

The limits of recognition: The Convention on the Rights of Persons with Disabilities, intersectional discrimination and Article 6

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Abstract: *The Convention on the Rights of Persons with Disabilities (CRPD) has been undeniably groundbreaking in advancing the legal rights of disabled people on international agendas. In particular, Article 6 – titled “Women with disabilities” – has also helped to ensure that the legal protection of disabled women was firmly situated and recognised within that agenda. However, via a socio-legal approach, this article argues that overall the CRPD is limited in its contribution, recognition, and approach to intersectional discrimination or intersectionality regarding disabled women or Article 6. Moreover, not only is the CRPD’s contribution to intersectional approaches limited, but it also appears exclusionary in some places (towards some groups of disabled women). To argue this, this article highlights normative treaty limitations, limitations to interpretive expansion by the CRPD Committee, and domestic implementation failures. It firstly examines the substantive articles of the CRPD, including the content of Article 6 itself, and the subsequent impact on conceptualisations of associated legal concepts, including legal capacity and integrity. It then assesses the impact of the CRPD Committee, and finally examines the effect of the CRPD in international legal contexts, with specific focus on case studies from the United Kingdom and South Africa. Through these last two sections, the article also shows that the CRPD’s contribution to intersectional discrimination is largely dependent on certain factors, such as time and domestic political context.*

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1. Introduction

This article argues that whilst the Convention on the Rights of Persons with Disabilities (CRPD) recognises intersecting identities to an extent, the CRPD is limited in its contribution, recognition, and overall approach to intersectional discrimination or intersectionality in the context of Article 6. This article also highlights that not only is the CRPD's contribution to intersectional approaches limited, but also to an extent exclusionary (for some groups of disabled women). To argue this, the article begins with contextualising arguments by outlining key definitions and recognising the importance of language. It then moves to highlight the differences between normative treaty limitations, limitations to interpretive expansion by the Committee on the Rights of Persons with Disabilities (CRPD Committee), and domestic implementation failures. It firstly discusses some substantive articles within the CRPD, highlighting technical issues and their implications on related concepts such as legal capacity and integrity. In doing so, this article also calls attention to groups of disabled women who have been excluded due to limitations of the CRPD's intersectional approach. It then moves to an analysis of more contextual aspects of the treaty, discussing the valuable contributions of the CRPD Committee, in addition to its interpretive limitations. It lastly assesses the CRPD's contributions to intersectional approaches in international legal spheres regarding Article 6, the United Kingdom (UK) and South Africa. These last two sections also highlight that the CRPD's contribution to intersectional discrimination is largely dependent on certain factors, such as domestic political context and implementation.

1.1. *Language, definitions and intersectionality*

When referring to disability, this article uses language associated with the social model of disability, which argues that people are dis-abled by societal barriers (Oliver 1996), moving the focus from impairment and individual responsibility to societal responsibility. This article uses phrases such as “disabled people” instead of “people with disabilities” to reflect this. However, language around disability can be extremely subjective and personal, and this may not be the preferred terminology for everyone.

This article defines discrimination in the context of the legal norms of discrimination law and of the protection of rights contained in the CRPD. Discrimination in this context refers to when groups or individuals are treated differently and/or are disadvantaged on the basis of certain

protected grounds (Khaitan 2015, 23), such as disability or gender. The commitment to non-discrimination is outlined in the CRPD in the preamble and Article 5.

As a concept, intersectional discrimination was first coined in the context of gender and critical race theory by Kimberlé Crenshaw. Her work has become a powerful analytical tool to aid marginalised groups in society, and this article adopts her definition of intersectionality as relating to “the ways that multiple forms of inequality or disadvantage sometimes compound themselves and create obstacles” (Crenshaw 1989, 149). Within this definition, discrimination and disadvantage operate against the “multidimensionality” (Crenshaw 1989, 139) of people who are not part of traditionally privileged groups. The intersectional discrimination experienced from these compounded obstacles based on intersecting identities is not simply experienced as a “sum” (Crenshaw 1989, 140) of each individual aspect of identity, but cooperates to produce discrimination at a higher level, compared to when they are experienced on singular grounds (De Beco 2020, 593). Intersectionality is a framework that is utilised to examine structural, political, or representational/cultural inequalities, and therefore also systems of power and oppression (Crenshaw 1991, 1241), while intersectional discrimination also examines specific related harm. This article involves discussions of both.

Yet, single-axis approaches, which examine and emphasise discrimination claims on separate and non-intersecting grounds, remain dominant in legal spheres (Atrey 2015b). Single-axis claims highlight multiple discrimination and additive discrimination, or essentially claims where “discrimination may be based on other identities but can be substantially understood as based on a single ground” (Atrey 2019, 84). Intersectionality as a theory currently unfortunately remains somewhat distinct from intersectional discrimination in law, as Crenshaw also pointed out when she argued that discrimination law contains “conceptual limitations of...single-issue analyses” (Crenshaw 1989, 140). The CRPD’s contributions to intersectional approaches to discrimination will be assessed in line with the above definitions.

2. Substantive articles and legal concepts

2.1. *The emphasis on multiple discrimination and inconsistencies in the “twin-track” approach*

Assessing the CRPD’s contribution, recognition, and approach to intersectional discrimination or intersectionality regarding Article 6 must begin with the substantive content of the CRPD. Article 6 itself has been described in the literature as the “strongest provision on intersectionality” (De Beco 2020, 12) within the CRPD. This perspective is partially due to Article 6’s explicit recognition of multiple identities intersecting with the

experience of disability, in addition to its cross-cutting nature with the rest of the treaty (Mykitiuk and Chadha 2018, 171). The CRPD adopts what is now widely referenced as a “twin-track” approach to protection involving women and disability (De Beco 2020), which involves “systematically mainstreaming the interests and rights of women and girls with disabilities” (CRPD General Comment No. 3 2016) across all action plans and issues such as health. This approach is present throughout the CRPD, and can be seen in a specifically targeted emphasis on areas of inequality where disabled women are more likely to be discriminated against. For instance, the preamble emphasises a need to include a “gender perspective” in the reading of the CRPD. Further on, Article 8 mentions a need to combat issues regarding sex and age in accordance with disability, Article 16 recognises the “gender-based aspects” of violence and exploitation and abuse, Article 25 emphasises “gender-sensitive” access to health services, and Article 28 explicitly mentions a need to ensure that women, girls, and older people with disabilities have access to social protection and poverty-related programmes. This appears to conform to an intersectional approach via the recognition that multiple barriers and disadvantages are compounded due to the intersecting nature of gender and disability. Superficially, this appears impressive and advanced when considering that the CRPD’s primary focus was to uphold disabled people’s rights on political agendas in general to challenge an ableist narrative (WHO 2020). Overall, superficially, there seems to be recognition of the prominent structural inequalities placing disabled women at a severe disadvantage, implying that the CRPD’s intersectional approach is robust.

Nevertheless, the lack of full recognition of intersectionality within the CRPD is also abundantly clear and in some ways appears misunderstood, especially in relation to disabled women. Perhaps most importantly, refuting De Beco’s (2020) statement above, it is important to recognise that Article 6 and the CRPD explicitly emphasise multiple discrimination, not intersectional discrimination. As the article dedicated to non-discrimination, Article 5 also fails to specify the exact types of discrimination – such as intersectional – that should be protected against, further failing to concretely commit to an intersectional approach. Combined with the above point, this reinforces the idea that discrimination claims based on multiple identities should be examined in line with the dominant single-axis approach. As explained previously, approaches to multiple discrimination do not equate to intersectional discrimination, highlighting a limited commitment to and recognition of intersectionality or intersectional discrimination for disabled women.

This is compounded by a lack of consistency in the “twin-track” approach. For instance, as pointed out by Mykitiuk and Chadha (2018), women are not mentioned in articles regarding family, education, employment, and humanitarian contexts. This is despite the fact that disabled women and girls are more likely to have their education restricted in comparison to other groups due to both their gender and disability (Ghosh et al. 2022).

Whilst the CRPD does recognise “gender-based aspects” in relation to Article 16, substantive articles fail to explicitly recognise and emphasise the sexual abuse of disabled women and girls. This is arguably most relevant to Article 11, which addresses humanitarian contexts. Viewing Article 11 in the context of forced displacement emphasises the need for, and questions the lack of, explicit intersectional recognition. For instance, forcibly displaced people are more likely to become disabled (Migration Data Portal 2023), whilst disabled women and girls are more likely to be sexually abused and exploited in humanitarian contexts (Holden et al. 2019). Imbalanced power relations, food insecurity, and geographical aspects such as isolation of hydration areas in refugee camps have also been found to increase discrimination and abuse of refugee women (Rohwerder 2022). Officially recognising how intersectional discrimination can occur or recognising intersectional aspects of experiences in these contexts could result in a higher degree of social justice. In this way, the CRPD also appears to inadvertently exclude different groups of disabled women. By omitting important substantive qualifications, the treaty fails to recognise specific political structures and contexts where discrimination could be more seriously experienced for some groups of disabled women.

In a similar vein, the treaty is also limited in the extent to which it is willing to extend an intersectional approach to other groups of disabled women alongside forcibly displaced disabled women. Common critiques in discussions of the CRPD’s contributions to intersectionality often point to the exclusion of LGBTQIA+ disabled women (Mykitiuk and Chadha 2018), who are not mentioned within the CRPD. As Blyth et al. (2020) powerfully argue, considering the previous dominance of the medical model and its impact on abuse of those with diverse sexualities and genders, this is a major concern. In line with the medical model primarily referring to “impairment” being viewed as the individual’s “problem” (Silvers et al. 1998), and not due to societal barriers unlike the social model, being non-heterosexual was considered a mental illness in some countries (Blyth et al. 2020). It remains illegal in many countries, sometimes violating the right to life via the death penalty (Al Jazeera 2023). Considering the above, disabled gay women are therefore at more risk of discrimination in some countries than heterosexual disabled women. Thus, the related absence of a fully established protective intersectional approach in the CRPD is concerning.

2.2. The impact on legal concepts

The above lack of explicit recognition of certain groups of disabled women within the substantive content of the CRPD also inevitably affects its ability to theoretically promote and protect certain legal concepts, further limiting its intersectional approach. Legal capacity and integrity are central concepts here, and are outlined in Articles 12 and 17 respectively. In Article 12, an intersectional approach is only hinted at via mention

that safeguards for legal capacity must be “proportional and tailored to the person’s circumstances” (CRPD 2006, Article 12(4)). This fails to recognise how intersectional discrimination can affect the perception of an individual’s circumstances and legal capacity. Comparatively, integrity is fundamentally about respect for “wholeness” (Atrey 2015a, 1519), viewing individuals “just as they are” (Equality and Human Rights Commission 2010), and thus related to capacity. Atrey (2015b, 101) interestingly and logically argues that upholding the intersectional integrity of the person as a *whole* and thus examining their linked identities is key when successfully addressing intersectional discrimination, while also critiquing the common single-axis approach. Yet, integrity is arguably assigned even less importance as both a concept and regarding intersectionality, with Article 17 summarised in one sentence: “Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.” The lack of explicit recognition of different groups of disabled women here, particularly for those who identify as LGBTQIA+, excludes those who cannot challenge intersectional discrimination due to the criminalisation of some sexualities. In these domestic contexts, they are not afforded recognition before the law as a whole multidimensional person in specific political contexts. While the CRPD set out to recognise existing rights for disabled people and therefore did not intend to generate new rights, this nevertheless hinders the CRPD’s ability to fully adopt an intersectional approach and encourage comprehensive protection. This also actively threatens corresponding legal principles and concepts.

However, it is important to recognise that many CRPD articles are designed to complement each other. As Seatzu (2018, 494) argues, integrity is a very broad concept yet it is mostly focused on in the context of mental and physical protection. This argument is bolstered by the fact that Article 17 should be read in conjunction with Articles 15 and 6 specifically for the protection of disabled women against sterilisation (Seatzu 2018, 494), and “on an equal basis with others” (CRPD 2006, Article 17). Yet, the phrasing “with others” implicitly assumes that all disabled people are the same, and that therefore reaching an “equal basis” is equally attainable. Utilising Atrey’s (2015a and 2015b) conceptual analysis, this conveys a failure to recognise disabled people as complex and different human beings. This also affects the comprehensive protection and dignity of being a disabled woman with intersecting identities, affecting the robustness of Article 12, and perhaps controversially refuting what Quinn and Arstein-Kerslake (2012, 39) hail as a “community” perspective of the disabled person within the CRPD. This also affects the status of the CRPD as being the embodiment of a human rights model of disability, as argued by Degener (2017, 19), or at least as existing in conjunction with the social model within the CRPD (Lawson and Beckett 2021, 348), due to this damage to the concept of human dignity via the lack of acknowledgement of difference. Whilst admittedly difficult to recognise all identities, a sentence explicitly incorporating the need to recognise intersectionality, and not

solely multiple discrimination, would make the CRPD's contribution to the protection of *all* disabled women stronger. Without this, the CRPD's intersectional approach regarding the protection of disabled women remains narrow.

3. The CRPD Committee

A key aspect that must be analysed to assess intersectional approaches in the CRPD is the CRPD Committee and its interpretative contributions. It must be recognised that the Committee has made impressive contributions to intersectional approaches in international contexts. For instance, General Comment No. 6 (2018), and General Comment No. 3 (2016), are extremely powerful in clarifying the normative interpretation of the CRPD regarding intersectionality (Mykitiuk and Chadha 2018). Paragraph 36 of General Comment No. 6 (2018) recognises that although Article 6 only mentions multiple discrimination, this must include combinations of types of discrimination and therefore intersectional discrimination. Paragraphs 19, 21, 22, 32 and 33 emphasise that state interpretation and implementation must include provision for, and analysis of, intersectional discrimination and its impact on disabled people. This is particularly highlighted by the emphasis on the diversity of personhood and on intersectional discrimination's impact on disabled women, countering some points made in the section above. Inclusive equality is presented as a key underlying principle that, unlike the formal equality model, embraces substantive equality and therefore recognition of difference and power relations (Stienstra 2023, 354). The Committee's contribution therefore appears to strengthen the CRPD's contribution to intersectional approaches to discrimination, as its corresponding guidance and clarification on intersectionality appear highly significant in comparison to the treaty's substantive articles.

However, there are also gaps in General Comment No. 6 regarding conceptualisations of social justice, which undermine the principle of intersectionality. Stienstra (2023, 354) points to a failure to adequately recognise the need for the decolonisation of disability-related rights in the context of intersectional discrimination. They consequently highlight that General Comment No. 6 fails to recognise the importance of restorative justice, in comparison to transformative justice, as a key contextual principle to uphold the rights of disabled indigenous people and women. Whilst there are debates on which aspect of justice is better to aim for in intersectional contexts (Said 2022), some academics writing in indigenous contexts have suggested that the former is more appropriate when seeking to uphold justice in the face of violence against indigenous women (Zellerer 1999). Considering that violence is higher against disabled indigenous women compared to those without disabilities (Gurung 2022), omitting discussion of this hinders the CRPD's contribution to a fully inclusive intersectional approach for disabled women. De Freitas (2011) has further

argued that in indigenous contexts, a lack of specific focus and careful discussion of restorative justice within intersectional approaches can lead to intersectional disempowerment. These issues also almost paradoxically affect the CRPD's relatively mainstream commitment to transformative justice and transformative equality, which relies on the principle of rejecting "sameness" (Fredman 2008, 11) in approaches to challenging inequality. Yet such gaps within the CRPD's intersectional approach, as highlighted above, convey a failure to adequately recognise difference and how differences can intersect to result in further discrimination for disabled women. Therefore, principles and trajectories of justice – and how they can affect different groups of disabled women – should be recognised and discussed further by the CRPD Committee to strengthen its intersectional approach.

On the other hand, the CRPD Committee monitoring mechanisms, such as Concluding Observations, have also sought to significantly address intersectional discrimination against disabled women. The CRPD Committee has consistently explicitly called for State parties - those who are signatories to the convention - to make changes to protect against intersectional discrimination within their domestic systems. This can be seen in almost all recent reports in 2023, such as the Committee's advice to Mauritania regarding the lack of comprehensive definitions that encompass different types of discrimination, including intersectionality, their advice to Israel on their specific failure to uphold Article 6 in an intersectional manner that also recognises all groups of disabled women, and advice to Andorra encouraging the existence of intersectional discrimination in domestic law. LGBTQIA+ people have also been recognised more prominently by CRPD reports, primarily in reference to Articles 5 and 17, although only one report between 2010 and 2020 also referenced Article 6 regarding this (Kirichenko and Król 2022). Admittedly, Kirichenko and Król (2022, 3238) also call for the CRPD to be seen as a "living instrument capable of adjusting", which suggests that in the future the CRPD's contribution to intersectional discrimination regarding Article 6 *could* be made more robust, as its approach is not necessarily static. However, whilst the Committee has made encouraging progress, more needs to be done for the CRPD's approach to intersectional discrimination to be fully comprehensive.

Moreover, the CRPD Committee's "case law" – made possible by ratification of the CRPD Optional Protocol – which addresses complaints focusing on intersectional discrimination, is extremely limited. One rare case relating to Article 6 is the 2019 case of *Z. v. Tanzania*. Ms. Z. was a pregnant woman with albinism who was violently attacked, and whose domestic State justice system had failed her. Although the case would have benefited from an analytically intersectional approach, only multiple discrimination was mentioned and considered. The severity of Ms. Z.'s case could have been further recognised and emphasised by, for instance,

recognition of not solely her gender and disability, but also how her marital status including the stigma of being a single mother, which is high in Tanzania (Shitindi and Lubawa 2022, 25), and nationality – and thus nature of the State record of human rights, particularly for pregnant women (Amnesty International 2022) – had interacted to contribute to such shocking levels of discrimination. This could have, albeit optimistically, encouraged more drastic State action and challenges to structural and cultural inequality. Instead, recognition of multiple discrimination led to a finding of a violation of Article 6 in conjunction with Articles 5, 15(1), 16, and 17. At the same time, gender and disability were considered as separate yet somewhat related grounds of discrimination. Overall, efforts towards a truly intersectional approach to discrimination can, and should, be strengthened via the CRPD Committee's interpretations.

4. Domestic implementation failures and the need for State responsibility in building intersectional approaches

Another useful measure of the CRPD's intersectional approach is through assessment of whether States parties and international bodies have adopted significant and related policy and legislative changes in light of CRPD recommendations on intersectional approaches regarding Article 6. In many instances, intersectionality in law should be "an action-oriented form of practice" (Truscan and Bourke-Martignoni 1995, 103). The CRPD framework and corresponding structures can only do so much: states must also take full responsibility and take adequate action in advancing an intersectional approach to discrimination against disabled women. Therefore, the CRPD and corresponding Committee contributions to an intersectional approach to discrimination against disabled women largely depend on the action and responses to recommendations by individual states, meaning that in some ways the Treaty's ability to enforce an intersectional approach is *inherently* limited. This section explores this in relation to the UK and Northern Ireland, and South Africa.

4.1. The United Kingdom and Northern Ireland

The CRPD Committee's (2017) concluding observations on the UK and Northern Ireland included specific reference to a need for heightened protection from intersectional discrimination. However, the UK's governmental response failed to include specific mention or discussion of intersectional discrimination and means to protect against it (Department for Work & Pensions and Office for Disability Issues 2019), indicating that the CRPD Committee's power to enforce an intersectional approach is limited beyond a certain point.

Attention must also be paid to the UK's Independent Mechanism monitoring body for the CRPD, which comprises UK human rights experts. Their 2017 shadow report highlighted the intersecting nature of

age, poverty and disability regarding social welfare, emphasising a need to protect disabled women from violence in line with General Comment No. 3 (Equality and Human Rights Commission 2017). This contrast suggests that attention to intersectional discrimination is somewhat reliant on political agenda.

Yet when turning to the wider legal field, of 48 cases explicitly referring to CRPD provisions in UK courts, none of them mentioned Article 6 of the CRPD (Lawson and Series 2018, 429). Moreover, some cases that were related to CRPD claims, such as regarding the sterilisation of disabled women, were dropped because the UK had not sufficiently incorporated the CRPD into domestic law (*The Mental Health Trust, The Acute Trust & The Council v. D.D. and B.C.* 2015). This conveys that the ability of the CRPD to encourage perspectives of intersectional discrimination is limited by domestic executive will, compounded by the UK's dualist nature and commitment to parliamentary sovereignty. Applying Sandra Fredman's work, for sufficient justice in the context of disability rights, there needs to be a "political repositioning" (Soldatic and Grech 2014, 8) to encourage intersectionality in UK law. In line with a fully intersectional approach, UK political structures should therefore be challenged to aid intersectional discrimination, and the CRPD should be clearly and sufficiently incorporated into UK law. The fact that there is still an overwhelming need for progress in the UK again indicates that the CRPD is constrained by domestic political contexts regarding its ability to enforce consistent intersectional approaches to discrimination in relation to Article 6. Future progress towards intersectional discrimination regarding Article 6 must include state involvement and accountability. Intersectional approaches cannot solely be achieved through the efforts of the CRPD Committee itself, and states must take further responsibility.

4.2. South Africa

South Africa is another useful case study when assessing the CRPD's efforts in approaches to intersectionality regarding Article 6 in domestic legal contexts. South Africa has been hailed as making relatively significant progress in intersectional approaches in law and within its constitution (Atrey 2021, 168). Particularly hailed was the Constitutional Court's ruling on *Mahlangu and Another v. Minister of Labour and Others* and its ruling of indirect intersectional discrimination against domestic workers. This also recognised a backdrop of vulnerability related to other aspects of identity, such as race and class. Superficially, this case coincides with, and therefore suggests active reception of, the Concluding Observations made by the CRPD Committee in 2018 – which called for attention to intersectional discrimination specifically in relation to Article 6. Overall, this indicated the CRPD's significant ability to encourage intersectional approaches to discrimination within South Africa.

However, the *Mahlangu* case did not refer to disability, despite its clear relevance, due to the case involving a partially blind woman. In general, jurists have argued that intersectional approaches are limited in South Africa's domestic justice system, as statistical data examining the occurrence of disability in relation to other identities, such as gender, did not exist for a long time (Emmett and Alant 2006, 445). While this has now changed (The Republic of South Africa Government 2022), a lack of sufficient and comprehensive recognition of intersectional discrimination is compounded by extremely limited disability legislation in South Africa (Basson 2023, 1), which is also arguably compounded by its dualist status. As Waddington and Lawson (2018) importantly point out, State obligations from other international treaties, domestic law, and political and historical context may override or complicate the impact of the CRPD. Overall, the case of South Africa again highlights that the CRPD's ability to encourage approaches to intersectional discrimination within States is indeed complicated by the domestic political and legal context.

5. Conclusion

In conclusion, this article has critically assessed the CRPD's approach to intersectional discrimination or intersectionality regarding Article 6 or disabled women. It has acknowledged that the treaty and its corresponding bodies such as the CRPD Committee have been invaluable, and have also recognised the importance of intersectional approaches to an extent. However, overall, this article has shown that the CRPD is limited in its contribution, recognition, and approach to intersectional discrimination or intersectionality regarding disabled women. It has also shown that not only is the CRPD's contribution to intersectional approaches limited, but also to an extent exclusionary (for some groups of disabled women). To argue this, after outlining key definitions, this article highlighted key issues with the substantive content of the CRPD. It examined the effects of these issues on upholding vital legal concepts, such as integrity. This also involved discussion of groups of disabled women who were not fully recognised, such as forcibly displaced and LGBTQIA+ disabled women, while pointing to the CRPD's emphasis on multiple discrimination alongside inconsistencies in its "twin-track" approach. This article then discussed key contributions and interpretative limitations of the CRPD Committee regarding Article 6 and intersectional discrimination. These were found to be limited regarding Article 6, although some hope remained for improvement over time. This article finally discussed the CRPD's contribution to intersectionality in other legal contexts and domestic implementation, examining the UK and South Africa. Here, the CRPD was found to have a significant impact on approaches to intersectional discrimination regarding Article 6 in some key ways, although the article also recognised that the CRPD was inherently limited in its contributions due to external factors such as the domestic political context. Moving forwards, this article calls for

a need for further State responsibility and accountability to assist the development of intersectional approaches. Overall, whilst the CRPD has undeniably significantly improved the recognition of disabled people's rights, at the time of writing, its contribution to intersectional approaches to discrimination regarding Article 6 remains limited.

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