpreters at public service level.452 It is argued that such measures required a concrete and strict implementation to achieve equal access to information for visually disabled and hearing impaired persons.

In order to respect the principle of non-discrimination as promoted by the Preamble of the CRPD, Lulu Xingwana, the minister of MWCPD, also targets the implementation of the SASL and captioning for the needs of hearing impaired persons located in rural areas.453 The MWCPD works in collaboration with others ministries or State departments to reinforce the policy of the NDP. For the instance the South African Department of Public Works (DPW) undertakes to make available accessible information to disabled persons in compliance with the CRPD.454 In that regard the DPW seeks to guarantee accessible information to visually disabled and hearing impaired persons in adequate format.455 It is argued that this important step taken by the DPW must aim, for example, to facilitate equal access to an elevator for a visually disabled person through the use of braille for elevator controls. Additionally the MWCPD meet with ICASA with a view to amending the ECA legislation in favor of the needs of disabled person for equal access to media.456

It is relevant to mention that the Constitution of South Africa, legislation and policies such as the PAIA, the PEPUDA, the INDS and the NAP also target equal access to information for disabled person, as discussed.457 However, the lack of effective coherence between ministries, NDP and

451 Chapter 4 Paragraph 4.1.1 of the NDP of 2007.
453 ‘General Assembly HR/5068: When We Respect the Inherent Dignity of Persons with Disabilities, We Enrich Our Human Family, Says Deputy Secretary General, as Headquarters Meeting Opens’ Available at: http://www.un.org/News/Press/docs/2011/hr5068.doc.htm (accessed on 27 October 2011).
the CRPD generates inaccessibility of information for visually disabled and hearing impaired persons in South Africa. Moreover, the South African government has not yet adopted adequate mechanisms to inform visually disabled and hearing impaired person about their protection and the existence of the CRPD.

It is argued that the lack of information about the CRPD creates a barrier to the exercise of the right to “know.” The South African NSI, although subject to certain obstacles for its implementation, strengthens access to information to visually disabled and hearing impaired person as enshrined by the CRPD. The exploration of monitoring mechanisms of the CRPD for equal access to information will be discussed in the following paragraph.

4.6.4 Monitoring of the CRPD

4.6.5 Framework, including independent mechanisms, involvement of the DPO

According to Schulze, Article 33(2) of the CRPD requires the involvement of national independent mechanisms for monitoring the CRPD at domestic level. This means that monitoring mechanisms of the CRPD, for equal access to information of visually disabled and hearing impaired persons in South Africa, must take into consideration the Paris Principles. It is argued that the respect of Paris Principles must aim to promote equal access to information for all without State interference.

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Lord and Stein highlight that National Human Rights Institutions (NHRI) play an important role for the implementation of monitoring mechanisms of the CRPD at domestic level.\textsuperscript{462} This can be justified by the crucial role played by these NHRI for the adoption of new legislation at parliamentary level.\textsuperscript{463} As mentioned by the Special Rapporteur on Disability of the Commission on Social Development, Shuaib Chalklen, the South African Human Rights Commission (SAHRC) is the organ in charge of monitoring the CRPD.\textsuperscript{464}

As already mentioned in the previous chapter, the SAHRC protect human rights violations against disabled persons, and in that regard the SAHRC can formulate recommendations to government and to parliament.\textsuperscript{465} In order to monitor the equal access to information for visually disabled and hearing impaired persons under the provisions of Article 33 of the CRPD, the SAHRC has established Commissioner on Disability.\textsuperscript{466}

The Commissioner on Disability of the SAHRC aims to develop strategy and guidance with a view to ensuring State compliance with the protection and equal rights of disabled persons.\textsuperscript{467} It is submitted that the Commissioner on Disability must target the basics needs of the visually disabled and hearing impaired persons in order to respect the principle of non-discrimination.

\textsuperscript{462} Lord J E & Stein M A ‘The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities’ (2008) 83 WLR 449- 479. See also Alizadeh H ‘A Proposal for How to Realize Human Rights at the National and Regional Level: A Three-pillar Strategy’ (2011) 33 HRQ 826-855. It is crucial to remind that international monitoring of the CRPD is assumed by the CRPD Committee. The Committee task is enshrined in Article 39 of the CRPD and Article 1(1) of the Optional Protocol of the CRPD. This task consists of monitoring report of States parties to the CRPD, with a view to ensure their compliance with the CRPD obligations. Moreover, the Committee also recognizes the ability to receive individual and collective complaints alleging violation of human rights as consecrated by the CRPD. See Lord J E & Stein M A ‘Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential’ (2010) 32 HRQ 689-728. In order to reinforce the respect of the CRPD, the Committee on the CRPD can also formulate recommendations to States parties to the CRPD. See Perlin M L International Human Rights and Mental Disability Law: When the Silenced Are Heard (2011) 151.


\textsuperscript{466} SAHRC Annual Report 2011 13.

Furthermore, the SAHRC also assists visually disabled and hearing impaired persons to access information as promoted by the PAIA.\textsuperscript{468} However, the lack of physical and material resources at the public body level does not facilitate government compliance with the PAIA, and therefore equal access to information.\textsuperscript{469} It is discussed that State non-compliance with the PAIA obligation, handicaps equal access to information for visually disabled and hearing impaired persons.

Additionally, the involvement of the DPO plays a crucial role in the implementation of monitoring mechanisms of the CRPD at domestic level.\textsuperscript{470} In South Africa, SADA represents the main DPO of the civil society responsible for the monitoring mechanisms of the CRPD.\textsuperscript{471} In that regard the SADA works in exchange with the South African government. This collaboration between both entities seeks to expose challenges faced by visually disabled and hearing impaired person for access to information.\textsuperscript{472} It is suggested that monitoring measures without follow-up are ineffective. However, the South African government has not yet complied with its obligations regarding the implementation of the CRPD. This is justifiable in view of the fact that South Africa has not yet submitted a report to the CRPD Committee since it ratification in 2007.\textsuperscript{473} It is important to remember that the first report was supposed to be submitted two years after the ratification of the CRPD and its Optional Protocol.\textsuperscript{474}

\textsuperscript{469} Peekhaus W ‘Biowatch South Africa and the challenges in enforcing its constitutional right to access to information.’ (2011) 28*GQ* 542-552.
Likewise, as noted by Flynn, the South African government often fails to consult with SADA concerning decisions involving disabled persons.\textsuperscript{475} For the instance it is demonstrated that in South African universities, SASL is not identified as “a school subject.”\textsuperscript{476} It is argued that such non-compliance with Articles 33 and 35 of the CRPD does not really reflect the respect for South Africa obligations under the CRPD. Consequently, this violates at the same time disabled persons’ slogan “Nothing about us without us.”

Moreover, it must be highlighted that the collection of statistic and data on disability are also recommended by the CRPD as an important point for an adequate implementation of the CRPD.\textsuperscript{477} Dube mentions that data and statistic on disability in South Africa “are neither comprehensive nor accurate.”\textsuperscript{478} The author argued that unclear statistics might wrongly influence implementation and monitoring measures or policies undertaken by the government. The South African government has put into place some measures and mechanisms targeting at implementing and monitoring the CRPD to ensure equal access to information, media and ICT. However, although measures have been officially taken, their full implementation still requires concrete achievement. This leads the next section to conclude this chapter in the paragraph below.

\textbf{4.7 Conclusion}

The right of access to information for visually disabled and hearing impaired person is protected by the Constitution, the PAIA and the PEPUDA. Although the mechanisms and IHRL reinforce this right in South Africa, disabled persons are still discriminated against as regards equal access to information. This conclusion is justified by State non-compliance with the PAIA and its international obligations under the CRPD. Efforts have been made to guarantee access to media

\textsuperscript{475} Flynn E \textit{From Rhetoric to Action: Implementing the UN Convention on the Rights of Person with Disabilities} (2011) 107.

\textsuperscript{476} Flynn E \textit{From Rhetoric to Action: Implementing the UN Convention on the Rights of Person with Disabilities} (2011) 110.


\textsuperscript{478} Dube A K The role and effectiveness of disability legislation in South Africa’ Available at: \texttt{http://www.healthlink.org.uk/PDFs/Small-scale-research_SouthAfrica.pdf} (accessed on 30 October 2011).
and ICT for visually disabled and hearing impaired person in South Africa. However more still needs to be done for an appropriate implementation of the CRPD at domestic level. The next step of this research consists of conclusions and proposal solutions relating to that issue in the following chapter.
5.0 Introduction

This study has explored the right of access to information and the challenges faced by visually disabled and hearing impaired person in South Africa. This chapter is divided in two different parts. The first part concludes this research and challenges faced by visually disabled and hearing impaired persons in exercising their right to access to information, media and ICT in South Africa. The second and the last part of this research highlight certain perspectives and solutions to those issues.

5.1 Conclusion

The right of access to information is presented as fundamental human right by Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right of access to information is recognized as a cornerstone of democratic society and therefore it must benefit all without discrimination.\(^{479}\) This includes also visually disabled and hearing impaired persons. For Jorgensen, the right of access to information as enshrined in the UDHR and the ICCPR allows citizen to “receive”, “seek” and “impert” information.\(^{480}\)

The ICCPR encourages States to adopt legislation in order to guarantee access to information to all. This means, according to Nowak, that the State must implement the right of access to information without government interference.\(^{481}\) In this view, the United Nations (UN) Special Rapporteur on freedom of expression encourages States to ensure access to records held by public bodies and their departments.\(^{482}\) The adoption of the Convention on the Rights of Persons

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\(^{479}\) Lor P J & Britz J J ‘Is a knowledge society possible without freedom of access to information?’ ( 2007) 33 J IS 387-397.


Article 21 of the CRPD guarantees the right of access to information for visually disabled and hearing impaired persons. With this aim, Article 21 of the CRPD recommends States parties to make information available to visually disabled and hearing impaired person in accessible format.\footnote{‘Information Prospectus Disabled Peoples’ International 8\textsuperscript{th} World Assembly: Durban International Convention Centre South Africa (10- 13 October 2011)’ Available at: \url{http://www.dpi2011.co.za/sites/default/files/DPI%20Prospectus%20final.pdf} (accessed on 21 October 2011).} This means equal access to information must be made through the usage of braille, sign language and “all other accessible format[s].”\footnote{Dimopoulos A Issues in Human Rights Protection of Intellectually Disabled Persons (2010) 71.} Furthermore, the CRPD aims also to guarantee equal access to Information and Communications Technology (ICT) to visually disabled and hearing impaired persons under the provision of Article 9 of the CRPD.

The right of access to information for a disabled woman it not expressly mentioned in the Convention on Elimination of All form of Discrimination Against Women (CEDAW). However the CEDAW and the General Comment 18 guarantee the right of access to information to disabled women relating to reproductive health. Consequently General Comment 9 also guarantees access to information as important source of emancipation for the disabled child. Moreover, this research has demonstrated that the right of access to information is also protected at regional level in the European, Inter-American and African system of human rights.


specifically refer to the right of access to information for visually disabled and hearing impaired persons.

In order to give life to Section 32 of the Constitution of South Africa in legislative form, Parliament adopted the Promotion of Access to Information Act 2 of 2000 (PAIA).\(^{489}\) The PAIA allows citizens to access to record held by public and private bodies.\(^{490}\) Moreover, the PAIA guarantees access to information to disabled person in Section 18(3), Section 29(5) and Section 29(6) of the PAIA. The right of access to information in South Africa strengthens the principles of democratic society.\(^{491}\) It is relevant to mention that, as with Article 19 of the ICCPR, the right of access to information can be also limited in South Africa.\(^{492}\) The PAIA recognizes limitations to access to certain records held by the Cabinet and its committees.\(^{493}\) To that list it must be added limitations on records requested for the purpose of criminal or civil suits.\(^{494}\) Furthermore, records held by the courts and members of the parliament are also exempt from disclosure.\(^{495}\)

Likewise the South African legislation under the PAIA also restricts access to records relating to commercial information and records relating to the South Africa Revenue Services (SARS).\(^{496}\) It must be mentioned that the restriction applicable to non-disabled citizens are also applicable to visually disabled and hearing impaired persons in South Africa. In order to strengthen equal rights for disabled person in South Africa, the legislator has also adopted the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

The PEPUDA does not directly deal with the right of access to information for visually disabled and hearing impaired persons in South Africa. However it seeks to eradicate disability based stereotypes in South Africa.\(^{497}\) For that reason, the PEPUDA guarantee full enjoyment of the


\(^{490}\) Burns Y *Administrative law under the 1996 constitution* (2006) 85.


\(^{494}\) Section 7(1) (a) and 40 of PAIA of 2000.

\(^{495}\) Section 12 of PAIA of 2000.


rights enshrined in by the Bill of Rights to visually disabled and hearing impaired person.\textsuperscript{498} These rights include the right of access to information.

The right of access to information in South Africa is also reinforced by the active contribution of the Non-Governmental Organizations (NGOs) of civil society.\textsuperscript{499} These NGOs are represented in this thesis by the Open Democratic Advice Centre (ODAC), and the South African History Archive (SAHA). To that list must also be mentioned the contribution of independent bodies such as the South African Human Rights Commission (SAHRC).\textsuperscript{500} On the one hand, these mechanisms facilitate the right of access to information to all, including visually disabled and hearing impaired persons. On the other hand these mechanisms examine compliance with public bodies regarding their obligations under the PAIA.\textsuperscript{501}

ICT and media are becoming valuable channels to reinforce knowledge for visually disabled and hearing impaired persons, through TV and also the internet. In that regard, the South African legislation guarantees access to ICT and media to visually disabled and hearing impaired persons through the Independent Communication Authority of South Africa (ICASA).\textsuperscript{502}

Moreover, the Electronic Communication Act 36 of 2005 (ECA) also reaffirms equal access to telecommunication services to disabled persons in South Africa.\textsuperscript{503} Besides this telecommunications legislation, South Africa has also adopted policies targeting access to media and ICT to visually disabled and hearing impaired persons.

The Integrated National Disability Strategy (INDS) was adopted as a White paper in 1997 by the South African government with the participation of Disabled Peoples Organization (DPO).\textsuperscript{504} In addition to that policy the National Accessibility Portal (NAP) which improves access to ICT for visually disabled and hearing impaired persons in South Africa must be mentioned.\textsuperscript{505}

\begin{itemize}
  \item \textsuperscript{499} Dimba M ‘The Power of Information: Implementing the Rights to Information Laws’ (2009) 30 SACQJ 21- 26.
  \item \textsuperscript{501} Dimba M ‘The Power of Information: Implementing the Rights to Information Laws’(2009) 30 \textit{SACQJ} 21- 26.
  \item \textsuperscript{503} Section 2(h) of Act 36 of 2005.
  \item \textsuperscript{504} MacLachlan M & Swartz L \textit{Disability & International Development: Towards Inclusive Global Health} (2009) 21.
\end{itemize}
Although McCallum recognizes the right of access to information as an important civil and political right for disabled persons, its fulfillment still a paradox in South Africa.\(^{506}\) This can be justified by the fact that the Constitution of South Africa does not expressly enshrine the right of access to information for disabled persons. Additionally, public bodies do not comply with the PAIA relating to the right of access to information for visually disabled and hearing impaired persons.

This situation results in discrimination against visually disabled and hearing impaired persons as regards equal access to information in South Africa. Furthermore, the South African Sign Language (SASL) and the braille use by DEAFSA and SANCB are not implemented by public bodies to ensure equal access to information.\(^{507}\) Besides the ratification of IHRL and the CRPD, the South African government has failed to guarantee the equal right of access to information, media and ICT to visually disabled and hearing impaired persons.\(^{508}\) The adoption of the CRPD was supposed to ensure equal rights for disabled persons, but the monitoring mechanisms and the implementation of the CRPD still have a long way to go. This led this research to suggest recommendations to these issues in the section below.

### 5.2 Recommendations

#### 5.2.1 Recommendation: At South African Constitutional level

Language represents an important channel for proper access to information in society. South African society is composed of various groups of race and different populations, which gave rise to the recognition of 11 official languages.\(^{509}\) In other words, visually disabled and hearing impaired persons also constitute an important group of South African society. This means they are supposed also to be able to use their languages everywhere, in the public, and in private spheres of society. The South African Constitution should therefore recognise SASL as one the

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\(^{509}\) Barry B Schools and the law: A participant's guide (2006) 47.
official languages in South Africa. This aims to reinforce equality between disabled and non-disabled person through an active participation.

5.2.2 Recommendation: At legislative and parliamentary level

The PAIA was adopted with a view to guaranteeing equal access to information to all, including visually disabled and hearing impaired persons in South Africa. With that aim, the South African parliament must adapt and reinforce legislation on the right of access to information. This must target especially an amendment of the PAIA Act 2 of 2000, which can take better consideration of the needs of disabled requesters for access to information held by both public and privates bodies. Moreover, such an amendment of the PAIA shall be accompanied by specific legislation promoting more training to SASL interpreters at the level of public bodies for the needs of hearing impaired persons. This could be very important due to the fact that an important majority of deaf people are not able to express themselves in another language.

5.2.3 Recommendation: At access to media and ICT level

Access to the media and ICT represent an important tool for visually disabled and hearing impaired persons for achieving the Millennium Development Goals. The South African Government must implement equal access to ICT to visually disabled and hearing impaired persons. Such initiative requires the South African State to use the provision of Article 32 of CRPD. Article 32 of the CRPD encourages State Parties to the CRPD to initiate cooperation with another State or organization. In other words South Africa must review and reinforce its cooperation with UNESCO, the International Telecommunication Union (ITU), and the World Intellectual Property Organization (WIPO). This concrete collaboration can establish equal access to ICT for visually disabled and hearing impaired persons in South Africa.

512 Consultative Meeting on Mainstreaming Information and Communication Technologies (ICTs) for Persons with Disabilities to Access Information and Knowledge Available at: http://unesdoc.unesco.org/images/0018/001892/189237e.pdf (accessed on 1 November 2011).
513 Consultative Meeting on Mainstreaming Information and Communication Technologies (ICTs) for Persons with Disabilities to Access Information and Knowledge Available at: http://unesdoc.unesco.org/images/0018/001892/189237e.pdf (accessed on 1 November 2011).
5.2.4 Recommendation: implementation of the CRPD at domestic level

The ratification of an international treaty generates international and domestic obligations binding State parties for its implementation at national levels.\footnote{Binder C ‘The PactaSuntServanda Rule in the Vienna Convention on the Law of Treaties : A Pillar on its Safeguards’ in Buffard I, Crawford J, Pellet A &Wittich S (ed) \textit{International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner} (2009) 319.} In other words, South Africa must observe and respect international obligations for the ratification of the CRPD and its Optional Protocol. In order to implement the right of access to information for disabled persons, the government must be mindful of the fact that “equal accessibility” is useful in breaking down discrimination based stereotypes in South Africa.\footnote{Preamble of the CRPD.} Moreover, the South African government must respect and ensure an effective collaboration and consultation with DPO with a view to developing adequate legislation, policies and measures which respond to the exact needs for equal access to information. This real and effective collaboration between the government and the DPO will aim to promote matters of “equal accessibility.” Finally this symbiosis will serve to strengthen the disabled persons slogan “Nothing about us without us.”
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